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REVISION OF THE CONVENTION

Document prepared by the Office of the Union

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

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)).

3. At its twenty-third session, the Committee based its discussions on a revised version of the document of the Office of the Union (document CAJ/XXIII/2) and on observations and proposals from the delegations of the Federal Republic of Germany (document CAJ/XXIII/4), Denmark (document CAJ/XXIII/5) and Sweden (document CAJ/XXIII/6). It further took note of the statement of ASSINSEL on its position regarding the protection of biotechnological inventions (document CAJ/XXIII/3).

B. Objectives of the Revision of the Convention

4. 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

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

6. This document does not address two 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.*

* 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. In any event, the proposed strengthening of the rights provided by the Convention should make the question of the recourse to industrial patents for the protection of plant varieties as such largely academic.

4. Maintenance of the express prohibition of "double protection".— Several 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, and this is the main reason for the proposed deletion of the Article in question: 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. In other words, according to a literal interpretation of Article 2(1), that Article does not address the relationship between the breeder's right and the industrial patent. However, it is highly improbable that a State would introduce a double protection system in conformity with the Convention; insofar as it did so Article 2(1)—interpreted literally—would be deprived of any scope of application. In fact, it is necessary to draw upon a historical interpretation to find its meaning: the purpose of the first sentence was to enable Italy to provide for the breeder's right within the meaning of the Convention under its industrial patent law, which was to be specially adapted for this purpose (the same route was subsequently followed by Hungary): the purpose of the second sentence was to enable certain States (Belgium, France, the Federal Republic of Germany and Spain) where the applicability of the industrial patent to plant varieties had been admitted by doctrine and case law—not without major controversies—to transitorily maintain it in respect of species not yet covered by the special protection system.

5. In order to meet the wish of the delegations which seek to clearly demarcate the field of application proper to the special protection system and prevent an undesired competition from other protection systems, 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 for plant varieties."

6. In this proposal 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.

7. The provision proposed above is designed to deal with both the direct protection of varieties (whether claimed as such or through claims pertaining to e.g. plants or plant parts) and the indirect protection that may be conferred by the extension of a process patent to the product directly obtained from the process. It should be mentioned, however, that under the present status of patent law, the extension of the process patent as contemplated by many laws relates only to plant material (the product) directly obtained; the question whether it may also relate to more complex plant material (for example whole plants regenerated from the transformed cells which would constitute the "direct product") and further generations is still being discussed. Furthermore, the extension of the process patent cannot relate to material obtained with a different process, in this particular case a different breeding process. To that extent it may be said that in theory the process patent cannot cover by extension a variety as such. Depending on the development of patent law in this respect, there may be in future difficult problems in the exercise of the indirect rights and, consequently, in the coexistence with the rights conferred by the special protection system. A collision norm is proposed in Article 5(5) below to address these problems.

8. 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 in that sentence. Belgium, France, the Federal Republic of Germany and Spain have made use of the provision.

9. 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, in appropriate cases, of basing the preliminary 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 and that all breeders should be given the benefits of sui generis protection. The provision proposed in paragraph 5 above would put an end to the special regime applying in the above-mentioned States.

10. 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 the substance of 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.

11. 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 as wide and as effective protection 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 plant, 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 single plants since a variety may be represented by a single plant (it is for instance sufficient that it may be propagated vegetatively); a reference to plant material since a variety may also be represented by material that is not a whole plant (the material must at least contain the genetic information that is characteristic of the variety; it must therefore be constituted by at least whole cells or protoplasts); 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.

5. 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.

6. 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.

7. 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).

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Article 3National 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 4Applicability of the Convention to Botanical Species

(1) This Convention shall be applied to all botanical species.

(2) [Alternative 1] 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.

[Alternative 2] Where, in a member State of the Union, the application of this Convention to a particular species is contrary to public interest or causes exceptional economic difficulties, that State may exclude the application of this Convention to that species. The member State of the Union concerned shall notify the exclusion to the Secretary-General, stating the reasons therefor. The Council shall state its position on this exclusion.

Description of proposals.- 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. General.- The above proposals are based on the principle that, unless there are valid reasons for an exception, under the terms of paragraph 2), each member State must apply its legislation to the whole plant kingdom as soon as it has accepted the terms of the new Act of the Convention. In that case there will no longer be a "list of species."

