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**INTERNATIONAL UNION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS**

GENEVA

**DIPLOMATIC CONFERENCE
ON THE REVISION OF THE INTERNATIONAL CONVENTION
FOR THE PROTECTION OF NEW VARIETIES OF PLANTS****Geneva, October 9 to 23, 1978**

COMMENTS OF OBSERVER ORGANIZATIONS ON ARTICLE 5

restated by the Office of the Union
on the request of the Conference meeting in Plenary

The Office of the Union has received, on October 11, 1978, the comments of two observer organizations on Article 5 which are intended to form a further basis for discussion of that Article. The comments are reproduced in the Annexes, in conformity with a request put forward by the Conference meeting in Plenary.

[Annexes follow]

ANNEX I

COMMENTS MADE IN PLENUM ON ARTICLE 5 PARA. 1 BY ASSINSEL
OCTOBER 10, 1978

Introduction

The representative of ASSINSEL expressed the feeling of the members of his organization that this paragraph contains essentially what the Convention intends to achieve. It is the very heart of the matter.

The representative pointed to the fact that the formulation of the paragraph was carefully composed. Every phrase is meaningful. Those who composed the text should be honored and respected for their work.

Any suggestion or proposal for change or alteration of the text should therefore be treated with utmost care. Besides, the justification for changes or alterations should be found not primarily in attempts to extend the breeder's rights as laid down in the paragraph. More important is the analysis of certain imperfections that have shown up in the course of the last ten years when the Convention has been in use (via national law). The main purpose of the ASSINSEL suggestions today is to repair those imperfections so that the spirit of the Convention may cover also those holes that seem to have been left open.

[Later on the representative of FIS suggested that some alterations proposed might be regarded as improvements of drafting, being in fact formulations that correspond better to the original meaning and spirit of the Convention. ASSINSEL is of the opinion that this holds true for its first and second proposal, for its third proposal ASSINSEL sees both: better drafting and a meaningful extension of the breeder's right.]

In the light of what has been said ASSINSEL wants to make a comment on three points.

1. ASSINSEL suggests to use the wording "... the production for commercial purposes ..." instead of the present text "... the production for the purpose of commercial marketing ..." (see *).

ASSINSEL understands quite well that the Convention does not go so far as to grant the breeder a right to prior authorisation of "the production", as it would impose on the producer an exclusive claim by breeders even if the producer is not going to make any commercial use at all.

However, practice of the last ten years has shown that very liberal interpretations of the present wording have been made, to the effect that the production became so important that at later stages no other than commercial use could be made of the produced material. This is especially so in cases where the originally intended use of the product is other than for propagation, but being available the owner changes its destination and starts using it as propagating material.

Examples are peas and beans for industrial use, not harvested green but dry, not used for processed or dry consumption but taken back to farmers and drilled for another pea/bean crop. This practice is deplorably widespread.

Similar practices occur in potato and grain crops.

ASSINSEL wants to respect the rights of the user of propagating material to save material for private use. It therefore should be clear what the proposed alteration into "... the production for commercial purposes ..." means. A suggestion was made to elaborate a document in which the Convention makes a definition of this term, that clarifies its meaning in a broad sense, so that strict interpretation is enabled, and trade practice would not develop into abuses of the spirit of the Convention as cited before.

*

ASSINSEL's suggestion would mean that the French text would simply read "à des fins commerciales" instead of "à des fins d'écoulement commercial".

This document should especially pay attention to the fact, and specifically lay it down, that the sale of reproductive material is the right of the breeder, that a "commercial purpose" is coming into effect not only when property passes from one person to another, but also when material, not originally destined as propagating material is used as such in quantities exceeding the normal needs of the average unit of production, viz. farm or nursery. Another criterion of "commercial purposes" is when official authorization to commercialize the material has been given, and the fact that the material was transported over more than a few kilometers from the place where it was in fact produced.

2. ASSINSEL suggests to delete the word "Vegetative" in the phrase "Vegetative material shall be deemed to include whole plants."

