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

GENEVA

**INTERNATIONAL CONVENTION FOR  
THE PROTECTION OF NEW VARIETIES OF PLANTS  
OF DECEMBER 2, 1961,  
AS REVISED AT GENEVA ON NOVEMBER 10, 1972, AND ON OCTOBER 23, 1978  
("REVISED TEXT OF THE CONVENTION")**

Documents Issued After the Diplomatic Conference held in Geneva from October 9 to 23, 1978

**SUMMARY OF THE MAIN AMENDMENTS TO THE CONVENTION  
INCORPORATED IN THE REVISED TEXT OF 1978**Memorandum prepared by the Office of the Union

## INTRODUCTION

1. A meeting of member and non-member States of the International Union for the Protection of New Varieties of Plants (UPOV) was held in Geneva from October 21 to 23, 1974, and was also attended by representatives of an intergovernmental organization and several international non-governmental organizations. The purpose of that meeting was to provide information on the aims and the work of UPOV and to discuss the conditions which might need to be fulfilled to make UPOV attractive to States which did not yet belong to it. A permanent record of what was said at that meeting was printed in 1975 in UPOV publication No. 330.
2. As a result of the discussion, the Council of UPOV established "the Committee of Experts on the Interpretation and Revision of the Convention," which held six sessions in 1975, 1976 and 1977. That Committee prepared a draft revised text of the International Convention for the Protection of New Varieties of Plants, comprising certain unchanged provisions of the existing Convention of December 2, 1961, as amended by the Additional Act of November 10, 1972 (hereinafter referred to as "the present text of the Convention" or "the present text"), and certain provisions where changes were proposed. This new text, which was to serve as the basis for the deliberations of the Diplomatic Conference to be held in Geneva from October 9 to 23, 1978, was distributed as document DC/3 on January 30, 1978, to all member States of the Union, to some 148 non-member States and to a number of intergovernmental and international non-governmental organizations.
3. On October 23, 1978, the Diplomatic Conference on the Revision of the International Convention for the Protection of New Varieties of Plants (hereinafter referred to as "the Diplomatic Conference") unanimously adopted the Revised Text of the Convention (hereinafter referred to as "the Revised Text"). The Revised Text was laid open for signature on the same date and was immediately signed by nine of the present ten member States and by the United States of America. The tenth member State signed the Revised Text on December 6, 1978.

4. The amendments incorporated in the Revised Text can conveniently be summarized under three headings:

- (a) amendments to facilitate the joining of the Union by further States;
- (b) amendments to the treaty law and administrative provisions of the Convention;
- (c) other amendments (principally of a technical and drafting nature).

#### AMENDMENTS TO FACILITATE THE JOINING OF THE UNION BY FURTHER STATES

##### Preamble

5. The desire of the Diplomatic Conference to provide an opportunity for wider membership of the Union is clearly demonstrated in the Preamble, which states: "The Contracting Parties, ... Considering that the idea of protecting the rights of breeders has gained general acceptance in many States which have not yet acceded to the Convention, [and] Considering that certain amendments in the Convention are necessary in order to facilitate the joining of the Union by these States, ... Have agreed [upon the Revised Text]."

##### Article 4: Botanical Genera and Species Which Must or May be Protected

6. When the present text of the Convention was drafted, in 1961, a list of important genera and species was established in the Annex to the Convention and member States were obliged to apply the Convention progressively to those genera and species. The genera and species listed are of particular significance in the European context and were fixed mainly with regard to the situation prevailing in countries of the temperate climatic zone. The genera and species listed are less relevant in other parts of the world and a considerable number of non-European States would find it difficult to meet the obligation to apply the Convention progressively to all of them. If this obligation were maintained, it would constitute one of the major obstacles to the adherence of several States to UPOV. Since it was not possible to agree on an obligatory list of genera and species which would be suitable for all countries, a practical solution was sought in abandoning the concept completely. That is precisely what the new wording of Article 4 does.

