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UPOV

C/XI/21

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## INTERNATIONAL UNION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS

GENEVA

## COUNCIL

**Eleventh Ordinary Session  
Geneva, December 6 to 9, 1977**

## REPORT

adopted by the Council

1. The eleventh ordinary session of the Council of UPOV (hereinafter referred to as "the Council") was held in Geneva, from December 6 to 9, 1977. The list of participants appears in Annex I to this report.
2. The session was opened by Mr. B. Laclavière (France), President of the Council, who welcomed the participants.
3. The President paid tribute to the late J.J.N. Vêrissi (France) and K. Christensen (United States of America), who had both participated in former sessions of UPOV. He also asked the Swedish Delegation to transmit the Council's best wishes to Professor Esbo, who had retired since the last session of the Council. He then mentioned that it was the last time that Mr. Doughty (United Kingdom) would be attending a UPOV session since he would be retiring in the coming months, and he extended to Mr. Doughty, who had greatly contributed to the work of the UPOV bodies, his best wishes for retirement. Finally, he said that Mr. Butler (Netherlands), who had been seriously ill, was to the Council's great relief well on the way to recovery. He asked the Netherlands Delegation to transmit to Mr. Butler the Council's best wishes for a prompt recovery.

Adoption of the Agenda

4. The Council adopted the agenda as appearing in document C/XI/1.

Exposés by the Representatives of the Different States (Member States, States Invited as Observers) on the Present Situation, the Problems Arising and the Progress Achieved in the Legislative, Administrative and Technical Fields

5. In connection with this item of the agenda, the following information was given :

(i) The Representative of South Africa said that his country's new Plant Breeders' Rights Act had entered into force on November 1, 1977, when the first plant breeders' rights regulations had already been published. The International Convention for the Protection of New Varieties of Plants and its Additional Act had entered into force with respect to South Africa on November 6, 1977. Since South Africa had submitted its original list of genera and species eligible for protection in that country, 29 further genera or species had been added to that list, making a total of 89 genera and species eligible for protection at present. He mentioned,

however, that that figure did not mean that test guidelines had already been established for all genera and species, but that the necessary preparations for such guidelines would be made as soon as the first applications for each genus or species had been received. Increasing interest on the part of foreign plant breeders had been noted. During the past year, 27 new applications for plant breeders' rights had been received. The main species were Peach, Rose, Bean, Cotton and Lucerne.

(ii) The Representative of the Federal Republic of Germany said that, as of March 23, 1977, his country had increased the number of species eligible for protection by a further three: Alstroemeria, Anthurium and Pelargonium, thus bringing the total number of genera and species eligible for protection to 142. The question was at present being studied whether another 10 to 20 species could be included in the list of species eligible for protection. That, however, would depend largely on the possibility of having the examination of varieties performed in other UPOV member States. Bilateral agreements for cooperation had been concluded with France, the Netherlands, Denmark and Belgium and similar agreements were anticipated with Sweden, the United Kingdom and Switzerland. The Federal Republic of Germany had offered to undertake examinations for other member States in respect of approximately 50 species. The number of applications received from July 1, 1976, to June 30, 1977, was 570. It could be expected that by the end of 1977 the total number of plant breeders' rights issued would reach 3,000. In this connection he pointed out that for many botanical species, such as Rape, Ryegrass, Rose and Pea, the difference between the varieties became smaller and smaller. The possible difficulties could not be overcome by a new interpretation of the term "important characteristics." Moreover, the question should be examined whether in the long run a new condition, in addition to distinctness, homogeneity and stability, should be required for the granting of protection. Such a condition might be, as in the patent field, the inventive step or the breeding progress. He also mentioned that since the last session of the Council a new law on fees and a new order for fees had entered into force which fully complied with the Council's decisions on the harmonization of fees.

(iii) The Representative of Belgium said that, on October 13, 1977, four royal decrees dated July 22, 1977, concerning the application of the Law of May 20, 1975, on the Protection of New Plant Varieties had been published, with respect, namely, to administrative formalities, to the list of species eligible for protection and to fees. The species eligible for protection were Wheat, Barley, Ryegrass Pea and Bean. It was expected to increase the list in the future by adding other cereals and some fruit species. For the time being, Belgium was not yet in a position to perform the examination of varieties itself but would rely on examination reports received from other member States of UPOV. It had asked the four neighboring member States--which had accepted--to undertake on its behalf the examination of certain species. The administrative agreements were being drafted. The agreement with the Federal Republic of Germany was already signed. Belgium was very grateful for the help of those member States but was also studying the possibilities of performing the technical examination itself. Another question being examined was that of the species for which Belgium would be able in the future to offer its examination facilities to other member States.

(iv) The Representative of Denmark reported that bilateral agreements had been concluded between Denmark and the Federal Republic of Germany for the exchange of examination results. Denmark was envisaging further bilateral agreements with the Netherlands and France. In addition, bilateral agreements with Switzerland and the United Kingdom were under discussion. Denmark had included Amaryllis and Potentilla fruticosa L. in the list of species eligible for protection, but would not be able to undertake the examination of varieties of those species. Consequently, protection could be granted only if the examination had been carried out in another member State.

(v) The Representative of France said that it was intended to increase the number of species eligible for protection in France in the near future, especially with respect to agricultural and ornamental species. So far, France had concluded, or was on the point of concluding, bilateral agreements for cooperation in examination with almost all member States with the exception of Italy and South Africa, which had both joined the Union very recently. In France also, the fees charged to breeders had been increased.

(vi) The Representative of Italy said that under the Law of July 16, 1974, the Italian Parliament had authorized the ratification of the UPOV Convention and that the Presidential Decree of August 12, 1975, had promulgated Regulations for the introduction in Italy of patents for new plant varieties. Under Article 24 of those Regulations, the Minister of Industry together with the Minister of Agriculture had promulgated decrees for the purpose of protecting varieties of 10 plant species. It was intended to increase that number in the near future. Italy had deposited its instrument of ratification of the UPOV Convention on June 1, 1977, and the Convention had entered into force in Italy on July 1, 1977. The first application for a patent for a new variety had been deposited on November 8 and so far 70 applications had been received. On August 6, 1977, the Ministry of Agriculture had set up a commission, which would have to give its opinion on the granting of patents for new varieties.

