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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

DRAFT

REPORT OF THE WORKING GROUP ON ARTICLE 5

submitted by its Chairman, Mr. R. DuyvendakI. Establishment and Activity of the Working Group

1. The Working Group on Article 5 (hereinafter referred to as "the Working Group") was established by the Conference meeting in Plenary on October 17, 1978. Its main task was to examine questions with respect to the scope of protection as laid down in Article 5 of the Convention in its version of December 2, 1961, as amended on November 10, 1972.
2. In accordance with the decision of the Conference meeting in Plenary, all member States and interested observer States were invited to delegate a representative to the Working Group. Most of the member and observer States present in the Plenary were represented at the meeting of the Working Group. At its first meeting, the Working Group decided to call upon further experts to assist it in its deliberations.
3. The Working Group elected Mr. R. Duyvendak (Netherlands) as Chairman and Mr. R. Derveaux (Belgium) and Mr. G. Curotti (Italy) as Vice-Chairmen. The Working Group met on October 17 and in the mornings of October 18 and 19.

II. Basis of Discussions

4. In accordance with the Rules of Procedure, the basis for the discussions was Article 5, as reproduced in document DC/3. In addition, the Working Group considered document DC/17 Rev., submitted by the Delegation of France; document DC/77, presented by the President of the Conference; and documents DC/50 and DC/80, containing the comments of observer organizations.

III. Result of the Discussions

5. At the beginning of the discussions, it was stated that, with respect to substance, Article 5(1) was a corner stone of the Convention.
6. It was felt that the three versions of the Convention, in English, French and German, did not seem to be identical and it was considered that the German version expressed best the intentions of the drafters of the Convention.

7. After some discussion on the wording of the first sentence of Article 5(1), a paper was drafted in which the main components of that sentence were set out. The paper which was mainly based on the German version of the Convention is reproduced in Annex I to this report. The representatives of France reaffirmed that the text in the French language did not differ in its meaning from the present text of the Convention.

8. The presentation was not meant to be a change of substance but merely to make it more clear that all three activities requiring prior authorization by the breeder:

production for purposes of commercial marketing,
offering for sale and/or
marketing

related equally to the propagating material.

9. The redrafted English and French versions might help to avoid the misinterpretations indicated by the professional organizations.

10. The Working Group recommends that the Conference meeting in Plenary examine whether the Drafting Committee should take Annex I into consideration.

11. It was suggested that "the production for purposes of commercial marketing of the propagating material as such" be replaced by "production for commercial purposes of the propagating material as such." This would mean an extension of the right in so far as the production of propagating material which was not to be marketed as such would also fall within the scope of protection. It was not acceptable to the Delegations of the member States that such an extension of protection be made a mandatory part of the Convention.

12. It was the general understanding in the Working Group that the term "propagating material" was to be understood in its widest meaning, e.g. also including material whereby one seed, graft, cutting, etc. would give one plant.

13. It was also understood that propagating material should include both sexual and asexual propagating material, even where both means of propagation would be possible for one and the same variety, on the understanding that both offsprings would satisfy the variety description.

14. The Working Group was reminded by the experts of the comments of the professional organizations as reproduced in documents DC/50 and DC/80.

15. The Delegation of France made a proposal for the amendment of Article 5(1) (document DC/17 Rev.). Its intention was to solve the major problems of the unlimited reproduction of the variety by growers, especially for vegetatively reproduced plants. The proposal proved, however, unacceptable because it would have implied protection of the end product.

16. The question was raised why the third sentence of Article 5(1) was restricted to ornamental plants only. It was suggested that the provision should be extended to fruit trees (see Annex II). The suggestion was not converted into a proposal because it was not acceptable to the member States.

17. After an enquiry the Delegation of the United States of America confirmed that in its country the Plant Patent Act made the production and use of vegetative propagating material subject to Section 163 of the Patent Law (see Annex III).

18. To draw more attention to the possibilities provided for by Article 5(4), the President of the Conference suggested that the Conference might adopt the recommendation set out in document DC/77. During the discussions, an amendment was proposed to reflect the necessary balance between the interests of the breeders and those of the users of varieties. The amended version of the recommendation is reproduced in Annex IV to this report. The Working Group proposes that this recommendation be adopted by the Conference.

[Four Annexes follow]

Main Components of Article 5(1) 1st Sentence
Principaux éléments de l'article 5(1), première phrase
Wesentliche Bestandteile des Artikels 5 Absatz 1, Satz 1

The effect of the right granted to the breeder of a variety is that his prior authorization shall be required for the

production for purposes of commercial marketing,
offering for sale, and/or
marketing

of the reproductive or vegetative propagating material, as such, of that/the variety.

* * *

Le droit accordé à l'obtenteur d'une variété a pour effet de soumettre à son autorisation préalable

la production à des fins d'écoulement commercial,
la mise en vente et/ou
la commercialisation

du matériel de reproduction ou de multiplication végétative, en tant que tel, de cette/la variété.

* * *

Das dem Züchter einer Sorte gewährte Recht hat die Wirkung, dass seine vorherige Zustimmung erforderlich ist, um

generatives oder vegetatives Vermehrungsmaterial dieser/der Sorte als solches
zum Zweck des gewerbsmässigen Absatzes zu erzeugen,
feilzuhalten und/oder
gewerbsmässig zu vertreiben.