7. Experience in the present member States has shown that, normally, States are able to apply the Convention to a far greater number of genera and species than the minimum required in the present text. For that reason, the minimum number of genera or species to be protected successively within a prescribed period has been increased to 24. Because some States may find it difficult to apply protection to so many genera and species, provision has been made in Article 4(4) of the Revised Text for the Council of UPOV to grant exemption in special cases, reducing, for the purposes of such States, the said minimum numbers of genera or species to be protected or extending the periods within which such States would have to apply the Convention to them. The latter form of exemption may also be granted under the provisions of Article 4(5) where a member State encounters special difficulties in fulfilling its obligations to apply the Convention to the said minimum numbers of genera or species.

8. The wording of Article 4(3) in the Revised Text would leave each member State entirely free to choose the genera and species which it would make eligible for protection in order to fulfill its obligation under the Convention in this respect. The Diplomatic Conference, "conscious of the fact that it is in the interest of both of agriculture in general and of breeders in particular that genera and species of economic importance be eligible for protection in each State," adopted a Recommendation on Article 4 in which each member State of the Union is encouraged to "use its best endeavours to ensure that the genera and species eligible for protection under its national law comprise as far as possible those genera and species which are of major economic importance in that State." The Recommendation also encourages each State intending to become a member of the Union to "choose the genera or species to which, as a minimum, the Convention as revised in 1978 has to be applied at the time of its entry into force in the territory of that State from genera and species of major economic importance in that State."

Article 2: Forms of Protection

9. Article 2(1) specifies that, where the national law of a member State of the Union admits of protection both under special titles of protection and under patents, protection for one and the same genus or species may be granted only in one of these two possible forms of protection, that is to say, by the grant either of a special title of protection or of a patent. The wording of this provision is the same as in the present text of the Convention. The Diplomatic Conference recognized, however, that some States interested in joining the Union might find it difficult to change existing laws under which, for historical reasons, protection might occasionally be granted in both the above-mentioned forms for varieties of the same genus or species. The Diplomatic Conference therefore adopted a clause providing for an exception whereby such States may continue their established practice (see Article 37(1) of the Revised Text). Such States may derogate from certain other provisions of the Convention (see Article 37(2) of the Revised Text).

10. Article 2(2) contains an entirely new provision which makes it clear that a member State may apply the Convention to only some of the varieties of a genus or species. Such varieties can be defined on the basis of the manner of reproduction or multiplication, for instance: sexually reproduced varieties and vegetatively propagated varieties; pure lines, hybrids, open-pollinated varieties, apomictic varieties, etc. They may also be defined by the intended use of the varieties, for instance: forest varieties, ornamental varieties, fruiting varieties, rootstocks, etc. This new paragraph leaves member States free to decide which type or types of varieties can be protected. To take a practical example, some States exclude hybrid varieties from protection because the breeders' interests are considered to be sufficiently safeguarded by the de jure protection or de facto possession of the components. Article 4(3)(c) specifies that such a limitation of protection does not prevent the genus or species in question from being counted as a complete genus or species in relation to the minimum numbers of genera or species to which a member State has to apply the Convention according to Article 4(3)(a) and (b).

Article 6(1)(b): Conditions Required for Protection - Prior Commercialization

11. The sole novelty requirements, as laid down in Article 6 of the present text, is that "at the time of the application for protection in a member State of the Union, the new variety must not have been offered for sale or marketed, with the agreement of the breeder or his successor in title, in the territory of that State, or for longer than four years in the territory of any other State."

12. In at least one non-member State of the Union--the United States of America--breeders are granted a period of one year, expiring on the date of the filing of the application for protection in that country, during which they can use and sell a variety without thereby causing prejudice to their right to obtain protection for it. It is understood that other States might be interested in following that example. The period of one year, called "period of grace," is favorable to breeders in so far as it allows them a certain time in which to test the economic value of a variety, and its suitability for being protected, in the country in question, before taking a decision on whether it is worth applying for protection there. The period of grace is a well-established tradition of many patent laws and some non-member States would encounter insurmountable difficulties in acceding to the Convention if it did not permit them to maintain--or to introduce--such a period. The Diplomatic Conference therefore included a provision in Article 6(1)(b) of the Revised Text which allows member States to grant a period of grace.

