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UPOV

CAJ/XII/8
ORIGINAL: French
DATE: April 11, 1984

INTERNATIONAL UNION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS

GENEVA

ADMINISTRATIVE AND LEGAL COMMITTEE

Twelfth Session
Geneva, November 7 and 8, 1983

REPORT

adopted by the Committee

Opening of the Session

1. The Administrative and Legal Committee (hereinafter referred to as "the Committee") held its twelfth session on November 7 and 8, 1983. The list of participants is given in Annex I to this document.

2. The session was opened by Mr. M. Heuver (Netherlands), Chairman of the Committee, who welcomed the participants.

Adoption of the Agenda

3. The Committee adopted the agenda as given in document CAJ/XII/1.

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

4. The Committee noted that the statements made at the seventeenth ordinary session of the Council, in October 1983, also related, where relevant, to the intentions of member States regarding amendment of national plant variety protection law.

5. The representative of South Africa explained that the Plant Breeders' Rights Act of that country had been amended in order to allow the Registrar to conclude agreements for cooperation in the examination of varieties. After entry into force of that amendment, in April 1983, negotiations for the conclusion of bilateral agreements had been resumed with Israel and the Netherlands.

6. The representative of Denmark stated that a committee had been set up to consider the drafting of a new law. It was hoped that the committee could start its work soon.

7. The representative of Japan stated that his country's authorities were considering the possibility of extending protection at the beginning of next year to further taxa, the list of which had not yet been fixed, however. In fact, the problem was to choose from among several dozens of taxa since the capacity of the examination service was limited.

8. The representative of the United Kingdom stated that the Plant Varieties Act 1983, which amended the Plant Varieties and Seeds Act 1964, had entered into force on July 9, 1983, and had enabled the United Kingdom to deposit its instrument of ratification of the 1978 Act of the Convention on August 24, 1983.

9. The representative of Switzerland stated that the question whether the protection afforded by his country's law also extended to the multiplication of fruit plants for the purpose of commercial production of fruit was currently under consideration. If necessary, the law would be amended. In that respect, the delegation of Switzerland considered that the French Decree Fixing the List of Plant Species for Which New Plant Varieties Certificates May be Issued and the Scope and Duration of the Breeder's Right in the Case of Each Plant Species constituted a very useful basis for discussion.

10. The representative of the Commission of the European Communities, referring to the statement he had made at the seventeenth ordinary session of the Council, reproduced in Annex II to this document, announced that the document containing the proposal had just been distributed to the Permanent Representatives of the member States of the European Communities.

Consideration of the Observations Submitted by International Organizations in Preparation for the Meeting to be held on November 9 and 10, 1983

11. Discussions were based on documents IOM/I/3 to 5 (being the bases for discussion prepared by the Office of the Union), documents IOM/I/6 to 10 (which contain, respectively, the observations of the International Community of Breeders of Asexually Reproduced Fruit Trees and Ornamental Varieties (CIOPORA), the Association of Plant Breeders of the European Economic Community (COMASSO), the International Federation of the Seed Trade (FIS), the International Association of Plant Breeders for the Protection of Plant Varieties (ASSINSEL) and the International Association of Horticultural Producers (AIPH)) and on document CAJ/XII/6.

a. Minimum Distances Between Varieties

12. The Committee noted the observations made by the international non-governmental organizations and also the arrangements decided upon at the seventeenth ordinary session of the Council in order to illustrate the problems arising in the examination of distinctness between varieties. It observed that a great part of the divergences between the opinions of the organizations could be attributed to the biological and economic differences between the various species and that, consequently, the issue of minimum distances between varieties should be considered separately for each group of species defined by its mode of propagation and its economic purpose.

