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INTERNATIONAL UNION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS

GENEVA

ADMINISTRATIVE AND LEGAL COMMITTEE

Fifteenth Session
Geneva, March 27 and 28, 1985

PREPARATION OF THE SECOND MEETING
WITH INTERNATIONAL ORGANIZATIONS

Document prepared by the Office of the Union

1. The second Meeting with International Organizations (IOM/II) is due to be held on October 15 and 16, 1985. To give the representatives of member States the possibility of making observations on the documents that will serve as the basis for the discussions at that meeting, the Office of the Union presents drafts for them in the Annexes to this document.

2. The Consultative Committee will discuss the arrangements made for IOM/II at its thirty-first session, due to be held on March 29, 1985, immediately after the forthcoming session of the Administrative and Legal Committee.

3. The Administrative and Legal Committee is invited to approve the attached documentation prepared for IOM/II or to make proposals for its improvement.

[Annexes follow]

DRAFT FOR AGENDA

For the
Second Meeting
with International Organizations
(Document IOM/II/1)

Geneva, [October 15 and 16, 1985]

prepared by the Office of the Union

1. Opening of the Meeting by the Chairman
2. Brief Report on Developments since the Meeting with International Organizations held in November 1983 (document IOM/II/2)
3. Appropriate Protection of the Results of Biotechnological Developments by Industrial Patents and/or Plant Breeders' Rights (document IOM/II/3)
4. International Cooperation (document IOM/II/4)
5. Any Other Business
6. Closing of the Meeting by the Chairman

Comments for the Administrative and Legal Committee

1. The above agenda has been drafted in accordance with the decisions taken by the Consultative Committee at its thirtieth session (see document CC/XXX/4, paragraph 8). The agenda items were made known to the invited organizations in the announcement sent to them on December 14, 1984.
2. As far as item 5 ("Any Other Business") is concerned, the Consultative Committee decided that the Office of the Union should invite the international organizations to propose additional items for the discussion. Further to that decision, the Office of the Union fixed March 1, 1985, as the final date for the submission of such items. Some organizations have already informed the Office of the Union that although it has not been possible for them to respect that deadline, they do expect to submit proposals.
3. The Consultative Committee decided that if the organizations submit additional items then they should provide a paper for each item, and that any papers received should be distributed by the Office of the Union at least six weeks before the Meeting.

[Annex II follows]

DRAFT FOR DOCUMENT IOM/II/2

BRIEF REPORT ON DEVELOPMENTS SINCE THE MEETING WITH
INTERNATIONAL ORGANIZATIONS HELD IN NOVEMBER 1983

prepared by the Office of the Union

Introduction

1. The first Meeting with International Organizations (IOM/I) was held on November 9 and 10, 1983. A detailed record of the Meeting was reproduced in document IOM/I/12, copies of which have been distributed with the invitation to the 1985 Meeting (IOM/II). This brief report on developments since IOM/I follows the agenda for that Meeting. It dealt with three main items, namely: Minimum Distances Between Varieties, International Cooperation and UPOV Recommendations on Variety Denominations.

Minimum Distances Between Varieties

2. It is recalled that the expression "Minimum Distances Between Varieties" was coined inside UPOV to signify the extent of the difference that has to exist between the new variety and any other variety if the new variety is to qualify for a grant of a plant variety protection.

3. Following IOM/I, the different bodies of UPOV discussed several of the questions raised at that meeting regarding minimum distances between varieties. They came to the following major conclusions:

4. UPOV sees no need to modify the interpretation of the notion "... clearly distinguishable by one or more important characteristics ..." used in Article 6(1)(a) of the Convention. A characteristic is considered "important" if it is important for distinguishing one variety from other varieties irrespective of whether it is a functional characteristic or not.

5. UPOV has set out basic principles and rules on the testing of varieties in its General Introduction to the Guidelines for the Conduct of Tests for Distinctness, Homogeneity and Stability of New Varieties of Plants and the individual Test Guidelines. It is reaffirmed that these basic principles and rules were established for the testing of varieties as well as for describing varieties. UPOV will continue collecting experience, species by species, which will be reflected in the General Introduction or the individual Test Guidelines when they are revised. UPOV does not consider it meaningful to indicate minimum distances in those Test Guidelines for each and every characteristic.

6. UPOV confirms the following three main criteria which it established to facilitate the decision on whether to include a characteristic in UPOV Test Guidelines:

(i) The characteristic should be considered an important characteristic and varieties that can be identified by that characteristic should also be expected to have a sufficient minimum distance from other varieties to justify the grant of plant variety protection.

(ii) Varieties should be expected to be homogeneous in the characteristic concerned, or to segregate according to a certain formula and

(iii) Harmonized and standardized methods to observe that characteristic should exist.