(vii) The Representative of the Netherlands reported that since January 1, 1977, the Netherlands had combined their services in one station, known in abbreviated form as RIVRO. The Netherlands had so far concluded bilateral agreements for cooperation in examination with the United Kingdom, France and the Federal Republic of Germany. The conclusion of agreements with Denmark, Sweden and Belgium was under discussion. It was intended to extend protection in the Netherlands, among others, to Pelargonium, Bougainvillea, Caraway, Marrow stem kale, Lucerne and Red clover.

(viii) The Representative of the United Kingdom said that in the past his country had been greatly occupied by the tasks connected with his country's joining the Common Market. Now more time could be devoted to plant breeders' rights aspects. In 1977, new schemes for the protection of the following species had been introduced: Tall fescue, Meadow fescue, Cocksfoot, Timothy, Red clover, White clover, Hop, Cherry and Cherry rootstock. At present discussions on the conclusion of bilateral agreements with France, the Federal Republic of Germany, Belgium and Switzerland were going on. It was planned to introduce plant breeders' rights schemes early in 1978 for the following species: Brussels sprouts, Cabbages, Marrows, Turnips, Celery and Celериac, Maize, Lupins, Red fescue and Chewing fescue, Agrostis, Poa, Fenu greek, Broad beans and Field beans. It was also planned to change the present fee structure.

(ix) The Representative of Sweden said that as of December 13, 1977, the number of species eligible for protection in Sweden would be increased by the addition of the following species: Alstroemeria L., Begonia elatior, Chrysanthemum, Euphorbia pulcherrima, Potentilla fruticosa L., Saintpaulia ionantha and Streptocarpus X hybridus Voss. At present, almost all agricultural and vegetable crops and about 10 ornamental species were eligible for protection in Sweden. The conclusion of bilateral agreements for cooperation in examination with the Federal Republic of Germany and the Netherlands was in course of preparation. The importance to Sweden of international cooperation could be estimated by the fact that half of the registered varieties in that country were foreign varieties.

(x) The Representative of Switzerland said that according to the Law of March 20, 1975, on the Protection of New Plant Varieties as well as the Order on Variety Protection of May 11, 1977, and the Order on Fees of June 30, 1977, protection in Switzerland was possible as of June 1, 1977, for varieties of Soft wheat, Maize, Ryegrass, Red clover and Apple. Since July 10, 1977, on which date Switzerland joined the Union, persons of the other member States could apply for the protection of varieties of the above-mentioned five species. So far the Swiss Office had received six applications for variety protection. At present, Switzerland would rely on the examination of varieties performed in other member States but it was studying the question of the species for which it could perform the examination itself and, also, the species for which it could offer to undertake the examination for other member States.

(xi) The Representative of Austria said that his country intended to join UPOV. At present a new law on plant variety protection was in course of preparation. That law would be an important prerequisite for subsequently acceding to the UPOV Convention. The first draft had already been prepared and presented to certain government authorities. During the consideration of the draft, however, certain problems of competence had arisen between institutes belonging to the Ministry of Agriculture and Forestry and the Patent Office and those problems would have to be clarified before further discussions could take place.

(xii) The Representative of Canada said that his Ministry of Agriculture had declared itself in favor of introducing plant breeders' rights legislation in Canada. That legislation was at present in the draft stage and was expected to be presented to Parliament during the current session. One of its objectives was to facilitate the obtaining of protected varieties from other countries. It could be assumed that Canada might at some time in the future apply to join UPOV.

(xiii) The Representative of Spain said that on July 10, 1977, a royal decree approving the general Regulations for Plant Variety Protection had come into force. According to those Regulations, the following species would be eligible for protection as of January 11, 1978: Wheat, Barley, Oats, Rice, Potato, Rose and Carnation. At present, the necessary steps were being taken to initiate the protection; for example, preparations were being made for the adoption of application forms, the issue of plant breeders' rights gazettes, the establishment of rules for variety examination, etc. Examinations for distinctness, homogeneity and stability would be conducted according to UPOV specifications. The Plant Variety Commission, the high consultative body of the plant breeders' rights administration, was being constituted in Madrid. The National Institute of Seed and Nursery Plants would be in charge of the plant variety protection schemes and it was now preparing the draft of the documentation which, after being studied and approved by the Government would be addressed to the Political Department of the Swiss Confederation in Berne as the formal application for accession to the UPOV Convention and its Additional Act.

(xiv) As regards the Representatives of the United States of America, the Patent Office Representative announced that he would inform the Office of the Union later of recent developments with respect to plant breeders' rights governed by the Patent Law; the Plant Variety Protection Office Representative reported that since the start of plant variety protection a total of 641 certificates of protection had been issued, 142 in the past fiscal year from October 1976 to October 1977. The statistical progress was as follows: out of a total number of applications amounting to 786, 112 had been received during the fiscal year 1977; 62 came from foreign countries and 76 from experimental stations; 175 applications had been abandoned, were ineligible, or had been withdrawn or denied, and 152 were still pending; 15 applications were in the certificate stage, 65 were in the research stage, 30 had been granted a time extension and 42 were still pending. Of the 38 species for which certificates had been issued, the greatest number has been for the following crops: Soybean 76, Pea 59, Bean 58, Wheat 56, Cotton 50, Lettuce 25, Marigold 14, Barley 12, China aster 10, Nasturtium 9, Ryegrass 9, Tobacco 8, Peanut 6, Rice 6. The Plant Variety Protection Office Representative also reported that "Reciprocity Limits" had been established with Germany (Federal Republic), the Netherlands, the United Kingdom and the Republic of South Africa. Agreements with Denmark, Israel and New Zealand were under discussion. With effect from March 17, 1977, the Plant Variety Protection Regulations had been amended to (i) extend from a total of 4 to 5 years the time within which a foreign applicant could file an application in the United States of America after filing in a foreign country, limited to the delay caused by a growing test plus one year, (ii) require a seed sample to be submitted with the application, and (iii) require the application and search fee to be submitted with the application. During the past year, an additional trainee examiner had been trained and ten variety description forms had been developed for Cowpea, Muskmelon, Orchard grass, Festuca spp., Trefoil, Rye, Eggplant, Red and White clover, Sudan grass and Sorghum and the Cole crops, Broccoli, Cabbage and Brussel sprouts. Over 2,400 plant variety descriptions had been computerized and a computer program for the reproduction and testing of new applications for direct reproduction in the Official Journal had been developed.

