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INTERNATIONAL UNION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS

GENEVA

MISSION OF A UPOV DELEGATION TO NORTH AMERICA

Report prepared by the Office of the Union

PART I

Mission to the United States of America

1. In April 1973, the Consultative Working Committee, meeting in its sixth session, and the Council of UPOV, meeting in its first extraordinary session, both decided to send a delegation to the United States of America, consisting of representatives of member States and of members of the Office of the Union, in order, first, to examine on the spot the two systems existing in the United States of America for the protection of plant breeders' rights--with particular reference to the examination of new varieties of plants--for the purpose of obtaining the necessary information from the government authorities and selected circles of breeders in that country on the prospects of the country's accession to the UPOV Convention and, second, to discuss questions of mutual interest with those government authorities and breeders' circles. After being informed that the introduction of a plant variety protection system was under discussion in Canada, the Consultative Committee decided, in its eleventh session, to extend the visit to Canada and to have discussions there with the Canadian Department of Agriculture and Canadian breeders' organizations. The program was prepared by the Office of the Union after extensive contacts with the Department of State, the Patent and Trademark Office, the Plant Variety Protection Office and the American Seed Trade Association in the United States of America, and with the Canadian Department of Agriculture in Canada. The visit was scheduled to take place during period from September 2 to 17, 1975.

Visit to Northrup, King & Company, Minneapolis, Minnesota

2. The UPOV delegation consisting of Mr. Laclavière (France), President of the Council of UPOV, Dr. Böringer (Federal Republic of Germany), Mr. Butler (Netherlands), Mr. Hutin (France), Mr. Kelly (United Kingdom), Mr. Mast (Vice Secretary-General of UPOV) and Mr. Skov (Denmark), arrived at Minneapolis on September 2, 1975, where it was welcomed by Mr. Underwood (American Seed Trade Association) and representatives of the seed firm Northrup, King & Company, Minneapolis. Mr. Rollin, Commissioner of the US Plant Variety Protection Office, was also present.

3. On September 3, the delegation visited the headquarters of Northrup, King & Co., where it was received by Mr. Ken Christensen, Mr. Allenby White and Mr. Sutherland. Mr. Rinke then gave a survey of the company's activities, primarily in connection with the following crops: mainly corn (American term for maize) and wheat, but also alfalfa, clover, rye-grass, sudan-grass, sorghum and, recently, sunflower. The company also has a general breeding program for vegetable seeds. It maintains research and trial stations all over the United States including Hawaii, which was referred to us as an "outdoor greenhouse" for the company. It sells its products in 40 countries and has testing programs in another 20 countries. In the sugar beet sector, the company cooperates with foreign firms including a major German company (Kleinwanzlebener Saatzzucht AG, Einbeck). Emphasis was also placed on breeding in the field of vines (squash, melon, cucumber, pumpkins, and honeydew). By using stations especially for multiplying in favored climatic zones, the company has succeeded in obtaining up to four plant generations in one year, thereby speeding up the breeding program.

4. The company's activity in Minnesota was demonstrated by a visit to its research centers at Stanton and Eden Prairie. Its new developments in the line-coating of alfalfa seeds was also shown as well as its trials on the breeding of turf grasses.

5. In the discussions connected with the various visits, it was pointed out amongst others that the company had gone into the breeding of soybeans only after

the introduction of plant variety protection in the United States. Mention was also made of the fact that, in order to conduct a breeding program on pest and disease resistance, artificial infection had been necessary and there was a demonstration of the way in which the latter had been achieved. The period of grace of one year during which a new variety can be commercialized in the United States without destroying its novelty was considered very important by the companies represented. The same was true for the possibility of releasing seed for experimental purposes. It was mentioned in this connection that seed of newly developed varieties had to be released for experimental purposes on a very large scale in cases where new varieties were produced for the canning industry, new varieties being brought on to the market in great quantities only after intensive testing. It was further mentioned that the industry's needs in the packaging and transport sectors were of major importance in the selection of certain varieties for large-scale production. A discussion also took place on the protection under the US Plant Variety Protection Law of a clover variety where 45% of the plants had white flowers and 55% had red flowers. The Commissioner of the US Plant Variety Protection Office, who accompanied the group during its visit to Northrup, King & Co., was of the opinion that the special distribution of flower coloring of clover varieties could not create the novelty of a variety since the flower coloring was not an essential characteristic of this crop, but that, on the other hand, it would not be an obstacle to protection from the viewpoint of homogeneity.

6. The delegation was informed that the company produced the prebasic seed (breeder's seed) of parent inbred lines of hybrid varieties in one lot for the whole period during which these varieties are sold, thereby ensuring the stability of the variety. It was also interesting to learn that the employees of the company consider that, while their task of describing new varieties on the official forms is difficult and, at times, a heavy burden, it is not impossible. It was agreed that, in the case of a considerable increase in the number of applications for protection, major companies would employ special taxonomists for this job. In reply to a question from a member of the UPOV delegation, the representatives of Northrup, King & Co. assured the delegation that they kept some standard varieties for reference purposes and that they would have to do so to a greater extent if more applications were to be filed.

Visit to Pioneer Hi-bred International, Des Moines, Iowa

7. On September 4, 1975, the UPOV delegation was flown in private planes belonging to the two firms Dekalb AgResearch and Pioneer Hi-Bred International, to the headquarters of the latter firm in Des Moines, where it was received by Mr. Skidmore and his collaborators. The delegation visited the exposition of corn hybrids at Johnston near Des Moines. The main concern of this firm is the production of hybrid corn seed and wheat seed. The delegation was informed that, for the naming of corn hybrid varieties, a four-digit system was used, the first digit of which was always 3, indicating that it was a variety of the Pioneer Seed Company; the second digit indicated, as is usual among breeders in the United States, the maturity, the two following digits indicating the place of the variety within the Pioneer Seed Program. The delegation was also informed that two-thirds of the firm's hybrid corn varieties were single-cross varieties because they are more uniform and higher yielding. The firm's representatives gave as the main aims for the breeding of corn varieties: yield, stem strength, resistance to diseases and conformity with requirements concerning maturity.

8. In the course of the discussions, it was stated that this firm applied for plant variety protection only in special sectors where it promised to be advantageous, for example in the field of soybeans and wheat varieties. As for hybrid corn varieties, there was no obvious need for protection. In reply to a question from one member of the UPOV delegation, who asked whether inbred lines had never been unlawfully used by others, it was admitted that this had occurred sometimes in the case of small breeders but that it did not bother the firm greatly since varieties changed so rapidly. The firm's representatives thus saw no need for obtaining protection for inbred lines nor did they see any reason for introducing provisions into the law of the United States, under which the hybrid variety itself can be protected. In response to the question why the firm applied for the protection of hybrid varieties in European States, it was replied that this was done on the advice of its European partners and also because in Europe examination is required in any case for the purpose of entering the variety in the national list.

9. One of the questions asked was what the firm's reactions were if another breeder applied for protection for the same variety. The answer given was that this had never happened until now, and that in such a case the firm would try to make an arrangement with the other breeder.

10. One of the members of the UPOV delegation asked what would happen if the first examination of the variety in the Plant Variety Protection Office showed that the variety was not new. Would the firm in that case accept the decision or ask the Plant Variety Protection Office to look into the matter further? It was replied that in such cases the firm might ask for a more detailed examination to be carried out. It was further mentioned that the firm maintained most standard varieties in their trial fields for the purposes of comparison.

11. The UPOV delegation showed interest in knowing how the firm as owner of a protected variety expected to prove its rights if it discovered after a number of years that another firm was putting the same variety on the market. It could happen that in the year in question the plants of the variety were growing in a different way than they had done in the year in which the variety was described, for example, because of weather conditions. It could therefore be that the plants grown from the infringer's seed appeared to be different from the plants described by the breeder when applying for protection. What prevailed in such cases: the description by the breeder or the appearance of the seed in the year during which the breeder was trying to prove his right? In reply to this question, the company's representatives mentioned the possibility of replacing the description given to the Plant Variety Office by an improved description. They were of the opinion that the description prevailed after the necessary corrections had been made.

12. The question of naming the pioneer varieties was discussed at length. Members of the UPOV delegation pointed out that the practice of naming new corn varieties by using the name "pioneer" and 4 digital numbers as a variety denomination might be fatal to the validity of the term "pioneer" as a trademark. In the procedure before European plant variety protection offices, the name "pioneer" would therefore have to be expressly excluded from the variety denomination. If this were done, however, the variety denomination would only consist of figures, which is not admissible under the UPOV Convention. In reply to the question why the firm would not use fancy names for its varieties, it was replied that it was difficult to phrase fancy names for the large number of different varieties of corn hybrids that were so frequently changing. It was also stated that the system of indicating maturity by digital numbers was appreciated by customers.

