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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**

Third Session

Geneva, February 17 - 20, 1976

COMMENTS OF PARTICIPANTS

Comments and Proposals of ASSINSEL

1. The International Association of Plant Breeders for the Protection of Plant Varieties (ASSINSEL) has, on January 16, 1976, transmitted its comments concerning the third Session of the Committee of Experts on the Interpretation and Revision of the Convention.
2. The President of ASSINSEL has in the accompanying letter expressed his hope that the coming discussions will bring UPOV a good step farther in its endeavour to introduce a world wide protection of the breeding of new plant varieties.

[Annex follows]

Re: Committee of Experts on the Interpretation and Revision of the Convention
Document IRC/III/2

The following questions are answered in the light of the fact that as extensive and complete a variety protection law as possible should be developed, at the same time safeguarding the legitimate interests of consumer protection.

1. Admissibility for member States to exclude controlled hybrids of sexually propagated crops from the scheme of protection (see Article 2(2)).

Yes. The member States should be allowed to exclude controlled hybrids of sexually propagated crops from the protection system. The eligibility of lines for protection, as provided in Article 2(2), in conjunction with the second sentence of Article 5(3), affords sufficient variety protection, so that a protecting right for hybrids produced from lines is not absolutely necessary.

2. Possibility, contrary to the second sentence of Article 2(1), for member States to grant protection to new varieties of plants belonging to the same botanical genus or species under both possible forms of protection (special title or patent).

Yes. Contrary to the second sentence of Article 2(1), the special title and the patent should be admissible simultaneously for the same botanical genus or species in so far as the species concerned can be both sexually and asexually propagated. This corresponds to the US system, where asexually propagated species (with the exception of potatoes) are protected by patents according to the Patent Law and sexually propagated species are protected by a variety protection right according to the Plant Variety Protection Act.

3. Removal of the Annex to the UPOV Convention, listing the genera and species to which Article 4(3) requires member States to apply the Convention within certain periods. Maintaining in the said paragraph the obligation for member States to apply the Convention to a minimum number of genera and species. Number of genera and species which should constitute that minimum.

Yes. The compulsory list in the Annex, in its present form, does not correspond to the needs of the present member States (e.g. rice). It would be better to oblige the member States, under Article 4(3), to apply the Convention within certain periods to a certain minimum number of species, without specifying those species uniformly for all member States. In the light of developments up to the present time, it could be required that every member State, and also all member States that join in the future, should apply the Convention to at least 13 species, which corresponds to the existing final number on the compulsory list.

4. Deletion, as a consequence of removing the Annex to the Convention, of the possibility, given to member States under the first part of Article 4(4), of not permitting nationals or residents of another member State to file an application for a variety of a genus or species which is not eligible for protection in that other member State, i.e. deletion, in Article 4(4), of all restrictions on the principle of national treatment as laid down in Article 3.

Yes. If, according to the answer to question 3, the compulsory catalogue no longer relates to species, there is no longer any reason for the present Article 4(4). Within the UPOV membership no member State should be allowed to exclude nationals of other member States from the protection rights which they grant to their own nationals. The possibility of requiring reciprocity should only be maintained for relations with nationals of non-member States.

5. Question whether, as a consequence of removing the Annex to the Convention, it is necessary to maintain the final part of Article 4(4) (which expressly authorizes member States to extend the benefit of protection under the Convention to all nationals or residents of member States of the Paris Union for the Protection of Industrial Property) and Article 4(5) (which enables any member State to declare that it will apply Articles 2 and 3 of the Paris Convention for the Protection of Industrial Property).

Yes. Article 4(5) should be maintained, in order to make it clear that the variety protection right is an industrial property right and that the Paris Convention of 1961 is therefore linked to the Paris Union for the Protection of Industrial Property.

6. Provision in Article 5(1) for protection of breeders against unauthorized reproduction of the protected variety for purposes other than commercial marketing of the propagating material as such.

Yes. Extension of the protection to the use of a variety for purposes other than commercial marketing does seem desirable and necessary. Today there is no need, for instance, to liberalize the "farm to farm" seed trade, especially since it had very often been used abusively. The words "for purposes of commercial marketing" in Article 5(1) should therefore be deleted.

Only dependent breeding, within the meaning of Article 5(3), and authorized use for experimentation (see question 11) should remain free.

