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INTERNATIONAL UNION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS

GENEVA

ADMINISTRATIVE AND LEGAL COMMITTEE

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REVISION OF THE CONVENTION

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OBSERVATIONS AND PROPOSALS FROM THE DELEGATION OF SWEDEN

Document prepared by the Office of the Union

The Annex to this document contains the observations and proposals from the Delegation of Sweden communicated by telecopy, on September 8, 1988, to the Office of the Union.

[Annex follows]

ANNEX

OBSERVATIONS AND PROPOSALS FROM THE DELEGATION OF SWEDEN

The following observations concentrate on principal issues of substance. They do not address questions of drafting, to which this Delegation would like to revert at a later stage. Any drafting suggestions made in this document are caused by the position taken as to the underlying issue. The comments take into account the revised draft as laid down in document CAJ/XXIII/2 as well as the observations made by the Delegation of the Federal Republic of Germany in document CAJ/XXIII/4.

Article 1

The Swedish Delegation has not yet reached a final position regarding the "ban on double protection." If there were to be a majority for keeping this ban, such a rule should be expressly spelled out in the Convention itself, along the lines suggested in document CAJ/XIII/2, paragraphs 5 and 6. The main reason is that "travaux préparatoires" have no legally binding effect, unless it is decided otherwise (under Article 31 of the Vienna Convention on the Law of Treaties) by a Conference designated to adopt the text of the treaty in question.

The words "directly" and "the variety as such" (paragraphs 5 and 6 of document CAJ/XXIII/2) seem to indicate a ban on other forms of industrial property rights (i.e., industrial patents) only where direct product protection is concerned. Such a clause would not address the question of process patents which could lead to indirect product protection of a plant variety. It remains to be discussed whether or not the suggested approach implies an inconsistency in this regard and, if so, whether there are valid reasons for this discrepancy.

Article 2

The suggested alternative to replace the present text by certain definitions is acceptable. Regarding the proposed text, the Swedish Delegation would like to offer the following comments.

The definition of "variety" seems unnecessary since the legal prerequisites are laid down in Article 6. Instead, the concept of plant breeders' rights (PBR)--or variety rights (VR)--could be inserted and defined here.

Article 3

Acceptable.

Article 4

The Swedish Delegation approves of the two main principles embodied in paragraph (2), i.e., the requirements of some economic (or other) importance and testing facilities to be at hand, before a species is accepted in principle for protection.

Article 5

Paragraph (1).- Acceptable.

Paragraph (2)(a).- This is a more controversial proposal. At the twenty-second session of the Administrative and Legal Committee our Delegation asked for more information regarding the need for an extension of PBR to cover "end products." What would be the rationale for States, having to take into account not only the interests of breeders but other interests in society as well, to extend the scope of PBR?

A rule covering "end products" should include a precise limitation, spelling out what is meant by "material." In this context, it would seem proper to stop at the first direct product of the variety. The material of a plant to be protected would thus encompass the plant itself and all its parts and--possibly--products achieved by some processing methods such as the production of oils or other chemicals. Further processing of such products would, on the other hand, not be covered by this right, nor any further dispositions (sales, etc.) of the covered product.

In comparison, paragraph (2)(a) does not seem consistent with paragraph (3). Thus, what seems to be already excluded under paragraph (2)(a) is again expressly excluded under paragraph (3). If paragraph (2)(a) were to include "commercial," it would be made clear that the phrase "for non-commercial purposes" in paragraph (3)(i) is superfluous. As it now stands, there seems to be some ambiguity. This is, however, more of a drafting matter.

Paragraph (2)(b).- The principle of exhaustion as proposed here would seem to correspond to the existing principle for patents. As such, it seems acceptable. Compared to the first draft (document CAJ/XXII/2), the point of exhaustion has been further limited ("put on the market in the State of the Union concerned"). Such a limitation seems acceptable.

As regards the proposed inclusion of derived material, care must be taken to ensure that the principle here is made consistent with the rule in paragraph (2)(a)(ii).