Article 13: Variety Denomination

13. The major changes in Article 13 are set out in paragraphs 14 to 16 below.

14. Article 13(2) now provides for an exception to the requirement that a denomination "may not consist solely of figures" by adding "except where this is an established practice for designating varieties." In a number of States which are interested in joining the Union, breeders are allowed to designate their varieties by a series of figures. Such denominations have become customary in those States, at least with respect to certain genera or species, and a continuation of the requirement set down in the present text would probably have constituted, for those States, an insurmountable obstacle to their joining the Union.

15. The original text of Article 13 contains a number of specific references to the relationship between variety denominations and trademarks. The requirements of the original text have given rise to procedural difficulties for authorities in member States of the Union and may also have prevented breeders from obtaining trademark protection in States in which they are unable to enjoy plant variety protection because such protection is simply not--yet--available. With the exception of Article 13(8), which relates to the association of "a trade mark, trade name or other similar indication with a registered variety denomination," the new wording makes no specific reference to the relationship between variety denominations and trademarks, thus leaving the question to be regulated by member States under their domestic legislation. The Revised Text, however, now expressly stipulates that member States will be obliged to ensure that no rights in the designation registered as the denomination of the variety "shall hamper the free use of the denomination in connection with the variety, even after the expiration of the protection" (Article 13(1)). Prior rights of third parties are not affected; where they would stand in the way of the use of a variety denomination, the breeder will be asked to submit another denomination.

16. Article 36 of the present text, which provides for transitional rules concerning the relationship between variety denominations and trademarks, will become superfluous and has not been included in the Revised Text.

#### Article 42: Languages

17. The Convention of 1961 and the Additional Act of 1972 were signed in one authentic text in the French language, while official translations were provided for in the Dutch, English, German, Italian and Spanish languages (see Article 41(1) and (3) of the Convention and Article VIII (1) and (2) of the Additional Act). According to Article 42(1) and (3) of the Revised Text, that Text is signed in three languages, namely in the French, English and German languages, the French text prevailing, however, should there be "any discrepancy among the various texts"; official texts are also to be established in the Arabic and Japanese languages in addition to the Dutch, Italian and Spanish languages, while, of course, the English and German languages have now had to be deleted from the list of those languages in which official texts have to be established.

### AMENDMENTS TO THE TREATY LAW AND ADMINISTRATIVE PROVISIONS OF THE CONVENTION

#### Article 15: Organs of the Union

18. In Article 15 of the Revised Text it is no longer provided that the Office of UPOV should be under the high authority of the Swiss Confederation. To that effect, the last sentence of Article 15 of the present text of the Convention was deleted by the Diplomatic Conference as were the references to the supervisory role of the Government of the Swiss Confederation in other Articles. That supervisory role was indeed a mere consequence of the fact that, according to Article 25 of the present text of the Convention, technical and administrative cooperation was established between UPOV and the United International Bureaux for the Protection of Intellectual Property (BIRPI), the predecessor of the World Intellectual Property Organization (WIPO), and that BIRPI was under the supervision of the Government of the Swiss Confederation. In 1967, however, with the adoption of the Convention Establishing the World Intellectual Property Organization (WIPO), BIRPI was for all practical purposes replaced by WIPO. The Government of the Swiss Confederation has no supervisory functions in relation to WIPO and it seemed logical to provide for the termination of this supervisory role in relation to UPOV as well, especially as UPOV has had since its creation an organ (its Council) which can effectively control the Union.

19. Consequential amendments are incorporated in Articles 20, 21, 23, 24, 32, 35 (33 in the present text), 36 (34 in the present text) and 41 (40 in the present text). Article 25 of the present text is omitted from the Revised Text.

#### Article 24: Legal Status

20. In view of its decision that UPOV should no longer be under the supervision of the Government of the Swiss Confederation, the Diplomatic Conference decided that it would be useful to insert provisions expressly mentioning UPOV's legal status. These new provisions are found in Article 24 of the Revised Text. Paragraph (1) specifies that the Union possesses legal personality within the meaning of international public law, while paragraph (2) confers on the Union legal capacity under

the national laws of its member States as far as is necessary "for the fulfilment of the objectives of the Union and for the exercise of its functions." Paragraph (3) provides for the conclusion of a headquarters agreement with the Swiss Confederation.

