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UPOV

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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

REPORT

adopted by the CommitteeOpening of the session

1. The first session of the Committee of Experts on the Interpretation and Revision of the Convention (hereinafter referred to as "the Committee") was held in Geneva from February 25 to 28, 1975.
2. The six member States of UPOV and the three signatory non-member States, Belgium, Italy and Switzerland, had been invited to the session. All, with the exception of Italy, were represented. The list of participants is attached to this report.
3. The session was opened by Mr. H. Skov (Denmark), Chairman of the Committee.

Adoption of the agenda

4. The agenda was adopted as appearing in document IRC/I/1.

Exchange of views on Article 7 of the Convention

5. Following the proposal of the Office of the Union in document IRC/I/3, paragraph 2, the Committee discussed the question whether it was required under the Convention that the examination provided for in Article 7 should actually be conducted on plant material, or whether it might also be conducted in other ways.
6. The representatives of the member States unanimously declared that they considered official examination of the variety indispensable as far as their own States were concerned. They pointed out that the present system whereby plant material of the variety was tested provided a sound basis for the Offices to judge whether the variety was distinct, homogeneous and stable. It was also of advantage to the breeder, especially the small breeder, because in many cases he might not be able to provide a description of the variety and maintain an adequate reference collection. The present system would not, however, necessitate the carrying out of growing tests in governmental institutes for varieties of all species. For some crops, especially vegetatively reproduced ornamental species, it might be sufficient to examine the plant even on the premises of the breeder.

7. The question whether the accession of new member States could be allowed when those States did not perform an examination including the testing of plant material was discussed in relation to policy and from the legal standpoint.

8. As far as policy aspects were concerned, it was pointed out that the admission of new member States which applied other examination systems would be an obstacle to the envisaged closer cooperation between member States in the technical field. The exchange of test results, as envisaged by the Committee of Experts on International Cooperation in Examination, would not be possible between the present member States and such new States. More far-reaching systems, for instance a system whereby one application and one examination would be sufficient for a plant breeder's right to be obtained for all UPOV member States, would be even less conceivable if member States with different examination systems were to be admitted. Technical cooperation of such a kind would make UPOV more attractive than any change in the examination requirements.

9. On the other hand, it was pointed out that the admission of States with other examination systems would lead at present to a faster increase in the number of member States, which would be of great advantage to the breeder and would also represent an enlargement of UPOV's financial possibilities, thereby permitting further tasks to be carried out. In such case, close technical cooperation had to be restricted to the group of member States performing an examination which included the testing of plant material. Some experts considered that the danger here would be that pressure might be exerted on present member States to make them reduce their examination levels too. It was further mentioned that any system embodying two groups of member States could only be introduced according to rules clearly set out in the Convention.

10. With regard to legal aspects, the experts unanimously adopted the view that examination under Article 7 should include an investigation of the reproductive material, or of plants of a variety, to ensure that the variety fulfilled the conditions of Article 6 of the Convention. It was therefore ruled that an examination based solely on a description of the variety given by the breeder in connection with his application would not constitute the test of the new plant variety. This conclusion was drawn from the fact that Article 7(1) expressly provided that an examination "of the new plant variety" had to be performed, and that the examination had to extend to the question of stability, which made it necessary for an official of the competent authority to investigate the material personally. Furthermore, it was held that the drafters of the Convention had, without any doubt, envisaged a system of examination including an inspection of the plant material in the field, though no evidence could be found of this in the "Actes" of the International Conferences. In concluding, the Committee underlined the fundamental character of the growing tests and referred to the recommendation annexed to the Convention, which was based on the assumption that a technical examination was undertaken.

11. The Committee felt unable to judge, for want of sufficient information, whether the examination performed in the United States of America fulfilled the requirements of Article 7. It underlined the necessity to send a mission to the United States of America, according to the decision already taken by the Council, to learn more about the two American systems on the spot. The Office of the Union was asked to prepare, on the basis of the outcome of the present session, a list of questions to be discussed with the authorities of the United States, which ought to be sent to those authorities in advance.

