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INTERNATIONAL UNION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS

GENEVA

**FIFTH MEETING
WITH INTERNATIONAL ORGANIZATIONS**

Geneva, October 10 and 11, 1990

REVISION OF THE CONVENTION:

DRAFT SUBSTANTIVE LAW PROVISIONS

Document prepared by the Office of the Union

INTRODUCTION

1. The present document contains a further draft of the administrative and final clauses proposed for inclusion in a revised Convention. An earlier draft of these clauses was considered at the twenty-seventh session of the Administrative and Legal Committee held from June 25 to 29, 1990.
2. The document will first be used for the purposes of the fifth Meeting with International Organizations (a hearing organized by UPOV for international non-governmental organizations) to be held on October 10 and 11, 1990. For this reason, it has received the reference "IOM/5/3." The document will thereafter be considered by the twenty-eighth session of the Administrative and Legal Committee to be held from October 12 to 16, 1990.
3. Titles, appearing between square brackets, have been introduced into the text of the draft provisions in the present document. The insertion of titles is intended to facilitate the reading of the Convention and follows the practice established during the last decade in treaties administered by the World Intellectual Property Organization (WIPO). It is recommended that the practice be adopted in the new text of the Convention. The titles are placed within square brackets in order to indicate that they do not themselves constitute part of the provisions of the Convention.

LIST OF THE ARTICLES OF THE PROPOSED NEW TEXT

- Article 1: Definitions
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Article 34: Communications Concerning Legislation and the Genera and Species Protected; Information to be Published*
Article 35: Preservation of Existing Rights*
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Article 37: Denunciation*
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* Contained in document IOM/5/2.

Present [1978] TextNote

The present text does not contain any provision corresponding to Article 1 of the proposed new text.

The expressions defined in Article 1 of the proposed new text appear in proposed Articles of that text in the present document and in document IOM/5/3 as follows ("int." refers to the introductory part of the corresponding provision):

- | | |
|-------------------------|--|
| (i) "this Convention" | 1(i), (v), (vii), (x); 2(2) (int.); 3; 4(1) (int.), (1)(i), (2) (int.), (2)(i); 5(1); 7(2)(b); 13(1); 26(3)(a), (5)(a); 27(1); 29; 30; 31(1)(a), (1)(b), (2), (3), (4); 32(1), (2), (3); 33(1), (2); 34(1) (int.), (1)(ii), (2)(ii); 35; 36(1), (2)(a), (2)(b); 37(1), (2), (4); 38(1), (2), (3), (4) |
| (ii) "Act of 1961/1972" | 1(ii), (x), (xi); 4(1) (int.), (2) (int.), (2)(i); 26(3)(a); 32(1) |
| (iii) "Act of 1978" | 1(iii), (x), (xi); 4(1) (int.), (2) (int.), (2)(i); 26(3)(a); 32(1), (3); 36(2)(a) |
| (iv) "breeder" | 1(iv), (v); 6(1), (2); 7(1)(b), (2)(a)(i), (2)(a)(ii); 8(1), (2), (3); 9(1)(b), (2); 11(1)(ii), (2)(b)(i), (2)(b)(ii), (2)(b)(iii); 12(1) (int.), (1)(b), (1)(c), (2)(a) (int.), (3) (title), (4), (5)(a) (int.), (5)(a)(ii); 13(2); 14(2), (3), (4), (5) |
| (v) "breeder's right" | 1(iv), (v), (vi); 2(1), (2)(i), (2)(ii), (2)(iii); 3; 6(1), (2); 7 (title), (1)(a), (1)(b), (2)(a) (int.), (3); 8(1); 9(1)(a), (2); 10 (title), (1), (2); 11 (title), (1) (int.), (1)(i), (1)(ii), (1)(iii), (2)(a), (2)(b) (int.), (3); 12 (title), (3) (int.), (4), (5)(a) (int.); 13 (title), (1); 14(1)(b), (3), (7); 31(1)(b); 34(1)(i), (2)(i), (3)(i); 36(2)(a) |

Proposed New Text

Article 1

Definitions

For the purposes of this Act:

