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UPOV

CAJ/XIX/4
ORIGINAL: French
DATE: March 12, 1987

# INTERNATIONAL UNION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS

GENEVA

## ADMINISTRATIVE AND LEGAL COMMITTEE

## Nineteenth Session
## Geneva, March 31 and April 1, 1987

REVISION OF THE CONVENTION

Document prepared by the Office of the Union

1. Pursuant to the decisions taken at the thirty-fourth session of the Consultative Committee (see paragraphs 14 and 15 of document CC/XXXIV/2 Prov.) and endorsed by the Council (see paragraphs 20 et 21(iv) of document C/XX/13 Prov.), the Office of the Union has invited the following international organizations to submit provisional proposals for amendment of the Convention:

- International Association of Horticultural Producers (AIPH)
- International Association for the Protection of Industrial Property (AIPPI)
- International Association of Plant Breeders for the Protection of Plant Varieties (ASSINSEL)
- International Chamber of Commerce (CCI)
- International Community of Breeders of Asexually Reproduced Ornamental and Fruit Tree Varieties (CIOPORA)
- Association of Plant Breeders of the European Economic Community (COMASSO)
- Seed Comittee of the Common Market (COSEMCO)
- International Federation of the Seed Trade (FIS)

- International Commission for the Nomenclature of Cultivated Plants of the International Union of Biological Sciences.

The circular letter that has been sent to them is reproduced at annex I.

2. The Office of the Union has received proposals from member States, organizations invited to make such proposals and from organizations not invited to do so. The proposals are reproduced as follows in the annexes:

- annex II : France
- annex III : Netherlands

- annex IV : CIOPORA
- annex V : COMASSO
- annex VI : FIS
- annex VII : International Commission for the Nomenclature of Cultivated Plants

- annex VIII : Chartered Institute of Patent Agents (CIPA) of the United Kingdom
- annex IX : International Group of National Associations of Manufacturers of Agrochemical Products (GIFAP).

3. The French Professional Union of Maize Breeding and Production (SEPROMA) asked on February 27, 1987 an extension of the deadline for replies. Its letter is reproduced at annex X.

[Annexes follow]

CAJ/XIX/4

ANNEX I

INTERNATIONALER VERBAND
ZUM SCHUTZ VON
PFLANZENZÜCHTUNGEN

GENF, SCHWEIZ

✆ (022) 99 91 11
TX 2.23.76

UPOV

UNION INTERNATIONALE
POUR LA PROTECTION
DES OBTENTIONS VÉGÉTALES

GENÈVE, SUISSE

INTERNATIONAL UNION
FOR THE PROTECTION OF
NEW VARIETIES OF PLANTS

GENEVA, SWITZERLAND

34, chemin des Colombettes
1211 Genève 20

C.U. 1165
-08.4

January 12, 1987

Subject: Proposals for Possible Amendments to the UPOV Convention

Sir,
Madam,

At its twentieth ordinary session, in December 1986, the Council of UPOV decided to put in hand the discussion of proposals for possible amendments to the UPOV Convention. Due to the urgency of the matter, it further decided to discuss the question at the following meetings in 1987:

(i) Session of the Administrative and Legal Committee on March 31 and April 1,

(ii) Session of the Administrative and Legal Committee on October 15 and 16,

(iii) Meeting with international organizations on October 20.

The Administrative and Legal Committee requested the member States to submit to the Office of the Union by March 1, 1987, proposals for possible amendments to the UPOV Convention. These proposals are not to be limited to individual articles of the Convention, but may extend to all of its articles. They may also include the question whether other living matter should be covered by the Convention and, consequently, whether the actual title of the Convention should possibly be changed.

The Council wished to give the international professional organizations a possibility of submitting proposals for amendments before discussions begin within the UPOV bodies. The Council is aware that the time limit of March 1, 1987, is extremely short, but nevertheless prefers

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C.U. 1165
-08.4

to already have your provisional ideas in time for the discussions at the session of the Administrative and Legal Committee in March, rather than to wait for more fully developed proposals.

I therefore invite you to submit initial proposals for amendments to the UPOV Convention to the Office of the Union by March 1, 1987.

You will have the opportunity after the session in March to make more detailed comments on any initial or subsequent draft amendments.

