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INTERNATIONAL UNION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS

GENEVA

**FOURTH MEETING
WITH INTERNATIONAL ORGANIZATIONS**

Geneva, October 9 and 10, 1989

REVISION OF THE CONVENTION

Document prepared by the Office of the Union

This document contains the proposed new text of the Convention as resulting from the discussions that have taken place so far in the Administrative and Legal Committee of UPOV, together with short explanatory notes.

INTRODUCTION

A. Historical Background

1. At its twenty-first ordinary session, the Council decided to entrust the Administrative and Legal Committee (hereinafter referred to as "the Committee") with the preparation of the forthcoming revision of the Convention.

2. The Committee considered the revision of the Convention at its twenty-second session (April 18 to 21, 1988), at its twenty-third session (October 11 to 14, 1988) and at its twenty-fourth session (April 10 to 13, 1989).

3. The first working paper contained proposals made by the Office of the Union on the basis of earlier discussions, in particular those of the Third Meeting with International Organizations. It had been updated thereafter. The present document is the result of a further updating on the basis of the discussions at the twenty-fourth session of the Committee.

4. At each of the above-mentioned sessions, the Committee took note of the contribution of an international non-governmental organization:

i) at its twenty-second session, of the observations from the International Chamber of Commerce (ICC) that had been adopted by its Executive Board at its fifty-second session, on December 1, 1987;

ii) at its twenty-third session, of the statement of the International Association of Plant Breeders for the Protection of Plant Varieties (ASSINSEL) on its position regarding the protection of biotechnological inventions, which had been unanimously adopted by its General Assembly at its Congress held in Brighton (United Kingdom) on June 9 and 10, 1988;

iii) at its twenty-fourth session, of the proposals and comments from the International Community of Breeders of Asexually Reproduced Fruit-Tree and Ornamental Varieties (CIOFORA).

B. Objectives of the Revision of the Convention

5. When it took the decision referred to above, the Council did not specify the objectives of the revision of the Convention. In fact, the objectives may be deduced from the proposals submitted for discussion. In general, as stated in Article 27(1) of the 1961 text of the Convention, the objective is to introduce amendments designed to improve the working of the Union. The more specific aims are as follows:

(i) to strengthen the right of the breeder, in particular through revision of Article 5;

(ii) to extend the practical scope of application of the plant variety protection system through revision of Articles 3 and 4;

(iii) to clarify, on the basis of experience, a number of provisions, in particular those of Article 6, and to adapt them to recent and prospective developments.

Present [1978] Text

Article 1

Purpose of the Convention;
Constitution of a Union;
Seat of the Union

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

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

Proposed New Text

Article 1

Constitution of a Union;
Purpose of the Convention

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

(1) The member States of the Union undertake to recognize and to ensure to the breeder of a new plant variety a right in accordance with the provisions of this Convention. [Subject to the provisions of Article 37, this right shall exclude any other form of protection for plant varieties as such.]

Explanatory Notes

1. Order of the provisions.- It is proposed to reverse the order of the first two paragraphs and to transfer the present paragraph (3) into Article 15 as a new paragraph (2) thereof.

2. Paragraph (2) [new].- This paragraph comprises two sentences, one corresponding to the present Article 1(1), and the other, to the present Article 2(1).

3. Concerning the first sentence, it is proposed to transform paragraph (1) from a declarative into a binding provision. The deletion of the reference to the successor in title is a consequence of the inclusion of a new Article 2 containing definitions.

4. It has been proposed--but the Committee has not yet taken a final position in this respect--to define the right concerned, for example to use the expression "breeder's right." The word "right" will be used throughout the proposed new text in lieu of "protection."

5. Concerning the second sentence, the Committee has not yet taken a final position.

Present [1978] Text

Proposed New 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.

Explanatory Notes

1. Paragraph (1). - See under Article 1(2).
2. Paragraph (2). - It is proposed to delete this paragraph.

Present [1978] Text

Proposed New Text

Article 2

Definitions

For the purposes of this Convention:

(i) "species" shall mean a botanical species or, where relevant, a subdivision of a species or a grouping of species known by one common name;

(ii) "variety" shall mean any plant or part of plant, or any grouping of plants or parts of plants, which, by reason of its characteristics, is regarded as an independent unit for the purposes of cultivation or any other form of use;

(iii) "breeder" shall mean the person who created or discovered a variety, or his successor in title;

[(iv) "material" shall mean:
- reproductive or vegetative propagating material;
[- material that has the potential of being used as reproductive or vegetative propagating material;]
- harvested material;
- products [directly] obtained from harvested material.]

