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INTERNATIONAL UNION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS

GENEVA

ADMINISTRATIVE AND LEGAL COMMITTEE

Twenty-fourth Session
Geneva, April 10 to 13, 1989

REPORT

adopted by the CommitteeOpening of the Session

1. The Administrative and Legal Committee (hereinafter referred to as "the Committee") held its twenty-fourth session from April 10 to 13, 1989. The list of participants is given at Annex I hereto.

2. The session was opened by Mrs. C. Holtz (Sweden), Chairman of the Committee, who welcomed the participants. She extended a particular welcome to Mrs. K.H. Adams of Australia, a State that had become a member of the Union on March 1, 1989, and to the Delegations of Austria, Bulgaria, the World Intellectual Property Organization (WIPO) and the European Patent Organisation (EPO), who were participating for the first time in a session of the Committee.

Adoption of the Agenda

3. The Committee adopted the agenda as given in document CAJ/XXIV/1, subject to the addition of an item "Adoption of the Report on the Twenty-third Session of the Committee."

Adoption of the Report on the Twenty-third Session of the Committee

4. The Committee adopted the report on its twenty-third session as given in document CAJ/XXIII/7 Prov., subject to a few substantive changes to the following paragraphs: paragraph 14 (amendment requested in writing by the Delegation of New Zealand); paragraph 49 in the English version and paragraph 57 (corrections proposed by the Office of the Union); paragraph 76 (amendment proposed in session by the Delegation of Denmark); paragraphs 110 and 119 (amendments proposed in session by the Delegation of the United States of America).

New Developments in the Field of Plant Variety ProtectionReports by the Delegations of the Member States

5. A number of delegations of European Community member States announced that they were very busy as a result of the draft¹ Commission proposal for an EC Council Regulation on Community Breeders' Rights and the Commission proposal for an EC Council Directive for the Legal Protection of Biotechnological Inventions, and as a result of the interface between plant variety protection and patent protection of living matter sought in respect of biotechnology.
6. The Delegation of the Federal Republic of Germany announced that a draft law on the repression of piracy of goods was about to be adopted by the Government for submission to Parliament. The draft was not limited to goods covered by trademarks, industrial designs or copyright, but also had effect in the field of patents and of plant variety protection. Its aim was to reinforce the effectiveness of those rights, particularly by increasing from one year to five years the term of imprisonment in the event of infringement and by laying down an obligation to furnish information on the origin of goods, a civil-law claim to destruction of the infringing goods and the seizure of such goods at the frontier.
7. The Delegation of Australia announced that protection had been extended to some one hundred species on January 1, 1989, and mentioned the fact that Australia had become a member of UPOV on March 1, 1989. The Australian authorities were closely examining the matter of the interface between patents and plant variety protection and were considering holding a seminar during the year.
8. The Delegation of Belgium announced that the list of protected taxa was soon to be extended and that contacts would be established with the authorities of other member States with a view to concluding bilateral agreements for cooperation in examination. Moreover, contacts with the Patent Office had been intensified.
9. The Delegation of Denmark announced that protection had been extended to bell flower and Clematis, two genera for which examination had been entrusted to the United Kingdom. The bilateral agreement concluded with Sweden had been extended to seven taxa, all examined in Denmark.
10. The Delegation of Spain announced that protection had been extended to strawberry.
11. The Delegation of the United States of America announced that the Department of Agriculture had concluded that it was not competent to issue regulations on "farm-saved seed." Furthermore, the fees stipulated by the Plant Variety Protection Act were to be increased as from April 20, 1989.
12. The Delegation of Israel announced that protection had been extended to five ornamental taxa and that the Plant Breeders' Rights Council had decided a further extension to three spice taxa.
13. The Delegation of Japan announced that protection had been extended in November 1988 to ten further taxa, bringing the total to 430.

¹ Prepared by the competent Commission departments.

14. The Delegation of the Netherlands announced that the third extension of protection in three years had been effected in February 1989 and that the fourth was to be made before the end of the year. The possibility of extension

to the whole of the plant kingdom was being closely examined as was the matter of the interface between plant variety protection and patents for invention.

15. The Delegation of the United Kingdom announced that the long-awaited extension of protection was now imminent. Fees had been increased by approximately 4.7% as from April 1, 1989. The report on the evaluation of examination systems in respect of varieties and seed was still with the Ministers for Agriculture. As in the other countries, in-depth discussions had been held with the Patent Office and the interested circles as regards the interface between plant variety protection and patents; a new conference dealing with that matter was to be held from September 20 to 22 at Cambridge, organized by the Queen Mary College of London University.

16. The Delegation of Switzerland announced that work had been resumed on the draft amendment to the Plant Variety Protection Law with the intention of extending protection to propagation of fruit plants by a producer for his own needs. However, it was not certain that the aim would be achieved since the producers involved had raised objections.

17. A draft amendment to the Patent Law was probably to be submitted to the relevant Parliamentary Committees before the end of the year. It provided for extension of patents to replicable biological matter and to products obtained through replication of such matter. In the statement of reasons, reference was made, as an example, to a pair of dogs with resistance to glanders or to genetically engineered wheat seed. As far as the effects of protection were concerned, the patentee's intention when defining the purpose of the matter involved and of the derived products was likely to be decisive. Various political parties had objected to the draft on the grounds that the Federal Government should first deal with the moral and ethical aspects of biotechnology and genetic engineering. As things stood, it was difficult to forecast the outcome of the Parliamentary debate.

18. At present, plant varieties and essentially biological processes for producing plants were excluded from patentability. Nevertheless, plant variety protection circles were afraid that the law governing such protection would be undermined in time by patent practice. For example, a patent had recently been granted for a process for obtaining a new variety of chamomile by the name of 'Manzana.' Those circles held that the claims concerned a variety even if reference was made only to chamomile and to propagating material. What was more, the process did not appear particularly new to them. That was why the Delegation of Switzerland wished to know whether other delegations had been faced with patents of the same kind.

19. The Delegation of the Federal Republic of Germany replied that a similar patent, concerning the same subject matter, had been previously granted in its country. Basically, the patent concerned tetraploidization, for example with the aid of colchicine, of an initial plant material rich in essential oils, from which process had been derived a series of dependent claims. The fact that a patent had been granted in the variety as such was based on a particularity of the exclusion provision contained in the Patent Law and on the fact that chamomile was not at that time protectable under the Plant Variety Protection Law. During recent discussions with the Patent Office, the latter had confirmed that such a patent would certainly no longer be granted today for the variety as such and perhaps not even for the use of propagating material of the variety.

