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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

THIRD SET OF OBSERVATIONS

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

The Annexes to this document contain the observations from the Delegation of the Netherlands on the draft revised Convention. It is recalled that the observations from Barbados, Canada, Pakistan, South Africa and Sweden are contained in document DC/6 and the observations from Bangladesh and Sri Lanka in document DC/8.

[Annexes follow]

ANNEX I

Commentary to the amended table of contents of the Draft International Convention for the protection of new varieties of plants as suggested by the Netherlands in Annex II and to the amendments to the Draft Convention proposed by the Netherlands in Annex III.

A. Amended table of contents

Using the revision it is suggested to update the order of the articles, which are assembled in 4 sections.

B. Amended articles

SECTION I

- Article 1 : This article consists of the first paragraph of article 1 of DC/3 with exception of the words "(both hereinafter referred to as "the breeder")", which have been worked into article 2 of the Dutch proposal, just like a part of paragraph 2. The main part of paragraph 2 and the third paragraph can be found in article 3 respectively article 5 of the Dutch proposal.
- (art 1(1), DC/3)
- Article 2 : This new article concerns various definitions which are scattered all over the text of DC/3 or which are not mentioned at all.
- Article 3 : This article consists of the main part of articles 1(2) and 15 of DC/3. It seems appropriate to mention the organs of the Union at the beginning of the Act, since they appear already in article 4(4) and 4(5) of DC/3.
- (art 1(2), 15, DC/3)
- Article 4 : This article is the same as article 23 A of DC/3. New is a paragraph indicating who has the competence to execute certain decisions of the Council.
- (art.23 A, DC/3)
- Article 5 : This is article 1(3) of DC/3.
- (art 1(3), DC/3)

SECTION II

Apart from some small changes in the wording, the articles of section II are the same as the articles 2 - 14 of DC/3. Since articles 34A, 35, 36A en 36 of DC/3 directly relate to subjects controlled by articles 2, 6 and 13, it is suggested to include these articles in this section.

SECTION III

All articles concerning the institutional framework and functioning of the Union (articles 16 - 24, 26 and 28 of DC/3) have been assembled in this section.

- Article 23
(art. 16, DC/3) : This article is the same as article 16 of DC/3, for the sake of completeness the words "subject to the application of the provision of article 33(5) (-art 26(5) of DC/3) have been added.
- Article 24
(art 17, DC/3) : The words "expressed their consent to be bound etc" are the consequence of a new wording of the articles relating to signature and ratification. (art 39 of the Dutch proposal. art. 31 and 32 of DC/3). Furthermore, a provision has been included in order that States, which have expressed their consent to be bound by this Act, can be invited while this Act has not yet entered into force, in general or with respect to such a State.
- Article 25
(art 18, DC/3) : Some new rules concerning vice-presidency of the Council have been added in order to prevent misinterpretation and to make clear that whenever "the President" is mentioned in the text, a vice-president has the same authority in the absence of the President.
- Article 29
(art. 22, DC/3) : The heading "Voting rules" seems more usual than the present one.
- Article 31
(art 28, DC/3) : It is suggested to delete the words "and of revision conferences" and to add in the article concerning revision conferences (art 38 of the Dutch proposal art. 27 of DC/3) that the provision with respect to the use of languages shall apply to the languages to be used by the conference.

SECTION IV

- Article 34
(art 30, DC/3) : A more complete wording of paragraph 1 is suggested.
- Article 37
(art 38, DC/3) : The Netherlands feel that some rules concerning the procedure of arbitration are necessary in order to prevent that a dispute gets stuck because of disagreement between parties about some simple rules of procedure. However, parties are free to submit the dispute to arbitration according to other rules which may exist between them. (subparagraph f).

