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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 CONVENTION AS REVISED

Memorandum prepared by the Office of the Union

1. The International Union for the Protection of New Varieties of Plants--hereinafter referred to in abbreviated form as "UPOV" or "the Union"--is an inter-governmental organization which became operational in 1969. It was founded by a multilateral treaty, the International Convention for the Protection of New Varieties of Plants, which was signed at Paris on December 2, 1961. At present (March 1979), the Union has ten member States. The seat of the Union is Geneva, where the Secretariat--also called the "Office"--of the Union is located. The highest organ of the Union is its Council, composed of representatives of the member States. According to an agreement between the Union and the World Intellectual Property Organization (WIPO; a specialized agency of the United Nations), the Secretary-General of the Union is the same person as the Director General of WIPO.

2. On October 23, 1978, a Diplomatic Conference in which the representatives of all member States and twenty-seven non-member States participated and which was attended by observers from three intergovernmental organizations and six international non-governmental organizations adopted the revised text of the above-mentioned Convention. This revised text, signed so far (March 1979) by eleven States, is entitled "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." It is hereinafter referred to as "the Convention."* The Convention is open for signature until October 31, 1979, by those States which participated in the Diplomatic Conference (Article 31). Signature will entitle them to ratify, accept or approve the Convention (Article 32(1)(a)). States other than those which are entitled to sign the Convention and States entitled to sign but not making use of that right may accede to the Convention at any time by depositing an instrument of accession (Article 32(1)(b)). Before doing so, they must, however, obtain, upon seeking the advice of the Council of the Union, a positive decision in respect of the conformity of their laws with the provisions of the Convention (Article 32(3)).

* Articles cited in this document are those of the Convention as revised.

3. Mainly for the benefit of States which might consider acceding to the Convention--but also for those States which are examining the possibility of still signing the Convention--efforts have been made in the following paragraphs to give a fairly concise summary of the main contents of the Convention. It is stressed that a complete and accurate picture of the contents of the Convention can be gained only from the text itself.

AIMS OF THE CONVENTION

4. Member States of the Union undertake to grant a title of protection to breeders of new varieties of plants. The title confers upon its holder what is called the "plant breeder's right." Such titles are granted for the promotion of agriculture, horticulture and forestry: they should be an incentive to the creation of new plant varieties. (Preamble; Article 1(1))

BENEFICIARIES OF PROTECTION

5. Plant breeders' rights are granted to the breeder of a new plant variety or to his successor in title. Both are hereinafter referred to as "the breeder." (Article 1(1))

SCOPE OF PROTECTION

6. Any plant breeder's right granted by a member State must have, at least, the effect that the prior authorization of the breeder is required for three activities concerning seed or other propagating material, as such, of the variety, namely:

- (i) production for purposes of commercial marketing,
- (ii) offering for sale, and
- (iii) marketing. (Article 5(1))

7. The authorization of the breeder is also required when ornamental plants or parts thereof, normally marketed for purposes other than propagation, are used commercially as propagating material in the production of ornamental plants or cut flowers (Article 5(1), last sentence). The same applies when, in the production of another variety, the repeated use of the variety is necessary, as in the case of certain hybrids (Article 5(3), second sentence).

8. On the other hand, the authorization of the breeder may not be required for the utilization of the variety as a source for the creation of other varieties or for the marketing of such other varieties. The Convention thus does not stand in the way of the development of improved varieties through the use of material of a protected variety. Needless to say, it also does not hamper research. (Article 5(3) first sentence)

9. The commercially marketed, or final, product (the grain for milling, the vegetable to be sold for consumption purposes, cut flowers, etc.) need not be covered--but may be covered (e.g., in the case of cut flowers)--by the protection afforded under national law (Article 5(4)).

