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INTERNATIONAL UNION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS

GENEVA

MEETING OF MEMBER AND NON-MEMBER STATES

Geneva, October 21 to 23, 1974

STATEMENTS BY PARTICIPANTS

Statement by the United States of America

The Department of State of the United States of America transmitted, on September 20, 1974, the annexed statement concerning proposals for amending the provisions of the International Convention for the Protection of New Varieties of Plants of December 2, 1961, in order to facilitate the accession of the United States to this Convention.

[Annex follows]



UPOV/NM/I/2
ANNEX
DEPARTMENT OF STATE
Washington, D.C. 20520

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Annex
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SEP 20 1974

Dr. Arpad Bogsch
Secretary General
International Union for the
Protection of New Plant Varieties
32 chemin des Colombettes
Geneva, Switzerland

Dear Dr. Bogsch:

The Government of the United States wishes to assure you of our interest in promoting industrial property rights in new plant varieties. To this important end, we are actively considering the desirability of adherence to the International Union for the Protection of New Plant Varieties (UPOV).

Many considerations must be taken into account, however, in deciding upon adherence. We are weighing modifications of some of our laws and practices, in light of the significant benefits our citizens might receive. Certain provisions of UPOV, however, will require modifications of our laws and practices which we do not believe to be in the best interests of our plant breeders.

We have some suggestions to offer for modifications of the provisions of UPOV of most concern to us. We believe these suggestions will accommodate most of our needs, while preserving the objectives and usefulness of UPOV.

At the meeting this October, our Government hopes to obtain the views of member delegations and observers on our suggestions. In evaluating these views, we will call upon the various sectors of our agricultural industry for their opinions.

By this time, you have undoubtedly received the letter of Mr. John C. Blum, of the United States Department of Agriculture. As you know, the Department of Agriculture administers the United States Plant Variety Protection Act. This Act concerns the granting and protection of legal rights for sexually reproduced plant varieties. Legal rights in asexually reproduced plant varieties, governed by our patent laws, are within the jurisdiction of the United States Patent

Office. These bodies of laws are distinct from each other, and separately administered. Therefore, I trust you will regard this letter as supplanting Mr. Blum's letter in presenting our Government's views on possible adherence to UPOV.

Article 2 acknowledges the right of a member state to recognize breeders' rights by grant of either a special title of protection or a patent. However, this Article precludes a member state from providing two forms of protection for any particular plant variety.

In the United States, a patent may be granted for a variety which has been asexually reproduced. If that same variety has been sexually reproduced, a certificate of plant variety protection may also be issued under the United States Plant Variety Protection Act. Accordingly, a single plant variety may be eligible for both forms of protection offered by our laws.

We see no compelling reason why member states should be precluded from providing legal rights in more than one form for any particular plant variety. When these rights differ in substance, as they do in the United States, a breeder should be able to avail himself of both forms of protection. In this way, he may receive the totality of rights offered by that state. We suggest, therefore, an amendment of Article 2 permitting a member state to protect a single species under two forms. However, protection under two forms, as we suggest, must not afford an extension of exclusive rights.

Articles 3 and 4 concern national treatment, and specify the terms under which it must or may be accorded by member states to foreign nationals. The United States believes that states must take appropriate steps to safeguard the property rights of their nationals. In doing so, either national treatment or reciprocity may be called for. In the United States, national treatment is accorded for asexually reproduced varieties, and sexually reproduced varieties are protected on a reciprocal basis. The United States is now actively studying this matter.

It seems to us that the policy of member states of requiring governmentally conducted or supervised field tests, as authorized under Article 7, may be a major obstacle to the implementation of protection. We would suggest elimination of such tests. In addition to hastening the protection of plant varieties, elimination of these tests would also avoid the significant costs now incurred.

Neither branch of our Government concerned with the examination of new plant varieties believes it necessary to conduct or administer field tests in ascertaining the novelty of a plant variety. Our experiences, in fact, suggest just the contrary. A rigorous examination can be satisfactorily conducted without mandatory field testing. Usually, tests for examination purposes merely duplicate those already conducted by the breeder prior to seeking protection. We can rely on the breeder's description of his variety and other available information.

Article 5 sets forth the rights of plant breeders against unauthorized use of their varieties. We suggest some modifications of this Article, as explained below.

Article 5 distinguishes between commercial and non-commercial use in determining whether or not any violation of a breeder's rights has occurred. For asexually reproduced plants, we believe that breeders must be protected against any unauthorized reproduction, whether for commercial or non-commercial purposes. Accordingly, we hope some consideration can be given to an appropriate modification of Article 5 to this effect. Experimental use, however, should not be considered a violation.

Article 5, as we understand it, permits unauthorized sexual reproduction for non-propagative purposes or experimentation. However, it proscribes unauthorized propagation or sale for propagative uses. We agree with these provisions with the understanding that they permit a farmer or gardener to save his seed from an authorized planting for planting a succeeding year's crop.

Articles 6 and 7 concern examination, and establish criteria or standards for determining if a plant variety is new. We certainly acknowledge and support the need for examination as a requirement for obtaining either breeders' rights or a patent for a new plant variety.

We do not believe, however, that a universal or world-wide standard for judging "protectability," as required in Article 6(a), is practical or particularly useful. This standard presupposes the ability of an examining authority to obtain and utilize undocumented knowledge from every country in the world regarding the use or sale of various plant varieties. This is an exceedingly difficult and elusive standard. We suggest establishment of a standard in Article 6 by which public knowledge, use or sale only in the state where protection is sought may be relied upon to bar protection.

