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INTERNATIONAL UNION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS

GENEVA

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

Geneva, October 9 to 23, 1978

DRAFT REVISED CONVENTION

Document adopted for distribution by the Council of UPOV

This document contains, pursuant to a decision taken by the Council of UPOV in its eleventh (December 1977) ordinary session (see document C/XI/21, paragraph 16):

(i) in Annex I, the draft revised text of the International Convention for the Protection of New Varieties of Plants, prepared by the Committee of Experts on the Interpretation and Revision of the Convention and approved by the Council for distribution in preparation for the Diplomatic Conference scheduled to take place from October 9 to 23, 1978; the present text of the Convention (the Convention of 1961 as amended by the Additional Act of 1972); Explanatory Notes;

(ii) in Annex II, a report on the work of the Committee of Experts on the Interpretation and Revision of the Convention and a Draft Preamble to the revised Convention prepared by Mr. H. Skov, Chairman of the above-mentioned Committee of Experts.

According to Rule 30(1) of the Provisional Rules of Procedure of the Diplomatic Conference (document DC/2), this document is to serve as the basis of the discussions in that Conference.

For drafting amendments not affecting all of the three languages in which this document has been published, reference is made to the version of the document in the relevant language.

[Two Annexes follow]

DC/3
ANNEX I

Draft

INTERNATIONAL CONVENTION FOR THE PROTECTION
OF NEW VARIETIES OF PLANTS

of December 2, 1961,
as revised at Geneva on November 10, 1972, and
on October 7, 1978

[Present Text]

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* In the brochure containing the present text of the Convention the Table of Contents was added by the Office of the Union for the convenience of the reader. It did not appear in the original (French) text of the Convention.

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Explanatory Notes on Article 1

Ad paragraph (1): The present text says that the subsequent provisions of the Convention define the content of the breeder's right and the conditions of exercise of that right. It is proposed to refer to the subsequent provisions in a more general way.

Also it is proposed to clarify that the term "breeder," wherever used in the subsequent provisions, is to be understood as referring either to the breeder himself or to his successor in title. It would thus be possible to avoid the use of the term "successor in title" in a number of provisions in order to simplify the text.

In subsequent provisions, it is proposed to omit the word "new" in the expression "new plant variety" since it no longer seems to be necessary. Furthermore, in subsequent provisions, where the present text uses the expression "plant variety," it is proposed to leave out the word "plant" since, in the context of the Convention, a variety can only be understood as meaning a plant variety. Nevertheless, both in Article 1 and in the title of the Convention, the words "plant" and "new" have been maintained in the English text: the word "plant," since, at the beginning of the text, the context is not yet established, and the word "new," for the purposes of emphasis. Furthermore, in the English text the word "new" has been maintained in the expression "new varieties of plants" as used in Articles 29(1) and 30(1), in view of the wording of the French and the German texts and in order to avoid any misunderstanding.

Ad paragraph (2): No amendment is proposed in this paragraph.

Ad paragraph (3): No amendment is proposed in this paragraph.

[Present Text]

Article 1

[Purpose of the Convention; Constitution
of a Union; Seat of the Union]

(1) The purpose of this Convention is to recognise and to ensure to the breeder of a new plant variety, or to his successor in title, a right the content and the conditions of exercise of which are defined hereinafter.

(2) The States parties to this Convention, hereinafter referred to as member States of the Union, constitute a Union for the Protection of New Varieties of Plants.

(3) The seat of the Union and its permanent organs shall be at Geneva.

[New Text]

Article 1

Purpose of the Convention; Constitution
of a Union; Seat of the Union

(1) The purpose of this Convention is to recognise and to ensure to the breeder of a new plant variety or to his successor in title (both hereinafter referred to as "the breeder") a right under the conditions hereinafter defined.

(2) [No change]

(3) [No change]

Explanatory Notes on Article 2

Ad paragraph (1): No amendment is proposed in this paragraph. However, attention is drawn to the proposed new Article 34A(1), which would allow certain States not to comply with the requirement provided for in this paragraph.

Ad paragraph (2): In the present text, this paragraph attempts to define the term "variety" by listing a number of types of varieties. It is proposed to replace this enumeration by the general term "assemblage of plants" in order to include in the definition all categories of varieties which have been developed since the adoption of the Convention and may be developed in the future as a result of the progress made in the field of plant breeding.

Ad paragraph (3): It is proposed that a new paragraph (3) be added clarifying that a member State may apply the Convention to only part of the varieties of a genus or species. Such a part can be defined on the basis of the manner of reproduction or multiplication; for instance: sexually reproduced varieties and vegetatively propagated varieties; pure lines, hybrids, open-pollinated varieties, apomictic varieties, etc. It may also be defined by the intended use of the varieties, for instance: forest varieties, ornamental varieties, fruit varieties, rootstocks, etc.

[Present Text]

Article 2

[Forms of Protection; Meaning of "Variety"]

(1) Each member State of the Union may recognise the right of the breeder provided for in this Convention by the grant either of a special title of protection or of a patent. Nevertheless, a member State of the Union whose national law admits of protection under both these forms may provide only one of them for one and the same botanical genus or species.

(2) For the purposes of this Convention, the word "variety" applies to any cultivar, clone, line, stock or hybrid which is capable of cultivation and which satisfies the provisions of subparagraphs (1)(c) and (d) of Article 6.

[There is no provision in the present text corresponding to paragraph (3) in the new text.]

[New Text]

Article 2

Forms of Protection; Varieties

(1) [No change]

(2) For the purposes of this Convention, the word "variety" is applicable to any assemblage of plants which is capable of cultivation and which satisfies the requirements of subparagraphs (c) and (d) of paragraph (1) of Article 6.

(3) Each member State of the Union may limit the application of this Convention within a genus or species to varieties with a particular manner of reproduction or multiplication, or a certain end-use.

Explanatory Notes on Article 3

Ad paragraph (1): The only amendment proposed is to replace the word "headquarters" by "registered office" in the English text.

Ad paragraph (2): The only amendment proposed is to omit the word "new." For explanations, see the Explanatory Notes on Article 1(1).

Ad paragraph (3): This proposed new paragraph corresponds to the first part of paragraph (4) of Article 4 in the present text which it is to replace. It would allow member States to replace under certain conditions the national treatment principle, embodied in the provisions of paragraphs (1) and (2) of Article 3, by the reciprocity rule. The new paragraph would differ, however, from the first part of paragraph (4) of Article 4 in the present text in so far as it refers to any genus or species and not only to those genera or species which are not included in the list presently annexed to the Convention. This difference is a consequence of the proposed deletion of that list (see the Explanatory Notes under Article 4(4)). The proposal to add this provision in Article 3 rather than leave it in Article 4 has been made since it authorizes member States to derogate from the first two paragraphs of Article 3 while the present links with Article 4 will no longer exist once the list has been deleted.

The second part of paragraph (4) of Article 4 in the present text is omitted since, as far as nationals, etc., of other member States of UPOV are concerned, the national treatment applies (unless the reciprocity rule referred to above is applicable and is applied) automatically, that is, does not require an extension (as provided in the present text), and, as far as nationals, etc., of member States of the Paris Union (not members of UPOV) are concerned, there is nothing in the UPOV Convention which would prevent a member State of UPOV from protecting them, or, for that matter, the nationals of any State.

Paragraph (5) of Article 4 of the present text is omitted because experience has shown that it is no longer necessary.

[Present Text]

Article 3

[National Treatment]

(1) Without prejudice to the rights specially provided for in this Convention, natural and legal persons resident or having their headquarters in one of the member States of the Union shall, in so far as the recognition and protection of the breeder's right are concerned, enjoy in the other member States of the Union the same treatment as is accorded or may hereafter be accorded by the respective laws of such States to their own nationals, provided that such persons comply with the conditions and formalities imposed on such nationals.

(2) Nationals of member States of the Union not resident or having their headquarters in one of those States shall likewise enjoy the same rights provided that they fulfil such obligations as may be imposed on them for the purpose of enabling the new varieties which they have bred to be examined and the multiplication of such varieties to be controlled.

[See Article 4(4) of the present text.]

[New Text]

Article 3

National Treatment; Reciprocity

(1) [No change, except replace the word "headquarters" by the words "registered office" in the English text.]

(2) [No change, except omit the word "new."]

(3) Notwithstanding paragraphs (1) and (2), any member State of the Union applying the Convention to a given genus or species shall be entitled to limit the benefit of the protection to the nationals of those member States of the Union which apply the Convention to the same genus or species and to natural and legal persons resident or having their registered office in any of those States.

Explanatory Notes on Article 4

Ad paragraph (1): No amendment is proposed in this paragraph.

Ad paragraph (2): No amendment is proposed in this paragraph.

Ad paragraph (3): In the present text, this paragraph obliges member States to apply the Convention progressively to thirteen genera and species listed in the Annex to the Convention. It is proposed to delete this Annex as well as the reference to it in the paragraph under consideration for the following reasons: the list of genera and species in the Annex was fixed mainly with regard to the situation prevailing in countries of the temperate climatic zone; it would be unreasonable to require countries belonging to other climatic zones to apply the Convention to the same genera or species (i.e., those listed); in order to allow all States to join the Union, it would therefore be necessary to amend the said list or to delete it; as it would hardly be possible to agree on a list suitable for all countries, the only practical solution is to abandon it completely.

Once the list is deleted, each member State will be free to choose the genera and species which it will make eligible for protection in order to fulfil its obligation under the Convention. Such freedom justifies an increase in the minimum numbers of genera or species to which member States have to apply the Convention within certain periods. The proposed amendment would increase the minimum number (to be reached within eight years) from 13 to 24.

Under the proposed new Article 2(3), member States will be able to apply the Convention to only a part of a genus or species. The new subparagraph (c) which is proposed to be added would clarify that, when counting the number of genera or species to which a member State applies the Convention, a genus or species in respect of which that State has availed itself of the possibility provided for in Article 2(3) (that is, to apply the Convention only to a part of its varieties) is nevertheless to be counted as one genus or species.

Ad paragraph (4) in the new text: Certain States which wish to join the Union might not be able to fulfil the obligations provided for in paragraph (3). It is therefore proposed that the Council be authorized to reduce, for the purposes of such States, the said minimum numbers of genera or species to be protected or to extend the periods within which such States would have to apply the Convention to them. The majority which is necessary for a Council decision of this kind is prescribed in Article 22. The wording of the proposed new paragraph in question is similar to that of Article 26(5) as contained in Article II of the Additional Act.

Ad paragraph (5) in the new text: This new paragraph has been introduced for the purposes of States which, after having ratified or acceded to the Convention, find unexpected difficulties in complying with the obligation provided for in paragraph (3)(b) within the prescribed periods. The present paragraph would authorize the Council to extend, in such cases, the periods set forth in paragraph (3)(b).

[Present Text]

Article 4

[Botanical Genera and Species Which Must
or May Be Protected; Reciprocity;
Possibility of Declaring that
Articles 2 and 3 of the Paris
Convention for the Protection of
Industrial Property Are Applicable]

- (1) This Convention may be applied to all botanical genera and species.
- (2) The member States of the Union undertake to adopt all measures necessary for the progressive application of the provisions of this Convention to the largest possible number of botanical genera and species.
- (3) Each member State of the Union shall, on the entry into force of this Convention in its territory, apply the provisions of the Convention to at least five of the genera named in the list annexed to the Convention.

Each member State further undertakes to apply the said provisions to the other genera in the list, within the following periods from the date of the entry into force of the Convention in its territory:

- (a) within three years, to at least two genera;
- (b) within six years, to at least four genera;
- (c) within eight years, to all the genera named in the list.

[There is no provision in the present text corresponding to subparagraph (c) in the new text.]

[There is no provision in the present text corresponding to paragraph (4) in the new text.]

[There is no provision in the present text corresponding to paragraph (5) in the new text.]

[New Text]

Article 4

Botanical Genera and Species Which Must
or May Be Protected

- (1) [No change]
- (2) [No change]
- (3)(a) Each member State of the Union shall, on the entry into force of the Convention in its territory, apply the provisions of the Convention to at least five genera or species.
- (b) Subsequently, each member State shall apply the said provisions to additional genera or species within the following periods from the date of the entry into force of the Convention in its territory:
 - (i) within three years, to at least ten genera or species in all;
 - (ii) within six years, to at least eighteen genera or species in all;
 - (iii) within eight years, to at least twenty-four genera or species in all.
- (c) If a member State of the Union has limited the application of the Convention within a genus or species in accordance with the provisions of paragraph (3) of Article 2, such genus or species shall nevertheless, for the purposes of subparagraphs (a) and (b) of the present paragraph, be considered as one genus or species.
- (4) At the request of any State intending to ratify or accede to this Convention, the Council may, in order to take account of special economic or ecological conditions prevailing in that State, decide, for the purposes of that State, to reduce the minimum numbers referred to in paragraph (3), or to extend the periods referred to in that paragraph, or to do both.
- (5) At the request of any member State, the Council may, in order to take account of special difficulties encountered by such State in the fulfilment of the obligations under subparagraph (b) of paragraph 3 of this Article, decide, for the purposes of that State, to extend the periods referred to in that subparagraph.

[Explanatory Notes on Article 4, continued]

Ad paragraphs (4) and (5) in the present text: See the Explanatory Notes on Article 3(3) in the new text.

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[Article 4, continued]

[Present Text]

[New Text]

(4) Any member State of the Union protecting a genus or species not included in the list shall be entitled either to limit the benefit of such protection to the nationals of member States of the Union protecting the same genus or species and to natural and legal persons resident or having their headquarters in any of those States, or to extend the benefit of such protection to the nationals of other member States of the Union or to member States of the Paris Union for the Protection of Industrial Property and to natural and legal persons resident or having their headquarters in any of those States.

(5) Any member State of the Union may, on signing this Convention or on depositing its instrument of ratification or accession, declare that, with regard to the protection of new varieties of plants, it will apply Articles 2 and 3 of the Paris Convention for the Protection of Industrial Property.

[See Article 3(3) of the new text.]

[There is no provision in the new text corresponding to paragraph (5) in the present text.]

Explanatory Notes on Article 5

Ad paragraph (1): It is proposed to omit the words "new plant" and "new" when they appear before the word "variety" and the words "or his successor in title." For explanations, see the Explanatory Notes on Article 1(1).

Ad paragraph (2): It is proposed to omit the words "or his successor in title." For explanations, see the Explanatory Notes on Article 1(1).

Ad paragraph (3): It is proposed to omit the word "new" (three times) and the words "or his successor in title" (once). For explanations, see the Explanatory Notes on Article 1(1).

Ad paragraph (4): The only amendment proposed is to replace the word "headquarters" by the words "registered office" in the English text.

[Present Text]

Article 5

[Rights Protected; Scope of Protection]

(1) The effect of the right granted to the breeder of a new plant variety or his successor in title is that his prior authorisation shall be required for the production, for purposes of commercial marketing, of the reproductive or vegetative propagating material, as such, of the new variety, and for the offering for sale or marketing of such material. Vegetative propagating material shall be deemed to include whole plants. The breeder's right shall extend to ornamental plants or parts thereof normally marketed for purposes other than propagation when they are used commercially as propagating material in the production of ornamental plants or cut flowers.

(2) The authorisation given by the breeder or his successor in title may be made subject to such conditions as he may specify.

