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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**

Third Session

Geneva, February 17 to 20, 1976

QUESTIONS CONCERNING THE INTERPRETATION AND
REVISION OF THE CONVENTION AND STATE OF DISCUSSIONSprepared by the Office of the Union**SUMMARY**

This paper deals with questions relating to the interpretation and possible revision of the Convention which have been brought forward so far, and sums up the state of discussions. It is intended as a working paper for the Committee of Experts' consideration of item 3 of the agenda of its third session.

1. At the meeting of member and non-member States of UPOV (October 1974) and at the first and second sessions of the Committee of Experts on the Interpretation and Revision of the Convention (hereinafter referred to as "the Committee") which were held in February and December 1975, respectively, a number of suggestions were made for a different interpretation or a revision of the UPOV Convention (hereinafter referred to as "the Convention"). The main suggestions were brought to the attention of prospective participants in the third session of the Committee in the "Summary of items to be dealt with during the third session of the Committee of Experts on the Interpretation and Revision of the Convention" (document IRC/III/2), which replaced the "Tentative list of items to be discussed during the third session of the Committee of Experts on the Interpretation and Revision of the Convention," the latter having been an Annex to the invitation to the third session of the Committee. In the present document, the suggestions are described in more detail and some of the main arguments for and against any proposed interpretation or revision are stated, in order to facilitate the discussions of item 3 of the agenda of the third session of the Committee.

Article 2(1)*, second sentence

2. 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 doing this, the Convention seeks 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 could be that a breeder might be forced to apply for a patent as well as for a plant variety protection right in order to prevent others from using his variety, because the scope of protection of each right might be different (as this is the case in the United States of America).

3. This preclusion could lead to difficulties in the United States of America, where plant patents are granted in respect of asexually reproduced varieties and special titles of protection in respect of sexually reproduced varieties. The UPOV delegation which, in September 1975, made a visit to the United States of America was informed that in that country, until then, it had not been possible or economically feasible to reproduce a plant variety sexually as well as asexually except in very rare cases. The problem had in practice arisen only in connection with 15 varieties of Poa pratensis. It was said to have little significance. The Committee, however, took the view at its second session that it might occur more often in the future that the same variety would be reproducible, under economically feasible conditions, both asexually and sexually, especially in the field of ornamental plants, and that therefore protection might be increasingly applied for in the United States of America under both systems.

4. To overcome this difficulty, it has been suggested that the Convention should not be extended in the United States of America to Poa pratensis and to other genus or species the sexual and asexual reproduction of which is possible and economically feasible. This solution seems to be very simple but the question arises as to how it can be actually realized. It is true that Article 4 of the Convention leaves it to the member States--with certain restrictions in paragraph (3)--to determine when and to what botanical genera and species the Convention is applied. Up to now, however, this application of the Convention to a certain genus or species has been achieved by the respective member State declaring, in its national law, the genus or species to be eligible for protection. In other words: whenever a member State has declared a genus or species to be eligible for protection, this has hitherto automatically meant the application of the Convention to that genus or species. No member State has so far denied application of the Convention to any genus or species for which it has accepted applications for variety protection. On the other hand, it must be noted that nothing in the Convention seems to prevent such denial as long as the genus or species in question is not listed in the Annex to the Convention (and as long as this Annex is not repealed). Another consequence of the suggested solution would be that a State might be forced to stop applying the Convention to certain genera or species (for example, when it is found later that a normally asexually propagated crop can also be reproduced sexually under profitable conditions, or vice versa),

* Where Articles are cited they refer to Articles of the UPOV Convention.

5. After discussion of the problem during its second session, the Committee expressed the opinion that the Convention should not allow any member State to protect varieties of a given species under two different systems.

Article 2(2)

6. In Article 2(2), it is stated that the word "variety" applies also to "hybrids" as long as they are capable of cultivation and satisfying the provisions of Article 6(1)(c) (homogeneity) and (d) (stability). The UPOV delegation was informed during its visit to the United States of America that, contrary to the situation in the present member States of UPOV, controlled hybrids of sexually propagated crops were expressly excluded from protection in that country. The question arises whether such a general exclusion--which would also be valid for varieties of those genera and species for which member States must, according to Article 4(3), grant protection--is admissible. The Committee decided at its second session to discuss this question during the third session.

