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UPOV

RC/ad hoc/11

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INTERNATIONAL UNION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS

GENEVA

AD HOC COMMITTEE ON THE REVISION OF THE CONVENTION

Geneva, September 11 to 15, 1978

DRAFT REPORT

prepared by the Office of the Union

Opening of the Session

1. The session of the Ad Hoc Committee on the Revision of the Convention (hereinafter referred to as "the Committee") was held in Geneva from September 11 to 15, 1978. All ten member States were represented. At the request of the US Department of State, a representative of the United States of America had been given the opportunity to have an exchange of views with the members of the Committee. For this purpose, he took part in the deliberations on September 13 and 14. The list of participants appears in Annex I to this document.

2. The session was opened by Mr. H. Skov (Denmark), Chairman of the Committee, who welcomed the participants. He paid tribute to the merits which Mr. J.I.C. Butler, who passed away earlier in the year, had acquired in the preparatory work for the revision of the UPOV Convention.

Adoption of the Agenda

3. The Committee adopted the agenda as appearing in document RC/ad hoc/1. The discussions of the Committee were based on documents DC/1 to 10 and RC/ad hoc/2 to 9.

Report

4. The Committee decided that the present report should reflect only the conclusions reached by the Committee and that its draft should be distributed as soon as possible, in view of the short time available before the Diplomatic Conference.

Tasks of the Committee; Procedure in the Diplomatic Conference

5. Pursuant to the decision taken by the Council at its eleventh session, held from December 6 to 9, 1977 (see document C/XI/21, paragraph 58 and Annex III), the main task of the Committee was to examine the observations received on the proposed new text of the UPOV Convention and to discuss the revision of Article 13. The Secretary-General recalled that, according to the Provisional Rules of Procedure of that Conference (document DC/2), the basis of the discussions of the Diplomatic Conference would be constituted by document DC/3 and nothing else and that any suggestion for adopting another text on any given point would have to be presented by a Government delegation to the Diplomatic Conference as a "proposal for an amendment" (see Rule 30(3) of the Provisional Rules of Procedure).

Proposals for amendments will have to be submitted in writing to the Secretary of the competent body, that is, the Diplomatic Conference meeting in plenary or a Committee of the Diplomatic Conference or a Working Group of the Diplomatic Conference (see Rule 30(3) of the Provisional Rules of Procedure).

Consideration of Comments on the Draft Revised Convention

6. Discussions were based on documents RC/ad hoc/7, (Compilation of the Observations on the Draft Revised Convention (documents DC/3 to 5) received by the Office of the Union before September 5, 1978, and contained in documents DC/6 to 8 and RC/ad hoc/4 to 6), DC/9 (Observations from the Delegation of the Netherlands), DC/10 (Amended Observations of AIPH) and RC/ad hoc/9 (Proposal for Article 13 of the UPOV Convention Submitted by the State Department of the United States of America).

7. Because of lack of time, the Committee did not examine most of the drafting proposals for the draft revised Convention. The Delegation of South Africa noted that a number of the present member States, as well as other States, had based their plant variety protection laws on the wording used in the present text of the Convention, and stated that it would be ready to withdraw its drafting proposals if it proved that their adoption would raise too many problems.

8. The Committee did not examine the treaty law provisions in detail because it felt that it was not qualified to do so. The Delegation of the Netherlands explained its main proposals appearing in document DC/9, in particular those relating to Articles 32B (Relations Between States Bound by Different Texts) and 38 (Settlement of Disputes).

9. The main conclusions of the Committee are summarized in the following paragraphs, most of which refer to the paragraph numbers used in the Annex to document RC/ad hoc/7:

(i) Paragraph 5 (Article 2(2) - Meaning of "Variety")

The majority of the Committee favored the new text as proposed in document DC/3. However, one member said that his Government might submit a proposal for amendment.

(ii) Paragraph 7 (Article 3 - National Treatment; Reciprocity)

The Committee expressed an unfavorable view on the proposal of CIOPORA.

(iii) Paragraph 11 (Article 4(3) - Extension of Protection to "Important Species")

The Committee agreed on a draft recommendation; it appears in Annex II to this document.

(iv) Paragraph 12 (Article 4(3) - Number of Genera and Species to be Protected)

The Committee expressed an unfavorable view on both proposals made in respect of this matter.

