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0033

**INTERNATIONAL UNION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS**

**GENEVA**

**ADMINISTRATIVE AND LEGAL COMMITTEE**

**Twenty-seventh Session**

**Geneva, June 25 to 29, 1990**

**REVISION OF THE CONVENTION:**

**DRAFT SUBSTANTIVE LAW PROVISIONS**

Document prepared by the Office of the Union

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Proposed New Text

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**Present [1978] Text**

[The present text does not contain any provision corresponding to  
Article 1 of the proposed new text.]

Proposed New Text

PART ONE

GENERAL PROVISIONS

INTERNATIONAL CONVENTION FOR THE PROTECTION OF  
NEW VARIETIES OF PLANTS  
ACT OF 1991

Article 1

Definitions

For the purposes of this Act:

(i) "this Convention" means the present (1991) Act of the International Convention for the Protection of New Varieties of Plants;

(ii) "Act of 1961/1972" means the International Convention for the Protection of New Varieties of Plants of December 2, 1961, as amended by the Additional Act of November 10, 1972;

(iii) "Act of 1978" means the Act of October 23, 1978, of the International Convention for the Protection of New Varieties of Plants;

(iv) "breeder's right" means the right of the breeder granted and protected in accordance with the provisions of this Convention;

[continued]

**Present [1978] Text**

[The present text does not contain any provision corresponding to  
Article 1 of the proposed new text.]

Proposed New Text

(Article 1, continued)

(v) "breeder" means the person who bred or discovered the variety, or his successor in title;

(vi) "variety" means a subdivision of a botanical species or of a taxon of a rank lower than species, which subdivision, and the genotype which it expresses, are by reason of their characteristics, regarded as an independent unit for the purposes of cultivation [or any other form of use].\* Such unit may be:

- a unit which is protectable under the provisions of this Convention, or
- a unit which is not so protectable in that it does not fully meet the conditions of Article 8(4), (5) and (6).

[Depending upon the mode of inheritance of its varietal characteristics, a variety may be represented:

- by a plant, or a part of a plant,
- by a grouping of plants, or of parts of plants,
- by plants or parts of plants whose production requires the repeated use of components;]\*

[continued]

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\* The words within square brackets represent an alternative.

Present [1978] Text

[The present text does not contain any provision corresponding to  
Article 1 of the proposed new text.]

Proposed New Text

(Article 1, continued)

(vii) "parts" in relation to plants means parts of plants which can be used to produce complete plants;

(viii) "genotype" means the genetic constitution of the plant, plants or plant parts which represent a variety;

(ix) "essentially derived variety" means a variety which satisfies all of the following conditions:

- it is predominantly derived from a single variety ("the initial variety"), particularly through methods which have the effect of conserving the essential elements of the genotype of the initial variety, such as the selection of a natural or induced mutant or of a somaclonal variant, the selection of a variant, back-crossings or transformation by genetic engineering,
- it is clearly distinguishable from the initial variety in accordance with Article 8(4), (5) and (6),
- it conforms to the genotype of the initial variety apart from the specific differences which result from the method of derivation used and differences which result incidentally from such method;

[continued]

**Present [1978] Text**

[The present text does not contain any provision corresponding to Article 1 of the proposed new text.]

Proposed New Text

(Article 1, continued)

(x) "material" means, in relation to a variety:

- reproductive or vegetative propagating material of any kind,
- harvested material,
- [the product directly obtained from harvested material];\*

(xi) "Union" means the Union for the Protection of New Varieties of Plants constituted by the Act of 1961/1972 and further mentioned in the Act of 1978;

(xii) "member of the Union" means a State party to the Act of 1961/1972 or the Act of 1978 and a State or intergovernmental organization party to this Convention;

(xiii) "Contracting Party" means a State or an intergovernmental organization party to this Convention;

(xiv) "territory of a Contracting Party" means, where the Contracting Party is a State, the territory of that State and, where the Contracting Party is an intergovernmental organization, the territory in which the constituting treaty of that intergovernmental organization applies;

[continued]

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\* The words within square brackets represent an alternative. The retention of these words will call for the deletion of the words in square brackets in Article 16(1).

**Present [1978] Text**

[The present text does not contain any provision corresponding to Article 1 of the proposed new text.]

Proposed New Text

(Article 1, continued)

(xv) "nationals" means, where the Contracting Party is a State, the nationals of that State and, where the Contracting Party is an intergovernmental organization, the nationals of the States members of that organization;

(xvi) "authority" means the authority referred to in Article 2;

(xvii) "Secretary-General" means the Secretary-General of the Union.

