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ORIGINAL: English

DATE: November 28, 1996

INTERNATIONAL UNION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS
GENEVA

COUNCIL

Thirtieth Ordinary Session
Geneva, October 23, 1996

EXAMINATION OF THE CONFORMITY OF A GOVERNMENT BILL
OF THE REPUBLIC OF TRINIDAD AND TOBAGO
WITH THE UPOV CONVENTION

Document prepared by the Office of the Union

Introduction

1. By letter dated November 18, 1996, Mr. Trevor Spencer, Ambassador and Permanent Representative of Trinidad and Tobago to the United Nations Office at Geneva, explained that the Government of his country was considering accession to the 1978 Act of the UPOV Convention (hereinafter referred to as "the 1978 Act") and requested the advice of the Council of UPOV in relation to the conformity with the 1978 Act of a Bill on the protection of new varieties of plants. Annex I to this document contains the text of the said letter and of the Secretary-General's reply to that letter, while Annex II contains a copy the Bill.
2. Trinidad and Tobago did not sign the 1978 Act. Under Article 32(1)(b) of that Act, it must deposit an instrument of accession in order to become a member State of UPOV on the basis of that Act. Under Article 32(3), an instrument of that kind can only be deposited if the State in question has requested the advice of the Council on the conformity of its laws with the provisions of the 1978 Act and if the decision of the Council embodying the advice is positive.

Basis for the Protection of New Plant Varieties in Trinidad and Tobago

3. The protection of new plant varieties will be governed in Trinidad and Tobago by the law on the protection of new varieties of plants which is eventually enacted by the legislature of Trinidad and Tobago on the basis of the Bill. The Government of Trinidad and Tobago accepts that if the law, that is eventually enacted on the basis of the Bill, differs substantially from the Bill, it will be necessary for it to seek fresh advice from the Council on the conformity of the law with the 1978 Act. An analysis of the Bill follows in the order of the substantive law provisions of the 1978 Act.

Article 1(1) of the 1978 Act: Purpose of the Convention

4. The Bill provides for the eventual enactment of “An Act to provide for the protection of new varieties of plants by the grant of certain rights ...” while Sections 3 to 8 of the Bill establish the granting of protection to the breeders of plant varieties as the main function of the Bill. The Bill is thus in accordance with the purpose of the Convention.

Article 2 of the 1978 Act: Forms of Protection

5. Section 3 of the Bill provides for the grant of a right to be known as a “plant breeder’s right” in respect of plant varieties which satisfy the conditions set out in the Section. The Bill thus establishes a “special title of protection” within the meaning of Article 2(1) of the 1978 Act.

6. The Patents Act 1996 of Trinidad and Tobago (which has not yet been promulgated) contains no exclusion of plant varieties from patenting. Accordingly, there might exist the possibility in the future of granting patents for plant varieties which satisfy the criteria of the said Patents Act. It is understood, however, that in practice no patents have been granted for plant varieties under the existing patent law.

Article 3 of the 1978 Act: National Treatment, Reciprocity

7. Section 12(1)(b) of the Bill permits applications by variety owners who are nationals or residents of a Contracting Party. “Contracting Party” is defined as “a State or intergovernmental organization party to [the International Convention for the Protection of New Varieties of Plants 1978].”

8. The only special formality required in relation to foreign applicants is that they should appoint an agent resident or with an office in Trinidad and Tobago (see Section 12(3) and (4)).

9. The Bill accordingly conforms with Article 3 of the 1978 Act.

Article 4 of the 1978 Act: Botanical Genera and Species Which Must or May be Protected

10. Section 8 of the Bill empowers the Minister to establish by order a list of the genera and species to which the Act applies. The Bill accordingly contains provisions which will enable Trinidad and Tobago to conform with the requirements of Article 4 of the 1978 Act.

Article 5 of the 1978 Act: Rights Protected; Scope of Protection

11. Section 15(1) and (2) defines the scope of the breeder's right in terms which reproduce verbatim the provisions of Article 5(1) of the 1978 Act. Section 15(3) extends the breeder's right to cover the repeated use of the variety for the commercial production of another variety. Section 15(3) also excludes from the breeder's right the use of the protected variety as an initial source of variation to produce another variety. The Bill accordingly satisfies the requirements of Article 5 of the 1978 Act.

Article 6 of the 1978 Act: Conditions Required for Protection

12. The conditions required for the grant of protection are specified in Sections 3 to 7 of the Bill. They conform fully with Article 6 of the 1978 Act.

