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UPOV

IOM/I/ 10

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

GENEVA

MEETING  
WITH INTERNATIONAL ORGANIZATIONS

Geneva, November 9 and 10, 1983

COMMENTS  
FROM INTERNATIONAL NON-GOVERNMENTAL ORGANIZATIONS

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AIPH

Document prepared by the Office of the UnionIntroduction

1. In accordance with the consultation procedure adopted by the Consultative Committee at its twenty-seventh session, the Office of the Union requested the international non-governmental organizations that had been invited to participate in the current meeting to communicate any preliminary comments they had on the items entered on the agenda.

2. The Office of the Union has received comments from the International Association of Horticultural Producers (AIPH) by letter of October 11, 1983, from the Secretary General of AIPH addressed to UPOV. Those comments are reproduced in the Annex to this document.

[Annex follows]

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Ref.nr. U-20.921

The Hague, 11th October 1983

We were pleased to hear that, in October and November of this year, there will again be opportunities for consultation between U.P.O.V. and representatives of the International professional organisations involved in plant novelty protection. Our Association will be represented both at the symposium on "Nomenclature" and, during the November meeting, in discussions on the following subjects:

- a) Minimum Distances between Varieties;
- b) International Co-operation
- c) U.P.O.V. Recommendations on Variety Denominations.

We therefore thought it appropriate to send you in advance some comments on these matters, as well as on other aspects less closely concerned with these subjects but, in our opinion, relevant to an efficient system of plant novelty protection.

We first set out our views on the three topics listed in the Agenda for your second meeting. A fourth paper considers the scope of protection and the merits of compulsory licenses.

Our representatives at your meetings will be pleased to speak to this letter.

Minimum Distances between Varieties

a) We welcome UPOV's paper IOM/1/3 on this subject which further reinforces efforts to establish a minimum level of distinctness in any new variety recognised as such. ALPH would indeed prefer longer minimum distances - a wider separation of varieties allowing the more orderly protection of clearly established rights, especially in the ornamental sector.

In our view it is the task of the authorities responsible for granting breeders' rights to decide if a new variety is sufficiently distinguishable from the existing range, based on one or more important characteristics. During this examination it is necessary to give attention to the principle that the variety must demonstrate originality. If this approach is maintained, the granting of breeders' rights to varieties which differ only minimally from the existing ones is avoided. The same criterion should also be applied to the granting of breeders rights to mutants.

A clear distinction should be preserved between varieties, including mutants; distances between them should not, therefore, be too small. This is desirable in order to maintain existing breeders' rights and also to facilitate the identification of varieties by those who use them. We therefore regret the amendment made to Article 6 (1) (a) in the revision of the Convention in 1978; specific reference to morphological and physiological characteristics rendered the Convention more effective in this area.

Mutants occur more frequently in varieties which are insufficiently homogeneous and stable. For the granting of breeders' rights varieties must be thoroughly examined with respect to these requirements, the more so because insufficient homogeneity and stability detected subsequently are no grounds for nullity. In conformance with Article 10 (2) (3), Termination of a breeder's right already granted in such cases cannot be retrospective.

International Co-operation

b)

ALPH supports the options reviewed in paragraphs 11 and 12 of UPOV's paper IOM/1/4.

Our organization is in favour of increasing co-operation between U.P.O.V. member countries in the examination of varieties prior to the granting of breeders' rights. In this respect we urge standardisation of the range of eligible species. Further, it is to be recommended that all member countries protect the same species.

The examination itself has been facilitated by the preparation by U.P.O.V. of guidelines for each species and we are grateful to U.P.O.V. for the completion of this task.

In order to achieve an efficient system and to make it cost effective, it will be necessary to develop a procedure whereby an examination successfully concluded in one country will permit the granting of breeders' rights in all U.P.O.V. member countries. We therefore support the concept of more intensive international co-operation, as developed by U.P.O.V. We have noted a similar initiative on the part of the E.E.C. but we prefer that these matters be studied and problems solved within the framework of U.P.O.V. owing to its universal character and wider membership. The E.E.C. should then ensure that the execution of breeders' rights does not result in the restriction of free trade between member countries.