12. The Committee also discussed the interpretation of Article 7 from other angles. In this connection, it debated whether Article 7 permitted, in the case of hybrids, the extension of the examination to hereditary components, or whether it would even be sufficient to examine only the hereditary components and the formula, and not the hybrids themselves. The Committee took the view that under Article 7 the examining Office could proceed, for the examination of certain hybrids, according to technical requirements, which could mean establishing at least a short description of the hybrid variety to be accompanied by a full description of the hereditary components and the formula. However, the Committee felt that the problem needed further consideration by technical experts.

Discussion of Article 13 of the Convention

13. In the course of the discussion on this Article and the Guidelines for Variety Denominations, the Delegation of the Federal Republic of Germany reported that, according to the Law of December 9, 1974, amending its Plant Variety Protection Act, combinations of letters and figures and combinations of words and figures were accepted as denominations in its country. It made a number of proposals on how to adjust the Guidelines to this new situation, and especially on how to apply the basic principles of the Guidelines to variety denominations consisting of combinations of letters and figures or words and figures. The Delegation of the Federal Republic of Germany promised to submit its proposals in writing, in order to enable the Committee to take a decision at a forthcoming session.

14. The Delegation of the United Kingdom asked that its former proposals concerning Article 13(9) might be discussed at the next session of the Committee. The Committee asked the Office of the Union to redistribute the relevant documents. The Delegation of the United Kingdom also mentioned the need for a further discussion of the problem of the use of prefixes, and the use of combinations of letters and figures for rootstocks, for example.

15. It was pointed out during the discussion that the preference of breeders for trademark protection was partly due to the fact that the majority of member States did not extend the Convention far enough to a sufficient number of species--for example, in the field of vegetables--thereby forcing the breeders to look for other means of protection. A possibility for encouraging the breeder to propose attractive variety denominations would be to allow him to use the same name as a variety denomination in one member State, and as a trademark in another member State where he was unable to obtain plant variety protection for the species in question. It was pointed out, however, that a trademark of that kind could be put into jeopardy by the fact that the same name was used in another State as the generic name for a plant variety.

16. The question was raised whether it was justified to force the breeder to renounce his right to a trademark for the whole class of trademarks (Article 13(3)) in view of the fact that the protection of the variety denomination was restricted to the same or to a closely related botanical species (Article 13, paragraph (2), second subparagraph, second sentence). In this connection, the question was also raised whether it was at all necessary to force the breeder to renounce his right to a trademark when using the same name for a variety denomination since, according to the second subparagraph of Article 13, paragraph 3, he could not assert his right to the trademark. It was pointed out, however, that an express renunciation of the right to the mark had the advantage that the trademark could possibly be cancelled in the trademark register.

Discussion of other Articles of the Convention

17. The discussion was based on document IRC/I/3.

18. Article 2(1), second sentence. On the proposal of the United States of America that member States should, contrary to the wording of Article 2(1), second 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 (paragraph 4(a) of document IRC/I/3), it was decided that the practical effect of protecting the same variety according to two systems, which under exceptional circumstances is possible in the United States of America, would be studied during the envisaged mission of a UPOV delegation to that country. The fact was mentioned that protecting the same variety under two systems normally forced the breeder to obtain protection under both systems, thereby burdening him with high expenses.

19. Article 4(3) and (4) and Annex. The Committee was unanimous in considering, on proposals by Canada and the Netherlands (paragraph 4(b) of document IRC/I/3), that the list of genera and species annexed to the Convention, as well as the mention of that list in Article 4(3) and (4), should be deleted.

