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INTERNATIONAL UNION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS

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REVISION OF THE CONVENTION

PROPOSALS BY THE DELEGATION OF THE FEDERAL REPUBLIC OF GERMANY

Document prepared by the Office of the Union

By a letter dated March 31, 1988, Mr. H. Kunhardt informed the Office of the Union of his intention of putting into the discussion drafting amendments to the proposals appearing in document CAJ/XXII/2 for a number of articles. The annex to this document contains the proposals for new texts and for drafting amendments relating to articles 5, 6(1), 7, 9 and 13.

[Annex follows]

ANNEX

PROPOSALS FOR NEW TEXTS OR DRAFTING AMENDMENTS
FROM MR. H. KUNHARDT
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Proposal relating to Article 5

(1) The breeder of a variety protected in accordance with the provisions of this Convention shall enjoy the exclusive right of reproducing the variety.

(2)(a) The breeder shall also enjoy the exclusive right of offering for sale, disposing of or using material of the variety, or importing it for any one of the aforementioned purposes.

(b) Such right shall not extend, however, to acts concerning the material put on the market by the breeder or with his express consent or material derived from that material in accordance with its intended destination.

(3) The right granted in accordance with the provisions of this Convention shall not extend to:

(a) acts done privately for non-commercial purposes;

(b) acts done for experimental purposes;

(c) acts done for the purpose of creating new varieties and exploiting them, except where material of the protected variety must be used repeatedly for the production of material of the new variety.

(4) Any member State may:

(a) exclude further acts from the effects of the right granted pursuant to the provisions of this Convention, if this is necessary in the public interest and provided that the substance of the right is not unreasonably restricted;

(b) provide that the exploitation of a variety which is essentially based on material of a protected variety shall give rise to payment of equitable compensation to the holder of the rights in the protected variety.

(5) The acts concerning a variety for which a right has been granted pursuant to the provisions of this Convention and

(a) to which the right relates pursuant to paragraphs (1) and (2)(a);

(b) which are excluded from the effects of the right pursuant to paragraph (2)(b), (3) or (4)(a)

may not be prohibited on the basis of another industrial property right.

Proposal relating to Article 6(1)

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

(a) The variety must be clearly distinguishable by the expression

Alternative 1: of at least one important characteristic

Alternative 2: of 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. The existence of a variety is in particular a matter of common knowledge when

(i) it has been entered in an official register of varieties;

(ii) its entry in an official register of varieties has been applied for, provided that the application is granted;

(iii) it has been exploited in a notorious way.

(b) The variety must be homogeneous, that is to say, the plant material belonging to it must be sufficiently uniform in the expression of the characteristics considered for the purposes of the application of subparagraph (a), subject to the variation that may be expected from the particular features of the sexual reproduction or vegetative propagation of the variety.

(c) There must be no indication from the examination of the variety made pursuant to Article 7 that the variety is unstable in the characteristics considered for the purposes of the application of subparagraph (a), that is to say, that it does not remain 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 cycle.

(d) The variety must be new at the date on which the application for protection is filed. A variety is not new

(i) if it has [already] been commercially exploited in the territory of that State [or, where the law of that State so provides,] for longer than one year, or

(ii) if it has been commercially exploited in the territory of any other State for longer than six years in the case of species of vines and trees or for longer than four years in the case of all other species.

(2) [Unchanged]

Proposal relating to Article 7

Examination of the Application; Provisional Protection

(1) Protection shall be granted after examination in the light of the criteria defined in Article 6. For the purposes of that examination, the competent authority may grow the variety or undertake further necessary tests, may have the growing tests or other tests undertaken by other bodies or take into account the results of growing tests or other tests undertaken by other bodies.

(2) [As in document CAJ/XXII/2]

(3) [As in document CAJ/XXII/2]

(4) Each member State of the Union shall provide that the owner of a right granted pursuant to the provisions of this Convention may claim equitable compensation from a third party who, in the period between the publication of the application for protection and the decision thereon, has done acts which, after that period, would be prohibited pursuant to Article 5.

Proposal relating to Article 9

The exercise of the right accorded to the breeder may only be restricted to the extent that it is in the public interest and economically bearable for the breeder. When any such restriction is made because the breeder does not allow third parties to exploit the variety or does not allow them to do so under reasonable conditions, the member State of the Union concerned shall take all measures necessary to ensure that the breeder receives equitable remuneration for the exploitation of the variety by third parties.

Proposal relating to Article 13

It is proposed that the variety denomination should no longer be a condition for protection, but that the competent authority should establish the variety denomination when issuing the title of protection.

Article 13

Variety denomination

(1) The competent authority shall establish the denomination of the variety at the same time as it grants the right provided for in this Convention.

(2) If, in a member State of the Union, the variety has already been entered in an official register of varieties or material of the variety has already been commercially put on the market, the denomination under which the variety has been entered in the register or under which the material has been commercially put on the market shall be established as the denomination of the variety, unless there is a ground for opposition under paragraph (4).

(3) If none of the circumstances under paragraph (2) prevails, the breeder may propose a denomination. That denomination shall be established if there is no ground for opposition under paragraph (4).

(4) There shall be a ground for opposition to the establishment of a denomination:

(a) if its use is prohibited by reason of a prior right of a third party;

(b) if there are difficulties for users in general to recognize and reproduce it as a variety denomination;

(c) if it is identical:

(i) to the designation under which, in any member State of the Union, another variety of the same species or of a closely related species has been entered in an official register of varieties, or under which material of that variety has been commercially put on the market, unless that other variety no longer exists and its denomination has acquired no special significance. or

(ii) to a designation which may be generally used when commercially putting goods on the market or whose use must remain free under other legal provisions;

(d) if it is liable to cause offence or is contrary to public order in the member State concerned.

(5) The denomination must be indicated when reproductive or vegetative propagating material is commercially put on the market or offered for sale, and, where it is set out in writing, it shall be readily distinguishable and clearly legible. This shall also apply after the right has lapsed.

(6) The owner of the right may not prohibit the use of the variety denomination on the basis of another right belonging to him and relating to a designation identical to the variety denomination.