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PM/1/2

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# INTERNATIONAL UNION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS

GENEVA

## FIRST PREPARATORY MEETING FOR THE REVISION OF THE UPOV CONVENTION

Geneva, April 23 to 26, 1990

DRAFT REVISED SUBSTANTIVE LAW PROVISIONS  
OF THE CONVENTION

Document prepared by the Office of the Union

### Introduction

00.1. The present document contains a draft of revised substantive law provisions of the Convention based upon the discussions:

(i) in the fourth Meeting with International Organizations held on October 9 and 10, 1989 (the record is reproduced in document IOM/IV/10);

(ii) in the twenty-fifth session of the Administrative and Legal Committee, held from October 11 to 13, 1989 (the draft report is reproduced in document CAJ/XXV/2 Prov.);

(iii) in the fortieth session of the Consultative Committee, held on October 16, 1989, and the twenty-third ordinary session of the Council, held on October 17 and 18, 1989;

(iv) in the session of the joint WIPO and UPOV Committee of Experts on the Interface Between Patent Protection and Plant Breeders' Rights which was held from January 29 to February 2, 1990 (the report is reproduced in document WIPO/UPOV/CE/I/4).

00.2. Concerning the discussions in the Council it should be recalled in particular that the Council confirmed the following decisions of the Consultative Committee: the Office of the Union was asked to present a new draft text to this session based upon the structure which was proposed by the delegation of the Netherlands at the Diplomatic Conference of 1978 but which was not adopted on account of the lateness of the proposal; furthermore it was asked to present a draft of provisions concerning the law of treaties and final provisions to the second--the next--meeting (see paragraph 23 of document CC/XL/5, reproduced in paragraph 139 of document CAJ/XXV/2 Prov.).

00.3. The proposal of the delegation of the Netherlands has been recorded on pages 95 to 100 of the Acts of the Diplomatic Conference of 1978. The Office of the Union suggests the further improvement of its structure by:

(i) regrouping the general provisions of substantive law and in particular by dealing with the present Article 14 (Protection Independent of Measures Regulating Production, Certification and Marketing) immediately after the provisions relating to the forms of protection;

(ii) by placing the Articles containing provisions of substantive law in the order in which they would be involved in the procedure for the grant and exercise of a breeder's right.

00.4. No draft text is provided for Article 6 (Forms of Protection). Guidance is sought on the appropriate content for this Article.

DRAFT REVISED SUBSTANTIVE LAW PROVISIONS  
OF THE CONVENTION

List of the Articles of the Proposed New Text

PART ONE: GENERAL PROVISIONS

- Article 1: Purpose of the Convention
- Article 2: Definitions
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- Article 6: Forms of Protection
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- Article 10: Free Choice of the Contracting Party With Which the First Application is Filed; Applications to Other Contracting Parties; Independence of Breeders' Rights Granted by Different Contracting Parties; Special Arrangements
- Article 11: Conditions Required for the Granting of a Breeder's Right
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- Article 17: Effects of the Breeder's Right
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- Article 19: Variety Denomination

Present [1978] Text

Proposed New Text

PART ONE

GENERAL PROVISIONS

Article 1

Article 1

Purpose of the Convention; ...

Purpose of the Convention

(1) 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 (both hereinafter referred to as "the breeder") a right under the conditions hereinafter defined.

The Contracting Parties undertake to recognise and to ensure to the breeder of a new plant variety a right which conforms with the provisions of this Convention.

(2) [See opposite Article 3 in the new text.]

(3) [See opposite Article 5 in the new text.]

Explanatory Notes

01.1. This Article corresponds:

(i) from a systematic point of view, to paragraph (1) of Article 1 of the present text;

(ii) from a systematic point of view, as well as from the point of view of its content to the first sentence of paragraph (2) of Article 1 of the text put forward in document IOM/IV/2 (hereinafter called "the previous draft").

01.2. The second sentence proposed in the previous draft is potentially part of the subject of Article 6. This separation comes about, on the one hand, as a result of the proposal made by the delegation of the Netherlands at the Diplomatic Conference in 1978, and, on the other hand, it seems suitable from a systematic point of view since Article 1, which fixes the general purpose of the Convention, ought not to refer to exceptions.

Present [1978] Text

Proposed New Text

Article 2

Definitions

[The present text does not contain any corresponding provision.]

For the purposes of this Convention:

(i) "Convention" shall mean the International Convention for the Protection of New Varieties of Plants;

(ii) "breeder's right" shall mean a right recognised and assured to a breeder in accordance with the provisions of the Convention;

[Cont'd]

Explanatory Notes

02.1. General.- There are several reasons for the increase in the number of definitions compared with those in the text of the previous draft:

(i) the proposal made by the delegation of the Netherlands at the 1978 Diplomatic Conference called for the inclusion of a larger number of definitions;

(ii) the discussions in the twenty-fifth session of the Administrative and Legal Committee revealed some interest in defining the concept of an essentially derived variety and of related concepts;

(iii) the opening of the Convention to intergovernmental organizations calls for certain necessary definitions;

(iv) the definitions which are proposed take into account the needs of the administrative, treaty law and final provisions without intending in any way to be exhaustive or final (definitions can be added or removed as necessary).

02.2. The Convention and its Acts.- The proposed text distinguishes between the Convention and the various Acts under which the Convention has been open for accession (in the broad, customary sense) by States and under which it is enforced. These various Acts ("the Act of 1961" and "the Act of 1978") are defined under points (vii) and (viii). "The Convention" is defined primarily as a matter of convenience. It should be noted that a special definition of the Additional Act of 1972 is not necessary since all the States which are still bound by the Act of 1961 are also bound by the additional Act.

02.3. The Breeder's Right.- It is proposed that the right recognised and ensured to the breeder be designated by a specific expression with a view to simplification and to taking into account suggestions made previously within the Administrative and Legal Committee and at the fourth Meeting with International Organizations.

Present [1978] Text

[The present text does not contain any corresponding provision.]

Proposed New Text

Article 2 [Cont'd]

(iii) "variety" shall mean any subdivision of a botanical species or of a taxon of a rank lower than species which, by reason of its characteristics, is regarded as an independent unit for the purposes of cultivation [or any other form of use] and includes:

- units which are protectable under the provisions of the Convention, and
- units which are not so protectable in that they do not fully meet the conditions of Article 11(1)(b), (c) and (d).

Depending upon the mode of inheritance of its varietal characteristics, a variety may be represented at any one moment, as a minimum:

- by a plant, or a part of a plant which can be used to produce a complete plant (types of varieties such as clones or pure lines),
- by a grouping of plants, or of parts of plants which can be used to produce complete plants (types of variety such as population varieties),
- by plants or parts of plants of components used repeatedly for the production of the said variety (types of varieties such as hybrid varieties or synthetic varieties);

[Cont'd]

Explanatory Notes

02.4. Variety.- Please refer to document PM/1/3 in relation to this definition.

02.5. The reference to other forms of use has been placed in brackets because of the debate it aroused in the twenty-fifth session of the Administrative and Legal Committee. It should be noted that it is linked to the eventual provisions of Article 6.

Present [1978] Text

[The present text does not contain any corresponding provision.]

