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INTERNATIONAL UNION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS

GENEVA

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REPORT ON THE WORK OF THE COMMITTEE OF EXPERTS
ON THE INTERPRETATION AND REVISION OF THE CONVENTION

AND

DRAFT PREAMBLE TO THE REVISED CONVENTION

Prepared by Mr. H. Skov,
Chairman of the Committee of Experts
on the Interpretation and Revision of the Convention

Report

to

the Council of the International Union

for the Protection of New Varieties of Plants

(UPOV)

submitted by the Chairman

of the

Committee of Experts on the

Interpretation and Revision of the

Convention

I. Establishment and Activities of the Committee

1. The Committee was established by the Council at its eighth ordinary session held from October 24 to 26, 1974. The main task of the Committee was to examine questions of interpretation of the present text of the Convention and to prepare draft amendments to the Convention.

2. The decision to establish the Committee was taken following a meeting held from October 21 to 23, 1974, with representatives of several non-member States and professional international organizations, the purpose of which was to provide information on the aims and the work of UPOV and to discuss the conditions which might need to be fulfilled to make UPOV attractive to States which do not yet belong to it.

3. The Committee has met in the following six sessions:

First session: February 25 to 28, 1975

Second session: December 2 to 5, 1975

Third session: February 17 to 20, 1976

Fourth session: September 14 to 17, 1976

Fifth session: March 8 to 10, 1977

Sixth session: September 20 to 23, 1977

The third and fifth sessions were attended by a considerable number of representatives of non-member States and professional international organizations.

4. In September 1975 members of the Committee visited the United States of America and Canada. The purpose of visiting the United States of America was, first, to examine on the spot the two systems existing in the United States of America for the protection of plant breeders' rights--with particular reference to the examination of new varieties of plants--for the purpose of obtaining the necessary information from the government authorities and selected circles of breeders in that country on the prospects of the country's accession to the UPOV Convention and, second, to discuss questions of mutual interest with those government authorities and breeders' circles. The purpose of visiting Canada was to have discussions there with the Canadian Department of Agriculture and Canadian breeders' organizations in view of the fact that the introduction of a plant variety protection system was under discussion in Canada.

5. In connection with the meetings of the Committee the Working Group on Variety Denominations has met to discuss those provisions of the Convention which fall under the terms of reference of that Working Group.

II. Analysis of the Text

6. At its fourth session the Committee decided to submit a full revised Act, that is, a text comprising both the unchanged provisions of the existing Convention of 1961 and of the Additional Act of 1972 and those provisions where changes are proposed. The Committee hereby submits the text contained in document C/XI/12 to serve as the basis for the deliberations of a Diplomatic Conference.

7. In the following paragraphs the main questions which have required the special attention of the Committee will be dealt with. For minor details reference is made to the text proposed by the Committee and the attached explanatory notes.

8. The Committee discussed at length the provision in the second sentence of Article 2(1) according to which protection for one and the same genus or species must be granted only under one of the two possible forms of protection, a patent or a special title of protection. The Committee felt that the provision under discussion was justified for those States which progressively extend the protection species by species, as is the case in most States, and for those States the Committee considered it desirable to maintain the principle of only one form of protection for the same genus and species. On the other hand, the Committee

recognized that the said provision might lead to difficulties in States where for historical reasons vegetatively propagated plants can be protected by the grant of plant patents while sexually reproduced plants can be protected by the grant of a special title of protection. For that reason the Committee has agreed on an exceptional clause whereby such States may continue their established practice (see Article 34A of the proposed text).

9. For several reasons the Committee has found it expedient to maintain the definition of "variety" in Article 2(2) but to redraft it, first of all in order to include in the definition new types of varieties which have been developed since the adoption of the Convention, such as multilines or multiclones, and which will be developed in the future as a result of the progress in the field of plant breeding. The wording of the definition proposed by the Committee follows the generally accepted language (see for instance the International Code of Nomenclature of Cultivated Plants) and includes any population or assemblage of plants which is capable of cultivation and which is sufficiently homogeneous and stable.

10. On the other hand, the Committee is aware of the fact that some States may not be able to protect all types or categories of plants of a given species. A practical example is a division of species into ornamental plants and "utility plants" (e.g., fruit-bearing plants or fodder plants). But above all mention should be made of hybrids which are not eligible for protection in some States, because the breeders' interests are considered to be sufficiently safeguarded by the de jure protection or de facto possession of the inbred lines. For that reason the Committee has proposed the addition of a new paragraph leaving the member States free to decide which type or types of varieties will be protected.