(v) Paragraphs 14 and 15 (Article 5(1) - Mandatory Protection of Final Product - Recommendation on the Protection of Cut Flowers)

The Committee agreed on a draft recommendation; it appears in Annex III to this document.

(vi) Paragraph 16 (Article 5(1) - Eluding Protection)

The Committee expressed an unfavorable view on the amendment proposed by ASSINSEL.

(vii) Paragraph 17 (Article 5(1) - "Farmer's Privilege")

The Committee expressed the view that it was desirable not to raise this question in the Diplomatic Conference.

(viii) Paragraph 18 (Article 5(1) - Protection of Plantlets)

The Committee defined the scope of the problem but reached no agreement.

(ix) Paragraph 19 (Article 5(1) - Use of Final Product as Propagating Material)

The Committee was of the opinion that, if a proposal more elaborate than the one referred to in this paragraph were made to the Diplomatic Conference, it might be worth while considering it. However, the amendment of the third sentence of Article 5(1) was not favored.

(x) Paragraph 21 (Article 5(3) - Drafting)

The Committee reached no agreement concerning the proposed deletion of the word "initial".

(xi) Paragraph 25 (Article 6(1)(b) - Marketing of Varieties)

The Committee expressed an unfavorable view on the proposed amendment of the first sentence of this provision.

(xii) Paragraph 26 (Article 6(1)(b) - Grace Period)

The Committee expressed itself in favor of maintaining the proposed option to grant a period of grace, as provided in Article 6(1)(b)(i) (in the version of document DC/3). The alternative proposal described in paragraph 26 of document RC/ad hoc/7 found no support.

(xiii) Paragraph 28 (Article 6(1)(b) - Trials not Affecting Right to Protection)

The Committee did not support the proposal of AIPH to amend subparagraph (b) and explained that the envisaged drafting of the whole of Article 6(1) was not in contradiction with the conclusion that each member State was to decide for itself the border-line between experimental use and commercialization.

(xiv) Paragraph 29 (Article 6(1)(b) - Acquisition of Notoriety by Variety)

The Committee saw no need to add "with the agreement of the breeder" to the last sentence of Article 6(1)(b).

(xv) Paragraph 30 (Article 6(1) - Drafting)

The Committee expressed a favorable view on the proposal that Article 6(1)(b)(ii) be simplified by using the expression "vines and trees, including their rootstocks."

(xvi) Paragraph 31 (Article 6(1) and 34A(2) - Application at National Level)

The Committee expressed itself in favor of replacing "novelty" by "patentability" in Article 34A(2).

(xvii) Paragraph 32 (Article 7 - Cooperation in Examination)

The Committee did not support the proposal of CIOPORA.

(xviii) Paragraph 33 (Article 7(3) - Provisional Protection)

The Committee reached no agreement on the question of making provisional protection mandatory. It expressed a favorable view on the proposal to replace the first word ("during") by "for".

(xix) Paragraph 34 (Article 7 - Drafting)

The majority of the Committee did not support the proposal to replace "botanical genus or species" by "variety" in the second sentence of Article 7(1), but expressed a favorable view on the proposal to delete "botanical" in the cited expression. Other proposals on which no conclusion was reached were also made, in particular that the said sentence be drafted as follows: "Such examination shall be adapted to the various genera and species having regard to their manners of reproduction or multiplication."

(xx) Paragraph 36 (Article 8 - Extension of Period of Protection)

The Committee did not support the proposal that the minimum period of protection be extended for potatoes, perennial grasses and clovers, and fruit trees.

(xxi) Paragraph 38 (Article 8 - Drafting)

The Committee expressed a favorable view on the proposal that this Article be simplified by using the expression "for vines and trees, including their rootstocks."

(xxii) Paragraph 39 (Article 9 - Widespread Distribution)

The Committee expressed an unfavorable view on the proposals for amending Article 9.

(xxiii) Paragraph 40 (Articles 9 and 10 - Interpretation)

The Committee expressed the view that it was up to each member State to interpret the relationship between Articles 9 and 10 and antitrust and similar laws.

(xxiv) Paragraph 41 (Article 10 - Drafting)

The principle underlying Article 10 was reaffirmed and explained. Some doubts were expressed as to whether the wording of Article 10(2) should not be amended.

