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REVISION OF THE CONVENTION

Document prepared by the Office of the Union

1. This document contains an updated version of document CAJ/XXII/2, which was submitted to the twenty-second session of the Administrative and Legal Committee. It takes account of the observations and proposals made at that session or subsequently.

2. Annexes I to III contain the supplementary observations and proposals made in writing after the said session by the Delegations of the Netherlands, the United Kingdom and Switzerland.

INTRODUCTION

A. Historical Background

1. At its twenty-first ordinary session, the Council decided to entrust the Administrative and Legal Committee (hereinafter referred to as "the Committee") with the preparation of the forthcoming revision of the Convention (see paragraph 109(iii) of document C/XXI/13).

2. The Committee had a first discussion on this subject at its twenty-second session, held from April 18 to 21, 1988, on the basis of document CAJ/XXII/2 (proposals made by the Office of the Union on the basis of earlier discussions, in particular those of the Third Meeting with International Organizations) and document CAJ/XXII/6 (proposals from the Delegation of the Federal Republic of Germany). The Committee also took note at that session of document CAJ/XXII/3 (observations from the International Chamber of Commerce (ICC)).

B. Objectives of the Revision of the Convention

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

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

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

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

C. Contents of this Document

4. This document contains draft provisions and other suggestions for the revision of the Convention, as a basis for discussions at the twenty-third (present) session of the Committee. It is an updated version of document CAJ/XXII/2 that was submitted to the twenty-second session of the Committee, and takes account of the observations and proposals made at that session or subsequently.

5. This document does not address three issues:

(i) the justification for a special protection system for plant varieties (and animal breeds): this may be a matter, if necessary, for the new preamble;

(ii) the extension of the UPOV system to animal breeds: it is suggested that the question be considered on the basis of a special study to be prepared in due course; it is also to be noted that the Delegation of the Federal Republic of Germany has announced its intention to propose the addition of a

provision in the final clauses of the Convention providing for the obligation to notify any extension of the provisions of the Convention to animal breeds*;

(iii) the possible extension of the UPOV system to subject matter such as genetic information: the Office of the Union believes that the amendment of Article 5 may offer attractive protection, and it is proposed that the matter be considered once sufficient progress has been achieved on Article 5.

* See also, in this respect, item 9 of document IOM/III/2.

Article 1

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

(1) The States parties to this Convention undertake to recognize and to ensure to the breeder of a new plant variety a right in accordance with the provisions of this Convention.

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

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

Description of proposal.— It is proposed to transform paragraph (1) from a declarative into a binding provision. In addition, that paragraph would be simplified as a result of the inclusion of a new Article 2 containing definitions.

Comments

1. The main amendment was initially proposed on account of the proposed deletion of Article 2(1), although it was not a consequential change and although it was not otherwise required. The amendment would strengthen the Convention.

2. Forms of protection.— The Convention gives freedom to member States regarding the type of protection granted (sui generis protection—e.g. by means of a "plant breeder's right" or a "plant variety protection certificate"—patent protection or even another type of protection), provided that such protection is in accordance with the provisions of the Convention.

3. Member States would be expected to give the widest effect to the undertaking made under Article 1(1) and to refrain from introducing a competing system of protection for varieties as such, in particular under the provisions of the law on industrial patents, once they have introduced legislation in accordance with the Convention. Except under special circumstances, such competition would in any case be considered as a violation of the principle of rationality of the legislative order and would therefore be rejected by the law-maker.

4. Maintenance of the express prohibition of "double protection".— Certain delegations have nevertheless expressed the wish that a provision expressly excluding the possibility of "double protection" be maintained. The second sentence of the present Article 2(1) excludes such a possibility, but its wording is ambiguous: because of its subordination to the first sentence, which refers to "the right of the breeder provided for in this Convention," it

may be interpreted as being limited to the demarcation between two parallel laws that are in conformity with the Convention. This is one of the reasons for the proposed deletion of the Article in question.

5. In order to meet the wish of these delegations, it would be necessary to introduce a provision which removes that ambiguity. Such a provision could be drafted as follows and inserted in Article 1 as a new paragraph (2) (or could replace the present Article 2(1)):

"(2) Subject to the provisions of Article 37, the right granted in accordance with the provisions of this Convention shall be exclusive of any other form of protection directly relating to the variety as such."

6. In this proposal:

(i) the purpose of the reference to the present Article 37 is to enable the United States of America (the only State which made use of that Article) to maintain their present protection system;

(ii) the purpose of the words "directly" and "as such" is to reserve in particular the indirect application of an industrial patent to variety material (for example in the form of the extension of a process patent to the immediate product of the process) as well as the trademark protection of a designation relating to the variety.

7. Maintenance of protection for plant varieties as such under another law (in particular under the law on industrial patents).- Under their legislation or as a result of doctrine or case law, some member States have admitted the possibility of granting an industrial patent to a plant variety prior to introducing special plant variety protection legislation and to becoming a member of UPOV. The purpose of the second sentence of Article 2(1) was to allow such States to continue to admit such a possibility (even though it was rather theoretical in some of them), but on the condition which is specified. Belgium, France, the Federal Republic of Germany and Spain have made use of the provision.

8. This provision is linked with the progressive application of the provisions of the Convention to the various species, which itself resulted from the technical and economic constraints of the official examination of varieties in growing tests. Today, a general agreement is emerging in favor of the principle of the mandatory application of the provisions of the Convention to all botanical genera and species; if the Convention is so applied, the provision in question will be deprived of all usefulness. A general agreement is also emerging on the possibility of basing the examination on the trial data and the description submitted by the breeder, but in accordance with guidelines established by the competent authorities (see in this respect the statement on Article 7 approved by the Council at its tenth ordinary session and reproduced on page 25 of the Acts of the 1978 Diplomatic Conference); such a procedure would eliminate most of the constraints. It may thus be considered that it is no longer necessary to maintain the industrial patent as a last resort source of protection. On the contrary, it would be useful to give all breeders the benefits of sui generis protection, and also to the public at large the benefit of a rational internal legislative order. The provision proposed in paragraph 5 above would put an end to the special regime applying in the above-mentioned States.

9. Those States--which protect in one way or another the whole plant kingdom --would be obliged in practice to extend protection under the Convention to all botanical genera and species or to amend their patent laws, in which case they would harmonize them with Article 53(b) of the European Patent Convention. However, they could have difficulties in that respect, which would lead to the need to introduce special provisions. Such provisions will be proposed by the Office of the Union if necessary.

