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INTERNATIONAL UNION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS

GENEVA

**COMMITTEE OF EXPERTS ON
THE INTERPRETATION AND REVISION OF THE CONVENTION**

SECOND SESSION

Geneva, December 2 to 5, 1975

COLLECTION OF PROPOSALS FOR A MORE FLEXIBLE INTERPRETATION
OR REVISION OF THE CONVENTION AND STATE OF DISCUSSIONSprepared by the Office of the Union

SUMMARY

This paper, which is a continuation of document IRC/I/3 summarizes the proposals made so far for the interpretation or revision of the Convention and sums up the state of the discussions on these proposals. It is intended as a working paper for the discussions of the Committee of Experts on item 3 of the draft agenda for its second session.

1. In preparation for the first session of the Committee of Experts on the Interpretation and Revision of the Convention (hereinafter referred to as "the Committee"), the Office of the Union had collected a number of proposals made at that time for a more flexible interpretation or a revision of the Convention (document IRC/I/3). These proposals were discussed during that session and some of them were approved by the Committee. In the case of some other proposals, it was decided that they should be considered during, or in the light of, the planned mission of a UPOV delegation to the United States of America and Canada (hereinafter referred to as "the mission"). There was a third group of proposals, which the Committee was unable to approve. With regard to the fourth group of proposals, it was agreed that discussion should continue on the basis of further information to be received. The outcome of the discussions is set forth in paragraphs 5 to 45 of the report on the first session of the Committee (document IRC/I/6).

2. The proposals made so far are listed and commented on below, in order to facilitate their discussion during the Committee's second session and the decision to be taken on the question which of the above-mentioned proposals and which new proposals made in the meantime should be placed on the final list of items to be discussed with observers of certain non-member States and of the international non-governmental organizations during the Committee's third session, to be held from February 17 to 20, 1976.

Article 2(1), second sentence

3. While the Convention permits the individual member State to recognize the breeder's right by the grant either of a special title of protection or of a patent, it precludes the provision of both forms of protection for one and the same botanical genus or species. In so doing, the Convention desires to prevent the grant of two exclusive rights--a plant patent and a plant variety protection right--in the same State for the same variety since this could lead to a collision of rights (where such rights are in the hands of different persons) or to dual protection (where such rights are held by the same person). A further disadvantage of allowing the protection of the same genus or species under both possible forms of protection would be that breeders might be forced to apply in the case of the same variety for a patent as well as for a plant variety protection right in order to prevent others from using the variety, because the scopes of protection are different.

4. This preclusion could lead to difficulties in the United States of America, where plant patents are granted in the case of asexual reproduction and special titles of protection in the case of sexual reproduction. In its first session, the Committee decided that during the mission the practical effect should be studied of the possibility of protecting the same variety according to two systems. The UPOV delegation was informed in the United States of America that only in very rare cases was it possible and economically feasible to reproduce a plant variety sexually as well as asexually. In practice, the problem had so far arisen only in connection with 15 varieties of Poa pratensis. The problem was said to have little significance and it was suggested that it could be solved by not extending the Convention in the United States of America to Poa pratensis and to other species for which the same problem existed. In the discussions in the United States of America, the latter suggestion was considered to be a better solution than the elimination of the basically sound principle in Article 2(1), second sentence.

Article 4(3) and (4) and the Annex to the Convention

5. Article 4(3) requires member States to apply the Convention, gradually and within certain time limits, to at least the genera and species listed in the Annex to the Convention.

6. It is the general conviction that the genera and species listed in the Annex to the Convention are of great importance to European States and other States with similar climatic conditions but of less value to States with other climatic conditions. The latter States would find it difficult to undertake to make all genera and species listed in the Annex eligible for protection. Other States have other reasons for not extending the protection under the Convention to certain of the genera and species listed therein. For the present member States of UPOV, the list has no importance whatsoever since all of them have made a far greater number of genera and species eligible for protection. It was for these reasons that the Committee unanimously recommended, during its first session, that this list should be deleted.

7. It has yet to be decided whether at the same time it would be appropriate to delete the obligation to extend the Convention to a minimum number of genera and species which, after the deletion of the Annex to the Convention, would be chosen by each member State. The maintenance of this principle would have the advantage that States would not accede to the Convention if they did not have the serious intention of applying it at least to a minimum number of genera and species. On the other hand, it could be argued that it might be left to means of persuasion in Council sessions and to the activities of national breeder organizations to compel member States gradually to extend the Convention to more and more genera and species.

