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UPOV

## INTERNATIONAL UNION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS

GENEVA

COMMITTEE OF EXPERTS ON  
THE INTERPRETATION AND REVISION OF THE CONVENTIONThird Session  
Geneva, February 17 to 19, 1976

## DRAFT REPORT

(First part: Discussions in the Presence of Observer Delegations)

prepared by the Office of the UnionOpening of the Session

1. The third session of the Committee of Experts on the Interpretation and Revision of the Convention (hereinafter referred to as "the Committee") was held in Geneva from February 17 to 19, 1976.
2. All six member States of UPOV were represented. Of the signatory non-member States, Belgium and Switzerland were represented by observers. Of the other non-member States invited, Hungary, Ireland, Japan, New Zealand, Poland, South Africa, Spain and the United States of America were represented by observers. In addition, the following international non-governmental organizations were represented by observers: the International Association of Horticultural Producers (AIPH); the International Association for the Protection of Industrial Property (AIPPI); the International Association of Plant Breeders for the Protection of Plant Varieties (ASSINSEL); the International Community of Breeders of Asexually Reproduced Ornamentals (CIOPORA); the International Federation of the Seed Trade (FIS). The list of participants is attached as Annex to this report.
3. The session was opened by Mr. Skov (Denmark), Chairman of the Committee, who extended a special welcome to the observers of non-members States and international organizations.

Report on the Mission of the UPOV Delegation to the United States of America and Canada

4. Mr. Laclavière, President of the Council of UPOV, gave an oral report on the mission of the UPOV delegation to the United States of America and Canada. He reported that the aim of the visit to the United States of America had been to study on the spot the two systems existing in that country for the protection of plant breeders' rights. The mission had been divided into two parts, one being the visit to a number of private breeding enterprises, the other the visit to the two offices concerned with plant breeders' rights: the Patent and Trademark Office and the Plant Variety Protection Office. Mr. Laclavière expressed his appreciation of the excellent organization of these visits by the representatives of the host country, who enabled the participants to see all they wished to see and took great pains to give a clear picture of the practice of granting plant breeders' rights in that country. He also expressed his appreciation of the warm hospitality extended to the participants and mentioned in particular the frank discussions held during the whole trip, especially on the two days spent in Washington D.C. As to the outcome of these discussions, he pointed out that considerable differences were noted

between the systems applied in the UPOV member States on the one hand and in the United States of America on the other hand. The UPOV delegation felt that in the United States of America the basis of the protection was the description of the variety rather than the plant itself. Mr. Laclavière went on to say that the UPOV delegation had found the same hospitable reception and the same spirit of frank discussion in Canada, where the introduction of a plant variety protection system was under discussion. It had noted the great interest taken by the Canadian federal authorities and private circles in the protection of new plant varieties. The delegation had answered a number of questions put to it and got the impression that the Canadian hosts were satisfied by the answers received.

Discussion of Questions Concerning the Interpretation and Revision of the UPOV Convention

5. The main part of the discussion was based on document IRC/III/2 and followed the order laid down in that document.

Ad item 1 of document IRC/III/2

6. With respect to the question whether member States are permitted to exclude controlled hybrids of sexually propagated crops from the scheme of protection, Mr. Bustarret (France) explained that the UPOV Convention did not provide for any obligation on member States to protect all types of varieties of a given species. A member State would therefore have the right to exclude hybrids from protection under its national law. The view that it should be left to the State to decide what type of varieties of a given species it would make eligible for protection was also supported by Mr. Desprez (ASSINSEL).

7. Mr. Rollin (United States of America) reported that under the US Plant Variety Protection Act first generation hybrids were not made eligible for protection as the US authorities thought it unnecessary since a hybrid could not be reproduced by itself.

Ad item 2 of document IRC/III/2 (Article 2(1)\*)

8. As to the question whether, contrary to the second sentence of Article 2(1), member States should be permitted to grant protection to new varieties of plants belonging to the same botanical genus or species under both possible forms of protection (special title or patent), Mr. Bustarret explained why the Diplomatic Conference which led to the signing of the UPOV Convention (hereinafter called "the Diplomatic Conference") had prohibited such a possibility. Mr. Schlosser (United States of America) stated that he saw no valid reason for prohibiting protection under both forms, as the requirements of the two systems were different and so also were the rights granted. If, however, this were to be the only obstacle between the systems applied inside UPOV and those applied in the United States of America, the US authorities would take into serious consideration the possibility of proposing a change in the national law of their country.

