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UPOV

INTERNATIONAL UNION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS

GENEVA

COMMITTEE OF EXPERTS ON INTERNATIONAL COOPERATION IN EXAMINATION

Second Session

Geneva, January 15 to 17, 1975

POSSIBLE WAYS OF ACHIEVING MULTILATERAL COOPERATION IN EXAMINATION

Memorandum of the Office of the Union

1. For the purposes of this document:

(i) "examination" means the testing, in the field or in a glasshouse, as the case may be, of a given variety of plants, to verify whether it is new (distinct), homogenous and stable to the extent required for the granting of a plant breeders' right to its breeder;

(ii) "national Office" means the "administration" or office of a member State of UPOV whose duty, under the law of that State, is to decide upon applications for the grant of plant breeders' rights under that law;

(iii) "member State" means a member State of UPOV.

2. It is believed that the rules governing multilateral cooperation in examination should be laid down in an agreement which would be entered into by those States members of UPOV which wished to participate in such cooperation. The agreement could take the form of a treaty ("special agreement" under the UPOV Convention) or--at least for a transitional period--of a decision of the Council of UPOV. It will doubtless require complementing on certain details by Regulations which would be adopted by the Council of UPOV. It is suggested that the agreement (whether a treaty or a decision) should incorporate the following three principles:

3. PRINCIPLE No. 1: Each member State would be required to announce in writing to the Council of UPOV which species its national Office was ready to examine according to the UPOV Convention and the applicable test guidelines approved by UPOV for the purposes of the agreement.

4. The announcement could be accompanied by certain conditions, for example: that it will apply only if a certain number of other national Offices inform the Office of the Union that they would use the results of the examination; that the announcement will cease to have effect if a certain number of requests for examination is not reached in a given year; that the readiness to examine exists only for a certain number of requests per year.

5. The announcement would have to indicate the amount of the fee charged for each examination and the moment in time when the fee has to be paid.

6. The Regulations should indicate whether any request for examination (and the transmittal of the material to be examined) must come from the breeder or from a national Office, or that it may come from either.
7. The Regulations could allow certain departures from the test guidelines. They should fix the time limits within which the examination has to be completed and its results communicated. The results of examinations effected for the purposes of certifying the variety for inclusion in the national list could be used, provided that the criteria for examination included those prescribed by the UPOV test guidelines (with the departures, if any, authorized by the Regulations).
8. Any announcement could be withdrawn, or its conditions modified, at any time, provided that such withdrawal or modification would not apply to varieties transmitted to the national Office before it indicated the withdrawal or modification.
9. PRINCIPLE No. 2: The Council would decide on the acceptance of the announcement.
10. In its decision, the Council would take account of the likelihood of the announcing State's national Office performing an examination satisfying the required standards, of the reasonableness of the fees and of the acceptability of any other conditions which might accompany the announcement.
11. It is desirable that the greatest possible number of species should be the subject of accepted announcements and that, generally, the same species should be the subject of only one accepted announcement. (The latter principle should be set aside, however, if climatic conditions, the great number of requests or other circumstances so require.) These principles, too, should guide the Council in deciding on the acceptance or refusal of any given announcement.
12. The acceptance of the announcement, together with all the pertinent details, would be published by the Office of the Union (in its Bulletin or Gazette).
13. It is believed that, by giving such a role to the Council, the likelihood of reliance by a member State on examinations performed by the national Office of another--foreign--member State would be increased, because the impartiality of the Council and its professional prestige would lend a certain "international trustworthiness" to examinations carried out in respect of a given species by a given national Office.
14. The Council would have the right to withdraw the acceptance pronounced by it--for example because the tests carried out proved to be consistently poor--provided that such withdrawal would not apply to varieties already under examination.
15. PRINCIPLE No. 3: Each member State would be required to inform the Office of the Union of the legal effect that it would give to positive examination certificates issuing from a national Office in respect of any variety belonging to a species for the purposes of which that Office had been "recognized" (as indicated under Principle No. 2 above).
16. Such an indication would be published by the Office of the Union (in its Bulletin or Gazette).
17. Any member State could remain silent or give a negative indication with respect to any species announced and accepted under Principles Nos. 1 and 2. Silence would be regarded as a negative indication.
18. The legal effect given may be of any kind and degree, according to the wishes and legal possibilities of the State. The following three possibilities are typical:

- (i) The State will grant the title of protection of plant breeders' rights if the examination certificate is positive (subject only to payment of the national fees--other than any fee corresponding to the cost of the examination--and subject to translation into its national language--of certain parts only?--of the examination certificate). This would be the maximum legal effect. It would amount, in practice, to what is sometimes called an "international right" or "international certificate," although, naturally, not for the purposes of all member States but only for the purposes of that or those member States which accepted this--maximum--legal effect. On the basis of declarations made, particularly at the October 1974 UPOV Meeting of Member and Non-Member States, it would appear that, for certain States and for certain species, the existence of examinations carried out

abroad and the possibility of basing the grant on such foreign examinations constitute the only way for granting protection to varieties belonging to such species, since such States are not in a position to carry out examinations themselves but are nevertheless prepared to grant protection.

(ii) The State will consider the examination (carried out abroad) as replacing the examination which, otherwise, would have to be carried out by its own national Office. The grant, or the refusal of the grant, would be a matter for the national Office: even where the examination certificate of the foreign examining Office was positive, the national Office could refuse the grant, for example because it draws other conclusions from the test results than did the examining Office. Under this solution, it would be desirable that the national Office should not require the payment of any fee corresponding to the cost of examination (because it did not effect any); it could, however, require that at least certain parts of the examination certificate be translated into the national language of its State.

(iii) The State will charge a lower fee--for example half of the full rate--where the applicant produces the foreign examination certificate. Under this solution, the national Office could effect an examination--full or partial--if it so desires, but it would treat the foreign test results as replacing or partly replacing testing by its own means.

19. Where, according to the national law of any State, the examination of any variety requires testing in more than one place, the examination effected abroad, under the agreement in question, could be given the effect described in (ii) or in (iii) of the preceding paragraph.

20. The legal effect indicated by any member State could, at any subsequent time, be modified by means of a new communication addressed to the Office of the Union; however, such modification would not apply to varieties already under examination.

21. Where any State chose the effect described in points (ii) or (iii) of paragraph 18, above, but the examination certificate draws negative conclusions as to the novelty, etc., of the examined variety, such (negative) certificate would have to be transmitted to the national Office of such State (since it may draw, from the same test results, other conclusions than did the examining Office).

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