At its meeting in March, the Administrative and Legal Committee will lay down the main items for discussion at the meeting with international organizations scheduled for October 20, 1987. You will therefore have the opportunity on October 20 to give oral explanations to your proposals and to supplement them or to make your comments on proposals made by the member States or by other professional organizations.

I regret that the calendar of meetings does not give you more time for submitting your proposals for amendments to the UPOV Convention, as would have indeed been warranted by this question. I nevertheless hope that, in the same way as the UPOV Council, you will prefer to have the earliest possible opportunity of influencing these new future developments.

I would like to thank you for your comprehension and to convey my best wishes to you and your members and staff for 1987.

Sincerely yours,

W. Gfeller

W. Gfeller
Vice Secretary-General

Distribution: Professional Organizations

[Annex II follows]

ANNEX II

# PROPOSALS OF THE DELEGATION OF FRANCE

## Letter dated March 9, 1987, from Mr. M. Simon, Secretary General of the Committee for the Protection of New Plant Varieties, to the Vice Secretary-General

In response to the wishes expressed by the UPOV Consultative Committee at its meeting on December 1, 1986, I have the honor to send you herewith the views of the French Committee for the Protection of New Plant Varieties on possible amendments to the UPOV Convention of 1961, as revised in 1978.

I hope that they can still be distributed to the member States.

[Enclosure follows]

# VIEWS OF THE FRENCH COMMITTEE FOR THE PROTECTION OF NEW PLANT VARIETIES ON POSSIBLE AMENDMENTS TO THE INTERNATIONAL CONVENTION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS OF DECEMBER 2, 1961, AS REVISED ON OCTOBER 23, 1978

Note: Possible amendments should in an initial stage be examined solely in the context of new plant varieties.

## Article 2, paragraph (1)

| | |
|---|---|
| (1) Each member State of the Union may recognise the right of the breeder provided for in this Convention by the grant either of a special title of protection or of a patent. Nevertheless, a member State of the Union whose national law admits of protection under both these forms may provide only one of them for one and the same botanical genus or species. | The French Committee agrees to the retention of the present wording, subject however to an adjustment to the provisions of Articles 4 and 5 of the Convention.<br>The Committee considers it inappropriate for cumulative protection of a new variety to be made possible by means of an amendment to the present wording. |

## Article 4, paragraph (1)

| | |
|---|---|
| (1) This Convention may be applied to all botanical genera and species. | No change. |

## Article 4, paragraphs (2) to (5)

| | |
|---|---|
| (2) The member States of the Union undertake to adopt all measures necessary for the progressive application of the provisions of this Convention to the largest possible number of botanical genera and species.<br><br>(3)(a) Each member State of the Union shall, on the entry into force of this Convention in its territory, apply the provisions of this Convention to at least five genera or species.<br><br>(b) Subsequently, each member State of the Union shall apply the said provisions to additional genera or species within the following periods from the date of the entry into force of this Convention in its territory:<br>(i) within three years, to at least ten genera or species in all;<br>(ii) within six years, to at least eighteen genera or species in all;<br>(iii) within eight years, to at least twenty-four genera or species in all. | The French Committee has no objection to the deletion of the minima at present specified in the Convention.<br>It agrees to an increased rate of extension of protection to new genera and species through member States being required to protect on their territory any genus or species of agricultural significance to them as soon as three member States--of which at least two provide for an official examination of distinctness, homogeneity and stability of the plant material--have extended protection to that genus or species. |

(c) If a member State of the Union has limited the application of this Convention within a genus or species in accordance with the provisions of Article 2(2), that genus or species shall nevertheless, for the purposes of subparagraphs (a) and (b), be considered as one genus or species.

(4) At the request of any State intending to ratify, accept, approve or accede to this Convention, the Council may, in order to take account of special economic or ecological conditions prevailing in that State, decide, for the purpose of that State, to reduce the minimum numbers referred to in paragraph (3), or to extend the periods referred to in that paragraph, or to do both.

(5) At the request of any member State of the Union, the Council may, in order to take account of special difficulties encountered by that State in the fulfilment of the obligations under paragraph (3)(b), decide, for the purposes of that State, to extend the periods referred to in paragraph (3)(b).