20. As far as the patentability of the invention was concerned, the specialists at the Federal Office of Plant Varieties considered that none of the steps taken in isolation was new. However, it remained to be seen whether the combination in a manner not yet published, of known products and of known processes could warrant a patent. In that context, a competitor had entered opposition to the patent and proceedings had been initiated.

21. The Chairman pointed out that a recent decision (November 10, 1988) taken by a Technical Board of Appeal of the European Patent Office concerned a similar subject. The decision held that a combination of essentially biological processes could assume a technical nature and escape the exclusion in Article 53(b) of the European Patent Convention. The decision finally referred back the application--concerning a "process for the rapid development of hybrid plants and the commercial production of hybrid seed"--to the Office for completion of examination. It remained to be seen whether the Office would initiate a procedure as regards the requirements of novelty and inventive step.

Statements by Delegations of Non-member States

22. The Delegation of Argentina stressed the importance and interest attached by its country to UPOV's activities in general and to the work of the Committee in particular.

23. Aware of the possibilities it was able to offer in the out-of-season production of seed of temperate species, Argentina had launched a publicity campaign with undertakings in the seed trade to make them aware of the rights offered by the Law on Seed and Phyto-genetic Creations. A more detailed interpretation had been given of various provisions of the Law. In particular, automatic reciprocity had been established with all countries that protected new plant varieties, therefore including the UPOV member States.

24. The first 10 years of implementation of the Law, which had entered into force in 1978, had been generally satisfactory. The Government of Argentina had nevertheless initiated a procedure to revise and improve the system. For that purpose, it had called upon other countries, particularly France, and the European Communities to establish a program of assistance in improving the certification and protection systems. The first stage--an overall analysis of the legislation with a view to drafting a new law in consultation with the interested circles--was still ongoing. It had already led to amendments to the existing rules. The term of protection had, for instance, been brought into conformity with Article 8 of the Convention: it was now 20 years for vine and trees and 15 years for other plants.

25. The Delegation of Austria announced that a draft law on the protection of new plant varieties had been produced by the Ministry of Agriculture and Forestry together with the Patent Office. It was soon to be submitted to Parliament by the Government; the deadline for doing so had been set at May 8. Parliament was likely to examine it in July. Accession to UPOV should then be effected at the earliest possible date.

26. Protection would initially apply to 13 taxa. However, as a transitional measure, all varieties entered in the Breeding Book would also be entered in the Variety Protection Register.

27. The Delegation of Bulgaria thanked the Office of the Union for its invitation to participate in the work of the Committee. It announced that a Committee had been set up to examine the matter of accession to UPOV. A decision should be taken during the forthcoming year. The Delegation expected the decision to be affirmative.

28. The Delegation of Finland announced that the Ministry of Agriculture had decided that a Committee would be set up for the drafting of a law on the protection of new plant varieties as soon as the practical problems had been settled.

29. The Delegation of Norway announced that a Committee appointed by the Government to examine the matter of patents and other forms of protection for biotechnological inventions had recommended that Norway should accede to UPOV. Preparations with a view to accession had been put in hand.

Statements by Representatives of Organizations

30. The Delegation of the European Communities (EC) announced that completion was scheduled by November of the consultation of the member States and of professional organizations on the draft Commission proposal for an (EC) Council Regulation on Community Breeders' Rights and it was hoped that the draft could be submitted to the Council before the end of the year. As regards the Commission proposal for an (EC) Council Directive on the Legal Protection of Biotechnological Inventions, which had already been submitted to the Council, it was difficult to say when discussions would be completed. As already mentioned by a number of delegations, the member States had undertaken a thorough examination of the question whether and to what extent protection under patents should be extended. There was as yet no consensus, but it was hoped that progress would be achieved shortly.

31. The Delegation of the European Patent Organisation (EPO) said that the EPO was aware of the importance of its relations with UPOV in order to improve mutual knowledge of the two systems. That was why the Office of the Union had been invited in September 1988 to participate in the work of an ad hoc group on the harmonization of patent legislation. The EPO was happy to be able to participate in the work of the Committee in view of the possible effects of the revision of the Convention--particularly decisions on the definition of the concept of variety--on Article 53(b) of the European Patent Convention and, thus, on the scope of protection afforded within the framework of the EPC.

32. The Delegation of the EPO pointed out that the Technical Board of Appeal 3.3.1 had clearly stated in 1983, in its decision T49/83 "propagating material/CIBA-GEIGY," that the EPO did not protect anything that could be protected by plant breeders' rights. The EPO recently granted a patent containing some 20 claims relating to a DNA vector, to a process for inserting the vector in plant cells and to the transformed cells and plants. It had held that the latter claims did not concern varieties. The time limit for opposition was nine months as from publication of the grant. Finally, the Technical Board of Appeal 3.3.2 had examined the matter of essentially biological processes (see paragraph 21 above). Its decision had been given on November 10, 1988.

33. The Delegation of the World Intellectual Property Organization (WIPO) welcomed the possibility of participating in the work of the Committee. WIPO had been examining over the last four years the matter of intellectual property protection concerning all categories of biotechnological inventions. It had been informed that the exclusion of plant varieties and essentially biological processes for producing plants could constitute an obstacle to investment in the field concerned. It had consequently examined whether the exclusion was still justified, particularly in the light of the historical background and of developments within UPOV; it had taken into account, in so doing, the information provided by the member States of UPOV and the Office of the Union. Developments had not appeared adequate for achieving a balanced solution.

34. WIPO nevertheless had need of additional information on the UPOV system and intended to take into account everything done within UPOV, including the revision of the Convention. The International Bureau of WIPO and the Office of the Union had received instructions to draw up a joint document on the interface between patent protection and plant variety protection. Document CAJ/XXIV/4 constituted a first step in that direction, but was not yet the joint study requested.

Revision of the Convention

General

35. Discussions were based on document CAJ/XXIV/2 (hereinafter referred to as "the basic document").

36. The Committee noted document CAJ/XXIV/5.

37. The Delegation of the Federal Republic of Germany stated that it held the subject of the discussion to be the preparation of the document to be communicated to the fourth Meeting with International Organizations (hereinafter referred to as "the next document") and that it intended to participate in the discussion on that understanding and on that understanding only.

38. The Delegation of Denmark pointed out that the matter of balance between the respective rights and obligations of breeders and users was still under study in its country and that the final stance would largely depend on the final balance achieved in the revised text of the Convention.

Article 1

39. Drafting.— On a proposal by the Delegation of the Federal Republic of Germany, it was agreed to invert the order of the first two paragraphs, thus also enabling the drafting to be simplified, and to transfer paragraph (3) to Article 15 as a new paragraph (2).

40. The above-mentioned Delegation further repeated its proposal to specify the meaning of the term "right" (see paragraph 26 of document CAJ/XXIII/7). In that respect, the terms "protection right" and "intellectual property right" were held inadequate. The matter was left in abeyance.

41. "Prohibition of double protection".— The Committee was unable to agree whether it was appropriate to stipulate a prohibition on cumulative granting of the two forms of protection (by patents and by plant breeders' rights) or choice between the two forms of protection or whether to insert a relevant provision in the Convention. Following a lengthy exchange of views, it decided that the next document should contain the following sentence in Article 1(2)(new):

"Subject to Article 37, the right granted in accordance with this Convention shall exclude any other form of protection for plant varieties as such."

The sentence would be placed within square brackets to show that it corresponded to a broad majority wish, but that it also raised objections. As far as the words "as such" were concerned, it was noted that their aim was to specify that other forms of protection would be available for material not corresponding to a variety.

42. The following arguments were put forward in favor of the exclusiveness of the system based on the UPOV Convention for the protection of plant varieties:

(i) On principle, there should be only one system of protection. From a more practical point of view, it would be for the lawmaker to lay down a system that was simple and understandable for the majority of those concerned (breeders and users); a system based on two forms of protection would lead to complex legal problems, for example with respect to the hierarchy of the two types of rights involved.

(ii) If the problems currently raised by the UPOV Convention were resolved, particularly if protection was afforded to all varieties and if its effects were extended as proposed in Article 5, a system based on two forms of protection--of which one would only be available for varieties obtained by breeding methods meeting specific criteria--would no longer be justified. However, that argument obliged the UPOV authorities to make their system adequate and to adjust it to the needs of breeders and genetic engineering specialists.

(iii) Some held that the present Article 2 contained a "prohibition on double protection"; others held that such was not the case, but that the prohibition was implicit; others again denied its existence in the UPOV Convention although it was contained in numerous conventions and laws on patents. Its inclusion in the UPOV Convention should therefore not lead to any prejudice nor raise any problem.

(iv) Very few varieties would satisfy the patentability requirements and their protection by means of a patent would raise legal problems at a number of levels. For instance, in Australia, where the Patent Office had interpreted case law to mean that varieties were patentable, some 30 patent applications had been filed within a period of five years, whereas there had been 55 applications for Plant Variety Rights during the first year of operation of the law.

(v) The present general tendency was in favor of harmonization; in the field of plant variety protection, that was more than justified by the international nature of plant breeding activities, including genetic engineering.

(vi) The parallel application of the patent system to varieties would raise serious problems in the administration of the two systems involved, particularly in that of the protection of new plant varieties. Reference was made in that respect to the arguments recorded in paragraph 30 of document CAJ/XXIII/7.

(vii) Taken in isolation, a patent creates uncertainty, not only for its owner (for example as regards the scope of his rights, particularly in view of the principle of exhaustion), but also for his competitors (for example as regards access to genetic variability) and for users (particularly as regards the scope of their rights and the identity of the person entitled to royalties).

(viii) The general balance of agricultural professions argued against a system based on two forms of protection. Plant varieties belonged to the field of agricultural policy.

(ix) The breeders in some countries were in favor of exclusiveness for the system based on the UPOV Convention for the protection of plant varieties.

43. The following arguments were put forward in favor of simultaneous application of both forms of protection involved to plant varieties:

(i) The introduction of a limitation on the scope of application of one of the systems of protection (that is to say patents) was a matter of national sovereignty. Each State should be able to lay down such a limitation, but should not be obliged to do so.

(ii) Patents and plant variety protection were based on common principles and shared the same aims of public policy: appropriate remuneration for innovations and economic development. They should therefore coexist in harmony. The "prohibition on double protection," which corresponded to a model of domination of one of the systems, led to problems of application in the courts. Additionally, since patents were available for plant varieties in certain States, it did not meet the demand for harmonization of laws at international level. Finally, it would establish a rigid principle that did not allow for future developments, for prior rights or for the special circumstances of each case.

(iii) On principle, a person should have the possibility of choosing either of the two forms of protection involved if he was capable of meeting the requirements. The deletion of that possibility could be contrary to the interests of such a person. Such possibility existed in other fields of intellectual property.

(iv) The general aim was to provide innovators with adequate protection. It was possible that such protection could not be offered by the UPOV Convention; additionally, the adequate nature of the protection raised a problem of perception and it was for the user to judge. The search for simplicity in the overall system of protection did not necessarily have to be a priority aim.

(v) The member States should take a clear stance and should not introduce into the Convention a provision which they would subsequently use at national level to refuse the wishes of the users.

(vi) If plant varieties were rarely patentable, then the matter would resolve itself and no special provision was needed.

(vii) Certain of the arguments advanced in favor of exclusive competence for the plant variety protection system were not convincing. In particular, it would be simple to require seed or plants from the patentee within the administration of that system and the consumer was not subjected to the payment of royalties since those would have been paid at an earlier stage.

44. However, a consensus emerged on the need for harmonious cohabitation of the two systems of protection. In that respect, the Delegation of WIPO pointed out that the Organization had proposed the deletion of the exclusion provisions contained in numerous patent laws, both within the Committee of Experts on Biotechnological Inventions and Industrial Property and within the Committee of Experts on the Harmonization of Certain Provisions of Legislation Protecting Inventions. The Delegation of the EC stated, for its part, that the Commission proposal for a Directive on the Legal Protection of Biotechnological Inventions was based on the existing legal arrangements and did not prejudice the rights of European Community member States to amend their policies.

45. In the case of the present Article 2(1), the Delegation of Australia drew attention to the fact that it could lead to a restriction in the scope of application of the special system of protection based on the UPOV Convention since a patent issued for a variety could imply that the patent was exclusive for the species involved.

Article 2 (new)

46. Paragraph (i) [definition of species].— It was pointed out that current thinking on the revision of the Convention meant that it would probably not be necessary to include a definition of species.

47. Paragraph (ii) [definition of variety].— A number of delegations spoke in favor of a definition of variety since it was needed in order to define the interface with patents.

