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INTERNATIONAL UNION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS
GENEVA

ADMINISTRATIVE AND LEGAL COMMITTEE

Thirty-Seventh Session
Geneva, October 27, 1997

REPORT

prepared by the Office of the Union

Introduction

1. The Administrative and Legal Committee (hereinafter referred to as "the Committee") held its thirty-seventh session on October 27, 1997, under the chairmanship of Mr. H. Dieter Hoinkes (United States of America).
2. The list of participants appears in the Annex to this document.
3. The session was opened by the Chairman, who welcomed the participants.
4. The Chairman expressed particular pleasure at the presence of the Delegations of Ecuador, Mexico and Paraguay, States that had become members of the Union since the Committee's previous session, as well as the Delegation of the International Association of Plant Breeders for the Protection of Plant Varieties (ASSINSEL), which was attending a session of the Committee for the first time as an observer.
5. The Delegation of Ecuador thanked the Chairman for his words of welcome and said that the process of acceding to UPOV had been greatly facilitated by the assistance received from the Office of the Union and other member States and that accession was extremely important for the protection of the interests of Ecuadorian breeders and the development of agriculture in Ecuador.

6. The Chairman informed the Committee of the death of Mr. Flemming Espenhain on July 18, 1997. Mr. Espenhain had been the Danish representative on the Committee since it had been established and had acted as Chairman from 1985 to 1988.

Adoption of the Agenda

7. The Committee adopted the agenda as it appeared in document CAJ/37/1, after noting that no documents were available concerning item 3.

Review, in 1999, of Article 27.3(b) of the Agreement on Trade-Related Aspects of Intellectual Property Rights by the Council for TRIPS

8. Discussions were based on an oral statement by the Vice Secretary-General.

9. The Committee requested the Office of the Union to prepare a document as soon as possible.

10. All delegations which took the floor on this agenda item emphasized that the problems mainly arose from the discussions on biodiversity and genetic resources. The following additional remarks were made:

(a) According to the Delegation of Chile, a system of protection in the area of genetic resources should be defined and introduced.

(b) In the view of the Delegation of ASSINSEL, many of the difficulties were due to mistaken ideas regarding the relationship between the protection of new plant varieties and the texts and principles applicable to genetic resources; it was necessary to explain that there was no incompatibility between the two systems.

(c) The Delegation of the European Community referred to a document entitled "Intellectual Property Rights and Plant Genetic Resources: Towards a *Sui Generis* System" and published by the International Plant Genetic Resources Institute (IPGRI). This document criticized the requirement on the uniformity of varieties, on the basis of arguments which had no scientific or technical basis. The Delegation considered that UPOV should make an effort to explain the criteria of distinctness, uniformity and stability as the basis for the definition and identification of varieties; it suggested that a symposium be held on this issue.

(d) The Delegation of Germany said that efforts should be made to maintain and develop the current system of protection for plant varieties applicable to new varieties. Regarding genetic resources, possible solutions should be studied.

(e) The Delegation of Argentina pointed out that the protection of plant varieties and a number of proposals currently being discussed under the title "farmers' rights" were in fact complementary. It also underlined the need to have a better understanding of the fundamental concepts.

11. Referring to the 1999 review process of Article 27.3(b) of the TRIPS Agreement, the Delegation of Argentina emphasized the need for discussions within UPOV. The Delegation of the European Union acknowledged that UPOV's role was limited, the forum for discussions being the WTO. Nevertheless, all the member States of UPOV were members of the WTO and, because of their experience and expertise, they were particularly well qualified to give an opinion on the detailed provisions that might be included in a revised TRIPS Agreement. In concluding, the Chairman said that UPOV should draw up a document to be used by the WTO regarding what UPOV understood by "an effective *sui generis* system."

12. Regarding the review possibilities, the Delegation of Argentina recalled that, at a previous session, it had already been agreed that the protection system based on the UPOV Convention was an effective system. The Delegation of ASSINSEL wished to see emphasis laid on the system of protection based on the 1991 Act. The Delegation of the European Community pointed out that it had been considered that the 1991 Act provided the basis for an effective protection system; it welcomed a review of Article 27.3(b) that would refer back to UPOV and the 1991 Act and would clarify concepts such as "microorganisms."

13. The Delegation of Germany pointed out that Article 27.3(b) of the TRIPS Agreement constituted a compromise that had been difficult to achieve and that "review" did not mean "revision." In view of the diversity of the positions and the interests at stake, he considered it unlikely that the Article would be amended. That should not, however, prevent UPOV from working on a common position.

Interpretation of Words "Expression of the Characteristics Resulting from a Given Genotype or Combination of Genotypes" in Articles 1(vi) and 14(5)(b) of the 1991 Act of the UPOV Convention

14. Discussions were based on document CA/37/3.

15. The Delegation of the Netherlands emphasized that any interpretation of the 1991 Act of the Convention must necessarily take into account the state of the art at the time the Act was adopted and subsequent developments. To the extent that it was possible to plagiarize a variety by inserting a genetic sequence, the existence of a difference in the DNA could not be a decisive criterion, and techniques for analyzing DNA could only be complementary tools.