10. Exceptional rules for protection under two forms (Article 37).— It is likely that it will be necessary to maintain the essence of Article 37, which deals with the case of the United States of America, and more particularly with: (i) the use of two systems of protection demarcated by the mode of propagation--sexual or vegetative--of the varieties, and: (ii) the use of the patentability criteria and the period of protection of the patent legislation. The proposed amendment of Article 1 and deletion of Article 2(1) make it necessary to reword the provision. Two solutions may be considered, as follows:

"(1) Any member State of the Union which, prior to October 31, 1979, provided for protection under different forms for one and the same specie may continue to do so if ... [rest unchanged]."

or (along the lines of Article 30(2)(a) of the Bern Convention for the Protection of Literary and Artistic Works):

"Any member State of the Union ratifying, accepting or approving this Act, or acceding to this Act, may retain the benefit of the provisions of Article 37 of the Geneva Act of October 23, 1978, on condition that it makes a declaration to that effect at the time of the deposit of its instrument of ratification, acceptance, approval of, or accession to this Act."

Article 2 (present)

Forms of Protection

Proposal: Delete the whole Article.

Comments

1. The reasons and consequences of the proposed deletion of paragraph (1) are explained in the comments to Article 1.
2. The proposed deletion of paragraph (2) is based on the following considerations:
 - (i) the purpose of the Convention should be to provide for protection as wide and as effective as possible. Exceptions should therefore be limited to the strict minimum;
 - (ii) there are more and more difficulties in distinguishing varieties according to their manner of reproduction or multiplication or their end-use;
 - (iii) the argument that hybrid varieties benefit from "biological protection" is no longer valid.
3. At the twenty-second session of the Committee, one delegation expressed the wish that this paragraph be maintained in substance. If maintained, the provision concerned should rather appear in Article 4, in a form that is compatible with the wording of the other exceptions, if any. However, it should be noted that the proposed new Articles 2(i) and 4(2) can be interpreted as permitting a limitation of the application of the provisions of the Convention within a species (but under the conditions mentioned in Article 4(2)); such interpretation could also be strengthened by replacing the words "subdivision of a species" in the proposed Article 2(i) by "subdivision or part of a species" or "part of a species."

Article 2 (new)

Definitions

For the purposes of this Convention:

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

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

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

Description of Proposals and Comments

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

2. It is recalled that, to underline the fact that States may limit the application of the provisions of the Convention within a species, in particular to varieties with a particular manner of reproduction or multiplication or a certain end-use, the words "subdivision of a species" could be replaced by "subdivision or part of a species" or "part of a species."

3. Paragraph (ii).— The wish has been expressed, in connection with the proposed deletion of the present Article 2(2), that a definition of "variety" be reinstated (the 1961 text of the Convention contained examples of types of varieties, i.e., cultivar, clone, line, stock and hybrid). It was also suggested to introduce a general definition.

4. The proposed text is based on the law of the Netherlands, with the following additions: a reference to plant material since a variety may be represented by material that is not a whole plant; a reference to characteristics in line with the International Code of Nomenclature for Cultivated Plants and in order to suggest a link with Article 6(1)(a); a reference to forms of use other than cultivation to take account of, for instance, use as a cell culture in a biotechnological process. The reference to a grouping would include a reference to a single specimen.

5. It was suggested at the twenty-second session of the Committee to use Article 10 of the International Code of Nomenclature for Cultivated Plants as the basis for the proposed definition; its wording is as follows: "The international term cultivar denotes an assemblage of cultivated plants which

is clearly distinguished by any characters (morphological, physiological, cytological, chemical or others) and which, when reproduced, sexually or asexually, retains its distinguishing characters." The Office of the Union considers that this suggestion should not be followed, mainly for the following reasons:

(i) The "definition" of the International Code is not free of defects; in particular, it does not refer to homogeneity (this is partly corrected in the rest of Article 10 and in Article 11) and it admits that any character may serve to distinguish a variety (which, in the framework of the Convention, would have undesired effects on the scope of protection since it permits protected varieties to be plagiarized);

(ii) Insofar as Article 6 already contains a detailed definition of "variety" a definition in Article 2 would only be meaningful if it is general.

6. It was also suggested at that session to merge paragraphs (ii) and (iii) by adding the words "created or discovered" before "grouping," thus avoiding the need for the definition of the breeder. It does not seem possible to follow that suggestion, in particular because the two notions in question are too important and therefore deserve separate definitions.

7. Paragraph (iii).— One of the essential features of the UPOV Convention is that it provides also for the protection of varieties that have been "discovered." This is suggested at present by the phrase "whatever may be the origin, artificial or natural, of the initial variation from which it has resulted" appearing in Article 6(1)(a). On the other hand, the word "breeder" may be construed restrictively. A definition of "breeder" is therefore proposed to clarify the situation.

8. Since certain States exclude the protection of varieties that would be merely discovered in the course of a botanical expedition, it would perhaps be necessary to clarify this in the Convention or an agreed interpretation thereof.

9. It was asked at the twenty-second session of the Committee whether the definition would also apply to the case where there are several breeders. The proposal is intended to cover also this case, subject to the general rules governing the various situations (independent breeders, joint breeders, employee breeder).

Article 3

National Treatment

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

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

(3) [Deleted]

Description of proposal and comments.- It is proposed to delete paragraph (3), i.e., the possibility of granting protection to foreigners on the basis of reciprocity, for the following reasons:

(i) The objective of the revision is to strengthen the system of protection based on the UPOV Convention;

(ii) There is a general trend among member States to provide for national treatment;

(iii) The proposals made in connection with Article 4 aiming at increasing the degree of uniformity of the lists of protected taxa would reduce the scope of applicability of the reciprocity rule and therefore also its pertinence;

(iv) Experience shows that the principle of reciprocity has not really fulfilled its purpose; in particular, it may be circumvented by assigning the rights in a variety to a national of the State requiring reciprocity.

Article 4

Applicability of the Convention to Botanical Species

- (1) This Convention shall be applied to all botanical species.
- (2) Notwithstanding the provisions of paragraph (1), any member State of the Union may, on account of special economic or ecological conditions prevailing in that State, decide to limit the application of the provisions of this Convention to the species for which the exploitation of plant material has acquired, or is expected to acquire, importance and for which the examination may be carried out in accordance with the provisions of Article 7.

Description of proposal.— The proposed provisions would establish the principle of the mandatory application of the Convention to all botanical genera and species, by replacing "may" by "shall" in paragraph (1). They would, however, allow exceptions to be made (paragraph (2)).

Comments

1. The proposal is the result of the discussions at the twenty-second session of the Committee where it was generally approved.
2. It was said in that context that the purpose of the reference to the importance of the exploitation was in particular to offer interested circles a legal basis for their requests for extension of protection (or removal of a limitation).
3. The following remarks were made in the same context:
 - (i) Certain States may have difficulties to accept the principle of a mandatory application of the provisions of the Convention to the whole plant kingdom;
 - (ii) In particular, this principle could prevent certain States from adhering to the Union, make their adherence difficult or delay it (see in this respect the proposed calendar for the extension of protection in Australia, published in "Plant Variety Protection" No. 55);
 - (iii) Certain States may prefer a system of progressive application of the Convention based on the alternative proposal for Article 4 reproduced in document CAJ/XXII/2 (incidentally, a time limit could also be incorporated in the above proposal);
 - (iv) The limitations based on special economic conditions could be made subject to prior authorization by the Council.
4. There would have to be a consequential change in Article 35 ("Communications Concerning the Genera and Species Protected...").

