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ADMINISTRATIVE AND LEGAL COMMITTEE

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QUESTIONS RELATING TO PLANT VARIETY PROTECTION LAW

Document prepared by the Office of the UnionIntroduction

1. At its sixth session, the Administrative and Legal Committee asked the Office of the Union to draft a questionnaire on the intentions of member States regarding the amendment of their plant variety protection legislation, and decided that it would consider the replies at its seventh session, if possible, and perhaps also at the subsequent session. It is recalled that the Delegation of the Netherlands has proposed that select groups be set up for the purpose and that they report to the Committee on their conclusions. (See paragraph 19 of document CAJ/VI/10).

2. The replies to the above questionnaire have been placed in order and are summarized below. Where appropriate they have been completed with other information available to the Office of the Union. Attention is drawn to the provisional nature of the information on the intentions of member States, which are more or less firm depending on the progress of the procedures for the amendment of national legislation.

I. National Treatment; Reciprocity (Article 3 of the Convention)

Question a: What plans are there for amendment of the provisions concerning national treatment and reciprocity?

3. The present situation is set forth in Chapter I of document CAJ/V/2.

4. The following States are not planning to make any amendment, and the systems currently in force are mentioned in brackets¹: South Africa (national treatment in relations with member States, and assimilation of certain other States to member States); Denmark (reciprocity, and access to protection if useful to the national economy); Spain (reciprocity); Israel (reciprocity, and access to protection if useful to the national economy); United Kingdom (no limitation); Sweden (reciprocity confined to member States, and access to protection if useful to the national economy); Switzerland (reciprocity). Italy will probably not amend its law because it uses the patent system for the protection of plant varieties and does not make any limitation on access to protection.

5. With regard to Denmark, recent draft regulations embody the present system (national treatment for the species appearing in the Annex to the 1961 text of the Convention, and reciprocity for other species). It has also been proposed that nationals of States that have ratified the 1978 Act be allowed to enjoy protection on the basis of reciprocity even before the Act enters into force.

6. The other States at present apply the reciprocity principle. The following systems are envisaged for the future:

(i) Federal Republic of Germany: national treatment for member States of the European Communities and reciprocity for other States;

(ii) Belgium: national treatment within UPOV;

(iii) France: reciprocity is the basic principle, but special agreements providing national treatment for certain member States of UPOV may be concluded. Other amendments will be made only in so far as they are made necessary by decisions, notably Community decisions, that are taken outside the national framework.

(iv) Netherlands: national treatment for member States, and perhaps also member States of the European Communities.

Question b: Are the planned amendments necessary in view of the amendment of the Convention (deletion of the list of species) or are they being made for other reasons (membership of an economic Union)?

7. The replies are as follows:

(i) Federal Republic of Germany: amendments are considered necessary owing to the removal of the Annex to the Convention containing the list of species. With regard to the alternatives still available, however, due account will be taken of the Federal Republic of Germany's membership of the European Communities;

(ii) Belgium: abandonment of reciprocity within UPOV is proposed as a result of the deletion of the list of species for mandatory protection, and as a result of Belgium's membership of the European Communities;

(iii) Netherlands: it could be argued that no amendment of the Law is required to comply with the obligations under the 1978 Act of the Convention, as Article 30(2) of the Law makes access to protection dependent on obligations under international agreements. However, in order to make it clear that the national treatment system will be applied, an amendment to the Article in question is being considered. This system will perhaps be applied also to breeders who are nationals of States members of the European Communities but not of UPOV, if it appears that the Netherlands are obliged to do so under the Treaty of Rome.

¹ Concerning the systems currently in force, it is understood that the member States apply the national treatment principle for the species appearing in the Annex to the 1961 text of the Convention.

II. Rights protected; Scope of Protection (Article 5 of the Convention)

Question a: What is covered by the term "propagating material" or the corresponding expressions used in national legislation?

8. Document CAJ/V/2, especially its paragraph 42, replies satisfactorily to the question for the Federal Republic of Germany, Belgium, Spain, France, the Netherlands, the United Kingdom (subject to the replacement of "are" by "include" in the expression "references to reproductive material are references" appearing in paragraph 42(iii)(c)), Sweden and Switzerland.

9. Denmark, Sweden and Switzerland gave the following additional information:

(i) In Denmark a new definition is being drafted for the purposes of the revision of the Law. "Growing material" would be defined as "living plants or parts of plants for further growing, such as seeds, seed potatoes, grafting material (buds and twigs) and bulbs, as well as vegetatively propagated plantlets and pot plants."