8. In any case, the deletion of the Annex to the Convention would make changes necessary in Article 4(3), Article 4(4) and Article 33(1). The changes in Article 4(4), which deals with the problem of reciprocity, would also be of substantial importance: at present, member States already offering protection for varieties of a genus or species included in the Annex to the Convention are obliged to extend to nationals or residents of other member States the benefits of this protection and thus to allow them to file applications for such protection. If the reference to the genera and species contained in the Annex to the Convention is simply deleted in Article 4(4), this means that the obligation of member States to allow nationals and residents of another member State to file applications is restricted to those genera and species which are also eligible for protection in that other member State. This would have the effect that the principle of national treatment embodied in Article 3 would be even more restricted than it already is by virtue of Article 4(4). The question should be discussed whether it is preferable to abandon, between member States and their nationals and residents, all exceptions to the national treatment principle so that each national or resident of a member State would have the right in any other member State to file applications for the grant of a plant breeder's right for the varieties of all species eligible for protection in that State (as already proposed by the Delegation of the United Kingdom during the Council's sixth session). The possibility of going even further and giving the benefit of protection to all nationals and residents of the member States of the Paris Union for the Protection of Industrial Property, as envisaged under Article 4(4) and (5), should be maintained in this case.

Article 5(1)

9. Article 5(1) states that the prior authorization of the breeder of the protected variety is required for the production, for purposes of commercial marketing, of the propagating material, as such, of the new variety, and for the offering for sale or marketing of such material. It has been proposed by a representative of the US Patent Office that breeders of asexually reproduced plants be protected against any unauthorized reproduction of the variety and not solely against an unauthorized reproduction of the variety for purposes of commercial marketing of the propagating material as such. This proposal was discussed in the first session. During the discussion, some of the problems of the application of Article 5(1) were mentioned and they are described below. It was decided that the Office of the Union would prepare a short paper specifying the provisions of the law of Denmark and of the United Kingdom for the prevention of these difficulties. This paper is attached as Annex I.

10. The restriction of the protection to the production, for the purposes of commercial marketing, of the propagating material as such is unquestioned in so far as it allows farmers to save their own seed or other propagating material of protected varieties to grow the plants in the coming season on their own premises. Under the US Plant Variety Protection Act, farmers are even permitted to sell such seed to other farmers (but not to seed dealers) and it can be expected that the United States of America, and other States too, will ask for this "farmer's privilege" to be made admissible under the Convention.

11. The right of farmers to save their own seed--and even the extended "farmer's privilege" of the US Plant Variety Protection Act as described above--have no great economic significance, but this might be different in other cases. The following examples mentioned in the first session are cases in which the application of the principle underlying Article 5 is detrimental to breeders: A large enterprise--for instance a canning firm, a sugar refinery or tobacco manufacturer--purchases a small quantity of seed of the protected variety from the breeder, multiplies it or has it multiplied on a contractual basis and delivers the multiplied seed to contractors for the production of plants for the purposes of consumption. In this case, the profit made by the breeder and received as remuneration for his

efforts is extremely small while the enterprise derives great benefits. A further example stated was the case where a cooperative multiplies propagative material or has it multiplied by some members for distribution to other members. It could be debated whether, to exclude these practices, the Convention would have to be changed in the sense that for all species, or at least for vegetatively reproduced species, every multiplication--if not performed only for private or experimental purposes--should be reserved to the owner or persons authorized by him. Exceptions could be made in the case of farmers (see the preceding paragraph). In order to enable a greater number of non-member States to accede to the Convention, it might, however, be wiser not to alter the wording of Article 5(1) and to leave it to the individual States to make use of the possibility open to them under Article 5(4) of granting more extensive rights to breeders than are provided for under the Convention, as has been done to some extent by Denmark and the United Kingdom (see Annex I).

12. The multiplication of ornamental plants of a protected variety by a commercial firm for the purpose of commercial production of cut flowers for sale requires the prior authorization of the owner of the protected variety according to the last sentence of Article 5(1). In the Committee's first session no final agreement was reached on the question whether such multiplication by a non-commercial entity, for example by a community, of plants to be used in public parks or for other public purposes also required the authorization by, and, if demanded, the payment of royalties to, the owner of the protected variety. Three delegations have taken the view that such multiplication is not done for commercial purposes since the plants will be used in the interest of the public. However understandable this view may be, it might seem dangerous at a time when States, communities and public institutions are leaving the traditional field of government activities and are expanding more and more into fields formerly considered the exclusive domain of private trade and business.

