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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

Fourth Session

Geneva, September 14 to 17, 1976

PROPOSALS FOR THE REVISION OF THE CONVENTION

(SECOND GROUP OF PROPOSALS)

prepared by the Office of the Union

SUMMARY

This document deals with a second group of proposals for amending the Convention during the Revision Conference which is envisaged for 1978. It is intended as a working paper for the studies of the Committee of Experts at its fourth session. The first group of proposals is contained in document IRC/IV/2.

INTRODUCTION

1. The Office of the Union has dealt, in document IRC/IV/2, with the major proposals for amending the Convention during the Revision Conference which is envisaged for 1978. The present document contains further proposals. It is based on decisions of the Committee of Experts on the Interpretation and Revision of the Convention (hereinafter referred to as "the Committee") taken during its third session (see paragraph 2 of document IRC/III/13) and of the Consultative Committee taken during its thirteenth session (see paragraph 13 of document CC/XIII/6).

PART I

PROTECTION OF HYBRID VARIETIES

Articles 2(2)¹

2. Article 2(2) reads as follows:

"(2) For the purposes of this Convention, the word 'variety' applies to any cultivar, clone, line, stock or hybrid which is capable of cultivation and which satisfies the provisions of subparagraphs (1)(c) and (d) of Article 6."

3. In other words, hybrids which are capable of cultivation and satisfying the provisions of Article 6(1)(c) (homogeneity) and (d) (stability) can form a variety. In the United States of America, first generation hybrids of sexually propagated crops are expressly excluded from protection (section 42(a) of the Plant Variety Protection Act). It was queried whether this exclusion--which does not, however, prevent the protection of the parental lines of first generation hybrids--was compatible with the Convention.

4. During the third session of the Committee, it was stated that no provision of the Convention obliged member States to protect all types of varieties of a given kind (species)² and thus, first generation hybrids could be excluded from protection under the national law; furthermore, that the term "hybrids" in Article 2(2) had only been included in the sense of a clarification and could not be interpreted to mean that each member State had to provide protection also for first generation hybrids. This opinion is supported by the history of the Convention. It is stated on page 57 of the "Actes des Conférences internationales pour la protection des obtentions végétales 1957-1961; 1972" that Article 2(2) is to be understood as a mere definition of the term "variety."

5. No drafting proposal need therefore be made for the amendment of Article 2(2) of the Convention.

PART II

SCOPE OF PROTECTION

Article 5(1) and (4)

6. Article 5(1) and (4) read as follows:

"(1) 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."

¹ Where Articles are cited, the citations refer to Articles of the International Convention for the Protection of New Varieties of Plants, of December 2, 1961.

² As to the use of the expression "kinds" for species and other units of the vegetable kingdom, see Part II of document IRC/IV/2.

Vegetative propagating material shall be deemed to include whole plants. 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."

"(4) Any member State of the Union may, either under its own law or by means of special agreements under Article 29, grant to breeders, in respect of certain botanical genera or species, a more extensive right than that set out in paragraph (1) of this Article, extending in particular to the marketed product. A member State of the Union which grants such a right may limit the benefit of it to the nationals of member States of the Union which grant an identical right and to natural and legal persons resident or having their headquarters in any of those States."

7. In other words, the Convention provides for a minimum scope of protection which all member States have to grant to the breeders: the owner of a title of protection is granted the exclusive right to produce propagating material as such, for purposes of commercial marketing, and to offer for sale and to market such material. Beyond this, Article 5(4) expressly allows individual member States to exceed the minimum and to grant to the breeder a more extensive right, which can in particular be extended to the marketed product. It is thus admissible under the Convention to extend the scope of protection, for instance, to cut flowers of a protected variety. The system of the Convention is therefore a very flexible one, and this flexibility is desirable in order to open the Convention to a maximum number of States. Any extension of the compulsory minimum of the scope of protection under the Convention would render it more difficult for some States which are not yet members of UPOV to accede to the Convention.