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

7. 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.

8. It is generally acknowledged that the genera and species listed in the Annex to the Convention are of importance to European States and other States with similar climatic conditions, but of less relevance to States with different climatic conditions. The latter States would find it difficult to undertake to make all genera and species listed in the Annex to the Convention eligible for protection. Other States have other reasons for not extending the protection under the Convention to certain of the listed genera and species. For the present member States of UPOV, the list no longer has any importance, 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, at its first session, that the list contained in the Annex to the Convention, and any reference to it in the Articles of the Convention, should be deleted. This recommendation was confirmed by the Committee at its second session.

9. During its second session, the Committee expressed the view that the obligation of member States gradually to apply the Convention to a minimum number of genera or species (Article 4(4)) should be maintained. It was left open, however, whether the minimum number of genera or species to be protected within certain periods of time, mentioned in that paragraph, should stay the same or whether--in view of the fact that, after deleting the Annex to the Convention, the new member States could freely choose the genera and species to which they wished to apply the Convention--the number of those genera and species should be increased. It was agreed to come back to this question in a discussion during the third session. In any case, the view was expressed that the Council of UPOV should be given the authority, in respect of any new member State, to reduce the number of genera and species in order to take into account exceptional circumstances prevailing in that State. Such exceptional circumstances could, for instance, exist in the case of developing countries, other smaller countries or countries having exceptional climatic conditions.

10. The recommendation to maintain the principle that member States were obliged to apply the Convention to a minimum number of genera and species was made in order to prevent States from acceding to the Convention--thereby assuring their nationals of national treatment in the other member States--without having the serious intention of applying it gradually to a greater number of genera and species. The Committee was not convinced that it might be simply left to pressure in Council sessions or to the activities of national breeder organizations to compel member States to increase sufficiently the number of genera and species eligible for protection.

11. As a drafting matter, the Committee expressed the view that the word "genera" whenever used in Article 4(3) should be replaced by the words "genera and species."

12. Deletion of the Annex to the Convention would make changes necessary in Articles 4(3), 4(4) and 33(1). The changes in Article 4(4) are of considerable substantial importance. At present, member States which offer protection to their nationals--as they have to after a certain period of time following the entry into force of the Convention for them--for varieties of genera and species included in the Annex to the Convention, are obliged to give the right to nationals and residents of other member States to file applications for the protection of such varieties. They cannot make this right dependent on the question whether the "home" State of the applicant offers protection for the same genus or species. A simple deletion of the words "not included in the list" in Article 4(4) would change this situation: It would result in the principle of national treatment embodied in Article 3 being even more restricted than it already is by virtue of Article 4(4) now. To avoid this consequence, the Committee agreed to recommend outright abandonment of the possibility of restricting the national treatment principle, which means that every national of a member State or person having his residence or headquarters in a member State would be entitled, in any other member State, to file applications for the protection of varieties of all genera and species eligible for protection there. This aim could be achieved by deleting the whole first part of Article 4(4). The question whether the second part of this paragraph under which member States may extend the benefit of protection to persons possessing the nationality of or having residence or headquarters in a member State of the Paris Union for the Protection of Industrial Property should also be deleted was left open. It was largely felt that member States in any case had the possibility of doing this and that therefore there was no need to mention it. As for Article 4(5) the Committee agreed to propose its deletion.

Article 5(1)

13. 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 was proposed by a representative of the US Patent and Trademark Office, during the meeting of member and non-member States of UPOV held in October 1974, 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. The Committee has discussed this proposal, and the scope of the protection under Article 5(1) in general, and has come to the conclusion that the wording of Article 5(1) should not be altered but that it should be left to each State to make use of the possibility open to it under Article 5(4) of granting more extensive rights to the breeders than are provided for under the Convention, as this had been done to some extent by Denmark and the United Kingdom (see Annex I). This view has been taken mainly because any obligatory extension of the scope of protection in Article 5(1) might make it more difficult for non-member States to accede to the Convention.