(3) Authorisation by the breeder or his successor in title shall not be required either for the utilisation of the new variety as initial source of variation for the purpose of creating other new varieties or for the marketing of such varieties. Such authorisation shall be required, however, when the repeated use of the new variety is necessary for the commercial production of another variety.

(4) Any member State of the Union may, either under its own law or by means of special agreements under Article 29, grant to breeders, in respect of certain botanical genera or species, a more extensive right than that set out in paragraph (1) of this Article, extending in particular to the marketed product. A member State of the Union which grants such a right may limit the benefit of it to the nationals of member States of the Union which grant an identical right and to natural and legal persons resident or having their headquarters in any of those States.

[New Text]

Article 5

Rights Protected; Scope of Protection

(1) [No change, except omit the words "new plant" and "new" and the words "or his successor in title."]

(2) [No change, except omit the words "or his successor in title."]

(3) [No change, except omit the word "new" in all cases in which it appears and the words "or his successor in title."]

(4) [No change, except replace the word "headquarters" by the words "registered office" in the English text.]

Explanatory Notes on Article 6

Ad paragraph (1), introductory lines: It is proposed to omit the word "new" and the words "or his successor in title." For explanations, see the Explanatory Notes on Article 1(1).

Ad paragraph (1)(a): It is proposed to omit the word "new" in the first and in the third sentences. For explanations, see the Explanatory Notes on Article 1(1). It is further proposed to merge the--present--two unnumbered subparagraphs into a single paragraph (a) and to invert in the last sentence the words "description" and "recognition."

Ad paragraph (1)(b): In at least one non-member State of UPOV, the United States of America, breeders are granted a period of one year, expiring on the date of the filing of the application for protection in that country, in which they can use and sell the variety without thereby causing prejudice to their right to obtain protection. Other non-member States plan to follow this example. The period of one year, called "period of grace," is favorable to breeders in so far as it allows them a certain time in which to test the economic value of the variety and its suitability for being protected in the country in question before taking a decision on whether it is worth applying for protection there. The period of grace being a well-established tradition of most patent laws, some non-member States would encounter unsurmountable difficulties in acceding to the Convention if the Convention did not permit them to maintain--or to introduce--such a period. It is therefore proposed to amend the wording of subparagraph (b) so that it allows member States to grant a period of grace of up to one year.

In addition, it is proposed that the period of four years expiring at the filing date of the application, during which the variety may have been offered for sale or marketed in a State other than the State in which the application is filed, be extended to a period of six years in the case of certain groups of plants which are usually slow-growing and for which Article 8 of the present text already envisages a longer minimum period of protection. The reference to these groups of plants has been adapted to the new draft of Article 8 (see the Explanatory Notes on Article 8).

The order of the two sentences has been changed so that the basic rule appears first and the rule of interpretation is stated afterwards. The drafting of the--present--second subparagraph has been amended to clarify its meaning and the words "or his successor in title" have been omitted. For explanations of the latter change, see the Explanatory Notes on Article 1(1).

It is further proposed to state in the part corresponding to the--present--first subparagraph (the last two sentences of subparagraph (b) of the new text) that only common knowledge established by offering for sale or marketing of the variety, or by trials involving such offering for sale or marketing, shall prevent the breeder from obtaining protection for such variety.

Attention is drawn to the proposed new Article 34A(2), which would allow certain States to apply in certain cases novelty criteria different from those provided for in this paragraph.

Ad paragraph (1)(c), (d) and (e): The only amendment proposed in each of these subparagraphs is to omit the word "new." For explanations, see the Explanatory Notes on Article 1(1).

[Present Text]

Article 6

[Conditions Required for Protection]

(1) The breeder of a new variety or his successor in title shall benefit from the protection provided for in this Convention when the following conditions are satisfied:

(a) Whatever may be the origin, artificial or natural, of the initial variation from which it has resulted, the new variety must be clearly distinguishable by one or more important characteristics from any other variety whose existence is a matter of common knowledge at the time when protection is applied for. Common knowledge may be established by reference to various factors such as: cultivation or marketing already in progress, entry in an official register of varieties already made or in the course of being made, inclusion in a reference collection or a precise description in a publication.

A new variety may be defined and distinguished by morphological or physiological characteristics. In all cases, such characteristics must be capable of precise description and recognition.

(b) The fact that a variety has been entered in trials, or has been submitted for registration or entered in an official register, shall not prejudice the breeder of such variety or his successor in title.

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, with the agreement of the breeder or his successor in title, in the territory of that State, or for longer than four years in the territory of another State.

(c) The new variety must be sufficiently homogeneous, having regard to the particular features of its sexual reproduction or vegetative propagation.

(d) The new variety must be stable in its essential characteristics, that is to say, it must remain true to its description after repeated reproduction or propagation or, where the breeder has defined a particular cycle of reproduction or multiplication, at the end of each cycle.

(e) The new variety shall be given a denomination in accordance with the provisions of Article 13.

[New Text]

Article 6

Conditions Required for Protection

(1) The breeder of a variety shall benefit from the protection provided for in this Convention when the following conditions are satisfied:

(a) Whatever may be the origin, artificial or natural, of the initial variation from which it has resulted, the variety must be clearly distinguishable by one or more important characteristics from any other variety whose existence is a matter of common knowledge at the time when protection is applied for. Common knowledge may be established by reference to various factors such as: cultivation or marketing already in progress, entry in an official register of varieties already made or in the course of being made, inclusion in a reference collection or a precise description in a publication. A variety may be defined and distinguished by morphological or physiological characteristics. In all cases, such characteristics must be capable of precise recognition and description.

(b) At the date on which the application for protection in a member State of the Union is filed, the variety

(i) must not--or, where the law of that State so provides, must not for longer than one year--have been offered for sale or marketed, with the agreement of the breeder, in the territory of that State, and

(ii) must not have been offered for sale or marketed, with the agreement of the breeder, in the territory of any other State for longer than six years in the case of vines, forest trees, fruit trees and ornamental trees, including their rootstocks, or for longer than four years in the case of all other plants.

Trials of the variety not involving offering for sale or marketing shall not affect the right to protection. The fact that the variety has become a matter of common knowledge in ways other than through offering for sale or marketing shall also not affect the right of the breeder to protection.

(c) [No change, except omit the word "new."]

(d) [No change, except omit the word "new."]

(e) [No change, except omit the word "new."]

[Explanatory Notes on Article 6, continued]

Ad paragraph (2): It is proposed to omit the words "in respect of a new variety" and the words "or his successor in title." For explanations of the latter omission, see the Explanatory Notes on Article 1(1). It is further proposed to replace the words "the national law of each country" by "the national law of the State in which the application for protection was filed."

[Article 6, continued]

[Present Text]

(2) Provided that the breeder or his successor in title shall have complied with the formalities provided for by the national law of each country, including the payment of fees, the grant of protection in respect of a new variety may not be made subject to conditions other than those set forth above.

[New Text]

(2) Provided that the breeder shall have complied with the formalities provided for by the national law of the State in which the application for protection was filed, including the payment of fees, the grant of protection may not be made subject to conditions other than those set forth above.

Explanatory Notes on Article 7

Ad paragraphs (1) to (3): It is proposed to omit the words "new plant" in paragraph (1), the words "of a new plant variety" in paragraph (3) and the words "or his successor in title" in paragraphs (2) and (3). For explanations, see the Explanatory Notes on Article 1(1).

It is recalled that during the preparatory discussions a statement was agreed upon which was noted with approval by the Council at its tenth ordinary session. This statement reads as follows:

"(1) It is clear that it is the responsibility of the member States to ensure that the examination required by Article 7(1) of the UPOV Convention includes a growing test, and the authorities in the present UPOV member States normally conduct these tests themselves; however, it is considered that, if the competent authority were to require these tests to be conducted by the applicant, this is in keeping with the provisions of Article 7(1), provided that:

"(a) the growing tests are conducted according to guidelines established by the authority, and that they continue until a decision on the application has been given;

"(b) the applicant is required to deposit in a designated place, simultaneously with his application, a sample of the propagating material representing the variety;

"(c) the applicant is required to provide access to the growing tests mentioned under (a) by persons properly authorized by the competent authority.

"(2) A system of examination as described above is considered compatible with the UPOV Convention."

[Present Text]

Article 7

[Official Examination of New Varieties;
Provisional Protection]

- (1) Protection shall be granted only after examination of the new plant variety in the light of the criteria defined in Article 6. Such examination shall be adapted to each botanical genus or species having regard to its normal manner of reproduction or multiplication.
- (2) For the purposes of such examination, the competent authorities of each country may require the breeder or his successor in title to furnish all the necessary information, documents, propagating material or seeds.
- (3) During the period between the filing of the application for protection of a new plant variety and the decision thereon, any member State of the Union may take measures to protect the breeder or his successor in title against wrongful acts by third parties.

[New Text]

Article 7

Official Examination of Varieties;
Provisional Protection

- (1) [No change, except omit the words "new plant."]
- (2) [No change, except omit the words "or his successor in title."]
- (3) [No change, except omit the words "of a new plant variety" and the words "or his successor in title."]

Explanatory Notes on Article 8

It is proposed that this Article be redrafted so as to consist of only one paragraph which would, however, include the main contents of paragraphs (1) and (2) of the present text but omit the words "or his successor in title." For explanations of this omission, see the Explanatory Notes on Article 1(1). It seems to be unnecessary to state expressly (as does paragraph (3) of the present text) that member States may fix different periods of protection for different classes of plants since no provision of the Convention obliges the member States to fix the same period for all classes of plants.

The reference to certain groups of normally slow-growing plants has been amended. Furthermore, the order of the groups of plants has been changed to clarify that rootstocks of all groups--and not only of the groups of vines and fruit trees--would enjoy a longer period of protection.

Attention is drawn to the proposed new Article 34A(2), which would allow certain States to maintain a period of protection which would be shorter than the relevant minimum period provided for in Article 8.

[Present Text]

Article 8

[Period of Protection]

(1) The right conferred on the breeder of a new plant variety or his successor in title shall be granted for a limited period. This period may not be less than fifteen years. For plants such as vines, fruit trees and their rootstocks, forest trees and ornamental trees, the minimum period shall be eighteen years.

(2) The period of protection in a member State of the Union shall run from the date of the issue of the title of protection.

(3) Each member State of the Union may adopt longer periods than those indicated above and may fix different periods for some classes of plants, in order to take account, in particular, of the requirements of regulations concerning the production and marketing of seeds and propagating material.

[New Text]

Article 8

Period of Protection

The right conferred on the breeder shall be granted for a limited period. This period may not be less than fifteen years, computed from the date of issue of the title of protection. For vines, forest trees, fruit trees and ornamental trees, including their rootstocks, the minimum period shall be not less than eighteen years computed from the said date.

Explanatory Notes on Article 9

It is proposed that the two paragraphs of the present text be numbered and that the words "new varieties" be replaced by "the variety" and the words "or his successor in title" be omitted in all cases where they appear. As far as the deletion of the word "new" and the words "or his successor in title" are concerned, see the Explanatory Notes on Article 1(1). The use of the singular and the definite article has been proposed in order to clarify that the provision refers only to restrictions made in order to ensure the widespread distribution of a specific variety.

[Present Text]

Article 9

[Restrictions in the Exercise
of Rights Protected]

The free exercise of the exclusive right accorded to the breeder or his successor in title may not be restricted otherwise than for reasons of public interest.

When any such restriction is made in order to ensure the widespread distribution of new varieties, the member State of the Union concerned shall take all measures necessary to ensure that the breeder or his successor in title receives equitable remuneration.

[New Text]

Article 9

Restrictions in the Exercise
of Rights Protected

(1) [No change, except that the paragraph should receive the number "(1)" and that the words "or his successor in title" should be omitted.]

(2) When any such restriction is made in order to ensure the widespread distribution of the variety, the member State of the Union concerned shall take all measures necessary to ensure that the breeder receives equitable remuneration.

Explanatory Notes on Article 10

Ad paragraph (1): No amendment is proposed in this paragraph.

Ad paragraph (2): It is proposed to omit the word "new" and the words "or his successor in title." For explanations, see the Explanatory Notes on Article 1(1).

Ad paragraph (3): It is proposed to omit, in the introductory lines, the words "or his successor in title" and, in subparagraph (a), the word "new." For explanations, see the Explanatory Notes on Article 1(1).

Ad paragraph (4): It is proposed to omit the words "or his successor in title." For explanations, see the Explanatory Notes on Article 1(1).

[Present Text]

Article 10

[Nullity and Forfeiture
of the Rights Protected]

(1) The right of the breeder shall be declared null and void, in accordance with the provisions of the national law of each member State of the Union, if it is established that the conditions laid down in subparagraphs (a) and (b) of paragraph (1) of Article 6 were not effectively complied with at the time when the title of protection was issued.

(2) The breeder or his successor in title shall forfeit his right when he is no longer in a position to provide the competent authority with reproductive or propagating material capable of producing the new variety with its morphological and physiological characteristics as defined when the right was granted.

(3) The right of the breeder or his successor in title may become forfeit if:

(a) after being requested to do so and within a prescribed period, he does not provide the competent authority with the reproductive or propagating material, the documents and the information deemed necessary for checking the new variety, or he does not allow inspection of the measures which have been taken for the maintenance of the variety; or

(b) he has failed to pay within the prescribed period such fees as may be payable to keep his rights in force.

(4) The right of the breeder may not be annulled and the right of the breeder or his successor in title may not become forfeit except on the grounds set out in this Article.

[New Text]

Article 10

Nullity and Forfeiture
of the Rights Protected

(1) [No change]

(2) [No change, except omit the word "new" and the words "or his successor in title."]

(3) [No change, except omit the word "new" and the words "or his successor in title."]

(4) [No change, except omit the words "or his successor in title."]

Explanatory Notes on Article 11

Ad paragraph (1): It is proposed to omit the words "of his right in respect of a new variety" and the words "or his successor in title." For explanations of the latter omission, see the Explanatory Notes on Article 1(1).

Ad paragraph (2): It is proposed to omit the words "or his successor in title." For explanations, see the Explanatory Notes on Article 1(1).

Ad paragraph (3): The only amendment proposed is to omit the word "new." For explanations, see the Explanatory Notes on Article 1(1).

[Present Text]

Article 11

[Free Choice of the Member State in Which the
First Application is Filed; Application in
Other Member States; Independence of
Protection in Different Member States]

(1) The breeder or his successor in title may choose the member State of the Union in which he wishes to make his first application for protection of his right in respect of a new variety.

(2) The breeder or his successor in title may apply to other member States of the Union for protection of his right without waiting for the issue to him of a title of protection by the member State of the Union in which he made his first application.

(3) The protection applied for in different member States of the Union by natural or legal persons entitled to benefit under this Convention shall be independent of the protection obtained for the same new variety in other States whether or not such States are members of the Union.

[New Text]

Article 11

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

(1) The breeder may choose the member State of the Union in which he wishes to make his first application for protection.

(2) [No change, except omit the words "or his successor in title."]

(3) [No change, except omit the word "new."]

Explanatory Notes on Article 12

Ad paragraph (1): It is proposed to omit the words "of a new variety" and the words "or his successor in title." For explanations, see the Explanatory Notes on Article 1(1). Furthermore, the wording of the second sentence has been slightly changed for the sake of consistency with other provisions of the Convention.