2. The following remarks were made in this context:

(i) Certain States may have difficulty in accepting the principle of a mandatory application of the provisions of the Convention to the whole plant kingdom; however, it should be noted in this respect that the cooperation in examination and the possibility, in appropriate cases, of basing the preliminary examination on the trial data and the description submitted by the breeder, but in accordance with guidelines established by the competent authority, would eliminate most of the constraints that may have limited so far the practical scope of application of the Convention;

(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 and inspired from the present text of Article 4 (incidentally, a time limit could also be incorporated in the above proposals).

There would have to be a consequential change in Article 35 ("Communications Concerning the Genera and Species Protected...").

Alternative 1.- Alternative 1 is the result of the discussions at the twenty-second session of the Committee. Like paragraphs 4) and 5) of the present text of the Convention, it provides two situations permitting a limitation to be made to the principle set out in paragraph 1): special economic conditions and special ecological conditions.

In addition, it limits the faculty of making an exception by setting out the obligation to protect the economically important, or possibly important, species for which the examination may be made in one way or another.

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).

Alternative 2.- Alternative 2 is the result of the discussions at the twenty-third session of the Committee. It shows a structural difference from alternative 1 since it permits member States to exclude certain species from protection. It has been stated, however, that that faculty could be exercised by establishing either the list of excluded species or the list of protected ones.

The situations in which an exclusion may be decided have been changed: on the one hand it was held that public interest should prevail; on the other the ecological conditions should no longer come into play, in particular in view of the extension of the scope of the breeder's rights (which may justify the breeder's interest in having his variety protected in a State in which it will not be grown) and of the new prospects for the examination.

The reasons for the exclusions would have to be given. In addition, a notification would have to be made to UPOV and the Council would have to state its position in this respect a posteriori. That mechanism should force member States to use discretion when using the faculty provided by Article 4(2).

At the twenty-third session of the Committee, it was suggested that the notification should be effected before deciding on the exclusion, to enable the Council to state its position a priori. That suggestion was not followed since it appears difficult for the Council to be the judge of public interest in a State. Moreover, the definition of the exclusions will be a one-time operation in most cases that will coincide with the putting into operation of the plant variety protection law; to that extent a preliminary advice of the Council may constitute a practical obstacle to the accession of further States to the Union.

Article 5Effects of the Right Granted to the Breeder

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

(i) from reproducing or propagating the variety;

(ii) from offering for sale, putting on the market or using, or importing or stocking for any of the aforementioned purposes, material of the variety.

(2) The right shall not extend to:

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

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

(iii) acts done for experimental purposes;

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

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

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

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

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

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

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

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

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

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.

* The relationship between this provision and paragraph (3) may have to be considered as well, depending on the alternative retained.

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), (2) and (4) in the draft. Paragraph (3) deals with rights relating to varieties developed by using the protected variety as the departure point. Finally, paragraph (5) deals with the incidence of other industrial property rights.

5. Type of right to be granted (paragraph 4(1), introduction).- The proposed text is based upon a patent-type approach and provides for a right to prevent other persons from performing certain acts (right of prohibition). It has been proposed in earlier documents to grant to the breeder a true exclusive right, tempered by the possibility of granting compulsory licenses (article 9). That copyright-type approach was based on the fact that varieties are exploited by means of reproduction (or propagation), like many literary and artistic works. Moreover, ornamental plants have a social role that is similar to that of literary and artistic works. And the ways in which the rights in varieties and such works are exercised are very similar in some countries. The type of right to be granted deserves therefore, in the opinion of the Office of the Union, further consideration.

6. Right of reproduction (paragraph (1)(i)).- The first right granted to the breeder concerns the reproduction or propagation of the variety, which can take several forms, in particular: 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 or propagation would be covered by the right envisaged in paragraph (1)(i). The right is limited in paragraph (2)(ii) to (iv) and can be further limited by a member State pursuant to paragraph (4). It is not subject to the principle of exhaustion.

7. Exploitation of the variety in a form other than reproduction or propagation (paragraph (1)(ii)). It is an essential feature of the exploitation of varieties that plant material (typically reproductive or vegetative propagating material and the produce of the harvest) is the subject of commercial operations. Paragraph (1)(ii) envisages a right over such operations subject to the principle of the exhaustion of rights set out in paragraph (2)(i) and to the limitations resulting from paragraphs (2)(ii) to (iv) 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 in the field of 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 or propagation which could only be established at the level of the produce. On the other hand, this would 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. That possibility is especially important in the case of varieties which are exclusively or mainly traded in that form. At the twenty-third session of the Committee, however, discussions took place as to whether it was possible or desirable to limit the scope of the word "material", for instance at the level of the harvested material or the produce directly obtained therefrom.