Article 5

Effects of the Right Granted to the Breeder

(1) The breeder of a variety protected in accordance with the provisions of this Convention shall enjoy the exclusive right of reproducing the variety.

(2)(a) The breeder shall also enjoy the exclusive right of offering for sale, putting on the market or using, or importing or stocking for any of the afore-mentioned purposes:

(i) material of the variety and

(ii) material of another variety produced by means of the repeated use of the variety, subject to any right which may be granted to another breeder in respect of that other variety.

(b) This right shall not extend, however, to any such afore-mentioned acts concerning any material which has been put on the market in the State of the Union concerned by the breeder or with his express consent, or material derived from the said material in accordance with the purpose intended when it was put on the market.

(3) The right granted in accordance with the provisions of this Convention does not extend to:

- (i) acts done privately and for non-commercial purposes;
- (ii) acts done for experimental purposes;
- (iii) acts done for the purpose of breeding new varieties.

(4) Each member State of the Union may exempt other acts from the effects of the right granted in accordance with the provisions of this Convention, if this is necessary in the public interest and provided that the exemption does not cause excessive prejudice to the legitimate interests of breeders.

(5) The exploitation of a variety which is essentially [Alternative 1: derived from a protected variety] [Alternative 2: based upon the material of a protected variety] shall give rise to the payment of equitable remuneration to the holder of the right in the protected variety.

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

(i) where the acts fall within the right in accordance with the provisions of paragraphs (1) and (2)(a);

(ii) which are exempt from the scope of the right in accordance with the provisions of paragraph (2)(b), (3) or (4).

Description of Proposals and Comments

1. General.— The present text of Article 5 was conceived at the end of the 50's, a period when objections to any form of intellectual property in relation to the essentials of life were still extremely strong; at that time, very many countries excluded from patentability by express provisions, by case law or by doctrine food, plant varieties and drugs (and also chemical compositions). The fathers of the Convention have thus developed a model provision specifying a minimum content for the right capable of avoiding the strongest objections, of satisfying the needs of the breeders and of preserving the public interest to the extent that it had been established (or was perceived) at that time.

2. This minimum content is no longer suitable to present circumstances, and, insofar as it plays a role as a model, the present Article 5 is a brake upon the putting into place of a globally satisfactory right (for further details on these points, see document CAJ/XVIII/6). It is accordingly proposed that an entirely revised text be introduced.

3. The new text proposed for Article 5 is based upon the principle that the right granted to the breeder should be strengthened. There are two objectives:

(i) The breeder must have the opportunity to exercise his right once in relation to any multiplication of his variety (subject to exceptions); it is not a case of permitting him to receive a flood of royalties or of controlling the exploitation of the variety in an abusive way. The exercise of the right requires, however, that the breeder can take enforcement proceedings on the basis of any product of the variety (including transformed product) which is present in commerce and which is derived from an unlawful multiplication.

(ii) To the extent that this is possible for the breeder and not contrary to the public interest, the breeder should have the possibility of exploiting the variety, the fruit of his labour, beyond the simple production for commercial purposes of seed and plants. In this connection, it should be recalled that in the context of biotechnology certain varieties will no longer be exploited in the form of commercial seed or plants, but in the form of cells in a fermenter on the premises of the holder of the rights and/or of a restricted number of licensees. For certain "minor" species, there also does not exist any true trade in seeds or plants on which the breeder could exercise his right.

4. It would be cumbersome to enlarge the present text in order to complete the catalogue of the different elements of the right which must be granted (paragraphs (1) and (3), second sentence, of the present text) and this would have also certain other disadvantages (see in this respect document CAJ/XVIII/6); these difficulties would be overcome if the definition of the rights was based upon an extension of protection as widely as possible, which extension would subsequently be subjected to the principle of exhaustion of rights and to limitations. This explains the layout of paragraphs (1) to (4) in the draft. Paragraph (5) deals with rights relating to varieties developed by using the protected variety as the departure point. Finally, paragraph (6) deals with the incidence of other industrial property rights.

5. Right of reproduction (paragraph (1)).— The proposal made in document CAJ/XVIII/6 was based upon a patent-type approach. The above proposal is based upon a copyright approach since varieties are exploited by means of reproduction, like many literary and artistic works. Paragraph (1) in consequence

envisages an exclusive right to reproduce. The reproduction of a variety can take several forms: sexual reproduction, vegetative propagation, the repeated use of other varieties for the production of material of the variety, the use of breeding methods in order to "recreate" the variety, the reappearance of a mutation. All the forms of reproduction would be covered by the right envisaged in paragraph (1). This right is limited in paragraph (3) and can be further limited by a member State on the basis of paragraph (4). The right is not subject to the principle of exhaustion.

6. The proposal envisages an exclusive right in favor of the breeder, tempered by the possibility of granting compulsory licenses (Article 9). It has been proposed to only grant a right to forbid third parties from performing certain acts. This question ought to be addressed by the Committee.

7. Exploitation of the variety in a form other than reproduction (paragraph (2)(a)). The second essential feature of the exploitation of varieties lies in the fact that plant material of the variety, typically reproductive or vegetative propagating material and the produce of the harvest, are the subject of commercial operations. Paragraph (2)(a) envisages an exclusive right over such operations subject to the principle of the exhaustion of rights set out in paragraph (b) and to the limitations resulting from paragraphs (3) and (4).

8. The operations with which this right is concerned should be defined in a way which enables advantage to be taken from precedents and from the case law developed in relation to industrial patents. The proposed text uses the terms of the Luxembourg Convention for the European patent for the common market (Community Patent Convention). Other approaches are possible, including the use of one or more terms which would be defined in the new proposed Article 2.

9. The type of material is not specified. Subject to the effects of the principle of exhaustion, this would permit on the one hand the taking of proceedings when there has been an unlawful reproduction and this reproduction has only been established at the level of the produce. On the other hand, this will also permit the extension of the right to the importation of transformed produce, e.g. to the essential oils from perfume plants, or to a chemical composition produced by means of a biotechnological process.

10. The proposed text states that the right applies equally to material of a variety produced by means of the repeated use of the protected variety, typically to material of a hybrid variety. The right dealt with at the present time in the second sentence of Article 5(3) in the form of an exception to the principle of free access to breeding material is thus incorporated in the fundamental rights in a positive form. The Office of the Union feels that this approach is more satisfactory; the text proposed by the Delegation of the Federal Republic of Germany at the twenty-second session of the Committee, which follows the form of the present Article 5(3), seems to imply that acts carried out for the purpose of creating a hybrid should also be subject to the right of the breeder of the inbred line, which is not the objective which is sought. In view of the exclusive nature of the right which is proposed to be introduced, it is necessary to make a reservation in favor of the right which may eventually be granted to the breeder of the hybrid.