9. Mr. Desprez (ASSINSEL) stated that his organization shared the view expressed by the Delegation of the United States of America. The Delegation of Japan added that it would be wise to permit member States to allow protection of the same species under two forms in special cases where, owing to historical developments, the two forms of protection existed side by side in a State. The same view was expressed by Mr. Slocock (AIPH).

10. The Delegation of Hungary reported that cumulative protection of the same subject matter by means of different industrial property rights was not unusual in the field of patents where, for instance, the same invention could be protected in some countries by a patent and a utility model or by a patent and an industrial design. As far as the Hungarian plant protection system was concerned, the breeder could, in some cases, choose between an industrial patent and a plant patent or could even

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\* Where Articles are cited the citation refers to Articles of the International Convention for the Protection of New Varieties of Plants of December 2, 1961.

apply for both of them. Cumulative protection might, of course, lead to some difficulties. In the Delegation of Hungary's view, the problem, however, was one to be solved at the national level in a manner that would be adequate under the relevant national law. It was not a problem to be dealt with in an international convention.

11. The view was expressed by Dr. Marschall (Switzerland) and approved by Mr. Rollin (United States of America) that, if the problem under consideration had to be regulated in the Convention, the granting of protection under both forms should be prohibited for the same plant variety (instead of for the same botanical genus or species).

Ad items 3 and 4 of document IRC/III/2 (Article 4)

12. With respect to the possible deletion of the Annex to the Convention listing the genera and species to which Article 4(3) requires member States to apply the Convention within certain periods, the Chairman reported that most of the member States were, at the moment, in favor of such deletion.

13. The deletion of the Annex was also favored by Mr. Wheeler (ASSINSEL), by the Delegations of Japan, New Zealand and Hungary, and by Mr. Leenders (FIS).

14. Mr. Wheeler (ASSINSEL), the Delegations of Japan and New Zealand and Dr. von Pechmann (AIPPI) considered that the obligation for member States to apply the Convention to a minimum number of genera and species on the date of entry into force of the Convention in the State concerned--and to a larger number of genera and species within certain periods of time after that date--should be maintained. The Council should, however, be given the authority to reduce that number in exceptional cases, particularly for States where special climatic conditions prevailed.

15. In this connection, Mr. Leenders (FIS) remarked, however, that the obligation to apply the Convention to a minimum number of genera and species, without expressly naming those genera and species, gave no guarantee that the species which were important in that State would be made eligible for protection. To avoid the situation where States entering the Union applied the Convention only to "border genera and species"--a danger that would be even greater if the system of reciprocity in Article 4(4) were abandoned--the following proposals were made in the course of the discussion. It was proposed either to fix a large number of genera and species--for instance 40--which a country would have to make eligible for protection within certain--perhaps extended--periods of time or to attach to the Convention a list containing a very large number of genera and species from various climatic zones out of which each State would have to choose a given minimum number to make eligible for protection under its national law.

Ad item 5 of document IRC/III/2 (Article 4)

16. As to the question whether after deletion of the Annex of the Convention the system of national treatment (system of assimilation) or the system of reciprocity should be applied with respect to nationals or residents from other member States, Mr. Bustarret (France) explained that, at the time of the drafting of the Convention, opinions had been split equally between those who were in favor of the system of assimilation and those who preferred the system of reciprocity, and that therefore States had been given the possibility of choosing between the two systems, except in the case of the 15 genera and species of the Annex. He explained further that the system of national treatment favored the users of new varieties while the system of reciprocity seemed to favor, at least on a short-term basis, the national breeders.

17. Dr. von Pechmann (AIPPI), the Delegation of Hungary, Mr. Desprez (ASSINSEL), Mr. Troost (AIPH) and the Delegation of New Zealand supported the idea of abandoning the possibility open to member States to make access to protection, for nationals or residents of another member State, depend on the treatment afforded to its own nationals in that other member State. Some of those observers thought, however, that it would be necessary to include some clause ensuring that only those States would be admitted to UPOV which had the firm intention to apply the Convention to an adequate number of genera and species and not only make "border genera and species" eligible for protection.

