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UPOV

CAJ/IV/5

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INTERNATIONAL UNION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS

GENEVA

ADMINISTRATIVE AND LEGAL COMMITTEE

Fourth Session

Geneva, November 14 to 16, 1979

OBSERVATIONS ON THE PRELIMINARY DRAFT OF A
UPOV MODEL LAW ON PLANT VARIETY PROTECTIONreceived by the Office of the Union

The Office of the Union has received observations on the preliminary draft of the UPOV Model Law on Plant Variety Protection, which appears in the Annex to document CAJ/IV/3, from the heads of the plant variety offices of Switzerland and of the United Kingdom. The observations of the Head of the Swiss Office for the Protection of Varieties are reproduced in Annex I to this document; the observations of the Head of the Plant Variety Rights Office of the United Kingdom are reproduced in Annex II to this document.

[Annexes follow]

[Original: German]

OBSERVATIONS OF THE HEAD OF THE SWISS OFFICE FOR THE PROTECTION OF VARIETIES
OF OCTOBER 23, 1979, ON THE PRELIMINARY DRAFT OF
A UPOV MODEL LAW ON PLANT VARIETY PROTECTION

I wish first to mention a few reflections which have somewhat influenced my observations.

1. Since I have taken the Swiss Federal Law on the Protection of New Plant Varieties as a basis, my observations can claim general validity only to a limited degree.

2. It is an extremely delicate question whether a rule belongs in the Model Law or whether it should be relegated to implementing regulations, because the provisions governing that question are different from State to State. The difference between the density of the provisions in the German Varieties Protection Law and our corresponding law is itself significant. (The German law rules on plant variety protection with about 150,000 letters - some 2,800 lines of approximately 60 letters -, the Swiss law with only about 30,000 letters - some 420 lines of approximately 75 letters).

Therefore I would suggest that all substantive questions to be treated and all measures to be taken by a State in order to implement the Convention should be reflected in the Model Law. The introduction to the Model Law could explain that, according to national tradition, certain rules may be included in a legal instrument of a lower order than a law.

Mentioning these ideas here does not mean that I am definitely convinced that it is impossible to draft model implementing regulations. I merely fear that discussion on what is to be regulated in a law and what in an implementing ordinance would be time-consuming and would bring little profit.

As to the question asked under paragraph 4(i) of document CAJ/IV/3, I wish to reply as follows:

(1) Scope: Subject Matter

- 11 A national law should fix conclusively the scope of the subject matter. Therefore an additional rule is necessary which determines in a binding manner for everyone how a protected variety is defined (reference: Article 1(3) of the Swiss Federal Law on the Protection of New Varieties*: "The new protected variety is defined by its official description and by the specimen cultivated in the reference collection of the authority responsible for carrying out the examination").
- 12 In addition to the proposed rule on the application of international bilateral or multilateral agreements, contained in Article 21 of the Model Law, there should be a provision to the effect that new plant varieties are to be protected by virtue of the national law and of its implementing regulations (reference: Article 1(1) of the Law).

* Hereinafter referred to as "the Law."

(2) Trademarks

- 21 I miss a provision permitting the use of a trademark differing from the denomination, in addition to the denomination (reference: Article 7(1) of the Law).
- 22 At some place it should be provided that it is prohibited to assert rights derived from a trademark which is registered as the variety denomination against that variety denomination. For example, the use of a variety denomination must not be allowed to be hampered by the fact that the owner of the trademark tries, after the expiry or surrender of the title of protection, to push the variety denomination out of commerce by means of his trademark (reference: Article 7(2) of the Law).

(3) Expropriation

It may be of importance on the national level, when supplies of goods necessary for survival are disturbed, that the title of protection is expropriated in the interest of the country. A provision to that effect should therefore be included in the Model Law (reference: Article 20 of the Law).

(4) Publication and Date of the Application

- 41 It is necessary to state in the Model Law that an application must be published and what should be contained in that publication (reference: Article 28 of the Law).
- 42 At least for the calculation of the periods under the priority rules, the time at which an application is considered as validly filed and can therefore be given a date is decisive. This also should be determined in the Model Law (reference: Article 26(2) of the Law).