- Article 38
(art 27, DC/3) : See explanation of art. 31 of the Dutch proposal.
- Article 39
(art 31, 32, DC/3) : In view of divergent constitutional requirements and practices existing in relation to becoming party to a treaty, it seems wise to include in this article also the possibilities of "signature without reservation as to ratification, acceptance or approval" "acceptance" and "approval".
- Article 40
(art 33, DC/3) : The new wording of art. 39 of the Dutch proposal results in a slightly changed wording of this article.
- Article 41
(art 32A, DC/3) : See explanation of article 40 of the Dutch proposal.
- Article 42
(art 32B, DC/3) : Only with respect to the matter of "Relations between States bound by different text" the Netherlands propose a fundamental change, based on the following arguments:
- The text of article 32B(2) of DC/3 does not make clear whether, and if so, which relation exists between a so-called "former State" and a "latter State", when no declaration has been made.
- It is doubtful whether candidate-members would appreciate the proposal of DC/3. For they are obliged by a declaration of an old-member-State to apply the new text containing some furthergoing obligations (see for instance art 6(4)(b) i and ii of DC/3 in relation to such an old-member-State, while the latter one continues to apply the old text in relation to them.

In the Dutch proposal the obligations between a new-member-State and an old one are equal, independent of any declaration (art 42 (2)i). However, a State bound by the new text may declare that it shall apply the new text in respect to a State, bound by the old text (art 42(2)ii). It seems only fair that, in her relation to an old-member-State, a State bound by the furthergoing obligations of the new Act may apply these to the same restricted level as to which the old-member-State is bound, unless it declares otherwise.

Amended table of contents of the International Convention for the protection of new varieties of plants, suggested by the Netherlands.

- Article 43
(art 34, DC/3) : A more usual, less offensive wording is proposed. Besides, this wording includes also territories which are part of a State but are able to decide independently whether a treaty shall be applicable to them or not (for instance: the Dutch Antilles).
- Article 44
(art 39, DC/3) : The words "signature and ratification of and accession to" have been deleted since they seem to be superfluous.
- Article 46
(art 41, DC/3) : In the heading the word "Copies" has been deleted since it is unusual. The word "Notification" has been replaced by the more usual, more including word "Depositary". Furthermore, the Netherlands feel that the transmission of one certified copy is enough. In paragraph 3 the word "texts" has been replaced by "translations" in order to make clear that these are not other "originals".
- Finally, the Netherlands suggest some minor changes in the wording of the preamble. Also a new paragraph has been added in order to perfect the preamble.

[Annex II follows]

TABLE OF CONTENTS		numbers of the corresponding Articles in Doc. DC/3:
<u>PART I</u>		
<u>GENERAL PROVISIONS</u>		
Article 1	: Purpose of the Convention	Art. 1 (1)
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Article 3	: Constitution of <u>the</u> Union	Art. 1 (2) en Art. 15
Article 4	: Legal status	Art. 23 ^A
Article 5	: <u>Seat</u>	Art. 1 (3)
<u>PART II</u>		
<u>PROVISIONS RELATING TO THE PROTECTION</u>		
<u>OF (NEW) VARIETIES (OF PLANTS)</u>		
Article 6	: <u>Forms of Protection</u>	Art. 2
Article 7	: Exceptional rules for protection under two forms	Art. 34 ^A
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Article 9	: Botanical genera and species which must or may be protected	Art. 4
Article 10	: Rights Protected; Scope of protection	Art. 5
Article 11	: Conditions required for protection	Art. 6
Article 12	: Transitional limitation of the requirement of novelty	Art. 35
Article 13	: Official examination of varieties; Provisional protection	Art. 7
Article 14	: Period of protection	Art. 8
Article 15	: Restrictions in the Exercise of rights protected	Art. 9
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Article 17 : 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	Art. 11
Article 18 : Right of priority	Art. 12
Article 19 : Denomination of varieties of plants	Art. 13
Article 20 : Exceptional rules for the use of denominations consisting solely of figures	Art. 36 ^A
Article 21 : Transitional rules concerning the relationship between variety denominations and trade marks	Art. 36
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PART III