(xxv) Paragraph 45 (Article 12(1) - Extension of Priority Period)

The majority of the Committee expressed an unfavorable view on the proposal to extend the priority period to two years.

(xxvi) Paragraph 46 (Article 12(1) - Computation of Priority Period)

The Committee expressed an unfavorable view on the proposal of ASSINSEL.

(xxvii) Paragraph 47 (Article 12 - Four-year Period)

The Committee explained the provisions of Article 12 and confirmed that member States not performing an official examination would not be required to wait up to four years before processing the application for protection for which the priority of an earlier application had been claimed.

(xxviii) Paragraph 49 (Article 12 - Relationship with Article 4 of the Paris Convention for the Protection of Industrial Property - Application at National Level)

It was explained that a member State protecting a plant variety by a patent was obliged to apply both the UPOV Convention and the Convention for the Protection of Industrial Property. It was further explained that the provisions of the UPOV Convention on priority had been designed in such a way as not to conflict with those of the Paris Convention for the Protection of Industrial Property.

(xxix) Paragraphs 50 and 51 (Article 13 - Terminology - Purpose of the Denomination)

The Committee expressed an unfavorable view on the proposals of CIOPORA.

(xxx) Paragraphs 53, 54 and 57 (Article 13 - Relationship Between Variety Denominations and Trade Marks)

The Committee examined this question at length on the basis of the various proposals made before its session and in the course of its discussions, in particular those appearing in Annex IV to this document. However, no agreement was reached on any of those proposals.

(xxxi) Paragraph 55 (Article 13 - Translation of Variety Denominations)

The Committee expressed a favorable view on the proposed deletion of "a translation of the original denomination or" in Article 13(5).

(xxxii) Article 13 - Communication of Information on Variety Denominations

The Committee took note of the difficulties encountered by the United States of America in transmitting information on variety denominations because of the confidentiality of patent applications.

(xxxiii) Article 13 - Mandatory Use of Variety Denominations

The Committee took note of the limited scope of the US Patent Law, which made it impossible to require the use of the variety denomination under the said laws.

(xxxiv) Paragraphs 61 and 62 (Article 21 - Tasks of the Council)

The Committee expressed itself in favor of amending item (c) as follows:

"(c) give the Secretary-General all necessary directions for the accomplishment of the tasks of Union."

The Committee further expressed itself in favor of amending item (g) as follows:

"(g) appoint the Secretary-General and, if it finds it necessary, a Vice Secretary-General."

It agreed, in this context, that the Council should be convened for an extraordinary session on the occasion of the Diplomatic Conference. During that session the Council should authorize its President to write a letter to the Director General of WIPO to the effect that the Council would not appoint a Vice Secretary-General without having sought the agreement of the Secretary-General beforehand. As to a further item on the agenda of that session of the Council, see paragraph 13 below.

(xxxv) Article 26 - Finances

The Delegation of the Federal Republic of Germany proposed a new text for paragraphs (2) and (4) (a). It appears in Annex V to this document. The Committee reached no conclusion on this matter.

(xxxvi) Article 27 - Revision of the Convention

The Delegation of Italy proposed that the convocation of a revision conference could be decided not only by the Council (with the majority specified in Article 22) but also by a number of member States (number not yet specified). The Committee reached no conclusion on this matter.

(xxxvii) Article 28 - Languages To Be Used by the Office of the Union and in the Council:

The Delegation of Italy proposed that the Italian language be also used by the Office of the Union and in the Council. The Committee reached no conclusion on this matter.

(xxxviii) Paragraph 68 (Article 32(3) - Accession of States)

The Committee did not support the proposal of ASSINSEL that that organization be consulted on requests from States to be admitted to accede to the UPOV Convention.

(xxxix) Paragraph 69 (Article 32A(2) - Drafting)

The Committee expressed a favorable view on the change proposed by South Africa.

(xl) Article 37 - Preservation of Existing Rights

The Delegation of Italy proposed that Article 37 be clarified to the effect that the Convention would not affect rights which existed in a member State at the time it entered into force on the territory of that State. The Committee reached no conclusion on this matter.

(xli) Articles 15 et seq. - Administrative and Treaty Law Provisions

The Delegation of Italy made a general reservation on these Articles which was noted by the Committee.