18. Mr. Sluis (FIS) remarked that the present provisions of the Convention concerning reciprocity might be necessary to compel member States to increase the number of genera and species eligible for protection. He gave some examples of unfair competition between nationals of UPOV member States that might arise and proposed that a kind of safety-valve should be built into the Convention for the case of a serious damage done to the interests of a member State. This would, he felt, be necessary if the possibility to apply the Convention on a reciprocity basis was deleted. Mr. Butler (Netherlands) pointed out that it could be expected, as a result of the envisaged cooperation in examination within UPOV, that States would more rapidly extend protection to further genera and species in the future. The main obstacles to the extension of protection had, in the past, been the cost and the administrative difficulties involved. Those would be reduced if States could obtain test results from the offices of other member States. It could therefore be anticipated that the pressure exercised by the reciprocity rule would no longer be necessary in the future.

19. The Delegation of the United States of America reported that national treatment was granted under the United States patent system, while under the Plant Variety Protection Act the reciprocity principle was applied. It took the view that it should be left to each State to decide on the system to be adopted.

20. The Delegation of Hungary referred to a statement made in another context in document IRC/III/3, paragraph 4, to the effect that nothing in the Convention obliged a member State to apply the provisions of the Convention to all genera and species eligible for protection in that State. It expressed concern about the possibility of excluding genera and species eligible for protection in a country from the application of the Convention and took the view that the Convention should expressly provide that all genera and species made eligible for protection in a given member State should automatically be covered by the Convention so that all nationals and residents of other member States would have the possibility of obtaining protection for a variety of those genera and species.

21. The question whether, as a consequence of removing the Annex to the Convention, it was necessary to maintain the final part of Article 4(4) and Article 4(5) was answered in the negative by Mr. Laclavière (France). No objection was raised to this reply.

Ad item 6 of document IRC/III/2 (Article 5)

22. The Committee discussed the question whether in Article 5(1) the scope of protection should cover any reproduction of the protected variety also for purposes other than the commercial marketing of the propagating material as such. After Mr. Bustarret (France) had reported on the history of Article 5, Mr. Kordes (CIOPORA), Mr. Sluis (FIS), Dr. von Pechmann (AIPPI) and Mr. Desprez (ASSINSEL) declared themselves in favor of extending the protection to the final product, but suggested that exceptions be provided for (for instance, no extension of the protection of a wheat variety to the final product, flour).

23. Mr. Leenders (FIS) and Mr. Royon (CIOPORA) gave examples of gaps in the scope of protection. Mr. Leenders (FIS) mentioned the case where specialized enterprises could buy a small sample of seed of a protected variety (for instance, lettuce, tomatoes or cucumbers) and multiply it for the production of plantlets, which would then be sold to the producers of the final product. Since such plantlets were not considered to be propagating material, no royalties had to be paid. To underline what had been said, Mr. Royon (CIOPORA) mentioned the case where the producers of cut roses in a State where protection was based on Article 5(1) only could escape the payment of royalties by importing the plants necessary for the production of cut flowers from a State where the variety was not protected. He proposed that the last sentence of Article 5(1) be clarified, or amended, and referred to the patent law, where the manufacturing, marketing and industrial use as a whole were reserved to the owner of the patent.

24. In answer to Mr. Leenders (FIS), Mr. Butler (Netherlands) stated that the Convention contained no definition of the term "propagating material." It was left to the national legislation to define the term. He added that plantlets could fall under the definition of propagating material as understood in the law of the Netherlands.

25. The Delegation of Hungary stated that its country was in favor of protecting breeders of ornamental varieties also against propagation for purposes other than the commercial marketing of propagating material as such, and that it planned to amend its national law to that effect. However, it preferred the Convention to maintain its present flexibility. Dr. Marschall (Switzerland) also proposed that Article 5 be left unchanged. In this context, Dr. Wuesthoff (AIPPI) stated that

different provisions should be applied to vegetatively propagated species and to sexually propagated species. Dr. Böringer (Federal Republic of Germany) replied that a variety, for example of pelargonium, could be propagated both sexually and vegetatively.

Ad item 7 of document IRC/III/2 (Article 6(1))

26. With respect to providing member States with the possibility, under Article 6(1), of introducing into their national law a one-year period of grace during which the variety could be marketed without prejudice to its novelty, Mr. Schlosser (United States of America) reported that the period of grace was given to the breeder to enable him to judge without risk the commercial potential of his new variety. The effect of the period was to allow for a screening of the applications. In the UPOV member States, the breeder would also have the possibility of judging the potential of his variety but, unlike the situation in the United States of America, the assessment could not take place in the country where the breeder later wished to apply for protection.

