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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

Fifth Session

Geneva, March 8 to 10, 1977

REPORT

(First Part: Discussions in the Presence of Ob-
server Delegations)adopted by the CommitteeOpening of the Session

1. The fifth 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 March 8 to 10, 1977.
2. All seven member States of UPOV were represented. Of the signatory non-member States, Switzerland was represented by observers. In the meetings of March 8 and 9, the following additional non-member States invited were represented by observers: Australia, Canada, Hungary, Ireland, Japan, New Zealand, Poland, South Africa, Spain and the United States of America. The following international non-governmental organizations were also represented by observers at the meetings of March 8 and 9: the International Association of Horticultural Producers (AIPH); the International Association for the Protection of Industrial Property (AIPPI); the International Association of Plant Breeders for the Protection of Plant Varieties (ASSINSEL); the International Community of Breeders of Asexually Reproduced Ornamentals (CIOFORA); the International Federation of the Seed Trade (FIS). The list of participants at the meetings of March 8 and 9 is annexed to this report.
3. The session was opened by Mr. H. Skov (Denmark), Chairman of the Committee, who welcomed the participants.

Adoption of the Agenda

4. For the meetings of March 8 and 9 which were held in presence of the observer delegations, the Committee adopted items 1 to 3 of the draft agenda as proposed in document IRC/V/1 Rev. It discussed the proposals for the revision of the Convention as contained in document IRC/V/2.

Provision of Two Forms of Protection (Special Title of Protection and Patent -
Article 2(1)*)

5. The discussion was based on the three alternative proposals appearing in paragraphs 8 to 10 of document IRC/V/2.

* Unless otherwise indicated, the Articles referred to are Articles of the Convention

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6. The Delegation of Japan was not in a position to express a preference for any of the alternative proposals since the responsibility for plant breeders' rights had not yet been allocated within the Japanese administration and the decision would have some influence on the Japanese position as far as the question under discussion was concerned. The representatives of the United States of America and those of the international organizations favored the proposal appearing under paragraph 9 of document IRC/V/2, i.e., to delete the second sentence of Article 2(2) and to add "or of both" to the first sentence.

Definition of Variety (Article 2(2))

7. The discussion was based on paragraphs 11 to 19 of document IRC/V/2 and on the proposal submitted by ASSINSEL (document IRC/V/8, Annex I, part II).

8. After thorough and detailed discussions, the representatives of the United States of America and of Switzerland, and those of the international organizations, expressed their preference for deleting Article 2(2). The representatives of the United States of America added that their main concern was not to be obliged to grant protection to hybrids; other solutions which avoided making the protection of hybrids mandatory would therefore also be acceptable for them. As to the proposal to delete the definition, it was pointed out that the Convention hardly ever used the term "variety," but rather the term "new variety," and that Article 6 clearly stated under which conditions rights were to be granted for a new variety. It was therefore generally felt that a definition was unnecessary. It was also stated that, with the progress of science and technology, any definition of the term "variety" might become too narrow in the course of time.

Annex to the Convention; Application of the Convention to a Minimum Number of Genera or Species; National Treatment and Reciprocity (Article 4(3) to (5) and Annex and Article 33(1))

9. The discussion was based on paragraphs 20 to 28 of document IRC/V/2, particularly on the proposed new wording of Article 4 and 33(1) as suggested in paragraphs 27 and 28 of that document.

10. The Delegations of ASSINSEL, the United States of America and Japan expressed their agreement with the new wording of Article 4 as suggested in paragraph 27 of document IRC/V/2. The Delegation of FIS also agreed with the proposal but wondered whether it were necessary to maintain in Article 4(6) of the new text the words "or to extend the benefit of such protection to the nationals of other member States." As Article 3 of the Convention already established the principle of national treatment, these words appeared to be a mere repetition.

11. Referring to Article 4(6) of the new text and to the explanations given in paragraph 25 of document IRC/V/2, the Delegations of AIPH and AIPPI proposed that any restriction of the principle of national treatment be eliminated. They emphasized that the principle was the cornerstone of most international treaties in the field of intellectual property and had proved to be of great practical value.