7. Possibility for member States, under Article 6(1), to introduce into their national law a one-year period of grace during which the variety can be marketed without prejudice to its novelty.

Yes. Such a period of grace has been requested by practitioners for some time already.

8. Maintaining in Article 6(1) the world novelty standard for determining whether the plant variety for which an application for protection under the Convention has been made is distinct from other varieties.

Yes. Abandonment of the world novelty standard would endanger the principle of a variety protection right effective throughout the world.

9. Clarification of the meaning of the words "important characteristics" in Article 6(1)(a).

No. A universally valid clarification of the words "important characteristics" is not possible and, as former discussions have shown, not expedient. It can only be made for each individual case by a decision of the granting authorities and according to the particular features of the species and the variety for which an application for protection has been made.

10. Extension of the four-year period in Article 6(1)(b) during which a variety can have been marketed in another country without affecting the novelty in the country of the application in the case of species falling under Article 8(1), third sentence, for which the minimum period of protection is 18 years. Question of abandoning the four-year period provided for in Article 12(3) during which an applicant who has claimed the priority of a former application in another member State can furnish plant material and additional documents to the Office of the State of the subsequent filing. Extension of the period of priority in Article 12(1) to two years.

The question of extension of the four-year period for the species mentioned in the third sentence of Article 8(1) (vines and species of trees) ought to be answered by experts on those species. It will be of no importance, however, if a longer protection period, uniform for all species, was arrived at (see under question 13).

There is no apparent reason for abandonment of the four-year period provided for in Article 12(3).

There is also no need to extend the period of priority of one year provided for in Article 12(1).

11. Incorporation in Article 6 of a provision expressly stating that release of seed or other propagating material for purposes of experimentation is not considered commercial use, and a provision to ensure preliminary protection in the case of release of seed or other propagating material for purposes of experimentation before an application is filed.

Yes. Here it should be stressed that the release of propagating material has to be for purposes of experimentation authorized by the holder of the title of protection (see answer to question 6).

12. Obligation for the examination mentioned in Article 7(1) to comprise in every case growing tests, or admissibility of equivalent methods. Possibility of admitting new member States which do not perform growing tests as part of the examination, and under what conditions.

No. Examination methods equivalent to the growing tests should be declared admissible. It should also be possible to admit new member States that do not require growing tests. Decisions on the equivalence of examination methods should be made according to the circumstances of each individual case.

13. Reduction of the minimum period of protection for the species falling under Article 8(1), second sentence. Calculating the period of protection for each variety from the same date in each member State (e.g. the date of the first filing or the date of the first granting of a plant breeder's right). Specifying the period of protection in the Convention instead of only determining the minimum period of protection.

Under no circumstances should there be a reduction in the protection period. On the contrary, a standard longer period (20 or 25 years) should be aimed at for all species, and it would be desirable to calculate this period uniformly in all member States. The grant of the first plant breeder's right (not the first filing) could be taken as the starting point of the protection period.

Under these circumstances, provisional protection should be requested for the period from the filing to the decision on the variety protection right.

14. Inclusion in Article 10 as grounds for annulment or forfeiture of the breeder's right the case of a breeder, or other person with his consent, selling propagating material, purporting to be of a protected variety, which does not show the characteristics of the variety as defined when the right was granted.

No. This is a case of fraud, which should be subject to punishment under criminal law.

15. Maintaining Article 10(4), under which a right may not be annulled or become forfeit except on grounds expressly stated in Article 10.

Yes. Any extension of grounds for annulment should be avoided, for reasons of legal security.

16. General discussion on whether, as a medium-term project, work should be started on the draft of a special agreement under which (i) applications for the protection of plant varieties could be filed with the national office of one Contracting State with effect also in other Contracting States and (ii) the title of protection granted by the national office of one Contracting State would, subject to certain conditions, have effect also in other Contracting States. A special agreement of this kind would, of course, require separate ratification by each Contracting State.

As a medium-term project, a situation should be brought about where applications for variety protection in one Contracting State can be made with effect also for other Contracting States, and where titles of protection granted in one Contracting State have effect also in other Contracting States. This corresponds to the principle of the comprehensive and completely effective variety protection right, which moreover the profession has been demanding for some time already as a means of saving labor and cost. The preparation for this purpose of an agreement between the member States, and its ratification, should take place as soon as is practicable.

[End of Annex and of document]