27. Mr. Sluis (FIS) declared that his organization was in favor of a period of grace of one year, although he admitted that the breeder availing himself of this possibility run certain risks. Mr. Desprez (ASSINSEL), the Delegation of Poland, Dr. von Pechmann (AIPPI) Dr. Troost (AIPH) and Mr. Kordes (CIOPORA) expressed themselves in favor of such a grace period. They considered it to be a way not only of saving money for the breeder but also of saving work for the overburdened national authorities since the number of applications might be reduced with the introduction of a grace period, namely by such applications as were now withdrawn during the first year of testing. Mr. Desprez (ASSINSEL) admitted, however, that a period of grace would be an inconvenience for the breeders of varieties of agricultural crops since it was in their interest to apply simultaneously for protection and for registration in the list of authorized varieties.

28. Dr. von Pechmann (AIPPI) reported that a grace period of six months was granted under the Patent Law of the Federal Republic of Germany. This period of grace was specially appreciated by small inventors. He added that the European Patent system did not, however, provide for a grace period since--following the pattern of some national patent laws (those, for instance, of the Federal Republic of Germany and of Japan)--the system of deferred examination had been adopted, which meant that examination started only upon special request, for which a special fee had to be paid, while the application fee was rather low. The effect of this system of deferred examination was that applications were, in general, only examined some time after the filing of the application and also that the fees due for the examination had to be paid later. It was for that reason that there had not seemed to be any need to provide for a period of grace in the European Patent Convention. Dr. von Pechmann (AIPPI) suggested considering whether the system of deferred examination, which had also the advantage of alleviating the work of the examining authorities (since some applications were withdrawn before the examination had been requested), would not be acceptable for UPOV.

29. Dr. Böringer (Federal Republic of Germany) said that the suggestion by Dr. von Pechmann (AIPPI) should be taken seriously into consideration. He pointed out, however, that for the main agricultural species the system of deferred examination could not be introduced without having regard to the legislation on the national catalogue and the seed trade. He proposed that member States should try, as a first step, to arrive at a common interpretation of the term "cultivation for purposes of experimentation."

Ad item 8 of document IRC/III/2 (Article 6(1))

30. As to the maintaining, in Article 6(1), of the world novelty standard for determining whether a plant variety is distinct from other varieties, Mr. Bustarret (France) drew the attention of the Committee to the fact that, strictly speaking, the Convention required only that the new variety must be distinct from other varieties whose existence was "a matter of common knowledge."

31. Mr. Desprez (ASSINSEL) and the Delegation of Japan confirmed that in their view it was necessary to maintain the requirement. That was the general view though it was made clear by several delegates that it was not possible to test for absolute world novelty. Such testing would go beyond the possibilities of every examining authority. It was pointed out, however, that under Article 10(1) the right of the breeder had to be declared null and void if it was discovered later

that the requirements of Article 6(1)(a) were not fulfilled at the time when the title of protection was granted. It was observed that such cases were rare; in the Federal Republic of Germany, for example, it had only happened once since 1968.

32. The Committee agreed that in practice there was in this respect little difference between the testing in the United States of America and that in the UPOV member States. It was remarked that also in the United States of America a knowledge of foreign varieties was taken into consideration in the framework of the examination of new plant varieties. Furthermore, in the same country, a plant breeder's right could also be declared null and void if, on the basis of a foreign publication, it could be proved that the variety had not been new.

Ad item 9 of document IRC/III/2 (Article 6(1)(a))

33. Mr. Bustarret (France) briefly described the history of the term "important characteristics" in Article 6(1)(a). He proposed the deletion of the word "important" and its replacement by the expression "fulfilling the criteria of the following subparagraph" for the following reasons: more and more minor characteristics such as biochemical characteristics were used for assessing distinctness; practical developments made it necessary not to take the word "important" into account; in the test guidelines the notion of important characteristics meant characteristics important for distinguishing purposes. The more the wording was simplified, the fewer difficulties would arise. This opinion was shared by Mr. Royon (CIOPORA).