11. When the original text of the Convention was drafted, in 1961, the drafters confined themselves to an obligatory list of 15 important species that were of particular significance in the European context: the list contained in the Annex to the Convention and mentioning those species to which member States were obliged to apply the Convention within certain time limits. The Committee was aware of the fact that this list is less relevant in other parts of the world, and that a considerable number of non-European States would find it difficult to apply the Convention to all these species, for which reason the existing list would constitute one of the major obstacles to the accession of several States to UPOV. On the other hand, experience in the present member States has proved that, normally, States are able to extend the Convention to a far greater number than the minimum requirement in the list. For these reasons the Committee decided to propose a complete deletion of the list and to increase to 24 the minimum number of genera and species to be protected successively within a prescribed period, it being understood that the choice of the genera and species to be protected in each member State would be entirely a matter for that State (see Article 4(3) of the proposed text). However, some States may find difficulties in extending the protection to 24 genera and species, for which reason Article 4(4) and (5) of the proposed text authorizes the Council of UPOV to grant exemptions in special cases.

12. According to the existing Convention member States may derogate from the national treatment principle in the case of genera and species not included in the list (and instead may limit the benefit of protection to nationals of those other member States in which their own nationals enjoy protection for the same genus or species under the reciprocity principle), whereas the national treatment principle applies in the case of all genera and species included in the list so that nationals of member States which have not (yet) extended protection to a given genus or species included in the list are entitled to protection in other member States where the genus or species has already been made eligible for protection. As a consequence of the deletion of the list referred to in the preceding paragraph, the Committee has opted for the reciprocity principle in respect of all genera and species. The corresponding provision has been transferred from Article 4(4) of the existing text to Article 3(3) of the proposed text.

13. Several proposals have been made with a view to extending the rights of the breeders as specified in Article 5 of the present text. In particular, it has been proposed, in respect of ornamental plants, to extend the protection to the final product (typically, the cut flower). The Committee was aware of the fact that cut flowers and--to some extent--plants are imported from non-member States to member States without any royalty being paid to the breeder. Since such practice is prejudicial not only to the breeders but also to the national producers because of the distortion of competition in the importing member States, the Committee has expressed

sympathy with the idea of assuring the breeders of royalties for such imported goods. However, the Committee considered that provisions to that effect should be established by national legislation by virtue of Article 5(4), since an extension of the minimum protection provided for in Article 5 might seriously jeopardize ratification of or accession to the revised text. The Committee took the same stand in the case where seed is multiplied not for the purpose of selling it but for the purpose of using it, in the same enterprise, for the production of plantlets for sale, which under the present text of the Convention does not require the authorization of the breeder. However, some members of the Committee declared their intention to raise the question of the adoption of a recommendation to member States to legislate so as to ensure the rights of the breeders in both cases.

14. In answer to the question whether or not the sale of seed from one farmer to another should be considered commercial marketing within the meaning of Article 5, the Committee has stated that it lay within the competence of the member States to define in their domestic laws what is to be regarded as commercial marketing, and provided that the sale from farmer to farmer is performed within very narrow restrictions it may be considered as not being an infringement of the Convention.

15. The novelty requirements laid down in Article 6 of the present Convention for granting protection of a variety can be summarized as follows:

(a) 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;

(b) at the time of application for protection in a member State the variety itself must not have been offered for sale or marketed, with the consent of the breeder, in that State or for longer than four years in another State.

ad a. The Committee has discussed a possible rewording of the expression "important characteristics," so as to clarify the text. However, since no practical difference was seen in the standards applied for judging distinctness, and since the Council has adopted, in connection with the establishment of test guidelines, an explanation which is generally accepted, the Committee saw no need for further clarification. The explanation which is contained in document TG/1/1, entitled "General Introduction to the Guidelines for the Examination of Distinctness, Homogeneity and Stability of New Varieties of Plants," reads as follows:

"An important characteristic is not necessarily a quality which is connected with the idea of a certain value which the variety may possess. The characteristics listed in the Guidelines are important for distinguishing varieties one from another, but these lists are not exhaustive and other characteristics may be added when they have been found useful."

ad b. Some patent and other legislations allow a period of one year before the application ("period of grace") in which it is permitted to make the invention publicly known (for plant varieties in particular: to market the varieties) without causing prejudice to novelty. The Committee was aware of the fact that States having established the tradition of a period of grace and even States envisaging the introduction of a period of grace would encounter insurmountable difficulties in acceding to the Convention unless the Convention permitted the period of grace, and therefore the Committee has decided to propose this possibility. In addition, it is proposed that the period of four years, expiring at the filing date of the application, during which the variety may have been offered for sale or marketed in a State other than the State in which the application is filed be extended to a period of six years in the case of certain groups of plants which are usually slow-growing and for which the Convention already envisages a longer minimum period of protection.