20. Article 5(1). The Committee discussed the proposal of the United States of America on Article 5(1) to protect the breeders of asexually reproduced plants against unauthorized reproduction of the variety for purposes other than commercial marketing of the propagating material as such (paragraph 4(c) of document IRC/I/3). The Office of UPOV was asked to prepare a short paper for the next session in which this question would be dealt with, specifying, in particular, the provisions of the laws of Denmark and the United Kingdom on the subject (Schedule 3 and Section 4.6(b) of the United Kingdom Plant Varieties and Seeds Act 1964 and Section 14(a) of the Danish Plant Variety Breeders (Protection of Rights) Law). In this connection, it was mentioned that under the Convention, according to Article 5(1), last sentence, the reproduction by a commercial enterprise of ornamental plants of a protected variety, on its own premises with a view to producing cut flowers at a later date, required authorization by the owner of the protected variety. On the question whether such reproduction by a non-commercial entity, for instance a community, of plants to be used in public parks also had to be regarded as "commercial" use and therefore required authorization by the owner, three delegations expressed no definite view, while the others disputed the commercial character of such activity.

21. Article 6(1)(a). The proposal of the United States of America, in connection with Article 6(1)(a) (paragraph 4(d) of document IRC/I/3), to abandon the worldwide standard for determining the novelty (distinctness) of plant varieties was unanimously rejected.

22. Article 6(1)(b). The Committee was not able to approve the proposal of the United States of America in connection with Article 6(1)(b) (paragraph 4(e) of document IRC/I/3) that member States be obliged to introduce a period of grace of one year during which the variety could be commercialized without affecting its novelty. The question whether member States should be given the possibility of providing for such a grace period in their national law should be discussed during the mission of the UPOV delegation to the United States of America. The further proposal of the United States of America concerning the period of four years during which the variety could have been commercialized in a foreign State without affecting the novelty was not accepted. The Committee even thought it justified to extend this period for certain species, especially the species falling under Article 8(1), third sentence. This question, however, will have to be discussed in detail with the breeders.

23. Article 6(1). In connection with the proposal of the United States of America on Article 6(1) (paragraph 4(f) of document IRC/I/3) that the breeder be allowed to release seed or other sexually reproduceable plant material for experimentation without this being interpreted as commercialization, Section 102 of the US Plant Variety Protection Act was discussed. The Committee decided to clarify the exact meaning of this rule during the visit of the UPOV delegation to the United States. The Committee considered that the release of any reproductive material for testing only would not, under normal conditions, be commercial use, in so far as the testing was done on behalf of the breeder. Some experts also mentioned the fact that practical problems were unlikely to arise since testing on a large scale was usually not performed before the application was filed.

24. Article 6(1)(a). The Delegation of the Federal Republic of Germany, in support of its proposal to harmonize the wording of Article 6(1)(a) and Article 6(1)(d) ("important characteristics" in paragraph (1)(a) and "essential characteristics" in paragraph (1)(d): see paragraph 4(g) of document IRC/I/3), suggested that paragraph (1)(a) should be clarified in the sense that the new variety would have to be clearly distinguishable by at least one morphological or physiological characteristic which is important for its identification and capable of precise description and recognition. It was pointed out that the term "important characteristic" should not be interpreted to mean only functional characteristics. The characteristic did not need to have any importance for the value of the plant in question. On the other hand, one delegation saw a danger in permitting any characteristic, irrespective of its importance, to be used in identifying the plant material as distinct. It was also mentioned that the Technical Steering Committee already considered that important characteristics meant "characteristics important for distinction." The question should be reconsidered by the delegation of the Federal Republic of Germany and rediscussed at a session where representatives of professional organizations were present.

