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INTERNATIONAL UNION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS

GENEVA

ADMINISTRATIVE AND LEGAL COMMITTEE

Thirty-fourth Session

Geneva, November 7 and 8, 1994

REPORT

adopted by the Committee

Introduction

1. The Administrative and Legal Committee (hereinafter referred to as "the Committee") held its thirty-fourth session on November 7 and 8, 1994, under the chairmanship of Mr. H. Kunhardt (Germany). The list of participants is given at Annex I hereto.

2. The session was opened by the Chairman, who welcomed the participants.

3. The Chairman gave a particular welcome to the Delegations of Austria and Uruguay, that had become members of UPOV since the preceding session of the Committee.

Adoption of the Agenda

4. The agenda was adopted as given in document CAJ/34/1.

Model Law on Plant Variety Protection

General

5. Discussions were based on document CAJ/34/2.

6. In presenting the document, the Vice Secretary-General emphasized that the purpose of a model law was to serve as a guide to the provisions that should be contained in a domestic law, and should therefore contain provisions that reflected the principles set out in the UPOV Convention, without those things that one could describe as national particularities. A model law had not to be drawn up for the purposes of a special category of States; it was intended for those countries that

wished to introduce a system of protection, but should also serve those States who already possessed such a system and wished to adapt it to the 1991 Act of the Convention. Moreover, wherever possible, a model law should be neutral from the point of view of style, particularly with respect to the traditions of the civil law countries and the common law countries. The length of the model law was a further question that would have to be looked at. The existing model law contained some 50 articles and the draft some 100, but it had to be realized that the number of articles was not a decisive factor since provisions could be either included in a law or relegated to the implementing regulations; national practice also varied in such cases. The model law had to draw the attention of lawmakers to those provisions that should be included in a law or should be considered during the drafting of a law. However, it would have to be examined whether a model law--and also a domestic law--should enter into detail on matters such as the type of property to be applicable to breeders' rights, being aware that it constituted property in the civil law systems and an intangible form of personalty in the common law systems. The same question arose for infringement procedure and for the rules that made the model law comply with the TRIPS Agreement. To conclude, the Vice Secretary-General invited the Committee to say whether the approach adopted for the draft model law--based on a particular legal tradition--was acceptable.

7. The Chairman remarked that the draft model law contained four types of provision:

(i) Provisions based on those of the Convention and which had therefore to be contained in a domestic law if it were to comply with the Convention;

(ii) Examples of general provisions that were not contained in the Convention, but which would have to be included in a domestic law;

(iii) Explanatory provisions that supplemented certain provisions of the Convention and of which some had been examined prior to or during the Diplomatic Conference, but had not been inserted into the Convention, for example because it had been wished to leave the matter in question to the appreciation of the national lawmaker or of the courts;

(iv) Proposed provisions concerning matters that did not necessarily have to be dealt with in the model law--for example the organs of the Office, penalties for infringement, employee varieties--and are dealt with in differing ways by the present member States, sometimes in a law other than that on plant variety protection.

The question therefore arose of how to ensure that States wishing to accede to UPOV could distinguish between the various types of provision--and recognize those areas in which they would be bound by the Convention and those in which they could legislate as they wished. Considering the fact that the domestic laws of the present member States possessed very different structures, although similar on essential matters, the question had also to be put whether it was in fact possible to propose a single model structure to those States and, more generally, whether it was possible to propose to them a model that was as detailed on matters of substance.

Procedure for Future Discussions

8. The Chairman added that the Committee could choose, for the present session, between a discussion on substance, Article by Article, or a discussion on principles, with the detail being left to a group of experts that would meet before the next session of the Committee.

9. The Committee favored the solution of a group of experts, who would be proposed by the Office of the Union.

10. The various questions were then put to Delegations in turn. The Delegations of the following States took the floor: Australia, Denmark, France, India, Japan, Netherlands, New Zealand, Norway, Romania, Spain, Sweden, United Kingdom. All congratulated, as had done the Chairman in his opening statement, the Office of the Union on the quality of the draft submitted to the Committee. Their other statements are summarized below:

Structure of the Model Law

11. The majority of Delegations were in favor of a model law containing "main provisions" that would have to be contained in any domestic law, i.e., provisions required by the UPOV Convention or those that were indispensable for some other reason.

12. Various opinions were expressed as to the other provisions, both during the general comments and during examination of the draft part by part:

(i) Some Delegations favored a model law of very restricted scope. The Delegation of Australia, in particular, felt that the draft was too restrictive and that it was liable to delay accessions to UPOV due to the fact that the model law would be used to measure the conformity of domestic laws with the Convention. Furthermore, it touched on matters of a constitutional nature that should not be included.

(ii) Several Delegations, particularly those of New Zealand and of Sweden, put forward the concept of a "check list." The Delegation of India proposed the concept of guidelines that would leave sufficient latitude to States, taking into account the fact that the diversity of national situations did not enable a single recommendation to be made.

(iii) In summing up the general comments, the Chairman also mentioned the possibility of describing the provisions in a commentary. That possibility was also referred to on a number of occasions during the part-by-part examination of the draft.