(ii) In Sweden, during the preparatory work on the Law the following definition was given: "From the circumstances it must be evident that the plant material is professionally offered for sale or supplied for the purpose of propagation."

(iii) In Switzerland, the competent authorities are of the opinion that, as far as reproductive material is concerned, the expression "propagating material" ("material de multiplication" or "Vermehrungsmaterial") is identical to "seed" ("semences" or "Saatgut") in the broadest sense (from the botanist's point of view and according to the German language). The general term "seed" includes both seeds and fruits, and there is no other botanical term that can be used. The experts agree moreover that the problem of plantlets grown from seed and intended for planting (Question e(i)) can be solved in Switzerland by broad interpretation of the word "seed": a plantlet is no more than another form of the seed, namely a germinated seed, and should therefore, on the basis of Article 12(2)(a) of the Law, be included within the purview of protection as reproductive propagating material. The competent authorities are well aware, of course, that the courts will have the last word. If it should turn out, in a dispute brought before the courts, that plantlets cannot be considered propagating material, an effort should be made to fill the gap by parliamentary means, for instance by completing Article 12(2)(a) of the Law as follows (addition underlined):

"["Propagating material for the production of plants" means:]

"(a) reproductive propagating material (seeds, fruits, plantlets before first transplanting, etc.)..."

With regard to vegetative propagating material, no problem has yet been discerned in relation to Article 12(2)(b) of the Law ("vegetative propagating material (plants or parts of plants such as cuttings, tubers, bulbs, etc.)"). Multiplication in vitro is thus covered by "parts of plants." The same applies to strawberry runners and any other part of a plant that may not be expressly mentioned and serves to produce plants of the variety.

10. South Africa revised its definition of "propagating material" in 1980. The definition now reads as follows: "Any reproductive or vegetative propagating material, as such, of a variety," and is interpreted as including all forms of propagating material.

11. In Israel, the rights protected and the extent of protection defined in Section 36 ("... the holder of a breeder's right may prevent any other person from utilising without his permission or unlawfully the variety in respect of which the right has been registered") refer solely to propagating material, as Section 1 of the Law defines the variety as "a group of plants capable of reproduction..." Thus the concepts of utilisation, cultivation, propagation and marketing likewise refer only to propagating material. In the opinion of the competent authorities, therefore, paragraph 42(i) of document CAJ/V/2 contains a misinterpretation of the Israeli Law. In the opinion of the Office of the Union, the same may well be true of some other paragraphs.

Question b: What activities in relation to propagating material fall within the scope of protection?

12. In the case of South Africa, the Federal Republic of Germany, Belgium, Denmark, Spain, France, Israel, the Netherlands, the United Kingdom and Sweden, document CAJ/V/2 describes the situation satisfactorily, if one takes account of the following remarks, some of which are also applicable to States other than those that made them.

(i) In Table 5, under "Acts to which breeders' rights relate," the absence of a cross does not necessarily mean that the State concerned does not cover the act in question, as the act may yet be covered by an interpretation of the key words used in its law (Federal Republic of Germany).

(ii) There is as yet no interpretation of the terms used in the Law, and no case law (Spain).

(iii) The terms "offering for sale" and "sale" have to be interpreted in the sense given during the preparatory work on the 1961 text of the Convention to the expressions "for the purposes of commercial marketing" and "offering for sale," which is mentioned on page 34 of document CAJ/V/2, in Note 3 (France).

(iv) The acts covered by the breeder's right in Israel (cultivation, propagation and marketing) have to be related to the propagating material, as mentioned in paragraph 11 above.

(v) The competent authorities in the Netherlands consider that each of the three acts mentioned in the definition of "commercialization" (offering for sale, selling and supplying) is in itself an act of commercialization. Moreover the professional production of propagating material for purposes other than marketing (such as for the producer's own use) is not covered by the breeder's right.

