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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 CIOPORA

The International Community of Breeders of Asexually Reproduced Ornamentals, Geneva, transmitted, on August 30, 1974, the annexed letter and memorandum dealing mainly with the subject of the prior examination (examen préalable) provided for in Article 7 of the International Convention for the Protection of New Varieties of Plants of December 2, 1961.

[Annex follows]

Letter from the Secretary General of C.I.O.P.O.R.A.
to the Secretary General of UPOV, dated August 30, 1974

M E M O R A N D U M

on the prior examination provided for
in Article 7 of the Paris Convention
establishing the Union for the Pro-
tection of New Varieties of Plants of
December 2, 1961

I.

C.I.O.P.O.R.A.,

Considering Articles 7 and 30(2) of the Convention
establishing the Union for the Protection of New Varieties
of Plants and the Recommendation annexed to the said
Convention concerning the organization of prior
examination at the international level,

Considering the recommendations made to States mem-
bers of the Union by the Council of the said Union at
the close of its seventh session, held from October 10
to 12, 1973,

Recalling also the advice and recommendations already
given by it in the past (observations of October 1961 on
the Preliminary Draft Convention of August 1961, on the
Protection of New Varieties of Plants, International Sym-
posia on the Protection of New Plant Varieties in Paris
in April 1967 and in Amsterdam in April 1972),

Referring to the letter sent to it by the Secretariat
General of UPOV on April 9, 1974,

submits to the Council of the International Union for
the Protection of New Varieties of Plants the following Memo-
randum, the purpose of which is to review the present
operation of prior examination with respect to vegetatively
reproduced ornamental plants, and to suggest such improve-
ments as are desired by the profession at the present time.

II.

It is important to bear in mind that the International
Conference on the Protection of New Varieties of Plants,
which resulted in the 1961 Paris Convention, was convened
from 1957 to 1961 at the instigation of the breeders of
plants which did not qualify for protection by patent,

As I mentioned to you at our last meeting in your Office,
our Association was very appreciative of the proposal you made
in your letter of April 9, 1974, to the effect that we should
submit to you our comments and suggestions, if any, on those
of the draft Guidelines for the Conduct of Tests which relate
to species of interest to our Association.

As agreed, our Association has investigated the problem
of prior examination in general and I enclose herewith a
memorandum containing a certain number of general considera-
tions deriving from recent experience of examination as pro-
vided for in Article 7 of the 1961 Convention.

We should be obliged if you would forward this document
to the Council of UPOV and to the Working Group responsible
for the drafting and revision of the Guidelines for the
Conduct of the Prior Examination.

We earnestly hope that, in accordance with your proposal,
communication may soon be established between our Association
and the bodies referred to, in such a way that the desired
improvements may be brought about in examination procedures
and the issue of titles of protection. We thank you in ad-
vance for whatever action you take to this end.

In addition, our Association will not fail to submit
more specific suggestions to you with regard to the examina-
tion of each of the species in which it is interested, as the
respective draft Guidelines become available.

that is, mainly, seed-reproduced plants for alimentary purposes.

For the majority of these plants provision was already made, in legislation on the commercialization of seeds and plants, for prior examination of the performance and the cultivation value of new cultivars.

Moreover, the novelty characteristics of this type of plant are often of a physiological nature (better performance, higher precocity rating, etc.), and generally can only be verified after a thorough test growing. The same applies to homogeneity and stability characteristics.

There is no doubt that this fact had a considerable influence on the decision taken by the writers of the Convention to introduce prior examination.

On the other hand, new varieties of vegetatively reproduced ornamental plants by definition present no major difficulty with respect to homogeneity and stability. As for their novelty characteristics, these are generally morphological and can therefore be determined more easily and rapidly. This no doubt explains how, in the United States of America, protection by "plant patent" of vegetatively reproduced plants has existed for 40 years without prior examination and has given satisfaction to breeders and users alike.

III.

C.I.O.P.O.R.A. concludes from the foregoing that the prior examination of vegetatively reproduced ornamental plants should be designed on the basis of norms and criteria radically different from those used for other categories of plants. This view is moreover quite in accordance with the 1961 Convention, which provides in Article 7(1) that "examination shall be adapted to each botanical genus or species having regard to its normal manner of reproduction or multiplication."

C.I.O.P.O.R.A. also considers that such a distinction is not only necessary but urgent, for, while prior examination is the keystone of plant variety protection as conceived by the new Convention, it could equally become a stumbling-block if care is not taken.

1. Prior examination limits the number of countries able to accede to the 1961 Paris Convention, which obliges any State contemplating accession to be in a position to put its provisions into effect immediately, and therefore to carry out the examination prescribed by Article 7.

It is now clear that a number of countries have not, and for a long time will not have, sufficient capital, the necessary installations or competent technicians to devise and operate a prior examination service.

2. Prior examination limits the number of species likely to enjoy protection under national laws enacted in accordance with the provisions of the Convention: The Federal Republic of Germany, for instance, justified its refusal to extend protection to carnations by the lack of ad hoc installations for the prior examination of varieties of this species.

3. Prior examination is likely to become more and more uncertain and less and less reliable owing to the growing number of varieties of every species being put on the market, and of commercial dealings between countries. There was a time when the cultivars of a given species, marketed in a given country, were for the most part produced by breeders who were nationals of that country. Nowadays the origin of the cultivars varies more and more, and they can come from the United States, the Soviet Union, Japan, Australia or New Zealand. Thus it becomes practically impossible for an expert to know all the cultivars in existence at any one time, or even all the "well-known varieties." Thus prior examination becomes progressively longer and more difficult.

