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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 8-10, 1977

COMMENTS OF PARTICIPANTS

Proposals by ASSINSEL

The International Association of Plant Breeders for the Protection of Plant Varieties (ASSINSEL) transmitted, on February 10, 1977, proposals by its Administrative Council concerning the items to be discussed during the fifth session of the Committee of Experts on the Interpretation and Revision of the Convention. These proposals are attached as Annexes to the present document.

[Two Annexes follow]

Proposals by the ASSINSEL Council in its meeting on January 14, 1977, in Paris for submission to the Fifth Session of the Committee of Experts on the Interpretation and Revision of the Paris Convention to be held on March 8 and 9, 1977, in Geneva.

(Documents: UPOV NEWSLETTER No. 7 - UPOV Document IRC/V/2 of December 14, 1976 - UPOV Document IRC/V/1 of December 16, 1976)

#### Part I

##### PROVISION OF TWO FORMS OF PROTECTION (SPECIAL TITLE AND PATENT)

###### Article 2(1)

Position: Deletion of the second sentence of Article 2(1).

Argumentation: For those countries which, like the USA, for example, offer the possibility of both kinds of protection for species with sexual and asexual propagation, the present limitation to one kind of protection could be an obstacle to accession.

#### Part II

##### DEFINITION OF VARIETY

###### Article 2(2)

Position: Article 2(2) should read as follows:

"For the purposes of this Convention, the word 'variety' shall apply to all populations of cultivable plants which satisfy the provisions of subparagraphs (1)(c) and (d) of Article 6.

Argumentation: The notion of "variety" should be interpreted as widely as possible in order to permit new developments.

#### Part III

##### 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

Position: ASSINSEL supports the proposal appearing in paragraph 27 of document IRC/V/2.

Argumentation: The present compulsory list is no longer appropriate. But it is necessary to determine a minimum number of species to be protected, leaving the member States, however, to determine the species that are important for them according to their climate conditions.

#### Part IV

##### SCOPE OF PROTECTION

###### Article 5

(a) "Farmers' Privilege"

Position: ASSINSEL approves the position reflected in paragraph 32 of document IRC/V/2.

Argumentation: It is known from the history of the creation of the Convention that most of the member States wanted to exempt from the scope of the protection the so-called "farm-to-farm" trade. But the danger resulting for the variety protection right from an extension of the trade with larger quantities is well known. The member States should therefore take care to ensure a strict interpretation in the national law of the notion of "commercial marketing".

(b) Protection of the marketed product

Position: ASSINSEL supports the position of CIOPORA.

Argumentation: This is above all a problem concerning the ornamental plants sector. For the final product of the major agricultural varieties, no protection is necessary. The protection of seed and the vegetative propagating material is sufficient. On the other hand, the protection of the final product should be provided for those species where it can be used for vegetative multiplication (ornamental plants).

(c) Sale of plantlets

Position: ASSINSEL approves the position reflected in paragraph 34 of document IRC/V/2.

Argumentation: Protection is desired for plantlets raised from seed of a protected variety. For this purpose, however, no amendment of the Convention is necessary. The member States should rather be recommended to interpret the notion of "propagating material" accordingly in their national law.

(d) Commercial multiplication

Position: ASSINSEL approves the position reflected in paragraph 35 of document IRC/V/2.

Argumentation: Here, too, the problem has to be solved by an interpretation based on practice.

Part V

CONDITIONS REQUIRED FOR PROTECTION

Article 6

(a) World novelty principle

Position: No modification desired.

Argumentation: Contrary to one filed divergent proposal, determining novelty on a national basis would be a step backwards and not in the interest of a worldwide variety protection right.

(b) Expression "important characteristics"

Position: No modification of the wording of the Convention is desired.

Argumentation: The notion of "important characteristic" should be left to the interpretation of the national authorities in each individual case. Every new method for distinguishing varieties should be applicable. The characteristics for distinction can be different according to the crops.

(c) Sale of propagating material for purposes of experimentation

Position: ASSINSEL approves the position reflected in paragraph 39 of document IRC/V/2.

Argumentation: The sale of propagating material should not be regarded as a commercial sale that is prejudicial for novelty. In this context reference should be made to the question of the introduction of a provisional variety protection right.

(d) Period of grace

Position: For "major agricultural crops" no modification is desired. It could be necessary for vegetables. Therefore the regulation should be left to the national law and the drafting proposal of the Committee in paragraph 43 should be endorsed.

Argumentation: The desire of the USA to introduce a period of one year before the filing of an application during which sale in the country of filing is not prejudicial to novelty is not practicable for "major agricultural crops" in Europe. In the European system it would make it necessary to have two examinations beginning at different times for the protection right and the sales right. For vegetables, where there is no authorization for sale but only a sales control, it is however desired.

(e) Commercializations in States Other than the Filing State

Position: No general extension of the period of grace; at most for crops with a slow growth like trees and vine.

Argumentation: A general prolongation would weaken the protective effect of the variety protection right. A prolongation is however desired for species with slow growth, especially fruit trees and vine.

Part VI

EXAMINATION OF NEW VARIETIES

Articles 7(1) and 7(2)

Position: Approval of the explanation of the Committee attached to document IRC/V/2 as Annex II.

Argumentation: This results from former discussions.

Part VII

PROTECTION PERIOD

Articles 8(1) and 8(2)

Position: A uniform protection period of 20 years is desired. Furthermore, the harmonization of the beginning and the end of that period in the UPOV member States is regarded as necessary. Moreover, the introduction of a provisional variety protection right is recommended.

