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INTERNATIONAL UNION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS

GENEVA

ADMINISTRATIVE AND LEGAL COMMITTEE

Twenty-ninth Session

Geneva, October 21 and 22, 1991

PROPOSAL OF THE IPG OF ASSINSEL
FOR AN ASSINSEL STATEMENT REGARDING THE IMPLEMENTATION OF
THE NEW PRINCIPLE OF ESSENTIALLY DERIVED VARIETIES
IN THE UPOV CONVENTION

Information Received by the Office of the Union from ASSINSEL

1. The Annex to this document reproduces the thoughts of ASSINSEL regarding the implementation of the new principle of "essentially derived varieties" and is intended as a working document only.

[Annex follows]

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PROPOSAL OF THE IPG OF ASSINSEL FOR AN ASSINSEL STATEMENT REGARDING THE IMPLEMENTATION OF THE NEW PRINCIPLE OF ESSENTIALLY DERIVED VARIETIES IN THE UPOV CONVENTION

At the UPOV Diplomatic Conference in Geneva in March 1991, new conditions in relation to essentially derived varieties (e.d.v.) were introduced into a revised convention. The following resolution was adopted:

> "The Diplomatic Conference for the Revision of the International Convention for the Protection of New Varieties of Plants held from March 4 to March 19, 1991, requests the Secretary General of UPOV to set in motion immediately after the closing of the Conference the establishment of draft standard guidelines, for adoption by the Council of UPOV, on essentially derived varieties."

In response ASSINSEL presents the following statement.

After careful consideration of the new text Article 14(5) it is concluded that the implementation of this new concept should take the following points into consideration.

Introduction

In all previous statements ASSINSEL has strongly approved of the introduction of the essentially derived varieties (e.d.v.) concept. With respect to the very recent developments in the field of plant breeding and biotechnology and the resulting lack of clarity between the fields respectively covered by patents and plant breeders' rights and the degree of protection which they offer, ASSINSEL considers that the new principle builds a bridge between the two protection systems in the interest of the affected industry. This new principle will also decrease drastically the possibility of plagiarism in plant breeding.

ASSINSEL plant breeders are convinced that this new principle brings about an important strengthening of plant breeders' rights without any real restrictions of the key issue of the so-called breeders' exemption.

It has to be appreciated that the introduction of this new principle into the UPOV Convention represents a step into new territories. As usual with such situations there are uncertainties and doubts. Therefore, at this stage, the national legislators - as well as the UPOV Council - should restrict their statements to general formulation of this new principle and should not go too far into detailed regulations. A too detailed regulation would run the risk that omissions will subsequently become apparent or that future developments will be hampered or not provided for. Furthermore the implementation should be practical and not too complicated.

As will be shown in the following, this principle mainly involves questions of scope of protection and enforcement of the rights of the breeder. It is, therefore, left to the initiative of the breeder to enforce these rights.

A. General Aspects

1. In its principle, the concept of e.d.v. deals with the genotype rather than with the phenotype. Contrary to the pinciple of "clear distinctness" of Article 7 of the UPOV Convention being judged on the basis of the expression of certain characteristics, Article 14(5) has to do with the question whether the essential part of the genotype of the initial variety (i.v.) has been taken over - that means whether it retains virtually the totality of the genotype of the i.v.

In this respect, only the quantity of the total genotype taken over (conformity/genetic distance) should be decisive.

Furthermore, depending on the given genetic constitution of a given plant species and established breeding technology the required threshold of the quantity of conformity can be different for different species.

2. According to Article 14(5)(b) the "genetic distance/conformity" has to be judged on a crop by crop basis in relation to the method of derivation used.

The given list of examples for methods of derivation [selection of a natural or induced mutant or of a somaclonal variant, selection of variant individual from plants of the i.v., backcrossing, transformation by genetic engineering: see Article 14(5)(c)] is not an exhaustive list.

3. Whether or not a plant variety is an e.d.v. may need to be based upon scientifically reliable methods. Depending on the given crop, this assessment can vary in relation to different methods of derivation used and also by different genetic distances. Scientific and reliable methods for the proof of genetic distances might be e.g. RFLP (Restricted Fragment Length Polymorphism), RAPD (Random Amplification of Polymorphic DNA) and PCR (Polymerase Chain Reaction).

4. This assessment can only be made by experts skilled in the art.

5. The plant variety offices have only a duty to prove whether a plant variety having been entered for protection fulfills the requirements for protection (DUS-test), regardless of the question of whether it is an e.d.v. or not. Thus for ASSINSEL it is important and obvious that the determination of the existence of an e.d.v. should not be a part of the procedure for granting plant breeders' rights although access to the registration data should be available.

6. The determination as to whether a plant variety is an e.d.v., is mainly a question of whether it has been derived from one protected variety (see 2). Where a plant variety has been developed independently from an i.v. there cannot be dependency. However, the general rules of burden of proof have to be considered (see C. below).

7. An e.d.v. remains an e.d.v. for ever. This means that other varieties cannot legally be derived from an e.d.v., even if the protection period of the i.v. has already been exhausted and, therefore, dependency does not exist any more. The reason for this lies in the spirit of the concept of dependency. This very new principle has mainly been introduced to protect more efficiently the initial breeders and not those who make derivations from it.

B. Special Interpretations of Article 14(5)

1. The principle of e.d.v. only exists in favour "of the protected variety" [see Article 14(5)(a)(i)].

   This means:

   a) The initial variety must be a protected one.

   b) Dependency can only exist from one protected variety alone.

   c) A dependent variety can be directly derived from the i.v. or from a variety that is itself predominantly derived from the i.v. [see Article 14(5)(b)(i)]. As already mentioned under A.7, dependency only exists in relation to the i.v.

2. ASSINSEL interprets Article 14(5)(b) ("a variety should be deemed to be essentially derived from the i.v.") in that the e.d.v. effectively has to meet the following three requirements in relation to the initial variety:

   a) clear distinction (in the sense of Article 7);

   b) predominant derivation;

   c) genetic conformity.

   If one requirement is not fulfilled, there will be no dependency.

   As already mentioned in this context the question of genetic conformity is the main one, rather than the expression of characteristics which is more a question of the phenotype than of the genotype.

3. These basic elements have to be considered on a crop by crop basis in order to elaborate appropriate specific aspects as to the methods of derivation and as to the methods to measure derivation. This will result in different thresholds being required to characterize dependency on a crop related basis.

C. General Rules for Burden of Proof

   a) According to the general rules of burden of proof, each party has the burden of proof for those requirements of the legal norm which is favourable to him. That means that the owner of the i.v. has to prove all the 3 requirements of dependency [Article 14(5)(b)(i)-(iii)].

   b) If the owner of the i.v. can prove the requirement of "genetic conformity" his burden of proof regarding "predominant derivation" is facilitated by the so-called "prima facie" proof (proof by evidence). The existence of "genetic conformity" gives the presumption that the second breeder has predominantly derived his variety from the i.v. On the other hand, if the owner of the i.v. can prove the requirements of "predominant derivation", the existence of "genetic conformity" can be also presumed.

   c) If the owner of the i.v. has proved the requirements of dependency and the second breeder claims that he has developed his variety without using the i.v., he has to prove it (reversal of burden of proof). If he succeeds, no dependency exists.

[End of Annex and of document]