11. One delegation expressed the wish that paragraph (2)(a) be limited to propagating material and that the more extensive rights be limited so as to apply only to imported material. It does not seem that this suggestion should be adopted, for the following reasons in particular:

(i) It would involve, in addition to a complication at the drafting level, difficulties in the exercise of the rights granted to the breeder, and this, without there resulting any necessary advantage for the national producers;

(ii) It could be followed by those member States that wish to do so under paragraph (4), on condition however that the requirements set out in the said paragraph are fulfilled.

12. Principle of the exhaustion of rights (paragraph (2)(b)).- As it is stated in paragraph 5 above, the principle of exhaustion is not applicable to the right of reproduction.

13. The principle of exhaustion is applicable in relation to material which has been lawfully put on the market within the member State concerned (or, in the case of the Common Market, in another State of the Community, in accordance with the relevant rules); in other words, there would not be any exhaustion in relation to imported material on the basis that the right has already been exercised in the exporting country.

14. This principle would be applicable also in relation to derived material; for example, the sale of certified seed to a farmer implies that he may freely produce a crop and that this crop may be freely used or processed. However, the derivation must be in keeping with fair practices, which is indicated by the reference to the "intended purpose" of the material used for the derivation. This problem arises particularly in the case of varieties with several end uses. For example, it would not be fair to use for the purposes of hybrid seed production, wheat seed that has been made available to farmers, or to market cut flowers produced from rose bushes or tulip bulbs sold to consumers for the purpose of planting in their own gardens (this case is presently covered by the third sentence of Article 5(1)), or yet again to use in a biotechnological process cells obtained from produce intended for animal feed.

15. In other words, the breeder should be able to obtain a share of the exceptional added value realized in utilizing the material of his variety in a manner that was not initially foreseen. The provision in question would establish a "droit de suite" analogous to that which is provided in relation to copyright (Article 14^{ter} of the Berne Convention). In addition, it does permit control of the use of the variety in the interest of users and licensees who use normal trade channels. Finally, it enables the picking up of the provision currently contained in the third sentence of Article 5(1), this in a more general form.

16. Limitation of the right (paragraphs (3) and (4)).- Paragraph (3) expresses two limitations on the right granted to the breeder in terms taken from patent law, which enables one to draw upon patent case law for their interpretation. As for subparagraph (iii), this expresses the principle of the free use of varieties for breeding purposes which is contained at the present time in the first sentence of paragraph (3).

17. It will certainly not be possible to unify the scope of the right at the UPOV level, and certain member States will be obliged by political, legal, economic or agro-ecological circumstances prevailing on their territories to limit the right even more. When account is taken of the diverse situations in current member States, and in non-member States, it is necessary to permit even this. Such is the object of paragraph (4), which sets out two conditions:

that the limitations be in the public interest and that they do not cause any excessive prejudice to breeders. The word "excessive" has been preferred to the word "unjustified" which featured in the draft submitted by the Delegation of the Federal Republic of Germany at the twenty-second session of the Committee since the public interest must be considered in all circumstances as an adequate justification.

18. It will be the task of the authorities in each member State, i.e., principally the lawmakers and judges, ultimately to define the limitations and to establish if the conditions necessary for their introduction are fulfilled. The present text has the advantage that controversial questions, in particular that of farm-saved seed, would not be regulated in the Convention itself but left to the judgment of each member State. Some degree of uniformity could nonetheless be achieved by work within UPOV (particularly by an additional protocol which would round off the new Act of the Convention or by a recommendation of the Diplomatic Conference) or by the example given by one or other of the States.

19. By way of example, member States could agree to permit a farmer to produce his own seed of certain well-defined species, but on condition that he does not have resort to any external aid (movable seed cleaners or contract cleaning by a cooperative) and that he pays a royalty to a central collecting agency for breeders as is done in relation to copyright for the public reproduction of musical works. It is to be noted in this connection that the principle of paying a royalty on the initiative of the multiplier has already been included in the Danish plant variety protection law for certain species, notably fruit trees.

20. Exploitation of derived varieties (paragraph (5)).- The present text of the Convention sets out the principle that the exploitation of a variety bred from a protected variety is not subject to the breeder's right in the protected variety. This principle has been criticized for many years since it applies equally to the case where the daughter variety is very different from the mother variety and to the case where the difference between them is minimal, although it lies in an "important characteristic" and is "clear" within the meaning of Article 6(1)(a). One case which has been examined on several occasions is that covered by the expression "easy mutations": the two varieties have the same genotype except for the mutant characteristic. Other cases can arise by backcrossing, by gene transfer, or again, in the case of a hybrid, by the use of a similar line or a combination of different lines which produces a similar hybrid. This last example shows that there is not necessarily a family connection between the varieties concerned.

21. On the other hand, the genetic engineers are preoccupied by the fact that a gene or a character which represents an innovation that they have introduced into a variety of a given species can be freely transferred by virtue of the present text of the Convention into other varieties.

22. These are the reasons why it has become necessary to reconsider the principle of free exploitation set out in Article 5(3) of the Convention (it being understood that one is not bringing into question the principle of the free utilization of varieties for breeding purposes, which can be likened to the exemption in favor of research in patent law). The objective will be to introduce a form of dependence. Two principle questions arise in this connection:

(i) What form should the dependence take? The draft provision in paragraph (5) proposes that this be the payment of equitable remuneration. One may expect that, at least once the system has been established, the remuneration will be established in the great majority of cases by agreements between the parties.

(ii) In what circumstances will dependence exist? Paragraphs 20 and 21 above give examples of cases in which the arguments for dependence are clearly set out. They show that a precise definition of all circumstances is difficult. Conversely, such a definition will not fail to raise the problem of borderline cases and would perhaps not facilitate a response to the future evolution of events. The provision proposed in paragraph (5) is for this reason of a general nature, the circumstances of individual cases and, for each of them, the amount of the remuneration being left to the judgment of the parties, to the arbitration of professional organizations and to the decision of judges.

23. In this respect, the "travaux préparatoires" for the revision of the Convention will play an extremely important role if the authors of the revision are to make clear their intentions. The proposed paragraph (5) includes two alternatives which were submitted to the twenty-second session of the Committee, in order to open a discussion on the subject. The major options sketched out by the twenty-second session of the Committee are as follows:

(i) The dependence should only arise in the case where the second variety is derived from a single mother variety as in the case of a mutation or the transfer of a gene by genetic engineering. In this option, the transfer of a gene arising from a work of backcrossing should be recognized and rewarded by an independent right.