Visit to DeKalb AgResearch, Inc.

13. After a flight in planes of Dekalb AgResearch and Pioneer Hi-Bred International on September 5, 1975, the UPOV delegation visited the corn hybrid demonstration field of Dekalb AgResearch Inc., under the guidance of Mr. Nolin and Mr. Holland. The latter made an extensive survey of the firm's activities, which mainly relate to the breeding of hybrid corn, wheat and sorghum. It also conducts a swine-breeding program. The firm was reported to be active in most European States and in Middle and South America, as well as in Australia and South Africa. It was stated that it preferred joint ownership with associated firms in each country as this was the best way to adapt the firm's activities to consumer's needs.

14. In the discussion that followed it was realized that the firm, while not objecting to the idea of plant variety protection, was not greatly in favor of it. It was pointed out that protection was not really necessary for the production of hybrid varieties. In foreign countries protection was however being applied for on the advice of the foreign partners, in conformity with the firm's general business policy. Hybrid varieties would, in the firm's opinion, also change too quickly to be protected, especially since it normally took several years before a title was granted. It was further pointed out that protection was not thought to be of special advantage to the consumer in this field since a breeder of hybrid varieties needs to sell seed each year and thus is under constant pressure to maintain the high quality of his varieties. Finally, it was stated that the protection was not considered sufficient. The possibility given to the farmer to save his own seed for the years to come represented a grave loophole. It was, however, admitted that this rather negative view was due to the firm's major activities in hybrid corn breeding and that the situation might change for other crops and it was indeed different for ornamental plants.

15. Answering the question whether there was a danger of another breeder using the protected inbred lines kept secret by the firm, it was pointed out that this never happened. Corn varieties changed too quickly to give the "infringer" a real advantage in the long run. He would always lag behind, as experience had shown.

16. As to the situation in Europe, where the firm occasionally applied for plant variety protection, it was stated that it was different in so far as an examination was necessary in any case for the listing of the variety. This system of national listing which was prevalent in Europe was not greatly appreciated by the firm's representatives, who considered it an unnecessary complication in the field of corn breeding. The hybrid producer relied on annual sales and had to safeguard his reputation with the farmer, and this depended on permanent success in his breeding work. It was therefore thought that matters were largely self-regulating in the field of hybrid corn.

17. It was also mentioned that outside the plant variety protection scheme varieties were checked and examined in the United States. The agricultural colleges would test and demonstrate the value of varieties and would then publish the outcome of the tests. This would give the consumer unbiased information.

18. The firm's representatives demonstrated the course of action they had adopted with respect to the wheat variety "Bonanza," for which protection had been obtained. The firm had first applied to the Variety Review Board for acceptance of the variety, which means that the variety is eligible as certified seed. Together with the application, indications are made regarding the origin and breeding history of the variety, a botanical and objective description is given and data are submitted on the detailed trials conducted on the variety by the firm. Mention is also made of the grounds on which the applicant considers the variety to be new and a statement is made on the bases of the applicant's ownership.

19. Another question raised was whether there existed any interest in licensing varieties and whether for such licensing an objective examination by a government authority was needed or not. It emerged from the discussion that licensing was not very common in this sector.

Visit to the US Patent and Trademark Office in Crystal City, Virginia

20. On September 8, 1975, the UPOV delegation visited the US Patent and Trademark Office in Crystal City, Virginia, near Washington D.C., where it was received by the following personalities of that Office: Mr. Bernard Meany, Assistant Commissioner for Trademarks, Mr. William Feldman, Deputy Assistant Commissioner for Examination, Mr. Michael K. Kirk, Director, Office of Legislation and International Affairs, Mr. S. Schlosser, Office of Legislation and International Affairs, and Mr. Bagwill, Examiner in the field of plant patents. In the ensuing discussion meeting in which the Secretary-General of UPOV, Dr. Arpad Bogsch, having joined the delegation, also participated, Mr. R. Bagwill gave a survey of the state of protection by patents for vegetatively reproduced plants. He explained that the applicant submitted, together with the application, colored illustrations of specimens of the plant to be protected, mainly color photographs but also aquarelles, pressed plants and other documentation. The first task of the Patent and Trademark Office was to classify the variety according to a special classification system. The examiner also checked at this stage of the procedure the colors according to the RHS-color chart and other color charts. If not satisfied, the examiner would immediately ask for another illustration. If the applicant was not in a position to provide a satisfactory illustration, the application would be refused.

21. Mr. Bagwill pointed out that the applicant could always correct his application without losing his filing date. In the field of plant protection, there would not be anything like "new matter" within the meaning of the US Patent Act.

22. In the case of agricultural varieties, the Patent and Trademark Office asked the Department of Agriculture for its opinion on the application. The opinion of the latter consisted in most cases merely of a statement to the effect that the variety was not known to the Department and not registered.

23. The full examination of the application usually started six months after the date of filing. This was due to the backlog.

24. While examining the novelty of the new plant variety, the examiner used any source of information available to him. He was in no way limited and mainly consulted the existing literature. Nothing prevented him from using also test results obtained in Europe. He could ask the breeders for plants and grow them himself or have them grown by the Department of Agriculture in glasshouses. This was only done in exceptional cases.

25. Mr. Bagwill emphasized his experience in examining plants. In reply to the question what would happen if he left the Office, Mr. Bagwill could not deny that the quality of the examination might decrease for some time. The same situation would however exist in other fields of the Patent Office, where the examination was to a great extent dependent on one examiner.

26. It was pointed out by Mr. Bagwill that the usefulness of a new plant was not examined, nor was the lack of usefulness a reason for rejecting an application for a plant patent. To this extent, the rules for plant patents deviated from the rules applicable to other patents.

27. Mr. Bagwill reported that an application for granting a plant patent was rejected if the new plant showed only minor differences compared with the existing plant. Of all applications filed, 35% were rejected. There were practically no appeals.

28. Mr. Bagwill also stated that applications were checked against the literature in general--in particular, manuals, major nursery catalogues and collections of the US Department of Agriculture--as well as against the material of the US Patent and Trademark Office. He confirmed that only the bibliographical data were published and not the contents of the applications.

29. The representatives of UPOV asked how the Patent and Trademark Office could be sure that the descriptions matched the plants. They also asked how it was possible to compare plants of different breeders that had been grown and described in different climatic zones of the country. Under the system applied by the present member States of UPOV, the plants compared were all grown at the same place and under the same climatic conditions. Mr. Bagwill replied that the breeders themselves compared the plants of their varieties with those of other varieties grown in their fields for comparison purposes. This was at least the case for the bigger firms, but it was not always true for amateur breeders. Their applications therefore needed a particularly careful check. The representatives of UPOV remarked in this connection that the system applied by the present member States of UPOV was more favorable to the smaller breeders, who obtained help from their national offices in describing their plants, whereas the system applied by the US Patent and Trademark Office necessarily obliged that Office to apply greater severity in examining applications from the smaller breeders.

30. In this respect, Mr. Bagwill pointed out that the basis of his examination was the photograph of the plant. There was a general feeling that the comparison of photographs with the color-charts was of doubtful value.

31. The representatives of the US authorities expressed their appreciation of the present system in the United States under which the breeder enjoyed a period of grace of one year in which he could commercialize the variety without endangering its novelty. This period of grace was a general concept of the US Patent Act. It was of special interest for the small breeder, who was likely to test first the commercial value of the plant before investing money and labor in obtaining protection.

32. It was explained that invalidation of a plant patent was possible by court decisions in connection with infringement cases and by declaratory judgments of courts. Such court decisions only had effect between two parties and not erga omnes.

33. The question from members of the UPOV delegation whether the US Patent and Trademark Office was planning the introduction of a computer search for varieties for which plant patents are sought was considered in the negative. It was remarked that, in the field of asexually reproduced plants, the manual search was considered more efficient than search by computer. Asked why the US Patent and Trademark Office did not keep any collections, Mr. Bagwill replied that it was a question of general policy, and of money.

34. The members of the UPOV delegation pointed out that under the UPOV Convention a plant breeder's right could not be invalidated for reasons which are not mentioned in the Convention. They recalled that the United States had repeatedly asked for the revision of this rule in the Convention and asked what other reasons for invalidation existed under the US Patent Act. The representatives of the US Patent and Trademark Office replied that in the United States a patent could be invalidated, for example, if its owner had filed an application abroad without having obtained permission from the competent US authority beforehand. This sanction contained in Section 184 of the US Patent Act was of little if any importance for plant patents. It might, however, be difficult to change the US law in this respect.

35. The representatives of the US authorities declared that the reasons for the exclusion of potatoes and Jerusalem artichokes from protection were purely historical.

