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INTERNATIONAL UNION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS

GENEVA

ADMINISTRATIVE AND LEGAL COMMITTEE

Twenty-second Session
Geneva, April 18 to 21, 1988

REVISION OF THE CONVENTION

Document prepared by the Office of the Union

INTRODUCTION

1. At its twenty-first ordinary session, the Council decided to entrust to the Administrative and Legal Committee the preparation of the forthcoming revision of the Convention (see document C/XXI/12, paragraph 9(iii)).

2. This document contains draft provisions and other suggestions for the revision of the Convention, as a basis for discussions at the twenty-second (present) session of the Administrative and Legal Committee.

3. The proposals are based in part on those that have already been made on earlier occasions, in particular in the Third Meeting with International Organizations held on October 12 and 13, 1987.

4. This document does not address three issues:

(i) the justification for a special protection system for plant varieties (and animal breeds): this may be a matter for the new preamble;

(ii) the extension of the UPOV system to animal breeds: it is suggested that the question be considered on the basis of a special study to be prepared in due course;

(iii) the possible extension of the UPOV system to subject matter such as genetic information: it is believed that the amendment of Article 5 may offer attractive protection, and it is proposed that the matter be considered once sufficient progress has been achieved on Article 5.

Article 1

Purpose of the Convention; Constitution of a Union; Seat of the Union

(1) The States parties to this Convention undertake to recognize and to ensure to the breeder of a new plant variety or to his successor in title (both hereinafter referred to as "the breeder") rights in accordance with the provisions of this Convention.

(2) [Unchanged] The States parties to this Convention (hereinafter referred to as "the member States of the Union") constitute a Union for the Protection of New Varieties of Plants.

(3) [Unchanged] The seat of the Union and its permanent organs shall be at Geneva.

Description of Proposal: It is proposed to transform paragraph (1) from a declarative into a binding provision as a result of the proposed deletion of Article 2(1).

Comments

1. Forms of protection.- Paragraph (1) gives freedom to member States regarding the type of protection granted (sui generis protection--e.g. by means of a "plant breeder's right" or a "plant variety protection certificate"--patent protection or even another type of potection), provided that such protection is in accordance with the provisions of the Convention.

2. Member States would be expected to give the widest effect to the undertaking made in Article 1(1) and to refrain from introducing a competing system of protection for varieties per se, in particular under the provisions of the law on industrial patents, once they have introduced legislation in accordance with the Convention.

3. Maintenance of protection for plant varieties per se under another law (mainly the patent law).- Under their legislation or as a result of doctrine or case law, some member States had admitted the possibility of granting an industrial patent to a plant variety prior to introducing special plant variety protection legislation and to becoming a member of UPOV. The purpose of the second sentence of Article 2(1) was to allow such States to continue to admit such a possibility on the condition mentioned therein. Belgium, France, the Federal Republic of Germany and Spain have made use of the provision. Other, presently non-member States may create or be confronted with the same situation. Two main possibilities may be considered in this respect (but the second one would fall if Article 4 required member States to extend the plant variety protection system to all botanical genera and species):

(i) Make no provision in the Convention.- Member States would then be expected to at least exclude the possibility that both systems of protection apply to the same subject matter and create undesirable interferences. In practice, the situation would thus be the same as at present.

(ii) Provide in the final articles of the Convention for the possibility of maintaining the applicability of the earlier law.- This possibility may be subdivided into: (a) one in which there would be no limitation [proposed text below without the words in square brackets] and (b) one in which there would be a time limit for the recognition of the applicability of the industrial patent law to plant varieties:

> "Any member State whose national law, [prior to (date) and] prior to the ratification, acceptance or approval of this Act, or accession to this Act, admitted of protection under the laws on patents for inventions in respect of plant varieties may continue to apply such laws to the species to which it does not apply the provisions of this Convention if, at the time of depositing its instrument of ratification, acceptance or approval of or accession to this Act, it notifies the Secretary-General of that fact."