13. It was proposed by the United States of America that the breeder be allowed to release seed or asexually reproduceable plant material for purposes of experimentation without its being interpreted as commercialization. Section 102 of the US Plant Variety Protection Act was mentioned in this respect. The Committee had decided during its first session to clarify the exact meaning of this rule during the mission of the UPOV delegation to the United States of America. The Committee took this decision because, in its view, the release of any reproductive material for testing only would not under normal conditions be commercial use, is so far as the testing was done on behalf of the breeder. It was also mentioned by some experts during the first session that practical problems were unlikely to arise since testing on a large scale was usually not performed before the application was filed. During its mission to the United States, the UPOV delegation was informed that in some cases, especially where varieties are bred for large enterprises of the canning industry, experimentation included the sale of the final product to the general public in great quantities and over longer periods to find out if these products were agreeable to the taste of the consumer. It is indeed doubtful whether, in the absence of a special legal rule, such experimentation can still be considered non-commercial use and the question has therefore to be discussed whether the proposal of the United States of America can be followed to include special exemption for experimental use. The view could be taken, however, that such experimental use before the filing of an application might be misleading for the competitor and that the breeder wishing to avail himself of such use could be expected to file an application prophylactically.

Article 6(1) (a)

14. Proposals by the United States of America to abandon the worldwide standard for determining whether the plant variety is new (distinguishable) and to introduce a system under which protection is refused only if the variety is publicly known, used or sold in the State where protection is sought were unanimously rejected during the Committee's first session.

15. The Committee has decided to rediscuss the proposal to clarify under what circumstances a characteristic is so "important" as to justify the distinctness of a new variety after its reconsideration by the Delegation of the Federal Republic of Germany. The problem is whether only characteristics having significance for the intended economic use of the plants (so-called "functional characteristics") could be considered important characteristics or whether it was sufficient that the characteristic be important for making the difference between plants of two varieties clearly recognizable.

Article 6(1)(b)

16. The United States of America proposed the introduction in the Convention of a period of grace of one year, during which the variety could be commercialized without affecting its novelty. This proposal was refused during the Committee's first session but it was decided to rediscuss the question whether member States should be given the possibility of providing for such a period of grace in their national law. During its mission to the United States of America, the UPOV delegation found out that the authorities as well as the breeders of that country thought this period of grace of one year--an old tradition of the patent law in the United States of America--to be of great importance and one that could not be sacrificed. Periods of grace of this kind, which may be of three months' to one year's duration, are also known in patent laws of other States and are applied without causing any harm to competitors. They fulfill two purposes. First, they enable the inventor or the breeder to test the commercial value of the invention or variety before incurring costs for the obtaining of the right of protection. The second purpose is to enable those inventors or breeders who recognize the protectability or value of their invention or variety only after they have brought the product already on the market still to apply for protection.

17. In judging the importance of a period of grace it should be noted that one year is seldom sufficient for testing the commercial value of a variety and that breeders in the United States of America have the further possibility of releasing seed for experimental purposes. It should also be noted that in the sector of the major agricultural crops a variety cannot be marketed in some countries before it has been registered in a special list of authorized varieties.

Article 6(1)(c)

18. A proposal to include a definition of homogeneity in Article 6(1)(c) was rejected by the first session of the Committee.

Article 7

19. The question was asked whether the "examination of the new plant variety in the light of the criteria defined in Article 6" had to include growing tests or at least some assessment of the plant material by an official authority. This is the interpretation that has so far been given to Article 7 by member States of UPOV. It can be justified by pointing to Article 30(1)(b) and to the Recommendation which was adopted by the Diplomatic Conference on the day on which the Convention was laid open for signature (reproduced on page 32 of the Official English Text).

20. The problem was already thoroughly discussed in the first session, when attention was drawn to the fact that Article 7(1) expressly provided that an examination "of the new plant variety" (and not only of the application) had to be performed and that the examination had to be extended to the question of stability, which made it necessary for an official of the competent authority to investigate the material in person. The fundamental character of the growing tests was also underlined. As to the situation in the United States of America, the Committee felt unable in its first session, to judge, for want of sufficient information, whether the examination performed there fulfilled the requirements of Article 7.

