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UPOV

CAJ/IX/10

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INTERNATIONAL UNION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS

GENEVA

ADMINISTRATIVE AND LEGAL COMMITTEE

**Ninth Session
Geneva, April 26 and 27, 1982**

DRAFT REPORT

prepared by the Office of the UnionOpening of the Session

1. The Administrative and Legal Committee (hereinafter referred to as "the Committee") held its ninth session on April 26 and 27, 1982. The list of participants appears in Annex I to this document.
2. The session was opened by Mr. P.W. Murphy (United Kingdom), Chairman of the Committee, who welcomed the participants.

Adoption of the Agenda

3. The Committee adopted the agenda as appearing in document CAJ/IX/1.

Adoption of the Report on the Eighth Session of the Committee

4. The Committee unanimously adopted the report on its eighth session as appearing in document CAJ/VIII/11, after noting, as a result of a remark by the Delegation of Denmark, that paragraph 22 of that document set out the results of a first discussion on the principles governing the choice of variety denominations.

Access for Breeders to Tests

5. Discussions were based on document CAJ/IX/2.
6. The Committee noted the points of view expressed by the international professional organizations. It ascertained that those points of view were divergent and that, further, the member States had adopted widely differing practices. Consequently, the Committee confirmed its provisional conclusion reached at its seventh session, i.e. that the UPOV Model Agreement on International Cooperation in the Testing of Varieties enabled member States carrying out trials both to adopt the policy of their choice as regards the varieties examined on their own behalf and to provide all necessary guarantees as regards the varieties they examined for other member States. The Committee further invited member States to take into account the points of view of the professional organizations, when the occasion arose, within the limits imposed by domestic law, of course.

Recommendations Concerning Article 13 of the Convention

7. Discussions were based on documents CAJ/IX/3 and 3 Add.

8. Following detailed discussion on both the substance and form of the draft Recommendations drawn up by the Office of the Union, whose main results and arguments are reproduced below, the Committee decided as follows:

(i) The draft, as amended in accordance with the decisions taken during the session, was to be reexamined at the next session.

(ii) The recommendations were to be discussed in 1983 (autumn) with the international professional organisations when their representatives were heard (a hearing for which the topic "Minimum Distances Between Varieties" had been suggested at the fifteenth ordinary session of the Council, see paragraph 10(vii) of document C/XV/16). The appropriate consent of the Council would have to be requested at its next ordinary session.

9. Preamble.- The Preamble was to be transformed into an introduction drafted in ordinary language and not in legal language. The third to sixth paragraphs were to be deleted as were the part of the ninth paragraph relating to a dialogue between the authorities and the applicants and the tenth paragraph. On the other hand, reference was to be made to experience acquired by the member States in variety denominations. Finally, the sequence of the indents was to be amended in the eleventh paragraph, the first being placed at the end and transformed into a recommendation inviting the member States to give ample information to the breeders on the recommendations so that they could be taken into account when denominations were chosen.

10. Rules.- They were to bear the title "Recommendation" ("Anleitung" being maintained in German).

11. Rule 1.- The recommendation was to be introduced by a paragraph setting out the principle that a denomination must be capable of serving as a generic designation. The verb in the first sentence of paragraph (2) was to be replaced by "may also be applicable." In subparagraph (3)(ii), the exception was to be deleted and reference was also to be made to trade in vegetative propagating material. "Basic" and "Heterosis" were to be mentioned as further examples. In respect of subparagraph (3)(iii), it was asked whether "DM 10," given as an example, was to be considered unsuitable in all countries or in the Federal Republic of Germany alone. That question did not, however, affect the validity of the rule or of the example. In respect of subparagraph (3)(iv), it was asked whether designations such as "CH 500" were acceptable. Subparagraph (3)(v) was to be deleted for the time being, it being agreed that the matter of geographical denominations would be reexamined if one or other of the delegations were to have problems with the deletion. In that context, and in the context of Rule 8(3), the Committee examined a number of types of problems, which may be analysed as follows:

(i) Reasons for unsuitability: may not serve as the generic designation of a variety (the case of an appellation of origin, for example), may be misleading or may create confusion.