Proposed New Text

Article 2 [Cont'd]

(iv) "essentially derived variety" shall mean a variety:

- which is derived from a single variety ("the initial variety"), particularly through plant breeding methods which have the effect of conserving the essential elements of the initial variety such as the selection of a natural or induced mutant or of a somaclonal variant, the selection of a variant, back-crossings or transformation by genetic engineering,
- which is distinguishable from the initial variety in accordance with Article 11(1)(b), and
- which conforms to the description of the initial variety apart from the specific differences which result from such breeding methods and other minimal differences which result incidentally from such breeding methods, such differences being evidenced at the level of the genome, the genotype or the phenotype;

[Cont'd]

Explanatory Notes

02.6. Essentially Derived Variety.- This definition would seem to be necessary in view of the discussions in the twenty-fifth session of the Administrative and Legal Committee, and of the wish of certain delegations to see defined the breeding methods which can result in essentially derived varieties (see in particular paragraphs 82 and 83 of document CAJ/XXV/2 Prov.). The list of methods is not exhaustive. They should be taken as examples only. The requirement of clear distinguishability and the limitation to specific and other minimal differences satisfy the consistent, general thrust of earlier discussions.

02.7. The proposed text specifies that the differences can be evidenced at the level of the genome (for example by measuring the genetic distance by means of analysis of the restriction fragment length polymorphism), of the genotype (for example by analysing an electrophoregramme for a characteristic whose genetic control is known) or at the level of the phenotype (by simply noting the existence of a difference in a traditional growing test).

Present [1978] Text

[The present text does not contain any corresponding provision.]

Proposed New Text

Article 2 [Cont'd]

(v) "breeder" shall mean a person who has created or discovered a variety or his successor in title;

(vi) "material of the variety" shall mean:

- reproductive or vegetative propagating material of any kind,
- harvested material,
- transformed products directly obtained from harvested material [or resulting from the use of the variety for purposes other than cultivation];

[Cont'd]

Explanatory Notes

02.8. Breeder.- This definition is retained from the previous draft.

02.9. Material.- This definition is retained from the previous draft in view of the text proposed for the definition of the effects of the breeder's right in Alternative 1 of Article 17. Differences are:

(i) the more general drafting of the first phrase (pursuant to a proposal made during the fourth Meeting with International Organizations) and the deletion of the reference to "material that has the potential of being used as reproductive or vegetative propagating material";

(ii) the deletion of the brackets which enclosed the word "directly" in view of the fact that the international non-governmental organizations expressed satisfaction with a right which could be exercised at the level of the direct product;

(iii) by the addition between brackets (see paragraph 02.5 above) - of a reference to material resulting from a form of use other than cultivation.

This last addition would appear to be desirable if one wants the breeder to be in a position to receive remuneration for the exploitation of the variety outside the agricultural sector which is implied by the use of the word "cultivation."

Present [1978] Text

[The present text does not contain any corresponding provision.]

Proposed New Text

Article 2 [Cont'd]

(vii) "Act of 1961" shall mean 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;

(viii) "Act of 1978" shall mean 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, and by the Act of October 23, 1978;

(ix) "Contracting Party" shall mean a State, or an intergovernmental organization, which is a party to the Convention;

(x) "territory of a Contracting Party" shall mean, where the Contracting Party is a State, the territory of that State and, where the Contracting Party is an intergovernmental organization, the territory in which the constituting treaty of that intergovernmental organization applies;

(xi) "nationals" shall mean, where the Contracting Party is a State, the nationals of that State and, where the Contracting Party is an intergovernmental organization, the nationals of any of the States members of that organization;

[Cont'd]

Explanatory Notes

02.10. Acts.- See paragraph 02.2 above.

02.11. Contracting Party, Territory of a Contracting Party, Nationals.- The use of references to "Contracting Parties" and not to "member States of the Union" results from the hypothesis that the European Communities might become parties to the Convention. The definition proposed at point (ix) is taken from the Treaty on Intellectual Property in Respect of Integrated Circuits adopted at Washington, D.C., on May 26, 1989. The definition of "nationals" follows the same principle as the definition of "territory of a Contracting Party."

02.12. The replacement in the text which follows of references to "member States of the Union" by references to "Contracting Parties" will not be commented upon. One should note however that in certain instances it has been necessary to adjust the text just a little.

Present [1978] Text

[The present text does not contain any corresponding provision.]

Proposed New Text

Article 2 [Cont'd]

(xii) "authority" shall mean an authority referred to in Article [30(1)(b) in the present text];

(xiii) "Union" shall mean the Union referred to in Article 3;

(xiv) "Secretary-General" shall mean the Secretary-General of the Union.

Explanatory Notes

02.13. Authority, Union, Secretary-General.- These definitions are taken from the proposal made by the delegation of the Netherlands at the Diplomatic Conference of 1978.

Present [1978] Text

Article 1

...; Constitution of a Union; ...

(1) [See opposite Article 1 in the new text.]

(2) The States parties to this Convention (hereinafter referred to as "the member States of the Union") constitute a Union for the Protection of New Varieties of Plants.

(3) [See opposite Article 5 in the new text.]

Proposed New Text

Article 3

Constitution of the Union

The Contracting Parties constitute the International Union for the Protection of New Varieties of Plants.

Explanatory Notes

03.1. In accordance with the proposal made by the delegation of the Netherlands at the Diplomatic Conference in 1978, the reference to "a Union" has been modified so as to refer to "the Union."

Present [1978] Text

Article 24

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 objectives of the Union and for the exercise of its functions.

(3) [See opposite Article 5 in the new text.]

Proposed New Text

Article 4

Legal Status

(1) The Union shall have legal personality.

(2) The Union shall enjoy on the territory of each Contracting Party, in conformity with the laws applicable in the said territory, such legal capacity as may be necessary for the fulfilment of the objectives of the Union and for the exercise of its functions.

Present [1978] Text

Article 1

...; Seat of the Union

(1) [See opposite Article 1 in the new text.]

(2) [See opposite Article 1 in the new text.]

(3) The seat of the Union and its permanent organs shall be at Geneva.

Article 24

Legal Status

(1) [See opposite Article 4 in the new text.]

(2) [See opposite Article 4 in the new text.]

(3) The Union shall conclude a headquarters agreement with the Swiss Confederation.

Proposed New Text

Article 5

Seat of the Union;  
Headquarters Agreement

(1) The seat of the Union and its permanent organs shall be at Geneva.

(2) The Union shall conclude a headquarters agreement with the Swiss Confederation.

Present [1978] Text

Proposed New Text

PART II

PROVISIONS RELATING TO  
THE PROTECTION OF VARIETIES

Article 2

Article 6

Forms of Protection

Forms of Protection

(1) Each member State of the Union may recognise the right of the breeder provided for in this Convention by the grant either of a special title of protection or of a patent. Nevertheless, a member State of the Union whose national law admits of protection under both these forms may provide only one of them for one and the same botanical genus or species.

[RESERVED]

(2) Each member State of the Union may limit the application of this Convention within a genus or species to varieties with a particular manner of reproduction or multiplication, or a certain end-use.

Explanatory Notes

06.1. The draft of a possible new Act of the Convention as contained in the present document is based on the assumption that the normal form in which protection is granted under the Convention is a special breeder's right fulfilling all the conditions of the Convention.

06.2. However, the questions arise whether, in certain circumstances:

(i) the breeder's right could be replaced by a patent;

(ii) both the breeder's right and a patent could be granted;

(iii) the beneficiary of the protection could be given the right to choose between the breeder's right and a patent (but not having both at the same time)?

