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UPOV

DC/6

ORIGINAL: French

DATE: July 31, 1978

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

GENEVA

**DIPLOMATIC CONFERENCE  
ON THE REVISION OF THE INTERNATIONAL CONVENTION  
FOR THE PROTECTION OF NEW VARIETIES OF PLANTS**

**Geneva, October 9 to 23, 1978**

## OBSERVATIONS

Submitted by Governmental authorities on  
documents DC/1 to DC/4

1. The Office of the Union has distributed documents DC/1 to DC/4 to the Ministries of Foreign Affairs, the Ministries of Agriculture and to selected persons of UPOV member States and of the States listed in Annex I to document DC/2.
2. The comments on these documents received so far from the Governmental authorities of a number of States are attached as Annexes to this document in the alphabetical order of the French names of States.

[Annexes follow]

PROPOSALS FOR CHANGES TO PROPOSED NEW TEXT OF CONVENTION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS AS CONTAINED IN PAPER DC 3 ANNEX II. : SUBMITTED BY REPUBLIC OF SOUTH AFRICA. [June 27, 1978]

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Article 1(1) : Change as follows :- "The purpose of this Convention is to recognise <sup>and</sup> to ensure<sup>7</sup> to the breeder of a new plant variety or to his successor in title (both hereinafter referred to as "the breeder") a right and to ensure the protection of such right, under the conditions hereinafter defined." 1)

Motivation : The two distinct steps involved in the granting of a right which is distinguished and to which frequent reference is made in the body of the Convention, namely -

- (a) recognition of a right which includes the application by the breeder, the examination of the application and the issuing of the title of protection, and
- (b) the protection of the right which follows on recognition and includes i.a. the privileges of the holder of the title of protection and the duration of the protection,

should be clearly indicated already in the first article of the Convention.

Article 2(1) : Insert the words, "and protect" after the word, "recognise".

Motivation: If the proposal for change of Article 1(1) is accepted this is a consequential change. Recognition is only one step in the granting of a right. Equally important is the protection of the right which means that without "and protect" this paragraph would be incomplete.

Article 5(1) : Change as follows: "The effect of the protection of the right <sup>granted</sup> to the breeder of a variety<sup>7</sup> is that the <sup>his</sup> prior authorisation of the breeder shall be required for the production for purposes of commercial marketing, of the reproductive or vegetative propagating material, as such, of the <sup>his</sup> variety ..... etc."

Motivation : A consequential change if the principle involved in the proposed change of Article 1(1) is accepted.

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- 1) In Annex I, words to be deleted have been placed between square brackets, words to be added have been underlined.

It is confusing when terms such as "right(s)" (see Articles 5(1), 5(4), 8, 14, 33(1)(iv), 40(4), "protection" (see Articles 6(1)\*, 7(1), 12(1), (2) and (3), 34A), "protection of ( his ) a right " (see Articles 11(1) and (2), 14(1), "protect the breeder" (see Article 7(3), "protection of the variety" (see Articles 13(7)\*\*, 29, 30(1)(a), and "right of the breeder" (see Articles 10(1), (3) and (4) ) are used when from the context in which they are used it is clear that have the same meaning namely, "protection of (a)(his) the right". In order to obtain uniformity of terms used and eliminate confusion it is suggested that the term "protection of (a)(the)(his) right" be used to indicate exactly what it means. What has been proposed for Article 5(1) will, therefore, also apply to those articles which have been referred to in this motivation.

Article 5(4) : Insert the words, "protection of a" before the word, "right".

Motivation : See remarks under Article 5(1).

Article 6(1) and (2) : Insert the words, "of a right" after the word "protection," wherever it appears in the text.

Motivation : See remarks under Article 5(1).

Article 7(1) and (3) : Insert the words, "of a right", after the word, "protection", where it appears in the text.

Motivation : See remarks under Article 5(1).

Article 7(3) : Insert the words, "the right of" after "protect".

Motivation : See remarks under Article 5(1).

Article 8 : Change as follows: "The protection of a right [conferred on the breeder] shall be [granted] for a limited period."

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\* also Article 6(2).