(i) "this Convention" means the present (1991) Act of the International Convention for the Protection of New Varieties of Plants;

(ii) "Act of 1961/1972" means 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;

(iii) "Act of 1978" means the Act of October 23, 1978, of the International Convention for the Protection of New Varieties of Plants;

(iv) "breeder" means

- the person who bred or discovered a variety,
- where the laws of the relevant Contracting Party provide that the breeder's right vests in the party who or which is the employer of such person or who or which has commissioned the work of such person, the said party, or
- the successor in title of such person or the said party, as the case may be;

(v) "breeder's right" means the right of the breeder provided for in this Convention;

[Continued]

Present [1978] Text[Note, continued]

- (vi) "variety" 1(i), (ii), (iii), (iv), (vi), (x); 3; 5(1); 7(1)(a), (1)(b), (2)(a) (int.), (2)(b), (3), (4), (5); 8(1), (4); 9(1)(a); 11(2)(b)(i), (2)(b)(iii); 12(1)(a), (1)(b), (1)(c), (2) (title), (2)(a)(i), (2)(a)(ii), (2)(a)(iii), (2)(b) (int.), (2)(b)(i), (2)(b)(ii), (2)(b)(iii), (3)(iii), (4), (5)(a) (int.), (5)(a)(i), (5)(a)(iii), (5)(b) (int.); 14 (title), (1)(a), (1)(b), (2), (3), (4), (5), (7), (8); 29; 36(2)(a); 37(4)
- (vii) "Contracting Party" 1(vii), (viii), (xi); 2 (title), (1), (2) (int.), (2)(ii); 3; 4(1) (int.), (2) (int.); 5(1), (2); 6(1), (2); 7(1)(b), (2)(a)(i), (2)(a)(ii), (2)(b); 8(1), (3); 9(2); 11(1) (int.), (2)(a), (2)(b) (int.); 12(4), (5)(a) (int.); 13(1), (2); 14(1)(b), (2), (5), (6), (7); 15(1), (3); 26(3)(b); 33 (title); 34(2) (int.), (3) (int.); 35; 37(1), (2)
- (viii) "territory" 1(viii); 3; 5(1); 7(2)(a)(i), (2)(a)(ii); 12(5)(a) (int.); 14(2), (5), (7); 15(3); 31(1)(b)
- (ix) "authority" 1(ix); 2(2)(ii); 6(1), (2); 7(1)(b); 8(1), (2), (3); 9(1)(a), (1)(b); 11(2)(b)(i); 14(3), (4), (5), (6)
- (x) "Union" 1(x), (xii); 15 (title), (1), (2), (3), (4), (5); 16 (title), (int.), (ii); 21 (title), (provis.); 22(i), (iii), (iv), (v), (viii); 24 (title), (1), (2), (3); 25; 26(1) (int.), (3)(b); 28(1); 37(1)
- (xi) "member of the Union" 1(xi); 4(1) (title), (2) (title); 15(1); 17(1)(a), (1)(b), (2); 18(1); 20(2); 22(v); 25; 26(1)(i), (2)(a), (3)(a), (3)(c), (4)(a), (4)(b), (5)(a), (5)(b); 27(1), (2); 29; 30; 31(3); 33(1), (2); 35; 37(1)
- (xii) "Secretary-General" 1(xii); 22(ii), (iv), (vi); 24 (title), (1), (2); 26(3)(b), (3)(c); 31(2); 33(2); 34(1) (int.), (2) (int.), (3) (int.); 36(2)(b); 37(1), (3); 38(1), (2), (3), (4)

Proposed New Text

[Article 1, continued]

(vi) "variety" means a group of plants, which group, irrespective of whether the conditions for the grant of a breeder's right are fully met,

- can be defined by the characteristics that are the result of a given genotype or combination of genotypes and
- can be distinguished from other groups of plants of the same botanical taxon by at least one of the said characteristics.