Present [1978] TextArticle 1Purpose of the Convention; ...

- (1) The purpose of this Convention is to recognise and to ensure to the breeder of a new plant variety or to his successor in title (both hereinafter referred to as "the breeder") a right under the conditions hereinafter defined.
- (2) [See opposite Article 17 in the new text.]
- (3) [See opposite Article 17 in the new text.]

Article 30Implementation of the Convention on the Domestic level; ...

- (1) Each member State of the Union shall adopt all measures necessary for the application of this Convention; in particular, it shall:
  - (a) provide for appropriate legal remedies for the effective defence of the rights provided for in this Convention;
  - (b) set up a special authority for the protection of new varieties of plants or entrust such protection to an existing authority;
  - (c) ensure that the public is informed of matters concerning such protection, including as a minimum the periodical publication of the list of titles of protection issued.
- (2) ...
- (3) ...

Proposed New Text

Article 2

Obligations of Contracting Parties; Implementation of the  
Convention on the Domestic Level

(1) Subject to the provisions of Article 38, each Contracting Party undertakes to recognise and to ensure a breeder's right to the breeder of a new variety.

(2) Each Contracting Party shall adopt all measures necessary for the application of this Convention; in particular, it shall:

(i) provide for appropriate legal remedies for the effective defence of breeders' rights;

(ii) maintain a special authority for the grant of breeders' rights or entrust the task of granting such rights to the special authority maintained by another Contracting Party;

(iii) ensure that the public is informed of matters concerning breeders' rights, at least through the periodical publication of lists of breeders' rights granted.

Present [1978] TextArticle 2Forms of Protection

(1) Each member State of the Union may recognise the right of the breeder provided for in this Convention by the grant either of a special title of protection or of a patent. Nevertheless, a member State of the Union whose national law admits of protection under both these forms may provide only one of them for one and the same botanical genus or species.

(2) Each member State of the Union may limit the application of this Convention within a genus or species to varieties with a particular manner of reproduction or multiplication, or a certain end-use.

Proposed New Text

PART II

PROVISIONS RELATING TO  
THE PROTECTION OF VARIETIES

[Article 3

Forms of Protection

No Contracting Party shall grant patents for invention, or any other industrial property right that is not a breeder's right, for varieties.]\*

(The new text does not contain a provision that would correspond to paragraph (2) of the present text.)

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\* This Article is placed between square brackets in order to indicate that an alternative solution would consist of not including this Article.

The inclusion of this article would mean that no Contracting Party could grant any title other than a breeder's right for the protection of varieties. In other words, Contracting Parties could not grant, for varieties, patents for inventions or other industrial property titles. The expression "patents for invention" is used to render it clear that it is the usual kind of industrial utility patent that could not be granted. It would not be prohibited to call the breeder's right a patent but such a patent, to be permitted, would have to conform with all the provisions of this Act, that is, it would be a patent only in name and would, as far as its legal nature is concerned, be a breeder's right.

The non-inclusion of this article would mean that any Contracting Party could protect varieties, in addition to the grant of a breeder's right, by the grant of other titles, particularly patents. It is to be noted that where a Contracting Party would use this faculty--that is, it would allow the granting, in addition to the breeder's right, of patents--it would be free to decide whether an applicant must choose between a breeder's right and a patent (that is, if he applies for one, he cannot apply for the other) or whether he can apply for and be granted both a breeder's right and a patent ("cumulative protection"). If, for any given variety, such cumulative protection is obtained, the resolution of any conflict between the two kinds of protection would be left to the legislation and the courts of the Contracting Party where both titles were obtained and would not be regulated in this Act.

Present [1978] TextArticle 14Protection Independent of  
Measures Regulating Production,  
Certification and Marketing

(1) The right accorded to the breeder in pursuance of the provisions of this Convention shall be independent of the measures taken by each member State of the Union to regulate the production, certification and marketing of seeds and propagating material.

(2) However, such measures shall, as far as possible, avoid hindering the application of the provisions of this Convention.

**Proposed New Text**

**Article 4**

**Protection Independent of  
Trade Regulation**

The breeder's right shall be independent of any measure taken by a Contracting Party to regulate within its territory the production, certification and marketing of material of varieties or the importing or exporting of such material. In any case, such measures shall not affect the application of the provisions of this Convention.

Present [1978] TextArticle 4Botanical Genera and Species Which Must or May be Protected

(1) This Convention may be applied to all botanical genera and species.