36. As to the possibility of protecting varieties of the same species by means of plant patents as well as variety certificates, it was mentioned that so far such double protection had only been found possible for Poa Pratensis (Kentucky bluegrass). It was unanimously agreed that the possibility of protecting varieties of the same species under two forms had more theoretical than practical importance. The exclusion of such double protection under the Convention was intended for other cases and not for a system under which different protection could be obtained depending on the normal type of propagation of the plants concerned.

37. The members of the UPOV delegation asked for what reason protection was restricted to plants found in cultivated areas. The reply was that the US legislator did not want to grant protection for "acts of nature."

38. The representatives of the US Patent and Trademark Office confirmed in response to a question from the UPOV delegation that, subsequent to the grant of the plant patent, the plant's continued stability was not tested under the Patent Act.

39. It was pointed out that the examination of the question whether a plant was homogeneous or not was performed solely on the basis of a photograph. It was further mentioned that the growing place had to be indicated in the application since differences might appear under certain growing conditions.

40. As far as the protection of trees is concerned, the representatives of the US Patent and Trademark Office replied to a question from one of the members of the UPOV delegation concerning the filing of applications for poplars that no such applications had been filed so far. They confirmed that applications for tree varieties were accepted when trees were described which were at least five years old. It was pointed out that at this stage the further development of the plant could be anticipated.

41. M. Laclavière, President of the Council of UPOV, thanked the representatives of the Patent and Trademark Office for having provided the opportunity for this discussion.

42. In the afternoon of September 8, 1975, a discussion meeting between the UPOV delegation, representatives of US authorities, and representatives of private circles in the United States of America and of international organizations took place in the US Patent and Trademark Office. Dr. Arpad Bogsch, Secretary-General of UPOV, participated in this meeting. The participants from the private sector were the following:

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43. Representing the US authorities were Mr. Stanley F. Rollin, Commissioner of the Plant Variety Protection Office, Mr. Bernard Leese, Chief Examiner of the Plant Variety Protection Office, Mr. Bagwill, primary Examiner of the US Patent and Trademark Office, and Mr. Stanley Schlosser of the US Patent and Trademark Office.

44. After a short introduction by Mr. Schlosser, US Patent and Trademark Office, Dr. Arpad Bogsch, Secretary-General of UPOV, gave an account of the contents of the UPOV Convention and the activities of UPOV while Mr. Laclavière, President of the Council of UPOV, explained the philosophy behind the UPOV Convention and described the history of the negotiations leading to the conclusion of that Convention. Dr. H. Mast, Vice Secretary-General of UPOV, made a survey of the situation with regard to possible future member States of UPOV and described the system of financing the Union through contributions. He mentioned in this connection that the expenses and the accounts of UPOV were supervised by the Swiss Government.

45. At the request of the participants, the members of the UPOV delegation informed the meeting of the fees charged in the member States of UPOV for obtaining plant variety protection. Some of the participants considered the fees high, especially if a plant breeder wanted protection in all UPOV member States, while others pointed out that the fee level was not considerably higher than that of the fees charged in the United States.

46. In reply to a question from one of the participants, explanations were also given on the right of nationals of other States to apply for protection in UPOV member States, and the basic principles of the UPOV Convention concerning national treatment and reciprocity were discussed in detail. Some participants remarked that UPOV would be more attractive if the possibility existed of introducing a system according to which rights obtained in one member State would be recognized in others.

47. As to Article 2 of the Convention, in this circle too the exceptional cases were mentioned in which it was possible in the United States to protect varieties of the same species under the Patent Act as well as under the Plant Variety Protection Act, a situation which might be inconsistent with the provisions of the UPOV Convention. The members of the UPOV delegation explained the reasons for excluding, in Article 2(1), second sentence, the granting of plant breeders' rights for one and the same botanical genus or species under both forms of protection. They pointed out that such double protection would lead to legal insecurity and force the applicant to obtain, in certain cases, a patent as well as a plant variety certificate for one variety. In this connection, it was explained that a breeder who had obtained a plant variety certificate from the US Plant Variety Protection Office could exclude others from commercializing not only sexually reproduced seeds but also asexually reproduced propagating material--except where they were acting in pursuance of a valid United States plant patent--while the scope of protection of the plant patent granted in the United States was restricted to the production or sale of asexually reproduced material. During the discussion

the fact was mentioned that cases in which varieties of one and the same species could be protected in the United States under the Patent Act as well as under the Plant Variety Protection Act were extremely rare and were of no economic importance. The problem of the inconsistency of the US system with Article 2(1), sentence 2, of the UPOV Convention was therefore of minor importance. It could be overcome by not extending the Convention to those species in which protection under both US systems was possible.

48. At the request of one of the participants in the meeting, it was explained that the Convention left it to the member States to decide to which species the Convention would apply. Under the present wording of the Convention, however, it had to be applied within eight years of the entry into force of the Convention for that State to varieties of 13 genera and species listed in an Annex to the Convention (see the following paragraph). In response to a further request from one of the participants, the members of the UPOV delegation made a survey of the species eligible for protection at the present time in the UPOV member States and explained the contents and purpose of the UPOV Test Guidelines.

49. As to Article 4, the members of the UPOV delegation explained that the Annex to the Convention listing certain varieties to which the Convention had to be applied within a certain time limit had to be changed. Either the Annex would have to be completely deleted and replaced by an obligation to apply the Convention within a certain time limit to a certain number of species whose choice would be left to the member States, or it would have to be amended. It had been realized within UPOV that the genera and species listed in the Annex were mainly of importance in European States and that on the one hand not all future member States would be ready to extend the protection to all the species and on the other hand some species which were very important for some future member States were missing in the Annex. It was pointed out that for the present member States the Annex had little meaning since these States had extended the Convention to a far greater number of species. Some obligation to extend the protection to a minimum number of species might, however, be useful in the case of the accession of a new member State. Mr. Butler, in his capacity of Chairman of the Committee of Experts on International Cooperation in Examination, made a survey in this context of the planned cooperation between plant variety protection offices and the importance of such cooperation for the extension of protection to further species. Mr. Kordes, President of CIOFORA, underlined the interest of breeders of ornamental plants in the extension of the application of the Convention to a greater number of plants in the ornamental sector.

50. Mr. Kordes also mentioned the interest of ornamental plant breeders in the extension of the scope of protection to the final product, especially to cut flowers. He pointed out that, without such extension, the protection of new plant varieties might turn out to be worthless if the variety was multiplied and cut flowers were produced in a non-member State without the payment of a license fee to the plant breeder and later sold in a member State.

51. The French members of the UPOV delegation pointed out that in France the scope of protection for some ornamental flowers was extended to the final product. The representatives of the US Patent and Trademark Office remarked that the protection derived from a plant patent also included cut flowers, but that the enforcement was causing problems. Finally, the fact was mentioned that the UPOV Convention left it to each member State to extend the plant breeder's right to the final product, either unilaterally by its national law or by means of special agreements. It was for the member States to decide if they wanted to make use of this option. In the opinion of most of the participants, prescribing in the Convention the extension of the protection to the final product was not to be recommended.

52. The participants in the meeting discussed the standards which were applied by the UPOV member States in assessing homogeneity. It was underlined that according to the UPOV Convention the variety must be "sufficiently" homogeneous and that special reference was made to the features of the sexual reproduction or vegetative propagation of the plants.

53. With respect to Article 6, the participants were also informed of the reasons for the rule prescribing that the variety may be marketed for as long as four years in the territory of another State without destroying its novelty.

54. The meeting spent most of its time on the discussion of Article 7 and of the question how varieties should be examined before the title is granted. The view was expressed that, in the case of asexually reproduced plants, it would not be necessary to conduct field trials as this was done in the present UPOV member States. As far as sexually reproduced varieties are concerned, some participants were of the opinion that examination in growing tests was also not necessary at least not for assessing novelty. This could be done on the basis of the description. If, later, the question arose whether varieties were identical or almost identical, it was still possible to grow the plants side by side since the US Plant Variety Protection Office received samples of the protected varieties before the title was granted. Such a procedure would be cheaper than to perform growing tests in each and every case. Members of the UPOV delegation pointed out, however, that growing tests, officially performed prior to the grant of the title, would give the title greater legal security.

55. As far as the assessment of homogeneity is concerned, some participants declared that they could not deny the value of growing tests officially performed. The same result could be achieved, however, if plants were tested by officials in the trial fields of the breeders. In the United States, neither official tests nor, in general, inspection of new varieties in the trial fields of the breeders would take place. So far, the two competent Offices relied only on the breeders' investigations. It had been proved that breeders in the United States could be trusted in this respect. Some of the breeders' representatives remarked that they preferred this system of testing a variety themselves. There was an obvious preference in the United States for a system of self-control and a fear of relying on the judgment of third parties. The breeder would be best placed to know what was worth protecting and what was not. The members of the UPOV delegation expressed their doubts as to whether private breeders possessed sufficient reference varieties to make a reliable judgment and would apply the same standards for homogeneity.