Argumentation: The necessity of a uniform protection period and of the harmonization of its beginning and end results from practical reasons. ASSINSEL is aware of the fact that at first its introduction and execution will meet with difficulties and probably need much time. Use should first be made of the possibility of bilateral agreements between the member States as provided for in the Convention with the aim of gradually reaching a multilateral harmonization. A paper on the special position of ASSINSEL regarding this question is attached in the Appendix (Annex II).

The introduction of a provisional variety protection right is generally desired for all UPOV member States. Article 7(3) gives the authorization for it. This would at the same time give the possibility of examining the market value of a variety and would probably result in a restriction of the number of varieties to be examined.

Part VIII

NULLITY AND FORFEITURE OF THE RIGHTS PROTECTED

Article 10

Position: An extension of the existing reasons for nullity and forfeiture does not seem to be necessary and ought to be considered very cautiously.

Argumentation: Too many reasons of this kind would endanger the legal security and the existence of the plant variety protection right.

Part IX

VALIDITY OF PRIORITY CLAIM

Articles 12(1) and 12(3)

Position: ASSINSEL approves the proposal appearing in paragraph 62 of document IRC/V/2.

Argumentation: This results from the document.

Part X

VARIETY DENOMINATION

Article 13

Position: Modification of Article 13 and of the guidelines in the sense that non-member States will not be prevented from joining if they use variety denominations that consist solely of figures. For this purpose the deletion of Article 13(2) is proposed.

Argumentation: ASSINSEL and other professional organizations have already frequently indicated their position in the form of petitions and resolutions. They desired at least the admissibility of a combination of letters and figures. An adaptation to given conditions and habits that have changed since the time of the creation of the Convention is necessary. In particular care should be taken that the accession should not be hindered of new member States whose existing practice is to allow a variety denomination consisting of figures only.

[Annex II follows]

Appendix to the Proposals by ASSINSEL (ANNEX I)Harmonization of the plant variety protection right within  
UPOV - Uniform protection period - Its beginning and end -  
Provisional protection

The questions raised in connection with the above have repeatedly been the subject of discussion among ASSINSEL members and plant breeders. The frequent differences from State to State in the provisions on the protection period and the times for beginning and ending such periods complicate practice in this field. Collisions with the seed trade regulations frequently add to the problems involved. The ASSINSEL Council has already dealt with these questions on several occasions. Meanwhile UPOV has made good progress with its efforts to harmonize the examination and application procedures, the latter by the creation of uniform forms, which is a prerequisite for solving the problems involved.

Within UPOV the protection period at present lies between the minimum period of 15 years, required by Article 8 of the Convention, and 25 years in some member States (UK, Sweden). In order to be able to apply the plant variety protection right effectively beyond the confines of the individual member States, a uniform period is a necessary condition. Proposals for a general extension of the protection period have already been made. Here, however, it is not the period of the protection right alone that is decisive. It can differ for individual species according to the normal longevity of its varieties, but it should be uniform for each species within all the member States of UPOV.

A modification of the Convention, however, does not seem necessary for this purpose if the member States agree under bilateral or multilateral agreements to apply protection periods which are longer than the minimum period under Article 8 and which are uniform. Authorization for this purpose follows from Article 8(3).

A uniform protection period, however, is useful only if its beginning and end are uniform in UPOV member States. Here the prerequisite is that each member State should not require its own application for the grant of plant variety protection rights, its own examination and the grant of its own plant variety protection right. With regard to the examination, UPOV has already done considerable work on harmonization by publishing test guidelines and by agreements on entrusting the examination for individual species to certain member States. Now it is a question of the reciprocal adoption or recognition between member States of the filing and granting procedures of other member States. In practice this could be done as follows: The breeder first submits an application for a new variety in a given member State. This is done by means of uniform application forms, which are already in preparation, and by copying. The filing authority sends copies of this first application to the competent offices of the other member States. The receipt of the filing copy will be regarded in all member States as the filing of an application. In these cases, Article 12 of the Convention would be irrelevant as far as the priority right and the four-year period are concerned. It would only apply in those cases where the breeder expressively restricts his first filing to a certain member State, a possibility which he would have to reserve. The examination would be carried out by the member State of the first filing or the member State entrusted with the examination under the UPOV guidelines. After a successful examination the member State of the first filing would grant the variety protection right and inform the offices of the other member States accordingly. The validity of the plant variety protection right would have a uniform beginning in all the member States and thus, after a uniform protection period, a uniform ending. It goes without saying that this project cannot be realized overnight. It should, however, remain one of UPOV's most important aims after promising progress with regard to the harmonization of the plant variety protection right has been made. There will certainly be consequences to be considered in several respects (e.g., possibilities of restricting the plant variety right under national law by a compulsory license). But it will be most important that in the first place member States should be ready to renounce some of their competence in favor of the idea of a uniformly effective plant variety protection right.

In this context it seems expedient to discuss at the same time the questions of the introduction of a provisional plant variety protection right for the period elapsing between the filing and the grant of the final plant variety protection right. As is known, according to Article 8(2) of the Convention the protection period starts on the date of the issue of the title of protection. In practice, there is however a need for protection from the very moment of filing. It is furthermore the custom to exchange breeding material before the issue of the title of variety protection, and as far as the sales right is concerned it is also permissible to commercialize propagating material before the title of protection has been granted. In order to protect the breeder in these cases, the introduction of a provisional variety protection right could be helpful. It would begin with the application for the grant of a title of protection for the plant variety and would become the final plant variety protection right when the title is issued. But, unlike the case of the patent right, the period of the provisional plant variety protection right that has elapsed would not include in the final variety protection period or deducted from it. It should, however, be limited in time (perhaps to 3 years) in order to avoid unjustified delay in the examination.

[End of Annex II and of document]