12. The Delegation of CIOPORA recalled that the Convention had abstained from obliging member States to extend protection to all genera and species since it had been assumed that, in the initial years following entry into force of the Convention for them, the States would not possess the necessary infrastructure for performing the examination on such a broad scale. In view of the achievements of UPOV in organizing international cooperation in examination, CIOPORA wondered whether this assumption was still valid. In no case should the Convention permit member States to exclude certain genera and species from protection for purely economic reasons. Limitations should only be possible for technical and administrative reasons.

13. The Delegation of Canada stated that Article 4 posed a problem for future member States since they had to evaluate whether they would be in a position to fulfill the obligations of Article 4(3) in the future. In that Delegation's opinion, paragraph (2) was sufficient and paragraph (3), which might even be considered interference in the internal affairs of member States, should be deleted.

14. The Delegations of New Zealand and Ireland supported, as a general principle, the proposal appearing in paragraph 27 of document IRC/V/2. They, too, were somewhat concerned about the high minimum numbers of genera and species eligible for

protection laid down in Article 4(3). They felt, however, that they could agree to these minimum numbers in view of the possibilities provided for under paragraphs (4) and (5) of the new wording of Article 4. The Delegation of New Zealand mentioned in this context that its Government had encountered considerable difficulties in extending the national plant breeders' rights legislation to--only--two more species during the year following the enactment of the legislation.

Scope of Protection (Article 5)

15. Farmers' Privilege. The discussion was based on paragraph 32 of document IRC/V/2.

16. The Delegations of AIPH, ASSINSEL, CIOPORA and FIS disagreed with the interpretation of Article 5(1) as reflected in the last sentence of paragraph 32 of document IRC/V/2. They stated that excluding sales between farmers from the scope of protection might lead to the destruction of the whole system of plant breeders' rights. The Delegation of FIS pointed out that no interpretation of that kind was needed to justify the provisions concerning farmer-to-farmer sales in the US legislation since they were only admitted under very restricted conditions. It mentioned especially that no seed could legally pass from farmer to farmer if the variety had been protected as a variety to be commercialized as a class of certified seed (the majority of varieties protected in the United States of America). The Committee took note of the wish of the Delegation of FIS that the Committee's statement appearing in the last sentence of paragraph 32 of document IRC/V/2 be revised as in none of the member States nor in the United States of America farmer to farmer trade was unconditionally exempted from plant variety protection.

17. The Delegation of the United States of America stated that it was not possible to abandon the farmers' exemption clause in the Plant Variety Protection Act of its country. Acceptance of that exemption by UPOV was therefore a sine qua non for the United States of America to be able to accede to the Convention. The Delegation of Canada stated that the seed law of its country also provided for an exemption for sales from farm to farm without advertisement, and that such exemption would also have to be introduced in the plant breeders' rights law.

18. Protection of the Marketed Product. The discussion was based on paragraph 33 of document IRC/V/2.

19. The Delegation of CIOPORA pointed out that the mandatory minimum scope of protection provided in Article 5(1) was not sufficient to serve the interests of breeders of vegetatively propagated ornamental plants. In a country which only applied that minimum, protection of a variety to be used in the production of cut flowers was practically ineffective; any producer of cut flowers could import plants of the protected variety from a country where no protection was granted. The Delegation of CIOPORA therefore proposed that the breeder be enabled to control the cultivation of his variety for commercial purposes. This could be achieved by amending Article 5(1) as follows:

"(1) The effect of the right...is that his prior authorization shall be required for the production and cultivation, for commercial purposes, of the reproductive or vegetative propagating material, as such, of the new variety..."

20. The Delegation of CIOPORA further pointed out that cut flowers were increasingly produced in countries which did not provide any protection. If those cut flowers were then imported into countries where the protection afforded only satisfied the minimum scope of protection provided under Article 5(1), the breeder would receive no remuneration. The Delegation therefore proposed that in Article 5(1) the protection of the marketed product be made mandatory for vegetatively propagated ornamental plants. This could be achieved by amending the last sentence of Article 5(1) as follows:

"With respect to vegetatively propagated ornamental plants, the right of the breeder shall extend to plants or parts of plants (cut flowers...) even if the latter are produced, offered for sale or marketed for purposes other than propagation."

