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

**ADMINISTRATIVE AND LEGAL COMMITTEE**

**Fortieth Session**  
**Geneva, October 18, 1999**

NEW PROCEDURES FOR THE REVISION OF TREATIES

*Document prepared by the Office of the Union*

Introduction

1. At the thirty-ninth session of the Committee, it was pointed out that WIPO was looking into the possibility of developing international law more rapidly than through the medium of diplomatic conferences and it was suggested that the Office of the Union should report on that matter to a subsequent session of the Committee (see paragraph 22(a) of document CAJ/39/6). That information and the suggestion that was made arose during the discussions on the notion of trees and vines for the purposes of the provisions on novelty and the duration of protection; it had been agreed that it was necessary to remove the special treatment for trees and vines at a forthcoming diplomatic conference.

Discussions in WIPO

2. A distinction has to be made between:
- (a) the amendment or revision of treaties and
  - (b) the establishment of new international legal norms.

*Amendment and revision of treaties*

3. Whereas the UPOV Convention provides for revision by a conference of the members of the Union (adopting a new Act subject to ratification, etc.), numerous treaties administered by WIPO provide for a procedure of amendment of the administrative provisions and certain other provisions that govern the operation of the corresponding Union. The amendment is adopted by the governing body (for example, the Assembly) of the Union concerned (normally on a qualified majority of three quarters of the votes cast) and requires acceptance by the States that were members of the Union at the time the amendment was adopted, using a written procedure carried out in compliance with the respective constitutional rules; once the required number of acceptances is achieved, the amendment enters into force and is binding on all member States, except if it increases the financial obligations of the States. For the provisions concerning substantive law, revision is carried out in diplomatic conferences in accordance with the procedure that is also followed by UPOV.

4. The International Bureau of WIPO has described the advantages of the amendment procedure as follows in its document A/34/9, devoted to the constitutional reform of WIPO:

“13. Advantages of the Special Procedure. – Compared to revision through a diplomatic conference, amendment pursuant to the special procedure before the Assembly or other competent organ has two advantages.

“14. The first advantage is the practical ease of the procedure before the Assembly in contrast to the convening of a diplomatic conference, which generally requires substantially greater organizational, administrative and diplomatic arrangements.

“15. The second and major advantage is the automatically binding effect of the amendment on all Contracting States once the requisite number of written acceptances have been received, as well as the simultaneous entry into force of the amendment for all Contracting States. In contrast, a revision of treaty adopted at a diplomatic conference binds only those States that subsequently accede to or ratify the new Act of the treaty that is adopted at the diplomatic conference. States thus become bound by the revised text at different times. In the case of the unitary contribution system, the changes in contribution classes or the policy on mandates of Directors General, the amendments could not be given practical effect if they were to apply only progressively to Member States as and when those States acceded to or ratified the revised text.”

5. The issue of constitutional reform is still under discussion. The Member States of WIPO have been invited to submit observations on the matters referred to in the aforementioned document for the Assemblies of the WIPO Member States to be held from September 20 to 29, 1999 (these concern the system of contributions, the term of office of Directors General and the simplification of the Assemblies and Conferences of Member States, in addition to that dealt with in this document).

*Establishment of new international legal norms*

6. WIPO continues to use the traditional procedure of treaties adopted by a diplomatic conference, for example with regard to certain aspects of patent law that it is wished to harmonize at international level.

7. With regard to the other procedures available for the progressive development of international intellectual property law, the following has been stated in the Program and Budget for the 1998-1999 biennium (document A/32/2 – WO/BC/18/2):

(a) On page xiii:

“Countries which agree on specific principles or rules may wish to consider expressing their agreement by signing a Memorandum of Understanding or a similar instrument. This is not subject to the long ratification and accession process, is easier to modify or replace, and can be signed by an industrial property office or other government agency if its subject does not require parliamentary approval (for example, if it concerns not the law itself but implementing regulations). The WIPO General Assembly (or another Assembly) may also adopt a resolution recommending that Member States and interested intergovernmental organizations implement certain principles and rules: this creates no legal obligation for any country, but following such a recommendation would produce practical benefits. A further option is the publication, under the responsibility of the Secretariat, of model or illustrative principles and rules that would be available to any legislator or other authority seeking guidance on how to solve specific problems, similar to the Model Provisions on Protection Against Unfair Competition published in 1996.

