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UPOV

INTERNATIONAL UNION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS

GENEVA

ADMINISTRATIVE AND LEGAL COMMITTEE

Thirty-Eighth Session
Geneva, April 2, 1998

REPORT

adopted by the Committee

Introduction

1. The Administrative and Legal Committee (hereinafter referred to as "the Committee") held its thirty-eighth session in Geneva on April 2, 1998, under the chairmanship of Mr. H. Dieter Hoinkes (United States of America).

2. The list of participants is given in the Annex to this report.

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

4. The Chairman extended a special welcome to the Delegations of Trinidad and Tobago, Bulgaria and the Russian Federation, which had become members of the Union since the previous session of the Committee; he pointed out that the 1991 Act of the Convention would enter into force on April 24, 1998, on which date six States (Bulgaria, Denmark, Israel, Netherlands, Russia Federation, Sweden) would be bound by it.

Adoption of the Agenda

5. The Committee adopted the agenda as appearing in document CAJ/38/1.

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

6. Discussions were based on document CAJ/38/2.

7. The Chairman emphasized the prospective, and therefore uncertain nature of the possibilities for amendment of Article 27.3(b) described in paragraph 9 of document CAJ/38/2. The possibility described in subparagraph (vi) of the same paragraph ("Confirm that plant variety protection is a form of intellectual property protection so as to require the application of the general provisions of the TRIPS Agreement") seemed interesting, however. On the other hand, great care should be taken with the texts proposed in paragraphs 13 and 15 (which would impose protection based on the 1978 and 1991 Acts respectively): in the first case one would be imposing an outdated text, and in the second there was a risk of creating problems for States that were still applying the 1978 Act. It was nevertheless desirable to have more precise provisions written into the TRIPS Agreement, and the representatives of the member States within UPOV should enter into close relations with their counterparts within the WTO.

8. The Representative of ASSINSEL wanted protection based on the 1991 Act to be insisted upon, but conceded that reference could be made to the spirit of the Convention rather than to a specific Act.

9. The Representative of CIOPORA considered that the reference to the protection of new plant varieties according to the principles of the UPOV Convention should appear in Article 1, not in Article 27.3(b), which should be left as it was. As for a more specific reference to an Act of the Convention, the breeders of vegetatively reproduced plants, the value of which manifested itself essentially at the stage of the harvested material, considered that neither Act provided for effective protection; what those breeders really needed was protection that related to the harvested material as such, in other words protection that was not subject to the absence of any reasonable opportunity of exercising the right at propagating material level. Such protection could be provided for under the 1978 Act, as was illustrated by French legislation, for instance. A reference to the Convention added to Article 1.3 of the TRIPS Agreement would therefore enable all UPOV members to promote the introduction of an effective protection system.

Characteristics Used in Distinctness Testing

10. Discussions were based on document CAJ/38/3.

11. The Delegation of France registered its disagreement with the sentence quoted in paragraph 9 of document CAJ/38/3, according to which "The actual concept of the phenotype depends on the observation methods and procedures used." It added that the Working Group which met on February 12, 1998, would not have made any distinction between "global tools" and "specific tools." In its opinion, there were four options:

(a) outright rejection of molecular tools;

(b) retention of an interpretation of the phenotype concept in a restricted sense;

(c) broadening of the phenotype concept towards that of the genotype;

(d) complete opening up of the system to include molecular tools.

The Working Group had unanimously rejected options (a) and (d) and had regarded option (b) as permitting fairly substantial progress. The majority had considered option (c) to be dangerous.

12. The Delegation of the United Kingdom subscribed to the opinion of the Delegation of France. It added that one should also refer to the overriding intentions at the time of the drafting of the 1991 Act: at the time it was a question of being careful and avoiding a situation where a rush towards molecular tools might put the very integrity of the plant variety protection system at risk. The system was based on the classical concepts of the genotype and phenotype, and it would be somewhat unwise to depart from them before more information was available on molecular biology in the variety field.

13. The Delegation of the United States of America recalled that the word genotype referred to the information contained in the genetic material; any physical expression of that information could be regarded as the phenotype. It had been considered at the first session of the Working Group on Biochemical and Molecular Techniques, and DNA Profiling in Particular, that the distinction between the genotype and the phenotype was becoming blurred as molecular technology progressed. The Delegation of the United States of America looked forward to being able to resume discussion of the question at the next session of the Working Group. On a more general level, it considered that there was already a great deal of difficulty in making a distinction on the basis of traditional morphological and physiological characteristics, that a decision to rule out the use of molecular tools would force a decision of the same kind with respect to more classical tools or techniques, and that a decision to freeze the protection system on the basis of what applied in 1991 was hard to imagine.

14. The Delegation of Germany thanked the Working Group and the Office of the Union for the amount of work done. It noted that the use of tools applied to the hereditary substance and of characteristics defined in relation to that substance was becoming increasingly important, not least among breeders. UPOV was rightly being very cautious in that connection, and the further development of the situation had to be watched with the utmost care.

15. The Delegation of the Netherlands was disappointed with the late distribution of document CAJ/38/3. It considered that the problem turned not so much on the definition of the variety concept as on the concept of clear distinctness and the means of establishing it. The general conclusion could be expressed in two points:

(a) expression is the deciding factor;

(b) the use of molecular tools to establish clearer distinctness is possible.

16. The Representative of ASSINSEL pointed out that document CAJ/38/3 contained three important conclusions to which ASSINSEL should be able to subscribe:

(a) “Global tools” could be used to confirm a clear difference.