56. Another difficulty of the US system was seen in the fact that examinations of new varieties were as a general rule performed in different places. This would make it difficult to compare the descriptions of plants of two varieties. It might happen that the identity of two varieties was not discovered when each was grown in a different place. It was also doubtful whether the US system under which each breeder had to do his own checking and had to establish a separate reference collection was really the cheaper one. In this connection, it was pointed out by some American breeders that the breeder had to examine the variety in any case before filing an application.

57. As to the question whether the variety should not preferably be examined on the premises of the breeder by representatives of the competent authority, some members of the UPOV delegation pointed out that such a practice might be worth considering, especially for smaller crops.

58. With regard to the question whether growing tests were prescribed by the Convention, it was noted that the wording of the Convention required an examination. The members of the UPOV delegation stressed the fact, however, that the drafters of the Convention had meant an examination of the plant material. This was confirmed by the wording of Article 30(2) and the Recommendation which the Diplomatic Conference had adopted on the day when the Convention was opened for signature. It might be true, however, that an examination as performed by the US authorities would not be contrary to the wording of the Convention.

59. Some members of the UPOV delegation added that they could believe that the breeder would perform a reliable examination in the case of at least a medium-sized company. The situation would be different where the breeder was an amateur or a small company. Such a breeder would hardly have sufficient reference material and the experience to carry out the necessary check and he would not be sufficiently trained to give a description. The members of the UPOV delegation expressed their doubts as to whether descriptions furnished by the breeders and based on trials in different geographical locations were of value for comparison purposes.

60. Concluding the discussion on Article 7, the Secretary-General of UPOV pointed out that UPOV was to decide during the coming weeks and months whether the examination performed in the United States could be considered sufficient under the Convention. This was the aim of the mission of the UPOV delegation. After having completed its mission, the delegation would have a good basis for considering the question of the interpretation of Article 7. The meeting had been highly beneficial for clarifying the position of interested circles in the United States on this question.

61. It was decided to spend the remainder of the time of the meeting discussing Article 13 and the question of variety denominations. Some participants asked why it was necessary at all to ensure that each variety was given a variety denomination and why rigid rules had to be applied for this purpose. The members of the UPOV delegation explained the background of Article 13. They mentioned, as the basic reason for this Article, the protection of the farmer, who should be sure that he always received the same variety under the same name. The fact was also mentioned that varieties fell into the public domain after the period of protection had expired. By that time, there must be a neutral non-proprietary name for the variety under which everybody could sell it. This would not be the case if the variety was sold during the period of its protection under the breeder's trademark. In the latter case, the exclusive right of the breeder in his variety was in practice prolonged beyond the period of protection of the variety.

62. With respect to the question which UPOV rules were thought to be particularly difficult to accept, the representatives of the private organizations referred to the exclusion of letter/figure combinations and to the prohibition of the use of family names in variety denominations. The system of naming corn varieties by numbers which were added to the name of the firm had been particularly well introduced in the United States and was said to be appreciated by customers. The US seed industry would not like to replace these indications by fancy names.

63. The representatives of the competent US authorities and of the private organizations in the United States mentioned that they did not basically disagree with the rules outlined in Article 13 of the UPOV Convention and some of them considered that these rules represented a well-balanced compromise between the interests of the breeders and those of the public in general. What they strongly disapproved of, however, were the more far-reaching restrictions in the UPOV Guidelines on Variety Denominations. The members of the UPOV delegation pointed out that the Guidelines for Variety Denominations were only recommendations to the UPOV member States. They did not bind these States. Any new member State could restrict itself to applying only the rules contained in Article 13 of the UPOV Convention and could therefore ignore the Guidelines. The fact was mentioned, however, that it was advantageous for the breeder if all member States applied the same rules concerning variety denominations. This would give the breeder, at least in most cases, the assurance that a denomination accepted in his home country would also be accepted in other member States. It was for this reason that the UPOV member States tried to harmonize the rules on variety denominations. As to the remark that certain names had a special attraction in certain countries but not in others, the members of the UPOV delegation pointed out that these were rare cases.

64. The members of the UPOV delegation underlined that it was admissible under the UPOV Convention to add a trademark to a variety denomination.

65. In the evening of September 8, the President of the Council of UPOV and the Secretary-General of UPOV gave a reception in the Watergate Hotel for the participants of the meeting held that day and other representatives of the US authorities.

Visit to the US Plant Variety Protection Office

66. On September 9, the UPOV delegation visited the installations of the US Plant Variety Protection Office in the building of the National Agricultural Library in Beltsville, Maryland. It was welcomed by Mr. Howard Woodworth, Deputy Director of the US Department of Agriculture, Mr. Stan Rollin, Commissioner of the Plant Variety Protection Office, Mr. Bernard Leese, Chief Examiner of the US Plant Variety Protection Office, and other staff members of that Office.

67. Mr. Rollin made a short survey of the history of the protection of plant breeders' rights in the field of sexually reproduced plants, starting from 1961. He mentioned that the law at present in force had been prepared in conformity with the following five principles:

- (1) participation should be voluntary,
- (2) the right should be based on novelty,
- (3) no performance tests should be required,
- (4) the right should not interfere with the release and distribution of germ plasm,
- (5) it should be left to the owner of a right to defend his right.

68. According to Mr. Rollin, the draft had been adopted by Congress without discussion. In order to avoid opposition on the part of influential circles, six vegetables had been excluded from the application of the Act, namely: okra, celery, peppers, tomatoes, carrots and cucumbers (Section 144 of the US Plant Variety Protection Act). The unexpectedly fast acceptance of the United States Plant Variety Protection Act of December 4, 1970, had necessitated a speedy organization of the Office. Examination in the Office was performed with the help of computers; the computer was programmed to compare the content of the description by the applicant, which is drafted according to special forms, with the existing documentation stored according to the same system. In elaborating the forms for the various species, the already existing UPOV Test Guidelines were of particular help. At the present time, forms existed for 15 different species, while work was being performed on 24 additional species. The US Plant Variety Protection Office urgently needed forms for another 20 species.

69. Mr. Rollin pointed out that the basic principles of the Plant Variety Protection Act were the same as those in the UPOV Convention. The new variety must be distinct, uniform and stable. Distinctness meant that the variety clearly differed by one or more identifiable morphological, physiological or other characteristics from all prior varieties of public knowledge at the determination date. The determination date was the date on which the plant variety fulfilled all conditions for being filed. Distinctness could be based, according to the wording of the Act, also on milling and baking characteristics in the case of wheat, an addition which had been included in the Act during the legislative procedure but had not acquired any significant importance.

70. Mr. Rollin emphasized that applications contained a "novelty statement" listing characteristics outlining the novelty of the variety, while the "whole description" gave a summary of all the characteristics of the new variety.

71. The US Plant Variety Protection Act also provided that plants of a new variety could be commercialized within one year prior to the application without affecting its novelty. Mr. Rollin stated that the U.S. Plant Variety Protection Office accepted a new cotton variety described as having 50% cream and 50% white pollen, but that the novelty could not be based on such a claim. A mixed character would not be accepted if it was considered an essential character.

72. In answer to the question what was decisive for protection--the description as filed or the true characteristics of the plant if different from the description--Mr. Rollin replied that the description could be adapted and corrected. He also said that characteristics which were not mentioned in the form did not count. If the variety showed, for example, certain characteristics such as special disease resistance which had not been listed beforehand, another breeder would not be prevented from obtaining protection for an identical variety by basing the novelty on that characteristic.

73. In reply to the remark that the protection granted by the Plant Variety Protection Office was largely based on the honesty of the breeder, Mr. Rollin referred to the fact that wrong statements in a plant variety application could be punished by a 10,000 dollar fine or by one year's imprisonment, and that legal defense was useless if it was based on an erroneous statement made in the form. Such severe consequences of erroneous statements would ensure that, in general, descriptions were true to the best knowledge of the applicant.

74. Mr. Rollin said that, to justify distinctness, one character, whether essential or not, was sufficient.

75. As to the one-year period of grace in which the variety could be commercialized by the breeder without affecting its novelty, Mr. Rollin pointed out that the applicant had to label the seed with a label reading: "Application for plant variety protection contemplated." Release of a new variety to one person merely for multiplying purposes or for experimental purposes would not be commercialization. In general, however, breeders would be cautious about releasing the variety in such a way since it would always be risky to put the new variety on the market at an early stage.

