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DC/PCD/3
ORIGINAL: English
DATE: March 28, 1980

INTERNATIONAL UNION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS

GENEVA

INTERNATIONAL CONVENTION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS OF DECEMBER 2, 1961, AS REVISED AT GENEVA ON NOVEMBER 10, 1972, AND ON OCTOBER 23, 1978 ("REVISED TEXT OF THE CONVENTION")

Documents Issued After the Diplomatic Conference held in Geneva from October 9 to 23, 1978

PROVISIONAL SUMMARY MINUTES
OF THE MEETINGS OF THE PLENARY
OF THE GENEVA DIPLOMATIC CONFERENCE
ON THE REVISION OF THE INTERNATIONAL CONVENTION
FOR THE PROTECTION OF NEW VARIETIES OF PLANTS
(IN ENGLISH)

prepared by the Office of the Union

Annex I to this document contains, in English, the provisional summary minutes of the sixteen meetings of the Plenary of the Geneva Diplomatic Conference on the Revision of the International Convention for the Protection of New Varieties of Plants.

Annex II to this document contains an index which shows the name of each speaker and, opposite the name, the country or organization of the speaker, the number of each paragraph containing the provisional summary minutes of an intervention of that speaker and an indication of the language in which the intervention was made.

Each speaker is requested, in accordance with the provisions of Rule 44 of the Rules of Procedure (document DC/16), as adopted by the Diplomatic Conference, to inform the Office of the Union of any suggestions for changes in the minutes of his or her interventions. The Office of the Union would appreciate receiving any such suggestions by July 1, 1980.

The French and German versions of the provisional summary minutes are in preparation and are expected to be available during the month of May 1980. They will be sent to all those speakers who made interventions in those languages and, on request, to any other speakers.

The final summary minutes of the meetings of the Plenary of the Geneva Diplomatic Conference will be established with due regard to the suggestions so communicated and will appear in the Records of the Geneva Diplomatic Conference.

[Two Annexes follow]

PLENARY* OF THE GENEVA DIPLOMATIC CONFERENCE ON THE REVISION OF THE INTERNATIONAL CONVENTION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS

President: Mr. H. SKOV (Denmark)

Vice-Presidents: Dr. D. BÖRINGER (Federal Republic of Germany)
Mr. P. W. MURPHY (United Kingdom)

Secretary General: Dr. H. MAST (UPOV)

FIRST MEETING

Monday, October 9, 1978,

morning

Welcome Address by the President of the Council of UPOV

1.1 Mr. H. SKOV, as President of the Council of UPOV, said how privileged and pleased he was to welcome the Delegates to the Conference and to the beautiful city of Geneva. This Conference to revise the International Convention was being held on the 150th anniversary of the birth of Henri Dunant, a great son of Geneva and the founder of the Red Cross. The aims of Henri Dunant had been exclusively humanitarian whereas those of the International Convention had a more economic aspect. Mr. Skov expressed the view that it was nevertheless perfectly justifiable to use the expression "city of Henri Dunant" to describe the

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* NOTE: In these minutes of the Plenary

(i) "UPOV" means the International Union for the Protection of New Varieties of Plants;

(ii) unless otherwise indicated, "President" means Mr. H. SKOV (Denmark)

(iii) "Convention" means the International Convention for the Protection of New Varieties of Plants of December 2, 1961, and the Additional Act of November 10, 1972

(iv) "Draft" means the draft revised text of the Convention as appearing in document DC/3;

(v) unless otherwise indicated, the Article numbers used are those used in the Draft.

meeting place of a Diplomatic Conference which would concern itself with the protection of new varieties of plants. He was sure that plant breeders were able to contribute to the alleviation of the malnutrition, hunger or starvation from which more than half of the world's population suffered. He instanced the development of new varieties of wheat which had changed Mexico from a wheat-importing to a wheat-exporting country, of new varieties of potato which were resistant, for example to wart disease or nematodes, of new varieties of maize which were more cold-tolerant, and of new varieties of cereals with an improved protein content. Much, however, remained to be done. Breeders might eventually develop plants, other than leguminous plants such as peas and clovers, which were capable of fixing nitrogen in the soil. If this dream could be achieved it would reduce the demand for artificial fertilizers whose manufacture was so costly in terms of energy. Mr. Skov noted that plant breeders were not alone in their work, being supported first by those responsible for seed certification, for seed testing and for gene banks, and secondly by all the researchers in plant and soil sciences whose findings were, in many cases, a precondition for the effective use of new varieties of plants.

1.2 Mr. Skov stated that daily work had begun in Geneva following the entry into force of the Convention in 1968. At first there had been four member States, a little later six, and now there were ten. It had quickly become apparent that, in order to widen the membership of UPOV, talks had to be initiated with other States. A meeting of member and non-member States had been held in 1974. The discussions had shown that it might be desirable to make some minor changes in the Convention. The Council of UPOV had therefore established a Committee for the Interpretation and Revision of the Convention which had met six times under his chairmanship. He expressed his appreciation of the goodwill and spirit of cooperation shown by all who had taken part in those meetings. The Committee had submitted a draft to the Council of UPOV in December, 1977, and this draft*, after a few amendments had been made, had been transmitted to all States and organizations invited to this Diplomatic Conference.

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* Document DC/3 of January 30, 1978 - "Draft Revised Convention"

1.3 Mr. Skov, having again welcomed the Delegates to the Conference and to the city of Henri Dunant, invited Dr. A. Bogsch, Secretary-General of UPOV, to preside over the introductory business of the Conference.

2.1 Dr. A. BOGSCH (Secretary-General of UPOV) invited delegates to consider document DC/1, the Provisional Agenda. He noted that item 1 of the agenda: "Welcome Address by the President of the Council of UPOV," had just taken place.

2.2 Dr. Bogsch said that the next item was: "Opening of the Conference by the Secretary-General of UPOV." He declared open the Diplomatic Conference.

2.3 Item 3 provided for the "Adoption of the Rules of Procedure" which were set out in document DC/2. Dr. Bogsch explained that a further document, DC/13, containing proposals to amend Rule 14 would have to be considered. He then called the individual Rules in sequence.

3. Rules 1 to 4 were adopted as appearing in document DC/2, without discussion.

4. Mr. W. GFELLER (Switzerland) questioned the reference to "Beobachterdelegation" in the German text of Rule 5, whereas the title referred to "Beobachterorganisationen."

5. Dr. A. BOGSCH (Secretary-General of UPOV) confirmed that the text should be aligned with the title of the Rule in question.

6. Subject to the amendment referred to in paragraphs 4 and 5, Rule 5 was adopted as appearing in document DC/2.

7. Rules 6 to 13 were adopted as appearing in document DC/2, without discussion.

8. Dr. D. BÖRINGER (Federal Republic of Germany) introduced document DC/13 which contained his Delegation's proposal for the amendment of Rule 14(1) and (2). It was the view of his Delegation that the wording of that Rule, which established the membership of the Steering Committee, was rather too narrowly drawn, and that the wording should be slightly widened to allow the Chairmen of any working groups which were created to participate in the work of the Steering Committee at least while the respective working group remained active. His delegation also considered

that the Vice-Presidents of the Conference should be members of the Steering Committee ex officio.

9. Subject to the replacement of paragraphs (1) and (2) by the proposal contained in document DC/13, Rule 14 was adopted as appearing in document DC/2.

10. Rules 15 to 47 were adopted as appearing in document DC/2, without discussion.

11. Mr. R. ROYON (CIOPORA) asked, with reference to Rule 48, that representatives of the observer organizations be authorized to participate in meetings of working groups, in particular with regard to Article 5, Article 7 and Article 13 of the Convention. Highly technical questions were likely to come up in such meetings and if the observer organizations were able to comment immediately on such questions this would undoubtedly dispense with the need for lengthy interventions in the Plenary, the work of which might otherwise be delayed thereby.

12. Dr. C.-E. BÜCHTING (ASSINSEL) said that ASSINSEL wished to support the request made by the representative of CIOPORA.

13. Dr. A. BOGSCH (Secretary-General of UPOV) advised the Conference that to meet such a request would amount to a change in the Rules and that a proposal to that effect would have to be made by one of the member or observer delegations.

14. Dr. D. BÖRINGER (Federal Republic of Germany) said that he had a certain understanding for the wish of the observer organizations to take an active part in the work of the Conference. He thought, however, that such participation could be assured by intensive discussion of most of the articles in the Plenary. He favored the adoption of Rule 48 on the understanding that the matter of participation by the observer organizations should perhaps be rediscussed later in the proceedings.

15. Subject to the understanding stated by the Delegation of the Federal Republic of Germany and mentioned in the preceding paragraph, Rule 48 was adopted as appearing in document DC/2.

16. Rules 49 and 50 were adopted as appearing in document DC/2, without discussion.

17. Dr. A. BOGSCH (Secretary-General of UPOV) said that the next item of the Provisional Agenda, item 4, was: "Election of the President of the Conference." He invited proposals in this respect.

18. Dr. D. BÖRINGER (Federal Republic of Germany) proposed that the Chairman of the Committee of Experts on the Interpretation and Revision of the Convention, who was also President of the Council of UPOV, be elected President of the Conference.

19. Mr. P. W. MURPHY (United Kingdom) said that he wished to support the proposal of the Delegation of the Federal Republic of Germany that Mr. Skov be elected President of the Conference.

20. Mr. B. LACLAVIERE (France) said that he also wished to support the proposal of the Delegation of the Federal Republic of Germany. He stressed that Mr. Skov, having participated in the Paris Conference of 1961, was in the best position to guide the discussions of the Conference.

21. Mr. S. MEJEGÅRD (Sweden), Mr. J. F. VAN WYK (South Africa) and Mr. K. A. FIKKERT (Netherlands) each supported the proposal of the Federal Republic of Germany.

22. Dr. A. BOGSCH (Secretary-General of UPOV), noting that there were no other proposals and no objections, said that it was a great pleasure and honor to declare that Mr. Skov, Head of the Delegation of Denmark, had been unanimously elected President of the Conference. He congratulated Mr. Skov and invited him to take the Presidential Chair.

23.1 The PRESIDENT thanked the Conference for the confidence shown in him and undertook to do his utmost to ensure, with the help of all present, a successful outcome to the proceedings.

23.2 The President said that the next item on the Provisional Agenda, item 5, was: "Adoption of the Agenda," namely document DC/1. He invited delegates to adopt the Agenda with the reservation that item 7: "Consideration of the First Report of the Credentials Committee" would have to be taken at some later stage in the proceedings.

24. Subject to the reservation referred to in the preceding paragraph the Agenda was adopted as appearing in document DC/1.

25.1 The PRESIDENT said that the first part of the next item of the Agenda, item 6(i), was: "Election of the Vice-Presidents of the Conference." He wished to propose that Dr. Böringer from the Delegation of the Federal Republic of Germany and Mr. Murphy from the Delegation of the United Kingdom be elected Vice-Presidents of the Conference.

25.2 The President, noting that there were no other proposals and no objections, congratulated Dr. Böringer and Mr. Murphy on their unanimous election as Vice-Presidents of the Conference.

26. The PRESIDENT then asked for proposals in respect of item 6(ii) of the Agenda: "Election of the Members of the Credentials Committee." He advised the Conference that Rule 11 provided that the Credentials Committee should consist of five members elected from among the Member Delegations.

27. Mr. W. GFELLER (Switzerland) proposed Mr. Jeanrenaud from his Delegation.

28. Dr. D. BÖRINGER (Federal Republic of Germany) proposed Dr. Graeve from his Delegation.

29. Mr. P. W. MURPHY (United Kingdom) proposed Mr. Parry from his Delegation.

30. Mr. B. LACLAVIERE (France) proposed Mr. Avram from his Delegation.

31. Mr. J. F. VAN WYK (South Africa) proposed Mr. Marx from his Delegation.

32. The PRESIDENT, noting that there were no other proposals and no objections, congratulated Mr. Jeanrenaud, Dr. Graeve, Mr. Parry, Mr. Avram and Mr. Marx on their unanimous election as members of the Credentials Committee.

33. The PRESIDENT then asked for proposals in respect of item 6(iii) of the Agenda: "Election of the Members of the Drafting Committee."

34. Dr. A. BOGSCH (Secretary General of UPOV) reminded the Conference of the need for extreme care in selecting the five member delegations and two observer delegations required, in accordance with Rule 12(2), to serve in the Drafting Committee, to ensure a proper representation for each of the three Conference languages. He therefore proposed that the election be postponed to allow the necessary consideration to be given to proposals for membership.

35. *The proposal of the Secretary-General of UPOV that further consideration of item 6(iii) of the Agenda should be deferred, as mentioned in the preceding paragraph, was adopted.*

36. *As foreseen in paragraph 23 above consideration of item 7 of the Agenda was deferred.*

37. The PRESIDENT said that he wished, before embarking on item 8 of the Agenda, to invite any delegations or observer organizations wishing to make a general statement to do so.

General Statements

38.1 Dr. C.-E. BÜCHTING (ASSINSEL) said that ASSINSEL appreciated having been invited to the Conference in which those engaged practically in plant breeding had a great interest. ASSINSEL had commented in writing* on the Draft Revised Convention contained in document DC/3 and he could therefore be brief. The comments submitted had been based on several years' experience. ASSINSEL had been very pleased to note the growth in interest in plant variety protection and the fact that the basis of the Conference was to increase the number of member States of UPOV. This was ASSINSEL's most important wish. It therefore considered that the Conference should principally concern itself with revising the Convention in such a way that the maximum number of States could adhere thereto, and especially those States which had so far seen difficulties in doing this because their national legislation was not in complete conformity with the Convention. ASSINSEL had noted with satisfaction that the Council of UPOV had largely been guided by such considerations in the Draft Revised Convention. Dr. Büchting said that he had in mind, for example, the Council's interpretation of Article 7** and the new transitional provisions proposed in Articles 34A and 36A. ASSINSEL sincerely hoped that such provisions would enable further States, such as the United States of America and Canada, to become member States of UPOV.

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* Annex III to document DC/7 of July 3, 1978.

** Page 18 of Annex I to document DC/3.

38.2 The speaker went on to say that on points of detail ASSINSEL had restricted itself to a few expressions of opinion which the Conference would find in the written comments*. ASSINSEL considered that the regulation of certain details had to be left to national legislation. If the Convention was to achieve its international vocation it must provide at least some opportunity for regulating national peculiarities.

38.3 The speaker expressed his gratitude for the consideration shown by Dr. Böringer, during the adoption of Rule 48, for the request made by the observer organization that they should be allowed to participate in specific working groups. ASSINSEL wished to underline that request in the belief that its practical experience should be brought to bear in such discussions.

38.4 Dr. Büchting concluded by expressing the wish that the outcome of the Conference would be a complete success and that a much larger number of States would be present at the next Diplomatic Conference.

39.1 Dr. E. FREIHERR VON PECHMANN (AIPPI) said that he wished to express the gratitude of his organization, the International Association for the Protection of Industrial Property, at having been invited to the Conference. The AIPPI, which had been in existence for almost one hundred years and which had more than three thousand members from all over the world, was particularly dedicated to the promotion and strengthening of the protection of intellectual achievements beneficial to mankind. His organization had therefore welcomed the creation of a special title of protection to provide for the needs of plant breeders. No one could contest the fact that progress was best promoted by strong legal protection of inventive achievements. The personal initiative and risk capital necessary for making purely technical inventions or for breeding new varieties of plants would only be forthcoming if effective protection was available for the results of such work. Consequently AIPPI was committed to ensuring that protection was available for the end product of plant breeding programs.

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* Annex III to document DC/7 of July 3, 1978.

It was a grave injustice for the breeder if his right in a new variety could be circumvented by importing the end product from States where plant variety protection was unobtainable or non-existent. With regard to ornamental plants, such as roses and carnations, the situation had already become unbearable. In its Resolution* AIPPI had drawn a parallel with process protection in the field of chemical and pharmaceutical patents where it had long been recognized that it was essential if effective protection was to be afforded to extend protection to the end product.

39.2 The speaker said that he also wished to draw attention to a second problem which was of concern to his organization. Members of AIPPI particularly involved with plant variety protection had noted that the question of variety denominations frequently caused problems in the practical application of that protection. For this reason it supported the aim of breeders' organizations that variety denominations should be regulated in the most simple and neutral way possible. It also advocated that it should be possible to add a fancy trade mark to a variety denomination. Whereas the latter characterized the product as the "generic name" the former could serve to indicate the specific firm from which the product originated, thus assuming a warranty function for the quality of the product as occurred for other trade products. In the pharmaceutical field, for example, it had been recognized that it was necessary to allow, in addition to the chemical denomination for the active ingredient, for protection of the producer of the actual product by means of a trade mark for that product.

39.3 Dr. Freiher von Pechmann concluded by wishing a successful outcome to the Conference. He hoped that the Conference would always bear in mind in its discussions, which he understood might not be in camera, that it wished to improve what was a framework for legislation created for the protection of plant breeders, having to be applied in everyday practice in the simplest manner possible whilst guaranteeing a fair balance between the interests of all parties concerned.

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* Annex II to document DC/7 of July 3, 1978.

40. Dr. Z. SZILVÁSSY (Hungary) congratulated the President on his election. He was certain that the President's extraordinary knowledge, international experience and personal abilities would guarantee the successful conduct of the Conference. The Delegation of the Hungarian People's Republic was interested in that success. In his country increasingly valuable results had been achieved in the selection of plant varieties and in the breeding of animals. It had therefore been essential to introduce legislation to provide protection for the practical achievements of Hungarian breeders. Legislation providing patent protection for new varieties of plants and animal breeds had been enacted in his country about a decade ago. Official classification of new varieties of plants and animal breeds had been practiced for some time and the regulations governing that work were currently being brought up to date. Experience gained at the international level regarding the examination of new varieties of plants and animal breeds was being taken into account and it was hoped that it would be possible, as international cooperation increased, for Hungary to accept the results of examinations performed by the competent authorities of other States and for other States to accept the results of examinations performed by the Hungarian authorities.

41. The speaker went on to say that the new regulations would also develop the material and moral recognition of the right of the breeder. It was felt that the application of national legislation would lead to participation by the Hungarian People's Republic in the international cooperation inherent in the Convention to be revised by the Diplomatic Conference. At various UPOV meetings the Hungarian Delegation had declared that the Hungarian Government was considering the possibility of accession but that some of the provisions of the Convention were seriously affecting its decision in the matter. The Hungarian Delegation had therefore proposed, during sessions both of the UPOV Council and of the Committee of Experts which had prepared the Diplomatic Conference, the introduction of amendments which would permit Hungary to accede without having to change its national legislation in a major way. The fact that the essence of the amendments proposed had been accepted by the Committee of Experts and had been included in the Draft to be discussed by the Conference had been noted with great pleasure. His Delegation particularly appreciated Article 34A which, if adopted, would allow its national legislation to provide, for the same genus or species, both of the forms of protection mentioned in the Convention. It had also greatly appreciated the possibility provided in Article 6(1)(b)(i) to introduce the so-called "period of grace" of one year. The adoption of those and other amendments sought by the Hungarian People's Republic

would in all probability lead to a situation in which its Government would find no difficulty in acceding to the Convention.

42. The speaker concluded by expressing the sincere appreciation of the Hungarian Delegation to the main bodies of UPOV and to its Committee of Experts for having prepared, under the guidance of the President, such excellent material as a basis for the work of the Diplomatic Conference. His Delegation was delighted to be able to participate in an observer capacity and was convinced that the outcome would be successful. It hoped that it would be possible for it to express its opinion in more detail in the course of the work.

43. Mr. SCHLOSSER (United States of America) extended the warmest appreciation of the United States Delegation and of its Government to the member States of UPOV for their invitation to the Conference which was of great importance. He also thanked the member States and the Secretariat for the courtesy and cooperation extended to his Delegation at past UPOV meetings.

44. The speaker said that his Delegation had given the most careful consideration to the provisions of the Convention. It could not imagine a more important objective than the promotion of plant breeding to which the Convention made a significant contribution. The fact that the Convention simultaneously protected the public interest was just as important. During the past few years the United States Delegation had offered suggestions for modifying the Convention in ways which it believed would enhance the attractiveness of the Convention to non-member States without detracting from its vitality. Many problems had been settled during the preparatory meetings. His Delegation would offer suggestions for the possible solution of the few complex and significant problems which nevertheless remained. It felt confident that these would be resolved given the spirit of cooperation which had prevailed in the past.

45. In conclusion Mr. Schlosser said that he was sure that the member States, the observer States and the international organizations assembled at the Conference shared as a common objective the creation of a worldwide Union.

46. Mr. R. KORDES (CIOPORA) expressed the appreciation of his organization at having been invited to the Conference. CIOPORA welcomed the aim of widening the membership of UPOV which, for the breeders, would increase the opportunities to obtain protection. Both Dr. Büchting, the President of ASSINSEL, and Dr. von Pechmann had referred extensively to the problems of the breeder and he had therefore noted with thanks the positive reaction of the President of the German Federal Varieties Office, Dr. Böringer, regarding the possibilities for collaboration.

47. The speaker concluded by stating that as far as the course of the Conference was concerned CIOPORA would just say at the outset that tolerance was necessary if progress was to be made with the aim in sight.

48. Dr. D. BÖRINGER (Federal Republic of Germany) declared in the name of the German Delegation that although the ten years which had passed since the entry into force of the International Convention for the Protection of New Varieties of Plants might seem a relatively short period by comparison with the other Conventions in the field of industrial property it should nevertheless be possible to draw up a balance sheet of what had so far been achieved. Already at this stage a decision would be taken which would be of lasting importance for the further development of the Union which, without doubt, had developed in a most remarkable way during the years since its establishment. The Secretaries-General, the Vice Secretaries-General and the other officers of the Secretariat had played an important part in this, showing the energy and the wealth of ideas which were needed in abundance especially by a young, rapidly expanding organization. It was a very pleasant duty for him, as the representative of the Government of the Federal Republic of Germany, to thank them all for the work done.

49. The speaker said that in the past ten years UPOV had above all shown itself to have great practical capabilities. In harmonizing the different opinions of the member States it had been necessary to resolve several practical questions. The successful intensification of cooperation at the technical level would have been impossible without the foundation stone of the mutually agreed Guidelines for the Conduct of Tests for Distinctness, Homogeneity and Stability. In that area, in particular, the Union and the Technical Working Parties set up by it had done pioneer work, the importance of which could not be overestimated and the influence of which stretched way beyond the present member States. Expressing every respect for that

excellent work Dr. Böringer said that it seemed that the time had come for the Union to give greater attention to other problems. This had been evident, for example, in the discussions which had taken place regarding Article 13 during the preparation of the Conference--discussions which would surely be continued by the Conference itself. Another example was the recent discussions concerning the relationship between plant variety protection and competition law. He saw as a further new task for the Union a public relations exercise to explain the benefits arising from plant variety protection. The degree to which technological development had been fostered by the protection of industrial property by means of patents was well-known, as were the many economic values flowing from such protection. Many countries, however, still hesitated to apply this practical experience to the field of plant variety protection. One of the main aims of the Union, if it was not to eventually stagnate, must be to counteract that attitude of hesitation. The revision of the Convention which was about to begin would have to take those points into account. New regulations would have to be prepared in such a way that in effecting the necessary harmonization of rights no unnecessary obstacles were erected for States wishing to join the Union.

50. Dr. Böringer expressed the hope of his Government that it would therefore be possible to arrive at the necessary compromises, including compromises between those member States which wished the protection system to be extended and those whose special requirements might put into question what had so far been achieved. But it was not only the regulations to be decided by the Conference which were important for the further development of the Union. In the recent past the importance of having a clear definition of the responsibilities of the various bodies of the Union had shown itself. His Delegation hoped that the changes provided for would not influence the principles which had already proved their value. In the light of all those considerations the Government of the Federal Republic of Germany held the view that the Conference was particularly important. It was convinced that the spirit of confidence and openness which had characterized the preparatory work of the Committee of Experts on the Interpretation and Revision of the Convention would also determine in a decisive manner the course of the Conference. The Delegation of the Federal Republic of Germany would do its utmost to help to bring it to a successful conclusion.

51. Dr. D. BÖRINGER (European Economic Community) said that, as a representative of a country which was not only one of the founder members of the Union but which also currently presided over the Council of the European Communities, he wished to make a declaration on behalf of the European Economic Community which was participating in the Conference as an observer. The Community welcomed the work already accomplished within the framework of UPOV. It expressed its satisfaction at the holding of the Conference and supported its aims. It supported the preparation of a revised text of the Convention which, on the one hand, would contain some clarifications and which, on the other hand, would include changes which would ensure that the Convention functioned well and which would permit additional States to participate. Dr. Böringer assured the Conference that the member States of the Community which were represented and the representatives of the Community who were present would do their best to contribute to a successful conclusion to its work. They would continually bear in mind the rules binding the member States of the Community regarding the free movement of goods and the rules governing competition, and also the provisions regarding trade in seeds and planting material. The Community wished the Conference a fruitful course and success in its work.

52. Mr. H. AKABOYA (Japan) congratulated the President on his election. He said that he would like to report on the latest developments in the protection of new varieties of plants in Japan where the necessity for such protection had been recognized for some time. Japan had been represented as an observer at sessions of the Council of UPOV and of the Committee of Experts on the Interpretation and Revision of the Convention and had shown a deep interest in developments in other countries and in the progress of the revision of the Convention. At these meetings the Japanese Delegation had reported on its Government's preparations to establish a system for the protection of new varieties of plants. A Government Bill--The Seeds and Seedlings Bill--had finally been adopted at the 84th plenary session of the Diet in June 1978. The Japanese Government was making preparations to bring the Seeds and Seedlings Law into force by the end of the year and he was therefore pleased to say that Japan was ready to participate in a positive manner as an observer in the discussions on the revision of the Convention. The speaker concluded by stating that it was his Delegation's sincere hope and conviction that the expert guidance of the President would help in bringing the Conference to a successful conclusion, whatever difficulties might be encountered.

53. Mr. V. DESPREZ (FIS) expressed the gratitude of the International Federation of the Seed Trade for having been invited to participate as an observer in the work of the Conference. Since it seemed that the Federation probably would not have an opportunity to participate in the committees or working groups established to treat specific matters, which were nevertheless basic to the future of its members, he asked the Conference to refer back to the Federation's written comments which were contained in Annex IV to document DC/7.

54. Mr. Desprez went on to say that the aim of the Conference was clearly to facilitate the admission of further member States. As a worldwide Federation with 50 member States the International Federation of the Seed Trade was certainly very much in favor of that aim but it wished just as strongly that the Conference should not weaken the Convention too much and above all that its nature should not be changed. He felt that he could subscribe to the views expressed on this question by Dr. Böringer on behalf of the Delegation of the Federal Republic of Germany. His Federation could not, however, fully subscribe to the views expressed by Dr. Böringer as a representative of the European Economic Community. He did not believe that the aim was to create a second Convention within the Convention which would really change the nature of the Convention. Although the aim of the Conference was clearly to facilitate the admission of future member States there were equally good grounds for taking the opportunity to correct those provisions which gave rise to difficulties in their application. The speaker said that he did not wish to expand on the various matters dealt with in the Federation's written comments which were available to the Conference.

55. The speaker said that the Conference might be surprised that the International Chamber of Commerce represented at this gathering by the FIS, should be suggesting solutions which were frequently very close to those put forward by ASSINSEL or by other plant breeders' organizations. The seed trade had undergone a significant change several years earlier when it had recognized that contractual production was replacing the gathering of seed in the wild and that the ecotypes were generally being outyielded by varieties. The breeding of new varieties of plants was the source of 50 percent of the progress seen in agriculture in the last 50 years. For their part plant breeders had recognized that the international seed trade was indispensable as a channel for popularizing their new varieties with and distributing them to the final consumer. Varieties were becoming more and more sophisticated.

New techniques such as androgenesis, meristem culture, cell fusion and cloning were being applied. The international and national trade had need of a strong technical structure which it had found in the technical services of the breeders. The trade fulfilled its responsibilities by multiplying stocks of varieties and by ensuring that the demands of consumers were met at reasonable prices which were guaranteed by the intense competition between varieties.

56. The speaker concluded by saying that in its written comments his Federation had drawn the attention of UPOV to some very specific matters. He hoped that the message of the FIS would be heard since it would be paradoxical to see UPOV whose task was at all events the protection of new varieties of plants, refuse to take account of certain proposals put forward by breeders and the trade, those proposals having been generously accepted by the consumers who had recognized the benefit for them.

57. Mr. R. TROOST (AIPH), speaking in the name of the International Association of Horticultural Producers and particularly of producers of ornamental plants, expressed appreciation at the large number of countries represented at the Conference. The high level of attendance proved that the preliminary studies devoted to the revision of the Convention had been favorably received, especially in those countries not so far cooperating under that Convention. He also saw the extension of the number of countries in which plant breeders' rights could be granted as an important development for the large group of horticultural producers in that it might stimulate breeders to create new and better propagating material for commercial production. It would also provide a broader financial basis for the activities of breeders and should thus contain the costs incurred by individual producers. Finally it was of the greatest interest for the breeders of new varieties themselves.

58. The speaker referred to his Association's letters commenting on the Draft, and reproduced in Annex I to document DC/7 and in document DC/10. Both letters made reference to the protection of the final product, in particular of ornamental plants, and made it clear that horticultural producers were not against such protection in cases where the breeder would not otherwise be adequately compensated. At first his Association had considered it advisable that provision should now be made in the text of the Convention itself, in Article 5, subject to the inclusion of two guarantees: first that royalties should not be charged on both the propa-

gating material and the final product; secondly that the breeder should not be allowed to impose on the producer a requirement to label each ornamental plant. Subsequently it had taken the view that the extension of the number of countries in which plant breeders' rights could be granted was of the utmost importance and that to amend Article 5, for instance by making protection of the final product mandatory for ornamental plants, might adversely influence the possibility of extending the number of participating countries. The two guarantees which he had mentioned previously would still be necessary where the final product was protected under national legislation. The thought that the revision of the Convention might maximise the opportunities to obtain protection had also inspired his Association's wish that Article 3 should refer only to the principle of national treatment, which, additionally, seemed more in keeping with other Conventions in the field of industrial or intellectual property.

59. Mr. Troost said that he would like to add a few words about variety denominations and trademarks. For his Association this was a question of two separate fields of law. For the sake of clarity it might be better to refrain from referring to or making rules for trademark rights in the Convention. Furthermore as far as denominations were concerned the most restrained wording should be used in the Convention which should not impose any obligations on the breeders of new varieties in this respect even should the breeder wish to use the same indication as denomination and trademark.

60. Finally the speaker endorsed earlier remarks concerning the Rules of Procedure on the basis of which participation in the Conference by the Observer organizations would be rather limited. He hoped that the Conference would be a great success.

61. Mr. R. LOPEZ DE HARO (Spain) congratulated the President on his election and on the qualities demonstrated by him as Chairman of the Committee of Experts which had proposed the Draft text for consideration by the Conference. Delegations from Spain had participated closely and with great interest in that preparatory work. As a result work in his country on legislation to prepare for the protection of new varieties of plants had been facilitated to such a degree that he wished to take advantage of that moment to announce to the Conference that Spain had begun the process of applying to accede to the Convention. In view of this it could be said that Spain had a very special interest in the work of the Conference in which his Delega-

tion would participate to its best effect in order that there should be a successful outcome. His Delegation favored a study in depth which would enable the Conference to adopt a new Convention, based on the Draft, with the qualifications and modifications necessary to allow further States to participate in the Union. Finally the speaker congratulated the Secretariat and the President personally on the preparatory work and said that his Delegation looked for a successful outcome to the Conference, leading to the final objective of a universal Union.

62. Mr. W. T. BRADNOCK (Canada) said that the Government of Canada very much appreciated the opportunity to participate in the Diplomatic Conference as an observer. The Conference happened to be taking place at a particularly important time from the Canadian point of view in that a Plant Breeders' Rights Bill had just been drafted for presentation to the Canadian Parliament in the session due to begin later that month. In drafting the Bill an attempt had been made to conform with the Convention. Although some difficulties had been posed by the existing Convention it was believed that these would be overcome by the revisions which it was hoped the Conference would make.

63. Mr. Bradnock went on to say that it was the intention that Canada would apply for membership of the Union once the Canadian Law was in force. He also wished to note Canada's great appreciation of the work done by the pioneers who established the Convention and set up the Union, developing along the way a wealth of expertise and knowledge which his country had been able to draw on and benefit from. Canada looked forward to becoming a member of the Union and to making its contribution.

64. Mr. J. FRISCH (Luxembourg) wished first to thank UPOV for its invitation to the Diplomatic Conference which had been accepted with pleasure. The Grand Duchy of Luxembourg had not yet signed the Convention but its government circles were fully aware of the necessity of UPOV for the country and they were convinced that sooner or later a solution would have to be found enabling Luxembourg to become a member of UPOV. A small country like his, however, came up against numerous problems and there were two which were currently causing some preoccupation. First there was the administrative and technical problem. The administrative and technical work involved in protecting new varieties of plants was too important to just be entrusted to an existing section of the Ministry. A special section would therefore be needed. Secondly there were the financial burdens comprising on the one hand participation in the common expenses of UPOV and, on the

other hand, the costs incurred in examining new varieties the subject of applications for protection. The major countries in UPOV could recover that expenditure by way of fees payable by breeders applying for protection of their varieties. For a small country like the Grand Duchy of Luxembourg such fees would be out of all proportion to the income which a breeder might count on receiving from his variety. As a result the probability of his country's being able to recover costs by way of fees was slight.

65. The speaker said that the Grand Duchy of Luxembourg would have to solve its difficulties either by way of a bilateral agreement concluded with a member State of UPOV to the effect that varieties protected in that member State were automatically protected in the Grand Duchy of Luxembourg, or by way of a plant breeders' right established at the level of the European Economic Community, in which case the ideal solution would be that varieties protected in one member State of that Community should be automatically protected in its nine member States. These were the only solutions available to his country and it was on this basis that those responsible in the Grand Duchy of Luxembourg in the matter of the protection of new varieties of plants hoped to find an answer to the question of Luxembourg's accession to UPOV. Mr. Frisch thanked UPOV for the efforts made on behalf of small countries, especially the proposal under Article 26 to reduce the contribution towards the common expenses and also the encouragement, under Article 29 and 30, of international cooperation in the examination of new varieties. He concluded by wishing complete success to the Conference.

66. Mr. F. SCHNEIDER (International Commission for the Nomenclature of Cultivated Plants of the International Union for Biological Sciences) said that the aims of the Commission he represented were the composing and editing of rules for the nomenclature of cultivated plants. Those rules were laid down in the International Code for Nomenclature of Cultivated Plants, issued for the first time in 1953 and most recently revised in 1969. The nomenclature of botanical and cultivated plants had been the subject of international discussion since the days of Linnaeus and Miller which meant since the second half of the 18th century. One might therefore say that he was representing a group of botanists with 200 years' experience concerning plant names. He very much appreciated being invited to attend the Conference and having an opportunity to put forward in UPOV circles his Commission's ideas and opinions on the nomenclature of cultivated plants. His Commission naturally had a special interest in all matters connected with Article 13 and he

hoped to participate in the discussions on that Article. He was certain that the decisions of the Conference would have an important influence on the International Code for Nomenclature of Cultivated Plants. Although he was less certain he hoped that the reverse would also be so.

67. Dr. R. M. MOORE (Australia) thanked the Union for having invited him to attend the Conference. The Australian Government was preparing plant variety protection legislation and had established a working group to draft regulations. A scheme had been prepared, based on internationally accepted criteria for novelty, uniformity and stability, to provide for the protection of plant varieties developed by sexual or asexual methods as a result of controlled breeding programs or of induced mutations. The scheme would enable a person who had developed a new variety to apply for the grant of a right confirming his sole ownership of that variety. Such rights would allow the holder to levy and collect royalties from persons selling or using new varieties registered under the scheme. At a meeting in August, 1978, the Australian Agricultural Council had agreed that the Minister for Primary Industry in the Australian Government should take early action to introduce suitable Commonwealth legislation. It was anticipated that such legislation would be prepared for submission to Parliament in spring 1979, that being autumn 1979 in Australia.

68. Dr. A. BEN SAAD (Libyan Arab Jamahiriya) expressed the gratitude of the Delegation of the Socialist People's Libyan Arab Jamahiriya at having been invited by UPOV to attend the Diplomatic Conference in which it had a great interest. It hoped that there would be a successful outcome to the Conference. His country supported international meetings and Unions and hoped to see UPOV fulfilling its commitments and its constructive role for the benefit of the international community It regretted, however, the fact that the Republic of South Africa, which practised racial discrimination, was a member of the Union, and moreover that the Republic of South Africa had been elected to serve in the Credentials Committee. This would seriously affect the desire of many countries, including the Socialist People's Libyan Arab Jamahiriya, which would like to join the Union but which could not do so under those circumstances. The speaker concluded by saying that his Country would maintain its firm stand against racial discrimination. Although the Conference was technical in nature it was nevertheless a Diplomatic Conference and it should observe all Resolutions voted by the United Nations Organization and by the World Community.

SECOND MEETING

Monday, October 9, 1978,

afternoon

69. The PRESIDENT suggested that discussion of Articles 1 and 2 should be deferred pending the distribution of two proposals which were in the course of being reproduced. Since many questions had been raised concerning Article 13, entitled Denomination of Varieties of Plants, he invited observer delegations and organizations to express their general views on that Article.

70. Dr. C.-E. BÜCHTING (ASSINSEL) said that the plant breeders who were grouped in ASSINSEL were most anxious to put forward their observations on Article 13. In their view that Article was not fundamental to plant variety protection legislation. It had been more debated and had been a greater hindrance to the actual management of plant variety protection than any other provision in the Convention. Long and difficult discussions had taken place on several occasions but so far it had not been possible to find a satisfactory solution. The Guidelines for Variety Denominations, as adopted by the Council of UPOV on October 12, 1973, had aggravated rather than improved the situation. In brief ASSINSEL believed that it would be sufficient to provide that the breeder had to submit a denomination for his variety, which denomination must not mislead or cause confusion, that the same denomination should be submitted in the different member States and that there should be coordination between the member States in this matter. Dr. Büchting said that ASSINSEL believed that its proposal agreed, in essence, with a proposal made by the Secretary-General of UPOV during the preparations for the Diplomatic Conference, whereby a clear separation was made between variety denominations and trademarks. ASSINSEL was advised that plant variety protection law and trademark law were two distinct fields and it wished particularly to support the elimination from Article 13 of all references to trademarks. In case the Conference could not, however, agree to adopt that approach he wished to comment briefly on the alternative proposal for Article 13, submitted by the Administrative and Legal Committee of UPOV and reproduced in document DC/4. ASSINSEL welcomed the recognition given in paragraph (4)(a) of that proposal to its

long-standing wish that breeders should not be required to renounce their rights to relevant trademarks when submitting variety denominations but only to refrain from asserting such trademark rights. In that paragraph three alternatives had been suggested regarding territorial effect. ASSINSEL would favor alternative 2, namely limiting the effect to the State in which the breeder had submitted the variety denomination.

71. Mr. R. ROYON (CIOPORA) said that CIOPORA could subscribe in a general way to the views just expressed by Dr. Büchting. Mr. Royon wondered whether there would be a further opportunity to discuss Article 13 and the other articles in the Draft in greater detail rather than by way of general statements. It had been precisely for that reason that he had asked earlier that the observer organizations be permitted to take part in the working groups and Committees which would be established to discuss certain points in the Draft.

72. Dr. H. H. LEENDERS (FIS) declared that the International Federation of the Seed Trade also agreed with the statement made by Dr. Büchting and supported Mr. Royon's desire for more detailed discussion. Should the Conference not be able to follow the point of view expressed by those representatives with regard to the alternative proposal for Article 13 reproduced in document DC/4 then his Federation would wish it to be noted that the Convention should not be restrictive in matters in which it was not applicable.

73. Mr. R. TROOST (AIPH) said that his Association believed it would be wise to delete from Article 13 all references to trademarks. In principle it was against any reference to trademarks in the Convention because the protection and regulation of breeders' rights was an entirely different field of law from trademark law. It proposed that paragraphs (4) and (8)(b) should be deleted from the alternative proposal for Article 13 reproduced in document DC/4.

74. Mr. S. D. SCHLOSSER (United States of America) said that he would make only rather general comments at that stage. After much deliberation his Delegation had concluded that Article 13 was not really needed for the protection of breeders and felt, furthermore, that the protection of the public could be left to other laws and provisions such as unfair competition laws, marketing laws and various aspects of consumer protection legislation in individual countries. Should the Conference not be prepared to delete Article 13, then his Delegation thought it would be improved if references to trademarks were eliminated, as had been done in a proposal made by the Secretary-General of UPOV during the preparations for the Conference. Finally his Delegation had prepared a proposal which had yet to be reproduced and distributed. It would revert to this proposal when the Conference came to discuss Article 13 in detail.

75. Dr. E. FREIHERR VON PECHMANN (AIPPI) said that his Association supported the view that references to trademarks should be eliminated and would welcome the deletion of paragraphs (4) and (8)(b) from the proposal for Article 13 reproduced in document DC/4. Should the Conference not be able to adopt this solution then his Association would support alternative 2 in paragraph (4)(a) of that document.

76. Mr. R. E. L. GRAEBER (European Economic Community) said that Article 13 had a bearing on the law of the European Economic Community. He had thought that this Article in particular would be discussed in a working group and that, as previously mentioned, the Community might be represented in that group by consultants or experts. He would therefore reserve his comments for presentation at that stage.

77. Mr. W. A. J. LENHARDT (Canada) referred to earlier statements regarding the absence of any particular connection between plant breeders' rights and trademarks. The connection was simply that in both cases a State offered certain rights in order to encourage certain benefits. At some stage it would be necessary to discuss whether breeders should have access to only one or to both of those rights.
Mr. Lenhardt said that he wished to comment on one other point. He had noticed in the documentation for the Conference some references specifically to trademark law and others, particularly in document DC/4, to rights which could hamper the free use of the variety denomination. He thought discussion might better hinge on the wording used in document DC/4 since any reference to trademark law, in view of the complexity of that subject, might just lead to a morass of confusion.

78. The PRESIDENT said that, having heard a number of general remarks on Article 13, he would suggest to the Conference that a working group on variety denominations should be established to consider that Article and the related Articles 36 and 36A.

79. Mr. S. D. SCHLOSSER (United States of America) said that he presumed that such a group's terms of reference would extend to considering the deletion of the Article. He wondered if the membership of such a group would correspond exactly to the membership of the Plenary in that everyone had a pressing interest in the matter of variety denominations.

80. The PRESIDENT felt that it would be open to the working group to discuss all possibilities. He reminded the Conference that it would be for the group to decide, however, and not for him as President. Regarding the membership of the group he believed that the problem which it had to tackle could best be dealt with by a number of experts. The President invited delegates from member States to comment on his suggestion that a working group on variety denominations should be established.

81. Dr. D. BÖRINGER (Federal Republic of Germany) said that his Delegation favored the establishment of a working group. He asked if the President intended to close the debate on that subject for the time being and to reopen the debate in the Plenary only after the group had presented the results of its work.

82. The PRESIDENT said in reply that it was for the Conference to decide on procedure. In reaching a decision the Conference would also have to discuss Dr. Böringer's earlier remarks about cooperation with the observer organizations. He just wished to know whether the Conference wanted to establish the working group which he understood the Delegation of the Federal Republic of Germany to favor.

83. Mr. P. W. MURPHY (United Kingdom) supported the proposal to establish a working group to discuss Article 13 and related matters concerning variety denominations.

84. Mr. B. LACLAVIERE (France) also supported the proposal. He would like the representative of the International Commission for the Nomenclature of Cultivated Plants to be a member of that group since he believed that sight of the very purpose of the variety denomination was occasionally somewhat lost. That purpose was rather special, being a matter of agricultural nomenclature rather than of industrial property as was sometimes imagined.

85. Mr. R. KÄMPF (Switzerland) said that his Delegation believed that the difficult problem of the relation between variety denominations and trademarks was more likely to be resolved in a working group than in the Conference meeting in Plenary. It felt, however, that the questions posed by the Delegations of the United States of America and of the Federal Republic of Germany regarding the tasks and composition of such a working group were really justified. He would prefer those questions to be answered before finally declaring his Delegation's view on the establishment of the working group.

86. The PRESIDENT proposed that the meeting be adjourned for a quarter of an hour and that the Heads of Delegations of member States meet in the adjoining room to consider the composition of the working group.

87. The proposal of the President that the meeting be adjourned, as mentioned in the preceding paragraph, was adopted.

(Adjournment)

88.1 The PRESIDENT said that the Heads of Delegations of member States had concluded that the Rules of Procedure prevented Observer Organizations from participating in the Working Group on Article 13. They would, however, welcome a discussion before the group started its work. He expected that discussion would take place the next morning. The working group would then be asked to make proposals on the basis of that dis-

cussion, which proposals would then be discussed in the Plenary. The working group would comprise representatives from Member Delegations plus volunteers from among the Observer Delegations and it would sit in parallel with the Plenary.

88.2 The President said that the composition of the Drafting Committee had also been discussed during the adjournment. The Rules of Procedure provided for seven members, five being from member States and two from non-member States. In view of the three official languages of the Union it was proposed that France, the Federal Republic of Germany and the United Kingdom each be asked to provide a member, and that the Netherlands and Sweden also each be asked to provide a member, thus making five members from the member States.

89. There being no other proposals and no objections the proposal that France, the Federal Republic of Germany, the Netherlands, Sweden and the United Kingdom each be asked to provide a member of the Drafting Committee, as mentioned in the preceding paragraph, was adopted.

90. The PRESIDENT said that it was further proposed that Hungary and the United States of America be invited as non-member States to provide the remaining two members of the Drafting Committee.

91. Mr. M. LAM (Senegal) proposed that a member from an African State be added to the Drafting Committee.

92. The PRESIDENT drew attention to the fact that paragraph (2) of Rule 12 of the Rules of Procedure provided for only two members from non-member States. It would therefore be necessary to choose from the three States proposed, namely from Hungary, the United States of America and one African State.

93. Dr. A. BOGSCH (Secretary-General of UPOV) suggested that the meeting should adjourn for half an hour to allow the Heads of Delegations of member States and of Hungary, Senegal and the United States of America to meet in the adjoining room to elect the Chairman and Vice-Chairman of the Credentials Committee, of the Drafting Committee and of the Working Group on Article 13, and to consider the composition of the Drafting Committee.

94. The suggestion of the Secretary-General of UPOV that the meeting be adjourned, as mentioned in the preceding paragraph, was adopted.

(Adjournment)

95. The PRESIDENT said that before announcing the decisions reached during the adjournment he would like to repeat his earlier statement about the Working Group on Article 13. In accordance with the Rules of Procedure it would comprise representatives of Member and Observer Delegations only. Further discussion with the Observer Organizations would take place in the Plenary the next day. The working group would then be asked to make proposals on the basis of that discussion, which proposals would then be carefully discussed in the Plenary. He understood that the Rules of Procedure permitted the working group to seek the help of experts if this was considered necessary.

96. Mr. R. ROYON (CIOPORA) asked whether it would be possible to determine the times at which the question of variety denominations would be discussed in the Plenary. Since it seemed that the Observer Organizations were prevented from participating in the Working Group on Article 13 they could only make their observations in the Plenary. Unless times were fixed it would be difficult for them to ensure the presence of expert representatives and he sought the understanding of the Conference in this matter.

97. The PRESIDENT confirmed that there would be a discussion the next day before the working group met. It was possible that the proposals of the working group

would be available for further discussion on Monday, October 16, but to ensure that there was sufficient time for them to be processed, reproduced and studied be proposed that the second discussion should be scheduled for Tuesday, 17, October.

98. Dr. D. BÖRINGER (Federal Republic of Germany) said that the President had expressly mentioned that the Rules of Procedure provided that working groups could call on experts to assist them. If the working group on Article 13 saw the need to hear experts it would be a pity if some or all of the expert representatives of the Observer Organizations were not present.

99. Mr. R. ROYON (CIOPORA) said that if the Observer Organizations could be heard in the working group as experts then that was quite another matter.

100. The PRESIDENT said that he felt that the timetable he had just set out should be maintained and that representatives of the Observer Organizations should be asked to reconsider any plans which they might have to leave Geneva.