4. Exceptional rules for protection under two forms (Article 37).- It is likely that it would be necessary to maintain the essence of Article 37, which deals with the case of the United States of America, more particularly with: (i) the use of two systems of protection demarcated by the mode of propagation --generative or vegetative--of the varieties and (ii) the use of the patentability criteria and the period of protection of the patent legislation. The proposed amendment of Article 1 and deletion of Article 2(1) make it necessary to reword the provision. Two solutions may be considered, as follows:

> "(1) Any member State which, prior to October 31, 1979, provided for protection under different forms for one and the same taxon may continue to do so if... [rest unchanged]."

or (along the lines of Article 30(2)(a) of the Berne Convention for the Protection of Literary and Artistic Works):

> "Any member State ratifying, accepting or approving this Act, or acceding to this Act, may retain the benefit of the provisions of Article 37 of the Geneva Act of October 23, 1978, on condition that it makes a declaration to that effect at the time of the deposit of its instrument of ratification, acceptance, approval of or accession to this Act."

Article 2 (Present)

Forms of Protection

Proposal: Delete the whole article.

Comments

1. The proposed deletion of paragraph (1) is compensated for by an amendment of Article 1(1). An alternative proposal to the deletion--which would take account of the wish that the meaning of Article 2(1) of the present text be clarified--is dealt with in paragraph 3 of the comments to the proposed amendment of Article 1(1). The consequences for Article 37 are dealt with in paragraph 4 of the said comments.

2. The proposed deletion of paragraph (2) is based on the following considerations:

(i) the purpose of the Convention should be to provide for protection as wide and as effective as possible. Exceptions should therefore be limited to the strict minimum;

(ii) there are more and more difficulties in distinguishing varieties according to their manner of reproduction or multiplication or their end-use;

(iii) in particular, the argument that hybrid varieties benefit from "biological protection" is no longer valid.

3. An alternative to the deletion of paragraph (2) could be to provide the possibility for the Council to authorize a limitation. If this alternative were to be pursued, it should be in Article 4 in the form of a new final paragraph.

Article 2 (New)

Definitions

For the purposes of this Convention:

(i) "species" shall mean a botanical species or, where relevant, a subdivision of a species or a grouping of species known by one common name;

(ii) "variety" shall mean any grouping of plants or plant material which, by reason of its characteristics, is regarded as an independent unit for the purposes of cultivation or any other form of use;

(iii) "breeder" shall mean the person who created or discovered a variety.

Description of Proposal and Comments

1. Paragraph (i).- It has been proposed that "genus and/or species" be replaced by "taxon." This proposal causes problems, however, in some cases where reference is made to a taxon of a lower rank, typically a species. It is therefore proposed at this stage to retain the word "species" and to qualify it. The proposed definition is inspired by the laws of the Federal Republic of Germany and the United States of America. It should be noted that it is possible that the revision of the Convention would make a definition unnecessary. In some instances, for example in the alternative proposal for Article 4, reference will be made to "botanical genera or species."

2. Paragraph (ii).- The wish has been expressed, in connection with the proposed deletion of the present Article 2(2), that a definition of the "variety" be reinstated (the 1961 text contained examples of types of varieties, i.e., cultivar, clone, line, stock and hybrid). It was also suggested to introduce a general definition.

3. The proposal is based on the law of the Netherlands, with the following additions: a reference to plant material since a variety may be represented by material that is not a whole plant; a reference to characteristics in line with the International Code of Nomenclature for Cultivated Plants and in order to suggest a link with Article 6(1)(a); a reference to forms of use other than cultivation to take account of, for instance, use as a cell culture in a biotechnological process. The reference to a grouping would include a reference to a single specimen.

4. Paragraph (iii).- One of the essential features of the UPOV Convention is that it provides also for the protection of varieties that have been "discovered." This is suggested at present by the phrase "whatever may be the initial variation from which it has resulted" in Article 6(1)(a). On the other hand, the word "breeder" may be construed restrictively. A definition of "breeder" is therefore proposed to clarify the situation.