13. It was also mentioned that the discussions could be divided into several topics, as follows:

(i) nature of the lists of characteristics included in the UPOV Test Guidelines (were they lists of characteristics, all of which were important for distinctness, or were they mainly aids to memory for the description of varieties?);

(ii) minimum distances required, for each characteristic, for distinguishing with sufficient precision two varieties showing a difference for that characteristic;

(iii) use of characteristics examined with the help of sophisticated methods (on this subject, discussions should be brief since it was generally considered that those characteristics should be used as supplementary criteria only--except of course where such characteristics obviously had to be examined, as for instance in the case of the chemical composition of the essential oils of perfume plants);

(iv) design of the tests, in particular in the case of cross-pollinated crops, in view of the fact that the accuracy of the test results depended on the size of the experiment.

b. International Cooperation

14. The Committee noted the observations submitted by ASSINSEL and AIPH. It recorded that the attitude towards such cooperation seemed to depend on the importance attached to the problems which had to be solved in order for cooperation to be efficient and which resulted, in particular, from a still incomplete harmonization in certain areas. In that respect, attention was drawn to the necessity of inducing the Technical Working Parties concerned to include truly harmonized updated lists of characteristics in the Test Guidelines. It was further noted that, at the proposal of the Technical Committee, the Council had urged the member States at its seventeenth ordinary session to implement the decisions taken by UPOV to their full extent and without delay and to use the forms and documents adopted by UPOV (see paragraph 23 of document C/XVII/14).

c. UPOV Recommendations on Variety Denominations

15. The Committee noted the observations submitted by the organizations.

16. The Committee also noted the correspondence, reproduced in the Annex to document CAJ/XII/6, concerning re-use of old denominations. It considered that the UPOV Recommendations were satisfactory in that respect. It observed moreover that in the course of the Symposium on Nomenclature held within the framework of the seventeenth ordinary session of the Council, Mr. C.D. Brickell, Chairman of the International Commission for the Nomenclature of Cultivated Plants of the International Union for Biological Sciences and Chairman of the Commission for Nomenclature and Registration of the International Society for Horticultural Sciences, expressed a point a view much less dogmatic than that of Mr. A.C. Leslie in his letter reproduced in the Annex to document CAJ/XII/6.

17. In that connection, it was noted that several participants in the aforementioned Symposium, and among them representatives of UPOV member States, had expressed a wish for closer relations between the plant variety protection authorities and the International Registration Authorities. It was felt that the matter concerned the authorities individually and that it was for them to find the best form of cooperation.

d. Other Observations

18. The Committee noted the wish expressed by certain members of CIOPORA that plant variety protection legislation afford them a right of control over the mutations derived from their varieties. (This issue was discussed at the eleventh session of the Committee--see paragraphs 33 to 36 of document CAJ/XI/11).

19. The Committee also noted the observations from AIPH regarding the scope of protection and the restrictions in the exercise of rights protected (Articles 5 and 9 of the Convention).

Legal Aspects of the Problem of Minimum Distances Between Varieties

a. Conclusions of the Eleventh Session of the Committee

20. Discussions were based on documents CAJ/XI/12, CAJ/XII/2 and CAJ/XII/7.

21. The Committee made an amendment to the reply to question 3 relating to distinctness and two amendments to the text of the question relating to the scope of protection. The conclusions as amended are given in Annex III to this document.

22. The representative of Japan drew attention to the fact that the replies given with regard to his country and reproduced in the Annex to document CAJ/XI/6 Add. differed in some cases from the conclusions reached by the Committee. The replies would be reconsidered in the light of the conclusions and probably brought into line with the latter.

23. As regards the follow-up to the study of the legal aspects of the problem of minimum distances between varieties, it was pointed out that the study had been undertaken at the outset for a very limited purpose. The purpose was in fact to enable the representatives of the member States to confer on those questions in order to be able to reply, if necessary, to the observations which the international non-governmental organizations might submit at the meeting of November 9 and 10, 1983. However, discussions at the eleventh and twelfth sessions of the Committee showed that the study was the outcome of comparing the points of view of the representatives of all member States--except the United States of America, for the reasons set out in the following paragraph--and that there was consensus among those representatives. It could therefore be considered an expert opinion.

24. The Committee noted the replies on the legal aspects of the problem of minimum distances between varieties recently given by the delegation of the United States of America and reproduced in document CAJ/XII/7. Attention was drawn to two facts: firstly, since the United States of America had applied Article 37 of the 1978 Act of the Convention, the legal situation could therefore in some instances be different from that prevailing in the other member States; secondly, the replies were personal opinions which could in no way bind the authorities or the courts. Similarly, the conclusions reproduced in Annex III to this document could not be binding on that country's authorities or courts.