101. Dr. D. BÖRINGER (Federal Republic of Germany) wished to confirm that what had been said regarding experts from the Observer Organizations would naturally apply equally to representatives of both the European Economic Community and the Commission of the European Communities.

102.1. The PRESIDENT agreed. He said that he would now like to inform the Conference about other developments which had taken place during the recent adjournment.

102.2. The Credentials Committee had held its first meeting and had elected a Chairman from the Federal Republic of Germany and two Vice-Chairmen from France and from the United Kingdom.

102.3. The Heads of Delegations of member States had considered the composition of the Drafting Committee and had decided unanimously to propose a small drafting change in paragraph 2 of Rule 12 of the Rules of Procedure to increase the number of members to eight, five being Member Delegations and three, instead of two, being Observer Delegations. Believing the change to be small and easily understood the President considered it could go forward without being presented in writing.

103. Mr. A. SUNESEN (Denmark) proposed that in the first line of paragraph (2) of Rule 12 the word "seven" should be changed to "eight" and that in the second line the word "two" should be changed to "three."

104. Mr. B. LACLAVIERE (France) supported the amendment proposed by the Delegation of Denamrk.

105. The amendment to paragraph (2) of Rule 12 of the Rules of Procedure, as mentioned in paragraph 103 above, was adopted.

106. The PRESIDENT went on to inform the Conference that the Drafting Committee had held its first meeting and had elected Mr. B. Laclavière (France) as Chairman and two Vice-Chairmen from the Federal Republic of Germany and from the United Kingdom. He now wished to invite proposals for the three Observer Delegation members of the Drafting Committee.

107. Mr. P. W. MURPHY (United Kingdom) proposed that Hungary, Senegal and the United States of America be elected members of the Drafting Committee.

108. Dr. D. BÖRINGER (Federal Republic of Germany) supported the proposal made by the Delegation of the United Kingdom.

109. There being no other proposals and no objections, the proposal that Hungary, Senegal and the United States of America be elected members of the Drafting Committee, as mentioned in paragraph 107 above, was adopted.

110. The PRESIDENT also informed the Conference that the Working Group on Article 13 had held its first meeting, had elected Mr. W. Gfeller (Switzerland) as Chairman and had invited the Delegations of Italy and of the Netherlands to each nominate one of the two Vice-Chairmen required.

Article 1: Purpose of the Convention; Constitution of a Union; Seat of the Union

111. The PRESIDENT opened the discussion on Article 1 and invited the Delegation of the Netherlands to introduce its proposed amendments which had been reproduced in document DC/14.

112. Mr. K. A. FIKKERT (Netherlands) said that his Delegation's proposal, which was based on the Draft as reproduced in document DC/3, was designed to put the various paragraphs of Article 1 into an order which was more in line with that generally found in international treaties. He wished to make two small corrections to the proposal. In Article 1A(c) the reference to "Article 11" should be changed to "Article 6" and in Article 1A(f) the reference to "Article 24" should be changed to "Article 30."

113. Dr. A. BOGSCH (Secretary-General of UPOV) enquired whether the proposal submitted by the Delegation of the Netherlands contained any substantive changes. At first sight it appeared to him to be a drafting proposal which presented ideas already included in various articles of the Convention, albeit in a more logical form.

114. Mr. K. A. FIKKERT (Netherlands) confirmed that his Delegation's proposal was a drafting proposal.

115. The PRESIDENT said that although there appeared to be no substantive changes he thought it would be helpful for delegates to have an opportunity to study the document.

116. It was decided to defer discussion on Article 1 to allow delegates an opportunity to study document DC/14. *(Continued at 193)*

Article 2: Forms of Protection; Varieties

117. The PRESIDENT opened the discussion on Article 2(2), which defined the word "variety," and invited the Delegation of the United Kingdom to introduce its proposed amendments which had been reproduced in the first part of document DC/15.

118. Mr. A. F. KELLY (United Kingdom) said that his Delegation had proposed two changes in the wording of Article 2(2). First of all the Draft referred to "any assemblage of plants which is capable of cultivation." That did not quite correspond to the wording of the International Code of Nomenclature which stated that the word "variety" was applicable to "an assemblage of cultivated plants." The two expressions were thought to mean the same thing and it was therefore suggested that the recognized wording of the International Code be used. Secondly the Draft stated that for the purposes of the Convention the word "variety" was applicable to "any assemblage of plants...which satisfies the requirements of subparagraphs (c) and (d) of paragraph (1) of Article 6." Turning to Article 6 one found that there was a further condition attaching to varieties, namely that of distinctness. It seemed illogical not to mention that in the definition of the word "variety" and it was therefore suggested that a reference to subparagraph (a) of paragraph (1) of Article 6 be included.

119. Mr. R. DUYVENDAK (Netherlands) said that he would like to begin by considering the second of the two changes proposed by the Delegation of the United Kingdom. The Delegation of the Netherlands was in favor of the inclusion of a reference to subparagraph (a) of paragraph (1) of Article 6.

120. The PRESIDENT asked whether delegates were ready to discuss that question or whether they required more time to consider document DC/15.

121. Mr. B. LACLAVIERE (France) said that he would have wished for time to think about at least the first part of that proposal since his Delegation had so far been unable to find an equivalent in French for the word "assemblage."

122. Dr. D. BÖRINGER (Federal Republic of Germany) said that his Delegation would also ask for time to consider the proposal. First, it wished to consider whether it was really correct to add a reference to Article 6(1)(a) at this point. It was not quite sure whether the inclusion of a reference to distinctness was essential or just desirable. Secondly his Delegation wished to consider the proposal to replace the words "any assemblage of plants which is capable of cultivation" by the words "an assemblage of cultivated plants." For the moment it would like to propose that the wording of the Draft be retained. One must bear in mind the abstract meaning of "variety." A variety for which protection was granted was, for example, represented by its seed and by the seed sample deposited and there was no condition in the present text of the Convention which obliged a breeder to actually cultivate a variety.

123. Mr. F. SCHNEIDER (International Commission for the Nomenclature of Cultivated Plants) said that he had taken part in 1969 in the formulation of the International Code of Nomenclature. He wished to say that the scope of the word "cultivate" was considered to be much wider than that of the German word "anbauen" which meant "to grow." "Cultivation" included, for instance, propagation or special treatments of breeders.

124. Mr. W. A. J. LENHARDT (Canada) said that his Delegation would also like a little more time to think about the proposal of the United Kingdom.

125. Dr. H. MAST (Secretary General of the Conference), at the invitation of the President, gave an interpretation of the effect of adopting the proposal of the United Kingdom to include a reference to Article 6(1)(a) in the definition of "variety" given in Article 2(2). The effect would be that a variety which was distinguishable only by one or more unimportant characteristics would not be considered a variety. Such a variety was already excluded from protection in that Article 6(1)(a) provided that for a variety to benefit from protection it "must be clearly distinguishable by one or more important characteristics from any other variety..." A reference to that rule in Article 2(2) would mean that such a variety would also be excluded from recognition as a variety in the sense of "any other variety" mentioned in Article 6(1)(a). For the purposes of the Convention such a variety would not be "any other variety"; it would not be a variety at all. Dr. Mast thought that it was for that reason that the drafters of the Convention had not referred to Article 6(1)(a) in Article 2(2).

126. Dr. R. M. MOORE (Australia) said that the various definitions of "variety" which had been put forward appeared to encompass hybrids. According to those definitions a variety had to satisfy the conditions of Article 6(1)(c) and (d). It had to be homogeneous and stable. Hybrids were not stable in reproduction and he therefore questioned their inclusion.

127. The PRESIDENT referred to the wording of Article 6(1)(d) which said that "a variety ... must remain true to its description ..., where the breeder has defined a particular cycle of reproduction or multiplication, at the end of each cycle." In view of this wording he believed hybrids were included under the definition of "variety."

128. Mr. M. TOURKMANI (Morocco) said that the stability of the variety could not be confirmed in the final product, for example in the hybrid maize. Generally one was forced to go back to the parents if one wished to confirm stability in

such a case. In his view the final product could not be said to be stable because segregation occured when it was multiplied. Therefore the definition of "variety" could not apply to such hybrids.

129. Dr. D. BÖRINGER (Federal Republic of Germany) said that the philosophy of the Convention was that a variety which could be cultivated and which, inter alia, satisfied the provisions of Article 6 (1)(c) and (d) could benefit from protection. Hybrid varieties of maize, sorghum or other species could fulfil those requirements provided they were duly produced each year. The Delegation of Morocco was correct in saying that the best way to test hybrid varieties was to test their hereditary components. He believed, however, that this was a technical question which need not influence the text. With respect to hybrid varieties his Delegation could adhere to the present text which was not affected with regard to hybrids as such by the proposals in the Draft or in document DC/15.

130. The PRESIDENT said that it would be necessary to revert to Article 2(2) since several delegations had expressed a wish to give further consideration to it.

131. It was decided to defer discussion on Article 2(2) until the discussion on Article 13, referred to in paragraph 97 above, had been completed. *(Continued at 212)*

THIRD MEETING

Tuesday, October 10, 1978,

morning

Article 13: Denomination of Varieties of Plants

132. The PRESIDENT opened the discussion on Article 13.

133. Dr. C.-E. BÜCHTING (ASSINSEL) said that he had already mentioned in his general remarks on Article 13 that plant breeders were very unhappy with the Guidelines for Variety Denominations which imposed quite unnecessary restrictions and which would hinder cooperation among the member States of the Union, since they were not fully applied in the Federal Republic of Germany while in other countries, they had become partially or fully effective. He proposed that the Guidelines for Variety Denominations should be dispensed with and that a limited set of basic principles should be agreed within the text of the Convention.

134. Dr. E. FREIHERR VON PECHMANN (AIPPI) said that he wished only to complete what Dr. Büchting had said by noting that the German Federal Patent Court had declared that Article 3 of the Guidelines for Variety Denominations, according to which the denomination had to consist of one to three words with or without a pre-existing meaning, had no effect for the Federal Republic of Germany since that requirement was not in accordance with the Convention. He therefore wished to support the proposal of ASSINSEL that the Guidelines for Variety Denominations should be abolished.

135. Dr. D. BÖRINGER (Federal Republic of Germany) wondered whether it was right to discuss the Guidelines for Variety Denominations in the Conference. He wished, however, to clarify the remarks made by the two previous speakers. First, the Guidelines were still applied by the Federal Varieties Office in its daily work as a Recommendation. Secondly, the reason for not applying Article 3 of those Guidelines was that the Federal Parliament, when last amending the Law on the Protec-

tion of Plant Varieties, had considered that Article 13 of the Convention did not exclude the use of a combination of letters and figures or of a combination of words and figures as a variety denomination. Thirdly, the decision of the Federal Patent Court had not been to favor such combinations. Between the dates of the relevant decision of the Federal Varieties Office and of the Federal Patent Court, however, national law had been changed to permit such combinations.

136.1. Mr. R. ROYON (CIOPORA) said that the various opinions expressed on Article 13 appeared to be based mainly on two different concepts of the purpose of the variety denomination.

136.2. The trade organizations did not believe that the denomination existed for the use of the general public. Indeed, paragraph (7) of that Article related only to the sale of "reproductive or vegetative propagating material" of a variety. It therefore appeared to refer only to relations between professionals or members of the trade. Consequently it was the view of CIOPORA that the function of the denomination should be limited to identifying the nature of the variety and to distinguishing it from other varieties of the same species. It should function as a kind of patronymic of the variety.

136.3. Conversely CIOPORA believed that it was the function of the trademark to present the variety to the general public. It was well-known that the advertising function and the indication of quality fulfilled by the trademark with regard to a given product were tending to supplant its traditional function as a guarantee of origin. For instance the members of the public were interested neither in the scientific denomination of a medecine nor in the laboratory which manufactured it, but solely in the trademark which served as a commercial reference for evaluating its qualities. The same was true for the person who purchased a rose variety under a well-known trademark. Mr. Royon said that he did not understand why ornamental plant varieties had to be subjected to different treatment than other products. One seemed to be confronted with two radically different doctrines as to the respective roles of the denomination and the trademark.

136.4. According to the first doctrine a plant variety should be identified by one generic denomination only, preferably having a commercial value and rendering practically useless the concurrent use of any registered trademark other than a firm's brand name. Mr. Royon thought that this was the reason why paragraph (1) of Article 13 required that each variety be given a denomination, whereas it would have been equally possible to reference each plant patent or special title of protection by a simple number. He also thought that certain national legislation and international regulations had been introduced for the same reason. He wished only to refer to Section 5A of the United Kingdom Plant Varieties and Seeds Act to the Danish Order on the Naming of New Plant Varieties of August 5, 1970 and, of course, to the Guidelines for Variety Denominations already referred to by Dr. Büchting and Dr. von Pechmann.

136.5. According to the second and contrary doctrine, which was supported by the members of the trade, whether breeders or users, the obligation to give a denomination to each variety should not lead to the imposition of unreasonable and unjustified restrictions as to the manner in which denominations had to be formed or as to the concurrent use of trademarks. Breeders of ornamental plants and of fruit trees had both been using a system of code denominations for twenty years. Allowances should be made for that recognized system in which each denomination was a code designation, formed according to precise rules and enabling the breeder and the country of origin to be indicated, thereby constituting an additional means of identification of the variety. Such denominations avoided costly research and the danger of overlapping inherent in fancy appellations, and, in the opinion of CIOPORA, totally met the requirements of Article 13 as presently drafted. The system was such that the code denomination was the unique, compulsory and final patronymic of the variety even if the variety had a very short commercial life. Such denominations did not give rise to problems of pronunciation or translation, could be used anywhere in the world--in Europe, in an Arabic-speaking country or in China--and were suitable for processing by computers. Also since they played no fundamental role in marketing there was no risk of their encroaching on the field of trademarks. In many instances breeders conducted commercial trials before deciding whether to market a variety. By using a code denomination they could avoid the risk of wasting the publicity potential of a fancy appellation. Where commercial trials were successful they could always add a fancy trademark to the code denomination when marketing the variety to the general public.

136.6. Mr. Royon felt it was important to consider those two doctrines. He did not wish to say which was the right one but thought one should always consider what was happening in other fields of industry and commerce. The commercial possibilities of breeders should not be unreasonably limited. In summary CIOPORA thought that denominations and trademarks had different purposes. They could coexist without clashing provided the authorities responsible for implementing the provisions of the Convention refrained from giving the denomination a role which encroached on the role of and limited the use of the trademark. A policy of such encroachment and limitation would indeed be discriminatory and contrary to the law.

137.1. The PRESIDENT noted that paragraph (7) of Article 13, which had been quoted in part by Mr. Royon, referred to sales of reproductive or vegetative propagating material by "any person." In his view "any person" included persons selling to the general public and was not limited to persons selling only to professionals or members of the trade.

137.2. The President invited the Delegation of the United States of America to introduce its proposal for a complete redrafting of Article 13, which had been reproduced in document DC/12.

138.1. Mr. S. D. SCHLOSSER (United States of America) said that before introducing his Delegation's proposal he wished to be sure that the Conference would not overlook what he had said earlier about the possibility of discussing whether Article 13 was even needed in a Convention for the protection of varieties of plants.

138.2. Mr. Schlosser said that the proposal reproduced in document DC/12 incorporated a number of provisions from a proposal made by the Secretary-General of UPOV during the preparations for the Conference and a number from document DC/4.

138.3. Paragraph (1), which appeared not to be in any way controversial, was taken from document DC/4.

138.4. The first thing which would strike everyone regarding paragraph (2) was the absence of any reference to the frequently discussed prohibition of denominations consisting solely of numbers. His Delegation had a number of reasons for omitting that prohibition. He would return to them in detail when that matter was discussed. The final sentence of the equivalent paragraph in document DC/4 ended with the words "of the same botanical species or of a closely related species." His Delegation was not quite sure what was meant and thought there might be some ambiguity. It believed the purpose of the entire Article was to identify variety denominations both to consumers and to the trade, and it had therefore redrafted that final sentence. It looked forward to discussion to determine the best wording.

138.5. Paragraph (3) described the role of an examining office in registering or rejecting a proposed variety denomination. In the United States of America those matters would involve two offices--the Patent and Trademark Office and the Plant Variety Protection Office. For the former it would be necessary to establish a new procedure since it had never concerned itself with the registration of variety denominations. Mr. Schlosser said that the Patent and Trademark Office would be willing to undertake that obligation to the extent permitted by its resources. The work would be done by members of the patent examining staff who certainly would not lay claim to any great expertise. They might acquire expertise but it would be based on whatever documentation could be reasonably obtained. In other words decisions would not be perfect in every case but would be the best which could be achieved. Decisions regarding the possibility of confusion about the identity of the breeders would raise matters of a trademark nature. He wished to emphasize that in the United States of America not all trademarks were registered. The staff responsible would not even know about conflicts between variety denominations and unregistered trademarks.

138.6. In paragraph (4)(a) his Delegation had selected Alternative 2 from the three alternatives given in document DC/4, believing that the use of a variety denomination in a given country would make that denomination the common name for the variety in that country but that it should not have extra-territorial effect. Mr. Schlosser said that, in particular, it should not have extra-territorial effect, in the judgement of his Delegation, in countries where protection under a breeders' rights law was not available. The idea contained in paragraph 8(b) in document DC/4 that the use of a variety denomination made it generic and destroyed trademark rights was a difficult one for his Delegation to follow. It thought it to be a matter for each country to decide exactly what made a name generic.

138.7. Paragraph (4)(b) was a general provision requiring member States to assure the protection of prior rights of third parties, but not fixing the way in which that protection was to be assured. Mr. Schlosser said it would be assured in different ways in different countries. It might be by way of an administrative procedure in one country and by way of a judicial procedure in another. The sole concern of his Delegation was that the trademark rights of third parties were protected.

138.8. Paragraph (5) required the same denomination to be used in all the member States. That was a very salutary principle. It might necessitate a slight modification of United States law or administrative procedures. If so this would be willingly undertaken. There was, however, a difficulty with the text in document DC/4 which called for the registration of a translation when the denomination proposed was found to be unsuitable. A translation might not be a good name for business purposes to describe a variety. If a member State found a proposed denomination unsuitable then it should not tell the breeder what name it would register. It should let the breeder decide.

138.9. Mr. Schlosser said that paragraph (6), which called for the exchange of information among member States, was couched in quite broad terms. His Delegation thought, however, that this did not in any way detract from its importance or its implications. The equivalent paragraph in document DC/4 contained one sentence

which had been omitted from his Delegation's proposal. That sentence referred to the receiving of objections from competent authorities. The proposal of the United States of America was silent on this point. It neither prohibited such objections nor required any special steps to be taken if such objections were received. Objections received by the United States of America would certainly be considered, provided they were timely.

138.10. Mr. Schlosser said that paragraph (7) was drafted in a more flexible way than equivalent paragraphs in other proposals. The compulsory nature of the relevant provision in document DC/4 had presented his Delegation with a difficulty with regard to plant varieties protected in the United States of America by patents. The patent laws did not deal with the naming of products or plants protected under a patent. That was a matter in his country for unfair competition laws, for consumer protection laws, perhaps even for trademark laws, but not for patent laws. The Patent Office was not a regulatory agency. It could not compel the use of names to describe patented products. There was, however, no cause for alarm since it was the conventional trade practice in his country to designate varieties by name when they were offered for sale. If the requirement to use the variety denomination remained absolutely compulsory it could be particularly troublesome for the Patent Office where a patent had expired whether the variety was being marketed by the former owner of that patent or by a competitor. It was simply beyond the scope of the patent laws to compel the use of the variety denomination at that time. Consequently paragraph (7) was worded in such a way that each member State would be required to demand the use of the denomination if such were not the usual practice of breeders in that State.

138.11. Mr. Schlosser said that his Delegation had not included in its proposal an equivalent to paragraph (8) in document DC/4. That paragraph had been felt not to be really necessary.

138.12. Paragraph (8) in his Delegation's proposal was a reflection of paragraph (9) in document DC/4. The latter paragraph contained two phrases in square brackets. The first of those optional phrases had been retained. Mr. Schlosser

said that he understood that the purpose of that phrase was to simplify the record-keeping of examining offices and to keep proprietary indications out of their records. The phrase had been included but he had to point out that its purpose could be achieved by administrative regulations. The second optional phrase seemed to infer, if not demand, regulation of the use of variety denominations. It had therefore been omitted. It was a matter for national decision and again one of consumer protection, marketing or unfair trade practices law. In his Delegation's view it was not inherently a matter for the Convention.

139. Dr. C.-E. BÜCHTING (ASSINSEL) said that the proposal of the United States of America had much to commend it; in particular it presupposed that variety denominations could not be the subject of trademarks. That strict separation seemed to ASSINSEL to be one of the cardinal prerequisites for a clear settlement of matters relating to variety denominations. Dr. Büchting said that he wished to stress that it had not been easy for breeders to come to that point of view but the experiences of the last ten years had convinced them that they should accept a strict separation.

140. Dr. E. FREIHERR VON PECHMANN (AIPPI) supported what had been said by the previous speaker. The proposal of the United States of America represented a considerable step forward. The Convention was a framework for legislation. As such, in his view, it should be as clear and as simple as possible. The original Convention, and especially Article 13, had been endowed with some very precise provisions which had given rise to difficulties in the member States. A particular case in point was the connection made in the wording of Article 13 between variety denominations and trademark law. If those provisions could be simplified the application of legislation in individual States should be made easier. Dr. von Pechmann felt that the proposal contained in document DC/12 probably had a bearing on the possible accession of the United States of America to the Convention which AIPPI would very much welcome. He therefore urged the Conference to accept that proposal.

141. Mr. TROOST (AIPH) associated himself with the views expressed by the previous two speakers. He wished, however, to ask two questions. First, why had the Delegation of the United States of America formulated a new text for Article 13--which was certainly much better than the existing text--when it held the view that the Article might be unnecessary in any case. His Association favored deletion of Article 13. Secondly it seemed that a proposal had been made by the Secretary-General of UPOV. He wondered whether it would be helpful if representatives of the Observer Organizations could study that proposal.

142. The PRESIDENT advised Mr. Troost that that proposal had been withdrawn and was not before the Conference.

143.1. Mr. S. D. SCHLOSSER (United States of America) said that if he had been convinced that he could have persuaded the Conference to delete Article 13, he would have stopped at that point. He thought that the Article could be deleted quite safely but recognized that others disagreed with him.

143.2. Mr. Schlosser, noting the President's statement that the proposal of the Secretary-General of UPOV was not before the Conference, asked whether there was a procedure for presenting it to the Conference.

144. Dr. A. BOGSCH (Secretary-General of UPOV) advised that only Government Delegations could propose amendments. The problems he had tried to resolve were mainly those which had just been mentioned by the Observer Organizations. He had systematically omitted the word trademark from his proposal and had stated in an explanatory note that such omission did not affect the freedom of a country to do whatever it wished to do in its trademark law. The philosophy behind his proposal had been that with regard to the accession of new States, in particular, and in view of the fact that parts of Article 13 had caused great difficulties in existing member States, it was extremely unlikely that one could achieve ratification of the Convention by the United States of America if that country had to modify its trademark law. He was convinced that the basic aims of Article 13 could be achieved without interfering with trademark law.

145. Mr. R. ROYON (CIOPORA) said that CIOPORA wished to associate itself with the comments of its fellow organizations and to express its support for the proposal of the Delegation of the United States of America. Equally it would like to pay tribute to the proposal formerly made by the Secretary-General of UPOV in that it fully met the philosophical considerations which he had put forward earlier on behalf of CIOPORA.

146. Dr. D. BÖRINGER (Federal Republic of Germany) said that he would have preferred not to speak about the relation between variety denominations and trademarks for the moment. Different solutions to that question were possible, either within the Convention or possibly outside it. He just wished to investigate what was the real aim of the Convention. The present text and the Draft both required that a balance should be struck between the interest of the breeder, on the one side, and the interest of the public on the other side. By the public he meant, in particular, the multiplier of seed and planting material, the consumer of that seed and planting material and all the interested parties. Dr. Böringer thought that the proposal of the Delegation of the United States of America was very constructive but it seemed to be designed to change the present balance slightly, to the disadvantage of the public. Paragraph (2) of that proposal omitted the requirement that the variety denomination could not consist solely of figures. He feared that if such a provision was not perpetuated in the revised text of the Convention it would be very difficult for member States to preserve the function of the variety denomination. Breeders might endeavor in future in all member States to increase the proportion of proposed variety denominations which consisted solely of figures. Everyone who was acquainted with the plant breeding sector and with the variety and seed trade knew that this would cause great insecurity among farmers, gardeners and foresters. In his view that insecurity would be increased by the fact that the trademark which would appear alongside the variety denomination would be strongly imprinted on the public consciousness. The trademark was primarily intended to characterize the products of a particular business. Therefore the same trademark could be used for several varieties. Dr. Böringer thought that very careful account of that fact would have to be taken in subsequent discussions regarding any wish to deviate from the present balance of interest between the breeder and the other interested parties.

147.1. Mr. W. T. BRADNOCK (Canada) said that he would like to refer back to the Draft and to follow on from Dr. Böringer's line of thought regarding the omission from the proposal of the United States of America of the words "may not consist solely of figures." Those words were included in the first sentence of Article 13(2) in the Draft, but under Article 36(A)(1) that rule did not apply to States in which the practice of admitting variety denominations consisting solely of figures was already established. There would therefore be the possibility of two classes of member States; one class in which number denominations might be used and another class in which they might not be used. In that case there could be some very real problems when varieties were to be moved from a State in the former class to a State in the latter class. Some years earlier in Canada, with future accession to the Convention in mind, the use of variety denominations which did not comply with the UPOV Guidelines for Variety Denominations had been prohibited. That action had had some quite marked effects in trade between Canada and its nearest neighbour which was not applying the same rules to its varieties. For many varieties coming from the United States of America into Canada a change of name had been necessary. That requirement could be extremely complicated and very impractical, particularly when the ultimate destination of a seed lot was unknown at the time of labelling or when surplus seed was returned across the border. The ideal situation was to do away with the need for synonyms. Mr. Bradnock shared some of Dr. Böringer's reservations about numbers and he felt that the same reservations applied to combinations of numbers and letters. In essence those kinds of denominations were relatively minor and it was the trademark which created the impression in the eye of the consumer. He had tried that philosophy on Canadian farmers. They had pointed out to him that many agricultural requirements, such as machinery, were identified by numbers or combinations of numbers and letters and that they had no difficulty in determining which sort of tractor they wished to purchase. In this respect the people he had been trying to protect had not shared his fears.

147.2. Mr. Bradnock felt that the proposed Article 36A would create a lot of complications for Canada in that it would result in two classes of member States. He thought that if it were adopted Canada would have to establish the practice of using variety denominations consisting solely of figures before applying for membership of the Union. It would then be able to act in the same way in this respect as

its nearest neighbour. Mr. Bradnock thought that the ideal solution would be to leave the regulation of denominations to domestic legislation so that any country which was really concerned about the use of numbers as denominations could make its own decision in that matter.

148. Dr. C.-E. BÜCHTING (ASSINSEL) said that he wished to emphasize what the previous speaker had stated regarding the progressive nature of the modern farmer. He wished to add that in his opinion the way in which plant breeders used variety denominations was not that unreasonable because it was important to them that their variety denominations should be as widely accepted as possible. Following the introduction of the Varieties Protection Law, breeders in the Federal Republic of Germany had departed from established practice with some hesitation at first. For the major agricultural crops, such as cereals and sugar-beet, however, breeders had since moved over to short names because they were rapidly accepted. Dr. Büchting believed that breeders would think very hard about which plant species were suited to being designated by denominations composed of figures or combinations of figures and letters. He thought that only a small percentage would be so suited and that one should therefore not be too worried about that matter.

149. The PRESIDENT said that although Dr. Büchting might be correct he had seen many denominations for varieties of sugar beet which were very difficult for farmers to remember.

150. Mr. S. D. SCHLOSSER (United States of America) said that he wished to point out certain incongruities which would occur if the phrase "it may not consist solely of figures" were retained. Dr. Böringer had very properly stated that the need of consumers to know what they were getting should be kept very much in mind. There might, however, be times when numbers would be more meaningful to them than other kinds of denominations. For example, a variety denomination in Swedish, Japanese or Arabic or in the Cyrillic alphabet, which was encouraged by the Convention, would be unintelligible to an American. A number designation would make a great deal of sense to him, if not perfect sense. Mr. Schlosser therefore thought that the retention of the phrase in question might create more confusion than would its deletion.

151. Mr. W. A. J. LENHARDT (Canada) wished to comment on paragraph (5) in the proposal of the Delegation of the United States of America. The last sentence of the equivalent paragraph in the Draft said "In this case, it may require the breeder to submit a translation... or another suitable denomination." In the proposal introduced by Mr. Schlosser the reference to "a translation" had been eliminated apparently on the basis that any translation of an unacceptable denomination also had to be unacceptable. Mr. Lenhardt believed that it might sometimes make perfect sense to submit a translation; if, for example, a denomination in English happened to be a profanity in Swedish, but the Swedish translation of it was not. If the proposal in document DC/12 meant that translations would be prohibited then he suggested that the Conference should retain the wording in the Draft.

152. Mr. S. D. SCHLOSSER (United States of America) said that a translation would sometimes constitute a perfectly suitable variety denomination. The breeder would know that and would be willing to use it. At other times translation might result in an absolutely terrible denomination which totally lacked consumer appeal. In that case there was no reason to prevent the breeder from developing and using a more appealing denomination. Mr. Schlosser believed that his Delegation's proposal allowed what Mr. Lenhardt was seeking but still gave the breeder the right to exercise his discretion.

153. Mr. R. KÄMPF (Switzerland) said that he wished to revert to a general question. Observer Organizations had been united in pointing out that the main advantage of the proposal of the United States of America was that it broke the connection made in the Convention between variety denominations and trademarks. His Delegation was in favor of that aim and wondered, therefore, whether the omission of the sentence "the denomination of the variety shall be regarded as the generic name of that variety," which was in paragraph (8)(b) of the present text of Article 13, should not be seen as a loss. Mr. Kämpf said that he would be interested to hear the views of the interested circles about the exclusion of that sentence from the revised text. He suggested that the distinction between variety denominations and trademarks might be made clearer by its inclusion.

154. Dr. C.-E. BÜCHTING (ASSINSEL) said that he was delighted by the understanding shown by the Delegation of Switzerland for the opinion of the Observer Organizations. Not being a lawyer he had to restrict his comments on Mr. Kämpf's final sentence but he thought that the inclusion expressis verbis of that statement taken from paragraph (8)(b) of the present text of Article 13 would be excessive. The Convention should not affect States outside the Union but he feared that such would be the consequence.

155. Dr. A. BOGSCH (Secretary-General of UPOV) said that he would be against the inclusion of any phrase to the effect that the denomination of a variety was its generic name because he would not want to force certain countries, by a fiat of the Convention, to have to change their trademark laws. Trademark laws contained rules about generic names which were also normally dealt with extensively in court decisions. In most countries, the variety denomination would probably be regarded as a generic name.

156.1. Dr. E. FREIHERR VON PECHMANN (AIPPI) said that the notion of a "generic name," at least for the Federal Republic of Germany, was defined in jurisprudence and not in legislation. A trademark could become a "generic name" and thereafter it lost its function as a trademark. It was not possible to determine clearly at the outset whether something was a "generic name" or a trademark. That question should not be regualted in the Convention which was an outline for legislation. At most, if it were considered necessary, a provision should be included requiring that the variety be designated with a denomination.

156.2. Dr. von Pechmann said that he wished to revert to Dr. Böringer's statement that the designation of a variety should be so easy to understand and to recognize that no confusion could occur in the trade. Dr. Böringer had seen in the proposal of the Delegation of the United States of America a deterioration of the consumers' position in that respect. Dr. von Pechmann believed figures were used to designate varieties in the United States of America and he therefore wished to ask the Delegation of that country whether, in its experience, consumers were unable to distinguish sufficiently between varieties so designated.

157. Mr. B. M. LEESE (United States of America) said that, in his experience, the use of numbers had caused no problems. They had been used consistently to identify varieties of maize, sorghum, soya beans and wheat, indicating maturity dates and other characteristics of the different varieties. Mr. Skidmore, who had practical experience of selling to farmers, could perhaps shed further light on the matter.

158. Mr. R. W. SKIDMORE (ASSINSEL) felt that Dr. Böringer's fears were totally unfounded. In some forty years of experience in the seed industry he had not had any difficulty with number designations; in fact such designations in the United States of America were generally very descriptive of the product, and especially of its maturity date. In his view farmers had more difficulty remembering names than numbers.

159. Dr. D. BÖRINGER (Federal Republic of Germany) said that he did not wish to make a fetish of the question of numbers or figures but that, as far as he knew, seeds were sold in the country bordering on Canada not under a number alone but always or largely under a number combined with another sign, generally a word sign or a brand name. Therefore the question for the consumer was not whether he could get used to numbers; he was faced with a combination of a word and several letters or figures. That was the first point. Secondly one had to stop and look at the policy which one wished to pursue in respect of plant breeders' rights. If he accepted that a variety might be identified solely by figures and that a trademark might be added to such a variety denomination, then he would be opening the way for a policy under which it would no longer be important which variety the consumer really bought. It would be the trademark of the firm introducing the seed or planting material into trade which would guarantee the consumer that he was getting a good variety. Dr. Böringer did not wish to judge whether that would be a positive or negative step but felt it must be taken into account when the Conference considered the balance of interests it wanted to provide in the revised Convention. Thirdly the question of figures should not be looked at in isolation. It should be considered with the other proposals which had been made, especially that of the Delegation of the United States of America. The Conference would have to consider whether it wished to reduce the importance of the variety denomination and whether it should do so having regard to the consumer.

160. Dr. C.-E. BÜCHTING (ASSINSEL) referred to an earlier statement he had made and to the President's comment about the names of sugar beet varieties. He believed there were as many as fifty or sixty varieties in the EEC Variety List and he had to agree that it was difficult to distinguish which variety was concerned, let alone the breeder responsible. It was the fact that the breeder was required to choose or create a name for the variety denomination which caused the problem. It had become necessary to have denominations composed of five, six or seven syllables in order to be able to distinguish them from other denominations formed in the same way. In earlier representations ASSINSEL had spoken of using a different system and had mentioned by way of example a series such as BMW 503, BMW 507 and BMW 508. He believed that a system of that kind was used to designate plant varieties in the United States of America. In that way the variety denomination contained both a reference to the name of the breeder responsible, in easily recognizable form, and, by means of the figures, a specific distinction between varieties. Dr. Büchting genuinely regretted that the Plant Varieties Offices maintained the view that denominations such as KWS 1001 and KWS 1002 for plant varieties were insufficient and unacceptable. He held a completely different opinion.

161. Mr. R. KÄMPF (Switzerland) said that he would like to take advantage again of the presence of the Observer Organizations to clarify a question which the Working Group on Variety Denominations would have to try to resolve. Paragraph (2) of the proposal of the United States of America said that a denomination "must enable the variety to be identified." The present text of Article 13 laid down that a denomination consisting solely of figures could not fulfill that requirement. He wondered whether without such express rule it would not be left to the competent office or court to decide whether, under certain circumstances and in certain areas of agriculture, such a denomination could enable the variety to be identified. He would welcome views on that question.

162. Dr. A. BOGSCH (Secretary-General of UPOV) said that he interpreted the proposal of the Delegation of the United States of America to mean that the Convention would allow any national office or court to determine, according to the circumstances, that a denomination consisting solely of figures was not acceptable.

163. Mr. S. D. SCHLOSSER (United States of America) said that he would like to confirm the interpretation given by the Secretary-General of UPOV.

164. The PRESIDENT closed the discussion on figure demominations and invited comment on the remainder of the proposal of the Delegation of the United States of America on a paragraph by paragraph basis.

165. Dr. D. BÖRINGER (Federal Republic of Germany) sought the opinion of the Observer Organizations on the omission of the words "of the same or a closely related botanical species" from paragraph (2) of the proposal. He believed that in this respect the proposed text was more demanding than either the Draft or the present text.

166. Dr. C.-E. BÜCHTING (ASSINSEL) said that if he had understood the proposal correctly it was based on leaving individual states to fix more restrictive provisions and confined itself to the general principle.

167. Dr. A. BOGSCH (Secretary-General of UPOV) said that he agreed with Dr. Böringer that the proposal was in fact stricter, and he therefore found some difficulty with Dr. Büchting's comment. Dr. Bogsch asked the Delegation of the United States of America why it had excluded that qualification.

168. Mr. B. M. LEESE (United States of America) thought that it had been taken out because the concept of a closely related species had been found to be somewhat confusing. It had not been clear whether it was based on botanical nomenclature or common usage. His Delegation had felt that the point could be dealt with by individual States when regulating the problem of confusing or misleading nomenclature.

169. Mr. W. A. J. LENHARDT (Canada) commented on paragraph (4)(a) of the proposal and noted that the proposal excluded paragraph (8)(b) of the alternative proposal contained in document DC/4. In his view paragraph (4)(a) prevented anyone who owned a trademark and who had that trademark registered as a variety denomination from continuing to assert his right to it. Paragraph (8)(b) in document DC/4

prevented anyone who owned a variety denomination from having it registered as a trademark. If that paragraph was to be excluded from the proposal then he suggested that paragraph (4)(a) should have the words "or receive or assert such a right at any future time," or a similar phrase, added to it.

170. Mr. P. W. MURPHY (United Kingdom) said that he did not wish to pose a question in relation to paragraph (4)(a) but to make a statement which was not designed to be unhelpful. The concept of a breeder being able to register a right but not being able thereafter to assert that right was found by the trademark authorities of the United Kingdom to be slightly objectionable. He thought, however, that the problem could be overcome, and that the point raised by the Delegate of Canada could be dealt with at the same time, if the Conference adopted, instead of paragraph (4)(a), the wording proposed by the Secretary-General of UPOV at the meeting of the Ad Hoc Committee on the Revision of the Convention. Mr. Murphy thought that his Delegation would wish to put forward that wording to the Working Group on Article 13 as an improvement on the present text.

171. Dr. A. BOGSCH (Secretary-General of UPOV) said that he would like to comment on the remarks made by the Delegate of Canada. If a variety denomination was considered to be a generic name, as it would be in most countries under present trademark laws, then an existing trademark would be annulled and the registration of a future trademark would be prevented.

172. Mr. W. A. J. LENHARDT (Canada) said that if the Conference was really convinced that variety denominations should not be the subject matter of trademarks at all then it should provide that variety denominations were to be deemed to be generic, as was provided in paragraph (8)(b) in document DC/4. If that were not done then it would always be possible that a court would decide otherwise, thus leaving open the possibility that variety denominations might, at some point, become the subject matter of trademarks.

173. Dr. A. BOGSCH (Secretary-General of UPOV) said that the Delegate of Canada was right, but asked what the real objective was. He believed it was that the variety denomination should be freely usable in connection with the variety even if it maintained its trademark character in some countries. Such was the essence of the proposal he had made at the meeting of the Ad Hoc Committee and which had been referred to by the Delegate of the United Kingdom. He felt that those delegates who had not been at that meeting should now be made aware of that proposal which had been "that each member State shall provide the necessary measures to ensure that any possible rights of the breeder in the word or sign which is registered as a variety denomination shall not hamper the use of that denomination in connection with the marketing or other use of the variety protected in that State." Delegates would note that the wording left it to individual countries to decide how they would "provide the necessary measures." Members of UPOV could find the wording in Annex IV to the internal document RC/ad hoc/11.

174. Mr. K. A. FIKKERT (Netherlands) expressed the support of his Delegation for the wording read out by the Secretary-General of UPOV. His Delegation had concluded that that wording was the best solution.

175.1. The PRESIDENT said that he would just like to add that the wording read out by the Secretary-General of UPOV was designed to replace only paragraph (4)(a) of the version of Article 13 appearing in document DC/4 and that it did not take into account the question of paragraph (8)(b) of that version.

175.2. The President asked the Delegation of the United States of America whether the differences between paragraph (4)(b) of its proposal and the comparative paragraph in document DC/4 were entirely of a drafting nature.

176. Mr. S. D. SCHLOSSER (United States of America) confirmed that his Delegation had not intended to introduce any substantive changes into paragraph (4)(b).

177. The PRESIDENT, noting that paragraph (5) of the proposal had already been discussed, invited comment on paragraph (6) which related to the exchange by member States of information concerning variety denominations.

178. Dr. A. BOGSCH (Secretary-General of UPOV) asked the Delegation of the United States of America whether the words "informed of matters concerning variety denominations" meant the communication of each denomination registered or whether they meant, in addition, the communication of matters such as legal provisions.

179. Mr. S. D. SCHLOSSER (United States of America) replied that his Delegation did not think that the competent authorities of member States would be interested in receiving regulations or technical legal information. The intention was to provide information about the registration of variety denominations.

180. Mr. R. KÄMPF (Switzerland) said that there were always difficulties in the Swiss Parliament with ratification of Conventions containing provisions in the form of recommendations. There was, however, nothing against the addition of a recommendation. His comment was probably applicable both to the words "are encouraged to" in paragraph (6) of the proposal and to the words "shall endeavour to" in paragraph (7), and he would like to revert to this question in the Working Group on Article 13.

181. Mr. P. W. MURPHY (United Kingdom) wondered if he might ask the Delegation of the United States of America if it could in fact replace the words "are encouraged to" in paragraph (6) by a somewhat stronger wording which did not impose a binding legal obligation on its country but which was a little more specific.

182. Mr. S. D. SCHLOSSER (United States of America) thought his Delegation could agree to something stronger provided it did not have to tell the Conference at that moment what the words might be.

183. Dr. A. BOGSCH (Secretary-General of UPOV) said that one might look for a solution by providing that the Union, rather than member States, should establish mechanisms for the communication of denominations.

184. The PRESIDENT, noting the comment already made by the Delegation of Switzerland, invited further comment on paragraph (7) of the proposal.

185. Dr. A. BOGSCH (Secretary-General of UPOV) wondered whether paragraph (7) might be deleted. The principle expressed in that paragraph was very desirable but one might question the correctness of including it in a Convention on the protection of plant breeders' rights. Even if the Convention were completely silent on the matter, the principle would probably still be enacted by each country in its national law. In his view, it related more to the seed trade and to consumer protection than to the protection of the private rights of a breeder.

186. Mr. R. ROYON (CIOPORA) said that CIOPORA wished to strongly support the remarks of the Secretary-General of UPOV.

187. Mr. S. D. SCHLOSSER (United States of America) said that his Delegation would welcome the deletion of paragraph (7).

188. The PRESIDENT noted that the proposal contained no provision to match paragraph (8) of document DC/4. Since there were no statements or questions at that stage he invited comment on paragraph (8) of the proposal which more or less corresponded to paragraph (9) of document DC/4.

189. Mr. P. W. MURPHY (United Kingdom) asked the Delegation of the United States of America whether there was any significance in the substitution of the word "associate" for the word "add."

190. Mr. B. M. LEESE (United States of America) said that his Delegation felt that the substitution was significant in that the word "add" implied that the indication became part of the variety denomination whereas the word "associate" meant that the indication could be used with the variety denomination.

191. Mr. D. M. R. OBST (European Economic Community) sought clarification of the effect of paragraph (8) with respect to legal prescriptions regarding the naming of seeds and planting material in trade.

192.1. The PRESIDENT said in response that he understood Mr. Obst to be referring to rules governing the official labelling of seeds and planting material. He believed that there was agreement among the member States of UPOV that the official label could not contain private names or trademarks but only the registered variety denomination.

192.2. The President closed the discussion on Article 13 and, in particular, on the proposal of the United States of America contained in document DC/12.

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FOURTH MEETING

Tuesday, October 10, 1978,

afternoon

Article 1: *Purpose of the Convention; Constitution of a Union; Seat of the Union* (*Continued from 116*)

193. The PRESIDENT reopened the discussion on Article 1(1) and asked the delegation of the Netherlands whether it wished to add to its earlier introduction of its proposal which was contained in document DC/14.

194. Mr. K. A. FIKKERT (Netherlands) confirmed that there was no intention in the proposal of his Delegation to make substantive changes.

195. Mr. B. LACLAVIERE (France) said that he did not think that the proposal was merely a matter of drafting. He believed that it was a matter of much greater importance. He admitted that he had, at first sight, found the proposal of the Delegation of the Netherlands to be totally compelling, and he had been preparing to make some complementary proposals. But on reflection, and having talked with a number of delegates, he had realized that the proposal was some fifteen years too late. Everyone knew what was meant by "the Union" and "a breeder." He had never heard of a plant breeder's right being attacked because the meaning of "the Union" or of "a breeder" was not known. More seriously, people had been conversant with the Convention for some fifteen years and, in particular, a certain number of States had studied it and were preparing to perhaps accede to it at some stage. If one was now going to say that Article 1 comprised Article 20 and parts of Article 30(2) and so on, then the Convention would become difficult to recognize for those who had been applying it for some fifteen years. Mr. Laclavière was therefore very afraid that the proposal would lead to confusion. For his part he would wish that the present text should not be modified when it did not reveal major disadvantages, and that the present order should be kept even if it were not satisfactory.

196. Mr. R. DERVEAUX (Belgium) said that he considered that the proposal of the Netherlands simplified the drafting but he thought that the Conference should defer detailed examination of Article 1, pending its examination of the remainder of the Convention. Then, at the end, it might examine whether the wording of that Article was coherent or whether it was in need of modification.

197. Mr. A. SUNESEN (Denmark) said that his Delegation supported the opinion expressed by the Delegation of Belgium. It thought that the proposal of the Netherlands had perhaps been made at a late stage and that the Conference should try to establish whether it was necessary to change the wording of Article 1.

198. Mr. K. A. FIKKERT (Netherlands) said that the Conference should not be afraid of trying to improve the drafting of the Convention it was revising, if that were possible.

199. Dr. D. BÖRINGER (Federal Republic of Germany) said that he did not know whether the Conference could limit its discussion of the proposal to Article 1 in isolation. He had the impression that the Delegation of the Netherlands had worked through the whole of the Convention very thoroughly and that it would come forward with a wealth of editorial proposals. However good that might be for the individual case, he, like Mr. Laclavière, was a little apprehensive that material changes might be concealed, quite unintentionally, in the editorial proposals. At the least the Conference would have imposed upon it a difficult and time-consuming task and the same would be true, in particular, for the Drafting Committee.

200. Mr. P. W. MURPHY (United Kingdom) said that he agreed entirely with Dr. Böringer's statement. He thought that the Conference had to be very careful in dealing with drafting amendments in the revision of the Convention.

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201. Mr. W. GFELLER (Switzerland) said that his Delegation wished to endorse Mr. Fikkert's statement. It thought that the Conference should have the courage to make improvements in so far as they could be seen as such.

202. Mr. G. CUROTTI (Italy) supported the view expressed by Dr. Böringer.

203. Mr. J. F. VAN WYK (South Africa) said that his Delegation would very much like to support the idea of introducing a paragraph giving definitions. Perhaps more could be added later to make the text even more simple.

204. Mr. S. MEJEGÅRD (Sweden) said that his Delegation thought that the proposal of the Netherlands was a very good one, but that, as Dr. Böringer had said, the Conference should be very careful in this respect. His Delegation thought it would be sensible not to make any amendment which did not involve a change of substance. It therefore supported the view expressed by Dr. Böringer.

205. The PRESIDENT concluded that three member States favored the introduction of the proposal of the Delegation of the Netherlands, contained in document DC/14, and that the remaining seven member States were somewhat reluctant or at least wished to be very careful. He thought that a decision should not be made on the drafting at that stage and proposed that only the substance should be considered for the time being. He asked whether anyone was against the substance of Article 1(1).

206. Article 1(1) was adopted as appearing in the Draft.

207. The PRESIDENT opened the discussion on paragraphs (2) and (3) of Article 1.

208. Paragraphs (2) and (3) of Article 1 were adopted as appearing in the Draft, without discussion.

209. It was decided that the decisions referred to in paragraphs 206 and 208 above remained subject to a decision on the drafting proposal contained in document DC/14. (Continued at 870)

Article 2: Forms of Protection; Varieties (Continued from 131)

210. The PRESIDENT opened the discussion on Article 2(1).

211. Article 2(1) was adopted as appearing in the Draft, without discussion.

212. The PRESIDENT reopened the discussion on Article 2(2) and asked the Delegation of the United Kingdom whether it wished to say more about its proposal which was contained in document DC/15.