INSTITUTIONAL PROVISIONS

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PART IV

MISCELLANEOUS PROVISIONS

Article 34 : Implementation of the Convention on the Domestic Level; Contracts on the joint utilisation of examination services	Art. 30
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Article 36 : Preservation of existing rights	Art. 37
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Article 38 : Revision of the Convention	Art. 27
Article 39 : <u>Signature, Ratification, Acceptance, Approval, Accession</u>	Artt. 31 en 32
Article 40 : Communications concerning the genera and species protected; Information to be published	Art. 33
Article 41 : <u>Entry into force</u>	Art. 32 A (1)
Article 42 : <u>Transitional rules</u>	Art. 32 B
Article 43 : <u>Territorial field of application</u>	Art. 34
Article 44 : Reservations	Art. 39
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Article 46 : Languages, <u>Depositary</u>	Art. 41

[Annex III follows]

ANNEX III

PART I

GENERAL PROVISIONS

- Article 1. (DC/3, art. 1 (1))

" Purpose of the Convention"

The purpose of this Convention is to recognise and to ensure to the breeder of a new plant variety or to his successor in title a right under the conditions hereinafter defined.

Amendments to the Draft International Convention for the protection of new varieties of plants as contained in Document DC/3, proposed by the Netherlands

- Article 2. (new)

"Definitions"

For the purpose of this Convention, unless the context otherwise requires:

- a) "the Union" means the Union for the Protection of New Varieties of Plants (UPOV);
- b) "the breeder" means the breeder of a new plant variety or his successor in title;
- c) "variety" means any assemblage of plants which is capable of cultivation and which satisfies the requirements of subparagraphs (c) and (d) of paragraph (1) of Article 11;
- d) "the Convention of 1961 as amended by the Additional Act of 1972" means the International Convention for the Protection of New Varieties of Plants of 2 December 1961, as amended by the Additional Act of 10 November, 1972, Amending the International Convention for the Protection of New Varieties of Plants.
- e) "member State of the Union" means a State party to this Convention.
- f) "special authority" means an authority set up or assigned in accordance with Article 34.

- Article 3. (DC/3, art. 1 (2) and art. 15)

"Constitution of the Union"

- (1) The States parties to this Convention constitute the Union.
- (2) The permanent organs of the Union shall be:
 - (a) the Council, and
 - (b) the Secretariat General, entitled the Office of the Union.

- Article 4. (DC/3, art. 23^A)

"Legal status"

- (1) The Union shall have legal personality.
- (2) The Union shall enjoy on the territory of each member State of the Union, in conformity with the laws of that State, such legal capacity as may be necessary for the fulfilment of the Union's objectives and for the exercise of its functions.
- (3) The Secretary-General /Or: The President of the Council/ shall represent the Union.

- Article 5. (DC/3, art. 1 (3))

"Seat"

(no change).

PART II

PROVISIONS RELATING TO THE PROTECTION OF VARIETIES.

- Article 6 t/m 22

(see for the corresponding Articles of Doc DC/3: Annex I).

PART III

INSTITUTIONAL PROVISIONS

- Article 23. (DC/3, art. 16)

"Composition of the Council, votes".

- (1) (no change)
- (2) (no change)
- (3) one vote in the Council, subject to the application of the provision of Article 33 (5) (DC/3, art. 26 (5))

- Article 24. (DC/3, art. 17)

"Observers in meetings of the Council"

- 1) States not members of the Union which have signed but not yet expressed their consent to be bound by this Act in accordance with Article 39 (1) (a) and (3), or States which have expressed their consent to be bound but for which this Act has not yet entered into force, shall be invited as observers to meetings of the Council.
- 2) (no change).

- Article 25. (DC/3, art. 18)

"Officers of the Council"

- (1) (no change)
(new second subsection)
The other Vice-Presidents shall in the order of their election take the place of the President if the latter and the first Vice-President are unable to officiate.
- (2) A Vice-President acting as President shall have the same powers and duties as the President.
- (3) - The President (and the Vice-Presidents) shall hold office for three years.

- Article 26. (DC/3, art. 19)

"Meetings of the Council"
(no change)

- Article 27. (DC/3, art. 20)

"Rules of procedure..... etc."
(no change)

- Article 28. (DC/3, art. 21)

"Tasks of the Council"
(no change)

- Article 29. (DC/3, art. 22)

"Voting rules".