34. Dr. Wuesthoff (AIPPI) proposed that the word "important" should not be deleted but that a stricter wording should be adopted. He feared that otherwise the owner of the plant breeder's right could not efficiently defend his right in infringement proceedings. Infringers should not be in a position to claim, in referring to minor differences, that the variety they were using was not the protected variety. Dr. von Pechmann (AIPPI) also stressed the special difficulties encountered by owners of plant breeders' rights in infringement proceedings--as compared with the situation of patent owners in similar cases--which arose from the fact that under the Convention the breeder's authorization was not required for the utilization of his variety as an initial source of variation for the creation of another new variety and the marketing of such variety. He proposed that there be a study of the question how to prevent the lack of dependency of the right in a variety which was derived from another protected variety from weakening the position of breeders vis-à-vis infringers.

35. Mr. Desprez (ASSINSEL) said that his organization was in favor of maintaining the word "important" and the interpretation presently given to it by the examining authorities. Mr. Troost (AIPH) shared the latter's opinion.

36. Mr. Leenders (FIS) expressed the view that, if rights were granted on the basis of very minor differences, plant breeders' rights would be endangered.

37. Dr. Marschall (Switzerland) supported Mr. Bustarret's view but proposed that, if the word "important" was maintained, it should be clarified in the sense of "important for distinguishing the variety."

38. Mr. Royon (CIOPORA) thought that the word "important" was dangerous and superfluous: it was dangerous since it led to greater severity in the preliminary examination, the scope and the costs of which CIOPORA had always wished to diminish. In view of the increasing number of varieties, however, and the fact that distinctness could be of a physiological as well as a morphological nature, the requirement of the importance of the characteristic might increase the duration and the complexity of the examination. It might also introduce a subjective element into the examination which it would be difficult to define. It was superfluous since the important characteristic was requested only in relation to "varieties whose existence is a matter of common knowledge". It did not therefore provide the guarantee expected by some of the participants in the present session. Moreover, in most countries court decisions relating to infringement in the patent field assessed such infringement in terms of resemblances and not of differences. Thus, even if the word "important" were deleted, any breeder considering that Variety B was not distinguishable from his own Variety A could protect himself by bringing an action for infringement. In the field of new varieties, it was really only in the case of mutant varieties that the problem arose.

39. Mr. Rollin (United States of America) stated that under the US Plant Variety Protection Act every difference was accepted for establishing the distinctness of a variety. He explained that, if two varieties were commercialized under the same name and differed even by a small characteristic, the seed buyers might recognize the difference and complain that they had been sold the wrong variety. He was therefore in favor of abandoning the word "important."

40. Mr. Bøgh (FIS) asked UPOV member States to develop improved methods for distinguishing grass varieties. He claimed that at present the examining authorities failed to recognize varieties as being distinct from each other though differences could be clearly seen in the field. Mr. Kelly (United Kingdom) and Dr. Böringer (Federal Republic of Germany) pointed out that the test guidelines for the main species of grasses were on the agenda of the coming session of the Technical Working Party for Agricultural Crops and, also, that the planned intensified cooperation in testing within UPOV might help to overcome difficulties in the assessment of the characteristics of grass varieties. Dr. Böringer added that research had to be undertaken inside UPOV to find better possibilities of distinguishing grass varieties, using not only the statistical methods but also visual assessments. He mentioned, however, that, if a difference was seen visually at a certain time, it did not necessarily mean that the variety was different.

Ad item 10 of document IRC/III/2 (Articles 6(1)(b) and 12(1) and (3))

41. The question whether the period in Article 6(1)(b)--during which a variety can be marketed in another country without affecting its novelty in the country of the application--should be extended for the slow-growing species mentioned in Article 8(1), third sentence, was answered in the affirmative by Mr. Sloccock (AIPH) and by the Delegation of the United Kingdom. Mr. Sloccock proposed that the period in question be extended from four to eight years, and the Delegation of the United Kingdom that it be extended from four to six years. The observers from the AIPPI objected to any extension since it would lead to periods of time which might no longer be workable. In this connection, Dr. Böringer (Federal Republic of Germany) considered it desirable to study the possibility of deferring the examination of certain long-living species for a given period of time, it being understood, that the applicant had nevertheless, to turn in a sample of the propagating material simultaneously with the application.

Ad item 11 of document IRC/III/2 (Article 6)

42. As to the proposal to incorporate in Article 6 provisions expressly stating that release of seed or other propagating material for purposes of experimentation is not considered commercial use and ensuring preliminary protection of the seed or other propagating material released for that purpose, Mr. Bustarret (France) pointed out that the Convention should abstain from regulating details and should only treat the general principles. Dr. Marschall (Switzerland) stated that it would be difficult to define what was meant by "purposes of experimentation" and that the provisional protection was very problematic.

