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INTERNATIONAL UNION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS
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ADMINISTRATIVE AND LEGAL COMMITTEE

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THE INTERPRETATION OF "THE EXPRESSION OF THE CHARACTERISTICS
RESULTING FROM A GIVEN GENOTYPE OR COMBINATION
OF GENOTYPES"

Document prepared by the Office of the Union

1. The words "the expression of the characteristics resulting from a given genotype or combination of genotypes" appear in Article 1(vi) (definition of "variety") and in Article 14(5)(b)(i) and (iii) (definition of an essentially derived variety) of the 1991 Act. Their meaning has been discussed in a joint session of the Administrative and Legal and Technical Committees in April 1993 (see document CAJ/32/3-TC/29/3 and the report of the session, document CAJ/32/10-TC/29/9) and in the Administrative and Legal Committee ("the Committee") in October 1996 (see document CAJ/36/3 and the report of the session, document CAJ/36/6).
2. The interpretation of the above-mentioned words and their practical application to the plant variety protection system continues to be a matter of concern in UPOV technical circles. It was discussed in the fourth session of the Working Group on Biochemical and Molecular Techniques, and DNA-Profiling in Particular ("the BMT"), held from March 11 to 13, 1997. Paragraphs 62 to 65 of the report of that session (document BMT/4/21) are set out in the Annex.
3. The attention of the Committee is drawn, in particular, to paragraph 65 of the report.

4. It would seem that some technical specialists are concerned that unless the words “the expression of the characteristics resulting from a given genotype” are interpreted so as to exclude from distinctness testing genetic information that is not known to be expressed or reflected in the phenotype, varieties which are sufficiently uniform in their phenotypic characteristics may nonetheless be variable in respect of apparently unexpressed DNA sequences and vulnerable to reselection. Some also think that if apparently unexpressed DNA sequences, whose presence is revealed only by one or other form of genetic probe, are used as the basis for distinctness decisions, the “minimum distance” between varieties will be unacceptably reduced.

5. In the light of paragraph 65 of the aforementioned report of the fourth session of the BMT, the Office of the Union has examined the records of the discussions in the 1991 Diplomatic Conference and of the preparatory meetings prior to the Conference. The discussions throw no specific light on the interpretation of the words in question.

6. The purpose of this document is to bring the concerns of technical circles to the attention of the Committee.

7. The Committee is invited to consider the subject matter of this document and to advise the Office of the Union.

[Annex follows]

EXTRACT FROM DOCUMENT BMT/4/21

[...]

62. The Vice Secretary-General of UPOV whilst explaining that the Secretariat of UPOV did not claim authority to pronounce upon the interpretation of the provisions of the Convention, referred to the language and interrelationships between Article 1, Article 7 and Article 14(5)b of the 1991 Act of the UPOV Convention which had been the subject of discussion in the Administrative and Legal Committee of UPOV on two separate occasions. The subject had been discussed at a joint session of the Administrative and Legal Committee and Technical Committee in April 1993 (see document CAJ/32/3-TC/29/3 and the report of the session, document CAJ/32/10-TC/29/9) and at a session of the Administrative and Legal Committee of UPOV in October 1996 (see document CAJ/36/3 and the report of the session, document CAJ/36/6). The Vice Secretary-General stated that the discussions in the documents and session reports should be studied in detail since they were not readily summarized. However the discussions supported *inter alia* the following propositions:

(a) “Article 1 defined the variety concept, but remained silent on whether or not a variety was eligible for protection; the reference to the genotype was intended to make it clear that the existence of a variety merely presupposed the possibility of defining it according to genetically determined criteria, and not necessarily by characteristics appearing in lists drawn up for the purposes of the grant of breeders’ rights. The genotype was neither defined nor even specified in the course of the discussions. There was nevertheless the underlying hypothesis that a variety could not be defined otherwise than by its genes; in that sense, no substantive difference was made between the genotype and the phenotype.”