(2) The member States of the Union undertake to adopt all measures necessary for the progressive application of the provisions of this Convention to the largest possible number of botanical genera and species.

(3)(a) Each member State of the Union shall, on the entry into force of this Convention in its territory, apply the provisions of this Convention to at least five genera or species.

(b) Subsequently, each member State of the Union shall apply the said provisions to additional genera or species within the following periods from the date of the entry into force of this Convention in its territory:

- (i) within three years, to at least ten genera or species in all;
- (ii) within six years, to at least eighteen genera or species in all;
- (iii) within eight years, to at least twenty-four genera or species in all.

(c) If a member State of the Union has limited the application of this Convention within a genus or species in accordance with the provisions of Article 2(2), that genus or species shall nevertheless, for the purposes of subparagraphs (a) and (b), be considered as one genus or species.

[continued]

Proposed New Text

Article 5

Field of Application of this Convention

(1) Each Contracting Party shall apply this Convention to all varieties of the plant kingdom in accordance with the provisions of this Article.

(2) Each Contracting Party shall be allowed a period of 10 years after the coming into force of this Convention in its territory within which to apply the provisions of this Convention to all varieties of the plant kingdom.

(3) Each Contracting Party which is bound by the Act of 1961/1972 or the Act of 1978 shall, after the coming into force of this Convention in its territory, apply this Convention to all genera or species which it protects under the Act of 1961/1972 or the Act of 1978.

(4) Each Contracting Party which is not bound by the Act of 1961/1972 or the Act of 1978 shall, after the coming into force of this Convention in its territory, apply the provisions of this Convention to at least 25 genera or species.

[continued]

Present [1978] Text

(Article 4, continued)

(4) At the request of any State intending to ratify, accept, approve or accede to this Convention, the Council may, in order to take account of special economic or ecological conditions prevailing in that State, decide, for the purpose of that State, to reduce the minimum numbers referred to in paragraph (3), or to extend the periods referred to in that paragraph, or to do both.

(5) At the request of any member State of the Union, the Council may, in order to take account of special difficulties encountered by that State in the fulfilment of the obligations under paragraph (3)(b), decide, for the purposes of that State, to extend the periods referred to in paragraph (3)(b).

Proposed New Text

(Article 5, continued)

(The new text does not contain any provision that would correspond to paragraph (4) of the present Text.)

(The new text does not contain any provision that would correspond to paragraph (5) of the present text.)

Present [1978] Text

Article 3

National Treatment; Reciprocity

(1) Without prejudice to the rights specially provided for in this Convention, natural and legal persons resident or having their registered office in one of the member States of the Union shall, in so far as the recognition and protection of the right of the breeder are concerned, enjoy in the other member States of the Union the same treatment as is accorded or may hereafter be accorded by the respective laws of such States to their own nationals, provided that such persons comply with the conditions and formalities imposed on such nationals.

(2) Nationals of member States of the Union not resident or having their registered office in one of those States shall likewise enjoy the same rights provided that they fulfil such obligations as may be imposed on them for the purpose of enabling the varieties which they have bred to be examined and the multiplication of such varieties to be checked.

(3) Notwithstanding the provisions of paragraphs (1) and (2), any member State of the Union applying this Convention to a given genus or species shall be entitled to limit the benefit of the protection to the nationals of those member States of the Union which apply this Convention to that genus or species and to natural and legal persons resident or having their registered office in any of those States.

Proposed New Text

Article 6

National Treatment

Without prejudice to the rights specially provided for in this Convention, nationals of a Contracting Party as well as natural persons resident and legal entities having their registered offices within the territory of that Contracting Party shall, in so far as the protection of varieties are concerned, enjoy within the territory of each other Contracting Party the same treatment as is accorded or may hereafter be accorded by the laws of each such other Contracting Party to its own nationals, provided that the said nationals, national persons or local entities comply with the conditions and formalities imposed on the nationals of the said Contracting Party.

(The new text does not contain any provision that would correspond to paragraph (3) of the present Text.)

Present [1978] Text

Article 11

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

- (1) The breeder may choose the member State of the Union in which he wishes to file his first application for protection.
  
- (2) The breeder may apply to other member States of the Union for protection of his right without waiting for the issue to him of a title of protection by the member State of the Union in which he filed his first application.
  
- (3) The protection applied for in different member States of the Union by natural or legal persons entitled to benefit under this Convention shall be independent of the protection obtained for the same variety in other States whether or not such States are members of the Union.

Proposed New Text

Article 7

First Application [; Independence  
of Protection in Different  
Contracting Parties]

(1) The breeder may choose the Contracting Party with whose authority he wishes to file his first application for a breeder's right.

