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INTERNATIONAL UNION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS

GENEVA

COMMITTEE OF EXPERTS ON
THE INTERPRETATION AND REVISION OF THE CONVENTION

Fifth Session
Geneva, March 8 to 10, 1977

PROPOSALS FOR THE REVISION OF THE GENERAL TREATY LAW PROVISIONS
AND OF TWO TRANSITIONAL PROVISIONS OF THE CONVENTION

Document prepared by the Office of the Union

SUMMARY

This document, which is intended as a working paper for the fifth session of the Committee of Experts on the Interpretation and Revision of the Convention, sums up the state of the discussions on questions which concern the general treaty law provisions of the UPOV Convention and which will form the subject of the next Diplomatic Conference, scheduled for October 1978. It contains proposals for amendments to those provisions as well as to two transitional provisions. It does not deal with questions concerning the protection of new varieties of plants as provided for in the UPOV Convention; those questions are treated in document IRC/V/2.

INTRODUCTION

1. The Committee of Experts on the Interpretation and Revision of the Convention (hereinafter referred to as "the Committee") has discussed in former sessions a number of proposals for the revision of the general treaty law provisions of the UPOV Convention, in particular Articles 25, 27 and 32. The state of the discussions is described in the following paragraphs. Further proposals in respect of the transitional provisions of Article 35 and Article 36 are made below by the Office of the Union.

PART I

COOPERATION WITH OTHER ORGANIZATIONS

Article 25*

2. Article 25 reads as follows:

"Article 25[Cooperation with the Unions Administered by BIRPI]

"The procedures for technical and administrative cooperation between the Union for the Protection of New Varieties of Plants and the Unions administered by the United International Bureaux for the Protection of Industrial, Literary and Artistic Property shall be governed by rules established by the Government of the Swiss Confederation in agreement with the Unions concerned."

3. In view of the fact that the United International Bureaux for the Protection of Industrial, Literary and Artistic Property (BIRPI) are in the process of being replaced by the World Intellectual Property Organization (WIPO), this Article needs redrafting. At its fourth session, the Committee expressed itself in favor of replacing "the Unions administered by the United International Bureaux for the Protection of Industrial, Literary and Artistic Property" by "the World Intellectual Property Organization."

4. The amended version of Article 25 could thus read as follows:

"Article 25[Cooperation with the Unions Administered by WIPO]

"The procedures for technical and administrative cooperation between the Union for the Protection of New Varieties of Plants and the World Intellectual Property Organization shall be governed by rules established by the Government of the Swiss Confederation in agreement with the said Organization and the said Union."

PART II

REVISION CONFERENCES

Article 27(2)

5. Article 27(1) and 27(2) read as follows:

"(1) This Convention shall be reviewed periodically with a view to the introduction of amendments designed to improve the working of the Union.

"(2) For this purpose, conferences shall be held every five years, unless the Council, by a majority of five-sixths of the members present, considers that the convening of such a conference should be brought forward or postponed."

* The Articles referred to are Articles of the UPOV Convention.

6. At its fourth session, the Committee agreed that the strict obligation of holding revision conferences every five years should be abandoned and that it should be for the Council to decide when revision conferences should be convened. Such decisions by the Council should require a three-quarters majority.
7. Consequently, Article 27(1) and 27(2) could read as follows:
- "(1) This Convention may be revised from time to time by a special conference of the member States of the Union.
- "(2) The convocation of any revision conference shall be decided by the Council."
8. The majority required for the Council's decision on the convocation of a revision conference should be specified only in Article 22 and not also in Article 27. The principle of mentioning majorities required for Council decisions exclusively in Article 22 has already been followed by the Additional Act of 1972.
9. Recent treaties on the protection of industrial property--and recent Acts of older treaties--contain clauses according to which provisions of a purely administrative nature can be amended by a decision of the highest organ of the competent organization and enter into force after the majority of the member States have submitted written notifications of acceptance effected in accordance with their respective constitutional processes. The Annex of this document contains a collection of provisions of that kind.
10. The advantage of such clauses lies in the fact that administrative provisions can be amended more easily and the new texts can be adopted more rapidly by the member States since most States do not need the approval of their Parliaments to notify their acceptance of the amended provisions. In the UPOV Convention it could be provided that the provisions of Articles 15, 16, 19, 20, 23, 24, 25 and 26(2) and (3) may be amended according to the procedure described above.
11. The Committee may wish to study whether provisions similar to those appearing in the Annex should also be included in the UPOV Convention. In the event that such provisions should be included, the following paragraph could be added to Article 27:
- "(5) [new] Articles 15, 16, 19, 20, 23, 24, 25, 26(2) and (3) and 27A may be amended either by a revision conference or according to the provisions of Article 27A."

