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INTERNATIONAL UNION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS

GENEVA

COUNCIL

Tenth Ordinary Session
Geneva, October 13 to 15, 1976

PROGRESS REPORT ON THE WORK OF THE COMMITTEE OF EXPERTS
 ON THE INTERPRETATION AND REVISION OF THE CONVENTION

prepared by the Office of the Union

1. Since the ninth ordinary session of the Council, the Committee of Experts on the Interpretation and Revision of the Convention (hereinafter referred to as "the Committee") has held three sessions: the second session, from December 2 to 5, 1975; the third session, from February 17 to 19, 1976; and the fourth session, from September 14 to 16, 1976. In most of the meetings of the third session, observer delegations from non-member States and international non-governmental organizations interested in the revision of the UPOV Convention participated as well.¹ The respective reports are contained in documents IRC/II/6², IRC/III/13² (meetings restricted to the ordinary members of the Committee), IRC/III/14 (meetings with the participation of observer delegations, and IRC/IV/7².
2. On September 16, 1976, the Committee held a joint meeting with the Working Group on Variety Denominations, which was holding its ninth session on that occasion. The report on the joint meeting is contained in document VD/IX/4.

¹ Signatory States: Belgium, Switzerland.

Other interested States: Hungary, Ireland, Japan, New Zealand, Poland, South Africa, Spain, United States of America.

International Organizations: International Association of Horticultural Producers (AIPH), International Association for the Protection of Industrial Property (AIPPI), International Association of Plant Breeders for the Protection of Plant Varieties (ASSINSEL), International Community of Breeders of Asexually Reproduced Ornamentals (CIOPORA), International Federation of the Seed Trade (FIS)

² Distribution limited to members of the Committee.

3. The Committee examined ways to remove obstacles hindering the accession of some States to the UPOV Convention, either by interpreting provisions of the Convention in a more flexible manner or by amending some of them. It considered proposals for such and other amendments and discussed the organization of the next Diplomatic Conference, which it suggested should be convened in the autumn of 1978, as well as a timetable for the various steps to be taken in preparing that Conference. The Committee also took note of the report on the mission of a UPOV delegation to the United States of America and Canada and the conclusions drawn from that mission.

Questions Relating to the Interpretation and Revision of the Convention

4. The stage reached in the discussions in the Committee can be summarized as follows.

5. The Committee examined whether Article 2(1)³ precluding the protection by States of plant varieties of the same genus or species under two systems of protection (special title of protection, plant patent) should be amended in order to allow accession by certain States which protect plant varieties under two systems. It decided to discuss again some possible solutions to this problem at its fifth session, which will be held in the presence of observer delegations from non-member States and interested international non-governmental organizations.

6. The Committee examined whether Article 2(2), defining the term "variety" as comprising *inter alia* hybrids, could be interpreted or ought to be amended in such a way that it did not prevent the accession to the UPOV Convention of those States which consider that hybrid varieties are inherently protected through the protection of their hereditary components and which therefore exclude such varieties from protection. The Committee felt that the definition of the word "variety," unless deleted, needed to be improved because, on the one hand, "cultivar," which is a synonym of "variety," was treated as a special type of variety and, on the other hand, the definition was incomplete in so far as multiclone or multiline varieties, which are becoming more and more important, are not mentioned. This question will also be discussed in the Committee's fifth session.

7. Concerning Article 4, the Committee agreed that the list of genera and species to be made eligible for protection within given periods (appearing in the Annex to the Convention) should be deleted; it agreed furthermore that the obligation requiring member States to protect certain minimum numbers of genera or species within given periods should be maintained but the numbers should be changed as follows: each State should be required to protect five genera or species (of its choice) at the time of the entry into force of the Convention in its territory; three years thereafter, the total of protected genera or species should rise to ten, six years thereafter to 18 and eight years thereafter to 24.

8. The Committee was well aware of the fact that the proposed minimum numbers, though low for most States, could be too high for some States. It therefore agreed that the Council should be authorized to reduce the aforesaid minimum numbers or to extend the above-mentioned periods at the request of newly acceding States having special economic or ecological conditions. The Committee furthermore agreed that in certain cases the Council should also be authorized to extend those periods for States which were already party to the Convention.

9. The Committee took the view that any member State should have the freedom to restrict the principle of national treatment (Article 3) and accord protection to nationals and residents of any other member State only in respect of those genera and species which were protected in both States. This freedom would go beyond that provided for in the first part of Article 4(4) since it would apply to all genera and species and not only to those which were not listed in the Annex to the Convention. Concerning the reference to the Paris Union for the Protection of Industrial Property in Article 4(4) and (5), the Committee considered that those provisions, although superfluous, ought to be maintained.

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The Articles referred to are Articles of the UPOV Convention.

10. The Committee discussed several questions pertaining to Article 5 and the scope of protection.

(i) It examined whether the sale of propagating material of a protected variety between farmers, whose primary occupation is the growing of crops for the sale of products other than propagating material, was to be considered an infringement of the plant breeder's right. It agreed that it lay within the competence of member States to interpret Article 5(1) and to determine the scope of protection under that Article. It felt that the interpretation had to be based on the French authentic text and it saw no objection to admitting, as new members, States which interpreted Article 5(1) in the sense that any sale of the kind referred to above was not considered commercial marketing and therefore was not within the scope of protection.

(ii) It examined whether protection should be extended in certain cases to the marketed product, or at least to certain acts of commercial multiplication of the variety for purposes other than the sale of the propagating material as such. It considered that any extension of the minimum (mandatory) scope of protection might render the accession of further States to the Convention--and also the ratification of the revised Convention by States parties to the present text of the Convention-- more difficult and that, under Article 5(4), each State was free to grant more extensive rights than those provided under Article 5(1). It therefore agreed not to propose the amendment of Article 5 in this respect.