8. In the previous discussions the following proposals were made for changing the existing system:

(a) It was proposed to permit expressly the sale, and offering for sale, of propagating material as such of a protected variety, without the authorization of its owner, from farmer to farmer (question of "farmers' privilege").

(b) It was proposed to extend the minimum scope of protection in paragraph (1) of Article 5 to the marketed product, at least for vegetatively reproduced ornamentals (question of "protection of the marketed product").

(c) it was proposed to make it clear that the scope of protection extends to plantlets grown from seeds of protected varieties and sold, or offered for sale, for purposes of production of the final product (question of "plantlets").

(d) The question was discussed whether it was necessary to extend the minimum scope of protection to commercial acts of multiplication of seed or other propagating material of a protected variety for purposes other than the sale of the seed or the propagating material (question of "commercial multiplication").

A. "Farmers' Privilege"

9. It is recalled that under Section 113 of the Plant Varieties Protection Act of the United States of America farmers are permitted to sell seed, produced by them, of a protected variety without the authorization of the owner of the variety to other farmers (but not to seed dealers). As to the wording of Article 113 of the US Plant Variety Protection Act, reference is made to document IRC/II/3, Annex I, page 3. It is further recalled that not only the United States of America but also other non-member States might find it difficult to make such sales from farmer to farmer of a protected variety dependent on the authorization of the owner. It was stated in former sessions of the Committee that such preferential treatment of farmers was incompatible with the Convention, but it is questionable whether it is not possible to interpret Article 5(1) in such a way that occasional sales of seed or other propagating material from farmer to farmer are not considered cases of "commercial marketing."

10. The following solutions to this problem seems to be possible:

(i) The Convention would not be amended and, if considered desirable, the problem would be solved by a flexible interpretation of the Convention.

(ii) The Convention would be amended to allow sales from farmer to farmer (so far rejected by the Committee).

11. In the event that it is decided to amend the Convention to allow sales from farmer to farmer, the following proposal is made:

Add the following new paragraph to Article 5:

"Any member State of the Union may exempt from the application of paragraph (1) the sale of reproductive or vegetative propagating material produced by a person whose primary farming occupation is the growing of crops for sale for other than reproductive purposes by that person himself to another person so engaged."

B. Protection of the Marketed Product

12. It is generally agreed that the protection of the marketed product (or final product) cannot be made mandatory for all kinds (species) of crops without exception. For example, the protection of a wheat variety cannot be extended to the marketed product flour. Actually, the extension to the marketed product has only been requested for vegetatively reproduced ornamentals.

13. The breeders of ornamental plants justify their request to extend the protection by pointing to the fact that, without such extension, the owner of a protected variety cannot prevent others from multiplying plants of the protected variety in a non-member State of UPOV where no protection is granted, producing cut flowers of that variety there and exporting them in great quantities into UPOV member States not making use of the possibility of Article 5(4) to extend the protection. The breeders also point out that they receive no royalties, nor can they control the maintenance of quality standards in the production of flowers of the protected variety.

Proposals

14. Several courses are open for improving the situation.

(i) It could be decided to abstain from any amendment of Article 5, in order to maintain its flexibility, but to adopt a recommendation to member States that they make use of the faculty under Article 5(4) and extend the scope of protection in the case of vegetatively reproduced ornamental plants to the marketed product.

(ii) Responding--in essence--to a proposal by CIOPORA (see document IRC/III/4 Annex I), it could be decided to amend as stated below Article 5(1) and (4):

Reword the last sentence of Article 5(1) as follows:

"(1) The breeder's right shall extend to vegetatively reproduced ornamental plants or parts thereof marketed for purposes other than propagation."

Reword the first sentence of Article 5(4) as follows:

"(4) Any member State of the Union may, either under its own law or by means of special agreements under Article 29, grant to breeders, in respect of certain kinds of plants, a more extensive right than that set out in paragraph 1 of this Article, capable in particular of extending, in the same way as for vegetatively propagated ornamental plants, to the marketed product."