Furthermore, the following new Article should be inserted between Articles 27 and 28:

"Article 27A

[Amendment of Certain Provisions of the Convention]

- "(1) Proposals for the amendment of Articles 15, 16, 19, 20, 23, 24, 25, 26(2) and (3) and the present Article may be initiated by any member State of the Union, by the Council or by the Secretary-General.
- "(2) Such proposals shall be communicated by the Secretary-General to the member States of the Union at least six months in advance of their consideration by the Council.
- "(3) Amendments to the Articles referred to in paragraph (1) shall be adopted by the Council.
- "(4) Adoption shall require a three-quarters majority of the members present and voting. Abstentions shall not be considered votes.
- "(5) Any amendment to the Articles referred to in paragraph (1) shall enter into force one month after written notifications of acceptance, effected in accordance with their respective constitutional processes, have been received by the Secretary-General from three-quarters of the States members of the Union at the time the Council adopted the amendment. Any amendment to the said Articles thus accepted shall bind all the States which are members of the Union at the time the amendment enters into force, or which become members thereof at a subsequent date, provided that any amendment increasing the financial obligations of member States of the Union shall bind only those States which have notified their acceptance of such amendment."

PART III

ACCESSION OF NON-MEMBER STATES

Article 32

12. Article 32 reads as follows:

"Article 32[Accession; Entry Into Force]

"(1) This Convention shall be open to accession by non-signatory States in accordance with the provisions of paragraphs (3) and (4) of this Article.

"(2) Applications for accession shall be addressed to the Government of the Swiss Confederation, which shall notify them to the member States of the Union.

"(3) Applications for accession shall be considered by the Council having particular regard to the provisions of Article 30.

Having regard to the nature of the decision to be taken and to the difference in the rule adopted for revision conferences, accession by a non-signatory State shall be accepted if a majority of four-fifths of the members present vote in favor of its application.

Three-quarters of the member States of the Union must be represented when the vote is taken.

"(4) In the Case of a favourable decision, the instrument of accession shall be deposited with the Government of the Swiss Confederation, which shall notify the member States of the Union of such deposit.

Accession shall take effect thirty days after the deposit of such instrument."

13. At the fourth session of the Committee, it was emphasized that the procedure, provided for in Article 32(3), of submitting the applications for accession of non-member States to a prior examination by the existing member States was unusual in contemporary multilateral treaties, and indeed completely unknown in the field of intellectual property. The question was raised whether it was not possible to do away with the application procedure--according to which, in essence, the member States of UPOV sit in judgement upon another State to decide whether it is in a position, under its domestic law, to give effect to the provisions of the UPOV Convention--and adopt the more usual procedure for accession by non-signatory States. The latter procedure would consist in depositing an instrument of accession, and the State depositing such an instrument would thereby give conclusive evidence that in its own judgement it complied with the requirements of the UPOV Convention, particularly since Article 30(3) of that Convention provides as follows: "It shall be understood that, on depositing its instrument of ratification or accession, each [prospective] member State must be in a position, under its own domestic law, to give effect to the provisions of this Convention."

14. The Committee agreed at its fourth session that the Ministers of Foreign Affairs of the member States should be consulted on this question and the Council fixed its eleventh session, to be held in October 1977, as the ultimate date for a decision on whether the question of deleting the said application procedure should be submitted to the Diplomatic Conference.