21. That amendment should, according to the proposal of the Delegation of CIOPORA, be supplemented by amending the end of the first sentence of Article 5(4) as follows:

"... a more extensive right than that defined 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."

22. The Delegation of AIPPI supported the proposal by CIOPORA to extend protection to the marketed product in the case of vegetatively propagated ornamental plants, while the Delegations of New Zealand and of AIPH, the latter stating that it had to represent both breeders and producers, were opposed to the proposal.

23. Sale of Plantlets. The discussion was based on paragraph 34 of document IRC/V/2 and on document IRC/V/6 which contained proposals by the Delegation of the Netherlands.

24. The Delegations of FIS and CIOPORA proposed making it clear that the sale of plantlets fell under the scope of protection by amending the wording of the Convention rather than by agreeing on a recommendation. The Vice Secretary-General mentioned that such clarification could probably be achieved by simply deleting the word "vegetative" in the second sentence of Article 5(1).

25. Commercial Multiplication. The discussion was based on paragraph 35 of document IRC/V/2.

26. The Delegation of FIS took the view that the expression "for purposes of commercial marketing" in Article 5(1) was too restrictive and should be replaced by the expression "for commercial purposes." It was, however, mentioned that this change might be interpreted as preventing farmers from saving seed of a protected variety produced by them to grow it on their own premises during the subsequent vegetation period.

Conditions Required for Protection (Article 6)

27. World Novelty Principle. The discussion was based on paragraph 37 of document IRC/V/2.

28. The Chairman stated that, as was seen in earlier sessions, no significant differences existed between the standards of the examination for distinctness as practiced in the United States of America and the standards applied in UPOV member States. No need was thus seen to amend the Convention in this respect.

29. Expression "Important Characteristics." The discussion was based on paragraph 38 of document IRC/V/2.

30. The Delegation of CIOPORA maintained its view expressed during the third session of the Committee that the word "important" was superfluous and ought to be deleted. The Delegation added that the word could even be considered dangerous as it might lead to a prolongation of the examination when examiner and applicant entered into arguments as to whether a characteristic was important or not. This had to be prevented since, in CIOPORA's view, examination should be simple in order to allow a maximum number of States to accede to UPOV and the greatest number of genera and species possible to be eligible for protection in the UPOV member States.

31. The Delegations of ASSINSEL and AIPPI opposed this view and advocated the maintenance of the word "important." The Delegation of the United States of America said that it had originally proposed to delete the word "important" but, considering the definition given to the term "important characteristic" in the General Introduction to the Guidelines for the Examination of Distinctness, Homogeneity and Stability of New Plant Varieties*, it had no objections to maintaining the expression.

32. The Delegation of Switzerland took the view that the expression "important characteristics" should be replaced by the clearer wording "characteristics important for diagnosis."

33. The Delegation of the Federal Republic of Germany pointed out that the working hypothesis of examination was that any characteristic permitting a variety to be identified was of importance. The word "important", however, did not indicate to what extent two varieties had to be distinct; this notion was referred to in Article 6(1)(a), by the word "clearly." The Delegation of the Netherlands advocated maintaining the word "important" since it enabled the competent authority to refuse protection to a variety which differed from another already existing variety to such a small degree that granting rights for both varieties was hardly justifiable.

* document UPOV/TG/1/1

34. Sale of Propagating Material for Purposes of Experimentation. The discussion was based on paragraph 39 of document IRC/V/2.

35. The Delegation of the United States of America stated that, in earlier sessions, it had gained the impression that there was no significant difference of opinion between UPOV and the United States of America on the sale of propagating material for purposes of experimentation. The Delegation had, however, some difficulty in approving the statement in the second sentence of paragraph 39 of document IRC/V/2 which said that only such sales were not prejudicial to novelty which were not intended to assess the commercial attractiveness of a variety to the customer. In the United States of America many sales for purposes of experimentation were specially performed to test that attractiveness. In that country, a distinction was made between releasing seed to the general public and contracts between the breeder and other persons for the purpose of either increasing the supply in seeds or of producing seed and of using it for the performance of experiments. If, in the last two cases, seed should "escape" to the general public, the one-year period of grace would begin to run.