(iv) The drafting of model provisions, with alternatives where appropriate, was advocated by the Delegations of France and of Spain. The Delegation of Spain emphasized that it was necessary in order to avoid the appearance of undesirable solutions. The Delegation of France pointed out that its country was familiar with framework laws and with the uncertainties they created, and also that experience had shown that States did not ask for assistance with regard to the principles of the Convention but on matters that were left to their appreciation. It therefore suggested, in view of the majority view, that the draft be restructured by grouping together, on the one hand, the fundamental provisions and, on the other hand, the provisions that could be described as regulatory. In his summary of the general comments, the Chairman also mentioned the possibility of drawing up a collection of model provisions. In the part-by-part examination of the draft, the Delegation of Belgium suggested that a graphical distinction be made (by using bold and light type, for example) within a single text between that which was indispensable and that which was accessory.

13. During the part-by-part examination of the draft, the Delegation of Slovakia observed that the law was intended to be a model, that the "core" provisions were already contained in the Convention and that, after all, it was for each State to define the final form and content of its own law.

14. In reply to a question, the Office of the Union explained that the 1980 Model Law had been drafted as a ready-to-use text.

Relations with the Convention

15. According to the statements made during the part-by-part examination of the draft, the model law should be based as far as ever possible on the actual text of the Convention.

16. On the other hand, diverging positions were expressed with regard to certain substantive matters: in some cases, it was recommended that the law should go no further than the Convention and, in other cases, that it should go beyond. Various Delegations wished in particular that a debate should not be opened up again on matters that had been debated at length before or during the Diplomatic Conference without a solution having found its way into the Convention. The Chairman concluded the discussions on Articles 11 to 13 by saying that that wish was shared by the majority.

Relations with the TRIPS Agreement

17. The Delegation of Japan wished to have a prior discussion on the question whether the TRIPS Agreement was applicable to plant variety protection.

18. The Delegation of Spain held that the model law should contain, in its "core," provisions that derived from the TRIPS Agreement. The Delegation of Romania also thought it useful that the draft model law--which was indeed similar in many ways to a patent law--should take the TRIPS Agreement into account.

Purpose of the Model Law

19. The Delegation of Spain pointed out that the 1980 Model Law had been drawn up at a time when the member States did not have any specific legislative activity, whereas most of them had at present to revise their laws. According to that Delegation, that factor had to be taken into consideration when drawing up the model law.

20. Several Delegations observed that the model law could also serve as a source of inspiration for the current member States when they adapted their laws to the 1991 Act. The Chairman emphasized in that respect that the model law was not intended to encourage member States to harmonize their laws on the basis of the model law, but rather to help the non-member States; however, he wondered whether those States could be given a text which the member States would not be able to accept for themselves.

Respective Roles of the Office of the Union and the Committee

21. Several Delegations referred to that matter and expressed their agreement with what was said in paragraph 4 of document CAJ/34/2.

22. The Delegation of the Netherlands wished to have more detail on the meaning of "under its own responsibility" [the Office of the Union], i.e., on the status of the model law. It noted that by examining the document the Committee implied its responsibility; it was able to accept the idea that such responsibility concerned conformity of the text with the Convention, but that acceptance of a

given text did not mean that it was the only text approved by the Committee or by any other organ of UPOV.

23. The Chairman said that the model law would have any status that the governing bodies of UPOV wished to give to it. In 1980, the Council had decided that the Model Law was to be published and had authorized the Office of the Union to publish it. The procedure currently adopted was also based on the terms of reference given to the Office of the Union to draw up a draft. However, the matters raised by the Delegation of the Netherlands would have to be examined within the Committee since it had been felt that there was a responsibility to prepare a model law that could be collectively supported with respect to the non-member States. Once the document had been finalized, it would be of little importance to know who had helped in drafting it and in what manner. It would be a UPOV document, under the responsibility of UPOV.

24. The Vice Secretary-General pointed out that conformity of the model law with the Convention could only be guaranteed by the Council. However, it would not be appropriate to submit the model law to the Council for its formal approval and thereby give it the status of a text deriving from the supreme organ of the Union.

Part-by-Part Examination of the Draft

25. **Article 2**. - The Office of the Union explained that the Article corresponded to Article 18 of the 1980 Model Law and that the proposed alternatives were based in one case on the Swiss Law and in the other case on the Laws of the Russian Federation and of Ukraine. It was proposed to explain in the commentary under what circumstances an Article of that type could be--usefully--included in a domestic law.

26. The Chairman said that it would have to be decided whether the model law was to contain a provision of the proposed type and, if so, whether it was to contain alternatives.

27. The Delegation of Australia would prefer such a provision to be included in the commentary and left out of the "core" of the model law.

28. **Article 3**. - The Delegation of the Netherlands wished that the possibility of applying a law immediately to the whole plant kingdom should be provided as an alternative. The Delegation of Denmark pointed out that the TRIPS Agreement could make such immediate application compulsory.

29. The Delegation of Slovakia mentioned the fact that its country also applied the law to animal breeds and would like an alternative to point out that possibility.

30. **Articles 11 to 13**. - In reply to a question by the Delegation of the United Kingdom, the Office of the Union explained that the definitions had been split up over three articles to permit the addition of further details on the concepts of variety, material and products. The concept of the breeder had been set out in a subsequent part; moreover, the model law referred to either the applicant or the holder, depending on the case.

31. The Delegation of France would have preferred Article 12 to have been split up. The Delegation of Australia suggested that paragraphs (2) and (3) be transferred to Part III.

32. The Delegations of Japan and of the United States of America wished to remain as close as possible to the text of the Convention. The Chairman stressed that the definitions constituted an area in which the question of a commentary was most acute.