10. Principle of the exhaustion of rights (paragraph (2)(i)).- As stated in paragraph 6 above, the principle of exhaustion is not applicable to the right of reproduction.

11. 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.

12. 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.

13. 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.

14. Limitation of the right (paragraphs (2)(ii) to (iv) and (4)).- Paragraph (2) expresses two limitations in subparagraphs (ii) and (iii) 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 (iv), 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).

15. It will be difficult to unify the scope of the right at the UPOV level-- i.e. worldwide; certain member States may be obliged by the diverse political, legal, economic or agro-ecological circumstances prevailing on their territories to limit the right. The object of paragraph (4) is to acknowledge this and to set out two conditions for the limitation of the scope of the right: that the limitations be in the public interest and that they do not cause any excessive prejudice to breeders.

16. 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 the so-called "farmer's privilege", 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.

17. By way of example, member States could agree to permit a farmer to produce his own seed of a strictly limited number of 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.

18. Exploitation of derived varieties (paragraph (3)).— 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) (if the difference does not meet those requirements, the plant material concerned would be within the perimeter of protection of the mother variety). 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 reselection, 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.

19. 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. They wish that their rights in the gene or character—which they seek under the patent system—also extend to the transfer and to the material into which the gene or character has been transferred. It is therefore desirable to strike a balance between the rights in genes and characters and the rights deriving from the UPOV Convention in genotypes (varieties) serving as hosts for such genes and characters.

20. 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). 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 (3) proposes three alternatives:

(a) Under alternative 1, the owner of the right in the mother variety would be granted a true right of prohibition relating to dependent derived varieties, whether protected or not. If a derived variety is protected and the right vested in another person, there will be two competing rights. Their owners will then have to seek agreement or arbitration on the conditions for exploitation of the derived variety. An unprotected derived variety could not be exploited without the consent of the owner of the right in the mother variety; should it be worth such exploitation, then its breeder would have to obtain protection or seek an agreement with the owner of the right in the mother variety. The latter, however, would enjoy automatically--without having to undergo a granting procedure--a full right in all derived varieties of his own. The Office of the Union considers that he should be obliged to file applications for protection.

(b) Under alternative 2, the owner of the right in the mother variety would only be entitled to equitable remuneration. This alternative has the drawback that it allows somebody who has introduced an irrelevant difference (albeit "clear" and relating to an "important" characteristic) into a variety, to obtain a relatively cheap share in the market of that variety.

(c) Alternative 3 is a combination of the preceding alternatives.

(ii) In what circumstances will dependence exist? Paragraphs 18 and 19 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 (3) is for this reason of a general nature, the circumstances of individual cases and, for each of them, the conditions of the consent or 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. One may expect that, at least once the system has been established, it will operate in the great majority of cases by agreement between the parties.

21. 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. At the present stage of the discussions, there seems to be general agreement on the following conditions:

(i) The difference between the two varieties involved must meet the requirement set out in Article 6(1)(a), that is, under the present text, be clear and relate to one or more important characteristics.

(ii) The derived variety must retain almost the totality of the genotype of the mother variety and be distinguishable from that variety by a very limited number of characteristics (typically by one). This results from the proposed text whether or not it contains the word "single".

(iii) The derived variety must have been obtained using a plant improvement method whose objective is the achievement of requirement (ii) above (mutation, gene transfer, full backcrossing scheme, selection of a variant within a variety, etc.); in other words, no varieties bred according to a classical or other scheme of crossing in which selection within the progeny is a major element would become the subject of dependence.

(iv) The mother variety must originate from true breeding work, that is, it must not itself be dependent; there should not be a "dependence pyramid". If variety C derives from variety B which derives from variety A, C would be dependent from A rather than B, since the very objective of dependence is to give to the breeder of an original genotype an additional source of remuneration; the collecting of that remuneration through a third party, in the example the breeder of variety B, does not seem very practicable.

22. Alternative 3 requires a judgment of the value of the derived variety in relation to the mother variety, or of the value of the added characteristic. The judgment should not cause insurmountable problems since it is very similar to the ones made in the operation of the systems of national lists of varieties admitted to trade. Moreover, alternatives 1 and 2 also require such a judgment for the definition of the conditions for exploitation or of the compensation payable.

23. 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.