\*\* Article 13(8) in documents DC/3 and DC/5, Article 13(7) in document DC/4.

Motivation : See remarks under Article 5(1).

Article 10 : Insert the words, "the protection of a" before the word "right", wherever it appears in the text.

Motivation : See remarks under Article 5(1).

Article 11(1) : Add the words, "of his right," at the end of the sentence.

Motivation : See remarks under Article 5(1)

Article 11(2): Change as follows : "The breeder ..... without waiting for the issue to him of a special title of protection or of a patent by the member State .....  
..... etc."

Motivation : According to Article 2(1) and 34A protection of a right may be granted either by means of a special title of protection or of a patent. It is, therefore, not entirely correct to refer in Article 11(3) to one of these forms only. For the sake of clarity the word "special" should be inserted before "title".

Article 11(3) : Insert the words, "of the right" after the word, "protection".

Motivation : See remarks under Article 5(1).

Article 12(1), (2) and (3) : Insert the words "of his right" after the word, "protection".

Motivation : See remarks under Article 5(1).

Article 13(7) (Text as it appears in Paper DC 4).

Change as follows : "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 respect of which protection of a right is enjoyed in that State ....

..... expiration of the protection of the right in respect of that variety .....  
..... etc ".

Motivation : See remarks under Article 5(1).

Article 14(1) : Change as follows:- "The protection of a right accorded [ to the breeder ] in pursuance ..... etc".

Motivation : See remarks under Article 5(1) . The words "to the breeder" appear to be superfluous.

Article 21, Heading and first sentence: Replace the word "tasks" with the word "functions".

Motivation : "Functions" appears to be a more appropriate word.

Article 21(c) : Change as follows: "(c) give the Secretary-General .....  
..... all necessary directions including those concerning relations with national [ authorities ] and international bodies " .

Motivation : UPOV will be dealing to an increasing extent with other international bodies and the Council may wish to instruct the Secretary - General in connection with such dealings. "National bodies" will include national authorities but UPOV may also need to deal with other national bodies than authorities.

Article 21 (g) : Delete the words, "after consultation " and "and" in the third line.

Motivation : These words appear to be superfluous as "with the agreement of" would always mean consultation before.

Article 23(1) : Change as follows : "The office of the Union shall [ have the task of ] carry [ ing ] out all the duties ..... etc".

Motivation : Simplification of text.

Article 29 : Heading : Change as follows : "Special Agreements for the Protection of Rights ~~[New Varieties of Plants]~~".

Motivation : See remarks under Article 5(1)

Article 29 : Change first sentence as follows : " "Member States of the Union reserve the right to conclude among themselves special agreements for the protection of rights in respect of new varieties of plants, ..... etc."

Motivation : See remarks under Article 5(1).

Article 31(1) : Change second paragraph as follows : "In particular, each member State of the Union shall undertake to :-

- (a) ensure to nationals of the other member States of the Union appropriate legal remedies for the effective defence of ~~[the]~~ their protected rights, provided for in this Convention;
- (b) set up a special authority for the recognition and protection of rights in respect of new varieties of plants, or to entrust their protection to an existing authority; and
- (c) ensure that the public is informed of matters concerning such protection, including as a minimum the periodical publication of the list of special titles of protection and of patents issued.

Motivation : (a) See remarks under Articles 5(1).  
(b) See remarks under Articles 1(1) and 5(1) .  
(c) In view of Article 2(1) and 34A reference to both forms of protection should be made.

Article 32 (3) : Change as follows : "Any State which is not a member of the Union ~~[and which has not signed this Act]~~ shall before depositing its instrument of accession or ratification, ask the Council ..... etc"

Motivation : It is not clear why States which have signed the Act are exempted

from the said requirement. It is felt that the same need exists to scrutinise legislation of such States.

Article 32A (2) : Change as follows : "In respect of ..... conditions referred to in subparagraphs (i) and (ii) of paragraph 1 have been fulfilled ..... etc."

Motivation : The change will make it quite clear to which conditions reference is made and eliminate the possibility that the introductory sentence be included for this purpose which, of course, is not the intention.

