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UPOV

IOM/II/6
ORIGINAL: English
DATE: September 30, 1985

INTERNATIONAL UNION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS

GENEVA

SECOND MEETING WITH INTERNATIONAL ORGANIZATIONS

Geneva, October 15 and 16, 1985

DOCUMENTS RECEIVED FROM ASSINSEL, CIOPORA AND FIS

Document prepared by the Office of the Union

1. The three professional organizations--International Association of Plant Breeders for the Protection of Plant Varieties (ASSINSEL); International Community of Breeders of Asexually Reproduced Ornamental and Fruit Tree Varieties (CIOPORA); International Federation of the Seed Trade (FIS)--which proposed items for discussion have, as requested, submitted preparatory documents in respect of those items and, in the case of CIOPORA, additional preparatory documents.

2. Annex I to this document contains the three documents submitted by ASSINSEL, which were forwarded to the Vice Secretary-General of UPOV by the Secretary General of ASSINSEL under cover of a letter dated September 18, 1985. The three documents relate to items 5, 6 and 7 of the agenda.

3. Annex II to this document contains the seven documents submitted by CIOPORA, which were forwarded to the Vice Secretary-General of UPOV by the Secretary General of CIOPORA under cover of a letter dated September 17, 1985. The seven documents relate to the meeting in general and to items 2 to 7 of the agenda.

4. Annex III to this document contains the document submitted by FIS, which was forwarded to the Vice Secretary-General of UPOV by the Secretary General of FIS under cover of a letter dated September 17, 1985. The document relates to item 7 of the agenda.

5. The documents submitted by CIOPORA include several references to observations made by it in the past. The four letters referred to (August 30, 1974; October 28, 1977; March 19, 1979; October 21, 1983) and the resolution of June 5, 1984, are reproduced for ease of reference in Annex IV to this document, mainly in the form in which they have been reproduced in earlier UPOV documents. The other material referred to is readily available in the Records of the 1957-1961, 1972 and 1978 Diplomatic Conferences (UPOV publications 316(F) and 337(E)), or in the Collection of Important Texts and Documents Established by UPOV (UPOV publication 644(E), Part I), and has therefore not been reproduced again.

[Annexes follow]

IOM/II/6
ANNEX I

ASSINSEL

Association Internationale des Sélectionneurs pour la Protection des Obtentions Végétales
International Association of Plant Breeders for the Protection of Plant Varieties
Internationaler Verband der Pflanzenzüchter für den Schutz von Pflanzenzüchtungen

HHL/FA

Nyon, 18th September 1985

Dr. Heribert Mast
Vice Secretary General
U P O V
34 Chemin des Colombettes
1211 Genève 20

Dear Dr. Mast,

Second UPOV meeting with international organizations

Please find enclosed short memoranda on
- Application of the UPOV Convention to botanical genera and species
- Scope of protection
- Biotechnology, industrial patents, plant breeders' rights.

Yours sincerely,

Hans H. Leenders
Secretary General

Encl.

Chemin du Reposoir 5-7 1260 NYON (Switzerland) Tel. 022/61 99 77 Telex 22 776 seed ch

ASSINSEL

Association Internationale des Sélectionneurs pour la Protection des Obtentions Végétales
International Association of Plant Breeders for the Protection of Plant Varieties
Internationaler Verband der Pflanzenzüchter für den Schutz von Pflanzenzüchtungen

ASSINSEL Document No. 1

HHL/FA

APPLICATION OF THE UPOV CONVENTION TO BOTANICAL GENERA AND SPECIES

Although in a number of UPOV member States the number of species elegible for protection has increased considerably in the last decennium and the number of UPOV Member States has increased there is still a great number of species not protectable in UPOV member States and the mumber of States in which there is no protection whatsoever possible is many times greater than the number of States in which protection is available.
In former times many companies sought some kind of protection for their varieties in non plant breeders right countries via trade mark protection available in over 100 countries.
Variety denominations however, have in a number of cases been declared generic and also the UPOV Convention rightly or wrongly starts from the premise.
This in combinaison with the often unworkable Guidelines, now Recommendations for Variety Denominations leaves breeders in a great number of cases without any rights.
Even in an economically well developed area as the European Common Market there are still important blank spots which urgently need to be filled, particularly after the extension of the Common Market.
Besides, the combination of common rules for commercialisation of seeds, common catalogue and competition rules applicable in the E.C. has rendered the legal position of the breeder weaker in all those cases where no protection is available.
Varieties may be put on the E.C. Common Variety List without the agreement of the breeder and the legality of commercialisation of reproductive material for which the breeder has not received any financial remuneration is thus emphasized.

The seed trade is traditionally very international and breeding companies/seed houses of many countries export their seed to a great number of countries in all five continents, often however without having any possibility whatsoever to protect their rights on their varieties.

A little more understanding in UPOV for the problem of variety denominations/trade marks, so that UPOV would help breeders in such situations rather than making it more difficult to exercise the (limited) rights available to them could somewhat help amending this situation.
Above all however, extension of protection possibilities to more species in UPOV member States should be an objective to be realized at short notice.
Extension of UPOV membership should be a second objection, although a careful examination of applications in order to guarantee that the requirements laid down in the Convention are complied with by the State concerned is considered necessary.

Chemin du Reposoir 5-7 1260 NYON (Switzerland) Tel. 022/61 99 77 Telex 22 776 seed ch

ASSINSEL Association Internationale des Sélectionneurs pour la Protection des Obtentions Végétales
International Association of Plant Breeders for the Protection of Plant Varieties
Internationaler Verband der Pflanzenzüchter für den Schutz von Pflanzenzüchtungen

ASSINSEL Document No. 2

HHL/FA

SCOPE OF PROTECTION

It is becoming apparent that the moment is rapidly approaching when, for certain species micro propagation/tissue culture techniques may well become a viable alternative to seed as a means of multiplying material suitable for planting by commercial growers and home gardeners.

This material can be produced either commercially by specialized companies or by commercial growers and home gardeners.
If produced commercially by specialized companies for the production of young plantlets the legislation of most, but probably not all countries covers this, as the plantlets would be considered as belonging to "reproductive or vegetative propagating material" as meant in article 5 of the Convention. This at least what most delegations reported at the 1978 Revision Conference.
It would however be preferable to make this clear in the text of the Convention as proposed at the Revision Convention in 1978.

If produced by commercial growers or home gardeners the present legislation is such that one viable seed of a new variety would suffice to produce thousands of plantlets without payment of a Royalty and in fact it would ruin the seed industry specialized in the species concerned if a popular version of the method would be made available to growers and home gardeners.

It would therefore be necessary to extend the scope of protection of these species to all material used for the commercial production of crops.

In addition to this note our Vegetable Section will be producing on this item which however will not be available until relatively shortly before the meeting on 15th and 16th October 1985.

Chemin du Reposoir 5-7 1260 NYON (Switzerland) Tel. 022/61 99 77 Telex 22 776 seed ch

ASSINSEL

Association Internationale des Sélectionneurs pour la Protection des Obtentions Végétales
International Association of Plant Breeders for the Protection of Plant Varieties
Internationaler Verband der Pflanzenzüchter für den Schutz von Pflanzenzüchtungen

ASSINSEL Document No. 3

HHL/FA

BIOTECHNOLOGY, INDUSTRIAL PATENTS, PLANT BREEDERS' RIGHTS

ASSINSEL has not yet arrived at a final conclusion on the above issue.