Article 3

National Treatment

(1) [Unchanged] 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) [Unchanged] 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) [Deleted]

Description of Proposal and Comments: It is proposed to delete paragraph (3), i.e., the possibility of granting protection to foreigners on the basis of reciprocity, for the following reasons:

(i) the objective of the revision is to strenghten the system of protection based on the UPOV Convention;

(ii) there is a general trend among member States to provide for national treatment;

(iii) the proposals made in connection with Article 4 aiming at increasing the degree of uniformity of the lists of protected taxa would reduce the scope of applicability of the reciprocity rule and therefore also its pertinence;

(iv) experience shows that the principle of reciprocity has not really fulfilled its purpose; in particular, it may be circumvented by assigning the rights in a variety to a national of the State requiring reciprocity.

Article 4

Applicability of the Convention to Botanical Species

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

(2) Notwithstanding the provision of paragraph (1), any member State of the Union may, on account of special economic or ecological conditions prevailing in that State, decide to exclude certain species from the application of the provisions of this Convention.

Description of Proposal and Comments: The proposed provisions would establish the principle of the mandatory application of Convention to all botanical genera and species, by replacing "may" by "shall" in paragraph (1). They would, however, allow exceptions to be made (paragraph (2)). There would be a consequential change in Article 35 ("Communications Concerning the Genera and Species Protected...").

Alternative Proposal: (see next page)

Article 4 (Alternative Proposal)

Genera and Species Which Must or May be Protected

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

(2) [Unchanged] 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 ten botanical genera and species.

(b) Each member State of the Union shall, within ten years from the said date, apply the said provisions to all species

Alternative 1: which can be grown on its territory, taking into account the agro-climatic conditions prevailing there, and

Alternative 2: of relevance to that State

Alternative 3: of commercial importance to that State

for which the examination of varieties in accordance with the provisions of Article 7 is carried out in that State or in any other member State of the Union.

(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 number referred to in paragraph (3)(a).

Description of Proposal: It is proposed to replace the present system of progressive application by one with two steps only: the initial minimum number would relate to botanical genera and species and would be ten; after ten years, the minimum would be one that is based on some factor yet to be determined (possibility of growing the species, relevance, commercial importance, etc.) and on the availability of examination facilities. The possibility for the Council to grant a derogation would be limited to the reduction of the initial minimum number.

Article 5

Rights and Their Limitations

(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, selling or importing material of the variety and, subject to the rights of any other breeder, material of any other variety produced by means of repeated use of the variety.

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

(3) Notwithstanding the provisions of paragraph (1), any member State of the Union may restrict in certain special cases the rights guaranteed to the breeders, provided that such restrictions do not conflict with a normal exploitation of the varieties and do not unreasonably prejudice the legitimate interests of the breeders. In particular, under normal circumstances, the following acts of reproduction shall not require the authorization of the breeder:

(a) acts of reproduction for consumption or use in the household of the person doing such acts;

(b) acts of reproduction for the purposes of research or the breeding of new varieties.

(4) The exploitation of a variety which is essentially derived from a protected variety shall give rise to payment of equitable compensation to the holder of the rights in the protected variety.

Comments

1. General.- The proposed new text of Article 5 is based on the principle that the rights granted to the breeder should be reinforced. The enlargement of the catalogue of rights that must be granted (present paragraphs (1) and (3), second sentence) would be cumbersome and would have some further disadvantages (see in this respect document CAJ/XVIII/6) which are overcome if the definition of the rights is based on the largest possible scope which, in a second stage, is made subject to limitations and to the principle of the exhaustion of rights. The final paragraph deals with the rights over varieties bred from the protected variety.