7. UPOV considers that, from the technical point of view, there is no difference between characteristics suitable for assessing distinctness as a prerequisite for the granting of plant variety protection and other characteristics suitable only for identifying a variety or a sample of a variety in the trade. One must remember, however, that other aspects, for example legal ones, or the uncertainty of the consequences of the acceptance of a characteristic for distinctness purposes, might not allow certain characteristics to be admitted for distinctness purposes in the procedure for the granting of plant variety protection, although they are used for identification purposes, for example in the seed trade.

8. UPOV confirms that differences which cannot be verified according to the basic testing principles as laid down in the General Introduction to the Test Guidelines or in the individual Test Guidelines should not be taken into account when assessing distinctness, homogeneity and stability. Sophisticated methods, such as electrophoresis, are so far considered not to fulfil these basic testing principles.

9. UPOV is of the opinion that additional efforts for establishing distinctness of a variety should be undertaken if the authority is convinced of the originality of a variety or if the breeder furnishes further proof. In looking for additional distinguishing possibilities, in the first instance new characteristics, i.e., those which so far are not considered in the testing of varieties, should be looked for. The reduction of minimum distances in a given characteristic is considered to be rather difficult. It was clarified in the discussions that in these cases also sophisticated methods, such as electrophoresis, should not be accepted.

10. UPOV is of the opinion that the suggestion that minimum distances should be enlarged for species where mutants occur frequently should not be followed since it has not yet been possible to prove that a mutant really is a mutant. It also notes that without a change in the UPOV Convention a droit de suite of the breeder of the original variety in respect of a mutant could not be admitted. UPOV is aware of the difficulties that exist in this area but sees no solutions at present; it was therefore decided to observe developments closely.

11. UPOV confirms that in the case of hybrid varieties the testing procedure depends on the species concerned, especially with respect to the question whether the breeding formula has to be examined and/or the lines tested. Parent lines should not be examined automatically in each and every case and the eligibility for protection should not be limited mandatorily to lines alone.

12. During the various discussions it showed that it was rather difficult to deal with the question of minimum distances in abstracto, i.e. without being able to base the discussion on specific cases. UPOV therefore decided not to continue discussing this item unless new developments change the present situation.

13. In connection with the question of minimum distances between varieties, possible ways of improving contacts with breeders and users of varieties were also discussed. As a result of further discussions inside UPOV, it was agreed that a greater number of meetings at the national level with breeders and users of varieties should be foreseen. This was considered preferable to providing, as a routine matter, for participation of representatives of breeders and users of varieties in sessions of the UPOV Technical Working Parties since it was considered that such participation might delay the technical work of UPOV. Mention was made in this context of the fact that for Begonia elatior the German Federal Plant Varieties Office had already invited breeders and users of varieties of that species from different UPOV member States to two meetings at its testing premises at Hanover. At the request of some breeders and users of varieties, UPOV has started to respond in detail to comments made by international non-governmental organizations on draft Test Guidelines in order to inform them why certain proposals have not been found acceptable. In this context it was stated that UPOV would appreciate it if it could receive more comments by correspondence from breeders or growers on draft Test Guidelines for fruit, ornamental and forest tree species.

International Cooperation

14. As the item "International Cooperation" is included again in the agenda for the second meeting, the brief report on developments in that area is included in document IOM/II/4.

Recommendations on Variety Denominations

15. After the first meeting with international organizations, the different UPOV bodies continued their discussions on the preparation of recommendations on variety denominations and these finally led to a text which was adopted by the Council during its last session, held in October 1984. The final text of the recommendations is reproduced in document UPOV/INF/10. It is also reproduced in section 14 of the UPOV Collection of Important Texts and Documents, which is now available in all three official UPOV languages. UPOV has also started a pilot scheme for the centralized examination of proposed variety denominations. The pilot scheme will be carried out by the Office of the Federal Republic of Germany for Begonia elatior and by the Office of the United Kingdom for Chrysanthemum. Once the scheme is operational, each of those offices will make a complete examination for the other offices participating in the scheme, of the acceptability of variety denominations filed with those offices. The examination will cover all criteria for the acceptability of a variety denomination, subject to the limitations of the office carrying out the examination.

[Annex III follows]

DRAFT FOR DOCUMENT IOM/II/3

APPROPRIATE PROTECTION OF THE RESULTS OF BIOTECHNOLOGICAL DEVELOPMENTS
BY INDUSTRIAL PATENTS AND/OR PLANT BREEDERS' RIGHTSMemorandum prepared by the Office of the UnionBackground