15. In order to facilitate the preparation of the envisaged discussion in the Consultative Committee and the Council, the following wording is proposed for Article 32:

"Article 32

[Accession; Entry Into Force]

"(1) This Convention shall be open to accession by non-signatory States.

"(2) Instruments of accession shall be deposited with the Government of the Swiss Confederation, which shall notify the member States of the Union accordingly. Accession shall take effect thirty days after the deposit of such instrument."

16. The question of the relationship between those States which, for a transitional period, will be party to the UPOV Convention and the Additional Act of 1972 only and those States for which the revised text of 1978 will have entered into force needs also to be solved in the Council's eleventh ordinary session. However, it would seem to be preferable to wait before making proposals until it is decided:

- (i) which States will be entitled to sign and ratify the revised text, and
- (ii) under what conditions the revised text will enter into force.

PART IV

MAJORITIES REQUIRED FOR THE COUNCIL'S DECISIONS

17. Article 22, as revised by Article I of the Additional Act reads as follows:

"Article I

[Amended Version of Article 22 of the Convention
(Majorities Required for Decisions of the Council)]

.....

"Decisions of the Council shall be taken by a simple majority of the members present, except in the cases provided for in Articles 20, 27, 28 and 32*, for the vote on the budget, for the fixing of the contributions of each member State of the Union, for the faculty provided for in paragraph (5) of Article 26 concerning payment of one-half of the contribution corresponding to Class V and for any decision regarding voting rights under paragraph (6) of Article 26. In the last four cases, the majority required shall be three-quarters of the members present."

18. At the present stage of the discussions, the following changes which concern voting in the Council have either been agreed upon or are under consideration:

(i) Under the proposed new version of Article 4(4) (see document IRC/V/2, paragraph 27), the Council could decide to reduce, for the benefit of certain States, the minimum number of genera and species to which the Convention has to be applied within certain periods or to prolong these periods. It was agreed that such decisions should be taken by a four-fifths majority and that a quorum of three-quarters of the member States was necessary.

(ii) Under the new proposed version of Article 4(5), the Council could decide to extend, for the benefit of a member State having difficulties in meeting its obligations under Article 4(3), the periods within which the Convention has to be applied to a minimum number of genera and species. It was agreed that such decisions should be taken by a simple majority.

*

Article 20 provides for the laying down of the rules of procedure of the Council and of the administrative and financial regulations of the Union; Article 27 provides, in paragraph (2), for the postponement or bringing forward of the date for the convening of a revision conference; Article 28 provides for the possibility of using further languages within the Union; Article 32 provides for the examination of applications for accession to the Convention.

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(iii) According to the proposed revised wording of Article 27 (see paragraph 7 above), the Council can decide to convene a revision conference. It is proposed to require for such decisions a three-quarters majority (see paragraph 6, above).

(iv) The deletion has been proposed of Article 32(3), which provides for a four-fifths majority and a quorum of three-quarters of the member States (see paragraph 14 above).

19. If Article 32(3) is to be deleted, it should be reconsidered whether in the case mentioned in paragraph 18(i) above the envisaged majority of four-fifths--which was proposed only for the sake of analogy with Article 32(3)--could be replaced by a majority of three-quarters of the member States. Such a change would have the advantage that only two kinds of majorities would be provided for decisions by the Council: a simple majority or a three-quarters majority. The quorum requirement should be deleted. Furthermore, it should be stated that only votes actually cast should be taken into consideration in deciding whether the required majority is obtained.

20. If the above suggestion is adopted, Article 22 could be redrafted as follows:

"Article 22

[Majorities Required for Decisions of the Council]

"The Council's decisions shall be taken by a simple majority of the members present and voting, except in the cases provided for in Articles 4(4), 20, 26, 27 and 28, and for the vote on the budget and the fixing of the contributions of each member State of the Union. In those cases, the majority required shall be three-quarters of the members present and voting. Abstentions shall not be considered votes."

PART V

TRANSITIONAL RULES

21. Articles 35 and 36 read as follows:

"Article 35

[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 of entry into force of this Convention in respect of such State."

