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INTERNATIONAL UNION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS
GENEVA

ADMINISTRATIVE AND LEGAL COMMITTEE

Thirty-Ninth Session
Geneva, March 25, 1999

REPORT

adopted by the Committee

Opening of the Session

1. The Administrative and Legal Committee (hereinafter referred to as “the Committee”) held its thirty-ninth session in Geneva on March 25, 1999, under the chairmanship of Mr. John Carvill (Ireland).
2. The list of participants is given in Annex I to this report.
3. The session was opened by the Chairman, who welcomed the participants. He extended a special welcome to the Delegation of China, which had deposited its instrument of accession to the 1978 Act two days earlier, and to the Delegation of the Russian Federation, a member State that was participating for the first time in a session of the Committee.

Adoption of the Agenda

4. The Committee adopted the agenda as given in document CAJ/39/1.

The Notion of Breeder

General discussion

5. Discussions were based on document CAJ/39/2.
6. The Chairman and the Vice Secretary-General emphasized that the notion of breeder – as a person having a right to a title of protection for a variety – had acquired special importance for a number of reasons:
 - (a) For a long time, the plant variety protection system had concerned, basically, species that had been subject to intensive breeding work. Today, however, the system also increasingly concerned species on which little work had been done either by reason of its extension, through a growing number of States, to all genera and species or by reason of the geographical situation of new UPOV member States.
 - (b) The Convention on Biological Diversity, the revision of the International Undertaking on Plant Genetic Resources, the use of material transfer agreements by certain gene banks and the international agricultural research centers had raised questions as to the borderline between what was protectable and what was not.
 - (c) The UPOV Convention permitted the protection of “discoveries”. Article 6(1)(a) of the 1978 Act referred to “the origin, artificial or natural, of the initial variation” which had resulted in the variety for which protection was sought. Article 1(iv) of the 1991 Act defined a breeder as “the person who bred, or discovered and developed, a variety”. It might be noted that, when the Convention was revised, there had been no wish to modify the fundamental rules of the system of protection in that respect.
7. The Office of the Union presented a short report on the relevant discussions in the thirty-fifth session of the Technical Committee.
8. The Committee then gave all representatives of the member States an occasion to speak of their own experience. Several delegations emphasized that the applicant was required to state in his application the genetic origin of his variety (how he had selected or modified the initial material and had obtained his variety). The information thus obtained was basically used for the technical examination of the variety, in order to facilitate it, and normally had no effect on the decision to grant a title of protection. From a legal point of view, the applicant was considered to be the breeder unless proven otherwise; it was up to any person who wished to oppose the grant of a title of protection to make use of the remedies provided by law (objection or opposition procedure, recourse to civil proceedings and, where appropriate, request for annulment of a granted title).
9. The following specific comments were made during the discussion:
 - (a) South Africa.– The question was becoming critical since South Africa was a supplier of new plant materials, particularly with regard to ornamental plants. From the point of view of the technical examination of distinctness, it was held that the description of the species and its variability in the literature did not make a variety one of common knowledge; the question was rather more complicated in the case of plants placed on the market without discrimination. The authorities had been very flexible with regard to varieties obtained by selection within the existing variability. For one thing, it was not easy to create a variety in

that way; for another, the grant of a title of protection to one person led to a benefit for many others and for society in general by reason of the variety denomination, the marketing channels, etc.

(b) Australia.— The Australian Office had received applications that reached the borders of the system of protection and was faced with criticism that was either unfounded or poorly justified. There were two aspects to the basic question: it was a matter, on the one hand, of establishing a reasonable and coherent policy in order to define what was protectable and, on the other hand, to define a policy common to the UPOV member States. From a strategical point of view, there were three options: one could compare the variety to be protected with the initial material (where that was possible), leave the resolving of problems to the courts, or take up an intermediary stance. From the legal point of view, the conditions of distinctness, uniformity and stability defined the product. As far as the definition of the breeder was concerned, it had to be observed that the human intervention consisted always in the placing of a product on the market; the breeder did not in fact create new characteristics, but recombined them at most. In Australia, a lot of work was done on species for which plant breeding had been very limited and for which a large quantity of superior material was selected from within the existing variability. To ask whether that activity led to a protectable variety— and to suggest a negative reply — was tantamount to requiring the breeder to create a new variability which was altogether useless since it already existed. From a practical point of view, at the present time, the Australian Office asked breeders not only to state how they had obtained the initial material and how they had modified it, but also to make a declaration. The new variety had normally to be compared with the initial material; considerable problems arose, however, due to the fact that the initial material may have disappeared, may have evolved, and so on.

(c) Austria.— There were no problems from the point of view of protection since the varieties to be protected were based on well-identified starting material. However, there was a debate on the marketing of material derived from genetic resources.

(d) Chile.— Many varieties in Chile were based on introductions and there was no experience of varieties based on landraces.

(e) Spain.— Spain had been faced with problems arising from the fact that some international agricultural research centers had distributed, without conditions, segregating material and that some entities had been able to independently produce the same variety from that material.

(f) Norway.— The authorities had held that a variety of tree with downward habit of which the original specimen had been found in the wild was protectable; there had been intellectual effort in the fact of recognizing, choosing and reproducing that specimen. However, the application had been withdrawn and no title of protection had been granted.