25. Article 7(1). With regard to the proposals of Denmark and of the United States of America on Article 7(1) concerning examination (paragraph 4(h) of document IRC/I/3), the Chairman noted that the suggestions of the United States of America had already been discussed, while he himself, in his capacity of Danish delegate, withdrew the proposal of Denmark.
26. With regard to the proposal of CIOPORA on Article 7(1) (paragraph 4(i) of document IRC/I/3), the Committee stated that only the proposal under (6), to examine whether official prior examination including field tests was necessary and to consider the examination systems of New Zealand and the United States of America, lay within its competence. It noted that New Zealand was actually introducing a system of prior examination, while the system in the United States would be examined by the UPOV delegation. For the rest, the proposal had already been discussed by the Committee.
27. The Delegation of Denmark withdrew its further proposals on Article 7(1) mentioned under paragraph 4(j) of document IRC/I/3.
28. Article 8(1). The Committee found it impossible to accept the proposal of the United States of America on Article 8(1), namely, that the same minimum period of protection should be introduced for all species (paragraph 4(1) of document IRC/I/3).
29. Article 10. With regard to the proposal of the United Kingdom on Article 10 to the effect 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 (paragraph 4(m) of document IRC/I/3), it was mentioned that the variety denomination could only be used for a variety which still possessed the characteristics as defined when the right was granted, and that, if those characteristics had changed, the variety should no longer be commercialized under the variety denomination. The authority could therefore prohibit the sale of a variety no longer possessing the original characteristics. The Delegation of the United Kingdom agreed to reconsider its proposal.
30. Article 10(2) and (3)(a). The Committee discussed, on the basis of the proposal of the Netherlands (paragraph 4(o) of document IRC/I/3), the differences in the wording of paragraph (2) of Article 10 as compared with paragraph (3)(a) of that Article ("shall forfeit" in paragraph (2), "may become forfeit" in paragraph (3)). It was pointed out that paragraph (2) provided--as a strict rule--for annulment of the breeders' rights in cases where the variety had lost its morphological and physiological characteristics, which meant that it was no longer stable within the meaning of Article 6(1)(d) or no longer existed. Paragraph (3)(a) had a completely different meaning. It gave the national authority the necessary means to enforce the cooperation of the breeder in that authority's task of supervising the variety: the national authority could--but was not required to--annul a plant breeder's right if the breeder refused his cooperation. It was also noted that the provision of Article 10(2) was by no means superfluous since it was the only provision for annulling the plant breeder's right in cases where the new variety had lost its morphological and physiological characteristics. The Committee agreed therefore that the Article should remain unchanged.
31. With regard to the proposal of the United States of America on Article 10(2) and (3)(a) to abandon the requirement of maintaining reproductive or propagating material (paragraph 4(n) of document IRC/I/3), the Committee held that such requirement was indispensable under the system applied in the present member States.
32. Article 10(4). With regard to the proposal of the United States of America on Article 10(4) (paragraph 4(p) of document IRC/I/3), the Committee held that it was not possible to accept that plant breeders' rights could be annulled on grounds which were not expressly mentioned in the Convention. On the other hand, it did not exclude the possibility of adding in Article 10 other grounds for annulment or forfeiture in addition to those already listed. Any proposals by the United States of America to include additional grounds for annulment or forfeiture should be considered on their merits. During the envisaged visit of the UPOV delegation to the United States of America, information should be requested as to the grounds which the representatives of that country had in mind when they made the proposal.

33. Basic requirements of grant and annulment (Articles 6 and 10). In connection with the discussion on the United States proposal on Article 10(4), the Delegation of the Federal Republic of Germany proposed examining whether the requirements for protection in Article 6 and the grounds for annulment or forfeiture in Article 10 were still valid. It considered that it was possible to restrict the prerequisites for the grant of plant breeders' rights in Article 6(1) to distinctness and homogeneity, while Article 10 could envisage, as sole grounds for annulment or forfeiture, lack of homogeneity and stability. It proposed that the lack of homogeneity as a ground for annulment or forfeiture should be expressly mentioned in Article 10. The Committee agreed that the Technical Steering Committee should discuss those proposals during its next meeting and asked the Office of the Union to prepare a short paper for that meeting.

34. The suggestion to insert a definition of the word "homogeneous" in Article 6(1)(c) was rejected after a short discussion.

35. Article 12. The Delegation of the Netherlands explained its proposal on Article 12(1) and (3) that the right of priority be made dependent on the existence of a valid first application (paragraph 4(q) of document IRC/I/3). It pointed out that a breeder might file a first application for a plant breeder's right at a time when the variety was not yet sufficiently homogeneous. He could then file further applications in other member States during the priority year and make use of the possibility of supplying the plant material in those States up to four years after the expiration of the period of priority. In such cases, he would have the possibility of improving his variety for the later applications within the maximum period of five years available to him. The withdrawal or rejection of the first application had no effect on the later applications.