48. However, some doubts were expressed as to the advisability of including two definitions of the same matter in the Convention, one in Article 2 and the other in Article 6. It was explained in that context that the word "variety" designated a concept covering physical objects having special properties, that is to say, from a technical point of view, a degree of distinctness, homogeneity and stability. Article 6 of the Convention and its implementing provisions specified that degree in respect of varieties for which an application was filed. However, the variety trade (breeders, seedsmen, users) also independently evaluated that degree and there were cases where its perception was quite different; thus, the International Maize and Wheat Improvement Center (CIMMYT) circulated material that it considered to constitute a variety, but which did not meet the UPOV requirements as regards homogeneity. In such case, it could be advisable to take into account in the administration of the plant variety protection system, and more particularly in the examination for distinctness, varieties such as defined on the criteria of the variety trade. In that connection, the Committee had considered at its twelfth session that "any other variety" within the meaning of Article 6(1)(a) of the Convention did not necessarily have to be "finished" and the Council had taken note of that opinion at its eighteenth session in 1984 (see at annex to document C/XVIII/9² and paragraph 81 of document C/XVIII/14). That situation, together with the widespread opinion that Article 6 contained a definition of variety, meant that it was highly desirable to reintroduce a general definition of variety and to state that Article 6 referred more specifically to conditions for protection.

² That text was worded as follows:

"2. What conditions must be fulfilled by the 'other variety'? Must the 'other variety' with which the variety that is the subject of an application for protection has to be compared when the latter is tested for distinctness be a 'finished' variety, that means a variety that is sufficiently homogeneous, or can it be a plant population that does not--yet--fulfill the requirements for homogeneity (a so-called "quasi-variety," as for instance most of the varieties distributed by CIMMYT)?

"The 'other variety' must not necessarily be 'finished,' that is to say meet the standards set for the protection of new plant varieties in the member State of the Union concerned (these standards are often identical with those set in other fields of law such as the regulations on production and trade in seed and seedlings). In the case of the 'other variety,' this must be material which already fulfills the usual criteria accepted by the trade for the notion of variety; in particular, the variety must at least be able to be described as such."

49. In that respect, the Delegation of the EPO asked whether the proposed definition was to include within the field of application of the UPOV Convention, by its scope, plant elements at present excluded therefrom and whether it would consequently be such as to oblige the EPO to change its patent granting practice; that practice was based on the "propagating material/CIBA-GEIGY" decision (see paragraph 32 above) and more particularly on the statement that "Article 53(b) EPC prohibits only the patenting of plants or their propagating material in the genetically fixed form of the plant variety."³

50. The Delegation of the United Kingdom observed that the same question had arisen in its country. No conclusions had as yet been drawn. The Ministry of Agriculture held that any cell containing the complete genotype was per se a part of a variety and should be treated as such. The problem was that that opinion would oblige the Patent Office to refuse grant of patents in those cases where the European Patent Office had already established a contrary practice; the Ministry of Agriculture would then be in the position of someone who imposed a restriction that did not exist at that juncture or that did not exist as yet. In fact, it would seem that the solution was to be found rather in agreement on a reasonable interface between the two systems of protection.

51. The Delegation of the Federal Republic of Germany expressed the opinion that the proposed new Article 2(ii) would oblige patent offices to change their granting practice. Offices currently held that the purpose of the UPOV Convention was to protect the plant varieties that were genetically fixed and that possessed the other required characteristics; all others could be the subject matter, according to those offices, of a patent.

52. The Vice Secretary-General felt that it would be illogical to give the possibility of a patent to a breeder who had not had access to plant variety protection on the grounds, for example, that his material did not meet the requirements in respect of homogeneity. There was therefore reason for the patent offices to reconsider their practice in that respect.

53. As regards the wording of the proposed provision, it was agreed that the words "plant material" should be replaced by "parts of plants" since the word "material" was also used, with a different meaning, in Article 5.

54. Paragraph (iii) [definition of breeder].- The Delegation of Sweden explained that, in its country, a successor in title could enjoy protection only if the breeder himself was also able to enjoy it by reason of his nationality, his place of residence or his place of business. The proposed definition would require a revision to the Swedish legislation on that point, which Sweden was prepared to do.

55. Definition of material.- The matter was examined in relation to Article 2(ii) and Article 5(1) in which the word "material" appeared, but with differing meanings. It was explained that, in Article 2(ii), the word designated a

³ In view of the forthcoming discussions on this matter and in view also of the approach adopted for the next document, it should be noted that this same decision explains the concept of plant variety as follows:

"The skilled person understands the term 'plant varieties' to mean a multiplicity of plants which are largely the same in their characteristics and remain the same within specific tolerances after every propagation or every propagation cycle."

plant element containing all the genetic information that was characteristic of the variety and that was capable of regeneration (with exceptions) and multiplication; such element had to be, as a minimum, a cell or a protoplast. As stated in paragraph 53 above, it was agreed to replace the word by "parts of plants." In Article 5(1), the word designated any form under which a variety could exist; it therefore also applied to transformed products. However, for the practical definition of the scope of protection and the exercise of the right, account would have to be taken of the circumstances of each case, particularly as regards the principle of exhaustion and of the possibility or impossibility of identifying the variety from which the product derived.

56. As regards the scope of the word "material" in Article 5, the following observations were made:

(i) For one delegation, it had to be limited to the product of the harvest. For another, it would be difficult to go beyond the material potentially usable as reproductive or vegetative propagating material.

(ii) One delegation stated that its professional circles were unanimously in favor of a definition extending to at least the product directly obtained from the product of the harvest. It was indeed at that stage that certain varieties were truly involved in trade and could be identified (for example in the case of aromatic plants). Another delegation was also in favor of a broad definition.

57. As regards the incorporation of a definition in the Convention, three delegations were in favor, whereas one further delegation preferred for the time being to refrain from defining the word "material." That delegation had ascertained, during discussions at national level, that it was most difficult to draft a definition satisfying all situations and making it possible, in particular, to exclude certain products from protection where such was advisable for reasons of general interest. It stressed that it was important to specify that the breeder could receive a royalty once only, at the first stage of the exploitation process of the variety. However, it was possible in future, particularly due to the impact of new technologies, that the right should be exercisable at the last stage, that is to say in relation to the final product. To make such an extension acceptable, it would be necessary, however, to stipulate that the onus of proof was to lie with the breeder.

Article 3

58. The proposal to delete the current paragraph (3) (reciprocity) was unanimously accepted.

Article 4

59. Paragraph (1) [field of application of the Convention].— A number of delegations stated their agreement with the principle set out in paragraph (1), that is to say that the Convention applied to all botanical species.

60. As regards the scope of the provision and its wording, reference was made to certain problems of nomenclature. According to one delegation, the term "botanical species" could be interpreted as excluding interspecific hybrids and graft chimaeras. That interpretation, based on narrow concepts of nomenclature, was contested by one other delegation that further emphasized that the first individuals of an interspecific hybrid constituted plant varieties worthy

of reliable protection and that plant variety protection was the surest form. That delegation consequently spoke in favor of a wording which would ensure such protection.