(2) The breeder may apply to the authorities of other Contracting Parties for the grant of breeders' rights without waiting for the grant to him of a breeder's right by the Contracting Party with which the first application was filed.

[(3) Protection of a variety in the territory of a given Contracting Party shall be independent from the protection or lack of protection for the same variety outside that territory.]\*

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\* It may be desirable to omit paragraph (3). Its omission would be justified by the tendency for States to rely on each others' work.

Present [1978] Text

Article 6

Conditions Required  
for Protection

(1) The breeder shall benefit from the protection provided for in this Convention when the following conditions are satisfied:

- (a) [See opposite proposed new paragraph (4)]
- (b) [See opposite proposed new paragraph (3)]
- (c) [See opposite proposed new paragraph (5)]
- (d) [See opposite proposed new paragraph (6)]
- (e) The variety shall be given a denomination as provided in Article 13.

(2) Provided that the breeder shall have complied with the formalities provided for by the national law of the member State of the Union in which the application for protection was filed, including the payment of fees, the grant of protection may not be made subject to conditions other than those set forth above.

[continued]

Proposed New Text

Article 8

Conditions Required for the  
Granting of a Breeder's Right

(1) The breeder's right shall be granted when the variety is:

- (i) new,
- (ii) distinct,
- (iii) uniform, and
- (iv) stable.

(2) The grant of the breeder's right shall not be subject to any further or different conditions, provided that the applicant complies with the provisions of Article 16 and with the formalities provided for by the law of the Contracting Party with whose authority the application has been filed and that he pays the required fees.

[continued]

Present [1978] Text

(Article 6(1), continued)

(b) At the date on which the application for protection in a member State of the Union is filed, the variety

(i) must not--or, where the law of that State so provides, must not for longer than one year--have been offered for sale or marketed, with the agreement of the breeder, in the territory of that State, and

(ii) must not have been offered for sale or marketed, with the agreement of the breeder, in the territory of any other State for longer than six years in the case of vines, forest trees, fruit trees and ornamental trees, including, in each case, their rootstocks, or for longer than four years in the case of all other plants.

Trials of the variety not involving offering for sale or marketing shall not affect the right to protection. The fact that the variety has become a matter of common knowledge in ways other than through offering for sale or marketing shall also not affect the right of the breeder to protection.

Proposed New Text

(Article 8, continued)

(3)(a) The variety shall be deemed to be new

(i) if it has not already been exploited commercially [, with the agreement of the breeder,]\* in the territory of the Contracting Party with whose authority the application has been filed by the date of filing of the application or, if the law of that Party so provides, earlier than one year before that date, and

(ii) if it has not been exploited commercially [, with the agreement of the breeder,]\* in a territory other than that of the Contracting Party with whose authority the application has been filed earlier than four years or, in the case of trees, of vines, or of other woody sarmentous plants, earlier than six years before the said date."

(b) Even if it has become a matter of common knowledge, the variety shall also be deemed to be new if such common knowledge is not the result of an act of commercial exploitation [or is the result of commercial exploitation through abusive acts of third parties].\*

(c) (Transitional condition of novelty, currently in Article 9)

[continued]

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\* The words in square brackets represent an alternative.

Present [1978] Text

(Article 6(1), continued)

(a) Whatever may be the origin, artificial or natural, of the initial variation from which it has resulted, the variety must be clearly distinguishable by one or more important characteristics from any other variety whose existence is a matter of common knowledge at the time when protection is applied for. Common knowledge may be established by reference to various factors such as: cultivation or marketing already in progress, entry in an official register of varieties already made or in the course of being made, inclusion in a reference collection, or precise description in a publication. The characteristics which permit a variety to be defined and distinguished must be capable of precise recognition and description.

(c) The variety must be sufficiently homogeneous, having regard to the particular features of its sexual reproduction or vegetative propagation.

(d) The variety must be stable in its essential characteristics, that is to say, it must remain true to its description after repeated reproduction or propagation or, where the breeder has defined a particular cycle of reproduction or multiplication, at the end of each cycle.

Proposed New Text

(Article 8, continued)

(4) The variety shall be deemed to be distinct if it is clearly distinguishable from any other variety whose existence is a matter of common knowledge at the time of filing of the application. The granting of a breeder's right in respect of a variety and the entry of a variety in an official register of varieties, makes, among other facts, that variety a matter of common knowledge. An application for the grant of a breeder's right or for the entry of the variety in an official register of varieties shall also be deemed to make that variety a matter of common knowledge, provided that the application is granted.