(xv) The Representative of Hungary said that his country had carefully studied the question whether the revision of the UPOV Convention would facilitate the accession of the People's Republic of Hungary to that Convention. He mentioned as positive aspects the proposals concerning the list in the Annex to the Convention and the statement with respect to Article 7. Since the last Council session, there had been no change in the Hungarian legislation concerning patent protection of plant varieties. However, in other fields of breeding, notably in respect of variety testing, new legal rules had been elaborated. One of the aims of the amendment of the legal rules was to establish closer links between the protection system and the variety testing, thereby promoting and strengthening plant variety protection. So far, 42 patents had been granted in respect of new plant varieties, of which 6 were granted in favor of Hungarians. It had been a great pleasure to note that the CIOPORA session in Budapest in April 1977 had been attended by several leading figures in UPOV. He was convinced that that visit had helped to make the present situation of plant variety protection in Hungary more clearly understood. He concluded by stating that the need for plant variety protection was being increasingly recognized in Hungary by the interested economic bodies.

(xvi) The Representative of Ireland said that in his country work was being undertaken at present towards the finalization of legislation for the implementation of the provisions of the Convention. The technical and scientific staff had built up considerable expertise in the evaluation and testing of varieties while working on the seed directives of the European Economic Community. Early in the current year experts had also visited Belgium and Switzerland to study the recently established plant variety protection rights systems in those two countries and had learned a great deal from their visits. They expressed thanks to their Belgian and Swiss colleagues.

(xvii) The Representative of Japan said that the Japanese Government fully recognized the importance of the protection of new varieties of plants. In this connection, he wished to report that active studies were in progress in his Government to prepare the framework for the protection of the rights of breeders of new varieties of plants, with due regard to the progress of the work on the revision of the Convention.

(xviii) The Representative of Norway said that recently in Norway a new administration (the Norwegian State Seed Council) had been established, with the tasks of regulating variety testing, accepting new varieties, certifying seed and vegetatively propagated material, importing seed and many other tasks. The intention was that this administration would also work as the secretariat for the protection of plant breeders' rights. Facilities for the testing of homogeneity and stability were being built up. In his opinion, a law on plant variety protection would soon be prepared. However, it had not yet been decided whether Norway would apply for accession to the UPOV Convention.

(xix) The Representative of New Zealand reported that since the last Council session activities in New Zealand with respect to plant variety protection had greatly increased. The number of species eligible for protection now comprised--in addition to Rose, Barley and Perennial ryegrass--Annual ryegrass, Potato, Pea, Lucerne and Lotus. A further extension of the list of species was under consideration, but the increased workload and the limited funds would have to be taken into consideration. In order to study the systems applied in different States, the Registrar of New Zealand had travelled to the United States of America and the United Kingdom. He had also paid a visit to the Office of UPOV. New Zealand had not yet made a final decision on whether to join UPOV or not. However, the proposed revised text of the Convention would remove several problems which New Zealand would be faced with under the Convention in its present wording. Therefore, New Zealand might well consider membership after the Diplomatic Conference of 1978.

(xx) The Representative of Poland said that the Ministry of Agriculture of his country had elaborated a new draft for a law on plant breeding and production of seeds and nursery material as well as a new draft for an implementing decree by the Ministry of Agriculture with respect to the registration of cultivated plant varieties and the granting of protection for the rights of their owners. The list annexed to the decree provided for the protection of 189 agricultural species, vegetables, fruit trees, medical plants and ornamentals. For the preparation of the new drafts, the detailed remarks prepared by the Office of UPOV on the draft presented by his Delegation in March 1977 had been taken into consideration. It could be expected that the next text of the legislative acts would cover all the provisions of the UPOV Convention. It could also be expected that the drafts would be presented to the Government for acceptance during the first quarter of 1978 and then to the Chamber of Deputies. The new text of the law would create the theoretical basis for the accession of Poland to the UPOV Convention.

(xxi) The Representative of Turkey said that as a member of the Turkish Mission in Geneva he had not yet been able to contact the authorities in his country in order to receive detailed information on the situation there but he hoped to be able to provide that information during the next session.

Report on the Meeting of the Eight Panamerican Seed Seminar, held at Tegucigalpa (Honduras)

6. The President informed the Council that the Office of UPOV had been invited to attend the eighth Panamerican Seed Seminar, held at Tegucigalpa, Honduras, in March 1977, and that Dr. Thiele-Wittig of the Office of the Union had attended that Seminar. He had asked for this item to be inserted in the agenda of the Council.
7. Dr. Thiele-Wittig introduced documents C/XI/9 and C/XI/9 Add. containing the report submitted by him on that mission and the recommendations of the Eighth Panamerican Seed Seminar to the governments participating in it. Dr. Thiele-Wittig mentioned as the subject of major importance to UPOV the Round Table on "The Right of Property in the Creation of Seed Varieties and its Influence on the Use of Genetic Material for Developing Countries," the outcome of which had led to the above-mentioned recommendations. The most important recommendation seemed to be "that a Committee be appointed to prepare a Model Law on plant variety protection which would be discussed during the next Seminar and would serve as a basis for making appropriate recommendations to the different governments for the adoption of legislations that would be similar and that would facilitate trade."
8. In this connection, the Vice Secretary-General reported that as a result of contacts established by Dr. Thiele-Wittig a representative of the Secretariat of the Andean Group, a community of Latin American States based on the "Acuerdo de Cartagena," had asked the Office of UPOV to designate a speaker for a meeting convened by that Group in Lima, Peru, in cooperation with the University of Lima. Since the topic went far beyond the competence of UPOV, the Office had proposed Dr. Böringer as speaker, after contacting the President of the Council, and Dr. Böringer had prepared a speech which was translated into Spanish under the supervision of the Office. However, a few days before the departure of Dr. Böringer for Lima, the meeting had been postponed until March 1978.
9. In this connection, Dr. Böringer informed the Council that he had been asked by experts from Chile to take the opportunity, when attending the meeting of the Andean Group in Lima, to visit Chile in order to help the experts of that country establish a plant variety register in Santiago. That visit had, however, also been postponed.