(b) Until the significance of the information drawn from DNA analysis was better known, it was not possible for "global tools" to be the main tools used.

(c) Transgenic plants were a special case (see paragraphs 41 to 43 of document CAJ/38/3). They could for instance be subjected to simplified examination only.

The Representative of ASSINSEL had three further comments to make:

(a) While it was important to relate Articles 1(vi) and 7 to each other (analysis of the latter in the light of the former), one should not overlook the links between Article 1(vi) on the one hand and Articles 8 and 9 (uniformity and stability) on the other.

(b) To interpret the text of the 1991 Act, one should refer to the technical context of the time of its adoption. If technical developments were such that the concepts adopted in 1991 were no longer valid, then it might become necessary to revise, in due course, certain provisions of the Act.

(c) Document CAJ/38/3 highlighted the ambiguity of the texts with regard to the distinctness and essentially-derived variety concepts. This ambiguity, which was due to an amendment adopted by the Diplomatic Conference which distorted the basic text, would be difficult to remove.

17. The Delegation of the European Community considered that document CAJ/38/3 was interesting, and that the statement by the Delegation of France had clarified the situation, which had been very clearly summarized by the Delegation of the Netherlands. It was able to accept that the second option—both that of document CAJ/38/3 and that in the statement by the Delegation of France—was the best one, even though one might wonder, in conceptual terms, about the possibility of confirming a phenotypic difference with a "global tool" of hereditary substance testing. In the case of essentially-derived varieties (paragraph 29 of document CAJ/38/3), it considered that it should be possible to make use in that field of tools that were not used for ascertaining distinctness.

18. The Representative of CIOPORA considered that the difficulties with the interpretation of the 1991 Act were due to the obscurity of the text and to the use of inadequate terminology: it would be better to speak of dependent varieties. In Article 14(5)(b), differences were mentioned only to determine the border line with varieties that were not clearly distinct. At a more general level, the 1991 Act obliged the owner of a right to prove derivation in an infringement action relating to an essentially-derived variety, whereas in other areas of intellectual property it was sufficient to prove resemblance.

19. The Delegation of the Netherlands pointed out that the Working Group had not considered the question of essentially-derived varieties in detail, and that one should concentrate on defining the concepts of variety and distinctness. It considered moreover that a decision not to use molecular tools to determine distinctness should not prevent their use to establish conformity between an initial variety and an essentially-derived variety.

20. The Chairman recalled that the question to be settled had to do with the procedure for the grant of breeders' rights, while questions of infringement were the business of the parties concerned and, where involved, the judiciary. He noted that the discussion had revealed

differences of opinion, but that the debate was in any event concerned with an evolving situation, which meant that no firm and final stance could be adopted. It seemed to him that the following conclusions could be drawn from the documentation and the discussions:

(a) One should not reject the use of molecular tools out of hand in the examination of distinctness.

(b) It was not possible, at the present stage at least, to allow information obtained using a molecular tool to serve alone as the basis for a conclusion on the clear distinctness of two varieties.

(c) The use of molecular tools could only be contemplated if there was a guarantee that the minimum distances between varieties would not be made smaller.

(d) The risk of "minisystems of protection" evolving from different examination practices, mentioned at the previous session of the Committee, could not be ruled out, but everything should be done to avoid them.

(e) To that end, it was particularly appropriate that the Working Group on Biochemical and Molecular Techniques, and DNA Profiling in Particular, should continue its work.

Variety Denominations

Use of Variety Denominations

21. Discussions were based on document CAJ/38/4.

22. The Committee agreed that the suggestions made in paragraphs 9 and 10 of document CAJ/38/4 were hardly practicable.

23. The Delegation of France made the point that the confusion that certain business operators could maintain between the variety denomination and other designations used in trade carried its own built-in sanction, as trademark law had at all times to contend with trademarks that became generic. Also, more emphasis should be given to the variety denomination in the general framework of the protection system, as in German or Community law for instance, which entitled the breeder to bring an action against any person who failed to use the variety denomination in trade.

24. The representative of CIOPORA said that his Organization was aware of the problem presented by certain practices that had more to do with ignorance than with deliberate policy. CIOPORA would be launching a campaign the following year on the correct use of marks (and therefore of variety denominations).

Uniqueness of the Variety Denomination

25. Discussions were based on document CAJ/38/6.

26. The Committee was aware of the fact that the example of the problem described by the Delegation of New Zealand was not the only one. Quite apart from the mistakes that could occur, particularly where applications for protection were filed by different people in different member States, it seemed that certain breeders actually sought to cause confusion. The Chairman considered that one should perhaps observe greater strictness in the examination of applications for protection, with the applicant risking rejection of his application in the event of incorrect information being inadvertently or deliberately given.

The Concept of Tree and Vine in the Provisions on Novelty and Duration of Protection

27. Discussions were based on document CAJ/38/5.

28. The Committee agreed that it would be more appropriate to consider the question—given its acknowledged complexity—within a Working Group.

29. This report has been adopted by correspondence.

[Annex follows]

ANNEXE/ANNEX/ANLAGE/ANEXO

LISTE DES PARTICIPANTS/LIST OF PARTICIPANTS/ TEILNEHMERLISTE/LISTA DE PARTICIPANTES

(dans l'ordre alphabétique des noms français des États/
in the alphabetical order of the names in French of the States/
in alphabetischer Reihenfolge der französischen Namen der Staaten/
por orden alfabético de los nombres en francés de los Estados)

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Max-Heinrich THIELE-WITTIG, Senior Counsellor
Nuria URQUÍA (Ms.), Senior Program Officer

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