14. In this context, the Committee discussed the so-called "farmer's privilege" under the US Plant Variety Protection Act. There was no question that the restriction of the scope of protection to the production, for purposes of commercial marketing, and the sale of the propagating material as such under Article 5(1) allowed 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, however, farmers are granted a more far-reaching privilege: they are permitted to sell seed of a protected variety which they have grown on their own premises to other farmers (but not to seed dealers). There is a possibility that the United States of America, and perhaps also other States, may ask for this extended "farmer's privilege" to be made admissible under the Convention. The Committee has taken the view that such a "farmer's privilege" is not compatible with the UPOV Convention and that an amendment of the Convention to provide for such a privilege is not desirable.

15. The Committee also discussed in this context some cases where it was questionable whether the multiplication of seed of a protected variety for other purposes than the sale of the propagating material ought to be allowed. One case mentioned was that where a large enterprise--for instance a canning firm, a sugar refinery or a 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 consumption purposes. In this case, the profit made by the breeder and received as remuneration for his efforts is extremely small, while the enterprise

makes substantial profits. Another example was the case where a cooperative multiplies propagating material or has it multiplied by some of its members for distribution to other members. The Committee came to the conclusion that Article 5(1) should not be changed in such a way as to oblige member States to reserve all multiplication of a protected variety--except where performed only for private or experimental purposes--to the owner or to persons authorized by him. It seems preferable indeed to maintain the great flexibility of Article 5, which provides for a minimum scope of protection under paragraph (1) and leaves it, in its paragraph (4), to each member State to decide if it is necessary to prevent any misuses in the cases mentioned by means of national legislation.

16. With regard to the cases mentioned above, the Committee made the general comment that the UPOV Convention was based on a different philosophy from that of patent law. Reference was made to the preamble of the UPOV Convention, which speaks of "limitations that the requirements of the public interest may impose on the free exercise" of the plant breeder's right.

Article 6(1) (a)

17. The Committee recommended non-acceptance of a proposal, made by a representative of the United States of America during the meeting of member and non-member States, 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.

18. As to the question which characteristics are "important characteristics" for justifying the distinctness of a new variety, and especially whether only functional characteristics could be important characteristics, the Committee recommended following the definition of the term "important characteristics" given in the General Introduction to the Guidelines for the Examination of Distinctness, Homogeneity and Stability of New Varieties of Plants. This means in particular that the Committee would not approve the restriction of the term to merely functional characteristics.

19. At the meeting of member and non-member States, representatives of the United States of America proposed that the breeder be allowed to release seed or asexually reproducible plant material for purposes of experimentation without such release being interpreted as a marketing of the seed. Section 102 of the US Plant Variety Protection Act was mentioned in this respect. The Committee had decided at 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 delegation was informed that in some cases, especially where varieties were 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 fairly long periods of time in order to find out whether the product was agreeable to the taste of the consumer. It is certainly 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 to include special exemption for experimental use can be followed. 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 as a preventive measure.

Article 6(1) (b)

20. Under the US Patent Law as well as under the US Plant Variety Protection Law the breeder is granted a "period of grace" of one year, during which he can commercialize the variety without affecting its novelty, that is, he can file an application even after the variety has been sold or otherwise marketed in the United States for up to one year. Periods of grace of this kind, which may be of three months' to one year's duration, are also known in the patent laws of other States and are apparently applied without causing 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. Second, they enable those inventors--or breeders--who recognize the protectability or value of their invention--or variety--only after they have already brought the product on the market to apply for protection nevertheless.

21. During its mission to the United States of America the UPOV delegation found 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 hardly be sacrificed.

22. The Committee nevertheless felt unable to recommend agreement to the introduction of such a period of grace in the Convention, or even to adopt a provision in the Convention which would allow a member State to introduce a period of grace in its national law. In the discussion it was noted that one year, as granted under the US system, 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. The members of the Committee also pointed out that in the sector of major agricultural crops a variety can in any event not be marketed in some countries before it has been registered in a special list of authorized varieties. Furthermore, the view was expressed that any testing of a variety before filing an application which made it necessary to transfer propagating material could be performed, as for instance was usual in the United Kingdom, under special contracts according to which the material remains the property of the breeder and has to be returned to him.

Article 6(1)(b) and Article 12

23. The Committee stated that the Convention provided for three periods which might lead to a considerable difference in time between the date of the first commercialization of the variety in some States and the date of the examination of the variety and the granting of protection in other States.