15. In the proposal made under paragraph 14(ii) above, the extension has been restricted to "vegetatively reproduced" ornamental plants as requested by CIOPORA. If this restriction is not considered to be justified, the word "vegetatively reproduced" could simply be deleted.

C. Sale of Plantlets

16. During the third session of the Committee, it was pointed out that specialized enterprises in member States could buy small samples of seed of a protected variety and multiply it for the production of plantlets which would then be sold to producers of plants for consumption, for example to producers of cut flowers or vegetables. It has been said that this sort of production has lately become more and more customary in horticulture since glasshouse growers, aiming at shortening the vegetative cycle of plants grown by them, have an interest in buying such plantlets already rooted in peat cubes. The members of the Committee mentioned, however, that the question whether such plantlets could be produced without the authorization of the owner of a protected variety depended on the definition of the term "propagating material."

17. It was reported that there was no problem in the Netherlands since the term "propagating material" was defined in a broad sense and included plantlets. Section 2 of the Dutch Seeds and Planting Materials Act of 1966 states that "propagating material shall mean plants or parts thereof intended for cultivation by planting or sowing or by any other means."

18. The example of the Dutch legislation seems to show that the problem can be solved in the national law. If, nevertheless, a clarification in the Convention is thought to be necessary--in view of the fact that this method of production is becoming more and more customary--consideration could be given to the possibility of replacing the second sentence of Article 5(1), which is now restricted to vegetatively propagated varieties, by the following wording:

"Propagating material shall be deemed to include whole plants or parts thereof which are intended to be used for cultivation by planting or sowing or any other means."

19. The wording proposed in the preceding paragraph also helps in the situation described by CIOPORA where producers of roses for consumption purposes buy young plants of a protected variety which have been multiplied in a non-member State without the authorization of the owner of that variety (see document IRC/III/12, paragraph 23).

D. Commercial Multiplication

20. The minimum scope of protection under Article 5(1) extends to the production, for purposes of commercial marketing, and to the offering for sale and marketing of propagating material. The question was asked in former sessions whether it was permissible, under the present wording of the Convention, for an enterprise, for example a canning factory, a tobacco manufacturer or a sugar refinery, to buy small quantities of seed of a protected variety, have it multiplied by persons or firms under contract and use the multiplied material, or turn it over to others in pursuance of a contract, for growing crops for the production of plants to be processed and used for consumption (see the detailed analysis in document IRC/II/3, paragraph 11, and Annex I). The breeder would in such cases receive royalties only for the sake of the initial small quantity of seed.

21. In the "Actes des Conférences internationales pour la protection des obtentions végétales" the following report is made on the discussions of the Committee of Experts which met at Munich, from June 30 to July 3, 1969: "The expression 'à des fins commerciales' ['for purposes of marketing'] does not seem sufficiently clear to certain experts: A pea-canner purchasing seed and multiplying it in view of releasing the seed so produced to farmers whose crops he buys back should be obliged to pay royalties. To cover this particular case and other similar cases, the experts would prefer using the phrase 'à des fins d'écoulement commercial' [translated as 'for purposes of commercial marketing']". A comparison of the legal provisions of the present member States shows that:

(i) the case mentioned in paragraph 20 above seems to be outside the scope of protection under some legislations on plant variety protection or is the subject of regulations in special cases by means of a directive from the Minister of Agriculture;

(ii) the case is included in the scope of protection under other legislations; reference is made in particular to Sections 4(1) and 4(6) of the Plant Varieties and Seeds Act 1964 of the United Kingdom.³

22. It is not, therefore, strictly necessary to amend Article 5(1). If, however, the Committee is of the opinion that a clarification would be useful, the first sentence of Article 5(1) could be reworded as follows:

"(1) The effect of the right granted to the breeder of a new plant variety or his successor in title is that his prior authorization shall be required for the production, for purposes of transactions effected in the course of business, of the reproductive or vegetative propagating material, as such, of the new variety, and for the offering for sale and marketing of such material."