Article 5(1), first subparagraph

(1) 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.

It would perhaps be appropriate to delete the words "as such" in order to facilitate verification and the provision of evidence for breeders wishing to enforce their rights.

Article 5(1), second subparagraph

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.

In view of the ineffectiveness of Article 5(4), an amendment would be appropriate to extend to sexually reproduced plants the provisions currently applying to ornamental plants only: in the case of varieties for which only sexual reproduction is used at present, the progress made with in vitro multiplication in

particular makes it necessary to extend the breeder's rights to whole plants and parts of plants for which efficient in vitro multiplication may become possible. The Committee proposes a wording such as the following: "The right of the breeder shall extend to whole plants or parts thereof normally marketed for purposes other than propagation when they are used commercially as propagating or production material."

Article 5, paragraph (3)

(3) Authorisation by the breeder shall not be required either for the utilisation of the variety as an initial source of variation for the purpose of creating other varieties or for the marketing of such varieties. Such authorisation shall be required, however, when the repeated use of the variety is necessary for the commercial production of another variety.

It would be desirable to explore the means of introducing dependence on the holder of rights in a variety which is used as the basis for a slavish modification. By "slavish" the Committee means both:

- resulting from mere observation in favorable circumstances;
- easily repeated in a routine fashion on varieties of one or more species, even where the process underlying the modification is undeniably original.

Article 6(1), subparagraph (b)

(b) 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.

The novelty concept is based on the offer for sale or marketing of the very material for which protection is sought.
Should not novelty be linked to the scope of the rights granted? Then the following would cause loss of novelty:

- the offer for sale or marketing of the variety for which protection is sought, or of any other variety whose commercial production requires repeated use of the first-mentioned variety.

Article 12

(1) Any breeder who has duly filed an application for protection in one of the member States of the Union shall, for the purpose of filing in the other member States of the Union, enjoy a right of priority for a period of twelve months. This period shall be computed from the date of filing of the first application. The day of filing shall not be included in such period.

(2) To benefit from the provisions of paragraph (1), the further filing must include an application for protection, a claim in respect of the priority of the first application and, within a period of three months, a copy of the documents which constitute that application, certified to be a true copy by the authority which received it.

(3) The breeder shall be allowed a period of four years after the expiration of the period of priority in which to furnish, to the member State of the Union with which he has filed an application for protection in accordance with the terms of paragraph (2), the additional documents and material required by the laws and regulations of that State. Nevertheless, that State may require the additional documents and material to be furnished within an adequate period in the case where the application whose priority is claimed is rejected or withdrawn.

(4) ...

It would be desirable to introduce an arrangement whereby each member State making its own technical examination for a genus or species outside the cooperation framework may request either the breeder of a variety for which priority has been claimed or the official testing authorities of the country of the first, basic application to provide a sample of the variety that would be sufficient for the updating of its reference collection for the species concerned.

Article 13

Variety Denomination

The Committee has no objection to the retention of Article 13. It also agrees that the provision could be sufficient on its own for implementation purposes.

[Annex III follows]

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ANNEX III

# MINISTERIE VAN LANDBOUW EN VISSERIJ

DIRECTIE JURIDISCHE EN
BEDRIJFSORGANISATORISCHE ZAKEN

*(bereikbaar met tram- en buslijnen via station Den Haag Centraal)*

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TO:
UPOV
Dr. W. Gfeller
34, Chemin Des Colombettes
1211 Geneve 20
Switzerland

Our ref.
J. 1798

Datum
February 23, 1987

Subject:
Proposals for possible amendments
to the UPOV Convention

Dear Dr. Gfeller,

Herewith I send you some first items which might be discused in the frame word of possible amendments to the UPOV Convention.

They concers the content and the consequences of the article 5.1., 5.1. jo. 5.4. and article 5.3. and could be subject of the study by the Administrative and Legal Committee.

A. The protection of article 5.1. should be enlarged to the multoplication on one's own premises concern (article 5.1.).

B. The protection of the marketed produkt in case of import (article 5.1. ju. 5.4.).

C. The relation between the protected variety and the new variety wich is developed from this variety, either by conventional breeding terhmiques or by bioterhmological techniques.