Ad paragraph (2): The only amendment proposed is to omit the words "of the new variety."

Ad paragraph (3): It is proposed to delete the words "or his successor in title." For explanations, see the Explanatory Notes on Article 1(1). Furthermore, it is proposed to add to this paragraph a sentence (starting with the word "Nevertheless") which would allow member States to shorten the four-year period which is normally granted to applicants benefiting from the right of priority for furnishing any "additional documents" (that is, other than the certified copy of the priority application) and "material" (that is, a sample of the variety) to the office with which the subsequent application is filed, where the priority application has been rejected or withdrawn. In this case, it is almost certain that the authority with which the priority application has been filed will destroy all or most documents or material received from the applicant some time after that rejection or withdrawal has taken place. Such destruction means that neither the office with which the subsequent application has been filed nor courts nor private parties in the country of the subsequent application can rely, as a possible source of evidence, on the files, the growing fields, the reference collections or the sample collections of the office with which the priority application has been filed, should the validity of the priority claim be in dispute. Under such circumstances, the office of the subsequent filing should be given a chance to ask for samples of the propagating material immediately because the sooner the applicant is obliged to furnish them the more likely it is that they will be the same as those which were given to the office with which the priority application was filed.

Ad paragraph (4): No amendment is proposed in this paragraph.

[Present Text]

Article 12

[Right of Priority]

(1) Any breeder or his successor in title who has duly filed an application for protection of a new variety in one of the member States of the Union shall, for the purposes of filing in the other member States of the Union, enjoy a right of priority for a period of twelve months. This period shall run from the date of filing of the first application. The day of filing shall not be included in such period.

(2) To benefit from the provisions of the preceding paragraph, the further filing must include an application for protection of the new variety, a claim in respect of the priority of the first application and, within a period of three months, a copy of the documents which constitute that application, certified to be a true copy by the authority which received it.

(3) The breeder or his successor in title shall be allowed a period of four years after the expiration of the period of priority in which to furnish, to the member State of the Union with which he has filed an application for protection in accordance with the terms of paragraph (2), the additional documents and material required by the laws and regulations of that State.

(4) Such matters as the filing of another application or the publication or use of the subject of the application, occurring within the period provided for in paragraph (1), shall not constitute grounds for objection to an application filed in accordance with the foregoing conditions. Such matters may not give rise to any right in favour of a third party or to any right of personal possession.

[New Text]

Article 12

Right of Priority

(1) Any breeder who has duly filed an application for protection in one of the member States of the Union shall, for the purpose of filing in the other member States of the Union, enjoy a right of priority for a period of twelve months. This period shall be computed from the date of filing of the first application. The day of filing shall not be included in such period.

(2) [No change, except omit the words "of the new variety."]

(3) The breeder shall be allowed a period of four years after the expiration of the period of priority in which to furnish, to the member State of the Union with which he has filed an application for protection in accordance with the terms of paragraph (2), the additional documents and material required by the laws and regulations of that State. Nevertheless, that State may require the additional documents and material to be furnished, within an adequate period, in the case where the application whose priority is claimed is rejected or withdrawn.

(4) [No change]

Explanatory Notes on Article 13*

Ad paragraph (1): The only amendment proposed is to omit the word "new." For explanations, see the Explanatory Notes on Article 1(1).

Ad paragraph (2): It is proposed to omit the word "new"; for explanations, see the Explanatory Notes on Article 1(1). Furthermore, it is proposed that the expression "existing varieties" be put into the singular in view of the fact that any given denomination normally designates only one variety, and not several. Finally, it is proposed to combine both subparagraphs in one paragraph.

It is to be noted that the rule contained in this paragraph and according to which a denomination "may not consist solely of figures" may be subject to an exception, namely, where the proposed new Article 36A applies (see that Article).

Ad paragraph (3) in the present text (paragraph (4) in the new text): It is proposed to omit the words "or his successor in title" wherever they appear. For explanations, see the Explanatory Notes on Article 1(1). Furthermore, it is proposed that this paragraph be amended in two respects.

According to the present text, any applicant who wishes to use as a denomination a sign which is one of his trade marks is obliged to undertake to renounce his right to the trade mark and--if he does not comply with this obligation--he may not, as from the time of the registration of the denomination, continue to assert his right to the trade mark in respect of products identical or similar to the plant variety. It is proposed merely to provide in the Convention that the applicant be prevented, in the above-mentioned situation, from asserting his right to the trade mark in respect of the above-mentioned products. The proposed solution would simplify the procedure before the plant variety rights offices of member States since such offices would no longer be required to compel the applicant to renounce his right in a trade mark and the applicant would no longer be required to attach a declaration of renunciation to his application. The proposed solution would not, on the other hand, prevent a member State from requiring under its domestic law the renouncement of the right to the trade mark.

The other proposed amendment would be the following. The present text provides, in effect, that the applicant who continues to use the denomination as a trade mark cannot assert his right to the trade mark (as far as certain products are concerned) in any member State; the proposed new text would limit the application of this sanction to those member States in which the genus or species to which the variety in question belongs is eligible for protection. The reason for such an amendment lies in the belief that it does not seem to be justified to deprive the applicant of the rights and advantages conferred upon him by a trade mark in member States in which he is not in a position to enjoy plant variety protection because such protection is simply not available, as the national laws do not offer the possibility of protection to the genus or species in question. In such States, because of the lack of plant variety protection, breeders can neither control the sale of propagating material of their varieties nor enforce the payment of royalties for their use; in such States, they should at least not be deprived of the exercise of any rights they may derive from their trade marks when their varieties are sold under such marks.

It is proposed to interchange paragraphs (3) and (4) in the new text in view of the fact that the case treated in paragraph (3) of the present text would no longer be a reason for a national authority to refuse registering a proposed denomination.

Ad paragraph (4) in the present text (paragraph (3) in the new text): It is proposed to omit the word "new." For explanations, see the Explanatory Notes on Article 1(1). It is further proposed to put the expression "of the preceding paragraphs" into the singular, as a consequence of the proposed amendment of paragraph (3) in the present text and of the interchanging of paragraphs (3) and (4): in the new text, the proposed denomination would have to satisfy the requirements of only one paragraph (namely, paragraph (2)).

Ad paragraph (5): It is proposed to omit the word "new" and the words "or his successor in title." For explanations, see the Explanatory Notes on Article 1(1).

* Other proposals for amendments formulated by the competent bodies of UPOV might be distributed in preparation for the Diplomatic Conference.

[Present Text]

Article 13

[Denomination of New Varieties of Plants]

(1) A new variety shall be given a denomination.

(2) Such denomination must enable the new variety to be identified; in particular, it may not consist solely of figures.

The denomination must not be liable to mislead or to cause confusion concerning the characteristics, value or identity of the new variety or the identity of the breeder. In particular, it must be different from every denomination which designates, in any member State of the Union, existing varieties of the same or a closely related botanical species.

(3) The breeder or his successor in title may not submit as the denomination of a new variety either a designation in respect of which he enjoys the protection, in a member State of the Union, accorded to trade marks, and which applies to products which are identical or similar within the meaning of trade mark law, or a designation liable to cause confusion with such a mark, unless he undertakes to renounce his right to the mark as from the registration of the denomination of the new variety.

If the breeder or his successor in title nevertheless submits such a denomination, he may not, as from the time when it is registered, continue to assert his right to the trade mark in respect of the above-mentioned products.

(4) The denomination of the new variety shall be submitted by the breeder or his successor in title to the authority referred to in Article 30. If it is found that such denomination does not satisfy the requirements of the preceding paragraphs, the authority shall refuse to register it and shall require the breeder or his successor in title to propose another denomination within a prescribed period. The denomination shall be registered at the same time as the title of protection is issued in accordance with the provisions of Article 7.

(5) A new variety must be submitted in member States of the Union under the same denomination. The competent authority for the issue of the title of protection in each member State of the Union shall register the denomination so submitted, unless it considers that denomination unsuitable in that State. In this case, it may require the breeder or his successor in title to submit a translation of the original denomination or another suitable denomination.

[New Text]

Article 13*

Denomination of Varieties of Plants

(1) [No change, except omit the word "new."]

(2) Such denomination must enable the variety to be identified; in particular, it may not consist solely of figures. It must not be liable to mislead or to cause confusion concerning the characteristics, value or identity of the variety or the identity of the breeder. In particular, it must be different from every denomination which designates, in any member State of the Union, an existing variety of the same or a closely related botanical species.

(4) If the breeder submits as the denomination of the variety either a designation in respect of which he enjoys the protection accorded to trade marks, and which applies to products which are identical or similar within the meaning of trade mark law, or a designation liable to cause confusion with such a mark, he may not, as from the time when it is registered, continue to assert his right to the trade mark, in respect of the above-mentioned products, in any member State of the Union applying the provisions of the Convention to the genus or species to which the variety belongs.

(3) [Same as paragraph (4) of the present text, except omit the word "new," replace "paragraphs" by "paragraph" and omit the words "or his successor in title" wherever they appear.]

(5) [No change, except omit the word "new" and the words "or his successor in title."]

* Other proposals for amendments formulated by the competent bodies of UPOV might be distributed in preparation for the Diplomatic Conference.

[Explanatory Notes on Article 13, continued]

Ad paragraph (6), first subparagraph, in the present text (paragraph (6) in the new text): The only amendment proposed is to omit the word "new". For explanations, see the Explanatory Notes on Article 1(1).

Ad paragraph (6), second subparagraph, in the present text (paragraph (7) in the new text): It is proposed to omit the word "new." For explanations, see the Explanatory Notes on Article 1(1). It is furthermore proposed to delete the last sentence.

Ad paragraph (7) in the present text (paragraph (8) in the new text): It is proposed to omit the word "new" in all cases in which it appears. For explanations, see the Explanatory Notes on Article 1(1). It is furthermore proposed to change the reference to paragraph (10) to a reference to paragraph (11) since the numbering of the subparagraphs has been changed in the new text.

Ad paragraph (8) in the present text (paragraph (9) in the new text): It is proposed to omit the word "new" in all cases in which it appears and the words "or his successor in title." For explanations, see the Explanatory Notes on Article 1(1).

[Article 13, continued]

[Present Text]

(6) When the denomination of a new variety is submitted to the competent authority of a member State of the Union, the latter shall communicate it to the Office of the Union referred to in Article 15, which shall notify it to the competent authorities of the other member States of the Union. Any member State of the Union may address its objections, if any, through the said Office, to the State which communicated the denomination.

The competent authority of each member State of the Union shall notify each registration of the denomination of a new variety and each refusal of registration to the Office of the Union, which shall inform the competent authorities of the other member States of the Union. Registrations shall also be communicated by the Office to the member States of the Paris Union for the Protection of Industrial Property.

(7) Any person in a member State of the Union who offers for sale or markets reproductive or vegetative propagating material of a new variety shall be obliged to use the denomination of that new variety, even after the expiration of the protection of that variety, in so far as, in accordance with the provisions of paragraph (10), prior rights do not prevent such use.

(8) From the date of issue of a title of protection to a breeder or his successor in title in a member State of the Union:

(a) the denomination of the new variety may not be used, in any member State of the Union, as the denomination of another variety of the same or a closely related botanical species;

(b) the denomination of the new variety shall be regarded as the generic name for that variety. Consequently, subject to the provisions of paragraph (10), no person may, in any member State of the Union, apply for the registration of, or obtain protection as a trade mark for, a denomination identical to or liable to cause confusion with such denomination, in respect of identical or similar products within the meaning of trade mark law.

[New Text]

(6) [Same as the first subparagraph of paragraph (6) of the present text, except omit the word "new."]

(7) The competent authority of each member State of the Union shall notify each registration of the denomination of a variety and each refusal of registration to the Office of the Union, which shall inform the competent authorities of the other member States of the Union.

(8) [Same as paragraph (7) of the present text, except omit the word "new" in all cases in which it appears and change "(10)" to "(11)".]

(9) [Same as paragraph (8) of the present text, except omit the word "new" in all cases in which it appears and the words "or his successor in title."]

[Explanatory Notes on Article 13, continued]

Ad paragraph (9) in the present text (paragraph (10) in the new text): The only amendment proposed is to omit the word "new." For explanations, see the Explanatory Notes on Article 1(1). It is understood that this paragraph permits the addition to a variety denomination not only of a trade mark, but also of other indications, names and signs such as a trade name, a brand name, etc.

Ad paragraph (10) in the present text (paragraph (11) in the new text): It is proposed to omit the word "new" in all cases in which it appears and the words "or his successor in title." For explanations, see the Explanatory Notes on Article 1(1). Furthermore, it is proposed to replace "paragraph (7)" by "paragraph (8)" and to omit the words "if need be."

[Article 13, continued]

[Present Text]

(9) It shall be permitted, in respect of the same product, to add a trade mark to the denomination of the new variety.

(10) Prior rights of third parties in respect of signs used to distinguish their products or enterprises shall not be affected. If, by reason of a prior right, the use of the denomination of a new variety is forbidden to a person who, in accordance with the provisions of paragraph (7), is obliged to use it, the competent authority shall, if need be, require the breeder or his successor in title to submit another denomination for the new variety.

[New Text].

(10) [Same as paragraph (9) of the present text, except omit the word "new."]

(11) [Same as paragraph (10) of the present text, except omit (twice) the word "new," change "(7)" to "(8)", omit the words "if need be" and the words "or his successor in title."]

Explanatory Notes on Article 14

Ad paragraph (1): No amendment is proposed in this paragraph.

Ad paragraph (2): No amendment is proposed in this paragraph.

[Present Text]

[New Text]

Article 14

Article 14

[Protection Independent of Measures Regulating
Production, Certification and Marketing]

Protection Independent of Measures Regulating
Production, Certification and Marketing

(1) The right accorded to the breeder in pursuance of the provisions of this Convention shall be independent of the measures taken by each member State of the Union to regulate the production, certification and marketing of seeds and propagating material.

(1) [No change]

(2) However, such measures shall, as far as possible, avoid hindering the application of the provisions of this Convention.

(2) [No change]

Explanatory Notes on Article 15

In 1961, when the UPOV Convention was concluded, it was planned that some aspects of the administration of UPOV should, to a certain extent, be the subject of cooperation with the United International Bureaux for the Protection of Intellectual Property (BIRPI). This plan found its expression in Article 25 of the 1961 Convention, which provides that "the procedures for technical and administrative cooperation between the Union for the Protection of New Varieties of Plants and the Unions administered by the United International Bureaux for the Protection of Industrial, Literary and Artistic Property shall be governed by rules established by the Government of the Swiss Confederation in agreement with the Unions concerned."

At that time, that is, in 1961, BIRPI was under the supervision of the Swiss Government. It is to be presumed that it was because it was found desirable to establish the same kind of relationship between UPOV and the Swiss Government as existed at that time between BIRPI and the Swiss Government that a certain role is specified in the last sentence of the Article under consideration (Article 15), which provides that the UPOV Office "shall be under the high authority of the Swiss Confederation," and in Articles 20(2), 21(g), 23, 24, 25, 32(2) and (4), 33(1) and (2), 34(1) and 40(2) of the 1961 Convention.

In 1967, however, the Convention Establishing the World Intellectual Property Organization (WIPO) was adopted. That Convention provided for the replacement of BIRPI by WIPO. The said Convention came into effect in 1970. Although still existing on paper for those few countries which have not yet ratified or acceded to the Stockholm texts of 1967 of the intellectual property conventions, BIRPI has in fact ceased to exist.