33. **Articles 21 to 25**. - The Chairman considered that those Articles should be examined by the working group, particularly from the editorial point of view, and announced that he had questions to raise on Article 23.

34. **Articles 31 and 32**. - The Chairman observed that the Articles dealt with matters in which the States generally felt the need to legislate and that they would be items for the "check list." Article 32 could require alternatives; it was necessary, in particular, to reflect whether a provision on representatives was needed.

35. **Articles 41 and 42**. - The Chairman noted that laws generally dealt with the right to protection, but felt that Article 42 was perhaps not drafted in the best possible fashion.

36. The Delegation of the Netherlands noted that, if it was wished to restrict the "core" of the model law to those provisions that could originate from the Convention, Article 42 should not be included in that "core." The Chairman felt that the "core" should be extended to certain other provisions.

37. **Articles 51 to 53**. - the Chairman pointed out that the matter of employee varieties was dealt with very differently from one State to another and was therefore very controversial. It would therefore be presumptuous for an international body to make recommendations in that field.

38. The Office of the Union agreed that the model law did not necessarily have to contain provisions on that issue. Numerous present member States had not legislated in that respect, thus creating uncertainty and controversy. Article 51 set out the applicable law: the 'Derliva' case heard by the German Supreme Court in 1975 suggested that it was very useful to have such a provision. Article 52, with its alternatives A and B, together with Article 53, were based in principle on Article 120 of the WIPO Model Law for Developing Countries on Inventions and had been adapted to the specific context of plant breeding.

39. The Chairman said that--at least in German law--transfer of the right to file an application was a matter for labor law and not for the law applicable to employee inventions. The latter simply set out the consequences of the employer using or failing to use the right to file an application. As for the 'Derliva' case, the decision had been the subject of numerous commentaries with the result that the legal situation was far from being clear in Germany. He was therefore most reticent at the prospect of UPOV making recommendations that had not been accepted in Germany.

40. The Delegation of Germany said that numerous States had problems with introducing provisions such as those that had been proposed; it did not therefore want the working group to deal with that matter.

41. The Delegation of the Netherlands also hesitated, although Article 1(iv) of the 1991 Act provided a basis for such provisions. It wanted the working group to examine more closely the wording of the European Union Council Regulation setting up a Community plant variety rights system.

42. The Vice Secretary-General stressed that the experience acquired by the Office of the Union in its contacts with certain States had shown that it was useful to include provisions, particularly in order to remove false concepts.

43. The Chairman concluded that it was necessary to state a principle in order to identify a problem, but that it should be left to the States to apply the principle; the commentary could possibly contain suggestions as to how that should be done and anything else should be a matter for individual assistance to States.

44. **Articles 61 and 62**. - The Chairman said that those Articles gave useful information and that the working group should examine the detail matters.

45. **Article 71 to 73**. - The Chairman stressed that those Articles also gave useful information and that the working group should examine the detailed points. He drew attention to Article 71(2) and observed that the laws of some States contained a requirement to work, but that others did not, and the question therefore arose whether it was advisable to include such a requirement in the model law taking into account the context of a model law which constituted a UPOV publication.

46. The Delegations of Germany and of the United States of America firmly opposed a provision of such type, or even reference thereto in the commentary. The Delegation of the Netherlands understood the need for Article 71(1) (obligation to maintain the protected variety), but considered that Article 71(2) should not be included in the model law. The Delegation of the United Kingdom had no problems with that latter Article.

47. The Delegation of Germany added that those Articles should be reviewed in depth in the light of the 1991 Act. It noted in particular that Article 73 was lacking in any basis in the Convention and questioned the nature--procedural or substantive--of the obligations referred to in Article 72.

48. The Delegation of New Zealand considered that the model law should not, as a matter of principle, refer to matters of catalogues or genetic resources.

49. **Articles 81 to 95**. - The Chairman called for a general discussion of those Articles, taking into account the observations that had already been made and which were applicable to that part. He nevertheless wished to raise a more particular question of principle concerning the arrangement of the provisions. The Office of the Union had endeavored to optimize the enacting terms, whereas those of the Convention were the result of lengthy discussion, and it had already been agreed that what was contained in the Convention should not be exceeded. Furthermore, a certain number of States--and the European Community--had already made use, with practically no changes, of the enacting terms of the Convention. Was it therefore necessary to reproduce those terms in the model law or could others be used?

50. The Delegation of the Netherlands wished that part to be aligned on the Convention, including matters of substance, with respect to the concept of non-distinguishable plant groupings and the definition of essentially derived variety.

51. The Chairman observed that the Delegation of the Netherlands had expressed a general opinion.

52. The Delegation of the United Kingdom was worried by the presence of an article on "farmer's privilege." Although the matter should be approached in a model law, it should not take the form of a proposed provision which could be interpreted as the ideal solution. It further noted that the draft did not take into account Article 16(3) of the 1991 Act.

53. The Chairman noted that Article 87 bore the same title as Article 17 of the 1991 Act, but did not deal with compulsory licenses. He therefore asked whether a different name could be used. Furthermore, Article 88 afforded a right in a variety denomination. That could be interpreted as a basic substantive modification to the legal nature of the denomination; exclusive rights could not be afforded in a generic designation.

54. The Delegation of Germany added that Article 87 contained an illogical mixture of public law provisions and private law provisions.

55. **Articles 91 to 95**. - The Chairman said that the working group would have to examine the need for those Articles and their opportuneness. However, it seemed to him that the model law (or the commentary) should deal with the matter of breeders' rights as an object of property. For Article 92, the alternative A should be chosen, whereas Article 93 raised basic problems.