2. Right of reproduction (paragraph (1)).- The proposal made in document CAJ/XVIII/6 was based on a patent approach. The proposal above is based on a copyright approach in view of the fact that varieties, like many literary and artistic works, are exploited through reproduction. Paragraph (1) therefore provides an exclusive right of reproduction. Reproduction of a variety may

take place in various forms, in particular: sexual reproduction, vegetative propagation, repeated use of other varieties for the production of material of the variety, use of creative breeding methods to "recreate" the variety, second occurrence of a mutation. All forms of reproduction would be covered by the right provided in paragraph (1). That right is limited in paragraph (3).

3. Sale of plant material (paragraph (2)(a)).- The second essential feature of the exploitation of varieties is the fact that plant material of the variety, typically reproductive or vegetative propagating material and the harvested crop, is the subject of commercial operations. Paragraph (2)(a) provides an exclusive right to such operations (offering for sale, sale and importation), subject to the exhaustion principle defined in subparagraph (b).

4. The kind of material is not specified; taking into account the effects of the exhaustion principle, this would allow the right to be extended also to importation of transformed products, for example essential oils of perfume plants or a chemical compound produced by means of a biotechnological process. The proposed text specifies on the other hand that the right applies also to material of a variety produced by means of repeated use of the protected variety, typically a hybrid variety. The right presently provided in the second sentence of the present text of Article 5(3) in the form of an exception to the principle of freedom of further breeding is thus incorporated into the basic rights in a positive form.

5. Exhaustion of rights principle (paragraph (2)(b)).- Paragraph (2)(b) states the exhaustion principle which would apply with respect to further sales only. It follows that the right of reproduction is not subject to exhaustion.

6. The exhaustion principle would apply with respect to the material initially sold and to derived material, but on the condition that the derivation follows fair practices. For example, the sale of cut flowers produced from rose bushes or tulip bulbs sold to the public for planting in private gardens would not be covered by the exhaustion principle.

7. Limitation of the right of reproduction (paragraph (3)).- The first sentence of paragraph (3), which is inspired by Article 9(2) of the Berne Convention for the Protection of Literary and Artistic Works, states the general principle that rights may be limited to some extent. That extent would be defined at the national level, within the limits set by the proposed text and on the basis of the circumstances prevailing, by means of legislative or administrative provisions and/or following judicial decisions. The proposed text has the advantage that controversial issues--in particular, the question of the farmers' seeds--would not be regulated in the Convention itself but left to the judgement of each member State of the Union, which could also decide to have them settled by the judiciary rather than by Parliament. This would provide a useful element of flexibility.

8. However, the proposed text would set a limit to that flexibility in the second sentence: each member State would be required to exempt reproductions made, under normal circumstances, for private use or for research purposes, including for the creation of new varieties. This sentence thus retains the principle of free use of varieties for breeding purposes which is presently contained in the first sentence of paragraph (3).

9. Exploitation of derived varieties (paragraph (4)).- The present text of the Convention sets out the principle that the exploitation of a variety bred from a protected variety is free. This principle has been criticized for years

because it applies indiscriminately to the case where the daughter variety is very different from the mother variety and to the case where the difference is minimal, though pertaining to an "important characteristic" and being "clear" in the meaning of Article 6(1)(a). One case has been dealt with on several occasions under the expression "easy mutations": both varieties have the same genotype but for a mutated characteristic. Other cases could be obtained through backcrossing or through gene transfer, or again in the case of a hybrid by using a similar line or a combination of different lines producing a similar hybrid. This latter example shows that there would not always be a direct line--a mother-daughter relationship--between the varieties concerned.

10. On the other hand, the genetic engineers are concerned that an innovative gene or characteristic which they have introduced into a variety of a given species can be transferred freely, under the present text of the Convention, into other varieties.

11. These are the reasons for which it has become necessary to reconsider the principle of free exploitation laid down in Article 5(3) of the Convention (on the understanding that the free use of a variety for breeding purposes, which may be assimilated to the research exemption of the patent law, would not be questioned). The aim would be to introduce a kind of dependency. Two main questions arise in this respect:

(i) What would be the form of the dependency? The draft provision in paragraph (4) proposes that it should involve the payment of equitable compensation. It is to be expected that, at least once the system is well-established, the compensation would be determined in the vast majority of cases by an agreement between the parties concerned.