43. Attention was drawn to the present wording of Article 6(1)(b), which stated that the fact that a variety had been entered in trials should not prejudice the breeder of such variety or his successor in title. Mr. Rollin (United States of America) pointed out that his Delegation had some doubt about the meaning of the phrase since in the second sentence of Article 6(1)(b) it was stated that the variety must not have been offered for sale or marketed. Release for experimentation could, however, in the United States of America, comprise certain sales. In such a case, it could be argued that the first sentence of Article 6(1)(b) was no longer applicable. He therefore proposed the addition in the second sentence of Article 6(1)(b) of the words "except for the purposes stated in the first sentence of this paragraph."

Ad item 12 of document IRC/III/2 (Article 7(1))

44. As to the question whether the examination of the plant variety should comprise in every case growing tests and whether--and under what circumstances--States should be admitted to UPOV which did not perform such growing tests as part of their examination, Mr. Bustarret (France) reported on the history of Article 7. At the time of the Diplomatic Conference, the participating States had already had experience of the seed legislation. Their experience had shown that it was not sufficient to rely on a description by the breeder for identifying a variety and that only a comparison in the field made it possible to judge whether two varieties were distinct or not. Furthermore, homogeneity could only be assessed in field trials. It was for those reasons that the examination had to comprise field tests, and the need for such tests had in fact not been questioned during the Diplomatic Conference.



45. Mr. Rollin (United States of America) described the system used by the US Plant Variety Protection Office in the case of sexually reproduced plants. The applicant had to furnish the description of the variety in a special form drawn up for each species on the basis of the existing literature and the advice of professionals, an exhibit on the breeding procedure, a statement that the variety was homogeneous and stable and a statement of the basis of his ownership. The description furnished by the applicant was processed by a computer, which selected the closely related varieties on the basis of characteristics that were least influenced by climatic conditions. The examiners then compared the variety in respect of which a title of protection was applied for with each of those related varieties and had to state the differences between them. In answer to a question from Mr. Sluis (FIS), Mr. Rollin stated that a sample of seed was deposited before the issue of the title of protection and was stored in a germ plasm bank for use if the breeder ceased propagation. The sample was also useful in cases where the title of protection was contested. Finally, Mr. Rollin expressed the hope that in future identical computer methods would be used by the different offices--and the results exchanged between them--in order to ease the checking of world novelty.
46. Mr. Schlosser (United States of America) also described the system used by the US Patent and Trademark Office in the case of vegetatively reproduced plants. That Office required that in specifications the variety had to be described in botanical terms in the way that was usual in the relevant literature. The applicant had also to indicate the breeding or discovery history and the place of breeding or discovery, as well as how and where the variety had been asexually reproduced. The description furnished by the applicant was then compared with the written descriptions contained in publications. In many cases the examination consisted only of a comparison of this kind. However, if the examiner was not satisfied, he could require specimens, affidavits from experts or from the Department of Agriculture, etc. In the United States of America, the breeders conducted scientifically accurate tests for the patentability of their varieties.
47. Mr. Palmer (New Zealand) explained that the law of his country contained a very liberal clause concerning the examination. Three possibilities were provided for: examination in national trials according to the facilities available in New Zealand, examination by national authorities of other States--as, for example, in the case of roses, where an informal arrangement had been concluded with the United Kingdom for the exchange of information--and thirdly examination in trials conducted by the breeder or applicant under conditions laid down by the New Zealand authorities. He expressed the hope that there would be some flexibility in the interpretation of Article 7 of the Convention. Miss Thornton (United Kingdom) expressed the wish that the situation of New Zealand would be declared compatible with the Convention. The Chairman stated as his personal opinion that the legislation of New Zealand was compatible with the Convention.
48. The Delegation of Japan explained that the authorities of its country were rather in favor of the US system, which consisted in having the field examination undertaken by the breeder and only in exceptional cases by the authority.
49. The Delegation of Hungary emphasized that the examination was a very important factor and was linked with the strength of the protection. Its country was in favor of a strong protection and had therefore introduced an examination by the authorities comprising growing tests. However, he was not convinced of the necessity to provide for such an examination under the Convention. He also pointed out that in the case of ornamentals, where varieties were renewed very rapidly, the examination with growing tests was a heavy and time-consuming burden which hampered the introduction of new varieties. He therefore proposed that a more flexible attitude be adopted with respect to the examination.
50. Dr. Böringer (Federal Republic of Germany) supported the view that granting protection without an examination of the variety meant the protection of a description rather than a protection of the subject-matter. It should be borne in mind that the Convention did not expressly provide that an official examination had to be performed on the premises of the competent authorities. He emphasized that the application should always be associated with the deposit of a sample and also that growing tests should be mandatory but that, under certain conditions, those tests could also be conducted on the breeder's premises.
51. Mr. Chabrand (France) stated that he was not in favor of allowing the member States of UPOV to choose the examination system. He recalled that, until recently, titles of protection of widely differing value had existed in Europe in the field of patents, a situation which had proved to be very unsatisfactory. He preferred a system of bilateral relations between member States and non-member States which also protected new plant varieties but did not perform an examination based on growing tests.