Yours sincerely,

miss Y.E.T.M. Gerner

7Z36.1

[Annex IV follows]

ANNEX IV

# PROPOSALS OF CIOPORA

Letter dated February 28, 1987, from Mr. R. Royon, Secretary-General, to the Vice Secretary-General

Further to your request of January 12, 1987, we have the honor to transmit herewith the proposals of CIOPORA for those amendments that it wishes to see incorporated in the UPOV Convention.

It was not possible, in the very short time allowed for reply, to convene a special meeting to study this important issue in depth. We had to consult our members by correspondence, and in general we have restated the wishes already expressed by our Association on various occasions (some of them at the Diplomatic Conferences of 1961 and 1978) in dealings both with national authorities and at the international level with UPOV.

We hope that UPOV member States will at last take into consideration our Association's requests which, over the years, have proved justified and have frequently anticipated the problems now confronting UPOV.

[Enclosure follows]

# PROPOSALS OF CIOPORA FOR A REVISION OF THE UPOV CONVENTION

## ARTICLE 2

- Paragraph (1)

Considering that one of the UPOV member States (the United States of America) already allows protection of one and the same plant species in more than one form,

Considering also that the level of protection afforded to breeders under the laws on patents is in general higher and therefore more satisfactory than that afforded by plant breeders' rights,

CIOPORA proposes that the prohibition of the possibility of obtaining dual protection, which seems to result from the provisions of this paragraph, be expressly deleted.

- Paragraph (2)

CIOPORA proposes the deletion of this paragraph.

## ARTICLE 3

CIOPORA wishes to see the principle of national treatment become the rule in all UPOV member States.

## ARTICLE 4

Taking into account the time that has elapsed since the member States became party to the Convention,

Taking into account the possibilities offered by bilateral or multilateral arrangements for the exchange of examination results,

CIOPORA considers that every member State of the Union should be obliged to extend protection, within a maximum of three years from the date of entry into force of the Convention on its territory, to any species already protected in another member State.

CIOPORA wishes to have paragraphs (4) and (5) of Article 4 deleted.

CIOPORA also draws attention to its document CIOP/IOM/4 of September 16, 1986.

ARTICLE 5

- Paragraph (1)

CIOPORA draws attention to its document CIOP/IOM/6 of September 16, 1986, and to its statements of October 1961, January 10, 1976, October 28, 1977, June 1978 (document DC/7) and October 1978.

CIOPORA considers the present wording of Article 5 difficult to improve owing to its shortcomings in both substance and form; CIOPORA therefore suggests that the wording of the Article should be reconsidered in its entirety.

CIOPORA requests that protection of the breeder's rights relate basically to any form of commercial exploitation of plants or parts of plants of his variety and, in particular, as in the field of patents, to their production, use for industrial purposes, offering for sale or marketing, introduction on the territory of the country in which the variety is protected or stocking with a view to industrial use or marketing.

- Paragraph (3)

The phrase "for the marketing of such varieties" could usefully be deleted. It adds nothing to the lawmaker's initial intention to allow full scope for research. Moreover its deletion would enable the notions of "minimum distances" and infringement to be strengthened. The right conferred on the breeder must enable him to prevent any marketing of infringing varieties, in particular varieties which, even if they are not slavish imitations of his variety, cannot be sufficiently distinguished from it and still remain within the bounds of protection defined by the "minimum distances."

ARTICLE 6

- General remark

It is essential that the criteria for sufficient "minimum distances" be defined species by species, and that the "important" characteristics used for assessing the distinctness of a variety give the variety, once protected, a sufficient area of protection in relation to other "characteristics" that are only slightly different and in any event of no concern (for the species in question) to the customers of the varieties concerned.

- Paragraph (1)(a)

Should "precise description in a publication" be considered sufficient disclosure?

- Paragraph (1)(b)

The word "trials" should be replaced by "any use."

- Paragraph (2)

CIOPORA requests that the formalities for the grant of protection be harmonized, in particular through the use of identical forms in all countries.

ARTICLE 7

CIOPORA wishes generally to draw attention to and reiterate its general remarks already submitted to UPOV on prior examination as conceived in the UPOV system and on its drawbacks for breeders (see document CIOP/IOM/3 of September 16, 1985).