(ii) In which cases would there be dependency? Paragraphs 10 and 11 give examples of cases where a strong case is made in favor of dependency. They show that a precise definition of the cases would be arduous. In addition, a precise definition would unavoidably raise the question of the borderline cases and may be superseded by new developments. The draft provision in paragraph (4) therefore contains a general phrase, leaving it to private negotiations, arbitration by breeders' organizations and court decisions to define the cases and, for each case, the amount of the compensation.

Article 6

Conditions Required for Protection

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

(a) Whatever may be the origin, artificial or natural, of the initial variation from which it has resulted, the variety must be clearly distinguishable

Alternative 1: ... [delete "by one or more important characteristics"]

Alternative 2: by at least one relevant characteristic

Alternative 3: by one or more important characteristics, or by a combination of characteristics attesting to the originality of the variety,

from

Alternative 1: any other variety whose existence is a matter of common knowledge at the time when protection is applied for. Where a variety has been the subject of an application for protection or for entry in an official register of varieties, it shall be deemed to be a matter of common knowledge as from the date of the application, provided that the application is granted.

Alternative 2: any other existing variety. A variety shall not be deemed to be existing, however, if its existence has not been sufficiently disclosed.

(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 commercially exploited in the territory of that State, and

(ii) must not have been commercially exploited in the territory of any other State for longer than six years in the case of cereals [and others], and also 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.

The fact that the variety has become a matter of common knowledge in ways other than through commercial exploitation shall not affect the right of the breeder to protection.

(c) The variety must be sufficiently homogeneous, that is to say, the plant material belonging to it must be uniform in 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.

(d) 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 the description of those characteristics determined for the variety after repeated reproduction or propagation or, where the breeder has defined a particular cycle of reproduction or multiplication, at the end of each cycle.

(e) [Deleted]

(2) [Unchanged] 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.

Description of Proposals and Comments

1. Distinctness (paragraph (1)(a)).- The term "important characteristics" raises the question whether the characteristics have to be important from a functional point of view, i.e., in relation to the use of the variety. Alternative 1 omits the term; in the application of this provision, the term "clearly distinguishable" would then be used as a basis for refusing characteristics that are considered as not giving rise to varietal differences. In alternative 2, the word "important" is replaced by "relevant."

2. There are concerns that differences that are not "clear" and relate to "important characteristics" are used in combination to establish distinctness in the meaning of Article 6(1)(a). It is proposed in alternative 2 to prevent such a practice by requiring clear distinctness in "at least one" characteristic.

3. On the other hand, some are attracted by the idea that there should be a more refined classification of the characteristics than the present one, which distinguishes two kinds, namely those which are taken into consideration in the application of Article 6(1)(a) ("important characteristics") and those which are not. Alternative 3 proposes to anchor this idea in the Convention.

4. Common knowledge (paragraph (1)(a)).- It has been questioned whether a "precise description in a publication" would suffice to make a variety a matter of common knowledge. Other questions may also be raised in this respect. Alternative 1 retains the notion of common knowledge, but not the examples of facts able to establish it. It merely states a case in which a variety would also be deemed to be a matter of common knowledge. Alternative 2 is based on a different approach: the basis for comparison would be the assortment of "existing varieties," provided that their existence has been made known. In

practice, the plant variety protection offices would continue to base their decisions on their reference collections and documents, and recourse would be made to Article 10 of the Convention if the existence of a variety had been overlooked when taking the decision.

5. Commercial novelty (paragraph (1)(b)).- The proposals are as follows:

(i) Replace the words "offered for sale or marketed" by "commercially exploited." The reason is that certain varieties may be exploited on a large scale without there being an offer for sale or marketing stricto sensu. An example that has already been considered and has led to a judicial decision in France is that of inbred lines used in the production of hybrid seeds.