25. Replying to the remark made by the representative of the United States of America concerning the independence of courts, the Vice Secretary-General observed that the Committee's conclusions were in no way able to bind the judiciary. The representative of the United States of America stated that he was still concerned by the fact that the conclusions could nevertheless influence courts.

b. Offer for Sale and Marketing in Relation with the Novelty Concept

26. Discussions were based on document CAJ/XII/3 and its three addenda.

27. In general, the Committee endorsed the conclusions drawn by the Office of the Union in subparagraphs (i) to (v) of paragraph 5 of document CAJ/XII/3. It was noted in that connection that each contract had to be considered on its own to check whether it implied marketing.

28. As regards the special case of inbred lines and hybrids, the delegation of France mentioned that inbred lines were not all sold on the open market. They were mostly transferred, as basic seed, to a producer of seed of a hybrid variety. Consequently, such lines were rarely available to the public (but it could be argued that to sell F1 seed was to sell the hybrid genotype as an embryo and the genotype of the female line as the rest of the seed).

29. The delegation of France further informed the Committee that the Court of Appeal of Paris just had decided on an appeal against a decision by the Committee for the Protection of New Plant Varieties to refuse the issue of a new plant variety certificate for an inbred line of maize. The Court confirmed the point of view of the French Committee according to which, in summary, the sale of seed of an inbred line to a producer of seed of a hybrid variety was detrimental to the novelty of the line. The delegation suggested that the decision could serve, together with an updated version of document CAJ/XII/3, as a basis for further discussions at the next session. For the purposes of that discussion, the Office of the Union was asked to make an enquiry also as to the existence of national catalogues in the member States (national lists of varieties approved for marketing) or commercial catalogues for those lines.

Procedures for the Examination of Proposed Variety Denominations

a. Report on the First Session of the Technical Working Party on Automation and Computer Programs

30. The Committee noted the information given by the Office of the Union in document CAJ/XII/4 on the first session of the Technical Working Party on Automation and Computer Programs. It also noted that the information given in that document on the situation in the member States was based on an enquiry made within the framework of that Working Group. Further information of that type could also be found in document CAJ/IX/4 and its two addenda.

31. Replying to the question whether the Committee could limit itself to taking note of the activities of the Working Group or whether it should give instructions to the latter as to the course of future work, Mr. Hutin (France), speaking in his capacity as acting Chairman of the first session of the Working Group, explained that the Working Group had set itself a limited objective: to draw up a summary list of variety denominations, starting with the example of barley. It was for the Committee to state the type of information which should appear in that list and, for example, whether it should also contain proposed denominations. In his view, harmonization should be furthered in that area.

32. On the proposal of the delegation of Denmark, the Committee decided that UPOV would undertake a pilot project of centralized examination of proposed variety denominations against the existing ones. The delegations of the Federal Republic of Germany and the United Kingdom stated that they were willing to carry out the project, the first in respect of elatior begonia and the second in respect of chrysanthemum. In that experiment, centralization would be combined, in the case of elatior begonia, with computerized searching of the existing denominations that were identical or similar to the proposed denominations and, in the case of chrysanthemum, with manual searching. As regards the procedural details for setting up and carrying out the project, it was decided to limit the latter to the UPOV member States participating in the cooperation system for the examination of varieties of the two species concerned. Furthermore, the delegations of the Federal Republic of Germany and the United Kingdom were asked to contact, if necessary, the delegations of the other States involved in the project and to report to the Committee at its next session.

b. Data Base for the Comparison of Proposed Denominations with Preexisting Denominations

33. Discussions were based on document CAJ/XII/5.

34. The delegations of Denmark, the Netherlands and Sweden informed the Committee that the situation in their respective countries was as described in paragraph 6 of document CAJ/XII/5. On the other hand, Belgium ought to be mentioned in paragraph 5 of that document, along with Switzerland. Moreover, the delegation of Hungary mentioned that, for the time being, the basis for comparison was constituted by the register of protected varieties, the register of qualified varieties (equivalent to a catalogue of varieties approved for marketing) and the trademark register. It mentioned that to extend its data bank to variety denominations from other member States, it would need the plant variety protection gazettes of those States, and asked them for their kind assistance.