(vi) The Law of the United Kingdom uses the expressions "sell reproductive material" and "the production of reproductive material for the purpose of selling it." The right includes the use of the protected variety as a parent in the production of, for instance, an F₁ hybrid (Section 2 of Schedule 3 of the Act--see document CAJ/V/2, paragraph 39). It may also include (depending on the species concerned) the production and propagation of a variety for the purpose of producing cut flowers, fruit, etc. (Section 1 of Schedule 3 of the Act--see document CAJ/V/2, paragraph 59 and Table 4) and, for instance, the cut flowers produced from plants propagated or produced by the seller (*ibid.*). The latter provision has not yet been invoked in any instrument extending protection to a species. The right extends to imported material, but only if such material is used in the United Kingdom as reproductive material (see document CAJ/V/2, paragraph 52). "Sale" and "selling" are not defined, but "selling" includes any transaction effected in the course of business under which the property in the reproductive material passes from one person to another, and the terms of processors' contracts where the supply of seed may not involve a transfer in the property (see document CAJ/V/2, paragraph 44(vi)).

Question c: Are the national rules sufficient to include in vitro multiplication within the scope of protection?

13. In vitro multiplication is protected in the following States (provided that it is carried out, in the case of non-ornamental plants, for the purposes of commercial marketing of the propagating material obtained): South Africa, Belgium, Denmark, France¹, Israel, Netherlands, United Kingdom, Sweden,

¹ France's reply is as follows:

"The reply would appear to be affirmative for vegetatively propagated species in so far as the breeder's right mentioned in the implementing decree

[Continued on page 5]

Switzerland. In the Federal Republic of Germany it is covered only for species whose plants are normally vegetatively propagated owing to the definition of propagating material, according to which plants and parts of plants constitute propagating material (for the purposes of the Varieties Protection Law) only in the above case. Finally, Spain has no experience as yet in this area.

Question d: What amendments are planned to the legislation concerning the definition of propagating material?

14. Apart from Denmark (see paragraph 9(i) above), only the Federal Republic of Germany has an amendment planned: the term "propagating material" ("Vermehrungsgut") is to be replaced by "planting material" ("Anbaumaterial"), and the new definition will make clear that it covers also plantlets of sexually reproduced varieties.

Question e(i): What plans are there for extension of the scope of protection or the field of application of the definition of propagating material in order to cover plants grown from seed and intended for growing?

15. The following States have confirmed that the production of plantlets for planting is already within the scope of protection: South Africa, Belgium, Spain (according to its interpretation of the expression "propagating material," although in fact there is not yet any case law on which to base that interpretation), France and Switzerland (according to the interpretation of the expression "propagating material"--see paragraph 9(iii) above). In the case of South Africa, it was pointed out that a producer of plantlets of a protected variety might legally procure the necessary seed from the breeder, from a person licensed by the breeder to sell such seed or from his own production if he was licensed by the breeder to produce such seed. In the latter case, he had to pay royalties for the seed produced for his own purposes, but it would be illegal to charge additional royalties for the plantlets produced, as that would constitute collection of double royalties.

16. The Federal Republic of Germany plans to amend the definition of propagating material (see paragraph 14 above).

17. In the United Kingdom there seems to be little concern in professional circles for the problem of the sale of plantlets produced from seed multiplied by the seller. There are nevertheless plans to extend protection to the multiplication of seed for that purpose.

18. Israel is not planning any amendment. However, if UPOV were to take up a position on the subject of the problems raised in Question e, those problems would have to be studied at the national level.

[Note 1 of page 4, continued]

relates to:

- seeds intended for propagation of the species (potato);
- any part of the plant intended for use as material for the propagation of the variety (poplar, strawberry);
- any part of the plant (fruit trees, ornamentals plants) or any reproductive or vegetative propagating element of the variety in question."

In the opinion of the Office of the Union, in vitro multiplication of plants traditionally reproduced by sexual means is also protected as, with respect to that category, the breeder's right mentioned in the implementing decree relates also to "plants or parts thereof marketed for planting purposes."

19. If the interpretation of "propagating material" given by the authorities of Switzerland were to be contradicted by case law, an amendment would be considered (see paragraph 9(iii) above).

20. Sweden is not planning any amendment. The same is true of Denmark, as there are new quality and phytosanitary rules that provide that seed intended for the production of plantlets has to be purchased in the usual way.

Question e(ii) What plans are there for extension of the right provided for in the third sentence of Article 5(1) for ornamental plants to other vegetatively propagated species, in particular fruit species?

21. The United Kingdom has already provided for such extension in the case of fruit species, rhubarb and hops (see document CAJ/V/2, paragraph 59 and Table 4). A similar system has already been applied in Denmark to certain species, and may be extended to others. Under that system, the commercial propagation of a variety for purposes other than the sale of plants (for instance that carried out by a fruit grower for his own purposes) is subject to a royalty, but not to the authorization of the breeder (see document CAJ/V/2, paragraph 64).