Contrary to the situation vis-à-vis BIRPI, the Swiss Government has no supervisory functions over WIPO. WIPO is supervised by all the Member States, and none of them has a special role or status such as Switzerland had vis-à-vis BIRPI.

Since its creation, the Council of UPOV--in which all member States are represented--has proved that it can effectively control the program, the budget and the Office of UPOV and that it can do so alone. As a matter of fact, the role of the Swiss Government proved to be largely formal. In other words, UPOV does not seem to need any special supervision by one of its member States; it can be supervised through its own Council. Furthermore, UPOV's continued supervision by the Swiss Government places it in an inferior situation vis-à-vis WIPO, whose inter-governmental organs are sovereign. Equality in status between UPOV and WIPO would require that the Council of UPOV become sovereign and that the supervisory role of the Swiss Government cease.

These are the reasons for which it is proposed that the last sentence of the Article under consideration be omitted.

For the same reasons, amendments will be proposed in this document to other Articles of the present text in which reference is made to the role of the Swiss Government as supervisory authority. The present text contains such references in Articles 20, 21, 23, 24, 25, 32, 33, 34 and 40.

It is to be noted that the Government of Switzerland has declared in writing that it had no objections to the proposed changes.

[Present Text]

Article 15

[Organs of the Union]

The permanent organs of the Union shall be:

(a) the Council;

(b) the Secretariat General, entitled the Office of the International Union for the Protection of New Varieties of Plants. That Office shall be under the high authority of the Swiss Confederation.

[New Text]

Article 15

Organs of the Union

The permanent organs of the Union shall be:

(a) the Council, and

(b) the Secretariat General, entitled the Office of the International Union for the Protection of New Varieties of Plants.

Explanatory Notes on Article 16

The only amendment proposed is to add in paragraph (1) the word "the" before the word "representatives" since the Council does not consist of all representatives, but of those representatives who have been duly appointed by the member States as such (or as alternates).

[Present Text]

Article 16

[Composition of the Council; Votes]

(1) The Council shall consist of representatives of the member States of the Union. Each member State of the Union shall appoint one representative to the Council and an alternate.

(2) Representatives or alternates may be accompanied by assistants or advisers.

(3) Each member State of the Union shall have one vote in the Council.

[New Text]

Article 16

Composition of the Council; Votes

(1) [No change, except insert the word "the" before the word "representatives."]

(2) [No change]

(3) [No change]

Explanatory Notes on Article 17

Ad paragraph (1): As in the original 1961 version of the Convention, the proposed new text provides that the States which have signed but not yet ratified the new text will have an ex officio observer status and will be invited to meetings of the Council. It was not felt necessary to mention expressly that they have the right to speak in a consultative capacity.

The provision in this paragraph refers only to States not members of the Union. The status of the present member States is not affected should they not sign, or sign but not ratify, the new text.

Ad paragraph (2): No amendment is proposed in this paragraph.

[Present Text]

Article 17

[Observers in Meetings of the Council]

(1) States which have signed but not yet ratified this Convention shall be invited as observers to meetings of the Council. Their representatives shall be entitled to speak in a consultative capacity.

(2) Other observers or experts may also be invited to such meetings.

[New Text]

Article 17

Observers in Meetings of the Council

(1) States not members of the Union which have signed but not yet ratified this Act shall be invited as observers to meetings of the Council.

(2) [No change]

[Present Text]

Article 18

[Officers of the Council]

(1) The Council shall elect a President and a first Vice-President from among its members. It may elect other Vice-Presidents. The first Vice-President shall take the place of the President if the latter is unable to officiate.

(2) The President shall hold office for three years.

Article 18

Officers of the Council

(1) [No change]

(2) [No change]

Explanatory Notes on Article 19

No amendment is proposed in this Article.

[Present Text]

Article 19

[Meetings of the Council]

(1) Meetings of the Council shall be convened by its President.

(2) A regular session of the Council shall be held annually. In addition, the President may convene the Council at his discretion; he shall convene it, within a period of three months, if a third of the member States of the Union so request.

[New Text]

Article 19

Meetings of the Council

(1) [No change]

(2) [No change]

Explanatory Notes on Article 20

Ad paragraphs (1) and (2) in the present text: As to form, it is proposed to combine paragraphs (1) and (2) of the present text in one new paragraph in the new text. As to substance, it is proposed to delete the references to the Swiss Government, which means the final part of the first sentence of paragraph (2) and the second sentence of paragraph (2) in the present text. For the reasons behind this proposal, see the Explanatory Notes on Article 15.

It is to be noted that, according to Article 22, the majority required for a decision under this paragraph is three-fourths.

Ad paragraph (3) in the present text: It is proposed to delete this paragraph. The required majority (three-fourths) would be provided for in Article 22 (see that Article).

[Present Text]

Article 20

[Rules of Procedure of the Council;
Administrative and Financial Regu-
lations of the Union]

- (1) The Council shall lay down its rules of procedure.
- (2) The Council shall adopt the administrative and financial regulations of the Union, after having consulted the Government of the Swiss Confederation. The Government of the Swiss Confederation shall be responsible for ensuring that the regulations are carried out.
- (3) A majority of three-quarters of the member States of the Union shall be required for the adoption of such rules and regulations and any amendments to them.

[New Text]

Article 20

Rules of Procedure of the Council;
Administrative and Financial Regu-
lations of the Union

The Council shall establish its rules of procedure and the administrative and financial regulations of the Union.

[There is no provision in the new text corresponding to paragraph (3) in the present text.]

Explanatory Notes on Article 21

No amendment is proposed in this Article except to replace in the introductory line the word "duties" by the word "tasks" and to change the wording of paragraph (g).

As to paragraph (g), it is proposed, for the reasons stated in the Explanatory Notes on Article 15, to omit the reference to the Swiss Government. The new text would vest in the Council, and only in the Council, the right to appoint the Secretary-General and a Vice Secretary-General if the Council finds it necessary to have also a Vice Secretary-General, as it does under the present system of cooperation with the World Intellectual Property Organization (WIPO). Before appointing a Vice Secretary-General, the Council has to consult the Secretary-General and has to obtain his agreement on the candidate chosen. The terms of appointment of the Secretary-General and of the Vice Secretary-General will, according to the proposal, be determined by the Council. As to the other staff, see Article 23(3).

It is to be noted that the majority required for a decision under paragraph (d) (approval of the budget, fixing of the contributions) would, according to Article 22, be three-fourths.

[Present Text]

Article 21

[Duties of the Council]

The duties of the Council shall be to:

(a) study appropriate measures to safeguard the interests and to encourage the development of the Union;

(b) examine the annual report on the activities of the Union and lay down the programme for its future work;

(c) give to the Secretary-General, whose functions are set out in Article 23, all necessary directions, including those concerning relations with national authorities;

(d) examine and approve the budget of the Union and fix the contribution of each member State in accordance with the provisions of Article 26;

(e) examine and approve the accounts presented by the Secretary-General;

(f) fix, in accordance with the provisions of Article 27, the date and place of the conferences referred to in that Article and take the measures necessary for their preparation;

(g) make proposals to the Government of the Swiss Confederation concerning the appointment of the Secretary-General and senior officials; and

(h) in general, take all necessary decisions to ensure the efficient functioning of the Union.

[New Text]

Article 21

Tasks of the Council

The tasks of the Council shall be to:

(a) [No change]

(b) [No change]

(c) [No change]

(d) [No change]

(e) [No change]

(f) [No change]

(g) appoint the Secretary-General; if it finds it necessary, appoint a Vice Secretary-General, after consultation with and the agreement of the Secretary-General; determine the terms of appointment of each;

(h) [No change]

Explanatory Notes on Article 22

The rule in both the present text and the proposed new text is that the majority required for the decisions of the Council is a simple one. Both texts provide for exceptions. A majority of three-quarters is required in both the present text and the proposed new text for decisions made under:

Article 20: adoption of the rules of procedure of the Council and of the administrative and financial regulations of the Union (in the present text, by the member States; in the proposed new text, by the member States present and voting);

Article 21(d): approval of the budget and fixing of the contributions;

Article 26(5): restoration of voting rights;

Article 28(3): designation of further languages for use by the Office and in certain meetings.

The same qualified majority is also provided for in the new text for decisions in the following case not provided for in the present text:

Article 4(4): lowering the obligations of certain States in respect of the minimum number of genera or species to be made eligible for protection.

As to Article 27(2), it is to be noted that any departure from the five-year periodicity of revision conferences provided for in the present text requires a five-sixths majority; in the proposed new text, the convocation of a revision conference would require a three-fourths majority.

As to Article 32(3), it is to be noted that the present text provides for a majority of four-fifths for decisions on the accession of a non-member State to the Convention; in the proposed new text, decisions of a comparable nature would require a three-fourths majority.

The proposed new text makes it clear that abstentions are not to be considered votes. Such a rule is already contained in Section II, second subparagraph, of the Rules of Procedure of the Council, as adopted on November 27, 1968 (document UPOV/INF/4).

It is not proposed to provide for a quorum requirement in the Convention. The Council will establish the quorum for its decisions in its Rules of Procedure, and it does not seem to be necessary to state in the Convention that it will have to do so.

[Present Text]

Article 22
as amended by Article I of the
Additional Act of 1972

[Majorities Required for Decisions
of the Council]

Decisions of the Council shall be taken by a simple majority of the members present, except in the cases provided for in Articles 20, 27, 28 and 32, for the vote on the budget, for the fixing of the contributions of each member State of the Union, for the faculty provided for in paragraph (5) of Article 26 concerning payment of one-half of the contribution corresponding to Class V and for any decision regarding voting rights under paragraph (6) of Article 26. In these last four cases, the majority required shall be three-quarters of the members present.

[New Text]

Article 22

Majorities Required for Decisions
of the Council

Any decision of the Council shall require a simple majority of the votes of the members present and voting, provided that any decision of the Council under Articles 4(4), 20, 21(d), 26(5), 27(1), 28(3) and 32(3) shall require three-fourths of the votes of the members present and voting. Abstentions shall not be considered as votes.

Explanatory Notes on Article 23

Ad paragraph (1): No amendment is proposed in this paragraph.

Ad paragraph (2): No amendment is proposed in this paragraph.

Ad paragraph (3): Article 21(g) deals with the Secretary-General and the Vice Secretary-General. As for the other staff, it is proposed that the conditions of appointment and employment be fixed in the administrative and financial regulations which are to be adopted by the Council by a three-fourths majority, according to Articles 20 and 22.

As for the reasons for no longer mentioning the Swiss Government, see the Explanatory Notes on Article 15.

[Present Text]

Article 23

[Tasks of the Office of the Union;
Responsibilities of the Secretary-
General; Appointment of Staff]

(1) The Office of the Union shall have the task of carrying out all the duties and tasks entrusted to it by the Council. It shall be under the direction of the Secretary-General.

(2) The Secretary-General shall be responsible for carrying out the decisions of the Council.

He shall submit the budget for the approval of the Council and shall be responsible for its implementation.

He shall make an annual report to the Council on his administration and a report on the activities and financial position of the Union.

(3) The Secretary-General and the senior officials shall be appointed, on the proposal of the Council, by the Government of the Swiss Confederation, which shall determine the terms of their appointment.

The terms of service and the remuneration of other grades in the Office of the Union shall be determined by the administrative and financial regulations.

[New Text]

Article 23

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

(1) [No change]

(2) [No change]

(3) Subject to the provisions of Article 21(g), the conditions of appointment and employment of the staff necessary for the efficient performance of the tasks of the Office of the Union shall be fixed in the administrative and financial regulations referred to in Article 20.

[Article 23A follows]

Explanatory Notes on Article 23A

There is no Article or other provision in the present text that would correspond to this proposed new Article.

Since it is proposed (see Article 15) that UPOV should no longer be under the supervision of the Swiss Government, it seems to be useful, if not necessary, to insert provisions, usual in comparable treaties, on UPOV's legal capacity. That is what this new Article is intended to achieve.

[Present Text]

[There is no Article 23A in the present text.]

[New Text]

Article 23A*

Legal Status

- (1) The Union shall have legal personality.
- (2) The Union shall enjoy on the territory of each member State of the Union, in conformity with the laws of that State, such legal capacity as may be necessary for the fulfilment of the Union's objectives and for the exercise of its functions.

[Article 24 follows]

* This and the following Articles will have to be renumbered in the final text which will be adopted by the Diplomatic Conference.

Explanatory Notes on Article 24

For the reasons stated in the Explanatory Notes on Article 15, it is proposed that this Article no longer provide any special role for the Swiss Government. On the other hand, it is proposed that the auditing of the accounts be the responsibility of a member State designated, to that effect, by the Council. Such a State may be Switzerland, and it would have to be Switzerland as long as Switzerland remains (as it is today) the auditor of the accounts of WIPO and the administrative cooperation between UPOV and WIPO continues. The proposed new text follows closely Article 11(10) of the WIPO Convention.

[Present Text]

Article 24

[Supervisory Function of the
Swiss Government]

The Government of the Swiss Confederation shall supervise the expenditure and accounts of the Office of the International Union for the Protection of New Varieties of Plants. It shall submit an annual report on its supervisory function to the Council.

[New Text]

Article 24

Auditing of the Accounts

The auditing of the accounts of the Union shall be effected by a member State of the Union as provided in the administrative and financial regulations referred to in Article 20. Such State shall be designated, with its agreement, by the Council.

Explanatory Notes on Article 25

It is proposed that Article 25 of the present text be omitted. Once the supervisory role of the Swiss Government ceases--as it would, under the proposal explained in connection with Article 15--any agreement between UPOV and another organization "for technical or administrative cooperation" could be concluded without the agreement of the Swiss Government.

The conclusion of such an agreement could, as far as UPOV is concerned, be decided by the Council by virtue of the powers vested in it under Article 21(h).

In its December 1977 session, the Council of UPOV expressed the view that the omission of Article 25 of the present text of the UPOV Convention should not be interpreted as a sign of that Council's desire to discontinue the existing arrangements between UPOV and WIPO; on the contrary, the Council of UPOV concluded that, should the Diplomatic Conference of Revision decide to omit the said Article, it would promptly notify WIPO that it wished to continue the said arrangements under an agreement which would have to be negotiated and concluded between UPOV and WIPO once the revised new text of the UPOV Convention entered into force.

[Present Text]

[New Text]

Article 25

[Cooperation with the Unions

Administered by BIRPI]

The procedures for technical and administrative cooperation between the Union for the Protection of New Varieties of Plants and the Unions administered by the United International Bureaux for the Protection of Industrial, Literary and Artistic Property shall be governed by rules established by the Government of the Swiss Confederation in agreement with the Unions concerned.

[There are no provisions in the new text corresponding to Article 25 of the present text.]

Explanatory Notes on Article 26

Ad paragraph (1): No amendment is proposed in this paragraph.

Ad paragraph (2): As to form, it is proposed that the two subparagraphs be identified by the letters "(a)" and "(b)."