(g) New Zealand.— The New Zealand Office regularly received applications for varieties deriving from selection from among the (domestic or foreign) plants found in the wild. So far, such applications had been processed without problem. The breeder was required to state the work he had carried out. It was not relevant to judge the magnitude of the efforts made in developing the variety.

(h) Netherlands.— There had been no difficulties in the Netherlands so far. From a practical point of view, there might be difficulties with applications concerning plants that

originated, directly or indirectly, in the wild and for which agro-botanical knowledge was limited. Two questions might be raised: had there been breeding? Had the variety been obtained on a local market and, in that case, should material offered for sale under the species name be held to correspond to a common-knowledge variety if it was distinct and was known to the local people?

(i) Uruguay.— Account had to be taken of past evolution, which was also observable in Uruguay: farmers began by identifying the best elements within the material they cultivated, they produced varieties and finally began submitting applications for protection. A restrictive view of the notion of breeder could discourage such activities or deprive such breeders of the advantages of protection.

10. The Delegation of the European Community remarked that the issue of notion of breeder and the limits of the right to protection had been raised by circles that did not understand, or did not wish to understand, the functioning and rationale of the system of protection. It would be necessary to provide more explanations of the system. As far as the management of the system was concerned, two questions had to be answered: Who was entitled to protection? What subject matter could be protected? The owner of the right to protection was the breeder, i.e. the person who had created or had discovered and developed the variety concerned; the threshold was very low since simple selection would suffice. Moreover, a discovery could be made just as well on the breeder's premises as in the wild. In order to be protected, a variety had, in particular, to be distinct; in that respect, all the necessary information was not always available and there was perhaps a need to be more stringent and more demanding.

11. The representative of ASSINSEL felt that it was difficult to give a technical response to political agitation. Moreover, if a person felt that a title of protection had been unduly granted, particularly if existing interests were prejudiced, he could institute annulment proceedings. Finally, certain international agricultural research centers had adopted a policy of distribution of material that was likely to raise practical problems; it was for the representatives of the member States participating in their administrative councils to insist that those policies be reviewed.

12. The representative of CIOPORA pointed out that the members of CIOPORA considered that discovery could not be considered as breeding; they welcomed the addition of the words "and developed" after "discovered." They wondered whether the taking of a plant in the wild should be considered as breeding work. Finally, it was perhaps necessary to reconsider the notion of known variety.

13. Numerous Delegations welcomed the reply given by the Vice Secretary-General to the Director General of IPGRI, which was reproduced in Annex II to document CAJ/39/2.

14. The Chairman concluded the discussion by noting that the general view was that the Convention provided satisfactory rules and that the questions to which replies had perhaps to be found were located at the borders of the system. He then suggested that the cases set out in document CAJ/39/2 should be briefly discussed.

The various scenarios for the production of a variety

15. It was the general opinion that any problems should be settled on a case-by-case basis, the fundamental problem being that the critics of the system did not understand, or did not wish to understand, the underlying principles of the system. It was therefore proposed that the Office of the Union should draw up an explanatory document to be examined at the next session of the Committee.

Variety creation in successive steps

16. The Committee dealt more particularly with the question raised in paragraph 12(b).

17. Several Delegations felt that it was a contractual matter, that is to say one of private law relationships falling within general civil law.

18. The Delegation of France pointed out that several years previous the Committee had examined the matter of varieties derived from material distributed in particular by CIMMYT and had concluded that, when examining distinctness, account had to be taken of “quasi-varieties” in which CIMMYT had waived all rights without specifying the intellectual property right that would result from the final breeding work. The Delegation wondered whether the Committee should not return to that issue.

19. The representative of ASSINSEL observed that material transfer agreements setting out the relations between the various players were increasingly used. On a more general level, he considered that there was no reason to deny to the breeder who carried out the final breeding work the right to protection if the preceding players had renounced that right.

The Notion of Trees and Vines for the Purposes of the Provisions on Novelty and the Duration of Protection

20. Discussions were based on document CAJ/39/3.

21. The Committee agreed that the problem arose more particularly for novelty since that involved the right to protection itself. It was also generally admitted that the special treatment of trees and vines had been unfortunately maintained in 1991 and it would be advisable to remove it at a future diplomatic conference.

22. Discussion then centred on two special aspects of the problem:

(a) From a legal point of view, it was observed that the Council had taken a decision on the impossibility of acceding to the 1978 Act subsequent to the entry into force of the 1991 Act and that there was perhaps a means of resolving the problem without a diplomatic conference. It was pointed out, however, that, in the event of a dispute, the matter was in the hands of the courts that might refer to the actual wording of the Convention and therefore reject any solution that departed from it. The Vice Secretary-General noted that WIPO was examining the possibility of developing international law more rapidly than through the medium of diplomatic conferences; he suggested that the Office of the Union should make a report on that subject at a forthcoming session of the Committee.

(b) From a practical point of view, it was agreed that the Office of the Union would draw up for the next session of the Committee a list of species containing information on their anatomy and their morphology.

Effects of a Priority Claim

23. The Committee took note of document CAJ/39/4.

The Global Information Network of WIPO

24. The Committee took note of document CA/39/5 and of the oral explanations given by Mr. Collin Buffam, a consultant with WIPO.

Program for the Fortieth session

25. The Committee noted that the program for the fortieth session would concern the notion of breeder (explanatory document), the notions of tree and vine and, depending on progress within WIPO, the practice in the amendment of treaties.

26. This report has been adopted by correspondence.

[Annex follows]