(5) The variety shall be deemed to be uniform if its material is sufficiently uniform in the expression of varietal characteristics, subject to the variation that may be expected from the particular features of the sexual reproduction or vegetative propagation of the variety.

(6) The variety shall be deemed to be stable if, as far as its varietal characteristics are concerned, it remains true to its description after repeated reproduction or propagation or, in the case of a particular cycle of reproduction or multiplication, at the end of each such cycle [and if there is no indication from the examination of the variety made pursuant to Article 11 that it is unstable].\*

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\* The words within square brackets represent an alternative.

Present [1978] Text

Article 38

Transitional Limitation of the  
Requirement of Novelty

Notwithstanding the provisions of Article 6, any member State of the Union may, without thereby creating an obligation for other member States of the Union, limit the requirement of novelty laid down in that Article, with regard to varieties of recent creation existing at the date on which such State applies the provisions of this Convention for the first time to the genus or species to which such varieties belong.

Proposed New Text

Article 9

Transitional Limitation of  
the Requirement of Novelty

Where a Contracting Party extends protection to a taxon heretofore not protected by it, it may consider a variety to satisfy the condition of novelty defined in Article 8(3)(a) even where the commercial exploitation described in that Article took place earlier than the time limits defined in that Article.

Present [1978] Text

Article 12

Right of Priority

(1) Any breeder who has duly filed an application for protection in one of the member States of the Union shall, for the purpose of filing in the other member States of the Union, enjoy a right of priority for a period of twelve months. This period shall be computed from the date of filing of the first application. The day of filing shall not be included in such period.

(2) To benefit from the provisions of paragraph (1), the further filing must include an application for protection, a claim in respect of the priority of the first application and, within a period of three months, a copy of the documents which constitute that application, certified to be a true copy by the authority which received it.

(3) The breeder shall be allowed a period of four years after the expiration of the period of priority in which to furnish, to the member State of the Union with which he has filed an application for protection in accordance with the terms of paragraph (2), the additional documents and material required by the laws and regulations of that State. Nevertheless, that State may require the additional documents and material to be furnished within an adequate period in the case where the application whose priority is claimed is rejected or withdrawn.

Proposed New Text

Article 10

Right of Priority

(1) Any breeder who has duly filed an application for the grant of a breeder's right with the authority of one of the Contracting Parties (the "first application") shall, for the purpose of filing an application for the same variety with the authority of any other Contracting Party (the "subsequent application"), enjoy a right of priority for a period of twelve months. This period shall be computed from the date of filing of the first application. The day of filing shall not be included in such period.

(2) In order to benefit from the provisions of paragraph (1), the breeder must, in the subsequent application, claim the priority of the first application and must, within a period of three months from the filing date of the subsequent application, furnish the authority with which the subsequent application is filed with a copy of the documents which constitute the first application, certified to be a true copy by the authority with which the first application was filed.

(3) The breeder shall be allowed a period of two years after the expiration of the period of priority or, where the first application is rejected or withdrawn, an appropriate time after such rejection or withdrawal, in which to furnish, to the authority of the Contracting Party with which he has filed the subsequent application, any supporting documents and material required by the laws and regulations of that Contracting Party.

[continued]

**Present [1978] Text**

(Article 12, continued)

(4) Such matters as the filing of another application or the publication or use of the subject of the application, occurring within the period provided for in paragraph (1), shall not constitute grounds for objection to an application filed in accordance with the foregoing conditions. Such matters may not give rise to any right in favour of a third party or to any right of personal possession.

Proposed New Text

(Article 10, continued)

(4) Facts occurring within the period provided for in paragraph (1), such as the filing of another application or the publication or use of the variety that is the subject of the first application, shall not constitute a ground for rejecting the subsequent application. Such facts shall also not give rise to any third-party right.

Present [1978] TextArticle 7Official Examination of Varieties;  
Provisional Protection

(1) Protection shall be granted after examination of the variety in the light of the criteria defined in Article 6. Such examination shall be appropriate to each botanical genus or species.

(2) For the purposes of such examination, the competent authorities of each member State of the Union may require the breeder to furnish all the necessary information, documents, propagating material or seeds.

Proposed New Text

Article 11

Examination of the Application;  
Provisional Protection

(1) The breeder's right shall be granted after an examination based upon the criteria defined in Article 8 and, where applicable, pursuant to Article 9. In the course of the examination, the authority may grow the variety or carry out other necessary tests, cause the growing of the variety or the carrying out of other necessary tests or take into account the results of growing tests or other trials which have already been carried out.