Article 33: Heading : Change as follows:

"Communications Concerning the Genera and Species [Protected] in respect of which Protection of Rights is provided; Information to be Published."

Motivation : See remarks under Article 5(1).

Article 33(2)(iv) : Change as follows : "(iv) on any use of the faculty provided for in Article 5(4), first sentence with an indication of the nature of the more extensive protection of rights and with a specification of the genera and species to which such extensive protection of rights apply.

Motivation : See remarks under Article 5(1) .

Article 34A : Heading : Insert words "of Rights" after the word " Protection".

Motivation : See remarks under Article 5(1).

Article 34A(1) : Change as follows: "Notwithstanding the provisions of paragraph (1) of Article 2, any State which at the date of opening for signature of this Act provides for protection of rights under the different forms of protection referred to in the said Article in respect of [for] sexually reproduced ..... etc. "



Motivation : See remarks under Article 5(1). Reference to the forms of protection of rights should be specific in order to eliminate any possibility of other forms of protection than those referred to in Article 2(1) being read into this paragraph.

Article 40(4) : Insert the words "protection of " before the word "rights".

Motivation : See remarks under Article 5(1).

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[Annex II follows]

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ANNEX II

[Original: English]

## OBSERVATIONS OF THE MINISTRY OF AGRICULTURE OF BARBADOS

[March 10, 1978]

The Ministry of Agriculture of Barbados has no comments to offer on documents DC/1 to DC/4. It is not foreseen that the Convention would have immediate benefits to Barbados.

[Annex III follows]

COMMENTS FROM THE DELEGATION OF CANADA TO THE  
DIPLOMATIC CONFERENCE ON  
DOCUMENTS DC/1 to DC/4

Document DC/1

The Canadian delegation wishes to make no amendments in the Provisional Agenda.

Document DC/2

The Canadian Delegation proposes no amendments to the "Provisional Rules of Procedure", U.P.O.V. Document DC/2.

Document DC/3

The Canadian Delegation has the following comments to make on Document DC/3;

1. As far as Canada is concerned, the proposed new Article 36A is unnecessary.
  
2. As the purpose of the "International Convention for the Protection of New Varieties of Plants" is to "ensure to the breeder of a new plant variety....a right" (Article 1, Paragraph (1)), the imposition of obligations in the field of trademarks is undesirable, and the proposed changes in Article 13 are not supported.

Document DC/4

The Canadian Delegation supports the proposed changes in Article 13, outlined in Document DC/4. Alternative 3 is preferred in paragraph (4)(a).

The Canadian Delegation supports the proposal made in the footnote to paragraph (6), i.e. that a sub-paragraph be added to Article 21 including in the duties of the Council, the task of adopting procedures for the mutual information of authorities of member states on variety denominations.

Alternative 3 is preferred in both instances in Paragraph (8)(b), and the omission of the reference to trade marks is supported.

The Canadian Delegation strongly urges that the second sentence in brackets in Paragraph (9): "If such an indication is added, the denomination must be easily recognizable" be included.

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ANNEX IV

[Original: English]

VIEWS OF THE GOVERNMENT OF PAKISTAN ON THE DOCUMENTS NO. DC-1,2,3  
AND 4 RELATING TO THE DIPLOMATIC CONFERENCE ON REVISION OF THE  
INTERNATIONAL CONVENTION FOR THE PROTECTION OF NEW VARIETIES OF  
PLANTS TO BE HELD IN GENEVA FROM 9 TO 23 OCTOBER, 1978.

[July 11, 1978]

The documents are closer to the needs of Western Europe and are barely applicable to the conditions prevailing in Pakistan, as Pakistan has not breeders' rights or royalty system on the new varieties of crop plants. The said documents deal mainly with the protection of plants varieties and rights of plant breeders, etc. Since in most of the Asian countries and more so in Pakistan, the work relating to breeding of crop varieties is essentially handled by the government departments, the system and procedures for payment of royalties to plant breeders is not of direct relevance to Pakistan.