24. The first period is the period of four years under Article 6(1)(b), which provides 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 the variety, and thereby of testing its value, 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 under Article 12(1) for a period of twelve months. 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 to withhold, 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 or a certified copy of the document which constitutes the first application) for up to four years after the expiration 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, examination in a member State is completed almost nine years--and the right is granted eleven years--after the variety was first offered for sale or marketed in a foreign State.

25. The Committee expressed some concern on the possibility of such accumulation of the three periods and investigated the need to retain them. However, it was stated that the four-year period in Article 6(1)(b) was necessary in order to prevent an undesired increase in the number of applications: in the absence of that four-year period breeders would be forced, when starting to market the variety in one State, to file applications immediately in all States in which they might possibly want protection at a later stage. Such increase in the number of applications would create problems for the national offices of member States. Also, the need to file applications in several States when starting marketing the variety in one State might create difficulties for the breeder. In view of this, no proposals were made in the Committee to delete or shorten the period in Article 6(1)(b). A proposal to extend it to six years, especially in the case of fruit trees and possibly also other trees, was not approved by the majority.

26. No recommendations were made to amend the priority period provided for under Article 12(1).

27. As for the four-year period under Article 12(3), the view was held in the Committee that this period was 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 view has been strongly contested, however. It has been pointed out that the absence of the four-year period in one member State caused no difficulties in that State. Some experts therefore pleaded for a deletion of that period, if indeed any of the three periods had to be deleted.

28. One of the disadvantages of the four-year period under Article 12(3) that was mentioned was that 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 under Article 12(1), but also of the four-year period under Article 12(3) for supplying the plant material to the other States; during these periods, in other words for up to five years, he could improve his variety, for instance to make it homogeneous by the time it was examined in the State of the subsequent application; in the State of the first application, the same variety might already have been rejected for lack of homogeneity; a breeder acting in this way would have an unjustified advantage over other breeders who did not file applications until their varieties had reached the necessary stage of homogeneity.

29. In order to prevent the misuse described in the preceding paragraph, the proposal was made to make the validity of the right of priority dependent on the continued validity of the first application. This proposal was rejected by the Committee. It was pointed out that the first application might be withdrawn or rejected on grounds that were valid only in the country of the first filing. It was also observed that the fate of the subsequent filing might, should that proposal be adopted, be uncertain for a long period of time, especially where the first application was subject to lengthy court proceedings. In such a case, 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.

30. Two practical possibilities were mentioned for preventing the above described misuse, at least partially. It could be provided that the authorities in the State of the subsequent filing had 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. Alternatively, the authority with which the first application was filed, could be required to keep its remaining seed, and to request and 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.

31. It was also mentioned that some interested circles had repeatedly complained about the termination of the protection of the same variety on different dates in different States. The Committee found that, if the question of different termination dates for the periods of protection was posing a real problem, the only solution was to start the computation of the period of protection for the same variety on the same date. One possibility would be to start the computation on the date of filing of the first application in one member State. It was mentioned that a similar proposal had been made several times in the related field of patents but had not been accepted. It was furthermore stated that such a rule would considerably advance the termination date of protection in some States as compared with the present situation, and it was anticipated that breeders would object strongly to such a change. Another proposal made was that of computing the period of protection from the date on which the first title of protection was granted. The majority in the Committee felt that, before adopting such a rule, it was necessary to harmonize the lengths of the periods of protection provided for in the various national laws. If such a proposal was followed, it would be necessary to specify these periods of protection in the Convention instead of only fixing minimum periods.

Article 7

32. With regard to this Article 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 adopted by the Diplomatic Conference on the day on which the Convention was laid open for signature (reproduced on page 32 of the official

33. The problem was thoroughly discussed in the Committee. 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 cover 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.

34. The UPOV delegation to the United States of America studied this question in detail 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. The question is 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 matter of practical significance.

Article 8(1) third sentence

35. The Committee felt unable to approve of a reduction of the minimum period of protection of 18 years for the species mentioned in Article 8(1) third sentence. It thought that the extended periods of protection for these species were justified owing to their special growing conditions.

Article 10

36. In view of the fact that, according to Article 10(4), a plant breeder's right may not be annulled or become forfeit except on grounds set out in this Article, the proposal was made to introduce an additional ground in Article 10(2) or (3), namely the case where the owner of a protected variety, or another on his behalf, sells propagating material purporting to be of that variety, yet not possessing the same characteristics of the variety as defined when the right was granted. Such sanction was held to be necessary in order to prevent the owner of the plant breeder's right from continuing to sell the variety when it has lost, owing to lack of stability, its characteristics as defined at the granting stage, or from selling, for other reasons, propagating material of a different kind from that of the protected variety.