06.3. Guidance is sought as to which of the stated possibilities, or any other possibility, should be retained, it being understood that the term "patent" means the orthodox kind of patent for invention (and not a form of protection which, while being called a "patent," is, in effect, a breeder's right).

[Cont'd]

Present [1978] Text

Proposed New Text

Article 2 [Cont'd]

Article 6 [Cont'd]

[RESERVED]

Explanatory Notes [Cont'd]

06.4. If, in certain circumstances and under certain conditions, a patent is the only or one of the two possible forms of protection, guidance is also sought on the following questions:

(i) Which are the provisions of the draft Convention that need not be applied?

(ii) Which are the provisions of the draft Convention that need to be applied?

(iii) Which are the provisions, if any, of the draft Convention whose non-application would be permitted only if certain other conditions, to be specified in the Convention, are to be applied?

06.5. Finally, guidance is sought on the question whether, if the Convention permits, under certain circumstances and under certain conditions, the grant of patents, this possibility should be available:

(i) to any Contracting Party;

(ii) to any Contracting Party whose law provides, at the time of becoming party to the revised Convention, for the grant of patents for certain kinds of plant varieties;

(iii) to any Contracting Party that, under the present text of the Convention, already has the right to grant patents?

06.6. It is to be noted that, should the revised Convention allow, under certain circumstances and under certain conditions, the granting of patents instead of, or in addition to, a plant breeder's right, it may be necessary to review the definition of plant variety (contained in Article 2 of the draft Convention).

Present [1978] Text

Article 14

Protection Independent of  
Measures Regulating Production,  
Certification and Marketing

(1) The right accorded to the breeder in pursuance of the provisions of this Convention shall be independent of the measures taken by each member State of the Union to regulate the production, certification and marketing of seeds and propagating material.

(2) However, such measures shall, as far as possible, avoid hindering the application of the provisions of this Convention.

Proposed New Text

Article 7

Protection Independent of  
Measures Regulating Production,  
Certification and Marketing

(1) The breeder's right shall be independent of the measures taken by each Contracting Party to regulate within its territory the production, certification and marketing of material of varieties.

(2) However, such measures shall not hinder the application of the provisions of the Convention.

Explanatory Notes

07.1. This Article differs in substance from the present Article 14 in that:

(i) it makes reference to "material of the variety" and not simply to "seeds and propagating material," thus taking into account the wider scope of the rights granted to the breeder;

(ii) paragraph (2) has been simplified in accordance with a wish expressed at the twenty-fifth session of the Administrative and Legal Committee.

Present [1978] Text

Article 4

Botanical Genera and Species  
Which Must or May be Protected

(1) This Convention may be applied to all botanical genera and species.

(2) The member States of the Union undertake to adopt all measures necessary for the progressive application of the provisions of this Convention to the largest possible number of botanical genera and species.

(3)(a) Each member State of the Union shall, on the entry into force of this Convention in its territory, apply the provisions of this Convention to at least five genera or species.

[Cont'd]

Proposed New Text

Article 8

Field of Application of  
the Convention

(1) This Convention shall be applied to varieties of the whole plant kingdom.

(2) Where a Contracting Party meets exceptional difficulties in the application of the Convention from the entry in force of the present Act in its territory to varieties of the whole plant kingdom, it may opt for a progressive application of the Convention in its territory subject to the following conditions:

(a) it must notify the Secretary-General of this fact at the time of the deposit of its instrument of ratification, acceptance or approval of the present Act, or at the time of depositing the request referred to in Article [32(3) of the present text];

[Cont'd]

Explanatory Notes

08.1. Paragraph (1).- This paragraph is based upon the decision taken at the twenty-fifth session of the Administrative and Legal Committee.

08.2. Paragraph (2).- In view of the structure proposed by the delegation of the Netherlands at the 1978 Diplomatic Conference and which is adopted in this document, it is not possible to transfer the substance of this provision to the final provisions as suggested by the delegation of the Federal Republic of Germany at the twenty-fifth session of the Administrative and Legal Committee.

Present [1978] Text

Article 4(3) [Cont'd]

(b) Subsequently, each member State of the Union shall apply the said provisions to additional genera or species within the following periods from the date of the entry into force of this Convention in its territory:

(i) within three years, to at least ten genera or species in all;

(ii) within six years, to at least eighteen genera or species in all;

(iii) within eight years, to at least twenty-four genera or species in all.

[Cont'd]

Proposed New Text

Article 8(2) [Cont'd]

(b) it must at the same time notify the Secretary-General of its proposed calendar for the progressive application of the Convention in its territory;

(c) it must apply the Convention:

(i) within a period of three years from the entry into force of the present Act in its territory to at least the varieties of all the botanical taxa for which another Contracting Party in the same climatic zone offers to undertake the examination of the said varieties within the framework of a special agreement under Article 14(3);

(ii) within a period of ten years calculated from the same date to all varieties of the whole plant kingdom.

Explanatory Notes

08.3. The proposed text contains, pursuant to the suggestion of the delegation of the Federal Republic of Germany, a time limitation and a principle according to which exceptional difficulties cannot be invoked in relation to species for which the examination can be carried out within the framework of a cooperative agreement. This principle is limited in two ways: first, by the period of three years which is given to a Contracting Party in order to put into place its administrative structure and to conclude agreements for cooperation; second, by limiting the application of the principle solely to cooperation effected within the same climatic zone.

08.4. The proposed text no longer contains the obligation to give notice of the reasons for opting for the progressive application of the Convention (i.e. the nature of the exceptional difficulties), nor that imposed on the Council to take a position on the subject. Both in the twenty-fifth session of the Administrative and Legal Committee and in the fourth Meeting with International Organizations, doubts were expressed in relation to this Article, and also to the scope of the breeder's right, concerning the suitability and the effect of these provisions. The Council will retain, however, the possibility of expressing a view on the conformity with the Convention of the law of a non-member State or organization which wishes to accede to the Convention, always assuming that the present Article 32(3) is retained in the new text.

[Cont'd]

Present [1978] Text

Proposed New Text

Article 4(3) [Cont'd]

(c) If a member State of the Union has limited the application of this Convention within a genus or species in accordance with the provisions of Article 2(2), that genus or species shall nevertheless, for the purposes of subparagraphs (a) and (b), be considered as one genus or species.

[The new text does not contain any corresponding provision.]

(4) At the request of any State intending to ratify, accept, approve or accede to this Convention, the Council may, in order to take account of special economic or ecological conditions prevailing in that State, decide, for the purpose of that State, to reduce the minimum numbers referred to in paragraph (3), or to extend the periods referred to in that paragraph, or to do both.

[The new text does not contain any corresponding provision.]

(5) At the request of any member State of the Union, the Council may, in order to take account of special difficulties encountered by that State in the fulfilment of the obligations under paragraph (3)(b), decide, for the purposes of that State, to extend the periods referred to in paragraph (3)(b).

[The new text does not contain any corresponding provision.]

Explanatory Notes [Cont'd]

08.5. A State or an organization which intends to take advantage of this option must give notice of its proposed timetable for the extension of protection to varieties of the whole plant kingdom. This will have two principle effects: the State or organization concerned will be somewhat committed in relation to all the interested Parties; breeders will be aware of the timetable and able to take steps to protect their interests.

08.6. Concerning this last point, it should be noted that the proposed Article 12(2) provides an obligation for such a State or organization to introduce a transitional limitation of the requirement of novelty.