23. Another possibility would be to leave the first sentence of Article 5(1) unchanged and to have it followed by an explanatory sentence such as:

"Marketing shall be deemed to include any transaction, effected in the course of business, under which the reproductive or vegetative propagating material is made over by one person to another, irrespective of whether the transaction implies a transfer of property and of whether the material will be used for growing further material or other crops."

3

These provisions read as follows:

"The nature of the rights

4. (1) Subject to this Part of this Act, the holder of plant breeders' rights in a plant variety shall have the exclusive right to do, and to authorize others to do, as follows:

- (a) to sell the reproductive material of the plant variety;
- (b) to produce the reproductive material of the plant variety in Great Britain for the purpose of selling it; and
- (c) in the circumstances described in Schedule 3 to this Act, to exercise the other rights there specified,

and, subject to this section, infringements of plant breeders' rights shall be actionable at the suit of the holder of the rights, and in any proceedings for such an infringement all such relief, by way of damages, injunction, interdict, account or otherwise, shall be available as is available in any corresponding proceedings in respect of infringements of other proprietary rights.

(6) In this section and in Schedule 3 to this Act references to selling reproductive material include references to any transaction effected in the course of business:

- (a) under which the property in the reproductive material passes from one person to another, or
- (b) under which the reproductive material is made over by one person to another in pursuance of a contract under which he will use the reproductive material for growing further reproductive material or other crops,

and paragraph (b) of this subsection shall apply irrespective of whether the contract provides that the property in the crop will be in the person to be regarded as the seller, or the person to be regarded as the purchaser, or a third party; and any reference to purchasing or a purchaser shall be construed accordingly."

PART III

WORLD NOVELTY STANDARD

Article 6(1)(a)

24. In the meeting of member and non-member States in October 1974 it was queried whether the universal or world wide standard for determining distinctness and novelty was practical and useful. It was suggested that instead a standard should be established in Article 6, by which public knowledge, or use or sale only in the State where protection is sought, may be relied upon to bar protection. At the third session of the Committee, it was indicated that the wording of the Convention required only that the new variety must be distinct from any other variety whose existence was "a matter of common knowledge." It was also stated that in this respect there was little difference between the practices of examining applications in the UPOV member States and in the United States of America. It was furthermore pointed out that the maintaining of the world novelty standard as a general principle was necessary for the promotion of international cooperation in examination. In view of the foregoing, it was the general feeling that it was not desirable to amend the Convention on this point.

PART IV

THE TERM "IMPORTANT CHARACTERISTICS"

Article 6(1)(a)

25. The expression "important characteristics" in Article 6(1)(a) has been the subject of thorough discussion. In the beginning, it was proposed to harmonize the wording of Article 6(1)(a) ("important characteristics") and that of Article 6(1)(d) ("essential characteristics"). It was then proposed to state in Article 6(1)(a) that the new variety had 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. In this context, it was stated that the characteristic did not need to have any importance for the value of the new variety. One delegation saw, however, a danger in permitting any characteristic, irrespective of its importance, to be used in identifying the plant material as distinct. During its second session, the Committee agreed that the definition given in the General Introduction to the Guidelines for the Examination of Distinctness, Homogeneity and Stability of New Varieties of Plants (document UPOV T/G/1/1) was sufficient to clarify the meaning of the expression "important characteristics" in Article 6(1)(a).

26. Other opinions were expressed during the third session of the Committee. It was proposed that the word "important" should be deleted or replaced by "fulfilling the criteria of the following subparagraph." It was also proposed to clarify the term by saying that the characteristics must be "important for distinguishing the variety." Another suggestion made was to adopt a stricter wording in order to prevent an infringer from being able to claim, in referring to slight differences, that the variety he is producing or selling is not identical with the protected variety. In this connection, it was proposed to study the basic problem of the dependency of the right in a variety which has been derived from another protected variety.

27. On the basis of the--non-uniform--outcome of the discussion, the following proposals can be made:

(i) Article 6(1)(a) would remain unchanged for the time being. Member States would increase their efforts to harmonize examination methods and agree on a more uniform interpretation of the term "important characteristics." If, in the course of this activity, a change of wording appears to be desirable, such a change could be the subject of a future Revision Conference.