Explanatory Notes

1. Paragraph (i).- It has been proposed that "genus and/or species" be replaced by "taxon." This proposal causes problems, however, in some cases where reference is made to a taxon of a lower rank, typically a species. It is therefore proposed at this stage to retain the word "species" and to qualify it. It is possible, however, that the revision of the Convention would make a definition unnecessary.

2. Paragraph (ii).- It is proposed to reintroduce a general definition of the term "variety" (the 1961 text of the Convention contained examples of types of varieties, i.e., cultivar, clone, line, stock and hybrid).

3. Paragraph (iii).- It is proposed to introduce a definition of "breeder" in order, on the one hand, to simplify the wording of Article 1 and streamline the wording of the Convention and, on the other, to underline that the Convention also provides for the protection of varieties that have been "discovered."

4. Paragraph (iv).- The definition of the term "material" is included in the present document as a basis for discussions for the Committee has not yet taken a final position on the propriety of a definition, nor has it done so in respect of its scope. This definition supplements the definition, given in Article 5, of the effects of the right granted to the breeder (see in particular paragraph (1)(ii) thereof).

Present [1978] Text

Article 3

National Treatment; Reciprocity

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

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

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

Proposed New Text

Article 3

National Treatment

(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.

Explanatory Notes

1. It is proposed to delete paragraph (3), i.e., the possibility of limiting the grant of protection to foreigners on the basis of reciprocity.

Present [1978] Text

Article 4

Botanical Genera and Species
Which Must or May be Protected

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

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

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

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

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

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

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

[Cont'd]

Proposed New Text

Article 4

Scope of Application
of the Convention

(1) This Convention shall be applied to

[Alternative 1] all botanical species.

[Alternative 2] the whole plant kingdom.

[Alternative 3] all varieties.

(2) Where, in a member State of the Union, the application of this Convention to

[Alternative 1] all botanical species

[Alternative 2] the whole plant kingdom

[Alternative 3] all varieties

causes exceptional difficulties, that State may opt for a progressive implementation of the provision of paragraph (1). That State shall notify the Secretary-General of its choice, stating the reasons therefor. The Council shall state its position on that subject.

Explanatory Notes

1. It is proposed to establish the principle of a mandatory application of the Convention to all botanical species (or to the whole plant kingdom, or again to all varieties)--which would be achieved by replacing "may" by "shall" in paragraph (1)--and at the same time to allow member States facing exceptional difficulties to opt for a progressive implementation of this principle (paragraph (2)).

2. The Committee has not yet taken a final position on the question of providing minimum conditions to be fulfilled by a State which has opted for a progressive implementation.

Present [1978] Text

Proposed New Text

Article 4 [Cont'd]

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

(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).

Present [1978] Text

Article 5

Rights Protected;
Scope of Protection

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

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

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

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

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

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

(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

Proposed New Text

Article 5

Effects of the Right Granted
to the Breeder

(1) A right granted in accordance with the provisions of this Convention shall confer on its owner the right to prevent all persons not having his consent:

(i) from reproducing or propagating the variety;

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

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

(2) The right shall not extend to:

(i) acts described in paragraph (1)(ii) and (iii) above concerning any material which has been put on the market in the member State of the Union concerned by the breeder or with his express consent, or material derived from the said material in accordance with the purpose intended when it was put on the market;

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

(iii) acts done for experimental purposes;

(iv) acts done for the purpose of breeding new varieties, and acts done for the commercial exploitation of such varieties, unless the material of the protected variety must be used repeatedly for such exploitation.

(3) If a variety is essentially derived from a [single] protected variety, the owner of the right in the protected variety

[Cont'd]

[Cont'd]

Present [1978] Text

Article 5 [Cont'd]

product. A member State of the Union which grants such a right may limit the benefit of it to the nationals of member States of the Union which grant an identical right and to natural and legal persons resident or having their registered office in any of those States.

Proposed New Text

Article 5 [Cont'd]

[Alternative 1] may prevent all persons not having his consent from performing the acts described in paragraph (1) above in relation to the new variety.

[Alternative 2] shall be entitled to equitable remuneration in respect of the commercial exploitation of the new variety.