56. **Articles 101 to 106**. - The Chairman said that that part also raised the question of whether it should not be restricted to setting out a series of principles.

57. **Article 111 to 114**. - The Chairman said that the working group would have to examine those Articles from an editorial point of view, particularly in order to simplify them.

58. **Articles 121 to 128**. - The Chairman said that each State would have to take measures to implement Article 30(1)(ii) of the 1991 Act. However, the draft contained proposals on the internal structure of an office and its operation, whereas there existed very differing models in the present member States and such would also necessarily be the case in the future member States. He therefore questioned whether it was necessary to go further than mentioning the fact that a State was required to possess an office in accordance with Article 30(1)(ii) of the 1991 Act.

59. The Office of the Union explained that the draft had been drawn up as a full law covering all the provisions that might be contained in a domestic law. Articles 121 to 128 were in no way intended to promote a given institutional or administrative form of protection in preference to the others that currently existed within the Union and that had proved their value; the wording had been influenced to a large measure by the fact that they were to serve as a basis for subsequent provisions.

60. The Chairman said that he understood the intention behind the drafting of the Articles; nevertheless, in view of the decisions taken by the Committee, the working group would have to reexamine them.

61. The Delegation of Germany suggested that it be examined whether the words "individual decisions" be maintained in Article 124(1) or whether, on the contrary, the competence of the Appeals Board should be extended to decisions on fees. Additionally, it could be useful to set out in that Article the composition of the Appeals Board (or give some suggestions). Finally, it might be appropriate to set out in Article 125 the possibility for other persons to consult the files.

62. The Delegations of the Netherlands and of the United States of America considered that Part III should not form part of the "core" of the model law.

63. **Articles 131 to 182**. - The Chairman said that the working group would have to check whether the model law should be as detailed as the draft and whether certain provisions should not be included as examples in a collection of model provisions, particularly since matters of procedure were frequently dealt with in implementing regulations. In the case of Articles 161 to 163, he pointed out that the model law should state principles since there were corresponding provisions in the Convention. The same applied to Articles 171 to 173, but Articles 171 and 172 would have to be simplified by omitting the listing of conditions for protection. Article 172 should be extended to other circumstances such as failure to supply plant material, to pay a fee or to propose a denomination. The drafting of Articles 181 and 182 should be reviewed.

64. The Delegation of the United Kingdom felt that there should not be too much detail on the matter of fees. Although most member States required the payment of annual fees, nothing obliged the State to do so; one could even consider that the cost of collecting them was very high in relation to the revenue obtained.

65. **Articles 191 to 196**. - The Chairman considered that the model law should set out the principle behind Article 191. In view of the objective on which the preparation of the draft had been based, it contained detailed provisions on the application of that principle; in view of the decisions taken by the Committee and the need for States to adapt that part to their civil and penal law, it would be necessary to delete those provisions.

66. The Delegation of the United States of America observed that Article 191(1)(b)(ii) could mean that the breeder himself could be the infringer. The Chairman pointed out that the Article referred to Article 88 and that an objection had already been made to the proposal for instituting a right in the denomination. The Office of the Union remarked, on the latter point, that it had based itself on existing domestic laws and, on the first point, that the possibility of taking infringement action on the basis of the denomination was of definite advantage for the breeder.

67. The Delegations of Sweden and of the United Kingdom considered that those provisions should be deleted. The Delegation of the Netherlands went along with that position, but noted that the 1980 Model Law contained similar provisions and that, therefore, the draft was not adopting a new approach. It would prefer that the matter be left pending and that the working group should examine whether, as in the past, the text should go beyond a declaration of principle.

68. Since no other delegation wished to speak, the Chairman noted that the proposal by the Delegation of the Netherlands could constitute a line of conduct for the working group on the Articles involved as also on the following Articles.

69. **Articles 221 to 224**. - The Delegation of the United Kingdom asked whether the Office of the Union had used precedents as a basis to foresee the possibility of increased sanctions for repeated offenses. The Office of the Union replied that such had been the case and added that some States also laid down the possibility of awarding increased damages in certain cases. From a more general point of view, it observed that the question of the means used to enforce breeders' rights was of very current interest and that, whatever opinion one may have on relations between the UPOV Convention and the TRIPS Agreement, it would be highly desirable for the model law to

provide suggestions that would enable the States to use the model law in order to comply with that Agreement.

70. **Articles 231 to 233**. - The Chairman noted that the Articles were similar to the recent provisions promulgated in Germany. Those provisions were and remained so controversial that it had to be concluded that they were not suited as a basis for a recommendation of universal scope made by the UPOV Council. It had therefore to be examined whether and, if appropriate, how the model law should approach those matters.

71. **Articles 241 to 243**. - In reply to a question by the Delegation of the United Kingdom, the Vice Secretary-General said that Article 243 conformed with Article 18 of the 1991 Act and that in fact it reflected practice in numerous member States. The Chairman added that the working group would have to examine the article very closely since a preferential recommendation should not be given for one or other instrument whereas recourse could not be had to such instrument at national level.

72. **Articles 251 to 253**. - The Chairman wondered whether the model law should refer to the issues dealt with in those Articles or whether, if those Articles were already dealt with in other sources of domestic law--or not dealt with at all--the model law should then remain silent.