38. In the event that the Committee should, nevertheless, decide to follow the above-mentioned proposal, it could adopt the following amendment for Article 8:

Reword Article 8 as follows:

"(1) The right conferred on the breeder of a new plant variety or his successor in title shall be granted for a limited period.

"(2) The period of protection in a member State shall run from the date of the issue of the title of protection and shall end twenty years after the issuance of that title of protection which was the first to be issued in a member State of the Union."

If it is decided to accept the above proposal, paragraph (3) would be deleted.

39. A national provision on the lines described above is contained in Article 26 of the Seeds and Phytogetic Creations Law of Argentina, which reads as follows:

"26. The title of ownership of a foreign cultivar shall be applied for by its creator or his lawfully authorized representative residing in Argentina and shall be granted provided the country where it originated recognizes similar rights for Argentine phytogetic creations. The maximum term of ownership in such cases shall be the period remaining before expiration of such right in the country of origin."

40. A similar provision is contained also in the Chilean law.

41. In view of the fact that need for the termination of the period of protection on the same date is of importance for a restricted number of member States only (for instance States being members of an economic community), the following proposal is made instead of the proposal under paragraph 38 above:

Add the following paragraph (4) to Article 8:

"(4) Member States of the Union belonging to a group of States may prescribe that, notwithstanding the provisions of paragraphs (1) and (2), the right conferred on the breeder or his successor in title shall be granted for a period of protection of a number of years to be fixed by that group. The period in each of those States shall run from the date of the issuance of the title therein and shall end at the expiration of the fixed number of years after the issuance of that title of protection which was the first to be issued in one of those States."

42. If it is decided to follow the proposal to eliminate the longer period of protection for vines and trees, it would be simply the last sentence of Article 8(1) that would have to be deleted.

PART VII

ADDITIONAL GROUND FOR FORFEITURE

Article 10(3)

43. Article 10(3) and (4) read as follows:

"(3) The right of the breeder or his successor in title may become forfeit if:

(a) after being requested to do so and within a prescribed period, he does not provide the competent authority with the reproductive or propagating material, the documents and the information deemed necessary for checking the new variety, or he does not allow inspection of the measures which have been taken for the maintenance of the variety; or

(b) he has failed to pay within the prescribed period such fees as may be payable to keep his rights in force.

"(4) The right of the breeder may not be annulled and the right of the breeder or his successor in title may not become forfeit except on the grounds set out in this Article."

44. The list of cases in Article 10(3) in which the right of the breeder might be invalidated has been considered insufficient. One delegation has proposed the addition as a further ground for forfeiture of the case where the breeder provides the competent office with reproductive or vegetative propagating material true to the description of the variety while he simultaneously sells material purporting to be of the variety which does not correspond to that description. The delegation was of the opinion that in this case the authorities of a member State ought to have the right to invalidate the breeder's right. At its second session, the Committee agreed to follow this proposal and to insert an additional provision in Article 10.

45. During the third session of the Committee, several international non-governmental organizations expressed objections to such an amendment. They claimed that the described activity could be classified as fraud and the owner of the variety could be prosecuted under criminal law. They also pointed to Article 13(8)(a), though any violation of Article 13(8)(a) does not allow the plant breeder's rights to be invalidated under the Convention.

46. In the event that the Committee should decide to follow the proposal to insert the above-mentioned additional ground for forfeiture, the following proposal is made:

Add a new subparagraph (b) in Article 10(3) (the present subparagraph (b) becoming subparagraph (c)):

"(b) he, or a third person with his consent, intentionally offers for sale or markets reproductive or vegetative propagating material, purporting to be of the new variety, which is not capable of producing the new variety with its morphological and physiological characteristics as defined when the right was granted;"

PART VII

LIMITATION OF THE GROUNDS FOR FORFEITURE

Article 10(4)