Report by the President on the Work of the Fifteenth and Sixteenth Sessions of the Consultative Committee

10. The President reported that, during the fifteenth session of the Consultative Committee, held on March 11, 1977, discussions had taken place on the progress of the preparations for the Diplomatic Conference on the Revision of the UPOV Convention and on the question whether UPOV member States should offer examination facilities to non-member States. He also reported that, during the sixteenth session, held on December 5, 1977, the Consultative Committee had held a preliminary exchange of views on the organization of the Diplomatic Conference and the preparation of documents for that Conference, and a discussion on a possible review of the list of committees and working groups and on the working program for 1978; the draft budget for 1978 had also been provisionally examined and preparatory studies concluded on the calendar of meetings for 1978 as well as on the admission of observers to sessions of the Council and certain meetings of UPOV.

Report by the Secretary-General on the Activities of the Union in 1976

11. The Secretary-General introduced document C/XI/2. He stressed in particular the unusually heavy workload imposed on the staff of UPOV and on the services of WIPO working for UPOV. That workload made it necessary to ask--as did the draft budget for 1978--for additional staff for the Office of UPOV. The Council noted the report of the Secretary-General with approval. The President expressed the wish that future reports should contain more information on the life of the Office of UPOV as did the oral report that had been presented by the Secretary-General.

Report by the Secretary-General on his Management and the Financial Situation of the Union in 1976 and Presentation of the Report Concerning the Auditing of the Accounts for 1976

12. The Secretary-General introduced document C/XI/3.

13. After the Delegation of the Federal Republic of Germany had asked some questions, including the question why the total expenditure proper to UPOV had been lower than budgeted for while the total of common expenses had been higher, and after the Secretary-General had given the necessary explanations, to the satisfaction of the Council, as well as the assurance that he would continue to do his best to estimate with the highest degree of accuracy the actual amounts of income and expenditure, the report of the Secretary-General on the management and on the financial situation of the Union in 1976 and the report of the Federal Audit Service were unanimously approved as appearing in document C/XI/3.

Revision of the Convention of the Union

14. The Council congratulated Mr. Skov (Denmark), the Chairman of the Committee of Experts on the Interpretation and Revision of the Convention, on his excellent report on the work of his Committee and decided that that report should form an Annex to the document containing the proposed new text of the Convention.

15. The Council decided unanimously to hold a Diplomatic Conference in 1978.

16. After discussion, the Council agreed that, subject to what is said in the next sentence, document C/XI/12 (with a new number) should be circulated before the Diplomatic Conference and should be submitted to the Diplomatic Conference. Amendments decided in the course of the present session of the Council would be incorporated; a short introduction to be prepared by the Secretariat would be incorporated; the introduction would refer to the report of the Chairman of the Committee of Experts on the Interpretation and Revision of the Convention, which would be annexed, as stated in paragraph 14 above; the Chairman of the said Committee, in cooperation with the Office of the Union, would make the necessary changes in the Explanatory Notes; the Preamble prepared by the Chairman of the said Committee (see document C/XI/11) would be inserted, except for its penultimate line ("having regard to the provisions of Article 27 of the Convention").

17. The Council then proceeded to the examination of document C/XI/12 and its corrigendum.

18. As regards that examination, the present report contains all the changes decided by the Council but only those statements whose rewording was expressly requested or which seem to be indispensable for understanding any specific decision. All provisions of the draft of the proposed new text in connection with which no decision is reported upon were adopted as proposed in document C/XI/12.

19. Article 2(3). This paragraph is to be reworded on the following lines: "Each member State of the Union may limit the application of the Convention to varieties of a genus or species with a particular multiplication or reproductive system or end-use."

20. Article 3(1) and (3) and Article 5(4). "Siège" and "Sitz" will be translated in English as "registered office."

21. Article 4(3). A new subparagraph (c) will indicate that even where a State limits the application of the Convention, in respect of any genus or species, as provided in Article 2(3), such limited protection will still be considered as meeting the requirements of subparagraphs (a) and (b) in respect of the said genus or species.

22. Article 4(5). The reference to paragraph (3) should be replaced by a reference to paragraph (3)(b). The explanations concerning paragraph (4) of the present text should place less emphasis on the highly specialized nature of certain agricultural systems.



23. Article 6(1)(b), last sentence. The words "of the breeder" are to be inserted after the words "the right." The Delegation of the United States of America stated that the new text of Article 6(1)(b) was to be understood as permitting each member State to decide under its own laws whether the sale of plant material as part of the process of experimentation would affect novelty.
24. Article 6(2). The words "by the national law of each country" are to be replaced by the words "by the national law of the State in which the application for protection was filed."
25. Article 7(1). "Merkmale" is to be replaced by "Voraussetzungen."
26. Article 9. The Delegation of the United States of America referred to the antitrust laws of its country and said that they could be applied as laws protecting "public interest."
27. Article 11. The Delegation of the United States of America referred to the requirement of its country's patent law according to which US applicants might have to obtain the express or tacit permission of the Government for filing applications in foreign countries.
28. Article 12. The Delegation of the United States of America referred to the understanding reached in the sixth session of the Committee of Experts on the Interpretation and Revision of the Convention (see paragraph 14 of document IRC/VI/21) according to which, in the case of priority applications, the practice of examining the applications immediately after their filing could be continued.
29. Article 13. The Council examined the proposals presented in writing by the German Federal Plant Varieties Office (reproduced in Annex II of this document).
30. Those proposals were introduced by the Delegation of the Federal Republic of Germany, which indicated that, after having consulted trademark experts, it aimed at achieving greater flexibility as far as the provisions on the relation between variety denominations and trademarks were concerned.
31. The Delegation of Denmark stated that it could conclude from previous discussions with Danish trademark experts that the latter were definitely opposed to the idea of having a variety denomination registered as a trademark, whether or not the variety denomination was used in Denmark.
32. The Delegation of France generally favored the spirit of the proposal of the Delegation of the Federal Republic of Germany. It said that Article 13 could be simplified. What was important was that the Convention should express that any given variety must have the same denomination in all member States and that the denomination must be neither confusing nor misleading. It might well be that all references to trademarks could be omitted in Article 13.
33. The Council discussed a proposal from the Delegation of the United Kingdom that in Article 13(9) (after "trademark") the words "or a trade name" be added.
34. The Delegation of the United Kingdom explained that the view had been expressed in its country that Article 13(9) permitted a trademark to be added to the variety denomination but forbade the addition of any other sign, in particular a trade name.
35. After several delegations had stated that they did not share that view, the Council agreed that the problem was to be solved by including in the Explanatory Notes and in the Records of the Diplomatic Conference an understanding that Article 13(9) did not prevent the addition to the variety denomination not only of a trademark but also of a trade name, a brand name or any other indication, name or sign.
36. In conclusion, the Council decided that
- (i) the proposed new text of Article 13 should be included in the preparatory document to be distributed but a footnote should indicate that other proposals for amendments of that Article might follow;