76. Mr. Rollin also mentioned the fact that applicants could file the description of a variety with the Plant Variety Protection Office and ask for publication only to prevent others from monopolizing the variety. So far, no use had been made of this possibility.

77. On request, Mr. Rollin described the appeal procedures open to applicants: (a) reconsideration of the case by the Office; (b) appeal to the Secretary of Agriculture, who seeks the advice of the Plant Variety Protection Board before taking a decision, the Plant Variety Protection Board being described as a body composed of private individuals with special experience; (c) appeal to the courts (Court of Customs and Patent Appeal and the United States Courts of Appeal, or the United States District Court for the District of Columbia). No appeals have yet been filed, but two cases had to be reconsidered. Mr. Rollin mentioned one case as being of special interest. The examiner had refused the application for protection for a cotton variety because the variety lacked homogeneity in the pubescence of its leaves. The variety was especially adapted for Texas, where the plants are artificially defoliated before harvesting. Therefore, it was decided that the characteristics of the leaves were not essential in the case of this variety and a lack of homogeneity of the pubescence of the leaves would thus not be an obstacle to the granting of a certificate.

78. Mr. Rollin informed the UPOV delegation of a special aspect of the US Plant Variety Protection Act: the applicant could specify that the variety could, by the variety name, only be commercialized as certified seed. In such a case, the seeds of the variety were controlled by the federal authorities, according to the Federal Seed Act. The breeder would thereby gain the assistance of the government authorities to enforce his rights. A specification stating that a variety can only be commercialized as certified seed was of course only possible for crops for which a certification system existed. Seventy-five per cent of all agricultural species were so protected.

79. Mr. Rollin also explained that the Secretary of Agriculture could declare a protected variety open to use by anyone on the basis of equitable remuneration to the owner, which should not be less than a reasonable royalty. This provision of the US Plant Variety Protection Act had not yet been used in practice.

80. Mr. Rollin also reported that farmers had the right to save seed from a protected variety and not only to use it in their own fields but also to sell it to other growers (farmers). The other farmers could not resell the seed nor could the first farmer sell the seed to a seed dealer.

81. Mr. Rollin explained the rules on reciprocity, which meant that nationals of another State had access to the protection scheme in the United States whenever US nationals were able to apply for protection for the same species in that other State under comparable conditions. Where comparable conditions only existed in part, access to the US system was limited in the same way.

82. Mr. Leese, Chief Examiner of the US Plant Variety Protection Office, made a survey of the organization of that Office in which he said that it employed seven examiners. Information on 20 to 22 crops was stored in a computer.

83. Mr. Leese then explained the examination procedure in detail. He stated that the computer was programmed to search the variety against all varieties of the same species. The computer contained information on 607 wheat variety descriptions and on 618 cotton variety descriptions. In the case of corn and rice, the number of variety descriptions stored in the computer was smaller.

84. Mr. Leese informed the UPOV delegation that the information given by the breeder was confidential during the examination. In response to the question whether the Plant Variety Protection Office was able to send samples of seed to the offices of other States, Mr. Leese replied that his Office would not obtain any seed before the certificate was granted. In this context, it was remarked by the representatives from the US Plant Variety Protection Office that, where an applicant had also filed an application in another country and submitted to the US Plant Variety Protection Office a test report from that other country, the US Office would make use of that test report. Mr. Leese also expressed the hope that the US Plant Variety Protection Office would receive descriptions from UPOV member States.

85. Mr. Leese described the examination of the application in detail. He explained that the applicant had to fill in a form and attach several Exhibits (Exhibit A to Exhibit E).

86. Mr. Leese mentioned that before a certificate was granted the applicant had to send in samples of his seed. The number of seeds required was 1200 but the Office usually received more.

87. In response to the question whether examiners visited breeding firms, Mr. Leese replied that this was only done exceptionally and had happened in one case so far. He would do so, however, if he found that something was wrong, or at the invitation of the breeder.

88. At the end of the discussion meeting, Mr. Laclavière thanked the Plant Variety Protection Office for the information given to the UPOV delegation.

Invitation from the American Seed Trade Association

89. In the evening of September 9, 1975, the UPOV delegation was invited by the American Seed Trade Association to a dinner party.

Visit to the Conard-Pyle Company - Star Roses - in West Grove, Pennsylvania

90. On September 10, 1975, the UPOV delegation visited the Conard-Pyle Company - Star Roses - which is primarily a nursery specializing in roses and hardy woody plants grown in containers. In addition, the company tests and evaluates new varieties, mainly of roses but also of some other plants which might be suitable for the American market. It does not have any hybridizing or other breeding program of its own. It relies on breeders and developers of new plants who do not have their own facilities for testing, growing stock or commercializing new plants. Since it does not have a breeding program of its own, the company does not compete with the breeders whose plants it multiplies, but acts as agent for breeders in looking after their rights in new varieties.

91. The UPOV delegation was welcomed by Mr. Richard Hutton, who informed the delegation that the company, which is commonly known under the name of Star Roses, has at present under test approximately 1600 varieties of roses from more than 45 breeders. It also evaluates roses from European countries.

92. The company maintains a test garden for the trials of All-America Rose Selections. Mr. Hutton reported that the latter was an organization for the testing of new roses on a national basis. There were 26 official test gardens across the United States. Each test garden had an official judge evaluating and scoring the entries over a two-year period. The judges were qualified experts on roses. Eight were with commercial rose nurseries, five with universities, nine with municipal work departments, and four were amateurs. At the end of the two-year trial, the results obtained by the judges were centrally collected and awards were given. Awards could vary from none to as many as five in each year.

92. At the request of the UPOV delegation, Mr. Hutton reported that, in order to participate in the All-America Rose Selections, breeders had to pay an entrance fee of between 100 to 300 dollars. The amount of the fee depended on the number of roses entered for trials: the more roses entered, the higher the fees to be paid. Usually, only roses which had won an award had any great chance of being sold. Fifteen rose varieties represented 75% of all rose sales in the United States.

93. Mr. Hutton also informed the UPOV delegation that each plant for which protection was granted had to be labelled. Licensees also had to label their plants since otherwise no protection could be granted.

94. Mr. Hutton reported in addition on container production. He also said that the company was searching for new varieties of many types of hardy ornamentals. At present, the company was evaluating new strains of deciduous azaleas, of glossy-leaved, red-berried, hardy Ilex (hollies), of conifers, of broad-leaved evergreens and of hardy shrubs.

95. As to the amount of protection obtained or applied for by the company, it was stated that the company worked with around 100 US plant patents and had eight plant patent applications being processed.

96. Mr. Hutton described the difficulties involved in serving a national market as big as that of the United States and informed the delegation that the company had adopted a policy of licensing reputable nurseries to grow and sell the patented varieties. The licensees paid a royalty for each plant they sold. The company thought this system to be more equitable than a royalty on each plant produced. In assessing the amount of royalties to be paid, the company accepted the licensee's word on the amount of sales. This "honor" system had worked satisfactorily in the United States.

Visit to the Burpee Company, Philadelphia, Pennsylvania

97. In the afternoon of September 10, 1975, the UPOV delegation visited the Burpee Company at Warminster near Philadelphia, where it was welcomed by Mr. Jerome Kantor. Later, it was received at Fordhook Farm, by Mr. David Burpee (83), who since 1915 has headed this enterprise founded in the last century. The company originally concentrated on the breeding of sweet peas, but changed to the breeding of mainly marigold flowers and other ornamentals. Mr. Burpee described variety protection as representing a great progress. Without variety protection, a breeding company could only recover its breeding costs in the first year of marketing, when the company is normally ahead of its competitor. Already in the second year, it would have to share the market with other competitors. Mr. Burpee explained that hybridization was rather unimportant in the field in which he worked, and that this was probably the reason for his favoring plant variety protection more than breeders of, for example, corn varieties.

98. After the introductory discussion with Mr. Burpee, the delegation visited the extensive trial grounds for ornamental flowers and for vines.

Visit to Princeton Nurseries

99. In the morning of September 11, 1975, the UPOV delegation visited the Princeton Nurseries, where it was received by Mr. John Flemer and Mr. Richard Henkel. Princeton Nurseries specialize mainly in trees, especially shade trees like ginko trees. They sell to wholesalers and landscaping firms. The company has extensive refrigeration installations which allow it to dig trees in autumn and sell them in May. The plants are kept at a temperature of 32°F to 36°F and under controlled moisture.

100. Mr. Flemer and Mr. Henkel reported on the long time required for developing new tree varieties. The length of time depended on the species. It would not take more than eight years to develop a crab apple, but for a special ginko variety the company needed 35 years.