Present [1978] Text

Article 3

National Treatment; Reciprocity

(1) Without prejudice to the rights specially provided for in this Convention, natural and legal persons resident or having their registered office in one of the member States of the Union shall, in so far as the recognition and protection of the right of the breeder are concerned, enjoy in the other member States of the Union the same treatment as is accorded or may hereafter be accorded by the respective laws of such States to their own nationals, provided that such persons comply with the conditions and formalities imposed on such nationals.

(2) Nationals of member States of the Union not resident or having their registered office in one of those States shall likewise enjoy the same rights provided that they fulfil such obligations as may be imposed on them for the purpose of enabling the varieties which they have bred to be examined and the multiplication of such varieties to be checked.

(3) Notwithstanding the provisions of paragraphs (1) and (2), any member State of the Union applying this Convention to a given genus or species shall be entitled to limit the benefit of the protection to the nationals of those member States of the Union which apply this Convention to that genus or species and to natural and legal persons resident or having their registered office in any of those States.

Proposed New Text

Article 9

National Treatment

(1) Without prejudice to the rights specially provided for in this Convention, natural and legal persons resident or having their registered office within the territory of one of the Contracting Parties shall, in so far as the recognition and protection of the right of the breeder are concerned, enjoy within the territory of the other Contracting Parties the same treatment as is accorded or may hereafter be accorded by the respective laws of such Parties to their own nationals, provided that such persons comply with the conditions and formalities imposed on such nationals.

(2) Nationals of Contracting Parties not resident or having their registered offices within the territory of one of these Parties shall likewise enjoy the same rights on the same conditions.

[The new text does not contain any corresponding provision.]

Explanatory Notes

09.1. In accordance with the proposal made in the fourth Meeting with International Organizations, paragraph (2) no longer makes reference to the control of the multiplication of varieties. The reference to the examination of varieties has also been deleted since it appears to be redundant.

Present [1978] Text

Article 11

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

(1) The breeder may choose the member State of the Union in which he wishes to file his first application for protection.

(2) The breeder may apply to other member States of the Union for protection of his right without waiting for the issue to him of a title of protection by the member State of the Union in which he filed his first application.

(3) The protection applied for in different member States of the Union by natural or legal persons entitled to benefit under this Convention shall be independent of the protection obtained for the same variety in other States whether or not such States are members of the Union.

[The present text does not contain any corresponding provision.]

Proposed New Text

Article 10

Free Choice of the Contracting  
Party With Which the First  
Application is Filed;  
Applications to Other Contracting  
Parties; Independence of Breeders'  
Rights Granted by Different  
Contracting Parties;  
Special Arrangements

(1) The breeder may choose the Contracting Party with which he wishes to file his first application for a breeder's right.

(2) The breeder may apply to other Contracting Parties for the grant of breeders' rights without waiting for the grant to him of a right by the Contracting Party with which the first application was filed.

(3)(a) Subject to the provisions of subparagraphs (b) and (c) below, the breeder's right granted by any one of the Contracting Parties to a natural or legal person entitled to benefit under the Convention shall be independent of any similar rights granted for the same variety by another Contracting Party or in States which do not belong to the Union.

(b) Any group of Contracting Parties may provide by a special agreement under Article [29 of the present text] that the breeder's right may be obtained on the basis of an international application followed by an international procedure, or that the right may have a unitary character throughout their territories and shall in such a case be granted jointly in respect of those Contracting Parties.

[Cont'd]

Explanatory Notes

10.1. Article 10(3)(b) and (c) reproduces provisions of the previous draft.

Present [1978] Text

Article 11 [Cont'd]

[The present text does not contain any corresponding provision.]

Proposed New Text

Article 10(3) [Cont'd]

(c) Any group of Contracting Parties may provide by a special agreement under Article [29 of the present text] that the breeder's right may be obtained in the territory of one of them only on condition that a similar right is granted in the territory of another, or that the right granted by one of them shall automatically extend to the territory of another.

Present [1978] Text

Article 6

Conditions Required  
for Protection

(1) The breeder shall benefit from the protection provided for in this Convention when the following conditions are satisfied:

(a) [See opposite proposed new subparagraph (b)]

(b) At the date on which the application for protection in a member State of the Union is filed, the variety

(i) must not--or, where the law of that State so provides, must not for longer than one year--have been offered for sale or marketed, with the agreement of the breeder, in the territory of that State, and

(ii) must not have been offered for sale or marketed, with the agreement of the breeder, in the territory of any other State for longer than six years in the case of vines, forest trees, fruit trees and ornamental trees, including, in each case, their rootstocks, or for longer than four years in the case of all other plants.

Trials of the variety not involving offering for sale or marketing shall not affect the right to protection. The fact that the variety has become a matter of common knowledge in ways other than through offering for sale or marketing shall also not affect the right of the breeder to protection.

[Cont'd]

Proposed New Text

Article 11

Conditions Required for the  
Granting of a Breeder's Right

(1) The breeder's right shall be granted by a Contracting Party to the breeder when the following conditions are satisfied:

(a) The variety must be new at the time of filing of the application for the grant of a breeder's right. A variety is not new if it has already been exploited commercially [Alternative 1: with the agreement of the breeder,] [Alternative 2: ---],

(i) in the territory of that Contracting Party at the said date or, if the legislation of that Party so provides, for longer than one year, or

(ii) in a territory other than that of that Contracting Party for longer than six years in the case of trees, of vines, or of other woody sarmentous plants or for more than four years in the case of any other species.

The fact that a variety has become a matter of common knowledge otherwise than by commercial exploitation within the conditions defined above [Alternative 1: ---][Alternative 2: or by abusive acts of third parties] shall not constitute grounds for opposing the grant of the breeder's right.

[Cont'd]

Explanatory Notes

11.1. Subparagraph (a).- Two alternatives have been reintroduced into the text in order to take into account the proposal made during the twenty-fifth session of the Administrative and Legal Committee that the text of the Convention be aligned more closely with other texts concerning the law of intellectual property.

[Cont'd]

Present [1978] Text

Article 6(1) [Cont'd]

(a) Whatever may be the origin, artificial or natural, of the initial variation from which it has resulted, the variety must be clearly distinguishable by one or more important characteristics from any other variety whose existence is a matter of common knowledge at the time when protection is applied for. Common knowledge may be established by reference to various factors such as: cultivation or marketing already in progress, entry in an official register of varieties already made or in the course of being made, inclusion in a reference collection, or precise description in a publication. The characteristics which permit a variety to be defined and distinguished must be capable of precise recognition and description.

[Cont'd]

Proposed New Text

Article 11(1) [Cont'd]

(b) The variety must be clearly distinguishable from any other variety whose existence is a matter of common knowledge at the time of filing of the application. The existence of a variety shall be in particular a matter of common knowledge:

(i) when it has been protected or entered in an official register of varieties, or

(ii) when protection or entry in an official register of varieties has been applied for, provided that the application is granted, or, if it is not granted, that the variety has satisfied the conditions of the present subparagraph and of subparagraphs (c) and (d) below, or

(iii) when it has been exploited [Alternative A: openly] [Alternative B: in such a way that its existence has become a known fact].

[Cont'd]

Explanatory Notes

[Subparagraph (a) Cont'd]

11.2. Under Alternative 1, which reproduces the present text, the variety must not have been commercialized with the agreement of the breeder; the word "express" has not been added, as requested by several organizations during the fourth Meeting with International Organizations, since this would make the examination of novelty very difficult for the authorities. Under Alternative 2 novelty is assessed in relation to any act of commercialization with the sole exception of the abusive acts of third parties.