21. The deletion of Article 25 of the present text regarding cooperation with the Unions administered by BIRPI does not mean, as the Council of UPOV expressly stated in its eleventh ordinary session in December 1977, that the Union does not wish to preserve the existing arrangements with WIPO; on the contrary, it is planned to continue the present cooperation under an agreement to be negotiated and concluded between UPOV and WIPO once the Revised Text enters into force.

#### Article 26: Finances

22. A more flexible system for fixing the annual contributions of member States of the Union has been introduced in this Article of the Revised Text. The present contribution system, which offers member States the choice of a number of classes each comprising a fixed number of contribution units, operates within a relatively small range from the lowest contribution to the highest (one to five) and only in exceptional circumstances can the lowest contribution be reduced to one-tenth of the highest. The new wording, which abandons the system of classes and provides only for contribution units--the minimum being one-fifth of one unit--should prove to be more flexible and equitable, allowing each State more easily to choose the appropriate level for its contribution. This change should facilitate the joining of the Union by further States.

#### Article 32: Ratification, Acceptance or Approval; Accession

23. Article 32(2) provides that "instruments of ratification, acceptance, approval or accession shall be deposited with the Secretary-General" of UPOV.

24. This provision, which follows contemporary practice as regards treaties concluded under the aegis of an intergovernmental organization, introduces a highly practical solution compared with the complex situation prevailing in the original text of the Convention of 1961 and in the Additional Act of 1972 under which the comparable instruments are to be deposited in some cases with the Government of the French Republic and in other cases with the Government of the Swiss Confederation.

25. Similar amendments have been introduced elsewhere in the Revised Text in respect of other depositary functions. Those functions also have been entrusted to the Secretary-General of the Union.

26. The possibility of expressing consent to be bound by the Revised Text also by depositing instruments of acceptance or approval has been introduced in order to permit States to avail themselves of that form of instrument which is most appropriate under their Constitution.

27. Article 32(3) of the Revised Text amends the present procedure for accession to the Convention by States which are not members of the Union and which have not signed the Revised Text. Under the present text of the Convention, a State which has not signed that text may apply for accession to the Convention and become a member of UPOV only if the Council considers by a qualified majority that the conditions for accession to the Convention by that State are met. This special procedure for admitting States to accession is amended in the Revised Text in such a way that States which have not signed that Text have to ask the Council for advice in respect of their legislation before depositing their instruments of accession and can deposit such instruments only if the Council's advice is positive. In view of the very special requirements of the Convention regarding national laws, such procedure seemed to be indispensable.

#### Article 34: Relations Between States Bound by Different Texts

28. This new Article achieves two things: first, it regulates the relations between States which became members of the Union by ratifying or acceding to the present text ("old members") where some of them are already bound by the Revised Text but the others are not yet bound by it; second, it allows the establishment of treaty relations between old members not yet bound by the Revised Text and

States which become members of UPOV by ratifying, accepting, approving or acceding to the Revised Text (and the Revised Text only) ("new members").

29. As to the first relationship, the solution is that the present text continues to apply as between any old member already bound by the Revised Text and any old member not (yet) bound by the Revised Text.

30. As to the second relationship, i.e., the relationship between old members not yet bound by the Revised Text and new members, the possibility is offered of creating a relationship. The initiative lies with the old members. If an old member declares that it wishes to create such a relationship, then, such a relationship comes into existence and takes the form of the application:

(i) of the present text by that old member (until it becomes bound by the Revised Text) in its relations with the new members;

(ii) of the Revised Text by the new members in their relations with that old member.

31. All member States, old members and new members, will, however, constitute one Union, that is a single entity from the administrative point of view, with the consequence that there is only one Council, one budget and one set of accounts, and there is not a separate administration for each separate text of the Convention, although the member States are bound by different texts and pay their contributions on the basis of these different texts.