101. The UPOV delegation was informed that the company employed attorneys to deal with the filing of its applications for obtaining plant patents. Mr. Flemer said that he was in favor of the protection of plant breeders' rights. In order to make its varieties public and to have a reference in case of later difficulties, the company regularly sends specimens of its program to arboretums.

102. As to difficulties, Mr. Flemer said that none had arisen with ginko trees but some with linden trees.

103. After visiting the nurseries, the UPOV delegation was invited to the home of Mr. William Flemer, Jr., the senior head of the company.

Visit to Cornell University, Ithaca, New York

104. On September 12, the UPOV delegation visited the Agricultural Faculty of Cornell University in Ithaca, and obtained information on the way in which breeding was performed by public institutions in the United States. The group was conducted by Dr. William Pardee.

105. The delegation was first informed of the Faculty's corn-breeding activities. It was explained that these activities were performed to adapt corn varieties mainly developed for the Middle East to the special climatic conditions in New York State. The Faculty also carried out fundamental research. Besides its breeding work, the Faculty grew new varieties in order to compare them and give advice to farmers.

106. The delegation visited the growing areas for cucumbers, where the disease resistance of cucumber was examined, and tomatoes, where for the time being the effect of the planting date on the yield was being studied. The delegation was informed that Cornell University published the results of its examination work in a bulletin of production recommendations.

107. The Faculty maintains 50 county agents and cooperates with a great number of farmers.

108. The delegation was also informed of the alfalfa-breeding activities of the Faculty, which consist mainly in the cross-breeding of clones, back-crossing and synthetic breeding.

109. The delegation was informed that a special Seed Committee was responsible for the release of new varieties. It consisted of experts in this field. In answer to a question from the members of the delegation, it was replied that the Faculty had in three cases applied for plant breeders' rights. The members of the Faculty reported that they sometimes found it difficult to answer the questions in the questionnaire of the Plant Variety Protection Office, but it was felt that this work could be done without employing a taxonomist. The Faculty was interested in protection mainly because, according to the Plant Variety Protection Act, it could require that only certified seed of the variety should be sold. On the question how the Faculty compared its own varieties with others, it was reported that in some cases this was very difficult but the Faculty was trying to grow the best known varieties as reference varieties in its own fields.

110. The Faculty does not charge royalty fees for the use of its varieties but receives voluntary grants for its research work from users. Most users would in any case support the research work of the Faculty by grants.

111. The delegation was also informed about the breeding work for cereals.

112. It was reported that the Faculty grows breeders' seed in a quantity which is sufficient for five to seven years and then stores it in special refrigeration houses. In this way, the foundation seed of each year is grown from the same material so that the stability of the variety is guaranteed for a longer period.

Visit to Harris Seeds Company, Rochester, New York

113. In the afternoon of September 12, 1975, the delegation visited another well-known seed company in the United States: Harris Seed Co., in Rochester, which has been in existence since 1876. It also has installations on the West Coast of the United States. The main activities of this company are the breeding of flower and vegetable varieties, as well as hybrids of these varieties. As with most hybrid breeders, only a few applications for protection are filed.

114. The representatives of the company reported that one plant pathologist was employed while the number of professional breeders amounted to five. Standard varieties were grown, as well as varieties of competitors for comparison purposes.

115. As to the current program, it was reported that one marigold variety had just obtained protection while one application for a pumpkin variety had been filed. Efforts were also being made in the breeding of disease-resistant radishes.

116. The representatives of the company could not report on any infringement of their varieties.

117. The representatives of the company assured the UPOV delegation of their great appreciation of the breeding work of public institutions and said that they did not consider that this was competition. The public institutions would not ask for royalties if their varieties were used; they would only set their conditions for the handling of the maintenance of the variety. Industry made contributions to the public institutions which were higher than any royalty they had to pay.

118. The UPOV delegation visited the company's extensive trial and multiplication fields.

Internal Discussions

119. The UPOV delegation used the weekend of September 13/14 for an internal discussion of the outcome of the visit to the United States, summarized in the Annex to this document, and for the preparation of the visit to Canada. It was agreed that a detailed report, not containing any conclusions, would be prepared by the Office of UPOV. The first draft of this report should be sent as early as possible to the participants in order to be compared with their own notes and to be amended where necessary or advisable. The President of the Council of UPOV would give a short report on the outcome of the mission in the Council meeting. The main discussions on the outcome of the mission should take place in the session of the Committee of Experts on the Interpretation and Revision of the Convention to be held from December 2 to 5, 1975, and should be continued in the presence of observers of interested States and international organizations in the third session of that Committee of Experts, which would take place from February 17 to 20, 1976.

PART II

Mission to Canada

120. On September 14, 1975, the UPOV delegation went on to Ottawa (Canada) for discussions with the Canadian authorities and interested circles.

Visit to the Canadian Department of Agriculture in Ottawa

121. On September 15, the UPOV delegation met with representatives of the Canadian Department of Agriculture in the John Carling Building in Ottawa, Ontario. It was received by Mr. C.H. Jefferson, Director, Plant Products Division, Production and Marketing Branch, and Mr. W.T. Bradnock, Chief, Seed Section, Plant Products Division. Besides Mr. Jefferson and Mr. Bradnock, the following persons participated in the meeting: Mr. Ronald J.G. Junk, Head, Seed Projects, Seed Section; Dr. A. Chan, Director, Ornamental Research Service, Research Branch, Agriculture Canada; Dr. M. Clarke, Research Coordinator (Forage Crops), Research Branch; Dr. J.W. Morrison, Research Coordinator, (Cereal Crops), Research Branch; Mr. C. Hughes, Legal Services, Department of Justice; Mr. E.G. McLaughlin, Secretary and Manager of the Canadian Seed Growers' Association and Dr. S.C. Barry, former Deputy Minister in the Canadian Department of Agriculture and at present Consultant to the Canadian Seed Growers' Association.

122. The Canadian representatives gave a report on developments in Canada. They informed the UPOV delegation that a decision by the Government concerning the protection of plant breeders' rights was pending. All parties concerned were very much in favor of introducing such protection. The question how to achieve this protection was still open. The government representatives were in close contact with the Canadian Seed Growers' Association. Discussions were also being held in the Canadian Agricultural Services Coordinating Committee. This Committee is composed of the Deputy Ministers of the Federal Department of Agriculture and the ten provincial Departments of Agriculture, as well as the Deans of the agricultural faculties of the Canadian universities. The Canadian representatives declared that the visit of the UPOV delegation had come just at the right moment.

123. The Canadian representatives reported on the history of endeavors to have plant varieties protected in Canada. These endeavors, which had been carried out since 1923 and which were mainly aimed at having plant breeders' rights protected by patents, had failed so far. The lack of protection had led, in the field of ornamentals, to the establishment of the Canadian Ornamental Plant Foundation (COPF), which distributed cultivars that breeders have registered with the Foundation against payment of royalties, supported research on breeding and facilitated agreements between breeders of new ornamental varieties and their users. The Canadian representatives reported on the good relationship existing between private and public breeders in Canada.

124. The Canadian representatives also indicated that a restrictive list existed for agricultural crops and turf grasses. Ornamentals were not contained in this list, nor were vegetable crops with the sole exception of potatoes.