213. Mr. A. F. KELLY (United Kingdom) said that the purpose of the proposal was to clarify the somewhat ambiguous wording, in the English text at least, in the Draft. The earlier discussion had shown that different meanings had indeed been given to Article 2(2). It had been evident, for instance, that the word "cultivated" in English meant something different from what was stated in the German text. It had also been evident that there was some confusion whether more than one kind of variety existed. For the purposes of the Convention he would personally favor that there should be only one kind of variety, being the variety one was trying to protect. After reflection he had come to the conclusion that perhaps the wisest course was simply to delete Article 2(2) and he so proposed.

214. Mr. J. BUSTARRET (France) thought that the present wording was, after all, no worse than every other wording which had been proposed. He would tend to agree with Mr. Kelly's conclusion that Article 2(2) was perhaps not necessary. He thought, nevertheless, that one really had to bear in mind that the word "variety" as it was used, without being defined in the Convention, had a meaning for everyone present. What was not absolutely certain was that the meaning was really the same for everyone. There had been no difficulties so far and he would therefore agree with Mr. Kelly that the paragraph, which was probably not indispensable, should be deleted. In considering whether a definite interpretation of the word "variety" might emerge he found himself thinking, in particular, about strains of cultivated mushrooms. Mr. Bustarret wondered if they were relly varieties for the purposes of the Convention if it did not clearly say that they were. He feared that there was a slightly narrow translation of the word "variété" which was applied only to cultivated plants whereas, in the spirit of the authors of the Convention it had been thought that it could have a wider significance, for example to 'varieties' of cultivated mushrooms. He believed that to be a minor difficulty and rather than replace that paragraph by the paragraph proposed, with its "assemblage" or "ensemble de plantes" which, although drawn from the Code of Nomenclature, did not signify very much, he wondered whether it would not be as well to simply delete paragraph (2). He therefore supported the opinion of Mr. Kelly.

215. Mr. M. TOURKMANI (Morocco) said that he would like to propose a definition which would give a slightly wider meaning. His new definition would be "For the purposes of this Convention the word "variety" is applicable to any plant material which is distinct, homogeneous and stable." It could be applied to both self-fertile and cross-fertile plants. He had replaced the words "assemblage of plants" by "plant material" because the idea of an assemblage gave the impression of something heterogeneous. The words "capable of cultivation" had been deleted because varieties which were already cultivated might otherwise be excluded from being considered as varieties. The word "distinct" had been added because distinctness was an important characteristic. Detailed definitions of homogeneity and stability were not included.

216. Mr. R. DERVEAUX (Belgium) asked whether the Delegation of the United Kingdom had withdrawn its proposal or whether it was still open for discussion.

217. Mr. A. F. KELLY (United Kingdom) confirmed that he had proposed the deletion of Article 2(2) but, if that were not carried, then the proposal in document DC/15 would be open for discussion again.

218. The PRESIDENT invited comments on and objections to the proposal of the Delegation of the United Kingdom to delete Article 2(2), which proposal had been supported by the Delegation of France.

219. Dr. H. H. LEENDERS (ASSINSEL) thought that it was desirable from a legal point of view to have a definition of "variety." He wondered whether the experts present could meet to see if they could formulate a satisfactory definition.

220. The PRESIDENT advised that the matter had been on the agenda at each of the six sessions of the Committee of Experts on the Interpretation and Revision of the Convention, and at sessions of other bodies of UPOV, but a satisfactory definition had not been found.

221. Dr. E. FREIHERR VON PECHMANN (AIPPI) said that the question of defining what should be eligible for protection had been under discussion in the field of patents for more than one hundred years, without result. Everybody was thankful that no result had been achieved because new developments and everything which would arise in the future could be combined under the broad concept. Perhaps it would really be sufficient in the Convention to mention the "plant variety" just in paragraph (1) of Article 1, thus catching everything which should be protected. It might be left to jurisprudence to interpret whether mushrooms or the like were covered, rather than seeking now a definition which might be too narrow and which, one day, would need to be altered again.

222. It was decided to omit paragraph (2) of Article 2.

223. The PRESIDENT opened the discussion on Article 2(3).

224. Mr. M. LAM (Senegal) said that he just wished to draw attention to the form of words used because the paragraph, as drafted, implied that "genus" and "species" were of equivalent value, whereas for him the genus was made up of species. He believed that there was a slight difference of meaning between the two words.

225. The PRESIDENT confirmed that there was a great difference. A genus could comprise several species which could comprise sub-species and sub-species could comprise varieties. Paragraph (3) had been very carefully drafted.

226. Mr. F. SCHNEIDER (International Commission for the Nomenclature of Cultivated Plants) noted that an orchid hybrid, which was a hybrid between genera, was neither within a genus nor within a species. He wondered whether it might not be better to refer only to "species." The inclusion of "genus" suggested that the authors of the Convention had wanted to exclude the family or the class. National lists of species protected included several families. For example, conifers were protected in the United Kingdom and orchids were protected in the Netherlands. It might be better to refer only to "species" in the general sense. The fact that "genus" had been added suggested that other botanical taxa were excluded.

227. The PRESIDENT said that efforts had been made to find a single word which would suffice. There was one word in the English language and that was the word "kind" which was used in the United States Plant Variety Protection Act of 1970. It had proved impossible to translate that word into other languages and, after long deliberations, the Committee of Experts had concluded that the words "genus" and "species," which were used elsewhere in the Convention, were the most suitable.

228. *Article 2(3) was adopted as appearing in the Draft.*

Article 3: National Treatment; Reciprocity

229. The PRESIDENT opened the discussion on Article 3(1).

230. *Article 3(1) was adopted as appearing in the draft, without discussion.*

231. The PRESIDENT opened the discussion on Article 3(2).

232. Mr. P. W. MURPHY (United Kingdom) noted that it would be necessary, in the English text, to replace the word "headquarters" by the words "registered office."

233. *Subject to the drafting amendment referred to in the above paragraph, Article 3(2) was adopted as appearing in the Draft.*

234. The PRESIDENT opened the discussion on Article 3(3), noting that it corresponded to the first part of Article 4(4) in the present text of the Convention.

235. Mr. R. TROOST (AIPH) said that his Association was opposed to paragraph (3), believing that it would be better, with the extension of the Convention in mind, to keep purely and simply to the principle of national treatment, as was done in other conventions in the field of industrial property.

236. Mr. R. ROYON (CIOPORA) said that his Organization wished to support Mr. Troost's intervention, believing that it was in the interest of breeders to be able to benefit from protection in the greatest possible number of States. In its

opinion adoption of the principle of assimilation of nationals of the Union might be the only way to encourage the development of collaboration and to establish uniform rights for nationals of the member States of the Union. CIOPORA therefore wished that Article 3(3) be rejected.

237. Dr. E. FREIHERR VON PECHMANN (AIPPI) said that his Association wished to add its support for the principle of national treatment. It had defended that principle, especially in connection with the Convention of the Paris Union, ever since that Convention had come into existence, and he therefore wished to stress that it naturally adopted the same attitude with regard to the Convention under discussion.

238. Mr. B. M. LEESE (United States of America) declared that adoption of the principle of national treatment would cause a problem for the Plant Variety Protection Office. Section 43 of the Plant Variety Protection Act contained reciprocity limits and he felt that it would not be possible to make the necessary change in that Act.

239. The PRESIDENT asked whether any delegation, having heard the wishes of AIPH, CIOPORA and AIPPI, and having heard the declaration of the Delegation of the United States of America, wished to make a proposal.

240. Article 3(3) was adopted as appearing in the Draft.

Article 4: Botanical Genera and Species Which Must or May be Protected

241. The PRESIDENT opened the discussion on paragraphs (1) and (2) of Article 4.

242. Paragraphs (1) and (2) of Article 4 were adopted as appearing in the Draft, without discussion.

243. The PRESIDENT opened the discussion on Article 4(3) and sought comments on subparagraph (a).

244. Mr. J. E. VELDHUYZEN VAN ZANTEN (ASSINSEL) said that it could be seen from Annex III to document DC/7 that ASSINSEL would like the words "of its main crops" to be added at the end of subparagraph (a). The purpose of adding those words would be to oblige States acceding to the Convention to apply its provisions initially to at least five genera or species of their main crops.

245. Mr. M. LAM (Senegal) said that he wished to draw attention to the fact that in some countries the range of crops grown was very limited. Such countries possessed several groups of varieties for a given species rather than numerous species. Mr. Lam wished to know what possibilities such countries would have to become members of the Union. He took as an example Senegal where the peanut was the dominant crop plant.

246.1. The PRESIDENT confirmed that Article 4(4), if adopted, would mean that the Council could relieve States which possessed only a few cultivated species from the obligation to afford protection to the minimum numbers of genera or species referred to in Article 4(3).

246.2. The President said that the Committee of Experts had considered very carefully the wish of ASSINSEL and of other organizations that the words "of its main crops," or similar words, should be added to Article 4(3)(a). It had found, however, that the obligation could not be enforced because it would be up to the States themselves to decide what were their main crops. The Committee had prepared a draft Recommendation which went further than the wishes expressed by ASSINSEL and their organizations. It would recommend that each member State should use its best endeavours to ensure that the genera and species eligible for protection under its national law comprised as far as possible those genera and species which were of major economic importance in that State. It would recommend further that each State intending to become a member of the Union should choose

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the genera and species to which as a minimum the Convention had to be applied at the time of its entry into force in the territory of that State from genera and species of major economic importance in that State.

247. Mr. J. E. VELDHUYZEN VAN ZANTEN (ASSINSEL) said he was unable to comment on the legal difficulties referred to by the President but he thought his Association would be in favor of the proposed Recommendation which he hoped it would be possible to study later.

248. The PRESIDENT confirmed that the draft Recommendation on Article 4 would be distributed.

249. Article 4(3)(a) was adopted as appearing in the Draft.

250. The PRESIDENT sought comments on subparagraph (b) of Article 4(3).

251. Mr. R. ROYON (CIOPORA) said that his Organization thought that the provisions of paragraphs (3) and (4) of the proposed Article 4 were aimed essentially at taking account of the technical and financial difficulties which some States might encounter in establishing facilities for the preliminary examination of each relevant species. It thought, nevertheless, that there was a risk that the minimum number of species which had been specified would be either too low, in view of the degree to which some countries were organized, or too high for other countries. It therefore thought that from a certain point in time after at least one member State was in a position to carry out the preliminary examination for a given species, no other member State should be able to refuse to afford protection to that species. CIOPORA therefore suggested that subparagraph (b)(iii) should be modified in such a way that after a certain period of time protection had to be extended to every genus or species to which any member State applied the Convention and for which such member State was in a position to carry out the preliminary examination provided for in Article 7.

252. Dr. F. POPINIGIS (Brazil) said that he understood the suggestion of the representatives of CIOPORA to mean that States joining the Union would have to extend protection, after some time, to all the species which were protected in the other member States. He felt that such an obligation might create some problems of a technical nature. Sugar beet, for example, might be protected in European Countries but was not grown in Brazil. If Brazil joined the Union and consequently had to extend protection to sugar beet, then, just because of that obligation, it would have to train persons to work with sugar beet.

253. Mr. R. ROYON (CIOPORA) said that the aim of the wish expressed by CIOPORA was to avoid the very situation which the Delegation of Brazil had instanced. In expressing that wish he had forgotten to underline that it should be achieved by means of bilateral or multilateral agreements on cooperation in examination. By that means a member State not protecting a given species, which was protected in at least one member State, should allow access to protection for that species in its territory, making beneficial use, naturally, of the result of the preliminary examination carried out in another member State. That other State would already have been affording protection to that species for a long time and would have established the means necessary to carry out the preliminary examination. Such an arrangement would help especially those countries which, whether for climatic, financial or technical reasons, were not in a position to make the preliminary examiantion for a given species. CIOPORA could be said to be looking in the same direction as was the Delegation of Brazil in the reservation it had expressed.

254. Dr. D. BÖRINGER (Federal Republic of Germany) thought that a careful answer should be given to Mr. Royon's suggestion concerning subparagraph (b). That suggestion was really very similar to the thinking of the Union but it was not, or was not yet, achievable. In practice if the United States of America acceded to the Union immediately then the following situation would exist: starting from the fact that rights in vegetatively propagated species were guaranteed by means of patents, the result was that, in essence, varieties of all vegetatively propagated species could be protected in that country, and, if he had correctly understood Mr. Royon, that would automatically mean that all the other member States of UPOV would have to protect varieties of those vegetatively propagated species.

That would not be practical. Dr. Böringer said that he could mention a series of other examples. Something like that might perhaps work in the future in a smaller circle of States but he believed that it was not feasible on a world-wide scale.

255. *Article 4(3)(b) was adopted as appearing in the Draft.*

256. The PRESIDENT sought comments on subparagraph (c) of Article 4(3) and noted that the reference to paragraph (3) of Article 2 would have to be replaced by a reference to paragraph (2) of Article 2 since the Conference had decided to delete the former paragraph.

257. *Subject to the drafting amendment referred to in the above paragraph, Article 4(3)(c) was adopted as appearing in the Draft, without discussion.*

258. The PRESIDENT opened the discussion on paragraphs (4) and (5) of Article 4.

259. Mr. A. PARRY (United Kingdom) referred to his experience in relation to obligations which were provided for under the EEC provisions relating to the association of overseas countries and territories with the Community. Although this might not seem to be of immediate relevance to plant varieties there was a provision, in the decision setting up that regime, which was very similar to paragraphs (4) and (5) of Article 4. It had been thought, when that regime had been set up, that it would be possible to identify in advance the countries and territories which should benefit from what might be called, for the purposes of the Conference 'paragraph 4 treatment' and that there would therefore be no need for retrospective 'paragraph 4 treatment.' That had not proved to be the case. It had been discovered in the operation of that regime that there was a need to reconsider the treatment envisaged at the time of ratification. The Conference might therefore wish to consider whether it should not provide that the facility enabling the Council to take account of special economic or ecological conditions should not apply merely to the time of ratification or accession, as provided in para-

graph (4), but should be extended to apply, under paragraph (5), either to any time thereafter or possibly to a period of say five years thereafter. Mr. Parry thought that it could be regarded as being too inflexible to require a State to determine, when deciding to ratify or accede, whether it needed to avail itself of paragraph (4).

260. Dr. A. BOGSCH (Secretary-General of UPOV) said that he thought that the very facility suggested by Mr. Parry was provided for in paragraph (5). The Council could assist a member State which encountered special difficulties by prolonging indefinitely the period for compliance.

261. Mr. A. PARRY (United Kingdom) thought that Dr. Bogsch was right in part but the facility enabling the Council to reduce the minimum numbers of genera or species to which a State had to apply the provisions of the Convention, which was applicable under paragraph (4), was not provided for in paragraph (5).

262. Dr. A. BOGSCH (Secretary-General of UPOV) said that a State could ask at any time up to eight years after ratification or accession for an unlimited period for compliance. The Council could prolong the period indefinitely and that would have the same effect as reducing the minimum numbers.

263. Mr. A. PARRY (United Kingdom) said that he had simply wished to draw attention to the problem. He did not wish to press the matter if the Conference felt that there was no difficulty.

264. Paragraphs (4) and (5) of Article 4 were adopted as appearing in the Draft.

265. The PRESIDENT drew attention to the fact that paragraphs (4) and (5) of the present text of Article 4 were not included in that Article in the Draft.

266. The exclusion of the paragraphs referred to in the preceding paragraph was adopted, without discussion.

Article 5: Rights Protected; Scope of Protection

267. The PRESIDENT opened the discussion on Article 5 and said that the proposal in the Draft contained only a few drafting amendments but none of a substantive nature. He knew that there were wishes for some changes in Article 5 and he felt it might be helpful to commence with a general discussion.

268. Dr. H. H. LEENDERS (FIS) referred to the first sentence of paragraph (1) and, in particular to that part which read "the prior authorisation of the breeder shall be required for the production, for purposes of commercial marketing, of the reproductive or vegetative propagating material." In spite of the fact that those words had been discussed at length when the Convention had been drawn up, the FIS felt that they were not satisfactory in all circumstances. Dr. Leenders quoted, by way of example, the situation which could arise when peas or beans were being produced for canning. He had no wish to be critical of the canneries, which were customers of the seed trade, but it could happen that their production exceeded their handling capacity. In that event it was not unusual for the canneries to reserve the surplus production for use as seed in the following year. Taking the wording he had specified earlier he would say that the canneries were not producing peas or beans "... for purposes of commercial marketing of the reproductive ... material" but for canning. If they found that they could not use for canning all the peas or beans produced then they changed the destination of the samples into that of use as seed in the following year. The FIS therefore thought that another wording, which had been considered when the Convention was being drafted, would improve paragraph (1). That wording had read "the prior authorisation of the breeder shall be required for the production for commercial purposes of reproductive or vegetative propagating material." There was, of course, the question of farmers saving seed from their own harvests. It might be said that they did that for commercial purposes but a reasoned explanation of the wording he had suggested would show that it could not be said that they were producing reproductive material for commercial purposes. Mr. Leenders said that the replacement of the words "for purposes of commercial marketing" by the words "for commercial purposes" would help in counteracting certain abusive practices.

269. Mr. J. VELDHUYZEN VAN ZANTEN (ASSINSEL) said that his Association believed Article 5 to be the very heart of the Convention. Any amendments proposed had to be treated with the utmost care. It was aware of the fact that the wording of that Article, and especially of paragraph (1), had resulted from long and thoughtful discussions which would be renewed if amendments were proposed. There had been more than ten years' experience, however which had shown that, although the wording had been good, some improvements could be justified. ASSINSEL thought that three points were worthy of consideration. The first was the point which had just been raised by the representative of FIS. ASSINSEL fully supported what had been said. If the wording "production for commercial purposes" were used instead of "production for purposes of commercial marketing" then it would be clear that the prior authorisation of the breeder was required for any production used commercially as reproductive or vegetative propagating material. ASSINSEL would also strongly recommend that a definition of non-commercial production should be made. Such a definition might include, for example, material remaining on the premises of the farmer who had produced it, material not transported over more than a few kilometres from the place where it was produced and material not officially authorised for commercial use.

270.1. Mr. R. ROYON (CIOPORA) wished to remind the Conference of CIOPORA's point of view on the scope of protection, as it appeared in the present text of Article 5 and as CIOPORA would like it to appear in the revised text of the Convention. CIOPORA thought that the most urgent question was not so much to know whether the scope of the minimum right of the breeder, as provided for in Article 5(1), should be extended, but to establish whether that minimum right was not, in fact, very inadequate and even illusory. As stated in greater detail in Annex V to document DC/7 the production of cut flowers was the sole purpose, in economic terms, for numerous species of ornamental plants, such as chrysanthemums, carnations and glasshouse roses. The breeder of varieties of such species exploited or licensed not the right to reproduce propagating material but the right to produce and sell cut flowers. It should be noted, furthermore, that trade in cut flowers was international and was becoming increasingly so. There was a growing tendency for production areas to be transferred from the present member States of UPOV to non-member States, such as certain countries in Latin America and in Africa. Originally it had been wished, when the Convention had been signed in 1961, that the need to protect cut

flowers in a somewhat special way should be taken into account. The last sentence of Article 5(1) had been included for that reason. That sentence, if read quickly, could give the impression that cut flowers were protected, whereas that was not so. In fact the last sentence of Article 5(1) protected only propagation from the reproductive parts found on the plants or on the cut flowers, whereas, to enable the breeder to exercise his minimum right normally, it was necessary to protect the plants and the cut flowers themselves. It was only in that way that the breeder could, on the one hand, effectively control plantings of his variety in countries in which he enjoyed protection and that he could, on the other hand, guarantee the right of peaceful enjoyment to his licensees. As things were at present, licensees in UPOV member States whose national legislation afforded only the minimum protection provided for in Article 5(1) were not protected in relation to imports of plants or cut flowers originating from non-member States. The imported plants or cut flowers were sold as such and were not destined to be used to propagate the variety. CIOPORA had therefore expressed the wish that Article 5(1) should be revised during the Conference and had proposed, in Annex V to document DC/7, an amended text, under the reference 5(2), which read: "The right of the breeder of vegetatively reproduced ornamental plants shall extend to plants or parts thereof which are normally marketed for purposes other than propagation."

270.2. Mr. Royon said that he would also like to recall that several experts had objected, on more than one occasion, that the protection of plants or cut flowers might enable the breeder to obtain a succession of royalty payments at the various stages of the marketing of the variety. Although present and former commercial practices of breeders showed such an objection to be totally unjustified, CIOPORA had sought a way of definitively excluding it by incorporating directly into the text of the Convention a provision which would give official authority to the theory of the exhaustion of rights, as had been done in the Luxemburg Convention on the Community Patent. CIOPORA had therefore suggested that a sentence should be added to the wording which he had just proposed under the reference 5(2), if it was felt that such a precaution was necessary, which might read: "The remuneration of that right, however, may not extend in the member States of the Union to the marketing of the respective plants or parts thereof after they have been put on the market in one of those States by the breeder or with his express consent."

270.3. Mr. Royon said that it was time to insist on the need to resolve the problem at the level of the Convention rather than leaving it to the discretion of member States because, as he had said earlier, it was not so much a matter of extending the scope of protection as of allowing the breeder to exercise his minimum right. At previous conferences CIOPORA had taken the opportunity to give practical examples of fraudulent practices which could occur. The minimum right provided for in the Convention did not allow the breeder to exercise his right normally in the event of such practices, examples of which could be found in the reports of the meetings of the Committee of Experts on the Interpretation and Revision of the Convention.

271.1. Mr. J. E. VELDHUYZEN VAN ZANTEN (ASSINSEL), noting the previous speaker's reference to the last sentence of Article 5(1), said that the second remark that he wished to make also concerned that sentence. It was recognized that ornamental plants or cut flowers could be used for the purposes of propagation. ASSINSEL believed that developments in technology would make similar possibilities available for vegetables and maybe for potatoes and for sugar-beet. Realisation of the day-dream of growing cauliflowers for machine harvesting, from cloned plantlets produced in meristem laboratories at a viable cost, for example, was not that distant. It therefore considered that the provision made in the Convention for ornamental plants should be extended to other kinds of plants and suggested that the final sentence of Article 5(1) should be amended to read: "The breeder's right shall extend to plants or parts thereof normally marketed for purposes other than propagation when they are used commercially as propagating material in the production of plants."

271.2. Mr. van Zanten said that the third and final point which he wished to raise concerned another development which had not been foreseen when the Convention was drafted. That was the production and sale of plantlets. It was very difficult to control the origin of the seed used by producers of plantlets who commercialized their product. ASSINSEL thought that the escape of significant quantities of propagating material from the control of the breeder were against the spirit of the Convention. It thought that the problem could be solved by deleting the word "vegetative" from the second sentence of Article 5(1) which would then read: "Propagating material shall be deemed to include whole plants." Mr. van Zanten

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stressed that breeders believed that royalty should not be payable more than once on the same material. Their reason for suggesting the amendment was to improve the effectiveness of their control over the use of seed of their varieties, and not to enable them to require a second royalty payment. Whether producers of plantlets purchased seed from the breeder or not the breeder could not maintain control if a further generation of seed was produced by them and used by them to produce plantlets which they subsequently commercialized.

272. Dr. H. H. LEENDERS (FIS) said that the Conference would have seen from the written comments made by his Organization and contained in Annex IV to document DC/7 that FIS fully supported what had just been said by the representative of ASSINSEL.

273. Mr. K. A. FIKKERT (Netherlands) said that his Delegation had great sympathy for the deletion of the word "vegetative" and was preparing a proposal to that effect.

274. Dr. D. BÖRINGER (Federal Republic of Germany) said that the great number of proposals which had just been made was somewhat confusing. If he had understood them correctly they were all aimed at extending the effect of protection, and in some cases to a rather considerable degree. One of them was aimed at saying something in the Convention about royalties. Dr. Böringer believed that they should all be considered calmly, proposal by proposal, to see whether any part of them could be taken into the revised text of the Convention. His Delegation had so far had the impression that the text contained in the Draft was very balanced on the one hand but that, on the other hand, it made it possible for member States to cope with practical difficulties or new technical developments by extending the effect of protection at the national level. He fully understood Mr. Royon's remark that it would really be more agreeable if the Convention itself provided for uniform treatment of such matters by all member States. He did not know whether it was possible or whether it was desirable. He imagined that several member States could act jointly under the present text to resolve existing problems. All in all Dr. Böringer thought that the Conference should examine those proposals very care-

fully and that it should examine, moreover, whether it would not be more difficult for States to accede to a Convention which, as regards the effect of protection, would go beyond or far beyond what had been proposed so far in the Draft.

275. Mr. A. SUNESEN (Denmark), supporting what had been stated by the Delegation of the Federal Republic of Germany, referred to his own Delegation's written comments which were contained in document DC/11. It was very satisfied with the wording in the Draft and doubted whether it could accept a text which gave a much wider protection than that wording.

276. Mr. P. W. MURPHY (United Kingdom) thought that his Delegation held the same views as the Delegation of the Federal Republic of Germany and the Delegation of Denmark regarding the possibilities of extending the right which was already set out in the Convention. He felt that he should point out that if the United Kingdom had to extend the right in the ways which had been proposed, then new national legislation would be required. Not only breeders but all interested organizations would be able to come forward with their own proposals for amendments. As a result the right of the breeder, far from being extended, might in fact be limited in other ways.

277. Mr. J. E. VELDHUYZEN VAN ZANTEN (ASSINSEL) said, in response to Dr. Böringer's remarks, that the suggestions made by ASSINSEL were aimed not at the extension, or considerable extension, of the rights granted to the breeder, but at repairing imperfections which had shown up from use of the system during the previous ten years. Dr. Böringer had expressed a fear that the accession of further States might be discouraged. ASSINSEL thought it to be of interest to existing member States and to any new ones to know that the protection system was complete and that it functioned well. Finally, Mr. van Zanten confirmed that ASSINSEL had not intended that royalties should be mentioned in the text.

278.1. Mr. R. ROYON (CIOPORA), replying to the comments made by the Delegations of the Federal Republic of Germany, of Denmark and of the United Kingdom, said that he wished to stress that CIOPORA was not asking that countries which were not yet members of UPOV should be obliged to align themselves on a 'maximum' level of protection, thus making it more difficult for them to accede. It was simply a matter of remedying a huge gap in Article 5(1). That gap, unless it was filled at the level of the Convention, would allow violations of the rights of breeders, which had occurred throughout the years since the Convention had entered into force, to go on occurring for years to come. To maintain the present wording of paragraph (1) was to say that the "minimum protection" given by it was available only in respect of some species, but not, for example, in respect of the ornamental species intended for the production of cut flowers or of the fruiting species intended for the production of fruit. For example, a supermarket, situated in a member State of UPOV applying the "minimum" protection, did not contravene the "minimum" text of the Convention since it sold the plants to amateurs; it did not sell plants intended for propagation but quite simply plants intended for use as such. Similar situations could occur in respect of the production of cut flowers and of fruit.

278.2. Mr. Royon went on to say that a breeder who obtained protection in a mem- State of UPOV for an ornamental or a fruiting variety did so in order to be able to control its commercial exploitation which consisted in the production of plants, cut flowers or fruit. Therefore, if the huge gap in Article 5(1) was not remedied it would have the same effect as a flat refusal to protect certain species and perhaps, as the years passed, the loopholes would be more and more easily exploited. Dr. Böringer had remarked that it might be more satisfactory to deal with the problem at the level of national legislation. Mr. Royon thought that such was not the case because, on the one hand, it seemed to him that the Conference should have the courage to consider the inadequacy of the legal provisions of the text of the Convention, and because, on the other hand, it had been seen that it was very difficult to get national legislation amended when there was no obligation in the Convention. He wished to give equal emphasis to the fact that the interest in having the said gap remedied was not just one of a juridical and economic nature in relation to importations from non-member States, but one which subsisted in the member States as well in relation to the breeder's control over his varieties. He believed that subject had been sufficiently developed by the representative of ASSINSEL.

FIFTH MEETING

Wednesday, October 11, 1978,

morning

279. The PRESIDENT invited the Delegation of the Netherlands to introduce its proposal, contained in document DC/33, to delete the word "vegetative" from the second sentence of Article 5(1).

280. Mr. R. DUYVENDAK (Netherlands) said that he would like to get agreement, for the purpose of the discussion, on the wording to be used in French to translate the words "propagating material." In French a different wording was used depending on whether a plant was sexually reproduced or vegetatively propagated. Such a separation did not exist in every day English and German but had been made in the translations of the existing text of the Convention into those languages. Mr. Duyvendak asked the Delegation of France whether it could agree, just for the purpose of the discussion, to use the single wording "matériel de reproduction."

281. Mr. J. BUSTARRET (France) thought that his Delegation could not follow Mr. Duyvendak's proposal. In fact three words were used in French: "reproduction," when sexual reproduction was involved, which meant that seeds were the only propagating material; "multiplication végétative," when cuttings, grafts or whole plants formed the propagating material; and "multiplication" with no adjective, which had a much wider meaning, encompassing everything which made it possible to propagate a variety. He therefore believed that, in that particular instance, the exact translation of "propagating material" was "matériel de multiplication."

282. Mr. R. DUYVENDAK (Netherlands) found what had just been said a great help. He therefore proposed that the French text of document DC/33 should read: "le matériel de multiplication comprend les plantes entières." The words "reproduction ou de" and "végétative" should be omitted.

283. Mr. J. BUSTARRET (France) said that the real reason for having included the sentence "vegetative propagating material shall be deemed to include whole plants" in the present text of Article 5(1) had been to take account of species for which whole plants were normally marketed as propagating material, and to show that the vegetative propagating material was not limited to cuttings, tubers and the like. If the word "vegetative" was taken out then the scope of the paragraph was changed, in that one introduced the possibility of protecting young plants which were propagated to replace seeds in the propagation of a variety.

284. Mr. R. DUYVENDAK (Netherlands) agreed that his Delegation was proposing a substantive change which was in line with the discussion which had taken place the previous day and which had been sought by some of the Observer Organizations. In a species such as lettuce, which was normally reproduced sexually, someone who produced and sold seed of a protected variety would be caught by the scope of the protection but he could avoid that net by selling plantlets instead of seed. His country's legislation provided that in such a case plantlets which were not the usual propagating material, but which were used as such, fell under the scope of protection. Mr. Duyvendak asked whether the laws of other countries contained a similar provision.

285. The PRESIDENT said that in Denmark a completely different system was envisaged, under which plantlets would be subjected to official control when they were sold. The control implied a genetic control of the origin of the seed. If it was found that the seed used was not certified seed then the sale of the plantlets would be prohibited.

286. Mr. B. M. LEESE (United States of America) confirmed that plantlets produced directly from seed were covered in his country by the Plant Variety Protection Act.

287. Mr. R. GUY (Switzerland) said that his country's legislation referred to "matériel de multiplication" which it defined as being reproductive propagating material, such as seeds, or vegetative propagating material, such as plants or parts of plants. His Delegation felt that the legislation did extend the protection to plantlets. It seemed evident that lettuce seed which was sold was reproductive propagating material and that plantlets which were sold were vegetative propagating material.

288. Mr. S. MEJEGÅRD (Sweden) said that his country's legislation gave the breeder a monopoly right in each generation of multiplication. There was no special provision for plantlets but the construction of the law was such that they were covered. In addition, Sweden had a similar system to that envisaged in Denmark, providing for the control of all sexually-produced material.

289.1. Mr. J. BUSTARRET (France) said that he would like to specify that, in France, protection was only extended to plantlets of certain species. Protection was extended in the case of vegetable species where the production of plantlets had become a commercial matter, for the sole purpose of ensuring that the rights of the breeder were suitably protected.

289.2. In response to the Delegation of Switzerland Mr. Bustarret thought that it could not be said that plantlets were vegetative propagating material because such material could only originate from the asexual organs of the plant. The term could not be applied to plants produced from seeds, at least not according to his way of thinking.

289.3. If one wished to expressly extend the right of the breeder to cover plantlets in large-scale commercialization then that could be done by saying that "le matériel de multiplication," or "propagating material," included whole plants.

290. Mr. J. F. VAN WYK (South Africa) said that his country had not so far been confronted with a request to protect plantlets. His country's legislation, however, protected the propagating material of a variety. Propagating material was defined as "any plant or any bulb," etc., including the seed of a plant. He believed it would be possible to give protection to plantlets.

291. Mr. G. CUROTTI (Italy) said that his country's legislation protected reproductive and vegetative propagating material but, in general, even plantlets were protected. Such was the case, for example with species of vine.

292. Mr. R. DERVEAUX (Belgium) said that the law of Belgium also allowed protection to be extended to plantlets.

293. Miss E. V. THORNTON (United Kingdom) said that throughout the United Kingdom's law the term "reproductive material" was used. It was defined as including whole plants and parts of plants, when used as reproductive material. She thought, therefore, that her Delegation could not agree to the proposal of the Delegation of the Netherlands. It would, of course, be for the courts to decide whether a sale of plants was being effected for reproductive purposes, but it appeared from the law that plantlets were not included.

294. Mr. W. BURR (Federal Republic of Germany) said that in his country the situation was similar to that in the United Kingdom. At present the legislation provided protection for whole plants and parts of plants, destined for the production of plants, only for species whose plants were normally vegetatively propagated. Therefore acceptance of the proposed amendment would be difficult for his Delegation as well.

295. Mr. H. AKABOYA (Japan) said that according to his country's new legislation, known as The Seeds and Seedlings Law, the scope of protection included not only plantlets of vegetatively propagated varieties but also plantlets of sexually reproduced varieties.

296. Mr. M. TOURKMANI (Morocco) said that his country had just introduced new legislation which foresaw the protection of new varieties of plants. In that legislation both seeds and plants were protected. The word "seed" had been defined as everything which was sexually reproduced, and the word "plant" as everything which was vegetatively propagated, whether it was a whole plant or part of a plant. Therefore a plantlet would be protected under his country's legislation.

297. The PRESIDENT asked whether any delegation wished to formally support the proposal of the Delegation of the Netherlands.

298. The proposal of the Delegation of the Netherlands, contained in document DC/33, was not proceeded with.

299. The PRESIDENT invited the Delegation of France to introduce document DC/17 Rev. which contained its proposal to replace the third sentence of Article 5(1) by certain new provisions.

300.1. Mr. B. LACLAVIERE (France) said that it had seemed to his Delegation that the wording in the Draft was slightly restrictive in that it applied only to ornamental plants. In fact the provision should apply to all vegetatively propagated plants. It should apply, in particular, to fruit trees to which no-one was currently giving attention. The breeders of those species were facing particularly difficult and worrying circumstances. For that reason his Delegation had thought that it would be interesting to change the Convention slightly in order to extend the relevant provision to all vegetatively propagated plants, and the first sentence of its proposal was thus aimed at providing help for breeders of fruit trees who had no real encouragement to conduct research.

300.2. Mr. Laclavière went on to say that breeders had been put in an unfavorable position in that they had often been accused of wishing to claim royalties right up to the stage of the marketing of cut flowers or fruit. Such was not the case. Breeders had proposed the addition of the second sentence of his Delegation's proposal, as a kind of safeguard, to indicate that royalties could not be demanded after the first stage of marketing and to make it clear that they had no hidden intention to demand that royalties be paid at successive stages.

301. Mr. R. DERVEAUX (Belgium) wondered whether acceptance of the amendment proposed by the Delegation of France would entail the deletion of Article 5(4).

302. Dr. D. BÖRINGER (Federal Republic of Germany) said that he would like to ask the Delegation of France whether it would be correct to interpret the first sentence of the proposal as meaning that any apple from a protected apple tree, that

any trunk produced from a protected tree, that any bottle of wine produced from a protected vine, and so on, fell under the effect of the protection.

303. Mr. B. LACLAVIERE (France) thought that although Dr. Böringer's remark was pertinent its force was perhaps reduced by the second sentence of his Delegation's proposal which indicated that royalties could never be demanded after the first stage of marketing. He believed that the problem which the breeders had sought to resolve was primarily to introduce a kind of right of control. There was no question of demanding royalties on apples, and even less on wine, if wine was a part of a plant, which remained to be seen. What the breeder sought was to be able to verify that apples coming onto the market originated from apple trees on which royalties had been paid. It could happen that a producer obtained a few trees of an apple variety, if necessary by importing them. He then propagated them himself. That propagation was not in itself of a commercial nature because the producer was not going to sell the apple trees. He was, however, going to put onto the market large tonnages of apples which would bring absolutely no benefit to the breeder. Mr. Laclavière believed that such was the problem for which a solution was being sought and that was the idea behind his Delegation's proposal.

304.1. Mr. R. ROYON (CIOPORA) wished to comment first on the question raised regarding Article 5(4). He thought that the amendment proposed by the Delegation of France, which was aimed only at vegetatively propagated plants, should not entail the deletion of that Article. It was quite possible that for reasons which were not so far evident, or for reasons resulting from the evolution of new techniques, such an extension of the effect of protection would be shown to be just as necessary for other categories of plants. For that reason, in his opinion, Article 5(4) should be allowed to remain.

304.2. Mr. Royon also wished to comment on Dr. Böringer's reference to final products. He thought that the proposal of the Delegation of France, as it had been very clearly explained by Mr. Laclavière, was aimed at affording the breeder a right of control over apples, which were parts of a plant, but certainly not over bottles of wine, which were not.

304.3. Mr. Royon said that he would like to revert to Mr. Laclavière's explanation of the motives underlying the amendment proposed by the Delegation of France. As had been said the aim of the wording put forward in document DC/17. Rev., and of the wording suggested by CIOPORA and reproduced in Annex V to document DC/7, was to enable the breeder to control two kinds of situation. The first was the control of the commercial exploitation of a variety for which a breeder had been granted plant breeder's rights. Very highly developed propagation techniques now existed for ornamental plants, fruit trees and many vegetatively propagated plants, which made it possible to produce absolutely phenominal quantities of plants in a very small space. Plantlets had also been mentioned extensively. As an example one could produce tens of thousands of carnation or chrysanthemum cuttings in a very small part of a glasshouse. At the propagation stage it was not possible to distinguish the variety. The cuttings were like tiny blades of grass or small twigs and it was not possible to recognize the variety. Therefore the breeder was unable to go to the propagator and to say that is my variety because he would be running a very great risk if he were mistaken or if he had received, for example, wrong information regarding a suspected infringement. The plantlets or propagating material, which were subsequently sold, were planted by a grower who used them to produce cut flowers or fruit. It was only at the moment where those cut flowers or that fruit were put onto the wholesale market, or when some rose-bushes were packed in polythene bags and put, for example, on a shelf in a supermarket, that it was possible for the breeder to check where his product was being sold and to control it in a sufficiently easy manner. Mr. Royon said that he had to draw a parallel at that point with what happened in the field of patents. There, checks to establish whether infringements had occurred were also made at the final marketing level. It was not a question of the patent holder collecting his royalty at that stage. That was collected at the manufacturing stage from the factory licensed to produce his invention. But it was at the retail level that it was possible to notice whether infringements had occurred. Breeders were asking for the same opportunity. They simply wanted to have the opportunity to control and the Convention in its present state did not give it to them. Mr. Royon said that the second situation envisaged by the proposed amendment was as follows. In a country which afforded no more than the "minimum" protection, as laid down in the present text of Article 5(1), a fruit tree and fruit grower with a large orchard, wishing to grow a certain variety which was protected in that country, could ask the breeder for a licence, pay a royalty

on each tree propagated in his orchard and then receive a licence to produce and sell fruit. Royalties, of course, would be payable only on the propagation of the trees. The grower could then sell the fruit he produced. The legal and economic relationship between the breeder and the licensed grower consisted, for the breeder, in the hiring out of his right, and, for the grower, in the obligation to pay royalties. Mr. Royon stressed that the breeder was obliged to guarantee the peaceful enjoyment of the licence. When the licensed grower took the fruit to market he found himself competing against fruit of the same variety produced by growers in countries where protection did not exist. It was accepted that the breeder could not control the use of his variety in such countries, but it was not acceptable that the breeder should see fruit of his protected variety sold under his very nose in the country in which he had been granted a title of protection. On the one hand his variety, which was intended for fruit production, was being commercially exploited and, on the other hand, he could not guarantee his licensees the peaceful enjoyment of their licence. In those circumstances the grower could tell himself that he was stupid to be honest and to accept to pay royalties, that he would no longer ask the breeder for a licence, that he would buy trees of the said variety from a country where there was no protection, plant them in his orchard and sell the fruit produced. In that case the grower had not propagated but simply purchased plants. He sold only the fruit, being the final product, which was not covered by the Convention in its present form. That was the situation which CIOPORA wished to cover. It was an important gap in the Convention and one should not bury one's head in the sand and not accept the need to put the situation right. Mr. Royon said that he could unfortunately point to many similar examples. It was not a matter of going beyond a reasonable protection but of enabling the breeder to exercise his right quite normally and quite reasonably in the country which had afforded protection to his variety.

305. The PRESIDENT asked whether there was formal support for, or further comment on, the proposal of the Delegation of France.

306. Mr. R. DERVAUX (Belgium) said that his Delegation seconded the proposal of the Delegation of France.

307. Mr. H. AKABOYA (Japan) explained that the new Japanese Law, called The Seeds and Seedlings Law, followed the present text of Article 5(1). If the proposal of the Delegation of France were accepted by the member States then Japan would have to amend its law accordingly. He wished the member States to be aware of that fact when making their decision.

308. Dr. D. BÖRINGER (Federal Republic of Germany) said that he agreed with the Delegation of France and with Mr. Royon that the problem being discussed was a very serious one, but he saw difficulties in resolving it properly within the Convention. He believed, however, that there was still a misunderstanding. Both Mr. Laclavière and Mr. Royon had stated convincingly that the effect of the protection provided for in Article 5(1) was less for vegetatively propagated species than for sexually reproduced species, and that breeders of vegetatively propagated species should therefore have the possibility of controlling the final product. In his opinion, however, the proposal which was on the table would in no way facilitate control in the market, and it did not bring anything new to the discussion of that matter. It would always be left to the owner of the title of protection to find out how to discover that a product originating from propagating material of his variety had come onto the market. He supposed, however, that the first sentence of the proposal was to be understood to mean that the effect of the protection extended automatically to the final product. That would mean, in respect of cut roses or apples, that the breeder would be given the possibility of using his exclusive right in the market. So far he had not fully understood whether that was really the intention behind the proposal or whether the intention was only to create a tool for control.

309. Mr. B. M. LEESE (United States of America) said that the proposal of the Delegation of France would present his country with a double problem in that both the Plant Patent Act and the Plant Variety Protection Act would have to be amended. The change which would be required in the latter Act was not feasible. It appeared to him that the matter was best left to national legislation. Finally, Mr. Leese advised that the final products of protected materials were not protected in the United States of America.

310. Mr. W. T. BRADNOCK (Canada) said that, although he had a great deal of sympathy for the particular problem which had been explained by the Delegation of France and Mr. Royon, he had to state that if the proposed amendment were adopted, and if it in fact made protection of the final product compulsory, then it would probably prevent Canada from being able to sign the Convention. Propagating material was subject to federal jurisdiction and could be protected but final products, which were subject to provincial jurisdiction, could not.

311. Mr. R. ROYON (CIOPORA) believed that the comments made by Dr. Böringer and Mr. Bradnock justified his underlining the misunderstanding which seemed to be ever-present. If one talked of "final product" or "marketed product" it was quite simply because the present text of Article 5(4) of the Convention referred to "marketed product." But it should not be thought that the breeder received a kind of monopoly of the final product in trade. CIOPORA was asking for no more and no less than had been enjoyed for several decades by holders of patents for industrial products.

312. Mr. F. ESPENHAIN (Denmark) felt that his Delegation could not support the proposal of the Delegation of France. Denmark was aware of the various problems which had been taken as examples. One was that fruit trees were purchased from countries where those trees were not protected. He could say that Denmark had considered regulating that matter by introducing legislation as provided for in Article 5(4) of the Convention.

313. Mr. R. ROYON (CIOPORA) regretted that he had failed to mention one important point which might have a bearing on what had just been said by the Delegation of Denmark and on an earlier remark by Dr. Böringer. It had been said that one might try to remedy the gaps in the Convention in another way. Dr. Böringer had even said that he did not see how the problem could be resolved by changing Article 5(1). Mr. Royon said that he nonetheless wished to stress that the purpose of the Convention was to recognize an exclusive right of the breeder. It was not its purpose to establish rules to control the marketing of plant material. That would exceed its purpose. Mr. Royon believed it was up to each breeder to defend his rights but he had to have the means to do that. Breeders, like patent holders, brought actions

against infringers. Patent holders had available to them legislation to that effect which enabled them to act. Given the present wording of Article 5(1) breeders did not have the means of action.

314. Mr. S. MEJEGÅRD (Sweden) said that the question of extending the rights of breeders had been discussed recently in his country; discussions had related, in particular, to giving the breeder a right to claim royalties in respect of propagating material produced and used within the canning industry, and to extending the right to the final product. Although it was believed that the best results would be achieved by extending the right as much as possible, it had been found that the time was not opportune. Therefore his Delegation could not accept any amendment to the minimum scope of protection.

315. Mr. G. CUROTTI (Italy) said that his Delegation supported the proposal of the Delegation of France.

316. Miss E. V. THORNTON (United Kingdom) said that she had listened with great interest to what had been said about Article 5 and particularly to the persuasive tones of Mr. Royon. The United Kingdom had been occupied for a number of years with the question of extending plant breeders' rights and was perfectly willing to discuss and to consider it is a matter of national treatment under the terms of Article 5(4); it might be possible in certain sectors to come to some agreement and to amend the law in the United Kingdom. Miss Thornton felt she should say, however, at that point, that the United Kingdom could not accept any amendment to the text of Article 5 contained in the Draft. If it were amended in the manner proposed then it would place her Delegation in very serious difficulties with regard to signing the new Convention.

317. Mr. R. GUY (Switzerland) said that his Delegation had been very impressed by what had been said by Mr. Royon, but it was convinced that it would be very difficult for the proposal of the Delegation of France to find acceptance in Switzerland. His Delegation preferred the text in the Draft, with paragraph (4) giving each State the possibility to manage its affairs.

318. Mr. T. E. NORRIS (New Zealand) said that his country's legislation was essentially similar to that of the United Kingdom; his Government would therefore not wish to accept the amendment being proposed by the Delegation of France.

319. Mr. R. DUYVENDAK (Netherlands) said that his Delegation preferred not to accept the proposal of the Delegation of France but to seek a solution through Article 5(4).

320. Mr. J. F. VAN WYK (South Africa) said that the Plant Breeder's Rights Act, 1976, provided for the minimum scope of protection laid down in Article 5(1). His Delegation would like to leave the question of any extension of the scope open to national discretion.

321. Mr. F. ESPENHAIN (Denmark) said that his Delegation supported the position adopted by the Delegation of the United Kingdom.

322. Mr. R. LOPEZ DE HARO (Spain) said that his country's legislation did not provide for the protection of the final product. Since it would be very difficult to introduce such a provision, his Delegation was, for the time being, against any extension of protection.

323. Mr. B. LACLAVIERE (France) said that he gained the impression from the debate that the proposal of his Delegation had attracted some sympathy but that, in its present wording, it provoked serious difficulties and States were not ready to accept it. Given the sympathy which the proposal had nevertheless attracted, he wished to ask the Conference whether it would be acceptable to form a small ad hoc working group to examine whether it was possible to formulate a proposal which the Conference could accept.

324. Miss E. V. THORNTON (United Kingdom) said that the proposal to establish an ad hoc working group placed her Delegation in some difficulty. If it was the general wish of the Conference that a working group should be set up then the United Kingdom would be willing to participate, but she really could not see the possibility of reaching an agreement on any wording different from that in Article 5 in the Draft, bearing in mind the provisions of paragraph (4) of that Article which left the matter open to national treatment.

325. Dr. D. BÖRINGER (Federal Republic of Germany) said that he believed that some more documents were being prepared in relation to Article 5(1). If that were so would it not be wiser to await those documents, have a look at them and then decide whether Mr. Laclavière's proposal to form a working group should be adopted. In any event he believed that the problems regarding the effect of protection were big enough to require that the Conference took time to consider them. Whether that consideration might lead, should lead or had to lead to a change in the text in the Draft was a completely different question. He therefore proposed that the discussions on Article 5 should be interrupted pending the possible tabling of further documents, and should be continued later on.