4. Being difficult, prior examination is of course also costly (in France a new plant variety certificate costs three times as much as a patent). This high cost limits the number of varieties in respect of which breeders decide to file an application for protection, and the vicious circle is completed by the examining bodies, which are thus obliged to charge high fees for reasons of economic viability.

A more accurate idea of the foregoing may be had by consulting the Register of New Varieties (vegetatively reproduced species) maintained by the French Association of Breeders of New Horticultural varieties (SNPNH): at the time of the entry into force of the French Law for the Protection of New Plant Varieties, 850 recent varieties had already been recorded in the SNPNH Register and were therefore eligible for the application of the provisions of Article 36 of the French Law; this option was exercised for only 32 varieties, however. Moreover, by April 1974, some 200 new varieties had been entered in the Register since the entry into force of the French Law whereas, during the same period, applications for new plant variety certificates had been filed in respect of only 40 varieties. Finally, bearing in mind that the Register in question does not cover all the varieties put on the market (many breeders are not members of the Association), it may be concluded from the above figures that there is a somewhat disquieting lack of interest in the protection afforded by the Convention.

On the basis of a survey of its own, C.I.O.P.O.R.A. is in a position to state that the main cause for this is the cost of protection, which is considered too high by a large number of breeders of ornamental plants. These breeders seek to make their research work profitable in roundabout ways (sale of propagating material at high prices, gentlemen's agreements). Another cause is undoubtedly the difficulties which are being encountered by breeders (particularly in the United Kingdom and Denmark) in the application of the UPOV Guidelines for Variety Denominations.

5. Since it is a long process, prior examination is likely to delay the marketing of new varieties or unduly prolong the period (prior to publication of the issue of the title of protection) during which the breeder, while enjoying preliminary protection, can only report or proceed against action prejudicial to his rights after notification of a certified copy of the application.

IV.

One cannot but conclude from all the foregoing that prior examination, as provided for at the present time, suffers from a number of limitations of a human, technical and financial nature, and that steps should be taken to investigate and apply promptly any measures which would permit, if not its elimination, at least its simplification within limits compatible with the texts of the Convention currently in force.

C.I.O.P.O.R.A. was pleased to note that the Council of the International Union had instituted a certain number of measures to rectify the situation, particularly at its October 1973 session, such as the possibility for each member State to issue the title of protection on the basis of the results of a prior examination carried out previously in another State.

C.I.O.P.O.R.A. nevertheless considers it necessary to go much further towards a simplification of the prior examination, and therefore takes the liberty of suggesting the following measures:

Short-term measures

1. It is desirable that, for each species which allows this in terms of technical considerations, only one State of the Union be responsible for prior examinations in respect of that species, in order to avoid the costly proliferation of reference collections and examination services. The results of the examination should be recognized automatically by the State making use of them except where the breeder or any other interested party has made an objection. It is also desirable that the country responsible for the examination of a given species be selected on the basis of its climatic and technical facilities in relation to the species concerned: it would be unfortunate if examination were entrusted to a country which would need a period of two years whereas another country could do the same work in a shorter time.

2. Where several countries of the Union have comparable prior examination facilities for a given species, the results of the first examination must prevail, under the same conditions as above, as far as the authorities of the other States are concerned. The party filing the application must of course have the right to choose freely the country in which he wishes to have the prior examination of his variety carried out.

3. Where, as indicated above, examination is carried out in one State of the Union only, it is neither reasonable nor justified, in the opinion of C.I.O.P.O.R.A., to expect other countries using the examination results to do more than cover the administrative costs occasioned by the transmittal of those results. The essential purpose of international cooperation, that is, the reduction of the cost of protection both for breeders and for the official bodies responsible, must be taken into account at all times. In this connection C.I.O.P.O.R.A. would also like to have examination fees standardized on the basis of the lowest rates currently applied.

4. As soon as one country of the Union protects a given species and therefore has established the appropriate prior examination services, that species should immediately and automatically be entered in the list of species to which all the other countries undertake to apply the provisions of the Convention.

5. Even where prior examination is carried out in one country only, C.I.O.P.O.R.A. proposes the appointment, for each ornamental species concerned, of a permanent working group composed of international experts. The experts, selected and designated by the Council on the basis of their competence, would be responsible for assisting the services of the country entrusted with the examination of the species concerned, and would travel on request. They would keep up to date the Guidelines for the conduct of tests on each species involved.

6. In view of the fact that the establishment of a comprehensive reference collection is practically impossible for obvious technical and financial reasons, C.I.O.P.O.R.A. considers it desirable to establish and keep up to date, for each species, a list of varieties maintained in public or private reference collections already in existence, in order that use may be made of these collections whenever necessary.

Medium-term measures

Even though the measures outlined above are likely to bring about a considerable simplification of the existing prior examination system, there is reason to wonder whether one should not consider still more radical and pragmatic solutions.

New Zealand recently drafted a law on the protection of new plant varieties which provides that examination may be carried out on the basis of reference plants kept by the applicant himself. Similarly, in the United States of America, the Plant Variety Protection Act of January 1, 1971, which introduces protection for categories of plants not eligible for protection under the 1930 Plant Patent Act and which is nevertheless extensively based on the 1961 Convention, does not provide for prior examination as foreseen by the Convention.

In view of the foregoing, C.I.O.P.O.R.A. requests that the Council and the representative professional organizations contact the competent authorities of these countries, in order to ascertain the reasons underlying the adoption of such provisions, to compare experience acquired in the field of examination and to make an objective review of the advantages and drawbacks of the two systems.

C.I.O.P.O.R.A. remains at the entire disposal of the Council of the Union for detailed discussion of each of the points mentioned in this Memorandum.

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