21. The delegation to the United States of America thoroughly studied this question and found that a conscientious examination of the application takes place in that country both in the Patent and Trademark Office and in the Plant Variety Protection Office, but that this examination is hardly ever conducted on plant material. It has to be decided by the competent organ of UPOV whether such an examination can be considered sufficient to permit the United States of America to accede to the UPOV Convention. Members of the UPOV delegation pointed out in discussions held in the United States of America that this was not only a question of the interpretation of Article 7(1) and other Articles of the Convention, but also a question of practical relevance since many of the present and planned activities of UPOV were based on the assumption that the official authorities of member States conduct the examination on plant material.

22. A question which was raised during the mission to the United States of America was whether a compromise could be found between the systems practised in that country and in the present UPOV member States. One idea is to consider as sufficient the examination of plant material in growing tests which are limited to one growing season and to the assessment of distinctness and homogeneity solely, thus excluding the assessment of stability. As to the latter limitation, it is worth mentioning that even the examination over two growing seasons, as normally performed in the present UPOV member States, is rarely sufficient to reach firm conclusions as far as stability is concerned.

23. Another compromise which might be worth discussing is the exclusion of vegetatively reproduced species from the obligation to perform the examination by growing tests or the restriction for these species of the examination by growing tests to the criterion of distinctness.

24. It must be mentioned that the decision to interpret Article 7(1) in the sense that it does not expressly prescribe growing tests has the advantage that non-member States which are not in a position to perform a full examination of the kind conducted by the present member States can accede to the UPOV Convention before a revised text of the Convention enters into force. As the example of the Additional Act shows, the entry into force of revised texts takes a considerable time. No danger seems to be involved in a flexible interpretation of Article 7(1) since the Council always has the possibility under Article 32(3) of restricting access to the UPOV Convention to States which perform the type of examination it considers necessary.

Article 8(1)

25. Article 8 provides that a period of protection shall be not less than 15 years for all species and 18 years for a number of slowly growing species which are mentioned under Article 8(1). The proposal was made by the United States of America to introduce the same minimum period of protection for all species. The reason for this proposal was that the minimum period of protection under Article 8(1), second sentence, of 18 years is longer than the period of protection under both systems in the United States of America. The Committee in its first session, concluded that it would be unable to accept that proposal.

26. The Committee did not accept either the proposal made by a representative of the United States of America to the effect that the computation of the period of protection should start on the filing date of the application rather than on the date of issue of the title of protection. It should be noted that under the US Patent Law the period of protection starts with the date of application, whereas under the Plant Variety Protection Act it starts with the date of grant of the certificate.

Article 10

27. For this Article, which contains the rules on nullity and forfeiture of the rights protected, several proposals were made. The proposal of the United Kingdom to the effect that the owner of a plant breeder's right should be obliged to keep a variety in commerce with the characteristics as defined when the right was granted was not accepted. It was agreed that the Delegation of the United Kingdom would reconsider that proposal. It was mentioned that the variety denomination could only be used for a variety which still possessed the characteristics as defined when the right was granted, and that, if those characteristics had changed, the variety could no longer be commercialized under the variety denomination.

28. A proposal to clarify the wording of paragraphs (2) and (3)(a) of this Article ("shall forfeit" in paragraph (2) and "may become forfeit" in paragraph (3)(a)) was not accepted in the first session. The wording was considered to be sufficiently clear. As to the proposal of the United States of America to abandon altogether the requirement of maintaining reproductive or propagating material of the protected variety, the Committee thought that under the system applied in the present member States this requirement was indispensable.

29. The United States of America questioned the rule in paragraph (4) that the right of the breeder may not be annulled and the right of the breeder or his successor in title may not become forfeit except on the grounds set out in Article 10.

Paragraph (4) is a basic guarantee to the breeder and it seems questionable that interested circles in the present UPOV member States would agree to any change. The Committee therefore refused in its first session to accept this proposal. However, it considered that the inclusion of other grounds of annulment or forfeiture in Article 10 would be desirable if they facilitated the accession of further States to the UPOV Convention, and asked the UPOV delegation to obtain information during its mission to the United States of America on the grounds which the representatives of that country had in mind. The delegation was informed that the only ground in the law of the United States of America which is not covered by Article 10 of the Convention is the rule in the US Patent Law that patent applications have first to be filed in the United States of America and that applicants violating this rule lose their rights in their inventions. The reasons for this rule--to give the national authorities the possibility of keeping secret inventions of relevance for the security of the State and preventing their publication in a foreign country--do not seem to be of any importance for plant varieties. The United States of America might therefore be expected to exclude plant varieties from the application of this rule of the US Patent Law. If this is not possible, it seems to be preferable not to change Article 10 but rather to introduce in the Convention a general reservation giving member States the right to adopt the measures necessary in the interests of their own security.