36. In the ensuing discussion, attention was drawn to the danger of the Netherlands proposal. It was mentioned that the application in the country of the first filing might be withdrawn or rejected on grounds that were valid only in that country. It was also pointed out that the fate of the subsequent filings might be uncertain for a long period of time, especially in cases where the application for a plant breeder's right in the country of the first filing was subject to lengthy court proceedings. In those cases, the authorities in the countries of the subsequent filings had to await the final decision in the State of the first filing before being able to decide on the grant of plant breeders' rights. It was also observed that incorporation of the Netherlands proposal in the Convention would deviate from the comparable provisions in Article 4A(2) and (3) of the Paris Convention for the Protection of Industrial Property of 1883.

37. As a further possibility of preventing such misuse, at least partially, it was proposed that the authorities in the States of the subsequent filings should be given the right to require, in the case of withdrawal or rejection of the first application, the immediate supply of plant material even if the period of four years under Article 12(3) had not run out.

38. It was suggested that another possibility would be to require that the authority with which the first application was filed would have to keep its remaining seed and would have to ask for and store more seed than was necessary for the purpose of the national procedure when a certificate of first filing for priority purposes was applied for by the breeder. In the case of withdrawal or rejection of the first application, such material could be sent on request to the authorities with which the subsequent applications were filed, thereby giving them the possibility of comparing the material of the first application with the material received directly from the breeder.

39. The Committee found it necessary to reconsider this complicated matter on a later occasion.

40. Termination of protection on same date. The Committee discussed the Netherlands proposal in connection with Article 12 to the effect that plant breeders' rights for the same variety should be terminated at the same time (paragraph 4(r) of document IRC/I/3). It was agreed that this proposal could not be implemented under the present system, where the period of protection was computed from the

date of the grant of the plant breeders' rights and where those rights were granted at different times in different States.

41. Granting with effect for other States. The Delegation of the Federal Republic of Germany proposed that work be started on a special agreement according to which the Offices of the Contracting States of such agreement could grant plant breeders' rights which would also have effect in the other Contracting States. The Delegation of the Federal Republic of Germany offered to prepare a paper on the subject and distribute it to the other member States, if possible before the next session of the Committee of Experts on International Cooperation in Examination as the proposal was also of interest for the work of that Committee.

42. Article 8(2). The Committee did not accept the proposal by the United States of America on Article 8(2) (paragraph 4(1) of document IRC/I/3) to the effect that the computation of the period of protection should start from the filing date of the application rather than from the date of issue of the title of protection.

43. Articles 6(1)(b) and 12(3). The proposals of various delegations (paragraphs 4(e) and (s) of document IRC/I/3) on the four-year periods in Article 6(1)(b) and in Article 12(3) were discussed. The view was held that if the first four-year period were abandoned it might lead to an unwanted increase in the number of applications since breeders would be forced to file applications in all States in which they might possibly want protection at a later stage when they started to market the variety in one State. As to the second four-year period, it was pointed out that in the first years breeders lacked a sufficient amount of seed or other propagating material to file applications in all States. The Delegation of the United Kingdom reported that its national law did not contain the four-year period envisaged in Article 12(3) but this had not led to great difficulties in that country. It was agreed to reconsider the question of time limits on a later occasion, preferably at a session where representatives of professional organizations were present. In this connection, it was proposed that the period of priority in Article 12(1) be extended to two years, but no decision was taken on this proposal.

44. Article 13. The Chairman observed that the proposal by Canada on Article 13 (paragraph 4(t) of document IRC/I/3) had already been dealt with at an earlier stage, whereas the proposal by the United States of America on Article 36 (also paragraph 4(t) of document IRC/I/3) should be discussed during the visit of the UPOV delegation to the United States of America.