(ii) Material object of the error or the confusion: the variety itself, the propagating material, the final product.

(iii) Property of the object in respect of which there was error or confusion: origin of the object (or of the variation that generated the variety), quality of the object.

12. Rule 2.- The wording of paragraph (2) was to be amended to make the introductory sentence compatible with the subparagraphs. Subparagraph (2)(i) was to be maintained for the time being (but without the example "AIEOU") since views were divided on that matter: some considered it too restrictive whereas others felt that it opened the way to undesirable practices. In subparagraph (2)(ii), the example "10,000 Dollars" was to be replaced by an example in which the number followed the word. In subparagraph (2)(iv), the example "Diplomengartenbauinspektor" was to be deleted since it was given in the International Code of Nomenclature for Cultivated Plants as to be avoided. In connection with that paragraph, attention was drawn to the fact that it

would be easy to get around the principles in Rule 2 (for example, a denomination comprising four syllables chosen at random could be divided into two words or even made more complicated by the addition of a third word) and that certain former practices could well be revived. In subparagraph (2)(v), the word "international" was to be deleted. Subparagraph (2)(vi) was to be deleted since the principle stated in it was to be transferred to Rule 7, under which it would become an exception.

13. Rule 3.- It was explained that Rule 3 did not prohibit denominations having a special spelling required by their meaning (for example, compound words or words of Scottish origin beginning with "Mc").

14. Rule 4.- The words "of other varieties" were to be inserted following "propagating material."

15. Rule 5.- Paragraph (1) was to be amended as follows to allow for the fact that certain member States no longer checked proposed denominations against signs such as trademarks: "...are not suitable as generic denominations and, consequently, not as variety denominations."

16. Rule 6.- In paragraph (1), reference was also to be made to the origin. The example "Big Head" or "Grosse-tête" was to be deleted in favor of "Protein" and an example based on a color characteristic, such as "Glacier" for an ornamental plant with red flowers. In subparagraph (2)(ii), the example "Silomaize" was to be deleted in favor of "Double Low" for a variety of rape. A new subparagraph was to be inserted after subparagraph (2)(ii) to cover the case of comparative and superlative denominations together with an example taken from the International Code of Nomenclature for Cultivated Plants. Finally, Rule 8(3) was to be transferred to Rule 6, the examples "True North" and "Beauty of Rembrandt's Garden" being deleted and a number of examples taken from Rule 1(3)(v).

17. Rule 7.- The principle set out in Rule 2(2)(vi) was to be incorporated in Rule 7 as an exception.

18. Rule 8.- It was explained that subparagraph 8(1) applied also to a trademark used in the past for a variety. In paragraph (2), whose wording in the three languages required harmonising, the reference to the conservation in a gene bank was to be deleted and the reference to "Brown Marga" was to be corrected to read "Marga" at the end of the example paragraph. Paragraph (4) was to be deleted.

19. Rule 9.- "UPOV" was to be added as an example.

20. Rule 10.- That rule was to be amended to avoid repeating a provision from the Convention, for example as follows: "will be considered closely related for the purposes of the fourth sentence of Article 13(2) of the Convention..." It was explained during discussions that when applying that sentence in practice, the services of the member States would also take into account, as was already done at present, denominations designating a variety of the same botanical species or of a closely related species in a non-member State, particularly a State with which close economic links existed, wherever such denominations were known to them.

21. Rule 11.- That rule was to be deleted.

22. Rule 12.- The first sentence of paragraph (1) was to be deleted. The indents in paragraph (2) were likewise to be deleted.

23. Rule 14.- In paragraph (1), the adverbial complement of time was to be deleted in the first sentence. In paragraph (2), the three-month period was to be maintained but reference added to the fact that the statutory period for filing comments on a proposed denomination might be less in some member States and, after that period, some comments might no longer be able to be taken into account.