Article 6(1)(b) and Article 12

30. Several proposals were made for Article 12, which contains the rules of priority, and Article 6(1)(b), which contains the rules on the novelty of a variety. According to these Articles, three periods of time are of significance.

31. The first period of time is the period of four years in Article 6(1)(b). It is stated there that, at the time of the application for protection in a member State of the Union, the new variety must not have been offered for sale or marketed for longer than four years in the territory of any other State. Thus, the breeder has the possibility of commercializing and thereby testing the value of the variety for up to four years abroad before he files his application in a member State of UPOV. After that filing, for applications in other member States, he still has the benefit of the priority right for a period of twelve months under Article 12. Filing of another application or publication or use of the subject of an application during that period of twelve months will not constitute grounds for objecting to the application for which priority is claimed. In addition, Article 12(3) gives the breeder or his successor in title the right not to furnish, as far as the application for which he has claimed priority is concerned, any material required or any additional documents (that means documents other than those in which he claims priority and a certified copy of the document which constitutes the first application) not earlier than four years after the expiry of the priority period. This gives the breeder in some cases another four year period. In extreme cases, it could happen that, by accumulating these three periods, a variety will have been examined in a member State almost nine years--and the right granted eleven years--after having first been offered for sale or marketed in a foreign State.

32. The various proposals for shortening these periods or at least preventing their accumulation were discussed during the Committee's first session. It was held that the first four-year period (Article 6(1)(b)) was necessary in order to prevent an undesired increase in the number of applications since breeders would be forced, in the absence of that four-year period, to file applications immediately, when starting to market the variety in one State, in all States in which they might possibly want protection at a later stage. This might be difficult for breeders for economic reasons. The second four-year period (Article 12(3)) was thought to be indispensable since breeders sometimes lacked sufficient seed or other propagating material to turn in samples in all States in which they had filed applications claiming the priority of the first application in one member State. This allegation has been seriously questioned, however. The Delegation of the United Kingdom reported that its national law did not contain the second four-year period and that this had not led to difficulties in that country. It was agreed to reconsider the question in the presence of the professional organizations. In this connection, it was proposed to extend the period of priority in Article 12(1) to two years instead of the present one year, but no decision has been taken on this proposal.

33. Non-governmental international organizations have repeatedly complained about the termination of the protection of the same variety on different dates in different States. They asked to have rules adopted to the effect that plant breeders' rights for the same variety should be terminated at the same time. This proposal was rejected by the Committee during its first session since it was not considered possible to extend the period of protection in certain States merely for the sake of harmonizing the date of termination of protection, while, on the other hand, it was assumed that the breeders would not accept a shortening of the period of protection only in order to achieve the termination at the same time of different national rights for the same variety.

34. If the question of different termination dates for the period of protection is posing a real problem, the only solution is to start the computation of the period of protection at the time of the first application whose priority is claimed for the other applications. This is a proposal which has also been made several times in the related field of patents but not accepted. It must be noted that such a rule would considerably advance the termination date of protection in some States as compared with the present situation. It can be anticipated that the breeders will strongly object to such a change.

35. As to priority, a further proposal was put forward which would make the validity of the right of priority dependent on the existence of a valid first application. This proposal was explained as follows: a breeder might file the first application in one member State at a time when the variety was not yet sufficiently homogeneous; he could then file further applications in other member States and take advantage not only of the priority year, but also of the four-year period for supplying the plant material in these other States; during these periods, for up to five years, he could improve his variety in order to make it homogeneous by the time it would be examined in the State of the subsequent application; in the State of the first application, it might already have been rejected because of a lack of homogeneity; a breeder acting in this way would have an unjustified advantage compared with other breeders who did not file applications until their varieties had reached the necessary stage of homogeneity.

36. The Committee rejected the above proposal. It was pointed out that the first filing might be withdrawn or rejected on grounds that were valid only in that country. It was also observed that the fate of the subsequent filing might be uncertain for a long period of time, especially in cases where the application for a plant breeder's right in the country of the first filing was subject to lengthy court proceedings. In those cases, the authorities in the country of the subsequent filing would have to await the final decision in the State of the first filing before being able to decide on the grant of the plant breeder's right.