37. The Committee discussed the proposal, made by representatives of the United States of America at the meeting of member and non-member States, to delete Article 10(4) which prescribes that the right of the breeder may not be annulled or become forfeit except on the grounds set out in Article 10. The Committee held that this paragraph was a basic guarantee to the breeder and should not be deleted. Furthermore it was noted that the UPOV delegation to the United States of America had been informed that the proposal to delete Article 10(4) had been made only in order to allow for invalidating a plant patent if the first application for protection of a US-bred variety had been filed abroad without the permission of the government, such permission being generally required under US patent law for security reasons. The view was expressed that instead of changing or deleting Article 10(4) for this reason, a future revision conference could record an understanding that measures taken by any Contracting State to protect its national security were always allowed.

Article 13

38. The Committee discussed in detail the provisions of Article 13. It gained the impression that criticism expressed in the past by non-governmental organizations was mainly directed against the Guidelines on Variety Denominations, the amendment of which will be discussed in the near future by the competent UPOV organs. The Committee therefore decided not to propose any discussion of Article 13 during its third session.

Article 14

39. 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) should not be envisaged.

System of Central Filing of Applications and Central Granting of Rights

40. Mainly in view of developments in the related field of patents, where three international conventions will enter into force in coming years--the Patent Cooperation Treaty (PCT), the European Patent Convention and 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 could be devised whereby the applicant can file an application with one single national office with effect in more than one, if not all, member States (centralized filing). This could save time and labor for breeders and offices. It was furthermore asked whether the possibility of having a plant breeder's right granted by one authority with effect for more than one State (centralized granting of an international plant breeder's right) should not be studied. Another proposal was made to have plant breeders' rights granted by the office of one member State and recognized by the offices of the other member States.

41. For the Committee it was quite clear that the introduction of any such system--which would go far beyond the mere cooperation among offices of member States in the technical examination of a variety--could only be achieved either by a revision of the Convention or--preferably--by a separate Convention, requiring separate ratification by Contracting States.

42. While the Committee realized that the elaboration of such a separate convention and its approval by the competent national bodies, would take a long time, it considered it premature to start discussion at the present time. It was stated that the different activities performed inside UPOV, especially the work on the centralization of examination, were progressing in the right direction and could, indeed should, be intensified in the future. It was furthermore considered possible, on the basis of national laws, without changing the Convention or adopting a separate Convention to devise a system of cooperation which, in practice, would come near to producing the same effects as would be obtainable through the central grant of an international plant breeder's right.

43. In this connection it was pointed out that there were two possible ways of achieving intensive international cooperation: one--which apparently had the preference of both the present Committee and the Committee of Experts on International Cooperation in Examination--would first, through an exchange of test results, bring about de facto cooperation at the technical level; another would immediately lay the legal foundation for the recognition, at least to some extent, of the validity of examination effected in one country by the other country, with a view to arriving gradually at a system whereby one application would have effect in several countries, and certificates granted in one country would be automatically--or subject only to a relatively simple and inexpensive procedure--recognized in the other country. It was mentioned that the discussion of these questions should be taken up in the near future, since they were considered urgent by some of the interested circles and some of the governments showing an interest in joining UPOV, and, if they were not taken up in time by UPOV, they might be taken up outside UPOV. The Committee therefore agreed to examine these questions in due course, but considered that for the time being it was more important to establish cooperation in the technical field on the basis of the UPOV Model Agreement worked out by the Committee of Experts on International Cooperation in Examination, and to assess the experience gained through this cooperation; once that cooperation was sufficiently extensive, the question of institutionalizing it and recognizing its legal effects should be examined.

[Annex follows]

ANNEX I
PROPAGATION OF VARIETIES
(ARTICLE 5 OF THE CONVENTION)

Survey of open problems and their solution in national laws

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 breeder's 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 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 gives 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);

(ii) 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(4) 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 produced 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:

(a) (...)

(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 the 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 certificating and amend the certificates 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 or 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 infringed by the use made by the farmer, on his own farm, of seeds or any vegetative material produced 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."