In this context I should like to contest Article 35 of the Model Law. Objections should be filed not against the breeder's right but against the application for the grant of a breeder's right. Justified objections by third parties during the proceedings which come before a grant are desirable and can be considered by the variety protection office; after the grant, however, the only remaining legal recourse is to the civil court (at least according to our legal system) (reference: Article 29 of the Law).

(5) Contents of the Register, Publicity of the Register

- 51 The Model Law should prescribe the minimum contents of the register of titles of protection (reference: Article 32 of the Law).
- 52 It also needs to be prescribed in the Model Law that the contents of the register are to be published and the legal consequence that no one may avail himself of the claim that he was unaware of an entry in the register needs to be stated. It would thus be impossible for someone to claim in legal proceedings before the civil court that he was unaware of the legal situation. The public law function of the register of titles of protection seems to me to be of central importance in respect of that provision (reference: Articles 33 and 34 of the Law).

(6) Civil Law Provisions

I could imagine that a provision could be included here according to which the applicant is guaranteed provisional protection (reference: Article 38 of the Law).

(7) Preservation of Business Secrets

As far as the civil courts are called upon to deal with disputes arising from protection, a provision is required according to which the courts have to preserve the manufacturing and business secrets of the parties (reference: Article 40 of the Law).

(8) Provisions on Penalties

- 81 Article 38(1) of the Model Law has been too generally drafted. Penal law provisions must describe the punishable acts as precisely as possible. Here the whole catalogue of facts relevant under penal law should be established and only then should a general clause appear, making any other violation of the provisions of the law the subject of a penalty. To fraudulently claim that a variety is protected is a particularly important punishable act (reference: Articles 48 and 49 of the Law).
- 82 Provisions on penalties are applied by the criminal courts. Therefore they should have the right to confiscate products which have been illegally produced (reference: Article 50 of the Law).

(9) Transitional Provisions

Each State might wish to establish transitional rules for the time after the entry into force of its plant variety protection law which allow breeders, for example, to file applications for the protection of older varieties during a certain limited period (reference: Article 53 of the Law).

As far as the observations in paragraph 4(ii) of document CAJ/IV/3 are concerned, I have already commented, at least partially. I shall therefore refer only to the provisions on licences and licences of right which according to my taste are too complicated. Licencing is largely left to the freedom of the contracting parties and this is emphasized by implication in Articles 42 to 44. Here I have the impression that too much has been prescribed while the equally important question of claims under the civil law is insufficiently regulated by one meagre article.

As far as the other questions mentioned by you are concerned, I wish for the time being not to make any remarks since otherwise I would refer too much to our national plant variety protection law.

I wish to mention one final thought. Instead of submitting a Model Law, drafted in Articles, I could imagine elaborating only a model concept which could be transformed on the national level into corresponding legal provisions. The model concept could mention the whole range of problems which need to be regulated on the national basis, duly grouped and structured, and the existing rules of the member States could be added as examples. I have filed for instance under the catchword "objections" Article 29 of our Law on the Protection of New Plant Varieties, Articles 21 and 22 of our Ordinance on the Protection of Plant Varieties, and also Article 35 of the German Plant Variety Protection Law, Articles 13, 14, 15, 17 and 18 of the Swedish Plant Variety Protection Law and Articles 17, 18, 20 and 23 of the French Ordinance No. 71 - 764. The advantages of such an approach would be that the diversity of national laws, and thereby alternatives, would be shown, that no legal text would have to be elaborated and that at the same time the relationship between the different legal texts could be demonstrated. The linguistic diversity which would result from the reproduction of the laws in the languages in which they have been enacted would enrich the Latin linguistic group by Italian and Spanish.

The disadvantage of such a compilation, namely the need to make a selection within the legislations of the UPOV States and to collect, with great effort, the relevant articles and paragraphs, could be overcome by having representatives of those States provide the necessary information from the provisions which are well known to them, and by making the selection on the basis of linguistic criteria.

I hope that I have made a constructive contribution to the discussion of the Model Law.

CAJ/IV/5

ANNEX II



THE PLANT VARIETY RIGHTS OFFICE

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FROM THE CONTROLLER

Our ref: PVA 462

12 October 1979

Dr H J Mast
International Union for the Protection of
New Varieties of Plants
34 chemin des Colombettes
1211 GENEVE 20

Dear Dr. Mast,

ADMINISTRATIVE AND LEGAL COMMITTEE: UPOV DRAFT MODEL LAW

1. I refer to CAJ/IV/3, circulated in June, to which was annexed a draft UPOV Model Law. This draft will be discussed at the next Administrative and Legal Committee meeting this November. Since we have quite a substantial number of comments on the draft, we have thought it best to submit these to you in writing for circulation in advance (if time permits) to the other members of the Committee.

2. Our detailed comments are set out in the enclosed memorandum. I would however like to make certain further general comments about the framework of the Model Law, which will I hope go some way to answering the specific questions raised in paragraph 4 of CAJ/IV/3. These are as follows:

a) in general, the Model Law should consist of two quite distinct types of provision. The first type would be those provisions (described as mandatory in the enclosed memorandum) which an applicant state must enact in order to bring its law into conformity with the Convention. In certain cases, there may be alternative mandatory provisions, since the Convention itself provides options. The second type would be permissive provisions which are included in the law as a guide to applicant states but which are not essential to ensure conformity with the Convention. Here again, there is scope for alternative permissive provisions;

b) the flexibility provided by the approach in a) is necessary since different states will have different constitutional and legal provisions relating to the laws of property, evidence, appeals, competition etc. It is important therefore to highlight those provisions of the Model Law which are essential and those which are merely desirable in terms of the practice of the existing member states;

- c) wherever possible, detailed provisions in the Model Law concerning penalties, periods for representations or publication, fees, application forms etc should be relegated to regulations issued under the proposed Section 50 of the draft;
- d) we believe it would be useful to include in the Model Law permissive provisions for the protection of an applicant for rights while his application is pending (ie the granting of protective directions). No doubt these could follow very closely the corresponding provisions in Schedule 1 in the UK law;
- e) it would be useful to have a covering memorandum or explanatory note to the Model Law drawing applicant states' attention to the purpose of the Law and to certain of the points indicated in our enclosed memorandum.

3. I would like to express our appreciation to you and your staff for preparing such a detailed and comprehensive draft in good time for consideration by the Administrative and Legal Committee.

Yours sincerely,
Patrick Murphy
P W Murphy

CAJ/IV/5
Annex II, page 3

SECTION 1 ENUMERATION OF CONDITIONS

This is a mandatory provision

1.1 The Convention prescribes five conditions required for protection and separates distinctness from novelty. "Distinctness" has to be shown by tests and is a technical matter, whereas the rule relating to novelty is a legal or administrative matter. We consider that the conditions should be enumerated as follows:

- (i) is new;
- (ii) is distinct ;
- (iii) is homogeneous;
- (iv) is stable; and
- (v) has been given a variety denomination etc.

1.2 In line 3 after the words "prescribed in this Law" add "or in Regulations made under this Law".

SECTION 2 MEANING OF THE TERM "PLANT VARIETY"

2.1 The Diplomatic Conference was unable to reach agreement on a definition of the term "plant variety" and it was agreed that it should be omitted from the new Convention. The definition might be included in the permissive provisions, although in the light of the 1978 discussions the UK has reservations. It might be considered advisable to include it in an Explanatory Note attached to the Model Law. This is for discussion, but the UK would not advocate its inclusion in mandatory provisions.

SECTION 3 DISTINCTNESS

3.1 This is a mandatory provision but the words "and Novelty" in the heading should be deleted; novelty is dealt with in Section 4 of the preliminary draft.

3.2 The first paragraph should start with the words "Whatever may be the origin, artificial or natural, of the initial variation from which it has resulted, a variety etc". At the end of this paragraph the sentence "The characteristics which permit a variety to be defined and distinguished must be capable of precise recognition and description" should be added (see also remarks at 4.1).

3.3 In paragraph 3 it appears that, in the circumstances referred to in relation to Section 23, there should be a similar restriction as in the first part of the paragraph i.e. provided that protection has been granted as a result of the application on which the priority claim has been based.

SECTION 4 NOVELTY

4.1 A mandatory provision along the lines of paragraph 1 must be provided in the Model Law, but according to the Convention a State may take one of two options i.e.

- (i) a variety shall be considered new if, prior to the date on which the application for protection is filed, plants of the variety and no material forming part of or derived from the variety, have been offered for sale or marketed with the consent of the breeder or his successor in title, in the country in which the application is filed; or
- (ii) a variety shall be considered new if prior to the date on which the application for protection is filed no plants of the variety and no material forming part of or derived from the variety, have been offered for sale or marketed with the consent of the breeder or his successor in title for longer than one year in the country in which the application is filed.

We feel that this could be dealt with in one of three ways i.e.

- (a) by making (i) the mandatory provision and providing for (ii) in a footnote;
- (b) by providing an "either"/"or" provision in the Model Law; or
- (c) by providing (i) as the mandatory provision and dealing with (ii) in an Explanatory Note attached to the Model Law.

We would favour (a) above.

4.2 A mandatory provision should be provided in respect of the second sentence of paragraph 1 of the Model Law. However, we feel it desirable that the "six" and "four year" periods referred to in this sentence should be clarified in an Explanatory Note since these periods do not commence until plant breeders' rights are obtainable in the genus or species concerned. The full periods do not apply until protection has been offered for four or six years as the case may be and the periods are less in the initial stages.

4.3 Paragraph 2 of the Model Law is permissive as in Article 38 of the new Convention and should be so included.

4.4 Paragraph 3 of the draft should be deleted as it relates to distinctness (remarks at 3.2 refer).

4.5 Paragraph 4 of the Model Law is an interpretation of a term used in it. It does not provide a "definition" but attempts to prescribe what the term "offering for sale" includes. This provision is not mandatory. We would not accept the wording as suitable for a permissive clause or an Explanatory Memorandum since it would be impossible to take a case to law based on such a wording. "Offering for sale" is a difficult term to attempt to interpret and in our view it should be left to authorities to interpret it or not as they think fit. This view could be expressed in an Explanatory Memorandum.

CAJ/IV/5
Annex II, page 5

4.6 In paragraph 5, we take it that the Model Law is attempting to provide an interpretation of marketing after protection has been granted. It is accordingly providing that marketing includes any business transaction under which

- (a) the property in the reproductive material changes hands; and
- (b) the reproductive material is made over to some other person in pursuance of a contract under which that person will use the material to produce further reproductive or consumption.

If this presumption is correct, there should be a mandatory provision to this effect but it should not be under the heading "novelty".

4.7 Paragraph 6 attempts a definition or interpretation, since it starts "Propagating material means" etc. We consider this is wrong; what might be considered is a permissive and separate provision to the effect that references in the Law to "propagating material" include references to:

- (a) seeds for sowing
- (b) seed potatoes and other vegetative propagating material and
- (c) whole plants, as well as the parts of plants, where whole plants may be used as reproductive material.

SECTION 5 HOMOGENEITY

5.1 A mandatory provision is required. We suggest the following:

"A variety shall be considered homogeneous if its plants all show the characteristics which permit the variety to be defined, subject to the variation which may be expected from the particular features of the normal method of propagation of the genus or species to which the variety belongs or of any particular method of propagation defined for the variety by its breeder".

SECTION 6 STABILITY

6.1 A mandatory provision is required. We suggest the words "each successive propagation" should be replaced by "repeated reproduction or propagation".

SECTION 7 LIST OF GENERA AND SPECIES ELIGIBLE FOR PROTECTION

7.1 In the opening words of paragraph 1, it is assumed that the Minister of Agriculture is the Minister responsible and there are similar references in succeeding sections. This may not however be the case and we suggest that the reference be changed to "The Minister of Agriculture, or such Minister as the case may be" or the footnote used on page 10 is inserted against "Minister of Agriculture". This should be a mandatory provision.

- 7.2 Paragraph (2) of this section does not appear applicable to the Law and should perhaps be dealt with in an Explanatory Note.
- 7.3 In paragraph 3 the words "or obtained" should be added after "applied for".

SECTION 10 APPLICATION BY A PERSON WHO IS NOT THE OWNER

- 10.1 A mandatory provision should be included on the lines of the first sentence but consideration should be given to the following wording:

"Where an application has been filed by a person who is not the owner of the variety and this fact is proved to the satisfaction of the President, he shall refuse to grant protection in the variety to that person. If the owner then submits an application for protection, his application shall be granted provided that the rules relating to novelty, distinctness, uniformity and stability are complied with".

- 10.2 A mandatory provision on the lines of sentences 2 and 3 of the section (which do not relate to the heading but to a situation arising after a grant of plant breeders' rights) should we suggest be added to Section 18, as follows:

"(4) The plant breeders' right shall be terminated if it is established that the person to whom it was granted was not the breeder of the variety or his successor in title".

- 10.3 There might also be a permissive provision included here on the lines of Section 13 Plant Varieties and Seeds Act 1964 Annex A making it a criminal offence to make false claims to plant breeders' rights and to give false information to the (Controller).

SECTION 11 PERSONS ENTITLED TO PROTECTION

- 11.1 In paragraph 1 we have to cater here for the "open" system of the UK which is permissive and the terms of the Convention which are mandatory. To cover the former there should be a permissive provision stating: "An applicant for a grant of plant breeders' rights must be the person (natural or legal) who bred or discovered the variety or the successor in title to the breeder or discoverer".

The mandatory provisions should be included as in paragraph 1(i)-(iv) with (v) being deleted.

- 11.2 In paragraph 2, we cannot agree to a mandatory provision requiring a foreign applicant to designate a representative to act on his behalf. It should be mandatory for a foreign applicant to provide an address in the country of application to which all documents may be served upon him. It should be permissive for the foreign applicant to appoint an agent within the terms of paragraph 2.

CAJ/IV/5
Annex II, page 7

SECTION 12 ASSIGNMENT AND TRANSFER

- 12.1 This is a mandatory provision.

SECTION 13 JOINT APPLICANTS ETC

- 13.1 This should in our view be deleted, since such matters could well be dealt with under the law of property in the country enacting the Model Law. It must certainly not be a mandatory provision and if our view is not upheld it should be considered as a permissive provision.

SECTION 14 EFFECT OF A PLANT BREEDERS RIGHTS

- 14.1 Paragraphs 1, 2 and 3 should be regarded as mandatory provisions.
- 14.2 Paragraph 4 should be deleted, since it is unenforceable (what would be the position of grain exports to a non-UPOV destination?).
- 14.3 So far as the words in square brackets in paragraph 5 are concerned, the first sentence should be made into a permissive provision i.e. "If an extended scope of protection is offered, the law may provide that such rights shall not be claimed etc". The second sentence in the square brackets should be deleted or made permissive.

SECTION 16 PERIOD OF PROTECTION

- 16.1 The convention lays down the 15 and 18 year periods as the minimum. Paragraph 1 is a mandatory provision but there should be a permissive provision for the establishment of longer periods. There should also be a permissive provision to permit the extension of a period for which plant breeders' rights may be exercised if circumstances beyond the control of the holder of rights have not enabled him to obtain adequate remuneration from his grant of rights.

SECTION 17 RENEWAL FEES

- 17.1 A mandatory provision.

SECTION 18 TERMINATION OF PROTECTION

- 18.1 Paragraph 1 a mandatory provision.
- 18.2 The first sentence in paragraph 2 is a mandatory provision.
- 18.3 There should be no mention in the mandatory provisions of the matters referred to in the second and third sentences. There might be a permissive provision on the following lines "Any person seeking to establish that any of the conditions prescribed in Sections 3 and 4 of this Law were not complied with should address his representations to the Plant Variety Rights Office".
- 18.4 Paragraph 3 is a mandatory provision. On a general point would it not be better to use English instead of the Latin phrases? We are not quite sure what the meaning of the Latin words is.

- 18.5 Sub section (ii) of paragraph 4 should be deleted; the Model Law should not be specific in its reference to reminders on non-payment of fees. If considered necessary an Explanatory Note should be appended.
- 18.6 Paragraph 5 should be deleted or made permissive. We do not believe it is generally desirable to provide a right of appeal to a Tribunal for non-payment of fees.

SECTION 19

- 19.1 We believe paragraph 6 is taken from the German law, but the requirement is not in fact embodied in UK law. The Controller does not have to establish an Opposition Board. The first point of appeal is to the Controller who may himself determine it or appoint someone else to do so. The second appeal board is the Tribunal and the Controller has no say at all in the Tribunal's composition. The paragraph might perhaps be re-drafted on the following lines:

"The President of the Plant Variety Rights Office shall establish a procedure for dealing with appeals against his decisions and may for this purpose appoint an Opposition Board. Appeals may also be heard by an independent Tribunal appointed for the purpose or by the courts if this is accepted practice". This should be a permissive provision.

SECTION 20

- 20.1 The Model Law cannot decide on the name of the Tribunal (paragraph 1).