11.3. It will be recalled that at the fourth Meeting with International Organizations it was proposed to extend to two years and to make mandatory the period provided for in subparagraph (i). It would not seem to be possible to adopt such a period unless the periods provided for in subparagraph (ii) are reduced. It should be noted that the harmonization of the periods would make the system of protection much easier to manage.

11.4. The reference to "vines" has been supplemented by a reference to "woody sarmentous plants."

11.5. Subparagraph (b).- Two alternatives are proposed for subparagraph (iii) in view of a comment made during the fourth Meeting with International Organizations.

Present [1978] Text

Article 6(1) [Cont'd]

(c) The variety must be sufficiently homogeneous, having regard to the particular features of its sexual reproduction or vegetative propagation.

(d) The variety must be stable in its essential characteristics, that is to say, it must remain true to its description after repeated reproduction or propagation or, where the breeder has defined a particular cycle of reproduction or multiplication, at the end of each cycle.

(e) The variety shall be given a denomination as provided in Article 13.

(2) Provided that the breeder shall have complied with the formalities provided for by the national law of the member State of the Union in which the application for protection was filed, including the payment of fees, the grant of protection may not be made subject to conditions other than those set forth above.

Proposed New Text

Article 11(1) [Cont'd]

(c) The variety must be sufficiently homogeneous, that is to say, the plant material belonging to it must be uniform in the expression of its varietal characteristics, subject to the variation that may be expected from the particular features of the sexual reproduction or vegetative propagation of the variety.

(d) There must be no indication from the examination of the variety made pursuant to Article 14 that the variety is unstable in its varietal characteristics. A variety is unstable if it does not remain true to its description after repeated reproduction or propagation or, in the case of a particular cycle of reproduction or multiplication, at the end of each cycle.

(2) The variety must have a denomination in accordance with the provisions of Article 19.

(3) The grant of the breeder's right shall not be subject to any other conditions than those mentioned above, provided that the breeder shall have complied with the formalities provided for by the law of the Contracting Party with which the application has been filed, including the payment of fees.

Explanatory Notes

11.6. Subparagraphs (c) and (d).- The reference to "characteristics considered for the purposes of the application of subparagraph (b)" which appeared in the previous draft has been replaced by "varietal characteristics" which is a term used in the definition of "variety" in Article 2. The explanation in subparagraph (d) now refers to instability rather than stability.

11.7. Paragraph (2).- The word "receive" has been replaced by "have" in accordance with a suggestion made in the twenty-fifth session of the Administrative and Legal Committee.

11.8. Paragraph (3).- The proposal made in the twenty-fifth session of the Administrative and Legal Committee to replace "conditions other than those set forth above" by "... set forth in paragraphs (1) and (2) above" has not been adopted since it tends to make the denomination again an absolute condition for the grant of a breeder's right.

Present [1978] Text

Article 38

Transitional Limitation of the  
Requirement of Novelty

Notwithstanding the provisions of Article 6, any member State of the Union may, without thereby creating an obligation for other member States of the Union, limit the requirement of novelty laid down in that Article, with regard to varieties of recent creation existing at the date on which such State applies the provisions of this Convention for the first time to the genus or species to which such varieties belong.

[The present text does not contain any corresponding provision.]

Proposed New Text

Article 12

Transitional Limitation of  
the Requirement of Novelty

(1) Notwithstanding the provisions of Article 11(1)(a) any Contracting Party may, without thereby creating an obligation for other Contracting Parties, limit the requirement of novelty laid down in that Article with regard to varieties of recent creation existing at the date when the present Act enters into force in its territory.

(2) When a Contracting Party has opted for the progressive application of the present Act in its territory in accordance with Article 8(2), it must provide for a transitional limitation of the requirement of novelty, in relation to varieties in the categories referred to in paragraph (1) which fall within botanical taxa to which the Convention is applied after the entry into force of the present Act in its territory.

Explanatory Notes

12.1. Paragraph (1) conforms in its substance with the present text.

12.2. In order to best preserve the interests of breeders in States which opt for the progressive application of the Convention to the whole plant kingdom, it is proposed that the transitional limitation of the requirement of novelty should be obligatory in relation to taxa whose protection is delayed. The nature of the limitation is not specified. The examples provided by existing member States would seem to be sufficient for this purpose.

Present [1978] Text

Article 12

Right of Priority

(1) Any breeder who has duly filed an application for protection in one of the member States of the Union shall, for the purpose of filing in the other member States of the Union, enjoy a right of priority for a period of twelve months. This period shall be computed from the date of filing of the first application. The day of filing shall not be included in such period.

(2) To benefit from the provisions of paragraph (1), the further filing must include an application for protection, a claim in respect of the priority of the first application and, within a period of three months, a copy of the documents which constitute that application, certified to be a true copy by the authority which received it.

(3) The breeder shall be allowed a period of four years after the expiration of the period of priority in which to furnish, to the member State of the Union with which he has filed an application for protection in accordance with the terms of paragraph (2), the additional documents and material required by the laws and regulations of that State. Nevertheless, that State may require the additional documents and material to be furnished within an adequate period in the case where the application whose priority is claimed is rejected or withdrawn.

(4) Such matters as the filing of another application or the publication or use of the subject of the application, occurring within the period provided for in paragraph (1), shall not constitute grounds for objection to an application filed in accordance with the foregoing conditions. Such matters may not give rise to any right in favour of a third party or to any right of personal possession.

Proposed New Text

Article 13

Right of Priority

(1) Any breeder who has duly filed an application for the grant of a breeder's right with one of the Contracting Parties shall, for the purpose of filing with other Contracting Parties, enjoy a right of priority for a period of twelve months. This period shall be computed from the date of filing of the first application. The day of filing shall not be included in such period.

(2) To benefit from the provisions of paragraph (1), the further filing must include an application for the grant of a right, a claim in respect of the priority of the first application and, within a period of three months, a copy of the documents which constitute that application, certified to be a true copy by the authority which received it.

(3) The breeder shall be allowed a period of two years after the expiration of the period of priority in which to furnish, to the Contracting Party with which he has filed an application for the grant of a right in accordance with the terms of paragraph (2), the additional documents and material required by the laws and regulations of that Party. Nevertheless, that Party may require the additional documents and material to be furnished within an appropriate period in the case where the application whose priority is claimed is rejected or withdrawn.

(4) Such matters as the filing of another application or the publication or use of the subject of the application, occurring within the period provided for in paragraph (1), shall not constitute grounds for objection to an application filed in accordance with the foregoing conditions. Such matters may not give rise to any right in favor of a third party or to any right of personal possession.

Present [1978] Text

Article 7

Official Examination of Varieties;  
Provisional Protection

(1) Protection shall be granted after examination of the variety in the light of the criteria defined in Article 6. Such examination shall be appropriate to each botanical genus or species.

(2) For the purposes of such examination, the competent authorities of each member State of the Union may require the breeder to furnish all the necessary information, documents, propagating material or seeds.

[Cont'd]

Proposed New Text

Article 14

Examination of the Application;  
Provisional Protection

(1) The breeder's right shall be granted after an examination based upon the criteria defined in Article 11 and, where appropriate, pursuant to Article 12. In the course of this examination, the authority may grow the variety or carry out other necessary tests, cause the growing of the variety or the carrying out of tests or take into account the results of growing tests or other trials which have already been carried out.