22. The competent authorities of Switzerland and applicants for protection for strawberry varieties from that country consider that whoever produces propagating material for the subsequent sale of the fruit is producing that material for purposes of commercial marketing. In other words, there is only production for own purposes when the purpose of such production is to cover household needs exclusively; no attempt is made to resolve the delicate question of whether "collective households" (hotels, restaurants, canteens, etc.) are also covering their own needs when they multiply a variety in their orchard or small fruit plantation with a view to meeting the needs of the collective household. As in the case of the production of plantlets from seed, no amendment of the legislation can be considered until case law has provided the appropriate guidance.¹

23. The authorities of France consider that the breeder's right should be allowed to relate to all or part of the plant, such as plantlets, grafts, cuttings and layers, intended for use as propagating material but also intended for the starting of plantations with a view to the commercial production of the fruit.

24. According to the Delegation of the Federal Republic of Germany, the question has yet to be studied and discussed more thoroughly, particularly with respect to the production of fruit plants from runners or cuttings with a view to production and marketing of the fruit.

25. The following States are not planning any amendment of the law on the question concerned: South Africa, Belgium, Spain, Israel (see paragraph 18 above, however), Sweden, Switzerland (in view of what is said in paragraph 22 above). In the Netherlands no definite plans have yet been made.

Question e(iii): What plans are there for extension of protection to the end product in the case of ornamental plants, in general or limited to the case where the end product is covered if it is grown in a country without protection and imported into a member State?

26. It is recalled that a certain number of States, namely France, Italy and Switzerland, already protect the end product in the case of ornamental plants. The Delegation of France pointed out that the question was an important one, but that the lack of exact reciprocity between member States of UPOV in itself

¹ This reply was in fact given in connection with Question f, but it seems entirely relevant to the context of Question e(ii).

already raised a problem that had to be settled before that of products from countries without protection was embarked upon.

27. Since the recent amendment of the law it has been possible in South Africa to extend protection to the sale of any product not normally used as propagating material. Such extended protection is available to nationals of South Africa and to breeders from other countries (member States of UPOV and States with which South Africa has entered into an agreement on the protection of plant varieties) that grant corresponding protection. This right is valid regardless of the country of origin of the product.

28. This question is being examined in the United Kingdom with legal advisers and Parliamentary Counsel. Currently material (flowers, plants, fruit, etc.) imported for other than reproductive purposes is not subject to protection (concerning the case of the end product produced in the United Kingdom from propagating material deriving from a multiplication made by the producer, see paragraph 12(vi) above).

29. The Federal Republic of Germany will consider the question in the event of other countries expressing definite wishes and proposals.

30. The Netherlands have not yet decided on their plans, and the following States do not envisage any amendment of their law: Belgium, Spain, Israel (see paragraph 18 above, however), Sweden.

31. In Denmark it is considered politically impossible to extend protection to cut flowers, except perhaps to cut flowers imported from countries in which no protection is available.

Question f:

A question was raised at the last session concerning the interpretation of the third sentence of Article 5(1) of the Convention. It was illustrated by the following case: A breeder brings tulip bulbs or rose bushes on to the market. A horticulturist buys the bulbs or the rose bushes, multiplies them and sells cut flowers grown from them without the consent of the breeder and without payment of royalties. In that case the multiplication of bulbs and the rose bushes by the horticulturist does not fall under the first and second sentences of Article 5(1) since it is not done "for the purpose of commercial marketing" of the bulb or rose bush. The question does arise, however, whether the third sentence of Article 5(1) is not applicable to this case, in other words whether the multiplied bulbs or rose bushes are not ornamental plants "normally marketed for purposes other than propagation," with the result that protection is extended to them as "they are used commercially as propagating material in the production of ornamental plants or cut flowers." Is this case provided for in your national law, and, if so, how?