As to substance, it is proposed to add to the present contribution classes I to V ten further classes, without, however, changing the numbers of the present five (I, II, III, IV, V) classes or the number of units presently attached to each of those five classes. (Not making changes in these respects would allow present member States to contribute the same number of units as they do now without having to change class.) The new classes (A, B, C, D, Vbis, Vter) would increase the proportion between the contributions in the highest and the lowest classes (instead of the present 1:5, the proportion would be 1:75) or would provide for intermediary classes (Ibis, IIbis, IIIbis, IVbis) between the present classes. All this should allow for a more equitable and flexible system in which each country could more easily choose an appropriate level of contributions.

No amendment is proposed in the second subparagraph (the new subparagraph (b)) of the present paragraph.

Ad paragraph (3): No amendment is proposed in this paragraph.

Ad paragraph (4): No amendment is proposed in this paragraph, except that its two subparagraphs would be identified by the letters "(a)" and "(b)" and that the words "member" and "of the Union" would be omitted in the first sentence since at the time the indication of the class is to be made the State is not yet a member of the Union.

Ad paragraph (5) in the present text: In view of the more differentiated system of contribution classes proposed under paragraph (2), it does not seem to be necessary to provide for a further reduction of contributions by a decision of the Council. It is therefore proposed to omit this paragraph.

[Present Text]

Article 26
as amended by Article II of the
Additional Act of 1972

[Finances]

(1) The expenses of the Union shall be met from:

(a) annual contributions of member States of the Union;

(b) payments received for services rendered; and

(c) miscellaneous receipts.

(2) For the purpose of determining the amount of their annual contributions, the member States of the Union shall be divided into five classes:

| | | |
|-----------|-------|---------|
| Class I | | 5 units |
| Class II | | 4 units |
| Class III | | 3 units |
| Class IV | | 2 units |
| Class V | | 1 unit |

Each member State of the Union shall contribute in proportion to the number of units of the class to which it belongs.

(3) For each budgetary period, the value of the unit of contribution shall be obtained by dividing the total expenditure to be met from the contributions of member States of the Union by the total number of units.

(4) Each member State of the Union shall indicate, on joining the Union, the class in which it wishes to be placed. Any member State of the Union may, however, subsequently declare that it wishes to be placed in another class.

Such declaration must be addressed to the Secretary-General of the Union at least six months before the end of the financial year preceding that in which the change of class is to take effect.

(5) At the request of a member State of the Union or of a State applying for accession to the Convention according to Article 32 and indicating the wish to be placed in Class V, the Council may, in order to take account of exceptional circumstances, decide to allow such State to pay only one-half of the contribution corresponding to Class V. Such decision will stand until the State concerned waives the faculty granted or declares that it wishes to be placed in another class or until the Council revokes its decision.

[New Text]

Article 26

Finances

(1) [No change]

(2) (a) For the purpose of determining the amount of their annual contributions, the member States of the Union shall be divided into the following classes:

| | | |
|----------------------|-------|------------|
| Class A | | 15 units |
| Class B | | 12.5 units |
| Class C | | 10 units |
| Class D | | 7.5 units |
| Class I | | 5 units |
| Class I <u>bis</u> | | 4.5 units |
| Class II | | 4 units |
| Class II <u>bis</u> | | 3.5 units |
| Class III | | 3 units |
| Class III <u>bis</u> | | 2.5 units |
| Class IV | | 2 units |
| Class IV <u>bis</u> | | 1.5 units |
| Class V | | 1 unit |
| Class V <u>bis</u> | | 0.6 unit |
| Class V <u>ter</u> | | 0.2 unit |

(b) [Same as the (unnumbered) second subparagraph of paragraph (2) of the present text.]

(3) [No change]

(4)(a) Each State shall indicate, on joining the Union, the class in which it wishes to be placed. Any member State of the Union may, however, subsequently declare that it wishes to be placed in another class.

(b) [Same as the (unnumbered) second subparagraph of paragraph (4) of the present text.]

[There are no provisions in the new text corresponding to paragraph (5) in the present text.]

[Explanatory Notes on Article 26, continued]

Ad paragraph (6) in the present text (paragraph (5) in the new text): No amendment is proposed in this paragraph. Any decision of the Council under this paragraph would require a majority of three-fourths (see Article 22).

[Article 26, continued]

[Present Text]

(6) A member State of the Union which is in arrears in the payment of its contributions may not exercise its right to vote in the Council if the amount of its arrears equals or exceeds the amount of the contributions due from it for the preceding two full years, but it shall not be relieved of its obligations under this Convention, nor shall it be deprived of any other rights thereunder. However, the Council may allow such State to continue to exercise its right to vote if, and as long as, the Council is satisfied that the delay in payment is due to exceptional and unavoidable circumstances.

[New Text]

(5) [Same as paragraph (6) of the present text.]

Explanatory Notes on Article 27

Ad paragraph (1): Experience has shown that rules which require periodic revisions--once every five years--are not practical since the need for revision may arise less frequently or more frequently than once every five years. Consequently, it is proposed to abandon the notion of periodicity contained in this paragraph and the rule according to which each period is generally five years long.

The rule concerning the required majority would be found in Article 22 (see that Article); it would lower the majority from five-sixths to three-fourths.

Ad paragraph (2) in the present text: It is proposed to omit this paragraph since its provisions will be contained in the new paragraph (1).

Ad paragraph (3) in the present text (paragraph (2) in the new text): No amendment is proposed in this paragraph other than to abandon its division into two subparagraphs, which is hardly justified by the content.

Ad paragraph (4) in the present text: It is proposed to omit this paragraph, which, besides being unclear in several points, is unusual in international conventions. The conditions of the entry into force of revised texts of international conventions should be fixed by the revision conference since the composition and the will of the member States may well vary from one revision conference to another. It is to be noted that Article III of the Additional Act of 1972, which constituted the first revision of the Convention of 1961, already deviates from the rules contained in the paragraph under consideration.

[Present Text]

Article 27

[Revision of the Convention]

(1) This Convention shall be reviewed periodically with a view to the introduction of amendments designed to improve the working of the Union.

(2) For this purpose, conferences shall be held every five years, unless the Council, by a majority of five-sixths of the members present, considers that the convening of such a conference should be brought forward or postponed.

(3) The proceedings of a conference shall be effective only if at least half of the member States of the Union are represented at it.

A majority of five-sixths of the member States of the Union represented at the conference shall be required for the adoption of a revised text of the Convention.

(4) The revised text shall enter into force, in respect of member States of the Union which have ratified it, when it has been ratified by five-sixths of the member States of the Union. It shall enter into force thirty days after the deposit of the last of the instruments of ratification. If, however, a majority of five-sixths of the member States of the Union represented at the conference considers that the revised text includes amendments of such a kind as to preclude, for member States of the Union which do not ratify the revised text, the possibility of continuing to be bound by the former text in respect of the other member States of the Union, the revised text shall enter into force two years after the deposit of the last of the instruments of ratification. In such case, the former text shall, from the date of such entry into force, cease to bind the States which have ratified the revised text.

[New Text]

Article 27

Revision of the Convention

(1) This Convention may be revised by a conference of the member States of the Union. The convocation of such conference shall be decided by the Council.

(2) [Same as paragraph (3) of the present text, except that the two subparagraphs in the present text will constitute a single paragraph.]

[See Articles 32A and 32B of the new text.]

Explanatory Notes on Article 28

Ad paragraph (1): No amendment is proposed in this paragraph.

Ad paragraph (2): No amendment is proposed in this paragraph.

Ad paragraph (3): The rule concerning the required majority would be transferred to Article 22 (see that Article).

[Present Text]

Article 28

[Languages To Be Used by the Office
and in the Council]

(1) The English, French and German languages shall be used by the Office of the Union in carrying out its duties.

(2) Meetings of the Council and of revision conferences shall be held in the three languages.

(3) If the need arises, the Council may decide, by a majority of three-quarters of the members present, that further languages shall be used.

[New Text]

Article 28

Languages To Be Used by the Office
and in the Council

(1) [No change]

(2) [No change]

(3) If the need arises, the Council may decide that further languages shall be used.

Explanatory Notes on Article 29

It is proposed to delete the second (unnumbered) paragraph since it is considered that the interests of the member States are already sufficiently safeguarded by the provisions of the first paragraph.

[Present Text]

Article 29

[Special Agreements for the Protection
of New Varieties of Plants]

Member States of the Union reserve the right to conclude among themselves special agreements for the protection of new varieties of plants, in so far as such agreements do not contravene the provisions of this Convention.

Member States of the Union which have not taken part in making such agreements shall be allowed to accede to them at their request.

[New Text]

Article 29

Special Agreements for the Protection
of New Varieties of Plants

[No change in the first (unnumbered) paragraph.]

[Omit the second (unnumbered) paragraph.]

Explanatory Notes on Article 30

Ad paragraph (1): No amendment is proposed in this paragraph, except to merge the two unnumbered subparagraphs in the present text.

Ad paragraph (2): It is proposed to omit the word "new." For explanations, see the Explanatory Notes on Article 1(1). Furthermore, the following drafting changes are proposed in the English text: "special agreements" is to be replaced by "contracts" and "member States of the Union" by "competent authorities of the member States of the Union."

Ad paragraph (3): It is proposed to omit the word "member" in the English text as that word has no counterpart either in the original French text or in the German text.

[Present Text]

Article 30

[Implementation of the Convention
on the Domestic Level; Special
Agreements on the Joint Utilisation
of Examination Services]

(1) Each member State of the Union shall undertake to adopt all measures necessary for the application of this Convention.

In particular, each member State shall undertake to:

(a) ensure to nationals of the other member States of the Union appropriate legal remedies for the effective defence of the rights provided for in this Convention;

(b) set up a special authority for the protection of new varieties of plants or to entrust their protection to an existing authority; and

(c) ensure that the public is informed of matters concerning such protection, including as a minimum the periodical publication of the list of titles of protection issued.

(2) Special agreements may also be concluded between member States of the Union, with a view to the joint utilisation of the services of the authorities entrusted with the examination of new varieties in accordance with the provisions of Article 7 and with assembling the necessary reference collections and documents.

(3) It shall be understood that, on depositing its instrument of ratification or accession, each member State must be in a position, under its own domestic law, to give effect to the provisions of this Convention.

[New Text]

Article 30

Implementation of the Convention
on the Domestic Level; Contracts
on the Joint Utilisation of Examination
Services

(1) [No change, except that the two subparagraphs in the present text will constitute a single paragraph.]

(2) Contracts may be concluded between the competent authorities of the member States of the Union, with a view to the joint utilisation of the services of the authorities entrusted with the examination of varieties in accordance with the provisions of Article 7 and with assembling the necessary reference collections and documents.

(3) [No change, except omit the word "member" in the English text.]

Explanatory Notes on Article 31

Ad paragraph (1): The proposed new text would enable any member State, and also any other State represented in the Diplomatic Conference adopting this Act, to sign the Act. This provision parallels the present text of the Convention, which enabled all States that were represented in the Diplomatic Conference in 1961 to sign the text of 1961. Allowing this category of non-member States to sign seems to be justified by the fact that most, if not all, of the States which are expected to fall into this category have actively participated in the preparatory work for the revision and, according to the proposed Rules of Procedure of the Diplomatic Conference, will have the possibility of actively participating in the said Conference.

Finally, States signing the new Act will rightly consider themselves authors of the new Act, and this fact may make it easier for them to ratify it in due course.

Considering that the Diplomatic Conference is scheduled for October 1978, the date proposed in the new text would leave the revised Act open for signature for roughly one year.

Ad paragraph (2) in the present text: There would be no paragraph (2) in the new text. The matters dealt with in paragraph (2) of the present text would be dealt with in Article 32 of the new text.

Ad paragraph (3) in the present text: There would be no paragraph (3) in the new text. The matters dealt with in paragraph (3) of the present text would be dealt with in Article 32A of the new text.

[Present Text]

Article 31

[Signature and Ratification;
Entry Into Force]

(1) This Convention shall be open for signature until December 2, 1962, by States represented at the Paris Conference for the Protection of New Varieties of Plants.

(2) [See opposite Article 32 of the new text.]

(3) [See opposite Article 32A of the new text.]

[New Text]

Article 31

Signature

This Act shall be open for signature by any member State of the Union and any other State which was represented in the Diplomatic Conference adopting this Act. It shall remain open for signature until October 31, 1979.

[For the provision corresponding to paragraph (2) of the present text, see Article 32 of the new text.]

[For the provision corresponding to paragraph (3) of the present text, see Article 32A of the new text.]

Explanatory Notes on Article 32

Ad paragraph (1) in the new text: Paragraph (1) is in conformity with established practice.

Ad paragraph (2) in the new text: Whereas the present texts provide that the instruments of ratification or accession have to be deposited with the Government of France or Switzerland (see Articles 31(2) and 32(4) of the 1961 Convention and Article V(5) of the 1972 Additional Act), it is proposed that, in respect of the new Act, they be deposited with the Secretary-General. The other depositary functions (see Articles 32(4), 33(1) and (2), 34(1) and 40(2) of the Convention of 1961 and Articles V(5) and VIII(1) and (5) of the Additional Act of 1972) should also be entrusted to the Secretary-General to the extent that there are corresponding functions in the new Act.

Such a change is proposed mainly for the following reasons:

(i) The prevailing contemporary practice is that, as regards treaties concluded under the aegis of an intergovernmental organization, the depositary functions are entrusted to the Head of the Secretariat of that organization. This is the case, for example, for most treaties concluded under the aegis of the United Nations and the specialized agencies, including the World Intellectual Property Organization (WIPO).

(ii) Entrusting the depositary functions to the Head of the Secretariat of the intergovernmental organization concerned is a highly practical solution. The receiving of instruments and their notification are routine matters in any international secretariat. Advice to governments intending to deposit instruments is readily available. Once the instrument is received, it can be notified not only to the Ministries of Foreign Affairs of the member States, but also directly to the services in charge of the plant variety protection.

Ad paragraph (3) in the new text: This proposed new paragraph would apply to non-member States which have not signed the new Act. It would not apply to any member State, whether it has signed the new Act or not, and it would not apply to any non-member State which has signed the new Act. It would ensure that any non-signatory non-member State would have to seek and receive the advice of the Council as far as the conformity of its laws with the provisions of this Act are concerned and that the instrument of accession could only be deposited if the Council, by a majority of three-fourths (see Article 22 above), decides to give a positive advice in respect of the conformity of the laws of such State with the provisions of the Convention as amended by this Act.

[Present Text]

Article 31

[... Ratifications ...]

(1) [See opposite Article 31 of the new text.]

(2) This Convention shall be subject to ratification; instruments of ratification shall be deposited with the Government of the French Republic, which shall notify such deposit to the other signatory States.

(3) [See opposite Article 32A of the new text.]

Article 32

[Accession; Entry Into Force]

(1) This Convention shall be open to accession by non-signatory States in accordance with the provisions of paragraphs (3) and (4) of this Article.

(2) Applications for accession shall be addressed to the Government of the Swiss Confederation, which shall notify them to the member States of the Union.

(3) Applications for accession shall be considered by the Council having particular regard to the provisions of Article 30.

Having regard to the nature of the decision to be taken and to the difference in the rule adopted for revision conferences, accession by a non-signatory State shall be accepted if a majority of four-fifths of the members present vote in favour of its application.

Three-quarters of the member States of the Union must be represented when the vote is taken.

(4) In the case of a favourable decision, the instrument of accession shall be deposited with the Government of the Swiss Confederation, which shall notify the member States of the Union of such deposit.

Accession shall take effect thirty days after the deposit of such instrument.