24. The proposed paragraph (3) would make a system of dependence obligatory in all the member States.

25. 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.

26. 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 6Conditions 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 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.

[Alternative B] 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 C] 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) [Alternative 1] The variety must be new at the time of filing of the application for the grant of a right. The variety is not new

(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 the variety has become a matter of common knowledge otherwise than by commercial exploitation within the conditions defined above--or by [Alternative A: abusive] [Alternative B: unauthorized] acts of other persons--shall not constitute grounds for opposing the grant of the right.

[Alternative 2] The variety must be new at the time of filing of the application for the grant of a right. The variety is not new if it has already been exploited commercially with the agreement of the breeder

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

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

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

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

(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. A further conceivable order would be: novelty, distinctness, homogeneity and stability.

3b. 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).

4a. 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. On the other hand, there are fears that the present text of the Convention might be taken advantage of to use combinations of differences in "important characteristics" which are not "clear," in order to establish distinctness in the sense of Article 6(1)(a). It is proposed in alternative 2 to prevent such a practice by requiring a clear distinction in "at least one important characteristic."

7. Common knowledge (paragraph (1)(a)).- Concerning the second sentence of paragraph (1)(a), 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. In Alternative A, it is proposed to delete that sentence.

8. It should be stressed, however, that the present text has been drafted with care in such a way that a variety fulfilling one of the conditions specified by way of example will not necessarily be considered a matter of common knowledge. Alternative B is worded in an obligatory form but does not cover the example mentioned previously. In addition, it does cover the other examples more precisely.

9. Alternative C 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.

10. 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.

11. 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 of stability to doubts raised by the trials. It is also proposed to tie it 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.

12. Novelty (paragraph (1)(d)).- The proposals common to alternatives 1 and 2 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 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;

(v) 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;

13. In alternative 1, it is further proposed 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. Two alternatives are proposed for the description of such exploitation by other persons ("abusive acts" or "unauthorized acts").

14. Alternative 2 was presented to the twenty-third session of the Committee. It is different from alternative 1 in that the phrase "with the agreement of the breeder" is reinstated, the reason being that it would facilitate proof in litigation. In addition, its drafting is simplified.

15. At the twenty-third session of the Committee, it was asked whether the reference to vines was to be understood as a reference to Vitis or to all woody climbers. That question remained to be discussed in detail. It should be noted that originally the term was construed in the narrow sense, but that there is no reason to give a different treatment to plants such as Wistaria, whose morphology is very similar to that of grapevine.

116. It should be recalled that the wish has been expressed to add other categories of 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).

Article 7Examination of the Application; Provisional Protection

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

(2) For the purposes of such examination, the competent authorities of each member State of the Union may require the breeder to furnish all the necessary information, documents, propagating material or seeds, including any information relevant to the question whether the variety is essentially derived from a protected variety.

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

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

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 (2).-- As a result of the proposed introduction of a dependency system, it will be important in future for the competent authorities to receive all necessary information on the breeding history to enable it to determine whether there is dependence. It is proposed to highlight this by means of an addition to paragraph (2). It will also be important that this information be available to the public, in particular in order to enable holders of rights to exercise their rights deriving from dependence.

4. 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).

5. 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.

6. 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 8Duration 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. However, it would be appropriate to develop already at this stage the arguments in favor of the various possible solutions.

Article 9Restrictions 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 other persons.

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. At the twenty-third session of the Committee, the following alternative proposal was made:

"The free exercise of the right may not be restricted except to the extent provided for in the national law of the member States of the Union."

This proposal would not impose any restriction on member States with regard to the faculty provided by this Article.

3. 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 other persons for the following reasons:

(i) 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);

(ii) the proposed amendment of Article 5 makes it necessary to modify Article 9.

Article 10Nullity 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

[Alternative 1 (unchanged)] 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;

[Alternative 2] the reproductive or propagating material deemed necessary for checking the variety or the evidence that the variety is being maintained;

(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). At the twenty-third session of the Committee it was proposed to amend the end of the subparagraph (a). Alternative 2 reflects the proposal.

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 or 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

- (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 another person 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

1. General.— This proposal is based on the contrary argument, namely, that the variety must be easily identifiable, 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.

2. 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.

3. 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)).

4. Paragraph (2).— This paragraph sets out in a simpler form the rules of procedure appearing in paragraph (3) of the present text.

5. 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.

6. 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).
7. 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.
8. 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.
9. 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.
10. 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.

[End of document]