(2) For the purposes of such examination, the authority may require the breeder to furnish all the necessary information, documents or material.

Article 30

...; Contracts on the Joint  
Utilisation of Examination  
Service

(1) ...

(2) Contracts may be concluded between the competent authorities of the member States of the Union, with a view to the joint utilisation of the services of the authorities entrusted with the examination of varieties in accordance with the provisions of Article 7 and with assembling the necessary reference collections and documents.

(3) ...

(3) Special agreements may be concluded between the authorities of the Contracting Parties with a view to the joint utilization of the technical services entrusted with the examination of varieties in accordance with the provisions of paragraph (1) and with assembling the necessary reference collections and documents.

[Cont'd]

Present [1978] Text

Article 7 [Cont'd]

(3) Any member State of the Union may provide measures to protect the breeder against abusive acts of third parties committed during the period between the filing of the application for protection and the decision thereon.

Proposed New Text

Article 14 [Cont'd]

(4) Each Contracting Party shall provide measures designed to safeguard the interests of the breeder during the period between the filing of the application for the grant of a breeder's right, its publication or its notification and the decision thereon. At the very least, these measures shall have the effect that the holder of a breeder's right shall be entitled to equitable remuneration from any person who, during the afore-mentioned period, has carried out acts which, after this period, would be prohibited by the provisions of Article 17.

Present [1978] Text

Proposed New Text

Article 8

Article 15

Period of Protection

Duration of the Breeder's Right

The right conferred on the breeder shall be granted for a limited period. This period may not be less than fifteen years, computed from the date of issue of the title of protection. For vines, forest trees, fruit trees and ornamental trees, including, in each case, their rootstocks, the period of protection may not be less than eighteen years, computed from the said date.

(1) The breeder's right shall be granted for a limited period.

(2) This period must not be less than [twenty] years, computed from the date of granting of the right. For trees, vines and other woody sarmentous plants, the period may not be less than [twenty-five] years, computed from the said date.

Explanatory Notes

15.1. This Article follows the previous draft except that the reference to "vine" has been supplemented by a reference to woody sarmentous plants.

Present [1978] Text

Article 10

Nullity and Forfeiture of the  
Rights Protected

(1) The right of the breeder shall be declared null and void, in accordance with the provisions of the national law of each member State of the Union, if it is established that the conditions laid down in Article 6(1)(a) and (b) were not effectively complied with at the time when the title of protection was issued.

[The present text does not contain any corresponding provision.]

(2) The right of the breeder shall become forfeit when he is no longer in a position to provide the competent authority with reproductive or propagating material capable of producing the variety with its characteristics as defined when the protection was granted.

[Cont'd]

Proposed New Text

Article 16

Nullity and Forfeiture  
of the Breeder's Right

(1) The breeder's right shall be declared null and void, in accordance with the provisions of the law of each Contracting Party, if it is established that the conditions laid down in Article 11(1)(a) and (b) were not effectively complied with at the time when the right was granted, or if the right has been granted to a person who was not the breeder and it is not possible to transfer the right to the breeder.

(2) The breeder's right can be declared null and void, in accordance with the provisions of the law of each Contracting Party, where the grant of the right was essentially based upon information and documents furnished by the breeder, if it is established that the conditions laid down in Article 11(1)(c) and (d) were not effectively complied with at the time when the right was granted.

(3) The right may become forfeit if the breeder has failed to take the necessary measures to secure the maintenance of the variety with its characteristics as defined when the right was granted.

[Cont'd]

Explanatory Notes

16.1. Paragraph (1).- In view of the questions that are often asked on this subject it is proposed to specify that the breeder's right may also be annulled if it has been granted to a person who was not entitled to it. In keeping with the laws of numerous countries, an exception is provided for the case where it is possible to transfer the breeder's right to its true owner.

16.2. Paragraph (2).- The new proposed paragraph (2) is in response to comments made in the twenty-fifth session of the Administrative and Legal Committee. The annulment could be declared both for a lack of homogeneity and for a lack of stability, since there is no reason to separate these conditions. Annulment would be at the discretion of the authorities who would be able to take into account the good faith of the applicant.

Present [1978] Text

Article 10 [Cont'd]

(3) The right of the breeder may become forfeit if:

(a) after being requested to do so and within a prescribed period, he does not provide the competent authority with the reproductive or propagating material, the documents and the information deemed necessary for checking the variety, or he does not allow inspection of the measures which have been taken for the maintenance of the variety; or

(b) he has failed to pay within the prescribed period such fees as may be payable to keep his rights in force.

(4) The right of the breeder may not be annulled or become forfeit except on the grounds set out in this Article.

Proposed New Text

Article 16 [Cont'd]

(4) The right may become forfeit if:

(i) after being requested to do so and within a prescribed period, the breeder does not provide the authority with the information, documents or material deemed necessary for checking the maintenance of the variety,

(ii) the breeder fails to pay within the prescribed period such fees as may be payable to keep his right in force, or

(iii) the denomination of the variety is cancelled after the grant of the right and the breeder does not propose, after being requested to do so and within a prescribed period, another acceptable denomination.

(5) The right may not be annulled or become forfeit except on the grounds set out in this Article.

Explanatory Notes

16.3. Paragraph (4).— It is proposed to change the numbering of the subparagraphs since they have an introductory phrase in common.

16.4. The proposed text for subparagraph (i) no longer includes the phrase "or he does not allow inspection of the measures which have been taken for the maintenance of the variety." It should be noted that this change makes the task of holders of breeders' rights theoretically more difficult, since they must rely upon the quality of the information, etc. furnished in order to prove the maintenance of the variety.

16.5. Notwithstanding a suggestion made in the twenty-fifth session of the Administrative and Legal Committee no provision has been made in subparagraph (ii) for the giving of notice; it is thought that this would place a significant burden upon the authorities and that it would be better to leave each member State or organization free to make its own provision.

16.6. Subparagraph (iii) results from a decision taken in the twenty-fifth session of the Administrative and Legal Committee.

Present [1978] Text

Article 5

Rights Protected;  
Scope of Protection

[See next page.]

Proposed New Text

Article 17

Effects of the Breeder's Right

[See next page.]

Explanatory Notes

17.1. General.— At the twenty-fifth session of the Administrative and Legal Committee, a new structure and a draft were proposed for the Article which deals with the effects of the breeder's right, principally as a result of criticism of the difficulty of comprehending the provision dealing with the principle of exhaustion. The proposal did not receive unanimous support and since some critical comments were made it was thought that the proposal should be reviewed and improved. Accordingly, the Office of the Union proposes to retain the essence of the principles upon which the text put to the fourth Meeting with International Organizations was based and which was in general very favorably received; the Office also submits to the Preparatory Meeting two alternatives dealing with the principle of exhaustion:

(i) the alternative proposed in the previous draft (Alternative 1), which is based upon the corresponding texts dealing with patents (in particular upon the Luxemburg Convention, and which has also been adopted by the Commission of the European Communities in its proposed Council regulation (EEC) on Community Plant Variety Rights;

(ii) the alternative proposed by the delegation of the Federal Republic of Germany (Alternative 2).

