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INTERNATIONAL UNION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS

GENEVA

FOURTH MEETING  
WITH INTERNATIONAL ORGANIZATIONS

Geneva, October 9 and 10, 1989

REVISION OF THE CONVENTION

Document prepared by the Office of the Union

This document contains the proposed new text of the Convention as resulting from the discussions that have taken place so far in the Administrative and Legal Committee of UPOV, together with short explanatory notes.

## INTRODUCTION

### A. Historical Background

1. At its twenty-first ordinary session, the Council decided to entrust the Administrative and Legal Committee (hereinafter referred to as "the Committee") with the preparation of the forthcoming revision of the Convention.

2. The Committee considered the revision of the Convention at its twenty-second session (April 18 to 21, 1988), at its twenty-third session (October 11 to 14, 1988) and at its twenty-fourth session (April 10 to 13, 1989).

3. The first working paper contained proposals made by the Office of the Union on the basis of earlier discussions, in particular those of the Third Meeting with International Organizations. It had been updated thereafter. The present document is the result of a further updating on the basis of the discussions at the twenty-fourth session of the Committee.

4. At each of the above-mentioned sessions, the Committee took note of the contribution of an international non-governmental organization:

i) at its twenty-second session, of the observations from the International Chamber of Commerce (ICC) that had been adopted by its Executive Board at its fifty-second session, on December 1, 1987;

ii) at its twenty-third session, of the statement of the International Association of Plant Breeders for the Protection of Plant Varieties (ASSINSEL) on its position regarding the protection of biotechnological inventions, which had been unanimously adopted by its General Assembly at its Congress held in Brighton (United Kingdom) on June 9 and 10, 1988;

iii) at its twenty-fourth session, of the proposals and comments from the International Community of Breeders of Asexually Reproduced Fruit-Tree and Ornamental Varieties (CIOPORA).

### B. Objectives of the Revision of the Convention

5. When it took the decision referred to above, the Council did not specify the objectives of the revision of the Convention. In fact, the objectives may be deduced from the proposals submitted for discussion. In general, as stated in Article 27(1) of the 1961 text of the Convention, the objective is to introduce amendments designed to improve the working of the Union. The more specific aims are as follows:

(i) to strengthen the right of the breeder, in particular through revision of Article 5;

(ii) to extend the practical scope of application of the plant variety protection system through revision of Articles 3 and 4;

(iii) to clarify, on the basis of experience, a number of provisions, in particular those of Article 6, and to adapt them to recent and prospective developments.

[...]

Present [1978] Text

Article 5

Rights Protected;  
Scope of Protection

(1) The effect of the right granted to the breeder is that his prior authorisation shall be required for

- the production for purposes of commercial marketing
- the offering for sale
- the marketing

of the reproductive or vegetative propagating material, as such, of the variety.

Vegetative propagating material shall be deemed to include whole plants. The right of the breeder shall extend to ornamental plants or parts thereof normally marketed for purposes other than propagation when they are used commercially as propagating material in the production of ornamental plants or cut flowers.

(2) The authorisation given by the breeder may be made subject to such conditions as he may specify.

(3) Authorisation by the breeder shall not be required either for the utilisation of the variety as an initial source of variation for the purpose of creating other varieties or for the marketing of such varieties. Such authorisation shall be required, however, when the repeated use of the variety is necessary for the commercial production of another variety.

(4) Any member State of the Union may, either under its own law or by means of special agreements under Article 29, grant to breeders, in respect of certain botanical genera or species, a more extensive right than that set out in paragraph (1), extending in particular to the marketed

Proposed New Text

Article 5

Effects of the Right Granted  
to the Breeder

(1) A right granted in accordance with the provisions of this Convention shall confer on its owner the right to prevent all persons not having his consent:

(i) from reproducing or propagating the variety;

(ii) from offering for sale, putting on the market, exporting or using material of the variety;

(iii) from importing or stocking material of the variety for any of the aforementioned purposes.

(2) The right shall not extend to:

(i) acts described in paragraph (1)(ii) and (iii) above concerning any material which has been put on the market in the member State of the Union concerned by the breeder or with his express consent, or material derived from the said material in accordance with the purpose intended when it was put on the market;

(ii) acts done privately and for non-commercial purposes;

(iii) acts done for experimental purposes;

(iv) acts done for the purpose of breeding new varieties, and acts done for the commercial exploitation of such varieties, unless the material of the protected variety must be used repeatedly for such exploitation.