Cooperation with the International Registration Authorities

24. Discussions were based on paragraph 8 of Annex II to document CAJ/IX/3 and on a further letter received from Dr. A.C. Leslie, of which an extract is reproduced in Annex II to this document.

25. The Committee felt that the offer made to check the proposed denominations against the lists kept by the International Registration Authorities was very generous and that gratitude was to be expressed to those Authorities. However, in view of the implications, particularly the financial implications, of cooperation with those Authorities, it decided to request the Office of the Union to ask for a list of the Authorities and the species concerned. It would then examine, in the light of such information, the advisability of cooperation and the conditions under which it would take place.

Harmonization of Procedures for the Examination of Proposed Variety Denominations

26. Examination of the matter was postponed to the next session.

Families of Denominations for Families of Varieties

27. Discussions were based on document CAJ/IX/8.

28. The Committee replied as follows to the questions put in the Annex to the above-mentioned document:

(i) Families of denominations were permissible. They were even desirable under certain circumstances, particularly where the varieties involved had the same growing requirements since, in such cases, they were very useful for the producers.

(ii) A new denomination may derive from a prior denomination by replacement of an intermediate descriptive element by another. In that context, it was pointed out that the National Chrysanthemum Society in the United Kingdom considered compound descriptive elements such as Salmon Bronze not to be desirable.

(iii) The varieties had to have the same origin but not necessarily be produced by the same breeder.

(iv) In view of the above replies, question 4 was no longer relevant. It was nevertheless pointed out that where a new mutant appeared, the description of already existing varieties of the same family had sometimes to be supplemented to cover the differences between those varieties and the new mutant.

Periodical Publication of Fees

29. Discussions were based on document CAJ/IX/5.

30. The Committee approved the proposals made by the Office of the Union, particularly its offer to send advance copies of articles in the UPOV Gazette and Newsletter concerning schedules of fees and to draw up a recapitulatory table (see paragraph 5 of document CAJ/IX/5).

31. In that context, the Vice Secretary-General urgently requested the member States to communicate to the Office of the Union any amendment to national legislation to permit, in particular, publication of relevant information in the UPOV Gazette and Newsletter in good time. Such communication should take the form of a notification or a letter rather than the forwarding of the National Plant Variety Protection Gazette containing a notice of the amendment. In that respect, the Committee asked the Office of the Union to draw up for its next session a list of the information it needed in a routine way.

Statistics on the Number of Protected Varieties

32. Discussions were based on document CAJ/IX/6.

33. The Committee accepted the proposal made by the Vice Secretary-General that the Office of the Union should draw up for the Council, as a trial, statistics on the number of protected varieties, based on the lists published each year by the member States. If necessary, the matter would be reexamined at the session which the Committee was scheduled to hold in spring 1983.

Intentions of Member States Regarding Amendment of National Plant Variety Protection Law

34. Discussions were based on document CAJ/IX/7 and on its two corrigendums.

35. The following explanations were given on the information contained in the above-mentioned documents:

(i) Denmark.- During the drafting of the Ordinance of March 26, 1982, concerning the possibility of granting plant breeders' rights to foreign breeders, etc. (see document CAJ/IX/7 Corr. 2), the Department of General Law of the Ministry of Justice concluded that Article 7 of the Treaty of Rome was not applicable. Consequently, national treatment was established solely in respect of nationals of UPOV member States and excluded, in particular, nationals of States that were members of the European Communities but not of UPOV. The representative of the Commission of the European Communities pointed out that the Commission had always held that each member State of the European Communities should grant national treatment to nationals of the other Community member States, and stated that the Commission would therefore have to draw conclusions from the new situation created by Denmark.

(ii) United States of America.- Concerning the Plant Variety Protection Act, the users of the system established by that Act had recommended to the Department of Agriculture that it introduce the following arrangements:

- (a) National treatment for nationals of UPOV member States;
- (b) National treatment for nationals of non-member States whose plant variety protection legislation met certain minimum requirements;
- (c) reciprocity on a species-by-species basis for nationals of non-member States whose legislation did not meet the said requirements.