52. Mr. Desprez (ASSINSEL) said that his organization remained in favor of the present system applied in UPOV because the establishment of a variety description was difficult for the breeder, who furthermore had difficulties of access to information. He thought it impossible to entrust the breeder with the testing of homogeneity, the lack of which was moreover the most frequent ground for rejection. However, he expressed the opinion that there should be a link with the other systems if they gave the same security to the breeder. Mr. Slocock (AIPH) doubted whether the European breeders would have the resources necessary for the examination.

53. Mr. Royon (CIOPORA) pointed out that, in the case of roses, the breeders had at their disposal numerous reference collections and competitions. He pointed to the economic aspect of the protection and intimated that the number of protected varieties was very small in comparison with the total number of marketed varieties, as the costs of protection were too high. He also mentioned that the breeder's main interest was to have as many States as possible become members of UPOV and grant protection to new plant varieties.

54. Dr. von Pechmann (AIPPI) expressed his agreement with the views of the Delegation of Hungary and confirmed the importance of the cooperation mentioned under item 16 of document IRC/III/2, especially since it allowed a reduction of the costs of examination in the member States, as stressed by Mr. Butler (Netherlands).

55. Mr. Thomas (South Africa) asked whether the member States would undertake the full examination of a variety which was claimed by its breeder to be identical with another variety except for the resistance to a given pest or disease which had been bred into that variety. Mr. Kelly (United Kingdom) said in reply that the tests would last as long as the authorities would need for evidencing. In this connection Mr. Bustarret (France) remarked that, some years ago, a breeder who discovered a new gene could secure adequate protection for the gene by breeding it into a variety and applying for its protection. At present, the profit made by the discoverer of a new gene could be very small in comparison with the profits made by third persons transferring that gene to other varieties, as this became easier with technical progress. He therefore proposed that the question and possibly also the question of an isolated protection of genes be studied further.

Ad item 13 of document IRC/III/2 (Article 8(1))

56. As to the question of reduction and calculation of the period of protection, Mr. Schlosser (United States of America) explained that his country provided for a uniform period of protection of 17 years for all species and therefore was not complying with the provisions of Article 8(1), according to which the minimum period should be 18 years, counted from the date of issue of the title of protection, for vines and trees. However, under the revised patent law which was being elaborated, the possibility was being considered of granting a period of protection of 20 years from the date of application and, as the granting procedure lasted around 18 months for plant patents, the United States of America would also be complying with the Convention with respect to vines and asexually reproduced trees.

57. Mr. Rollin (United States of America) noted that the US Plant Variety Protection Act would not comply with Article 8(1) of the Convention in the case of sexually reproduced trees.

58. Mr. Desprez (ASSINSEL) recalled that ASSINSEL was asking for a uniform period of protection of 20 years computed in all States from the date of issue of the first title of protection in order to avoid the expiration of the protection period on different dates in different States. Dr. Troost (AIPH) declared that he was not in favor of the latter proposal, whereas Mr. Leenders (FIS) recalled that his organization considered it premature to require that the period of protection should end at the same time in all member States.

59. Mr. Royon (CIOPORA) said that his organization did not share ASSINSEL's view that the periods of protection should be computed from the date of the grant of the first title of protection and was in favor of a longer priority period and of provisional protection.

60. The delegation of Hungary proposed that the Convention be amended to the effect that the member States would be free to fix their own periods of protection.