[New Text]

Article 32

Ratification; Accession

(1) Any State shall express its consent to be bound by this Act by the deposit of

(a) its instrument of ratification, if it has signed this Act, or

(b) its instrument of accession, if it has not signed this Act.

(2) [See below]

(3) Any State which is not a member of the Union and which has not signed this Act shall, before depositing its instrument of accession, ask the Council to advise it in respect of the conformity of its laws with the provisions of this Act. If the decision embodying the advice is positive, the instrument of accession may be deposited.

(2) Instruments of ratification or accession shall be deposited with the Secretary-General.

[For the provision corresponding to the second subparagraph of the present text, see Article 32A of the new text.]

[Article 32A follows]

Explanatory Notes on Article 32A

Ad paragraph (1) in the new text: The Convention of 1961 required three ratifications for its entry into force. It is proposed that the new Act enters into force if five States have ratified or acceded to it. In order to ensure that this Act will not enter into force without having been ratified, or acceded to, by an adequate number of "old" member States, i.e., States party to the Convention of 1961, as amended by the Additional Act of 1972, it is proposed to provide that at least three of the States causing the entry into force of this Act must be such "old" member States.

Ad paragraph (2) in the new text: This paragraph would lead to practically the same results as Article 31(3), second sentence, and Article 32(4), of the present text.

Ad paragraph (3) in the new text: This paragraph would "close" the Convention of 1961, as amended by the Additional Act of 1972, once the new Act enters into force. Such closing seems to be desirable in order not to perpetuate the possibility of applying different texts among member States or, once the new Act applies among all member States, of reviving the old texts through accession to them by States which formerly were not members of UPOV.

[Present Text]

Article 31

[... Entry Into Force]

- (1) [See opposite Article 31 of the new text.]
- (2) [See opposite Article 32 of the new text.]
- (3) When the Convention has been ratified by at least three States, it shall enter into force in respect of those States thirty days after the deposit of the third instrument of ratification. It shall enter into force, in respect of each State which ratifies thereafter, thirty days after the deposit of its instrument of ratification.

Article 32

[... Entry Into Force]

- (1), (2) and (3), first subparagraph [See opposite Article 32 of the new text.]
- [(4), second subparagraph] Accession shall take effect thirty days after the deposit of such instrument [of accession].

[New Text]

Article 32A

Entry Into Force; Closing of Earlier Texts

- (1) This Act shall enter into force one month after the following two conditions are fulfilled:

- (i) the number of instruments of ratification or accession deposited is not less than five,

- (ii) not less than three of the said instruments are instruments deposited by States party to the Convention of 1961 as amended by the Additional Act of 1972.

- (2) In respect of any State depositing its instrument of ratification or accession after the conditions referred to in paragraph (1) have been fulfilled, this Act shall enter into force one month after the deposit of the instrument of the said State.

- (3) Once this Act enters into force according to paragraph (1), no State may accede to the Convention of 1961 as amended by the Additional Act of 1972.

[Article 32B follows]

Explanatory Notes on Article 32B

This new Article would achieve two things: first, it would regulate the relations among States which became members of the Union by ratifying or acceding to the "old texts," that is, the Convention of 1961 as amended by the Additional Act of 1972 ("old members"), where some of them are already bound by the new Act but the others are not yet bound by the new Act; second, it would allow the establishment of treaty relations between old members not yet bound by the new Act and States which become members of UPOV by ratifying or acceding to the new Act (and the new Act only) ("new members").

As to the first relationship, the solution is proposed in paragraph (1). Simply stated, it means that, as between any old member already bound by the new Act and any old member not (yet) bound by the new Act, the old texts continue to apply.

As to the second relationship, i.e., the relationship between old members not yet bound by the new Act and new members, it has to be recognized that there is no legal basis for an automatic relationship since they are bound by different texts. Paragraph (2), however, would offer the possibility of creating a relationship. The initiative would lie with the old members. If an old member declares that it wishes to create such a relationship, then, such a relationship would come into existence and it would consist of the application

(i) of the old texts by the old member not yet bound by the new Act in its relations with the new members;

(ii) of the new Act by the new members in their relations with any old member which has made such a declaration.

Thus, there could be protection in both directions, although the content of such protection would differ slightly in each case.* The proposed solution would have the great advantage that protection among all the members of UPOV could start much earlier than would be the case if it were necessary to wait until all the old members became bound by the new Act.

As to the role of the Secretary-General as depositary, see the Explanatory Note on Article 32(2).

*

The only situation in which there would be no protection would be that between old members not making the declaration and new members.

[Present Text]

[There is no provision in the present text which would correspond to this Article.]

[New Text]

Article 32B

Relations Between States
Bound by Different Texts

(1) Any member State of the Union which, on the day on which this Act enters into force with respect to that State, is bound by the Convention of 1961 as amended by the Additional Act of 1972 shall, in its relations with any other member State of the Union which is not bound by this Act, continue to apply, until the present Act enters into force also with respect to that other State, the said Convention as amended by the said Additional Act.

(2) Any member State of the Union not bound by this Act but bound by the Convention of 1961 as amended by the Additional Act of 1972 ("the former State") may declare, in a notification addressed to the Secretary-General, that it shall apply the said Convention as amended by the said Additional Act in its relations with any State bound by this Act which becomes a member of the Union through ratification of or accession to this Act ("the latter State"); as from the beginning of one month after the date of any such notification and until the entry into force of this Act with respect to the former State, the former State shall apply the Convention of 1961 as amended by the Additional Act of 1972, in its relations with any such latter State, whereas any such latter State shall apply this Act in its relations with the former State.

[Article 33 follows]

Explanatory Notes on Article 33

Ad paragraph (1): In the proposed new text, this paragraph deals only with States which become members of the Union through ratification of or accession to the revised Act ("new members") since those States which have become members of the Union through ratification of or accession to the existing texts ("old members") have already complied with the obligation of communicating the list of genera and species to which they apply the Convention. The reference to the admission procedure is omitted since the new Act would not provide for such a procedure (see the Explanatory Notes on Article 32(3)). The matters dealt with in the second sentence of paragraph (1) in the present text would be dealt with in paragraph (2)(ii) of the proposed new text. As to the words "on the entry into force of this Act," it is to be noted that, according to Article 4(3) of the proposed new text, any new member State must apply the provisions of the Convention to at least five genera or species on the date on which the Act enters into force on its territory. As to the transfer of the depositary functions to the Secretary-General, see the Explanatory Notes on Article 32(2).

Ad paragraph (2) in the new text: The introductory words correspond in substance to paragraph (3) of the present text. As to the transfer of the depositary functions to the Secretary-General, see the Explanatory Notes on Article 32(2).

Item (i) corresponds to paragraph (2) of the present text.

Item (ii) corresponds in substance to the second sentence of paragraph (1) of the present text. Paragraph (4) of Article 4 in the present text, or paragraph (3) of Article 3 in the proposed new text, deals with the possibility of establishing reciprocity among member States not protecting the same genus or species.

Item (iii) refers to Article 4(4) and (5) in the new text, by which the Council is authorized to decide to reduce, in special cases, the minimum numbers of genera or species to which States, when becoming members of the Union, and later within certain periods, must apply the Convention--or to prolong those periods--thus permitting States in whose favor such decisions have been taken to deposit their instruments of ratification or accession, or to remain members of the Union, without applying the Convention to the minimum numbers of genera or species within certain periods as provided for under paragraph (3) of Article 4 in the new text.

Item (iv) refers to Article 5(4), first sentence, which allows any Contracting State to grant rights more extensive than those requested by the Convention, particularly in connection with the "marketed product."

Item (v) refers to Article 5(4), second sentence, which allows for reciprocity in the case of a State having made use of the faculty dealt with in the preceding item.

Item (vi) refers to Article 6(1)(b)(i), which, in the proposed new text, allows a member State to grant a "grace period" of one year (see the Explanatory Notes on Article 6(1)(b)).

Item (vii) refers to Article 8, which provides for the minimum terms of protection.

[Present Text]

Article 33

[Communications Indicating the Genera and Species Eligible for Protection]

(1) When ratifying this Convention, in the case of a signatory State, or when submitting an application for accession, in the case of any other State, each State shall give, in the first case to the Government of the French Republic and in the second case to the Government of the Swiss Confederation, the list of genera or species in respect of which it undertakes to apply the provisions of the Convention in accordance with the requirements of Article 4. In addition, it shall specify, in the case of genera or species referred to in paragraph (4) of that Article, whether it intends to avail itself of the option of limitation available under that provision.

(2) Each member State of the Union which subsequently decides to apply the provisions of this Convention to other genera or species shall communicate the same information as is required under paragraph (1) of this Article to the Government of the Swiss Confederation and to the Office of the Union, at least thirty days before its decision takes effect.

(3) The Government of the French Republic or the Government of the Swiss Confederation, as the case may be, shall immediately communicate to all the member States of the Union the information referred to in paragraphs (1) and (2) of this Article.

[New Text]

Article 33

Communications Concerning the Genera and Species Protected; Information To Be Published

(1) When depositing its instrument of ratification of or accession to this Act, each State which is not a member of the Union shall notify the Secretary-General of the list of the genera and species to which, on the entry into force of this Act in respect of that State, it will apply the provisions of this Convention.

(2) The Secretary-General shall, on the basis of communications received from each member State concerned, publish information

(i) on the extension of the application of the provisions of this Convention to additional genera and species after the entry into force of this Act in respect of that State,

(ii) on any use of the faculty provided for in Article 3(3),

(iii) on the use of any faculty granted by the Council pursuant to Article 4(4) or (5),

(iv) on any use of the faculty provided for in Article 5(4), first sentence, with an indication of the nature of the more extensive rights and with a specification of the genera and species to which such rights apply,

(v) on any use of the faculty provided for in Article 5(4), second sentence,

(vi) on the fact that the law of the said State contains a provision allowed by Article 6(1)(b)(i), and the length of the period allowed by such provision,

(vii) on the length of the period referred to in Article 8 if such period is longer than the fifteen years and the eighteen years, respectively, referred to in that Article.

Explanatory Notes on Article 34

It is proposed to adapt the provisions of this Article to similar, more recent provisions in other conventions in the field of intellectual property, in particular to Article 24 of the Paris Convention for the Protection of Industrial Property of March 20, 1883, as revised in Stockholm on July 14, 1967.

[Present Text]

Article 34

[Territories]

(1) Every member State of the Union, either on signing or on ratifying or acceding to this Convention, shall declare whether the Convention applies to all or to a part of its territories or to one or more or to all of the States or territories for which it is responsible.

This declaration may be supplemented at any time thereafter by notification to the Government of the Swiss Confederation. Such notification shall take effect thirty days after it has been received by that Government.

(2) The Government which has received the declarations or notifications referred to in paragraph (1) of this Article shall communicate them to all member States of the Union.

[See Article 40(3) of the present text.]

[See the second sentence of second subparagraph of paragraph (1) above.]

[New Text]

Article 34

Territories

(1) Any State may declare in its instrument of ratification or accession, or may inform the Secretary-General by written notification any time thereafter, that this Act shall be applicable to all or part of those territories, designated in the declaration or notification, for the external relations of which it is responsible.

[See paragraph (5) of Article 41 of the new text.]

(2) Any State which has made such a declaration or given such a notification may, at any time, notify the Secretary-General that this Act shall cease to be applicable to all or part of such territories.

(3) (a) Any declaration made under paragraph (1) shall take effect on the same date as the ratification or accession in the instrument of which it was included, and any notification given under such paragraph shall take effect three months after its notification by the Secretary-General.

(b) Any notification given under paragraph (2) shall take effect twelve months after its receipt by the Secretary-General.

[Article 34A follows]

Explanatory Notes on Article 34A

This new Article would constitute a limited exception to the rules contained in the second sentence of Article 2(1), in Article 6(1) and in Article 8.

Ad paragraph (1): In the United States of America, two forms of plant breeders' rights are granted according to two different laws by two different authorities: special titles of plant protection are granted by the Plant Variety Protection Office for sexually reproduced plants on the basis of the Plant Variety Protection Act, whereas plant patents are granted by the Patent and Trademark Office for vegetatively reproduced plants on the basis of the Patent Act. These two forms of protection are the result of historical developments. It would be hardly possible to change this system, which is working satisfactorily. Its maintenance would cause no inconvenience for other member States of UPOV should the United States of America itself become a member of UPOV. The proposed new provision would provide the possibility for the United States of America to become a member of UPOV without the need of changing its national law in this respect.

Ad paragraph (2): Where, as in the United States of America, plant patents are granted only for certain categories of plants, and special titles of protection for other plants, it hardly seems to be possible to amend the patent legislation so as to conform to the rules on novelty which are contained in paragraph (1) of Article 6 and to the rules on the minimum period of protection which are contained in Article 8. The corresponding rules of the patent legislation are applicable to the totality of patent applications, of which applications for the grant of plant patents form only an extremely small proportion. Moreover, it would be difficult to amend the patent legislation only as far as plant patent applications are concerned since the number of these applications is rather small. It is for this reason that it is proposed to allow such a State to continue the application of the novelty criteria and the term of protection of the patent legislation to the varieties protected in the form of patents.

Ad paragraph (3): This paragraph would allow the withdrawal of the notification provided for in paragraph (1).

[Present Text]

[There is no Article 34A in the present text.]

[New Text]

Article 34A

Exceptional Rules for Protection
Under Two Forms

(1) Notwithstanding the provisions of paragraph (1) of Article 2, any State which, at the date of opening for signature of this Act, provides for protection under different forms for sexually reproduced and for vegetatively propagated varieties of one and the same genus or species may continue to do so if, at the time of signing this Act or of depositing its instrument of ratification of or accession to this Act, it notifies the Secretary-General of the Union of that fact.

(2) Where, in a member State of the Union to which the preceding paragraph applies, protection is sought under patent legislation, the said State may apply the novelty criteria and the period of protection of the patent legislation to the varieties protected thereunder, notwithstanding the provisions of Articles 6 and 8.

(3) The said State may, at any time, notify the Secretary-General of the withdrawal of the notification it has given under paragraph (1). Such withdrawal shall take effect on the date which the State shall indicate in its notification of withdrawal.

[Article 35 follows]

Explanatory Notes on Article 35

This Article is intended to protect the interests of a breeder who has started the commercialization of a variety without knowing that such commercialization might destroy the novelty of the variety since he could not know in advance when the provisions of the Convention would be applicable to the genus and species to which that variety belongs. The present text makes an exception as to varieties (of recent creation) existing at the date of entry into force of the Convention in respect of the interested State; the proposed new text would make the exception as to varieties (of recent creation) existing at the date on which such State applies for the first time the provisions of the Convention to the genus or species to which the variety in question belongs. That date will be the date of entry into force of the Convention if the genus or species is among those which the State protects when it becomes a member of the Union; it will be a later date if the genus or species is one to which the State extends protection later.

[Present Text]

Article 35

[Transitional Limitation of the
Requirement of Novelty]

Notwithstanding the provisions of Article 6, any member State of the Union may, without thereby creating an obligation for other member States of the Union, limit the requirement of novelty laid down in that Article, with regard to varieties of recent creation existing at the date of entry into force of this Convention in respect of such State.

