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INTERNATIONAL UNION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS

GENEVA

**COMMITTEE OF EXPERTS ON
THE INTERPRETATION AND REVISION OF THE CONVENTION**

First Session

Geneva, February 25 to 28, 1975

PROPOSALS FOR A MORE FLEXIBLE INTERPRETATION

OR REVISION ON THE CONVENTION

Working paper prepared by the Office of the Union**SUMMARY**

This paper contains a résumé of the proposals for the interpretation or revision of the Convention presented by certain member States (discussed in the ninth session of the Consultative Working Committee) or submitted by certain non-member States and a non-governmental organization to the meeting of member and non-member States (October 1974).

1. In order to prepare the first session of the Committee of Experts on the Interpretation and Revision of the Convention, the Office of the Union has listed below proposals made so far for a more flexible interpretation or a revision of the Convention. Some of those proposals were put forward by member States of the Union and discussed at the ninth session of the Consultative Working Committee (April 1974), on which occasion that Committee decided that, as a preliminary step, the said proposals should be further examined by a special working committee (document UPOV/WC/IX/12, paragraph 21). The other proposals were submitted by two non-member States (Canada, United States of America) and one international non-governmental organization (CIOPORA) in connection with the meeting of member and non-member States held in October 1974 (documents UPOV/NM/I/2, 3 and 4).
2. At the eighth ordinary session of the Council, the view was expressed that "it was important to examine whether the interpretation so far placed by most of the present member States on some of the provisions of the UPOV Convention was correct, in particular, whether it was required under the Convention that examination must be actually conducted in the field or whether it could be conducted also in other ways," and "whether Article 13 of the Convention can be interpreted more liberally than had been the case heretofore"; the discussion of these two problems should have priority over the question if and which provisions of the Convention need revision (document UPOV/C/VIII/17, paragraphs 41 and 43). See paragraph 4(h) and (t) below.
3. If time permits the discussion of additional points, the Committee of Experts may wish to discuss the question whether Article 9 of the Convention is broad enough to allow for the issue of compulsory licenses in the sense of Article 5.A of the Paris Convention for the Protection of Industrial Property of March 18, 1883.
4. The proposals so far made on the interpretation and revision of the Convention are the following:

- (a) Ad Article 2(1), second sentence.
Proposal by the United States of America (Document UPOV/NM/I/2, Annex)

It is proposed that member States should, contrary to the wording of this sentence, be free to provide both possible forms of protection of new plant varieties--special title or patent--side by side for varieties belonging to the same genus or species.

- (b) Ad Article 4(3) and Annex to the Convention.
Proposal by Canada (UPOV/NM/I/3, Annex) and by the Netherlands
(UPOV/WC/IX/12, paragraph 21(i))

Both proponents point out that the obligation to apply the Convention to all genera and species listed in the Annex within 8 years is too rigid, since a State might not be in a position to extend protection to one or more particular species and would therefore be prevented from acceding to the Convention. Both propose the adoption of a more flexible system:

- (1) Canada proposes that member States should be obliged to apply the Convention on the date of the entry into force to at least 5 genera, within 3 years to at least 2 further genera, and within 6 years to at least 4 further genera.

- (2) The Netherlands proposes that member States should be obliged to apply the Convention within a fixed period of time to a limited number of genera and species of their choice; in this case, the Annex could either be enlarged or completely abandoned.

- (c) Ad Article 5(1).
Proposal by the United States of America (UPOV/NM/I/2, Annex)

It is proposed that breeders of asexually reproduced plants should be protected against any unauthorized reproduction, whether for commercial or non-commercial purposes; however, experimental use should not be considered a violation of a granted plant breeder's right.

- (d) Ad Article 6(1) (a).
Proposal by the United States of America (UPOV/NM/I/2, Annex)

It is proposed that the worldwide standard for determining whether the plant variety is new (distinguishable) should be abandoned; a system should be introduced according to which protection is only barred if the variety is publicly known, used or sold in the State where protection is sought (standard of national novelty [distinctness]).

- (e) Ad Article 6(1) (b).
Proposal by the United States of America (UPOV/NM/I/2, Annex)

It is proposed that a period of grace of one year be introduced during which the variety can be commercialized in a member State without affecting its novelty [distinctness]; furthermore, that the present system--under which the variety must not have been commercialized in the State of application before the date of filing the application and in other States for longer than four years before that date--should be abandoned.

- (f) Ad Article 6(1).
Proposal by the United States of America (UPOV/NM/I/2, Annex)

It is proposed that the breeder should be able to release seed or other sexually reproduceable plant material for experimentation without this being interpreted as commercialization, in other words without losing the right to obtain protection for the respective variety later. The breeder should also enjoy a special type of preliminary protection during the testing stage.

- (g) Ad Article 6(1) (a) and (d).
Proposal by the Federal Republic of Germany (UPOV/WC/IX/12, paragraph 21(ii))

It is pointed out that in subparagraph (a) the term "important characteristics" is used, while subparagraph (b) speaks of "essential characteristics." It is proposed to harmonize the wording of those two subparagraphs.