Further discussions will take place on 14th October 1985.

If it would be possible to arrive at a final conclusion this will be announced orally at the meeting on 15th and 16th October.

[Annex II follows]

Chemin du Reposoir 5-7 1260 NYON (Switzerland) Tel. 022/61 99 77 Telex 22 776 assel ch

IOM/II/6
ANNEX II

0049

C I O P O R A

COMMUNAUTÉ INTERNATIONALE DES OBTENTEURS DE PLANTES ORNEMENTALES DE REPRODUCTION ASEXUÉE

4, Place Neuve — GENÈVE

TÉLÉPH.: 25 13 55 - TÉLÉGR.: CIOPORA GENÈVE - CH POSTAUX: 12-16328 GENÈVE

September 17, 1985

Dr. Heribert MAST
Vice Secretary General
U. P. O. V.
34, Chemin des Colombettes
1211 GENEVE 20
SUISSE

Re. Second Meeting with International Organizations

Dear Dr. Mast,

Please find enclosed some comments by CIOPORA on the items to be discussed at the next UPOV Meeting.

With best regards.

Yours sincerely.

René Royon
Secretary General
C.I.O.P.O.R.A.

Enclosures : 7 - (Documents CIOP/IOM/1 thru 7)

[Original: French]

Document CIOP/IOM/1
(16.09.1985)

Subject: General remarks

CIOPORA welcomes UPOV's decision to organize meetings with breeders' organizations so as to maintain a satisfactory level of communication with them.

If such meetings are going to achieve their objective, the exchanges of views must be open, candid and marked by a reciprocal determination to achieve concrete results.

CIOPORA has noted with regret that most of the observations, remarks or criticisms made and reiterated for nearly 25 years (which it can only reaffirm today) have almost never been taken into account by UPOV (for example: extension of protection to the marketed product, problems related to prior examination, freedom in the formulation of denominations, etc.).

Experience has shown that the majority of the comments and demands made by CIOPORA were justified.

Today, innovation and research are the subject of incentives in the majority of modern States; CIOPORA therefore expresses the hope that its comments and demands will at last not only be "heard" but also "listened to". Otherwise the usefulness of such meetings between UPOV and the members of our Association risks being seriously jeopardized.

It is important not to lose sight of the fact that the basic goal of the Convention of the Union for the Protection of New Varieties of Plants is to enable breeders to benefit from the commercial exploitation of the results of their research. It must be stated that, in its present conception and formulation, the Convention shows such lacunae and defects that, if these are not "corrected" at the national level (which is still the case in a fairly large number of member countries), breeders are not able effectively to ensure respect for their rights and the above-mentioned goal is therefore not reached.

[Original: French]

Document CIOP/IOM/2
(16.09.1985)

Subject: Minimum distances between varieties

This question was raised fairly recently by UPOV itself and CIOPORA is surprised to note that UPOV already envisages abandoning the study.

Even if it is difficult, this question is of interest and is important at several levels.

Under present circumstances, CIOPORA can only reaffirm its position stated in a letter to UPOV on October 21, 1983.*

Contrary to what is stated in paragraph 10 of the UPOV document IOM/II/2 of April 30, 1985, the problem of mutants could be considerably reduced (for those species where the problem is most critical) if the minimum distances between varieties were enlarged. The requirement of greater minimum distances should be applied to all varieties of a particular species and it would not then be necessary to know, or to be able to verify, if a particular variety is or is not a mutant or the result of cross-breeding.

CIOPORA reiterates that the problem is not the same for all species and that, consequently, each species should be the subject of a specific examination. Characteristics of the same type (for example, the coloring of leaves) can be insignificant for one species and important for another. This is why CIOPORA considers that UPOV must necessarily consult professional experts so as to determine, species by species, the minimum distances.

Nevertheless, a certain number of general principles applicable to all species must be taken into account; the enlargement of minimum distances must be seen not only from the point of view of prior examination, but also from that of controlling the protected variety and the risks of infringement.

Up to the present, infringement has primarily been considered as consisting of the propagation, offer for sale, sale, etc. of THE protected variety as such, without the authorization of the breeder. In view of current work in the field of mutation breeding or genetic engineering, the concept of infringement should also be extended to the above-mentioned acts when they apply not only to THE variety, but also to any "mini-variation" of it, that is to say to any other variety falling within the said minimum distances.

In all industrial property fields, slavish reproduction is relatively rare; infringers generally try to imitate, with a few minimal differences, the protected object or process.

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* Reproduced in Annex IV to this document, page 1.

With the development of the protection of new varieties of plants, this form of infringement could develop.

CIOPORA therefore considers that UPOV should not abandon the question of minimum distances so hastily for the simple reason that it is a difficult problem to solve.

[Original: French]

Document CIOP/IOM/3
(16.09.1985)

Subject: International Cooperation (UPOV document IOM/II/4)

CIOPORA understands international cooperation to mean principally cooperation in the field of prior examination.

CIOPORA considers that this problem is closely linked to item 5 of the agenda (Application of the UPOV Convention to Botanical Genera and Species). In CIOPORA's view, because of its cost and the national infrastructures it involves, prior examination is the main factor restricting application of the UPOV Convention to a sufficient number of plant species.

CIOPORA recalls that it has on a number of occasions drawn UPOV's attention to the problems raised by prior examination and it refers UPOV to the following documents:

- Comments of October 1961 on the Draft International Convention on the Protection of New Varieties of Plants (see Article 7)*

- CIOPORA's letter of August 30, 1974, to the Secretary-General of UPOV and the memorandum of the same date on prior examination**

- CIOPORA's letter of March 19, 1979, to the Vice Secretary-General of UPOV concerning the collection and interpretation of data on prior examination.***

The majority of these comments and documents, although of long standing, remain relevant and CIOPORA hopes that they will be taken into account.

Among new countries, many that have become members of UPOV (the United States of America, New Zealand, Japan) use examination procedures which other countries should use as a model.

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* Note of the Office of the Union: reproduced in the "Records of the International Conferences for the Protection of New Varieties of Plants, 1957-1961, 1972," UPOV publication 316(F), page 93.

** See Annex IV to this document, pages 2 to 5.

*** See Annex IV to this document, page 6.

[Original: French]

Document CIOP/IOM/4
(16.09.1985)

Subject: Application of the Convention to Botanical Genera and Species

This question also is closely linked to that of prior examination and CIOPORA has already drawn UPOV's attention several times to the conceptual defect of the 1961 Convention (See Records of the Geneva Diplomatic Conference on the Revision of the International Convention for the Protection of New Varieties of Plants, pages 90, 143, 144).*

CIOPORA has also proposed that the protection of a particular species should be compulsorily extended to all UPOV countries when one of them protects the said species and is able to provide the other countries with the results of the prior examination carried out on its territory.

The conception of the "UPOV system" is very restrictive compared with patent legislation. It can even be considered as backward in view of the efforts made by the majority of countries to encourage research and innovation.

The reasons usually put forward by national offices for the protection of new varieties of plants when they try to justify the absence of protection for a particular species are not in harmony with the basic objective of the UPOV Convention, which is to guarantee breeders recognition and respect of their rights as creators. Even if there were only one breeder in the world for a particular species, he has the right to have his research protected.