(ii) This option would cause fundamentally identical situations to be treated differently on the basis of the differing routes used to arrive at the end-product. It should be noted in this respect that the work of transferring a gene by genetic engineering could turn out to be as difficult as the work of backcrossing and thus merit the same reward. It would thus seem more appropriate to pay more attention to the definition of the level of differences or of resemblance between the varieties concerned that is required in order that dependence should exist. Two cases seem to justify dependence:

(a) the case where the derived variety contains essentially the same genotype as the mother variety (or the variety taken as a model);

(b) the case where the derived variety has a different genotype but acquires from the mother variety a gene or a character which constitutes a real innovation (irrespective of the procedure, "classical breeding" or genetic engineering, by which this gene or this character has been introduced into the mother variety and irrespective of whether the gene or the character or yet again the procedure itself is patentable or not). An example of this case could be the transfer of male sterility from the first male sterile variety into a line.

Whatever solution is retained, no varieties bred according to a classical scheme of crossing followed by selection within the progeny would become the subject of dependence.

24. It must be recognized, however, that many arrangements are possible. Substantial bodies of opinion in breeding circles, whilst welcoming the concept of dependence, do not agree that the breeder of the dependent variety should invariably be entitled to commercialize the dependent variety. It might be inappropriate and unfair for a trivial change in a variety to entitle a party to compete with the first breeder; equitable remuneration may not always be an adequate recompense. It has been proposed for example that dependence in the case mentioned in paragraph 23(i) should take the form of a right, in favor of the breeder of the initial variety, to participate in the commercial exploitation of the derived variety (whilst in the case mentioned in paragraph 23(ii) there would only be a right to remuneration). The argument invoked is that the breeder of the initial variety has taken steps with a view to the exploitation of his variety from which the breeder of the derived variety profits largely (while in the case of genes and characters it is imperative not to stop genetic progress).

25. The decision of the Commission of the European Communities of December 13, 1985, relating to a Proceeding under Article 85 of the EEC Treaty (IV/30.017-- Breeders' Rights--Roses) could be interpreted as an invitation addressed to breeders and their licensees who have bred a variety derived by mutation to explore co-breeding as a solution, that is, the division of the commercial exploitation of the derived variety. Reference is made in this respect to documents CAJ/XVII/6 and CAJ/XVII/10, paragraphs 57 to 60.

26. The proposed paragraph (5) would make a system of dependence obligatory in all the member States.

27. Interactions with other rights of industrial property (paragraph (6)).- The member States commit themselves to guarantee, to the extent that they are able to, the peaceful enjoyment of the rights conferred by the Convention, whether these rights be exclusive (proprietary) or on the contrary granted to the community at large. To the extent that it is difficult for the Convention to cut across the process of granting competing certificates of protection, particularly industrial patents for products or processes which are upstream or downstream from the variety, it is proposed to only regulate interactions to the extent that they are in conflict with rights resulting from plant variety protection.

28. It should be recalled that the principle of the proposal has already been implemented in the past in certain member States (notably in the seed law of 1953 of the Federal Republic of Germany) as well as for the purpose of defining the interrelationships between denominations and trademark homonyms in the Convention of 1961.

Article 6

Conditions Required for the Granting of the Right

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

(a) The variety must be clearly distinguishable

Alternative 1: ... [delete "by one or more important characteristics"]

Alternative 2: by the expression of one or more important characteristics, or by a combination of characteristics attesting to the originality of the variety,

Alternative 3: by the expression of at least one important characteristic

from

Alternative A: any other variety whose existence is a matter of common knowledge at the time of filing of the application for the grant of a right. The existence of a variety shall be specifically a matter of common knowledge

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

(ii) when protection or entry in an official register of varieties has been applied for, provided that the application is granted, or, if it is not granted, that the variety has satisfied the conditions of the present subparagraph and of subparagraphs (b) and (c) below;

(iii) when it has been openly exploited.

Alternative B: any other existing variety. A variety shall not be deemed to be existing, however, if its existence has not been sufficiently disclosed.

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

(c) There must be no indication from the examination of the variety made pursuant to Article 7 that the variety is unstable in the characteristics considered for the purposes of the application of subparagraph (a), that is to say, that it does not remain true to its description after repeated reproduction or propagation or, in the case of a particular cycle of reproduction or multiplication, at the end of each cycle.

(d) The variety must be novel at the time of filing of the application for the grant of a right. A variety is not novel

(i) if it has [already] been exploited commercially in the territory of that State [or, if the legislation of that State so provides,] for longer than one year, or

(ii) if it has been exploited commercially in the territory of any other State for longer than six years in the case of vines and trees or for longer than four years in the case of any other species.

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

(e) [Deleted]

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

Description of Proposals and Comments

1. General.-- It is proposed that the word "right" replace the word "protection" in the title of the Article, the introductory section of paragraph (1), the proposed new paragraph (1)(d) (relating to novelty) and in paragraph (2).
2. It is also proposed to set out the conditions in the following order: distinctness, homogeneity, stability and novelty. The conditions of a scientific and technical nature will thus be grouped together and followed by the condition of a purely legal nature.
3. Origin of the variety (paragraph (1)(a)).-- It is proposed to delete the introductory phrase of paragraph (1)(a) which refers to the origin of the initial variation which gave rise to the variety, account being taken of the content of the proposed new Article 2(iii).
4. Distinctness (paragraph (1)(a)).-- The expression "important characteristic" raises the question of knowing whether the characteristics must be important from the functional point of view, i.e., from the point of view of the utilization of the variety. Experience shows that the interpretation of the word "important" in the sense of "functional" appears the more natural to the non-specialist. There is thus a constant need to explain and justify the notion of important characteristics in the context of the plant variety protection system.
5. Alternative 1 remedies the situation by deleting the expression in question; in the application of the relevant provision, characteristics which are not considered to give rise to varietal differences will be refused on the basis that they do not meet requirements of the expression "clearly distinguishable."

6. The present text of the Convention leads to the distinguishing in practice of two types of characteristics: those which are taken into consideration in the application of Article 6(1)(a) ("important characteristics") and those which are not. Some people are attracted by the idea that there should be a more refined classification of characteristics. Alternative 2 proposes the anchoring of this idea in the Convention.
7. This wording would have the advantage of giving to the word "important" its natural meaning in the context of plant breeding and agriculture, and of permitting the taking into account of botanically interesting characteristics, the requirement for differences based upon a combination of such characteristics making it difficult to plagiarize a variety. This wording should also permit more global approaches to the notion of variety calling upon very elaborate statistical techniques.
8. On the other hand, there are fears that such techniques might be introduced and that combinations of differences in "important characteristics" might be used which are not "clear," in order to establish distinctness in the sense of Article 6(1)(a). It is proposed in alternative 3 to prevent such a practice by requiring a clear distinction in "at least one important characteristic."
9. Common knowledge (paragraph (1)(a)).- For alternative A, the Office of the Union proposes that one should revert to the present text of the end of the first sentence to the extent that there is no intention to modify the present practice. Concerning the second sentence, it has been asked whether "a precise description in a publication" should be sufficient to make a variety a matter of common knowledge. Other questions could be raised in this connection. But it should be stressed that the present text has been drafted with care in such a way that a variety fulfilling one of the specified conditions will not necessarily be considered a matter of common knowledge. Alternative A is worded in an obligatory form but does not cover the example mentioned previously. In addition, it does cover the other examples more precisely.
10. Alternative B is based upon a different approach: the basis for comparison will be the collection of "existing varieties," on condition that their existence has been made public. In practice, the plant variety protection offices will continue to base their decisions on their reference collections and their records, Article 10 of the Convention being called in aid if one has failed to take account of the existence of a variety in relation to a particular decision.
11. Homogeneity (paragraph (1)(b)).- It is proposed that a definition of homogeneity be added to the Convention which, however, will be based solely upon those characteristics of the species in question which are considered for the purposes of distinctness.
12. Stability (paragraph (1)(c)).- The combination of Articles 6 and 7 could be interpreted to mean that the plant variety protection offices are bound, at the present time, to satisfy themselves that a variety is stable. This is not possible in certain cases within the time granted for the examination. It is therefore proposed to tie the condition to doubts raised by the trials. It is also proposed to tie the condition of stability to the characteristics considered for the purposes of distinctness, i.e., to consider as synonyms the expressions "important characteristics" and "essential characteristics" used

at the present time in the Convention. Finally, it is proposed to delete the reference to the breeder in relation to a particular cycle of reproduction or multiplication.

13. Novelty (paragraph (1)(d)).— The proposals are as follows:

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

(ii) to define novelty negatively, which has the advantage of simplifying the text;

(iii) to replace the words "offered for sale or commercialized" by "exploited commercially." The reason for this is that certain varieties can be exploited on a large scale without there having been an offer for sale or commercialization in the strict sense. One example which has already been discussed and which has already resulted in a judicial decision in France is that of the inbred lines used in the production of hybrid seed;

(iv) to delete the words "with the agreement of the breeder" in order to avoid sterile discussions, it being understood that any exploitation in violation of the rights of the breeder would not be prejudicial to novelty (this point is dealt with in the third sentence of the proposed subparagraph);

(v) to make the "period of grace" of one year obligatory, which will be achieved by the deletion of the words between brackets;

(vi) to delete the existing second sentence ("Trials of the variety not involving offering for sale or marketing shall not affect the right to protection") as superfluous and "also" in the third sentence;

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

(viii) to introduce in the same sentence a reference to the abusive acts of third parties.

14. It should be recalled that the wish has been expressed to add additional species to those which benefit from the period of prior commercialization abroad of six years. Conversely, it has been stated that the requirement of novelty would be deprived of all substance by the prolongation of the periods provided in Articles 6 and 12 (priority).

15. Denomination (paragraph (1)(e)).— The proposed deletion is a consequence of either the proposed deletion of Article 13 or the proposal that the denomination should no longer be made a condition of protection.

Article 7

Examination of the Application; Provisional Protection

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

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

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

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

Description of Proposals and Comments

1. Title.- It is proposed to replace "official examination of varieties" by "examination of the application," an expression which better describes the relevant procedure.
2. Paragraph (1).- The proposals are as follows:
 - (i) to replace the word "protection" by the word "right";
 - (ii) to delete the reference to "the variety";
 - (iii) to delete the second sentence since the principle which it expresses is self-evident and is already contained implicitly, in part, in Article 6;
 - (iv) to add a new sentence detailing the different possibilities which exist regarding the examination for the authorities competent for the grant of the right.

3. Paragraph (3).-- It is proposed to underline the importance of close cooperation between the member States by repositioning the provision contained at the present time in Article 30(2).

4. It is suggested that consideration should be given to whether it would be appropriate to add an obligation--subject to justified exceptions (based principally upon special economic or ecological conditions)--to base the decision on the protection of a given variety on the results of growing trials already carried out or under way in another member State. The usefulness and advisability of such a provision depend in part on the solution adopted for Article 4.

5. Paragraph (4) (former paragraph (3)).-- It is proposed to make provisional protection mandatory by replacing "any member State of the Union may" by "each member State of the Union shall." The relevant period has been defined in a more flexible way to reflect the current practice in certain member States. This practice is common to several branches of intellectual property in any one country so that harmonization within UPOV to meet the needs of plant variety protection alone has not seemed possible. It is also proposed to require a minimum of provisional protection consisting of the possibility of demanding equitable remuneration the timing for which is not specified in the Convention itself in view of the current practices of the member States.

Article 8

Duration of the Right

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

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

Description of Proposals and Comments

1. The proposals are as follows:

(i) to replace the references to protection by a reference to the right;

(ii) to divide the Article into two paragraphs;

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

(iv) to increase the minimum periods of protection (presently 15 and 18 years] and to revise the list of categories of plants to which the longest period of protection is applied (the addition has been proposed of cereals and potatoes).

2. It was suggested at the twenty-second session of the Committee to suspend discussion on the proposals described at point (iv) above until the Diplomatic Conference.

Article 9

Restrictions on the Exercise of the Right

(1) The free exercise of the right may not be restricted otherwise than for reasons of public interest.

(2) When any such restriction is made, the member State of the Union concerned shall take all measures necessary to ensure that the breeder receives equitable remuneration for the exploitation of the variety by third parties.

Description of Proposals

1. Title and paragraph (1).— It is proposed to simplify the title and paragraph (1) by using a simple reference to the right.
2. Paragraph (2).— It is proposed to replace the reference to "the widespread distribution of the variety" by a reference to the exploitation of the variety by third parties for the following reasons:
 - (i) a compulsory licence is not always an effective method of bringing about the widespread distribution of a variety against the wishes of the breeder since it is scarcely possible to force him to supply the necessary plant material for the implementation of the licence;
 - (ii) in certain cases varieties can be the subject of adequate exploitation without there being widespread distribution in the strict sense (the case of inbred lines) or involvement of a large number of producers (the case with certain ornamental plants);
 - (iii) the proposed amendment of Article 5 makes it necessary to modify Article 9.

Article 10

Nullity and Forfeiture of the Right

(1) The right shall be declared null and void, in accordance with the provisions of the national law of each member State of the Union, if it is established that the conditions laid down in Article 6(1)(a) and (d) were not effectively complied with at the time when the right was granted.

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

(3) The right may become forfeit if:

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

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

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

Description of Proposals and Comments

1. Drafting.— It is proposed to harmonize and simplify the references to the right of the breeder.

2. Paragraph (2).— It is proposed to affirm more positively the obligation put on the breeder to maintain the variety. In practice, the failure to maintain the variety would continue to be established on the basis of the inability of the breeder to provide "reproductive or propagating material capable of producing the variety with its characteristics as defined when the protection was granted."

3. Paragraph (3).— In connection with this paragraph, reference was made at the twenty-second session of the Committee to a possible intrusion into the industrial secrets of the breeder. Protecting him in this respect would require the elimination of the reference to documents, information and measures or its limitation (the same problem arises moreover in relation to the preliminary examination dealt with in Article 7).