[Alternative 3] may prevent all persons not having his consent from performing the acts described in paragraph (1) above in relation to the new variety. However, where the new variety shows a substantial improvement over the protected variety, the owner of the right shall only be entitled to equitable remuneration in respect of the commercial exploitation of the new variety.

(4) Each member State of the Union may exempt other acts from the effects of the right granted in accordance with the provisions of this Convention, [if this is necessary in the public interest and] provided that the exemption does not cause excessive prejudice to the legitimate interests of breeders. Any member State of the Union making use of the faculty provided for in this paragraph shall notify the Secretary-General of this fact, stating the reasons therefor. The Council shall state its position thereon.

[(5) No acts concerning a variety for which a right has been granted in accordance with the provisions of this Convention shall be prohibited on the basis of some other industrial property right

(i) where the acts fall within the right in accordance with the provisions of paragraph (1), or

(ii) which are exempt from the scope of the right in accordance with the provisions of paragraph (2).]

Explanatory Notes

1. It is proposed to strengthen the right granted to the breeder by redrafting completely Article 5.
2. Paragraph (1).-- This paragraph sets out the fundamental rights of the breeder using, in adapted form, the terminology of the Luxembourg Convention for the European patent for the common market (Community Patent Convention). It further differs from that Convention in that it extends the right of the breeder to exportation of material of the variety.
3. Concerning the scope of the term "material," reference is made to Article 2 [new].
4. Paragraph (2).-- This paragraph sets out three types of limitations of the right of the breeder: the principle of the exhaustion of the rights, which would not be applicable to the reproduction or multiplication of the variety (subparagraph (i)); two limitations that are commonplace in the field of industrial property (subparagraphs (ii) and (iii)); the "principle of free access to genetic resources," similar to that presently contained in paragraph (3) of Article 5 (subparagraph (iv)).
5. Paragraph (3).-- This paragraph introduces a new concept into the law of plant variety protection: the exploitation--but not the breeding--of a variety that is essentially derived from a protected variety would be subject to the right granted to the breeder of the latter variety ("dependence").
6. The Committee has not yet taken a final position on the question whether the word "single" would be inserted or omitted; at the present stage of the discussions, there seems to be general agreement on the fact that the following conditions should be met for there to be dependence:
 - (i) The difference between the two varieties involved must meet the requirement set out in Article 6(1)(a), that is, under the present text, be clear and relate to one or more important characteristics.
 - (ii) The derived variety must retain almost the totality of the genotype of the mother variety and be distinguishable from that variety by a very limited number of characteristics (typically by one).
 - (iii) The derived variety must have been obtained using a plant improvement method whose objective is the achievement of requirement (ii) above (mutation, gene transfer, full backcrossing scheme, selection of a variant within a variety, etc.); in other words, no varieties bred according to a classical or other scheme of crossing in which selection within the progeny is a major element would become the subject of dependence.
 - (iv) The mother variety must originate from true breeding work, that is, it must not itself be dependent; there should not be a "dependence pyramid". If variety C derives from variety B which derives from variety A, C would be dependent from A rather than B, since the very objective of dependence is to give to the breeder of an original genotype an additional source of remuneration; the collecting of that remuneration through a third party, in the example the breeder of variety B, does not seem very practicable.
7. The Committee has not yet taken a final position on the question of the nature of the right that would be granted to the breeder under the principle of dependence. Three alternatives are proposed for discussion.

8. Paragraph (4).- This paragraph is self-explanatory. The Committee has not yet taken a final position on the question whether a reference to public interest should be inserted or omitted.

9. Paragraph (5).- This paragraph sets out a "collision norm" governing the interactions with other industrial property rights. The Committee has not yet taken a final position on the propriety of such a provision, nor on its contents.

Present [1978] Text

Article 6

Conditions Required
for Protection

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

(a) 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.

(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.

[Cont'd]

Proposed New Text

Article 6

Conditions Required for the
Granting of the Right

(1) The right provided for in this Convention shall be granted to the breeder when the following conditions are satisfied:

(a) The variety must be new at the time of filing of the application for the grant of a right. The variety is not new if it has already been exploited commercially with the agreement of the breeder

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

(ii) in the territory of any other State for longer than six years in the case of vines and trees, or for longer than four years in the case of any other species.

The fact that a variety has become a matter of common knowledge otherwise than by commercial exploitation within the conditions defined above shall not constitute grounds for opposing the grant of the right.