73. The Office of the Union replied that Articles 251 and 253 had been taken from the WIPO Model Law for Developing Countries on Inventions. Article 252 covered a specific--new--need of UPOV and its principle had already been included in the new Australian legislation; it would be highly desirable for the member States to introduce machinery for determining the status of a variety that was not linked to infringement procedure.

74. The Chairman noted that the Office of the Union had used all available sources of inspiration, but that the existence of precedents in member States or elsewhere was perhaps not sufficient to justify a Council recommendation.

75. **Articles 261 to 263**. - The Chairman concluded that it would have to be checked whether those Articles should be contained in a model law.

76. **Articles 272 to 275**. - The Chairman noted that the Articles would have to be examined by the working group in the light of the overall decision to draft a model law limited to basic principles.

77. **Final remark**. - The Vice Secretary-General pointed out that the TRIPS Agreement would influence the way in which the model law would be used in future to the extent that numerous States could decide to introduce a system of protection for new plant varieties basically with the aim of complying with that Agreement whereas the States concerned had hitherto acted on the basis of agro-economic considerations and had given considerable thought to the features that they wished to give to their systems of protection. Such a new approach could result in a wish to obtain from the Union a complete text capable of being easily adopted.

TRIPS Agreement and Plant Variety Protection

78. Discussions were based on document CAJ/34/3.

79. Introducing the document, the Vice Secretary-General reminded the meeting that the Office of the Union had not participated in the drafting of the TRIPS Agreement; it had, nevertheless, had occasional contacts with the GATT Secretariat and had replied to its questions. He emphasized the future possibility of plant variety protection matters also being examined by the Council for TRIPS. It was also conceivable that a State would introduce a *sui generis* system that would comply with the TRIPS Agreement, but not with the UPOV Convention; or that a State would adopt a system based on the 1978 Act despite the fact that the entry into force of the 1991 Act would have closed the 1978 Act for further accessions.

80. The Chairman said that the Committee should examine whether and, if appropriate, to what extent the TRIPS Agreement affected the UPOV Convention and whether specific activities should be recommended. As far as the various aspects of the matter were concerned, he reiterated the following facts:

(i) It was established that plant variety protection constituted a form of intellectual property.

(ii) The TRIPS Agreement did not concern all aspects of intellectual property (see Article 1(2)).

(iii) Plant variety protection was not mentioned as a sector in which the TRIPS Agreement created obligations. It was mentioned by the way in Article 27(3)(b).

(iv) That article did not state when a *sui generis* system was effective. The TRIPS Agreement did not take a stance either on the question of whether the general conditions set out in Articles 1 to 8 had to be satisfied for a *sui generis* system to be considered effective.

In that respect, the *ratio legis* of the reference to a *sui generis* system had to be borne in mind since it was based on the existing systems of protection that were themselves based on the Convention. It could therefore be deduced that the Convention had been recognized as providing an effective system in the form in which it existed at the time the TRIPS Agreement was adopted. That meant that the Convention provided an effective system even where it did not fulfill the general conditions set out in Articles 1 to 8 of the Agreement.

81. The Chairman explained that that was the theory he wished to put up for discussion. It raised the following issues:

(i) Article V of the WTO Agreement stipulated that "the General Council shall make appropriate arrangements for effective cooperation with other intergovernmental organizations that have responsibilities related to those of the WTO." Was UPOV one of those organizations?

(ii) If such was the case, what was the line of conduct that would have to be given to the Office of the Union for its contacts with WTO? One parameter could be not to leave the initiative of judging the Convention to WTO, it being for UPOV to first define a position that the Office of the Union could then defend with respect to WTO.

82. The representative of the European Community explained that it was the Community that had negotiated the agreements concluded within the Uruguay Round. It was currently preparing to ratify the WTO Agreement; the sole question still undecided was whether ratification should be given by the Community alone or by the Community and by its Member States.

83. As to the question raised in paragraph 19(i) of document CAJ/34/3--that was to say whether plant variety protection systems and the UPOV Convention fell within the definition of "intellectual property" formulated in the TRIPS Agreement--the representative of the European Community said that he was unable to contribute to the discussion without first consulting those who had negotiated the Agreement. He felt it would be premature to consider that issue of interpretation. It was sufficient to accept what was said in Article 27(3)(b).

84. The Delegation of Germany wished at that juncture to go no further than matters of substantive law, without entering into the question of cooperation with WTO, that had played a big part in the sessions of the WIPO Governing Bodies held from September 26 to October 4, 1994. It shared the view that the TRIPS Agreement did not govern plant variety protection, but was based on its existence. Analysis of the text was not clear: Article 1(2) referred to certain forms--but not all--of intellectual property; the same applied, for example, to Articles 41(1) and 42 as a result of the phrase "intellectual property rights covered by this Agreement." It could therefore be considered that the TRIPS Agreement did not impose any provisions on piracy in the case of plant varieties, it being understood that the need for such provisions in the field in question was a quite separate matter.

85. The Delegation of Germany emphasized the fact that Article 27 did not concern plant variety protection, but patent protection, and was to be taken into account only with regard to the admitted exceptions to patentability. That aspect had given rise to lengthy discussion and the Article was to be considered a compromise: those States that do not wish to provide plant variety protection by means of a patent must provide some other form of protection. There was no doubt that the existing systems of plant variety protection had been borne in mind at the moment of drafting the Article.