Consideration of Questions Concerning the Organization of the Diplomatic Conference

10. Discussions were mainly based on documents DC/2 (Provisional Rules of Procedure of the Diplomatic Conference) and RC/ad hoc/3 (Note prepared by the Office of the Union on the organization of the Diplomatic Conference).

11. The Committee decided that the second team of interpreters should be employed as from Wednesday, October 11, 1978, in order to allow more time for discussing the question of Article 13.

12. The Committee further decided that the press should be invited to the opening of the Diplomatic Conference rather than to a press conference shortly after it had started. It noted the wish that the international press agencies--and not only the local press--should also be invited.

Other Business

13. The Committee took note of the wish of the Soviet Union to be invited to the next sessions of the Administrative and Legal Committee and of the Technical Committee. It agreed that the extraordinary session of the Council, to be convened on the occasion of the Diplomatic Conference (see paragraph 9 (xxxiv) above), should also take a decision on this matter.

[Annexes follow]

ANLAGE I

LIST OF PARTICIPANTS/LISTE DES PARTICIPANTS/TEILNEHMERLISTE

I. MEMBER STATES/ETATS MEMBRES/VERBANDSSTAATENBELGIUM/BELGIQUE/BELGIEN

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Mr. H. KUNHARDT, Leitender Regierungsdirektor, Bundessortenamt, Rathausplatz 1, 3000 Hannover 72

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ITALY/ITALIE/ITALIEN

Mr. A. SINAGRA, Professeur, Université - Trieste, Magistrat de Tribunal, Ministère des Affaires Etrangères, Rome, Bureau du "Delegato per gli Accordi di Proprietà intellettuale"

NETHERLANDS/PAYS-BAS/NIEDERLANDE

Mr. K.A. FIKKERT, Legal Advisor, Ministry of Agriculture and Fisheries, Bezuidenhoutseweg 73, The Hague

Mr. A.W.A.M. VAN DER MEEREN, Board for Plant Breeders' Rights, P.B. 104, 6700 AC Wageningen

Mr. R. DUYVENDAK, Head of Section for Registration of Varieties of Agricultural Crops, RIVRO, Postbus 32, 6700 AA Wageningen

SOUTH AFRICA/AFRIQUE DU SUD/SÜDAFRIKA

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SWEDEN/SUEDE/SCHWEDEN

Mr. C. UGGLA, President of the Court of Patent Appeals, 10242 Stockholm

SWITZERLAND/SUISSE/SCHWEIZ

Mr. W. GFELLER, Chef des Büros für Sortenschutz, Abteilung für Landwirtschaft,
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Mr. K. WÜTHERICH, juristischer Beamter, Amt für geistiges Eigentum, Eschmann-
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UNITED KINGDOM/ROYAUME-UNI/VEREINIGTES KÖNIGREICH

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Fisheries and Food, Whitehouse Lane, Huntingdon Road, Cambridge CB3 0LE

II. OBSERVERS/OBSERVATEURS/BEOBACHTER
(September 13 and 14/13 et 14 septembre/13. und 14. September)

UNITED STATES OF AMERICA/ETATS-UNIS D'AMERIQUE/VEREINIGTE STAATEN VON AMERIKA

Mr. S.D. SCHLOSSER, Attorney, US Patent and Trademark Office,
Washington, DC 20231

III. OFFICER/BUREAU/VORSITZ

Mr. H. SKOV, President

IV. OFFICE OF UPOV/BUREAU DE L'UPOV/BÜRO DER UPOV

Dr. A. BOGSCH, Secretary-General
Dr. H. MAST, Vice Secretary-General
Dr. M.-H. THIELE-WITTIG, Senior Technical Officer
Mr. A. HEITZ, Administrative and Technical Officer

As of September 12, 1978:

Mr. A. WHEELER, Legal Advisor

[Annex II follows]
[L'annexe II suit]
[Anlage II folgt]

DRAFT RECOMMENDATION ON ARTICLE 4

The Conference,

Having regard to Article 4(2) and (3) of the revised Act of the Convention,

Considering the fact that the Convention in its original version of 1961 contains an Annex listing a number of economically important species to which each member State had to apply the Convention within certain periods,

Considering further that that Annex has been deleted in the revised Act, thereby giving greater freedom of choice to the member States and to those States which are intending to become members of the Union to decide which genera and species the Convention is to be applied to,

Conscious of the fact that it is in the interest both of agriculture in general and of breeders in particular that genera and species of economic importance be eligible for protection in each State,

Recommends that each member State use its best endeavours to ensure that the genera and species eligible for protection under its national law comprise as far as possible those genera and species which are of major economic importance in that State,

Recommends further that each State intending to become a member of the Union choose the genera or species to which, as a minimum, the Convention has to be applied at the time of its entry into force in the territory of that State from genera and species of major economic importance in that State.