16. A special explanation should be given for the concept of "common knowledge." Under Article 6(1)(a) of the present Convention this concept is related to the other varieties with which the submitted variety must be compared in the course of examination, and the factors by which common knowledge may be established are explained in the Convention. The Committee does not propose any change in this respect. However, the Committee has felt it desirable also to specify the relation of this concept to the variety submitted for the granting of protection (the variety itself) by adding a provision in Article 6(1)(b) (in fine) to clarify that common knowledge (for instance, by means of a publication) of the variety itself

shall not affect the right to protection unless such common knowledge has been established by offering the variety for sale or marketing. This provision contradicts the current patent novelty criteria, and would cause difficulties in some States, especially those States which provide for protection under different forms for sexually reproduced and for vegetatively propagated varities. In order to obviate this difficulty an exemption clause is proposed in Article 34A.

17. Regarding the examination of the variety referred to in Article 7 of the present Convention, the Council adopted at its tenth ordinary session (October, 1976) the following statement:

"(1) It is clear that it is the responsibility of the member States to ensure that the examination required by Article 7(1) of the UPOV Convention includes a growing test, and the authorities in the present UPOV member States normally conduct these tests themselves; however, it is considered that, if the competent authority were to require these tests to be conducted by the applicant, this is in keeping with the provisions of Article 7(1), provided that

(a) the growing tests are conducted according to guidelines established by the authority, and that they continue until a decision on the application has been given;

(b) the applicant is required to deposit in a designated place, simultaneously with his application, a sample of the propagating material representing the variety;

(c) the applicant is required to provide access to the growing tests mentioned under (a) by persons properly authorized by the competent authority.

(2) A system of examination as described above is considered compatible with the UPOV Convention."

It should be noted that the consequence of failure to give access to the growing tests is that the application will be rejected.

18. Considering the total period of five years after the deposit of the first application in a member State during which the breeder can defer, under Article 12 of the present Convention, the furnishing of the required additional plant material to other member States where the breeder has also applied for protection, the danger exists that a breeder in order to get priority might file an application in respect of a variety which he has not yet finished, even foreseeing that protection may be rejected in the member State where the first application was lodged. In order to avoid such a situation--or at least to limit the period--the Committee has decided to propose that when the first application has been withdrawn or rejected the States where the subsequent filings have been made may require the additional documents and material to be furnished within an adequate period.

19. Whereas the present text (Article 13(3)) provides that a breeder who submits his trademark as a variety denomination must renounce his right to the trademark, it is proposed in the new text only to provide that he may no longer assert his right to the trademark. Furthermore, it is proposed that this provision should be limited to member States applying the provisions of the Convention to the genus or species to which the variety belongs.

20. No other major amendments to Article 13 have been proposed. The Committee was unable to accept a proposal to delete the second part of the first sentence of Article 13(2): "in particular, it (the denomination) may not consist solely in figures." However, considering that some States which have the established practice of admitting variety denominations consisting solely of figures might find it difficult or impossible to join UPOV on account of the provision in Article 13(2), the Committee has proposed a possibility of derogation from that provision (see Article 36A).

21. The main proposals for amendments to provisions related to the functioning of UPOV and to treaty law can be summarized as follows:

(a) to omit the provisions regarding the supervision by the Government of the Swiss Confederation;

(b) to substitute for the authority given to UPOV to decide on cooperation with BIRPI a provision giving UPOV legal capacity in general;

(c) to expand the scale of contributions from member States;

(d) to entrust the Secretary General of UPOV with the depositary functions in respect of the new Act and to receive instruments of ratification and accession as well as notifications;

(e) to amend the present procedure for accession to the Convention by States which have not signed the Convention;

(f) to include an Article establishing the relations between States bound by different texts.

ad a. In 1961 when the Convention was set up, BIRPI was under the supervision of the Swiss Government, and in view of the cooperation foreseen between UPOV and BIRPI it was only natural that UPOV should also be placed under the same supervision. Since then BIRPI has been replaced by WIPO, which is not under that supervision, and since UPOV is now continuing the cooperation with WIPO, it is equally natural that the supervision by the Swiss Government should be brought to an end. It should be added that the Swiss Government has declared that it would have no objection to the proposed amendment.

ad b. Considering the above-mentioned proposal to discontinue the special role of the Swiss Government and the replacement of BIRPI by WIPO, the provision on cooperation with BIRPI cannot be maintained in its present form. In order to take account of this new situation the Committee proposes to include in the new text a provision giving UPOV legal capacity in general as is the case for other international Unions of a similar nature. Furthermore, the Committee proposes the omission of a special reference to WIPO, since such reference could be interpreted as excluding the possibility of cooperation with other public or private international organizations. In this connection the Committee wishes to express its entire satisfaction with the existing relations between UPOV and WIPO and to stress that it does not envisage a change of the established cooperation.