(ii) Delete the words "with the agreement of the breeder."

(iii) Add cereals--and other crops still to be defined--to those for which the period of prior commercialization abroad may be up to six years.

(iv) Delete the second sentence ("Trials of the variety not involving offering for sale or marketing shall not affect the right to protection") as superfluous, and "also" in the third sentence.

6. Homogeneity (paragraph (1)(c)).- It is proposed to include a definition of homogeneity in the Convention, which, in addition, would relate only to the characteristics considered for distinctness purposes.

7. Stability (paragraph (1)(d)).- The combination of Articles 6 and 7 could be interpreted in the sense that the plant variety protection offices would be required, at present, to ascertain that the variety is stable. This is not possible in some cases within the period allowed for examination. It is therefore proposed to relate the condition to suspicions deriving from the tests. A further proposal is to relate the condition of stability to the characteristics considered for distinctness purposes, i.e., to equate the phrases "important characteristics" and "essential characteristics" used at present in the Convention.

8. Denomination (paragraph (1)(e)).- The proposed deletion is a consequence of the proposed deletion of Article 13.

Article 7

Official 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 species.

(2) [Unchanged] 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.

(3) Contracts may be concluded between the competent authorities of the member States of the Union with a view to the joint utilization of the services of the authorities entrusted with the conduct of growing tests carried out in the framework of the examination of varieties in accordance with the provisions of paragraph (1) and with assembling the necessary reference collections and documents.

(4) Each member State of the Union shall 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.

Description of Proposals and Comments

1. Paragraph (1).- It is proposed to replace "botanical genus or species" by "species," i.e., by a reference to a crop (see proposed definition in the new Article 2).

2. Paragraph (3).- It is proposed to emphasize the importance of close cooperation between member States by moving forward the provision now contained in Article 30(2). Furthermore, it is proposed to replace "examination" by a reference to growing tests.

3. It is suggested to consider whether there should also be an obligation--subject to justified exceptions (mainly special economic or ecological conditions)--to base the decision on the protection of a given variety on the results of the growing tests already conducted or in the course of being conducted by another member State. The usefulness and desirability of such a provision will partly depend on the alternative retained for Article 4.

4. Paragraph (4) [Former Paragraph (3)].- It is proposed to replace "any member State of the Union may" by "each member State of the Union shall," thus making provisional protection mandatory.

Article 8

Period of Protection

(1) The right conferred on the breeder shall be granted for a limited period. This period may not be less than [twenty] 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 [twenty-five] years, computed from the said date.

(2) Notwithstanding the provisions of paragraph (1) and Article 11(3)(a), each member State of the Union shall have the faculty of providing that, in respect of a variety bred or first protected in another member State of the Union, the protection granted in respect of its territory shall last as long as the protection granted in respect of the territory of that other State.

Description of Proposals

1. Paragraph (1).- It is proposed to increase the minimum duration of protection.

2. Paragraph (2).- It is proposed to enable member States to establish a system whereby the periods of protection would end at the same time in different countries. That system would not necessarily be linked with an agreement under Article 11(3)b) or (c).

Other Proposals Made

1. It has also been proposed to provide for [a] fixed period[s] of protection, rather than minimum durations, in the Convention itself.

2. It has also been proposed to add (where still relevant) species such as cereals and potatoes to those for which the protection period is longer.

3. It has also been proposed to increase still further the period for trees (up to 50 years?).

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 or where, for example, the breeder unreasonably refuses to grant an authorization to exploit the variety or imposes or puts forward unreasonable terms for such authorization.

(2) Alternative 1: [Deleted]

Alternative 2: [Combine with paragraph (1), with following wording] When any such restriction is made, 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.

Description of Proposals

1. Paragraph (1).- It is proposed to indicate in the Convention that compulsory licences may also be envisaged where there is no "public interest" stricto sensu involved.