- Paragraph (3)

CIOPORA requests that "any member State of the Union may provide" be replaced by "any member State of the Union shall provide."

ARTICLE 8

It is indispensable that the duration of protection be harmonized in all member States. It should be calculated from the date of filing of the application.

ARTICLE 12

CIOPORA requests extension of the priority period to two years.

ARTICLE 13

- Paragraph (2)

CIOPORA requests the deletion of the second sentence "It may not consist solely of figures...".

- CIOPORA uses this occasion to draw attention to its own and other organizations' requests for the total deletion, or amendment according to the wishes of breeders, of the UPOV Recommendations of 1985 on Variety Denominations (see document CIOP/IOM/7 of September 16, 1985, and the statements of CIOPORA during the UPOV meeting on April 18, 1986). This is a matter of urgency, and should be dealt with without waiting for the next revision of the Convention.

CIOPORA reserves the right to elaborate on these observations and requests at a later date. To this end, it wishes to be kept informed of the reactions of the delegations of UPOV member States to this note.

[Annex V follows]

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ANNEX V

PROPOSALS FROM COMASSO

Letter dated February 24, 1987, from Mr. J. Winter, Secretary-General, to the Vice Secretary-General

It is relevant to note, as a preliminary remark, that the mere fact of having to submit proposals on specific points testifies to the absolute necessity of a revision.

On the basic question of the alternatives of patent protection and plant breeders' rights protection for genetic engineering and its products, it should be underlined that our members have different opinions, ranging from the removal of the prohibition of dual protection, in so far as it could be laid down in Article 2 of the UPOV Convention, via a wish for differentiated treatment for products of genetic engineering, to the maintenance of the present provisions. However, it may well be that the need for patent protection would be reduced by a strengthening of plant variety protection.

The limitation laid down in Article 2(2) of the UPOV Convention should be deleted as irrelevant, since the merit of a variety, in terms of protection, should not depend on the propagation method.

The reciprocity under Article 3 of the UPOV Convention is an obstacle to the widespread recognition of protection based on the Convention and to efforts to make it more attractive; it should therefore be deleted.

The provisions of Article 4 of the UPOV Convention (genera and species which must or may be protected) should be amended to make the extension of protection to a particular species automatic in all member States once one of them has provided for such extension. Progress achieved in international cooperation in examination has made the cost argument irrelevant.

The content and scope of protection under Article 5(1) of the UPOV Convention need to be extended to allow for structural developments and developments in the rapid propagation methods.

Our reflections concern the effect of rights on commercial exploitation, i.e. the extension of the notion of exploitation to production with a view to commercial use, as well as the extension of protection to the varietal material, i.e. the material which may be regenerated from whole plants, or the end product where it does not belong to the food sector.

The issue of the farmers' privilege should be considered realistically; if maintained at all, this exemption should be limited to family farms, households, etc.

The principle of the freedom of plant breeding, as such, laid down in Article 5(3) of the UPOV Convention is considered inviolable. On the other hand, our internal discussions have related to the possible deletion of the phrase "or for the marketing of such varieties" in the first sentence of the Article. The purpose of the deletion would not be to introduce a dependency principle, but this undoubtedly requires a new definition of the distinctness criteria.

On the conditions required for protection (Article 6 of the UPOV Convention), an in-depth study is necessary, for example on a new definition of "important characteristics" or of the requirement of worldwide novelty.

Provisional protection under Article 7(3) of the UPOV Convention should be made mandatory; alternatively protection should take effect from the date of filing.

The duration of protection (Article 8 of the UPOV Convention) should be harmonized upwards, for instance on the basis of the relevant provisions of the law of the Federal Republic of Germany; the minimum duration of protection should be discarded.

The equating of the public interest, in terms of Article 9 of the UPOV Convention, with measures to ensure the widespread distribution of the variety is unsound. There is no reason for limiting to that case only the measures necessary to ensure that the breeder receives equitable remuneration. Article 9(2) should be deleted.

The priority period laid down in Article 12 of the UPOV Convention should be extended to 18 months.

The principle written into Article 13 of the UPOV Convention according to which the variety denomination is a generic designation should be deleted to enable breeders to use other forms of protection in non-member States of UPOV.

The prohibition on denominations consisting solely of figures should be removed.