- (1) DC/3, art. 22, no change, except replace twice the word "member" by the word "member State of the Union".

- Article 30. (DC/3, art. 23)

"Tasks of the office.... etc."
(no change)

- Article 31. (DC/3, art. 28)

"languages to be used..... etc."

- (1) (no change)
- (2) omit the words "... and of revision conferences..."
(see below Article 38 (3))
- (3) (no change)

- Article 32. (DC/3, art. 24)

"Auditing of accounts"
(no change)

- Article 33. (DC/3, art. 26)

"Finances"
(no change)

PART IV

MISCELLANEOUS PROVISIONS

- Article 34. (DC/3, art. 30)

"implementation..... etc."

- (1) (a) ensure to nationals of any member State of the Union the same appropriate legal remedies for the effective defence of the rights provided for in this Convention as to its own nationals, provided that the conditions and formalities imposed upon nationals are complied with.

- Article 35. (DC/3, art. 29)

"special Agreements...."

(no change)

- Article 36. (DC/3, art. 37)

"Preservation of existing rights"

(no change)

- Article 37. (DC/3, art. 38)

"Settlement of disputes"

- (1) (no change) "
(2) After the words..at the request of all the parties concerned.. is added" in accordance with the following procedure

(a) Each disputing party, whether constituted by one or more Parties to this Convention, shall designate one arbitrator.

These two arbitrators shall propose a Chairman who shall be a national of a State not party to the dispute, and who shall be designated by common agreement by the disputing parties. The arbitrators shall be designated within two months and the Chairman within three months from the date of submission to arbitration of the dispute.

If these time limits are not met, and the parties to the dispute have not agreed on another designation procedure, the disputing parties may request the President of the Council or one of the Vice-Presidents, in accordance with the provision of Article 25 (1), who shall be a national of a State not party to the dispute, to make the necessary designations.

(b) The arbitrators shall establish their own arbitration procedure.

Decisions shall be taken by a majority of the arbitrators.

The decision of the arbitration tribunal shall be binding on the parties to the dispute.

(c) Each party shall bear the cost of its representation before the arbitration tribunal as well as the cost of its own arbitrator. The costs of the Chairman of the tribunal and any other costs involved in the arbitration shall be shared equally between the parties in the dispute.

(d) The arbitration tribunal shall decide on the basis of respect for law.

(e) The foregoing provision shall not prejudice the power of the tribunal to decide the dispute ex aequo et bono if the parties agree thereto.

(f) Notwithstanding the foregoing provisions, the parties may agree to submit the dispute to arbitration in accordance with another arrangement operating between them.

- Article 38. (DC/3, art. 27)

"Revision of the Convention"

- (1) (no change)
- (2) (no change)
- (3) The provisions of Article 31 shall apply to the languages to be used by the Conference.

- Article 39. (DC/3, art. 31 and art. 32)

"Signature, Ratification, Acceptance, Approval, Accession"

- (1) This Act shall remain open for signature by any member State of the Union and any other State, which was represented in the Diplomatic Conference adopting this Act, at the Headquarters of the Union at Geneva from until..... and shall thereafter remain open for accession.
- (2) Any State shall express its consent to be bound by this Act by:
 - a) signature without reservation as to ratification, acceptance or approval;
 - b) the deposit of its instrument of ratification, acceptance or approval if it has signed this Act subject to ratification, acceptance or approval; or
 - c) the deposit of its instrument of accession, subject to the provision of paragraph 4 of this Article.
- (3) The instruments of ratification, acceptance, approval or accession shall be deposited with the Secretary-General who shall be the Depositary.
- (4) Text of Act 32 (3), Doc DC/3.

- Article 40. (DC/3, art. 33)

"Communications.....etc."

- (1) When expressing its consent to be bound by this Act, each State which is not a member State of the Union shall notify the Secretary-General.....etc.
- (2) (no change).