(b) The variety must be clearly distinguishable from any other variety whose existence is a matter of common knowledge at the time of filing of the application for the grant of a right. The existence of a variety shall be specifically a matter of common knowledge

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

(ii) when protection or entry in an official register of varieties has been applied for, provided that the application is granted, or, if it is

[Cont'd]

Present [1978] Text

Article 6 [Cont'd]

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.

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

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

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

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

Proposed New Text

Article 6 [Cont'd]

not granted, that the variety has satisfied the conditions of the present subparagraph and of subparagraphs (c) and (d) below, or

(iii) when it has been openly exploited.

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

(d) There must be no indication from the examination of the variety made pursuant to Article 7 that the variety is unstable in the characteristics considered for the purposes of the application of subparagraph (b). A variety is stable if it remains true to its description after repeated reproduction or propagation or, in the case of a particular cycle of reproduction or multiplication, at the end of each cycle.

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

(3) The grant of the right shall not be subject to any other conditions than those mentioned above, provided that the breeder shall have complied with the formalities provided for by the national law of the member State of the Union in which the application for the grant of the right has been made, including the payment of fees.

Explanatory Notes

1. Order of the provisions.- It is proposed to set out the conditions in the following order in paragraph (1): novelty, distinctness, homogeneity and stability. It is also proposed to set out the condition relating to the variety denomination as a new paragraph (2).

2. Paragraph (1)(a) [new] - novelty.- It is proposed:

(i) to introduce the concept of "novelty" to describe the condition under consideration;

(ii) to define novelty negatively;

(iii) to replace the words "offered for sale or commercialized" by "exploited commercially";

(iv) to simplify the reference to vines and trees;

(v) to delete the present second sentence as superfluous and "also" in the third sentence;

(vi) to introduce in the third proposed sentence (equivalent to the present third sentence) a reference to the authorized period of exploitation, defined in the second sentence.

3. Paragraph (1)(b) [new] - distinctness.- It is proposed:

i) to delete the introductory phrase which refers to the origin of the initial variation which gave rise to the variety, account being taken of the content of the proposed new Article 2(iii);

ii) to delete the reference to "important characteristics";

iii) to redefine the cases in which a variety is, in particular, a matter of common knowledge.

4. Paragraph (1)(c) - homogeneity.- It is proposed that a definition of homogeneity be added to the Convention which, however, will be based solely upon those characteristics of the species in question which are considered for the purposes of distinctness.

5. Paragraph (1)(d) - stability.- It is proposed:

i) to tie the condition of stability to doubts raised by the trials and to define the notion of stability in a separate sentence;

ii) to tie this condition to the characteristics considered for the purposes of distinctness, i.e., to consider as synonyms the expressions "important characteristics" and "essential characteristics" used at the present time in the Convention;

iii) to delete the reference to the breeder in relation to a particular cycle of reproduction or multiplication.

Present [1978] Text

Article 7

Official Examination of Varieties;
Provisional Protection

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

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

(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 7

Examination of the Application;
Provisional Protection

(1) The right shall be granted after an examination based upon the criteria defined in Article 6. In the course of this examination, the competent authority may grow the variety or carry out the other necessary trials, cause the growing of the variety or the carrying out of trials or take into account the results of growing trials or other trials which have already been carried out.

(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 or material.

(3) Contracts may be concluded between the competent authorities of the member States of the Union with a view to the joint utilization of the services of the authorities entrusted with the examination of varieties in accordance with the provisions of paragraph (1) and with assembling the necessary reference collections and documents.

(4) Each member State of the Union shall provide measures designed to safeguard the interests of the breeder during the period between the filing of the application for the grant of the right, its publication or its notification and the decision thereon. At the very least, those measures shall have the effect that the holder of a right granted in accordance with the provisions of this Convention shall be entitled to equitable remuneration from any person who, during the afore-mentioned period, has carried out acts which, after this period, would be prohibited by the provisions of Article 5.