(ii) the Administrative and Legal Committee should re-examine the question of Article 13 on the basis of the proposal from the Federal Republic of Germany (referred to above), a draft to be prepared by the Secretary-General (which would attempt a far-reaching simplification of the Article) and any other proposal which others might make in the meantime; non-member States particularly interested in the question might be invited to participate in the discussions; the Delegation of Japan added that its country was interested in that question.

37. Article 15. In connection with the Explanatory Notes on that Article, the Delegation of Italy expressed its Government's concern at the proliferation of international organizations and the increase in their budgets. In view of that concern the continuation of the existing administrative links between WIPO and UPOV were of great importance.

38. Article 22. The Delegation of the United States of America asked whether a quorum requirement should not be foreseen or whether Article 20 should not provide that the Council would have to lay down such a requirement in its Rules of Procedure. It was decided that a quorum requirement should be included in the Rules of Procedure of the Council but that it was not necessary to refer to such requirement in the Convention itself.

39. It was further agreed to include in Article 22 a reference to Article 32(3).

40. Article 23A(1). The word "capacity" is to be replaced by "personality." The Delegation of Switzerland wondered whether the provisions of this Article should not be transferred to Article 1.

41. The Council did not agree to a proposal to include in the Convention a provision authorizing UPOV to conclude a headquarters agreement with Switzerland. On a proposal made by the Secretary-General, it was decided that the Records of the Diplomatic Conference should, if the Swiss authorities agreed, contain a statement that the Swiss Government saw no objections to concluding such an agreement with UPOV even if no express authorization were contained in the Convention.

42. Article 24. On a proposal from the Delegation of the Federal Republic of Germany, it was agreed to omit all references to "external" auditors.

43. Article 25 (in the present text). The Council did not accept a proposal made by the Delegation of France, and supported by the Delegation of Italy, that an Article on technical and administrative cooperation between UPOV, on the one hand, and WIPO or any other international organization, on the other hand, be reintroduced into the proposed new text of the Convention.

44. The Council unanimously approved the statement contained in the third paragraph of the Explanatory Notes on Article 25, subject to replacing the words "decided" by "concluded" and "intended" by "wished."

45. Article 26. Fractions of units should be expressed in decimals.

46. Article 29(2). This paragraph is to be deleted. In the Explanatory Notes it should be stated that it was the opinion of the Council that the interests of the member States were already sufficiently safeguarded by the first paragraph of Article 29.

47. Article 32(3). On a proposal from the Delegation of France, it was decided that a sentence would be added to the effect that, if the decision embodying the advice was positive, the instrument of accession could be deposited.

48. Article 32A(1). This paragraph should indicate that at least three of the five instruments must come from member States.

49. Article 32B. The Delegation of the Federal Republic of Germany asked the Office of the Union to improve the drafting of Article 32B and bring the three versions closer to each other. On a proposal from the Delegation of the United Kingdom, it was decided that the footnote referring to Article 32B and the contents of the square brackets in Article 32B would be deleted, since the United Kingdom would ratify the Additional Act before the Diplomatic Conference.

50. Article 34A(2). This paragraph should read as follows (amendments underlined): "where, in a member State of the Union to which the preceding paragraph applies, protection is sought under patent legislation, the said State may apply the novelty criteria and the term of duration of the patent legislation to the varieties protected thereunder, notwithstanding the provisions of Article 6 and Article 8" (final drafting reserved).
51. Article 38(2). The words "of one of the parties" are to be replaced by "of all parties." Paragraphs (3) to (6) are to be deleted.
52. Article 39. The proposed second paragraph, and the reference to it in the first paragraph, are to be deleted.
53. Agenda of the Diplomatic Conference. The Council approved the draft of this agenda as appearing in document C/XI/13.
54. Rules of Procedure of the Diplomatic Conference. The Council approved the draft of those Rules as appearing in document C/XI/14, after having agreed that Rule 1(2)(iv) should be reworded along the following lines: "adopt a revised text (hereinafter referred to as "the new Act") of the Convention as amended by the Additional Act." A similar wording should be applied in the Notes and letters of invitation.
55. The list of States referred to in Rule 2(1)(ii) will be the list appearing in the Annex of document C/XI/15, except that the ten member States of UPOV will be omitted. The list of the organizations to be invited is the list appearing in the Annex of document C/XI/15.
56. Notes and Letters of Invitation. The Council agreed on the Notes and letters of invitation to the Conference as appearing in document C/XI/15, after having agreed to include in the letter to be sent to the international organizations an additional paragraph along the following lines: "Your organization may, if it so wishes, submit written observations (in English, French and/or German) on the draft revised text of the Convention to the Office of UPOV by June 30, 1978. Copies of your observations will be distributed by that Office to the States and organizations invited in the language or languages as submitted."

List of Committees and Working Groups which Can Be Expected To Be Active in 1978

57. Discussions were based on document C/XI/10.Rev.
58. The Council agreed to the reorganization of the committees as proposed by the Consultative Committee (see document CC/XVI/4 (restricted distribution)) as well as to the dates of meetings and to the topics to be dealt with at the various meetings (see document C/XI/10.Rev.Rev.), except that the September 1978 meeting for considering comments on the draft revised Convention would be a meeting of an ad hoc Committee. The calendar of meetings as agreed has been attached as Annex III to this document [by the Office of the Union after the adoption of the present report].

Examination and Approval of the Program and Budget of the Union for 1978

59. Discussions were based on document C/XI/4.
60. The Secretary-General said that South Africa had chosen to contribute on the basis of one unit to the budget of UPOV whereas Belgium had announced that it would contribute on the basis of one and a half units. Consequently the value of one contribution unit will be 42,808 Swiss francs. He also said that the program and budget would be adjusted to take into account the changes decided in connection with the reorganization of certain committees. Although the number of days for which interpretation would be provided might increase, no increase in the total of the budget was proposed.
61. The Council unanimously adopted the program and budget for 1978 as proposed in document C/XI/4, subject to the adjustments indicated in the preceding paragraph.