The present system of "progressive" extension of protection to botanical genera and species and the fact that certain species within the same geographical region (the Common Market, for example) are protected in one country but not in another, naturally creates serious problems of economic disparity. These problems are further aggravated by the fact that the substance of protection of the breeder's rights is inadequate even in countries where the species in question is protected.

For example, many propagators of chrysanthemum and kalanchoë cuttings establish themselves in Spain where these species cannot be protected and export cut flowers or plants to other countries (Holland, Federal Republic of Germany...) where the law does not protect the "finished product" as such. It therefore follows that, even in countries where protection exists, the breeder cannot peacefully enjoy his rights.

CIOPORA asks that a rapid solution to this problem be found at last.

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* Note of the Office of the Union: UPOV publication 337(E).

[Original: French]

Document CIOP/IOM/5
(16.09.1985)

Subject: Appropriate Protection of the Results of Biotechnological Developments by Industrial Patents and/or Plant Breeders' Rights

This question has been the subject of detailed discussion within CIOPORA. However, because of its complexity and technical scope, as well as breeders' varying awareness of the possibilities and consequences of new technologies, CIOPORA has not yet come to any concrete conclusions and therefore reserves judgment.

CIOPORA nevertheless deems it useful to recall a certain number of general principles which are in harmony with its approach to problems of the protection of new varieties of plants:

1. As soon as new techniques or technologies appear, they necessarily raise new problems and each time there is always a great temptation for the human intellect to wish to create each time appropriate new regulations or laws. In doing so, unfortunately one always risks complicating, and deviating from, the basic legal principles.

   This is why, as early as October 1961, CIOPORA suggested that the protection of new varieties of plants should be organized within the general framework of patent protection, with the necessary adaptations. More recently, in 1977, the Budapest Treaty on the Deposit of Microorganisms illustrated a posteriori the type of system of protection that could have been organized since 1961.

   With a patent "as such" or a modified patent, breeders could have benefitted since 1961 from experience and confirmed jurisprudence, and above all from a far more satisfactory substantive protection than that given by the UPOV Convention.

2. With regard to principles, it therefore does not seem necessarily desirable to set up a special regime for inventions in the biotechnological field that fulfill the general criteria of patentability (novelty, existence of an inventive step, industrial application) and which, through existing or future means, could be disclosed in a manner capable of being reproduced.

3. With regard to the respective fields of application of patents and new plant variety certificates, although at first sight they appear to be different, they can overlap, the first being obviously more extensive and global than the second:

While new plant variety certificates can protect only one variety, within the meaning of the UPOV Convention, patents can cover not only any patentable invention (process, product, combination ...), but also a new plant variety. The United States of America already issues utility patents for plants that are the "result of human intervention". Likewise, some European legislation (Federal Republic of Germany, France ...) allows the protection of new varieties of plants that belong to species not yet protected by new plant variety certificates.

4. It would therefore appear to be premature to establish a strict boundary between what belongs to the patent and what belongs to the new plant variety certificate. Breeders and researchers in genetic engineering will naturally be responsive to the respective effectiveness of each of the systems proposed.

5. A priori, what appears to be essential is the consequences at the commercial and economic level that result from the form of protection rather than the form of protection itself. If one takes the example of a new patentable gene that can be incorporated in new varieties, positions of principle regarding the droit de suite for the gene will be likely to vary considerably according to whether one is a licensor or a buyer.

Although the principles governing patent rights do not appear to need special amendment or adaptation for biotechnological inventions, transfers and licenses affecting the latter will undoubtedly require appropriate treatment.

[Original: French]

Document CIOP/IOM/6
(16.09.1985)

Subject: Scope of Protection

CIOPORA can add little to what it has reiterated for nearly 25 years.

In this context, it draws attention to and confirms its past interventions:

October 1961: Comments on the Draft UPOV Convention (see Records of the Diplomatic Conference of November 1961,* page 92).

October 28, 1977: Letter from CIOPORA to the Secretary General of UPOV transmitting an analytical report on the problems caused by the inadequate wording of Article 5(1) of the 1961 Convention.**

June 1978: Comments by CIOPORA on the draft revised Convention - document DC/7.***

October 1978: Interventions by CIOPORA during the Diplomatic Conference on the Revision of the Convention (see Records of the Conference, pages 145, 146, 148, 149, 177, 178, 179).****

CIOPORA confirms that for fruit trees, for example, the basic provisions of the Convention (Article 5(1)) do not even allow "minimum" control of varieties cultivated for fruit production.

At the international level, this omission should be remedied at the next revision of the UPOV Convention.

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* Note of the Office of the Union: UPOV publication 316(F).

** See Annex IV to this document, pages 7 to 17.

*** Note of the Office of the Union: reproduced in the "Records of the Geneva Diplomatic Conference on the Revision of the International Convention for the Protection of New Varieties of Plants, 1978," UPOV publication 337(E), pages 90 to 92.

**** Note of the Office of the Union: UPOV publication 337(E).

At the national level, the "recommendation" concerning Article 5 of the Convention, annexed to the text of the Convention signed at Geneva on October 23, 1978,* should enable every member State of UPOV to take the essential corrective measures immediately.

CIOPORA hopes that the basic principles of patent rights will be applied to the protection of new varieties of plants: what needs to be protected, so that it can be controlled by the breeder, is any "commercial exploitation" of the protected variety.

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* Note of the Office of the Union: reproduced in the "Records of the Geneva Diplomatic Conference on the Revision of the International Convention for the Protection of New Varieties of Plants, 1978," UPOV publication 337(E), page 274. In this document it is also reproduced as part of the FIS document (see Annex III, page 2).

[Original: French]

Document CIOP/IOM/7
(16.09.1985)

Subject: Denominations
UPOV Recommendations adopted in October 1984

CIOPORA attaches great importance to breeders enjoying the greatest possible freedom in choosing and formulating variety denominations.

It considers that the Recommendations on denominations adopted by the UPOV Council* constitute a restrictive interpretation of Article 13 of the Convention and, therefore, place unacceptable restrictions on breeders.

CIOPORA has already sent a Resolution (dated June 5, 1984) to UPOV and regrets that it did not receive any reply in sufficient time.**

The Recommendations in question mainly reproduce the Guidelines of 1973, already unanimously criticized and rejected by the professionals.

CIOPORA's comments on the Recommendations are already well known to UPOV. CIOPORA therefore asks that its comments be taken into account as soon as possible and that the Recommendations be either annulled or amended accordingly.

Finally, CIOPORA asks that its specific system of nomenclature using codes as denominations, in use for more than 30 years, be officially recognized by UPOV as one of the valid systems for the formulation of variety denominations.

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* Note of the Office of the Union: see Section 14 of the UPOV "Collection of Important Texts and Documents," UPOV publication 644(E), Part I.

** Note of the Office of the Union: CIOPORA was informed, by letter of June 15, 1984, that this resolution would be submitted to the Council of UPOV, and that was done in Annex II to document C/XVIII/9 Add.2. The CIOPORA resolution is reproduced in Annex IV to this document, pages 18 and 19.