As regards the Patent Act, it was intended to set up a system of fees for the maintenance of granted patents comprising three due dates, and not a system of annual fees.

(iii) France.- The extension from 20 to 25 years of the term of protection of inbred lines of maize, stated as an intention in paragraph 75 of document CAJ/IX/7, had been introduced by Decree No. 82-247 of March 12, 1982, amending Decree No. 71-765 of September 9, 1971, fixing the list of plant species for which new plant variety certificates may be issued, as well as the scope and duration of the breeder's right in the case of each plant species.

(iv) Sweden.- Contrary to the statement in paragraph 8 of document CAJ/IX/7, it was now proposed to keep the possibility of granting protection, if such appeared to be in the general interest, in addition to national treatment for nationals of other UPOV member States.

36. As regards the continuation of its activities in respect of the intentions of member States regarding amendment of national plant variety protection law, the Committee decided to close the series of documents concerning those intentions and, instead, to enter on the agenda for each future session an item under which States would report any new element.

Any Other Business

37. Questionnaire from the University of Manitoba.- Discussions were based on Circular No. U 693-08, reproduced in Annex III to this document.

38. It was pointed out that some member States had been consulted directly by the University of Manitoba. The Vice Secretary-General urgently requested the States that had not yet done so and which, in view of their experience, were able to do so, to communicate as rapidly as possible to the Office of the Union the information needed to reply to the questionnaire.

Program for the Tenth Session of the Committee

39. Subject to new items arising, the agenda for the tenth session was to include the following items:

(i) Intentions of member States regarding amendment of national plant variety protection law.

(ii) List of routine information required by the Office of the Union.

(iii) Variety denominations:

(a) Recommendations concerning Article 13 of the Convention.

(b) Harmonization of procedures for the examination of proposed variety denominations.

(c) Cooperation with International Registration Authorities.

[Annexes follow]

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- Dr. G. ASCHENBRENNER, Senior Legal Affairs Officer, European Free Trade
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IV. OFFICER/BUREAU/VORSITZ

Mr. P.W. MURPHY, Chairman

V. OFFICE OF UPOV/BUREAU DE L'UPOV/BÜRO DER UPOV

Dr. H. MAST, Vice Secretary-General
Dr. M.-H. THIELE-WITTIG, Senior Technical Officer
Mr. A. WHEELER, Legal Officer
Mr. A. HEITZ, Administrative and Technical Officer

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

EXTRACT OF A LETTER, DATED APRIL 5, 1982,
FROM Dr. A.C. LESLIE, REGISTRATION OFFICER,
THE ROYAL HORTICULTURAL SOCIETY'S GARDEN, WISLEY,
WOKING, SURREY (UNITED KINGDOM),
TO THE VICE SECRETARY-GENERAL

Perhaps I could take the opportunity now to voice some particular concerns of the RHS as International Registration Authority for cultivar and grex names in eight major horticultural groups (Conifers, Dahlias, Dianthus, Delphinium, Narcissus, Orchids, Lilies and Rhododendrons). These concern the operation of the Plant Variety Rights Schemes by many member States in two respects, one of procedure and one of regulations used in deciding the acceptability of a new name.

1. It greatly concerns us as an International Plant Registration Authority that the organizations concerned with plant variety rights (PVR) in UPOV member States are not consulting our Registers, where these are available, in assessing the acceptability of names submitted to them for PVR. An IRA maintains a complete list of all cultivar names in use and obviously the only fully up to date copy of each is in the hands of the IRA. There is no charge for enquiring after the acceptability of a name. In recent years there have been examples of names accepted for PVR which duplicate those already on the relevant Register; clearly this must lead to confusion in both amateur and professional circles and could so easily be avoided. I should add that the PVR organization in this country does consult us and the operation is found to be mutually advantageous. Could your other member States be advised of the existence of IRA's and be asked to use them? Fifty-nine groups of plants are involved in registration schemes and a full list can be provided on request.