(2) For the purposes of examination, the authority may require the breeder to furnish all the necessary information, documents or material.

[continued]

Present [1978] TextArticle 30...; Contracts on the Joint Utilisation  
of Examination Services

(1) ...

(2) Contracts may be concluded between the competent authorities of the member States of the Union, with a view to the joint utilisation of the services of the authorities entrusted with the examination of varieties in accordance with the provisions of Article 7 and with assembling the necessary reference collections and documents.

(3) ...

Article 7 [cont'd]

(3) Any member State of the Union may provide measures to protect the breeder against abusive acts of third parties committed during the period between the filing of the application for protection and the decision thereon.

Proposed New Text

(Article 11, continued)

[(3) Special agreements may be concluded between the authorities of the Contracting Parties with a view to the joint utilization of the technical services entrusted with the examination of varieties in accordance with the provisions of paragraph (1) and with assembling the necessary reference collections and documents.]\*

(4) Each Contracting Party shall provide measures designed to safeguard the interests of the breeder during the period between the filing of the application for the grant of a breeder's right, its publication or its notification by the applicant to interested parties and the decision thereon. At least, these measures shall have the effect that the holder of a breeder's right shall be entitled to equitable remuneration from any person who, during the afore-mentioned period, has carried out acts which, once the right is granted, would be prohibited pursuant to the provisions of Article 14.

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\* The words within square brackets represent an alternative.

**Present [1978] Text****Article 8****Period of Protection**

The right conferred on the breeder shall be granted for a limited period. This period may not be less than fifteen years, computed from the date of issue of the title of protection. For vines, forest trees, fruit trees and ornamental trees, including, in each case, their rootstocks, the period of protection may not be less than eighteen years, computed from the said date.

Proposed New Text

Article 12

Duration of the Breeder's Right

- (1) The breeder's right shall be granted for a fixed period.
  
- (2) The protection conferred by a breeder's right shall not end before the expiration of twenty years from the date of the grant of the breeder's right. For trees, vines and other woody sarmentous plants, such protection shall not end before the expiration of twenty-five years from the said date.

Present [1978] TextArticle 10Nullity and Forfeiture of the  
Rights Protected

(1) The right of the breeder shall be declared null and void, in accordance with the provisions of the national law of each member State of the Union, if it is established that the conditions laid down in Article 6(1)(a) and (b) were not effectively complied with at the time when the title of protection was issued.

(2) The right of the breeder shall become forfeit when he is no longer in a position to provide the competent authority with reproductive or propagating material capable of producing the variety with its characteristics as defined when the protection was granted.

Proposed New Text

Article 13

Nullity and Cancellation  
of the Breeder's Right

(1) Each Contracting Party [shall]\* [may]\* declare a breeder's right granted by it null and void when it is established:

(i) that the conditions laid down in Article 8(3) and (4) were not effectively complied with at the time of grant, or

(ii) when the grant of the breeder's right has been essentially based upon information and documents furnished by the breeder, that the conditions laid down in Article 8(5) and (6) were not effectively complied with at the time of grant,

(iii) that the breeder's right has been granted to a person who is not entitled to it, unless it can be transferred to the true breeder.

(2) Each Contracting Party [shall]\* [may]\* cancel a breeder's right granted by it if it is established that the conditions laid down in Article 8(5) and (6) are no longer effectively fulfilled.

[continued]

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\* "Shall" and "may" are alternatives, and a choice between them will have to be made.

Present [1978] Text

(Article 10, continued)

(3) The right of the breeder may become forfeit if:

(a) after being requested to do so and within a prescribed period, he does not provide the competent authority with the reproductive or propagating material, the documents and the information deemed necessary for checking the variety, or he does not allow inspection of the measures which have been taken for the maintenance of the variety; or

(b) he has failed to pay within the prescribed period such fees as may be payable to keep his rights in force.

(4) The right of the breeder may not be annulled or become forfeit except on the grounds set out in this Article.

Proposed New Text

(Article 13, continued)

(3) Each Contracting Party [shall]\* [may]\* cancel a breeder's right granted by it if:

(i) after being requested to do so and within a prescribed period, the breeder does not provide the authority with the information, documents or material deemed necessary for checking the maintenance of the variety,

(ii) the breeder fails to pay within the prescribed period such fees as may be payable to keep his right in force, or

(iii) the denomination of the variety is cancelled after the grant of the right and the breeder does not propose, after being requested to do so and within a prescribed period, another acceptable denomination.