SECTION 21

- 21.1 The remarks in the footnote are noted and the provision must be subject to discussion. Our preliminary view is that we could not accept it as a mandatory provision.

SECTION 22

- 22.1 The second sentence of paragraph 4 should be included in the permissive provisions. We could not accept it as a mandatory requirement.

SECTION 23

- 23.1 This is a mandatory provision.

SECTION 24

- 24.1 Paragraph 1 is a mandatory provision.
- 24.2 Paragraph 2 - the Convention states that a four-year period shall be allowed for the supply of additional documents and material. As drafted the paragraph implies that the PVRO shall not require it until four years have elapsed. But the PVRO may in fact request it at any time and if the applicant is in a position to supply it, the information and material can be accepted. A mandatory provision.

CAJ/IV/5
Annex II, page 9

SECTION 25

- 25.1 The second sentence of paragraph 2 should either be deleted or made permissive.

SECTION 26

- 26.1 We suggest paragraph 1 be re-drafted on the following lines: "An applicant for plant breeders' rights must submit a proposal for a variety denomination which should be made etc". This should be a mandatory provision.
- 26.2 Paragraph 2 should be included under the permissive provisions.

SECTION 27

- 27.1 Paragraph 1 does not accord with UPOV naming rules. Under these a name may consist of up to three words and figures to a maximum of 4 may be used if they have a meaning in relation to the word, e.g. James Bond 007.

SECTION 29

- 29.1 Paragraph 2 appears proper to Section 27(3) and should be so included.

SECTION 31

- 31.1 The Convention is silent on the subject of cancellation of a variety denomination and so too is UK law. We suggest this should be included as a permissive provision.

SECTION 33

- 33.1 The second sentence of paragraph 2 should be deleted. The date for the submission of plant material is dependent upon the time of sowing and it is not possible to provide a 3 month period for submission after the closing date. Neither is it possible to say that material must be submitted 3 months after the application since the application may have been made early.

SECTION 34

- 34.1 This whole section is a mandatory provision. We suggest the words in square brackets in paragraph 1 should be deleted.

SECTION 35

- 35.1 This section provides for opposition after the grant of rights. UK law provides for opposition before the grant of rights. The section should be re-drafted to provide an "either/or" situation. We suggest a new paragraph 1 on the following lines:
- (1) The President shall publish a notice of his proposed decision in the Gazette and shall provide the date by which any person may file an opposition to that proposed decision. The opposition can be based on the claim that the variety does not conform with any of the rules relating to novelty, distinctness, homogeneity and/or stability. If the opposition is justified, the plant breeders' right will not be

CAJ/IV/5
Annex II, page 10

granted. If it is not justified, the plant breeders' right will be granted.

Then add (1) of the draft as an alternative.

Paragraph 2 of the draft will apply in both cases but a full stop should be placed after the word "prescribed" and the words "in paragraph (1)" should be deleted.

SECTION 36

36.1 Paragraph 1 must be considered in the light of our comments on Section 35. We suggest that an appeal may be made to the Tribunal on the following grounds:

- (a) against a proposal to grant or refuse an application for protection of a variety;
- (b) against a decision to grant or refuse a request for an extension of the plant breeders' right;
- (c) against any decision to terminate plant breeders' rights except in a case where renewal fees have not been paid;
- (d) against any decision to grant or refuse an application for a compulsory licence.

36.2 Paragraph 2 of the section should be a permissive provision. Under UK law there is no appeal to a Tribunal on naming questions; the Controller's decision is final.

36.3 The second sentence of paragraph 4 should not be included as a mandatory provision. We feel it would be better to provide for the "idea" of the sentence in an Explanatory Note.

SECTION 38

38.1 Paragraph 2 should be deleted as it must be dependent upon the legal practices of the State concerned.

38.2 Paragraphs 3 and 4 should be deleted. It is not for UPOV to dictate upon such matters.

SECTION 40

40.1 This section should be a permissive provision.

SECTIONS 41-47

41.1 We doubt if all these should be mandatory provisions. The only one that should is 41(1); the remainder might be included as permissive provisions.

SECTION 48

48.1 We would like to see the "compulsory licensing" provisions made mandatory but doubtless this will be discussed. If the provisions are made "permissive" consideration should be given to a strong recommendation in our Explanatory Note that they be included.

SECTION 49

49.1 This section should be deleted.

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