17.2. Collision norm.— In view of the underlying objective of the proposed paragraph (5) in the preceding drafts--which was to provide a basis for discussion and not a text destined to be included in the revised text of the Convention--the text now proposed does not include any provision other than that which will be provided eventually in Article 6 on the relationships between the breeder's right and other forms of protection.

Present [1978] Text

Article 5

Rights Protected;  
Scope of Protection

(1) The effect of the right granted to the breeder is that his prior authorisation shall be required for

- the production for purposes of commercial marketing
- the offering for sale
- the marketing

of the reproductive or vegetative propagating material, as such, of the variety.

Vegetative propagating material shall be deemed to include whole plants. The right of the breeder shall extend to ornamental plants or parts thereof normally marketed for purposes other than propagation when they are used commercially as propagating material in the production of ornamental plants or cut flowers.

[Cont'd]

Proposed New Text

Article 17

Effects of the Breeder's Right

(1) [Alternative 1: ---] [Alternative 2: Subject to the provisions of paragraph (4)] the breeder's right shall confer on its owner the right to prevent all persons not having his consent from exploiting the variety commercially and in particular:

(i) from reproducing or propagating the variety;

(ii) from offering for sale, putting on the market, conditioning or using material of the variety;

(iii) from exporting material of the variety;

(iv) from importing or stocking material of the variety for any of the aforementioned purposes.

[Cont'd]

Explanatory Notes

17.3. Paragraph (1).- The proposed alternatives are linked to the alternatives dealing with the principle of exhaustion.

17.4. The introductory part of the paragraph refers to the commercial exploitation of the variety as proposed in the fourth Meeting with International Organizations.

17.5. The different specific acts of exploitation to which the breeder's right extends are set out in subparagraphs; "exporting" has been isolated in view of the fact that the principle of exhaustion ought not to be applied to this act in the same way as to other acts of exploitation. A reference to "conditioning" has been added to subparagraph (ii). The suggestion made in the fourth Meeting with International Organizations to delete the reference to the "aforementioned purposes" has not been taken up in order to retain the text of the Luxemburg Convention (the same comment applies to paragraph (3)(a)(i)).

Present [1978] Text

Article 5 [Cont'd]

(2) The authorisation given by the breeder may be made subject to such conditions as he may specify.

(3) Authorisation by the breeder shall not be required either for the utilisation of the variety as an initial source of variation for the purpose of creating other varieties or for the marketing of such varieties. Such authorisation shall be required, however, when the repeated use of the variety is necessary for the commercial production of another variety.

[Cont'd]

Proposed New Text

Article 17 [Cont'd]

[The new text does not contain any corresponding provision.]

(2) The breeder's right shall in addition confer on its owner the right to prevent all persons not having his consent from undertaking the above-mentioned acts in relation to:

(i) varieties which are not distinguishable in accordance with Article 12(1)(b) from the protected variety;

(ii) varieties which are essentially derived, whether directly or indirectly, from the protected variety, where the protected variety is not itself an essentially derived variety;

(iii) varieties whose production requires the repeated use of the protected variety.

[Cont'd]

Explanatory Notes

17.6. Paragraph (2).- The Office of the Union proposes a structural change which consists of regrouping into one paragraph those cases in which the effects of a breeder's right granted for one variety extend to other varieties.

17.7. There was broad agreement in the fourth Meeting with International Organizations (with the exception of agricultural users' organizations) in favor of the extension of the right of prohibition granted to a breeder to essentially derived varieties. The discussions in the twenty-fifth session of the Administrative and Legal Committee suggest that this solution was also that which was most favorably received by the delegations of member States; furthermore, no delegation was opposed to it. It is accordingly proposed to adopt this solution in the text which will be submitted to the Diplomatic Conference.

[Cont'd]

Present [1978] Text

Proposed New Text

Article 5 [Cont'd]

Article 17 [Cont'd]

[The present text does not contain any corresponding provision.]

(3) (a) The breeder's right shall not extend to:

[Cont'd]

(i) acts done privately and for non-commercial purposes;

(ii) acts done for experimental purposes;

(iii) acts done for the purpose of breeding new varieties, and, subject to the provisions of paragraph (2), acts done for the commercial exploitation of such varieties.

[Cont'd]

Explanatory Notes

[Paragraph (2), Cont'd]

17.8. The present treatment of varieties which are produced commercially through the repeated use of a protected variety is not entirely satisfactory from a drafting standpoint. The extension of the effects of the breeder's right to such varieties is currently achieved, in effect, by an exception to an exception. It is accordingly proposed to define this extension in a positive way and to group all the comparable cases in a single paragraph.

17.9. In order to perfect the text and also to eliminate any uncertainty that might exist it is proposed to mention at the outset those varieties which are not clearly distinguishable from the protected variety. It should be emphasized in this connection that it is not intended to change the present situation since the Administrative and Legal Committee considered at its twelfth session that the protection of a variety extended to all material which could not be clearly distinguished from the protected variety to the extent required by Article 6. The Council took note of this opinion at its eighteenth ordinary session held from October 17 to 19, 1984.

17.10. Paragraph (3)(a).- The grouping within paragraph (2) of all the cases where the breeder's right extends to other varieties than that which is protected makes some simplification of subparagraph (iii) necessary. Nonetheless, in order to reinforce the notion of an "exemption in favor of plant breeding" (sometimes wrongly called the "breeder's privilege"), it is proposed that a reference in this subparagraph to the exploitation of varieties bred from the protected variety should be maintained.

Present [1978] Text

Article 5 [Cont'd]

Proposed New Text

Article 17(3) [Cont'd]

(b) [Alternative A] Each Contracting Party may exempt other acts from the effects of the breeder's right if this is necessary in the public interest and provided that the exemption does not cause excessive prejudice to the legitimate interests of breeders.

[Alternative B] By derogation from the provisions of the Convention, each Contracting Party may, in the case of species of field crops whose harvested material is botanically identical to their seed, grant to their growers a faculty to use a part of the harvest produced on their holdings as seed for the sowings of the following season, provided that:

(i) the holding is a family holding,

(ii) the part of the harvest is used as seed in its raw state, or after cleaning by the grower himself using his own machinery, or within the framework of agricultural cooperation,

(iii) equitable remuneration is paid to the breeder.

[Cont'd]

Explanatory Notes

17.11. Paragraph (3)(b).- Two alternatives are proposed in order to reflect the discussions in the fourth Meeting with International Organizations and in the twenty-fifth session of the Administrative and Legal Committee:

(i) as in the previous draft Alternative A permits each Contracting Party to introduce further limitations to the breeder's right but within fixed limits;

(ii) Alternative B provides for a "farmer's privilege" whose nature is underlined by its introduction ("by derogation ..."). The conditions of this privilege are essentially those which were enunciated in the fourth Meeting with International Organizations by the agricultural users' organizations.

[Cont'd]

Present [1978] Text

Article 5 [Cont'd]

Proposed New Text

Article 17 [Cont'd]

(4) [Alternative 1] The rights conferred by the breeder's right shall not extend to acts concerning any material of the protected variety or of a variety covered by the provisions of paragraph (2) which has been put on the market by the breeder or with his express consent, or any material derived from the said material, unless:

(i) such acts involve further reproduction or multiplication of the variety in question,

(ii) such acts fall outside the field of use for which the breeder put material on the market or gave his express consent,

(iii) such acts involve an export of material of the variety which enables the reproduction of the variety into a country which does not protect plant varieties.