35. As regards the two problems mentioned by the Office of the Union in paragraph 6(iv) of document CAJ/XII/5, the majority of the Committee agreed that in the event of identity or similarity of two proposed denominations, priority should be given to the denomination with the earliest filing date (or the earliest utilization date, where relevant, for example, where the legislation of the State in question provided for "a period of grace" and where the breeder had made use of that period). The Committee further noted that in the case of Ireland, the procedure described under (b) of the above-mentioned subparagraph was theoretical since there had been no case as yet in practice.

Other Business

36. Cooperation in Examination Between States Enjoying Very Different Climatic Conditions.- Discussions were based on an extract from the draft detailed report on the seventeenth ordinary session of the Council, which was read out in the meeting. That extract is reproduced in Annex IV to this document.

37. It was mentioned that the problems raised in the Council session also existed within one and the same country, in the case of species cultivated both in the open and under glass, where the examination was carried out in one of those environments only, even for the varieties to be cultivated in the other.

38. The Committee felt that those problems should first be examined by the Technical Committee and then by the Administrative and Legal Committee at its fourteenth session, next autumn, on the basis of a document which the Office of the Union was requested to prepare.

39. Biotechnology and Plant Variety Protection. - The Committee noted that the Council had decided, when adopting the program and budget of the Union for 1984, that "the possible impact on plant variety protection of new developments in the fields of biochemistry and genetic engineering--and of the wish of inventors in these fields to obtain patent protection for their inventions" was to be examined within the Union (see item UV.05 of chapter II of document C/XVII/4). Further, the Consultative Committee recommended to the Council that it should be left to the Administrative and Legal Committee to decide whether the question mentioned above should be examined by that Committee itself or by a subgroup (see paragraph 8(ii) of document CC/XXVIII/5). Finally, the Council had decided that the Symposium to be held next year in the framework of its eighteenth ordinary session was to be devoted to "industrial patents and plant breeders' rights - their proper fields and possibilities for their demarcation" (see paragraph 13(i) of document C/XVII/14).

40. The Committee decided that examination of the above matters were to be put in hand at its next session. In that respect, member States were asked to supply the Office of the Union with any documentation which might facilitate the drafting of the documents to be submitted to the Committee.

Program for the Thirteenth Session of the Committee

41. Subject to any new matters that might arise, the agenda of the thirteenth session of the Committee would include the following items:

(i) Intentions of member States regarding amendment of national plant variety protection law (reports on any new event);

(ii) Evaluation of the results of the Meeting with International Organizations held on November 9 and 10, 1983;

(iii) Biotechnology and plant variety protection;

(iv) Novelty concept in the case of hybrids and their parental lines;

(v) Pilot project in the examination of proposed variety denominations.

42. This report was adopted by the Committee at its thirteenth session, on April 4, 1984.

[Annexes follow]

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Mr. A. HEITZ, Senior Officer
Mr. A. WHEELER, Senior Officer
Mr. K. SHIOYA, Associate Officer

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

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ANNEX II

EXPOSE MADE BY THE REPRESENTATIVE OF THE COMMISSION OF THE EUROPEAN COMMUNITTIES AT THE SEVENTEENTH ORDINARY SESSION OF THE COUNCIL

Extract from the Draft Detailed Report

"92. European Communities.- The European Communities had for some years already concerned themselves with a number of problems that resulted from the coexistence at Community level of a common market for propagating material and national systems of new plant variety protection leading to the granting of titles of protection whose effect was limited to the national territory of each State. That situation had recently led the Commission of the European Communities to make an official proposal to the Community Member States and to the professional organizations set up at Community level. That proposal concerned the creation of a European/Community breeder's right having the following essential features:

(i) An optional nature (that is to say, it would coexist with national rights);

(ii) A single application leading to a single title with uniform and immediate effect for the whole of the Community market;

(iii) As regards conditions, terms and content, it would be based on the current and future results of UPOV's work;

(iv) It would provide suitable possibilities of participation by interested European countries that were not members of the Communities.

