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UPOV**CAJ /XIX/8****ORIGINAL: French****DATE: March 23, 1987****INTERNATIONAL UNION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS****GENEVA****ADMINISTRATIVE AND LEGAL COMMITTEE****Nineteenth Session****Geneva, March 31 and April 1, 1987****REVISION OF THE CONVENTION***** * * * *****PROPOSALS****FROM THE INTERNATIONAL ASSOCIATION OF HORTICULTURAL PRODUCERS**Document prepared by the Office of the Union

1. By letter of March 20, 1987, the International Association of Horticultural Producers (AIPH) submitted its preliminary proposals for the revision of the UPOV Convention. These proposals are reproduced in the annex hereto.

[Annex follows]

**Association Internationale des Producteurs de l'Horticulture**

Internationaler Verband
des Erwerbsgartenbaues

International Association of
Horticultural Producers

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Ref.nr.

The Hague, 20 March 1987

Dear Sir,

In reply to your letter of 12 January 1987 concerning proposals for possible amendments of the UPOV-convention, we send you following provisional ideas of our organisation for the necessary amendments to a number of articles of the convention.

Art. 2.1. We are not prepared to see any change in this article.

Art. 4.3. This article must provide protection to all genera and species

- a. in which there is breeding in the state concerned;
- b. in which there is significant production or trade in the state concerned;
- c. for which protection is already available in an other member-state of the Union.

Art. 4.4. This article can be abrogated because of our amendment to article 4.3.

Art. 5.1. The meaning of the last two sentences of this article is more accurately expressed as follows: "Propagating material shall be deemed to include whole plants, parts thereof and tissue culture, when they are used as propagating material in the production of plants."

Art. 5.2. We would prefer the following text: "The authorization given by the breeder may be made subject to such conditions as he may specify, but these conditions shall be limited to the production and sale of the reproductive material of the new plant variety." Our organisation is of the opinion that this supplement is more appropriate to the framework of the convention.

Art. 6.1.a We prefer the text of this article as it was originally, namely with following last sentence: "A new variety may be defined and distinguished by morphological or physiological characteristics."

In all cases such characteristics must be capable of precise description and recognition." In our view it is the task for the authorities responsible for granting breeders' rights to decide if a new variety is sufficiently distinguishable from the existing range, based on one or more important characteristics. During this examination it is necessary to pay attention to the principle that the variety must demonstrate originality. If this approach is maintained, the granting of breeders' rights to varieties which differ only minimally from the existing ones is avoided. The same criterion should also be applied to the granting of breeders' rights to mutants. A clear distinction should be preserved between varieties including mutants; distances between them should not, therefore, be too small. This is desirable in order to maintain existing breeders' rights and also to facilitate identification of varieties by those who use them. We therefore regret the amendment made to Article 6 (1)(a) in the revision of the Convention in 1978; specific reference to morphological and physiological characteristics made the Convention more effective in this area.

Art.6.1.c Mutants occur more frequently in varieties which are in-
Art.6.1.d sufficiently homogeneous and stable. For the granting of breeders' rights varieties must be thoroughly examined with respect to these requirements, the more so because insufficient homogeneity and stability detected subsequently are no grounds for nullity. Insufficient homogeneity and stability should be a base for nullity.

Art. 7.1. Member-states should enter into bilateral agreements in order to reduce costs because of a more efficient and less expensive testing system.
Such a system should include testing by breeders themselves at their own premises.

Art. 7.3. In our opinion this period should form part of the period of protection granted under the convention.

Art. 9. Our organization recommends a revision of Art. 9 of the convention. We therefore suggest the insertion of a text based on the United Kingdom legislation:

- "(1) Subject to the provisions of this section, if any person applies to the Controller and satisfies him that the holder of any plant breeders' rights has unreasonably refused to grant a licence to the applicant, or, in granting or offering to grant a licence, has imposed or put forward unreasonable terms, the Controller shall, unless it appears to him that there is good reason for refusing the application, grant to the applicant in the form of a compulsory licence any such rights as respects the plant variety as might have been granted to the applicant by the holder of the plant breeders' rights.
- (2) In entertaining applications and settling the terms of compulsory licences under this section the Controller shall endeavour to secure that the plant variety is available to the public at reasonable prices, that it is widely distributed, that it is maintained in quality and that there is reasonable remuneration for the holder of the plant breeders' rights."

We therefore feel that, if the Convention is revised, a new article which embodies this approach should be included.

Art. 10.3 We propose to add an article 10.3.c. as follows:

"he does not keep his varieties homogeneous or stable."

Art. 11. We suggest to make the following system: "An application in a member-state for protection under the terms of this convention shall be deemed to constitute an application for such protection in all other member-states in which the variety involved is protectable."

Art. 13.8 On the question of variety denominations we emphasize that a clear distinction must exist between these variety denominations, being part of the breeders' right on the one hand and a trade-mark or trade name on the other. We recognize that, in accordance with Article 13 (8) of the Convention, the breeder is entitled to add a trade mark to the variety denominations. In horticultural trade however, there is often confusion as to whether the name is a variety denomination or a trade mark. In these cases the requirement, also mentioned in Article 13 (8), that variety denominations are easily recognizable, has not been fulfilled. These problems occur both during the period of breeders' right and after the termination of that period. It is not acceptable that the holder of such a right should convey the impression, by use of a trade mark, that the protection continues to apply after the right has in fact expired.

We suggest to add an Article 13.9. with following text:
"Under no circumstances shall the use of trade marks confer rights to the breeders over or above those rights provided under the terms of this convention".

Yours faithfully,

J.B.M. Rotteveel

drs. J.B.M. Rotteveel
Secretary General AIPH

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