- Article 41. (DC/3, art. 32A)

"Entry into force"

- (1) (no change)
 - (i) five States have expressed their consent to be bound by this Act, in accordance with Article 39.
 - (ii) not less than three of the said States are parties to the Convention of 1961 as amended by the Additional Act of 1972.
- (2) In respect of any State expressing its consent to be bound by this Act after the conditions referred to in paragraph (1) etc.
- (3) After the entry into force of this Act in accordance with paragraph (1), no State may accede etc.

- Article 42. (DC/3, art. 32B)

"Transitional rules"

- (1) (no change)
- (2)
 - (i) Any State which becomes a member State of the Union, in accordance with Article 39 ("the former State") shall, in its relations with any member State of the Union not bound by this Act ("the latter State"), provisionally apply the Convention of 1961 as amended by the Additional Act of 1972, until the present Act enters into force also with respect to the latter State.
 - (ii) However, the former State may, when expressing its consent to be bound by this Act, in accordance with Article 39, or at any later date by written notification addressed to the Secretary-General, declare that it shall apply this Act in its relations with any such latter State, whereas the latter State shall, in its relations with the former State, continue to apply the Convention of 1961 as amended by the Additional Act of 1972, until the entry into force of this Act also with respect to the latter State.
- (3) Notwithstanding the foregoing provisions, after the entry into force of this Act the functioning of the Union shall be governed by the provisions of this Act.

- Article 43. (DC/3, art. 34)

"Territorial field of application"

- (1) Any State may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, or at any later date by written notification addressed to the Secretary-General, declare to which territory or territories this Convention shall apply.
- (2) Any notification made in pursuance of the preceding paragraph may be withdrawn in accordance with the provisions laid down in the following paragraph.
- 3) (a) Any notification made under paragraph (1) shall take effect on the same date as the signature without reservation as to ratification or the depositing of the instruments of ratification, acceptance, approval or accession, and any declaration given at any later date shall take effect three months after its notification by the Secretary-General.
- (b) DC/3, art. 34 (2) (b)
(no change)

- Article 44. (DC/3, art. 39)

"Reservations"

This Convention shall not be subject to any reservation.

- Article 45. (DC/3, art. 40)

"Duration and denunciation..... etc."

(no change)

- Article 46. (DC/3, art. 41)

"Languages, Depositary"

- (1) (no change)
- (2) "two" becomes "one"
- (3) "texts" becomes "translations"
- (4) (no change)
- (5) (no change)

titel: International Convention for the protection of new varieties of plants of December 2, 1961, as amended at Geneva on November 10, 1972, and as revised at Geneva on October 7, 1978.

Preamble:

THE CONTRACTING PARTIES,

Considering that the International Convention for the Protection of New Varieties of Plants of December 2, 1961 as amended by the Additional Act of November 10, 1972, has proved a valuable instrument for international cooperation in the field of the protection of the rights of breeders.

Reaffirming their statements contained in the Preamble to that Convention to the effect that

- (i) they are convinced of the importance attaching to the protection of new varieties of plants not only for the development of agriculture in their territory but also for safeguarding the interests of breeders,
- (ii) they are conscious of the special problems arising from the recognition and protection of the right of the creator in this field and particularly of the limitations that the requirements of the public interest may impose on the free exercise of such a right,
- (iii) they deem it highly desirable that these problems, to which very many States rightly attach importance, should be resolved by each of them in accordance with uniform and clearly defined principles.

Considering that in recent years the idea of protecting the rights of breeders has gained a strong foothold in many States which have not yet acceded to that Convention.

Having regard to the fact that for some of these States minor amendments to that Convention are necessary before they will be able to accept it.

Considering that the necessary amendments do not in general affect the main principles of that Convention.

Anxious to reach an agreement on these principles to which other States having the same interests may be able to adhere.

Considering, furthermore, that some provisions regulating the functioning of the Union created by that Convention should be updated.

Considering that these objectives may be best achieved by the revision of the International Convention for the Protection of New Varieties of Plants of December 2, 1961, as amended by the Additional Act of November 10, 1972,

Have agreed as follows: