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INTERNATIONAL UNION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS

GENEVA

AD HOC COMMITTEE ON
THE REVISION OF THE CONVENTION

Geneva, September 11 to 15, 1978

PROPOSALS CONCERNING THE DRAFTING OF THE
REVISED TEXT OF THE CONVENTIONprepared by the Office of the Union

1. Annex I to this document contains proposals concerning the drafting of the revised text of the Convention (see document DC/5). The Ad Hoc Committee on the Revision of the Convention (hereinafter referred to as "the Committee") is invited to examine these proposals and to decide on the action to be taken on them. It is suggested that any proposal meeting with the agreement of the Committee be submitted to the Drafting Committee of the Diplomatic Conference rather than to the Plenary, provided that the substance of the provision to which such proposal relates is adopted by the Plenary.

2. Proposals relating only to the French or German version of the revised text of the Convention are not mentioned in the English version of this document, a mere reference being made to the French or German version, as appropriate.

3. The Office of the Union wishes to stress that, in drafting the proposals, it restricted itself to those that concerned the drafting of the revised text and did not affect its substance.

4. In this document, provisions are cited according to the numbering they have been given in document DC/5, except where reference is made to document DC/4.

[Two Annexes follow]

ANNEX I

PROPOSALS CONCERNING THE DRAFTING OF THE
REVISED TEXT OF THE CONVENTIONGeneral Proposal

1. The method of citing other provisions of the Convention should be harmonized. It is proposed that throughout the Convention provisions should be referred to according to the following example taken from Article 2(2): "[the requirements of] Article 6(1)(c) and (d)" rather than "[the requirements of] subparagraphs (c) and (d) of paragraph (1) of Article 6." This would shorten and simplify the text and improve its legibility. If this proposal is accepted, amendments will have to be made in Articles 2(2), 4(3)(c), 4(5), 10(1), 37(1) and 40(1).

2. In addition, the question should be discussed whether, for the sake of uniformity, a reference to a preceding paragraph or subparagraph of the same Article should also be followed by the words "of this Article". References to such paragraphs (and subparagraphs) are made in the following provisions: 3(3), 4(4), 4(5), 5(4), 12(2), 12(3), 13(8), 13(9)(b), 13(11), 33(2), 33(3), 36(3)(a) and (b), 37(3) and 40(2), and in document DC/4 13(4)(b) and 13(7).

Ad Article 3(3)

3. It is proposed that the words "the provisions of" be inserted at the beginning of the sentence, which would then read "Notwithstanding the provisions of paragraphs (1) and (2)," in order to harmonize this provision with other Articles, in particular Articles 37, 38 and 40(1). This proposal affects neither the French nor the German texts.

Ad Article 4(3)(c)

4. It is proposed that the words "the present" be replaced by "this" in the expression "for the purposes of subparagraphs (a) and (b) of the present paragraph." This proposal affects neither the French nor the German texts.

Ad Articles 5(1) and 6(1)

5. It is proposed that the words "of a variety" be deleted in the expression "the breeder of a variety" since Article 1(1) states that the word "breeder" applies to the "breeder of a new plant variety or his successor in title."

Ad Article 5(1)

6. It is proposed that the word "vegetative" be inserted in the last sentence, which would then read as follows: "The breeder's right shall extend to ornamental plants or parts thereof normally marketed for purposes other than propagation when they are used commercially as vegetative propagating material in the production of ornamental plants or cut flowers." This proposal does not affect the French text.

7. This proposed amendment seems to be justified by the fact that it would eliminate a possible discrepancy between the English and German texts and the French--authentic--text of the Convention. In the French language, "reproduction" means a process where a new individual plant is produced by sexual means whereas "multiplication" refers to a process where the new individual plant is produced by vegetative means. The English language has one word to designate both these processes, namely "propagation" (German: "Vermehrung"). Thus, in the third sentence of Article 5(1), the French "matériel de multiplication" refers to vegetative propagating material only whereas the English "propagating material" and the German "Vermehrungsmaterial" refer to both reproductive and vegetative propagating material.

8. Of course, the Committee could also consider another solution, which would consist in leaving the English and German texts unchanged and in using the expression "matériel de reproduction ou de multiplication" (addition underlined) in the French text. This would be a substantive amendment to the Convention and would therefore have to be discussed in the Plenary as well as in the Drafting Committee.

Ad Article 5(3)

9. It is proposed that the word "initial" be deleted in the first sentence which would then read "Authorization by the breeder shall not be required either for the utilization of the variety as a source of variation for the purpose of creating other varieties or for the marketing of such varieties." The reason is that the present text may be--and has already been--mistakenly interpreted to mean that it forbids, as in the case referred to in the second sentence, the repeated use of a protected variety for the creation of another variety (other than a hybrid variety).

10. This proposal has no effect either on the German text--which, for linguistic reasons, uses another, equivalent wording--or on the wording of Article 6(1)(a).

Ad Articles 5(4) and 7(1)

11. It is proposed that the word "botanical" be deleted in the expression "botanical genera [genus] or species" since, by virtue of Article 2(3), the Convention now expressly allows the possibility of applying its provisions to part of a botanical genus or species only.

12. This proposal does not mean that the word "botanical" should also be deleted in Articles 13(2) and 13(9)(a), where reference is made to a "variety of the same or a closely related botanical species," to which the Convention may or may not be applied.

Ad Article 6(1)(a)

13. It is proposed that the word "a" be deleted in the expression "or a precise description in a publication," since all the other factors by reference to which common knowledge may be established according to the provision under consideration are enumerated without the indefinite article. The "a" could in fact be misleading, giving the impression that the term "precise description" was governed by the words "inclusion in." This proposal affects neither the French nor the German texts.

Ad Articles 6(1)(b)(ii) and 8

14. It is proposed that the Committee examine whether the reference to "vines, forest trees, fruit trees and ornamental trees, including their rootstocks" could not be simplified to read "vines and trees, including their rootstocks." First, the enumeration--which is obviously meant to include all kinds of trees--does not introduce any legal precision into the text and is therefore superfluous. Second, the enumeration could be incomplete and thus create legal insecurity with respect to plants that are trees without being forest trees, fruit trees or ornamental trees in the traditional sense. Examples of this are coffee trees, cacao trees and palm trees. Finally, the proposed amendment would simplify the proposed text.

Ad Article 7(1)

15. It has already been proposed that the word "botanical" be deleted in the expression "each botanical genus or species" (see paragraph 11 above). One might also consider whether the cited expression could not be replaced by "each variety," in which case the second sentence of Article 7(1) would read as follows: "Such examination shall be adapted to each variety having regard to its normal manner of reproduction or multiplication."

16. This proposal is based on the fact that, within a genus or species, there may be different types of varieties, characterized by their normal manner of reproduction or multiplication, for instance vegetatively propagated varieties and sexually reproduced varieties, or pure lines and hybrid varieties. Experience shows that examination methods are adapted to each type of variety rather than to the genus or species in general. Thus the proposed amendment would make the text more precise. It should also be borne in mind that Article 6(1)(c) (requirement of homogeneity) contains a specific reference to the variety's particular features of sexual reproduction or vegetative propagation.

Ad Article 7(2)

17. It is proposed that the word "country" be replaced by "member State of the Union," for the sake of conformity with the terminology used in other Articles.

Ad Article 8

18. It is proposed that the third sentence be simplified to read "For vines..., it may not be less than eighteen years ..." rather than "... the minimum period shall be not less than ..." (see also paragraph 14 above). This proposal does not affect the French text.

Ad Article 10

19. Paragraph (2) uses the expression: "The breeder shall forfeit his right." Paragraph (3) uses the expression: "The right of the breeder may become forfeit." Paragraph (4) uses the expression: "The right of the breeder may not be annulled or become forfeit." It is proposed that the wording of the three paragraphs be harmonized to make paragraph (2) use the expression: "The right of the breeder shall become forfeit." This proposal affects neither the French nor the German texts.

Ad Article 13

20. Since there are a number of proposals concerning Article 13, one of them affecting most of its paragraphs, the proposed new text taken from document DC/5 and amended according to the proposals described in paragraphs 21 to 25 is reproduced in Annex II of this document for the reader's convenience. In order to highlight the proposed amendments, expressions that have been deleted are replaced by three dots between brackets and words that replace others are underlined. Should the proposals be adopted by the Committee, the proposed text appearing in document DC/4 should be amended accordingly.

21. Title: It is proposed that the title of Article 13 be amended to read "Variety Denomination." This proposal affects neither the French nor the German texts.

22. Paragraph (1): It is proposed that the indefinite article preceding "variety" be replaced by a definite article, paragraph (1) then reading as follows: "The variety shall be given [designated by] a denomination." Whereas the present wording could--and even logically should--be interpreted as being applicable to any variety, irrespective of whether the Convention is applied to it or not, the text amended as proposed would clearly refer to the varieties to which the Convention is applied (see the preceding Articles, where the expression "the variety" is always used in that sense). It should be recalled that the text now in force refers to "a new variety," that is, according to the terminology of that text, a variety in respect of which an application for protection has been filed or, as the case may be, in respect of which a title of protection has been issued.

23. Several Paragraphs: Since it is made clear by paragraph (1) that a variety that is the subject of an application for protection--or in respect of which protection has been granted--is designated by a denomination and that the whole of Article 13 is applicable to such a variety, it is no longer necessary to use the expression "of the variety" and similar expressions after the word "denomination." A number of simplifications are therefore possible (see Annex II), it being understood that, in the German text, there would be no such simplification where only the composite word "Sortenbezeichnung" is used.

24. Paragraph (5): It is proposed that the second sentence be reworded as follows: "The competent authority for the issue of the title of protection in each member State of the Union shall register the denomination so submitted, unless it establishes the unsuitability of that denomination in that State." The main amendment consists in replacing the word "considers" by "establishes," which at least in this text, seems to be a better translation of the French "constate." This proposal affects neither the French nor the German texts.

25. Paragraph (9) (b): It is proposed that the first (underlined) "denomination" be replaced by "designation" in the expression "a denomination identical to or liable to cause confusion with such denomination," in order to use the same terminology as in paragraph (4). This proposal does not affect the German text.

Ad Articles 26(1) (b) and 30(1) (b)

26. It is proposed that one might consider deleting the word "and" after the semicolon to align the English text with the French and German texts.

Ad Article 30(2)

27. See the French and German versions of this document.

Ad Article 34(2)

28. The first part of Article 34(2) may be simplified by deleting "but bound by the Convention of 1961 as amended by the Additional Act of 1972," since it is obvious that a member State not bound by the revised Act is bound by earlier Acts, which must be the Convention of 1961 and, with the exception of one member State as of the date of this document, the Additional Act of 1972. With the consequential changes, it would then read as follows: "Any member State of the Union not bound by this Act ("the former State") may declare, in a notification addressed to the Secretary-General, that it will* apply the Convention of 1961 as amended by the Additional Act of 1972 in its relations with any State bound by this Act which becomes a member of the Union through ratification of or accession to this Act ("the latter State")."

29. Attention is drawn to the fact that, in the first part of the sentence, the same tense is not used in the three texts in the phrase "which becomes a member of the Union through ratification of or accession to this Act." Whereas the French and English texts use the present tense, the German text uses the past tense. In the first case, the tense was chosen in order to give no indication as to the date on which the State concerned becomes a member of the Union. In the second case emphasis is put on the fact that the State concerned is "bound by this Act" and has thus already become a member of the Union. Both approaches seem to be possible, but the second has the disadvantage that it might be misinterpreted to mean that the declaration applied only with respect to States that had already become members of the Union on the date on which it was made.

30. It is proposed that the word "shall" be replaced by "will" in the sentence "Any member State (...) may declare (...) that it shall ..." This proposal affects neither the French nor the German texts.

Ad Article 37(1)

31. It is proposed that the words "of the Union" be deleted in the expression "the Secretary-General of the Union" since this detail is not added in other Articles.

Ad Article 40 (Title)

32. It is proposed that the word "variety" be inserted before "denominations." This proposal does not affect the German text.

* See paragraph 30 below.

ANNEX II

NEW TEXT OF ARTICLE 13 TAKEN FROM DOCUMENT DC/5 AND AMENDED
ACCORDING TO THE PROPOSALS APPEARING IN ANNEX I, PARAGRAPHS 21 TO 25

Article 13

Variety Denomination

- (1) The variety shall be given a denomination.
- (2) Such denomination must enable the variety to be identified; in particular, it may not consist solely of figures. 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 or a closely related botanical species.
- (3) The denomination (...) shall be submitted by the breeder to the authority referred to in Article 30. If it is found that such denomination does not satisfy the requirements of the preceding paragraph, the 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) If the breeder submits as the denomination (...) either a designation in respect of which he enjoys the protection accorded to trade marks, and which applies to products which are identical or similar within the meaning of trade mark law, or a designation liable to cause confusion with such a mark, he may not, as from the time when it is registered, continue to assert his right to the trade mark, in respect of the above-mentioned products, in any member State of the Union applying the provisions of the Convention to the genus or species to which the variety belongs.
- (5) A variety must be submitted in member States of the Union under the same denomination. The competent authority for the issue of the title of protection in each member State of the Union shall register the denomination so submitted, unless it establishes the unsuitability of that denomination in that State. In this case, it may require the breeder to submit a translation of the original denomination or another suitable denomination.
- (6) When the denomination (...) is submitted to the competent authority of a member State of the Union, the latter shall communicate it to the Office of the Union referred to in Article 15, which shall notify it to the competent authorities of the other member States of the Union. Any member State of the Union may address its objections, if any, through the said Office, to the State which communicated the denomination.
- (7) The competent authority of each member State of the Union shall notify each registration of a denomination (...) and each refusal of registration to the Office of the Union, which shall inform the competent authorities of the other member States of the Union.
- (8) Any person in a member State of the Union who offers for sale or markets reproductive or vegetative propagating material of the variety shall be obliged to use its denomination (...), even after the expiration of the protection of that variety, in so far as, in accordance with the provisions of paragraph (11), prior rights do not prevent such use.
- (9) From the date of issue of a title of protection to a breeder in a member State of the Union:
 - (a) the denomination (...) may not be used, in any member State of the Union, as the denomination of another variety of the same or a closely related botanical species;
 - (b) the denomination (...) shall be regarded as the generic name for the variety. Consequently, subject to the provisions of paragraph (11), no person may, in any member State of the Union, apply for the registration of, or obtain protection as a trade mark for, a designation identical to or liable to cause confusion with the denomination, in respect of identical or similar products within the meaning of trade mark law.

(10) It shall be permitted, in respect of the same product, to add a trade mark to the denomination (...).

(11) Prior rights of third parties in respect of signs used to distinguish their products or enterprises shall not be affected. If, by reason of a prior right, the use of the denomination (...) is forbidden to a person who, in accordance with the provisions of paragraph (8), is obliged to use it, the competent authority shall require the breeder to submit another denomination (...).

[End of Annex II and of document]