32. The case is covered in the following States:

(i) South Africa, owing to the fact that protection covers the production of propagating material without the purpose of that production being specified;

(ii) The Federal Republic of Germany, owing to the provision corresponding to the third sentence of Article 5(1) of the Convention, which reads as follows: "In the case of ornamental plants, the holder shall have in addition the exclusive right to commercially use, for the production of ornamental plants or cut flowers, such plants or parts thereof as are normally commercialized for purposes other than propagation" (Article 15(2) of the Law);

(iii) Belgium, according to Section 21(3) of the Law, the text of which is practically identical to the third sentence of Article 5(1) of the Convention;

(iv) France, Italy and Switzerland, owing to the protection of the end product;

(v) the United Kingdom, by virtue of Section 1 of Schedule 3 of the Act, described in paragraph 12(vi) above; it will be noted that this provision extends the breeder's right to the fact of "producing or propagating" the variety with a view to the sale of cut flowers;

(vi) Sweden, under Article 4(2) of the Law, which makes the use of plants or parts of plants as propagating material for the commercial production of cut flowers or ornamental plants subject to the breeder's authorization.

33. In Spain, everything depends on the interpretation of the second sentence of Section 5(1) of the Law, which reads as follows: "The breeder's right shall extend to plants or parts thereof normally marketed for purposes other than propagation especially as regards the commercial production of ornamental plants or cut flowers, provided these plants or parts thereof are used as propagating material." As yet there is no case law on the subject. As for Denmark, its Delegation is not in a position to reply to the question, which will be considered by the Committee for the revision of the Law.

34. According to the delegation of Israel, Israeli law does not protect the end product as illustrated by the case quoted in the question.

35. According to the delegation of the Netherlands, the case in question is not covered by protection. The second sentence of Section 40(1) of the Law provides that "A plant breeder's right shall extend to ornamental plants or parts thereof normally commercialized for purposes other than propagation if they are used commercially as propagating material in the production of ornamental plants or cut flowers."

36. To recapitulate:

(i) a number of State (South Africa, France, Italy, Switzerland) cover the case by a provision not based on the third sentence of Article 5(1) of the Convention and independently of the provision based on that sentence;

(ii) other States (United Kingdom, Sweden) cover the case by a provision that is based on the sentence in question, but in modified form;

(iii) still other States (Federal Republic of Germany, Belgium) consider that the case is covered by a provision that is based on the sentence in question, which does not differ fundamentally from it;

(iv) the Netherlands consider that the sentence--and the corresponding provision of their law--does not cover the case.

III. Novelty (Article 6 of the Convention)

Sole question: Are there any plans for the introduction of a period of grace of one year, and, if so, will it be for all species or for certain species only?

37. Following a recent amendment of its law, South Africa provides for a period of grace of one year, applicable to all protected species.

38. The following States plan to do the same: Federal Republic of Germany, Belgium, Israel, Netherlands.

39. The following States intend to retain the present condition of novelty (no period of grace): Denmark, Spain, France, United Kingdom, Sweden, Switzerland.

IV. Conditions for the Validity of an Application for Protection and for the Assignment of an Application Number and Application Date

Questions a: What formal conditions have to be met by a national application for protection to be considered validly filed, especially with respect to the documents to be filed, fees payable

and the submission of propagating material? What plans are there for the amendment of these conditions?

40. As the replies enter into a greater or lesser amount of detail, they are summarized and reduced to essentials below. There are five elements that may contribute to the validity of the application for protection and to the assignment of an application number and application date:

(i) the application form and its annexes, or some of them, which are required in all the States that replied to the question, namely South Africa, the Federal Republic of Germany, Belgium, Denmark, Spain, France, Israel, the Netherlands, the United Kingdom and Sweden;

(ii) the "technical questionnaire," which is required in South Africa, the Federal Republic of Germany, Belgium, Denmark, Spain, France, Israel, the Netherlands and Sweden;

(iii) the application fee, which is required in South Africa, Belgium, Spain, France, Israel, the Netherlands, the United Kingdom and Sweden;

(iv) the examination fee for the first growing cycle, required in the Netherlands;

(v) the provision of plant material within two weeks following the filing of the application form, in the case of varieties reproduced by seed, or within a period set by the competent authority in the case of other varieties, required in the Netherlands.

41. In other words, three combinations exist:

(i) application form and "technical questionnaire" (Federal Republic of Germany, Denmark);

(ii) application form and application fee (United Kingdom);

(iii) application form, "technical questionnaire" and application fee (South Africa, Belgium, Spain, France, Israel, Sweden);

(iv) all five elements (Netherlands).

42. In the case of the Federal Republic of Germany, it was mentioned that the payment of fees and the supply of plant material were also necessary to the application but could take place afterwards, within specific periods. In the case of failure to pay fees (within the month following the notification addressed by the Federal Office of Plant Varieties), the application is deemed not to have been filed. In the case of failure to supply plant material, the application is rejected.