"Article 36

[Transitional Rules Concerning the Relationship Between
Variety Denominations and Trade Marks]

"(1) If, at the date of entry into force of this Convention in respect of a member State of the Union, the breeder of a new variety protected in that State, or his successor in title, enjoys in that State the protection of the denomination of that variety as a trade mark for identical or similar products within the meaning of trade mark law, he may either renounce the protection in respect of the trade mark or submit a new denomination for the variety in the place of the previous denomination. If a new denomination has not been submitted within a period of six months, the breeder or his successor in title may not continue to assert his right to the trade mark for the above-mentioned products.

"(2) If a new denomination is registered for the variety, the breeder or his successor in title may not prohibit the use of the previous denomination by persons obliged to use it before the entry into force of this Convention, until a period of one year has expired from the publication of the registration of the new denomination.

22. Articles 35 and 36 authorize member States to deviate under certain conditions from the normal rules for novelty and for the protection of the denomination as a trademark. These rules were adopted primarily to remedy the situation arising at the time of the entry into force of the Convention in respect of a State. Breeders having started commercialization of a new variety or having obtained trade mark protection for the variety shortly before that entry into force will not be excluded from the full enjoyment of the benefits under the Convention. Moreover, it was the intention to prevent breeders from withholding applications pending the entry into force of the Convention in a State in the immediate future.

23. A similar situation exists when the application of the Convention after its entry into force is extended to additional genera or species. Member States have already interpreted the Convention as meaning that the transitional provisions are allowed also in such cases. It seems to be appropriate to state expressly and beyond any doubt that this interpretation is covered by the Convention.

24. If the above proposal is accepted, Articles 35 and 36(1) could be redrafted as follows:

"Article 35

[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 where in that State the provisions of this Convention are applied to the genera or species to which such varieties belong.

"Article 36

[Transitional Rules Concerning the Relationship Between
Variety Denominations and Trade Marks]

"(1) If, at the date when in a member State of the Union the provisions of this Convention are applied to a genus or species, the breeder of a new variety protected in that State and belonging to that genus or species, or his successor in title, enjoys in that State the protection of the denomination of that variety as a trade mark for identical or similar products within the meaning of trade mark law, he may either renounce the protection in respect of the trade mark or submit a new denomination for the variety in the place of the previous denomination. If a new denomination has not been submitted within a period of six months, the breeder or his successor in title may not continue to assert his right to the trade mark for the above-mentioned products."

[Annex follows]

ANNEX

PROVISIONS OF CERTAIN TREATIES ON THEIR REVISION

1. Stockholm Act (1967) of the Paris Convention for the Protection of Industrial Property¹"Article 17[Amendment of Articles 13 to 17]

"(1) Proposals for the amendment of Articles 13, 14, 15, 16, and the present Article, may be initiated by any country member of the Assembly, by the Executive Committee, or by the Director General. Such proposals shall be communicated by the Director General to the member countries of the Assembly at least six months in advance of their consideration by the Assembly.

"(2) Amendments to the Articles referred to in paragraph (1) shall be adopted by the Assembly. Adoption shall require three-quarters of the votes cast, provided that any amendment to Article 13, and to the present paragraph, shall require four-fifths of the votes cast.

"(3) Any amendment to the Articles referred to in paragraph (1) shall enter into force one month after written notifications of acceptance, effected in accordance with their respective constitutional processes, have been received by the Director General from three-fourths of the countries members of the Assembly at the time it adopted the amendment. Any amendment to the said Articles thus accepted shall bind all the countries which are members of the Assembly at the time the amendment enters into force, or which become members thereof at a subsequent date, provided that any amendment increasing the financial obligations of countries of the Union shall bind only those countries which have notified their acceptance of such amendment."

"Article 18[Revision of Articles 1 to 12 and 18 to 30]

"(1) This Convention shall be submitted to revision with a view to the introduction of amendments designed to improve the system of the Union.

"(2) For that purpose, Conferences shall be held successively in one of the countries of the Union among the delegates of the said countries.