2. It also concerns us that the use of code names has become widespread in applying for PVR. By code names I mean the use of names formed using an abbreviation derived from a grower's name tacked on to some other letters e.g. Stajoli, Stapora etc. from van Staaveren in Holland (for some carnations).

I am not aware that such code names are required for PVR and many of these names are meaningless or unpronounceable. Further they are usually replaced by another cultivar name when the time comes to sell the plant. It is only the latter name that we would register and why cannot these be used in applications to PVR schemes? Since some growers seem to manage without using code names at all, could the use of code names be rejected by UPOV--unless they (a) make sense, (b) are pronounceable and (c) are the ONLY name under which the plant is sold? To have more than one, unique, name for any plant is surely nonsensical! (This does not mean of course that some trademark can not be added to the name).

There is a further matter which may or may not be something which UPOV can have any control over, but which I am sure should concern you. It is increasingly obvious that many growers (the Dutch in particular) are buying in named stock and selling it under total superfluous new names, without any reference to the earlier (often registered) name. Surely this is a practice that could be entirely repudiated?

[Annex III follows]

CIRCULAR No. U 693-08, DATED APRIL 7, 1982,
CONCERNING THE QUESTIONNAIRE FROM THE UNIVERSITY OF
MANITOBA (CANADA)

Dr. Loyns and Mr. Begleiter of the Department of Agriculture, Economics and Farm Management of the University of Manitoba in Winnipeg, Manitoba (Canada R3T 2N2), have informed us in a letter dated March 16, 1982, that the Department is currently engaged in a study to determine the potential economic impact of proposed plant breeders' rights legislation in Canada, and that it would therefore be very interested to know if any evaluation has been made of the economic effects of plant breeders' rights in UPOV member countries. The Department has transmitted the annexed questionnaire and has asked UPOV to provide it with the best available answers to the individual questions on a country-by-country basis. The Department is also interested in views on other aspects of plant breeders' rights which UPOV consider to be important.

The questions contained in the questionnaire refer to the situation in the member States of UPOV and a full answer can only be given by the Office on the basis of information received from member States. It is proposed to discuss this questionnaire under the item "Any other business" at the next session of the Consultative Committee (April 28 and 29, 1982). In view of the fact that the plant breeders' rights legislation in Canada is pending and the matter is therefore urgent, it would be appreciated if any statistical or other material enabling the Office to answer the questionnaire could be sent to the Office before the above-mentioned session or turned over to it during that session.

The Office of the Union has sent to the said Department copies of the UPOV General Information Brochure, the records of the 1980 Symposium and, with the permission of the Secretary-General of ASSINSEL, copies of the ASSINSEL brochure "Feeding the 5,000 Million."

A copy of this letter has been sent to the Canadian Department of Agriculture.

Distribution: Members of the Consultative Committee

Annex to Circular No. U 693/08

QUESTIONNAIRE FROM THE UNIVERSITY OF MANITOBA

1. Has PBR led to a change in the level of investment in plant breeding by either the private or public sector which would not otherwise have taken place?
2. Has there been a shift in the emphasis of plant breeding effort in the public sector away from varietal development to more "basic" research?
3. Has the exchange of germ plasm between plant breeders at the national or international level been affected by PBR?
4. (a) Has there been a marked change in the number of new varieties of grains and oilseeds which have been introduced annually for commercialization since PBR was introduced?

(b) Has there been a change in the quality of new varieties which have been introduced?
5. Has the collection of royalties on protected varieties posed any major problems?
6. Has there been a discernible change in the structure of the seed industries in UPOV member countries since UPOV was established? In particular, has there been a marked change in the participation of multinational enterprises in the seed industries?
7. Has there been a change in licencing requirements, or equivalent, for new varieties since PBR was introduced?
8. Has there been a change in net royalty flows into or out of UPOV member countries since PBR came into effect?
9. Do you feel that the overall effects of PBR have been positive for UPOV members? What do you consider to be the most important negative effects, if any, which PBR has had on the seed industries of members of UPOV? What changes, if any, should be made to the present UPOV convention to improve the current situation?

[End of document]