[Annex II follows;
l'annexe II suit;
Anlage II folgt]

The breeder's right shall extend to

ornamental plants,
fruit trees or
parts thereof

normally marketed for purposes other than propagation

when they are used commercially as propagating material in the production of

ornamental plants,
cut flowers or
fruit.

* * *

Le droit de l'obtenteur s'étend aux

plantes ornementales,
arbres fruitiers ou
parties de ces plantes

normalement commercialisés à d'autres fins que la multiplication,

au cas où ils seraient utilisés commercialement comme matériel de multiplication en vue de la production

de plantes d'ornement,
de fleurs coupées ou
de fruits.

* * *

Das Recht des Züchters erstreckt sich auf

Zierpflanzen,
Obstbäume oder
deren Teile,

die üblicherweise nicht zu Vermehrungszwecken gewerbsmässig vertrieben werden,

falls sie als Vermehrungsmaterial zur Erzeugung von

Zierpflanzen,
Schnittblumen oder
Obst

gewerbsmässig verwendet werden.

[Annex III follows;
l'annexe III suit;
Anlage III folgt]

SECTION 163 OF THE US PATENT LAW
SECTION 163 DE LA LOI SUR LES BREVETS DES USA
ARTIKEL 163 DES US PATENTGESETZES

Section 163 of the US Patent Law reads as follows:

"In the case of a plant patent the grant shall be of the right to exclude others from asexually reproducing the plant or selling or using the plant so reproduced."

* * *

L'article 163 de la loi sur les brevets des USA a la teneur suivante :

"Dans le cas d'un brevet de plantes, le droit accordé est celui d'interdire aux tiers de reproduire la plante par voie asexuée ou de vendre ou d'utiliser la plante ainsi reproduite."

* * *

Artikel 163 des US Patentgesetzes hat den folgenden Wortlaut:

"Im Fall eines Pflanzenpatents beinhaltet die Erteilung das Recht, andere von der vegetativen Vermehrung der Pflanze oder dem Verkauf oder der Benutzung der auf diese Weise erzeugten Pflanze auszuschliessen."

[Annex IV follows;
l'annexe IV suit;
Anlage IV folgt]

ANNEX IV/ANNEXE IV/ANLAGE IV

RECOMMENDATION ON ARTICLE 5
RECOMMANDATION RELATIVE A L'ARTICLE 5
EMPFEHLUNG ZU ARTIKEL 5

The following recommendation is submitted to the Conference for adoption:

"The Conference,

"Having regard to Article 5(1) and (4) of the Convention,

"Conscious of the fact that the scope of the protection laid down in Article 5(1) may create special problems with regard to certain genera and species,

"Considering it of great importance that breeders be enabled effectively to safeguard their interests,

"Recognizing at the same time that an equitable balance must be struck between the interests of breeders and those of users of new varieties,

"Recommends that, where, in respect of any genus or species, the granting of more extensive rights than those provided for in paragraph (1) of Article 5 is desirable to safeguard the legitimate interests of the breeders, the Contracting States take adequate measures, pursuant to paragraph (4) of Article 5."

* * *

La recommandation suivante est soumise à la Conférence pour adoption :

"La Conférence,

"Considérant l'article 5.1) et 4) de la Convention;

Consciente du fait que l'étendue de la protection prévue par l'article 5.1) risque de créer des problèmes particuliers pour certains genres et espèces,

"Considérant qu'il est d'une grande importance que les obtenteurs puissent sauvegarder efficacement leurs intérêts;

"Reconnaissant d'autre part qu'il faut instaurer un équilibre équitable entre les intérêts des obtenteurs et ceux des utilisateurs de variétés nouvelles,

"Recommande que lorsque l'octroi de droits plus étendus que ceux définis au paragraphe 1) de l'Article 5, à l'égard d'un genre ou d'une espèce, est souhaitable pour sauvegarder les intérêts légitimes des obtenteurs, les Etats contractants prennent toutes mesures adéquates, conformément au paragraphe 4) de l'article 5."

* * *

Die nachstehende Empfehlung wird der Konferenz zur Annahme vorgelegt:

"Die Konferenz,

Im Hinblick auf Artikel 5 Absätze 1 und 4 der revidierten Akte des Übereinkommens,

Im Bewusstsein der Tatsache, dass der in Artikel 5 Absatz 1 umschriebene Schutzzumfang für bestimmte Gattungen und Arten Probleme aufwerfen kann,

Mit Rücksicht darauf, dass es sehr wichtig ist, dass die Züchter in die Lage versetzt werden, ihre Interessen wirksam zu wahren,

In Anerkennung der Notwendigkeit, ein gerechtes Gleichgewicht zwischen den Interessen der Züchter und denen der Benutzer neuer Sorten herzustellen,

Empfiehl, dass in den Fällen, in denen für eine Gattung oder Art die Gewährung von Rechten, die über die in Artikel 5 Absatz 1 vorgesehenen Rechte hinausgehen, wünschenswert ist, um die berechtigten Interessen der Züchter zu wahren, die Vertragsstaaten angemessene Massnahmen nach Artikel 5 Absatz 4 ergreifen."

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