13. Section 4(3) contains provisions permitting the protection on a transitional basis of varieties of recent creation which have already been commercialized. The provisions permit the protection of varieties which were offered for sale or marketed up to four years prior to the introduction of protection for the species in question. These provisions would seem to satisfy the requirements of Article 38 of the 1978 Act concerning the transitional limitation of the requirement of novelty.

Article 7 of the 1978 Act: Official Examination of Varieties; Provisional Protection

14. Sections 30 and 31 of the Bill provide for the examination of the application for protection. Section 31(3) and (5) enables the Controller of the Intellectual Property Office to take advantage of test results obtained by other testing authorities. The Bill makes no provision for provisional protection which, however, is optional only under Article 7(3) of the 1978 Act.

15. The Bill satisfies the requirements of Article 7 of the 1978 Act.

Article 8 of the 1978 Act: Period of Protection

16. Section 17 of the Bill provides for the minimum period of protection specified in Article 8 of the 1978 Act.

Article 9 of the 1978 Act: Restrictions on the Exercise of Rights Protected

17. Section 44(1) establishes the general principle that a person may apply to the Court for the grant of a compulsory license in respect of any plant breeder's right only on the ground that it is necessary to safeguard the public interest in Trinidad and Tobago. Section 44(4) provides for the payment of remuneration to the licensor which will, in default of agreement, be determined by the Court. The Bill accordingly satisfies the requirements of Article 9 of the 1978 Act.

Article 10 of the 1978 Act: Nullity and Forfeiture of the Rights Protected

18. Section 19(2) and (4) makes provisions for the circumstances in which a breeder's right shall be annulled or forfeited, while Sections 33 and 34 specify the procedure which must be followed. The provisions of Section 19 fully satisfy Article 10 of the 1978 Act.

Article 11 of the 1978 Act: Free Choice of the Member State in which the First Application is Filed; Application in Other Member States; Independence of Protection in Different Member States

19. The Bill contains no provision which is contrary to Article 11 of the 1978 Act.

Article 12 of the 1978 Act: Right of Priority

20. Sections 21 and 22 of the Bill contain provisions concerning priority which fully conform with Article 12 of the 1978 Act.

Article 13 of the 1978 Act: Variety Denomination

21. Sections 24, 26, 27 and 28 of the Bill contain provisions relating to the denomination of new varieties. They satisfy all the requirements of Article 13 of the 1978 Act.

Article 14 of the 1978 Act: Protection Independent of Measures Regulating Production, Certification and Marketing

22. The Bill contains no provision whereby protection is made subject to measures regulating production, certification or marketing. It accordingly satisfies the requirements of Article 14 of the 1978 Act.

Article 30(1) of the 1978 Act: Implementation of the Convention on the Domestic Level

23. Section 37 provides for the availability to the holder of the breeder's right of all remedies for infringement available under the civil law including the right to damages and injunction. The Bill accordingly conforms with Article 30(1)(a) of the 1978 Act.

24. Section 2(2) of the Bill provides for the Intellectual Property Office to be established under the Patents Act 1996 to be responsible for the administration of breeder's rights. The Bill accordingly satisfies the requirement of Article 30(1)(b) of the 1978 Act.

25. The Bill provides for the publication in a "periodical" of information concerning the protection of plant varieties as follows: Section 20(4) (applications), Section 25 (denominations proposed, registered or canceled), Section 31(1) and (11) (decisions to grant and to reject), Section 32(7) (grants), Section 39(4) (grants of exclusive licenses). "Periodical" is defined in Section 2(1) to include the Gazette, daily newspapers or any other publication issued by the Intellectual Property Office. Section 47 concerns the establishment of the Register of Plant Breeders' Rights and its examination by the public. The Bill thus fully satisfies Article 31(1)(c) of the 1978 Act.

General Conclusion

26. The Bill would seem to comply fully with the substance of the 1978 Act.

27. The Office of the Union suggests that the Council may wish

(a) to decide that the Bill provides the basis for a law conforming with the 1978 Act;

(b) to request the Secretary-General to advise the Government of Trinidad and Tobago that after the enactment into law of the Bill without substantial changes, it may deposit an instrument of accession to the 1978 Act (provided that such Act remains open to accession at the date of the proposed deposit).

28. The Council is invited to take note of the information given above and to adopt the decisions set out in the preceding paragraph.

[Two Annexes follow]

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ANNEX I

[Annex II follows]

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