Article 11

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

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

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

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

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

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

Description of Proposals

1. Drafting.— It is proposed to replace the references to the title of protection and the protection by a reference to the right.

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

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

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

Article 12

Right of Priority

(1) Any breeder who has duly filed an application for the grant of a right in one of the member States of the Union shall, for the purpose of filing in the other member States of the Union, enjoy a right of priority for a period of [Alternative 1: twenty-four months] [Alternative 2: eighteen months]. This period shall be computed from the date of filing of the first application. The day of filing shall not be included in such period.

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

(3) The breeder shall be allowed a period of [Alternative 1: four years] [Alternative 2: two years] after the expiration of the period of priority in which to furnish, to the member State of the Union with which he has filed an application for the grant of a right in accordance with the terms of paragraph (2), the additional documents and material required by the laws and regulations of that State. Nevertheless, that State may require additional documents and material to be furnished within an appropriate period in the case where the application whose priority is claimed is rejected or withdrawn.

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

Description of Proposals and Comments

1. Drafting.— It is proposed to harmonize all the references to the protection by means of a reference to a right.

2. Paragraph (1).— It is proposed to extend the priority period provided in paragraph (1), which is at present twelve months, either to twenty-four months or to eighteen months. The fact that the vegetative cycles are often of one year's duration militates in favor of a period of twenty-four months, whereas the possible aggregation of the periods of novelty (Article 6(1)(d)) and priority militates in favor of a shorter period.

3. Paragraph (3).— The last preceding argument can also militate in favor of a reduction of the supplementary period of four years provided to the

breeder to fulfil his obligations with respect to the examination of the variety. One suggestion is to reduce it to two years.

4. Taking into account the fact that in certain forms of examination it is not necessary to provide plant material or a large quantity of material, one could also examine the possibility of adding to the second sentence the case where the decision on the application can be taken without putting the applicant in a difficult situation.

Article 13

Variety Denomination

First Proposal: Delete the Article.

Second Proposal:

Article 13

Variety Denomination

- (1) The variety shall be designated by a denomination.
- (2) The denomination shall be proposed by the breeder to the authority referred to in Article 30(1)(b) which shall register it at the same time as the right is granted, unless it is found unsuitable. In the latter case, the authority shall require that the breeder propose another denomination within a prescribed period.
- (3) If a denomination has already been proposed or registered for the purpose of protection or entry in an official register of varieties, or openly used in the exploitation of the variety, this denomination shall be proposed by the breeder and, unless it is found unsuitable in the member State of the Union concerned, it shall be registered by the authority.
- (4) A designation shall not be suitable as a denomination:
 - (a) if prior rights of a third party oppose its use as a denomination;
 - (b) if, for users in general, there are difficulties in recognizing and reproducing it as a denomination;
 - (c) if it is identical:
 - (i) to the designation under which, in any one of the member States of the Union, another variety of the same species or of a closely related species has been protected or entered in an official register of varieties, under which protection or entry in an official register of varieties has been applied for, or under which it has been openly exploited, except if this other variety no longer exists and its denomination has not acquired great importance;
 - (ii) to a designation which may be generally used in commerce or which must remain in the public domain in accordance with other legal provisions;
 - (d) if it is contrary to morality or public order in the member State concerned;
 - (e) if it is liable to mislead or to cause confusion concerning the characteristics, value or identity of the variety or the identity of the breeder.

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

(6) [Alternative 1] Any person who, in a member State of the Union, offers for sale or markets reproductive or vegetative propagating material of a variety protected in that State shall be obliged to identify the variety by means of the denomination registered in accordance with the provisions of this Article, even after the expiration of the right granted to the breeder. The denomination so registered shall also be used for any other product of the variety when the identification of the variety is either obligatory by virtue of other legal provisions or usual in relation to that product.

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

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

Description of Proposals and Comments

First Proposal

1. This proposal is based on the argument that it is no part of the Convention to legislate on the subject of denominations; in any event, its rules would apply only to protected varieties.

Second Proposal

2. General.— This proposal is based on the contrary argument, namely, that the variety must be able to be easily identified, even at the level of the functions of the plant variety protection authorities. Moreover, Article 13 provides both rights and obligations for the breeder on the one hand, and for the users on the other hand. Its provisions can be very useful to the breeder in the defence of his right.

3. This proposal is mainly based on the proposal of the Delegation of the Federal Republic of Germany submitted to the twenty-second session of the Committee.

4. Paragraph (1).— This paragraph is identical to the start of the present paragraph (1). The reference to the generic character of the denomination has been deleted in order to facilitate the obtaining of protection by trademark

in countries where plant variety protection is not available. In the countries where the variety is protected, the generic character of the denomination remains as a result of the obligation to use the denomination in commerce (proposed paragraph (6)).

5. Paragraph (2).-- This paragraph sets out in a simpler form the rules of procedure appearing in paragraph (3) of the present text.
6. Paragraph (3).-- This paragraph sets out the principle of having a consistent denomination in the member States which appears in paragraph (5) of the present text. This principle would be even better guaranteed than it is in the present text as there is also reference to other circumstances establishing the denomination, and the text is no longer limited only to (other) member States.
7. Paragraph (4).-- This paragraph sets out the principal reasons for unsuitability of a designation as a denomination. Subparagraph (c)(i) has been developed from the proposal of the Delegation of the Federal Republic of Germany. Moreover, the reason appearing in the present paragraph (2) has been taken up in subparagraph (e).
8. Paragraph (5).-- This paragraph is identical to paragraph (6) of the present text, except for a simplification of the wording in the second sentence concerning the competent authority.
9. Paragraph (6).-- This paragraph sets out the obligation to use the variety denomination. In Alternative 1, it was considered desirable to maintain the economy of the wording of paragraph (7) of the present text. Nevertheless, the obligation does not relate to the use of a denomination but to the identification of the variety concerned by means of the denomination. It is extended to trade in products other than seeds and plants when identification of the variety is either a legal requirement or is usual. This extension would be particularly important for the breeder since he must also be able to enforce his right at the level of the products of his variety.
10. Alternative 2 is more general in its formulation. In particular, it would give member States complete freedom in legislating on the subject of the use of variety denominations.
11. Paragraph (7).-- This paragraph sets out a condition which comes from paragraphs (1) and (4) of the present text.

Article 14

Protection Independent of Measures Regulating
Production, Certification and Marketing

Proposal: Delete the Article as superfluous.

[Annexes follow]

ANNEX I

OBSERVATIONS AND PROPOSALS
FROM THE DELEGATION OF THE NETHERLANDS

Annex to the letter, dated May 9, 1988,
from Miss Y.E.D.M. Gerner to the Office of the Union

Proposals for the revision of the convention

1. Proposal relating to Article 1

The second part of article 2, first paragraph is deleted. We suggest to add that part to article 1. As mentioned in the comments that if there is a double protection we must exclude the possibility that two systems of protection apply to the same subject matter.