36. The Chairman stated that the underlying principle was to prevent the marketing of seed creating legal insecurity. Sales of peas to a pea-canner for canning, to mention a frequently cited example, and, in general, sales of dead plant material, caused no problems. As to the latter remark, the Delegation of the Netherlands doubted whether the distinction between living and dead material led to realistic solutions. The Delegation of the Federal Republic of Germany emphasized that it was for each member State to define in which cases sales of varieties were sales within the meaning of Article 6(1)(b) and in which cases they were considered to be merely intended for experimentation and for this reason not prejudicial to novelty. The provision of the Varieties Protection Act of the Federal Republic of Germany, which corresponded to Article 6(1)(b) of the Convention, laid down that propagating material of the variety to be protected or other harvested material may not have been offered for sale or marketed. Thus, sales of peas to a pea-canner or sales of cut roses were normally considered prejudicial to the novelty of the variety. That did not preclude a realistic approach to the problem and, for instance, it was not required that cans containing peas produced in tests on the variety's suitability for canning be destroyed; they could be sold anonymously. The Delegations of the Federal Republic of Germany and the Netherlands felt it would be difficult to establish general rules in this matter which could be valid for all crops and for all countries.

37. The Delegation of FIS proposed that Article 6(1)(b), second subparagraph, be expressly amended to read as follows:

"...the new variety must not have been offered for sale or marketed for purposes other than experimentation..."

38. The Delegation of AIPPI took the view that the problem under discussion could also be solved by introducing a system of deferred examination. The Delegation of the Federal Republic of Germany mentioned that the introduction of a system of deferred examination had already been discussed within UPOV and it had been agreed that each State was free to introduce such a system in its national law. The Federal Republic of Germany had already done so for forest trees.

39. In view of the legal insecurity resulting from sales of propagating material for purposes of experimentation before the filing of an application, especially in the case of vegetatively propagated ornamental plants, the Delegation of CIOPORA suggested that the problem could be solved by introducing a period of grace combined with the obligation for the breeder wishing to avail himself of that period to declare his intention to file an application. The Delegation of the Netherlands took the view that such a solution was equivalent to the introduction of a system of deferred examination.

40. Period of Grace; Marketing in States other than the State in which the Application is filed. The discussions were based on paragraphs 40 to 44 of document IRC/V/2. The Delegation of AIPH confirmed its written comment that the possibility of introducing a period of grace should be open to all member States. It was therefore in favor of the proposed new wording of Article 6(1)(b) as appearing in paragraph 43 of document IRC/V/2, which had, however, to be combined with the wording proposed in paragraph 44 of the same document, since AIPH also

favored an extension to eight years of the four-year period provided for in Article 6(1)(b), in the case of trees and vines. The Delegation of CIOFORA supported this view since its organization was generally interested in enlarging the possibilities of testing new varieties before an application had to be filed. The Delegation of AIPPI mentioned that if a system of deferred examination were introduced, it would not be necessary to extend the four-year period provided for in Article 6(1)(b).

41. The Delegation of the United States of America saw no reason for the four-year period under Article 6(1)(b). Some varieties which had been sold for years in the United States of America were still not cultivated in other States, for instance in Brazil, but might prove to be interesting for the agriculture of such States. It wondered why it should be impossible to obtain protection for those varieties there. The Delegation of CIOFORA mentioned that some varieties might obtain importance only after ten or more years had passed since first being marketed, i.e. at a time when it was too late to apply for protection.

42. The Delegation of the United States of America also mentioned that the legislation of its country did not provide for a four-year period similar to that envisaged under Article 6(1)(b). That was, however, a minor problem since after four years of marketing abroad the variety would probably be in public use in the United States of America and, in addition, the introduction of a period corresponding to Article 6(1)(b) could be envisaged in the United States of America.