#### OTHER AMENDMENTS

##### Article 3(3): National Treatment; Reciprocity

32. This new paragraph corresponds to the first part of paragraph (4) of Article 4 in the present text, which it replaces. It allows member States to restrict under certain conditions the national treatment principle, embodied in the provisions of paragraphs (1) and (2) of Article 3, submitting the access to protection under the national law, as far as each genus or species is concerned, to the reciprocity rule. The new paragraph differs, however, from the first part of paragraph (4) of Article 4 in the present text in that it refers to any genus or species and not only to those genera or species which are not included in the list annexed to the Convention of 1961. This difference is a necessary consequence of the deletion of that list (see paragraphs 6 to 8 above). The change made will allow member States to restrict access to protection to a larger extent than is admissible under the present text. The Diplomatic Conference decided to add this provision to Article 3 rather than leave it in Article 4, since it authorizes member States to derogate from the first two paragraphs of Article 3 while the present links with Article 4 no longer exist in the Revised Text.

33. The second part of Article 4(4) in the present text of the Convention has been omitted as being superfluous since none of the options mentioned in that part are prevented by the Convention. For similar reasons, the possibility provided for under Article 4(5) of the present text of the Convention has also been omitted.

##### Article 5: Rights Protected; Scope of Protection

34. The first sentence of Article 5(1) has been rearranged to make it clearer that all the three activities specified as requiring prior authorization by the breeder relate equally to the reproductive and vegetative propagating material as such.

35. The Diplomatic Conference considered it desirable to draw greater attention to the possibilities provided for by Article 5(4) to grant "a more extensive right." It adopted a Recommendation to the effect that, "where, in respect of any genus or species, the granting of more extensive rights than those provided for in Article 5(1) is desirable to safeguard the legitimate interests of the breeders, the Contracting States of the said Convention [should] take adequate measures pursuant to Article 5(4)."

##### Article 6(1)(b)(ii): Conditions Required for Protection - Novelty

36. Article 6(1)(b) of the present text of the Convention provides that a variety may have been offered for sale or marketed in a State, other than the State in which an application for protection is filed, for up to a period of four years,

expiring at the filing date of the application, without prejudicing the novelty. Article 6(1)(b)(ii) of the Revised Text extends that period to six years "in the case of vines, forest trees, fruit trees and ornamental trees, including, in each case, their rootstocks," thus taking into account the fact that these plants are usually slow-growing so that more time is needed for judging whether it is worth while to apply for protection for a variety or not. Article 8 of both the present text of the Convention and the Revised Text provides for a longer minimum period of protection for these groups of plants.

37. The last two sentences of Article 6(1)(b) of the Revised Text, which correspond to the first sentence of Article 6(1)(b) in the present text of the Convention, specify that common knowledge (acquired, for instance, by means of publication) of the variety itself shall not affect the right to protection unless such common knowledge has been established by offering the variety for sale or marketing.

38. This provision is different from the traditional patent novelty criteria, and might cause problems in States providing protection for plant varieties in the form of a patent. In order to obviate this difficulty at least for those States falling under the narrow exception of Article 37(1) of the Revised Text (see paragraph 9 above), an exemption is provided in Article 37(2) of that Revised Text.

#### Article 12(3): Right of Priority - Four-Year Period

39. The Diplomatic Conference decided, in view of certain procedural difficulties which were foreseen, to add a sentence to the text of Article 12(3) of the present text of the Convention. This is now the final sentence of Article 12(3) in the Revised Text. This additional sentence allows member States to shorten the four-year period which is normally granted to applicants benefiting from the right of priority for furnishing any "additional documents" (that is, other than the certified copy of the first application) and "material" (that is, a sample of the variety) to the office with which the subsequent application is filed, where the first application has been rejected or withdrawn. In such cases, it is almost certain that the authority with which the first application has been filed would have abandoned all or most documents or material received from the applicant some time after that rejection or withdrawal had taken place. Such abandoning would mean that neither the office with which the subsequent application had been filed nor courts nor private parties in the country of the subsequent application could rely, as a possible source of evidence, on the files and material kept by the office with which the first application had been filed, should the validity of the priority claim be in dispute. Under such circumstances, the office of the subsequent filing should be given a chance to ask for samples of the propagating material immediately, because the sooner the applicant is obliged to furnish them the more likely it is that they will be the same as those which were given to the office with which the first application was filed.