A variety may be represented by several plants, a single plant or by one or several parts of a plant, provided that such part or parts can be used for the production of entire plants of the variety;

(vii) "Contracting Party" means a State or an intergovernmental organization party to this Convention;

(viii) "territory," in relation to a Contracting Party, means, 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;

(ix) "authority" means the authority referred to in Article 2(2)(ii);

(x) "Union" means the Union for the Protection of New Varieties of Plants constituted by the Act of 1961/1972 and further mentioned in the Act of 1978 and in this Convention;

(xi) "member of the Union" means a State party to the Act of 1961/1972 or the Act of 1978, and a Contracting Party;

(xii) "Secretary-General" means the Secretary-General of the Union.

Present [1978] TextArticle 1Purpose 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.
- (2) [See opposite Article 15 in the proposed new text.]
- (3) [See opposite Article 15 in the proposed new text.]

Article 30Implementation of the Convention on the Domestic Level; ...

- (1) Each member State of the Union shall adopt all measures necessary for the application of this Convention; in particular, it shall:
 - (a) provide for appropriate legal remedies for the effective defence of the rights provided for in this Convention;
 - (b) set up a special authority for the protection of new varieties of plants or entrust such protection to an existing authority;
 - (c) ensure that the public is informed of matters concerning such protection, including as a minimum the periodical publication of the list of titles of protection issued.
- (2) [See opposite Article 31 in the proposed new text.]
- (3) [See opposite Article 31 in the proposed new text.]

Proposed New Text

Article 2

Obligations of Contracting Parties

(1) [Protection of breeders' rights] Subject to the provisions of Article 36(2), each Contracting Party shall grant and protect breeders' rights.

(2) [Measures of implementation] Each Contracting Party shall adopt all measures necessary for the implementation of this Convention; in particular, it shall:

(i) provide for appropriate legal remedies for the effective enforcement of breeders' rights;

(ii) maintain an authority entrusted with the task of granting breeders' rights or entrust the said task to an authority maintained by another Contracting Party;

(iii) ensure that the public is informed through the regular publication of information concerning

- applications for and grants of breeders' rights, and
- proposed and approved denominations.

Present [1978] Text**Article 2****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.

(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.

Proposed New Text

Note

The proposed new text does not contain a provision that corresponds to Article 2 of the present text.

The non-inclusion of an article corresponding to Article 2(1) of the present text means that any Contracting Party may protect varieties, in addition to the granting of breeders' rights, by the grant of other titles, particularly patents for invention. ("Patents for invention" in this context refers to the usual kind of industrial or utility patent. It is not a reference to the breeders' rights which are granted in some States but which are called "patents" or to the special kinds of plant patent which are granted by certain States for asexually reproduced varieties.) It is to be noted that where a Contracting Party uses this faculty--that is, it allows the granting, in addition to the breeder's right, of patents for invention--it would be free to decide whether an applicant must choose between a breeder's right and a patent for invention (that is, if he applies for one, he cannot apply for the other) or whether he can apply for and be granted both a breeder's right and a patent for invention ("cumulative protection"). If, for any given variety, such cumulative protection is obtained, the resolution of any conflict between the two kinds of protection would be left to the legislation and the courts of the Contracting Party where both titles were obtained and would not be regulated in this Convention.

Present [1978] TextArticle 14Protection 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 3

Measures Regulating Commerce

The breeder's right shall be independent of any measure taken by a Contracting Party to regulate within its territory the production, certification and marketing of material of varieties or the importing or exporting of such material. In any case, such measures shall not affect the application of the provisions of this Convention.

Present [1978] TextArticle 4Botanical 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.
- (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.
- (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.*
- (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.*
- (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 proposed new text does not contain any corresponding provision.

Proposed New Text

Article 4

Genera and Species to Be Protected

(1) [New members of the Union] Each Contracting Party which is not bound by the Act of 1961/1972 or the Act of 1978 shall apply the provisions of this Convention,

(i) at the date on which it becomes bound by this Convention, to at least 25 plant genera or species and,

(ii) at the latest by the expiration of a period of 10 years from the said date, to all plant genera and species.