16. The Delegation of the European Community said that the Committee had not taken any binding decision at its previous sessions (one of which had been held jointly with the Technical Committee) because, in the Committee's view, the issue should be resolved on a case-by-case basis by the authorities dealing with applications for protection. The dissatisfaction shown by some technical experts therefore had no objective basis. It was also necessary to ensure that decisions taken in each particular case by the various authorities were uniform.

17. Regarding the substance, the Delegation recalled that Article 7(1) of the Regulation of the Council of the European Union was a combination of Articles 1(vi) and 6 of the 1991 Act and required that the variety should be "clearly distinguishable by reference to the expression of the characteristics that results from a particular genotype or combination of genotypes." Consequently, the granting of protection required the existence of a phenotypic difference; a

difference in the genotype would not be acceptable if it was not also to be found in the phenotype. More generally, accepting differences that could only be perceived at the level of the DNA would condemn the protection system.

18. The Delegation of Japan shared the views expressed by the Delegation of the European Community and added that, with the current stage of knowledge, it was not possible to use DNA analytical tools to examine varieties.

19. The Delegation of the United States of America also shared this view. It noted, however, that the tools in question yielded useful information and that it was necessary to consider how they could be used in an appropriate manner. For example, they made it possible to distinguish, in certain cases, differences due to the environment from those due to the genotype, or to compare a new variety to a variety that had disappeared but whose DNA profile still existed. UPOV should in any event refrain from adopting positions that might prove restrictive and unfounded with progress in scientific and technical knowledge. The Delegation of France recalled in this connection that the task of the Working Group on Biochemical and Molecular Techniques was precisely to consider the possibilities for utilizing biotechnical and molecular tools.

20. The Chairman noted that, at the present stage of the discussion, it could justifiably be asked what type of characteristics could be used in examining varieties, and that it was up to the Committee to make recommendations and ensure that there were no different practices in administering the protection system leading to the creation of “minisystems.” He also recalled that use of a particular method depended on the ultimate objective; for example, a method used for the purposes of distinction could be required to show a difference in the DNA expressed, while this condition was not necessary when establishing the identity of infringing material.

21. The Delegation of Germany warned against any attempt to make the 1991 Act say something that had not been the original intention. It recalled that the phenotype was the expression of the genotype (taking into account the effects of the environment) and that, in the case of protection (and in general), one would limit oneself to a description of the phenotype without trying to ascertain how it was obtained. It proposed that it be stated that the Convention did not say anything about the types of characteristics liable to be utilized for the examination of varieties and that the characteristics to be used should be defined according to the customary criteria, and noted that this should exclude “minisystems” of protection. In general, the options available should not be restricted by a narrow legal interpretation for which there was no basis in the Convention.

22. The Delegation of ASSINSEL said that the basic question was whether or not molecular markers could be used in examining distinctness. For ASSINSEL, such a use would be premature because there was not enough information on the behavior of “varieties” defined by using such markers from the point of view of uniformity and stability. The “traditional” morphological and physiological characteristics should therefore continue to be used, bearing in mind however that molecular markers could be tools to help in taking decisions. ASSINSEL hoped that UPOV would take a decision on this issue as soon as possible with a view to guaranteeing the security of breeders and users of varieties.

23. A discussion was then held on the procedure to be followed for future work. It was suggested that the objective was to define the types of characteristics and tools that could (or could not) be used and the criteria for decisions. It was decided to convene a Working Group to establish a basis for discussion for the next session of the Committee. The Office of the Union would decide on the membership of the Working Group.

Variety Denominations: Their Transliteration and Translation

24. Discussions were based on document CAJ/37/4.

25. The Committee basing itself on the legal rationale of Article 20 of the 1991 Act of the Convention, decided that plurilingual States should also ensure that each variety was designated by a single denomination in their territory.

26. The Committee noted in this connection that the International Code of Nomenclature for Cultivated Plants had been revised in 1995. The Office of the Union had learnt of this revision too late for its comments to be reflected in the Code and for it to ensure that the latter was aligned on the Convention.

Report on Transitional Provisions Included in Laws Adapted to the 1991 Act

27. The Committee took note of the report by the Office of the Union (document CAJ/37/5).

Program for the Thirty-Eighth Session

28. The Committee agreed to hold its thirty-eighth session in April 1998 and to consider the following points:

- (a) review of Article 27.3(b) of the TRIPS Agreement;
- (b) characteristics used in variety examination.

29. The Delegation of the Netherlands proposed that the question of essentially-derived varieties also be considered. It was decided however that such consideration would be premature.

30. The Delegation of Australia proposed that the relations between the criteria for protection and the criteria for the release of genetically modified organisms be considered. The Chairman proposed that this matter be taken up at the Autumn session of the Committee.

31. The Delegation of Argentina wished to see an assessment of the status of case law, particularly as regards the “farmer’s privilege.” After the Office of the Union had explained the difficulty of obtaining relevant information and putting it in an analytical form of use to Delegations, the Chairman decided that the matter should be taken up when a case occurred.

Retirement

32. The Committee noted that Mr. Henning Kunhardt (Germany) was participating in its work for the last time. It thanked him for the work accomplished over many years of association with UPOV and wished him a long and happy retirement.

33. This report has been adopted by correspondence.

[Annex follows]