[Annex III follows]

DRAFT RECOMMENDATIONS ON ARTICLE 5

The Conference,

Having regard to Article 5(1) and (4) of the Convention,

Conscious of the special problems which may arise from the right of the breeder in the case of certain genera and species,

Considering it of great importance that breeders be enabled effectively to safeguard their interests,

Recommends that, where, in respect of any genus or species, the granting of more extensive rights than those provided for in paragraph (1) of Article 5 is desirable to safeguard the legitimate interests of the breeders, the Contracting States take adequate measures, pursuant to paragraph (4) of Article 5.

[Annex IV follows]

PROPOSALS FOR ARTICLE 13

Proposal of the Chairman of the Ad Hoc Committee¹

"The member States shall take the necessary measures to ensure that no obstacles hamper the free use of the denomination for that variety, even after the expiration of the protection."

Proposal of the Secretary-General²

"Each member State shall provide the necessary measures to ensure that any possible rights of the breeder in the word or sign which is registered as a variety denomination shall not hamper the use of that denomination in connection with the marketing or other use of the variety protected in that State."

[Annex V follows]

¹ This proposed paragraph would replace both paragraph (4) (a) and paragraph (8) (b) in the version of Article 13 appearing in document DC/4.

² This proposed paragraph would replace paragraph (4) (a) in the version of Article 13 appearing in document DC/4.

PROPOSAL FOR ARTICLE 26

Submitted by the Delegation of the
Federal Republic of Germany

In paragraph (2), fixed classes are provided for the determination of the annual contributions of member States. The system as adopted raises the following problems:

The 1961 version of the Convention provided for three classes of contributions, namely:

First Class	:	five units
Second Class	:	three units
Third Class	:	one unit

This system became too narrow so that the following classes were provided for under the Additional Act of November 10, 1972, amending the Convention:

Class I	:	5 units
Class II	:	4 units
Class III	:	3 units
Class IV	:	2 units
Class V	:	1 unit

Again, this system became too narrow so that the draft revised Convention now provides for fifteen classes, which are designated by a complex system of letters, Roman figures and Roman figures followed by a "bis" or a "ter."

This system still retains the inconvenience of the earlier versions of fixing a rigid system of classes. It may be expected that, in particular after the accession of further States to the Union, it would again have to be adapted, especially because in such case the value of the contribution unit calculated pursuant to paragraph (3) will decrease and that of contributing in proportion to a greater number of units will increase. Then, should a State contribute in proportion to 15 units, an amendment of the Convention would again be necessary, and would be more difficult to bring about with the expansion of the Union. A system should therefore be chosen which would allow movements within the scale without amendment of the Convention. A prerequisite thereof is that the scale should not be restricted to 15 classes but left open at the top.

The following text could be considered:

"(2) Each member State of the Union shall contribute in proportion to the number of units taken over.

(3) (Unchanged)

(4)(a) Each State shall indicate, on joining the Union, the number of units it wishes to take over. It may, however, subsequently declare that it wishes to pay another number of contribution units."

(Rest unchanged)

The classes are deleted because they are not necessary. This rule is open to any modification in the contributions which may become necessary through modifications of the membership or of the financial structure of the Union.

If it were considered necessary to state expressly that not only full units but also intermediate levels might be chosen, this could be done by using the phrase "units and/or fractions of a unit."

In so far as it appears indispensable to introduce a rule for the transition from the present class system to the new regulation, the following sentence could be added to paragraph (2) of the above proposal:

"Any member State of the Union which, on the day on which this Act enters into force with respect to that State, pays contributions according to the provisions of the Additional Act of 1972 shall, subject to the provisions of the second sentence of paragraph (4), contribute as from that date in proportion to the number of units already chosen by it."

[End of Annex V and of document]