43. In the case of France, the filing date of the application is assured even if the required submissions are not in order in respect to form.

44. Only Israel is considering an amendment, which would add the supply of plant material and the payment of the examination fee to the conditions of validity of the application.

45. The Delegation of Denmark considers that the supply of a seed sample, as a necessary part of the filing of the application, should be studied.

Questions b: In cases where an application for protection claims the priority of another application, what are the standards for assessing the validity of that other application? What plans are there for legislation on this matter or for the amendment of existing provisions?

46. Most of the States described the formal conditions for the claim of priority, which for the most part correspond to the provisions of Article 12 of the Convention. The Federal Republic of Germany mentioned that it judged

the validity of the first application, the priority of which was claimed, on the basis of the documents relating to it, which the applicant had to submit. In this respect it presumed that the other States, like it, only issued "a copy of the documents which constitute that application, certified to be a true copy by the authority which received it" (Article 12(2) of the Convention) if the application had been validly filed. In the case of doubt, it made inquiries of the State that had received that first application. No amendment of this procedure is envisaged.

47. Denmark said that it required a copy of the first application, certified by the service that received the application as being a true copy.

V. Provisional Protection (Article 7(3) of the Convention)

Sole question: What amendments to the legislation on provisional protection are planned?

48. The present situation is described in Chapter I of document CAJ/VI/5.

49. Denmark is planning to adopt the system at present applied by Sweden, which more or less corresponds to the system provided for in Section 60 of the Danish Patent Law. This system, which is described in paragraph 9 of document CAJ/VI/5, will perhaps be completed by the following two provisions:

(i) royalties have to be deposited in a bank until it is known whether or not rights will be granted;

(ii) the breeder will be required to grant licenses to all qualified producers.

50. The Netherlands are planning to make an amendment to the legislation with regard to provisional protection. A provisional protection system is to be introduced, under which the owner of protection may, after the grant of the title, claim royalties from any person who may have continued, in spite of warnings, to perform acts covered by the right, during the period between the date of the warning and the date of the grant of the title.

VI. Period of Protection (Article 8 of the Convention)

Question a: What are the criteria determining the period of protection, especially where the law does not itself specify the period of protection but only sets limits?

51. The present situation is described in Chapter II of document CAJ/VI/5.

52. Two major types of criteria can be distinguished among those that were mentioned in the reply:

(i) Mainly economic criteria:

(a) For the Netherlands, it is a question of striking a balance between the interests of the breeder and those of users;

(b) For the United Kingdom, it is mainly a question of allowing a sufficiently long period of protection for the breeder to secure, under normal circumstances, reasonable remuneration for his work. This criterion introduces others, which are of the second type;

(ii) Mainly botanical and technical criteria, from which however economic considerations are not always absent:

(a) Growth pattern of the species (annual, pluriannual, etc.): South Africa, Federal Republic of Germany, France;

- (b) Manner of propagation, and especially time required to reach the commercial stage: South Africa, France, United Kingdom;
- (c) Time required for the variety to penetrate the market and establish itself with the public: United Kingdom;
- (d) Length of commercial life: South Africa, Spain;
- (e) Duration of breeding process: Federal Republic of Germany, Spain;
- (f) Duration of testing: Spain.

53. These criteria may be incorporated in a classification of species. In Belgium, for instance, the duration of protection is:

(i) 20 years for annual agricultural plants and vegetables (except potatoes), for strawberries and for such ornamental species as are protected at present;

(ii) 25 years for potatoes, fruit species (except strawberries), forest trees and hops.

54. There is in fact one last criterion which has not been expressly mentioned, namely respect for the obligations deriving from the Convention.

55. In the case of the "time required to reach the commercial stage" criterion, it should be noted that advent of in vitro multiplication methods is in the process of completely upsetting the classification of species based on that criterion.

Question b: What amendments to the period of protection are planned?

56. In Denmark, the Bill recently submitted to Parliament provides for the following terms of protection:

(i) vegetatively propagated plants:

(a) 25 years for potatoes;

(b) 18 years for forest trees, fruit trees and their rootstocks, and for ornamental trees;

(c) 15 years for other plants;

(ii) Sexually reproduced plants: 20 years.