The Commision of the European Communities was shortly to hold hearings of the Community Member States and of the professional organizations, which could possibly be extended and would, in any event, be held in close liaison with UPOV.

"93. The Secretary-General took note, with satisfaction, of the final remark made by the representative of the Commission of the European Communities and, in a more general way, of the details of the proposal. He also pointed to the positive experience gained in the parallel case of participation of the World Intellectual Property Organization (WIPO) in preparing the European Patent Convention."

[Annex III follows]

LEGAL ASPECTS OF THE QUESTION OF MINIMUM DISTANCES BETWEEN VARIETIES

Conclusions Reached of the Administrative and Legal Committee

I. DISTINCTNESS

Article 6 (1) (a) of the UPOV Convention:

"Whatever may be the origin, artificial or natural, of the initial variation from which it has resulted, the variety must be clearly distinguishable by one or more important characteristics from any other variety whose existence is a matter of common knowledge at the time when protection is applied for. Common knowledge may be established by reference to various factors such as: cultivation or marketing already in progress, entry in an official register of varieties already made or in the course of being made, inclusion in a reference collection, or precise description in a publication. The characteristics which permit a variety to be defined and distinguished must be capable of precise recognition and description."

1. When is a variety "another variety" in the meaning of the above provision? Does a variety that is identical or almost identical with the variety the subject of an application for protection, but that has been bred independently by someone else ("parallel breeder"), belong to the variety the subject of an application for protection or is it "another variety"?

In Article 6, variety is taken to mean the plant material, bred by the applicant for protection, on which the application is based. Identical or almost identical material produced by another breeder--independently of the applicant--certainly constitutes material of the same variety in a botanical sense but nevertheless represents an "other variety" for the purposes of Article 6(1)(a) of the Convention. If the "existence" of the material representing the "other variety" is already "common knowledge" at the time protection is applied for, the application must be refused for lack of distinctness. Similarly, the notion of "variety" is also to be interpreted in the same way in the other subparagraphs of Article 6: the question whether the "variety" has already been offered for sale or marketed, and whether it is homogeneous and stable, is examined solely on the basis of the plant material bred by the applicant for protection.

2. What conditions must be fulfilled by the "other variety"? Must the "other variety" with which the variety the subject of an application for protection has to be compared when the latter is tested for distinctness be a "finished" variety, that means a variety that is sufficiently homogeneous, or can it be a plant population that does not--yet--fulfill the requirements for homogeneity (a so-called "quasi-variety", as for instance are most of the varieties distributed by CIMMYT)?

The "other variety" must not necessarily be "finished," that is to say meet the standards set for the protection of new plant varieties in the member State of the Union concerned (these standards are often identical with those set in other fields of law such as the regulations on production and trade in seed and seedlings). In the case of the "other variety," this must be material which already fulfills the usual criteria accepted by the trade for the notion of variety; in particular, the variety must at least be able to be described as such.

3. What conditions must be fulfilled by the "other variety" for it to be able to be considered as a matter of common knowledge on the basis of a "precise description in a publication"? Is a description by the breeder, published or submitted to the plant variety protection office, sufficient? In the case of a hybrid variety, is it sufficient to indicate the formula if the parent lines are a matter of common knowledge, or are there additional conditions that have to be fulfilled? If so, what are they (must it be certain that the "other variety" does not only exist on paper)?

The Convention requires the "existence" of the other variety to be a matter of common knowledge. Unless a sample of the variety in question may be made available to the plant variety protection office, a breeder's description published or handed to that office or a statement of the formula for a hybrid are not sufficient to make the existence of the variety in question a matter of common knowledge.

4. What conditions have to be fulfilled by a characteristic for it to be used in testing for distinctness?

(a) Should the decision be taken species by species, account being taken of the development of plant breeding? If not, what common rules can be established?

(b) Should characteristics be considered that are not "capable of precise recognition" without means that are not normally available to:

(i) breeders

(ii) plant variety protection authorities?

(c) Before taking into account a new characteristic (i.e. a characteristic that is not yet included in the list of characteristics), must it be assured that to do so will not lead to a disturbance of the system of plant variety protection for the species in question, for instance by encouraging grants of plant breeders' rights that would prejudice rights already granted? What criteria are to be taken into account?