(3) If a variety is essentially derived from a [single]—protected variety, the owner of the right in the protected variety

[Cont'd]

[Cont'd]

Present [1978] Text

Article 5 [Cont'd]

product. A member State of the Union which grants such a right may limit the benefit of it to the nationals of member States of the Union which grant an identical right and to natural and legal persons resident or having their registered office in any of those States.

Proposed New Text

Article 5 [Cont'd]

[Alternative 1] may prevent all persons not having his consent from performing the acts described in paragraph (1) above in relation to the new variety.

[Alternative 2] shall be entitled to equitable remuneration in respect of the commercial exploitation of the new variety.

[Alternative 3] may prevent all persons not having his consent from performing the acts described in paragraph (1) above in relation to the new variety. However, where the new variety shows a substantial improvement over the protected variety, the owner of the right shall only be entitled to equitable remuneration in respect of the commercial exploitation of the new variety.

(4) Each member State of the Union may exempt other acts from the effects of the right granted in accordance with the provisions of this Convention, [if this is necessary in the public interest and] provided that the exemption does not cause excessive prejudice to the legitimate interests of breeders. Any member State of the Union making use of the faculty provided for in this paragraph shall notify the Secretary-General of this fact, stating the reasons therefor. The Council shall state its position thereon.

[(5) No acts concerning a variety for which a right has been granted in accordance with the provisions of this Convention shall be prohibited on the basis of some other industrial property right

(i) where the acts fall within the right in accordance with the provisions of paragraph (1), or

(ii) which are exempt from the scope of the right in accordance with the provisions of paragraph (2).]

Explanatory Notes

1. It is proposed to strengthen the right granted to the breeder by redrafting completely Article 5.

2. Paragraph (1).— This paragraph sets out the fundamental rights of the breeder using, in adapted form, the terminology of the Luxembourg Convention for the European patent for the common market (Community Patent Convention). It further differs from that Convention in that it extends the right of the breeder to exportation of material of the variety.

3. Concerning the scope of the term "material," reference is made to Article 2 [new].

4. Paragraph (2).— This paragraph sets out three types of limitations of the right of the breeder: the principle of the exhaustion of the rights, which would not be applicable to the reproduction or multiplication of the variety (subparagraph (i)); two limitations that are commonplace in the field of industrial property (subparagraphs (ii) and (iii)); the "principle of free access to genetic resources," similar to that presently contained in paragraph (3) of Article 5 (subparagraph (iv)).

5. Paragraph (3).— This paragraph introduces a new concept into the law of plant variety protection: the exploitation—but not the breeding—of a variety that is essentially derived from a protected variety would be subject to the right granted to the breeder of the latter variety ("dependence").

6. The Committee has not yet taken a final position on the question whether the word "single" would be inserted or omitted; at the present stage of the discussions, there seems to be general agreement on the fact that the following conditions should be met for there to be dependence:

(i) The difference between the two varieties involved must meet the requirement set out in Article 6(1)(a), that is, under the present text, be clear and relate to one or more important characteristics.

(ii) The derived variety must retain almost the totality of the genotype of the mother variety and be distinguishable from that variety by a very limited number of characteristics (typically by one).

(iii) The derived variety must have been obtained using a plant improvement method whose objective is the achievement of requirement (ii) above (mutation, gene transfer, full backcrossing scheme, selection of a variant within a variety, etc.); in other words, no varieties bred according to a classical or other scheme of crossing in which selection within the progeny is a major element would become the subject of dependence.

(iv) The mother variety must originate from true breeding work, that is, it must not itself be dependent; there should not be a "dependence pyramid". If variety C derives from variety B which derives from variety A, C would be dependent from A rather than B, since the very objective of dependence is to give to the breeder of an original genotype an additional source of remuneration; the collecting of that remuneration through a third party, in the example the breeder of variety B, does not seem very practicable.

7. The Committee has not yet taken a final position on the question of the nature of the right that would be granted to the breeder under the principle of dependence. Three alternatives are proposed for discussion.

8. Paragraph (4). - This paragraph is self-explanatory. The Committee has not yet taken a final position on the question whether a reference to public interest should be inserted or omitted.

9. Paragraph (5). - This paragraph sets out a "collision norm" governing the interactions with other industrial property rights. The Committee has not yet taken a final position on the propriety of such a provision, nor on its contents.

[...]