86. The TRIPS Agreement referred in its initial part to the Conventions administered by WIPO. Where those Agreements contained provisions that did not comply with the principle of national treatment or most favored nation treatment--for example, with regard to copyright--the TRIPS Agreement noted the fact. If the authors of the Agreement had considered that it also covered plant variety protection, there would also have been a reference to the relevant provisions of the UPOV Convention. That was an additional argument in favor of the theory that the TRIPS Agreement did not directly concern plant variety protection.

87. The Delegation of the Netherlands was unable to say at that juncture whether the TRIPS Agreement covered plant variety protection or not. There were arguments in both cases. The Delegation of Germany had presented the arguments in favor of a no. In favor of a yes, it was sufficient to note that where plant varieties were protected by patents, the TRIPS Agreement was fully applicable. According to the German theory, it was sufficient to choose *sui generis* protection to escape the commitments under the Agreement; it was very difficult to see the reason for such a disparity. Consequently, the Delegation of the Netherlands suggested that the States should continue to examine the matter and, further, that the Office of the Union should ask the GATT Secretariat informally what had been the intentions of the negotiators of the TRIPS Agreement.

88. The Chairman pointed out that the TRIPS Agreement referred to patents for invention. The plant patents issued by certain States on the basis of the Convention constituted a *sui generis* system of protection.

89. The Delegation of Japan said that its Government had already submitted draft laws to Parliament with a view to ratifying the agreements that had resulted from the Uruguay Round, and ratification was expected before the end of the year. The drafts were based on the assumption that the TRIPS Agreement--particularly its provisions on national treatment and most favored nation treatment--did not apply to plant variety protection. That assumption derived from both the process of negotiation and the structure of the Agreement.

90. The Delegation of Australia emphasized that discussions should bear on the implications of the TRIPS Agreement for UPOV. Australia was in a rather special position in that plant varieties were protectable both by patents and by breeders' rights. It had adopted the same position as Japan, that was to say that the TRIPS Agreement did not apply to plant variety protection. In conclusion, the Delegation of Australia thought it highly important that the Office of the Union should participate in the work related to WTO.

91. The Chairman observed that, as could be concluded from the discussions, it could be necessary to examine whether the Convention should not be revised.

92. The Delegation of Denmark announced that no conclusion had as yet emerged in its country. The matter was being examined within the framework of revision of the Plant Variety Protection Law. As for relations with WTO, the Delegation of Denmark recommended prudence as long as a common stance had not been decided within UPOV.

93. The Delegation of Germany took the floor again to raise the matter of the continuation of discussions. It had objections to raise on the suggestion made by the Delegation of the Netherlands, for two reasons: firstly, each State had to take measures very rapidly to implement the TRIPS Agreement and Germany had indeed already promulgated a corresponding law; secondly, it was not the Office of the Union, but the Council for TRIPS that would ensure that States met their obligations under the TRIPS Agreement. The Delegation recommended that a model should be taken from the decisions taken by the WIPO Governing Bodies, that had defined a formal framework for cooperation with the WTO Secretariat and had set up an *ad hoc* working group. It invited the Office of the Union to look at the possibility of association with the steps taken by the International Bureau of WIPO.

94. The Delegation of France stressed, to begin with, that plant variety protection obviously represented a form of intellectual property; however, it was much more difficult to say whether the system based on the UPOV Convention should enter into the framework of the TRIPS Agreement. Ongoing studies in various parliaments, as also in the European Community, could be supported by highly informal discussions between the Office of the Union and the WTO Secretariat to check whether the *sui generis* system referred to in Article 27 of the TRIPS Agreement indeed corresponded to the UPOV system and also to obtain information as to what would be involved, from the point of view of revising the Convention for example, if the theory were adopted that the TRIPS Agreement also concerned plant variety protection.

95. The Delegation of the United States of America said that, following an in-depth study at national level, it had been concluded that it would not be opportune to raise the questions given in paragraph 19 of document CAJ/34/3. Indeed, it was not for the organs of UPOV, but for the Council for TRIPS to interpret the TRIPS Agreement; it was that latter body that would decide whether a member of WTO satisfied its obligations under the TRIPS Agreement, including Article 27 in respect of a *sui generis* system of plant variety protection. It was not so much a

matter of whether the UPOV Convention fell within the scope of the TRIPS Agreement, but rather whether the commitment to provide for an "effective *sui generis* system" was met by a system based on the UPOV Convention. There was no doubt that during the negotiations on the TRIPS Agreement it had been considered that the system based on the UPOV Convention was an "effective *sui generis* system."

96. However, the fact that the latter formula had been adopted had consequences that could go well beyond what the negotiators had intended. In particular, that formula suggested that other effective *sui generis* systems could exist. The structure of the Agreement also raised the question whether its general provisions were applicable to *sui generis* systems. Finally, there were matters of interpretation, for example whether "plant varieties" applied also to mushrooms. Those questions could be of concern for the organs of UPOV, but depended in the final analysis on the Council for TRIPS and, should there be a dispute, on a panel.

97. As far as relations with WTO were concerned, the Delegation of the United States of America also recommended prudence, it being understood, however, that although plant variety protection was only mentioned indirectly, the UPOV Convention was certainly affected.

98. The Delegation of Switzerland said that the questions raised in document CAJ/34/3 certainly warranted a reply. However, they were questions of interpretation of the TRIPS Agreement that were of the competence of the contracting parties to that Agreement. Switzerland was in favor of all initiatives for collaboration between the organizations involved that would enable those issues to be resolved.