326. The PRESIDENT said that he could see that Mr. Laclavière was in agreement.

327. It was decided that discussions on Article 5 should be resumed after any further relevant documents had been distributed. *(Continued at 883)*

328. Dr. A. BOGSCH (Secretary-General of UPOV) said that he would like to announce, before the discussion moved on to Article 6, that the Delegations of South Africa and Italy would switch places in the Credentials Committee and the Working Group on Article 13. Italy would become a member of the Credentials Committee, and its place in the Working Group on Article 13 would be taken by South Africa.

329. Mrs. O. REYES-RETANA (Mexico) said that her Delegation wished to support the earlier statement of the Delegation of the Libyan Arab Jamahiriya and to indicate its disagreement with the fact that a country like South Africa was nominated as a member of the Credentials Committee. It believed that the nomination of South Africa as a member of any Committee in the Conference did not encourage non-member States to join UPOV.

330. Miss R. E. SILVA Y SILVA (Peru) said that her Delegation fully supported the statement made by the Delegation of Mexico.

331. Mr. S. OMAR (Iraq) declared, on behalf of the Government of the Republic of Iraq, that the presence of South Africa as a member would be an impediment to its joining UPOV.

332. Dr. Z. SZILVÁSSY (Hungary) said that his Delegation strongly supported the earlier statement of the Delegation of the Libyan Arab Jamahiriya.

333. Mr. B. SADRI (Iran) said that his Delegation supported the statements which had been made.

334. Mr. M. TOURKMANI (Morocco) said that his Delegation supported the statements which had been made.

335. Mr. M. LAM (Senegal) said that his Delegation supported the statements which had been made.

336. Mr. J. F. VAN WYK (South Africa) said that his Delegation deemed it necessary to voice its strenuous objections to the introduction of matters of a political nature in a Conference which, although a diplomatic conference, had been convened to deal with a strictly technical subject. There were appropriate international forums for dealing with political matters and it was suggested that such matters be left to those forums and not be raised at the Conference.

Article 6: Conditions Required for Protection

337. The PRESIDENT opened the discussion on Article 6(1)(a).

338. Mr. A. HEITZ (Office of the Union) advised that document DC/19, containing a drafting proposal submitted by the Delegation of the Federal Republic of Germany, had just been distributed. The proposal was to delete the words "of a variety" from the phrase "the breeder of a variety" at the beginning of the first sentence of Article 6(1).

339. It was decided to refer document DC/19 to the Drafting Committee.

340. The PRESIDENT invited the Delegation of the United Kingdom to introduce the proposals for amendment contained in documents DC/15 and DC/20.

341. Mr. A. F. KELLY (United Kingdom) said that his Delegation considered both proposals to be merely drafting amendments, designed to clarify and perhaps slightly shorten Article 6(1)(a). Document DC/15 concerned the opening and final two sentences. It was suggested that a small change in construction in the opening sentence, substituting "its origin" for "the origin," would allow that sentence to be simplified by the deletion of the words "of the initial variation from which it has resulted." It was further suggested that the meaning of the final two sentences would be made clearer if they were combined and shortened, so that they read: "A variety may be defined and distinguished by any characteristic which is capable of precise recognition and description." That wording, by omitting the words "morphological or physiological," had the added advantage that it removed any possible implication that the two types of characteristic mentioned in the text in the Draft were to be considered as a restriction of the types of characteristic which could be used. In document DC/20 a relatively small drafting change in the second sentence was suggested. Mainly to bring that into line with the French and German versions, the word "a" should be deleted from the phrase "or a precise description."

342. Mr. J. BUSTARRET (France) said that whilst Mr. Kelly's wording was shorter he thought it to be less precise than the wording of the Draft. It was not a matter of the artificial or natural origin of the variety but of the variation giving rise to the variety. A mutation could be induced or could occur naturally. It was from that variation that the variety was derived by a process of selection. Mr. Bustarret thought also that it would be regrettable to leave out the words "morphological or physiological." The text proposed by Mr. Kelly was certainly not unacceptable but it did not particularly improve the Draft. Since the Conference had agreed to make only those changes that were necessary he favored maintaining the Draft.

343. Mr. R. DUYVENDAK (Netherlands) said that his Delegation had no specific opinion on the proposal to substitute "its origin" for "the origin." It did, however, wish to support the proposal to delete the words "morphological or physiological" and to combine the final two sentences.

344. Mr. F. ESPENHAIN (Denmark) said that his Delegation wished to add its support to that expressed by the Delegation of the Netherlands.

345. Dr. D. BÖRINGER (Federal Republic of Germany) said that his Delegation's first priority with respect to the opening sentence of Article 6(1)(a) was to retain the wording of the Draft. If there were a majority for the proposal of the Delegation of the United Kingdom, however, then his Delegation would like to reconsider its opinion. In addition his Delegation had the impression that the nature of the proposed redrafting of the last two sentences was more than editorial. It believed that the substance might also have been altered as a result of the replacement of the word "characteristics" by the words "any characteristic." Dr. Böringer thought that the discussions in the Technical Working Parties, in the Technical Committee and in the Council of UPOV had so far led to the conclusion that it was necessary to study thoroughly which characteristics could be used to assess distinctness and that in all cases characteristics used for that purpose had to be capable of precise recognition and description. His Delegation was slightly hesitant in case the proposal of the Delegation of the

United Kingdom entailed a commitment to use "any" characteristic, no matter how sophisticated the methods were that were needed to identify it. Finally Dr. Böringer believed that his Delegation could agree to the proposal contained in document DC/20 since it had no effect on the German text.

346. Mr. A. F. KELLY (United Kingdom) thought that the interpretation given by Dr. Böringer to the words "any characteristic" was possible but it seemed that the sophisticated methods mentioned by him were also covered by the wording of the Draft. Mr. Kelly believed that any characteristic could be classified as morphological or physiological. One could find a physiological origin for a chemical difference, and so on. He therefore thought that Dr. Böringer had a point but he was not sure that it was a major one.

347. The PRESIDENT, considering that the Delegation of the Federal Republic of Germany would wish to follow the majority opinion, sought the views of the other delegations.

348. Mr. R. GUY (Switzerland) said that his Delegation thought that the first sentence of Article 6(1)(a) in the Draft was more precise than the shorter version proposed in document DC/15 by the Delegation of the United Kingdom. As far as the final sentence of that proposal was concerned he tended to agree with the Delegation of the Federal Republic of Germany that it introduced a slightly different meaning. If the Conference agreed that all characteristics were either morphological or physiological then it seemed to him that there was no need to amend the Draft.

349. Mr. R. DUYVENDAK (Netherlands) said that when his Delegation had expressed support for the deletion of the words "morphological or physiological" it had not commented on the introduction of the word "any" which was a separate matter. It thought that there was no need to add that word and proposed that the text should revert to "by characteristics."

350. Mr. A. F. KELLY (United Kingdom) said that his Delegation accepted the alteration proposed by the Delegation of the Netherlands.

351. Mr. J. BUSTARRET (France) said that the words "morphological or physiological characteristics" had been used simply to indicate that there were characteristics other than morphological ones. Characteristics recognized by means of biochemistry, for example, were "physiological" in the broad sense of that word.

352. Mr. R. DUYVENDAK (Netherlands) asked whether any delegate thought that the inclusion of the words "morphological or physiological" had a restrictive effect. His Delegation believed that there had been no intention to be restrictive; it had therefore favored deleting those words. In the Code of Nomenclature of Cultivated Plants, however, mention was also made of cytological and chemical characteristics. The fact that those kinds of characteristics were not mentioned in the Convention could lead people to believe that it specifically excluded such kinds. The proposal of the Delegation of the United Kingdom, by omitting any reference to specific kinds of characteristics, made it clear that there was no intention to be restrictive in that respect.

353. Mr. J. BUSTARRET (France) said that the words "morphological or physiological" were not restrictive; on the contrary, they were all-embracing.

354. Mr. R. DUYVENDAK (Netherlands) asked whether delegates could therefore support the deletion of the words "morphological or physiological" which, although they might be correctly understood by the Conference, might lead to misunderstanding by other people who might wrongly interpret the omission from the Convention of the additional kinds of characteristics referred to in the Code of Nomenclature.

355. Mr. W. T. BRADNOCK (Canada) said that his Delegation preferred the wording proposed by the Delegation of the United Kingdom. The wording of the Draft could cause confusion and indeed had done so in his country.

356. Dr. D. BÖRINGER (Federal Republic of Germany), noting that the Conference had agreed that the words "morphological or physiological" were to be understood in their broadest sense, asked whether any delegate could indicate a characteristic that did not fall under that definition.

357. Mr. R. DUYVENDAK (Netherlands) said that he could not answer Dr. Böringer's question. He thought he could name a characteristic which was neither morphological nor physiological but why should the Convention refer specifically to two classes of characteristic if it related to any characteristic or class of characteristic. The specific reference frequently led to the belief that other classes, such as those mentioned in the Code of Nomenclature, were excluded.

358. Mr. J. F. VAN WYK (South Africa) said that his Delegation was in favor of the proposed amendment, as adjusted.

359. Mr. J. BUSTARRET (France) said that he personally was in favor of not modifying the Draft except where difficulties had arisen. He would, however, like the words "morphological or physiological" to be deleted. He thought that the proposal as presented, in its English language version, even after deleting the word "any," lacked clarity. In the first sentence of Article 6(1)(a) it was said that "... the variety must be clearly distinguishable by one or more important characteristics..." He would like the final sentence to be adapted to that sentence and suggested that it might read: "The characteristics which define and distinguish a variety must be capable of precise recognition and description."

360. Mr. A. W. A. M. VAN DER MEEREN (Netherlands) said that his understanding was that Mr. Bustarret agreed to the deletion of "morphological or physiological." Mr. van der Meeren believed that the other point which had been raised was for the Drafting Committee to resolve.

361. Dr. D. BÖRINGER (Federal Republic of Germany) said that he had thought that there were no problems with Article 6(1)(a). It was, however, clear that it contained several small difficulties and he believed that the Conference should not leave the matter exclusively to the Drafting Committee. He was in favor of improving the wording but would like to see what now seemed to be the common opinion of the Plenary set down in a document.

362. It was decided to continue the discussion on Article 6(1)(a) after a redrafted version of the proposal contained in document DC/15 had been submitted to the Plenary by the Secretariat. *(Continued at 403)*

SIXTH MEETING

Wednesday, October 11, 1978,

afternoon

363. The PRESIDENT opened the discussion on Article 6(1)(b).

364. Dr. D. BÖRINGER (Federal Republic of Germany) referred to document DC/21 which contained a proposal by his Delegation for the amendment of Article 6(1)(b)(ii). His Delegation considered its proposal to be purely a matter of drafting which should be referred to the Drafting Committee.

365. Mr. J. BUSTARRET (France) said that he found some difficulty in accepting the proposal of the Delegation of the Federal Republic of Germany. He was concerned that the word "trees," in its generally accepted sense, might exclude fruit trees. The Draft, which mentioned "forest trees, fruit trees and ornamental trees" was, however, quite clear. He wondered whether it was really necessary to amend a text which had brought forth no comments.

366. Dr. D. BÖRINGER (Federal Republic of Germany) said that the proposed amendment had originated not from his Delegation but from the session of the Ad Hoc Committee on the Revision of the Convention. If the majority of the Member Delegations no longer wished to simplify the text in that way then his Delegation was willing to withdraw its proposal.

367. Mr. A. W. A. M. VAN DER MEEREN (Netherlands) said that his Delegation supported the proposal of the Delegation of the Federal Republic of Germany.

368. Mr. J. F. VAN WYK (South Africa) said that his Delegation would also support the proposed amendment.

369. Mr. G. CUROTTI (Italy) said that his Delegation also supported the proposed amendment.

370. Mr. F. ESPENHAIN (Denmark) said that his Delegation had no strong feelings in the matter and would support the majority view.

371. Mr. A. F. KELLY (United Kingdom) said that his Delegation was in a similar position to that of Denmark and would support the majority view.

372. Mr. S. MEJEGÅRD (Sweden) said that his Delegation would also support the majority view.

373. Mr. R. GUY (Switzerland) said that his Delegation would also support the majority view.

374. Mr. B. LACLAVIERE (France) said that he saw a difficulty in adopting the proposed amendment in that the Convention provided that the French text should prevail in case of any discrepancy among the various texts. It was somewhat difficult for the French to group fruit trees in the general category of trees. Fruit trees formed a category apart.

375. Dr. A. BOGSCH (Secretary-General of UPOV) suggested that the difficulty might be overcome by using the expression "trees, including fruit trees."

376. Mr. J. BUSTARRET (France) said that he still considered the proposal of the Federal Republic of Germany to be more ambiguous than the wording of the Draft.

377. Dr. D. BÖRINGER (Federal Republic of Germany) said that his Delegation had understood that its proposal reflected the unanimous decision of the Ad Hoc Committee on the Revision of the Convention. Since the proposal appeared to give rise to difficulties of interpretation his Delegation withdrew it. Dr. Böringer thanked the delegations which had supported it.

378. Mr. B. LACLAVIERE thanked the Delegation of the Federal Republic of Germany for the understanding which it had shown.

379. The PRESIDENT noted that since no other delegation had taken up the proposal of the Delegation of the Federal Republic of Germany, contained in document DC/21, Article 6(1)(b)(ii) would, subject to any further observations and proposals, remain as appearing in the Draft.

380. Mr. F. ESPENHAIN (Denmark) said that the comments of his Government on Article 6(1)(b)(ii) were contained in document DC/11. His Government was somewhat concerned about the introduction of a six year period permitting prior marketing abroad of certain groups of plants and would prefer to retain the present provision of a four year period common to all plants.

381. The PRESIDENT noted that there was no support for the concern expressed by the Delegation of Denmark.

382. Mr. W. T. BRADNOCK (Canada) asked whether the proposed Article 35, regarding transitional limitation of the requirement of novelty, meant that periods of prior commercialization, such as the four year and six year periods specified in Article 6(1)(b)(ii), could be set aside by a member State when it applied the provisions of the Convention to a particular species for the first time. He understood that the legislation of some member States allowed prior commercialization to have taken place for a longer period at that time.

383. Dr. D. BÖRINGER thought that two completely different questions were involved. Article 6(1)(b)(ii) dealt only with the period during which a variety could be commercialized in another State without affecting its novelty when an application for protection was made in a given State. The limitation of the requirement of novelty provided for in Article 35 was an entirely different matter. Mr. Bradnock was correct in his understanding that some States had provided that varieties bred some years before an application for protection were eligible for protection when they first applied the Convention to a species. In the Federal Republic of Germany, for example, it just so happened that a period of four years applied in such cases. The length of the period, however, was in no way related to the periods mentioned in Article 6. Some member States did not limit the requirement of novelty; others provided for a much longer period than four years.

384. The PRESIDENT invited observations on Article 6(1)(b)(i).

385. Mr. B. M. LEESE (United States of America) said that he wished to confirm that it was planned to amend the Plant Variety Protection Act slightly to bring it into conformity with Article 6(1)(b)(i). The "period of grace" of one year, which had been incorporated in the wording of that Article in the Draft, was already a feature of the Plant Variety Protection Act. As far as the Plant Patent Act was concerned the exception provided for in the proposed Article 34A(2) would be applied in his country.

386. Mr. F. ESPENHAIN (Denmark) said that his Government's views on the introduction of the so-called "period of grace" of one year were stated in document DC/11. Given that it was necessary to provide for such a derogation his Government would prefer to see it take the form of a special provision like the exceptions provided for in Article 34A.

387. The PRESIDENT noted that there was no support for the wish expressed by the Delegation of Denmark.

388. Article 6(1)(b) was adopted as appearing in the Draft.

389. The PRESIDENT opened the discussion on Article 6(1)(c).

390. Article 6(1)(c) was adopted as appearing in the Draft, without discussion.

391. The PRESIDENT opened the discussion on Article 6(1)(d).

392. Mr. A. F. KELLY (United Kingdom) said that his Delegation thought that the last phrase of Article 6(1)(d) might be made more clear in the English text if the word "defined" was added. Earlier in the Article reference was made to a particular cycle defined by the breeder and it might therefore be better to conclude with the words "at the end of each defined cycle."

393. Mr. B. LACLAVIERE (France) said that his Delegation had no objection to the proposed addition. If it was translated directly into French, however, it would not be quite correct and he would propose using the words "à la fin de chaque cycle ainsi défini" in the French text.

394. The PRESIDENT considered that the amendment proposed was relatively small and that the document normally required under the Rules of Procedure of the Diplomatic Conference could be dispensed with provided the Conference had no objections.

395. Mr. W. BURR (Federal Republic of Germany) said that his Delegation had some difficulty with the proposal. The German text in the Draft read: "... am Ende eines jeder Zyklus." The meaning of those words was clear. If, however, the text was changed to: "...am Ende eines jeder so festgelegten Zyklus," in accordance with the proposal of the Delegation of France, then the German text would be more far-reaching than the English text. Mr. Burr was not sure that the changes proposed would really have the same effect in the three languages.

396. Mr. A. F. KELLY (United Kingdom) said that the English text could be amended to read: "...at the end of each cycle thus defined," if that would help to bring the three texts closer together.

397. The PRESIDENT asked whether there was formal support for the proposal of the Delegation of the United Kingdom. He noted that there was not.

398. Article 6(1)(d) was adopted as appearing in the Draft.

399. The PRESIDENT opened the discussion on Article 6(1)(e).

400. Article 6(1)(e) was adopted as appearing in the Draft, without discussion.

401. The PRESIDENT opened the discussion on Article 6(2).

402. Article 6(2) was adopted as appearing in the Draft, without discussion.

403. The PRESIDENT reopened the discussion on Article 6(1)(a) and invited observations on document DC/31 which contained the provisional outcome of the earlier discussions on that Article, as recorded by the Office of the Union. (Continued from 362)

404. Mr. J. BUSTARRET (France) said that his Delegation accepted the wording, as recorded in document DC/31, in all three languages.

405. Mr. A. F. KELLY (United Kingdom) noted that the correspondence between the English and French texts would be improved by changing the final sentence in the English version to: "The characteristics which permit a variety to be defined and distinguished must be capable of precise recognition and description."

406. Subject to the amendment referred to in the preceding paragraph, Article 6(1)(a) was adopted as appearing in document DC/31.

Article 7: Official Examination of Varieties; Provisional Protection

407. The PRESIDENT opened the discussion on Article 7 and invited the Delegation of the Federal Republic of Germany to introduce its proposals for amendments, as contained in document DC/22.

408.1 Mr. W. BURR (Federal Republic of Germany) said that the amendments proposed in document DC/22 resulted largely from the discussions in the Ad Hoc Committee on the Revision of the Convention. Member Delegations might recall that there had been a detailed discussion about the consequences of the fact that some botanical species could be propagated both sexually and vegetatively. At that time it had been provisionally concluded that the final part of the second sentence of Article 7(1), which read: "having regard to its normal manner of reproduction or multiplication," should be put into the plural so that the examining offices at least had the possibility to take into account in each particular case the relevant system of propagation.

408.2 Mr. Burr went on to say that the proposal to replace the word "country" by the words "member State of the Union" was made solely in order to align the language used in Article 7(2) with that of other Articles in the Draft.

408.3 Mr. Burr concluded by saying that it had been noted during the discussions in the Ad Hoc Committee that the legislation in some member States provided for a system of provisional protection under which the applicant could not sue third per-

sons in respect of acts committed during the period between the filing of the application for protection and the decision thereon until a grant of protection had been made. His Delegation therefore proposed that the words "for the period..." would be more appropriate in Article 7(3) than "during the period ... ." That amendment would have the advantage that it left it open whether suits could be brought during or only after the period.

409. Mr. B. M. LEESE (United States of America) said that his Delegation wished to record its understanding of the statement reproduced in the explanatory notes on Article 7 on page 18 of the Draft. In the light of that interpretation it understood that Article 7 did not require a government itself to conduct the necessary tests for the determination of distinctness, homogeneity and stability, always provided that the conditions specified in that interpretation were met.

410. Mr. R. DUYVENDAK (Netherlands) believed that the proposal of the Delegation of the Federal Republic of Germany for the amendment of Article 7(1) differed slightly from the conclusion reached in the Ad Hoc Committee, in that the word "normal" had been retained. For many crops one could not speak of 'the normal manner of reproduction.' In maize, for example, where inbred lines were produced by inbreeding and hybrids were produced by crossing, there was no 'normal' reproductive system. His Delegation thought that it had been agreed that the word "normal" should be deleted. Mr. Duyvendak thought that the proposal in document DC/22 did not resolve the problem, which had been discussed many times; he said that he would be willing to make an alternative written proposal for the amendment of the second sentence of Article 7(1) which he believed should read: "Such examination shall be adapted to the various botanical genera and species having regard to their reproductive systems." Before doing so, however, he would appreciate further clarification of the aim of the proposal submitted by the Delegation of the Federal Republic of Germany.

411. Dr. D. BÖRINGER (Federal Republic of Germany) said that his Delegation's proposal aimed to introduce the conclusion reached in the Ad Hoc Committee. He had to confess, however, that the words "üblich" in the German text and "normal" in the English text probably had differing meanings. He thought that "normal" might be

stronger than "üblich" which perhaps would be more accurately translated by the word "usual." By using the word "üblich" his Delegation had wished to establish that the examination methods should not extend beyond the manners of reproduction or multiplication by which varieties were customarily ("üblicherweise") produced. It had wished to make it impossible for a breeder to demand, without reason, that his variety be examined in such and such a very special way.

412. Mr. J. BUSTARRET (France) thought that the word "normal" in the English text was not equivalent to "habituel" and "üblich" in the French and German texts respectively. What one wished to provide in Article 7(1) was that account had to be taken of what might be called the 'usual' manner of reproduction. Mr. Duyvendak had cited inbred lines of maize. Clearly the concept of homogeneity for an allogamous plant, such as an inbred line of maize, was not the same as for a pure line of an autogamous plant. More latitude had to be given in the case of an allogamous plant. Therefore the different examination criteria had to take into account the 'usual' manner of reproduction of the species in question, particularly with regard to homogeneity.

413. Mr. R. DUYVENDAK (Netherlands) said that it was precisely because account had to be taken of the specific case one was working with that he had proposed the deletion of the word "normal," "habituel" or "üblich."

414. Dr. A. BOGSCH (Secretary-General of UPOV) saw two problems in relation to the proposal to amend Article 7(1). The first was to establish whether it was essential for the Delegation of the Federal Republic of Germany to maintain the word "üblich." If it was then the question arose whether equivalent words could be found in English and French.

415. Mr. J. BUSTARRET (France) supported the proposal of the Delegation of the Netherlands to delete "normal," "habituel" and "üblich."

416. Dr. D. BÖRINGER (Federal Republic of Germany) said that his Delegation would really like to keep the word "üblich" if the second sentence of Article 7(1) was to be retained.

417. Mr. R. DUYVENDAK (Netherlands) said that he would be pleased if the whole of the second sentence could be deleted. The conduct of examinations would then be entirely regulated by Article 6. He therefore proposed that the second sentence of Article 7(1) be deleted.

418. Mr. J. BUSTARRET (France) thought that it would be wrong to delete the whole of the second sentence but he would accept, personally, that it should simply say: "Such examination shall be appropriate to each botanical genus or species."

419. It was decided to continue the discussion on Article 7(1) after the proposal referred to in the above paragraph had been formally submitted by the Delegation of France (Continued at 470).

420. The PRESIDENT opened the discussion on the proposed amendment of Article 7(2).

421. Article 7(2) was adopted as appearing in document DC/22, without discussion.

422. The PRESIDENT opened the discussion on the proposed amendment of Article 7(3).

423. Mr. J. WINTER (ASSINSEL) said that his Association supported the amendment proposed in document DC/22. He also wished to make a general statement. Provisional protection was, for ASSINSEL, a matter of the highest importance. It realized, however, that it would probably not be possible to introduce a provision into Article 7(3) to oblige the member States to grant provisional protection. Such protection was, however, available in France, in the United Kingdom, on a some-

what different basis, and in Switzerland. ASSINSEL therefore asked that note be taken of its wish that UPOV should make a recommendation that the protection available within the member States should be as uniform as possible.

424. Dr. A. BOGSCH (Secretary-General of UPOV) proposed that the translations of "für" into English and French should be considered by the Drafting Committee. He felt that "in respect of" and "en ce qui concerne," respectively, would be better than "for" and "pour."

425. Mr. J. BUSTARRET (France) saw nothing wrong with keeping the wording of the Draft for Article 7(3). In any event the amendment proposed did not seem to him to be a matter of substance.

426. It was decided to refer the proposal mentioned in paragraph 424 to the Drafting Committee.

427. Subject to the decision referred to in the preceding paragraph, Article 7(3) was adopted as appearing in document DC/22.

Article 8: Period of Protection

428. The PRESIDENT opened the discussion on Article 8 and invited the Delegation of the Federal Republic of Germany to introduce its proposal for amendment as contained in document DC/23.

429. Dr. D. BÖRINGER (Federal Republic of Germany) said that the proposal was analogous to the earlier proposal in document DC/21 to amend Article 6(1)(b)(ii). Since it had withdrawn that earlier proposal his Delegation now withdrew its proposal in respect of Article 8.

430. The PRESIDENT invited observations on the new wording proposed for Article 8 in the Draft.

431. Mr. J. WINTER (ASSINSEL) said that his Association favored a world-wide, uniform plant variety protection right. For as long as the procedure for granting protection and, in particular, the duration of protection differed from State to State, that would remain a long-term objective. In the shorter term it should be possible to increase the duration of protection for species which needed a long time for their introduction to the market, such as potatoes, perennial grasses, clover and fruit trees. ASSINSEL believed that the present minimum periods of protection of fifteen and eighteen years were too short in the case of such species. It would like to see a minimum period of twenty years for the species quoted.

432. Mr. G. CUROTTI (Italy) said that his Delegation proposed that the period of protection for fruit trees should be made longer.

433. Dr. D. BÖRINGER (Federal Republic of Germany) said that his Delegation would be willing to examine both the wish expressed by ASSINSEL and the proposal of the Delegation of Italy if they were presented as written proposals.

434. Miss E. V. THORNTON (United Kingdom) said that her Delegation would like to have clarified that part of the last sentence of Article 8 in the Draft which read: "For vines, forest trees, fruit trees and ornamental trees, including their rootstocks ..." It was not clear whether the rootstocks of all the groups mentioned, or only those of ornamental trees, were included.

435. Dr. A. BOGSCH (Secretary-General of UPOV) said that the intention had certainly been to include the rootstocks of all the groups mentioned. He proposed that the Drafting Committee be asked to improve the wording in that respect.

436. It was decided to refer the proposal mentioned in the preceding paragraph to the Drafting Committee.

437. Mr. B. M. LEESE (United States of America) confirmed that his Government could accept Article 8 provided the exception specified in Article 34A(2) was retained.

438. It was decided to continue the discussion on Article 8 after the proposal referred to in paragraph 432 had been formally submitted by the Delegation of Italy (Continued at 564).

Article 9: Restrictions in the Exercise of Rights Protected

439. The PRESIDENT opened the discussion on Article 9.

440. Mr. B. M. LEESE (United States of America) said that his Government could accept Article 9 with the understanding that it permitted member States to annul or restrict for antitrust or national security reasons the exclusive right accorded to a breeder. In its view the obligation of a State to take such measures in the public interest took precedence over other provisions of the Convention and there would therefore be no conflict between its patent legislation and either Article 10(4) or Article 11(1) of the Convention.

441. Dr. A. BOGSCH (Secretary-General of UPOV) noted that the expression "public interest" characteristically referred to the situations mentioned by the Delegation of the United States of America.

442. Mr. J. WINTER (ASSINSEL) said that his Association would like the phrase "in order to ensure the widespread distribution of the variety" to be deleted from Article 9(2). It considered that the obligation to ensure that the breeder received equitable remuneration should not be limited to restrictions made for that

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443. The PRESIDENT noted that no delegation wished to submit a proposal to delete the phrase referred to by the representative of ASSINSEL.

444. *Article 9 was adopted as appearing in the Draft.*

Article 10: Nullity and Forfieture of the Rights Protected

445. The PRESIDENT opened the discussion on Article 10(1).

446. Mr. W. T. BRADNOCK (Canada) said that his Delegation was concerned that there was no reference to Article 6(1)(c) and (d) in Article 10(1). That Article provided that the right of the breeder had to be annulled if it was established that the conditions of distinctness and novelty were not effectively met when the title of protection was issued. Article 6(1)(c) and (d), however, provided that the variety also had to be "sufficiently homogeneous" and "stable in its essential characteristics." There appeared to be no basis for annulment if the latter two conditions were not met.

447. Mr. R. DUYVENDAK (Netherlands) said that in his country the fact that a variety was found, after the title of protection had been issued, not to be homogeneous was not considered to be a ground for annulment of the right of the breeder.

448. The PRESIDENT asked whether delegates thought it desirable to include the criterion of homogeneity in Article 10(1).

449. Mr. J. BUSTARRET (France) thought that homogeneity should not be included in Article 10(1). Homogeneity was judged at the time of the preliminary examination and the responsibility for that judgement did not rest with the breeder. In the case of distinctness and novelty new facts or documents which established that the examining authority had been misled could come to light. Once the authority had determined, however, that the variety was homogeneous there was no going back.

450. Mr. J. WINTER (ASSINSEL) said that his Association was against the inclusion of the criterion of homogeneity in Article 10(1).

451. Mr. W. T. BRADNOCK (Canada) said that he had also referred to "stability." He would like to know what the authorities in the member States did if they discovered that a protected variety had lost its stability.

452. Dr. D. BÖRINGER (Federal Republic of Germany) said that the annulment of the right of a breeder was a very significant matter. He believed that it had been the wish, when the Convention had been established in 1961, that annulment should be obligatory if it was shown, after the title of protection had been issued, that a variety had not been distinct or novel. It had been the intention that in such a case the right had to be declared null and void which meant that it had never been valid. As far as Mr. Bradnock's second question was concerned, Dr. Böringer believed that it had been the intention to provide an opportunity in the wording of the Convention for some flexibility of interpretation, which was justified by the biological nature of the material being examined. If a State found that a variety had lost its homogeneity or stability it would examine the variety very carefully. If it proved that those prerequisites were no longer met then it could declare the right of the breeder to be forfeit. It was not obliged to do so, however, since those qualities could sometimes be restored to the variety by the breeder.

453. Mr. R. DUYVENDAK (Netherlands) said that it was felt in his country that in most cases it was not a question of the variety being unstable but of the breeder not maintaining it correctly. It was generally possible for the original stability to be recovered.

454. Mr. J. BUSTARRET (France) said that Article 10(2) of the Convention dealt very clearly with the last question raised by Mr. Bradnock. It provided that the breeder forfeited his right if he was no longer in a position to maintain the variety in conformity with its description. The right was not annulled. It was forfeit as a result of considerations arising after the grant of the title of protection.

455. Mr. F. ESPENHAIN (Denmark) said that his Delegation agreed with the comments made by the Delegations of the Federal Republic of Germany, the Netherlands and France.

456. Mr. W. T. BRADNOCK (Canada) said that he appreciated the clarification provided by member Delegations and recognized the differentiation between declaring the right null and void and declaring it forfeit.

457. *Article 10(1) was adopted as appearing in the Draft.*

458. The PRESIDENT opened the discussion on Article 10(2) and invited the Delegation of the United Kingdom to introduce its proposal for amendment as contained in document DC/24.

459. Miss E. V. THORNTON (United Kingdom) noted that paragraphs (2) and (3) of Article 10 dealt with related situations. The former paragraph dealt with a mandatory requirement and the latter with a permissive one. The opening words of paragraph (3) stated that: "The right of the breeder may become forfeit..." and her Delegation thought this to be the correct expression. It suggested, therefore, that a similar expression should be ascribed to paragraph (2) which should begin with the words: "The right of the breeder shall become forfeit ..."

460. Dr. A. BOGSCH (Secretary-General of UPOV) felt that the proposal should be submitted to the Drafting Committee. In the French text, the introductory words of paragraphs (2) and (3) were already compatible. In that text, however, which said: "... est déchu de son droit l'obtenteur ...," the breeder was the suffering party, whereas in the English text proposed in document DC/24 the suffering party was the right.

461. Miss E. V. THORNTON (United Kingdom) said that her Delegation also wished to propose that the words "morphological and physiological" be deleted from Article 10(2), as had been done in respect of Article 6(1)(a).

462. Subject to the decisions of the Drafting Committee on the proposals referred to in paragraphs 459 and 461 above, Article 10(2) was adopted as appearing in the Draft.

463. The PRESIDENT opened the discussion on Article 10(3).

464. Mr. B. M. LEESE (United States of America) said that his Delegation could agree to the requirement placed on breeders by Articles 10(2) and (3)(a) to possess propagating material, although such a requirement did not currently feature in the Plant Patent Law. Users of the plant patent system in his country had pointed out the desirability of such a provision and his Government had acknowledged its willingness to amend the Plant Patent Law accordingly.

465. Article 10(3) was adopted as appearing in the Draft.

466. The PRESIDENT opened the discussion on Article 10(4).

467. Mr. W. T. BRADNOCK (Canada) said that he wished to revert to the fact that Article 10(4) provided that the right of the breeder could not be annulled or become forfeit except on the grounds set out in Article 10. It was implied in Article 9 that the right of a breeder could be restricted in the public interest. As a matter of interpretation he wished to know whether it was possible under Article 9 to cancel a right either in the public interest or because of failure to comply with a restriction imposed in the public interest. If it was not possible to do so then a provision was needed in Article 10 to allow cancellation in certain public interest situations.

468. Dr. A. BOGSCH (Secretary-General of UPOV) thought that non-compliance with a restriction imposed pursuant to Article 9 was, in formal terms, no reason for cancellation, but he felt that the restriction imposed could be so severe that it re-

duced the right to an infinitesimal fraction of its original value.

469. *Article 10(4) was adopted as appearing in the Draft.*

SEVENTH MEETING

Thursday, October 12, 1978,

morning

Article 7: *Official Examination of Varieties; Provisional Protection* (*Continued from 419*)

470. The PRESIDENT invited the Conference to consider document DC/40 which contained a proposal, submitted by the Delegation of France, for a new wording for the second sentence of Article 7(1). It was proposed that the sentence should read: "Such examination shall be appropriate to each botanical genus or species."

471. Mr. R. DUYVENDAK (Netherlands) remarked that test guidelines for a wide range of species had been developed in the period since the coming into force of the original Convention. That collection of guidelines provided much more detailed information about the examination of varieties than did the single sentence under consideration. He therefore repeated his proposal that the second sentence of Article 7(1) should be deleted.

472. Mr. B. LACLAVIERE (France) believed that the existence of the test guidelines was due to the fact that the Convention encouraged their development. He believed, moreover, that the sentence in question was certainly reassuring to the professional organizations which feared examinations. There were some which contested them. He thought, therefore, that it might be preferable to retain the sentence.

473. Mr. J. WINTER (ASSINSEL) said that his Association wished to emphasize what had been said by Mr. Laclavière. It would not view favorably the deletion of the sentence in question which really had provided a basis for the preparation of the test guidelines cited by Mr. Duyvendak.

474. It was decided that the second sentence of Article 7(1) should be replaced by the wording proposed in document DC/40.

475. Subject to the decision recorded in the preceding paragraph Article 7(1) was adopted as appearing in the Draft.

Article 11: Free Choice of the Member State in Which the First Application is Filed; Application in Other Member States; Independence of Protection in Different Member States

476. The PRESIDENT opened the discussion on Article 11 and invited the Delegation of South Africa to introduce document DC/34 containing its proposal for the amendment of Article 11(2).

477. Mr. J. F. VAN WYK (South Africa) said that his Delegation considered its proposal to be mainly of a drafting nature. The intention was to improve the text by referring specifically to the titles of protection involved as was done in Article 2(1) which mentioned both special titles of protection and patents.

478. Dr. D. BÖRINGER (Federal Republic of Germany) said that he could not see any substantive reason for the proposed amendment. Since Article 2(1) provided a clear basis for the recognition of the right of the breeder "by the grant either of a special title of protection or of a patent" he felt it to be unnecessary to expand on the words "a title of protection" in Article 11(2).

479. Mr. B. LACLAVIERE (France) thought that the proposal would modify the text in that its scope would be limited to some extent. He considered the proposed amendment to be substantive and he would not be in favor of it.

480. Mr. A. W. A. M. VAN DER MEEREN (Netherlands) was of the opinion that the text of Article 11(2) as appearing in the Draft was quite clear. He therefore saw no need for the amendment proposed by the Delegation of South Africa.

481. The PRESIDENT noted that there was no support for the proposal contained in document DC/34.

482. Article 11 was adopted as appearing in the Draft.

Article 12: Right of Priority

483. The PRESIDENT opened the discussion on paragraphs (1) and (2) of Article 12.

484. Paragraphs (1) and (2) of Article 12 were adopted as appearing in the Draft, without discussion. (Paragraph (1) reconsidered at paragraph 593.2 et seq.)

485. The PRESIDENT opened the discussion on Article 12(3).

486.1 Mr. H. J. WINTER (United States of America) said that his Delegation wished to make a general statement with regard to Article 12 and the right of priority. There were a number of differences between the relevant provisions of the Paris Convention for the Protection of Industrial Property and of the UPOV Convention. In each instance the Paris Convention was more liberal towards applicants. At previous discussions delegations from his country had been assured that as far as plant patents were concerned it would be in order for the United States Patent and Trademark Office to apply the terms and conditions of the Paris Convention. As a result foreign applicants would be accorded more liberal treatment than was required by Article 12. The Plant Variety Protection Office of the Department of Agriculture would apply the provisions of Article 12.

486.2 Mr. Winter went on to make specific reference to Article 12(3) which allowed the breeder up to four years after the expiration of the period of priority to provide propagating material for examination. At previous discussions assurances had been given that both of the United States Offices could examine applications upon receipt, without reference to the four-year period. His Delegation was concerned, however, that a literal reading of Article 12(3) might not so allow.

487. The PRESIDENT invited comments on the statement made by the Delegation of the United States of America.

488. Miss E. V. THORNTON (United Kingdom) sought confirmation from the Delegation of the United States of America that it was referring only to the case of its own country and breeders making applications there and that it was not expecting current member States of the Union to provide anything further for applicants from its own country.

489. Mr. H. J. WINTER (United States of America) confirmed that Miss Thornton's understanding of the scope of his statement was correct.

490. The PRESIDENT said that he understood from the earlier discussions that when an application was filed in the United States of America no additional documents or material were required and the application could be processed immediately.

491. Mr. H. J. WINTER (United States of America) said that the understanding expressed by the President was quite correct.

492. The Conference noted that Article 12(3) had no relevance for the United States of America in the circumstances referred to in paragraphs 486.2 to 491 above.

493. *Article 12(3) was adopted as appearing in the Draft.*

494. The PRESIDENT opened the discussion on Article 12(4). The Delegation of Denmark was preparing a proposal and he therefore asked that consideration of that Article be deferred.

495. *It was decided to defer discussion on Article 12(4) until the proposal referred to in the preceding paragraph had been circulated.* *(Continued at 580).*

Article 13: Denomination of Varieties of Plants

496. The PRESIDENT opened the discussion on Article 13 and noted that it was being examined by the working group especially established for that purpose.

497. *It was decided to defer discussion on Article 13 until the working group referred to in the preceding paragraph had reported.* *(Continued at 1011)*

Article 14: Protection Independent of Measures Regulating Production, Certification and Marketing

498. The PRESIDENT opened the discussion on Article 14.

499. *Article 14 was adopted as appearing in the Draft, without discussion.*

Article 15: Organs of the Union

500. The PRESIDENT opened the discussion on Article 15. He noted that the Government of Switzerland had declared in writing that it had no objection to the proposal in the Draft to delete the final sentence of the original text of Article 15 which stated: " That Office shall be under the high authority of the Swiss Confederation", and to the consequential amendments proposed in the Draft in respect of a number of subsequent Articles.

501. *Article 15 was adopted as appearing in the Draft, without discussion.*

Article 16: *Composition of the Council; Votes*

Article 17: *Observers in Meetings of the Council*

Article 18: *Officers of the Council*

502. *It was decided to defer examination of Articles 16, 17 and 18 until proposals for amendment being submitted by the Delegation of the Netherlands had been circulated.* *(Continued at 602, 607 and 610)*

Article 19: *Meetings of the Council*

503. The PRESIDENT opened the discussion on Article 19.

504. *Article 19 was adopted as appearing in the Draft, without discussion.*

Article 20: *Rules of Procedure of the Council; Administrative and Financial Regulations of the Union*

505. The PRESIDENT opened the discussion on Article 20.

506. *Article 20 was adopted as appearing in the Draft, without discussion.*

Article 21: *Tasks of the Council*

507. The PRESIDENT opened the discussion on Article 21 and invited the Delegation of the Federal Republic of Germany to introduce its proposals for amendment as contained in document DC/26.

508. Mr. W. BURR (Federal Republic of Germany) said that he would like to take first that part of his Delegation's proposal which related to Article 21(c). The present text of the Convention provided that the Council should "give to the Secretary-General ... all necessary directions, including those concerning relations with national authorities." In order to ensure that relations with international, supranational and suchlike organizations were not excluded his Delegation felt that it might be more appropriate to refer instead to "all necessary directions for the accomplishment of the tasks of the Union."

509. Mr. J. F. VAN WYK (South Africa) said that a proposal by his Delegation for the amendment of Article 21(c) was currently being reproduced in document DC/36. He wished to withdraw that proposal and to support, at the same time, the proposal submitted by the Delegation of the Federal Republic of Germany in document DC/26.

510. Article 21(c) was adopted as appearing in document DC/26.

511. Mr. W. BURR (Federal Republic of Germany) said that the remaining amendment proposed by his Delegation in document DC/26 related to Article 21(g). His Delegation had certain reservations about the revised wording proposed in the Draft which provided that the Council required the agreement of the Secretary-General when appointing a Vice Secretary-General. According to its cooperation agreement with the World Intellectual Property Organization (WIPO) the Union had no influence in the appointment of the Secretary-General. It was conceivable that a future Director General of WIPO might have aims which were quite different to the present and future aims of the Union. In that case the work of the Union might be blocked if a Vice Secretary-General could not be appointed without the agreement of the Secretary-General. His Delegation believed that the amendment it was proposing would in no way mean that a future Secretary-General should not have an opportunity to express his opinion about the appointment of a Vice Secretary-General. On the contrary, good cooperation between the Council and the Secretary-General was essential. His Delegation believed, however, that the matter should be regulated in administrative provisions on cooperation in such a way that the work of the Union would not be blocked. It therefore proposed that Article 21(g) should simply state that the Council should "appoint the Secretary-General and, if it finds it necessary, a Vice Secretary-General."

512. Mr. B. LACLAVIERE (France) said that he had considerable hesitation about the proposed amendment. In his view the problem, which had been widely discussed, was more theoretical then practical. It was inconceivable that a Vice Secretary-General should be appointed without the agreement of the Secretary-General. In that event the working relationship between the Union and the World Intellectual Property Organization would cease to exist. He believed that it would be preferable to keep the wording proposed for Article 21(g) in the Draft in order to facilitate a good relationship with the Secretary-General.

513. Miss E. V. THORNTON (United Kingdom) said that she was inclined to support the proposal of the Federal Republic of Germany. Her Delegation thought that the duties of the Union should be quite clear and that there should not be an obligation to consult with and obtain the agreement of the Secretary-General.

514. Mr. F. PINI (Italy) said that although he had not followed all the preparatory work for the Diplomatic Conference he found the remarks of the Delegation of France quite reasonable and wished to support them.

515. Mr. R. DERVEAUX (Belgium) said that his Delegation supported the proposal submitted by the Delegation of the Federal Republic of Germany.

516. Mr. W. VAN SOEST (Netherlands) said that his Delegation was in favor of the proposal of the Delegation of the Federal Republic of Germany.

517. Mr. J. F. VAN WYK (South Africa) said that his Delegation also favored that proposal.

518. Mr. F. ESPENHAIN (Denmark) said that his Delegation also favored that proposal.

519. Mr. H. J. WINTER (United States of America) said that his Delegation, as an Observer Delegation, naturally had no position on the matter. It did seem, however, that it would be desirable to reserve the final decision on it until the Secretary-General's return.

520. Mr. S. MEJEGÅRD (Sweden) said that he shared the views expressed by the Delegation of the United States of America.

521. The PRESIDENT said that it might help the Conference to know that the Secretary-General had accepted the proposal under consideration. The President understood that the Delegation of the Federal Republic of Germany had made the proposal in order to ensure that the work of the Union would not be blocked in the event of an irreconcilable difference between the Union and the World Intellectual Property Organization.

522. Mr. S. MEJEGÅRD (Sweden) said that his Delegation would support the proposal of the Federal Republic of Germany, in view of the clarification given by the President.

523. Mr. F. PINI (Italy) said that he was of the same opinion as the Delegation of Sweden.

524. Mr. R. GUY (Switzerland) said that his Delegation also supported the proposal of the Delegation of the Federal Republic of Germany.

525. Mr. B. LACLAVIERE (France) asked the Conference to note that his Delegation abstained.

526. Article 21(g) was adopted as appearing in document DC/26. (see also paragraphs 535 to 537)

527. *Subject to the decisions recorded in paragraphs 510 and 526 above, Article 21 was adopted as appearing in the Draft.*

Article 22: Majorities Required for Decisions of the Council

528. *It was decided to defer examination of Article 22 until the proposal for amendment being submitted by the Delegation of the Netherlands had been circulated.* *(Continued at 620)*

Article 23: Tasks of the Office of the Union; Responsibilities of the Secretary-General; Appointment of Staff

529. The PRESIDENT opened the discussion on Article 23(1) and invited the Delegation of South Africa to introduce its proposal for amendment contained in document DC/27.

530. Mr. J. F. VAN WYK (South Africa) said that his Delegation proposed as a drafting matter that the words "have the task of carrying" in the first sentence of Article 23(1) be replaced by the word "carry."

531. *It was decided to refer the proposal reproduced in document DC/27 to the Drafting Committee.*

532. *Subject to the decision referred to in the preceding paragraph Article 23(1) was adopted as appearing in the Draft.*

533. The PRESIDENT opened the discussion on Article 23(2).

534. *Article 23(2) was adopted as appearing in the Draft, without discussion.*

535. The PRESIDENT opened the discussion on Article 23(3).

536. Mr. A. PARRY (United Kingdom) drew attention to the reference in Article 23(3) to Article 21(g). The Conference had adopted as the text of Article 21(g) the amendment proposed in document DC/26 which read: "appoint the Secretary-General and, if it finds it necessary, a Vice Secretary-General." (See paragraphs 511 to 526). The reference in Article 21(g) to the conditions of appointment of the Secretary-General and of a Vice Secretary-General, which had been included in the wording proposed for that Article in the Draft, did not appear in the text adopted. There was therefore no point in retaining the cross-reference in Article 23(3). It appeared to Mr. Parry that the cross-reference to Article 21(g) should be deleted and that the Conference had to consider what should be said about the conditions of appointment of the Secretary-General and of a Vice Secretary-General, given that the relevant reference had been deleted from Article 21(g).

537. Dr. D. BÖRINGER (Federal Republic of Germany) agreed with Mr. Parry's analysis but felt that it would be sufficient to refer the question to the Drafting Committee for alignment with the present content of Article 21(g).

538. It was decided that the Drafting Committee should be asked to ensure that there was conformity between the texts of Articles 21(g) and 23(3).

539. Subject to the decision referred to in the preceding paragraph, Article 23(3) was adopted as appearing in the Draft.

Article 23A: Legal Status

540. It was decided to defer examination of Article 23A until the proposal for amendment being submitted by the Delegation of the Netherlands had been circulated.
(Continued at 626)

Article 24: Auditing of the Accounts

541. The PRESIDENT opened the discussion on Article 24.

542. Article 24 was adopted as appearing in the Draft, without discussion. It was noted that the Delegation of Switzerland might wish to make a Statement regarding the cessation of the supervisory function of the Government of the Swiss Confederation. (Continued at 694)

Article 25: (Cooperation with the Unions Administered by BIRPI)

543. The Conference noted that there was no provision in the Draft corresponding to Article 25 of the original text of the Convention.

