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UPOV

CAJ/VI/10

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## INTERNATIONAL UNION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS

GENEVA

## ADMINISTRATIVE AND LEGAL COMMITTEE

## Sixth Session

Geneva, November 13 and 14, 1980

DRAFT REPORT

prepared by the Office of the UnionOpening of the Session

1. The sixth session of the Administrative and Legal Committee was held in Geneva on November 13 and 14, 1980. All member States were represented. The following States were represented by observers: Ireland, Japan and the United States of America. The Commission of the European Communities was represented by an observer. The list of participants is annexed 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/VI/1, subject to the inclusion of an item "Any other business".

Adoption of the Report of the Fifth Session of the Committee

4. The Committee unanimously adopted the report on its fifth session as appearing in document CAJ/V/7.

Variety Denominations

5. Use of Prefixes in Variety Denominations. The discussion was based on document CAJ/V/6 and Annex IV to document CAJ/IV/8.
6. The Committee noted that the use of prefixes in variety denominations was established practice for certain species and that the practice was not without justification in commercial terms. The Committee further noted that Article 2 of the Guidelines for Variety Denominations provided that "the denomination must make it possible to identify the new variety without risk of confusing a purchaser of average attentiveness", and asked the member States to see to it that the variety denominations approved by them were sufficiently different from each other to avoid any possibility of confusion.

7. Use by a Member State of the Announcement of a Proposed Variety Denomination Made by Another Member State. The discussion was based on document CAJ/V/6.

8. The Committee noted that, according to Article 13(5) of the Convention, a variety had to be submitted in member States of the Union under the same denomination and that the competent authority of a member State was obliged to register the denomination proposed unless it considered that denomination unsuitable in the State in question. It was for each member State to take the measures which it considered necessary to check the suitability of a variety denomination and thus to decide whether it was indispensable to publish a proposed variety denomination, and consequently whether, in the cases mentioned in Annex I to document CAJ/V/6, such publication could be waived.

9. In that context, the Committee noted that it might be necessary to examine whether, in the long term, a central register for variety denominations should be established. The Delegation of the Federal Republic of Germany informed the Committee that the competent authority of its country had at its disposal a data bank on variety denominations comprising information from all member States. In checking a denomination proposed in another member State, that authority was in a position to submit to that State, should the occasion arise, an objection or an observation based on the existence of an identical or similar denomination in a third State to which the latter might have failed to draw attention. Since that procedure was costly the Delegation of the Federal Republic of Germany wished to know whether the other member States thought it useful or desirable for it to continue to transmit such objections or observations. It was confirmed that such action was useful and desired. The Delegation of France said that once there was a computer program with which one could sort variety denominations on the basis of tests for similarity that were adapted to the French language, then it would be useful to that Delegation to have a data bank on variety denominations at its disposal.

10. Review of the Guidelines for Variety Denominations with a View to Determine what Future Activities Should be Undertaken in this Area. The discussion was based on document CAJ/VI/2.

11. As far as the Guidelines were concerned, the Committee decided that States should transmit any proposals for amendments to the Office of the Union by January 31, 1981. The question of the Guidelines for Variety Denominations would then, if necessary, be put on the agenda for a future session of the Committee.

12. As far as the list of classes for variety denominations was concerned (Appendix to the Guidelines for Variety Denominations), the Committee noted that it needed to be updated in view of the extension of protection to genera not mentioned in it, each of which in principle formed a class although that was not always justified. For that purpose, the Office of the Union was asked to establish a draft revised list for submission to the next session of the Committee.

13. Relations Between Variety Denominations and Trademarks. The discussion was based on document CAJ/VI/3.

14. The Committee noted that document CAJ/VI/3 was in essence an information document and that it did not contain suggestions for the procedure to be followed when revising national legislation. The Committee invited the member States to transmit to the Office of the Union within a reasonable time their observations, if any, on the document.

15. The Committee went on to discuss briefly the case where a breeder had his variety protected in member State A and, instead of doing the same in member State B, had the variety denomination registered as a trademark there and prohibited the marketing of his variety there on the basis of his right deriving from the trademark. The following statements were made in that respect:

(i) The trademark law of State B allowed, either by itself or in conjunction with the legislation on the protection of new varieties of plants, for the prohibition of the registration of the trademark in that State or, if the trademark was already registered at the time of the approval of the variety denomination, for the cancellation of the registration or for the reduction of the list of goods and services covered by the trademark. In that

respect mention was made, by way of example, of the decision of the Registrar of Trade Marks of the United Kingdom concerning the designation "Ogen" which had been used in the United Kingdom as a trademark for melons (a species not protected in that State) whilst registered as a variety denomination in Israel and used as such in several countries.

(ii) As a general rule, the plant variety protection legislation of State A contained rules to the effect that the variety denomination could not be registered or used as a trademark in some other countries. State B might be one of those countries (see document CAJ/VI/3, Chapter I, Part C and Table 1). However, those rules often had little or even no effect where State B had not included in its legislation the provisions necessary for enforcement.

(iii) In that respect, the Federal Republic of Germany and Switzerland were exceptions since their legislation provided that, if a designation was registered as a variety denomination abroad, the rights deriving from the trademark could no longer be asserted on their territory; that provision applied in the case where the variety belonged to a genus or species which they also protected.

16. The Delegation of the Federal Republic of Germany informed the Committee that it intended, in the course of the revision of its law, to simplify the rules concerning the relations between variety denominations and trademarks of an applicant for protection. It would simply prohibit the assertion in the Federal Republic of Germany of trademark rights as from the date of registration of the denomination in that country, or as from the date of registration in another country if the variety belonged to a genus or species protected in the Federal Republic of Germany. It thus intended to delete the rules mentioned in paragraph 15(ii) above.