1. The question of appropriate legal protection of the results of work in the field of biotechnology has occupied UPOV for some time. Already, two UPOV symposia have been concerned with this subject, namely, for the first time on October 13, 1982 (subject: "Genetic Engineering and Plant Breeding"), and for the second time on October 17, 1984 (subject: "Industrial Patents and Plant Breeders' Rights - Their Proper Fields and Possibilities for Their Demarcation"). Reference is made to the Records of both symposia (UPOV Publication No. 340 for the event of 1982; UPOV Publication No. 342 for the event of 1984). The Records of the Symposium which took place in 1984 include document SYMP/1984/4, in which the basic aspects of the legal protection of biotechnological inventions are set out.
2. A further important discussion took place in November 1984, in the World Intellectual Property Organization (WIPO). Representatives of UPOV and of the international non-governmental organizations in the field of plant breeding and trade in seed and other propagating material participated in that discussion. As to the outcome, reference is made to WIPO document BioT/CE/I/3.
3. A subgroup has been established within UPOV and this has tried to summarize the legal situation. The work of that subgroup has not yet been concluded.
4. UPOV has included this item in the agenda for IOM/II because it is believed that an open discussion on this subject between representatives of the member States and representatives of the international organizations would be of value.

Proposals for the Discussion

5. Since the subject is very broad, it is envisaged to conduct the discussions in the following order:
 - (i) Are there obstacles that stand in the way of the patenting of genetic engineering processes?
 - (ii) Are processes for the breeding of varieties which are based on genetic engineering patentable? If not, is it desirable that they be patentable?
 - (iii) Can plant varieties created with the help of genetic engineering be protected by a product patent or as the direct result of a patented process, or is this excluded under the provisions of patent laws or the provisions of the UPOV Convention?
 - (iv) Are genes eligible for protection under a product patent? If so, what should be the extent of the scope of protection?
 - (v) How might Article 5(3) of the UPOV Convention be affected by developments in genetic engineering?
 - (vi) Is it recommendable, in view of the results or expected results of genetic engineering, to change current legal provisions relating to industrial patents or to the protection of plant varieties?

[Annex IV follows]

DRAFT FOR DOCUMENT IOM/II/4

INTERNATIONAL COOPERATION

Memorandum prepared by the Office of the UnionIntroduction

1. The subject "International Cooperation" was included in the agenda for the first Meeting with International Organizations, which took place in 1983 (IOM/I/1, item 3). At that meeting, the subject was thoroughly discussed (see paragraphs 77 to 112 of the Record of that meeting (document IOM/I/12)). The basis for the discussions at that 1983 meeting was document IOM/I/4. Documents IOM/I/4 and IOM/I/12 have been distributed to the expected participants in IOM/II.

2. The subject was included in the agenda for the second Meeting with International Organizations since it can be expected that further developments in international cooperation make it desirable to renew the discussion with the international organizations on that subject. As far as new developments are concerned, the activities of UPOV itself and those of other organizations have to be considered separately.

Activities of UPOV

3. As far as the activities of UPOV are concerned, the following may be said:

4. The List of the Taxa Protected in the Member States of UPOV and in the Signatory States of the 1978 Act of the Convention, as submitted to the eighteenth ordinary session of the Council of UPOV, held in October 1984, is reproduced in section 8 of the UPOV Collection of Important Texts and Documents (subsequently referred to as "the Collection"). More recent developments are published in "Plant Variety Protection". Reference is made to the following publications: Plant Variety Protection No....., Page [to be supplemented for document IOM/II/4].

5. As far as fees are concerned, the Recommendation on Fees in Relation to Cooperation in Examination (section 21 of the Collection) has not been changed. The amounts of the fees charged at present by the national authorities can be found, for a number of States, in recent issues of "Plant Variety Protection". As to the more recent developments, reference is made to pages 2 to 8 of "Plant Variety Protection" No. 42 [to be supplemented for document IOM/II/4].

6. As far as administrative proceedings are concerned, the Council, at its eighteenth ordinary session, held in October 1984, adopted a new UPOV Model Form for an Application for Plant Breeders' Rights and a new UPOV Model Form for an Application for a Variety Denomination. Those new model forms are reproduced in sections 10 and 11 of the Collection.

7. As far as cooperation in examination is concerned, the Council, at the same session, adopted a new UPOV Model Administrative Agreement for International Cooperation in the Testing of Varieties. That model is reproduced in section 19 of the Collection. It is basically characterized by the fact that the authority of a Contracting State is also obliged to take over the results of an examination performed by the authority of another Contracting State even if both authorities have suitable testing facilities for the species in question. In other words, the new type of agreement guarantees that normally only one examination is performed for each variety for which protection has been applied in the Contracting States.

Initiatives of Other Bodies

8. As far as the initiative of the Commission of the European Communities is concerned, having as its object the creation of a European/Community Breeders' Right, it can be said that the representative of the Commission reported, at the eighteenth ordinary session of the Council of UPOV, that the observations of the Member States of the Communities and of the professional organizations set up at European Community level, had encouraged the Commission to continue with its initiative. On that occasion, it was also stated that the Commission was organizing work on the writing of a preliminary draft, which would also reply to the individual questions asked and observations made during the consultation procedure. At the time of drafting this document, the first draft of the Commission of the European Community was not available.

[End of Annex and of document]