FIELD OF APPLICATION OF THE CONVENTION

10. There is no limit to the botanical genera or species to which the Convention may be applied (Article 4(1)). It should in fact be progressively applied to the largest possible number of botanical genera and species (Article 4(2)). On the other hand, any member State may start by protecting a fairly small number of genera or species, namely, five. But member States are obliged to increase the number of genera or species eligible for protection within certain periods which are enumerated in Article 4(3)(b). The highest number of genera or species to which the Convention obliges a member State to apply the Convention is 24. That number must be reached within eight years after the entry into force of the Convention for the member State concerned. A member State may limit the application of the Convention within a genus or species to varieties with a particular manner of reproduction or multiplication, or a certain end-use--for instance, to all but hybrid varieties or to ornamental varieties of the genus or species--in which case, the genus or species is still considered one genus or species as regards the obligation to apply the Convention to certain minimum numbers of genera or species. (Article 2(2), Article 4(3)(c))

11. Since some States in which special economic or ecological conditions prevail may find it difficult to apply the Convention to the minimum numbers referred to in the preceding paragraph, which for other States are quite modest, the Council of the Union has been authorized to reduce these minimum numbers or to extend the periods within which the Convention has to be applied to those minimum numbers or both. The Council's decision must be taken before the Convention becomes binding for such State, more precisely, in the case of a State intending to accede to the Convention, before the deposit of its instrument of accession, in the case of a signatory State, before the deposit of its instrument of ratification, acceptance or approval. Later on, when a State has already become a member of the Union, the Council may, if the State encounters special difficulties, extend the said periods but it may not reduce the minimum number. (Article 4(4) and (5))

NATIONAL TREATMENT; RECIPROCITY

12. The basic principle of the Convention is the right known as "national treatment": each member State must, as far as the recognition and protection of plant breeders' rights are concerned, afford to the nationals of all other member States, to persons residing in other member States and to legal persons having their registered office in other member States, the same treatment as its laws provide for its own nationals; naturally, the conditions and formalities prescribed by the said laws must be complied with (Article 3(1) and (2)). The Convention provides, however, for the possibility of derogating from this principle in one respect, namely, where access to protection is concerned. Here, a member State may limit protection to nationals, residents or legal persons of those other member States which protect the same genus or species.

CONDITIONS FOR GRANTING PLANT BREEDERS' RIGHTS AND FOR THEIR VALIDITY

13. In its efforts to harmonize protection, the Convention lists the conditions which must be fulfilled before a plant breeder's right may be granted (Article 6(1)). On the other hand, it also stipulates that, where those conditions are fulfilled, the title must be granted and must not be made dependent on the fulfillment of any additional condition, except the compliance with formalities including the obligation to pay prescribed fees (Article 6(2)).

14. The said conditions are the following: the variety must be distinct and new, it must be homogeneous, it must be stable and it must have been given a variety denomination as provided in Article 13.

15. The meanings of the terms "distinct" and "new" are indicated in Article 6(1)(a) and (b). Roughly, it can be said that a variety is distinct if it is distinguishable by one or more important characteristics from any other variety whose existence is a matter of common knowledge at the date of application for protection. It is new when at that date it has not been offered for sale or marketed in the territory of the State in which the application for its protection is filed (unless that State has made use of the option to grant a so-called "period of grace," which means that the variety may already have been offered for sale or marketed for up to one year when protection is applied for), and it must not have been offered for sale or marketed for longer than four years--six years in the case of some plants--in any other State. The novelty of a variety is not affected by the fact that the variety itself was already a matter of common knowledge by other means, nor do trials of the variety affect the right to protection if they do not involve offering for sale or marketing.

16. The terms "homogeneous" and "stable" are not defined in great detail in the Convention since they are considered to be self-explanatory. As to homogeneity, the Convention merely states that a variety must be homogeneous in relation to the particular features of its reproduction or propagation. As to stability, the Convention states that the variety must be stable in its essential characteristics, namely, that it must remain true to its description either after repeated reproduction or propagation or at the end of each particular cycle of reproduction or multiplication defined by the breeder. (Article 6(1)(c) and (d))

17. In addition to the option to grant the period of grace already mentioned, two further exceptional rules are contained in the Convention as far as novelty is concerned. Wherever a State applies the Convention for the first time to a genus or species, it may derogate from the normal novelty rules, which means that it may treat varieties as if they were new despite the fact that they have already been offered for sale or marketed in that State

within certain periods (Article 38). Another derogation has been provided for a special case, namely, the case where a plant breeder's right is to be granted under patent legislation in a member State which provides for protection for the same genus or species both in the form of a patent and in the form of a special title of protection (see paragraph 26 below). In such a case the patentability criteria (which include the novelty criteria) of the patent legislation may be applied instead of the rules provided under the Convention (Article 37(2)).