62. The Delegation of the Federal Republic of Germany thanked those member States which had offered to pay contributions in excess of the amount which would result from their choice of class. Their attitude would have the result of practically avoiding any increase in the value of the contribution unit between 1977 and 1978, notwithstanding the fact that extraordinary expenses would have to be incurred in 1978 on account of the Diplomatic Conference. The said Delegation expressed the strong wish that the value of the contribution unit would not increase, but rather decrease, for 1979 and thereafter since the extraordinary expenses to be incurred in 1978 would not recur in those years.

63. The Secretary-General said that the revision of the Convention would continue to cause extraordinary expenses even after 1978 (preparation and publication of minutes and records, etc.). In any case, he would continue to do his best to keep the expenses to the strict minimum required by the program, which, however, was entirely under the control of the Council.

64. The Delegation of the United Kingdom expressed the view that the wish expressed by the Delegation of the Federal Republic of Germany did not take into account the long-term interests of the Union. The increase in the activities of the Union during the past two or three years, which indeed had considerable repercussions on the budget, had resulted in an increase in the membership from six to ten States. It was that increase in membership that allowed the contributions of the old members to remain the same in 1977 and 1978. The Delegation of the United Kingdom also declared that it wished the policy of investing efforts in the increase of member States to be pursued in 1979 and the following years. Its view was shared by the Delegation of the Netherlands. The Delegation of Denmark said that it would in principle support the view expressed by the Delegation of the Federal Republic of Germany, though it could not but recognize the value of the arguments put forward by the Delegation of the United Kingdom.

65. The Secretary-General said that, unless he received instructions to the contrary, he would prepare the draft budget for 1979 on the assumption that the activities of UPOV would continue at the same rhythm as presently.

66. In response to a remark made by the Delegation of Canada that, when considering the possibility of acceding to the UPOV Convention, the country had to compare the costs of membership in UPOV with the advantages derived from such membership, the Delegation of France recalled that each increase in the number of member States resulted in a decrease in each country's share in the UPOV budget. In addition, costs and benefits were not comparable since costs were mainly borne by the public authorities whereas benefits accrued to the public. It was supported in its view by the Delegation of South Africa, which pointed out that its country regarded the contribution paid to UPOV as an investment which not only allowed its competent authorities to participate in the meetings and thereby to acquire the experience gained by other member States, but also helped the whole country to obtain the best varieties bred abroad.

67. In concluding, the President stressed the importance of geographical distribution when recruiting the new professional staff member provided for in the budget.

#### Admission of Observers to Council Sessions and Certain Meetings of the Union

68. The discussions were based on document C/XI/16.

69. The Council decided that Argentina, in view of its involvement in preparing a model law for Latin American States, should be invited to the forthcoming Council sessions.

#### Progress of the Work of the Technical Steering Committee

70. Dr. Böringer (Federal Republic of Germany), Chairman of the Technical Steering Committee, introduced document C/XI/8 giving a progress report on the work of that Committee since the last ordinary session of the Council. In addition to

the facts stated in that document, Dr. Böringer stressed that, to his knowledge, it was the first time that States had agreed in detail upon the prerequisites that varieties would have to fulfill with respect to distinctness before plant breeders' rights could be granted and that the same work was at present being undertaken with respect to homogeneity and stability. He added that in almost a hundred years since the conclusion of the first conventions in the patent sector nothing similar had yet been possible in that related field. Therefore, UPOV could be proud of its progress.

#### Progress of the Work of the Committee of Experts on International Cooperation in Examination

71. In the absence of Mr. Butler (Netherlands), Chairman of the Committee of Experts on International Cooperation in Examination, who was unable to attend the session, the Vice Secretary-General introduced documents C/XI/5 to 7 which summarized both the progress made by the said Committee in its activities and the progress made by the Union in general with respect to cooperation in examination. In describing the activities of that Committee, he placed emphasis on two points: (i) the Committee had decided, with the approval of the Council, that cooperation should first be established in a pragmatic way by concluding bilateral agreements between competent authorities and that the introduction of a multilateral system of cooperation should be examined once sufficient experience had been gathered from cooperation under bilateral agreements; (ii) the Committee had begun the examination of some questions, in particular the relationship between fees and cooperation in examination and the possibilities of harmonizing the plant breeders' rights gazettes of the member States. Those activities, as well as other activities which were of permanent interest, had to be continued by the Administrative and Legal Committee.

72. The Delegation of Canada stated that it was issuing a gazette of the kind referred to above and was keenly interested in receiving information on the proposals for harmonizing the gazettes in order to be able to adapt its own gazette to those proposals.

#### Report on the Activity of the President During his Term of Office

73. Mr. Laclavière (France), President of the Council for the last three years, gave a report on his activities. He recalled that he had participated in the 1961 Diplomatic Conference which established the UPOV Convention and that he had a good knowledge of the history and the spirit of the Convention since he had been entrusted with establishing the first draft of its administrative provisions. His first action as President of the Council had been to pay a visit to the Secretary-General and to have a general exchange of views, which showed that they were converging on most points. He had also visited the premises of the Office of the Union and had assured himself that the latter was well equipped and able to work in satisfactory conditions.

74. His second action had been to invite the Secretary-General to pay a visit to his office, to the premises of an official testing station and to the fields of a plant breeder.

75. He said that he had had further meetings with the Secretary-General in order to solve a certain number of delicate problems and to prepare the Council sessions so that they would be as efficient and as successful as possible.

76. He stated that he had represented UPOV on several occasions, in particular at the General Assembly of ASSINSEL held in Monterey (California, United States of America) in May 1977. On that occasion, he had declared that, if Governments were to make efforts, the professional organizations must also make efforts to spread the idea of plant variety protection. For the purpose of these common efforts, a joint pamphlet had been prepared by ASSINSEL and UPOV.

77. The President concluded by extending his warm thanks to the Secretary-General for his collaboration and for his efforts to make his term as President as successful as possible, and also to the Office of the Union and the delegates of all the member States.