Explanatory Notes

1. Title.- It is proposed to replace "official examination of varieties" by "examination of the application".
2. Paragraph (1).- It is proposed:
 - (i) to delete the reference to "the variety" in the first sentence;
 - (ii) to delete the second sentence;
 - (iii) to add a new sentence detailing the different possibilities which exist regarding the examination for the authorities competent for the grant of the right.
3. Paragraph (2).- It is proposed to replace "propagating material or seeds" by "material."
4. The Committee has considered in connection with this paragraph and with Article 10 the question of the confidentiality of the information and material supplied by the breeder. Its discussions have not yet led to a conclusion as far as the text of the Convention is concerned.
5. Paragraph (3) [new].- It is proposed to underline the importance of close cooperation between the member States by repositioning the provision contained at the present time in Article 30(2).
6. Paragraph (4) (former paragraph (3)).- It is proposed to make provisional protection mandatory and to define a minimum scope for such protection.

Present [1978] Text

Article 8

Period 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.

Proposed New Text

Article 8

Duration of the Right

(1) The right conferred on the breeder shall be granted for a limited period.

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

Explanatory Notes

1. It is proposed:

- (i) to divide the Article into two paragraphs;
- (ii) to simplify the reference to vines and trees;
- (iii) to increase the minimum periods of protection.

2. The Committee has not yet taken a final position on the minimum durations, nor on certain other proposals.

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 TextArticle 9Restrictions on the Exercise
of the Right

(1) The free exercise of the right granted to a breeder may not be restricted by a decision of the authorities otherwise than for reasons of public interest.

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

Explanatory Notes

1. It is proposed:

(i) to specify in paragraph (1) that Article 9 deals solely with limitations decided by the authorities in individual cases;

(ii) to adapt paragraph (2) to the new wording of Article 5.

Present [1978] Text

Proposed New Text

Article 10

Article 10

Nullity and Forfeiture of the
Rights Protected

Nullity and Forfeiture of the
Right

(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.

(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.

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

(1) The right 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 right was granted.

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

(3) The right may become forfeit if:

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

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

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

Explanatory Notes

1. Paragraph (2). - It is proposed to affirm more positively the obligation put on the breeder to maintain the variety;

2. Paragraph (3). - It is proposed to align the reference to the information, etc. on the text of Article 7(2) and, possibly, to delete the reference to the inspection of the measures taken for the maintenance of the variety.

Present [1978] Text

Article 11

Free Choice of the Member State
in Which the First Application
is Filed; Application in Other
Member States; Independence
of Protection in Different
Member States

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

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

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

Proposed New Text

Article 11

Free Choice of the Member State
in Which the First Application
is Filed; Application in Other
Member States; Independence
of Rights Granted in Different
Member States; Special Agreements

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

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

(3)(a) Subject to the provisions of subparagraphs (b) and (c) below, the right granted in any one of the member States of the Union to a natural or legal person entitled to benefit under this Convention shall be independent of the rights obtained for the same variety in other States whether or not such States are members of the Union.

(b) Any group of member States of the Union may provide by a special agreement under Article 29 that the right may be obtained on the basis of an international application followed by an international procedure, or that the right may have a unitary character throughout their territories and shall in such a case be granted jointly in respect of those States.

(c) Any group of member States of the Union may provide by a special agreement under Article 29 that the right may be obtained in one of them only on condition that a right is granted in another, or that the right granted in one of them shall automatically extend to the territory of another.

Explanatory Notes

1. It is proposed to anchor in the Convention the principle of closer cooperation, by providing expressly two exceptions to the principle, stated in paragraph (3), of the independence of the rights granted in different member States:

(i) an exception to allow international or unitary (supranational) plant breeders' rights, e.g. like the European patent or the Community patent (the proposed provision is partly based on Article 142 of the European Patent Convention);

(ii) an exception to enable a State, typically a small State, to link plant variety protection in its country with that of a neighboring country.

Present [1978] Text

Article 12

Right of Priority

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

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

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

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

Proposed New Text

Article 12

Right of Priority

(1) Any breeder who has duly filed an application for the grant of a right 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

[Alternative 1] twelve months.

[Alternative 2] eighteen months.

[Alternative 3] twenty-four months.

This period shall be computed from the date of filing of the first application. The day of filing shall not be included in such period.

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

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

[Cont'd]

Proposed New Text

Article 12 [Cont'd]

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

Explanatory Notes

1. The Committee has not yet taken a final position as to the duration of the priority period provided in paragraph (1). Three alternatives are proposed for discussion.
2. It is proposed to reduce the period provided in paragraph (3) to two years.

Present [1978] Text

Proposed New Text

Article 13

Article 13

Variety Denomination

Variety Denomination

(1) The variety shall be designated by a denomination destined to be its generic designation. Each member State of the Union shall ensure that subject to paragraph (4) no rights in the designation registered as the denomination of the variety shall hamper the free use of the denomination in connection with the variety, even after the expiration of the protection.