43. The Delegation of the United States of America drew the Committee's attention, however, to Section 102(d) of the US Patent Law which precluded protection in the United States of America if, before filing in that State, the variety was patented in another country on the basis of an application filed there more than one year before the US filing date. Replying to a question on the provision's compatibility with the Convention, the Vice Secretary-General felt that it did not seem to be the case unless the provision of the US Act were considered to be a formality within the meaning of Article 6(2) of the Convention.

44. Homogeneity. The Delegation of Canada wondered whether the definition of the term "uniformity" in the Plant Variety Protection Act of the United States of America ("uniformity in the sense that any variations are describable, predictable and commercially acceptable"*) was compatible with the Convention. The question was answered by the Delegation of the United States of America in the affirmative in view of the fact that the Convention only required a variety to be "sufficiently" homogeneous. The Delegation of the Federal Republic of Germany said that it was difficult to define the term "homogeneity" in abstract terms. It was only possible to give certain indications.

Examination of New Varieties; Provisional Protection (Article 7)

45. The Chairman referred to paragraphs 45 to 47 and Annex II of document IRC/V/2.

46. No comments were made on the Statement concerning Article 7 as reproduced in Annex II to document IRC/V/2. Referring to its written comments, the Delegation of ASSINSEL recalled its Organization's wish that more use be made of the possibility of granting provisional protection as provided for under Article 7(3) of the Convention.

Period of Protection (Article 8)

47. The discussion was based on paragraphs 48 to 50 of document IRC/V/2.

48. The Delegation of ASSINSEL referred to its written comments, in which it had suggested that a harmonized period of protection be introduced within UPOV, and urged that the extension of the period of protection to 20 years in general cases and to 25 years in the case of trees and vines be considered. Such extension was also favored by the Delegation of AIPPI. The Delegation of the United States of America said that extension to 18 years of the period of protection under the Plant Variety Protection Act would be recommended to the competent authorities.

Nullity and Forfeiture of the Rights Protected (Article 10)

49. The discussion was based on paragraphs 51 to 58 of document IRC/V/2.

* Section 41(a)(2) of the US Plant Variety Protection Act.

50. It was agreed that Article 10 should not be amended. It was the general view that the proposed addition to Article 10(3), suggested in paragraph 58 of document IRC/V/2, should, in particular, not be adopted.

Right of Priority (Article 12)

51. Validity of Priority Claim. After detailed explanations had been given, no objections were raised to adding to Article 12(3) the sentence proposed in paragraph 62 of document IRC/V/2.

52. Four-Year Period of Article 12(3). The discussion was based on observations made by the Delegation of the United States of America.

53. The Delegation of the United States of America said that the period provided for under Article 12(3), allowing the breeder who claimed the priority of a prior application in another UPOV member State a period of four years to submit any additional documents or material, might not be acceptable for the United States of America. That period practically forced the authorities in the country of the subsequent application to defer the examination for up to four years after the priority period of one year had run out. Under the US Plant Variety Protection Act, the applicant was allowed a period of only six months to submit any supplementary documentation, but which could, however, be prolonged by administrative measures. It added that the Regulations to the Act had been changed, with effect from March 17, 1977, to require a sample of seed to be furnished simultaneously with the application. The Patent and Trademark Office would have no possibility to prolong the period for furnishing documents or material, where desired, for up to four years. It was the understanding of the United States delegation that the four-year period in Article 12(3) had been provided for in view of the performance of official growing trials. Since the authorities in the United States of America did not normally conduct such official growing tests, no need was seen to introduce the four-year period.