#### Development of the Union

17. Questions Relating to Plant Variety Protection Law. The discussion was based on documents CAJ/VI/4, CAJ/V/2 and CAJ/VI/5.

18. The Committee examined the list of questions relating to plant variety protection law which appeared in Annex II to document CAJ/VI/4 and took the following decisions:

(i) Item 3 (Rights Protected; Scope of Protection) should be amended to allow for a discussion on what was covered by the term "propagating material" and on the extension of protection to products other than propagating material. The discussion on the first question should also concern the effects of in vitro multiplication on plant variety protection. The discussion on the second question should include the points mentioned in items 3(i) to (iii) and should also cover the question whether the third sentence of Article 5(1) of the Convention satisfied its purpose. Finally, it was decided to delete the asterisk against item 3(iv).

(ii) An asterisk was added against item 5 (Conditions of validity of an application for protection and conditions for the grant of an application number and date).

(iii) The discussion on item 11 (Transitional Limitation of the Requirement of Novelty) should also concern the admissibility, in the light of the provisions of Article 38 of the 1978 Revised Text of the Convention, of the provision in the legislation of the United Kingdom according to which a variety could only be protected in the United Kingdom if it had not been marketed, in the United Kingdom or elsewhere, before the date on which the Scheme extending protection to the species to which the variety belonged had come into force (Schedule 2, Part II, Paragraph 2(1) of the Law).

19. The Office of the Union was asked to draft a questionnaire on the intentions of member States regarding the amendment of their legislation. The Committee would consider the replies received during its next session, if possible, and perhaps also at the subsequent session. The Delegation of the Netherlands proposed that for that purpose smaller groups should be formed which would report to the Committee on their conclusions.

20. Model Form for the Notification of the Receipt of the Plant Material Necessary For the Examination. The discussion was based on document CAJ/VI/6.

21. On the basis of a clarification given by the Delegation of the Netherlands, the Committee concluded that the model form in question was not needed and confirmed the adoption of the UPOV Model Form for the Interim Report on the Examination of a Variety, as reproduced in Annex II to document CAJ/VI/6.

22. Cooperation Going Beyond the Bounds of Variety Examination. The discussion was based on documents CAJ/IV/2, CAJ/IV/8, paragraphs 5 to 14, and CAJ/VI/4.

23. The Committee confirmed the view expressed by its Subgroup at its first session that work on the introduction of a system of cooperation going beyond the bounds of variety examination should be started quickly, as soon as the review of questions relating to plant variety protection law had progressed sufficiently (see paragraph 12 of document CAJ/VI/4). The Committee consequently decided that its next session and, depending on the state of progress of the work, the following sessions, should be devoted to the review of questions relating to plant variety protection law.

#### Annual Publication by Each Member State of a List of Protected Varieties

24. The discussion was based on document CAJ/VI/7.

25. The Committee recognized the usefulness of an annual list of protected varieties and recommended the publication of such a list by each member State on the date most convenient to it. It furthermore recommended that the list should contain, as a minimum, the following information: genus or species, variety denomination, name and address of the holder of the title of protection.

#### Explanatory Note on the Recommendation on Fees in Relation to Cooperation in Examination

26. The discussion was based on document CAJ/VI/8.

27. The Committee agreed that an explanatory note was not necessary and that the Recommendation on Fees in Relation to Cooperation in Examination should be applied in practice according to the following principles, which should be construed, if need be, in the light of document CAJ/VI/8, and which should be published in the UPOV Newsletter:

(i) Anticipation (see paragraphs 8 to 15 of document CAJ/VI/8): The basic application should be determined according to the chronological order of applications for protection (normally, the basic application was thus the first application filed), provided that a decision on the basic application which had already been taken and notified would not be changed as a result of a request, received after the date of the decision, for transmission of examination results. If need be, the basic application would have to be determined at the latest date for the submission of material.

(ii) Procedure in the case of withdrawal of an application for protection (see paragraphs 16 to 22 of document CAJ/VI/8): The general principle was that any test, concluded or begun, had to be remunerated. The consideration and the administrative fee, corresponding to 350 Swiss francs, were due for each final report received by the State which had requested its transmission.

(iii) Procedure in the case of rejection of an application for protection (see paragraphs 23 to 26 of document CAJ/VI/8): To simplify the system of cooperation rejections should be treated in the same manner as withdrawals.

(iv) Procedure in the case of withdrawal (or rejection) of an application for protection and filing of a new application: The solution mentioned in paragraph 27 of document CAJ/VI/8 was approved.

Participation of EFTA in the Work of the Committee

28. On a proposal by the Swedish Delegation, supported by the Spanish and the Swiss Delegations, and without opposition, the Committee decided to recommend that EFTA be invited to participate in future sessions of the Committee with observer status. The Committee took note in that context of the work which the Consultative Committee intended to undertake during its next session on the question of the admission of observers to the various meetings of UPOV.

Program for the Seventh Session of the Committee

29. Subject to any new questions arising, the agenda for the seventh session of the Committee should comprise the following items:

- (i) Questions relating to plant variety protection law;
- (ii) Guidelines for Variety Denominations (examination of any proposals for amendment and examination of a revised list of classes);
- (iii) "Statistical" documents submitted each year to the Council;
- (iv) The possibility for a testing authority acting for another member State to enter into direct contact with the applicant for protection, without prior reference to the competent authority of that other member State;
- (v) Free access for breeders to the tests being made by testing authorities acting for other States, whether the breeders have varieties under test or not.

[Annex follows]

CAJ/VI/10

ANNEX/ANNEXE/ANLAGE

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