61. The words "the whole plant kingdom," proposed to replace "all botanical species," raised the question, for one delegation, of algae and the like. In that context, another delegation pronounced categorically in favor of a broad understanding of "plant kingdom." Following an exchange of views, the following wording was proposed: "this Convention shall be applied to all plant varieties." It was noted that a problem of redundancy arose with Article 1. This wording was nevertheless supported by one delegation that felt that it made the Convention less restrictive in the matter of double protection.

62. It was pointed out that the word "botanical" could be deleted in the expression "botanical species." It was also suggested that the problems raised, reported above, could be resolved in the new Article 2 or that paragraph (1) could be simply deleted in view of the content of Article 1. That latter suggestion was not followed: it was held that paragraph (1) was necessary as the statement of a principle and as an introduction to paragraph (2), and also that it was necessary to maintain it, at least for the moment, for the purposes of the fourth Meeting with International Organizations.

63. On second reading, on the basis of the text drawn up by the Office of the Union following the discussion on paragraph (2), the Committee decided on the following three alternatives for the forthcoming discussions: "all botanical species," "the whole plant kingdom," "all varieties."

64. Paragraph (2) [possibility of exceptions].-- No delegation spoke against the principle set out in paragraph (2). The Committee's attention centered on the situations in which a State may derogate from the principle set out in paragraph (1) and on the conditions for such derogation. The discussions on that subject were held on April 10 and were based mainly on alternative 2 in the basic document, then on April 13 and 14 on the basis of a text drawn up by the Office of the Union following the preceding discussions. That text is reproduced in Annex II to this report at the request of the Committee.

65. As regards the situations, the general view was that the reference to "exceptional economic difficulties" (in alternative 2 in the basic document) was too narrow and would not meet the needs of States having only recently introduced a system of protection and wishing to apply it progressively for reasons of administrative convenience. As to the reference to public policy --or public interest--made in that same alternative, it was emphasized that the examples given in session (plants that were poisonous or were likely to facilitate the spread of disease) were in fact more in the way of individual measures of prohibition or limitation on exploitation. It was also pointed out that a State could meet with political difficulties in extending protection to certain species, a case that was not covered by any of the wordings under consideration. Finally, the Committee noted that no wording possessed the necessary flexibility nor was at the same time capable of preventing a dishonest interpretation of the provision. It was therefore proposed that "exceptional difficulties" should be maintained or even that no situation should be mentioned at all.

66. As far as the conditions were concerned, it was first pointed out that if it was wished to ensure that a State would protect the "important" species or varieties, it was necessary to specify: "in any of the member States of the Union" in order to protect the interests of foreign breeders. In the text

reproduced at Annex II to this report, the wording chosen in paragraph (3) is: "of importance to the domestic economy of that State and to the trade between that State and the other member States of the Union."

67. The proposal to introduce minimum numbers met with the objection that they would be arbitrary and that States could be tempted to be satisfied with those numbers.

68. On the subject of the notification procedure provided for in alternative 2 in the basic document, it was explained that the whole paragraph (2) would be applied, in practice, once only for each State after that State had opted for a limitation of the application of the Convention: at the time it ratified, accepted or approved the revised Act or submitted a request for advice on conformity of its legislation with the provisions of the new Act (assuming that the provisions of the 1978 Act would be reproduced in the new Act). The Council would therefore have greater powers in the case of non-member and non-signatory States wishing to accede to the Convention since the importance of the limitation could influence its opinion on the conformity of the legislation. In the case of other States, its opinion would only have a moral effect.

69. It was then asked whether paragraph (2) should not be limited to new member States. It was felt that the current member States were not likely to have too many problems in extending protection to all botanical species. It was also noted that a difference in treatment between existing and new member States would be problematic by its very principle and that it could encourage States to remain party to old texts indefinitely or for a lengthy period, thereby creating an awkward transitional situation. That opinion finally prevailed.

70. In the text reproduced at Annex II, a dual system was proposed to allow for that opinion. Paragraph (2) provided for progressive application of the Convention to all botanical species within a period of ten years, a solution that had already been envisaged at an earlier date. However, that solution was not maintained.

71. It was also suggested that a State wishing to avail itself of the faculty provided in the paragraph concerned should submit a proposed calendar for extension of protection to the largest possible number of botanical species and that the Council should periodically review the reasons for the limitations and the calendar. However, it was objected that it would be difficult for many States to draw up a calendar and that the periodical review of the reasons would create political problems for a result that was likely to be minimal in view of the legal effects of the Council's opinion once a State had become a member of the Union.

72. Finally, the Committee agreed on the following proposal (which takes into account the decision taken in respect of paragraph (1)) and requested the Office of the Union to take stock of the diverging points of view that still existed in respect of the minimum conditions:

"(2) Where, in a member State of the Union, the application of this Convention to [Alternative 1: all botanical species] [Alternative 2: the whole plant kingdom] [Alternative 3: all varieties] causes exceptional difficulties, that State may opt for a progressive implementation of the provision of paragraph (1). That State shall notify its choice to the Secretary-General, stating the reasons therefor. The Council shall state its position on that subject."

73. In respect of the current procedure for extending protection to various species, one delegation observed that the fact that the procedure was cumbersome meant that, in the country concerned, protection was not extended to species for which the professional circles showed no interest. A further delegation mentioned that unwieldiness also had the opposite effect: some States extended protection to whole families--and even envisaged suppressing all limitation--and regulated certain details of the procedures for applying the system of protection by means of administrative decisions taken, depending on the case, in a general fashion for one species or a group of species, or individually where an application was filed in respect of a variety of a "minor" species.

Article 5

74. Paragraph (1) [fundamental right].-- In view of the ability of certain material of a variety to reproduce or to propagate and the facility with which a parallel market could be created in certain cases, the Committee agreed to add exportation to the acts concerned by the breeder's fundamental right.

75. As regards the drafting, particularly the meaning of the words "using" and "aforementioned purposes," it was explained that the proposed text was based on the Community Patent Convention, itself largely based on European domestic legislation, in order to profit from patent case law. In the context of the UPOV Convention, "utilization" had to be understood as activities such as growing or the use of the product of the harvest for food or industrial purposes. To ensure that the term "aforementioned purposes" would indeed apply to all activities, including reproduction or propagation of the variety referred to in subparagraph (i), it was agreed to introduce a new subparagraph (iii) devoted to the stocking of variety material.