125. The Canadian representatives furthermore explained that the six different climatic zones which existed in Canada represented a major problem for plant breeders. Canada was a State with a small population and its arable land was restricted to approximately 100 to 200 miles north of the border between Canada and the United States of America. These conditions were sometimes responsible for the view that the protection of plant varieties was of little use to Canada and would only hamper the development of free enterprise. There was, however, a growing interest in the protection of plant breeding. Canada took a close interest in the activities of UPOV in the field of cooperation in examination.
126. In reply to questions raised by the Canadian representatives concerning public breeding in the member States of UPOV, the members of the delegation said that normally public institutions charged royalties for permission to use their varieties in order to obtain a return on their research investment without entering the seed business with its attendant budgetary needs. The delegation also confirmed that hybrids could be protected under the Convention and that, with one temporary exception, they were protected in the member States of UPOV. The delegation explained in detail the possibility under the Convention and the national laws of granting compulsory licenses but underlined that no compulsory licenses had so far been granted. The respective rules in the UPOV Convention and in the national laws merely served as a means for promoting mutual agreements between breeders and users.
127. Mr. Laclavière made a survey of the history of plant variety protection in Europe and of the Paris Conference from 1957 to 1961, describing in general terms the background of the UPOV Convention. The Vice Secretary-General of UPOV summarized the contents of the Convention and described the organization of UPOV. On a question from a Canadian representative, it was confirmed that, in the private sector, mainly ASSINSEL and CIOPORA were behind UPOV. The fact was also mentioned that a number of international non-governmental organizations had been heard on several occasions by UPOV but were not represented in the Council. It was emphasized that private circles in Europe strongly favored the present system whereby UPOV member States examined new varieties by growing tests and had the descriptions drafted by the official authorities.
128. Mr. Skov (Denmark), Chairman of the Committee of Experts on the Interpretation and Revision of the Convention, reported on the outcome of the Committee's first session and explained that a number of proposals for a more flexible interpretation of the Convention and for the revision of some of its articles had been discussed but most of the work was still before the Committee, which would hold its second and third sessions in December 1975 and in February 1976, respectively. For the 1976 session, apart from interested States such as Canada, a number of international non-governmental organizations had been invited to send observers.
129. After these introductory explanations, a number of questions by the Canadian representatives were answered. In reply to the question how breeders could prove their rights in court, it was pointed out that besides the fact that there was a description made by an impartial government authority and the variety was often grown as a reference variety on official trial fields, it was also possible, if required by the court, to have the protected variety grown side by side with another variety. It was indicated in this connection that, according to European experience, breeders found it difficult to describe their varieties adequately in an application. Contrary to former procedure, European plant variety protection offices usually did not demand extensive descriptions from the breeders, but only asked for such information as was necessary for grouping the varieties. The description was made by the office, thereby saving the breeder the trouble of making the description himself or even employing special staff for the purpose. It was pointed out that the concentration of description work in the office was more economical than having the job done with less effect and less precision by the breeder himself. In addition, the fact that descriptions made by the breeder had necessarily to be made in different parts of the country, especially a country like Canada, would prevent them from being really comparable, a disadvantage which could be avoided by growing the varieties centrally in the same official testfields side by side. Viewed from this angle, the European way of examining new plant varieties was not more expensive, but in fact more economical. The fact was also mentioned that the "European examination" was especially advantageous for small breeders, who did not have the means to maintain extensive collections of standard varieties. It was the small breeders in particular who, in cases of infringement, would depend strongly on the results of the official examination.
130. As far as provisional protection is concerned, the UPOV delegation reported that in Article 7, paragraph (3), the Convention allowed such protection and it existed in some but not all member States.

131. Asked whether the official examination could be performed on the breeders' premises, the UPOV delegation replied that so far this had not been the practice in UPOV member States, but it might be accepted in future for small crops in order to reduce the costs of examination.

132. The relationship of the examination for the purpose of plant variety protection to the examination required for inclusion in the national list was also explained. It was pointed out that part of the examination was identical in both cases. For the main crops, where commercialization is not admissible in most European States without entering the variety in the national list, the examination for the purpose of plant variety protection therefore created only a little additional work.

133. As to the period of protection, the UPOV delegation explained on request that this period differed from one member State to another and that the Convention merely contained a rule on the minimum period of protection. For most varieties the length of the period of protection was merely theoretical because they were not commercialized for more than eight to ten years. Only in a very few cases the protection was, therefore, upheld for the whole period of protection provided for under the national law.

134. As to the question of the length of time during which reference varieties are kept, it was pointed out that this depended on the crop.

135. The Canadian representatives asked whether the requirement of homogeneity, if carried too far, would not be harmful to the variety. It was claimed that sometimes a less homogeneous variety, especially a multiline variety showed more field resistance to pests and diseases. The UPOV delegation replied that a multiline variety could be protected under the UPOV scheme by protecting the different lines. The breeder would, in such a case, obtain more than one title for the protection of his right. He could then mix the lines under controlled conditions. Any other solution would lead to difficulties from the legal point of view: the competitor had to know what exactly was protected. For the rest, it was pointed out that the UPOV Convention only required "sufficient" homogeneity.

136. Mr. Butler (Netherlands), in his capacity of Chairman of the Committee of Experts for International Cooperation in Examination, described UPOV's endeavors to organize collaboration in the technical examination for the sake of economy. He mentioned in particular that a draft UPOV Model Agreement was about to be adopted by the Council and a model for a multilateral arrangement serving the same purpose was under discussion. He also said that some bilateral agreements were already in force. He cited as an example the fact that Denmark was performing examination work on behalf of other offices for poinsettias, the Federal Republic of Germany for begonias, African violets and some berryfruits, the United Kingdom for apples, chrysanthemums and probably later for rye-grass, lucerne and a great number of additional ornamental plants, while the Netherlands was planning to perform examination work for grasses, freesias and hyacinths and other bulbous plants. Some offices of member States were ready to accept the results of other offices for roses. Mr. Butler underlined the fact that no blank recognition of the test results of other offices was foreseen; these test results would rather be used as a basis for each office's own decision. Mr. Butler concluded by saying that cooperation of this kind, which has been called "centralized testing," might not at present include major crops.

137. Mr. Butler also mentioned the possibility of asking for test results for other crops where tests had already been made in the office of another member State, or were being performed in that office (called "exchange of test results"). He added that rules would have to be adopted for the hearing of witnesses from the office carrying out the examination work.

138. The Canadian representatives doubted whether the need to hear witnesses in appeal cases might not make the system of centralized testing too difficult. The representative of UPOV replied that there had been only a limited number of legal proceedings in all UPOV member States. Breeders could be convinced more easily of the shortcomings of their varieties than inventors, in the related field of patents, could be convinced for the non-patentability of their inventions.

139. Another question raised was whether, in the UPOV member States, a 2% higher yield would suffice to justify the distinctness of a new variety where other distinguishing features were missing. If such was not the case, it was asked whether a 5% higher yield would prove sufficient or, if not, what higher percentage would be necessary.

140. The answer given was that, according to the present practice of offices of UPOV member States, yield per se was never enough. It never happened, however, than an increase in yield was noted without noticing other different characteristics of the new variety at the same time. The office's task was therefore to look for other morphological or physiological differences in the new variety. The differences had to exist since, otherwise, the higher yield could not be explained; somehow, the other variety had to be different.

141. In response to a question from the Canadian representatives, the UPOV delegation described in detail the testing of new varieties and the function of UPOV Test Guidelines. It was also mentioned that the examination lasted normally for two and in some cases for three years. It was indicated that some offices were using computers and the UPOV Test Guidelines were adapted to such procedure. In connection with the discussion concerning procedure, the representatives of the different UPOV member States described the procedures in their States, including the possible legal remedies that existed.

142. A further item of the discussion was the obligatory list attached to the Convention. It was observed that member States had to apply the Convention to all genera and species listed therein within a period of only eight years after the entry into force of the Convention for those States. It was further pointed out that the present UPOV member States were already determined to change the Annex or to delete it completely. On the other hand, the present UPOV member States thought that there should be some undertaking to compel new member States to apply the Convention to a certain number of genera and species after a given time. The experts in the UPOV member States had realized, however, that the list contained genera and species important for Western Europe which might not be so important in other parts of the world. The Canadian representatives declared that they were not interested in protecting some of the genera and species. In the event of joining the Convention, Canada would expect the present list to be deleted or amended before the eight years had elapsed. It was pointed out in this connection that, even in the event of a revision of the Convention the revised version had to enter into force. This could take some time. If, however, the list attached to the Convention was the only obstacle to Canada's accession to the Convention, it could be agreed by an exchange of letters between the present UPOV member States and Canada that these member States would not expect Canada to apply the Convention to all genera and species listed therein, as normally provided for within the meaning of the Convention.

143. Another item discussed was the question of variety denominations. It became obvious that Canadian objections existed in respect of the Guidelines for Variety Denominations but not in respect of Article 13. It was observed that it would be difficult for the breeder to coin up to 40 fancy names per year in order to name new corn varieties and that no reason was seen for excluding family or company names to which numbers were added.

144. The UPOV delegation explained the relation between Article 13 and the Guidelines for Variety Denominations. The latter were mere recommendations. On the other hand, the purpose served by the issue of Guidelines for Variety Denominations was that breeders had a certain guarantee that they could use the same denomination in another UPOV member State as they used in their own State. Without the harmonization achieved by these Guidelines, the breeder might find a different situation in each member State. The second purpose of Article 13 was to ensure, in the consumer's interest, that the same variety denomination would be used as far as possible in all the member States, since, after the period of protection of the variety had expired, anyone could commercialize that variety under the same denomination as had previously been used. If the variety denomination consisted of a family or a company name, this would mean that anyone who commercialized the variety after the protection period had expired would be providing involuntary advertisement for the firm of the original breeder. These aspects should be considered when deviating from the present practice in UPOV member States. The fact should also be taken into account that breeders selling their varieties under a trademark were endangering the trademark protection in States where the same expression was used as a variety denomination, i.e., a generic term.

145. As far as the combination of letters and figures is concerned, it was mentioned that one UPOV member State, as a result of a decision taken by its Parliament when amending the plant variety protection law, was not in a position to apply the Guidelines on Variety Denominations; it would therefore have to deviate from these Guidelines until they could be altered. This showed that the Guidelines were not binding upon member States.