[Annex III follows]

IOM/II/6

ANNEX III

Fédération Internationale du Commerce des Semences

Ch. du Reposoir 5-7
1260 Nyon (Suisse - Switzerland)
Tél. 022 - 61 99 77
Télex 22776 seed ch

HHL/FA

Nyon, 17th September 1985

U P O V
34 Chemin des Colombettes
1211 Genève 20

Dear Sirs,

Please find enclosed as requested a note on "Scope of protection" which subject will be discussed at the forthcoming meeting of UPOV with the International professional organizations.

Yours sincerely,

Hans H. Leenders
Secretary General

Encl. 1

Fédération Internationale du Commerce des Semences

Ch. du Reposoir 5-7
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HHL/FA

SCOPE OF PROTECTION

New quick multiplication techniques have been developed by which it is possible to produce plants of traditionally sexually reproduced species without sowing seed which could reduce for certain seed sales to an absolute minimum.
In principle these methods (micro propagation/tissue culture) could be applied by anyone. In principle it is possible to start a commercial production of for instance cucumbers, tomatoes etc., on the basis of the tissue of a plant obtained from one seed.

In several countries courses are organised where participants can learn how to do tissue culture.
In so far this is done by commercial enterprises who sell plantlets most national legislation cover this situation and the plantlets thus produced would come under the plant breeders' rights legislation.
If however market growers/farmers would grow their own plantlets in this way one would be confronted with exactly the same problem existing for fruit orchards discussed during the revision Convention.
At that time a recommendation on article 5 of the Convention was unanimously adopted which reads as follows :

"The Diplomatic Conference on the Revision of the International Convention for the Protection of New Varieties of Plants, held in 1978,

Having regard to Article 5(1) and (4) of the International Convention for the Protection of New Varieties of Plants of December 2, 1961, as revised at Geneva on November 10, 1972, and on October 23, 1978,

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 than 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 Article 5(1) is desirable to safeguard the legitimate interests of the breeders, the Contracting States of the said Convention take adequate measures, pursuant to Article 5(4).

This Recommendation was unanimously adopted by the Plenary of the Diplomatic Conference on October 23, 1978."

../.

../.

Our organization is of the opinion that the time has come to adapt the Convention in an adequate way to the new situation which has arisen.
We realize that there are certain political currents working against plant breeders' rights. This should however not be a sufficient reason to do what is necessary to avoid that the concept of plant breeders rights will be completely undermined by the development of techniques which could not been foreseen at the moment of the Convention and to which one cannot and should not in itself be opposed.

[Annex IV follows]

IOM/II/6

ANNEX IV

DOCUMENTS REFERRED TO IN ANNEX II (CIOPORA)
COLLECTED BY THE OFFICE OF THE UNION

[Original: French]

LETTER OF OCTOBER 21, 1983, REFERRED TO IN DOCUMENT CIOP/IOM/2,
REPRODUCED FROM PARAGRAPH 5 OF UPOV DOCUMENT IOM/I/12 OF MAY 4, 1984

5. Mr. Royon (CIOPORA) noted that a fairly recent letter from his Association, dealing solely with the problems of minimum distances, had not yet reached the UPOV Secretariat. It in fact concerned the conclusions at which the select committee set up by his Association had arrived. Mr. Royon read out the letter:

"(a) It is necessary to increase the "minimum distances" beyond which a variety may be recognized as new in relation to varieties that are a matter of "common knowledge" and therefore as protectable.

"(b) The minimum level of differentiation between the varieties, however, should be laid down species by species, taking into account the special features of each. It would be eminently desirable that when establishing these varying levels of differentiation, the government experts should consult the professional experts in order to take account of their practical experience.

"(c) Differentiation between varieties should, in most cases, be possible "visually" without the need to use sophisticated techniques whose use should be restricted to identifying varieties.

"However, to allow for the development of techniques and of science, CIOPORA feels that the criterion of "visual" determination of minimum distances could prove inadequate, particularly in the case of differences that concern solely physiological characteristics.

"On the other hand, in the case of varieties that are morphologically identical or very close, but physiologically distinct, measures should be provided to determine any possible abuse of rights.

"CIOPORA considers that the difficulties raised by this problem constitute a further argument to support its view that breeder's rights need to be extended to the finished product on the market.

"(d) As regards mutations, CIOPORA considers that the requirement in examination of greater minimum distances between varieties should make it possible to eliminate the parasitic competition of "mini-variations" for which at the present time (particularly for certain species such as begonia, African violet, kalanchoë, pelargonium, etc.) abusive applications for protection are made to the detriment of varieties from which they have been derived.

"Moreover, by giving greater value to a title of protection, such a measure would also comfort, if not satisfy entirely, those of the breeders who would also wish to obtain a droit de suite in all mutations of their varieties, even where such mutations are sufficiently distinct to be protectable."

Mr. Royon said that he was willing to explain each of those points during the debates.

[Original: French]

LETTER AND MEMORANDUM OF AUGUST 30, 1974, REFERRED TO IN DOCUMENT CIOP/IOM/3, REPRODUCED FROM UPOV DOCUMENT NM/I/4 OF OCTOBER 15, 1974

Letter from the Secretary General of C.I.O.P.O.R.A. to the Secretary General of UPOV, dated August 30, 1974

As I mentioned to you at our last meeting in your Office, our Association was very appreciative of the proposal you made in your letter of April 9, 1974, to the effect that we should submit to you our comments and suggestions, if any, on those of the draft Guidelines for the Conduct of Tests which relate to species of interest to our Association.

As agreed, our Association has investigated the problem of prior examination in general and I enclose herewith a memorandum containing a certain number of general considerations deriving from recent experience of examination as provided for in Article 7 of the 1961 Convention.

We should be obliged if you would forward this document to the Council of UPOV and to the Working Group responsible for the drafting and revision of the Guidelines for the Conduct of the Prior Examination.

We earnestly hope that, in accordance with your proposal, communication may soon be established between our Association and the bodies referred to, in such a way that the desired improvements may be brought about in examination procedures and the issue of titles of protection. We thank you in advance for whatever action you take to this end.

In addition, our Association will not fail to submit more specific suggestions to you with regard to the examination of each of the species in which it is interested, as the respective draft Guidelines become available.

M E M O R A N D U M

on the prior examination provided for in Article 7 of the Paris Convention establishing the Union for the Protection of New Varieties of Plants of December 2, 1961

I.

C.I.O.P.O.R.A.,

Considering Articles 7 and 30(2) of the Convention establishing the Union for the Protection of New Varieties of Plants and the Recommendation annexed to the said Convention concerning the organization of prior examination at the international level,

Considering the recommendations made to States members of the Union by the Council of the said Union at the close of its seventh session, held from October 10 to 12, 1973,

Recalling also the advice and recommendations already given by it in the past (observations of October 1961 on the Preliminary Draft Convention of August 1961, on the Protection of New Varieties of Plants, International Symposia on the Protection of New Plant Varieties in Paris in April 1967 and in Amsterdam in April 1972),

Referring to the letter sent to it by the Secretariat General of UPOV on April 9, 1974,

submits to the Council of the International Union for the Protection of New Varieties of Plants the following Memorandum, the purpose of which is to review the present operation of prior examination with respect to vegetatively reproduced ornamental plants, and to suggest such improvements as are desired by the profession at the present time.

II.