(4) The right may not be annulled or be cancelled except on the grounds set out in this Article.

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\* "Shall" and "may" are alternatives, and a choice between them will have to be made.

Present [1978] TextArticle 5Rights 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 may specify.

(3) (See opposite Article 14(2)(iii) and (3)(a)(iii) of the proposed new text)

(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 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 14

Effects of the Breeder's Right

(1) [A]\* The breeder's right shall confer on its owner the right to prevent all persons not having his consent [from exploiting the variety and, in particular,]\*

(i) from reproducing or propagating the variety, or from conditioning reproductive or propagating material of the variety;

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

(iii) from exporting material of the variety;

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

(The new text does not contain a provision that would correspond to paragraph (2) of the present text.)

[(b) Each Contracting Party may extend the scope of protection of the plant breeder's right in respect of any variety to the product directly obtained from harvested material.]\*\*

[continued]

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\* The words in square brackets represent an alternative.

\*\* A decision must be made whether to retain or delete these words; the decision will be linked to the decision to retain or delete the words in square brackets in Article 1(x).

**Present [1978] Text**

(Article 5, continued)

(The present text does not contain any provision corresponding to Article 14(2)(i) and (ii) of the proposed text).

(3) Such authorisation shall be required, however, when the repeated use of the variety is necessary for the commercial production of another variety.

Proposed New Text

(Article 14, continued)

(2) The breeder's right shall in addition confer on its owner the right to prevent all persons not having his consent from undertaking the acts mentioned in paragraph (1) in relation to:

(i) varieties which are not clearly distinguishable in accordance with Article 8(4) from his variety,

(ii) varieties which are essentially derived, whether directly or indirectly, from his variety, where his variety is not itself an essentially derived variety,

(iii) varieties whose production requires the repeated use of his variety.

(3)(a) The breeder's right shall not extend to:

(i) acts done privately and for non-commercial purposes,

(ii) acts done for experimental purposes,

[continued]

Present [1978] Text

(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.

(The present text does not contain any provision corresponding to Article 14(3)(b).)

(The present text does not contain any provision corresponding to Article 14(4).)

Proposed New Text

(Article 14(3), continued)

(iii) acts done for the purpose of breeding new varieties, and, except where the provisions of paragraph (2) apply, acts done for the commercial exploitation of such varieties.

(b) By derogation from the provisions of paragraphs (1) and (2), each Contracting Party may, within reasonable limits, restrict the breeder's right in relation to any variety in order to permit farmers\* to use for reproductive or propagating purposes on their own holdings\*, the product of the harvest which they have obtained by planting, on their own holdings\*, the protected variety or a variety covered by paragraph (2) [, provided equitable remuneration is paid to the breeder].\*\*

(4) The breeder's right shall not extend to acts concerning any material of his variety, or of a variety covered by the provisions of paragraph (2), which has been put on the market by the breeder or with his express consent, or any material derived from the said material, unless such acts

[continued]

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\* The precise substance intended to be conveyed by these words remains unclear and may present difficulties when seeking equivalents in the three Convention languages. The words "farmer" and "holding" are translated into French as "agriculteur" and "exploitation" and into German as "Landwirt" and "Betrieb" in the French and German versions of this document.

\*\* The words within square brackets represent an alternative.

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Present [1978] Text

[The present text does not contain any provision corresponding to the text of Article 14(4).]

Proposed New Text

(Article 14(4), continued)

(i) involve further reproduction or multiplication of the variety in question,

(ii) fall outside the field of use for which the breeder put material on the market or gave his express consent,

(iii) involve an export of material of the variety which enables the reproduction of the variety into a country which does not protect plant varieties.

Present [1978] Text

Article 9

Restrictions in the Exercise  
of Rights Protected

(1) The free exercise of the exclusive right accorded to the breeder may not be restricted otherwise than for reasons of public interest.

(2) When any such restriction is made in order to ensure the widespread distribution of the variety, the member State of the Union concerned shall take all measures necessary to ensure that the breeder receives equitable remuneration.

Proposed New Text

Article 15

Restrictions on the  
Exercise of the Right

(1) The free exercise of a breeder's right may not be restricted otherwise than for reasons of public interest.

(2) When any such restriction has the effect of authorizing a third person to exploit the variety, the Contracting Party concerned shall take all measures necessary to ensure that the breeder receives equitable remuneration.

Present [1978] TextArticle 13Variety Denomination

(1) The variety shall be designated by a denomination destined to be its generic designation. Each member State of the Union shall ensure that subject to paragraph (4) no rights in the designation registered as the denomination of the variety shall hamper the free use of the denomination in connection with the variety, even after the expiration of the protection.