[Annex V follows]

## OBSERVATIONS OF THE GOVERNMENT OF SWEDEN

MINISTRY  
FOR  
FOREIGN AFFAIRS

Stockholm, July 7, 1978

The Secretary-General of the International  
Union for the Protection of New Varieties  
of Plants  
32, chemin des Colombettes  
1211 GENEVA SCHWEIZ

Sir,

Referring to your note of January 30, 1978 (C.U 399-312) concerning the Diplomatic Conference on the Revision of the International Convention for the Protection of New Varieties of Plants, the Swedish Government has the honour to submit the following comments on the Draft of a revised text of the above-mentioned Convention.

General comments

The Swedish Government is in general satisfied with the present text of the Convention. Several of the proposed amendments do not, in the view of the Swedish Government, represent any improvement of the Convention. If the revised text is adopted, this may lead to a reduction of the uniformity of legislation in the member States. Some of the amendments, however, are proposed in order to make it easier for certain States at present not members of UPOV to adhere to the Convention. The Swedish Government considers it important that more States become parties to the Convention. For this reason, the Swedish Government can, except for one point, accept the draft revised text.

Article 6

Under the proposed text of this Article, the Convention will allow Contracting States to grant in their national laws a so called "period of grace" of one year (art. 6.b.i). The Swedish Government considers it a step backward to introduce this possibility in the Convention. It is aware, however, of the fact that some States might find it impossible to ratify the Convention unless they were permitted to provide in their national law for such a period of grace. For this reason the Swedish Government will not object to this amendment.

In the draft (art. 6.b.ii) it is proposed to extend, in case

of certain groups of plants (vines, forest trees, fruit trees and ornamental trees). from four to six years the period during which a variety may, without prejudicing its novelty, have been offered for sale or marketed in a State other than the State in which the application is filed. The Swedish Government does not consider such extension desirable. As the extension is proposed only for groups of plants which are usually slow-growing, the Swedish Government will, however, not oppose the amendment.

### Article 13

Under the present text of the Convention (art. 13.3), any applicant who submits as a variety denomination a designation in respect of which he enjoys trademark protection in a Contracting State must renounce his right to the trademark. It is proposed (art. 13.4) that the Convention should not require such renouncement in the above-mentioned case; the applicant would in the future only be prevented from asserting his right to the trademark.

The Swedish Government can accept this amendment on the understanding that any Contracting State would be free to require, also in the future, in its national law the renouncement of the right to the trademark in such cases.

A further amendment is proposed (art. 13.4) to the effect that the breeder would be prevented from asserting his trademark in the case referred to above only in those member States in which the genus or species to which the variety in question belongs is eligible for protection; under the present text (art. 13.3) the breeder is prevented from asserting his right to the trademark in any Contracting State. This amendment is not acceptable to the Swedish Government.

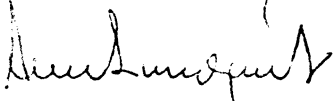
It is clear from Article 13, paragraph 8, that the variety denomination is the generic name of the variety. In the view of the Swedish Government it is evident that a generic name cannot be subject of any rights as a trademark with regard to products which are identical or similar to the product for which the designation is a generic name. This applies not only in States where the variety in question is eligible for protection, but in any State. The Swedish Government considers, therefore, that the proposed amendment in this respect is contrary to a basic principle of trademark law.

In this context it must be emphasized that no quasi breeders rights or surrogate for such rights can be obtained by means of trademark protection. Such protection entails simply the exclusive right to the name itself, but confers no rights in the new variety. Thus, the trademark protection could not exclude the reproduction or the marketing of the variety by others than the breeder, as long as they do not use the "trademark". Even if they do use the "trademark", it is believed that, in most legal systems, infringement proceedings

against them would fail, if it is brought out that the "trademark" is, in fact, the true generic name of the variety in question, for if this were proved the "trademark" would be held invalid.

The Swedish Government is aware of the fact that the Administrative and Legal Committee of UPOV has elaborated an alternative proposal for the new text of Article 13 (doc. DC/4). For the reasons given above, only alternative 3 of Article 13.4.a in that proposal is acceptable to the Swedish Government.

For the Minister



Arne Lundquist  
Head a.i. of the Legal Department

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