(Document CAJ/32/10-TC/29/9, paragraph 15(ii))

(b) “Article 7 dealt only—and that was already clear from its inclusion in Chapter III—with the circumstances in which a variety may be protected, in view of the fact that it was not eligible for protection by virtue of the mere fact of its being a variety. Article 7 therefore contained stricter conditions than Article 1. To qualify for protection, a variety had to be ‘clearly’ distinguishable. The word ‘clearly’ had not been defined, and it was important to point out that the Diplomatic Conference did not want to introduce specific restrictions. Article 7 did not refer to the characteristics to be taken into account, not even from the point of view of their importance or their essential nature. It was therefore for the examining authority to determine the characteristics or combinations of characteristics that it would use in examination. The Article also did not specify when a difference was clear, so it was for the authority to decide, for instance, whether a single difference was sufficient, assuming that it was great enough, or alternatively whether one needed only note the existence of a number of differences that were not clear, provided that they could be combined to give a clear difference. The Convention left all these options open.”

(Document CAJ/32/10-TC/29/9, paragraph 15(iii))

(c) “The words ‘the expression of the characteristics resulting from a given genotype or combination of genotypes’ appearing in Article 1(vi) of the 1991 Act do not conflict

with the use of characteristics based upon the features of genetic material (in particular ‘DNA profiles’).”

(Document CAJ/36/3, paragraph 6(b))

(d) “The question of deciding whether a characteristic based upon the features of genetic material and resulting from the use of a well-established method of analysis (a ‘DNA profile’) can be used within the framework of the examination of distinctness should be addressed in each particular case by applying the criteria which have already been established in relation to ‘traditional’ characteristics (including characteristics resulting from the use, for example, of electrophoresis).”

(Document CAJ/36/3, paragraph 6(c))

(e) “The extension of protection to essentially derived varieties ought not to result in a weakening of the criteria for decisions on distinctness.”

(Document CAJ/36/3, paragraph 6(d))

(f) “The question whether ‘directly-read characteristics of the genome’ could be taken into account was not settled by the Convention, which did not pronounce on the nature of the characteristics to be considered.”

(Document CAJ/36/6, paragraph 15(b))

(g) “The question had to be settled case by case according to the usual criteria, which included the requirement of the clearness of the difference noted and the need to abide by the essential purpose of the protection system.”

(Document CAJ/36/6, paragraph 15(c))

(h) “It would in particular be contrary to that purpose (*the essential purpose of the protection system*) to allow the protection of one plant group that was too close to another. It would be wrong to conclude from the position set forth in paragraph 6 of document CAJ/36/3 that the use of biochemical characteristics was sufficient for determining distinctness. The 1991 Act did not rule out the use of new technological solutions, but did not validate those solutions either.”

(Document CAJ/36/6, paragraph 15(d))

(i) “It was sometimes suggested that distinctness was associated with the phenotype and the concept of essentially-derived variety with the genotype. The problem was, however, that Article 1(vi) (on the definition of the variety), and Article 14(5)(b) of the 1991 Act used the same terminology.”

(Document CAJ 36/6, paragraph 15(e))

63. Perhaps for present purposes the most important views expressed by the Administrative and Legal Committee were:

(a) “[...] It was for the authority to decide [...] whether a single difference was sufficient [...] or alternatively whether one needed only note the existence of a number of differences that were not clear, provided that they could be combined to give a clear difference. The Convention left all these options open.”

(Document CAJ/32/10-TC/29/9, paragraph 15(iii))

(b) “The question had to be settled case by case according to the usual criteria, which included the requirement of the clearness of the difference noted and the need to abide by the essential purpose of the protection system.”

(Document CAJ/36/6, paragraph 15(c))

64. The last two propositions perhaps suggest how to reconcile any eventual use of the new technology with the need to avoid damaging the existing protection system. The use of a minimum number of molecular characteristics, well distributed through the genome would, when compared with some phenotypic characteristics in current use, increase rather than decrease the so-called minimum distance. The closer examination of intra-varietal variability in the next session of the BMT would considerably clarify the impact of using molecular techniques on the UPOV protection system.

65. Breeders and technical experts from national offices who responded to the report by the Vice Secretary-General expressed reservations on the interpretation made by the CAJ. The whole question would need to be carefully discussed again in the Technical Committee and also in the Technical Working Parties and the views of those present during the Diplomatic Conference should be obtained and the preparatory documents as well as the records of the Diplomatic Conference studied in the light of any new insights which emerge as practical work progresses. If, as a result of those discussions and studies, the interpretation of the CAJ was confirmed, an appropriate UPOV approach to these new methods would need to be developed.

[...]

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