In any event, any recommendations that interpret the provisions of the Convention more restrictively should be eliminated.

The points raised above are in no way final, comprehensive proposals from COMASSO, but reflect the present state of discussions in our organization.

[Annex VI follows]

ANNEX VI

PROPOSALS FROM FIS

Letter dated March 10, 1987, from Mr. M. Besson, Secretary General, to the Vice Secretary-General

...

In the first place we wish to underline that the issue of intellectual property rights is of fundamental importance to the whole seed trade. Until now, our organization has never considered the possibility of a fundamental revision of the Convention or of its extension to other areas of the living world.

The time allowed for the submission of proposals in this survey (as in the case of the previous one based on questionnaire BioT/Q2) is totally insufficient for an in-depth study if we are to start by collecting the opinions of our member States. Yet consideration of these questions does require a study starting at that level.

We therefore reserve our position on the questions raised. Moreover it is quite possible that we will set up a special committee within our Association to study this subject and other problems raised by intellectual property rights in our area.

Nevertheless, we wish to express unequivocally our firm intention to keep abreast of present developments by sending you herewith some remarks on the functioning of the Convention. We consider that these remarks may or must be studied in the light of both practical experience gained in the past and present developments. They are the results of an internal consultation to which not all of our members could reply for want of time. We therefore reserve the right to submit further observations, as is moreover provided in the procedure described in your circular of January 12.

[Enclosure follows]

# REMARKS OF FIS ON THE UPOV CONVENTION

## ARTICLE 2 - FORMS OF PROTECTION

This is still a very open question, and opinions vary as to whether the choice between plant breeders' rights (hereinafter referred to as "PBRs") and patents should be exclusive or whether a free choice between the two forms of protection could be contemplated.

A possible solution could be to substantially strengthen the protection offered by PBRs in order to make them attractive for biotechnology.

There seems to be agreement on the fact that paragraph (2) of this Article should be deleted, as the right to protection should not depend on the propagation system.

## ARTICLE 3 - NATIONAL TREATMENT; RECIPROCITY

With a view to effectively opening up the Convention and the protection offered by it, it is suggested that the principle of reciprocity should be abandoned.

Paragraph (2) is unrealistic and should be deleted.

## ARTICLE 4 - BOTANICAL GENERA AND SPECIES WHICH MUST OR MAY BE PROTECTED

First of all, it is suggested that the number of species covered (paragraphs (2) and (3)) should be substantially increased in order to stimulate the introduction of PBRs.

In addition, the idea has been raised that, given the progress made in international cooperation in examination, it should be possible to offer automatic protection in all member States for genera that can be protected in anyone of them.

## ARTICLE 5 - RIGHTS PROTECTED; SCOPE OF PROTECTION

First of all, the definition of the protected subject matter should be extended to include everything that enables whole plants to be regenerated. This conception is required by the new propagation techniques.

The acts and commercial activities subject to authorization by the breeder should include:

- propagation with a view to commercial production of plants or parts thereof;

- use of plants or parts thereof with a view to production of material (for instance perennial basic products);

- transport, importation (including from countries where the variety is not protected), exportation, stocking for commercial purposes.

The farmers' privilege would remain limited to family farms and households. It would only be tolerated as regional usage.

Finally, in view of the developments in multiplication techniques, it would be appropriate to delete the limitation to ornamental plants and cut flowers appearing in the second half of paragraph (1).

With regard to further plant breeding work, the principle of free access to varieties (even those containing patented genes) seems to be generally recognized.

However, access to varieties at commercial utilization level is still a debated point, reflecting the positions taken regarding the type of protection to be granted, notably to varieties developed by biotechnological means.

A suggestion to reconcile the various points of view might be the following: if a royalty is to be paid for the commercial utilization of varieties containing patented genes, the varieties that host those genes and have been created by "conventional" plant breading should in return be given adequate financial compensation.

ARTICLE 6 - CONDITIONS REQUIRED FOR PROTECTION

Progress in biotechnology requires on the one hand a redefinition of the important characteristics on which distinctness from other varieties is based and of the minimum distances that should separate varieties. On the other hand, the array of tests for assessing distinctness should be extended, and new techniques such as eletrophoresis should be taken into consideration.

