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COMMITTEE OF EXPERTS ON THE INTERPRETATION AND REVISION OF THE CONVENTION

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DRAFTING PROPOSALS CONCERNING THE AUTHENTIC FRENCH TEXT AND THE
OFFICIAL ENGLISH AND GERMAN TRANSLATIONS
OF THE UPOV CONVENTION

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, lists a small number of proposals for the improvement of the authentic French text of the Convention which also affect the official texts in other languages (Chapter A), one drafting proposal concerning the French text and affecting the German text (Chapter B) and some drafting proposals concerning the English (Chapter C) and the German (Chapter D) translations only.

BACKGROUND

1. In former sessions of the Committee of Experts on the Interpretation and Revision of the Convention (hereinafter referred to as "the Committee") it was noted that both the authentic French text of the UPOV Convention and its official translations should be improved on the occasion of the next revision conference. During these sessions, some discrepancies were also discovered between the authentic text and the official English and German translations. As far as the latter are concerned, it was decided that they should be changed at the next opportunity.

2. The authentic French text of the UPOV Convention can only, of course, be amended in a revision conference. The next revision conference, scheduled for October 1978, will be a particularly suitable occasion for making drafting changes since a complete new text will be laid open for signature at the close of the conference. The Office of the Union has collected a small number of proposals for the improvement of the authentic text which could be discussed in the Committee's fifth session and, if necessary, also in its sixth. They are dealt with in Chapter A of this document; they affect also the English and German texts. Another proposal concerning mainly the French text but affecting also the German text is dealt with in Chapter B.

3. As far as amendments affecting only the German and English translations are concerned, the situation is as follows. If it is intended that the 1978 Diplomatic Conference should adopt the revised text not only in French but also in English and German, it is indispensable that proposals for the amendment of the last two texts be considered before the start of the Conference. On the other hand, if it is intended that the said Diplomatic Conference should adopt the revised text in French only, the amendment of the English and German texts can wait until after the Diplomatic Conference, although, for information purposes, it would be useful if the Office of the Union could present draft official translations of the text which would be submitted to the Conference. In the course of the Conference, the delegations could then comment on those draft translations. Whatever course is chosen, it would appear to be desirable to consider what seem to be discrepancies between the existing versions in the various languages. Chapters C and D of this document provide a basis for such consideration.

4. If, in the course of the preparatory work for the Diplomatic Conference, additional points of a drafting nature are discovered, they too will be submitted to the Committee.

CHAPTER A

PROPOSALS FOR CLARIFYING CERTAIN PROVISIONS

IN ALL LANGUAGES

Article 4(4)

5. Article 4(4) reads as follows:

"(4) Any member State of the Union protecting a genus or species not included in the list shall be entitled either to limit the benefit of such protection to the nationals of member States of the Union protecting the same genus or species and to natural and legal persons resident or having their headquarters in any of those States, or to extend the benefit of such protection to the nationals of other member States of the Union or to member States of the Paris Union for the Protection of Industrial Property and to natural and legal persons resident or having their headquarters in any of those States."

6. The paragraph cited above could be misinterpreted to mean that member States of the Union protecting a genus or a species not included in the list are restricted to the courses of action expressly mentioned, namely, either to limit the benefit of such protection to the nationals and residents of member States protecting the same genus or species or to extend that benefit to nationals and residents of other member States of UPOV or of the Paris Union for the Protection of Industrial Property. In particular, the text would seem to exclude the possibility of extending the benefit of protection to anybody, that is, even to applicants who are not nationals (or residents, etc.) of any member State of UPOV or of the Paris Union for the Protection of Industrial Property. Nevertheless, extension of protection of the latter kind does exist in the national legislation of at least one of the present member States of UPOV.

7. In order to exclude the above-mentioned narrow interpretation of Article 4(4), an additional sentence or paragraph could be added, worded as follows:

"Nothing in this Convention shall prevent any member State of the Union from extending the benefit of the protection of any genus or species protected in that State to any person applying for such protection."

8. It should be noted that the proposed additional sentence or paragraph is not limited to the genera and species referred to in Article 4(4), namely, those listed in the Annex to the Convention. This has the advantage that other misinterpretations--for instance an unduly narrow interpretation of Article 3 or Article 4(5)--will be prevented.

9. It should furthermore be noted that the above-mentioned problem is also relevant for the new wording of Article 4(6) which has been proposed in document IRC/V/2, paragraph 27.

Article 8(2)

10. The authentic French text and the English and German translations of Article 8(2) read as follows:

(French)

"(2) La durée de la protection dans un Etat de l'Union s'entend à partir de la date de la délivrance du titre de protection."

(English)

"(2) The period of protection in a member State of the Union shall run from the date of the issue of the title of protection."

(German)

"(2) Die Dauer des Schutzes in einem Verbandsstaat läuft vom Zeitpunkt der Erteilung des Schutzrechts an."