78. Speaking in the name of all the delegations of the member States, the Delegation of the Federal Republic of Germany stated that it paid tribute to the President's report and expressed its gratitude and thanks to him for his achievements. It fully recognized the difficulties of the task of a President, both from the administrative and from the technical and legal points of view. It recalled that the term of office of the President had been characterized by the enlargement of the Union, which was rapidly growing into a mature organization. It finally stressed that the collaboration between the President, the Secretary-General, the Office of the Union, the member and non-member States and the interested international organizations had been very fruitful.

79. Speaking in the name of the delegations of the non-member States, the Delegation of the United States of America thanked the President for the understanding and patience he had shown in his many contacts with non-member States.

80. The Secretary-General placed emphasis on the two very important facts which had characterized the President's term of office, namely, that the membership of the Union had almost doubled and that the Union was engaged in an irreversible policy of opening towards non-member States and professional organizations in the field of plant breeding and the seed trade.

81. He added that the enormous experience, the knowledge, the diplomacy, the dynamism and the patience of the President had facilitated the very important relations between the Council and the Secretariat. He warmly thanked and congratulated the President in the name of the Office of the Union and on his own behalf.

82. The Delegation of the United Kingdom said that it was only normal that the observations of the delegations on documents prepared by the Secretariat dealt only with points which they wanted to question. The points which were not mentioned had not been mentioned because they met with general agreement. Those points constituted the overwhelming majority of the points covered. The delegations fully recognized the excellence and the volume of the work of the Secretary-General, the Vice Secretary-General and the staff of UPOV and WIPO and wished to thank them and encourage them to continue in the same way in the future.

#### Election of the New President of the Council

83. The Delegation of the Federal Republic of Germany said that the three-year term of office of the next President of the Council would be characterized by the holding of a Diplomatic Conference on the revision of the UPOV Convention. It was only natural that Mr. Skov (Denmark), Chairman of the Committee of Experts on the Interpretation and Revision of the Convention, should be the person to take in hand the direction of the Council for the next three years.

84. The Council unanimously elected Mr. Skov, Representative of Denmark, as the President of the Council. His term of office will start on December 9, 1977, with the closing of the eleventh ordinary session of the Council, and will end with the closing of the ordinary session of the Council in 1980.

85. Mr. Skov thanked the delegations of the member States for the confidence they had placed in him and expressed the hope that, with the friendly collaboration and good understanding of all delegations, he would contribute to the further development of the Union.

86. The election of Mr. Skov as the new President of the Council resulted in the vacancy of the post of Vice-President of the Council for one year. On a proposal from the Delegation of the United Kingdom, Mr. Butler (Netherlands) was unanimously elected as the new Vice-President for one year. His term of office will end with the closing of the ordinary session of the Council in 1978.

#### Election of the New Chairmen of the Committees

87. Following the reorganization of the committees and working groups decided by the Council, Chairmen had to be elected for the Ad Hoc Committee on the Revision of the Convention and for the Administrative and Legal Committee.

88. The Council unanimously elected Mr. Skov (Denmark) as Chairman of the said Ad Hoc Committee.

89. As to the Administrative and Legal Committee, the Delegation of Denmark proposed that Miss Thornton (United Kingdom) be entrusted with the chairmanship of that Committee. The Representative of the United Kingdom noted with satisfaction the appreciation of Miss Thornton's abilities shown by the Delegation of Denmark and those of the other member States but informed the Council that she would not be able to accept the chairmanship of the said Committee because of her heavy responsibilities in the Plant Breeder's Rights Office of the United Kingdom in the coming year. He then proposed that Dr. Böringer (Federal Republic of Germany) be elected Chairman of the Administrative and Legal Committee, in view of his wide experience and knowledge and of the difficult problems which that Committee would have to examine, and that, if the Council took the view that the United Kingdom should chair one of the main committees, Mr. Kelly (United Kingdom) be elected Chairman of the Technical Committee in replacement of Dr. Böringer. The Council unanimously endorsed those proposals. It recalled that the duration of the term of office of Chairmen of Committees was three years.

#### Other Business

90. The Vice Secretary-General informed the Council that he had received corrections to be made to the Report by CIOPORA on the Legal and Economic Situation of the Western European Market for Ornamental Plants and that a revised version would be distributed by the Office of the Union to the participants in the Council session together with the final report on the session.

91. This report was unanimously adopted by the Council at its meeting on December 9, 1977.

[Three Annexes follow]

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Dr. H. MAST, Vice Secretary-General  
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Mr. A. HEITZ, Administrative and Technical Officer

[End of Annex I, Annex II follows;  
Fin de l'annexe I, l'annexe II suit;  
Ende der Anlage I, Anlage II folgt]

LETTER FROM THE GERMAN PLANT VARIETIES OFFICE  
OF NOVEMBER 29, 1977

Subject: Revision of the Convention, Article 13  
Reference: Document VD/XI/2, Numbers 7 and 16, and  
Document IRC/VI/21

Dear Colleagues,

After examining the proposals for revising Article 13 and in agreement with the Federal Ministry of Justice, we would draw your attention to the following:

According to Article 13(8)(b) of the present text, which has not been changed so far by the Committee of Experts, a variety denomination having been registered in one member State may not be the subject of an application for registration or be registered as a trademark in any other member State. This provision creates the following problems:

No trademark Office of any member State examines before registering a trademark whether that trademark is identical or liable to cause confusion with a registered variety denomination (see document VD/XI/2, paragraph 16). Also, it is obviously not intended in any member State that this practice, which does not comply with the text of the Convention, should be changed. A breeder, who has asked for protection of a variety in only one or a few member States is thus practically not prevented from having the variety denomination registered as a trademark, even for the same variety, in other member States in which he has not asked for protection for the variety. In these other States the following situation could arise:

If a dealer exports propagating material of the variety, legally acquired by him in the State in which protection has been granted to it, to one of the above-mentioned other States under the established variety denomination, the breeder could take the following measures in those States, on the basis of his identical trademark.

1. He could prohibit the use of the variety denomination by the dealer, on the basis of his identical trademark, and thereby make it impossible for the dealer to comply with Article 13(7) (present text). Thus he could use his trademark to secure for himself the exclusive right to market the variety in another State, a right which would go beyond the protection to which he was entitled under plant variety protection.
2. He could also market propagating material of similar varieties of the same species under the same trademark in order, for instance, to profit from the economic success of the variety in question. It would be very difficult, if not impossible, for the consumer to know whether the name under which he bought propagating material was a variety denomination, or a trademark, and it would therefore not be possible to recognize by the name whether the propagating material offered belonged to the variety or not.