With regard to the period before the filing of the application during which the variety may be offered for sale or marketed, there should be a greater differentiation according to species. Some countries wish to have the period extended to six years in the case of cereals.

ARTICLE 7 - OFFICIAL EXAMINATION OF VARIETIES; PROVISIONAL PROTECTION

As with patents, there should be (provisional) protection as from the date of filing of the application.

Harmonization of the examination criteria for hybrid varieties and of the examination procedures used in member States has also been requested.

Finally, competent authorities should have the right to request only the elements necessary for the determination of the characteristics of the variety, and nothing else (paragraph (2)).

ARTICLE 8 - PERIOD OF PROTECTION

There is a unanimous desire for extension of the duration of protection, with a new minimum to be set at no less than 20 years.

ARTICLE 9 - RESTRICTIONS ON THE EXERCISE OF RIGHTS PROTECTED

Paragraph (2) should be deleted.

ARTICLE 11 - FREE CHOICE OF THE MEMBER STATE IN WHICH THE FIRST APPLICATION IS FILED; APPLICATION IN OTHER MEMBER STATES; INDEPENDENCE OF PROTECTION IN DIFFERENT MEMBER STATES

One proposal aims to reverse the system so that dependence of protection becomes the rule, but at the discretion of the applicant. PBRs obtained in one State would then automatically apply in all the others if the applicant so requested. If not, the rule of independence would apply.

ARTICLE 12 - RIGHT OF PRIORITY

The priority period could be extended to 18 months.

ARTICLE 13 - VARIETY DENOMINATION

There have been many reactions in favor of complete revision of this provision or at least its adaptation to commercial realities. Inadequate restrictions should be deleted.

[Annex VII follows]

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ANNEX VII

PROPOSALS FROM THE INTERNATIONAL COMMISSION
FOR THE NOMENCLATURE OF CULTIVATED PLANTS

Annex to the letter, dated February 11, 1987, from Mr. F. Schneider, Secretary of the Commission, to the Vice Secretary-General

**Proposal for an amendment**

**to the text of the UPOV Convention**

It is proposed to replace following expressions at each place of the text where they are used:

"genus and species" by "taxon" (e.g. art. 2(2))
"genera and species" by "taxa" (e.g. art. 4 heading, (1), (2))
"genus or species" by "taxon" (e.g. art. 3(3))
"genera or species" by "taxa" (e.g. art. 4(3)(b)(i),(ii),(iii), art. 5(4))

Explanation:

1. In many national legislations the eligibility for protection is not only restricted to genera and species but may also contain other taxonomic groups as orders, families, sections, parts of genera or species.

2. For "genus" and "species" there are no unanimously followed definitions available. The term "taxon" however is defined in the three UPOV languages in the International Code of Botanical Nomenclature (Adopted by the Thirteenth International Botanical Congress, Sydney, August 1981), E.G. Voss c.s., 1983.
   In this code art. 1 reads:
   1.1. Taxonomic groups of any rank will, in this Code, be referred to as taxa (singular: taxon).

Wageningen, 10-2-1987
F. Schneider
Secr. Int. Comm. for the Nomenclature of Cultivated Plants

[Annex VIII follows]

THE CHARTERED INSTITUTE OF PATENT AGENTS

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27th February 1987

C.U. 1165
-08.4

Secretary General,
UPOV,
34, chemin des Colombettes,
1211 Geneva 20,
Switzerland.

Dear Sir,

Proposals for Possible Amendments to the UPOV Convention

I have had the honour to chair, in recent months, the committees of the Chartered Institute that have examined the relationship between patent protection and Plant Variety Rights. Unfortunately I have only just become aware of your letter of 12th January and in view of the 1st March deadline we do not have an opportunity to consider fully the implications of your letter. However I do know that we would wish to make the following two points.

The prohibition in UPOV Article 2(1) second sentence is out of touch with current developments in technology, especially concerning plant genetic manipulation, and should be removed.

Also, the scope of protection under UPOV Article 5 is too limited. Whatever improvement is possible in this respect, it should in any event be without prejudice to rights granted under other forms of protection. For example, the commercialisation or use of plant varieties developed with the aid of patented methods or falling within the scope of relevant product patents should be subject to the effect of such patents.