11. It is the opinion of the Committee that Article 8(2) should not be interpreted as obliging member States to harmonize the beginning of the period of protection. It should be understood merely as a basis for calculating the date on which the minimum period prescribed in Article 8(1) is to end. It is for that reason only that Article 8(2) refers to the issue of the title of protection as the start of the minimum period of protection. Member States would, however, be free to provide that the protection should start on an earlier date if it lasts only as long as, or longer than, the minimum period calculated from the date when the title of protection was issued.

12. In the Committee's view, the authentic French text is flexible enough to cover the above interpretation. The same does not seem to apply in the case of the English and German translations. If the Committee's view is shared, it will therefore be necessary to amend at least the English and German translations. A better solution, however, would be to eliminate the ambiguity in the French authentic text as well and adapt the two translations to the new French version. This could be done by drafting Article 8(2) to read as follows:

(French)

"(2) Pour déterminer la date d'expiration des durées minimales prévues au paragraphe (1), la durée de la protection dans un Etat de l'Union s'entend à partir de la date de la délivrance du titre de protection."

(English)

"(2) For the purpose of establishing the date of expiration of the minimum periods prescribed in paragraph (1), the period of protection in a member State of the Union shall be deemed to run from the date of the issue of the title of protection."

(German)

"(2) Für die Bestimmung des Ablaufs der in Absatz 1 festgesetzten Mindestfristen ist als Beginn ihrer Laufzeit der Zeitpunkt der Erteilung des Schutzrechts zugrundezulegen."

Article 8(3)

13. Article 8(3) reads as follows:

"(3) Each member State of the Union may adopt longer periods than those indicated above and may fix different periods for some classes of plants, in order to take account, in particular, of the requirements of regulations concerning the production and marketing of seeds and propagating material."

14. The question should be studied whether the final part of the above paragraph ("in order to....") which mentions the main reason for fixing different periods of protection for some classes of plants, needs to be maintained. This final part has no legal effect since it does not prevent States from fixing different periods of protection for reasons other than those mentioned in the existing text. Its obvious aim is to guide member States in the right direction when applying Article 8(3). Such guidance might have been necessary during the early years of application of the Convention but whether the clause in question could not be abandoned now is a matter that should be considered.

Article 13(2)

15. Article 13(2), second paragraph, reads as follows:

"(2)....The denomination must not be liable to mislead or to cause confusion concerning the characteristics, value or identity of the new 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, existing varieties of the same or a closely related botanical species."

16. Since a single denomination usually designates a single variety, the last sentence of the above subparagraph should state that the proposed variety denomination must be different from every denomination which designates, in any member State of the Union, "an existing variety" (and not "existing varieties") of the same or a closely related botanical species.

17. Article 13(2), second subparagraph, would then read as follows:

"The denomination must not be liable to mislead or to cause confusion concerning the characteristics, value or identity of the new 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 or a closely related botanical species."

CHAPTER B

DRAFTING PROPOSAL CONCERNING THE AUTHENTIC FRENCH TEXT WHICH HAS
REPERCUSSIONS ON THE GERMAN TRANSLATIONArticle 12(2)

18. Article 12(2) of the authentic French text reads as follows:

"(2) Pour bénéficier des dispositions du paragraphe précédent, le nouveau dépôt doit comporter une requête en protection de l'obtention, la revendication de la priorité de la première demande et, dans un délai de trois mois, une copie des documents qui constituent cette demande, certifiée conforme par l'administration qui l'aura reçue."

19. To obtain a consistent terminology throughout the Convention (see the wording of Article 7(3)), consideration should be given to the question whether the term "obtention" in the expression "une requête en protection de l'obtention" could not be replaced by "variété nouvelle." In the English translation the French word "obtention" is already translated by "new variety." The German translation, which follows more closely the authentic French text, would also have to be amended if the authentic French text were changed, and the words "der Züchtung" would have to be replaced by "der neuen Sorte."

CHAPTER C

DRAFTING PROPOSALS CONCERNING THE ENGLISH TRANSLATION ONLY

Article 4(4)

20. The authentic French text and the English translation of Article 4(4) read as follows:

(French)

"(4)...chaque Etat de l'Union...a la faculté...d'étendre le bénéfice de cette protection aux nationaux d'autres Etats de l'Union ou des Etats membres de l'Union de Paris pour la protection de la propriété industrielle,"

(English)

"(4) Any member State of the Union ...shall be entitled...to extend the benefit of such protection to the nationals of other member States of the Union or to member States of the Paris Union for the Protection of Industrial Property... ."

21. The English translation contains a mistake as it seems to entitle member States to extend the benefit of protection to the member States of the Paris Union for the Protection of Industrial Property themselves and not to nationals of those States. To eliminate this mistake the word "to" before the words "member States of the Paris Union" should be replaced by "of the."

22. Article 4(4) would then read as follows:

"Any member State of the Union...shall be entitled...to extend the benefit of such protection to the nationals of other member States of the Union or of the member States of the Paris Union for the Protection of Industrial Property... ."

Article 30(3)

23. The authentic French text and the English translation of Article 30(3) read as follows:

(French)

"(3) Il est entendu qu'au moment du dépôt de son instrument de ratification ou d'adhésion, chaque Etat doit être en mesure, conformément à sa législation interne, de donner effet aux dispositions de la présente Convention."