Article 26: Finances

544. It was decided to defer examination of Article 26 until the proposal for amendment being submitted by the Delegation of the Federal Republic of Germany had been circulated. (Continued at 628)

Article 27: Revision of the Convention

Article 28: Languages to be Used by the Office and in the Council

545. It was decided to defer examination of Articles 27 and 28 until proposals for amendment being submitted by the Delegation of the Netherlands had been circulated. (Continued at 643 and 651)

Article 29: Special Agreements for the Protection of New Varieties of Plants

546. The PRESIDENT opened the discussion on Article 29.

547. Article 29 was adopted as appearing in the Draft, without discussion.

Article 30: *Implementation of the Convention on the Domestic Level; Contracts on the Joint Utilization of Examination Services*

Article 31: *Signature*

Article 32: *Ratification; Accession*

Article 32A: *Entry Into Force; Closing of Earlier Texts*

Article 32B: *Relations Between States Bound by Different Texts*

Article 33: *Communications Concerning the Genera and Species Protected; Information to be Published*

Article 34: *Territories*

548. It was decided to defer examination of Articles 30, 31, 32, 32A, 32B, 33 and 34 until proposals for amendment being submitted by the Delegation of the Netherlands had been circulated. *(Continued at 654, 697, 704, 707, 722, 734 and 737)*

Article 34A: *Exceptional Rules for Protection Under Two Forms*

549. The PRESIDENT opened the discussion on Article 34A and noted that the Delegation of the United States of America had submitted a proposal, which was reproduced in document DC/32, for the amendment of Article 34A(2).

550. Mr. H. SHIRAI (Japan) said that his Delegation would like the adoption of Article 34A to be deferred since it was considering whether to submit a proposal for amendment.

551. Dr. D. BÖRINGER (Federal Republic of Germany) said that his Delegation supported the proposal of the Delegation of Japan to defer further consideration of Article 34A.

552. *It was decided to defer discussions on Article 34A.* *(Continued at 828)*

Article 35: Transitional Limitation of the Requirement of Novelty

553. The PRESIDENT opened the discussion on Article 35.

554. *Article 35 was adopted as appearing in the Draft, without discussion.*

Article 36: Transitional Rules Concerning the Relationship Between Variety Denominations and Trademarks

Article 36A: Exceptional Rules for the Use of Denominations Consisting Solely of Figures

555. *It was decided to defer examination of Articles 36 and 36A until the Report of the Working Group on Article 13 was available.* *(Continued at 1011)*

Article 37: Preservation of Existing Rights

556. The PRESIDENT opened the discussion on Article 37.

557. *Article 37 was adopted as appearing in the Draft, without discussion.* *(Reconsidered at paragraph 753 et seq.)*

Article 38: Settlement of Disputes

Article 39: Reservations

558. *It was decided to defer examination of Articles 38 and 39 until proposals for amendment being submitted by the Delegation of the Netherlands had been circulated.* *(Continued at 759 and 769)*

Article 40: *Duration and Denunciation of the Convention*

559. The PRESIDENT opened the discussion on Article 40.

560. Mr. W. BURR (Federal Republic of Germany) said that his Delegation had a small problem at least with the German text of Article 40(2). It considered the matter to be one for the Drafting Committee to decide but wished to know whether the Conference would like a written proposal to be submitted. The problem occurred in the second and final sentence of Article 40(2). His Delegation would like the words "of the receipt of the notification of denunciation" to be replaced by "of the receipt of that notification." Repetition of part of the first sentence of that Article would thus be avoided.

561. It was decided to refer the proposal recorded in the preceding paragraph to the Drafting Committee.

562. Subject to the decision referred to in the preceding paragraph, Article 40 was adopted as appearing in the Draft.

Article 41: *Copies; Languages; Notifications*

563. It was decided to defer examination of Article 41 until the proposal for amendment being submitted by the Delegation of the Netherlands had been circulated. *(Continued at 777)*

Article 8: *Period of Protection* *(Continued from 438)*

564. The PRESIDENT reopened the discussion on Article 8 and invited the Delegation of Italy to introduce its proposal for amendment, contained in document DC/41.

565. Prof. A. SINAGRA (Italy) said that his Delegation's proposal to increase the minimum period of protection for vines, forest trees, fruit trees and ornamental trees, including their rootstocks, from 18 years to 25 years was based on the length of the productive life of trees and on the fact that their varietal or clonal denominations remained in current use for longer than did those of herbaceous plants. Furthermore, trademark and patent legislation generally afforded a longer period of protection than 18 years. His Delegation believed that a long minimum period of protection stimulated the work of breeders.

566. Dr. D. BÖRINGER (Federal Republic of Germany) said that his Delegation wished to support the proposal of the Delegation of Italy so that there could be a further discussion in the Plenary of the question of the period of protection.

567. Mr. J. WINTER (ASSINSEL) said that his Association also welcomed the proposal of the Delegation of Italy. The arguments put forward for extending the minimum period of protection for vines, forest trees, fruit trees and ornamental trees, including their rootstocks, were equally valid for potatoes. ASSINSEL would recommend that potatoes should be included in the consideration of the proposal.

568. Miss E. V. THORNTON (United Kingdom) said that the minimum periods laid down in the Convention had been translated into United Kingdom law. Longer periods had been fixed for some species where it was considered that the minimum period of protection was not sufficient. Her Delegation felt, however, that to accept an obligation under the Convention for the prolongation of the minimum period to 25 years, which would require an amendment of United Kingdom law, would cause considerable difficulties. It therefore could not support the amendment proposed by the Delegation of Italy and would prefer to retain the discretionary approach to extensions of the minimum period of protection.

569. Mr. F. ESPENHAIN (Denmark) said that his Delegation supported the views expressed by the Delegation of the United Kingdom. Consideration was being given currently in Denmark to fixing longer periods of protection for some species where difficulties were known to exist.

570. Mr. H. AKABOYA (Japan) said that his country's new legislation prescribed a minimum period of protection of 18 years for vines, forest trees, fruit trees and ornamental trees. He asked Member Delegations to take that fact into consideration.

571. Mr. J. F. VAN WYK (South Africa) said that his country was in more or less the same situation as the United Kingdom. Longer minimum periods were already in force for a large number of fruit trees and other types of trees and for potatoes, but those periods were less than 25 years. If the proposal of the Delegation of Italy were adopted then it would require an amendment of South African Law. His Delegation regretted that it was therefore unable at that time to support the proposal.

572. Mr. S. MEJEGÅRD (Sweden) said that his country's position was similar to that of the United Kingdom and Denmark. Although his Delegation could not support the proposal of the Delegation of Italy, consideration was being given in Sweden to the voluntary introduction of a longer period of protection.

573. Mr. T. E. NORRIS (New Zealand) said that his country's legislation was somewhat similar to that of the United Kingdom. His Delegation would also prefer not to be bound to the longer period but to be able to consider it for particular species as appropriate.

574. Mr. A. W. A. M. VAN DER MEEREN (Netherlands) said that his Delegation would prefer not to introduce a longer minimum period of protection. Every member State was free to fix a longer period when it wished to do so.

575. Mr. R. GUY (Switzerland) said that his country had fixed periods of protection of 20 and 25 years for some species but his Delegation believed a rather short minimum period, which could be accepted by all countries, should be retained.

576. Mr. R. DERVEAUX (Belgium) said that his Delegation also was unable to support the proposal of the Delegation of Italy.

577. Dr. D. BÖRINGER (Federal Republic of Germany) said that when the Convention was established in 1961 the minimum periods of protection had been fixed at 15 and 18 years as a compromise. That compromise had been reached, in particular, as a result of a declaration by one State that it would grant protection within the framework of its patent legislation and in recognition of the consequential difficulties to grant a longer period of protection than 18 years. Although his Delegation was not proposing that the Convention should be changed immediately in the way proposed by the Delegation of Italy, it thought that it had become clear from the discussions that a period of 15 or 18 years was in many cases too short for breeders. Many member States had already fixed longer periods of protection and discussions should perhaps continue in the Union, during the coming decade, to determine whether member States could not at some stage agree in common to extend the period of protection on a voluntary basis.

578. Mr. M. O. SLOCOCK (International Association of Horticultural Producers) said that his Association had a particular interest in ornamental plants. As a breeder and producer of trees he personally thought that it must be recognized that it would be wrong to fix a minimum period of protection of 25 years for that category of plants as a homogeneous unit. For many species falling into the category covered by the proposal of the Delegation of Italy a period of less than 25 years would be perfectly acceptable on technical grounds. In view of the scope existing in national legislation to fix periods, where appropriate, that were longer than the minimum periods of 15 and 18 years, he suggested that those minimum periods should not be increased.

579. Subject to the decision referred to in paragraph 436 above, Article 8 was adopted as appearing in the Draft.

EIGHTH MEETING

Thursday, October 12, 1978,

afternoon

Article 12: *Right of Priority* (*Continued from 495*)

580. Dr. D. BÖRINGER (Federal Republic of Germany) announced that the President had asked him, as one of the Vice-Presidents, to preside over the discussion on the proposal for the amendment of Article 12(4) submitted by the Delegation of Denmark and contained in document DC/52. Dr. Böringer invited the Delegation of Denmark to introduce its proposal.

581.1 Mr. H. SKOV (Denmark) said that during the course of the summer several lawsuits had been filed in his country against persons who had begun to exploit a variety, apparently in good faith. The question of good faith had not been discussed, however, and could not have been discussed, because of the existing text of the last sentence of Article 12(4). Although it was not known whether production had been started in good faith, one of the producers had already been reduced to bankruptcy because he had not foreseen that his production would give rise to a financial liability. Mr. Skov said that as a result his Government would like to introduce a number of measures. It wished to provide that a variety must have an approved name before it was marketed. That could be done under seed law. It would also try to establish a provisional protection for the period between the application for and the grant of protection, thereby making it impossible in many cases, he hoped, for a producer to claim that he had started production in good faith.

581.2 Mr. Skov went on to draw the Conference's attention to the fact that before and after the period of priority there were other periods in which difficulties might arise which were not covered by Article 12(4). In between came the period of priority for which special provision had been made in that Article. His Government thought that it would be appropriate to allow the producer who had started production in good faith to dispose of his stock. That was all that his Delegation was proposing. If such a producer had produced, for example, some rose plants then he should be allowed to dispose of his stock.

581.3 It could be argued that the provision in the last sentence of Article 12(4) had been taken from the Paris Convention for the Protection of Industrial Property. In the matters regulated by that Convention, however, there was only one period, namely the period of priority. Also, when an applicant for a patent filed his application there was a clear description of the subject matter which was quite clearly intelligible to persons with a knowledge of the matter. In the case of applications for plant variety protection all that was announced was that breeder "X" had applied for protection of a new variety of a given species. It was not possible to identify from the announcement the variety in question. For that reason there was a clear possibility, even if one did one's best to eliminate it, that a producer could start production in good faith of a variety in respect of which protection was subsequently granted. That was the reason behind his Delegation's proposal to delete or amend the last sentence of Article 12(4).

582. Dr. D. BÖRINGER (Acting President) invited observations on the amendment proposed by the Delegation of Denmark, as appearing in document DC/52 and as introduced by Mr. Skov.

583.1 Mr. J. WINTER (ASSINSEL) said that his Association was extraordinarily grateful to the Delegation of Denmark for having provided an opportunity for the problem to be discussed by the Conference, in particular with reference to the need for provisional protection to be introduced. He was of the opinion, however, that several aspects of the problem were in need of clarification. He thought that the meaning of the content of the right of priority, as laid down in Article 12, was that a given State, receiving an application for protection, could not hold that an earlier application in another State was detrimental to the novelty of the variety. In other words the relationship between breeders and authorities receiving applications for protection was regulated under the aspect of novelty. Assuming that his interpretation, which was based on the situation for patents, was correct, he considered that one could argue against the systematic grouping of the provisions of the last sentence of Article 12(4) in that it regulated the relationship between an applicant and third parties. Mr. Winter thought that such a provision should nevertheless be included somewhere

in the Convention. If no difficulties had arisen so far in the exercise of that provision then ASSINSEL would suggest that the first proposal of the Delegation of Denmark, namely to delete the last sentence of Article 12(4), should be rejected.

583.2 Mr. Winter went on to consider the alternative proposal submitted by the Delegation of Denmark. He wondered whether the reference to "plants or parts of plants" was meant to imply that the proposed exception should apply exclusively in respect of vegetatively propagated plants. He noted the reference to production "begun in good faith." In his view that matter was one for the courts to interpret and one which was not normally provided for in a basic work on industrial property. If he had correctly understood the proposed addition to the last sentence of Article 12(4) it would allow member States to decide to establish a personal right, contrary to the principle established in the original text of that Article. The effect of such a decision would be that when protection was granted in respect of the variety in question the content of that protection would be limited. Mr. Winter believed that the problem experienced in Denmark could not be solved on the basis of the amendment proposed by that country's Delegation. He wished to stress again the need for provisional protection to be introduced. It seemed to him that, for the time being, the solution of the kind of problem instanced by the Delegation of Denmark should be left to the competence of individual member States. ASSINSEL would welcome it if the Conference rejected the amendment proposed in document DC/52.

584. Mr. S. MEJEGÅRD (Sweden) said that Article 12 dealt with a right of priority. The whole article dealt with novelty questions. Paragraph (1) referred only to a right of priority and did not state what that right was. The effect of that right was set out in paragraph (4). The sole reference to the content of the right was in the last sentence of paragraph (4). The main scope of the right protected was laid down in Article 5 where it was stated that it was compulsory to afford protection from the day when the right was granted. Protection during the period between the filing of an application for protection and the grant of a right was, according to Article 7(3), a matter for the discretion of each member State. If he had correctly understood the proposal submitted by the Delegation

of Denmark he believed it concerned that period. If Denmark had difficulty in finding a solution to its problem he wondered if it could not be solved within the national legislation, as had been suggested by the previous speaker.

585. Mr. A. W. A. M. VAN DER MEEREN (Netherlands) believed that the question of "good faith" had to be determined by the courts and that it was for judges to take account of the absence or presence of it when fixing the amount of fines for infringement. He was also concerned by what he saw as a contradition between the amendment proposed by the Delegation of Denmark and the existing text of the last sentence of Article 12(4). The existing text stated that "such matters may not give rise to any right in favour of a third party ... ." The proposal, however, went on to state that in such and such a case a member State could give rights to a third party. His Delegation could not understand how one could give a right of priority with one hand and take it back with the other.

586. Mr. W. BURR (Federal Republic of Germany) believed that Mr. Skov, in introducing the proposal of the Delegation of Denmark, had referred to the examination period. He would prefer to leave open whether the reference had concerned the country of first application or a country in which a subsequent application was filed with a claim in respect of the priority of the first application. In the view of his Delegation problems associated with the examination period could not be solved within the framework of Article 12 which was concerned with the priority period. The first sentence of paragraph (4) referred back to paragraph (1) which specified a one-year priority period but it did not refer to the four-year period for submitting additional documents and material. That period was mentioned only in paragraph (3). His Delegation therefore wondered whether the problem raised by the Delegation of Denmark would not have to be solved within the existing framework of Article 7 where member States were authorized to provide for provisional protection.

587.1 Mr. H. SKOV (Denmark) said that Article 12(4) contained two rules. The first sentence contained a rule about matters which could occur within the prior-

ity period without prejudicing novelty. The other rule, which concerned rights, was in the second and last sentence. If it was felt that his Delegation's proposal to add to the latter rule was wrong then he defied the wisdom of including a rule concerning rights in an article which dealt with priority.

587.2 Mr. Skov said that he wished to clarify that no protection was given in his country during the examination period. Producers were free to use the variety during that period. Serious consideration was being given to changing that situation. At the moment, however, when the day came and the right was granted, then, all of a sudden, a person who had produced some rose plants or other products was prevented from selling them. It was only that situation which his Delegation thought should be changed. That could be done by granting provisional protection under certain conditions, thus normally excluding claims that production had been started in good faith. But there could still be problems arising from the fact that a variety could be marketed in other countries for up to four or six years before an application for protection was filed in a given member State. Europe was a relatively small area in which there was a considerable trade and in which the boundaries were rather open. It was therefore very easy for a situation to arise in which a producer started production in good faith.

587.3 Mr. Skov concluded by saying that he had no strong feelings about retaining the reference in his Delegation's proposal to "plants or parts of plants," which had been questioned by the representative of ASSINSEL. He thought, however, that if a rose or chrysanthemum producer, for instance, filled his whole glasshouse in good faith with a variety then he should have some chance of disposing of his production. The only purpose of his Delegation's proposal was to ensure that in such cases the producer had that chance, even after rights had been granted in the variety, provided that he had started his production in good faith. Mr. Skov agreed that the question of good faith was clearly one for the courts. They would decide when there was good faith and when there was not.

588. Mr. A. W. A. M. VAN DER MEEREN (Netherlands) said that the situation just described by Mr. Skov could and did occur from time to time in his country. In the majority of such cases the holder of the plant breeder's right was quite willing to licence the sale of the production in question because he was well aware that he might find himself in a similar situation on some future occasion. Mr. van der Meeren said that his Delegation believed that the breeder must, in any case, receive some remuneration. To allow a third party to sell his stock without some payment to the breeder would run counter to the protection afforded to the breeder.

589. Mr. H. J. WINTER (United States of America) said that his Delegation had already indicated its support for the text of Article 12 appearing in the Draft, subject to certain understandings regarding its application (see paragraphs 486 to 492). It appeared to his Delegation that the last sentence of Article 12(4) had the same effect as part of Article 4, Section B, of the Paris Convention for the Protection of Industrial Property. The redrafting of the sentence, as proposed by the Delegation of Denmark, was not favored since it appeared to limit the rights of the breeder and to create uncertainty as to his rights. A number of the delegations which had already spoken had indicated that the concept of good faith was rather ambiguous and might lead to a good deal of uncertainty.

590. Dr. H. H. LEENDERS (FIS) said that perhaps the majority of the members of the International Federation of the Seed Trade would have supported the proposal of the Delegation of Denmark, if it had been made 15 to 20 years earlier. He did not think that would still be the case. The relationship between breeders and the trade was good and his Federation did not want to have that disturbed. He was somewhat astonished that in Denmark, where growers were keenly aware of market situations, someone could be reduced to bankruptcy because he did not know that there were plant breeder's rights. It had cost some time to educate people and his Federation would not wish to see exceptions introduced by way of the concept of good faith.

591. Dr. D. BÖRINGER (Acting President) asked whether any delegation wished to second either of the proposals of the Delegation of Denmark as appearing in document DC/52. He noted that no delegation wished to do so.

592. *Article 12(4) was adopted as appearing in the Draft.*

593.1 The PRESIDENT thanked Dr. Böringer for having chaired the now concluded discussion on Article 12(4).

593.2 The President advised the Conference that although Article 12(1) had been adopted as appearing in the Draft, without discussion (see paragraph 484), the Delegation of France wished to submit a proposal for amendment. He noted that there were no objections to reconsidering Article 12(1) and invited the Delegation of France to introduce its proposal for amendment which was reproduced in document DC/53.

594. Mr. B. LACLAVIERE (France) said that his Delegation's proposal concerned the first sentence of Article 12(1). When studying the Convention and the professional activities of breeders he had noted that it was rather difficult for breeders, given the time required to complete each growth cycle, to test their varieties commercially in foreign countries. It was known, nevertheless, that important steps and expenses were involved in filing an application for protection in a foreign country. It was for that reason that breeders would like to see the priority period extended to two years, thus making it easier for them to carry on their businesses. With that in mind his Delegation submitted its proposal that the words "twelve months" be replaced by "two years" in the first sentence of Article 12(1).

595. Mr. J. WINTER (ASSINSEL) said that Mr. Laclavière had quite rightly mentioned the fact that the proposal of the Delegation of France had originated in the professional circles. ASSINSEL therefore wished to support the proposal. It might, however, lead to greater legal uncertainty.

596. Mr. M. O. SLOCOCK (AIPH) drew the attention of the Conference to the submission of the International Association of Horticultural Producers as reproduced in paragraph 11 of Annex I to document DC/7. His Association had thoroughly discussed

the question before making its submission and it fully supported the amendment proposed by the Delegation of France.

597. Mr. F. ESPENHAIN (Denmark) said that his Delegation had already expressed its concern about various periods when the question of "good faith" had been discussed. It could not support the proposal of the Delegation of France.

598. Mr. G. CUROTTI (Italy) said that his Delegation was opposed to the proposal of the Delegation of France.

599. Mr. B. M. LEESE (United States of America) said that the text of Article 12(1) as amended in the proposal of the Delegation of France would be inconsistent with both the Plant Variety Protection Act and the Plant Patent Act. His Delegation was therefore opposed to it.

600. The PRESIDENT asked whether any delegation wished to support the proposal of the Delegation of France. He noted that no delegation wished to do so.

601. The earlier adoption of Article 12(1) as appearing in the Draft (see paragraph 484) was confirmed.

Article 16: Composition of the Council; Votes (Continued from 502)

602. The PRESIDENT opened the discussion on Article 16 and invited the Delegation of the Netherlands to introduce its proposal for the amendment of paragraph (3) as appearing in document DC/43.

603. Mr. A. W. A. M. VAN DER MEEREN (Netherlands) said that the text of Article 16(3) in the Draft did not take into account the provision in Article 26(5) whereby a member State could be deprived of its right to vote. His Delegation therefore proposed that the phrase "subject to the application of the provision of Article 26(5)" should be added to Article 16(3).

604. Mr. A. PARRY (United Kingdom) remarked that Article 16(3) described a single situation in that it provided that each member State had one vote in the Council. His immediate reaction on reading the proposal of the Delegation of the Netherlands had been that the additional words must relate to a provision later in the Convention giving parties to the Convention more than one vote. The provision in Article 26(5), however, dealt with the circumstances in which the right to vote could be suspended if a member State was in arrears in the payment of its contributions. That being the case, he would not advise that the proposed amendment be adopted because the two articles in question dealt with quite different situations. Mr. Parry said that he had in front of him copies of a number of the Conventions sponsored by the World Intellectual Property Organization. None of those conventions had a provision of the kind proposed for inclusion in Article 16(3). They all had separate provisions similar to Articles 16(3) and 26(5) of the Draft. Such separate provisions were also to be found, for example, in the International Sugar Agreement of 1977. He therefore felt it was clear that the normal procedure in multilateral conventions was to separate entirely the two ideas. His Delegation would not advocate support of the proposal of the Delegation of the Netherlands.

605. The PRESIDENT asked whether any delegation wished to support the proposal reproduced in document DC/43. He noted that no delegation wished to do so.

606. Article 16 was adopted as appearing in the Draft, without discussion of paragraphs (1) and (2) thereof.

Article 17: *Observers in Meetings of the Council* (*Continued from 502*)

607. The PRESIDENT opened the discussion on Article 17 and invited the Delegation of the Netherlands to introduce its proposal for the amendment of paragraph (1) as appearing in document DC/44.

608. Mr. A. W. A. M. VAN DER MEEREN (Netherlands) said that it was rather difficult to introduce his Delegation's proposal since it contained a reference to Article 32, which was also the subject of a proposed amendment, yet to be circulated.

609. It was decided to further defer discussion on Article 17 until the proposal for the amendment of Article 32, referred to in the preceding paragraph, had been circulated. (*Continued at 701*)

Article 18: *Officers of the Council* (*Continued from 502*)

610. The PRESIDENT opened the discussion on Article 18 and invited the Delegation of the Netherlands to introduce its proposals for amendment as appearing in document DC/45.

611. Mr. A. W. A. M. VAN DER MEEREN (Netherlands) said that Article 18(1), which would not be affected by his Delegation's proposal, provided for the possibility of electing more than one Vice-President of the Council. The purpose of the proposal was to establish an order of seniority, to specify the powers and duties of a Vice-President acting as President and to fix the duration of a Vice-President's term of office at three years.

612. Mr. B. LACLAVIERE (France) said that he well understood the concern of the Delegation of the Netherlands. Its proposal was certainly quite correct from the legal point of view. He wondered, however, whether the points could not be more happily left to the internal Rules and Regulations of the Union.

613. The PRESIDENT asked whether there was any support for the first of the proposed amendments which sought to establish an order of seniority in the event of their being more than one Vice-President.

614. Mr. J. F. VAN WYK (South Africa) said that his Delegation wished to support the proposed amendment referred to by the President.

615. Mr. B. LACLAVIERE (France) remarked that Mr. van Wyk had not participated in the first years of the life of the Union. During those years one had been very pleased at not having an order of precedence, a fixed term of office and specific provisions in respect of Vice-Presidents. The Council had acted in the way that seemed most opportune. He believed that acting in that way had been most valuable for the functioning of the Union.

616. Dr. D. BÖRINGER (Federal Republic of Germany) said that his Delegation supported what had just been said by the Delegation of France.

617. Miss E. V. THORNTON (United Kingdom) said that her Delegation associated itself with the support expressed by the Delegation of the Federal Republic of Germany.

618. Mr. A. M. A. M. VAN DER MEEREN (Netherlands) said that his Delegation withdrew its proposals for the amendment of Article 18, as contained in document DC/45.

619. Article 18 was adopted as appearing in the Draft.

Article 22: Majorities Required for Decisions of the Council (Continued from 528)

620. The PRESIDENT opened the discussion on Article 22 and invited the Delegation of the Netherlands to introduce its proposal for amendment as appearing in document DC/46.

621. Mr. A. W. A. M. VAN DER MEEREN (Netherlands) said that his Delegation considered its proposal to replace the word "members" in Article 22 by the expression "member States of the Union" to be a drafting amendment.

622. It was decided to refer the proposal contained in document DC/46 to the Drafting Committee for consideration.

623. Mr. H. J. WINTER (United States of America) said that his Delegation thought that it would be useful to include in the Convention a quorum requirement for decisions of the Council. If that was not acceptable his Delegation would suggest that such a requirement be established by the Council in its Rules of Procedure.

624. The PRESIDENT drew the attention of the Conference to the final paragraph of page 52 of document DC/3 where it was stated that the Council would "establish the quorum for its decisions in its Rules of Procedure."

625. Subject to the decision referred to in paragraph 622 above, Article 22 was adopted as appearing in the Draft.

Article 23A: Legal Status (Continued from 540)

626. The PRESIDENT said that, although the proposal for amendment submitted by the Delegation of the Netherlands had now been circulated in document DC/47, he understood that another proposal for amendment, from the Delegation of France, was in preparation.

627. It was decided to further defer discussion on Article 23A until the proposal for amendment being submitted by the Delegation of France had been circulated. (Continued at ...)

Article 26: Finances (Continued from 544)

628. The PRESIDENT opened the discussion on Article 26 and invited the Delegation of the Federal Republic of Germany to introduce its proposal for amendment as appearing in document DC/28.

629.1 Mr. H. KUNHARDT (Federal Republic of Germany) said that his Delegation's proposal was aimed at solving a particular problem. The Convention of 1961, which had entered into force in 1968, had provided for three contribution classes. After just four years, however, it had already become apparent that a system of three classes was too narrow to accommodate the necessary degree of differentiation between member States. In the Additional Act of 1972 the number of classes had therefore been increased from three to five. Now, six years later, the Union was again confronted with the same need to increase the number of classes. At first sight it might seem that the proposal in Article 26(2) in the Draft to have 15 classes, ranging from one-fifth to 15 units of contribution, should suitably meet requirements for a long time to come. His Delegation, however, was not so sure. The value of one unit was calculated according to the provisions of Article 26(3). That method of calculation had the effect that as the number of States belonging to the Union increased so the value of one unit decreased.

As a result the need for the lower contribution classes would almost certainly be reduced and, eventually, the system might cease to be suitable to meet the need to differentiate between member States. His Delegation believed that the answer to the problem was to remove the upper limit from the proposed scale, thus allowing the payment of more than 15 units without it being necessary to change the Convention. The sole aim of the proposal contained in document DC/28 was to remove that upper limit.

629.2 Mr. Kunhardt said that he wished to comment briefly on the details of his Delegation's proposal in which the structure of Article 26 in the Draft had been followed as closely as possible. No change was proposed in paragraph (1). Paragraph (2) had been amended to exclude any reference to "class" and, in view of the present practice of some member States, to make it clear that contributions "may also comprise fractions of a full unit." No change was proposed in paragraph (3) which was the essential part of Article 26 in that it regulated the calculation of the unit of contribution. No substantive changes were proposed in paragraphs (4)(a) or (4)(b) but drafting changes had been made to exclude any reference to "class," thus aligning them with the wording proposed by his Delegation for paragraph (2). The only new provision was paragraph (5). Since it was proposed that the system of "classes" should give way to a simple system of "units" it seemed expedient to include a transitional rule. The aim of paragraph (5) was to make it clear that, once the revised text of the Convention entered into force, a State whose membership preceded that event should continue to pay the number of units of contribution corresponding to its former class, unless it had declared that it wished to pay another number of units.

629.3 Mr. Kunhardt concluded by noting that his Delegation wished to preserve paragraph (5) of the Draft version of Article 26 unchanged. It would therefore have to be added as a separate paragraph at the end of the proposal contained in document DC/28.

630. The PRESIDENT invited comment on the idea of deleting the list of classes, which he saw as the main point of the proposal of the Delegation of the Federal Republic of Germany.

631. Mr. A. PARRY (United Kingdom) said that he would like to support the proposal of the Delegation of the Federal Republic of Germany for the purpose of the discussion but the absence of any definition of the "units" referred to caused him some difficulty. He would have thought that if one was starting from an entirely fresh system one could have worked on the basis of just dividing the budget in terms of percentage points, or something of that kind. The system proposed was workable only because it was dependent on a system found in a previous Act of the Convention. His Delegation could nevertheless see merit in the idea of deleting the list of classes and in having a rather more flexible procedure.

632. Mr. H. KUNHARDT (Federal Republic of Germany) said that he wished to reply briefly to the statement made by the Delegation of the United Kingdom. It seemed sufficient that paragraph (3) specified how to calculate the unit of contribution. In the present system there was no definition of "class" but just a statement of the number of units corresponding to a class.

633. Mr. A. W. A. M. VAN DER MEEREN (Netherlands) believed that it was better to speak of units. If the percentage system were used then member States would have to make a fresh choice whenever the membership of the Union increased.

634. Mr. H. J. WINTER (United States of America) said that if paragraph 2(a) in the Draft, which set forth various classes, were deleted then his Delegation was not sure how the United States would determine the number of units it would have to pay to become a member State.

635. Mr. A. PARRY (United Kingdom) noted that the Delegation of the Federal Republic of Germany had stated that the crux of its proposal was paragraph (3) of the existing text, which would remain unchanged. It was, however, not possible to make the calculation described in that paragraph unless one knew the "total number of units" and there was no fixed yardstick for finding that number. Mr. Parry believed that the Delegation of the United States of America had really been referring to that point.

636. Mr. H. J. WINTER (United States of America) said that a State joining the Union had to indicate the number of contribution units it wished to pay. To do that the State needed a point of reference. Although paragraph (5) of the proposal provided some sort of point of reference for member States, it seemed to his Delegation that the proposal was silent in that respect as regards non-member States.

637. The PRESIDENT invited Mr. Ledakis to clarify the situation.

638. Mr. G. LEDAKIS (Legal Counsel, International Bureau of the World Intellectual Property Organization (WIPO)) said that the choice of a "class" or of a "number of units" was something that a number of States wishing to join a Union had had to face. The Secretariat had often been asked on what basis a State should make its choice. The question came up, for example, in connection with the Convention Establishing the World Intellectual Property Organization, the Paris Convention for the Protection of Industrial Property and the Berne Convention for the Protection of Literary and Artistic Works, which all made reference to "classes." The advice given by the Secretariat was that it was for each State to make its own choice and that it might wish to do so in the light of the choice made by member States of the Union it sought to join, bearing in mind its comparative stature, position, and level of social and economic development.

639. Mr. H. J. WINTER (United States of America) thanked Mr. Ledakis for his explanation. It was still necessary, however, to have a point of reference with respect to other member States. Unless some specific number of units was set forth for different groups of countries it would still be difficult for a State to determine how many units it should pay upon assuming membership of the Union. Mr. Winter said that his Delegation was sure that the matter would be very carefully looked into by the financial authorities in the various non-member States. It would appreciate further information from the Delegation of the Federal Republic of Germany regarding the way in which the proposed system would work in practice and the number of units which would be paid by member States.

640. Mr. H. KUNHARDT (Federal Republic of Germany) said that it was not possible to give reference points regarding the "amount" a State would have to pay, especially since that amount would vary from year to year as a result, for example, of changes in the financial structure of the Union. He wished just to point out that it made no difference at all whether a new member State had to decide, when joining the Union, on a class or a number of units. To choose a class it had to find out first how many units corresponded to that class, and secondly the current value of a unit. The decision process, therefore, would not be changed at all by his Delegation's proposal. In the end a State had to choose an amount that it was willing to pay and it was completely irrelevant whether it chose a class or a number of units corresponding to that amount. Currently the budget which had to be met by the member States amounted to slightly more than 1,000,000 Swiss francs and the total number of units was 26. A unit therefore amounted to some 40,000 Swiss francs but, as he had said, the amount changed from year to year.

641. Mr. H. J. WINTER (United States of America) said that his Delegation, which was an Observer Delegation, did not want to cause difficulties in respect of Article 26. It wondered, however, whether the final decision on that Article could be deferred to allow time for further reflection on the amendments proposed.

642. It was decided to defer further discussion on Article 26. (Continued at 949).

Article 27: Revision of the Convention (Continued from 545)

643. The PRESIDENT opened the discussion on Article 27 and invited the Delegation of the Netherlands to introduce its proposal for amendment as appearing in document DC/48.

644. Mr. A. W. A. M. VAN DER MEEREN (Netherlands) felt that his Delegation's proposal needed no explanation. Since Article 27 contained provisions for the revision of the Convention it would be more logical to determine in that Article, rather than in Article 28, the languages to be used in revision conferences.

645. Dr. D. BÖRINGER (Federal Republic of Germany) said that his Delegation wished to support the substance of the proposal of the Delegation of the Netherlands. It believed, however, that the proposed wording would have to be carefully checked by the Drafting Committee, at least in respect of the German version.

646. Mr. A. PARRY (United Kingdom) said that his Delegation felt that the question of languages in revision conferences was perfectly neatly dealt with in Article 28. The amendment proposed was therefore purely cosmetic and the Conference should try to avoid changes where no point of substance was involved.

647. Mr. B. LACLAVIERE (France) said that his Delegation supported the position taken by the Delegation of the United Kingdom.

648. Prof. A. SINAGRA (Italy) said that his Delegation took the same position as the Delegation of France.

649. The proposal for amendment submitted by the Delegation of the Netherlands (see paragraph 644) was rejected on a show of hands by seven votes against to two in favor, with one abstention.

650. Article 27 was adopted as appearing in the Draft.

Article 28: Languages to be Used by the Office and in the Council (Continued from 545)

651. The PRESIDENT opened the discussion on Article 28. He noted that the proposal for amendment submitted by the Delegation of the Netherlands and reproduced in Document DC/48 had been rejected during the discussion on Article 27 (see paragraphs 643 to 649).

652. Mrs. O. REYES-RETANA (Mexico) said that her Delegation was preparing a proposal for the amendment of Article 28 and would like the discussion to be deferred.

653. It was decided to defer further examination of Article 28 until the proposal for amendment being submitted by the Delegation of Mexico had been circulated. (Continued at 777).

Article 30: Implementation of the Convention on the Domestic Level; Contracts on the Joint Utilisation of Examination Services (Continued from 548)

654.1 The PRESIDENT opened the discussion on Article 30. He noted that proposals for amendment had been submitted by the Delegations of the Federal Republic of Germany, of South Africa and of the Netherlands. Those proposals were reproduced in documents DC/29, DC/37 and DC/49 Rev. respectively.

654.2 The President said that the proposal of the Delegation of the Federal Republic of Germany as appearing in document DC/29 referred to Article 30(2). The proposal was to delete the words "éventuelle" and "etwaigen" from the French and German texts respectively. There was no corresponding word in the English text.

655. Mr. A. W. A. M. VAN DER MEEREN (Netherlands) said that his Delegation wished to support the proposal of the Delegation of the Federal Republic of Germany.

656. The PRESIDENT noted that there were no objections to deleting the words "éventuelle" and "etwaigen."

657. It was decided to delete from the French and German texts of Article 30(2) the words "éventuelle" and "etwaigen" respectively.

658. The PRESIDENT invited the Delegation of South Africa to introduce its proposal as appearing in document DC/37.

659. Mr. J. F. VAN WYK (South Africa) said that his Delegation's proposal related to Article 30(1). He considered that the proposal to add, after the words "each member State" in the second sentence, the words "of the Union," was a matter for the Drafting Committee. In view of what had been decided earlier with regard to the proposal appearing in document DC/34 (see paragraphs 476 to 481) his Delegation withdrew its proposal to extend the wording of Article 30(1)(c) to include a reference to "patents."

660. It was decided that the first of the two proposals mentioned in the preceding paragraph should be referred to the Drafting Committee.

NINTH MEETING

Friday, October 13, 1978,

morning

661. The PRESIDENT invited the Delegation of the Netherlands to introduce its proposal, contained in document DC/49 Rev., for the amendment of Article 30(1)(a).

662. Mr. A. W. A. M. VAN DER MEEREN (Netherlands) said that the purpose of his Delegation's proposal was to make good the omission from Article 30(1)(a) of a reference to a member State's "own nationals." It appeared from the text in the Draft that each member State had to ensure appropriate legal remedies only to "nationals of the other member States."

663. Mr. A. PARRY (United Kingdom) said that he agreed with the Delegation of the Netherlands and that he supported its proposal to the extent that the text in question was defective. Article 3 provided for national treatment in relation to the recognition and protection of the breeder's right to be accorded to all sorts of persons. He believed that it inevitably followed that the Convention must equally provide for that same national treatment in relation to the effective defence of the rights provided for therein. Mr. Parry said that he would therefore suggest that the first part of Article 30(1)(a) should refer not to "nationals" but to "all those persons specified in Article 3." The precise wording was a matter for the Drafting Committee but, for example, one might consider saying: "Ensure to all persons enjoying the benefits of Article 3 appropriate legal remedies for the effective defence of the rights provided for in this Convention." He would also suggest that the words "as to its own nationals, provided that the conditions and formalities imposed upon nationals are complied with," which the Delegation of the Netherlands had proposed to introduce into the text, were superfluous. That point was already made in Article 3(1).

664. Mr. H. J. WINTER (United States of America) said that the broad provisions of Article 3 on national treatment certainly seemed to cover the situation dealt with in Article 30. With that in mind his Delegation thought that the amendment proposed by the Delegation of the Netherlands was unnecessary. His Delegation had not, however, had sufficient opportunity to consider all the implications of that proposal. Mr. Winter noted that his country was in an ambivalent position since it provided for national treatment under the Patent Law, in relation to its membership of the Paris Convention for the Protection of Industrial Property, whilst under the Plant Variety Protection Act it provided for reciprocity.

665. The PRESIDENT wondered whether it would be sufficient to say, for example, "ensure appropriate legal remedies for the effective defence of the rights provided for in this Convention." He said that what he was wondering, in other words, was whether one could not resolve the matter by taking the text of Article 30(1)(a) as appearing in the Draft and deleting the words "to nationals of the other member States of the Union."

666. Mr. A. PARRY (United Kingdom) said that he accepted the point made by the Delegation of the United States of America. He therefore wished to withdraw his earlier statement (see paragraph 663) and to support the President's suggestion to delete all reference to the persons to whom appropriate legal remedies were to be ensured.

667. Mr. J. BUSTARRET (France) commented that it was necessary, in any event, to indicate who would be able to benefit from such legal remedies.

668. Dr. H. H. LEENDERS (ASSINSEL) said that he agreed with Mr. Bustarret and that he believed that the inclusion of such an indication in Article 30(1)(a) might help someone defending his right in a court in that he could then base himself not only on national law but also, if necessary, on the Convention.

669. Mr. A. PARRY (United Kingdom) said that his Delegation wished to reiterate its support for the President's suggestion that the paragraph should simply read: "ensure appropriate legal remedies for the effective defence of the rights provided for in this Convention." If that solution was not acceptable then he thought that Article 30(1)(a) could be deleted entirely.

670. Mr. A. W. A. M. VAN DER MEEREN (Netherlands) said that he also supported the President's suggestion. He thought that the wording might be improved, however, by replacing "ensure" by the more positive expression "provide for."

671. Mr. J. BUSTARRET (France) said that his Delegation thought that Article 30(1)(a), although it somewhat duplicated the provisions of Article 3, at least guaranteed that the legislation of each member State had to enable the "ressortissants" of the other member States to exercise effectively the rights accorded to them by virtue of Article 3. After all it was not illogical for a State joining the Union to have such a guarantee. He thought, furthermore, that when one spoke of ensuring legal remedies it was generally necessary to say to whom they were ensured. He therefore considered the suggestion by the Delegation of the United Kingdom to say that those legal remedies were ensured to persons enjoying the benefits of Article 3 (see paragraph 663) to be preferable to a non-specific declaration.

672.Prof. A. SINAGRA (Italy) said that his Delegation shared entirely the opinion expressed by the Delegation of France.

673. Mr. H. J. WINTER (United States of America) said that he thought that the wording suggested by the President and supported by the Delegation of the United Kingdom (see paragraphs 665 and 669) was simple and clear-cut. Article 30(1)(a) in the Draft ended with the phrase "for the effective defence of the rights provided for in this Convention." That phrase, in a sense, would of course cover any pertinent articles such as Article 3, and additional reference to that Article might therefore be redundant. His Delegation had previously expressed the

view that the proposal of the Delegation of the Netherlands contained in document DC/49 Rev. (see paragraph 662) was unnecessary, given that Article 3 provided for national treatment. He felt that the addition of a cross-reference to Article 3 would encumber Article 30(1)(a) and make it even more redundant.

674. Mr. J. BUSTARRET (France) said that on reflection, and having heard the views of others on the matter, he thought that the best solution would be to retain Article 30(1)(a) in its present form.

675. The PRESIDENT invited observations on Mr. Bustarret's thought that Article 30(1)(a) should be left unchanged.

676. Mr. A. W. A. M. VAN DER MEEREN (Netherlands) said that the difficulty with leaving Article 30(1)(a) as it stood was that it ensured the possibility of defending their rights only to nationals of the other member States. His Delegation wished to have the wording broadened so that a member State's own nationals also had effective means to defend their rights. Such had been the reasoning behind the proposal submitted by his Delegation and reproduced in document DC/49 Rev.

677. Dr. D. BÖRINGER (Federal Republic of Germany) thought that Mr. van der Meeren was right. In the German text his wish could be met just by deleting the word "übrigen."

678. Mr. A. PARRY (United Kingdom) said that he objected to the proposal of the Delegation of the Netherlands, and therefore to the suggestion just made by the Delegation of the Federal Republic of Germany, because a reference to "nationals" was insufficient. Article 3, in specifying who was entitled to rights under the Convention and what those rights were, did not refer just to nationals but also to natural and legal persons resident in particular places. He believed that it was for that reason that the President had suggested that it would be preferable to delete the words "to nationals of the other member States of the Union" (see

paragraph 665) rather than to add a cross-reference to Article 3. As the Delegation of the United States of America had pointed out, the latter course would merely encumber the text.

679. Prof. A. SINAGRA (Italy) wondered whether the requirements both of the Delegation of the Netherlands and of the Delegation of the United Kingdom might be satisfied by adding in the French text, for example, the expression "aux mêmes conditions que pour ses nationaux," between commas and after the word "Union." Such an amendment would in effect simplify the drafting of the proposal for the amendment of Article 30(1)(a) submitted by the Delegation of the Netherlands and contained in document DC/49 Rev.

680. Mr. J. BUSTARRET (France) said that he wished, in reply to the remarks made by Mr. Parry (see paragraph 678), to add that the French text of Article 30(1)(a) referred specifically to "ressortissants des autres Etats de l'Union." In his opinion the word "ressortissants" covered not only "nationaux" but also "résidents," whereas in the English text the word "nationals" was more restrictive.

681.1 Mr. A. PARRY (United Kingdom) said that if the word "ressortissants" did in fact cover nationals, residents and companies having their registered office in one of the member States, then, as far as the French text was concerned, that would appear to answer his objection (see paragraph 678). He thought, however, that to cover those concepts in the English language one would have to say "nationals, residents and companies having their registered office." It was for that reason that he had referred in his original statement to "all persons enjoying the benefits of Article 3" (see paragraph 663).

681.2 Mr. Parry went on to say that the rights assured to nationals, residents and companies having their registered office in one of the member States could, of course, be restricted by virtue of Article 3(3). He had therefore suggested originally that a cross-reference to Article 3 should be inserted in Article 30(1)(a). Such an amendment, which he could accept, would have the effect that whoever benefitted from Article 3 should benefit from Article 30(1)(a). Nevertheless he did not really see the difficulty in not indicating who should have the benefit of

appropriate legal remedies. Anybody who came to the United Kingdom with a cause of action could bring an action before a British court. It was not necessary to be resident. One had merely to show that the court had jurisdiction. Mr. Parry concluded by saying that he would be surprised if that were not the position in every other member State of the Union.

682. Mr. H. J. WINTER (United States of America) said that his Delegation fully agreed with the statement made by the Delegation of the United Kingdom. He did not know of any country in which foreign nationals had access to the courts whilst its own nationals and residents did not have such access. Such a situation was inconceivable to his Delegation.

683. Prof. A. SINAGRA (Italy)said that he had listened with great interest to the observations of the Delegation of the United Kingdom. He believed, however, that the problem was not one of explaining the meaning of the word "ressortissants." The problem was rather to explain that in theory, and he stressed the words "in theory," "ressortissants" could not have more extensive legal protection than "nationaux." That was why he had proposed to add to Article 30(1)(a) the expression "aux mêmes conditions que pour ses nationaux" (see paragraph 679).

684. The PRESIDENT, noting that many solutions had been put forward, asked whether delegates could agree to delete Article 30(1)(a) in its entirety. He believed that all States that gave rights would allow those persons who held them to have access to the courts. It was therefore hard to deny that it was not strictly necessary to retain the Article under discussion.

685. Mr. R. DERVEAUX (Belgium) said that his Delegation would not oppose deletion of the whole of Article 30(1)(a) since constitutionally the "ressortissants" of other States had the same rights as the "nationaux."

686. Dr. D. BÖRINGER (Federal Republic of Germany) said that he did not believe that the whole Article should be deleted but that he would like to have a few minutes to reflect on the matter.

687. Mr. B. LACLAVIERE (France) thought that it would weaken the Convention to delete the Article. At the least it was a reassuring declaration to have. His Delegation would strongly support the proposal made by the Delegation of Italy (see paragraph 679).

688. Mr. R. DERVEAUX (Belgium) said that his Delegation, in order to resolve the matter, would also support the proposal of the Delegation of Italy.

689. It was decided to defer further consideration of Article 30(1)(a) until a document reproducing the amendment proposed by the Delegation of Italy had been circulated. *(Continued at 955)*

690. Article 30(1)(b) was adopted as appearing in the Draft, without discussion.

691. Article 30(1)(c) was adopted as appearing in the Draft, without discussion, the proposal for its amendment submitted by the Delegation of South Africa and reproduced as part of document DC/37 having been withdrawn (see paragraph 659).

692. Subject to the decision referred to in paragraph 657 above, Article 30(2) was adopted as appearing in the Draft.

693. Article 30(3) was adopted as appearing in the Draft, without discussion.

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Article 24: *Auditing of the Accounts* (*Continued from 542*)

694. The PRESIDENT invited Mr. Jeanrenaud of the Delegation of Switzerland to make a statement on behalf of the Government of the Swiss Confederation.

695. Mr. M. JEANRENAUD (Switzerland) stated, in clarification of the position of the Federal Authorities of Switzerland on the question of their supervision of the Union and on the future situation regarding that matter, that, in June 1977, the Secretary-General of the Union had asked whether they saw any difficulty in relinquishing that supervisory function and in there being no mention in the revised text of the Convention of a special function for them. His authorities had concluded that, in the light of the evolution of the United International Bureaux for the Protection of Intellectual Property (BIRPI) into the World Intellectual Property Organization (WIPO) and in the light of the probable modification of the legal status of the Union, they had no difficulty in relinquishing their mandate to supervise the Union.

696. The PRESIDENT thanked Mr. Jeanrenaud for his clarification of the decision of the Government of the Swiss Confederation.

Article 31: *Signature* (*Continued from 548*)

697. The PRESIDENT opened the discussion on Article 31 and invited the Delegation of the Netherlands to introduce its proposal for amendment as appearing in document DC/54.