At the base of this suggestion is the aim to create a possibility to exercise the breeder's rights at the point where such can be done normally in practice; preferably in the first stage of introducing propagating material of a variety in commerce. If however at this first stage exercise of rights appears to be technically impossible, a following stage should be the point where the breeder could exercise his rights.

Reference is made to a new practice in the vegetable world, not known when the Convention was drafted in 1960, but an internationally wide-spread type of enterprise today; the raising and sale of plantlets from seed. Similar future developments, e.g. in sugar beet, might be expected.

In order to prevent the production of seed of varieties at the plant raiser's own premises, for which the possibilities of control are nil, the control of the breeder's rights for plantlets is probably best realized at the point where this material is leaving the plant raiser's nursery.

ASSINSEL however wants to stress at this point that it is not the intention to ask for more remunerations: these should be exerted only once, at the first possible stage of the commercial cycle of the propagating material.

3. ASSINSEL suggests in the third instance to generalize the provision as given already in the Convention to ornamentals, in view of recent new technological and economical developments in horticulture and agriculture in general.

The wording of the last sentence of paragraph 1 is proposed as follows:
"The breeder's right shall extend to plants or parts thereof normally marketed for purposes other than propagation when they are used commercially as propagating material in the production of plants."

It is a recognized fact that in ornamentals the possibility to use commercial plants or cut flowers for propagation instead of consumer use exists.

New technology enables the multiplication of commercial plants or parts thereof of nearly every vegetable, and also of potatoes and sugar beet, in large quantities. The advantage of clonal multiplication of usually generative material is the extreme uniformity that enables mechanical harvesting. A not too distant daydream is the growing of cauliflowers for mechanical harvesting from cloned plantlets, produced by meristem laboratories at economically feasible prices.

In view of this future development it seems appropriate to bring the Convention up to date by generalizing the existing provisions given exclusively to ornamentals.

ASSINSEL's suggestions are to be considered as separate from each other.

[Annex II follows]

ANNEX II

COMMENTS ON ARTICLE 5

presented by the Delegation of CIOPORA

CIOPORA refers to the observations appearing in Annex V to document DC/7 and to the comments and practical examples presented by its Delegation in the Plenary.

CIOPORA draws the very special attention of the delegates attending the Diplomatic Conference to the serious loopholes subsisting in Article 5(1) of the Convention which place the breeders of vegetatively-reproduced plants in a situation where they cannot control the marketing of their varieties properly and therefore cannot exercise in practice the right which it is the aim of the Convention to grant them.

In view of the fact that Article 5 is the very cornerstone of the Convention, CIOPORA considers that the problem should be settled at the level of the Diplomatic Conference, and to this end submits the following wording of Article 5 for consideration by the delegations of member States:

"(1) The effect of the right granted to the breeder of a variety is that his prior authorisation shall be required for the production and use, for commercial purposes, of the reproductive or vegetative propagating material of that variety, as well as the offering for sale or marketing of such material.

Vegetative propagating material shall be deemed to include whole plants.

"(2) The right of the breeder of vegetatively reproduced plants shall extend to plants or parts thereof that are normally marketed for purposes other than propagation. However, each member State of the Union shall make the necessary arrangements to avoid a situation where remuneration pertaining to the said right extends to the marketing of the respective plants or parts thereof after they have been put on the market in the State concerned by the breeder or with his express consent.

"(3) [The present Article 5(2)]

"(4) [The present Article 5(3)]

"(5) [The present Article 5(4)]"

Explanation:

The purpose of the inclusion in the first sentence of Article 5(1) of the phrase "use for commercial purposes" and the deletion of "as such" is to make it possible to control certain fraudulent practices without at the same time extending the protection afforded to plants or parts thereof.

The purpose of paragraph (2) is to grant to the breeders of vegetatively-reproduced plants of every member State of the Union protection similar to that enjoyed in the same countries by inventors owning product patents.

The second sentence of paragraph (2) is based on the text of Article 32 of the Luxembourg Convention of December 15, 1975.

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