(English)

"(3) It shall be understood that, on depositing its instrument of ratification or accession, each member State must be in a position, under its own domestic law, to give effect to the provisions of this Convention."

24. At the time of depositing its instrument of ratification or accession the depositing State is not yet a member State for another 30 days (Article 31(3)). The authentic French text does not therefore use the term "member" State here. It is proposed to delete the word "member" in the English translation.

25. Article 30(3) would then read as follows:

"(3) It shall be understood that, on depositing its instrument of ratification or accession, each State must be in a position, under its own domestic law, to give effect to the provisions of this Convention."

CHAPTER D

DRAFTING PROPOSALS CONCERNING THE GERMAN TRANSLATION ONLY

Article 6(1)(a), first sentence

26. The authentic French text and the German translation of Article 6(1)(a), first sentence, read as follows:

(French)

"a) Quelle que soit l'origine, artificielle ou naturelle, de la variation initiale qui lui a donné naissance, la variété nouvelle doit pouvoir être nettement distinguée par un ou plusieurs caractères importants, de toute autre variété dont l'existence, au moment où la protection est demandée, est notoirement connue."

(German)

"a) Die neue Sorte muss sich ohne Rücksicht darauf, ob das Ausgangsmaterial, aus dem sie entstanden ist, künstlichen oder natürlichen Ursprungs ist, durch ein oder mehrere wichtige Merkmale von jeder anderen Sorte deutlich unterscheiden lassen, deren Vorhandensein im Zeitpunkt der Anmeldung des Schutzrechts allgemein bekannt ist."

27. The French expression "variation initiale" (in English: "initial variation") has been translated into German by the word "Ausgangsmaterial" (English translation: "initial material"). This does not correspond to the authentic text and might lead to misunderstandings. It is proposed that the word "Ausgangsmaterial" be replaced by the word "Ausgangsänderung."

28. The German translation of Article 6(1)(a), first sentence, would then read as follows:

"a) Die neue Sorte muss sich ohne Rücksicht darauf, ob die Ausgangsänderung, aus der sie entstanden ist, künstlichen oder natürlichen Ursprungs ist, durch ein oder mehrere wichtige Merkmale von jeder anderen Sorte deutlich unterscheiden lassen, deren Vorhandensein im Zeitpunkt der Anmeldung des Schutzrechts allgemein bekannt ist."

Article 6(1)(b), first sentence

29. The authentic French text and the German translation of Article 6(1)(b), first sentence, read as follows:

(French)

"b) Le fait pour une variété d'avoir figuré dans les essais...ne peut pas être opposé à l'obtenteur de cette variété ou à son ayant cause."

(German)

"b) Die Tatsache, dass eine Sorte bereits versuchsweise angebaut... worden ist, kann ihrem Züchter oder seinem Rechtsnachfolger nicht entgegengehalten werden."

30. The translation of the French term "figuré dans les essais" (in English: "entered in trials") into German by the words "versuchsweise angebaut" (English translation: "grown in an experimental way") is too narrow. It does not cover any experimental use of the variety other than the growing of plants. It is therefore proposed that the words "versuchsweise angebaut" be replaced by the words "in Versuche einbezogen."

31. Article 6(1)(b), first sentence, would then read as follows:

"b) Die Tatsache, dass eine Sorte bereits in Versuche einbezogen...worden ist, kann ihrem Züchter oder seinem Rechtsnachfolger nicht entgegengehalten werden."

Article 13(10), second sentence

32. The authentic French text and the German translation of Article 13(10), second sentence, read as follows:

(French)

"(10) Si, en vertu d'un droit antérieur, l'utilisation de la dénomination d'une variété nouvelle est interdite à une personne qui, conformément aux dispositions du paragraphe (7), est obligée de l'utiliser, le service compétent exige, le cas échéant, que l'obtenteur ou son ayant cause propose une autre dénomination pour la variété nouvelle."

(German)

"(10) Wird die Benutzung der Sortenbezeichnung einer neuen Sorte einer Person, die gemäss Absatz 7 zu ihrer Benutzung verpflichtet ist, auf Grund eines älteren Rechts untersagt, so verlangt die zuständige Behörde in diesem Fall von dem Züchter oder seinem Rechtsnachfolger, dass er eine andere Sortenbezeichnung für die neue Sorte vorschlägt."

33. The French expression "le cas échéant" (in English: "if need be") has been translated into German by the words "in diesem Fall" (in English: "in this case"), which gives the paragraph a rather different meaning. It is proposed that the words "in diesem Falle" be replaced by the word "erforderlichenfalls".

34. Article 13(10), second sentence, would then read as follows:

"Wird die Benutzung der Sortenbezeichnung einer neuen Sorte einer Person, die gemäss Absatz 7 zu ihrer Benutzung verpflichtet ist, auf Grund eines älteren Rechts untersagt, so verlangt die zuständige Behörde erforderlichenfalls von dem Züchter oder seinem Rechtsnachfolger, dass er eine andere Sortenbezeichnung für die Sorte vorschlägt."

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