However, we recognised that, if this harmonisation of examination procedures and their multilateral acceptance is not achieved under the auspices of UPOV, our attitude to the concept of a 'Community right' will have to be reappraised.

c) Nomenclature and Variety Denominations

Our organisation agrees in principle to the recommendations for the verification of variety denominations. We realize that such a verification has to be carried out by experts of U.P.O.V. member countries, and it is therefore essential that the policy of these experts is based on these recommendations. These, however, appear to us rather too detailed and we suggest that they could, to advantage, be presented in an abbreviated form.

We consider, however, that the following should be retained:

- 1 To be precluded: Designations consisting of a combination of more than three letters if the combination is not pronounceable in syllables and does not clearly form a sequence of letters commonly known to the public. It is not necessary for the syllables to have a meaning.
- 2 A variety denomination is liable to mislead and is therefore not suitable if there is a risk of it creating a misleading impression as to the characteristics and value of the variety.

On the question of variety denominations, we emphasise that a clear distinction must exist between these variety denominations, being part of the breeders' right, on the one hand and a trademark or trade name on the other. We recognise that, in accordance with Article 13 (8) of the Convention, the breeder is entitled to add a trade mark to the variety denominations. In the horticultural trade, however, there is often confusion as to whether the name is a variety denomination or a trade mark. In these cases, the requirement, also mentioned in Article 13 (8), that variety denominations are easily recognisable has not been fulfilled. These problems have already occurred during the term of the breeders' right and for that reason it is our view that U.P.O.V. should urge member countries to pay more attention to this aspect in their respective National legislations. Such a statutory regulation is particularly required for a period immediately after the termination of the breeders' right. It is not acceptable that the holder of such a right should convey the impression by the use of a trademark, that the protection continues to apply after the right has in fact expired.

A new paragraph should therefore be added to Article 13 (8);

"The use of the indication shall not extend the rights granted to the breeder in respect of the same variety identified by a variety denomination or, where it is not so identified, the rights granted under the terms of this convention."

Interpretation of U.P.O.V. Text

- 1) As U.P.O.V. already knows, our organisation, during its congress at Taormina in 1981, has ascertained that the majority of horticultural growers are opposed to the extension of a breeders' right to the final product. Application of Article 5 (4) of the U.P.O.V. Convention by National legislators cannot therefore be considered desirable. We are of the opinion that the meaning of the last two sentences of Article 5 (1) is more accurately expressed as follows:

"Vegetative propagating material shall be deemed to include whole plants or parts thereof, when they are used commercially as propagating material in the production of ornamental plants or cutflowers."

On our part there is also need for a renewed discussion on the second para of art. 5. We would prefer the following text:

"The authorisation given by the breeder may be made subject to such conditions as he may specify, but these conditions shall be limited to the production and sale of the reproductive material of the new plant variety."

Our organisation is of the opinion that this supplement is more appropriate to the framework of the Convention.

- 2) Our organisation recommends that U.P.O.V. advises its member countries on the application of Article 9 of the convention in their respective national legislations. We therefore suggest the insertion of a text based on the United Kingdom legislation:

- (1) Subject to the provisions of this section, if any person applies to the Controller and satisfies him that the holder of any plant breeders' rights has unreasonably refused to grant a licence to the applicant, or, in granting or offering to grant a licence, has imposed or put forward unreasonable terms, the Controller shall, unless it appears to him that there is good reason for refusing the application, grant to the applicant in the form of a compulsory licence any such rights as respects the plant variety as might have been granted to the applicant by the holder of the plant breeders' rights.



- (2) In entertaining applications and settling the terms of compulsory licences under this section the Controller shall endeavour to secure that the plant variety is available to the public at reasonable prices, that it is widely distributed, that it is maintained in quality and that there is reasonable remuneration for the holder of the plant breeders' rights.

We therefore feel that, if the Convention is at any time revised, a new article which embodies this approach should be included.

Sincerely yours,



N. Luitse,  
General Secretary.

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