[New Text]

Article 35

Transitional Limitation of the
Requirement of Novelty

Notwithstanding the provisions of Article 6, any member State of the Union may, without thereby creating an obligation for other member States of the Union, limit the requirement of novelty laid down in that Article, with regard to varieties of recent creation existing at the date on which such State applies the provisions of this Convention for the first time to the genus or species to which such varieties belong.

Explanatory Notes on Article 36

Ad paragraph (1): It is proposed to omit the word "new" in the term "a new variety" and the words "or his successor in title" wherever they appear. For explanations, see the Explanatory Notes on Article 1(1).

Ad paragraph (2): It is proposed to omit the words "or his successor in title." For explanations, see the Explanatory Notes on Article 1(1).

[Present Text]

Article 36

[Transitional Rules Concerning the
Relationship Between Variety
Denominations and Trade Marks]

(1) If, at the date of entry into force of this Convention in respect of a member State of the Union, the breeder of a new variety protected in that State, or his successor in title, enjoys in that State the protection of the denomination of that variety as a trade mark for identical or similar products within the meaning of trade mark law, he may either renounce the protection in respect of the trade mark or submit a new denomination. If a new denomination has not been submitted within a period of six months, the breeder or his successor in title may not continue to assert his right to the trade mark for the above-mentioned products.

(2) If a new denomination is registered for the variety, the breeder or his successor in title may not prohibit the use of the previous denomination by persons obliged to use it before the entry into force of this Convention, until a period of one year has expired from the publication of the registration of the new denomination.

[New Text]

Article 36

Transitional Rules Concerning the
Relationship Between Variety
Denominations and Trade Marks

(1) [No change, except omit the word "new" in the term "a new variety" and the words "or his successor in title" wherever they appear.]

(2) [No change, except omit the words "or his successor in title."]

[Article 36A follows]

Explanatory Notes on Article 36A

This new Article would constitute a limited exception to the rule contained in Article 13(2), which provides that no denomination may "consist solely of figures."

Ad paragraph (1): In a number of States which are interested in joining the Union, breeders are allowed to designate their varieties by a series of figures. Such denominations have become customary in those States, at least with respect to certain genera or species, and any prohibition of such practice would probably constitute, for those States, an unsurmountable obstacle to joining the Union. It is therefore proposed that such States be permitted to derogate from the above-mentioned provision of Article 13(2).

The proposed permission would be as restricted as possible. The admission of numerical denominations must be established practice and not merely sporadic or exceptional. Such practice must be established at the date of opening the revised Act for signature. This date has been preferred to the date of ratification or accession by a State in order to avoid making numerical denominations established practice between the date of opening for signature of the revised Act and the date of ratification or accession.

Ad paragraph (2): This paragraph would allow the withdrawal of the notification provided for in paragraph (1).

[Present Text]

[New Text]

Article 36A

Exceptional Rules for the Use of
Denominations Consisting Solely of Figures

[There is no Article 36A in the present
text]

(1) Notwithstanding the provisions of paragraph (2) of Article 13, any State which, at the date of opening for signature of this Act, has the established practice of admitting variety denominations consisting solely of figures may continue such practice in respect of all or certain genera and species if, at the time of signing this Act or of depositing its instrument of ratification or accession to this Act, it notifies the Secretary-General of the Union of its intention to do so and, unless it intends to do so in respect of all genera or species, of the genera and species in respect of which it intends to continue the said practice.

(2) The said State may, at any time, notify the Secretary-General of the withdrawal of the notification it has made under paragraph (1). Such withdrawal shall take effect on the date which the State shall indicate in its notification of withdrawal.

[Article 37 follows]

[Present Text]

Article 37

[Preservation of Existing Rights][New Text]

Article 37

Preservation of Existing Rights

This Convention shall not affect exist- [No change]
ing rights under the national laws of member
States of the Union or under agreements con-
cluded between such States.

Explanatory Notes on Article 38

Ad paragraph (1): No amendment is proposed in this paragraph.

Ad paragraphs (2) to (6): Providing for compulsory arbitration, as does the present text, might be an insurmountable obstacle preventing certain States from ratifying or acceding to the UPOV Convention. In order to avoid this risk it is proposed to replace the present provisions in paragraph (2)--under which arbitration proceedings may be invoked by one of the parties concerned only--by a clause providing for arbitration on the request of all the parties concerned. Under these conditions, paragraphs (3) to (6) should be omitted.

[Present Text]

Article 38

[Settlement of Disputes]

(1) Any dispute between two or more member States of the Union concerning the interpretation or application of this Convention which is not settled by negotiation shall, at the request of one of the States concerned, be submitted to the Council, which shall endeavour to bring about agreement between the member States concerned.

(2) If such agreement is not reached within six months from the date when the dispute was submitted to the Council, the dispute shall be referred to an arbitration tribunal at the request of one of the parties concerned.

(3) The tribunal shall consist of three arbitrators.

Where two member States are parties to a dispute, each of those States shall appoint an arbitrator.

Where more than two member States are parties to a dispute, two of the arbitrators shall be appointed by agreement among the States concerned.

If the States concerned have not appointed the arbitrators within a period of two months from the date on which the request for convening the tribunal was notified to them by the Office of the Union, any of the member States concerned may request the President of the International Court of Justice to make the necessary appointments.

In all cases, the third arbitrator shall be appointed by the President of the International Court of Justice.

If the President is a national of one of the member States parties to the dispute, the Vice-President shall make the appointments referred to above, unless he is himself also a national of one of the member States parties to the dispute. In this last case, the appointments shall be made by the member of the Court who is not a national of one of the member States parties to the dispute and who has been selected by the President to make the appointments.

(4) The award of the tribunal shall be final and binding on the member States concerned.

(5) The tribunal shall determine its own procedure, unless the member States concerned agree otherwise.

(6) Each of the member States parties to the dispute shall bear the costs of its representation before the arbitration tribunal; other costs shall be borne in equal parts by each of the States.

[New Text]

Article 38

Settlement of Disputes

(1) [No change]

(2) If such agreement is not reached within six months from the date when the dispute was submitted to the Council, the dispute shall be referred to an arbitration tribunal at the request of all the parties concerned.

(3) [There is no provision in the new text corresponding to paragraph (3) in the present text.]

(4) [There is no provision in the new text corresponding to paragraph (4) in the present text.]

(5) [There is no provision in the new text corresponding to paragraph (5) in the present text.]

(6) [There is no provision in the new text corresponding to paragraph (6) in the present text.]

[Present Text]

Article 39

[Reservations]

Signature and ratification of and accession to this Convention shall not be subject to any reservation.

[New Text]

Article 39

Reservations

[No change]

Explanatory Notes on Article 40

Ad paragraph (1): No amendment is proposed in this paragraph.

Ad paragraph (2) in the new text: The proposed new text of this paragraph would no longer refer to Article 27(4), which is proposed to be omitted in the new text. The new text would expressly state the right of denunciation and the fact that any denunciation must be notified to the Secretary-General, who, in turn, would have to notify it to the member States. As to the depositary role of the Secretary-General, see the Explanatory Notes on Article 32(2).

Ad paragraph (3) in the new text: This paragraph would maintain the essence of paragraph (2) of the present text. Paragraph (2) of the present text provides that the denunciation takes effect one year after it is notified by the depositary; the paragraph under consideration would provide that the denunciation takes effect at the end of the calendar year following the denunciation; the latter solution appears to be of advantage for practical reasons since the obligation to pay contributions--which are fixed from one calendar year to the next calendar year--would, in the case of a denunciation, always expire at the end of a financial year in UPOV.

It is to be noted that the new text of Article 40 would contain no provisions corresponding to paragraph (3) of the present text since the content of that paragraph is dealt with in paragraph (2) of Article 34 itself.

Ad paragraph (4) in the new text: The essential part of this paragraph would be maintained without amendment in the new text.

[Present Text]

Article 40

[Duration and Denunciation
of the Convention;
Discontinuation of the
Application of the
Convention to Territories]

- (1) This Convention shall be of unlimited duration.
- (2) Subject to the provisions of paragraph (4) of Article 27, if a member State of the Union denounces this Convention, such denunciation shall take effect one year after the date on which notification of denunciation is made by the Government of the Swiss Confederation to the other member States of the Union.
- (3) Any member State may at any time declare that the Convention shall cease to apply to certain of its territories or to States or territories in respect of which it has made a declaration in accordance with the provisions of Article 34. Such declaration shall take effect one year after the date on which notification thereof is made by the Government of the Swiss Confederation to the other member States of the Union.
- (4) Such denunciations and declarations shall not affect rights acquired by reason of this Convention prior to the expiration of the time limit laid down in paragraphs (2) and (3) of this Article.

[New Text]

Article 40

Duration and Denunciation
of the Convention

- (1) [No change]
- (2) Any member State of the Union may denounce this Convention by notification addressed to the Secretary-General. The Secretary-General shall promptly notify all member States of the Union of the receipt of the notification of denunciation.
- (3) The denunciation shall take effect at the end of the calendar year following the year in which the notification was received by the Secretary-General.
- [See Article 34(2) and (3)(b) of the new text.]
- (4) The denunciation shall not affect any rights acquired in a variety by reason of this Convention prior to the date on which the denunciation becomes effective.

Explanatory Notes on Article 41

Ad paragraph (1) in the new text: The original would be drawn up by the Diplomatic Conference in the three official languages referred to in Article 28. As to the role of the Secretary-General as depositary, see the Explanatory Notes on Article 32(2).

Ad paragraph (2) in the new text: This paragraph would follow established practice and would take into account the special status of States having been represented in the Diplomatic Conference as provided for in Article 31.

Ad paragraph (3) in the new text: The languages mentioned in this paragraph are the same as in the present text of paragraph (3), except that English and German would now be referred to in paragraph (1). Otherwise, the Explanatory Notes given in the preceding paragraph apply here too.

Ad paragraph (4) in the new text: This paragraph corresponds to paragraph (4) of Article VIII of the Additional Act of 1972.

Ad paragraph (5) in the new text: The Explanatory Notes on paragraph (2) apply here too. Article 32B deals with relations between States, Article 34 deals with the territories to which this Act applies or ceases to apply, Article 34A(1) deals with protection under two forms, Article 36A deals with denominations consisting solely of figures and Article 39(2) refers to settlement of disputes.

[Present Text]

Article 41

[Copies of the Convention;
Language and Official Translations
of the Convention]

(1) This Convention is drawn up in a single copy in the French language. That copy is deposited in the archives of the Government of the French Republic.

(2) A certified true copy shall be forwarded by that Government to the Governments of all signatory States.

(3) Official translations of this Convention shall be made in the Dutch, English, German, Italian and Spanish languages.

Article VIII of the
Additional Act of 1972[Original Copy of the Additional Act;
Language and Official Translations
of the Additional Act; Notifications;
Registration of the Additional Act]

(1) This Additional Act shall be signed in a single original in the French language, which shall be deposited in the archives of the Government of the French Republic.

(2) Official translations of this Additional Act shall be established by the Secretary-General of the Union, after consultations with the interested Governments, in Dutch, English, German, Italian and Spanish, and in such other languages as the Council of the Union may designate. In the latter event, the Secretary-General of the Union shall also establish an official translation of the Convention in the language so designated.

[New Text]

Article 41

Copies; Languages; Notifications

(1) This Act shall be signed in a single original in the French, English and German languages, the French text prevailing in case of any discrepancy among the various texts. The original shall be deposited with the Secretary-General.

(2) The Secretary-General shall transmit two certified copies of this Act to the Governments of all States which have been represented in the Diplomatic Conference that has adopted it and, on request, to the Government of any other State.

(3) The Secretary-General shall, after consultation with the Governments of the interested States which have been represented in the said Conference, establish official texts in the Dutch, Italian and Spanish languages and such other languages as the Council may designate.

(4) The Secretary-General shall register this Act with the Secretariat of the United Nations.

(5) The Secretary-General shall notify the Governments of the member States of the Union and of the States which, without being members of the Union, have been represented in the Diplomatic Conference that has adopted it of the signature of this Act, the deposit of instruments of ratification and accession and any denunciation, as well as of any notification received under Articles 32B, 34, 34A or 36A or of any declaration made under Article 34 or 39.

[Article VIII of the
Additional Act of 1972, continued]

(3) The Secretary-General of the Union shall transmit two copies, certified by the Government of the French Republic, of the signed text of this Additional Act to the Governments of the States referred to in paragraph (1) of Article V, and on request to the Government of any other State.

(4) The Secretary-General of the Union shall register this Additional Act with the Secretariat of the United Nations.

(5) The Government of the French Republic shall notify the Secretary-General of the Union of the signatures of this Additional Act and of the deposit with that Government of instruments of ratification or accession. The Government of the Swiss Confederation shall notify the Secretary-General of the Union of the deposit with that Government of instruments of ratification or accession.

(6) The Secretary-General of the Union shall inform the member States of the Union and the signatory States of the Convention of the notifications received pursuant to the preceding paragraph and of the entry into force of this Additional Act.

[Annex II follows]

REPORT ON THE WORK OF THE COMMITTEE OF EXPERTS
ON THE INTERPRETATION AND REVISION OF THE CONVENTION

prepared by Mr. H. Skov, Chairman of the Committee of
Experts on the Interpretation and Revision of the Convention

I. Establishment and Activities of the Committee

1. The Committee was established by the Council at its eighth ordinary session held from October 24 to 26, 1974. The main task of the Committee was to examine questions of interpretation of the present text of the Convention and to prepare draft amendments to the Convention.

2. The decision to establish the Committee was taken following a meeting held from October 21 to 23, 1974, with representatives of several non-member States and professional international organizations, the purpose of which was to provide information on the aims and the work of UPOV and to discuss the conditions which might need to be fulfilled to make UPOV attractive to States which do not yet belong to it.

3. The Committee has met in the following six sessions:

First session: February 25 to 28, 1975

Second session: December 2 to 5, 1975

Third session: February 17 to 20, 1976

Fourth session: September 14 to 17, 1976

Fifth session: March 8 to 10, 1977

Sixth session: September 20 to 23, 1977

The third and fifth sessions were attended by a considerable number of representatives of non-member States and professional international organizations.

4. In September 1975 members of the Committee visited the United States of America and Canada. The purpose of visiting the United States of America was, first, to examine on the spot the two systems existing in the United States of America for the protection of plant breeders' rights--with particular reference to the examination of new varieties of plants--for the purpose of obtaining the necessary information from the government authorities and selected circles of breeders in that country on the prospects of the country's accession to the UPOV Convention and, second, to discuss questions of mutual interest with those government authorities and breeders' circles. The purpose of visiting Canada was to have discussions there with the Canadian Department of Agriculture and Canadian breeders' organizations in view of the fact that the introduction of a plant variety protection system was under discussion in Canada.

5. In connection with the meetings of the Committee the Working Group on Variety Denominations has met to discuss those provisions of the Convention which fall under the terms of reference of that Working Group.

II. Analysis of the Text

6. At its fourth session the Committee decided to submit a full revised Act, that is, a text comprising both the unchanged provisions of the existing Convention of 1961 and of the Additional Act of 1972 and those provisions where changes are proposed. The Committee hereby submits the text contained in document C/XI/12* to serve as the basis for the deliberations of a Diplomatic Conference.

7. In the following paragraphs the main questions which have required the special attention of the Committee will be dealt with. For minor details reference is made to the text proposed by the Committee and the attached explanatory notes.