2. Proposal relating to article 5

The protection described in the two alternatives gives a protection, like the patentright, to the endproduct. As we explained such protection goes in our opinion too far. Though we want to inforce the plantbreeders right for the material which comes from a not UPOV-country.

3. Proposal relating to article 13

Add the alternative of keeping the whole article.

[Annex II follows]

ANNEX II

OBSERVATIONS AND PROPOSALS
FROM THE DELEGATION OF THE UNITED KINGDOM

Annex to the letter, dated May 3, 1988,
from Mr. John Harvey to the Office of the Union

Articles 1 and 2

We feel it is important to retain the principle in the present Article 2(1) that 'double protection' should not be permitted. By 'double protection' we mean the application of a choice between plant breeders' rights or patents (or any two alternative systems) to varieties within the same genus or species. In principle we would like to establish that plant breeders' rights should apply only to whole plant varieties, ie not to elements in a plant variety such as a gene or DNA sequence nor to assemblages greater than a variety. It may help, therefore, if the term 'variety' is defined, as proposed in new Article 2. We would not of course object to the existence of an alternative system of protection in cases wh
1) it has not been found possible to produce a plant breeders' rights scheme for a particular species because of technical difficulties or 2) Member States already have an alternative system in place.

We do agree with the principle that a protected plant variety may contain genetic or other material covered by a patent, and that the patent should be transferable from one variety to another. The UK will be producing a policy paper detailing its proposals in this respect and will ask the Secretariat to circulate this to Member States.

We agree with the change of Article 1(1) to a mandatory statement.

Article 2(New)

We agree the need to define 'variety' and that it would be helpful to define 'breeder' so as to include the discoverer of a variety. However, the definition of 'species' may be unnecessary unless it is to state that it includes 'genus' for our purposes. As it is undesirable that there should be too many definitions of the same thing we have requested that the definition of 'variety' in the International Code of Nomenclature for Cultivated Plants should be examined to determine its suitability.

Article 3

No comments.

Article 4

We agree with the principle that the Convention should apply to all botanic genera and species, and with the proposed exception for economic or agronomic reasons. We believe that the main criterion should be commercial demand, ie demand from a breeder in any Member State of the Union for a scheme for a particular species. This demand may occur before the breeder has a finished variety to enter, because he is undertaking breeding work. The economic or agronomic reasons for not introducing a scheme should be confined to the facts that a) there was no commercial demand or b) that there were difficulties in drawing up testing protocols. The fact that a species does not necessarily grow well in a particular Member State should not necessarily be a reason for refusing to grant rights in it, as a breeder in another Member State may still wish to protect his varieties in that country.

Article 5(1 - 3)

We understand the reasons for the proposed extension of the scope of rights to cover the reproduction of a variety. The UK is concerned that the problem of the abuse of 'farmers' privilege' should be tackled in the Convention and realises that this may be possible only by removing the basic right to reproduce a protected variety. The amendments to Article 5 proposed by Herr Kunhardt in Paper CAJ/XXII/6 would deal with the problem. However, we shall be exploring the possibility of a refinement which would amend the wording of the proposed paragraph 3(a) of the German proposal. This would have the effect of clarifying that acts involving third parties (for example the use of mobile seed processors or seed processing co-operatives) would be regarded as an infringement of the breeder's rights whilst acts performed by the farmer alone, for example with his own processing equipment, would not be an infringement. Special provision may also be necessary to deal with vegetatively produced material. Whatever form of wording is agreed, we are clear in the view that the problem must be addressed in the Convention to ensure that Member States deal with the problem in broadly the same way.

Article 5(4)

We do not necessarily accept that there is a case for a dependency provision requiring the payment of compensation in cases where the new variety has been bred by conventional means from one or more existing varieties, and we would have difficulty in defining what was intended by the words 'essentially derived' or 'essentially based'. Again, we feel that the principle of the 'research exemption', and how far this should extend, must be addressed in the revised Convention and not left to individual Member States to interpret.

The interface with the patent system will need to be considered in the light of discussions in the WIPO Committee of Experts. The UK Paper referred to under Articles 1 and 2 contains proposals for a scheme for the legal protection of innovation in plants developed by microbiological methods, proposing a suitable interface between the two systems.

Article 6

We believe that detailed consideration of this Article will be more profitable after the series of UPOV workshops on minimum distances. We feel that it is important to achieve a degree of unanimity on what should be regarded as 'important characteristics' and would wish to ensure that account was taken of the multivariant approach to the determination of distinctness. As an initial view we would prefer a form of words similar to the following:

'Whatever may be the origin, artificial or natural, of the initial variation from which it has resulted, the variety must be clearly distinguishable by one or more important characteristics, or by a combination of characteristics attesting to the originality of the variety from any other existing variety. A variety shall not be deemed to exist, however, if its existence has not been sufficiently disclosed.'

Article 7

No comments.

Article 8

Although we are attracted by the idea of harmonising periods of protection, we do not see this as a fundamental principle. Neither do we see any need for periods of protection to end at the same time in all Member States, which would reduce periods of protection to the minimum offered by any one Member State. It is important that we weigh carefully the interests of breeders with the public interest in encouraging the breeding of new varieties when considering whether periods of protection should be increased, and we foresee national and international political opposition to further extensions unless a clear economic case has been established.

Article 9

We are content with the principles involved in the proposed amendments but would wish to consider further the precise wording of the Article.

Article 10

No comment.

Article 11

We strongly support the proposed amendments to Article 11 as a step towards greater harmonisation.

Article 12

We have reservations about extending the period of priority to 24 months, although we may be able to accept 18 months. We also have reservations about the present 4 year period specified in Article 12(3). Both provisions cause potential problems for the Authorities, particularly in the proper maintenance of reference collections and the possibility of finding that rights granted may have to be annulled or forfeited. In the case of Article 12(3) we should prefer a reduction of the period to no more than 2 years.

Article 13

We are opposed to the deletion of this Article, and although we would accept a simplification to reflect the revised naming guidelines we should wish to include the basic principle that a denomination should not be misleading or confusing to the purchaser. It is important when Member States check each other's naming proposals that there is a degree of uniformity in the consideration of proposals.

[Annex III follows]

OBSERVATIONS AND PROPOSALS FROM THE DELEGATION OF SWITZERLAND

Letter, dated April 29, 1988,
from Mrs. M. Jenni to the Office of the Union

Coming back to the session of the Administrative and Legal Committee held last week, we should like to request you to note the following in the report:

In the course of the discussion on the proposals for amendment of Article 5 of the Convention, some delegations expressed reservations to paragraph (5) of the proposal by the Delegation of the Federal Republic of Germany ("The acts concerning a variety ... may not be prohibited on the basis of another industrial property right").

In view of the importance of this issue and given that the discussion thereon was not exhaustive, it would be appropriate not to consider this proposal as finally rejected by the Committee, and to put it on the agenda of the next session to be held in October.

[End of document]