54. The Delegation of the United States of America furthermore questioned whether Article 12(3) was compatible with paragraph (1)(b) of the Statement concerning Article 7 (Annex II to document IRC/V/2) which obliged countries in which the growing test was conducted by the applicant himself to require the applicant to deposit in a designated place, simultaneously with his application, a sample of the propagating material representing the variety. The Vice Secretary-General said that he saw no such contradiction. Paragraph (1)(b) of the Statement referred to the normal case of an application filed in a country which left the performance of growing tests to the breeder. Article 12(3) of the Convention contained a provision for a specific case, namely the case of an applicant in such country claiming the priority of an earlier application in another State. This type of specific provision had to take precedence over the general rules. It could also be argued that in the last-mentioned case a sample of the propagating material had already been deposited in a designated place, namely with the authority with which the first application had been filed. The Delegation of AIPPI supported this view and stated that, as in the field of patents for inventions involving microorganisms, the introduction of a system of centralized deposit of samples ought to be envisaged.

55. The Delegation of FIS declared that breeders needed the four-year period provided for in Article 12(3) and wished it to be maintained. The need for that period was decreasing, however, with the development of cooperation in examination presently being established within UPOV.

56. The Delegations of ASSINSEL, CIOPORA and FIS supported the Delegation of the United States of America in its view that the four-year period was appropriate only in States undertaking official growing trials. The Delegation of ASSINSEL proposed that the applicability of Article 12(3) be expressly restricted to such States. Other delegations held the view that the whole priority system was mainly of importance for States applying the first-to-file system as, for instance, the European UPOV member States. It was of less or no importance for States applying the first-to-invent system. The Delegation of the United Kingdom wondered whether the whole of Article 12 should not be restricted to member States applying the first-to-file system, a view which was not shared by all other delegations.

Variety Denomination (Article 13)

57. The discussion was based on paragraphs 63 to 67 of document IRC/V/2 and on document IRC/V/10.

58. The Delegations of ASSINSEL, CIOPORA and FIS supported a proposal by the United States of America that the final part of the first sub-paragraph of Article 13(2) reading "in particular, it may not consist solely of figures" be deleted.

59. The Delegation of CIOPORA favored the deletion of the whole of Article 13(2). It furthermore proposed the deletion in Article 13(3) of the words "unless he undertakes to renounce his right to the mark as from the registration of the denomination of the new variety" and of the second subparagraph. As to the latter proposal, it took the view that the function of the variety denomination was to identify and define a variety for the purpose of its professional users only, while the trademark, having an advertising function, had to identify the product for the purposes of the consumers. In view of these different functions, it was not necessary to permit breeders to have the same name first protected as a trademark and later used as a variety denomination.

60. The Delegation of FIS was able to agree to the deletion of all references to trademarks in Article 13. Referring to its written comments (document IRC/V/10), it also proposed that any requirement of the Convention with respect to trademarks be restricted to those States where the genus or species to which the variety belonged was eligible for protection.

61. The Delegation of AIPH also took the view that references to trademarks should be deleted and suggested examining whether it would not be preferable to delete the whole of Article 13.

62. The Delegation of AIPPI recalled that it had suggested at the third session of the Committee that the expression "so submitted" in the second sentence of Article 13(5) be replaced by "submitted in the country where protection was applied for first."

63. The Delegation of Japan expressed the view that, should Japan accede to the UPOV Convention, Article 13 might cause difficulties in view of the linguistic differences between the Japanese language and those of the other UPOV member States. Article 13 should provide that, where such difficulties arose, the breeder would be entitled to propose in one member State a different variety denomination from that proposed by him in another member State. It added that the prohibition of numerical denominations in Article 13(2) and of letter-figure combinations in the Guidelines for Variety Denominations might also cause difficulties in Japan.

Closing of the Session

64. The Chairman thanked the observers from the non-member States and from the international organizations for their participation and promised that their comments would be taken into account when preparing the final draft proposals for the Revision Conference in 1978.

65. This report was unanimously adopted by the Committee in its meeting held on September 20, 1977.

[Annex follows]

LIST OF PARTICIPANTS/LISTE DES PARTICIPANTS/TEILNEHMERLISTE

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¹ Represented only on March 8 and 9
 Représentées les 8 et 9 mars seulement
 Nur am 8. und 9. März vertreten

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1 Represented only on March 8 and 9
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- Mr. S. MEJEGARD, Chairman of the Working Group on Variety Denominations

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