698. Mr. A. W. A. M. VAN DER MEEREN (Netherlands) said that his Delegation had been advised by its Ministry for Foreign Affairs that there were several ways in which States could consent to be bound by international conventions. Articles 31 and 32 of the Convention in the present text, and in the Draft, provided only for ratification and accession. The purpose of his Delegation's proposal was to include other possibilities. It understood that those possibilities had been included in a number of recent international conventions.

699. Mr. A. PARRY (United Kingdom) thought that the proposal of the Delegation of the Netherlands was very admirable and commendable, as were many of the other proposals of that Delegation. He was conscious, however, of the fact that the Committee of Experts on the Interpretation and Revision of the Convention had chosen, in preparing the Draft, to follow as closely as possible the existing text of the Convention. He was therefore reluctant to depart from that text, unless there were sound practical reasons for doing so. The proposed amendments reproduced in document DC/54 seemed perfectly acceptable in substance but he thought it extremely unlikely, for instance, that any State would wish to sign "without reservation as to ratification, acceptance or approval." He did not think that any of the additional possibilities mentioned were in fact essential to the purpose of Articles 31 and 32 and he would therefore be reluctant to support the proposal.

700. Article 31 was adopted as appearing in the Draft.

Article 17: Observers in Meetings of the Council (Continued from 609)

701. The PRESIDENT reopened the discussion on Article 17 and invited the Delegation of the Netherlands to introduce its proposal for the amendment of paragraph (1) as appearing in document DC/44.

702. Mr. A. W. A. M. VAN DER MEEREN (Netherlands) said that his Delegation's proposal was closely related to its proposal for the amendment of Article 31. Since the latter proposal had just fallen (see paragraphs 697 to 700), his Delegation withdrew its proposal for the amendment of Article 17(1).

703. Article 17 was adopted as appearing in the Draft, without discussion.

Article 32: Ratification; Accession (Continued from 548)

704. The PRESIDENT opened the discussion on Article 32 and invited the Delegation of the Netherlands to introduce its proposal for amendment as appearing in document DC/54.

705. Mr. A. W. A. M. VAN DER MEEREN (Netherlands) said that his Delegation wished to withdraw that proposal.

706. Article 32 was adopted as appearing in the draft, without discussion. (Reconsidered at 714 et seq.)

Article 32A: Entry Into Force; Closing of Earlier Texts (Continued from 548)

707. The PRESIDENT opened the discussion on Article 32A and noted that proposals for amendment had been submitted by the Delegation of South Africa and by the Delegation of the Netherlands. The proposals were reproduced in documents DC/30 and DC/54 respectively. He invited the Delegation of South Africa to introduce its proposal.

708. Mr. J. F. VAN WYK (South Africa) said that the purpose of his Delegation's proposal to add the words "subparagraphs (i) and (ii)" to Article 32A(2) was to make it clear to which conditions reference was made and to eliminate any possibility that the introductory sentence of paragraph (1) might be regarded as forming part of the reference.

709. Prof. A. SINAGRA (Italy) said that his Delegation was pleased to support the proposal of the Delegation of South Africa in so far as it clarified the meaning of paragraph (2).

710. It was decided to adopt as Article 32A(2) the wording proposed in document DC/30.

711. The PRESIDENT invited the Delegation of the Netherlands to introduce its proposal.

712. Mr. A. W. A. M. VAN DER MEEREN (Netherlands) said that his Delegation wished to withdraw its proposal as reproduced in document DC/54.

713. Subject to the decision referred to in paragraph 710 above, Article 32A was adopted as appearing in the Draft.

Article 32: Ratification; Accession

714. The PRESIDENT advised the Conference that although Article 32 had been adopted as appearing in the Draft, without discussion (see paragraph 706), he understood that the Delegation of the Netherlands wished to make a statement regarding that Article.

715. Mr. K. A. FIKKERT (Netherlands) said that his Delegation would appreciate it if the Conference would agree to reconsider Article 32. Constitutional procedure in the Netherlands was such that the Netherlands, once it had signed the new Act, could only express its consent to be bound by that Act by means of an instrument of acceptance. The authority for his Delegation to take part in the Diplomatic Conference, and to sign the new Act, had been given by the Minister for Foreign Affairs and not by the Queen. Consequently, once the new Act had been approved by the Dutch Parliament, the Netherlands could only express its consent to be bound by it by means of an instrument signed by the Minister. That instrument, which would have the same legal effects as an instrument of ratification, would be called an "acceptance." He was therefore concerned that if Article 32 designated "ratification" as the only means by which a State, having signed the new Act, could express its consent to be bound by that Act, then real difficulties would exist for the Netherlands. Mr. Fikkert thought, furthermore, that there could be no real objections to including "acceptance" and "approval" as alternatives to "ratification," especially since the Vienna Convention on the Law of Treaties of 1969 had provided for those three different instruments.

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716. The PRESIDENT noted that Rule 33 of the Rules of Procedure provided that when a matter had been decided it could not be reconsidered, "unless so decided by a two-thirds majority of the Member Delegations present and voting."

717. Mr. A. PARRY (United Kingdom) said that he would like, before taking a view on the request made by the Delegation of the Netherlands, to ask whether it was Article 32(1)(a) that the Conference was being asked to reconsider.

718.1 The PRESIDENT said that he understood that to be the case. If Article 32(1)(a) were amended then there would also be consequential changes in some other Articles.

718.2 The President noted that there were no objections to reconsidering Article 32(1)(a) and invited the Delegation of the Netherlands to submit its proposal for amendment.

719. Mr. K. A. FIKKERT (Netherlands) said that his Delegation proposed that Article 32(1)(a) should read: "its instrument of ratification, acceptance or approval, if it has signed this Act; or."

720. Mr. A. PARRY (United Kingdom) said that his Delegation seconded the proposal of the Delegation of the Netherlands.

721. It was decided to adopt as Article 32(1)(a) the text proposed by the Delegation of the Netherlands and recorded in paragraph 719 above, and to authorize the Secretariat to draft the consequential changes in other Articles.

Article 32B: Relations Between States Bound by Different Texts (Continued from 548)

722. The PRESIDENT opened the discussion on Article 32B and noted that proposals for

amendment had been submitted by the Delegation of the Federal Republic of Germany and by the Delegation of the Netherlands. The proposals were reproduced in documents DC/42 and DC/55 respectively. He noted that neither proposal had any bearing on paragraph (1).

723. Article 32B(1) was adopted as appearing in the Draft, without discussion.

724. The PRESIDENT invited the Delegation of the Federal Republic of Germany to introduce its proposal.

725. Dr. D. BÖRINGER (Federal Republic of Germany) said that his Delegation's proposal, which concerned only the first part of Article 32B(2), was merely a drafting matter. In preparing its proposal his Delegation had endeavored to keep as close as possible to the text in the Draft. His Delegation believed, however, that it was not necessary to retain all of the text preceding the expression "the former State," and that it would suffice to say "Any member State of the Union not bound by this Act," "this Act" meaning the future Act of 1978. Before a State could be a member State it must have ratified or acceded to one of the different Acts of the Convention. A member State not bound by the 1978 Act must of necessity be bound by the Act of 1961 and the Draft could therefore be simplified in the way proposed in document DC/42.

726. The PRESIDENT invited the Delegation of the Netherlands to introduce its proposal.

727. Mr. K. A. FIKKERT (Netherlands) said that he would like, before introducing his Delegation's proposal to make substantive amendments to Article 32B(2), to ask what would happen if a member State not bound by the new Act did not make the declaration referred to in that Article.

728. The PRESIDENT thought that the answer was that nothing would happen. He believed that some official, legally binding declaration had to be made.

729. Dr. H. MAST (Secretary General of the Conference) said that a member State that did not express its consent to be bound by the new Act would not be bound by that Act in its relations with a State that joined the Union by ratifying, accepting or approving of or acceding to that Act. They were just parties to different instruments of international law. He therefore thought that the reference to the possibility of making a declaration was the most that could be done.

730.1 Mr. H. J. WINTER (United States of America) said that the matter under discussion was very complicated, sensitive and important. He agreed with the answer given by the Secretary General of the Conference to the Delegation of the Netherlands. Mr. Winter said that it was inconceivable to his Delegation that a member State that had not expressed its consent to be bound by the new Act should be bound by the second part of paragraph 2(ii) of the proposal submitted by the Delegation of the Netherlands.

730.2 Mr. Winter went on to say that his country, if it ratified or acceded to the new Act, could not be bound by the provisions of paragraph 2(i) of the proposal of the Delegation of the Netherlands. Being bound by the later Act could in no way mean that the United States would be bound to the "old" member States by the earlier Act. That would be constitutionally and legally impossible.

730.3 Mr. Winter concluded by saying that his Delegation felt that the text proposed in the Draft under the reference Article 32B(2), although it might not provide an answer to all of the situations that might arise, and although it might not clearly cover the situation mentioned by the Delegation of the Netherlands, was nevertheless the more acceptable text. The text in the Draft left it open to an "old" member State to make a declaration. That was consistent with the practice followed in Article 27 of the Stockholm Act of 1967 of the Paris Convention for the Protection of Industrial Property, which allowed adherents to the earlier Acts of that Convention to extend protection to new members adhering to the Stockholm Act.

731. Mr. A. PARRY (United Kingdom) said that he tended to subscribe to the feeling expressed by the Delegation of the United States of America.

732. Mr. R. DUYVENDAK (Netherlands) suggested that it might be wise to postpone the final decision on Article 32B to allow for an opportunity for consultation with Dr. Bogsch, Secretary-General of the Union, who had such a wide experience in the matter.

733. It was decided to postpone the final decision on Article 32B in accordance with the suggestion made by the Delegation of the Netherlands and referred to in the preceding paragraph. *(Continued at 969)*

Article 33: Communications Concerning the Genera and Species Protected; Information to be Published *(Continued from 548)*

734. The PRESIDENT opened the discussion on Article 33 and invited the Delegation of the Netherlands to introduce its proposal for amendment as appearing in document DC/54.

735. Mr. A. W. A. M. VAN DER MEEREN (Netherlands) said that his Delegation wished to withdraw that proposal.

736. Subject to the decision regarding consequential changes, referred to in paragraph 721 above, it was decided to adopt Article 33 as appearing in the Draft, without discussion.

Article 34: Territories *(Continued from 548)*

737. The PRESIDENT opened the discussion on Article 34 and noted that proposals for amendment had been submitted by the Delegation of the Netherlands and by the

Delegation of Morocco. The proposals were reproduced in documents DC/56 and DC/68 respectively. He invited the Delegation of the Netherlands to introduce its proposal.

738. Mr. A. W. A. M. VAN DER MEEREN (Netherlands) said that his Delegation's proposal had been designed in part to adapt Article 34 to the wording his Delegation had submitted earlier in respect of Article 32 ("Ratification, Acceptance or Approval; Accession"), and in part to make more neutral the reference in Article 34(1) to territories to which the new Act would be applicable by excluding the reference to responsibility for external relations. An effort had also been made to simplify the drafting of Article 34.

739. Mr. M. TOURKMANI (Morocco) said that his Delegation proposed that two amendments should be made to Article 34(1). First, to align the text with the United Nations' Charter, the closing words "for the external relations of which it is responsible" should be deleted. Secondly, the expression "of those territories" should be replaced by "of its territories."

740. Dr. A. BEN SAAD (Libyan Arab Jamahiriya) said that his Delegation seconded the proposal submitted by the Delegation of Morocco.

741. Prof. A. SINAGRA (Italy) said that he had nothing against the proposal of the Delegation of Morocco but wished just to make an observation. Given that non-autonomous territories were an international political reality, he wondered what legal régime would be applicable to them.

742. The PRESIDENT noted that both of the proposals under consideration had more or less the same effect, namely to delete the words "for the external relations of which it is responsible."

743. Prof. A. SINAGRA (Italy) believed that the two proposals were not equivalent. In his view the proposal submitted by the Delegation of the Netherlands reflected a change, as that Delegation had said, of a drafting nature, whereas the proposal submitted by the Delegation of Morocco had an impact on substance. He had to interpret the very clear reference to "its territories" as a reference to metropolitan territories.

744. Mr. M. TOURKMANI (Morocco) said that his Delegation could go along with the proposal of the Delegation of the Netherlands and therefore withdrew its own proposal.

745. Mr. H. J. WINTER (United States of America) said that his Delegation could accept the proposal of the Delegation of the Netherlands. It also wished to commend the Delegation of Morocco for its spirit of cooperation.

746.1 Mr. A. PARRY (United Kingdom) recalled that the Article under consideration had given rise to much discussion in the Committee of Experts on the Interpretation and Revision of the Convention. The text proposed in the draft was virtually identical with Article 24 of the Paris Convention for the Protection of Industrial Property. The Committee of Experts had deliberately chosen that text.

746.2 Mr. Parry said that his Delegation could accept the substance of the amendment to Article 34(1) proposed by the Delegation of the Netherlands, which would mean deleting the words "for the external relations of which it is responsible." It would, however, suggest that it might be better to leave the rest of the Draft as it was.

747. Prof. A. SINAGRA (Italy) said that he wished to support the view expressed by the Delegation of the United Kingdom. He also wished to thank the Delegation of Morocco for the understanding it had shown.

748. Mr. A. W. A. M. VAN DER MEEREN (Netherlands) thought that his Delegation could accept what had been said by the Delegation of the United Kingdom.

749. It was decided to delete the words "for the external relations of which it is responsible" from Article 34(1).

750. Subject to the decision referred to in the preceding paragraph, and subject to the decision regarding consequential changes, referred to in paragraph 721 above, it was decided to adopt Article 34(1) as appearing in the Draft.

751. Article 34(2) was adopted as appearing in the Draft, without discussion.

752. Subject to the decision regarding consequential changes, referred to in paragraph 721 above, it was decided to adopt Article 34(3) as appearing in the Draft, without discussion.

Article 37: *Preservation of Existing Rights*

753. Prof. A. SINAGRA (Italy) said that he would like to revert to Article 37, if the Conference would allow him to do so, and to repeat a suggestion which he had already made in the Ad Hoc Committee on the Revision of the Convention. Article 37 referred to "existing rights." Those rights were things of the past and not things of the future. He therefore believed that it was necessary to include the word "already" in the phrase "or under agreements concluded between such States."

754.1 The PRESIDENT noted that Article 37 had already been adopted as appearing in the Draft, without discussion (see paragraph 557). Rule 33 of the Rules of Procedure provided that when a matter had been decided it could not be reconsidered, "unless so decided by a two-thirds majority of the Member Delegations present and voting."

754.2 The President further noted that there were no objections to reconsidering Article 37.

755. Mr. A. W. A. M. VAN DER MEEREN (Netherlands) said that he would like the Delegation of Italy to explain the reason for its proposal. He believed that it was implicit in the Draft that the agreements referred to were agreements "already" concluded between member States.

756. Prof. A. SINAGRA (Italy) thanked the Delegation of the Netherlands for providing him with a decisive argument in favor of his suggestion. If what he wanted to say was implicit in Article 37 as worded in the Draft then he could not see what there was against making the wording explicit. As he had said before, Article 37, in referring to "existing rights," referred to something of the past. For that reason he had suggested that the word "already" should be included in the phrase "or under agreements concluded between such States." Mr. Sinagra said that he would also like, by way of clarification, to ask whether a State could invoke a later agreement with regard to a right covered by Article 37.

757. Mr. H. J. WINTER (United States of America) said that his Delegation could see no need for Article 37 to be amended.

758. The PRESIDENT noted that there was no support for the wish of the Delegation of Italy and that Article 37 would therefore remain as previously adopted (see paragraphs 556 and 557).

TENTH MEETING

Friday, October 13, 1978,

afternoon

Article 38: Settlement of Disputes (Continued from 558)

759. The PRESIDENT opened the discussion on Article 38 and noted that proposals for amendment had been submitted by the Delegation of the Netherlands and by the Delegation of France. The proposals were reproduced in documents DC/57 and DC/61 respectively.

760. Mr. B. LACLAVIERE (France) said that the proposal of the Delegation of the Netherlands suited his Delegation very well. If that proposal were accepted then his Delegation would withdraw its proposal.

761.1 Mr. A. PARRY (United Kingdom) said that he found the proposal of the Delegation of the Netherlands broadly acceptable and that his Delegation would be able to support it on that basis. As far as he could see, the proposal, in general, followed the pattern of Article 38 as it was set out in the Draft. He commended the idea of attempting to cope with the problem of having more than two parties to a dispute while retaining at the same time the assumption that there would only be two sides to the dispute. There were, however, some points of substance on which he wished to comment.

761.2 In the third subparagraph of paragraph (2)(a) it was provided that "the disputing parties may request the President of the Council" to do certain things. Mr. Parry said that his Delegation assumed that the phrase should begin with the words "either party to the dispute may request." The present wording would mean that all sides would have to agree to the use of a procedure, whereas presumably

the intention was that once the procedure under paragraph (2) was in motion nothing should be able to stop it, provided one State wanted it to continue. In the same subparagraph there was a reference to "the Vice-Presidents in accordance with the provisions of Article 18(1)." He took that reference to be a reference to Article 18(1) as it would have been amended had the proposal of the Delegation of the Netherlands in respect of that Article been adopted. Since that proposal had been withdrawn (see paragraphs 610 to 619), he assumed that the reference should be deleted from the proposal under consideration.

761.3 Regarding paragraph (2)(c), Mr. Parry believed that some drafting amendments would be needed to make it clear that there was a distinction between the two sides to the dispute and the States parties to it where more than two States were involved.

761.4 Mr. Parry said that his Delegation was not quite sure of the meaning of paragraph (2)(d) but thought that possibly it could be deleted. If it was a reference to decision in accordance with law as opposed to equity he thought that that could be left to the operation of the first subparagraph of paragraph (2)(b) which said: "The arbitrators shall establish their own arbitration procedure." The elements of law that would govern that procedure would presumably be decided either in the rules of procedure or in the "compromis d'arbitrage" that would have to be made under paragraph (2)(a).

761.5 As to paragraph (2)(e), Mr. Parry said that his Delegation considered that a reference to deciding a dispute "ex aequo et bono" was rather old-fashioned and that it could be deleted.

761.6 Mr. Parry concluded by saying that his Delegation felt that paragraph (2)(f) could also be deleted. Either the arbitration procedure established by Article 38 would be invoked or another method would be selected. It was not necessary, however, to have a specific rule about the relationship between the two.

762. Mr. A. W. A. M. VAN DER MEEREN (Netherlands) said that he was not sure whether his Delegation could accept all the points made by the Delegation of the United Kingdom. As far as paragraph (2)(e) of his Delegation's proposal was concerned he wished to explain that there were two kinds of forum in the Netherlands. In one there was an arbitration procedure which followed the law; in the other the parties agreed that the decision, which was known as a 'binding advice,' was taken "ex aequo et bono." He was not sure whether that situation had to be reflected in the Convention and his Delegation wished to reserve its position until it had studied the point. As to the other points, the major aim of his Delegation's proposal was that a procedure should be laid down in the Convention.

763. Mr. W. BURR (Federal Republic of Germany) said that his Delegation also was of the opinion that a clause on the settlement of disputes should be included in the Convention. Before taking a decision he would like to see in writing the proposal in the amended form proposed by the Delegation of the United Kingdom, if need be already including certain drafting improvements.

764. Mr. A. PARRY (United Kingdom) indicated that his Delegation was willing to submit a written proposal.

765. Mr. H. J. WINTER (United States of America) said that it was rather unusual for an international agreement to spell out the various procedures and methods for arbitration in the great detail contained in the proposal of the Delegation of the Netherlands. His Delegation felt very strongly that the procedure should be voluntary and it was most pleased that the voluntary nature of the provision in the Draft had been retained in the proposal of the Delegation of the Netherlands. If the procedure was to be voluntary, however, then it would seem that the method or means of arbitration should be left to the parties concerned. In any event, if the proposal were adopted then his Delegation would strongly support the retention of paragraph (2)(f) so that the door would remain open for parties to a dispute to agree on some other method of arbitration.

766. Mr. H. AKABOYA (Japan) said that his Delegation was of the opinion that Article 38 should remain as it was in the original text because disputes concerning the interpretation or application of the Convention should be settled as obligatorily and objectively as possible. If the proposal of the Delegation of the Netherlands were adopted, however, then his Delegation could accept that text.

767. Dr. G. PUSZTAI (Hungary) said that he would just like to record that his Delegation strongly supported the opinion expressed by the Delegation of the United States of America as to the substance of the proposal.

768. It was decided to defer further consideration of Article 38 until the proposal referred to in paragraphs 761 and 764 above had been formally submitted by the Delegation of the United Kingdom. *(Continued at 999)*

Article 39: Reservations *(Continued from 558)*

769. The PRESIDENT opened the discussion on Article 39 and invited the Delegation of the Netherlands to introduce its proposal for amendment, as appearing in document DC/58.

770. Mr. A. W. A. M. VAN DER MEEREN (Netherlands) said that the purpose of his Delegation's proposal was to adjust Article 39 to the new wording of Article 32 (see paragraphs 719 and 721), which had been expanded to allow for a wider range of instruments by means of which States could consent to be bound by the new Act.

771. Mr. R. DERVEAUX (Belgium) said that the English and French texts of document DC/58 had different meanings. The English text, literally translated, said: "La présente Convention ne doit faire l'objet d'aucune réserve."

772. Mr. B. LACLAVIERE (France) said that his Delegation agreed that the French translation gave a bad rendering of the original English text of document DC/58. Furthermore, his Delegation saw no reason to modify the text proposed for Article 39 in the Draft. It had always held that a State signing or acceding to the Convention must not be able to make any reservation.

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773. Mr. R. DERVEAUX (Belgium) said that he wished to draw attention to the fact that under the text as proposed in the Draft a State could make reservations, for example, five years after having ratified or acceded to the Convention. The Draft, taken literally, clearly said that no reservation could be made when signing, ratifying or acceding to the Convention. It did not say that reservations could not be made at a later stage. The proposal of the Delegation of the Netherlands, however, would have that effect.

774. The PRESIDENT asked whether precedents existed in other conventions which might assist the Conference.

775. Mr. A. PARRY (United Kingdom) noted that Article VII of the Additional Act of 1972 said: "No reservations to this Additional Act are permitted." That wording was very similar to that of the proposal of the Delegation of the Netherlands. The wording used in the Additional Act was very simple. It might overcome any possible ambiguity, as mentioned by the Delegation of Belgium, and it would also take account of the amendment made to Article 32.

776. It was decided to adopt as Article 39 the wording of Article VII of the Additional Act of 1972, mutatis mutandis.

Article 28: Languages to be Used by the Office and in the Council (*Continued from 653*)

777.1 The PRESIDENT reopened the discussion of Articles 28 and 41. He noted that several proposals in respect of languages had been submitted. The Delegations of Mexico and Peru had jointly proposed amendments to Article 28 and to Article 41. Those proposals were reproduced in documents DC/65 and DC/66 respectively. The Delegation of Italy had proposed amendments to Article 28 and that proposal was reproduced in document DC/67. The Delegation of the Libyan Arab Jamahiriya had proposed amendments to Article 28 and to Article 41. Those proposals were reproduced in documents DC/71 and DC/72 respectively.

777.2 The President invited the Delegation of Mexico to introduce the proposals it had submitted jointly with the Delegation of Peru.

778. Mrs. O. REYES-RETANA (Mexico) said that her Delegation and that of Peru, in view of the growing interest of Spanish-speaking countries in the work of the Union, considered it important that the word "Spanish" be inserted into Article 28(1), and that the word "three" in Article 28(2) be replaced by the word "four." The use of the Spanish language by the Office of the Union in carrying out its duties would be an incentive for Spanish-speaking countries to join the Union. Both Delegations also believed that the Union was interested in expanding its activities among such countries, since they were consumers of products and technology protected under the Convention. Finally they also wished to point out that Spanish was an official language of the United Nations and that it was used in most of the international organizations.

779. Mr. R. LOPEZ DE HARO (Spain) said that his Delegation wished to express its warm and strong support for the proposal of the Delegations of Mexico and Peru. His Delegation thought that it would be appropriate for the Union to expand its activities among Spanish-speaking countries and believed that the use of the Spanish language would be helpful. Finally, Mr. Lopez de Haro asked the Conference to bear in mind that Spanish was an official language of the United Nations and of the World Intellectual Property Organization.

780. Mr. C. A. PASSALACQUA (Argentina) said that his Delegation wished to endorse what had been said by the previous speakers and to support the proposal of the Delegations of Mexico and Peru. The arguments in favor of the inclusion of the Spanish language had been clearly stated and he hoped that the proposal would be adopted.

781. Dr. F. POPINIGIS (Brazil) said that his Delegation, considering that many countries in Latin America were in the process of studying draft plant variety protection laws and might be willing in the future to join the Union, considering

that Spain and Argentina had already introduced relevant legislation and might also be willing to join the Union in the near future, and considering that Spanish was an official language of the United Nations, wished to express its approval of and support for the proposal submitted by the Delegations of Mexico and Peru.

782. Prof. A. SINAGRA I(taly) said that his Delegation welcomed the proposal to add Spanish to the official languages of the Union. Leaving to one side his Delegation's proposal to add Italian to the official languages of the Union, he wished to remark, however, that he could not share in the constant references to what happaned in the United Nations. To do so would mean cutting short the discussion at its beginning and binding the other international organizations which had different needs, different structures and different geographical compositions.

783. Dr. W. P. FEISTRITZER (Food and Agriculture Organization of the United Nations (FAO)) said that he was aware of the encouragement given by the President to FAO member countries to join the Union. The FAO would like to urge the member States of the Union to consider the use of both the Spanish and the Arabic languages since such a practice would contribute substantially to facilitating communication.

784. Mr. H. AKABOYA (Japan) said that his Delegation sympathized very deeply with the proposal of the Delegation of Italy. Japanese, like Italian, had not been adopted as an official language in international conferences. The language barrier was always imposed on his Delegation at such conferences.

785. The PRESIDENT invited the Delegation of the Libyan Arab Jamahiriya to introduce its proposals for amendment as contained in documents DC/71 and DC/72.

786. Mr. A. BEN SAAD (Libyan Arab Jamahiriya) said that his Delegation wished only to stress that simply by counting the number of Arab States that might join the Union one could see very clearly the importance of introducing Arabic as one of its official languages.

787. Prof. A. SINAGRA (Italy) said that he had asked for the floor because he wished to thank the Delegation of Japan for its kind words. He also wished, if the Conference would permit him, to speak in justification of his Delegation's proposal. He believed that the criterion of facilitating the access of many additional countries to the Convention was very important. He also believed, however, that one had to have regard to other criteria. It would be all too easy for him to say that, throughout the world, there were probably as many as one hundred million persons who spoke Italian, but he did not wish to rely on that argumentation since he did not wish to give an impression of linguistic imperialism. He just wished to underline the real importance of Italian discoveries in the botanical field and of the theoretical and practical studies being carried out in Italy. Among his country's scientific research institutes he wished to mention, in particular, the "Istituto Agronomico per l'Oltremare" at Florence. That scientific involvement justified the proposal that he had formulated in the name of the Government of Italy which attached great importance to the matter under consideration. He believed that he could hope that the Conference would consider his Delegation's proposal with the greatest understanding possible.

788. Mr. M. TOURKMANI (Morocco) said that his Delegation wished to support the proposal of the Delegation of the Libyan Arab Jamahiriya regarding the use of Spanish and of Arabic. That proposal was self-explanatory in view of the great number of Spanish-speaking or Arabic-speaking countries that might be interested in joining the Union.

789. Miss R. E. SILVA Y SILVA (Peru), referring to document DC/66, said that her Delegation, in conjunction with the Delegation of Mexico, had proposed that the original Act prepared for signature should also be in the Spanish language in view of the fact that many Spanish-speaking countries had a strong interest in joining the Union.

790. The PRESIDENT drew the Conference's attention to Article 28(3) which gave the Council the power to decide that languages other than English, French and German should be used. He also referred to the fact that Article 41(3) required the

Secretary-General of the Union to "establish official texts in the Dutch, Italian and Spanish languages and such other languages as the Council may designate." At present there were only ten member States of the Union and it would be very costly to comply with the wishes to include Arabic, Italian and Spanish in the official languages of the Union.

791. Mr. F. ESPENHAIN (Denmark) said that his Delegation found the proposals under consideration very interesting. It knew what is was like to have to express oneself and to understand technical and legal matters in a foreign language. It could see some difficulty, however, in creating an obligation to use languages additional to those already provided for in the Convention. Taking into consideration the costs of interpretation for meetings and of the translation of documents it felt unable to support the proposals which would give rise to a major obligation for the Union. Article 28(3) already gave the Council the power to decide on the use of further languages should the need arise.

792. Mr. S. MEJEGÅRD (Sweden) said that his Delegation shared entirely the views of the Delegation of Denmark. The problem was one of expenditure. The wish had been expressed in the past that one of the Scandinavian languages should be used. Costs had to be limited, however, and since there were only two Scandinavian members of the Union that wish had not been pursued. His Delegation therefore felt somewhat hesitant about the proposals.

793. Mr. R. DERVEAUX (Belgium) said that he could readily intervene in the somewhat delicate discussion, being of Flemish and not French mother tongue, to ask the Conference not to give favorable consideration to the proposals submitted by various countries. He had to associate himself with the remarks of the Delegation of Denmark concerning the costs of interpretation and translation. He drew attention to Article 28(3) and to the fact that the Council could decide from one day to another, by a majority of three-quarters of the members present and voting, that a further language would be used by the Office of the Union and in meetings of the Council and of revision conferences.

794. Mr. B. LACLAVIERE (France) said that he wished to record his complete sympathy with the proposals made by various States to increase the number of official languages. He understood their problems perfectly but would like them equally to understand the material difficulties of the existing member States. The same matter had arisen in 1961 and that was the reason for the somewhat practical approach taken in Article 28. Moreover, he drew attention to the fact that the Office of the Union had already published some documents in Japanese and Spanish, and that it was not excluded that it might also publish some in Arabic. He wondered whether the Conference might express a wish that it would be interested to see an extension of the number of working languages, in so far as that was possible, but that one should retain just the three languages presently used for as long as material considerations did not permit an extension.

795. Prof. A. SINAGRA (Italy) said that he understood that the tendency of several delegations was to limit the number of official languages of the Union for budgetary reasons. If his understanding was correct, then he would like to know whether the Secretariat was in a position to present a document to the Conference showing the extra costs which the use of the additional languages would involve. He believed that the discussion could then take place with a greater knowledge of the elements of the problem.

796. The PRESIDENT asked Mr. Ledakis whether the Secretariat could meet the request of the Delegation of Italy.

797.1 Mr. G. LEDAKIS (Legal Counsel, International Bureau of the World Intellectual Property Organization (WIPO)) said that, if he had correctly understood the request, then the Delegation of Italy was seeking a projection of the increase in costs involved in introducing certain languages. He assumed that the Delegation of Italy had been speaking to Article 28 and not to Article 41. There was also a problem in connection with the latter Article since all the Conference documentation had so far been produced only in the three languages used by the Office of the Union. The Conference was supposed to terminate its work on October 23 and, as yet, the text for the Drafting Committee was not available in any language. There

were therefore certain limitations of time. Delegations normally liked to have an opportunity to examine a text in each of the languages in which it was going to be signed before signing or even before adopting it. He thought, therefore, that the Secretariat would not be in a position to present between then and the end of the Conference a text in Spanish, Arabic, Italian, Dutch or any language other than the three official languages. Provision was made in Article 41 for the establishment of official texts, so that as soon as possible after the Conference had adopted a text, texts could be prepared in the other languages and made available to facilitate ratification, acceptance or approval, or accession.

797.2 Mr. Ledakis then said that as far as the question of additional languages to be used by the Office of the Union was concerned, he thought that most delegations were familiar with the present staffing situation and with the fact that the Office of the Union relied on the services of WIPO for the preparation of much of its documentation. WIPO itself had not yet made a decision regarding the use of languages other than English and French, but he could say that the matter had recently been placed on the agendas for the 1979 sessions of its Governing Bodies. A document on the financial implications of the use of certain additional languages would have to be presented to those sessions and would be relevant to any study of the financial implications for UPOV of the use of additional languages, but he did not think that the Secretariat could now prepare such a document for the present Conference. Moreover, the preparation of such a document would depend on the extent to which interpretation, documents as distinct from interpretation and publications as distinct from documents, were to be the subject of the languages concerned.

798. Prof. A. SINAGRA (Italy) said that his Delegation's proposal did not refer to the continuation of the proceedings of the Conference. He believed that the same could be said for the proposals concerning Spanish and Arabic. It went without saying that the work of the Conference would continue in the existing official languages. What he had asked was whether the Secretariat could prepare a document giving an estimate of additional costs should one or several other languages be made official languages.

799. Dr. W. P. FEISTRITZER (Food and Agriculture Organization of the United Nations (FAO)) drew the attention of the Conference to the fact that many Spanish and Arabic speaking countries were drafting, considering and implementing national seed laws. FAO therefore felt that it would be in the interests of the Union to have the revised text of the Convention and specific technical papers available in Spanish and Arabic.

800.1 Mr. A. PARRY (United Kingdom) said that it was perhaps somewhat unrealistic to draw a comparison between the number of languages used by UPOV and the number used by the World Intellectual Property Organization or by the United Nations. By comparison UPOV was a small organization which, at the moment, had a regional character. It did not seem to him to be terribly relevant to know precisely what the costs would be but he could imagine that for each language added the Office of the Union, which had a very small staff, would need to employ at least one additional administrative grade officer and presumably at least one clerical or typing officer. If there were particular documents of importance to countries considering membership of the Union then such documents could presumably be translated. He wondered, however, if it was fair to ask the existing member States to adopt a language not spoken by any of them, when a number of their own languages had not yet been adopted. The practical difficulties of expanding the number of languages used seemed to him to militate against such a step.

800.2 Mr. Parry noted that a number of speakers had referred to the fact that Article 28(3) empowered the Council to decide that further languages should be used if the need arose. As far as the establishing of texts of the Convention was concerned he thought that the Conference might consider extending the provision in Article 41(3) by adding to the list of languages in which official texts had to be established. He wondered whether the Union should go beyond that for the moment.

801. The PRESIDENT said that he had tried to make a rough calculation. He thought that the Union would probably need to employ a professional officer and two secretaries for each additional language, and that the addition of Arabic, Italian and Spanish would probably mean increasing the existing budget by roughly one-third.

802. Mr. M. JEANRENAUD (Switzerland) said that his Delegation had listened with great sympathy to the proposals to increase the number of working languages of the Office of the Union and it too thought that the language barrier should not be allowed to constitute an obstacle to the development or to the future activities of the Union. But one had to take into account the size of the organization. An extension of the number of official languages would undoubtedly give rise to rather serious financial problems and his Delegation thought that an immediate decision on the matter would in fact be premature. Article 28(3) made it possible to introduce additional languages should the development of the Union make that necessary.

803. Mr. W. VAN SOEST (Netherlands) said that his Delegation shared the views expressed by the Delegation of Switzerland.

804. Prof. A. SINAGRA (Italy) said that whatever decisions the Diplomatic Conference might take he believed that reference to Article 28(3) did not solve the problem on the table but merely avoided it. It was already quite clear that that Article referred to a power of the Council and further, through the inclusion of the words "if the need arises," it referred to exceptional situations. The proposals that had been made by his Delegation and by the Delegations of Mexico and of the Libyan Arab Jamahiriya were aimed at introducing Italian, Spanish and Arabic as official languages.

805.1 The PRESIDENT noted that there was no support for the proposal of the Delegation of Italy, as contained in document DC/67, and that the proposal had therefore fallen.

805.2 The President noted that there was not a majority in favor of the proposal submitted jointly by the Delegations of Mexico and Peru, as contained in document DC/65, and that the proposal had therefore fallen. He then addressed delegates

of Spanish mother tongue in their own language, saying how much he would like their language to be used by the Union. He regretted that financial means did not permit that for the moment but he hoped that one day there would be sufficient Spanish-speaking member States to enable Spanish to be adopted as a working language in the Union's meetings.

806. Mr. R. LOPEZ DE HARO (Spain) thanked the President for his kind words.

807. Mrs. O. REYES-RETANA (Mexico) also thanked the President and said that it had been very pleasant for the Spanish-speaking delegates to hear his words. She had to say, however, that her Delegation really regretted the fact that its proposal had not been adopted.

808. The PRESIDENT noted that there was not a majority in favor of the proposal of the Libyan Arab Jamahiriya, as contained in document DC/71, and that the proposal had therefore fallen. He was sorry not to be able to express his regrets in Arabic.

809. Article 28 was adopted as appearing in the Draft.

810. Dr. A. BEN SAAD (Libyan Arab Jamahiriya) said that his Delegation wished to change the proposal that it had submitted for the amendment of Article 41. It would now like paragraph (1) to remain as in the Draft, and paragraph (3) to be extended to the Arabic language.

811. The PRESIDENT ruled that the change proposed by the Delegation of the Libyan Arab Jamahiriya was such that it could be considered even though it had not been circulated in writing. In his capacity as Head of the Delegation of Denmark he supported the proposal reproduced in document DC/72 as revised orally by the Delegation of the Libyan Arab Jamahiriya.

812. It was decided to adopt the proposal to amend Article 41(3), referred to in paragraph 810 above, and to add Arabic to the list of languages in which official texts had to be established.

813. Mrs. O. REYES-RETANA (Mexico) withdrew the proposal that her Delegation had submitted jointly with the Delegation of Peru, as contained in document DC/66.

814.1 The PRESIDENT thanked the Delegations of Mexico and Peru for the understanding they had shown.

814.2 The President then invited the Delegation of the Netherlands to introduce its proposal for the amendment of paragraphs (2) and (3) of Article 41, as reproduced in document DC/59.

815. Mr. A. W. A. M. VAN DER MEEREN (Netherlands) said that his Delegation wished to make two small corrections to the text proposed in the Draft. First, in paragraph (2), it did not see the need for the Secretary-General of the Union to transmit "two certified copies of this Act." It thought that one copy would suffice. Secondly, in paragraph (3), the word "translations" would be preferable to the word "texts."

816. Dr. H. MAST (Secretary General of the Conference) advised the Conference that the wording of the Draft was in conformity with Article 29 of the Paris Convention for the Protection of Industrial Property as revised at Stockholm in 1967.

817. Mrs. O. REYES-RETANA (Mexico) said that she would like to be quite certain as to which documents or texts were going to be published in Spanish.

818. The PRESIDENT confirmed that the words "official texts" in Article 41(3) referred to official texts, in the specified languages, of the text to be signed in a single original in the three official languages of the Union, as provided for in Article 41(1).

819. Mr. M. LAM (Senegal) said that his Delegation considered that if the Union was looking for an increase in its membership then it must not be designed just to meet the needs of the existing member States. The Union would have to consider the situation of States which could form part of its future membership and it should now take the measures necessary to ensure that potential member States would not have misgivings. When the African States, the Arabic States and the Third World States, which would tomorrow be the partners of the existing member States, turned towards membership of the Union it was certain that they would be greater in number than the entire existing membership. He believed that it would be a good thing to keep in mind the present situation of those countries that had sent delegates to the Diplomatic Conference so that their Governments might gain useful information as they considered joining the Union.

820. The PRESIDENT said that the Union must consider very carefully what means it had whereby contacts could be established with non-member States. He was sure that the matter would be carefully studied by the Council of the Union.

821. Mr. A. W. A. M. VAN DER MEEREN said that his Delegation wished to withdraw its proposal for the amendment of paragraphs (2) and (3), as appearing in document DC/59.

822. Mr. H. AKABOYA (Japan) referred to the statement he had made on behalf of his Delegation on the opening morning of the Conference. His country had a strong desire to join the Union and his Delegation would like to ask the Conference to consider including the Japanese language in the list of languages specified in Article 41(3), as had been agreed in respect of the Arabic language (see paragraph 812).

823. Prof. A. SINAGRA (Italy) said that his Delegation warmly supported the proposal of the Delegation of Japan.

824. The PRESIDENT ruled that the amendment proposed by the Delegation of Japan was such that it could be considered even though it had not been circulated in writing.

825. It was decided to include the word "Japanese" after the word "Italian" in Article 41(3).

826. Mr. H. AKABOYA (Japan) said that his Delegation appreciated the adoption of its proposal and that his country would cooperate as far as possible in the translation of the Convention into Japanese.

827. Subject, in respect of paragraph (3), to the decisions referred to in paragraphs 812 and 825 above, and subject, in respect of paragraph (5), to the decision regarding consequential changes, referred to in paragraph 721 above, it was decided to adopt Article 41 as appearing in the Draft.

Article 34A: Exceptional Rules for Protection Under Two Forms (Continued from 552)

828. The PRESIDENT reopened the discussion on Article 34A and asked whether there was support for the proposal for the amendment of paragraph (1) submitted by the Delegation of Japan and reproduced in document DC/73.

829. Dr. D. BÖRINGER (Federal Republic of Germany) said that his Delegation seconded the proposal of the Delegation of Japan.

830. Mr. A. W. A. M. VAN DER MEEREN (Netherlands) said that his Delegation also supported the proposal of the Delegation of Japan.

831. Subject to the decision regarding consequential changes, referred to in paragraph 721 above, and subject to consideration of the proposal submitted by the Delegation of South Africa and appearing in document DC/38, it was decided to adopt as Article 34A(1) the wording appearing in document DC/73.

832. The PRESIDENT invited the Delegation of South Africa to introduce its proposal as appearing in document DC/38.

833. Mr. J. F. VAN WYK (South Africa) said that his Delegation felt that the reference in the wording of Article 34A(1) in the Draft to "protection under different forms" was too vague and could allow forms of protection other than those mentioned in Article 2(1). His Delegation's proposal was a matter of clarification and not of substance, and was believed to be an improvement on the Draft. He recognized that the proposal, if approved, would require some drafting changes to align it with the proposal of the Delegation of Japan just adopted by the Conference.

834. Mr. A. PARRY (United Kingdom) suggested that the wording of the proposal of the Delegation of South Africa might be amended slightly by replacing the expression "in the said Article" by "in the said paragraph."

835. The PRESIDENT said that it seemed to him that it would be of benefit to merge the proposal of the Delegation of South Africa, subject to the amendment suggested by the Delegation of the United Kingdom, with the new wording of Article 34(A)(1) (see paragraph 831). Referring to the English version of document DC/73 that would mean replacing the section "under different forms for one and the same genus or species" by "under the different forms referred to in the said paragraph for one and the same genus or species."

0241

836. It was decided to amend document DC/73 in the way stated in the preceding paragraph.

837. The Secretariat was asked to prepare and circulate a document recording the new text of Article 34A(1) in the light of the decisions referred to in paragraphs 831 and 836 above.

838. The PRESIDENT invited the Delegation of the United States of America to introduce its proposal for the amendment of Article 34A(2), as appearing in document DC/32.

839. Mr. L. DONAHUE (United States of America) said that his Delegation's proposal to replace the word "novelty" by the word "patentability" was more a drafting change than a substantive change. His country's Patent Law concerned itself not with novelty but with patentability. As far as plant varieties were concerned the effect was the same as the requirement in the Plant Variety Protection Act that a variety had to be new.

840. Mr. A. PARRY (United Kingdom) asked whether the intention of the proposal of the Delegation of the United States of America was to provide for the possibility, in the circumstances specified, of an alternative to just the requirements laid down in Article 6(1)(a), or to the whole of Article 6.

841. Mr. L. DONAHUE (United States of America) understood that Article 6 would continue to be applicable under his country's Plant Variety Protection Act.

842. Prof. A. SINAGRA (Italy) said that for him "novelty" was an implicit condition of "patentability." Indeed it was the main condition of patentability. It would therefore be better to retain the word "novelty."

843. Dr. H. MAST (Secretary General of the Conference) said that he understood that the problem for the Delegation of the United States of America was that under its country's patent system novelty was not the only criterion of patentability. There were other criteria, such as non-obviousness, and the Delegation of the United States of America therefore wished to align the wording of Article 34A(2) to the wording of its Patent Law. It was very difficult to ask a country to amend its normal patent legislation only for the sake of a small number of applications in respect of plant varieties. It had already been stated that Article 6 would be applied without limitation under the Plant Variety Protection Act. The exception sought by the Delegation of the United States of America was solely in respect of its country's patent legislation.

844. Mr. J. BUSTARRET (France) remarked that Article 6 really was one of the foundation stones of the Convention. He was quite willing to see an exception made to certain of the provisions of that Article for plants, such as vegetatively propagated plants in the United States, that were protected under a patent system. It was unacceptable for him, however, to have a text which substituted for the whole of Article 6 patentability criteria whose exact scope was not known to the Conference. He therefore requested that the matter be more closely studied.

845. Prof. A. SINAGRA (Italy) said that his Delegation was of the same opinion as the Delegation of France.

846. Mr. L. DONAHUE (United States of America) said that his Delegation would make a statement later in clarification of its proposal.

847. It was decided to defer further consideration of Article 34A(2) until the Delegation of the United States of America was in a position to clarify its proposal as appearing in document DC/32. *(Continued at 973)*

848. Article 34A(3) was adopted as appearing in the Draft, without discussion.

ELEVENTH MEETING

Monday, October 16, 1978,

morning

849. The PRESIDENT said that it would be helpful if the Secretariat could begin the preparation of the text for consideration by the Drafting Committee. He therefore wished to begin at the beginning by discussing the Title of the Convention.

850. Dr. A. BOGSCH (Secretary-General of the Union) asked the Delegation of the United Kingdom whether the Drafting Committee could work on the assumption that it would not be necessary to make the complicated provisions that would be required if the Additional Act of 1972 were not in force in respect of the United Kingdom when it ratified the revised text of the Convention, hopefully in the next two to three years.

851. Mr. P. W. MURPHY (United Kingdom) confirmed that the Drafting Committee could work on the assumption specified by the Secretary-General of the Union.

852. Dr. A. BOGSCH (Secretary-General of the Union) said that he appreciated the confirmation given by the Delegation of the United Kingdom. It meant that the text could be drafted in a much simpler way.

Title of the Convention

853. The PRESIDENT opened the discussion on the Title of the Convention and invited the Delegation of the Netherlands to introduce its proposal for amendment as appearing in document DC/64.

854. Mr. K. A. FIKKERT (Netherlands) said that his Delegation's proposal had been made because it was thought that one of the purposes of the Diplomatic Conference was to include the text of the Additional Act of 1972 in the revised Act, and that the wording of the Title should clearly express what had happened. One could see that the Additional Act was an amendment of the original Convention from the fact that Roman numerals had been used to number the Articles.

855. Mr. A. PARRY (United Kingdom) said that he did not know whether the use of Roman numerals was significant. He noted, however, that the Additional Act referred to itself as "amending the International Convention for the Protection of New Varieties of Plants." His Delegation was therefore inclined to support the proposal of the Delegation of the Netherlands.

856. Mr. B. LACLAVIERE (France) saw no difference from the legal point of view between what had been done in 1972 and what the Diplomatic Conference was doing. In 1972 the Convention had been amended; in 1978 it was being amended again. One should say, in respect of both occasions, either that it had been 'amended' or that it had been 'revised.'

857. Mr. M. JACOBSSON (Sweden) tended to agree that it was unnecessary to have both terms and noted that the Vienna Convention on the Law of Treaties used only the word "amendment."

858. Dr. D. BÖRINGER (Federal Republic of Germany) asked what wording had been used in the titles of other conventions.

859. Dr. A. BOGSCH (Secretary-General of the Union) said that in the style of some other conventions the title would read: "as completed by the Additional Act of 1972 and as revised at ... ." That would be a complete statement of what had happened. If the Conference wished, however, either the word "amended" or the word "revised" could be used in respect of both the Additional Act and the new text.

860. Dr. D. BÖRINGER (Federal Republic of Germany) wondered whether it might be left to the Drafting Committee to consider all three proposals, namely those reproduced in documents DC/3 and DC/64 and the wording given by the Secretary-General of the Union, and to formulate a solution.

861. It was decided to ask the Drafting Committee to consider the various wordings referred to in the preceding paragraph and to determine the Title of the Convention.

Preamble

862.1 The PRESIDENT opened the discussion on the Preamble to the Convention. He noted that there was a slight difference in the basic proposal, as reproduced on page 7 of Annex II to document DC/3, in that the second paragraph referred in the French text to "reaffirming the statements," whereas the English and German texts both referred to "reaffirming their statements." Since it was the hope that the revised text would be signed not only by the existing member States but also by other States he felt that it might be better to align the English and German texts to the French text by using the word "the" instead of "their."