This provision is qualified by a clause whereby the Minister of Agriculture may decide that the protection of the plant varieties mentioned under (i)(b) and (i)(c) above, for which a title of protection has been granted prior to January 1, 1970, shall not lapse before 20 years have expired.

57. The Federal Republic of Germany is planning to list in an Ordinance the woody species that will enjoy the 25-year protection period, owing to the fact that the word "tree" used in the Convention and in the Law of the Federal Republic of Germany is somewhat imprecise and that the question therefore arises, in the case of certain species, whether the subject is already a tree or still a bush.

58. France is planning to increase from 20 to 25 years the duration of protection of inbred maize lines (the breeders want a 30-year period).

59. The United Kingdom is planning merely to bring its law into strict conformity with the 1978 Act of the Convention.

60. In Sweden, amendments have been suggested, but there are as yet no actual texts.

61. The following States are not planning any amendment: South Africa, Belgium, Spain, Israel, Netherlands, Switzerland.

VII. Priority (Article 12 of the Convention)

Sole question: What amendments are planned to the rules concerning priority in order to allow the competent authority to request the advance submission of additional documents and material where the application the priority of which is claimed has been rejected or withdrawn?

62. The following States are planning to introduce a provision whereby the competent service may require the advance provision of additional documents and material when the application the priority of which is claimed has been rejected or withdrawn: Federal Republic of Germany, Belgium, France, Netherlands, United Kingdom (by means of an amendment to the regulations).

63. In this connection the Delegation of Belgium mentioned that, for the practical application of this provision, member States should consult and inform each other in good time on rejected or withdrawn applications that have been used as the basis for priority claims.

64. Denmark is not planning any amendment for the time being.

VIII. Transitional Limitation of the Requirement of Novelty (Article 38 of the Convention)

Question a: What plans are there for the amendment of the legislation concerning the transitional limitation of the requirement of novelty?

65. Except in the case of South Africa, the situation as described in Chapter V of document CAJ/V/2 has remained unchanged.

66. In a recent amendment of its law, South Africa has included a provision in it whereby the Registrar is allowed to accept, within six months following extension of the law's applicability to a genus or species, an application relating to a variety of that species that no longer meets the conditions of novelty.

67. The Federal Republic of Germany is planning to amend its present system by increasing from four to six years, in the case of certain species (of trees in particular), the period during which a variety benefiting from the transitional limitation may have been marketed in the Federal Republic of Germany before the date of extension of protection to the species to which the variety belongs.

68. The Netherlands are considering introducing a system under which a variety of recent creation may be protected if, on the date of extension of protection to the species concerned, it has not been marketed for more than four years, and if the application is filed within the year following that date.

69. The following States are not planning any amendment: Belgium, Denmark, Spain, France, Israel, United Kingdom, Sweden, Switzerland. It should be noted that the Delegation of France pointed out that the absence of any transitional limitation of the requirement of novelty could have adverse effects for certain breeders.

Question b: Is the system adopted by one member State, according to which the variety can only be protected if it has not yet been marketed in the country or abroad before the entry into force of the legislative provisions by which protection is extended to the genus or species to which the variety belongs, considered acceptable?

70. The Delegation of the United Kingdom considers that the system described in the above question is acceptable. According to the Delegation of Denmark,

the system is entirely compatible with the Convention and therefore cannot be declared either acceptable or unacceptable. The same Delegation mentioned moreover that Denmark was following a middle path, refusing priority claims relating to applications filed abroad before the extension in Denmark of protection to the relevant genus or species. (This system is also applied by the United Kingdom).

71. The Delegation of Israel considers that this system is not acceptable; according to the Delegation of Belgium, it appears to contradict Article 38 of the Convention. The Delegation of Spain said that the system was not in conformity with its own. The Delegation of South Africa said that the system was not observed in its country and never would be. According to the Delegation of Sweden, Article 38 of the 1978 Act of the Convention was satisfactory. The Delegation of the Federal Republic of Germany announced that it would not introduce such a system, in view of the provisions of Article 6(2) of the Convention, and that, in making that remark, it was not taking a position on the question of the grounds on which the system had been introduced in another country. Finally, the Delegation of the Netherlands pointed out that its country usually extended protection to a genus or species when the breeding work on that genus or species was already carried out on a large scale; it seemed fair, therefore, that one should make the novelty rules more flexible in favor of pioneer varieties. That did not mean that a system that did not embody such flexibility (like the present Dutch Act) should be considered unacceptable.

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