ad c. The present contribution system operates with a relatively low range from the highest class to the lowest, namely, one to five, and only in exceptional circumstances can the lowest class be diminished to one-tenth of the highest. In order to widen this range and give more flexibility as a whole the Committee proposes additional classes above, below and between the present classes with the possibility of allowing smaller fractions in exceptional circumstances.

ad d. It is proposed to discontinue the relatively complicated system set up in the present Convention under which instruments of ratification shall be deposited with the French Government, while instruments of accession shall be deposited with the Swiss Government and some declarations shall be made to the French Government and other declarations and notifications to the Swiss Government. Instead it is proposed that the Secretary-General of UPOV shall be entrusted with all the tasks relating to depositary functions and receipt of notifications.

ad e. Under the present Convention States which have not signed it may apply for accession to the Convention and thereby become members of UPOV only if the Council by a qualified majority considers that the legislation, etc., of that State conforms with the Convention. This admission procedure is proposed to be amended in the new text in such a way that States which have not signed it should consult the Council in respect of their legislation before depositing their instruments of accession. In view of the very special requirements of the Convention regarding the national laws such procedure is desirable.

ad f. Whereas there is no problem in respect of the relationship between States which are bound only by the old text ("old members") and between States which are bound only by the new text, whether or not they are "old" or "new" members, the Committee considers it necessary to establish the relationship between "old" members some of which are also bound by the new text and some of which are not. The Committee considers it expendient to clarify that in this case the relationship shall be based on the old text. This leaves the relationship between States bound only by the old text ("old members") and States bound only by the new text ("new members"). For this case the Committee proposes that a link could be established by means of a notification made by the old member States declaring that they will consider themselves bound by the old text vis-à-vis the new member States with the consequence that the new member States will be bound by the new text vis-à-vis the

States making such a declaration. In this connection it should be mentioned that, according to established practice, the member States constitute one Union, that is a single entity from the administrative point of view, with the consequence that there is only one Council, one budget and one set of accounts, and there is not a separate administration for each separate Act of the Convention, although the member countries are bound by different Acts and pay their contributions on the basis of these different Acts.

III. Conclusion

22. By submitting this report and the attached* Draft Convention the Committee considers its task fulfilled. The Chairman wishes to underline the spirit of co-operation and goodwill in which all the members of the Committee as well as the Secretariat have contributed to the work. It should also be underlined that the members of the Committee have acted in a strictly personal capacity, not binding their Governments and not necessarily representing the point of view of their Governments. Necessary compromises have been found without any intention of satisfying national wishes. It is a pleasure for the Chairman to express his appreciation of the atmosphere of mutual understanding and friendship which has characterized the joint efforts to achieve the best possible solutions.

Lyngby (Denmark), November 1, 1977

H. Skov

* See document C/XI/12

DRAFT PREAMBLE
TO THE
CONVENTION ON THE PROTECTION OF NEW VARIETIES OF PLANTS

submitted by the Chairman of the Committee of Experts
on the Interpretation and Revision of the Convention

THE CONTRACTING STATES,

Considering that the International Convention for the Protection of New Varieties of Plants, of December 2, 1961, hereinafter referred to as "the Convention," has proved a valuable instrument for international cooperation in the field of the protection of the rights of breeders,

Reaffirming their statements contained in the Preamble to the Convention to the effect that

(i) they are convinced of the importance attaching to the protection of new varieties of plants not only for the development of agriculture in their territory but also for safeguarding the interests of breeders,

(ii) they are conscious of the special problems arising from the recognition and protection of the right of the creator in this field and particularly of the limitations that the requirements of the public interest may impose on the free exercise of such a right,

(iii) they deem it highly desirable that these problems, to which very many States rightly attach importance, should be resolved by each of them in accordance with uniform and clearly defined principles,

Considering that in recent years the idea of protecting the rights of breeders has gained a strong foothold in many States which have not yet acceded to the Convention,

Having regard to the fact that for some of these States minor amendments to the Convention are necessary before they will be able to accept it,

Considering that the necessary amendments do not in general affect the main principles of the Convention,

Anxious to reach an agreement on these principles to which other States having the same interests may be able to adhere,

Considering, furthermore, that some provisions regulating the working of the Union created by the Convention should be updated,

Having regard to the provisions of Article 27 of the Convention,

Have agreed as follows:

. . . . . .

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