Article 6 does not permit a plant breeder to commercialize his variety in a member state, prior to applying for protection there. However, commercialization may take place in a state other than where protection is sought, for as long as four years prior to applying for protection. This four year period, we understand, is to permit the commercial potential of the variety to be judged.

We recommend, instead, consideration of a period of grace, during which a plant variety may be commercialized in a member state without affecting the breeder's right to obtain protection in that state. Probably, a one-year period of grace would suffice.

Both Article 6 in its present form and our recommendation for a grace period require a clear understanding of the nature and meaning of "commercialization" in the seed trade. Certainly, experimentation efforts should not be considered as "commercialization." Therefore, we suggest consideration of an addition to Article 6, modeled after section 192 of our Plant Variety Protection Act, to clarify the meaning of this term, namely:

An owner who, with notice that release is for testing only, releases possession of seed or other sexually reproduceable plant material for testing retains ownership thereof. Any diversion from authorized testing or any unauthorized retention of such material by anyone who has knowledge that it is under such notice, or who is chargeable with notice, is prohibited, and violates the property rights of the owner. Anyone receiving the material tagged or labeled with the notice is charged with knowledge thereof.

Article 8 specifies minimum periods of protection for various plants, depending on the type of plant involved. We realize

that the period of protection must be long enough to provide incentives for the development of new varieties. Nevertheless, we suggest consideration of a simpler provision in UPOV, setting a minimum period of protection of fifteen years for all plant varieties. Such a minimum term will avoid conflicts with certain national laws providing shorter terms than the eighteen years required for some plants under Article 8. The specific term could be left to national determination.

Also, consideration might be given to measurement of the period of protection from the date of application for protection in a national office. Measurement of the term in this way would be consistent with many industrial property laws.

We note that Article 9 permits national authorities to restrict, in some circumstances, the free exercise of breeders' or patent rights. We understand this Article to authorize implicitly the compulsory licensing of breeders' rights or patents. While the right to do this is unquestioned, we suggest a modification permitting compulsory licensing only under the conditions set forth in Article 5 of the Paris Convention of 1883. We point out that the compulsory licensing provisions administered by our Department of Agriculture, and as mandated by our courts in patent cases, fully comply with the requirements of Article 5 of the Paris Convention.

Article 10 states the conditions under which breeders' rights may be amended or forfeited. One basis for forfeiture is failure to furnish to a national authority, upon request, breeding or propagating material capable of producing the protected variety.

While we are not necessarily critical of this requirement, we point out that the maintenance of propagative material is not a requirement of our patent laws, and that our patent system functions effectively without this requirement. A breeder incapable of maintaining the characteristics of his variety must expect his rights in that variety to be withdrawn. Accordingly, we suggest that any requirement for the maintenance of propagative material be left to national laws.

Also, many or most states, including the United States, have individual or unique grounds for the forfeiture or annulment of rights in industrial property, beyond those grounds recognized in Article 10. We suggest, therefore, a modification

of Article 10 permitting national offices to annul or forfeit rights in new varieties on these national grounds as well. This suggestion would require a revision of Article 10(4).

As we understand Article 12, it permits the examination of applications for patents or breeders' rights, in certain circumstances, to be deferred up to four years after filing in a national office. In our judgement, however, applications for rights in new varieties should be examined as promptly as possible upon receipt in a national office. To do otherwise may confuse the public as to rights to that plant variety. We suggest a revision of Article 12 to preclude the deferral of examination of applications for breeders' rights or patents.

UPOV Articles 13 and 36 concern variety denominations. We appreciate the practical importance of protecting variety denominations, as well as protecting plant varieties themselves. We also acknowledge the need for assuring that variety denominations cannot be usurped as trademarks, and that trademarks will not be improperly used as variety denominations.

Nevertheless, we suggest that the selection and approval of variety denominations, and the details of their policing, be left to national laws. However, UPOV does properly assure that variety denominations are generic in nature, and cannot be appropriated as trademarks. Thus, the role of UPOV in informing states of the appropriation of variety denominations should be retained, and possibly enhanced.

We are concerned about the effects of seed and plant control measures in UPOV member states on the marketing of new plant varieties. Article 14 recognizes the possible effects of these measures in precluding or hampering commercialization, even when breeders' rights have been obtained. We hope that ways may be found to liberalize these control measures, consistent with legitimate national concerns in maintaining high quality and other standards for commercial plant materials.

We are concerned about the expenses of adherence to UPOV. Of course, the initial and annual expenses depend on the number of adhering states. However, we hope that attention can be given at the meeting to means for reducing these expenses.

With regard to the Provisional Agenda of the meeting, we note that a very short time has been allocated for discussions of

specific questions proposed by non-member states. We believe this will be a significant feature of the meeting, and that a considerable number of observers and delegates will wish to present their views and offer suggestions to other countries. We suggest, therefore, that, if at all possible, the schedule be revised to permit more time for this discussion.

I hope these comments will be of assistance to you in your preparations for the meeting. These suggestions, of course, are directed to the present text of UPOV. The United States delegation will be pleased to consider and discuss other suggestions and comments as they arise during the meeting.

Sincerely,

A handwritten signature in dark ink, appearing to read "Harvey J. Winter". The signature is fluid and cursive, with the first name "Harvey" being more prominent.

Harvey J. Winter, Director
Office of Business Practices
U.S. Department of State

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