99. The Delegation of the United Kingdom felt that one could not simply note that it was for the WTO authorities to decide whether the TRIPS Agreement covered plant variety protection or not; in other words, one could not ignore the situation. Though it was perhaps not appropriate to dwell too long on the questions raised and the terms of reference proposed in paragraph 19 of document CAJ/34/3, at least general instructions should be given to the Office of the Union to establish contacts with WTO, to inform it of UPOV's concern and to report back in one year, for example. Those terms of reference would be based on the reexamination clause in Article 27(3)(b) of the TRIPS Agreement; the questions that had been raised during the discussions would inevitably arise during such a reexamination.

100. The Delegation of India said that the first issue was to know whether plant variety protection constituted a form of intellectual property. The reply was incontestably yes. The following question was whether plant variety protection constituted an effective system and, subsidiarily, who should decide that question. The Council for TRIPS would seem the most appropriate body.

101. The Delegation of India added that Article 27 of the TRIPS Agreement implied that a patent was an effective form of protection for plant varieties. That implication was debatable if only, for example, for the fact that the patent system did not provide for a "breeder's exemption" or for the free use of a protected variety for the creation of new varieties. Finally, one had to be aware of the fact that the effectiveness of a system depended on the level of development of the State concerned; the conditions for "farmer's privilege" gave a good example in that respect.

102. The Vice Secretary-General pointed out that the Office of the Union had already had informal relations with the GATT Secretariat. Furthermore, the WTO Preparatory Committee had already considered the matter of legislative information; in that context, the UPOV collection of laws had

been made available and attention had been drawn to the provisions of the Convention relating to communications on laws.

103. The Chairman concluded the discussion as follows:

(i) Plant variety protection was a form of intellectual property; the statements made in that respect by the Delegation of India had not been contradicted.

(ii) The members of the Committee were capable of forming an opinion on the effectiveness of the UPOV system; indeed the intention of the authors of the Convention had been to set up an effective system.

(iii) UPOV as an organization could not decide unilaterally whether the UPOV system entered into the scope of the TRIPS Agreement; WTO and the States were equally involved.

(iv) Consequently, the Office of the Union could not state to the WTO authorities that the Convention fell--or did not fall--within the scope of the TRIPS Agreement; it could simply say that the matter was still being analyzed in numerous member States and that the States that had completed the analysis had reached differing conclusions.

(v) As far as future activities were concerned, cooperation between WIPO and WTO had to be taken into account as did the fact that the Director General of WIPO was the Secretary-General of UPOV; it was therefore necessary to align the positions of WIPO and of UPOV. The Office of the Union should therefore concert with the International Bureau of WIPO as to the form that informal contacts with WTO should take. It could also point out that the UPOV system was in any event an effective system and request WTO to inform it of the conclusions it drew from that fact.

(vi) The Office of the Union should report back to the next session.

104. The Delegation of the Netherlands announced that it could not go along with the point of view reported in paragraph (v) above: identity of person did not imply identity of function and, in any event, the questions that arose for WIPO differed from those that arose for UPOV.

105. The Chairman noted that statement and said that it could be recorded in the minutes of the session. He nevertheless emphasized that UPOV would not be in a very good position, in its informal relations, if it were to be contradicted by WIPO within the framework of a formal procedure. He nevertheless accepted that positions could prove, after discussion, to be contradictory.

UPOV Central CD-ROM Database on Plant Variety Protection and Related Matters

106. Discussions were based on document CC/48/2.

107. The prototype CD was presented to the Committee by two officials of the International Bureau of WIPO. Annex II contains the text of the visual mediums used for the demonstration.

108. The Delegations of Spain and the United Kingdom said that they had had occasion to test the prototype. The former had a few minor technical observations to make; the latter had found the product to be excellent.

109. In reply to comments made by the Delegation of the United Kingdom and the representative of the European Community, it was stated that a users' manual would be drawn up and that the help screens would be improved in the final version; and that the data base was technically transferable, but that it would be for UPOV to decide whether it would be legally possible. For the moment, it was only envisaged to make the data base available to official services. Whether or not it could be more broadly exploited would be examined at a later stage.

110. With regard to the timescale proposed in paragraph 10 of document CC/48/2, it was emphasized that a degree of flexibility was available, particularly for the stages to come. The Committee took note of that timescale.

List of Classes for Variety Denomination Purposes

111. Discussions were based on document CAJ/34/4.

112. The Delegation of the United Kingdom noted that two matters had to be examined: should the present list be revised, and should it be supplemented in view of the extension of protection to the whole plant kingdom? On the first question, it suggested that it should be waited until experience had been acquired with the CD-ROM data base and, on the second question, that the technical bodies of UPOV be consulted. Reference of the matter to the technical bodies was supported by the Delegation of Australia.

113. The Delegation of New Zealand said that it was relatively satisfied with the current list, although it could be improved. As far as the minor species were concerned, the number of varieties was limited anyway.

114. The Delegation of France noted that the problem that arose involved contradictory tendencies: on the one hand, varieties were becoming worldwide, due also to the fact that protection now extended to the product and that the denomination played a part both in production and in consumption; on the other hand, the arguments put forward by the Office of the Union in favor of regionalization were not simply theoretical, but already used in the practical administration of the system of protection. Certain classes had to be split up and it was not too soon to think about it.

115. In a more general way, the question had to be asked as to the part played by the variety denomination, particularly in the light of the fact that samples of varieties preserved in gene banks had to be accurately identified in the long term. The Delegations of Sweden and of Switzerland supported that view.