40. In settling the difficulties referred to in the preceding paragraph, the Diplomatic Conference has, at the same time, effectively prevented the situation in which a breeder, in order to construct a priority claim, might file an application in respect of an unfinished variety, even anticipating that it may be rejected in the State of the first application.

#### Article 38: Transitional Limitation of the Requirement of Novelty

41. This Article is intended to protect the interests of a breeder who has started the commercialization of a variety without knowing that such commercialization might destroy the novelty of the variety since he could not know in advance when the provisions of the Convention would be applicable to the genus or species to which that variety belongs. Article 35 of the present text of the Convention makes an exception as to varieties (of recent creation) existing at the date of entry into force of the Convention in respect of the interested State; Article 38 of the Revised Text makes the exception as to varieties (of recent creation) existing at the date on which such State applies for the first time the provisions of the Convention to the genus or species to which the variety in question belongs. That date will be the date of entry into force of the Convention if the genus or species is among those which the State protects when it becomes a member of the Union; it will be a later date if the genus or species is one to which the State extends protection later.



## FINAL REMARKS

42. The above summary by the Office of the Union is not intended to be a complete analysis of all the amendments to the present text of the Convention which are incorporated in the Revised Text. It refers only to those amendments thought to be of a certain general importance. It has especially abstained from indicating drafting improvements adopted in an endeavor to eliminate the danger of inconsistency between the authentic English, French and German versions of the Revised Text.

43. The two Recommendations adopted by the Diplomatic Conference are attached as Annexes to this Memorandum.

[Annexes follow]

DC/PCD/1

ANNEX I

RECOMMENDATION ON ARTICLE 4 ADOPTED BY THE  
DIPLOMATIC CONFERENCE ON  
OCTOBER 23, 1978

The Diplomatic Conference on the Revision of the International Convention for the Protection of New Varieties of Plants, held in 1978,

Having regard to Article 4(2) and (3) of the International Convention for the Protection of New Varieties of Plants of December 2, 1961, as revised at Geneva on November 10, 1972, and on October 23, 1978,

Considering the fact that the Convention of 1961 contains an Annex listing a number of economically important species to which each member State of the International Union for the Protection of New Varieties of Plants had to apply that Convention within certain periods,

Considering further that the Annex has been deleted in the Convention as revised in 1978, thereby giving greater freedom of choice to the member States of the Union and to those States which are intending to become members of the Union to decide which genera and species that Convention is to be applied to,

Conscious of the fact that it is in the interest both of agriculture in general and of breeders in particular that genera and species of economic importance be eligible for protection in each State,

Recommends that each member State of the Union use its best endeavours to ensure that the genera and species eligible for protection under its national law comprise as far as possible those genera and species which are of major economic importance in that State,

Recommends further that each State intending to become a member of the Union choose the genera or species to which, as a minimum, the Convention as revised in 1978 has to be applied at the time of its entry into force in the territory of that State from genera and species of major economic importance in that State.

[Annex II follows]

RECOMMENDATION ON ARTICLE 5 ADOPTED BY THE  
DIPLOMATIC CONCERENCE ON  
OCTOBER 23, 1978

The Diplomatic Conference on the Revision of the International Convention for the Protection of New Varieties of Plants, held in 1978,

Having regard to Article 5(1) and (4) of the International Convention for the Protection of New Varieties of Plants of December 2, 1961, as revised at Geneva on November 10, 1972, and on October 23, 1978,

Conscious of the fact that the scope of the protection laid down in Article 5(1) may create special problems with regard to certain genera and species,

Considering it of great importance that breeders be enabled effectively to safeguard their interests,

Recognising at the same time that an equitable balance must be struck between the interests of breeders and those of users of new varieties,

Recommends that, where, in respect of any genus or species, the granting of more extensive rights than those provided for in Article 5(1) is desirable to safeguard the legitimate interests of the breeders, the Contracting States of the said Convention take adequate measures, pursuant to Article 5(4).

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