It is important to bear in mind that the International Conference on the Protection of New Varieties of Plants, which resulted in the 1961 Paris Convention, was convened from 1957 to 1961 at the instigation of the breeders of plants which did not qualify for protection by patent,

that is, mainly, seed-reproduced plants for alimentary purposes.

For the majority of these plants provision was already made, in legislation on the commercialization of seeds and plants, for prior examination of the performance and the cultivation value of new cultivars.

Moreover, the novelty characteristics of this type of plant are often of a physiological nature (better performance, higher precocity rating, etc.), and generally can only be verified after a thorough test growing. The same applies to homogeneity and stability characteristics.

There is no doubt that this fact had a considerable influence on the decision taken by the writers of the Convention to introduce prior examination.

On the other hand, new varieties of vegetatively reproduced ornamental plants by definition present no major difficulty with respect to homogeneity and stability. As for their novelty characteristics, these are generally morphological and can therefore be determined more easily and rapidly. This no doubt explains how, in the United States of America, protection by "plant patent" of vegetatively reproduced plants has existed for 40 years without prior examination and has given satisfaction to breeders and users alike.

III.

C.I.O.P.O.R.A. concludes from the foregoing that the prior examination of vegetatively reproduced ornamental plants should be designed on the basis of norms and criteria radically different from those used for other categories of plants. This view is moreover quite in accordance with the 1961 Convention, which provides in Article 7(1) that "examination shall be adapted to each botanical genus or species having regard to its normal manner of reproduction or multiplication."

C.I.O.P.O.R.A. also considers that such a distinction is not only necessary but urgent, for, while prior examination is the keystone of plant variety protection as conceived by the new Convention, it could equally become a stumbling-block if care is not taken.

1. Prior examination limits the number of countries able to accede to the 1961 Paris Convention, which obliges any State contemplating accession to be in a position to put its provisions into effect immediately, and therefore to carry out the examination prescribed by Article 7.

It is now clear that a number of countries have not, and for a long time will not have, sufficient capital, the necessary installations or competent technicians to devise and operate a prior examination service.

2. Prior examination limits the number of species likely to enjoy protection under national laws enacted in accordance with the provisions of the Convention: The Federal Republic of Germany, for instance, justified its refusal to extend protection to carnations by the lack of ad hoc installations for the prior examination of varieties of this species.

3. Prior examination is likely to become more and more uncertain and less and less reliable owing to the growing number of varieties of every species being put on the market, and of commercial dealings between countries. There was a time when the cultivars of a given species, marketed in a given country, were for the most part produced by breeders who were nationals of that country. Nowadays the origin of the cultivars varies more and more, and they can come from the United States, the Soviet Union, Japan, Australia or New Zealand. Thus it becomes practically impossible for an expert to know all the cultivars in existence at any one time, or even all the "well-known varieties." Thus prior examination becomes progressively longer and more difficult.

4. Being difficult, prior examination is of course also costly (in France a new plant variety certificate costs three times as much as a patent). This high cost limits the number of varieties in respect of which breeders decide to file an application for protection, and the vicious circle is completed by the examining bodies, which are thus obliged to charge high fees for reasons of economic viability.

A more accurate idea of the foregoing may be had by consulting the Register of New Varieties (vegetatively reproduced species) maintained by the French Association of Breeders of New Horticultural varieties (SNPNH): at the time of the entry into force of the French Law for the Protection of New Plant Varieties, 850 recent varieties had already been recorded in the SNPNH Register and were therefore eligible for the application of the provisions of Article 36 of the French Law; this option was exercised for only 32 varieties, however. Moreover, by April 1974, some 200 new varieties had been entered in the Register since the entry into force of the French Law whereas, during the same period, applications for new plant variety certificates had been filed in respect of only 40 varieties. Finally, bearing in mind that the Register in question does not cover all the varieties put on the market (many breeders are not members of the Association), it may be concluded from the above figures that there is a somewhat disquieting lack of interest in the protection afforded by the Convention.

On the basis of a survey of its own, C.I.O.P.O.R.A. is in a position to state that the main cause for this is the cost of protection, which is considered too high by a large number of breeders of ornamental plants. These breeders seek to make their research work profitable in roundabout ways (sale of propagating material at high prices, gentlemen's agreements). Another cause is undoubtedly the difficulties which are being encountered by breeders (particularly in the United Kingdom and Denmark) in the application of the UPOV Guidelines for Variety Denominations.

5. Since it is a long process, prior examination is likely to delay the marketing of new varieties or unduly prolong the period (prior to publication of the issue of the title of protection) during which the breeder, while enjoying preliminary protection, can only report or proceed against action prejudicial to his rights after notification of a certified copy of the application.

IV.

One cannot but conclude from all the foregoing that prior examination, as provided for at the present time, suffers from a number of limitations of a human, technical and financial nature, and that steps should be taken to investigate and apply promptly any measures which would permit, if not its elimination, at least its simplification within limits compatible with the texts of the Convention currently in force.

C.I.O.P.O.R.A. was pleased to note that the Council of the International Union had instituted a certain number of measures to rectify the situation, particularly at its October 1973 session, such as the possibility for each member State to issue the title of protection on the basis of the results of a prior examination carried out previously in another State.

C.I.O.P.O.R.A. nevertheless considers it necessary to go much further towards a simplification of the prior examination, and therefore takes the liberty of suggesting the following measures:

Short-term measures

1. It is desirable that, for each species which allows this in terms of technical considerations, only one State of the Union be responsible for prior examinations in respect of that species, in order to avoid the costly proliferation of reference collections and examination services. The results of the examination should be recognized automatically by the State making use of them except where the breeder or any other interested party has made an objection. It is also desirable that the country responsible for the examination of a given species be selected on the basis of its climatic and technical facilities in relation to the species concerned: it would be unfortunate if examination were entrusted to a country which would need a period of two years whereas another country could do the same work in a shorter time.

2. Where several countries of the Union have comparable prior examination facilities for a given species, the results of the first examination must prevail, under the same conditions as above, as far as the authorities of the other States are concerned. The party filing the application must of course have the right to choose freely the country in which he wishes to have the prior examination of his variety carried out.

3. Where, as indicated above, examination is carried out in one State of the Union only, it is neither reasonable nor justified, in the opinion of C.I.O.P.O.R.A., to expect other countries using the examination results to do more than cover the administrative costs occasioned by the transmittal of those results. The essential purpose of international cooperation, that is, the reduction of the cost of protection both for breeders and for the official bodies responsible, must be taken into account at all times. In this connection C.I.O.P.O.R.A. would also like to have examination fees standardized on the basis of the lowest rates currently applied.

4. As soon as one country of the Union protects a given species and therefore has established the appropriate prior examination services, that species should immediately and automatically be entered in the list of species to which all the other countries undertake to apply the provisions of the Convention.

5. Even where prior examination is carried out in one country only, C.I.O.P.O.R.A. proposes the appointment, for each ornamental species concerned, of a permanent working group composed of international experts. The experts, selected and designated by the Council on the basis of their competence, would be responsible for assisting the services of the country entrusted with the examination of the species concerned, and would travel on request. They would keep up to date the Guidelines for the conduct of tests on each species involved.