Ad item 14 of document IRC/III/2 (Article 10)

61. Dr. Wuesthoff (AIPPI) stated that the case of a breeder, or other person with his consent, selling propagating material, purporting to be of a protected variety, which did not show the characteristics of the variety as defined when the right was granted was to be considered a fraud under criminal law but not a ground for annulment. Apart from the aspects of penal and competition law, such marketing constituted also a violation of Article 13(8)(a).

62. The latter opinion was shared by Mr. Desprez (ASSINSEL), who specified that, if the ground of annulment was to be included in the Convention, it should be modified and an exception should be made in the case of an error made in good faith.

63. Mr. Rollin (United States of America) stated that the case in point was covered in his country by the Federal Seed Act under misrepresentation of varieties.

Mr. Kelly (United Kingdom) and Dr. Böringer (Federal Republic of Germany) mentioned that the cases underlying the proposal were not rare in practice. The most frequent practical case was that the variety was no more stable, a fact already constituting a ground for forfeiture under Article 10(2). The most difficult case was where the sample sent to the authority corresponded to the variety while the material marketed showed differences. Sanctions under the legislation on the seed trade were only possible in States where such legislation existed and only in the case of species to which such legislation applied.

Ad item 15 of document IRC/III/2 (Article 10(4))

64. In reply to the question whether to maintain Article 10(4)--according to which a plant breeder's right may not be annulled or become forfeit except on grounds expressly stated in that Article--Mr. Schlosser (United States of America) pointed out that special national reasons might exist for annulling the right. He mentioned that in his country that could be true in the case of a violation of the antitrust legislation. Mr. Thomas (South Africa) proposed that the grounds laid down in Article 10(1) to (3) should be mandatory for inclusion in the national law, whereas the States should have the opportunity to include other reasons.

65. All organizations expressed themselves in favor of maintaining the provisions of Article 10(4). Mr. Leenders (FIS) and Mr. Bustarret (France) expressed the view that the special case mentioned by Mr. Schlosser could be solved under Article 9, which provided for the limitation of the free exercise of the exclusive right accorded to the breeder or his successor in title for reasons of public interest.

Ad item 16 of document IRC/III/2

66. In reply to the question whether work should be started on the draft of a special agreement under which (i) applications for the protection of plant varieties could be filed with the national office of one Contracting State with effect also in other Contracting States, and (ii) the title of protection granted by the national office of one Contracting State would, subject to certain conditions, have effect also in other Contracting States, Mr. Butler (Netherlands) made a survey of the present activities with a view to organizing cooperation between the competent authorities of member States in the field of examination. He pointed out that such cooperation was the first step to be taken and would already lead to great advantages for the breeders and for the authorities of member States. Once the system was working well, the cooperation could also be extended to the administrative features and the questions of centralizing the application procedure and perhaps also the granting procedure could be considered. It was the intention of the UPOV member States to approach the problem of cooperation on a step-by-step basis. At the moment UPOV was concentrating on cooperation in examination.

67. It was the general view that cooperation as mentioned under item 16 of document IRC/III/2 was highly desirable and should be started as soon as possible.

Additional Questions Raised by the Observer Delegations

68. The Chairman noted that apart from the proposals on Article 13--which the Committee decided not to discuss in its present session in view of the fact that the Working Group on Variety Denominations would be meeting in September 1976--

Other Items on the Agenda

69. The Chairman informed the participants that item 4 of the agenda would have to be discussed in a meeting restricted to the ordinary members of the Committee. The Committee decided that no report would be adopted at the close of the session. The Office of the Union was asked to prepare a draft report on the session which would have to be adopted in the course of the Committee's fourth session. The observers of the non-member States and the international organizations having participated in the Committee's third session would have the opportunity to ask in writing for amendments to their own statements as recorded.

70. Answering to Mr. Royon (CIOPORA), the Chairman confirmed that the fourth session of the Committee, planned to be held from September 14 to 17, 1976, would comprise a joint meeting with the Working Group on Variety Denominations and be restricted to ordinary members of the Committee and the Working Group.

Closing of the First Part of the Session

71. The Chairman thanked the observers for the valuable contributions they had sent in writing before the session and made orally during the session. He expressed the view that the work accomplished had been a further important step on the way to enabling non-member States to join the Union.

[Annex follows]

IRC/III/14  
ANNEX/ANNEXE/ANLAGE

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