* Now in substance Annex I to this document

8. The Committee discussed at length the provision in the second sentence of Article 2(1) according to which protection for one and the same genus or species must be granted only under one of the two possible forms of protection, a patent or a special title of protection. The Committee felt that the provision under discussion was justified for those States which progressively extend the protection species by species, as is the case in most States, and for those States the Committee considered it desirable to maintain the principle of only one form of protection for the same genus and species. On the other hand, the Committee recognized that the said provision might lead to difficulties in States where for historical reasons vegetatively propagated plants can be protected by the grant of plant patents while sexually reproduced plants can be protected by the grant of a special title of protection. For that reason the Committee has agreed on an exceptional clause whereby such States may continue their established practice (see Article 34A of the proposed text).

9. For several reasons the Committee has found it expedient to maintain the definition of "variety" in Article 2(2) but to redraft it, first of all in order to include in the definition new types of varieties which have been developed since the adoption of the Convention, such as multilines or multiclones, and which will be developed in the future as a result of the progress in the field of plant breeding. The wording of the definition proposed by the Committee follows the generally accepted language (see for instance the International Code of Nomenclature of Cultivated Plants) and includes any population or assemblage of plants which is capable of cultivation and which is sufficiently homogeneous and stable.

10. On the other hand, the Committee is aware of the fact that some States may not be able to protect all types or categories of plants of a given species. A practical example is a division of species into ornamental plants and "utility plants" (e.g., fruit-bearing plants or fodder plants). But above all mention should be made of hybrids which are not eligible for protection in some States, because the breeders' interests are considered to be sufficiently safeguarded by the de jure protection or de facto possession of the inbred lines. For that reason the Committee has proposed the addition of a new paragraph leaving the member States free to decide which type or types of varieties will be protected.

11. When the original text of the Convention was drafted, in 1961, the drafters confined themselves to an obligatory list of 15 important species that were of particular significance in the European context: the list contained in the Annex to the Convention and mentioning those species to which member States were obliged to apply the Convention within certain time limits. The Committee was aware of the fact that this list is less relevant in other parts of the world, and that a considerable number of non-European States would find it difficult to apply the Convention to all these species, for which reason the existing list would constitute one of the major obstacles to the accession of several States to UPOV. On the other hand, experience in the present member States has proved that, normally, States are able to extend the Convention to a far greater number than the minimum requirement in the list. For these reasons the Committee decided to propose a complete deletion of the list and to increase to 24 the minimum number of genera and species to be protected successively within a prescribed period, it being understood that the choice of the genera and species to be protected in each member State would be entirely a matter for that State (see Article 4(3) of the proposed text). However, some States may find difficulties in extending the protection to 24 genera and species, for which reason Article 4(4) and (5) of the proposed text authorizes the Council of UPOV to grant exemptions in special cases.

12. According to the existing Convention member States may derogate from the national treatment principle in the case of genera and species not included in the list (and instead may limit the benefit of protection to nationals of those other member States in which their own nationals enjoy protection for the same genus or species under the reciprocity principle), whereas the national treatment principle applies in the case of all genera and species included in the list so that nationals of member States which have not (yet) extended protection to a given genus or species included in the list are entitled to protection in other member States where the genus or species has already been made eligible for protection. As a consequence of the deletion of the list referred to in the preceding paragraph, the Committee has opted for the reciprocity principle in respect of all genera and species. The corresponding provision has been transferred from Article 4(4) of the existing text to Article 3(3) of the proposed text.

13. Several proposals have been made with a view to extending the rights of the breeders as specified in Article 5 of the present text. In particular, it has been proposed, in respect of ornamental plants, to extend the protection to the final product (typically, the cut flower). The Committee was aware of the fact that cut flowers and--to some extent--plants are imported from non-member States to member States without any royalty being paid to the breeder. Since such practice is prejudicial not only to the breeders but also to the national producers because of the distortion of competition in the importing member States, the Committee has expressed sympathy with the idea of assuring the breeders of royalties for such imported goods. However, the Committee considered that provisions to that effect should be established by national legislation by virtue of Article 5(4), since an extension of the minimum protection provided for in Article 5 might seriously jeopardize ratification of or accession to the revised text. The Committee took the same stand in the case where seed is multiplied not for the purpose of selling it but for the purpose of using it, in the same enterprise, for the production of plant-lets for sale, which under the present text of the Convention does not require the authorization of the breeder. However, some members of the Committee declared their intention to raise the question of the adoption of a recommendation to member States to legislate so as to ensure the rights of the breeders in both cases.

14. In answer to the question whether or not the sale of seed from one farmer to another should be considered commercial marketing within the meaning of Article 5, the Committee has stated that it lay within the competence of the member States to define in their domestic laws what is to be regarded as commercial marketing, and provided that the sale from farmer to farmer is performed within very narrow restrictions it may be considered as not being an infringement of the Convention.

15. The novelty requirements laid down in Article 6 of the present Convention for granting protection of a variety can be summarized as follows:

(a) the variety must be clearly distinguishable by one or more important characteristics from any other variety whose existence is a matter of common knowledge at the time when protection is applied for;

(b) at the time of application for protection in a member State the variety itself must not have been offered for sale or marketed, with the consent of the breeder, in that State or for longer than four years in another State.

ad a. The Committee has discussed a possible rewording of the expression "important characteristics," so as to clarify the text. However, since no practical difference was seen in the standards applied for judging distinctness, and since the Council has adopted, in connection with the establishment of test guidelines, an explanation which is generally accepted, the Committee saw no need for further clarification. The explanation which is contained in document TG/1/1, entitled "General Introduction to the Guidelines for the Examination of Distinctness, Homogeneity and Stability of New Varieties of Plants," reads as follows:

"An important characteristic is not necessarily a quality which is connected with the idea of a certain value which the variety may possess. The characteristics listed in the Guidelines are important for distinguishing varieties one from another, but these lists are not exhaustive and other characteristics may be added when they have been found useful."

ad b. Some patent and other legislations allow a period of one year before the application ("period of grace") in which it is permitted to make the invention publicly known (for plant varieties in particular: to market the varieties) without causing prejudice to novelty. The Committee was aware of the fact that States having established the tradition of a period of grace and even States envisaging the introduction of a period of grace would encounter insurmountable difficulties in acceding to the Convention unless the Convention permitted the period of grace, and therefore the Committee has decided to propose this possibility. In addition, it is proposed that the period of four years, expiring at the filing date of the application, during which the variety may have been offered for sale or marketed in a State other than the State in which the application is filed be extended to a period of six years in the case of certain groups of plants which are usually slow-growing and for which the Convention already envisages a longer minimum period of protection.

16. A special explanation should be given for the concept of "common knowledge." Under Article 6(1)(a) of the present Convention this concept is related to the other varieties with which the submitted variety must be compared in the course of examination, and the factors by which common knowledge may be established are explained in the Convention. The Committee does not propose any change in this respect. However, the Committee has felt it desirable also to specify the relation of this concept to the variety submitted for the granting of protection (the variety itself) by adding a provision in Article 6(1)(b) (in fine) to clarify that common knowledge (for instance, by means of a publication) of the variety itself shall not affect the right to protection unless such common knowledge has been established by offering the variety for sale or marketing. This provision contradicts the current patent novelty criteria, and would cause difficulties in some States, especially those States which provide for protection under different forms for sexually reproduced and for vegetatively propagated varieties. In order to obviate this difficulty an exemption clause is proposed in Article 34A.

17. Regarding the examination of the variety referred to in Article 7 of the present Convention, the Council adopted at its tenth ordinary session (October, 1976) the following statement:

"(1) It is clear that it is the responsibility of the member States to ensure that the examination required by Article 7(1) of the UPOV Convention includes a growing test, and the authorities in the present UPOV member States normally conduct these tests themselves; however, it is considered that, if the competent authority were to require these tests to be conducted by the applicant, this is in keeping with the provisions of Article 7(1), provided that

(a) the growing tests are conducted according to guidelines established by the authority, and that they continue until a decision on the application has been given;

(b) the applicant is required to deposit in a designated place, simultaneously with his application, a sample of the propagating material representing the variety;

(c) the applicant is required to provide access to the growing tests mentioned under (a) by persons properly authorized by the competent authority.

(2) A system of examination as described above is considered compatible with the UPOV Convention."

It should be noted that the consequence of failure to give access to the growing tests is that the application will be rejected.

18. Considering the total period of five years after the deposit of the first application in a member State during which the breeder can defer, under Article 12 of the present Convention, the furnishing of the required additional plant material to other member States where the breeder has also applied for protection, the danger exists that a breeder in order to get priority might file an application in respect of a variety which he has not yet finished, even foreseeing that protection may be rejected in the member State where the first application was lodged. In order to avoid such a situation--or at least to limit the period--the Committee has decided to propose that when the first application has been withdrawn or rejected the States where the subsequent filings have been made may require the additional documents and material to be furnished within an adequate period.

19. Whereas the present text (Article 13(3)) provides that a breeder who submits his trademark as a variety denomination must renounce his right to the trademark, it is proposed in the new text only to provide that he may no longer assert his right to the trademark. Furthermore, it is proposed that this provision should be limited to member States applying the provisions of the Convention to the genus or species to which the variety belongs.

20. No other major amendments to Article 13 have been proposed. The Committee was unable to accept a proposal to delete the second part of the first sentence of Article 13(2): "in particular, it (the denomination) may not consist solely in figures." However, considering that some States which have the established practice of admitting variety denominations consisting solely of figures might find it difficult or impossible to join UPOV on account of the provision in Article 13(2), the Committee has proposed a possibility of derogation from that provision (see Article 36A).

21. The main proposals for amendments to provisions related to the functioning of UPOV and to treaty law can be summarized as follows:

- (a) to omit the provisions regarding the supervision by the Government of the Swiss Confederation;
- (b) to substitute for the authority given to UPOV to decide on cooperation with BIRPI a provision giving UPOV legal capacity in general;
- (c) to expand the scale of contributions from member States;
- (d) to entrust the Secretary General of UPOV with the depositary functions in respect of the new Act and to receive instruments of ratification and accession as well as notifications;
- (e) to amend the present procedure for accession to the Convention by States which have not signed the Convention;
- (f) to include an Article establishing the relations between States bound by different texts.

ad a. In 1961 when the Convention was set up, BIRPI was under the supervision of the Swiss Government, and in view of the cooperation foreseen between UPOV and BIRPI it was only natural that UPOV should also be placed under the same supervision. Since then BIRPI has been replaced by WIPO, which is not under that supervision, and since UPOV is now continuing the cooperation with WIPO, it is equally natural that the supervision by the Swiss Government should be brought to an end. It should be added that the Swiss Government has declared that it would have no objection to the proposed amendment.

ad b. Considering the above-mentioned proposal to discontinue the special role of the Swiss Government and the replacement of BIRPI by WIPO, the provision on cooperation with BIRPI cannot be maintained in its present form. In order to take account of this new situation the Committee proposes to include in the new text a provision giving UPOV legal capacity in general as is the case for other international Unions of a similar nature. Furthermore, the Committee proposes the omission of a special reference to WIPO, since such reference could be interpreted as excluding the possibility of cooperation with other public or private international organizations. In this connection the Committee wishes to express its entire satisfaction with the existing relations between UPOV and WIPO and to stress that it does not envisage a change of the established cooperation.

ad c. The present contribution system operates with a relatively low range from the highest class to the lowest, namely, one to five, and only in exceptional circumstances can the lowest class be diminished to one-tenth of the highest. In order to widen this range and give more flexibility as a whole the Committee proposes additional classes above, below and between the present classes with the possibility of allowing smaller fractions in exceptional circumstances.

ad d. It is proposed to discontinue the relatively complicated system set up in the present Convention under which instruments of ratification shall be deposited with the French Government, while instruments of accession shall be deposited with the Swiss Government and some declarations shall be made to the French Government and other declarations and notifications to the Swiss Government. Instead it is proposed that the Secretary-General of UPOV shall be entrusted with all the tasks relating to depositary functions and receipt of notifications.

ad e. Under the present Convention States which have not signed it may apply for accession to the Convention and thereby become members of UPOV only if the Council by a qualified majority considers that the legislation, etc., of that State conforms with the Convention. This admission procedure is proposed to be amended in the new text in such a way that States which have not signed it should consult the Council in respect of their legislation before depositing their instruments of accession. In view of the very special requirements of the Convention regarding the national laws such procedure is desirable.

ad f. Whereas there is no problem in respect of the relationship between States which are bound only by the old text ("old members") and between States which are bound only by the new text, whether or not they are "old" or "new" members, the Committee considers it necessary to establish the relationship between "old" members some of which are also bound by the new text and some of which are not. The Committee considers it expedient to clarify that in this case the relationship shall be based on the old text. This leaves the relationship between States bound only by the old text ("old members") and States bound only by the new text ("new members"). For this case the Committee proposes that a link could be established by means of a notification made by the old member States declaring that they will consider themselves bound by the old text vis-à-vis the new member States with the consequence that the new member States will be bound by the new text vis-à-vis the States making such a declaration. In this connection it should be mentioned that, according to established practice, the member States constitute one Union, that is a single entity from the administrative point of view, with the consequence that there is only one Council, one budget and one set of accounts, and there is not a separate administration for each separate Act of the Convention, although the member countries are bound by different Acts and pay their contributions on the basis of these different Acts.

III. Conclusion

22. By submitting this report and the attached* Draft Convention the Committee considers its task fulfilled. The Chairman wishes to underline the spirit of co-operation and goodwill in which all the members of the Committee as well as the Secretariat have contributed to the work. It should also be underlined that the members of the Committee have acted in a strictly personal capacity, not binding their Governments and not necessarily representing the point of view of their Governments. Necessary compromises have been found without any intention of satisfying national wishes. It is a pleasure for the Chairman to express his appreciation of the atmosphere of mutual understanding and friendship which has characterized the joint efforts to achieve the best possible solutions.

H. Skov

Lyngby (Denmark), November 1, 1977

* Now in substance Annex I of this document.

DRAFT PREAMBLE
TO THE
INTERNATIONAL CONVENTION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS
submitted by the Chairman of the Committee of Experts
on the Interpretation and Revision of the Convention

THE CONTRACTING STATES,

Considering that the International Convention for the Protection of New Varieties of Plants, of December 2, 1961, hereinafter referred to as "the Convention," has proved a valuable instrument for international cooperation in the field of the protection of the rights of breeders,

Reaffirming their statements contained in the Preamble to the Convention to the effect that

- (i) they are convinced of the importance attaching to the protection of new varieties of plants not only for the development of agriculture in their territory but also for safeguarding the interests of breeders,
- (ii) they are conscious of the special problems arising from the recognition and protection of the right of the creator in this field and particularly of the limitations that the requirements of the public interest may impose on the free exercise of such a right,
- (iii) they deem it highly desirable that these problems, to which very many States rightly attach importance, should be resolved by each of them in accordance with uniform and clearly defined principles,

Considering that in recent years the idea of protecting the rights of breeders has gained a strong foothold in many States which have not yet acceded to the Convention,

Having regard to the fact that for some of these States minor amendments to the Convention are necessary before they will be able to accept it,

Considering that the necessary amendments do not in general affect the main principles of the Convention,

Anxious to reach an agreement on these principles to which other States having the same interests may be able to adhere,

Considering, furthermore, that some provisions regulating the working of the Union created by the Convention should be updated,

Have agreed as follows:

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[End of Annex II
and of document]