(a) The decision can only be taken on a species-by-species basis.

(b) Generally speaking, a characteristic may be used once the following conditions are met:

(i) It must be adapted to the needs of distinctness testing, that is to say meet the requirements of Article 6(1)(a) of the Convention (it must be important, it must enable the varieties to be defined and distinguished, and must be capable of being precisely recognized and described);

(ii) It must be known to science, to the plant variety protection office and to plant breeding circles;

(iii) It must be reliable;

(iv) It must be usable under reasonable economic conditions;

(v) It must give a result within a reasonable period of time (compatible with the aims pursued by plant variety protection).

(c) As a principle, no breeder holding protection of a variety may claim that the list of characters examined for the purpose of distinctness be frozen at that used in deciding on the grant of his title.

II. NOVELTY

Article 6 (1)(b) of the UPOV Convention:

"At the date on which the application for protection in a member State of the Union is filed, the variety

(i) must not - or, where the law of that State so provides, must not for longer than one year - have been offered for sale or marketed, with the agreement of the breeder, in the territory of that State, and

(ii) must not have been offered for sale or marketed, with the agreement of the breeder, in the territory of any other State for longer than six years in the case of vines, forest trees, fruit trees and ornamental trees, including, in each case, their rootstocks, or for longer than four years in the case of all other plants.

Trials of the variety not involving offering for sale or marketing shall not affect the right to protection. The fact that the variety has become a matter of common knowledge in ways other than through offering for sale or marketing shall also not affect the right of the breeder to protection."

1. What is covered by the expression "the variety" in the meaning of the above provision? Is it detrimental to novelty in the meaning of the above provision if material that is identical with the variety, but that has been developed independently by someone other than the breeder/applicant ("a parallel breeder"), is offered for sale or marketed (please note the connection with question I.1 above)? If the answer to this question is positive, whose agreement must have been given for the activity to be detrimental to novelty; that of the breeder of the variety the subject of an application for protection or that of the "parallel breeder"?

The fact that, at the time of filing an application for protection, someone else has already offered for sale or marketed material he has bred himself and which is identical to the material on which the application for protection is based has to be examined from the point of view of distinctness under Article 6(1)(a) of the Convention and not from that of novelty under subparagraph (b). If, as should be the rule, the "existence" of someone else's material has become "common knowledge" through offering for sale or marketing, the application that is later than that event and is based on identical material must be refused for lack of distinctness in relation to the "other variety."

The second question above does not apply.

2. Is offering for sale or marketing detrimental to novelty if it takes place at a time at which the variety is not yet "finished" and is thus still a "quasi variety" (see question I.2 above), not yet completely fulfilling the conditions for homogeneity?

Yes, where the material offered for sale or marketed can be defined as a variety. An important consequence of this event is the fact that the breeder who has marketed the material during the time between filing the application for protection and the refusal of the application for lack of homogeneity, foregoes the possibility of protection of the variety derived from such material by "purification."

3. Is the offering for sale or marketing of a hybrid variety detrimental at the same time to the novelty of the parent lines?

No. The case in which possession of lines is transferred (for example, under a growing contract) must be analyzed from the point of view of offering for sale or marketing of such lines.

III. SCOPE OF PROTECTION

Article 5(1) of the UPOV Convention:

"The effect of the right granted to the breeder is that his prior authorisation shall be required for
- the production for purposes of commercial marketing
- the offering for sale
- the marketing

of the reproductive or vegetative propagating material, as such, of the variety.

Vegetative propagating material shall be deemed to include whole plants. The right of the breeder shall extend to ornamental plants or parts thereof normally marketed for purposes other than propagation when they are used commercially as propagating material in the production of ornamental plants or cut flowers."

1. What is meant by "propagating material of the variety" in this context?

(a) Only material corresponding to the variety description and deriving from material of the breeder (the owner of the plant breeder's right)?

(b) Also material which cannot be distinguished from that referred to in (a) above, and which originates from a "parallel breeder"?

(c) Also material that may only be distinguished from material of the breeder to such a small extent that it cannot constitute another, distinct, variety?