47. Article 10(4)⁵ provides that the right of the breeder may not be annulled or become forfeit on grounds other than those set out in Article 10. It has been stated that this provision could lead to difficulties in the United States of America, where other reasons for invalidating a granted plant breeder's right exist. Two cases have been mentioned as examples. The first case is the provision of the Patent Act of the United States of America to the effect that a patent can be annulled if the first application for protection has been filed abroad without the permission of the government. Such permission is generally required under the US Patent Act--as in the patent laws of other States--for security reasons. It has also been pointed out that a violation of the US anti-trust legislation might result in the annulment of the patent. In the former sessions of the Committee it was stated that the first case could better be handled by leaving it to a future revision conference to record as a common understanding that measures taken by any Contracting State to protect its national security were always allowed. As to the second case, it was considered that Article 9 gave sufficient basis for any restrictions which a member State felt to be necessary for reasons of public interest.

⁵ Reproduced under paragraph 43 above.

48. It must, however, be stated in this context that rules in the national legislation to the effect that the first application for protection of a new variety bred in a country must be made in that country would not be compatible with Article 11(1), which expressly states that the breeder or his successor in title may choose the member State of the Union in which he wishes to make his first application for protection of his right in respect of a new variety.

PART VIII

VALIDITY OF THE PRIORITY CLAIM

Article 12

49. Article 12(1) reads as follows:

"(1) Any breeder or his successor in title who has duly filed an application for protection of a new variety in one of the member States of the Union shall, for the purposes of filing in the other member States of the Union, enjoy a right of priority for a period of twelve months. This period shall run from the date of filing of the first application. The day of filing shall not be included in such period."

50. It has been proposed that the validity of the priority claim should be made dependent on the validity of the prior application. If the prior application is rejected or withdrawn, the priority claim should become invalid. This proposal has been explained as follows. The breeder might file a first application in one member State at a time when the variety was not yet sufficiently homogeneous; he could then file further applications in other member States and take advantage not only of the priority year, but also of the four-year period under Article 12(3) for supplying the plant material in these other States; during these periods, for up to five years, he had ample time to improve his variety in order to make it homogeneous by the time it was examined in the States of the subsequent applications; the first application might already have been rejected because of lack of homogeneity. A breeder acting in this way would have an unjustified advantage compared with other breeders who did not file applications until their variety had reached the necessary stage of homogeneity.

51. In the preceding Committee sessions, several disadvantages of the above proposal were mentioned. It was stated in particular that the first application might be rejected or withdrawn for reasons which were only valid in the State in which it had been filed. It was further said that in the case of adoption of the proposal the fate of the subsequent filings might be uncertain for long periods of time, thus creating legal insecurity. It was also mentioned that a provision as proposed would deviate from comparable provisions in Article 4A(2) and (3) of the Paris Convention for the Protection of Industrial Property. The Committee was therefore not in favor of this proposal.

52. In the course of the discussion, however, several proposals were made in order to prevent the misuse mentioned by the proponents of the above proposal.

53. It was proposed that the authorities of the States in which the subsequent filings were made should be given the right to require, in the case of withdrawal or rejection of the first application whose priority had been claimed, the immediate supply of plant material, even if the period of four years under Article 12(3) had not run out. In the case of adoption of this proposal, a new sentence would have to be added to Article 12(3), which could be worded as follows:

"Nevertheless, that State may require the supply, within a period specified by it, of the additional documents and material where the first application has been rejected or withdrawn."

54. It was further proposed that the authority with which the first application was filed should ask for further propagating material whenever a certified copy of the application was required for the purpose of claiming priority. That authority would have to store the propagating material and deliver it, in case the first application should be rejected or withdrawn, to the authorities, with which the

subsequent applications were filed in order to allow them to compare that material with the material received by them directly from the breeder. It is believed that such a proposal can be followed without amending the Convention. It should, however, be pointed out that a provision of the kind envisaged under this proposal is difficult to administer since the authority of the first filing has, at the time of the rejection or withdrawal of that application, no or little information on the question with which other authorities subsequent applications have been filed.

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