37. Mention was made of two possibilities for preventing such misuse, at least partially, by other means. It was proposed to provide that the authorities in the State of the subsequent filing should be given the right to require, in the case of withdrawal or rejection of the first application, the immediate supply of the plant material even if the period of four years under Article 12(3) had not expired. The second proposal was to require the authority with which the first application was filed to keep its remaining seed and to ask for and to store more seed than was necessary for the purpose of the national procedure, when a certificate of the first filing was applied for by the breeder for priority purposes. In the case of withdrawal or rejection of the first application, such material should be stored and kept available for, and sent on request to, the authorities with which the subsequent application was filed. These authorities would then have the possibility of comparing the material of the first application with the material received directly from the breeder.

Article 13

38. For this Article, which contains the rules on variety denominations, various proposals were made and the variety denomination has already been the subject of much discussion. Two preliminary remarks seem to be justified.

39. First, any criticism expressed was mainly directed towards the Guidelines for Variety Denominations. These Guidelines will very probably be changed. The Delegation of the Federal Republic of Germany reported already in the Committee's first session that part of these Guidelines was not compatible with the rules of the amended Plant Variety Protection Act of that country. This Delegation has promised to submit in writing proposals for changing the Guidelines. During its

mission to the United States, the delegation of UPOV also encountered some criticism of the present rules, but, again, this criticism was mainly expressed in connection with the Guidelines on Variety Denominations. The provisions of Article 13 themselves do not therefore seem to require any change though the fact must be mentioned that variety denominations are not protected in the United States of America either under the US Patent Law or under the US Plant Variety Protection Act, and it is possible only under the US Federal Seed Act to check a denomination.

40. Secondly, it can nevertheless be argued that the requirements of Article 13 contain an additional difficulty for States wishing to accede to the UPOV Convention. For the main aim of the Convention--which is to secure rights to the breeders and to harmonize protection in different States--the variety denomination is in general of only minor importance. Where this is not the case, namely, in the sector of the main agricultural crops, member States of UPOV have the possibility of checking the denomination under their procedure for entering varieties in a national list and in catalogues. The view could thus be taken that Article 13 could be completely abandoned without harm to the main aims of the Convention. It is claimed, however, that the procedure for obtaining plant variety protection rights and the procedure for entering a variety in a national list are to some extent interlinked or even telescoped in most member States. In the interest of maintaining this link between the two procedures, the basic rules of Article 13 ought to be maintained. Another argument that could be advanced against the deletion of Article 13 would be that any closer cooperation between Offices might be impaired if, because of the use of different denominations for the variety, there was less certainty about the identity of varieties. As a third argument, it could be maintained that the aspect of consumer protection, which is closely connected with the variety denomination, is a strong motivation in some States for acceding to the UPOV Convention.

41. The United States of America proposed that UPOV's role of informing States of the appropriation of variety denominations in order to ensure that the denominations are generic in nature and cannot be appropriated as trademarks should be maintained and possibly enhanced. This proposal could be followed by applying Article 13(6). It does not require a change in the Convention.

42. It is proposed that in the third session of the Committee--which will be one in which observers from non-member States and non-governmental international organizations will participate--it should be asked to state clearly whether any of the observers wanted to change Article 13 itself.

Article 14

43. The proposal of the United States of America that ways be found of liberalizing the national control measures mentioned in Article 14 in cases where plant variety rights have been obtained was discussed during the first session. The Committee took the view that more far-reaching provisions than those contained in Article 14(2) could not be envisaged.

Article 25

44. "BIRPI" should be replaced by "WIPO".

Article 27(2)

45. The first session of the Committee took the view that the obligation to hold a revision conference every five years, unless otherwise decided by the Council, should be deleted.

System of Central Filing of Applications and Central Grant of Rights

46. Mainly in view of developments in the related field of patents, where two international conventions will enter into force in the coming years--the Patent Cooperation Treaty (PCT) and the European Patent Convention--and a third convention is to be the subject of a Diplomatic Conference yet to be held in 1975--the Convention on the European Patent for the Common Market--the question has been raised whether it would not be possible to envisage a more international system for obtaining plant breeders' rights. It has been suggested that a system is conceivable

whereby the applicant can file an application with an international or national office with effect in more than one, if not all, member States. This could save time and labor for breeders and offices. It was asked whether the possibility of having a plant breeder's right granted by one authority with effect for more than one State should not be studied. Another proposal made was to have plant breeder's rights granted by the office of one member State recognized by the offices of the other member States. The delegation of the Federal Republic of Germany has announced its intention to make a proposal which could serve as a working paper for discussion on these questions.