76. Paragraph (2)(i) [exhaustion of right].-- A discussion ensued on the phrase "material which has been put on the market in the member State of the Union concerned," that is to say the question whether a breeder who had placed material on the market in one country should still have the possibility of exercising his right of prohibition in another country to oppose imports of the material into the latter country. That question was answered affirmatively in view of the nature, that is to say domestic, of the titles of protection issued and of the independence of protection afforded in the various member States. The proposed text was held to be satisfactory on that point.

77. Paragraph (3) [dependency].-- No delegation spoke against the inclusion of a principle of dependency in the Convention. However, a number of delegations wished for a clear statement in the commentary on the draft revised text that it constituted a de jure and de facto exception, and reference was made to paragraph 95 of document CAJ/XXIV/4 in that context. One delegation held that the proposed text of paragraph (3) was sufficiently clear; a further delegation emphasized that, for one or other species, the principle could become of frequent application if the most regularly used plant breeding methods were those that led to dependency.

78. A large majority spoke in favor of maintaining the word "single" in the phrase "if a variety is essentially derived from a [single] protected variety." It was nevertheless decided to maintain the square brackets in the next document. One delegation stated that the professional circles in its country favored a system of dependency that was restricted to those cases where the relationship of the two varieties concerned was obvious.

79. Each of the three alternatives proposed as regards the effects that dependency would have was supported by at least one delegation. It was therefore decided to maintain them in the next document. Two additional alternatives were also proposed, but were not included as yet:

(i) add to alternative 1 the following phrase: "unless equitable remuneration has been offered";

(ii) invert the order, in alternative 3, of the rights listed there in order to emphasize that payment of equitable remuneration would constitute the usual situation and that the right of prohibition would be the exception.

80. Paragraph (4) [possibility of limiting the scope of protection].- A number of delegations emphasized the need for that provision on account of the needs of the countries that wished to become members of the Union and also of the political necessity that could exist in some countries for maintaining "farmer's privilege" or even on account of the breeders' wish to maintain good relations with the farmers.

81. A number of delegations suggested that an attempt should be made to achieve greater harmonization or to specify "farmer's privilege" in the paragraph under discussion if it was the intention of that paragraph to specifically permit such privilege. It was replied that such was not the case: in view of the broad scope of the right afforded in the initial paragraphs of that Article, a State could feel a need to provide for other limitations, for example to exclude certain products from protection. As far as the "farmer's privilege" in particular was concerned, it would be extremely difficult to define in the Convention those species to which it should apply or the possible conditions and limitations of its application. It had to be agreed that situations could be highly different from one country to another and that the Convention could not deal equitably with all those situations.

82. The suggestion made in session to have a provision on "farmer's privilege" and another on the other possible limitations met with the objection that a detailed list of exceptions was likely to encourage member States to incorporate those exceptions in their domestic laws. It was therefore agreed to maintain the general nature of paragraph (4).

83. However, the Committee agreed to add a procedure for notification and statement of a position by the Council on the lines of that proposed for Article 4.

84. It was also agreed to place in square brackets the phrase "if this is necessary in the public interest" on the grounds that a "farmer's privilege" would probably not be in the public interest.

85. Paragraph (5) [collision norm].- On the question whether it was necessary to have provisions to govern the relationship between patents and plant breeders' rights, it was explained that the choice was one between legislating--as was the case in the paragraph under discussion or in the EC drafts mentioned by a number of delegations--or noting that there existed two independent rights and possibly two owners who would need to settle between themselves the conditions for exercising their respective rights. If it was possible to agree on a system of reciprocal dependence it could then possibly be enough to note its existence.

86. Two delegations were formally opposed to paragraph (5); it was also observed that it could be inadvisable to exercise control over another intellectual property right in the Convention, that it would perhaps be impossible to legislate on that right in the Convention and that the proposed text was not yet adequate as a final solution. The Committee nevertheless proposed that it be maintained, in square brackets, in the next document as a provocative basis for discussion at the fourth Meeting with International Organizations.

Article 6

87. Order of provisions.— The Committee was generally in favor of an order in which the requirement of novelty should appear first.

88. Paragraph (1), introductory sentence.— It was agreed to word that sentence as follows:

"(1) The right provided for in this Convention shall be granted to the breeder when the following conditions are satisfied."

89. Paragraph (1)(a) [distinctness].— A survey round the table produced a strong majority in favor of alternatives 1 and B. Alternative C was supported by one delegation only and alternative A by none. After a minor drafting change, underlined in the text below, and the alteration of the order of the subparagraphs, a text with the following wording was chosen:

"(b) The variety must be clearly distinguishable from 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, or

(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 this subparagraph and of subparagraphs (c) and (d) below, or

(iii) when it has been openly exploited."

90. A proposal to introduce a new subparagraph on sufficient disclosure of the variety was rejected on the grounds that it would be redundant and that the insertion of the sentence concerned ("in particular...") required that the list of cases should be neither too long nor too detailed; that would avoid the sentence being interpreted as an exhaustive provision.

91. As for the reference to an official register of varieties, it was explained that, in view of the background to the Convention, it was more particularly intended to mean the official catalogues of varieties authorized for marketing (the provision concerned was nevertheless explicative and not exhaustive). It was asked that the explanation be entered in the report. It was also asked that a future document should explain the term "openly exploited," particularly as regards inbred lines comprised in the formula of hybrids.

92. Paragraph (1)(b) [homogeneity].- No comments were made on that paragraph.

93. Paragraph (1)(c) [stability].- It was agreed to divide up the various elements of this subparagraph into two sentences, as follows, in order to remove any ambiguity (taking into account the proposed new order of the subparagraphs):

"(d) 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 (b). A variety is stable if it remains 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."

94. Paragraph (1)(d) [novelty].- A survey round the table produced a majority in favor of alternative 2, which was the closest in its principle to the current text. It was agreed to delete the other alternative from the next document; however, one delegation entered a reservation in that respect and a further delegation announced that it wished to return to the matter and to the general structure of the paragraph under discussion.

95. The question of the optional or compulsory nature of the one-year period of time referred to in subparagraph (i) ("period of grace") was raised. No change to the proposed text was accepted as a result of opposition by one delegation, based on the position taken by the national professional organizations.

96. Paragraph (1)(e) [variety denomination].- The Committee looked at the nature of the provision concerned, mainly within the framework of discussions on Article 13. Should it be a substantive or a formal requirement for protection? In the first case, subparagraph (e) was necessary; in the second, it was possible to envisage a more flexible administrative practice and to come closer to the view expressed by certain professional organizations. Or again, should it be a requirement independent of the granting procedure for the title of protection? The majority of delegations felt that the requirement for a denomination was a condition of protection; several held that it was in fact a condition for exercising the right. Reference was also made, in that respect, to the--formal--requirement that an invention for which protection by means of a patent had been requested had to have a title and to the fact that a patent could not be granted without such title.

