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INTERNATIONALER VERBAND
ZUM SCHUTZ VON
PFLANZENZÜCHTUNGEN

UNION INTERNATIONALE
POUR LA PROTECTION
DES OBTENTIONS VÉGÉTALES

INTERNATIONAL UNION
FOR THE PROTECTION OF
NEW PLANT VARIETIES

C O U N C I L

Seventh Ordinary Session

Geneva, October 10 to 12, 1973

PROTECTION PERIOD

Report by the Secretary General

This document contains, for the consideration of the Council, some comments on the protection period, the priority period and the grace period for submitting plant material.

1. Article 8 of the Convention for the Protection of New Varieties of Plants provides for a minimum protection period of 15 years for short-living plants and 18 years for long-living plants, running from the date of the delivery of the title of protection.
2. The said Article expressly allows member States to adopt longer periods and, if they do so, to fix different periods for particular classes of plants.
3. Protection periods vary from one member State to another, as can be seen from the following table:

	short-living plants	long-living plants
Denmark	15	18
France	20	20
Germany (Fed. Rep. of)	20	25 (*)
Netherlands	20	25 (+)
Sweden	15	18
United Kingdom	15 (x)	18 (x)

- (*) including potatoes and hops
 (+) including potatoes
 (x) administrative prolongation up to 25 years possible.

4. Attention is drawn to Article 12(1) of the Convention which gives the breeder a priority period of 12 months from the first application filed in a member State. During this priority period he can file applications in other member States with priority from the first application. In addition, under Article 12(3) of the Convention, the breeder is allowed to postpone, in the other member States, the submission of necessary documents and material until four years after the expiration of the priority period. This means that a total of five years from the first application may elapse before subsequent applications can be dealt with.

5. As a consequence of the aforementioned provisions the date of expiration of the protection would hardly ever be the same in the different member States even if the protection period were the same in those States, but could vary by up to five years.

6. In the case of different protection periods the variation could be even greater, namely up to five years, as mentioned, plus the difference between the protection periods in the given countries.

Note: In the calculation of the variation of the date of expiration in member States, minor differences which may result from different testing periods have been disregarded.

7. In connection with the question of the one-year priority period and the additional four-year period, the following points should be considered:

8. Paragraph (1), and to some extent paragraphs (2) and (3), of Article 12 have been formulated along the lines of Article 4 of the Paris Convention for the Protection of Industrial Property, which expressly defines what is to be understood by the expression "régulièrement fait le dépôt d'une demande" (duly filed an application), also used in Article 12(1) of the UPOV Convention. Under the terms of the Paris Convention for the Protection of Industrial Property the expression should be understood to include "any filing that is adequate to establish the date on which the application was filed in the country concerned, whatever may be the subsequent fate of the application." It is understood that there must be identity between the subject matter of the first and subsequent filings.

9. The provisions of the Paris Convention for the Protection of Industrial Property are understood as follows:

- (i) the priority right is not prejudiced by the withdrawal or rejection of the first application;
- (ii) the priority right exists even when it pertains to an invention which is excluded from patentability in the country where the application was filed.

10. Since paragraph (1) of Article 12 of the UPOV Convention has been taken over practically unchanged from the Paris Convention for the Protection of Industrial Property it would be natural to interpret it the same way as is done with the latter Convention.

11. This would mean that the applicant would not lose his priority if he withdrew his application shortly after it had been filed. In many cases he could also obtain priority by lodging an application with the authority of a country which does not grant rights for the species concerned. Moreover, under the terms of paragraph (3) of Article 12, he would have a grace period of four years for the submission of plant material.

12. However, it could be argued against this interpretation that the situation in the two Conventions is not the same. Whereas the patent application stands on its own in the sense that anybody skilled in the art should be able to imitate the invention on the basis of the written description, the application for plant breeders' rights must be supported by living plant material submitted for tests, and it is hardly likely that another person will be able to "imitate" the breeding work on the basis of the description so as to produce the same variety with the same characteristics. Moreover, the subsequent applications would not, without checking, show that they were identical with the first application. Finally, the extra four-year period does not exist under the Paris Convention for the Protection of Industrial Property. This period, together with the priority period, would give the breeder a total of five years, for example, for making the variety sufficiently homogenous, if this was not the case at the time of the first application.

13. Finally, the length of the protection period as such might be considered. Whereas it is desirable that the period should be sufficiently long to enable the breeder to obtain equitable remuneration without charging the user exaggerated royalties, it would not be advisable to grant rights for a period so long that it deprived the breeders of the inducement to create further varieties at a rate compatible with the needs of the community. For the different species conditions may vary and the difference between the protection period for short-living and long-living species laid down in the Convention (15 and 18 years respectively) may seem rather little.

14. The Council is invited to consider the different problems related to the protection period and other periods mentioned above.

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