(2) The denomination must enable the variety to be identified. It may not consist solely of figures except where this is an established practice for designating varieties. It must not be liable to mislead or to cause confusion concerning the characteristics, value or identity of the variety or the identity of the breeder. In particular, it must be different from every denomination which designates, in any member State of the Union, an existing variety of the same botanical species or of a closely related species.

(3) The denomination of the variety shall be submitted by the breeder to the authority referred to in Article 30(1)(b). If it is found that such denomination does not satisfy the requirements of paragraph (2), that authority shall refuse to register it and shall require the breeder to propose another denomination within a prescribed period. The denomination shall be registered at the same time as the title of protection is issued in accordance with the provisions of Article 7.

Proposed New Text

Article 16

Variety Denomination

(1) The variety shall be designated by a denomination destined to be its generic designation. Each Contracting Party shall ensure that, subject to paragraph (4), no rights in the designation registered as the denomination of the variety shall hamper the free use of the denomination in connection with the variety, even after the expiration of the breeder's right.

(2) The denomination must enable the variety to be identified. It may not consist solely of figures except where this is an established practice for designating varieties. It must not be liable to mislead or to cause confusion concerning the characteristics, value or identity of the variety or the identity of the breeder. In particular, it must be different from every denomination which designates, in the territory of any Contracting Party, an existing variety of the same botanical species or of a closely related species.

(3) The denomination of the variety shall be submitted by the breeder to the authority. If it is found that such denomination does not satisfy the requirements of paragraph (2), the authority shall refuse to register it and shall require the breeder to propose another denomination within a prescribed period. The denomination shall be registered at the same time as the title of protection is issued in accordance with the provisions of Article 11.

[continued]

Present [1978] Text

(4) Prior rights of third parties shall not be affected. If, by reason of a prior right, the use of the denomination of a variety is forbidden to a person who, in accordance with the provisions of paragraph (7), is obliged to use it, the authority referred to in Article 30(1)(b) shall require the breeder to submit another denomination for the variety.

(5) A variety must be submitted in member States of the Union under the same denomination. The authority referred to in Article 30(1)(b) shall register the denomination so submitted, unless it considers that denomination unsuitable in its State. In the latter case, it may require the breeder to submit another denomination.

(6) The authority referred to in Article 30(1)(b) shall ensure that all the other such authorities are informed of matters concerning variety denominations, in particular the submission, registration and cancellation of denominations. Any authority referred to in Article 30(1)(b) may address its observations, if any, on the registration of a denomination to the authority which communicated that denomination.

(7) Any person who, in a member State of the Union, offers for sale or markets reproductive or vegetative propagating material of a variety protected in that State shall be obliged to use the denomination of that variety, even after the expiration of the protection of that variety, in so far as, in accordance with the provisions of paragraph (4), prior rights do not prevent such use.

Proposed New Text

(Article 16, continued)

(4) Prior rights of third parties shall not be affected. If, by reason of a prior right, the use of the denomination of a variety is forbidden to a person who, in accordance with the provisions of paragraph (7), is obliged to use it, the authority shall require the breeder to submit another denomination for the variety.

(5) A variety must be submitted to all Contracting Parties under the same denomination. The authority shall register the denomination so submitted, unless it considers that denomination unsuitable within the territory of the Contracting Party concerned. In the latter case, it may require the breeder to submit another denomination.

(6) The authority shall ensure that all other authorities are informed of matters concerning variety denominations, in particular the submission, registration and cancellation of denominations. Any authority may address its observations, if any, on the registration of a denomination to the authority which communicated that denomination.

(7) Any person who, within the territory of one of the Contracting Parties, offers for sale or markets reproductive or vegetative propagating material of a variety protected within the said territory shall be obliged to use the denomination of that variety, even after the expiration of the breeder's right in that variety, insofar as, in accordance with the provisions of paragraph (4), prior rights do not prevent such use.

[continued]

Present [1978] Text

(Article 16, continued)

(8) When the variety is offered for sale or marketed, it shall be permitted to associate a trade mark, trade name or other similar indication with a registered variety denomination. If such an indication is so associated, the denomination must nevertheless be easily recognizable.

**Proposed New Text**

(Article 16, continued)

(8) When a variety is offered for sale or marketed, it shall be permitted to associate a trade mark, trade name or other similar indication with a registered variety denomination. If such an indication is so associated, the denomination must nevertheless be easily recognizable.

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