116. The Chairman concluded that the present list of classes was relatively satisfactory and that problems that could lead to adjustments arose not so much with respect to "new" species as to current species. Possible modifications would derive from use of the CD-ROM data base or would have to be formulated by the technical bodies of UPOV. Once that information had been obtained, it would be decided whether it was necessary to convene a joint meeting of the Committee and of the Technical Committee.

117. This report was unanimously adopted by the Committee at its thirty-fifth session, on April 26, 1995.

[Two annexes follow]

CAJ/34/5

ANNEXE I/ANNEX I/ANLAGE I

LISTE DES PARTICIPANTS/LIST OF PARTICIPANTS/TEILNEHMERLISTE

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André HEITZ, Director-Counsellor
Makoto TABATA, Senior Program Officer

[L'annexe II suit/
Annex II follows/
Anlage II folgt]

ANNEXE II/ANNEX II/ANLAGE II

BASE DE DONNEES CENTRALE DE L'UPOV SUR DISQUE COMPACT ROM CONCERNANT LA PROTECTION DES OBTENTIONS VEGETALES ET DES QUESTIONS CONNEXES/
UPOV CENTRAL CD-ROM DATABASE ON PLANT VARIETY PROTECTION AND RELATED MATTERS/ZENTRALE ELEKTRONISCHE DATENBANK DER UPOV FUER PFLANZENSORTENSCHUTZ UND VERWANDTE FRAGEN

UPOV-ROM PROTOTYPE

- CD-ROM publication
- GTI software of JOUVE S.I., France
- test data gathered from six countries

CD-ROM

- CD Read Only Memory
- Capacity: >600 MB
- inexpensive distribution medium

PROTOTYPING OF UPOV-ROM

- JOUVE publication platform
- [extension of the WIPO contract for ROMARIN]
- data gathered by the UPOV Secretariat
- input data format (tagged text)

THE AIM OF THE PROTOTYPING

- To demonstrate the software technology
- To highlight the data specific problems
- To identify "hidden problems"

BASIC TECHNICAL TERMS

- Database (e.g., phonebook)
- Record (an entry in the phonebook)
- Field (name, address, phone number, fax number)
- Repeatable field (phone number, fax number)
- Index (name, number phone/fax)
- Subfield structures
  - one person with more than one address
  - (zip code, city, street, number)

  - <540 DENOMPROP> 691201 Red Peat
  - <542 DENOMAPPR> 901011 Red Pontiac

ADDITIONAL TECHNICAL TERMS

- Tagged format
  - <210 AAD 05/123.456
  - <220 ADP 1995.12.11.
- Indexing word/position
  - TANGE DER INSEL SACHALIN

  - DER
  - INSEL
  - SACHALIN
  - TANGE
- Collection (common, Arypton, etc)
  - 123.456

  - 123
  - 456

CONTENTS OF THE UPOV-ROM PROTOTYPE

- Bibliographic database
- Taxon file

BIBLIOGRAPHIC DATABASE

- <5000 records
- 6 cooperating countries

- 2/3 DE, GB, FR [1500,1000,1000]
- 1/3 ES, IL, US [500,100,100]

- 1/2 National listing [2000]
- 1/3 Plant Breeders Right [1500]
- rest Plant Patent [700]

SEARCH IN THE BIBLIOGRAPHIC DATABASE

- Authority
- Identifier (Code + common id)
- Denomination (subfield structure)
- Breeders reference
- Latin name
- Application date
- Application number
- Grant date
- End date
- Parties
- Priority

TAXON FILE

- Latin name
- ISTA name
- Synonyms
- English, French, German, Spanish name
- Countries

FIRST IMPRESSIONS

√ Input definition: OK
√ CD-ROM publication: feasible
√ User interface: OK
√ Minor problems

PROBLEMS

- 1. Size
- 2. Mandatory fields
- 3. Data format
- 4. Subfield presentation
- 5. Presentation of data (capitals)

1. Size of the test database

- 1500 DE
- 100 US records

- too small sample

2. Handling of mandatory fields

- Authority
- Identifier

- Denomination
- Name of parties

3. Data formats

- Identifier
  - NLI00000000123 [12 positions]
  - NLI003000123 [9 positions]
  - NLI123
  - NLI 123
  - NLI 03000123 [8 positions] !

- Description and explanation of data formats

4. Subfield presentation

Missing dates in the denomination field

1989.12.11. Red Arrow

Red Pontiac

Red Arrow [1989.12.11] !

Some problems

- DE
  - missing mandatory field (names of parties)
- IL
  - common name and Latin name are mixed up
  - field for the UPOV code is filled in
- GB
  - data in capitals
  - duplicate applicants name
- ES
  - missing dates 0000.00.00
- FR
  - Zero filling, NLI0000000001234

- [No index for common name]

5. Presentation of data

- capital letters (?)
- length of fields (FR)

JOUVE remarks

- Tag _<220>_19930716
- Character set (enya, umlauts)
- Missing type of date (DE,US)
- Date format (19901211 and not 901211) [DE]
- Missing dates [00000000 or _____]
- Non existing fields: priority, other appl., other info, remarks, note)

How to continue?

- testing the prototype
- using the feed back of the test
- requesting new data delivery
- asking data from other cooperating offices
- we have to analyze the data again
- and the regular production could be started

Thank you for your attention

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Ende des Dokuments]