862.2 The President further noted that a proposal for the amendment of the Preamble had been submitted by the Delegation of the Netherlands. He invited that Delegation to introduce its proposal, as appearing in document DC/62.

863. Mr. K. A. FIKKERT (Netherlands) said that his Delegation thought that its proposal was a matter for the Drafting Committee to consider.

864. Mr. W. A. J. LENHARDT (Canada) said that it seemed to him that the Conference was in the process of drafting an Act which would replace everything that had preceded it. If that was the intention then he would suggest that it might be explicitly stated somewhere in the Preamble.

865. Mr. K. A. FIKKERT (Netherlands) said that his Delegation had introduced the final paragraph of document DC/62 for the very reason mentioned by the Delegation of Canada. His Delegation thought that the product of a revision was something totally new, namely a new Act replacing in the future the old Act.

866. Dr. D. BÖRINGER (Federal Republic of Germany) said that his Delegation seconded the proposal submitted by the Delegation of the Netherlands.

867. Dr. A. BOGSCH (Secretary-General of the Union) suggested that the Drafting Committee might be asked to condense into one paragraph the four paragraphs devoted, both in the basic proposal and in the proposal submitted by the Delegation of the Netherlands, to expressing the desire to make the Convention accessible to other countries.

868. Mr. A. PARRY (United Kingdom) indicated that his Delegation, in response to the suggestion made by the Secretary-General of the Union, was willing to prepare an amendment to the proposal of the Delegation of the Netherlands, for the consideration of the Drafting Committee.

869. It was decided that the Drafting Committee should determine the text of the Preamble on the basis of the proposal contained in document DC/62 and of an amended version thereof to be prepared by the Delegation of the United Kingdom.

Article 1: *Purpose of the Convention; Constitution of a Union; Seat of the Union*

(Continued from 209)

870. The PRESIDENT reopened the discussion on Article 1 and invited the Delegation of the Netherlands to introduce again its proposal for amendment, as appearing in document DC/14.

871. Mr. K. A. FIKKERT (Netherlands) confirmed that his Delegation's proposal, apart from the introduction of Article 1A setting out a list of "definitions," was concerned only with drafting matters and with the systematic ordering of the Articles of the Convention.

872. Mr. J. F. VAN WYK (South Africa) suggested that the proposed Article 1A should be discussed first because the definition of "the breeder" included therein would have a bearing on the wording proposed for Article 1.

873. Mr. B. LACLAVIERE (France) said that the Conference had so far worked on the basis of making as few changes as possible. He believed that Article 1 had never given rise to difficulties. He therefore saw nothing to be gained by introducing Article 1A. It would be totally contrary to French tradition to introduce a list of definitions.

874. Mr. P. W. MURPHY (United Kingdom) thought that the main question for the Conference was whether the revised text should or should not contain a list of definitions. He was not certain what consequential changes might be introduced if the proposed Article 1A were adopted. He would prefer to retain the existing structure of the Convention, if at all possible.

875. Mr. F. ESPENHAIN (Denmark) said that he was of the same opinion as the Delegation of the United Kingdom.

876. Mr. M. JACOBSSON (Sweden) said that his Delegation also shared the opinion of the Delegation of the United Kingdom.

877. Mr. W. A. J. LENHARDT (Canada) said that he was in sympathy with the proposal of the Delegation of the Netherlands. It was always helpful, particularly from the lawyer's point of view, to have the "definitions" set out at the beginning of a text. He did not think that the proposed Article 1A, if adopted, would

have any effect whatsoever on the Convention. Although he was not sure that he agreed with the wording of all of the definitions proposed he would prefer to have definitions included in the text. If necessary they could be put in the individual Articles and not in a separate list.

878. Mr. H. J. WINTER (United States of America) said that his Delegation had no strong views on the matter under discussion. If it was decided, however, to include a list of definitions, then one would have to be absolutely certain that the drafting followed exactly the definitions currently to be found in various Articles.

879. Dr. D. BÖRINGER (Federal Republic of Germany) said that he had before him the texts of two Conventions, both dated July 14, 1967. The Convention Establishing the World Intellectual Property Organization contained a list of "definitions"; the Paris Convention for the Protection of Industrial Property did not. He agreed with what had just been said by the Delegation of the United States of America. His Delegation was in favor of keeping the text as it was for three reasons. First, it was not sure that the proposed Article 1A covered all the important terms in the Convention. To check that would involve the Drafting Committee in a considerable amount of work. Secondly, it was not sure that those definitions that were listed were correctly worded in all the three official languages. Finally, adoption of the proposal of the Delegation of the Netherlands would result in a renumbering of almost every Article in the Convention, including Article 13, and that would lead to confusion.

880. Mr. W. GFELLER (Switzerland) said that his Delegation wished to second the proposal of the Delegation of the Netherlands.

881. The proposal of the Delegation of the Netherlands as appearing in document DC/14 was rejected by 7 votes against to 2 in favor, with 1 abstention.

882. The adoption of Article 1 as appearing in the Draft was confirmed. (See paragraphs 206 and 208 above).

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Article 5: Rights Protected; Scope of Protection (*Continued from 327*)

883. The PRESIDENT reopened the discussion on Article 5.

884. It was decided to refer to the Drafting Committee the proposal submitted by the Delegation of the Federal Republic of Germany to delete the words "of a variety" from the first sentence of Article 5(1), as reproduced in document DC/18.

885. The PRESIDENT then invited comments on documents DC/17. Rev. and DC/50, being respectively the proposal submitted by the Delegation of France for the amendment of Article 5(1) and the comments of Observer Organizations on Article 5 as restated by the Office of the Union on the request of the Conference.

886. Mr. R. ROYON (CIOPORA) said that in his earlier statements (see paragraphs 270, 278 and 304.3) he had emphasized the problems facing members of CIOPORA as a result of imports of plants or parts of plants from non-member States of the Union. He wished the Conference to also be aware that problems could equally arise even at the level of the European member States of the Union. Because of differing periods of protection, or for purely financial reasons, or because of market forces, it was possible that a variety protected in one member State was not protected in another member State. Producers of that variety in the latter State did not need a licence since the variety was "free." Exports of that production to the former State, however, were very damaging to the owner of plant variety protection.

887. Dr. H. H. LEENDERS (FIS) asked the Conference to bear in mind, when considering document DC/50, one point which was always stressed by his Federation, namely that once plant variety protection had been introduced into a country and once the trade had become accustomed to the payment of royalties, the regular trade was faced with unfair competition if others could too easily produce material without paying a royalty. He was not questioning the right of a farmer to produce seed for his own use. Commercial production, however, for example by cooperatives, raisers of plantlets or canneries, was a different matter. That could lead to unfair competition and he wished to draw the attention of the Conference to that problem.

888. Mr. H. J. WINTER (United States of America) said that when Article 5 had been debated the previous week his Delegation had clearly stated that any attempt to protect the final product would cause very severe problems in its country (see paragraph 309). His Delegation believed that such an amendment would cause some serious problems under its country's antitrust laws and that it would go beyond the scope of protection necessary in the Convention. His Delegation would therefore be opposed to such an amendment.

889. Mr. R. ROYON (CIOPORA) said that the requests made by CIOPORA were concerned with two different problems. One was protection, in the case of vegetatively propagated plants, for the final product as such, namely for a plant or a part of a plant, be it a cut flower or even a fruit. That was the purpose of the proposed Article 5(2) in Annex II to document DC/50. The other, which was covered by the proposed Article 5(1) in that same document, was not designed to extend protection to the final product, but simply, by amending the drafting, to enable the owner of a protected variety to exercise his "minimum" right. The plant patent legislation of the United States of America already covered the "commercial use" of a plant and that was what CIOPORA was seeking to cover in the proposed Article 5(1).

890. Mr. J. BUSTARRET (France) felt that there were two different problems to be discussed and that they should be taken separately. The first was the amendment of the wording of the first sentence of Article 5(1), namely to replace the expression "for purposes of commercial marketing" by the expression "for commercial purposes," and to delete the words "as such." The second concerned, in various forms, the proposal submitted by his Delegation and reproduced in document DC/17. Rev., whereby certain provisions so far reserved for ornamental plants would be extended to vegetatively propagated plants in general.

891. Dr. D. BÖRINGER (Federal Republic of Germany) said that he would like to associate himself with the proposal of Mr. Bustarret. He would like first to ask the representative of CIOPORA to clarify his organization's proposed Article 5(1), and the explanation thereon, as appearing in Annex II to document DC/50.

892. Mr. R. ROYON (CIOPORA) said that he would take as an example the case of a grower producing cut flowers in country "A," where the variety was protected, who imported plants from country "B," where the variety was not protected, planted them in his glasshouse and subsequently, without multiplying the variety, sold cut flowers. Such a practice was not covered by the present wording of Article 5(1). Mr. Royon said that he asked himself to what extent the "minimum protection" of the right of the breeder existed when the breeder of a rose, carnation or chrysanthemum variety used for the production of cut flowers could not subject such use, even in country "A," to the holding of a licence. The wording suggested by CIOPORA for Article 5(1) would overcome that difficulty. Given that vegetative propagating material included whole plants, the plants imported from country "B" could then be considered to be vegetative propagating material. The fact that the grower had them in his glasshouse with a view to commercially producing and marketing cut flowers would be covered by the expression "the ... use, for commercial purposes," of the propagating material. As was stated in the first paragraph of the "explanation" at the end of Annex II to document DC/50, the purpose of amending the drafting of Article 5(1) was not to extend protection to plants or parts thereof but to cover "utilisation à des fins commerciales." The expression "à des fins d'écoulement commercial" left room for doubt, since it could be construed to cover only reselling, which in CIOPORA's opinion had not been the intention of the drafters of the Convention.

893. Dr. H. H. LEENDERS (ASSINSEL) said that ASSINSEL, as could be seen from section 1 of Annex I to document DC/50, had also found certain imperfections in the wording of Article 5(1). The problem faced by members of his Association differed slightly from the difficulties explained by the representative of CIOPORA.
Dr. Leenders said that he would take as an example a cannery producing peas and beans for canning. When the quantity of peas or beans produced exceeded that required for canning the surplus was retained for use as seed in the following year. The first sentence of Article 5(1) stated that the breeder's authorization "shall be required for the production, for purposes of commercial marketing, of the reproductive or vegetative propagating material." In the case he had cited there was no "marketing." He was sure, however, that the Conference would agree that in such cases the cannery should pay the normal royalties. The problem was, of course, that the cannery could rely on the present wording of Article 5(1), refusing to pay a royalty on the ground that no marketing had taken place.

894. Mr. J. BUSTARRET (France) said that he would like to respond to what had been said earlier by Mr. Royon about fruit trees (see paragraph 304.3), and to what Dr. Leenders had just said about peas and beans, by explaining the intentions of the persons who had drafted Article 5(1) in 1961. Their intention regarding the fruit grower who bought some trees of a new variety and reproduced the variety in his own orchard by means of grafting had been that he did not have to pay royalties on that reproduction, unless the owner of the variety had taken the precaution of specifying in his conditions of sale that reproduction of the variety by that means was not permitted. Their intention regarding the canner who multiplied seeds himself for delivery to his contract growers, however, had really been that such delivery, being in effect an act of commercial marketing, should give rise to the payment of royalties to the owner of the variety. Mr. Bustarret said that he did not know whether the wording used to express those intentions was perfect, but nevertheless such had been the intentions of the drafters.

895. Mr. M. TOURKMANI (Morocco) said that he would just like to give a simple example to show the problems one might face if the wording suggested by CIOPORA were accepted. He took as an example a farmer producing wheat who purchased 'certified' seed, delivered 99 per cent of the resulting crop to the mill for the production of flour and retained one per cent for his own use as seed. Mr. Tourkmani believed that subjecting the use of that small quantity to the authorisation of the breeder would lead to unimaginable practical difficulties. In his view what should be subjected to the authorisation of the breeder was seed destined to be marketed as seed. Technical regulations covering seed production always required proof of the origin of the seed used to establish the crop entered for certification as seed. In other words the identity of the 'basic' seed had to be disclosed. 'Basic' seed could only be obtained from the breeder and at that point the right of the breeder was respected.

896. Mr. R. ROYON (CIOPORA) said that in the example given by the Delegation of Morocco there would be no "utilisation à des fins commerciales." It would be a question of the producer satisfying his own needs and that was not covered by the text suggested by CIOPORA. Furthermore, that text was applicable only to vegetatively propagated plants. One of the reasons why CIOPORA sought a rather

special scope of protection in respect of vegetatively propagated plants was that breeders of sexually reproduced plants benefitted from indirect means of a technical nature in protecting themselves in respect of the use made of reproductive material of their varieties.

897. Dr. H. H. LEENDERS (ASSINSEL) said that in the example given by the Delegation of Morocco it was clear that the farmer was producing reproductive material not for commercial purposes but for his own purposes. He believed that there was some misunderstanding.

898. Mr. A. W. A. M. VAN DER MEEREN (Netherlands) agreed that there was some misunderstanding. He could see no difference between an ornamental plant used to produce cut flowers and a cereal used to produce bread. According to his understanding, if the proposed Article 5(1) in Annex II to DC/50 were adopted then all farmers would be dependent on the authorisation of the breeder. The wheat producer who retained some of his crop and used it as seed to produce wheat for the milling industry used the material he had retained as reproductive material. According to the wording suggested by CIOPORA for Article 5(1) the "use, for commercial purposes of the reproductive or vegetative propagating material" required the prior authorisation of the breeder.

899. Dr. H. H. LEENDERS (ASSINSEL) said that he had based his earlier remark on his Association's suggestion, recorded in item 1 of Annex I to document DC/50, that the existing wording of Article 5(1) should be retained, except that the phrase "production, for purposes of commercial marketing, ... " should be replaced by "production, for commercial purposes, ..." Both the existing text and the text including ASSINSEL's suggested amendment referred to production of reproductive material and not to its use.

900. Mr. R. ROYON (CIOPORA) believed that the exclusion from the scope of protection of the two activities that he had mentioned in relation to fruit trees and cut flowers ran counter to the very spirit of the Convention. Leaving aside the question of protection for the final product, it seemed to him that there was a

basic defect in the Convention if the breeder of a variety whose purpose was to produce fruit or cut flowers of a better quality could not control the commercial exploitation of the variety.

901. Mr. M. TOURKMANI (Morocco) said that if the representative of CIOPORA agreed that the wheat producer in the earlier example was free to use material retained by him to sow his fields in the following year then surely the situation in respect of fruit trees was analogous. In his view it was the interpretation and application of the text to different categories of species, for example to sexually reproduced species or to vegetatively propagated species, that gave rise to difficulties.

902.1 Mr. J. BUSTARRET (France) agreed with the conclusions drawn by the Delegation of Morocco. If a text permitted a producer of cereals to use his own grain crop as seed for sowing his own fields--and it appeared that no-one contested that--then one had to apply a similar reasoning in respect of fruit trees. Nevertheless, seen objectively, the situations differed. The same text could not permit in the one case what it forbade in the other. In the first case, however, the rights that the cereals breeder could legitimately count on in respect of his innovation were satisfied, whereas in the second case the breeder could justifiably consider that his rights in the variety of fruit bred by him brought him nothing by comparison with the work entailed in the breeding of that variety. It was not the nature or scope of the right that was in question; it was a matter of the consistency of the right when looked at objectively. That was the very difficult problem with which the Conference was faced.

902.2 Mr. Bustarret went on to say that it was clear that the fruit tree breeder had practically no interest in seeking protection for his varieties. His interest lay in seeking other means of control such as very high prices, Draconian conditions of sale and so on. It was clear that the breeding of fruit trees was not financially viable. As a consequence nine-tenths of the breeding work in that field was being carried out in government research stations and very few private breeders remained. Mr. Bustarret said in conclusion that he recognized, however, that it was not through the text of the Convention that a solution would be found.

903. Mr. M. O. SLOCOCK (AIPH) said that he had found Mr. Bustarret's intervention very illuminating. The description of the situation prevailing in respect of fruit trees was equally applicable in respect of ornamental plants. As the representative of AIPH, which tended to represent the interests of the growers of ornamental crops rather than the breeders, he wished to state that it would not be of advantage to either sector of the industry if the breeding of new varieties became a governmental responsibility and if there were no longer sufficient incentive for private breeders to continue their work. That could occur if Article 5(1) remained as it was.

904. Mr. R. ROYON (CIOPORA) supported what had been said by the representative of AIPH. A fruit tree breeder could spend fifteen or even twenty years perfecting a variety. Assuming that the variety had extraordinary properties, for example of tolerance to being packed and shipped, or of a flavor which everyone appreciated, should one accept the fact that the breeder, once he had sold a single tree, could not control the production of tens or hundreds of thousands of trees therefrom by any grower enjoying a favorable climate or terrain. Those were the sort of quantities involved in orchard production. Should not the breeder be able to control the commercial exploitation of his variety occuring by means of the sale of the fruit, which would be in world-wide demand. Mr. Royon said that as he had listened to the debate he had wondered what purpose had been served by the signature some seventeen years earlier of the International Convention for the Protection of New Varieties of Plants.

905. Dr. W. P. FEISTRITZER (Food and Agriculture Organization of the United Nations (FAO)) was concerned that the reference in Article 5(1) to the "prior authorisation" of the breeder might imply that the breeder could hinder the utilization, for example, of a variety that had been identified in official trials as being suitable from an agronomic point of view, the use of which was being recomended.

906.1 The PRESIDENT thought that the question raised by the representative of FAO was answered by implication in Article 9(1).

906.2 The President sought the views of the Conference on the establishing of a working group to discuss Article 5.

907. Dr. A. BOGSCH (Secretary-General of the Union) said that he would strongly recommend such a solution. The Working Group on Article 13 had evolved not only a new text but also some explanatory statements. Dr. Bogsch thought that part of the discussion on Article 5 had been based on misunderstandings and part had been genuinely directed to amending the basic proposal. Both areas might be resolved in a working group; the first by an agreed declaration and the second by an amendment, if any, of the text.

TWELFTH MEETING

Monday, October 16, 1978,

afternoon

908. Mr. A. SUNESEN (Denmark) said that his Delegation felt that it could be useful to establish a working group to give detailed consideration to the problems arising from Article 5. He had participated in the Working Group on Article 13 where it had been proved that problems could be isolated and that common solutions could be found. His Delegation therefore proposed that the Conference establish a working group to consider Article 5.

909. Mr. S. MEJEGÅRD (Sweden) noted that he had announced earlier that, for the time being, his Delegation could not accept any amendment to the minimum scope of protection (see paragraph 314). It was therefore unable to support the establishment of a working group charged with preparing a proposal for the amendment of Article 5. It would, however, support the establishment of a working group with the task of studying the question and even of drafting some examples.

910. Mr. P. W. MURPHY (United Kingdom) said that his Delegation had the same difficulties as the Delegation of Sweden in agreeing to the establishment of a working group if such agreement implied that the scope of protection provided for in Article 5 would be extended or that it would become mandatory for member States to extend that scope of protection. His country already went well beyond the existing mandatory provisions of Article 5, but whether such an extension was acceptable as a mandatory obligation, imposed under the Convention, was another matter. His Delegation would therefore very much like to have a proposal for the terms of reference of the proposed working group.

911.1 The PRESIDENT said that the proposed working group would, of course, have a number of points of reference. It would have available for consideration the basic proposal in document DC/3, the proposal submitted by the Delegation of France in document DC/17. Rev., the comments of Observer Organizations in document DC/50 and a new document under the reference DC/77. The latter document, containing a recommendation on Article 5, had been presented by himself as President of the Conference. If it was decided that Article 5 should not be amended then he hoped that the Conference would adopt that recommendation.

911.2 Referring to the statements made by the Delegations of Sweden and the United Kingdom the President said that he was certain that some other delegations would also find it difficult to accept any amendment of the basic proposal for Article 5. In his view, therefore, discussion in the proposed working group should be without prejudice to the final decision by the Conference meeting in Plenary.

912. Mr. A. SUNESEN (Denmark) said that his Delegation would find it difficult to accept any changes. It did feel, however, that the establishment of a working group would provide an opportunity for a useful discussion.

913. Dr. D. BÖRINGER (Federal Republic of Germany) said that his Delegation would be willing to participate in a working group provided that there was sufficient time for meaningful discussion and provided that the Observer Organizations considered that its establishment would be useful.

914. Mr. J. WINTER (ASSINSEL) said that ASSINSEL would welcome the establishment of a working group to discuss the problems arising from Article 5 and would be pleased to participate.

915. Mr. R. ROYON (CIOPORA) said that CIOPORA fully endorsed the statement made by the representative of ASSINSEL.

916. Prof. R. K. MANNER (Finland) said that his Delegation believed that it would be difficult for its country to join the Union if the scope of protection was extended. It considered that the possibility of extension could form part of the agenda for the next Diplomatic Conference on the Revision of the Convention, say in five years' time.

917. It was decided to establish a Working Group on Article 5 to thoroughly consider and discuss the documents referred to in paragraph 911.1 above and to report its conclusions to the Conference meeting in Plenary.

918. It was further decided that participation in the Working Group on Article 5 would be open to all Delegations and that it would invite experts from the Observer Organizations to attend. *(Continued at 1019)*

Article 23A: Legal Status *(Continued from 627)*

919. The PRESIDENT opened the discussion on Article 23A. He noted that the Delegation of the Netherlands and the Delegation of France had each submitted a proposal to add a paragraph (3) to that Article. Those proposals were reproduced respectively in documents DC/47 and DC/60.

920. Paragraphs (1) and (2) of Article 23A were adopted as appearing in the Draft, without discussion.

921. The PRESIDENT invited the Delegation of the Netherlands to introduce its proposal for amendment.

922. Mr. K. A. FIKKERT (Netherlands) said that the purpose of his Delegation's proposal was to indicate who was competent to execute certain decisions of, for example, the Council. There was no reference in the Draft of the revised text, for example, to powers of signature. His Delegation thought it would be wise to

have some indication in that direction in the Convention. Mr. Fikkert drew the Conference's attention to the fact that his Delegation's proposal left open the question of who should represent the Union.

923. Dr. A. BOGSCH (Secretary-General of the Union) noted that the Convention Establishing the World Intellectual Property Organization, for example, provided in its Article 9(4) that "The Director General shall be the chief executive of the Organization" and that "He shall represent the Organization." The signatures of which the Delegation of the Netherlands had spoken were needed in Geneva usually, and in any case, in all important matters the Secretary-General simply executed the directives that he received from the Council. Dr. Bogsch thought that the proposal submitted by the Delegation of the Netherlands had merit. It conformed with general practice. If it were to be adopted then he would suggest that the first of the variants proposed, namely "The Secretary-General," be taken.

924. Mr. A. PARRY (United Kingdom) said that his Delegation had no strong views about the proposal of the Delegation of the Netherlands. Article 23(2) already provided that the Secretary-General "shall be responsible for carrying out the decisions of the Council." Although it emerged from that Article that it was normally the Secretary-General who represented the Union, his Delegation could see no harm in including in Article 23A the addition proposed by the Delegation of the Netherlands.

925. Mr. B. LACLAVIERE (France) said that it would be normal for the Secretary-General to represent the Union in what might be termed its daily tasks. But when the Union sent a mission overseas, for example, was it the Secretary-General or the President of the Council who should represent it. He was tempted to say that the Union, in accordance with existing practice, was represented by the President of the Council but that the Secretary-General was responsible for the accomplishment of its daily tasks. But that was merely a personal opinion of his.

926. Dr. D. BÖRINGER (Federal Republic of Germany) said that he believed that the proposal of the Delegation of the Netherlands gave rise to a number of diffi-

culties because the position of the Secretary-General of UPOV differed from that of his counterparts in other international unions. He was convinced that the provisions of paragraphs (1) and (2) of Article 23 were sufficient in all cases except where the Council reserved matters to its President.

927. Mr. B. LACLAVIERE (France) said that, to avoid further discussion, he would support what has just been said by the Delegation of the Federal Republic of Germany. If necessary one might add a suitable provision to the Rules of Procedure of the Council.

928. Mr. A. PARRY (United Kingdom) said that it seemed to him that the purpose of including the paragraph proposed by the Delegation of the Netherlands would be to show specifically the actual scope of the ostensible authority. As he had said, his Delegation felt that the matter was already sufficiently clear, but if it was decided not to include a specific provision in the Convention then there seemed to be no point in including one in the Rules of Procedure of the Council. They did not really constitute evidence of the legal position.

929. Dr. A. BOGSCH (Secretary-General of the Union) said that he was of the opinion, having listened to the debate, that the Convention should remain silent on the matter, leaving the Council to make the decision as and when required.

930. Mr. K. A. FIKKERT (Netherlands) said that his Delegation withdrew its proposal as contained in document DC/47.

931. The PRESIDENT invited the Delegation of France to introduce its proposal for amendment.

932. Mr. B. LACLAVIERE (France) said that he believed his Delegation's proposal to be very simple. In view of the changes made to certain provisions of the

Convention it now seemed indispensable to include a clause, found in a number of similar conventions, requiring the Union to conclude a headquarters agreement with the Swiss Confederation.

933. Mr. W. GFELLER (Switzerland) regretted that his colleague, Mr. Jeanrenaud, from the Federal Political Department was not present since he could certainly have advised the Conference in the matter of headquarters agreements with the Swiss Confederation. Having received no instructions he personally was not able to comment thereon (see paragraph 990 for subsequent statement).

934. Dr. A. BOGSCH (Secretary-General of the Union) considered that the proposal submitted by the Delegation of France was useful and even necessary. Under the existing text of the Convention, the Swiss Confederation unilaterally governed the affairs of the Union, naturally in consultation with the Council. When the revised text of the Convention entered into force, the Union would cease to be under the guardianship of the Confederation. Consequently the existing decree would have to be replaced by a bilateral agreement between the Union and the Confederation.

935. Dr. D. BÖRINGER (Federal Republic of Germany) thought that the second sentence of the proposal of the Delegation of France was not needed. In accordance with Article 23 the Council would either ask the Secretary-General himself to conclude a headquarters agreement or it would ask the Secretary-General to prepare the agreement and to present it to the Council, the right of signature being reserved to the President of the Council.

936. Mr. B. LACLAVIERE (France) said that he did not entirely share the opinion of the Delegation of the Federal Republic of Germany. The Council could entrust the Secretary-General with the negotiation of the agreement but the outcome had to be confirmed by the Council.

937. Prof. A. SINAGRA (Italy) said that his Delegation considered that it would be right to include in the Convention a paragraph such as the one proposed by the Delegation of France. He wondered, however, if it would not be better to include it in the transitional provisions since the specific agreement in question did not concern the daily management of the Union.

938. Dr. A. BOGSCH (Secretary-General of the Union) thought that it would be useful to include such a paragraph in the general provisions. A headquarters agreement could be modified from time to time and was not necessarily a single operation.

939. Mr. M. JACOBSSON (Sweden) said that his Delegation also believed that a clause such as that one proposed by the Delegation of France could be useful. He noted that Article 12 of the Convention Establishing the World Intellectual Property Organization contained a similar clause. He endorsed the opinion of the Secretary-General regarding the positioning of the clause. Mr. Jacobsson concluded by saying that his Delegation had no strong views regarding the need for the second sentence of the proposal of the Delegation of France.

940. Mr. A. PARRY (United Kingdom) said that if the second sentence of the proposal of the Delegation of France was to be retained then it should be somewhat expanded. It stated that: "The agreement shall be approved by the Council." It did not specify, however, the stage at which the approval was needed, nor did it specify what was the purpose of that approval. It was therefore not clear whether it was for the Council to approve the agreement in draft or whether its approval in fact constituted the conclusion of the agreement on behalf of the Union. It seemed to him that the sentence, as proposed, might be insufficient and that it might be better either to replace it by something more elaborate or to omit it altogether.

941. Mr. H. J. WINTER (United States of America), noting the reference by the Delegation of Sweden to Article 12(2) of the Convention Establishing the World Intellectual Property Organization, said that he would agree with the Secretary-

General's opinion that it was desirable to include in the Convention a specific reference to a headquarters agreement with the State in which the Union had its seat.

942. The PRESIDENT asked delegates whether they were in favor of including as Article 23A(3) the first sentence of the proposal of the Delegation of France, as reproduced in document DC/60.

943. Mr. K. A. FIKKERT (Netherlands) said that his Delegation could support the proposal of the Delegation of France but thought it might be better to just say: "The Union shall conclude a headquarters agreement." Article 1(3) already provided that the seat of the Union was to be at Geneva.

944. Dr. A. BOGSCH (Secretary-General of the Union) said that it was another question whether one made a reference to Switzerland or to "host country" or even "country on whose territory the seat is." For as long as the Convention referred to Geneva the host country was Switzerland.

945. It was decided to adopt the first sentence of the proposal reproduced in document DC/60.

946. The PRESIDENT asked delegates whether they considered it necessary to retain the second sentence of the proposal under consideration or whether sufficient provision was already made in Article 21.

947. Subject to the Records of the Conference stating that the conclusion of or any amendment to the headquarters agreement required the decision and approval of the Council acting pursuant to Article 21(h), it was decided that the second sentence of the proposal reproduced in document DC/60 should not be retained.

948. Subject to the proviso referred to in the preceding paragraph, the first sentence of document DC/60 was adopted as Article 23A(3).

Article 26: Finances (Continued from 642)

949. The PRESIDENT reopened the discussion on Article 26 and invited the Delegation of the Federal Republic of Germany to introduce its revised proposal for amendment, as appearing in document DC/28 Rev. 2.

950. Mr. H. KUNHARDT (Federal Republic of Germany) said that the revised version of his Delegation's proposal was the same, from the substantive point of view, as the original proposal, as reproduced in document DC/28. He had already explained the aim of that proposal (see paragraph 629). The revision concerned only improvements of a drafting and linguistic nature.

951. Dr. A. BOGSCH (Secretary-General of the Union) noted that it was difficult to construe paragraph (2) logically. It said that: "For the purpose of determining the amount of the annual contributions of the member States of the Union, each member State shall contribute ... ." That was tantamount to saying 'for the purpose of determining the price of the car, everybody will pay 1,000 dollars.' He suggested that the Drafting Committee should be asked to find a better wording. Dr. Bogsch also wondered whether it might not be necessary, in creating the provisions for the new system proposed by the Delegation of the Federal Republic of Germany, to commence with what was for the moment paragraph (4)(a) in document DC/28 Rev. 2. Again he suggested that the Conference should authorize the Drafting Committee to look into the matter.

952. Mr. H. KUNHARDT (Federal Republic of Germany) said that to some extent the suggestion of the Secretary-General reverted to the original proposal, as reproduced in document DC/28. Paragraph (2) of that document read: "Each member State of the Union shall contribute in proportion to the number of units taken

over. The contribution may also comprise fractions of a full unit." His Delegation had been informed that that wording presented certain difficulties. Although his Delegation had not been able to fully visualize the difficulties it had tried to take them into account in its revised proposal. If it was the general wish to revert to the original proposal then his Delegation would be willing to do that. It was concerned only with the substance of its proposal and would be very open to and appreciative of any help offered with a view to achieving a meaningful text, especially in the English version. His Delegation would equally be willing, if the Conference agreed on the substance of the proposal, to leave the precise wording to the Drafting Committee.

953. Mr. F. ESPENHAIN (Denmark) said that his Delegation considered the proposal of the Delegation of the Federal Republic of Germany to be a simplification of the existing text of Article 26 and wished to support the proposal, on the understanding that the Drafting Committee was authorized to improve the wording.

954. Subject to the understanding that the Drafting Committee was authorized to improve the wording of and even, if necessary, to interchange certain sentences and certain paragraphs in document DC/28 Rev.2, it was decided that the system and the principles proposed by the Delegation of the Federal Republic of Germany in that document should form the basis of Article 26.

Article 30: Implementation of the Convention on the Domestic Level; Contracts on Joint Utilisation of Examination Services (Continued from 689)

955. The PRESIDENT reopened the discussion on Article 30(1)(a). He noted that there were four proposals for consideration. One proposal, namely that submitted by the Delegation of the Netherlands, as reproduced in document DC/49 Rev., had been introduced and considered at the end of the previous week (see paragraphs 661 et seq.). Two further proposals, namely that now submitted by the Delegation of Italy and that now submitted by himself as President of the Conference, as reproduced in documents DC/69 and DC/70 respectively, had been made orally at the time when document DC/49 Rev. had been considered (see respectively paragraphs 665 and 679). Finally, a new proposal had been submitted by the

Delegation of South Africa. Since that proposal, as reproduced in document DC/79, related not only to Article 30(1)(a) but also to paragraphs (1) and (2) of Article 3, which had already been adopted by the Conference (see paragraphs 229 to 233), it could not be considered, according to Rule 33 of the Rules of Procedure, "unless so decided by a two-thirds majority of the Member Delegations present and voting." The President noted that there were no objections to reconsidering paragraphs (1) and (2) of Article 3.

956. Dr. A. BOGSCH (Secretary-General of the Union) said that for him the wording proposed in document DC/70 was better than that in the Draft.

957.1 Mr. A. PARRY (United Kingdom) said that he wished to echo what had been said by the Secretary-General. The proposals before the Conference in relation to Article 30(1)(a) seemed to fall into two categories. On the one hand, the proposals reproduced in documents DC/49 Rev., DC/69 and DC/70 all referred to "appropriate legal remedies;" on the other hand, the proposal reproduced in document DC/79 would tend, if adopted, to convert the Article into one about "effective implementation" of the Convention. His Delegation would prefer that the Article should not relate to effective implementation. If a State ratified the Convention then it could be assumed that it would provide in its law for the effective implementation of the Convention.

957.2 Mr. Parry then said that he had already explained why the proposals reproduced in documents DC/49 Rev. and DC/69 were insufficient (see paragraphs 663 and 681.2). The fact was that the beneficiaries of the Convention were not merely nationals but also residents and companies having their headquarters in a member State. His Delegation was therefore of the opinion that the best solution in respect of Article 30(1)(a) would be the adoption of the proposal reproduced in document DC/70, which simply stated: "provide for appropriate legal remedies for the effective defence of the rights provided for in this Convention."

958. Dr. D. BÖRINGER (Federal Republic of Germany) said that his Delegation considered Article 3(1), which provided for national treatment, to be the basic rule.

Protection was only meaningful when it was accompanied by the necessary legal remedies. Article 30(1)(a) was a complement to that Article. When Article 30(1)(a) was first drafted the sole intention had been to guarantee such legal remedies to the nationals of other member States. His Delegation would therefore prefer the present wording to be maintained. It believed that the same wish had been expressed by the Delegation of France (see paragraph 674). Alternatively, it could accept the proposal submitted by the President of the Conference and reproduced in document DC/70, although it believed that the proposal went beyond what had been intended originally and that there was no compulsion to do that.

959.1 Dr. A. BOGSCH (Secretary-General of the Union) said that, in view of what had just been stated by the Delegation of the Federal Republic of Germany, he would like to explain why he considered the proposal of the President of the Conference to be an improvement. Article 3 provided for national treatment and Article 30(1)(a) was indeed just an appendix to that Article. It emphasized that there were not only rights but also remedies. In his view, those remedies could only be applied where they applied also to nationals of the country. That was why it was a national treatment. He believed that it was much safer to take that as a basis than to have an express reference to nationals of the other country, thereby giving the impression that there were two sets of remedies: one set for nationals and the other for foreigners. Although the latter had to be effective it could be different.

959.2 Dr. Bogsch said that the second point was that it was not only the nationals who needed to have remedies available to them but also the foreign domiciliaries and the foreign companies, as had been rightly indicated by the Delegation of the United Kingdom. They were not covered by the existing text. He therefore considered the less specific wording proposed in document DC/70 to be superior to the existing text.

960. Mr. J. BUSTARRET (France) said that when the Convention had been drafted the eventual content of the various national legislations had been unknown and

it had been thought to be not without usefulness to insist on the provisions contained in Article 30(1). In his view it was not absolutely essential to preserve Article 30(1)(a). He nevertheless wished to say something further on the matter. In the proposal submitted by the Delegation of South Africa the provision was transferred to paragraphs (1) and (2) of Article 3. In reality the question of remedies for third parties involved not only those to whom a right was granted but also those who might contest that right. Perhaps that point had been somewhat lost from sight. One had to bear in mind that the Convention not only accorded rights; it also created obligations and possible remedies.

961. Dr. A. BOGSCH (Secretary-General of the Union) noted that neither the existing text nor any of the proposals covered the last point mentioned by the Delegation of France. The provision contained in Article 30(1)(a) was quite unnecessary but it seemed to be the general wish that it should be preserved to avoid such misunderstandings as might arise if it were deleted. In his opinion, the best solution was offered by the proposal submitted by the President of the Conference.

962. Mr. M. TOURKMANI (Morocco) believed that Article 30(1)(a) could be preserved just by inserting the words "the same" before "legal remedies" and by specifying more clearly who benefitted from those remedies.

963. Dr. A. BOGSCH (Secretary-General of the Union) said that the amendment proposed by the Delegation of Morocco would simply restate the national treatment principle. He believed that the only justification for Article 30(1)(a) was that it required the remedies provided by a State to be "effective."

964. Mr. H. J. WINTER (United States of America) said that his Delegation had noted earlier that it saw no real reason, in view of Article 3, for having Article 30(1)(a) (see paragraphs 664 and 673). If something was to be included in the revised text then his Delegation would certainly prefer the wording proposed by the President of the Conference.

965. Mr. M. JACOBSSON (Sweden) said that there was a certain merit in not changing the existing state of affairs. His Delegation endorsed what had been said by the Secretary-General and supported the proposal submitted by the President of the Conference.

966. Mr. J. F. VAN WYK (South Africa) said that, in view of what had been stated by the other delegations and to assist the meeting, his Delegation withdrew its proposal, as reproduced in document DC/79, and supported the proposal submitted by the President of the Conference.

967. Mr. W. VAN SOEST (Netherlands) said that his Delegation supported the proposal submitted by the President of the Conference.

968. By 8 votes in favor to 1 against, with one abstention, it was decided to adopt as Article 30(1)(a) the proposal submitted by the President of the Conference and reproduced in document DC/70.

Article 32B: Relations Between States Bound by Different Texts (Continued from 733)

969. The PRESIDENT reopened the discussion on Article 32B(2).

970. Mr. R. DUYVENDAK (Netherlands) announced the withdrawal by his Delegation of its proposal for amendment as appearing in document DC/55.

971. It was decided to adopt the proposal submitted by the Delegation of the Federal Republic of Germany and reproduced in document DC/42 in place of the first part of Article 32B(2), ending in the Draft at the semicolon.

972. Subject to the decision referred to in the preceding paragraph, and subject to the decision regarding consequential changes referred to in paragraph 721 above, it was decided to adopt Article 32B(2) as appearing in the Draft.

Article 34A: Exceptional Rules for Protection Under Two Forms (Continued from §47)

973. The PRESIDENT reopened the discussion on Article 34A(2) and invited the Delegation of the United States of America to clarify its proposal, as appearing in document DC/32, to replace the word "novelty" by the word "patentability."

974. Mr. S. D. SCHLOSSER (United States of America) said that the purpose of his Delegation's proposal was to provide for the theoretical requirement under his country's Patent Laws to examine plant varieties for non-obviousness. It was not easy to explain the potential or actual meaning of non-obviousness. There had been very little litigation on the matter over the course of the years. The most recent court decision dealing with the matter had simply ruled that non-obviousness was a very nice requirement of the Patent Laws. Its application, if any, to plant patents was uncertain, but, being a formal requirement, it had to be dealt with in some way. If the requirement had to be met that would mean that the United States of America had, in some way, to evaluate the amount or degree of distinctness present in a new variety submitted for patenting, distinctness, of course being a requirement of Section 161 of its Patent Laws. That would be tantamount to judging new varieties for important differences, as required by Article 6(1)(a) of the Convention. Mr. Schlosser said that he wished to stress that his Delegation had nothing in mind beyond the practice examined by the Committee of Experts on the Interpretation and Revision of the Convention and approved of in many discussions and during a visit to the United States of America.

975. Mr. M. JACOBSSON (Sweden) expressed his concern that the use of the word "patentability" would cover not only the criterion of "novelty" but also the criteria of "homogeneity" and "stability."

976. Mr. S. D. SCHLOSSER (United States of America) said that he did not see homogeneity or stability as presenting a problem since they were taken for granted where vegetatively propagated plants were concerned and the Plant Patent Law was only applicable to such plants.

977. Mr. J. BUSTARRET (France) said that he accepted that the provisions of Article 6 in respect of homogeneity and stability were automatically satisfied in that only vegetatively propagated plants were eligible for patenting in the United States of America. He was, nevertheless, still disturbed by the inclusion in the text proposed in document DC/32 of the words "notwithstanding the provisions of Article 6." He had stated earlier that he could not accept the substitution of "patentability criteria" for the whole of Article 6 (see paragraph 844). He had noted that the Delegation of the United States of America had confirmed that the substitution related only to the criterion of "novelty." If one wished to keep the word "patentability" he would prefer the reference to Article 6 to be restricted to that or those parts of it that were being substituted.

978. Dr. A. BOGSCH (Secretary-General of the Union) suggested that the genuine difficulty raised by the Delegation of France might be overcome by saying: "notwithstanding the relevant provisions of Articles 6 and 8." He noted that the provisions of Article 6(2), for example, were in no way affected by the proposal submitted by the Delegation of the United States of America.

979. Dr. D. BÖRINGER (Federal Republic of Germany) said that in principle his Delegation shared the hesitation expressed by the Delegation of France. He would appreciate further clarification of the difference between "patentability criteria" and "novelty criteria."

980. Dr. A. BOGSCH (Secretary-General of the Union) said that there were two almost universal criteria of patentability, namely that the invention had to be new or novel and that there had to be an inventive step or non-obviousness. He believed that the Delegation of the United States of America was concerned that the word "novelty" stricto sensu did not include the concept of the inventive step or non-obviousness, whereas largo sensu it did of course include it.

981. Dr. D. BÖRINGER (Federal Republic of Germany) noted that Article 6(1)(a) of the Convention stated that: "a variety must be clearly distinguishable by one or more important characteristics ... ." The meaning of the word "important" had not been discussed by the Conference but within the Union it had been decided that for practical purposes it referred to characteristics suited to the purpose of establishing distinctness. He wished to know whether, under the concept of "patentability criteria," and in view of the requirement of non-obviousness, only functionally important characteristics could be used in examining a variety.

982. Mr. S. D. SCHLOSSER (United States of America) said that in his country the characteristics used in examining a variety were not limited to functional ones.

983. Mr. J. BUSTARRET (France) said that he still thought, having listened to the discussion, that it was a pity to use the general expression "notwithstanding the provisions of Article 6." He would prefer the reference to be limited to certain provisions of Article 6. In view of the fact that the scope of application of Article 34A(1) had been extended (see paragraphs 828 to 836) the derogations to be provided for in Article 34A(2) needed rather careful consideration.

984. Dr. D. BÖRINGER (Federal Republic of Germany) wondered whether it might help to resolve the concern felt by the Delegation of France if the expression "novelty criteria" were retained and if reference were made to "Article 6(1)(a)" rather than just to "Article 6."

985. Mr. S. D. SCHLOSSER (United States of America) said that he did not think that the wording proposed by the Delegation of the Federal Republic of Germany would resolve the problem. The word "novelty" was insufficient to encompass the concept that his Delegation was trying to take care of, namely that of non-obviousness. His Delegation was not attempting to add a substantive requirement or to make it more difficult to obtain a plant patent than it was in other countries. The purpose of its proposal was simply to take care of a formality in its country's Patent Laws.

986. The PRESIDENT said that it seemed to him that some matters dealt with in Article 6(1)(b) also needed to be covered by the derogation to be included in Article 34A(2). For instance, the very last sentence of Article 6(1)(b) stated that: "The fact that the variety has become a matter of common knowledge in ways other than through offering for sale or marketing shall also not affect the right of the breeder to protection." He understood that under the Patent Laws of the United States of America publication was prejudicial to novelty.

987. Dr. D. BÖRINGER (Federal Republic of Germany) said that he wished to withdraw the proposal he had made (see paragraph 984). His Delegation proposed, however, that an analysis be made of Article 6 to determine which parts had to be mentioned in the derogation provided for in Article 34A(2).

988. Mr. S. D. SCHLOSSER (United States of America) said that his Delegation would appreciate time to consider the various points made in the discussion.

989. It was decided to defer further consideration of Article 34A(2) until the following meeting. *(Continued at 993)*

THIRTEENTH MEETING

Tuesday, October 17, 1978,

morning

Article 23A: Legal Status

990. Mr. W. GFELLER (Switzerland) said that he would like to make a short statement regarding the conclusion by the Union of a headquarters agreement with the Swiss Confederation, as provided for in Article 23A(3). When that matter had been discussed he had unfortunately found himself without instructions from the Federal Political Department (see paragraph 933). Having consulted with that Department he was pleased to be able to inform the Conference that the competent authority in that Department saw no difficulties in concluding such an agreement.

991. The PRESIDENT thanked Mr. Gfeller for his statement and asked that it be recorded in the minutes.

992. Dr. A. BOGSCH (Secretary-General of the Union) said that he also wished to express his sincere thanks to the Government of the Swiss Confederation.

Article 34A: Exceptional Rules for Protection Under Two Forms (Continued from 989)

993. The PRESIDENT reopened the discussion on Article 34A(2) and invited the Delegation of the United States of America to comment on the previous day's discussion of its proposed amendment as appearing in document DC/32.

994. Mr. S. D. SCHLOSSER (United States of America) said that his Delegation, having considered again all the factors involved in its proposal, wished to retain it, with one qualification. In his Delegation's opinion "patentability criteria" was the only expression that could be safely used when talking about the application of patent laws to the protection of plant varieties. It understood, however, that the use of that expression could be taken as an untoward use of words. Accordingly, his Delegation wished to pursue its proposal by specifying that the reference to "the provisions of Article 6" related only to "Article 6(1)(a) and (b)," thereby limiting the applicability of the patentability concept to those two portions of the Article.

995. Dr. D. BÖRINGER (Federal Republic of Germany) said that his Delegation believed that the revised proposal of the Delegation of the United States of America overcame the difficulties raised in the earlier discussion. It therefore wished to support that revised proposal.

996. Mr. J. BUSTARRET (France) said that his Delegation also found that the revised proposal of the Delegation of the United States of America met the concerns that it had expressed the previous day. Consequently, his Delegation also supported that revised proposal.

997. The PRESIDENT ruled that the oral amendment to document DC/32 proposed by the Delegation of the United States of America was such that a further written proposal was unnecessary.

998. Subject to the oral amendment recorded in paragraph 994 above, Article 34A(2) was adopted as appearing in document DC/32.

Article 38: Settlement of Disputes (Continued from 768)

999. The PRESIDENT reopened the discussion on Article 38 and invited the Delegation of the United Kingdom to introduce its proposal for amendment, as reproduced in document DC/74.

1000. Mr. P. W. MURPHY (United Kingdom) regretted that Mr. Parry was not present to introduce the proposal. It was based on the proposal submitted earlier by the Delegation of the Netherlands and reproduced in document DC/57. In essence it retained paragraphs (2)(a), (b) and (c) of that proposal, whilst deleting paragraphs (2)(d), (e) and (f) thereof.

1001. Mr. H. J. WINTER (United States of America) noted that his Delegation had expressed serious concern about the proposal of the Delegation of the Netherlands when it had first been introduced (see paragraph 765). That proposal, if adopted, would make it very difficult for the United States of America to adhere to the Convention. The text of Article 38 in the Draft had been considered very carefully by the Department of State and that text was acceptable to the United States of America. Both the proposal submitted by the Delegation of the Netherlands and that submitted by the Delegation of the United Kingdom spelt out in detail the arbitration procedure to be followed. For Mr. Winter that was all the more unusual since, in the Draft and in both the proposals in question, the decision to refer a dispute to arbitration was to be a voluntary one "at the request of all the parties concerned." His Delegation therefore entreated the Delegation of the Netherlands and the Delegation of the United Kingdom to revert to the basic proposal in respect of Article 38, as appearing in the Draft.

1002. Mr. K. A. FIKKERT (Netherlands) said that the reason for including in his Delegation's proposal details of the procedure to be followed was that it wished to prevent disputes from becoming blocked because of disagreement between the parties regarding rules of procedure. His Delegation wondered whether it was really so difficult, once one had accepted that a dispute should be referred to arbitration "at the request of all the parties concerned," to further accept the inclusion in Article 38 of some simple rules of procedure. It felt that some rules had to be included and it was quite willing to give consideration to the simplified proposal submitted by the Delegation of the United Kingdom.