(2) [States already members of the Union] Each Contracting Party which is bound by the Act of 1961/1972 or the Act of 1978 shall apply the provisions of this Convention,

(i) at the date on which it becomes bound by this Convention, to all plant genera and species to which it applies, on the said date, the provisions of the Act of 1961/1972 or the Act of 1978 and,

(ii) at the latest by the expiration of a period of three years after the said date, to all plant genera and species.

Present [1978] TextArticle 3National 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.*

* The proposed new text does not contain any corresponding provision.

Proposed New Text

Article 5

National Treatment

(1) [Treatment] Without prejudice to the rights specified in this Convention, nationals of a Contracting Party as well as natural persons resident and legal entities having their registered offices within the territory of a Contracting Party shall, in so far as the protection of varieties is concerned, enjoy within the territory of each other Contracting Party the same treatment as is accorded or may hereafter be accorded by the laws of each such other Contracting Party to its own nationals, provided that the said nationals, natural persons or legal entities comply with the conditions and formalities imposed on the nationals of the said other Contracting Party.

(2) ["Nationals"] For the purposes of the preceding paragraph, "nationals" means, where the Contracting Party is a State, the nationals of that State and, where the Contracting Party is an intergovernmental organization, the nationals of the States members of that organization.

Present [1978] TextArticle 11Free 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 proposed new text does not contain any corresponding provision.

Proposed New Text

Article 6

First Application

(1) [Place of first application] The breeder may choose the Contracting Party with whose authority he wishes to file his first application for a breeder's right.

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

Present [1978] TextArticle 6Conditions 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 paragraph (3)]
- (b) [See opposite proposed new paragraph (2)]
- (c) [See opposite proposed new paragraph (4)]
- (d) [See opposite proposed new paragraph (5)]
- (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.

[Continued]

Proposed New Text

Article 7

Conditions for the Grant of a Breeder's Right

(1) [Criteria of protectability] (a) The breeder's right shall be granted where the variety is

- (i) new,
- (ii) distinct,
- (iii) uniform and
- (iv) stable.

(b) The grant of the breeder's right shall not be subject to any further or different conditions, provided that the variety is designated by a denomination in accordance with the provisions of Article 14, that the applicant complies with the formalities provided for by the law of the Contracting Party with whose authority the application has been filed and that he pays the required fees.

[Continued]

Present [1978] Text[Article 6(1), continued]

(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.

[Continued]

Article 38Transitional 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.

Proposed New Text

[Article 7, continued]

(2) [Newness] (a) The variety shall be deemed to be new if, at the date of filing of the application for a breeder's right, reproductive or vegetative propagating or harvested material of the variety [or any product directly obtained from the harvested material of the variety]

(i) has not been sold or otherwise made available to others by or with the consent of the breeder, for the purposes of exploitation, in the territory of the Contracting Party in which the application has been filed or, if the law of that Contracting Party so provides, earlier than one year before that date, and

(ii) has not been sold or otherwise made available to others by or with the consent of the breeder, for the purposes of exploitation, in a territory other than that of the Contracting Party in which the application has been filed earlier than four years or, in the case of trees or of vines, earlier than six years before the said date.

(b) Where a Contracting Party applies this Convention to a plant genus or species to which it did not previously apply this Convention or an earlier Act, it may consider a variety of recent creation existing at the date of such extension of protection to satisfy the condition of newness defined in sub-paragraph (a) even where the sale or making available to others described in that sub-paragraph took place earlier than the time limits defined in that sub-paragraph.

[Continued]

Present [1978] Text[Article 6(1), continued]

(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.

(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.

Proposed New Text

[Article 7, continued]

(3) [Distinctness] The variety shall be deemed to be distinct if it is clearly distinguishable from any other variety whose existence is a matter of common knowledge at the time of the filing of the application. In particular, the filing of an application for the granting of a breeder's right or for the entering of the variety in an official register of varieties, in any country, shall be deemed to render the variety a matter of common knowledge from the date of the application, provided that the application leads to the granting of a breeder's right or to the entering of the variety in the official register of varieties, as the case may be.

(4) [Uniformity] The variety shall be deemed to be uniform if, subject to the variation that may be expected from the particular features of its sexual reproduction or vegetative propagation, it is sufficiently uniform in its relevant characteristics.