47. It is clear that the introduction of such a system--which would go far beyond any system of mere cooperation among offices of member States in the technical examination of a variety--can only be achieved by either a revision of the Convention or by a separate Convention, requiring the approval of the legislative bodies of member States. The most feasible way would be the conclusion of a separate Convention. It is obvious that such a system cannot be adopted in a short time but it is also clear that, in view of the long time that would be needed for the elaboration of such a separate Convention and for its approval by the competent national bodies, work should be started soon.

Preparation of the Third Session of the Committee

48. The Committee may wish to decide on a list of items to be discussed with the observers of non-member States and of international non-governmental organizations during its third session. A tentative list of items to be discussed during that session has already been sent to the respective States and organizations in order to allow them more time for consideration. It is proposed to add to this tentative list all items mentioned in this paper which were not already included in it.

[Annexes follow]

ANNEX I

PROPAGATION OF VARIETIES

1. The scope of protection of plant breeders' rights, according to Article 5(1) of the Convention, is restricted--subject to certain exceptions--to the production, for the purposes of commercial marketing, and the sale of propagating material as such. This means that only the production of the propagating material (seeds, grafts, etc.) for commercial marketing is covered by the plant breeders' right. The protection is thus not extended to the following:

(i) the production of plants of the protected variety with a view to the sale of the plants themselves or their fruits for consumption purposes;

(ii) the multiplication of the plants with a view to the use of their seeds or other propagating material for the production of further plants on one's own premises in order to sell such plants or their fruits for consumption purposes; an exception is made for ornamentals, where commercial multiplication of every kind is only permitted with the authorization of the breeders or their successors in right (see Article 5(1), last sentence);

(iii) all activities in the private ("non-commercial") sector.

2. It is doubtful whether the protection covers the following cases:

(i) multiplication performed by public institutions for public purposes (for example: a community multiplies ornamentals of a protected variety with a view to growing the new plants in public parks, a use which is not considered in some States to be "commercial" use);

(ii) multiplication and production as described in paragraph 1(ii), above, not performed on one's own premises but by others on a contractual basis (for example: a canning firm, a tobacco manufacturer or a sugar refinery give seed of the protected variety to farmers to be multiplied by them under contract; the seeds are then used for the growing of plants by these or other farmers with a view to the sale of the plants or their fruits for consumption);

(iii) multiplication as described in paragraph 1(ii), above, if it is performed by members of a cooperative, and if the propagating material produced by the multiplication is given to other members of the cooperative for growing the plants with a view to the sale of the plants or their fruits for consumption.

3. Article 5(3) of the Convention allows member States to grant more extensive breeders' rights and to reserve all kinds of multiplication, and even the sale of the final product, to the owner. While France, in the case of ornamentals, has extended the protection to the final product, two other member States, Denmark and the United Kingdom, have given an authorization to their respective Ministers of Agriculture to extend the protection to certain cases of multiplication and sale.

4. In Denmark, this matter is regulated by Article 14a of the Plant Variety Protection Law, which refers to Article 14, paragraph (3). Article 14 and 14a read as follows:

"14.-(1) No material for sexual or vegetative propagation (basic seed, basic cereal, seed potatoes, cuttings, etc.) of a protected plant variety may be produced for purposes of sale, offered for sale or commercialized without the authorization of the breeder or in breach of the agreed terms, including the terms relating to payment of royalties. In the case of material for vegetative propagation, this provision shall apply also to whole plants."

"(2) Where ornamental plants normally sold for purposes other than propagation, or parts of such plants, are used professionally as propagating material with a view to the production of ornamental plants or cut flowers, subsection (1) shall also apply."

"(3) Any person who, for purposes of sale, propagates a protected plant variety or who offers for sale or commercializes propagating material of a plant variety shall of his own accord furnish the breeder with the necessary information for the calculation and collection of royalty payable."

"14a.- The Minister of Agriculture may direct that any breeder of new varieties of specified classes of plants to which Section 14(2) does not apply shall be entitled to ask for royalties, on the conditions determined by the Minister, from any person who for purposes other than sale produces propagating material in his own professional interest. The breeder's right to royalties may be restricted to a shorter term of years than the period of protection and be made to relate only to propagation with a view to the production of crops for specified purposes. Section 14(3) shall apply mutatis mutandis."