18. The Convention also contains mandatory rules for the nullity and forfeiture of the rights protected which basically correspond to the rules governing the conditions of protection. Here again the Convention states that the right of the breeder shall be declared null and void or shall, or may, become forfeit if certain conditions are not met, but that, on the other hand, it must not be annulled or become forfeit for reasons other than those provided for under the Convention. (Article 10)

VARIETY DENOMINATIONS

19. According to the Convention, protection must not be granted unless a denomination is given to the variety (Article 6(1)(e)). Article 13 of the Convention contains a number of provisions aimed at ensuring that each variety is designated by the same denomination in all member States where protection is granted, that the denomination is used by everybody when propagating material of the variety is offered for sale or marketed in a member State where that variety is protected (even after the expiration of such protection) and that, as far as possible, such use is not hampered by rights of third parties. Article 13 begins by stating that the denomination is destined to be the generic designation of the variety, thereby largely excluding its appropriation for trademark protection. It then requires member States to ensure that no rights in the designation which is registered as a variety denomination will hamper the latter's free use except where prior rights of third parties already exist--in which case, the breeder is normally obliged to submit another denomination for the variety. Thereafter, Article 13 gives some basic conditions which a denomination has to fulfill to be suitable for use as a variety denomination and fixes the procedure for the acceptance of a variety denomination in a member State: the denomination must be submitted by the breeder to the competent authority for the protection of new varieties, which examines whether it fulfills the requirements of the Convention. Article 13 expressly states that the breeder must submit a variety in all the member States under the same denomination and the competent authority of a member State must register a denomination already used for that variety in another member State unless it considers the denomination unsuitable for its State. In the latter case, the breeder may be asked to submit another denomination.

20. As far as trademarks, trade names or similar indications are concerned, Article 13 permits them to be associated with the variety denomination when the variety designated by the latter is offered for sale or marketed, on condition, however, that in such cases the denomination must be easily recognizable.

21. The plant variety protection authorities of member States have to ensure that all such authorities in the other member States are properly informed of matters concerning variety denominations. Any such authority has the right to address observations on any registration of a variety denomination to any authority having given such information.

DURATION OF PROTECTION

22. Plant breeders' rights are granted only for a limited period. The Convention does not fix this period, but provides for a minimum of 15 years, or 18 years in the case of certain groups of plants (Article 8; exception in Article 37(2)).

FREE EXERCISE OF RIGHTS; RESTRICTION

23. Already in its Preamble, the Convention refers to the possible need for member States to impose restrictions on the free exercise of plant breeders' rights in the public interest. Article 9 states, however, that the public interest is the only reason for such restrictions and it requires member States which impose any restriction in order to ensure the widespread distribution of a variety to see to it that the breeder receives equitable remuneration.

INDEPENDENCE OF PROTECTION

24. An important guarantee to the breeder is given in Article 14, which states that a plant breeder's right shall be independent of the measures taken by member States to regulate the production, the certification and the marketing of seeds and propagating material. Where such measures are taken, member States must, as far as possible, avoid hindering the application of the provisions of the Convention.

PRIORITY

25. In Article 12, a right of priority, similar to that of the patent system, of one year is ensured to the breeder. A breeder claiming the priority of an earlier application is granted a further four-year period for furnishing, to the authority of the member State in which the subsequent application is filed, any additional documents and material called for by the laws and regulations of that State unless the first application is rejected or withdrawn when earlier submission may be required. (Article 12(3))

FORMS OF PROTECTION

26. Plant breeders' rights may be granted in the form of a special title or in the form of a patent, but member States must not provide for protection in both forms for one and the same genus or species (Article 2(1)). An exception to the latter interdiction is made where a State provides for such protection prior to October 31, 1979, and declares its intention to continue this practice by notifying the Secretary-General of the Union of that fact when taking the final steps to become a member of the Union: in the case of an acceding State, when depositing its instrument of accession; in the case of a signatory State, either when signing or when ratifying, accepting or approving the Convention (Article 37(1)).