6. In view of the fact that the establishment of a comprehensive reference collection is practically impossible for obvious technical and financial reasons, C.I.O.P.O.R.A. considers it desirable to establish and keep up to date, for each species, a list of varieties maintained in public or private reference collections already in existence, in order that use may be made of these collections whenever necessary.

Medium-term measures

Even though the measures outlined above are likely to bring about a considerable simplification of the existing prior examination system, there is reason to wonder whether one should not consider still more radical and pragmatic solutions.

New Zealand recently drafted a law on the protection of new plant varieties which provides that examination may be carried out on the basis of reference plants kept by the applicant himself. Similarly, in the United States of America, the Plant Variety Protection Act of January 1, 1971, which introduces protection for categories of plants not eligible for protection under the 1930 Plant Patent Act and which is nevertheless extensively based on the 1961 Convention, does not provide for prior examination as foreseen by the Convention.

In view of the foregoing, C.I.O.P.O.R.A. requests that the Council and the representative professional organizations contact the competent authorities of these countries, in order to ascertain the reasons underlying the adoption of such provisions, to compare experience acquired in the field of examination and to make an objective review of the advantages and drawbacks of the two systems.

C.I.O.P.O.R.A. remains at the entire disposal of the Council of the Union for detailed discussion of each of the points mentioned in this Memorandum.

[Original: French]

LETTER OF MARCH 19, 1979, REFERRED TO IN DOCUMENT CIOP/IOM/3, REPRODUCED FROM THE ANNEX TO UPOV DOCUMENT TC/XIII/7 OF MARCH 26, 1979

Subject: Data recording and interpretation for preliminary examination

...

As you will have already been informed by Mr. Favre, whom I requested to ring you in this matter, our Association will not be holding its next Annual General Meeting until May next. It will not be possible, therefore, to let you have our comments on the above-mentioned document before the date planned for the meeting of the Expert Committee.

However, we expect to be able to submit comments following our meeting and we hope that the Committee will be able to take them into account when drafting the final wording of the Guidelines.

As regards document TG/26, concerning the draft guidelines for examining the species "Chrysanthemum," I have received a number of remarks over the telephone, of which the following are the more important:

1. In view of the extremely large number of minor mutations which occur in chrysanthemums and which could lead to it becoming impossible to effectively protect hybrid varieties, the majority of chrysanthemum breeders favor a degree of stringency in the recognition of novelty, stability and homogeneity characteristics.

2. Most breeders feel that such a detailed description should make it possible to suppress or defer (until such time as a dispute arises) examination of the plants (under glass) and therefore to reduce the examination, as in the USA, to a paperwork examination.

3. Most of the characteristics mentioned in the description document are liable to variations, which may be large, depending on:

- temperature,
- day length,
- light intensity.

It might therefore be desirable to ask the breeder to specify the data for these three parameters at the time the description is made.

4. The description document seems to have been drawn up with a view mainly to "cut flowers." Other criteria would possibly have to be taken into consideration for pot chrysanthemums.

5. The chrysanthemum breeders would also like a little more time to examine the UPOV document in more detail and to formulate any comments they may have.

[Original: French]

LETTER FROM THE SECRETARY GENERAL OF CIOPORA, DATED OCTOBER 28, 1977, ADDRESSED TO THE SECRETARY-GENERAL OF UPOV AND REPORT, REFERRED TO IN DOCUMENT CIOP/IOM/6

. . .

Further to the unofficial, restricted meeting which brought together a number of representatives of UPOV and CIOPORA at Sparrieshoop, Federal Republic of Germany, in August this year, I have the honor to enclose for your attention a report on the problem that was discussed at that meeting, that is to say, on the increasing difficulties experienced by breeders in our Community in exercising the rights that they hold as a result of the plant variety protection certificates registered in UPOV countries.

I should be most grateful if you would transmit this report to the President of the Committee of UPOV and to the President of the Committee of Experts for the Interpretation and Revision of the Convention.

Given the seriousness of the situation and the risk that this will get even worse in view of the increasing tendency for cut flowers to be transported from Third World countries to European countries, CIOPORA requests that the suggestions and recommendations that it has already made regarding the definition of the right of the breeder (Article 5) be taken into consideration by the member States of UPOV, both at the national and the international level, particularly as part of the work currently going on regarding the revision and interpretation of the Convention.

. . .

C I O P O R A

INTERNATIONAL COMMUNITY
OF BREEDERS OF ASEXUALLY
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R E P O R T

ON THE LEGAL AND ECONOMIC SITUATION OF THE WESTERN EUROPEAN MARKET FOR ORNAMENTAL PLANTS, PARTICULARLY CUT FLOWERS. THE IMPACT OF THIS SITUATION ON THE POSSIBILITIES OPEN TO PLANT BREEDERS TO EXERCISE THEIR RIGHTS IN NEW PLANT VARIETIES FOR WHICH SUCH RIGHTS HAVE BEEN GRANTED

INTRODUCTION

The signing of the Paris Union Convention for the Protection of New Varieties of Plants by five European countries on December 2, 1961, in Paris created a wave of hope amongst breeders. The Convention not only confirmed unambiguously official recognition of the rights of breeders in their creations, but gave grounds for hoping that, in the fairly near future, breeders' rights would acquire still wider international recognition. Breeders hoped that the Convention would fill the existing "gaps" which jeopardized the effective protection of their rights.

It is disappointing to note that, more than 15 years after the signature of the Convention, only nine countries have ratified it. And it should further be stressed that those countries do not always protect the same species, which leaves open a certain number of loopholes for fraudulent practices which are difficult for breeders to control (e.g., Guernsey and Belgium, especially for roses and carnations).

What is still more serious, however, is that the breeders of ornamental plants are finding it increasingly difficult, if not impossible, to secure respect for their rights even in the Convention countries in which they have filed applications for plant breeders' rights.

This state of affairs, which appears inconceivable, is the result of both economic and legal causes.

I. DEVELOPMENT OF THE ECONOMIC SITUATION OF THE EUROPEAN MARKET FOR THE PRODUCTION OF ORNAMENTAL PLANTS, PARTICULARLY CUT FLOWERS

After an extremely encouraging expansion at the beginning of the sixties, the European market for cut flower production has markedly deteriorated since 1969, and especially after 1974.

While selling prices at production level have been practically unchanged for more than 10 years (they have even declined in relation to certain reference years), the costs of horticulturists have increased in alarming proportions:

- labour costs (+ 250% in 7 years);
- social charges and special levies;
- Fourfold increase in the price of fuel-oil for the heating of greenhouses (petrol crisis);
- increase in the price of fertilizers and plant care products;
- increase in the cost of credit for the renewal of investments.

This explains the fact that a very large number of nurseries are barely above the break-even point and that many are "in the red," those which lack the necessary financial reserves being the first to disappear.

This difficult situation has been aggravated for some years past by the contemporary evolution of horticultural production in several non-European countries (in the Third World).

The statistics+ attached to this report are sufficiently eloquent and require no commentary. Here we shall stress only a few particularly striking examples:

- Columbia's carnation plantations have increased from about 100 hectares* at the beginning of 1973 to 250 hectares in 1974 and to 600 hectares in 1976 (forecast for 1977: 700-800 hectares). Having conquered the North American market, Colombian carnations are now competing with European-grown flowers: whereas, formerly, carnations from the South of France accounted for nearly 80% of Great Britain's consumption, today Colombian carnations cover 70% of that country's needs. And the same applies to all the big cut-flower importing countries (the Federal Republic of Germany, Switzerland, Scandinavia).