2. Paragraph (2).- It is proposed either to delete the provision as superfluous or to combine it with paragraph (1). In the latter case, the reference to "widespread distribution of the variety" would be replaced by a reference to the exploitation of the variety by third parties since in some instances varieties may be the subject of sufficient exploitation without there being widespread distribution (case of inbred lines or some ornamental plants) and in view of the proposed amendment of Article 5.

Article 10

Nullity and Forfeiture of the Rights Protected

(1) [Unchanged] 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 if the breeder has failed to ensure the continued existence of the variety with its characteristics as defined when the right was granted.

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

Description of Proposal: It is proposed to replace paragraph (2) by a text affirming in a more positive way the obligation put on the breeder to maintain the variety. In practice, the failure to maintain the variety would continue to be established on the basis of the inability of the breeder to provide "reproductive or vegetative propagating material capable of producing the variety with its characteristics as defined when the protection was granted."

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; Special Agreements

(1) [Unchanged] The breeder may choose the member State of the Union in which he wishes to file his first application for protection.

(2) [Unchanged] 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)(a) Subject to the provisions of subparagraphs (b) and (c) below, 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.

(b) Any group of member States of the Union may provide by a special agreement under Article 29 that protection may be obtained on the basis of international applications followed by an international procedure, or that protection may have a unitary character throughout their territories and shall in such case be granted jointly in respect of those States.

(c) Any group of member States of the Union may provide by a special agreement under Article 29 that protection may be obtained in one of them only on condition that protection is granted in another, or that protection granted in one of them shall automatically extend to the territory of another.

Description of Proposal: It is proposed to anchor in the Convention the principle of closer cooperation, by providing two exceptions to paragraph (3):

(i) an exception to allow international or unitary (supranational) plant breeders' rights, e.g. like the European patent or the European Community patent (the proposed provision is partly based on Article 142 of the European Patent Convention);

(ii) an exception to enable a State, typically a small State, to link plant variety protection in its country with that in a neighboring country.

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 twenty-four 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) [Unchanged] 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) [Unchanged] 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.

(4) [Unchanged] 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 favor of a third party or to any right of personal possession.

Description of Proposal: It is proposed to increase the priority period provided in paragraph (1) from twelve to twenty-four months.

Comments: Another proposal that has been made is to increase the priority period to 18 months. During the Third Meeting with International Organizations, it was generally recognized, however, that, due to the length of the vegetation periods, it might be preferable to have a 24-month period.

Article 13

Variety Denomination

Proposal: Delete the article.

Alternative Proposals

1. In the event that it is wished to maintain provisions on variety denominations, a proposal will be made in the form of draft provisions according to the principles outlined below (subject to the decisions of the Committee).

2. Layout.- The provisions would be in the following order:

(i) obligation to give a designation to the variety;

(ii) breeder to chose the designation, with obligation to use the same as the one already fixed in another member State if there is no ground for unsuitability;

(iii) conditions to be met by the designation to be suitable;

(iv) obligation to use the designation in the exploitation of the variety;

(v) effects of prior rights and on prior rights.

3. Substance.- The draft would provide for or examine the feasibility of the following:

(i) the introduction of a system of double nomenclature with an international reference and a national (or regional) denomination;

(ii) the deletion of the reference to the generic character of the denomination to facilitate obtaining trademark protection in countries where there is no plant variety protection law;

(iii) the reintroduction of the possibility of obtaining trademark protection for the variety denomination, even in the country where the variety is protected, on the condition that trademark rights could not be asserted to oppose the use of the denomination where such use is lawful under the Convention;

(iv) alternatively, the possibility of granting the breeder trademark-like protection in respect of the variety denomination, subject to the aforementioned condition, with the obligation for member States to introduce civil and penal sanctions for any infringement of the rights of the breeder in the denomination and for any failure to use the denomination when such use is required.

Article 14

Protection Independent of Measures Regulating Production, Certification and Marketing

Proposal: Delete the Article as superfluous.

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