(iii) For the same reasons as stated under subparagraph (ii) above, it agreed that no amendment should be proposed that would make it mandatory to protect the breeder against unauthorized multiplication of propagating material of his variety for purposes other than the commercial marketing of that material. Any such extension of the scope of protection, if considered necessary, should be effected under the national laws of the member States.

(iv) It examined whether the minimum scope of protection should be extended to the commercial marketing of plantlets, for example, of vegetables, grown from seeds of a protected variety, as an intermediate step in the production of the final product. It decided to discuss the question again at its next session, after having noted that it could be solved on the national level, and that it might be appropriate to adopt, during the Diplomatic Conference, a recommendation that the necessary measures be taken to extend the scope of protection in the national law to plantlets.

11. Several problems were discussed in connection with Article 6(1).

(i) The Committee noted, after a thorough examination of the practice in member States and certain non-member States, that it was not necessary either to change the standard for examination ("world novelty principle") or to amend the expression "important characteristics."

(ii) As to the proposal to permit the granting of a period of grace of one year during which the variety could be commercialized without prejudice to its novelty, the majority of the Committee considered that States which, at the time of their ratification of or accession to the Convention, provided for such a period of grace should be allowed to continue that practice, while a minority was even of the opinion that all member States should be given the possibility of introducing such a period, at least for certain species.

(iii) The Committee also examined whether sales of propagating material for experimental purposes would prejudice the novelty of a new variety. It considered that any experimentation with a view to assessing the characteristics of a variety (for example, milling, baking, canning, and, in general, processing properties) which coincidentally involved commercialization was not commercial in nature and did not mean that the novelty of the variety was precluded.

(iv) The Committee also discussed whether the four-year period contemplated in Article 6(1)(b) should be extended in the case of slow-growing species, such as trees and vines. It decided to discuss the question again at its next session.

12. Concerning Article 7, the Committee studied the question whether examinations for distinctness, homogeneity and stability which were not undertaken by the authority competent for plant breeders' rights, or by other official authorities, complied with the provisions of the said Article. It formulated a statement concerning the minimum requirements which such examination should fulfill. That statement was submitted to the Consultative Committee at its thirteenth session, on March 10 and 11, 1976, where it was decided that it should be presented to the Council. The statement is reproduced in the Annex of this document.

13. As to the question of the introduction of a system of deferred examination the Committee considered that such system was fully compatible with the Convention and therefore a proposal to amend the Convention was not necessary.

14. Concerning Article 8, the Committee agreed that the minimum period of protection of 18 years provided for the slow-growing species (trees and vines) should not be reduced. After having noted a slight discrepancy between the French authentic text of paragraph (2) ("La durée de la protection ... s'entend à partir de ...") and its translation into English ("The period of protection ... shall run ..."), the Committee considered that the period of protection could also be computed from the date of filing of the application, provided that the effective duration of the protection computed from the date of grant of the title was in conformity with the minimum periods provided for in paragraph (1) of Article 8.

15. Concerning Article 10, the Committee studied the possibility of including further grounds for annulment or forfeiture of breeders' rights. It reached no agreement on the question and decided to continue the study at its next session. As to the more far-reaching proposal to delete Article 10(4), which precludes the annulment or forfeiture on grounds other than those set out in Article 10, the Committee felt unable to agree to such an amendment.

16. Concerning Article 12, the Committee examined whether, in cases where the priority of a prior application is claimed in one State, such State should be allowed to require the supply of the additional documents and of the material before the expiration of the four-year period under Article 12(3) if the first application is rejected or withdrawn. It agreed that such a rule should be introduced.

17. Concerning Article 13, the Committee and the Working Group on Variety Denominations did not agree on any proposal to amend this Article, particularly the proposal to delete the part of Article 13(2) prohibiting variety denominations consisting solely of figures. The Committee and the Working Group on Variety Denominations also dealt with some proposals pertaining to the Guidelines for Variety Denominations, and mainly the proposal expressly to allow, or at least not to exclude, letter/figure or word/figure combinations as variety denominations. It was decided that those would be studied again at the next session.

18. The Committee agreed that Article 25 should be updated by replacing the words "the United International Bureaux for the Protection of Industrial, Literary and Artistic Property" by the words "the World Intellectual Property Organization."

19. The Committee agreed that the obligation to hold a revision conference every five years should be discontinued and that decisions to hold such conferences should be taken by the Council by a majority of three-quarters of the members present.

20. The Council is invited to take note of the Committee's work, especially the statement concerning Article 7, and the envisaged continuation of its activities as described above.

[Annex follows]

C/X/8

ANNEX

STATEMENT CONCERNING ARTICLE 7 FORMULATED BY THE
COMMITTEE OF EXPERTS ON THE INTERPRETATION AND REVISION
OF THE CONVENTION

(1) It is clear that it is the responsibility of the member States to ensure that the examination required by Article 7(1) of the UPOV Convention includes a growing test, and the authorities in the present UPOV member States normally conduct these tests themselves; however, it is considered that, if the competent authority were to require these tests to be conducted by the applicant, this is in keeping with the provisions of Article 7(1) provided that:

(a) the growing tests are conducted according to guidelines established by the authority, and that they continue until a decision on the application has been given;

(b) the applicant is required to deposit in a designated place, simultaneously with his application, a sample of the propagating material representing the variety;

(c) the applicant is required to provide access to the growing tests mentioned under (a) by persons properly authorized by the competent authority.

(2) A system of examination as described above is considered compatible with the UPOV Convention.

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