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* 1 hectare = 2.47 acres.

\+ not reproduced in this Annex

- In 1972, Kenya's cut-flower exports amounted to less than 500 tons. Today, whole charter-planeloads of flowers are imported by a German wholesaler based in Frankfurt.

Other countries in Africa (Morocco, Senegal, Ivory Coast), Asia (Singapore, Thailand, Sri Lanka) and South America (Argentina, Brazil, Ecuador, Guatemala, Mexico) are also becoming major centres of flower production.

Apart from the benefit of climatic conditions which are often ideal and permit the full-scale industrialization of production, these Third World countries enjoy certain special advantages which enable them to compete unfairly with their European counterparts:

- underpaid labour ($2 per working day);
- virtually non-existent social charges;
- very lax taxation, if any at all;
- lastly, with few exceptions and failing amicable arrangements, most of these countries do not protect plant varieties, so that growers can cultivate the newest varieties without having to pay royalties to the breeders.

This "invasion" of horticultural products from the Third World has not, alas!, been offset by an increase in European consumption, which, while encouraging at the beginning of the seventies, has slowed down considerably, as is shown by the total expenditure (in millions of DM) of households in the Federal Republic of Germany during the period 1971 to 1976:

Year	Total expenditure		
1971	765	=	
1972	1,076	=	+ 39%
1973	1,430	=	+ 32%
1974	1,585	=	+ 11%
1975	1,631	=	+ 3%
1976	1,685	=	+ 3%

The market trend illustrated above has had direct adverse repercussions on the economic situation of breeders.

First, for the reasons indicated above, breeders' research costs have been growing without any proportional increase in royalty rates, as a direct result of the difficulties of their flower-growing customers.

At the same time, the costs of protection (plant breeders' rights) have considerably increased with the institution of preliminary examination by UPOV countries.

Lastly, the rate of "turnover" of new varieties has increased, so that breeders have to cover their research and distribution costs in a much shorter time.

As against these increases in costs, the production areas in which breeders can collect their royalties have ceased to grow and are even declining: on account of heating costs, German rose-growers can virtually no longer afford to cultivate winter varieties and have to concentrate on summer varieties; in Great Britain, the area of greenhouse roses fell from about 100 acres in 1971 to less than 30 acres in 1977 (whereas the area under roses in Guernsey, which refuses protection, increased from less than 10 acres to some 60 acres during the same period).

These losses must be added to the reduction of earnings due to the hundreds of hectares under new varieties in the Third World countries referred to above which escape from any control by the breeders. It is indeed the most recent varieties--those that are protected in Europe--which are cultivated in these countries.

It is easy to convert cut-flower production into the number of roseplants cultivated and the French Breeders' Syndicate considers that its members' loss of earnings already amounts to some 10 million francs.

This shift in the centres of cut-flower production towards the developing countries is only just beginning and may well accelerate during the coming years. In the present state of domestic legislation in the Third World countries, however, it is very difficult, if not impossible, for breeders to control the production of their varieties in those countries. Not only have most of those countries no special legislation on the protection of plant varieties, but at the present time their whole policy is directed towards the strict limitation of the exercise by foreigners of industrial property rights (Andean Pact, regulations enacted in Brazil and Mexico on licenses and transfer of technology, etc.). Even if a firm of breeders succeeded in concluding an amicable agreement, the payment of royalties, if it took place at all, would be strictly limited in amount and duration.

In addition, European growers are exerting more and more pressure on breeders to protect them against the unfair competition constituted by the sale, free of royalties, of cut flowers of varieties for which they themselves have to pay royalties. The obligation on a breeder granting a license to ensure to the licensee the peaceful enjoyment of the right granted is, in fact, an essential counterpart to the right of the breeder granting the license to receive royalties.

In the countries in which they have filed applications for plant breeders' rights, breeders are therefore under an obligation to oppose the illicit sale, without a license and consequently without paying royalties, of cut flowers of their varieties. It is important, therefore, to know whether the rights conferred by European plant variety laws permit them to do so.

II. THE BREEDER'S RIGHTS IN HIS VARIETIES, AS DEFINED IN THE 1961 PARIS CONVENTION AND IN THE RELEVANT LAWS OF UPOV COUNTRIES

With the exception of France, practically all the European members of the 1961 Convention have adopted only the obligatory minimum provisions of Article 5(1) of the Convention.

Article 5(1) of the Convention reads as follows:

> "The effect of the right granted to the breeder of a new plant variety or his successor in title is that his prior authorisation shall be required for the production, for purposes of commercial marketing, of the reproductive or vegetative propagating material, as such, of the new variety, and for the offering for sale or marketing of such material."

Thus the obligatory minimum right recognized by the Convention is a right in the propagating material, as such.

The extension of the breeder's right to the marketed product (whatever it may be: seedling, plant, cut flower, etc.) is provided, in paragraph (4) of Article 5, merely as an additional provision which is optional for each State of the Union.

The last sentence of Article 5(1) provides, however, that:

> "The breeder's right 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."

From a cursory reading of this sentence, it might be thought that the intention was to provide a certain privileged treatment for ornamental plants. While that was indeed the original idea of the Experts (see Resolution No. 6 of the Final Act of the International Conference of May 7 to 11, 1957, reproduced below), the discussions at subsequent meetings have unfortunately diverged from that objective, probably on account of the related problems arising in the case of industrial and food crops.

In fact, however, this last sentence constitutes merely a repetition of the first part of paragraph (1): only the propagating material is protected, even in the case of ornamental plants. The same result could have been obtained without the addition of this ambiguous sentence, simply by deleting the above-quoted words "as such."

Is this protection sufficient to enable breeders to exercise their rights and to meet their obligations?

Two practical examples serve to demonstrate that the protection of the propagating material alone is not enough in the case of ornamental plants:

1. Let us suppose that a rose-breeder has created a new variety the essential merit of which is to produce high-quality roses for the cut-flower market:

The breeder protects his variety in a UPOV country which, in its domestic law, applies only the minimum provided for in Article 5(1).

Now let us suppose that horticulturists in the country in question, whose activity consists in producing and selling cut flowers, decide, instead of propagating the variety themselves, to buy rose trees of that variety in a country where there is no protection and plant them in their greenhouses. It would seem that those horticulturists will be able to exploit the variety commercially, i.e., to derive a profit from it, without infringing the law of the UPOV country in question. They will, in fact, be producing and selling cut flowers of the "protected" variety which are:

- neither "propagating material as such,"
- nor "used commercially as propagating material in the production of ornamental plants or cut flowers,"

and they will do so without having to pay royalties to the breeder.

2. Similarly, if horticulturists producing cut flowers in a country where there is no protection start mass production of the variety in question, they can flood the market of the UPOV country referred to in our previous example, often at "dumping" prices, thus endangering the local production of cut flowers.

The breeder will be unable to protect his licensees or to guarantee to them the peaceful enjoyment of their license on the territory of the UPOV country in question.

It is worth pointing out, in connection with the second example, that it is difficult at the present time to control these imports even in a country like France where protection has been extended to the marketed product in the case of roses and carnations.

Indeed, since the end of 1975, trade in products of class 06 (cut flowers) has been completely liberalized under EEC regulations. This means that the system of quotas or of import licenses has been replaced by a system of import certificates.

The Aalsmeer Flower Auction, which is the veritable centre for the cut-flower trade in Europe, is now a factor of disturbance from the standpoint of the control of protected varieties. It is, in fact, through this Auction, that the majority of flower imports from Colombia, Kenya, Israel, etc., are channelled. These flowers are then re-exported from Aalsmeer to all the countries of the Community. Having been cleared through Customs (the duties, if any, being collected by the Netherlands), these flowers can circulate freely inside the EEC. If to this is added the fact that the plant health certificates issued by the countries of origin of the cut flowers are often, if not always, "lost" in the Netherlands, it is understandable that French breeders find it difficult to ensure the application of the provisions of the French law, which would however permit them to prevent the import into France of illicit cut flowers of their own varieties.

The situation illustrated by the two examples given above unquestionably runs counter to the whole purpose of the 1961 Convention.

Here it is relevant to recall Resolution No. 6 of the Final Act of the International Conference for the Protection of Plant Varieties (Paris, May 7 to 11, 1957):

> "The protection of a new variety should have the effect of subjecting any marketing of the reproductive or vegetative propagating material of that variety to the authorization of the breeder.
>
> "The Conference recognizes, however, that, for reasons of public interest, breeders may be obliged to issue licenses against fair remuneration.
>
> "The Conference has also considered the possibility, in certain cases, such as that of ornamental plants, of providing protection also for the marketing, in the natural state, of leaves, flowers or fruit. It has recognized the importance of such protection, which will be the subject of careful study."

Today, we can appreciate the gap that exists between this Resolution and the wording of Article 5(1) of the Convention.

The fact that the discussions on this point covered simultaneously such varied problems as those of cut flowers, tobacco plants and tinned peas has clearly been gravely detrimental to the interests of breeders of ornamental plants.

Thus the question that arises, first and foremost, today as far as asexually reproduced ornamentals are concerned is not only whether the right to protection should be extended to the marketed product, but, essentially, whether the right conferred by the Convention is capable of being usefully and effectively applied.

This question should be studied and settled without delay.

We have already had occasion to make certain suggestions to the Committee of Experts on the Interpretation and Revision of the Convention.

One simple and effective solution would be to delete, in the last sentence of Article 5(1) of the Convention, the words: "for the cultivation or the use for commercial purposes of plants the production of ornamental plants or cut flowers."

An intermediate solution would be for the definition of the content of the right in Article 5(1) to include the words: "...the cultivation or the use for commercial purposes of plants of the variety..." But this solution would not prevent the abuses referred to in example 1 and would leave the door open to those referred to in example 2.

- Finally, as Dr. Palos, the eminent Hungarian jurist, has recently suggested, at the Third International Symposium on the Protection of Plant Varieties, it would seem that any search for a solution must be along the lines of the existing conventions and laws in other industrial property fields, so as to benefit from the experience thus obtained.

In this connection, it may be useful to refer to the 1965 BIRPI publication No. 801(E) entitled "Model Law for Developing Countries on Inventions".

Section 21 of the Model Law defines the nature of the rights conferred by patents as follows:

"The patent shall confer upon its registered owner the right to preclude third parties from the following acts:

(a) when the patent has been granted in respect of a product:

(i) making, importing, offering for sale, selling and using the product,

(ii) stocking such product for the purposes of offering for sale, selling or using."

With some minor adjustments, this definition might be used for the special needs of new ornamental varieties, and the objections which have often been raised by the UPOV Experts can be disposed of by quoting also Section 23 of the same Model Law.

This Section imposes the following limitations on the rights conferred by the patent under Section 21:

"(1) The rights under a patent shall only extend to acts done for industrial or commercial purposes.

"(2) The rights under a patent shall not extend to acts in respect of the product covered by the patent after the product has been lawfully sold in the country; nevertheless, in so far as the patent also concerns a special application of the product, this application shall continue to be reserved to the registered owner of the patent."

CONCLUSION

We hope that this survey will help to give the UPOV experts a clearer picture of the problem and enable them better to appreciate the fragility of the protection conferred at present by Article 5(1) of the Convention on the breeders of ornamental plants.

Some believe that only national legislations can provide a remedy to the problem describes above, because each member of the Union can avail itself of the option provided in Article 5(4) of the Convention (as France has already done).

The amendment of national laws is certainly essential, but we think that the problem should also be tackled and solved at the level of the Convention itself.

The definition of the content of the right granted to the breeder is, in fact, the keystone of the whole Convention. If Article 5(1) does not effectively confer on the breeders of ornamental plants the basic protection to which they are

entitled and which it was proposed to grant in Resolution No. 6, quoted above, this situation must be remedied as soon as possible; otherwise the system of protection of plant varieties provided by the Convention is in danger of losing all credibility.

In view of its urgency, this question should, in our view, unquestionably be included in the agenda of the Diplomatic Conference which is to deal, in 1978, with the interpretation and revision of the Paris Union Convention of 1961.

René ROYON
Secretary-General
October 1977

[Original : French]

RESOLUTION ADOPTED BY THE GENERAL ASSEMBLY OF CIOPORA ON JUNE 5, 1984, ON THE PROPOSAL OF THE EXECUTIVE COMMITTEE, REFERRED TO IN DOCUMENT CIOP/IOM/7, REPRODUCED FROM ANNEX II TO UPOV DOCUMENT C/XVIII/9 ADD.2 OF JULY 26, 1984

Subject: UPOV Recommendations on Variety Denominations (document IOM/I/5 of May 4, 1983)

RESOLUTION

WHEREAS the UPOV Recommendations of May 4, 1983, basically go no further than to repeat the provisions of the Guidelines for Variety Denominations adopted by the UPOV Council on October 12, 1973; whereas those provisions had been unanimously criticized by the professional organizations consulted on December 6, 1972;

WHEREAS Article 13 of the Convention is in itself adequate; whereas the revised 1978 Act amended that Article to give it greater flexibility (for example, even denominations consisting solely of figures are now acceptable if they correspond to an established practice); whereas there would be no justification for giving a restrictive interpretation;

CIOPORA

1. INVITES the UPOV Council to reconsider the need and the advisability of "Recommendations" or "Guidelines" in respect of the creation and acceptance of denominations submitted by breeders.

2. REQUESTS that, in any event,

(a) the "Recommendations" should forego any provision that has the purpose or effect

- of limiting the rights (at present recognized by Article 13) of breeders in their choice of denominations or their system of creating them,

- of changing the function of denominations by giving them an advertising and trading role encroaching on an area normally covered by trademarks;

(b) those proposed provisions, in particular, be deleted that require

- that the denomination be easy to remember and to pronounce for the average user (Recommendation No. 2(1)),

- that the denomination should not be composed of more than three syllables without pre-existing meaning (Recommendation No. 2(2)(iv)).

3. **INVITES** the UPOV Council to give official recognition as an established practice to the system of "coded denominations" (combinations of syllables and numerals) that has been used since 1954 by the breeders (both members and non-members of CIOPORA) of asexually reproduced ornamentals and fruit plants.

[End of Annex IV and of document]