1003. Mr. M. JACOBSSON (Sweden) said that his Delegation tended to share the concern expressed by the Delegation of the United States of America. It wondered

whether the inclusion of detailed rules might not make it more difficult to achieve an agreement between the parties to submit a dispute to arbitration. Mr. Jacobsson said that, for the time being, he did not wish to comment at length on the proposals reproduced in documents DC/57 and DC/74. He did just wish to note, however, that his Delegation doubted the wisdom of the provision that, as a last resort, the President of the Council could be asked to designate one or more of the members of the arbitration tribunal. It was also somewhat hesitant about paragraph (2)(d) of the proposal of the Delegation of the Netherlands.

1004. Mr. B. LACLAVIERE (France) said that he had to state that it would be impossible for France to sign a text containing the provisions proposed in the Draft. His Delegation therefore greatly favored the procedure proposed by the Delegation of the Netherlands and amended by the Delegation of the United Kingdom. As he had said previously the Delegation of France would withdraw its own proposal for amendment, as appearing in document DC/61, so long as that other proposal was adopted (see paragraph 760). Should it not prove possible to reach agreement it saw no inconvenience in deleting Article 38 in its entirety.

1005. Dr. A. BOGSCH (Secretary-General of the Union) said that, on the basis of his experience in other conventions dealing with private property, he considered that it would be most desirable either to completely suppress Article 38 or to limit it to optional provisions. First, it was most unlikely that a State would litigate with another State on the basis that a new plant variety had been refused protection, for example, as a result of a misinterpretation of the Convention. It was unlikely because the procedure was so expensive and so complicated. Secondly, it was a fact of international life that several States, as a matter of policy, would not sign treaties containing compulsory provisions on the settlement of disputes before a compulsory jurisdiction.

1006. Mr. H. J. WINTER (United States of America) said that he did not intend to repeat the difficulties posed for his country by the proposals under discussion. As a compromise, his Delegation could certainly accept the suggestion made by the Delegation of France that Article 38 might be deleted.

1007. Mr. B. LACLAVIERE (France) said that his Delegation wished to formally propose that Article 38 be deleted.

1008. The PRESIDENT, noting that Rule 39 of the Rules of Procedure provided that: "Proposals for amendments relating to the same text shall be put to a vote in the order in which their substance is removed from the said text, the furthest removed being put to a vote first and the least removed being put to a vote last," asked whether there was support for the proposal of the Delegation of France that Article 38 be deleted.

1009. Mr. M. JACOBSSON (Sweden) said that his Delegation seconded that proposal of the Delegation of France.

1010. By 6 votes in favor to 1 against, with two abstentions, it was decided to omit Article 38.

Article 13: Denomination of Varieties of Plants (Continued from 497)
Article 36: Transitional Rules Concerning the Relationship Between Variety Denominations and Trade Marks (Continued from 555)
Article 36A: Exceptional Rules for the Use of Denominations Consisting Solely of Figures (Continued from 555)

1011. The PRESIDENT reopened the discussion on Article 13 and invited the Chairman of the Working Group on Article 13 to introduce its report.

1012.1 Mr. W. GFELLER (Chairman of the Working Group on Article 13) said that the Working Group had met on eight occasions and, in accordance with the mandate given by the Conference meeting in Plenary, had prepared a proposed new text for Article 13, which it recommended the Conference to adopt. It also recommended the Conference to adopt four declarations concerning respectively the interpretation of paragraphs (1), (5), (7) and (8) of that text and to delete Articles 36 and 36A from the Draft.

1012.2 Mr. Gfeller then said that the Report of the Working Group, circulated the previous day as document DC/78, also referred in parts I and II to formal matters. The names of the States represented and of the experts invited to assist the Working Group were listed there.

1012.3 Mr. Gfeller asked the Conference to particularly note that the new text recommended by the Working Group was in the English language. It was reproduced as the Annex to the English version of document DC/78. That text was the result of long discussions and was a synthesis of a variety of opinions. He therefore stressed to the Conference that even the smallest change might endanger the whole proposal. As Chairman of the Working Group he wished to express his warmest appreciation to all who had participated, both for their lively and equitable approach and for their extraordinary willingness to find the compromises which had enabled the proposal to be formulated.

1012.4 Mr. Gfeller said that he wished to refer in particular to paragraphs (1) and (2) of the proposal. Paragraph (1) recommended member States to consider the variety denomination to be a generic designation and to ensure that the free use of the variety denomination was not hampered in so far as there were no prior rights of third parties in the designation so registered. That formulation had made it possible to avoid the controversial questions raised by the proposals contained in paragraphs (4)(a) and (8)(b) of document DC/4. The remaining seven paragraphs of the text recommended by the Working Group largely followed the proposals found in the Draft, in document DC/4, and, as far as paragraph (8) was concerned, in document DC/12. Paragraph (2) provided a limited opening for variety denominations consisting solely of figures. Consequently the derogation proposed in the Draft in Article 36A would be unnecessary, always assuming that the Annex to document DC/78 was adopted. The Working Group had also been of the opinion that Article 36 in the Draft should be deleted.

1012.5 Mr. Gfeller concluded by saying that he was sure that those who had participated in the Working Group would be willing to answer any questions that the Conference might have.

1013. Mr. W. GFELLER (Switzerland) said that, as Head of the Delegation of Switzerland he would like to propose the adoption of Article 13 in the English language version reproduced in the Annex to the English version of document DC/78, and of the other recommendations recorded in that document.

1014. The PRESIDENT thanked Mr. Gfeller and the Working Group for its achievements and asked whether there was support for the proposal of the Delegation of Switzerland.

1015. Dr. D. BÖRINGER (Federal Republic of Germany) said that his Delegation seconded the proposal of the Delegation of Switzerland.

1016. Mr. S. D. SCHLOSSER (United States of America) said that his Delegation also supported the proposal of the Delegation of Switzerland.

1017. By 10 votes in favor to none against, with no abstentions, it was decided to adopt Article 13 as appearing in the Annex to the English version of document DC/78, to adopt the interpretations in respect of paragraphs (1), (5), (7) and (8) as appearing in page 2 of that document, and to delete Articles 36 and 36A from the Draft.

1018. Mr. B. LACLAVIERE (Chairman of the Drafting Committee) said that in some instances the wording of Article 13 in the Annex to the French version of document DC/78 did not reflect accurately the English text just adopted. In this particular case it was the English text that prevailed and the Drafting Committee would therefore align the French text of Article 13 on that text.

Article 5: *Rights Protected; Scope of Protection* (*Continued from 918*)

1019. The PRESIDENT noted that Article 5 was the only Article that remained to be adopted. He therefore proposed that the meeting be adjourned to allow the Working Group on Article 5 to begin its work.

1020. The proposal of the President referred to in the preceding paragraph was adopted.

(*Adjournment*)

FOURTEENTH MEETING

Thursday, October 19, 1978,

afternoon

1021. The PRESIDENT advised the Conference that the Working Group on Article 5, under the chairmanship of Mr. R. DUYVENDAK (Netherlands), who was supported by Mr. R. Derveaux (Belgium) and Mr. G. Curotti (Italy) as Vice-Chairmen, had completed its discussions. He invited Mr. Duyvendak to introduce the Report of the Working Group on Article 5, as appearing in document DC/82.

1022.1 Mr. R. DUYVENDAK (Chairman of the Working Group on Article 5) said that it was his pleasure to introduce the report reproduced in document DC/82. It contained a resume of the outcome of the discussions held on October 17, 18 and 19. The recommendations and decisions of the Working Group were recorded in paragraphs 8, 9, 12, 13 and 15 of and in Annexes I, II and IV to the report. In other paragraphs of part III of the document the Conference would find a record of a number of interpretations and understandings arrived at by the Working Group.

1022.2 Mr. Duyvendak then expressed the wish that the good contacts established and the discussions held in the Working Group would continue and that it might eventually prove possible to agree on a more elegant expression than "the reproductive or vegetative propagating material, as such."

1022.3 Mr. Duyvendak concluded by thanking the Vice-Chairmen, Mr. Derveaux and Mr. Curotti, for the support they had given him.

1023. The PRESIDENT thanked Mr. Duyvendak for his report and, noting that there were no objections, declared it to be adopted.

1024. By 6 votes in favor to none against, with four abstentions, it was decided that the Drafting Committee should take into consideration Annex I to document DC/82.

1025. The Recommendation on Article 5, reproduced in Annex IV to document DC/82 was adopted.

1026. Subject to the decision recorded in paragraph 1024 above it was decided to adopt Article 5 as appearing in the Draft.

1027. The PRESIDENT, noting that the first reading of the revised text of the Convention had been completed, proposed that the meeting be adjourned to allow the members of the Steering Committee to discuss with the Secretariat the arrangements for the final reading and signature of the text.

1028. The proposal of the President that the meeting be adjourned, as mentioned in the preceding paragraph, was adopted.

(Adjournment)

1029. The PRESIDENT informed the Conference that the final reading of the text, as drafted by the Drafting Committee, would take place on Saturday, October 21. The final adoption of the revised text would take place at noon on Monday, October 23, and the text would be laid open for signature immediately thereafter. The PRESIDENT concluded by announcing that there would not be a final act of the Conference for adoption by delegates.

1030. The meeting was adjourned until Saturday, October 21.

(Adjournment)

FIFTEENTH MEETING

Saturday, October 21, 1978,

morning

Adoption of the Report of the Credentials Committee

1031. The PRESIDENT invited Mr. A. Parry (United Kingdom), as a Vice-Chairman of the Credentials Committee, to present the Report of that Committee in the absence of its Chairman, Dr. H. Graeve (Federal Republic of Germany).

1032.1 Mr. A. PARRY (Vice Chairman of the Credentials Committee) said that he did not propose to read to the Conference the entire Report. It was contained in document DC/83 which had been circulated to delegates that morning. Paragraphs 5 to 9 of that document set out the details of the considerations of the Credentials Committee. The credentials of the Observer Delegation of Canada had been presented after the Report had been prepared. A reference to Canada should therefore be inserted in paragraph 7(a) of document DC/83.

1032.2 Mr. Parry then referred to paragraph 10 of the Report where it was recorded that: "The Committee expressed the wish that the Secretariat should bring Rules 6 ("Credentials and Full Powers") and 10 ("Provisional Participation") of the Rules of Procedure to the attention of delegations not having presented credentials."

1032.3 Mr. Parry concluded by referring to paragraph 11 of the Report. He noted that the mandate given by the Committee to its Chairman "to examine and to report to the Conference upon any further credentials and full powers which

might be presented by delegations after the close of its meeting" had been transmitted to him by Dr. Graeve, Chairman of the Committee, who had had to return to Bonn the previous evening.

1033. The PRESIDENT thanked Mr. Parry for presenting the Report of the Credentials Committee. He noted that there were no remarks thereon.

1034. Subject to the addition of a reference to Canada in paragraph 7(a), as referred to in paragraph 1032.1 above, the Report of the Credentials Committee was adopted as appearing in document DC/83.

Adoption of a Revised Text of the Convention Submitted by the Drafting Committee

1035. The PRESIDENT said that he wished, before inviting Mr. Laclavière (France), as Chairman of the Drafting Committee, to present document DC/84 containing the Draft Convention prepared by the Drafting Committee, to thank that Committee and the Secretariat for their intensive efforts.

1036.1 Mr. B. LACLAVIERE (Chairman of the Drafting Committee) said that the Drafting Committee had thoroughly examined the text of the Convention as adopted by the Conference meeting in Plenary. The Committee had limited itself to endeavoring to put that text into correct language, the principles thereof having been settled. It had done its utmost to avoid the introduction of any substantive changes; that would have exceeded its purpose. It had also thoroughly examined the titles of the Articles. It had done its utmost to ensure the closest possible concordance between the French, English and German versions of the text. Even though the text provided that the French text prevailed in case of any discrepancy among the various texts, the Committee had done its utmost, by aligning the English and German texts as closely as possible on the French text, to ensure that there were no discrepancies. The Secretariat had reproduced in document DC/84 the results of the Committee's work.

1036.2 Mr. Laclavière concluded by thanking the members of the Drafting Committee for the patience that they had shown. He thanked the Secretary-General of the Union for his assistance during the Committee's discussions, especially in matters of treaty law. Finally, he thanked the Secretariat for the diligence it had shown and for the preparation of document DC/84 for examination by the Conference.

1037. The PRESIDENT thanked Mr. Laclavière and proposed that the meeting be adjourned for one hour to allow delegates an opportunity to study the text submitted by the Drafting Committee, as reproduced in document DC/84.

1038. The proposal of the President that the meeting be adjourned, as mentioned in the preceding paragraph, was adopted.

(Adjournment)

1039. The PRESIDENT opened the discussion on the revised text of the Convention as submitted by the Drafting Committee and reproduced in document DC/84. (hereinafter referred to as "the text of the Drafting Committee")

1040. Mr. K. A. FIKKERT (Netherlands) said that his Delegation was concerned to establish whether the word "revised" in the Title of the text of the Drafting Committee was correct. The Preamble to that text, for instance, referred to the Convention of 1961, as "amended by the Additional Act of 1972." The same reference occurred in some Articles; Article 34(1) (*Article 32B(1) in the Draft*), for instance, included the words "the Convention of 1961 as amended by the Additional Act of 1972."

1041. Dr. A. BOGSCH (Secretary-General of the Union) noted that the word "amending" was included in the title of the Additional Act of 1972. He also noted that the title of Article 27, both in the Convention and in the text of the Drafting Committee, was "Revision of the Convention." In his opinion, both terms were valid but the latter was considered to be the better.

1042. Mr. B. LACLAVIERE (Chairman of the Drafting Committee) noted that the Drafting Committee, in which the Netherlands had been represented, having spent a considerable time on the matter under discussion, had unanimously adopted the word "revised."

1043. The Title of the Convention was adopted as proposed in the text of the Drafting Committee.

1044. It was decided that the adoption of an Article would imply the adoption of the title of that Article for the purposes of the adoption of the Table of Contents.

1045. Mr. P. W. MURPHY (United Kingdom) said that his Delegation wondered whether the phrase "has gained general acceptance," which appeared in the second *"Considering"* in the Preamble, accorded with "a pris une grande importance" in the French text.

1046. Mr. B. LACLAVIERE (Chairman of the Drafting Committee) said that the comment made by the Delegation of the United Kingdom was pertinent. He believed the English text to be better but, in the first place, the Drafting Committee had been unable to find a better translation and, in the second place, he thought that it would not be too serious if the Preamble allowed of a slight difference of interpretation in this one instance.

1047. The Preamble was adopted as proposed in the text of the Drafting Committee.

1048. Articles 1 to 4 (corresponding to the Articles bearing the same numbers in the Draft) *were adopted as proposed in the text of the Drafting Committee, without discussion.*

1049. Mr. H. KUNHARDT (Federal Republic of Germany) said that his Delegation had no comments to make on the wording of Article 5, but it did wish to question the use of small Roman numerals in paragraph (1) of that Article. It appeared that the numbering system followed in the text of the Drafting Committee was that arabic numerals indicated paragraphs within an Article, that small letters of the Roman alphabet indicated subparagraphs and that small Roman numerals indicated subdivisions thereof. Article 4 provided a good example of that system. In conformity with that system, and as shown in Article 26(1), the subdivisions of Article 5(1) should be indicated not by small Roman numerals but by small letters of the Roman alphabet.

1050. Mr. J. SPANRING (Yugoslavia) drew the attention of the Conference to the standard recommended by the International Organization for Standardization for numbering in written documents. That standard required the use of just arabic numerals and decimal points.

1051. Mr. B. LACLAVIERE (Chairman of the Drafting Committee) thought that the observation made by the Delegation of Yugoslavia was very relevant, but the Conference had decided that, as a general rule the existing text of the Convention should be changed as little as possible. If that decision had not been made then other changes in presentation that had been sought would have been accepted. Consequently, he believed that it would be better not to revise the numbering system for the time being.

1052. Mr. R. DUYVENDAK (Chairman of the Working Group on Article 5) said that the proposal of the Delegation of the Federal Republic of Germany would create a text for Article 5(1) that went beyond the intentions of the Working Group on Article 5. The use of small letters of the Roman alphabet would be wrong since it indicated subparagraphs. He would propose that the small Roman numerals in the text of the Drafting Committee be replaced by dashes.

1053. Mr. S. D. SCHLOSSER (United States of America) said that his Delegation found Article 5(1) as proposed in the text of the Drafting Committee to be completely acceptable. The three items in that Article were perfectly clearly designated.

1054. Mr. R. DUYVENDAK (Chairman of the Working Group on Article 5) said that what was in question was not a matter of substance but of having a systematic way of numbering paragraphs, subparagraphs and so on. He noted, by way of an example, the use of small letters of the Roman alphabet in Article 35(2) as proposed in the text of the Drafting Committee.

1055. Dr. A. BOGSCH (Secretary-General of the Union) said that there was no fixed numbering system in the text of the Drafting Committee. Equally, there was no fixed system in the existing text of the Convention. It was usual when drafting a treaty to employ small letters of the Roman alphabet only to indicate subparagraphs and to employ small Roman numerals only to indicate enumerations. In the text under consideration, however, small letters of the Roman alphabet were employed for both purposes and small Roman numerals were employed for further subdivisions. Dr. Bogsch thought that the best solution would be to replace each small Roman numeral in Article 5(1) by a single dash, as proposed by the Chairman of the Working Group on Article 5.

1056. Mr. H. KUNHARDT (Federal Republic of Germany) said that his Delegation seconded the proposal of the Chairman of the Working Group on Article 5.

1057. The PRESIDENT said that the way in which Article 5(1) was now drafted could give the impression that the prior authorization of the breeder was required for each of the three activities mentioned. It was, however, to be understood that the producer could offer for sale and sell the material produced, and that the breeder could not require royalties to be paid more than once.

1058. It was decided to replace each small Roman numeral in Article 5(1) by a single dash.

1059. Subject to the decision recorded in the preceding paragraph, Article 5 (corresponding to the Article bearing the same number in the Draft) *was adopted as proposed in the text of the Drafting Committee.*

1060. Articles 6 to 12 (corresponding to the Articles bearing the same numbers in the Draft) *were adopted as proposed in the text of the Drafting Committee, without discussion.*

1061. Mr. B. LACLAVIERE (Chairman of the Drafting Committee) said that he had noticed that the wording of the French text of Article 13(8) could give rise to some confusion. In the expression "ou une indication similaire à la dénomination variétale enregistrée" it appeared that the "indication" was "similar" to the "denomination." He proposed to overcome the problem, if the Conference agreed, simply by putting a comma after the word "similaire."

1062. It was decided to insert a comma in the French text of Article 13(8) between the words "similaire" and "à."

1063. Mr. J. SPANRING (Yugoslavia) suggested that, in view of Article 29 of the International Code of Nomenclature of Cultivated Plants, 1969, the abbreviation for the word "cultivar" (cv.) should be inserted at the end of the first sentence of Article 13(1).

1064. The PRESIDENT noted that there was no support for the suggestion made by the Delegation of Yugoslavia.

1065. Mr. H. J. WINTER (United States of America) said that his Delegation understood that the Conference, in adopting Article 13 as proposed in the text of the Drafting Committee, in effect confirmed its earlier acceptance of the interpretations set forth in the Report of the Working Group on Article 13. (See paragraph 1017)

1066. Subject to the decision recorded in paragraph 1062 above, Article 13 (corresponding to the Article bearing the same number in the Draft) *was adopted as proposed in the text of the Drafting Committee.*

1067. Articles 14 to 20 (corresponding to the Articles bearing the same numbers in the Draft) *were adopted as proposed in the text of the Drafting Committee, without discussion.*

1068. Mr. B. LACLAVIERE (Chairman of the Drafting Committee) suggested that it would be more logical if the provisions contained in Article 21(g) were placed immediately after Article 21(a). He therefore proposed that such change be made.

1069. Mr. W. GFELLER (Switzerland) said that his Delegation seconded the proposal of the Chairman of the Drafting Committee.

1070. It was decided that Article 21(g) should become Article 21(b) and that Article 21(b) to (f) inclusive should be renumbered accordingly.

1071. Subject to the decision recorded in the preceding paragraph, Article 21 (corresponding to the Article bearing the same number in the Draft) *was adopted as proposed in the text of the Drafting Committee.*

1072. It was decided, as a consequence of the decision recorded in paragraph 1070 above, to replace the reference in Article 22 to Article 21(d) by a reference to Article 21(e).

1073. Subject to the decision recorded in the preceding paragraph, Article 22 (corresponding to the Article bearing the same number in the Draft) *was adopted as proposed in the text of the Drafting Committee, without discussion.*

1074. It was decided, as a consequence of the decision recorded in paragraph 1070 above, to replace the reference in Article 23(3) to Article 21(g) by a reference to Article 21(b).

1075. Subject to the decision recorded in the preceding paragraph, Article 23 (corresponding to the Article bearing the same number in the Draft) *was adopted as proposed in the text of the Drafting Committee, without discussion.*

1076. Articles 24 and 25 (corresponding to the Articles bearing the numbers 23A and 24 in the Draft) *were adopted as proposed in the text of the Drafting Committee, without discussion.*

1077. It was decided, by analogy with the decision recorded in paragraph 1058 above, to replace each small letter of the Roman alphabet in Article 26(1) by a single dash.

1078. Subject to the decision recorded in the preceding paragraph, Article 26 (corresponding to the Article bearing the same number in the Draft) *was adopted as proposed in the text of the Drafting Committee, without discussion.*

1079. Mr. K. A. FIKKERT (Netherlands) said that his Delegation wished to know whether the effect of Article 27(1) would be that even a slight amendment of one Article would require the signing of a totally new Act. It noted that Article 27(1) of the existing text of the Convention said: "This Convention shall be reviewed ... ," whereas the text of the Drafting Committee said: "This Convention may be revised ... ." It wished to be sure that the possibility of amending the Convention by means of an Additional Act, as had been done in 1972, remained open.

1080. The PRESIDENT thought that the Delegation of the Netherlands could rest assured that it would still be possible to amend the Convention by means of an Additional Act.

1081. Dr. A. BOGSCH (Secretary-General of the Union) said that he agreed with the interpretation given by the President of the Conference.

1082. Article 27 (corresponding to the Article bearing the same number in the Draft) *was adopted as proposed in the text of the Drafting Committee.*

1083. Articles 28 and 29 (corresponding to the Articles bearing the same numbers in the Draft) *were adopted as proposed in the text of the Drafting Committee, without discussion.*

1084. Mr. J. F. VAN WYK (South Africa) wondered whether the words "of the Union" should be inserted after the word "State" in the second sentence of Article 30(1).

1085. Dr. A. BOGSCH (Secretary-General of the Union) suggested that the best solution, which would also bring the English text closer to the French text, would be to replace the full stop at the end of the first sentence of Article 30(1) by a semicolon and to continue: "in particular, it shall:".

1086. It was decided to amend Article 30(1) in the way suggested by the Secretary-General of the Union and referred to in the preceding paragraph.

1087. Subject to the decision recorded in the preceding paragraph, Article 30, (corresponding to the Article bearing the same number in the Draft) *was adopted as proposed in the text of the Drafting Committee.*

1088. Articles 31 to 36 (corresponding to the Articles bearing the numbers 31, 32, 32A, 32B, 33 and 34 in the Draft) *were adopted as proposed in the text of the Drafting Committee, without discussion.*

1089. Mr. P. W. MURPHY (United Kingdom) said that his Delegation wished the minutes to record that the United Kingdom accepted the final phrase of Article 36(1) as adopted (*corresponding to the Article bearing the number 34(1) in the*

Draft, as amended by the Conference (see paragraphs 749 and 750)), on the basis that the substance of that provision had not been affected. Specifically, the United Kingdom would interpret that provision as relating to those territories for the external relations of which it was for the time being responsible.

1090. Articles 37 to 41 (corresponding to the Articles bearing the numbers 34A, 35, 37, 39 and 40 in the Draft) *were adopted as proposed in the text of the Drafting Committee, without discussion.*

1091. Mr. H. KUNHARDT (Federal Republic of Germany) said that his Delegation wished to question the reference at the end of Article 42(5) *(corresponding to the Article bearing the number 41(5) in the Draft)* to any declaration made under Article 36(3)(a). That Article related not to the making of a declaration but to its taking effect. It was Article 36(1) that related to the making of a declaration.

1092.1 Mr. G. LEDAKIS (Legal Counsel, International Bureau of the World Intellectual Property Organization (WIPO)) regretted that the reference in Article 42(5) to Article 36(3)(a) was erroneous. It should be replaced by a reference to Article 36(1).

1092.2 Mr. Ledakis also noted that the words "any notification received" had been omitted in error from the English text of Article 42(5). Those words should be inserted after the word "accession." Also in the English text of that Article the word "declarations" should be replaced by the word "declaration."

1092.3 Mr. Ledakis concluded by confirming that the final part of Article 42(5) in the English text should read: "... the deposit of instruments of ratification, acceptance, approval and accession, any notification received under Articles 34(2), 36(1) and (2), 37(1) and (3) or 41(2) and any declaration made under Article 36(1)."

1093. It was decided to amend Article 42(5) in the manner indicated by Mr. Ledakis and referred to in paragraph 1092.1 above.

1094. It was further decided to replace the final part of Article 42(5) in the English text by the wording given by Mr. Ledakis and referred to in paragraph 1092.3 above.

1095. Subject to the decisions recorded in the two preceding paragraphs, Article 42 (corresponding to the Article bearing the number 41 in the Draft) *was adopted as proposed in the text of the Drafting Committee.*

Adoption of Recommendations on Articles 4 and 5

1096. The PRESIDENT drew the attention of delegates to documents DC/86 and DC/88 which contained respectively the texts of the Recommendations on Article 4 and Article 5, as edited by the Secretariat on the basis of the Draft Convention, of document DC/76 and of Annex IV to document DC/82. (See paragraphs 248 and 1025) The final adoption of those recommendations would take place on Monday, October 23, immediately after the final adoption of the revised text of the Convention.

General Statements

1097. Mr. W. T. BRADNOCK (Canada) said that when he had made a short statement during the opening meeting of the Diplomatic Conference he had expressed the belief that the amendments proposed for consideration would make it possible for Canada to eventually become a member of the Union. He wished to congratulate the Member Delegations on the understanding shown for the difficulties posed for his country by the original Convention. His Delegation greatly appreciated the compromises made with a view to overcoming those difficulties without destroying the spirit of the Convention or altering anything in the original intention. It fully endorsed the revised text, which seemed likely to be adopted on Monday, October 23, and hoped that, in due course, Canada would sign and ratify the Convention and would play a full part in the Union.

1098. Mr. M. TOURKMANI (Morocco), speaking on behalf of the Delegations of Hungary, Iraq, the Libyan Arab Jamahiriya, Senegal and Yugoslavia, and of his own Delegation, expressed their admiration of and gratitude for the competence, eloquence and objectiveness manifested by the President of the Conference in his conduct of the discussions. They also wished to congratulate him on having reconciled, to the satisfaction of all participants, points of view that had been diametrically opposed. Mr. Tourkmani said that he would like to conclude by presenting a declaration: "The Delegations of Hungary, Iraq, the Libyan Arab Jamahiriya, Senegal, Yugoslavia and Morocco - *conscious* of the importance of increasing agricultural production in a world in which the number of people was continually expanding; *convinced* of the part to be played by new varieties of plants in improving agricultural production; *persuaded* of the necessity for protection of the rights of breeders as an encouragement to the intensification of research into the improvement of plants - *desired* to join the International Union for the Protection of New Varieties of Plants and to maintain close cooperation with it. Nevertheless, they declared that they were not in a position to do so for as long as States acting contrary to human rights and principles, such as South Africa, continued to form part of the Union. They expressed their gratitude to the Council of the Union for having invited them to participate in the Diplomatic Conference."

1099. The PRESIDENT thanked the Delegation of Morocco for its intervention and said that its declaration would be noted in the minutes.

1100. Mr. H. J. WINTER (United States of America) said that as the Head of an Observer Delegation he wished to thank all of the Member Delegations for their fine spirit of cooperation and for their helpfulness in arriving at compromises on some very difficult problems. His Delegation was most pleased with the outcome of the Diplomatic Conference and he could say that, on the basis of the very successful deliberations and the resulting revised text of the Convention, the United States of America intended to sign on Monday, October 23. His Delegation also wished to congratulate the President of the Conference for his guidance and inspired leadership which had enabled the Conference to arrive at a revised text which he hoped and believed would be adopted unanimously. Finally, Mr. Winter expressed his Delegation's gratitude to the Secretariat for its excellent work throughout the Conference.

1101.1 The PRESIDENT thanked the Delegation of the United States of America for its very kind words and said that he wished to acknowledge the very real help he had received from the delegates.

1101.2 The President then said that he wished, before giving the floor to the Delegation of Mexico, to draw the attention of the Conference to a statement submitted by that Delegation and reproduced in document DC/81. The President congratulated the Delegation of Mexico on its statement.

1102. Mrs. O. REYES-RETANA (Mexico) said that her Delegation wished to thank the President of the Conference and the Member Delegations for having invited its country to participate in what had been, in its opinion, a very successful Diplomatic Conference. Also, her Delegation just wished to support the declaration made by the Delegation of Morocco.

1103.1 Dr. D. BÖRINGER (Federal Republic of Germany) said that his Delegation also wished to express its satisfaction with the course taken by the Diplomatic Conference. It believed that the Convention in its new version represented a meaningful compromise among the various points of view of all the States and organizations that had participated. On the basis of what had been achieved in 1961 the new version would now make it possible for all interested States to cooperate internationally in the field of plant variety protection, especially States of the Third World, the active interest of which was very much welcomed. The outcome of the Conference was positive and the Federal Republic of Germany would sign on Monday, October 23.

1103.2 Dr. Böringer then said that the agreeable course taken by the Conference and the high level of debate had been assured by the skilful way in which the President of the Conference had guided the discussions. The expertise and patience of the Chairman of the working groups had also made a decisive contribution to the successful outcome of the proceedings. An important contribution had also been made by Dr. Bogsch, Secretary-General of the Union, with excellent

support from Dr. Mast, Secretary General of the Conference and Vice Secretary-General of the Union. Excellent support had also been given by the staff of the Office of the Union and of the International Bureau of the World Intellectual Property Organization. His Delegation wished to express its special gratitude to the interpreters who had shown an excellent mastery of very difficult technical terminology. Without their translations several contributions would not have been so fully developed from the linguistic point of view.

1103.3 Dr. Böringer concluded by saying that, in the opinion of his Delegation, the new version of the Convention was distinguishable by several important characteristics from the existing text, was sufficiently homogeneous in all three languages and was to be wished a long-lasting stability.

1104. Mr. S. AGUILAR YEPEZ (Mexico) said that he wished to thank again the members of the Union for having given his country the great opportunity of participating in the Diplomatic Conference. He appreciated the way in which his Delegation had been received by all the Member and Observer Delegations.
Mr. Aguilar Yepez concluded by acknowledging with gratitude the kind remarks of the President of the Conference regarding his statement, as reproduced in document DC/81, and by reading that statement to the Conference. He hoped that his general statement would be useful to delegates who might visit his country and that it would assist in establishing a basis for a future in which Mexico might have the opportunity of joining the Union.

1105. Dr. F. POPINIGIS (Brazil) thanked the members of the Union, the Council of the Union and the Secretariat for having invited his country to participate in the Diplomatic Conference as an Observer Delegation. Work on the drafting of plant variety protection legislation had been in progress in Brazil for some four years. He hoped that it would be possible for Brazil to join the Union at some time in the future. Mr. Popinigis concluded by congratulating the President of the Conference and the Secretariat on the successful outcome of the Conference.

1106. Mr. M. LAM (Senegal) said that he wished to express to the members of the Union the appreciation of the Government of Senegal for the opportunity to observe the entire proceedings of the Diplomatic Conference. His Delegation had found them most informative and believed itself to be in a position to faithfully report to the Government on the high level of debate and on the importance of the results achieved. It was convinced that it could act as the Ambassador of the Union and that it could provide its Government with all the advice necessary to enable a favorable decision to be reached as regards the steps to be taken regarding membership of the Union.

1107. Mr. R. LOPEZ DE HARO (Spain), on behalf of the Delegation of Spain, congratulated the President on the excellent way in which he had conducted the Conference. He also congratulated the Secretariat on its work and extended his congratulations to all the members of the Union for the understanding they had shown in revising the Convention and making it more accessible to further States. He hoped that the Government of Spain would soon reach a decision regarding the eventual signing of the new Convention.

1108.1 The PRESIDENT said that, although there would be one further meeting on Monday, October 23, he wished to take the opportunity to thank the Chairman and Vice-Chairmen of the committees and working groups and all the delegates for the positive cooperation shown during the Conference. As a result of that cooperation the desired result had been achieved. The President said that he also wished to thank Dr. Bogsch, Dr. Mast and the staff of the Union and of the World Intellectual Property Organization for their great assistance and for the very high volume of work so efficiently completed. Last but not least, he wished to thank the interpreters for their contribution.

1108.2 The President concluded by acknowledging all the kind words addressed to him and said that those words should be addressed to all who had taken part in the Diplomatic Conference.

SIXTEENTH MEETING (LAST)

Monday, October 23, 1978,

noon

1109. The PRESIDENT opened the last meeting of the Diplomatic Conference. He informed delegates that it was four years to the day since the work on the interpretation and revision of the Convention had begun. On October 23, 1974, the decision had been taken to establish the Committee of Experts on the Interpretation and Revision of the Convention. That decision followed a meeting with representatives of several non-member States and international professional organizations, held to ascertain the wishes and desires of interested circles. For him, therefore, the meeting in progress represented the culmination of what had begun exactly four years earlier. It really was a day of great importance.

Adoption of the Second Report of the Credentials Committee

1110. The PRESIDENT invited the Secretary of the Credentials Committee, in the absence of its Chairman and Vice-Chairmen, to present the Second Report of that Committee.

1111. Mr. G. LEDAKIS (Secretary of the Credentials Committee) said that, as recorded in paragraph 11 of document DC/83, the Credentials Committee had authorized its Chairman to report to the Conference on any further credentials and full powers which might be presented after the close of its meeting on October 19. Mr. Parry, as a Vice-Chairman of the Committee, had already reported on the receipt of the credentials of the Observer Delegation of Canada. (see paragraph 1032.1) Subsequently, the Secretariat had received the credentials and full powers of the Member Delegations of Belgium and Italy and the credentials of the Observer Delegation of Mexico.

1112. The PRESIDENT thanked Mr. Ledakis for presenting the Second Report of the Credentials Committee. He noted that there were no remarks thereon.

1113. The Second Report of the Credentials Committee, as presented orally by the Secretary of the Committee, was adopted.

Final Adoption of the Revised Text of the Convention submitted by the Drafting Committee

1114. The PRESIDENT introduced document DC/89 which combined document DC/84 and the amendments thereto, as adopted on Saturday, October 21. (see paragraphs 1035 to 1095)

1115. Dr. H. MAST (Secretary General of the Conference) confirmed, at the request of the President of the Conference, that the text reproduced in document DC/89 was exactly as adopted by the Conference on October 21.

1116. The text reproduced in document DC/89 was unanimously adopted as the Revised Text of the Convention, all ten Member Delegations participating in the vote by show of hands.

Adoption of Recommendations on Articles 4 and 5

1117. The PRESIDENT introduced documents DC/90 and DC/91, which contained respectively the texts of the Recommendations on Articles 4 and 5, as previously circulated on Saturday, October 21, in documents DC/86 and DC/88 respectively. (see paragraph 1096)

1118. The Recommendations on Articles 4 and 5, as reproduced respectively in documents DC/90 and DC/91, were adopted unanimously.

1119. The PRESIDENT informed the Conference that there were no statements to be adopted for inclusion in the Records of the Conference and that there was no final act to be adopted.

General Statements

1120. Mr. H. AKABOYA (Japan) expressed the congratulations of his Delegation on the fact that the new Convention had just been adopted unanimously. The new Convention might be quite satisfactory for his country and he hoped that it would be possible for it to join the Union at an early date. Mr. Akaboya concluded by expressing his deep gratitude for the excellent leadership of the President of the Conference and for the kind cooperation of the Secretary-General of the Union, of his staff and of all who had taken part in the Conference.

1121. H.E. Mr. F. BENITO (Spain) said that his Delegation wished to endorse the congratulations expressed by the Delegation of Japan on the unanimous adoption of the new Convention. His Delegation found the new Convention very positive and would make all necessary efforts to recommend the Spanish authorities to sign it, as provided for in Article 31, as soon as possible.

Closing of the Conference

1122. The PRESIDENT declared closed the Diplomatic Conference on the Revision of the International Convention for the Protection of New Varieties of Plants. In so declaring the President said that he was sure that he could rely on all those who had taken part to use their best endeavors to promote the earliest possible entry into force of the Revised Text of the Convention.

[Annex II follows]

INDEX
OF THE INTERVENTIONS IN THE MEETINGS
OF THE PLENARY OF
THE GENEVA DIPLOMATIC CONFERENCE
ON THE REVISION OF THE INTERNATIONAL CONVENTION
FOR THE PROTECTION OF NEW VARIETIES OF PLANTS
(BY SPEAKER)

Name of Speaker*	Country or Organization of the Speaker	Paragraph Numbers and Languages** of Interventions
Mr. AGUILAR YEPEZ	Mexico	1104 (E)
Mr. AKABOYA	Japan	52,295,307,570,766,784,822, 826,1120 (E)
H.E. Mr. BENITO	Spain	1121 (F)
Dr. BEN SAAD	Libyan Arab Jamahiriya	68,740,786,810 (E)
Dr. BOGSCH (Secretary-General of the Union)	UPOV	2,5,13,17,22,34,93,113,144,155, 162,167,171,173,178,183,185,260, 262,274,328,375,414,424,435,441, 460,468,850,852,859,867,907,923, 929,934,938,944,956,959,961,963, 978,980,992,1005,1041,1055,1081, 1085 (E)
Dr. BÖRINGER (Acting President)	Federal Republic of Germany	582,591 (G)
Dr. BÖRINGER	Federal Republic of Germany	8,14,18,28,48,49,50,81,98,101,108, 122,129,135,146,159,165,199,254, 302,308,325,345,356,361,364,366, 377,383,411,416,429,433,452,478, 537,551,566,577,580,616,645,677, 686,725,829,858,860,866,879,891, 913,926,935,958,979,981,984,987, 995,1015,1103 (G)
Dr. BÖRINGER	European Economic Community (EEC)	51 (G)
Mr. BRADNOCK	Canada	62,63,147,310,355,382,446,451,456, 467,1097 (E)
Dr. BÜCHTING	International Association of Plant Breeders for the Protection of Plant Varieties (ASSINSEL)	12,38,70,133,139,148,154,160,166 (G)
Mr. BURR	Federal Republic of Germany	294,395,408,508,511,560,586,763 (G)
Mr. BUSTARRET	France	214,281,283,289,342,351,353,359, 365,376,404,412,415,418,425,449, 454,667,671,674,680,844,890,894, 902,960,977,983,996 (F)
Mr. CUROTTI	Italy	202,291,315,369,432,598 (F)

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* In alphabetical order

** E: English; F: French; G: German

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Name of Speaker*	Country or Organization of the Speaker	Paragraph Numbers and Languages** of Interventions
Mr. DERVEAUX	Belgium	196,216,292,301,306,515,576,685, 688,771,773,793 (F)
Mr. DESPREZ	International Federation of the Seed Trade (FIS)	53,54,55,56 (F)
Mr. DONAHUE	United States of America	839,841,846 (E)
Mr. DUYVENDAK	Netherlands	119,280,282,284,319,343,349,352, 354,357,410,413,417,447,453,471, 732,970 (E)
Mr. DUYVENDAK (Chairman of the Working Group on Article 5)	Netherlands	1022,1052,1054 (E)
Mr. ESPENHAIN	Denmark	312,321,344,370,380,386,455,518, 569,597,791,875,953 (E)
Dr. FEISTRITZER	Food and Agriculture Organization of the United Nations (FAO)	783,799,905 (E)
Mr. FIKKERT	Netherlands	112,114,174,194,198,273,715,719, 727,854,863,865,871,922,930,943, 1002,1040,1079 (E)
Dr. FREIHERR VON PECHMANN	International Association for the Protection of Industrial Property (AIPPI)	39,75,134,140,156,221,237 (G)
Mr. FRISCH	Luxembourg	64,65 (F)
Mr. GFELLER	Switzerland	4,27,201,880,933,990,1013,1069 (G)
Mr. GFELLER (Chairman of the Working Group on Article 13)	Switzerland	1012 (G)
Dr. GRAEBER	European Economic Community (EEC)	76 (G)
Mr. GUY	Switzerland	287,317,348,373,524,575 (F)
Mr. HEITZ	UPOV	338 (F)
Mr. JACOBSSON	Sweden	857,876,939 (F), 965,975,1003, 1009 (E)
Mr. JEANRENAUD	Switzerland	695,802 (F)
Mr. KÄMPF	Switzerland	85,153,161,180 (G)
Mr. KELLY	United Kingdom	118,213,217,341,346,350,371,392, 396,405 (E)
Mr. KUNHARDT	Federal Republic of Germany	629,632,640,952,1049,1056,1091 (G)

* In alphabetical order

** E: English; F: French; G: German

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Name of Speaker*	Country or Organization of the Speaker	Paragraph Numbers and Languages** of Interventions
Mr. LACLAVIERE	France	20,30,84,104,121,195,300,303,323, 374,378,393,472,479,512,525,594, 612,615,647,687,760,772,794,856, 873,925,927,932,936,1004,1007 (F)
Mr. LACLAVIERE (Chairman of the Drafting Committee)	France	1018,1036,1042,1046,1051,1061, 1068 (F)
Mr. LAM	Senegal	91,224,245,335,819,1106 (F)
Mr. LEDAKIS	International Bureau of WIPO	638,797 (E)
Mr. LEDAKIS (Secretary of the Credentials Committee)	International Bureau of WIPO	1092,1111 (E)
Dr. LEENDERS	International Association of Plant Breeders for the Protection of Plant Varieties (ASSINSEL)	219,668,893,899 (E)
Dr. LEENDERS	International Federation of the Seed Trade (FIS)	72,268,272,590,887 (E)
Mr. LEESE Jr.	United States of America	157,168,190,238,286,309,385,409, 437,440,464,599 (E)
Mr. LENHARDT	Canada	77,124,151,169,172,864,877 (E)
Mr. LOPEZ DE HARO	Spain	61 (F), 322,779,806,1107 (E)
Prof. MANNER	Finland	916 (E)
Dr. MAST (Secretary General of the Conference)	UPOV	125,729,816,843,1115 (E)
Mr. MEJEGÅRD	Sweden	21,204,288,314,372,520,522,572, 584,792,909 (E)
Dr. MOORE	Australia	67,126 (E)
Mr. MURPHY	United Kingdom	19,29,83,107,170,181,189,200,232, 276,851,874,910,1000,1045,1089 (E)
Mr. NORRIS	New Zealand	318,573 (E)
Mr. OBST	European Economic Community (EEC)	191 (G)
Mr. OMAR	Iraq	331 (E)
Mr. PARRY	United Kingdom	259,261,263,536,604,631,635,646, 663,666,669,678,681,699,717,720, 731,746,761,764,775,800,834,840, 855,868,924,928,940,957 (E)
Mr. PARRY (Vice Chairman of the Credentials Committee)	United Kingdom	1032 (E)

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* In alphabetical order

** E: English; F: French; G: German

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Name of Speaker*	Country or Organization of the Speaker	Paragraph Numbers and Languages** of Interventions
Mr. PASSALACQUA	Argentina	780 (F)
Mr. PINI	Italy	514,523 (E)
Dr. POPINIGIS	Brazil	252,781,1105 (E)
Dr. PUSZTAI	Hungary	767 (F)
Mrs. REYES-RETANA	Mexico	329,652,778,807,813,817,1102 (E)
Mr. ROYON	International Community of Breeders of Asexually Reproduced Ornamentals (CIOPORA)	11,71,96 (F), 99 (G), 136 (E), 145 (F), 186 (E), 236,251,253, 270,278,304,311,313,886,889,892, 896,900,904,915 (F)
Mr. SADRI	Iran	333 (E)
Mr. SCHLOSSER	United States of America	43,44,45,46,47,74,79,138,143, 150,152,163,176,179,182,187, 974,982,985,988,994,1016,1053 (E)
Mr. SCHNEIDER	International Commission for the Nomenclature of Cultivated Plants of the International Union for Biological Sciences	66,123,226 (E)
Mr. SHIRAI	Japan	550 (E)
Miss SILVA Y SILVA	Peru	330,789 (E)
Prof. SINAGRA	Italy	565,648,672,679,683,709,741,743, 747,753,756,782,787,795,798,804, 823,842,845,937 (F)
Mr. SKIDMORE	International Association of Plant Breeders for the Protection of Plant Varieties (ASSINSEL)	158 (E)
Mr. SKOV (President of the Council of the Union)	Denmark	1 (E)
Mr. SKOV (President)	Denmark	23,25,26,32,33,37,69,78,80,82,86, 88,90,92,95,97,100,102,106,110,111, 115,117,120,127,130,132,137,142, 149,164,175,177,184,188,192,193, 205,207,210,212,218,220,223,225, 227,229,231,234,239,241,243,246, 248,250,256,258,265,267,279,285, 297,299,305,326,337,340,347,363, 379,381,384,387,389,391,394,397, 399,401,403,407,420,422,428,430, 439,443,445,448,458,463,466,470, 476,481,483,485,487,490,494,496, 498,500,503,505,507,521,529,533, 535,541,546,549,553,556,559,564, 593,600,602,605,607,610,613,620, 624,626,628,630,637,643,651,654, 656,658,661,665,675,684,694,696, 697,701,704,707,711,714,716,718, 722,724,726,728,734,737,742,754, 758,759,769,774,777,785,790,796, 801,805.1 (E), 805.2 (S), 808,811, 814,818,820,824,828,832,835,838,

* In alphabetical order

** E: English; F: French; G: German; S: Spanish

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Name of Speaker*	Country or Organization of the Speaker	Paragraph Numbers and Languages** of Interventions
Mr. SKOV (President) (continued)		849,853,862,870,883,885,906,911, 919,921,931,942,946,949,955,969, 973,986,991,993,997,999,1008, 1011,1014,1019,1021,1023,1027, 1029,1031,1033,1035,1037,1039, 1057,1064,1080,1096,1099,1101, 1108,1109,1110,1112,1114,1117, 1119,1122 (E)
Mr. SKOV	Denmark	581,587 (E)
Mr. SLOCOCK	International Association of Horticultural Producers (AIPH)	578,596,903 (E)
Dr. SPANRING	Yugoslavia	1050,1063 (E)
Mr. SUNESEN	Denmark	103,197,275,908,912 (E)
Dr. SZILVÁSSY	Hungary	40,41,42 (G), 332 (F)
Miss THORNTON	United Kingdom	293,316,324,434,459,461,488,513, 568,617 (E)
Mr. TOURKMANI	Morocco	128,215,296,334,739,744,788,895, 901,962,1098 (F)
Mr. TROOST	International Association of Horticultural Producers (AIPH)	57,58,59,60,73,141,235 (E)
Mr. VAN DER MEEREN	Netherlands	360,367,480,574,585,588,603,608, 611,618,621,633,644,655,662,670, 673,676,698,702,705,712,735,738, 748,755,762,770,815,821,830,898, (E)
Mr. VAN SOEST	Netherlands	516,803,967 (E)
Mr. VAN WYK	South Africa	31,203,290,320,336,358,368,477, 509,517,530,571,614,659,708,833, 872,966,1084 (E)
Mr. VELDHUYZEN VAN ZANTEN	International Association of Plant Breeders for the Protection of Plant Varieties (ASSINSEL)	244,247,269,271,277 (E)
Mr. H.J. WINTER	United States of America	486,489,491,519,589,623,634,636, 639,641,664,682,730,745,757,765, 878,888,914,941,964,1001,1006, 1065,1100 (E)
Mr. J. WINTER	International Association of Plant Breeders for the Protection of Plant Varieties (ASSINSEL)	423,431,442,450,473,567,583,595, (G)

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