"(3) Amendments to Articles 13 to 17 are governed by the provisions of Article 17."

2. Patent Cooperation Treaty (1970)²

REVISION and AMENDMENT

"Article 60Revision of the Treaty

"(1) This Treaty may be revised from time to time by a special Conference of the Contracting States.

"(2) The convocation of any revision conference shall be decided by the Assembly.

¹ Article 13 of that Act relates to the Assembly of the Paris Union, Article 14 to the Executive Committee, Article 15 to the International Bureau and Article 16 to the finances of the Paris Union.

² Article 53 of that Treaty relates to the Assembly, Article 54 to the Executive Committee, Article 55 to the International Bureau, Article 56 to the Committee for Technical Cooperation and Article 57 to finances.

"(3) Any intergovernmental organization appointed as International Searching or Preliminary Examining Authority shall be admitted as observer to any revision conference.

"(4) Articles 53(5), (9) and (11), 54, 55(4) to (8), 56, and 57, may be amended either by a revision conference or according to the provisions of Article 61.

"Article 61

[Amendment of Certain Provisions of the Treaty]

"(1) (a) Proposals for the amendment of Articles 53(5), (9) and (11), 54, 55(4) to (8), 56, and 57, may be initiated by any State member of the Assembly, by the Executive Committee, or by the Director General.

"(b) Such proposals shall be communicated by the Director General to the Contracting States at least six months in advance of their consideration by the Assembly.

"(2) (a) Amendments to the Articles referred to in paragraph (1) shall be adopted by the Assembly.

"(b) Adoption shall require three-fourths of the votes cast.

"(3) (a) Any amendment to the Articles referred to in paragraph (1) shall enter into force one month after written notifications of acceptance, effected in accordance with their respective constitutional processes, have been received by the Director General from three-fourths of the States members of the Assembly at the time it adopted the amendment.

"(b) Any amendment to the said Articles thus accepted shall bind all the States which are members of the Assembly at the time the amendment enters into force, provided that any amendment increasing the financial obligations of the Contracting States shall bind only those States which have notified their acceptance of such amendment.

"(c) Any amendment accepted in accordance with the provisions of subparagraph (a) shall bind all States which become members of the Assembly after the date on which the amendment entered into force in accordance with the provisions of subparagraph (a)."

3. Strasbourg Agreement (1971) Concerning the International Patent Classification³

"Article 10

[Revision of the Agreement]

"(1) This Agreement may be revised from time to time by a special conference of the countries of the Special Union.

"(2) The convocation of any revision conference shall be decided by the Assembly.

"(3) Articles 7, 8, 9 and 11 may be amended either by a revision conference or according to the provisions of Article 11."

* Article 7 of that Agreement relates to the Assembly of the IPC Union, Article 8 to the International Bureau and Article 9 to the finances of the said Union.

"Article 11[Amendment of Certain Provisions of the Agreement]

"(1) Proposals for the amendment of Articles 7, 8, 9 and of the present Article may be initiated by any country of the Special Union or by the Director General. Such proposals shall be communicated by the Director General to the countries of the Special Union at least six months in advance of their consideration by the Assembly.

"(2) Amendments to the Articles referred to in paragraph (1) shall be adopted by the Assembly. Adoption shall require three-fourths of the votes cast, provided that any amendment to Article 7 and to the present paragraph shall require four-fifths of the votes cast.

"(3) (a) Any amendment to the Articles referred to in paragraph (1) shall enter into force one month after written notifications of acceptance, effected in accordance with their respective constitutional processes, have been received by the Director General from three-fourths of the countries members of the Special Union at the time of the amendment was adopted.

"(b) Any amendment to the said Articles thus accepted shall bind all the countries which are members of the Special Union at the time the amendment enters into force, provided that any amendment increasing the financial obligations of countries of the Special Union shall bind only those countries which have notified their acceptance of such amendment.

"(c) Any amendment accepted in accordance with the provisions of subparagraph (a) shall bind all countries which become members of the Special Union after the date on which the amendment entered into force in accordance with the provisions of subparagraph (a)."

[End of Annex and of document]