[Cont'd]

Explanatory Notes

[Paragraph (3)(b), Cont'd]

There have been added a limitation to species of field crops where the product of the harvest is botanically identical to the seed and an obligation to pay equitable remuneration to the breeder.

17.12. Paragraph (4).- This paragraph states the principle of exhaustion.

17.13. Alternative 1 is, as already mentioned taken from the previous draft; it is based upon the corresponding texts dealing with patents (and, in particular, upon the Luxemburg Convention) and has also been adopted by the Commission of the European Communities in its draft proposal for a Council regulation (EEC) on Community Plant Variety Rights. It differs from the text in the previous draft in that it states clearly the inapplicability of the principle in relation to further reproduction or multiplication. However, in order to make the right effective in relation to exports, these are excluded from exhaustion; this exclusion, however, is only valid in relation to exports to countries without protection as provided by Article 10(4) of the relevant law in the Federal Republic of Germany.

Present [1978] Text

Article 5 [Cont'd]

(4) Any member State of the Union may, either under its own law or by means of special agreements under Article 29, grant to breeders, in respect of certain botanical genera or species, a more extensive right than that set out in paragraph (1), extending in particular to the marketed product. A member State of the Union which grants such a right may limit the benefit of it to the nationals of member States of the Union which grant an identical right and to natural and legal persons resident or having their registered office in any of those States.

Proposed New Text

Article 17(4) [Cont'd]

[Alternative 2] When the owner of a breeder's right is not able to exercise his right in relation to reproductive or propagating material, including parts of plants which can be regenerated into complete plants, he can exercise his right in relation to the harvested product of the variety. When he is unable to exercise his right in relation to reproductive or propagating material, including parts of plants which can be regenerated into whole plants, or in relation to the harvested product of the variety, he can exercise his right in relation to products directly obtained from harvested material of the variety.

[The new text does not contain any corresponding provision.]

Explanatory Notes

17.14. Alternative 2 reproduces the text proposed by the delegation of the Federal Republic of Germany at the twenty-fifth session of the Administrative and Legal Committee. It should be noted that in this alternative, paragraph (1) begins with the words "subject to the provisions of paragraph (4)."

Present [1978] Text

Article 9

Restrictions in the Exercise  
of Rights Protected

(1) The free exercise of the exclusive right accorded to the breeder may not be restricted otherwise than for reasons of public interest.

(2) When any such restriction is made in order to ensure the widespread distribution of the variety, the member State of the Union concerned shall take all measures necessary to ensure that the breeder receives equitable remuneration.

Proposed New Text

Article 18

Restrictions on the  
Exercise of the Right

(1) The free exercise of a breeder's right may not be restricted otherwise than for reasons of public interest.

(2) When any such restriction has the effect of authorizing a third person to exploit the variety, the Contracting Party concerned shall take all measures necessary to ensure that the breeder receives equitable remuneration.

Present [1978] Text

Article 13

Variety Denomination

(1) The variety shall be designated by a denomination destined to be its generic designation. Each member State of the Union shall ensure that subject to paragraph (4) 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.

(2) The denomination must enable the variety to be identified. It may not consist solely of figures except where this is an established practice for designating varieties. It must not be liable to mislead or to cause confusion concerning the characteristics, value or identity of the variety or the identity of the breeder. In particular, it must be different from every denomination which designates, in any member State of the Union, an existing variety of the same botanical species or of a closely related species.

(3) The denomination of the variety shall be submitted by the breeder to the authority referred to in Article 30(1)(b). If it is found that such denomination does not satisfy the requirements of paragraph (2), that authority shall refuse to register it and shall require the breeder to propose another denomination within a prescribed period. The denomination shall be registered at the same time as the title of protection is issued in accordance with the provisions of Article 7.

[Cont'd]

Proposed New Text

Article 19

Variety Denomination

(1) The variety shall be designated by a denomination destined to be its generic designation. Each Contracting Party shall ensure that, subject to paragraph (4), 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.

(2) The denomination must enable the variety to be identified. It may not consist solely of figures except where this is an established practice for designating varieties. It must not be liable to mislead or to cause confusion concerning the characteristics, value or identity of the variety or the identity of the breeder. In particular, it must be different from every denomination which designates, in the territory of any Contracting Party, an existing variety of the same botanical species or of a closely related species.

(3) The denomination of the variety shall be submitted by the breeder to the authority. If it is found that such denomination does not satisfy the requirements of paragraph (2), the authority shall refuse to register it and shall require the breeder to propose another denomination within a prescribed period. The denomination shall be registered at the same time as the title of protection is issued in accordance with the provisions of Article 14.

[Cont'd]

Explanatory Notes

19.1. In view of the positions taken by the representatives of organizations in the fourth Meeting with International Organizations, it is proposed that no modifications be made to Article 13 except to the extent required by the new proposed definitions.

Present [1978] Text

Article 13

(4) Prior rights of third parties shall not be affected. If, by reason of a prior right, the use of the denomination of a variety is forbidden to a person who, in accordance with the provisions of paragraph (7), is obliged to use it, the authority referred to in Article 30(1)(b) shall require the breeder to submit another denomination for the variety.

(5) A variety must be submitted in member States of the Union under the same denomination. The authority referred to in Article 30(1)(b) shall register the denomination so submitted, unless it considers that denomination unsuitable in its State. In the latter case, it may require the breeder to submit another denomination.

(6) The authority referred to in Article 30(1)(b) shall ensure that all the other such authorities are informed of matters concerning variety denominations, in particular the submission, registration and cancellation of denominations. Any authority referred to in Article 30(1)(b) may address its observations, if any, on the registration of a denomination to the authority which communicated that denomination.

(7) 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 that State shall be obliged to use the denomination of that variety, even after the expiration of the protection of that variety, in so far as, in accordance with the provisions of paragraph (4), prior rights do not prevent such use.

[Cont'd]

Proposed New Text

Article 19 [Cont'd]

(4) Prior rights of third parties shall not be affected. If, by reason of a prior right, the use of the denomination of a variety is forbidden to a person who, in accordance with the provisions of paragraph (7), is obliged to use it, the authority shall require the breeder to submit another denomination for the variety.

(5) A variety must be submitted to all Contracting Parties under the same denomination. The authority shall register the denomination so submitted, unless it considers that denomination unsuitable within the territory of the Contracting Party concerned. In the latter case, it may require the breeder to submit another denomination.

(6) The authority shall ensure that all other authorities are informed of matters concerning variety denominations, in particular the submission, registration and cancellation of denominations. Any authority may address its observations, if any, on the registration of a denomination to the authority which communicated that denomination.

(7) Any person who, within the territory of one of the Contracting Parties, offers for sale or markets reproductive or vegetative propagating material of a variety protected within the said territory shall be obliged to use the denomination of that variety, even after the expiration of the protection of that variety, insofar as, in accordance with the provisions of paragraph (4), prior rights do not prevent such use.

[Cont'd]

Present [1978] Text

Article 13 [Cont'd]

(8) When the variety is offered for sale or marketed, it shall be permitted to associate a trade mark, trade name or other similar indication with a registered variety denomination. If such an indication is so associated, the denomination must nevertheless be easily recognizable.

Proposed New Text

Article 19 [Cont'd]

(8) When a variety is offered for sale or marketed, it shall be permitted to associate a trade mark, trade name or other similar indication with a registered variety denomination. If such an indication is so associated, the denomination must nevertheless be easily recognizable.

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