Thus, we believe that full patent protection should be available for all genuine inventions and that any ban on patent protection for plants should be eliminated.

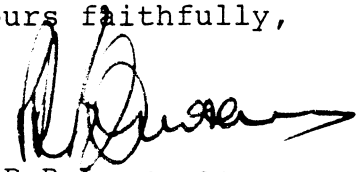
In particular, we can see no philosophical reason why genuine inventions that are commercialised as plants should

be treated any differently from genuine inventions that are commercialised as antibiotics, polymers, machines or anything else. We are not advocating patent protection for new plant types that do not involve a genuine invention and we are not advocating patent protection for plant varieties as such, unless a particular variety has involved a genuine invention. Thus a relative routine cross-fertilisation or grafting that happens to give a particular variety of a plant may not involve a genuine invention and thus should remain subject only to plant variety protection. However if the production of the new variety did involve genuine invention then it should be subject both to patent protection and, if the inventor so wished, to plant variety right protection. The possibility of double protection would not be a new concept. Various national laws already permit the combination of patent and copyright and/or patent and design protection.

We believe that the restrictions on the acts that can constitute infringement of a Plant Variety Right are now inappropriate. For instance Article 5(3) is much too wide ranging in view of the present state of plant technology.

I am sending a copy of this letter to the Secretary General of CNIPA and to Mr.Tarnofsky in the British Department of Trade and Industry. If, after we have had an opportunity of considering further the issues that you raise in your letter of 12th January, we wish to make any additional comments at this stage, we will inform you.

Yours faithfully,



P.R.B.Lawrence

cc Mr.R.C.Petersen
Mr.V.Tarnofsky

[Annex IX follows]

GROUPEMENT INTERNATIONAL DES ASSOCIATIONS NATIONALES
DE FABRICANTS DE PRODUITS AGROCHIMIQUES

INTERNATIONAL GROUP OF NATIONAL ASSOCIATIONS OF
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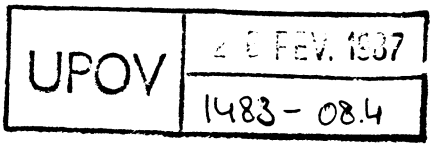
GIFAP

GIFAP N° L. 87/DG/018

20th February 1987

Mr. W. Gfeller
Deputy Secretary General
U P O V
34 Chemin des Colombettes
1211 Geneva 20
Switzerland




Dear Mr. Gfeller

Referring to your letter of 12th January 1987, concerning the proposals for the amendment of the UPOV Convention, we would like to submit the following proposals:

1. Double protection bar of article 2(1) should be eliminated.

2. Inventor should have freedom of choice to protect his invention by the appropriate Law (plant breeders right and/or patent).

3. For plant varieties obtained by genetechnological modifications the protection by plant breeders right should always extend to products of further processing and to products for consumption.

4. For plant varieties obtained by genetechnological modifications article 5(3) should not apply (research exemption) or should come into effect after a certain time only, e.g. 10 years after grant.

Yours sincerely,

Hans G. von Loeper
Director General

[Annex X follows]

ANNEX X

REQUEST BY SEPROMA

Letter dated February 27, 1987, from Mr. D. Vial, President, to the Vice Secretary-General

Your letter of January 12, 1987, concerning the intended revision of the UPOV Convention has been transmitted to us by members of the French section of ASSINSEL.

As the national organization representing French breeders of maize, we should like to inform you of our interest in the plans of UPOV and in the consultation; we consider that the amendment of the UPOV Convention is a very wide subject, and of extreme importance to the breeders' community as a whole.

The problem of the protection of new plant varieties is indeed of current interest, but it is of such economic importance to the profession that it requires consideration in great depth.

Moreover we are of the opinion that there are many subjects that deserve consideration in the course of this study on the revision of the rules of UPOV.

We have taken note of the calendar of work of UPOV, which explains the very short period allowed for consultation on this issue.

However, in order that we may organize the necessary consultation of all French breeders of maize, we request an extension of the time limit for reply. We believe that we would be able to convey our proposals to you by April 15, 1987, at the latest.

We would be very grateful to you if you could grant our request, given the importance that we attach to the protection of our products.

[End of document]