97. The following proposals were made during the discussions on subparagraph (e):

(i) delete the subparagraph under discussion, since Article 13 meant that deletion would make no difference of substance;

(ii) amend the subparagraph in order to remove any ambiguity as to the fact that it constituted a condition for protection;

(iii) transform the subparagraph to a new paragraph (2).

The third solution was finally chosen. As far as the first suggestion recorded above was concerned, it was thought preferable to deal with the matter of denomination in Article 6 in view of the controversy caused by Article 13.

Article 7

98. Paragraph (1).— As regards the aim of revising that Article, it was confirmed that no basic change in practice was envisaged by the member States: a majority of them wished to maintain the principle of growing trials and only depart therefrom in specific cases.

99. It was asked whether the results of testing carried out by others, referred to at the end of the paragraph, would be complementary or exhaustive. It was replied that the purpose of the sentence concerned was to ensure that the lawmaker would give the competent authority the necessary powers to call upon others when carrying out the examination. The nature of such results would depend on the scope of what had been requested and also on the value of the results as a basis for decision. In any event, the competent authority should keep its powers to request supplementary trials or to carry them out itself.

100. Paragraph (2).— It was proposed that the reference to "propagating material or seeds" be replaced by a reference to "material."

101. One delegation interpreted the end of the paragraph ("including any information relevant to the question whether the variety is essentially derived from a protected variety") as implying examination of dependence by the competent authority, and therefore definition by such authority of the conditions of future exercise of the right. It held that the matter should be settled by the breeders concerned in relation to the management of their respective rights; it therefore wished that the phrase be deleted. In any event, "from a protected variety" should be replaced in its view by "from another variety."

102. It was replied that the aim of the phrase concerned was simply to ensure that the necessary information was supplied and included in the file. The Committee nevertheless felt that the first part of the sentence already gave such a guarantee. Consequently, the proposed deletion was approved.

103. A discussion ensued on the confidentiality of information and of material received by a competent authority, either from the breeder under paragraph (2) or from another authority under paragraph (3). In that respect, it was proposed that the following provision be added:

"The information furnished by a breeder to the competent authority under paragraph (2) or by a competent authority under paragraph (3) shall be kept confidential."

An alternative proposal would be to limit the provision to the period ending on publication of the application.

104. As regards the plant material, a number of delegations pointed out practical difficulties. As to the nature and processing of the documents, it appeared that domestic laws were somewhat at variance in that respect and in some cases they were based on the general rules of law from which the plant variety protection law could not depart. It was felt that the provision involved had therefore to be drawn up in a very general manner and that it would consequently become easily contested.

105. It was pointed out in that context that a basic principle of intellectual property law was that the counterpart for the monopoly that was granted was disclosure of the subject matter of the monopoly. In that respect, it was to

be asked whether such counterpart existed in plant variety protection law in the case of hybrids whose formulae were kept secret. Likewise, the principle of free availability of a protected variety as initial source of variation could be found lacking in the case of varieties such as the inbred lines that were comprised in the formula of hybrids and which were not the object of any real trade. It could certainly be argued that the genes of the lines were available in the form of hybrids, but a comparison had to be made with the situation in the field of patents where the deposit of living matter was required in certain cases. It was felt that those matters would have to be examined in the context of the proposal reproduced in paragraph 103 above.

106. To conclude, it was decided to maintain the wording of Article 7 as it stood on that item and to insert in the next document a reference to the matter of confidentiality of documents and material in the commentary.

107. Paragraph (3).— It was agreed that the conclusion of agreements on cooperation in examination should not be made compulsory.

108. Paragraph (4).— The Delegation of the United States of America referred to the reservation it had entered at the preceding session as regards the compulsory nature of the provisional protection in view of the absence of any such protection in patent law. It asked whether "shall provide measures" could not be replaced by "may provide measures." It was replied that the proposed obligation to introduce at least a certain form of provisional protection was in reply to a strongly felt wish of the professional organizations and that such protection was necessary in many cases due to the short commercial lifetime of varieties and the relative length of examination.

109. The Delegation of Italy entered a reservation on the reference to the filing date of the application since it felt that it would be unfair to penalize someone who had used the variety before the application was published, that is to say at a date at which that person could not have been aware of the infringing nature of his activities. It was replied that the reference was drawn from the fact that it already existed in certain domestic laws and that it would probably be impossible to harmonize existing systems in view of links with other branches of intellectual property law.

110. It was agreed to replace "shall be entitled to demand equitable remuneration" by "shall be entitled to equitable remuneration."

Article 8

111. That Article provoked no comment.

Article 9

112. The Delegation of the United States of America resubmitted the proposal made at the twenty-third session of the Committee (see paragraph 115 of document CAJ/XXIII/7) and explained that a literal interpretation of paragraph (1) would prevent the owner of a competing right, for example a patent on a gene, from exercising his right in respect of a protected variety. It was objected, however, that the text proposed to resolve the problem laid down no limits on the right of States to limit exercise of the right afforded to the breeder and would thus run counter to the interests of users of the system of protection.

It was therefore proposed to delete paragraph (2) of the commentary on Article 9 given in the basic document and to replace it with a general observation on the interest shown by certain delegations for an amendment as proposed by the Delegation of the United States of America.

113. On second reading, the Committee approved an amendment to specify in paragraph (1) that it applied only to a limitation of free exercise decided by the authorities of a member State.

114. One delegation wished that Article 9 should also contain, if only to provoke a debate at the fourth Meeting with International Organizations, the principle of payment of compensation in the event of prohibition on the exploitation of a variety. It noted that the principle was contained in certain patent laws. A further delegation observed that the matter could not be settled in the Convention since it was a matter of constitutional law in its country. According to that delegation, Article 9 should be limited to the rights a breeder could assert in respect of another person who had obtained authorization to exploit the variety as a result of an administrative or judicial decision. It proposed that the principle be strengthened by wording paragraph (2) as follows:

"(2) When any such restriction is made in order to authorize another person to exploit the variety, the member State of the Union concerned shall take all measures necessary to ensure that the breeder receives equitable remuneration."

That proposal was adopted.

Article 10

115. A number of amendments to alternative 1 of paragraph (3) were suggested during the discussions:

(i) delete "or he does not allow inspection of the measures which have been taken for the maintenance of the variety" on the grounds that a recalcitrant owner could find a way out by proposing to the competent authority that it carry out an inspection or again on the grounds that an inspection is not generally necessary;

(ii) replace the above-mentioned phrase by "[...does not provide...] or proof that the variety has been maintained";

(iii) simplify as follows: "[...does not provide...] the reproductive or propagating material, the documents and the information deemed necessary for checking maintenance of the variety";

(iv) replace the word "or" between the two possibilities by "and." However, attention was drawn to the fact that that proposal subjected forfeiture to both conditions at once.