(5) [Stability] The variety shall be deemed to be stable if, so far as its relevant characteristics are concerned, it remains true to its description after repeated reproduction or propagation or, in the case of a particular cycle of reproduction or propagation, at the end of each such cycle.

Present [1978] TextArticle 12Right 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.

[Continued]

Proposed New Text

Article 8

Right of Priority

(1) [The right; its period] Any breeder who has duly filed an application for the grant of a breeder's right with the authority of one of the Contracting Parties (the "first application") shall, for the purpose of filing an application for the same variety with the authority of any other Contracting Party (the "subsequent application"), 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) [Claiming the right] In order to benefit from the provisions of paragraph (1), the breeder shall, in the subsequent application, claim the priority of the first application. The breeder may be required to furnish, not earlier than three months from the filing date of the subsequent application, a copy of the documents which constitute the first application, certified to be a true copy by the authority with which that application was filed.

(3) [Supporting documents and material] The breeder shall be allowed a period of two years after the expiration of the period of priority or, where the first application is rejected or withdrawn, an appropriate time after such rejection or withdrawal, in which to furnish, to the authority of the Contracting Party with which he has filed the subsequent application, any additional supporting documents and material required by the laws of that Contracting Party.

[Continued]

Present [1978] Text

[Article 12, continued]

(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 8, continued]

(4) [Facts occurring during the period] Facts occurring within the period provided for in paragraph (1), such as the filing of another application or the publication or use of the variety that is the subject of the first application, shall not constitute a ground for rejecting the subsequent application. Such facts shall also not give rise to any third-party right.

Present [1978] TextArticle 7Official 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.
- (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 9

Examination of the Application; Provisional Protection

(1) [Examination] (a) The breeder's right shall be granted after an examination in the light of the criteria provided for in Article 7. In the course of the examination, the authority may grow the variety or carry out other necessary tests, cause the growing of the variety or the carrying out of other necessary tests, or take into account the results of growing tests or other trials which have already been carried out.

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

(2) [Safeguards before grant] Each Contracting Party shall provide measures designed to safeguard the interests of the breeder during the period between the filing or the publication of the application for the grant of a breeder's right and the decision thereon. Such measures shall have the effect that the holder of a breeder's right shall at least be entitled to equitable remuneration from any person who, during the said period, has carried out acts which, once the right is granted, require the breeder's authorization as provided in Article 12. A Contracting Party may provide that the said measures shall only take effect in relation to parties whom or which the breeder has expressly notified of the filing of the application.

Present [1978] TextArticle 8Period of Protection

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.

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Proposed New Text

Article 10

Duration of the Breeder's Right

(1) [Period of protection] The breeder's right shall be granted for a fixed period.

(2) [Minimum period] The said period shall not be shorter than 20 years from the date of the grant of the breeder's right. For trees and vines, the said period shall not be shorter than 25 years from the said date.

Present [1978] TextArticle 10Nullity 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 provision corresponding to Article 11(1)(ii) and (iii) of the proposed new text.]

[Continued]

Proposed New Text

Article 11

Nullity and Forfeiture of the Breeder's Right

(1) [Compulsory reasons of nullity] Each Contracting Party shall declare a breeder's right granted by it null and void when it is established

(i) that the conditions laid down in Article 7(2) and (3) were not complied with at the time of the grant of the breeder's right,

(ii) that, where the grant of the breeder's right has been essentially based upon information and documents furnished by the breeder, the conditions laid down in Article 7(4) and (5) were not complied with at the time of the grant of the breeder's right, or

(iii) that the breeder's right has been granted to a person who is not entitled to it, unless it can be transferred to the party who or which is so entitled.

[Continued]

Present [1978] Text

[Article 10, continued]

(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.

(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.

[The present text does not contain any provision corresponding to Article 11(2)(b)(iii) of the proposed new text.]

(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 11, continued]

(2) [Optional reasons for cancellation] (a) Each Contracting Party may cancel a breeder's right granted by it if it is established that the conditions laid down in Article 7(4) and (5) are no longer fulfilled.

(b) Furthermore, each Contracting Party may cancel a breeder's right granted by it if, after being requested to do so and within a prescribed period,

(i) the breeder does not provide the authority with the information, documents or material deemed necessary for verifying the maintenance of the variety,

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

(iii) the breeder does not propose, where the denomination of the variety is cancelled after the grant of the right, another suitable denomination.

(3) [Exclusion of other reasons] No breeder's right shall be declared null and void or cancelled for reasons other than those referred to in paragraphs (1) and (2).

Present [1978] TextArticle 5Rights 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.

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

(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.

* The proposed new text does not contain any corresponding provision.

Proposed New Text

Article 12

Effects of the Breeder's Right

(1) [Acts requiring the breeder's authorization] Subject to paragraphs (3) and (4), the following acts shall require the authorization of the breeder:

(a) in respect of the reproductive or vegetative propagating material of the protected variety,

- (i) production or reproduction,
- (ii) conditioning,
- (iii) offering for sale,
- (iv) sale or other putting on the market,
- (v) exporting,
- (vi) importing,
- (vii) stocking for any of the purposes mentioned in (i) to (vi), above,
- (viii) use in any way other than those mentioned in (i) to (vii), above;

(b) in respect of the harvested material of the protected variety, any of the acts referred to in (a), above, provided that the harvested material was obtained through the use of reproductive or vegetative propagating material whose use, for the purposes of obtaining harvested material, was not authorized by the breeder;

[Continued]

Present [1978] Text

[The present text does not contain any provision corresponding to Article 12(2)(a)(i) and (ii) of the proposed new text. Concerning Article 12(2)(a)(iii) of the proposed new text, see Article 5(3) of the present text.]

Proposed New Text

[Article 12, continued]

(c) in respect of products directly obtained from harvested material of the protected variety, any of the acts referred to in (a), above, provided that such products were made using harvested material falling within the provisions of (b) above whose use, for the purposes of making such products, was not authorized by the breeder.

(2) [Same, in respect of essentially derived and certain other varieties] (a)
Subject to paragraphs (3) and (4), the acts mentioned in paragraph (1) shall also require the authorization of the breeder in relation to

(i) varieties which are essentially derived from the protected variety, where the protected variety is not itself an essentially derived variety,

(ii) varieties which are not clearly distinguishable in accordance with Article 7(3) from the protected variety and

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

[Continued]

Present [1978] Text

[The present text does not contain any provision corresponding to Article 12(2)(b) or to Article 12(3)(i) and (ii) of the proposed new text. Concerning Article 12(3)(iii) of the proposed new text, see Article 5(3) of the present text.]

Proposed New Text

[Article 12(2), continued]

(b) For the purposes of sub-paragraph (a)(i), a variety shall be considered to be essentially derived from another variety ("the initial variety") when

(i) it is predominantly derived, whether directly or indirectly, from the initial variety, or from a variety that is itself predominantly derived from the initial variety, particularly through methods which have the effect of conserving the essential characteristics that are the result of [elements of] the genotype or of the combination of genotypes 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,

(ii) it is clearly distinguishable from the initial variety in accordance with Article 7(3) and

(iii) it conforms to the genotype or the combination of genotypes of the initial variety, apart from the specific or incidental differences which result from the method of derivation.

(3) [Acts not requiring the breeder's authorization] The breeder's right shall not extend to

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

(ii) acts done for experimental purposes and

(iii) acts done for the purpose of breeding other varieties, and, except where the provisions of paragraph (2) apply, acts referred to in paragraph (1) in respect of such other varieties.

[Continued]

Present [1978] Text

[The present text does not contain any provision corresponding to Article 12(4) of the proposed new text.]

Proposed New Text

[Article 12, continued]

(4) [Possible "farmer's privilege"] Notwithstanding paragraphs (1) and (2), each Contracting Party may, within reasonable limits and provided that due consideration is given to the need for the breeder to obtain adequate remuneration, restrict the breeder's right in relation to any variety in order to permit farmers* to use for reproductive or propagating purposes, on their own holdings*, the product of the harvest which they have obtained by planting, on their own holdings, the protected variety or a variety covered by paragraph (2)(a)(i) or (ii) [, provided that such use is limited to a quantity equal to the quantity of reproductive or vegetative propagating material of the variety originally purchased].

* The words "farmer" and "holding" are translated into French as "agriculteur" and "exploitation" and into German as "Landwirt" and "Betrieb" in the French and German versions of this document.

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Present [1978] Text

[The present text does not contain any provision corresponding to Article 12(5) of the proposed new text.]

Proposed New Text

[Article 12, continued]

(5) [Exhaustion of right] (a) 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 consent in the territory of the Contracting Party concerned, or any material derived from the said material, unless such acts

(i) involve further reproduction or propagation of the variety in question,
(ii) fall outside the field of use for which the breeder put material on the market or gave his consent, or

(iii) involve an export of material of the variety which enables the reproduction of the variety into a country which does not protect varieties of the plant genus or species to which the variety belongs.

(b) For the purposes of sub-paragraph (a), "material" means, in relation to a variety,

- (i) reproductive or vegetative propagating material of any kind,
- (ii) harvested material and
- (iii) any product directly obtained from the harvested material.

Present [1978] TextArticle 9Restrictions 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 13

Restrictions on the Exercise of the Breeder's Right

(1) [Public interest] Except where expressly provided in this Convention, no Contracting Party may restrict the free exercise of a breeder's right otherwise than for reasons of public interest.

(2) [Equitable remuneration] When any such restriction has the effect of authorizing a third party to perform any act for which the breeder's authorization is required, the Contracting Party concerned shall take all measures necessary to ensure that the breeder receives equitable remuneration.

Present [1978] TextArticle 13Variety 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.

[Continued]

Proposed New Text

Article 14

Variety Denomination

(1) [Designation of varieties by denominations; Use of the denomination] (a)

The variety shall be designated by a denomination destined to be its generic designation.

(b) 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 breeder's right.

(2) [Characteristics of the denomination] 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 plant species or of a closely related species.

(3) [Registration of the denomination] The denomination of the variety shall be submitted by the breeder to the authority. If it is found that the 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 accepted by the authority shall be registered by the authority at the same time as the breeder's right is granted.

[Continued]

Present [1978] Text[Article 13, continued]

(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.

[Continued]

Proposed New Text

[Article 14, continued]

(4) [Prior rights of third parties] 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 party who or which, 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) [Same denomination in all Contracting Parties] A variety must be submitted to all Contracting Parties under the same denomination. The authority of each Contracting Party shall register the denomination so submitted, unless it considers the denomination unsuitable within its territory. In the latter case, it shall require the breeder to submit another denomination.

(6) [Information among the authorities of Contracting Parties] The authority of a Contracting Party shall ensure that the authorities of all the other Contracting Parties 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.

[Continued]

Present [1978] Text[Article 13, continued]

(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.

(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 14, continued]

(7) [Obligation to use the denomination] Any party who or which, 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 breeder's right in that variety, except where, in accordance with the provisions of paragraph (4), prior rights prevent such use.

(8) [Indications used in association with denominations] 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.

[End of document]

INTERNATIONAL UNION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS

GENEVA

**FIFTH MEETING
WITH INTERNATIONAL ORGANIZATIONS****Geneva, October 10 and 11, 1990**

CORRIGENDUM TO DOCUMENT IOM/5/2 Rev.

prepared by the Office of the Union

The following corrections should be made on page 2 of document IOM/5/2 Rev.:

(i) In paragraph 1, the second sentence should be replaced by the following:

"Earlier drafts of these clauses were considered at six sessions of the Administrative and Legal Committee held over the years 1988, 1989 and 1990 and at the Fourth Meeting with International Organizations (a hearing organized by UPOV for international non-governmental organizations) held on October 8 and 9, 1989."

(ii) In paragraph 2, lines 2 and 3, the phrase between brackets should be deleted and, on line 4, the reference to the document number should read "IOM/5/2."

[End of document]