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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:

COMMENTS FROM UNICE

Document prepared by the Office of the Union

The annex to this document contains the comments from the Union of Industrial and Employers' Confederations of Europe (UNICE) on the revision of the Convention. They were received by the Office of the Union on September 24, 1990.

[Annex follows]



5.1/40/1

24th September 1990.

REVISION OF THE U P O V CONVENTION

UPOV Documents IOM/5/2&3

UNICE COMMENTS

General Remarks

- 1. In this further discussion about the revision of the UPOV Convention UNICE welcomes the open approach adopted by UPOV in inviting non-governmental organisations also to the next meetings in Geneva in October 1990.

Since the letter of invitation dated July 25, 1990 was encouraging those invited to present written comments in advance, UNICE would like to take this opportunity to present its views on a few points of the proposed new text of the Convention.

- 2. First of all, UNICE would like to congratulate the Office of the Union for this liberal and pluralistic approach, in which, for the first time, the so-called double protection bar has been eliminated. With the deletion of this provision the Office has removed from the Convention an unusual and unjustified inhibition.
- 3. By making this deletion, the Office also recognizes that both systems, Plant Breeders' Rights and Patents, have their justification, merits and benefits and that both can and should coexist without one system being exclusive of the other in certain areas of intellectual property protection.

Specific comments on the proposed new text

Article 1(vi)

Although the definition of "variety" has been very much improved in comparison to earlier drafts, UNICE still is of the opinion that there is no need for such a definition. The "Paris Convention for the Protection of Industrial Property", the national Patent Laws and the European Patent Convention do not contain the definition of an invention either and this has never caused any problem. UNICE believes that varieties have to fulfill the requirements of the proposed Article 7 and should, therefore, be defined according to this Article.

If, however, the general opinion is that such a definition is indispensable, then the proposed definition in Article 1(vi) should be amended to read (additions are underlined, while deletions are within square brackets):

\*\* (vi) "Variety" means a group of plants within the same species, which group, [irrespective of whether] meets 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 combinations of genotypes, and
- can be distinguished from other groups of plants from the same [botanical taxon] species by at least one of 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.] \*\*

The initial expression "Variety" means a groups of plants" is correct, but in contradiction with the last sentence, which reads "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..."

A variety must be a group of plants, otherwise the definition makes no sense. A part of a plant can never represent a variety.

The term variety does not exist in biology. It stems from the plant breeder's right, so that a variety can be only a group of plants that actually meets the conditions of the plant breeder's right. If not, then each group of plants could fall under the term variety. The proposed term "... irrespective of whether the conditions of a plant breeder's right are fully met..." makes the definition ambiguous.

The term botanical taxon is indefinite because it embraces the kingdom, the order, the suborder, the family, the subfamily, the species, etc. There are clearly defined differences e.g. between an order and a family. In the above context the only proper expression is the species.

If the proposed definition is retained then each genetically modified plant would automatically fall under the term variety and owing to the exclusion of Article 53b of the European Patent Convention, could only be protected by a plant breeder's right.

Such a broadening of this exclusion is neither desirable nor justified.

Article 2

In view of the deletion of the so-called double protection bar, UNICE does no longer see any need for the proposed Articles 2(1) and 36. They no longer make any sense and it would be inconsistent to keep them in the present text.

Article 4

The transitional period of 10 years for new members of the Union appears very long and, in order to have unified laws sooner, UNICE suggests that this period of 10 years be reduced to three years as proposed for existing members of the Union.

Article 5

UNICE supports the deletion of the obsolete reciprocal treatment of non-national applicants. The national treatment principle strengthens the UPOV Convention considerably.

Article 7(2)(b)

The provisions of this paragraph make novelty a very vague requirement and non-uniform from one Contracting State to the other. UNICE, therefore, suggests the deletion of Article 7(2)(b), as it sees no justification for the provisions therein contained.

Article 12(2)

The introduction of the provisions relating to "essentially derived" varieties will considerably improve the protection under this convention. However, UNICE considers the definition in Article 12(2)(b)(i) unbalanced and suggests inserting in line 5 of paragraph (i) the wording "without adding essential new characteristics".

It is possible to introduce a new gene into a plant, thereby preserving the essential characteristics of the original variety but also adding new valuable characteristics which increase the market value of the new variety considerably and it no longer can be considered as "essentially derived".

Article 12(4)

UNICE is surprised that the possible farmer's privilege is stated in such broad terms. UNICE is of the opinion that the farmer's privilege should be more limited in order to prevent misuses and suggests that the quantity allowed for use by the farmer on his own holdings should at least be limited to half of the quantity equal to the originally purchased quantity.

Article 36

In view of the proposed Article 1, this Article 36 should be deleted as redundant.