“These various approaches would not necessarily exclude each other: the process could, for instance, start with the adoption of a resolution by the WIPO General Assembly and later move to considering the conclusion of a treaty. This gradual approach may be employed when the conclusion of a treaty seems to be the most desirable objective but its attainment is prevented by difficulties with no bearing on its substance (for example, by disagreement on procedural issues).”

(b) On page 86 (with respect to Main Program 09 — Development of Industrial Property Law):

“Given the practical imperative for accelerated development and implementation of certain international harmonized common principles and rules in industrial property law, the future strategy for this main program includes consideration of ways to complement the treaty-based approach, as discussed above in the Introduction (p. vii). If Member States judge it to be in their interests so to proceed, a more flexible approach may be taken towards the harmonization of industrial property principles and rules, and coordination of administration, so that results can be achieved and applied more rapidly, ensuring earlier practical benefits for administrators and users of the industrial property system.

“For instance, projects of an essentially administrative nature could culminate in a Memorandum of Understanding (MoU) or similar instrument, rather than a formal treaty; activities aimed at a harmonization of national laws may be advanced through the conclusion by the Standing Committee and adoption by the WIPO General Assembly (or another WIPO Assembly), of a resolution recommending that Member States and interested IGOs adopt and implement these principles and rules; and work requiring a rapid, interim result could, pending further agreements, be achieved through the publication of model principles and rules that would be available to any legislator or other authority seeking guidance on how to solve specific problems, similar to WIPO’s Model Provisions on Protection Against Unfair Competition.”

8. It has been proposed within WIPO to use the resolution procedure, adopted by both the Paris Union Assembly and the WIPO General Assembly – for the protection of well-known marks. The Standing Committee that had drawn up the draft nevertheless agreed that, in the

long term, it would be preferable to incorporate the relevant provisions in a treaty. It should also be noted that the Paris Convention for the Protection of Industrial Property and the TRIPS Agreement already contain an obligation to protect well-known marks. The proposed resolution does not therefore create a new obligation but sets out the conditions for implementing an existing obligation.

#### The Situation in UPOV

9. The UPOV Convention provides only for revision by a conference of the members of the Union (Article 38 of the 1991 Act).

10. However, the Council has a mission “in general, to take all necessary decisions to ensure the efficient functioning of the Union” (Article 26(5)(x)). As part of that mission, the Council adopts (or approves) instruments that aim to supplement the international norms concerning plant variety protection,

(a) in a routine manner, particularly the Test Guidelines, or

(b) in a formal manner, for example in the case of the Recommendations on Variety Denominations or the Declaration on the Conditions for the Examination of a Variety Based Upon Trials Carried out by or on Behalf of the Breeder.

The importance of the above-mentioned documents should not be underestimated: the Test Guidelines serve as a basis for deciding whether to grant or refuse breeders’ rights in each individual case and the forerunners of the present Recommendations on Variety Denominations have been incorporated in the legal norms of several member States.

11. The Council has also used its general power of decision with regard to matters dealt with in the Convention. For example, it decided in 1971 to adopt “provisional” rules of procedure for the exchange of variety denominations which replaced the rules at that time contained in Article 13 of the Convention (that was amended in 1978 and adapted to the practice set up by the Council). The decision to set up a Working Capital Fund to which member States would contribute, in addition to the normal contribution (now provided for in Article 29), may also be held to affect the Convention. More recently, on 29 April 1997, the Council decided to postpone by one year the date on which it would become impossible for certain States to accede to the 1978 Act (see paragraphs 15 to 17 of document C(Extr.)/14/7).

12. In none of those cases did the Council amend provisions affecting the substantive law of the Convention, except to supplement them (as, for example, in the case of the variety denominations under the former guidelines) or to interpret them (as in the case of examination based on breeders’ trials). That is in no way unusual. It has to be emphasized in this respect that, as a general rule, the provisions concerned have in any event to be integrated within national (or regional) law. Furthermore, in those States of monistic tradition where primacy is given to international law, the legal norm under the Convention, as adopted by the procedure under the Convention and ratified by a national parliament, would prevail over any decision taken by the Council to amend that norm. Moreover, various other States provide in their national legislation that in the event of disagreement between that legislation and an international treaty, it is the international treaty that prevails.

Future work

13. The various ways of establishing and amending international legal norms have their advantages and drawbacks. It would seem too early to analyze them in greater detail now since no revision of the Convention is on the agenda. However, the overall issue would warrant further thought at the appropriate time.

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