- (h) Ad Article 7(1).
Proposal by Denmark (UPOV/WC/IX/3, Annex 1, page 2; UPOV/WC/IX/12, paragraph 21(iv)), and by the United States of America (UPOV/NM/I/2, Annex)

Two proposals were made concerning the obligation to perform field tests for the purposes of the official prior examination required by Article 7(1):

(1) Denmark proposes that it should be made clear that the examination has to include field tests. However, a revision of the Convention could also be considered, to make it accessible also to States not performing a prior examination.

(2) The United States of America proposes elimination of the obligation to perform field tests.

- (i) Ad Article 7(1).
Proposal by CIOPORA (UPOV/NM/I/4, Annex)

The following proposals were made concerning prior examination:

(1) The examination of each species should be concentrated in one member State and provision should be made for recognition of the results obtained in one member State by the other member States; in view of the savings made, the fees should be standardized at the lowest rate currently applied.

(2) Where the examination is performed in more than one State, the results of the first examination should prevail.

(3) If one member State protects a given species, all other member States should automatically and immediately extend protection under their national laws to that species also.

(4) A group of international experts should be established to assist test stations in member States and to keep the Test Guidelines up to date.

(5) A list of reference varieties maintained in public or private reference collections should be established and kept up to date, so that use may be made of those collections whenever necessary.

(6) It should be examined whether official prior examination including field tests is at all necessary; the examination systems of New Zealand and the United States of America should be considered.

(j) Ad Article 7(1).

Proposal by Denmark (UPOV/WC/IX/12, paragraph 21(iv))

It is proposed to clarify that the examination should be extended to the question whether the new variety has been commercialized (Article 6(1)(b)) and whether it has been given a denomination (Article 6(1)(e)). It is furthermore proposed that it be made clear whether in all cases an examination as to stability (Article 6(1)(d)) is necessary.

(k) Ad Article 8(1).

Proposal by the United States of America (UPOV/NM/I/2, Annex)

It is proposed that the same minimum period of protection (15 years) should be adopted for all varieties and that the period of protection of 18 years for certain slower growing varieties should be abandoned.

(l) Ad Article 8(2).

Proposal by the United States of America (UPOV/NM/I/2, Annex)

It is proposed that the computation of the period of protection start from the filing date of the application rather than from the date of issue of the title of protection.

(m) Ad Article 10.

Proposal by the United Kingdom (UPOV/WC/IX/12, paragraph 21(v))

It is proposed that the owner of a plant breeder's right should be obliged to keep the variety in commerce with the characteristics as defined when the right was granted.

(n) Ad Article 10(2) and (3)(a).

Proposal by the United States of America (UPOV/NM/I/2, Annex)

It is proposed that the requirement of maintaining reproductive or propagating material be abandoned; any such requirement should be left to the national law.

(o) Ad Article 10(2) and (3)(a).

Proposal by the Netherlands (UPOV/WC/IX/12, paragraph 21(v))

Attention is drawn to the fact that according to Article 10(2) the breeder shall forfeit his right when he is no longer in a position to provide the competent authority with reproductive or propagating material, while according to Article 10(3) the right may become forfeit if the breeder does not provide the competent authority on request with the reproductive or propagating material for checking the new variety. It is proposed that the reasons for these two different rules be examined.

(p) Ad Article 10(4).

Proposal by the United States of America (UPOV/NM/I/2, Annex)

It is proposed that other grounds, contained in the applicable national law of a member State, should also be admitted for annulment or forfeiture.

- (q) Ad Article 12(1) and (3).
Proposal by the Netherlands (UPOV/WC/IX/12, paragraph 21(vi))

It is proposed that the right of priority be made dependent on the existence of a valid first application, especially since the effects of claiming priority are very far-reaching as a result of the four-year-privilege of Article 12(3).

- (r) Ad Article 12(1).
Proposal by the Netherlands (UPOV/WC/IX/12, paragraph 21(vi))

It is proposed to provide that national rights for the same variety should be terminated at the same time, at least in States belonging to an economic Union (which would mean that the duration is computed from the date of the first application in a member State).

- (s) Ad Article 12(3).
Proposal by Denmark and France (UPOV/WC/IX/12, paragraph 21(ii)) and by the United States of America (UPOV/NM/I/2, Annex)

It is proposed that the four-year-privilege be abandoned; this would result in deferring the examination in member States where subsequent applications are filed.

- (t) Ad Articles 13 and 36.
Proposals by Canada (UPOV/NM/I/3, Annex) and by the United States of America (UPOV/NM/I/2, Annex)

(1) Canada proposes abandonment of the present constraints with respect to denominations; combinations of words or series of letters with numbers should be admitted (this proposal refers mainly to the Guidelines on Variety Denominations).

(2) The United States of America propose that the selection and approval of variety denominations, and the details of their policing, should be left to the national laws of member States; on the other hand, the role of UPOV in informing States of the appropriation of variety denominations in order to assure that variety denominations are generic in nature, and cannot be appropriated as trademarks, should be maintained and if possible enhanced.

- (u) Ad Article 14.
Proposal by the United States of America (UPOV/NM/I/2, Annex)

It is proposed that ways be found of liberalizing the national control measures mentioned in Article 14 in cases where plant variety rights have been obtained.

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