The cases described under numbers 1 and 2 both stand in contradiction to the function of the variety denomination as laid down in Article 13. The following possibility should therefore be taken into consideration: Applications for registration and registration of a trademark which are identical with a variety denomination established in another member State, by the breeder or by his successor in title, are no longer to be excluded in view of the existing practice in the member States. The right to use the trademark is to be limited to the variety itself, however, as is the right to use the variety denomination. Furthermore, the right deriving from a trademark is to be limited in that its use cannot be prohibited if, in the member States in question, it is permissible for it to coexist with plant variety protection.

The following practical reasons speak in favor of permitting applications for registration and registration of trademarks which are identical with a variety denomination established in another member State, by the breeder or his successor in title, quite apart from the above-mentioned practice in the member States:

If the abuses described above are excluded (see below), it must be acknowledged that the breeder has a legitimate interest in a variety denomination which is protected in one member State being registered as a trademark in other member States, should he not be able to obtain variety protection in those other member States, due to the species in question not being eligible for protection there, or if he does not wish to apply for plant variety protection in those other States, for instance, because it is not economically worthwhile. In such a case, a trademark could provide a degree of protection for the variety. Furthermore, the breeder can also be interested in obtaining trademark protection in a member State (normally the State of origin) if he wishes to use such a trademark as a basis for obtaining trademark protection in States not party to the Convention, which require a trademark, either generally or for international trademark applications (Madrid Agreement), to be registered in the country of origin.

If the wishes of the breeders are to be taken into consideration and abuses are to be prevented, the solution will have to adopt the following principles:

(a) Only the breeder or his successor in title, not a third person, may have a variety denomination registered as a trademark.

(b) He may not use this trademark to prevent the variety denomination being used by a third person.

(c) He may have the trademark registered only for the variety in question, not for any other variety of the same or a related species.

If these principles are adopted, paragraph (8) [in the new text, paragraph (9)] of Article 13 could be worded as follows, whereby the question whether the variety denomination can still be considered a generic term and whether this should be stated expressly is left open:

"From the date of issue of a title of protection to a breeder or his successor in title in a member State of the Union:

(a) subject to subparagraph (b) and to paragraph (10) [in the new text, paragraph (11)], no person may apply in any member State of the Union for the registration of, or obtain protection as a trademark for, a denomination identical or liable to cause confusion with such denomination, in respect of identical or similar products within the meaning of trademark law.

(b) The breeder or his successor in title may apply in any member State for registration as a trademark of any denomination identical to a variety denomination. He may not assert his rights deriving from the trademark, however, in the event of the denomination being used for the variety, if the use of the denomination is admissible under plant variety protection in those States in which the trademark is registered.

(c) The variety denomination of the variety may not be used as a variety denomination or, subject to paragraph (10) [in the new text, paragraph (11)], as a trademark for another variety of the same botanical species or a related species in any member State."

Should there be problems in allowing the registration of a variety denomination as a trademark in all the member States, the proposal for the third sentence of subparagraph (b) above could be worded, similar to the proposal in document IRC/VI/2, as follows:

"The breeder or his successor in title may apply for the registration of a denomination which is identical with a variety denomination as a trademark for the variety in any member State not applying the Convention to the genus or species to which the variety belongs. In such case ... (continue as in subparagraph (b) above)."

It must, however, be mentioned that such a rule could cause difficulties when the member State in question subsequently extends application of the Convention to the species concerned.

As far as Article 13(4) [paragraph (3) in the new text] is concerned, we agree basically with the proposal made by the Dutch experts in document VD/XI/2, and propose the following wording:

"(4) If the breeder or his successor in title proposes a variety denomination for which he enjoys, in a member State of the Union, the protection accorded to trademarks in respect of the variety or of another variety of the same botanical or of a related species, or a designation liable to cause confusion with such trademark, he may not, as from the time the variety denomination is registered for such varieties continue to assert his rights deriving from the trademark in any member State in which the variety is protected."

Furthermore, it might be considered whether reference should not be made in paragraph (9) [in the new text, paragraph (10)] to the fact that a trademark used in addition to the denomination of the variety must not overshadow the variety denomination to such an extent that that denomination ceases to exercise the functions allotted to it under the Convention. The following second sentence might therefore be added to the paragraph:

"The variety denomination must remain easily recognizable in cases where a trademark is added to it."

[Annex III follows].

## UPOV MEETINGS IN 1978 AS DECIDED BY THE COUNCIL

<u>Date and Place</u>	<u>Body</u>	<u>Topics</u>
January or February (3 days) Geneva	Administrative and Legal Committee	Law on Competition and Plant Variety Protection
April 17 to 19 Geneva	Administrative and Legal Committee and/or Technical Committee	Law on Competition and Plant Variety Protection, Article 13 and/or Distinct- ness, Homogeneity, Stability
April 20 and 21 Geneva	Consultative Committee	Various
May 23 to 25 Zürich-Reckenholz (Switzerland)	Technical Working Party for Agricultural Crops	Various Test Guidelines
June 6 to 8 Hanover (Federal Republic of Germany)	Technical Working Party for Vegetables	Various Test Guidelines
June 20 to 22 Paris (France)	Technical Working Party for Ornamental Plants	Various Test Guidelines
September 5 to 7 Florence (Italy)	Technical Working Party for Fruit Crops	Various Test Guidelines
September 11 to 15 Geneva	Ad Hoc Committee on the Revision of the Convention	Observations received on proposed new text of the UPOV Convention  Variety Denominations
September 19 to 21 Melle (Belgium)	Technical Working Party for Forest Trees	Various Test Guidelines
October 9 to 23 Geneva	Diplomatic Conference	Revision of the Convention
November 13 to 15 Geneva	Technical Committee	Distinctness, Homogeneity, Stability
November 15 to 17 Geneva	Administrative and Legal Committee	Fee Questions: Questions relating to Cooperation; Harmonization of Gazettes (on November 15); Model Law (on November 16 and 17)
December 5 and 8 Geneva	Consultative Committee	Various
December 6 to 8 Geneva	Council	Various