116. Finally, the Office of the Union was requested to draw up a text in the next document. That text should maintain as many elements of the basic document as possible; on the other hand, parts that appeared superfluous in the context of paragraph (3) or in relation to paragraph (2) should be deleted. Reference to inspection should be placed in square brackets.

Article 11

117. No comments were made on that Article.

Article 12

118. Paragraph (1) [priority period].— A survey round the table showed that opinions were very divided. It was therefore agreed to include three alternatives in the next document, that is to say 1 year, 18 months and 2 years.

119. Paragraph (3) [additional period for examination].— A survey round the table showed, on the other hand, a large majority in favor of alternative 2, that is to say reduction of the period to 2 years even where the priority period was maintained at 1 year. It was therefore decided to maintain only the wording of alternative 2 in the next document.

120. Several delegations emphasized the need, both for breeders and users, to reduce as far as possible the period of uncertainty resulting from the lack of an application for protection or the lack of a final decision. It was also noted that the provisions of Article 6 on distinctness (worldwide criterion) and novelty (non-prejudicial character of disclosure and exploitation within the limits of certain periods of time) meant that priority had less effect in respect of plant variety protection than in other fields.

Article 13

121. As a result of comments on repetitions in paragraphs (2) and (3), the Office of the Union submitted the following revised text to the Committee:

"(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). Where relevant, the denomination proposed shall be that which has already been proposed or registered for the purpose of protection in another member State of the Union or for the purpose of entry in an official register of varieties of the member State of the Union concerned or another member State of the Union, or openly used in the exploitation of the variety.

"(3) If the proposed denomination is found unsuitable, the authority shall require the breeder to propose another denomination within a prescribed period of time.

"(4) The authority shall register the denomination at the same time as it grants the right."

[Paragraphs (4) et seq. of the basic document to be renumbered.]

Article 14

122. It was noted by one delegation that the Article could prove useful for States considering accession to the Union and in which considerations of agricultural policy could require plant variety protection to be subject to

measures regulating the marketing of varieties. It was therefore proposed to maintain the Article.

123. A further delegation said that it had made the same analysis and come to the opposite conclusion.

124. It was decided to maintain the proposal to delete Article 14 in the next document and to state in the commentary that views were divided.

Documentation for the Fourth Meeting with International Organizations

125. Discussions were based on document CAJ/XXIV/3.

126. The Committee requested the Office of the Union to prepare for the fourth Meeting with International Organizations and for the forthcoming session of the Committee a document containing the new text proposed for the Convention, together with short explanations.

Documentation for the Joint WIPO/UPOV Meeting on the Relationship Between Patent Protection and Plant Variety Protection

127. Discussions were based on document CAJ/XXIV/4 distributed in session in English only.

128. The Vice Secretary-General referred to the decisions taken by the governing bodies of UPOV and WIPO as regards the joint meeting and explained the background to document CAJ/XXIV/4, emphasizing that discussions were to be held between the Office of the Union and the International Bureau in accordance with a procedure that ensured strict equality of the parties.

129. The Committee noted the information given by the Vice Secretary-General.

130. A number of delegations congratulated the authors of document CAJ/XXIV/4 and expressed the wish that the next version should center more on the problems to be resolved for the future.

Date and Program for the Twenty-fifth Session of the Committee

131. The Committee agreed to propose to the Consultative Committee that the fourth Meeting with International Organizations be extended by one day; the meeting would then be held on October 9 and 10 and that of the Administrative and Legal Committee from October 11 to 13. However, the Committee would begin its work as of the 10th if the fourth Meeting should finish earlier. [The Consultative Committee agreed with those recommendations at its thirty-ninth session on April 14, 1989.]

132. Subject to new developments, the program will comprise revision of the Convention and a report by the Vice Secretary-General to the Committee to inform it of progress in preparing the joint meeting.

133. This report has been adopted by correspondence.

[Annexes follow]

ANNEX I/ANNEXE I/ANLAGE I

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V. OFFICE OF UPOV/BUREAU DE L'UPOV/BUERO DER UPOV

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Mr. A. HEITZ, Senior Counsellor
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Mr. Y. HAYAKAWA, Associate Officer

[Annex II follows/
L'annexe II suit/
Anlage II folgt]

ANNEXE II

ARTICLE 4

Text Proposed by the Office of the Union
on the Basis of the Discussions of April 10, 1989

(1) This Convention shall be applied to

- [Alternative 1] all botanical species.
[Alternative 2] the whole plant kingdom.
[Alternative 3] all varieties.

(2) Any member State of the Union may, under the following conditions, opt for a progressive implementation of the provision of paragraph (1):

(a) it shall notify the Secretary-General of this fact when depositing its instrument of ratification, acceptance or approval of this Act or when making a request under Article [32(3)] of this Act*;

(b) it shall, at the same time, notify the Secretary-General of its proposed calendar for the progressive implementation of the provision of paragraph (1);

(c) it shall, on the entry into force of this Act in its territory, apply the provisions of this Convention to at least [twenty] botanical species of economic importance;

(d) it shall, when depositing its instrument of ratification, acceptance or approval of or accession to this Act, undertake to apply the provisions of this Convention to [Alternative 1: all botanical species] [Alternative 2: the whole plant kingdom] [Alternative 3: all plant varieties] within ten years from the date of entry into force of this Act on its territory.

(3) Notwithstanding the provision of paragraph (1), any State not bound by the 1961 Act of the Convention, as amended by the Additional Act of 1972, or by the 1978 Act may, under the following conditions, opt, on account of exceptional difficulties, for a limitation of the application of the provisions of this Convention to the species of importance or likely to become of importance to the domestic economy of that State and to the trade between that State and the other member States of the Union:

(a) it shall notify the Secretary-General of this fact prior to depositing its instrument of ratification, acceptance or approval of this Act or when making a request under Article [32(3)] of this Act [request for advice on the conformity of the legislation with the Convention];

(b) it shall, at the same time, notify the Secretary-General of the nature of the difficulties encountered and of its proposed calendar for the progressive application of the provisions of this Convention to the species concerned, and the Council shall state its position on the reasons and the calendar, and thereafter periodically review these;

(c) it shall, on the entry into force of this Act in its territory, apply the provisions of this Convention to at least [ten] botanical species.

* This is a request for advice on the conformity of the legislation with the provisions of the Convention.