146. In connection with the statement of members of the UPOV delegation to the effect that Guidelines should also prevent the misleading of farmers, the representatives of the Canadian Department of Justice said that in Canada laws existed to prevent misleading advertising. If these laws were violated, the fact that the denomination used was registered as a variety denomination would not be a defense.

147. As to hybrids, the members of the UPOV delegation pointed out that they could be protected according to the UPOV Convention. The allegation that hybrids would not need any protection was questioned by most of the participants in this meeting. It was pointed out that for the expert in the field it was not difficult in most cases to find out which inbred lines had been used and in what way.

148. One Canadian representative referred to the existence of corn committees in most of the provinces of Canada, authorized by provincial Departments of Agriculture to evaluate and make recommendations on corn varieties for use in their respective provinces.

150. In response to a question by the Canadian representatives, the members of the UPOV delegation explained that in the UPOV member States the State did not have to check whether the breeders' rights were infringed. That would be the sole responsibility of the owner of the breeder's right.

Meeting with Canadian Private Circles

151. On September 16, 1975, the UPOV delegation, again in the building of the Canadian Department of Agriculture, met with representatives of the Canadian Seed Trade. Those present were Mr. Stewart from Stewart Seeds, Ltd., a large Canadian cereal breeder, Mr. Dough Kerr, Maple Leaf Mills, Mr. Gabriel Eros of OSECO Ltd., and, as representatives of the Canadian authorities, Mr. Bradnock of the Department of Agriculture and Mr. Rugg from the Agricultural Products Division of the Department of Industry and Commerce.

152. Mr. Laclavière (France), President of the Council of UPOV, again presented his survey of the history and the background of the UPOV Convention, while the Vice Secretary-General of UPOV explained once more the contents of the Convention. Mr. Skov (Denmark), Chairman of the Committee of Experts for the Interpretation and Revision of the Convention, described the work achieved so far in that Committee.

153. As on the previous day during the discussions with the Canadian authorities, the members of the UPOV delegation gave the reasons underlying Article 13 and the motivation for the present Guidelines for Variety Denominations, pointing out that these Guidelines might be changed in the near future.

154. As to the question of the examination, all members of the UPOV delegation were unanimous in expressing the opinion that they saw little chance that their country would apply the system encountered in the United States. The President of the Council of UPOV, mentioning the negotiations that had preceded the adoption of the Convention, pointed out that, in the view of the scientists, it was only possible to define a variety if it was compared with other varieties. He underlined the value of the official pre-grant examination for legal security. Other members of the UPOV delegation took the view that it was difficult for the breeder to describe the variety in such a way that he could rely on his description in the event of future infringement. At the time when European plant variety protection offices still demanded lengthy descriptions from breeders, it was realized that they were of no great value. The present system in which the offices described the variety in the course of the official procedure spared the breeders this task. European breeders, especially the small breeders, would appreciate this. One member of the delegation said that, if the examination as performed in the present member States of UPOV became too expensive, he would prefer a mere registration system under which it was left to the court, in an infringement proceeding, to order that the two varieties concerned be grown side by side. He did not think that the examination as performed in the United States would be of great help in such an infringement proceeding. Some members of the delegation, however, declared that they could consider a system to be acceptable where the varieties of smaller species were not grown in official testing fields but inspected in the breeder's fields, and where reference varieties of these crops were inspected in public gardens or in arbore-tums.

155. In the course of the discussion on this point, the members of the UPOV delegation who represented member States were asked to send to the Canadian Department of Agriculture information on their resources for operating offices in their home States (financial means, staff, etc.) as well as on the proportion of applications which referred to agricultural crops and to ornamentals. The Vice Secretary-General of UPOV was asked to send Mr. Bradnock a collection of the laws of member States of UPOV. It was explained that the Canadian Department of Agriculture needed this information for the preparation of a law introducing a plant variety protection system.

156. The members of the UPOV delegation reported in detail on the fees charged by their offices for granting plant breeders' rights. One representative pointed out that the system applied in the present UPOV member States saved the breeders expense since they no longer had the problem of describing their variety, which in some cases could lead to the need for the employing of a taxonomist. The increased legal security under the European system represented another advantage for the breeder which might make up for the expense incurred.

157. As to the general situation in Canada, it was pointed out by Mr. Stewart that, for the time being, varieties were seldom used by third persons without authorization. Breeders--mainly big companies--followed at present their own honor code which made them respect the rights of others. In the case of collision, breeders reached a mutual settlement. The situation could deteriorate if smaller breeders appeared on the market. He realized that in such a case the breeders would need legal protection.

158. The question was also discussed whether plant variety protection would not slow down the commercialization of new varieties. In this connection it was pointed out that in the European States it was necessary in the case of the main agricultural crops to wait in any event for the national listing, which took at least the same time as the examination of new varieties for protection purposes. It was also pointed out in this context that European breeders did not mind the time lost by value tests conducted for the national listing (corresponding to merit tests in Canada), since these value tests provided them with the best possible information and represented for the varieties passing the tests a sort of public recommendation. If time could be spared for value tests and those tests were even appreciated by breeders, there did not seem to be any reason why the time spent on examination for protection purposes could not be sacrificed.

159. Mr. Butler (Netherlands), Chairman of the Committee of Experts for International Cooperation in Examination, presented again the report on the plans for international cooperation in the examination of varieties which he had given the day before during the discussion with the Canadian government representatives.

160. The question of variety denominations was discussed and Mr. Laclavière (France), President of the Council of UPOV, described the outcome of the discussion that had taken place the day before and gave some further general information. He underlined that denominations were intended as a guarantee for the user. Using a trademark constituted a risk for the applicant since he might lose his trademark protection in certain countries. The American system of indicating in figures the maturity date of corn varieties was of no use in other countries where other climatic conditions prevailed. There did not seem to be any reason why the breeder should not use instead fancy names which could be easily remembered.

161. As to the remark that it would be difficult to find sufficient names for a wide range of varieties, the attention of the Canadian participants was drawn to the fact that the UPOV Guidelines for Variety Denominations established certain groups within which the same names could not be used. A variety denomination used in one group could, however, be freely used in other groups. To cite an example, it was therefore possible to use variety denominations of rose varieties, which existed in thousands, to name new corn varieties.

162. In this circle too it was emphasized that guidelines had only the value of recommendations and no binding power. If in some countries they were not liked it was sufficient to apply only Article 13 of the Convention. In such a case, however, the breeders would lose the benefit of finding the same situation abroad as they had found in their own country. They would probably have to change names when going abroad, which would cause a number of difficulties such as new labelling.

163. One member of the UPOV delegation mentioned that the problem of variety denominations could be solved in a much easier way if more States acceded to UPOV.

164. In a final remark, Mr. Stewart mentioned that the Canadian Seed Trade would be glad if Canada joined the Union.

165. Mr. Laclavière (France), President of the Council of UPOV, thanked all the participants for their frank and fair discussion of the problems involved and expressed his optimism that Canada would soon become a member of UPOV.

[Annex follows]

Annex

CONCLUSIONS OF THE MEMBERS OF THE UPOV MISSION TO THE UNITED STATES

(Niagara Falls, September 14, 1975)

To assist the discussions in the Committee of Experts on the Interpretation and Revision of the Convention which is to meet at Geneva in December 1975, the members of the UPOV Mission have attempted to summarize their impressions from the visit to the United States.

While appreciating the many points of agreement and the interest of the US authorities in the problems raised by the Mission, there remained some points of difference between the US legislation and the requirements of the Paris Convention of December 2, 1961.

- (1) The list of species in the Annex to the Convention is not suitable for the US (it should be possible to find a solution to this).
- (2) Variety denominations are not subject to any particular protection except for those varieties of which the seed is certified.
- (3) A variety may be marketed up to one year before an application for protection is made without prejudicing the novelty.
- (4) The US does not protect controlled hybrids of sexually propagated crops.
- (5) The duration of the protection is limited to 17 years.
- (6) Sales of seed between farmers under certain conditions do not contravene the rights of the breeder.
- (7) The main differences between the US systems and that operated by all the present UPOV member States lies in the way in which the preliminary examination is made. Article 7 of the UPOV Convention requires a preliminary examination to be made. In the US the description of the variety is not directly related to the plant material during the official examination as is possible when a growing test is requested. In sexually reproduced species a deposit of seed is required, but only after protection has been granted; no steps are taken to ensure that the seed will produce plants matching the description. In asexually reproduced species no deposit is required. Thus while the Group felt that the UPOV Convention is worded in such a way that the US systems might be held to conform to Article 7, this essential difference must also be recognized and the consequence of admitting the US systems carefully considered.

[End of Annex and of document]