(d) Also material that is clearly distinguishable by one or more important characteristics from material of the breeder, but that has been developed manifestly to by-pass a breeders' right and that constitutes a slavish imitation of the protected variety?

The term "propagating material of the variety" covers the material referred to in items (a), (b) and (c) above. It does not cover the material referred to in item (d).

[Annex IV follows]

COOPERATION IN EXAMINATION BETWEEN STATES ENJOYING VERY DIFFERENT CLIMATIC CONDITIONS

Extract from the Draft Detailed Report on the Seventeenth Ordinary Session of the Council

"51. As far as cooperation in examination was concerned, Israel faced the problem of its climatic conditions, mainly that of high luminosity and high temperatures. Indeed, the descriptions of varieties, carnation or rose for example, established in the countries of northern Europe and those established in Israel contained differences affecting characteristics such as the color of the flower, the length of the stem or the number of petals, and those differences were such that one would be inclined to conclude that they concerned different varieties. In that respect, certain colors seemed to be more subject than others to variations resulting from the intensity of the light. In view of that problem, the Israeli authorities had decided to make use of tests carried out in other member States for determining distinctness, homogeneity and stability and then to carry out additional growing trials and an examination to draw up a description that corresponded to local climatic conditions. That practice had at least the advantage of dispensing with the--costly--upkeep of a reference collection.

"52. The comments reported in the above paragraph gave rise to an exchange of views. The representative of New Zealand pointed out, in concluding his statement, that his country also had similar, or even greater, reservations to make as regards the usefulness of the descriptions drawn up in other countries. Indeed, his country enjoyed a climate characterized by an unusual combination of high luminosity and low temperatures. When comparing the description of a variety drawn up, for example, in Europe and drawn up in New Zealand, it was sometimes very difficult to convince oneself that they were descriptions of the same variety. Additionally, it sometimes happened that two varieties that had proved to be distinct in another country could not be distinguished in New Zealand or again that a variety had proved homogeneous in another country but was not so in New Zealand. Finally, for some species such as wheat, the assortment of varieties grown in New Zealand, was characteristic of the country and unknown in the other member States, thus making it necessary to examine varieties for which protection had been requested, at national level, in comparison with that assortment. It was to a great extent because of those problems that New Zealand did not participate in the cooperation arrangements instituted within UPOV.

"53. The representative of France felt that it had been clearly shown that the principles governing variety examination had to be adapted to each climatic zone and, notably, the lists of characteristics and the levels of expression used in the examination could not be harmonized in detail if the effect of the environment was ignored. Indeed, even at the level of a single country such as France, it could also be observed that the behavior of a variety, particularly as regards its distinctness in relation to another variety and also its homogeneity, varied depending on the environment in which it was studied. Knowledge of the various environments in which examinations were carried out and their effect on the behavior of the varieties would, however, enable variety descriptions to be drawn up that had practical significance for users. On the other hand, a description drawn up by a breeder in a specific environment was not necessarily comparable to those drawn up in the official testing locations.

"54. The representative of the Federal Republic of Germany considered that the solution adopted by Israel, which was not unreasonable, raised a problem insofar as it was not included in the various recommendations made by UPOV in respect of cooperation. He therefore proposed that the matter be referred to the Administrative and Legal Committee which should examine whether the solution could be incorporated in the cooperation arrangements currently in force. Such an examination was all the more necessary since, as had been shown by the comments of the representative of New Zealand, the difficulties referred to by the representative of Israel also arose in a good number of other countries and UPOV indeed had a universal vocation. He further remarked that the problem was in fact even more complex. He noted, for instance, that a breeder to whom

a title of protection had been issued in the Federal Republic of Germany for a variety of saintpaulia was required to furnish in the United States of America, in connection with an application for a plant patent, a description whose content did not correspond to that drawn up in the Federal Republic of Germany despite the fact that saintpaulia was a species cultivated under glass and that glasshouse growing conditions were very similar in both States. In his view, account should also be taken of that fact in order to further improve the cooperation arrangements."

Note When it adopted the program of future work of the Administrative and Legal Committee, the Council noted that the questions reported upon above might also need to be examined in the Technical Committee (see paragraph 113 of document C/XVII/15 Prov.)

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