Paragraph (3).- If non-commercial and other private acts were to be excluded already in paragraph (2)(a), paragraph (3)(i) should be limited to an express rule on the farmer's privilege.

However, if the present approach is pursued, we would like to point out that, since farmers' use of seed would mainly have commercial purposes, the text should be amended to read "acts done privately or for non-commercial purposes."

Paragraph (4).- The comments to this paragraph made in paragraph 17 of document CAJ/XXIII/2 suggest that any acts by the State may be justified. If so, the choice of a new concept "excessive prejudice" does not seem to remedy the problem. If the act is justified, there is no prejudice. If this reasoning is correct, this Delegation could accept a full stop after "public interest."

Paragraph (5).- Although this Delegation is favorable to the idea of a principle of dependence, its point of departure and content need further discussions before a detailed regulation could be considered, inter alia for the following reasons.

It has not been possible in the Swedish Patent Act to define the legal prerequisites for dependency. Over the years, a number of precedents have evolved instead, giving a fairly good picture of which criteria constitute dependency. This may be an indication that efforts to define these conditions within the UPOV context may be difficult to achieve.

Further, we would like to refer to paragraph 23 of the comments (page 17), which seems to indicate an intended discrimination based on "differing routes used to arrive at the end-product." Putting the justification of a discriminatory rule aside for the moment, it should be asked whether a dependency rule should not be based also on the concept of a variety as defined under the Convention. Or, in other words, should not a dependency rule--in analogy with patent law--cover new varieties which are protected under the Convention, so that the owner of a new PBR is held liable to pay remuneration to the holder of an older PBR--given the prerequisites of a dependent position for the former upon the latter are met? Cf. the Swedish Patent Law, Section 46, which reads in essence: "The holder of a patent for an invention, the exploitation of which is dependent on a patent held by another person may be granted a compulsory licence to exploit the latter invention, provided that it is found reasonable taking into account the importance of the former invention."

The approach chosen under patent law means that dependency under patents would exist only where the dependent invention has been granted protection itself.

For PBR, a dependency rule covering both protected and non-protected varieties derived from protected ones must be considered, however. Since no infringement occurs under the PBR system where new varieties have been developed, no other sanction but a remuneration is possible.

Paragraph (6)(ii).- While the interest underlying this rule (the privilege of farmers, scientists, etc.) has much merit in itself, it is hard to accept the inclusion of a regulation on a topic which is not the object of this Convention.

Article 6

Paragraph (1)(a).- The Swedish Delegation favors alternative 1 combined with a revised version of alternative A, to read as follows:

> "(a) The variety must be clearly distinguishable from any other variety whose existence is a matter of common knowledge at the time of filing of the application."

This sentence thus corresponds to the first part of the present paragraph (1)(a).

Paragraphs (1)(b) and (c) as well as paragraph (2) are acceptable.

Paragraph (1)(d).- We would like to keep the phrase "with the agreement of the breeder" to ensure the protection of his rights. The first part of the paragraph could thus be structured as follows:

"(d) The [...] right. A variety is not novel/new if it has been exploited with the agreement of the breeder in the territory of

(i) that State [...] one year, or
(ii) any other State [...] any other species."

Article 7

Apart from drafting matters, the general outline seems acceptable. It should be pointed out that the Swedish legislation already provides for provisional protection which is in consistency with the provisions of paragraph (4).

Article 10

Some redrafting could be done in order to facilitate the reading of this Article.

Article 13

The Swedish Delegation would prefer a deletion of this Article.

General comments

As indicated under Article 2 above, a definition of the concept of a variety right granted under the Convention could be inserted there. This would in turn make it possible to cut down long references in the substantive Articles (e.g. in Article 7 where "the holder of a right granted in accordance with the provisions of this Convention" could be replaced by "the holder of a variety right/a plant breeder's right").

For future drafting sessions, the proposed text could be scrutinized with the aim of finding out whether there are other frequent concepts which could be included and defined under Article 2, thus saving space elsewhere in the Convention.

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