5. The regulation in the United Kingdom is contained in Part I Section 4(6) (b) and Schedule 3 of the Plant Varieties and Seeds Act. Section 4(6) (b) and Schedule 3, part 1 read as follows:

(i) Section 4(6) (b)

"(6) In this section and in Schedule 3 to this Act references to selling reproductive material include references to any transaction effected in the course of business:

- (b) under which the reproductive material is made over by one person to another in pursuance of a contract under which he will use the reproductive material for growing further reproductive material or other crops,

and paragraph (b) of this subsection shall apply irrespective of whether the contract provides that the property in the crop will be in the person to be regarded as the seller, or the person to be regarded as the purchaser, or a third party; and any reference to purchasing or a purchaser shall be construed accordingly."

(ii) Schedule 3

"1.-(1) If it appears to the Ministers that, in the case of any species or group of plant varieties, plant breeders will not receive adequate remuneration unless they have control over the production or propagation of the plant variety in Great Britain for the purpose of sales of cut blooms, fruit or some other part or product of plants of the variety, and that the control will be of substantial benefit to the plant breeders, they may by a scheme under Part I of this Act provide that, as respects any plant variety of the species or group prescribed by the scheme, plant breeders' rights shall include the exclusive right to do and to authorise others to do as follows, that is to produce or propagate the variety for the purpose of selling such parts or products of the variety as may be prescribed by the scheme.

"(2) A scheme conferring any such rights may also provide that plant breeders' rights shall include the exclusive right to do, and to authorise others to do, as follows, that is to sell the parts or products of the variety in relation to which the rights are extended in so far as they are obtained by the seller from plants of the variety which the seller has himself produced or propagated.

"(3) References in this paragraph to parts or products of a plant variety include references to whole plants of that plant variety."

6. Similar rules which are contained in laws of States not members of UPOV and which are stated in the following paragraphs might be of interest.

7. In the United States of America, the rules for generatively reproduced plants are contained in Sections 83 and 113 of the Plant Variety Protection Act. These Sections read as follows:

Section 83(a) - Contents and Term of Plant Variety Protection

"(a) Every certificate of plant variety protection shall certify that the breeder (or his successor in interest) his heirs or assignees, has the right, during the term of the plant variety protection, to exclude others from selling the variety, or offering it for sale, or reproducing it, or importing it, or exporting it, or using it in producing (as distinguished from developing) a hybrid or different variety therefrom, to the extent provided by this Act. If the owner so elects, the certificate shall also specify that in the United States,

seed of the variety shall be sold by variety name only as a class of certified seed and, if specified, shall also conform to the number of generations designated by the owner. Any rights, or all rights except those elected under the preceding sentence, may be waived; and the certificate shall conform to such waiver. The Secretary may at his discretion permit such election or waiver to be made after certifying and amend the certificate accordingly, without retroactive effect."

Section 113 - Right to Save Seed: Crop Exemption

"Except to the extent that such action may constitute an infringement under subsections (3) and (4) of section 111,* it shall not infringe any right hereunder for a person to save seed produced by him from seed obtained, or descended from seed obtained, by authority of the owner of the variety for seeding purposes and use such saved seed in the production of a crop for use on his farm, or for sale as provided in this section: Provided, That without regard to the provisions of section 111(3)* it shall not infringe any right hereunder for a person, whose primary farming occupation is the growing of crops for sale for other than reproductive purposes, to sell such saved seed to other persons so engaged, for reproductive purposes, provided such sale is in compliance with such State laws governing the sale of seed as may be applicable. A bona fide sale for other than reproductive purposes, made in channels usual for such other purposes, of seed produced on a farm either from seed obtained by authority of the owner for seeding purposes or from seed produced by descent on such farm from seed obtained by authority of the owner for seeding purposes shall not constitute an infringement. A purchaser who diverts seed from such channels to seeding purposes shall be deemed to have notice under section 127 that his actions constitute an infringement."

8. For vegetatively reproduced plants, the only rule existing is contained in Section 163 of the US Patent Act. It reads as follows:

Section 163 - Grant

"In the case of a plant patent the grant shall be of the right to exclude others from asexually reproducing the plant or selling or using the plant so reproduced."

9. The respective rules of the Seeds and Plant Varieties Act of Kenya are similar to the rules of the United Kingdom.

10. Article 5(1) third sentence of the Spanish Plant Variety Protection Act reads as follows:

".... the breeder's right shall not be violated by the use made by the farmer on his own farm of seeds or any propagating material used by him."

* According to Section 111(3) and (4) the following shall be an infringement:
 "(3) Sexually multiply the novel variety as a step in marketing (for growing purposes) the variety; or
 (4) use the novel variety in producing (as distinguished from developing) a hybrid or different variety therefrom."