45. Article 14. With regard to the proposal of the United States of America on Article 14 (paragraph 4(u) of document IRC/I/3), the Committee took the view that more far-reaching provisions than those contained in Article 14(2) could not be envisaged.

Mission to the United States of America

46. The Committee noted that the mission of the UPOV delegation to the United States of America was on the agenda of the eleventh session of the Consultative Committee, to be held on March 5 and 6, 1975. It suggested that the visit should take place before the next Council session, preferably in September.

Other business

47. Recommendations. In reply to a question by one of the delegations, it was stated that the Council's right to adopt recommendations for member States was based on Article 21(h) of the Convention. It was considered that an express authorization by the Council was not necessary but could be inserted in the Convention on the occasion of a future revision.

48. The Committee requested the Secretariat to collect all recommendations made by the Council. It also thought that it would be desirable to restate in a document all the main decisions taken by the Council.

49. Article 35. At the request of one delegation, each delegation informed the Committee how Article 35 had been implemented in its State when the Convention entered into force and at the various times when further species had been made eligible for protection.

50. The information given on the situation at the time when the Convention entered into force can be summed up as follows. No provisions were included in the law of the Netherlands. Denmark adopted special provisions only for potato varieties grown under contract. In France, special provisions were adopted for varieties which, before the entry into force of the law on the protection of new varieties, had been the subject of a patent or had been entered in an official catalogue of one of the member States or in an agreed catalogue of a French professional organization. In those cases, the protection was retroactive from the date of the first registration (Article 36 of the French law). The United Kingdom Plant Varieties and Seeds Act of 1964 contained a limited provision under which the breeder could apply, up to May 11, 1965, for the protection of a variety which had been sold previously, but in any case not before November 12, 1963, and only if the breeder had taken all measures to inform the purchaser that an application would possibly be made (Schedule 2, Part II, Article 3(1)(i)). The Swedish law accorded a delay of six months in which applications could be filed for varieties which had been entered in the national list during the three years preceding the entry into force of that law.

51. For species which were made eligible for protection after the entry into force of the Convention, the law amending the German Variety Protection Law, which entered into force on December 31, 1974, provided in Article 1(1) that the novelty of a variety was not destroyed if the variety had been offered for sale within a period of four years before the relevant species was made eligible for protection and up to six months after that date. The laws of Denmark, the Netherlands, Sweden and the United Kingdom had no special provisions on this question while, according to the statement by the Delegation of France, the national law of that country was not clear on this subject.

52. The Delegation of Belgium reported that after the entry into force of the Belgian law varieties would be protectable if they had been previously patented, or registered in a catalogue or protected in a member State. The Delegation of Switzerland informed the Committee that varieties which had been commercialized four years prior to the entry into force of the Swiss plant variety protection law would be accepted for protection. Both Delegations explained that those provisions would also apply mutatis mutandis when in future new species became eligible for protection.

53. The Delegation of the Federal Republic of Germany mentioned that the declaration made by three member States at the time of signing the Convention to the effect that it was their common intention to extend the provisions of the Convention to at least 15 mutually agreed genera and species had not yet been implemented. It underlined the importance of increasing the number of species eligible in a great number of member States.

Program for the next session

54. The Committee noted that the next session would take place from December 2 to 5, 1975, and that the Consultative Committee would decide on the participation of further observers in that session.

55. This report was unanimously adopted by the Committee in its meeting held on February 28, 1975.

[Annex follows]

ANNEX/ANNEXE/ANLAGE

LIST OF PARTICIPANTS/LISTE DE PARTICIPANTS/TEILNEHMERLISTE

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III. OFFICER/PRESIDENT/VORSITZENDER

Mr. H. SKOV, Chairman

IV. OFFICE OF UPOV/BUREAU DE L'UPOV/BÜRO DER UPOV

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Dr. H. MAST, Vice Secretary-General

Dr. M.-H. THIELE-WITTIG, Administrative and Technical Officer

Mr. A. HEITZ, Administrative and Technical Officer

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