ORGANIZATION OF THE UNION

27. As briefly stated in paragraph 1 of this memorandum, the States parties to the Convention form a Union (Article 1(2)). The Union is an intergovernmental organization which possesses legal personality within the meaning of international public law and, on the territory of each member State, such legal capacity within the meaning of municipal law as is necessary for the fulfillment of its objectives and for the exercise of its functions (Article 24).

28. The highest organ of the Union is the Council and it is chaired by a President, who is elected for three years. At least one Vice-President must also be elected. The Council holds one ordinary session each year and may be convened by its President to extraordinary sessions. The Council has set up subordinate bodies. Needless to say, the Convention contains a list of the tasks of the Council and the fundamental rules on the majorities required for decisions and on the functioning both of the Council and the second permanent organ of UPOV, which is the Office of the Union. The Convention also provides that the Council shall establish its own rules of procedure and the administrative and financial regulations of the Union. (Articles 16 to 23)

FINANCES

29. The expenses of the Union are mainly met by the annual contributions, expressed in "units," of the member States of the Union. Each State is free to choose the number of units according to which it will pay its annual contributions. The number of contribution units is expressed in whole numbers or fractions thereof. The smallest unit which can be chosen is one-fifth of one unit. Member States can change the number of contribution units originally chosen provided they observe certain time limits. The amount of the contribution unit is fixed by the Council each year and it is obtained by dividing the total expenditure to be met from contributions by the total number of units which member States have undertaken to pay. Each member State has to multiply the value of the contribution unit by the number of units chosen by it in order to find out the amount of its annual contribution. (Article 26)

SPECIAL AGREEMENTS

30. Member States may conclude between themselves special agreements for the protection of new varieties of plants. The provisions of such agreements must not contravene the provisions of the Convention. (Article 29)

IMPLEMENTATION OF THE CONVENTION

31. Article 30 states that member States must adopt all measures necessary for the application of the Convention, and three measures are particularly mentioned: providing for appropriate legal remedies for the effective defense of plant breeders' rights, setting up a special authority for the protection of such rights or entrusting an existing authority with that task, ensuring a certain amount of publication of information concerning the protection of plant breeders' rights. In addition, it is understood that States, when taking the final steps to join the Union--for acceding States when depositing their instruments of accession, for signatory States when depositing their instruments of ratification, acceptance or approval--must be in a position to give effect to the provisions of the Convention under their domestic law. As far as such law is concerned, it has already been mentioned that States wishing to accede to the Convention (instead of signing and ratifying, accepting or approving it) have to ask the Council for its advice as to the conformity of that law with the provisions of the Convention, and that they can deposit an instrument of accession only if such advice is positive (Article 32(3)).

FINAL CLAUSES

32. The Convention contains those final clauses which are usual in international conventions of this kind. Depositary functions are entrusted to the Secretary-General of the Union, who is also responsible for a number of notifications and publications. The revised text of the Convention will enter into force one month after it has been ratified, accepted, approved or acceded to by not less than five States of which three were already parties to the original Convention of 1961. For each State subsequently depositing an instrument of ratification, acceptance, approval or accession the revised text will come into force one month after the corresponding deposit. (Article 33)

LANGUAGES

33. The Convention has been signed in three languages, French, English and German, the French text prevailing in case of doubt (Article 42(1)). The said three languages are to be used by the Office and in Council meetings and revision conferences (Article 28(1) and (2)). The Council can decide on the use of further languages (Article 28(3)). Other official texts of the Convention will be established, after consultation with the interested States, in Arabic, Dutch, Italian, Japanese and Spanish (Article 42(3)). The Council can designate further languages in which official texts are to be made (Article 42(3)).

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