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

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

(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

(1) The variety shall be designated by a denomination.

(2) The denomination shall be proposed by the breeder to the authority referred to in Article 30(1)(b). Where relevant, the denomination proposed shall be that which has already been proposed or registered for the purpose of protection in another member State of the Union or for the purpose of entry in an official register of varieties of the member State of the Union concerned or another member State of the Union, or openly used in the exploitation of the variety.

(3) If the proposed denomination is found unsuitable, the authority shall require the breeder to propose another denomination within a prescribed period.

(4) The authority shall register the denomination at the same time as it grants the right.

(5) A designation shall not be suitable as a denomination:

(a) if prior rights of another person oppose its use as a denomination, or

(b) if, for users in general, there are difficulties in recognizing and reproducing it as a denomination, or

(c) if it is identical:

(i) to the designation under which, in any one of the member States of the Union, another variety of the same species or of a closely related species has been protected or entered in an official register of varieties, under which protection or entry in an official register of varieties has been applied for, or under which it

Present [1978] Text

Article 13 [Cont'd]

require the breeder to submit another denomination for the variety.

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

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

(7) Any person who, in a member State of the Union, offers for sale or markets reproductive or vegetative propagating material of a variety protected in that State shall be obliged to use the denomination of that variety, even after the expiration of the protection of that variety, in so far as, in accordance with the provisions of paragraph (4), prior rights do not prevent such use.

(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 13 [Cont'd]

has been openly exploited, except if this other variety no longer exists and its denomination has not acquired great importance, or

(ii) to a designation which may be generally used in commerce or which must remain in the public domain in accordance with other legal provisions, or

(d) if it is contrary to morality or public order in the member State concerned, or

(e) if it is liable to mislead or to cause confusion concerning the characteristics, value or identity of the variety or the identity of the breeder.

(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 may address its observations, if any, on the registration of a denomination to the authority which communicated that denomination.

(7) [Alternative 1] 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 identify the variety by means of the denomination registered in accordance with the provisions of this Article, even after the expiration of the right granted to the breeder. The denomination so registered shall also be used for any other product of the variety when the identification of the variety is either obligatory by virtue of other legal provisions or usual in relation to that product.

[Cont'd]

Proposed New Text

Article 13 [Cont'd]

[Alternative 2] The member States of the Union shall provide that in the case where, in accordance with the provisions of national law, the variety must be identified at the time of the offer for sale or marketing of plant material, the denomination registered in accordance with the provisions of this Article shall be used for this purpose, even after the expiration of the right granted to the breeder.

(8) The breeder may not prohibit the use of the denomination in relation to the variety on the basis of a right which has been granted to him for a designation identical to the denomination.

Explanatory Notes

1. In general terms, it is proposed to streamline the wording of Article 13 by setting out its provisions in the following order: principle (paragraph (1)); registration procedure, including the principle of consistency of the denomination throughout the Union (paragraphs (2) to (4)); requirements for the denomination (paragraph (5)); cooperation between authorities (paragraph (6)); use of the denomination in trade (paragraphs (7) and (8)).

2. Paragraph (1). - It is proposed to delete the reference to the generic character of the denomination in order to facilitate the obtaining of protection by trademark in countries where plant variety protection is not available. In the countries where the variety is protected, the generic character of the denomination remains as a result of the obligation to use the denomination in commerce (paragraph (7)).

3. Paragraph (2) [new]. - This paragraph sets out in a more precise form the circumstances under which the breeder cannot propose any more a denomination of his choice.

4. Paragraph (7). - Alternative 1 is based on the economy of the wording of paragraph (7) of the present text. Nevertheless, the obligation does not relate to the use of a denomination but to the identification of the variety concerned by means of the denomination. It is extended to trade in products other than seeds and plants when identification of the variety is either a legal requirement or is usual. Alternative 2 is more general in its formulation and would in particular give member States complete freedom in legislating on the subject of the use of variety denominations.

Present [1978] Text

Proposed New Text

Article 14

Protection Independent of
Measures Regulating Production,
Certification and Marketing

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

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

Explanatory Notes

1. It is proposed to delete the Article as it may be considered as superfluous. However, the Committee has not yet taken a final decision in this respect.

[End of document]