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UPOV

0219
IRC/VI/3

ORIGINAL: English

DATE: August 8, 1977

INTERNATIONAL UNION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS

GENEVA

COMMITTEE OF EXPERTS ON THE INTERPRETATION AND REVISION OF THE CONVENTION

Sixth Session

Geneva, September 20 to 23, 1977

PROPOSALS CONCERNING ARTICLES 15 to 32, 32A, 32B, 33, 34, 37 to 41

Memorandum prepared by the Office of the Union

INTRODUCTION

1. This document contains the present text of those articles of the Convention which are not covered by document IRC/VI/2--that is, Articles 15 to 34 and 37 to 41--, the drafts of the proposed new text, if any, of the same articles and two new articles (Articles 32A and 32B), and a draft commentary on the draft articles. The draft commentary is drafted in the style proposed to be used in the document which would be presented to the Diplomatic Conference. In a few instances, the draft texts are also accompanied by observations which are directed to the Committee of Experts; whether and if so to what extent such observations could become part of the commentary directed to the Diplomatic Conference depends on the reaction of the Committee of Experts to the said observations.

2. The drafts of the revisions are generally based on the tentative decisions arrived at by the Committee of Experts in its last sessions. In several cases, a departure from such decisions was made; attention to such cases is drawn at the appropriate places in this document. In some cases, no tentative decisions were made by the Committee of Experts although decisions seem to be necessary; this document tries to cover also these cases since the aim is to draw attention to all questions which will require solution by the Diplomatic Conference.

[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]

(2) [No change]

(3) [No change]

Comments on Article 17

Ad paragraph (1): The present text provides ex officio observer status for States which have signed but not yet ratified "this Convention." Once the new Act will be in existence, there might be some uncertainty whether the words "this Convention" mean the Convention signed in 1961 or the new Act. In order to avoid such uncertainty, it is proposed that the paragraph under consideration be so amended that it be clear that the ex officio observer status apply to such non-member States of UPOV which will have signed the new Act. Member States of UPOV will continue to be members of the Council whether or not they sign the new Act. There is no need to provide for ex officio observer status for States which have signed "but not yet ratified" the 1961 Convention since all States which have signed the 1961 Convention have ratified it.

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. Their representatives shall be entitled to speak in a consultative capacity.

(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.

[New Text]

Article 18

Officers of the Council

(1) [No change]

(2) [No change]

Comments on Article 19

No amendment is proposed in this Article.

OBSERVATION

In treaties comparable to the one under consideration, the head of the Secretariat is usually entitled to convene the supreme organ of the organization. For example, the WIPO Convention of 1967 provides that the General Assembly shall meet in ordinary session "upon convocation by the Director General" (Article 6(4)(a)) and in extraordinary session "upon convocation by the Director General either at the request of the Coordination Committee or at the request of one-fourth of the States members of the General Assembly" (Article 6(4)(b)). The Committee of Experts may wish to examine the question whether similar solutions should not be adopted for the convocation of the UPOV Council.

[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]

Comments on Article 20

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

Ad paragraph (2): It is proposed to delete the second half of the first sentence ("after having consulted the Government of the Swiss Confederation.") and the second sentence of the said paragraph ("The Government of the Swiss Confederation shall be responsible for ensuring that the regulations are carried out.").

For the reasons of this proposal, see the comments 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 there).

[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

- (1) [No change]
- (2) The Council shall adopt the administrative and financial regulations of the Union.

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

0239

Comments on Article 21

No amendment is proposed in this Article except in its paragraph (g).

As to paragraph (g), it is proposed, for the reasons stated in the comments 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 of appointing the Secretary-General. As to the other staff, including "senior officials," see Article 23(3). The terms of appointment of the Secretary-General are, according to the present text (Article 23(3)), determined by the Swiss Government; it is proposed that they be determined by the Council.

It is to be noted that the majority required for a decision under paragraph (d) (approval of the budget, fixation 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

Duties of the Council

The duties 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 and determine the terms of his appointment;

(h) [No change]

0234

Comments 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 in the proposed new text for decisions made under:

- Article 20(1): adoption of the rules of procedure (in the present text, of the member States; in the proposed new text, of the member States present and voting);
- Article 20(2): adoption of the administrative and financial regulations (in the present text, of the member States; in the proposed new text, of the member States present and voting);
- Article 21(d): approval of the budget and fixing of the contributions;
- Article 26(5): halving of the contributions in certain cases;
- Article 26(6): restoration of voting rights;
- Article 28(3): designation of further languages for the Office and certain meetings.

The same qualified majority is provided for in the new text also for decisions in the following two cases, 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;
- Article 25: adoption of an agreement on technical and administrative cooperation.

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.

Finally, the proposed new text makes it clear that abstentions are not to be considered votes. Such 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).

OBSERVATION

It is still to be decided whether a quorum should be required for Council decisions or at least for some of them.

Under the present text no quorum is required, except in the case of Article 32(3) which, however, is proposed to be amended in a way that eliminates the need of any decision by the Council.

It is not recommended to introduce a quorum requirement. In the fifth session of the Committee of Experts, it was proposed to provide for a quorum and that the quorum be three-quarters of the member States. Such a requirement could cause difficulties once the Union will have a higher number of States, some of them far from Geneva; travel costs of delegates may prevent such States to attend all sessions of the Council. Nevertheless, if it is considered indispensable to provide for a quorum, the following rules could be adopted as paragraphs (2) and (3) of Article 22 (they are similar to those contained in comparable other Conventions; see, for example, Article 13(4) of the Stockholm Act of the Paris Convention for the Protection of Industrial Property):

"(2) One-half of the member States of the Council shall constitute a quorum.

"(3) Notwithstanding the provisions of paragraph (2), if, in any session, the number of members represented is less than one-half but equal to or more than one-third of the members, the Council may make decisions but, with the exception of decisions concerning its own procedure, all such decisions shall take effect only if the conditions set forth hereinafter are

[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(1) and (2), 21(d), 25, 26(5) and (6), 27(2) and 28(3) shall require three-fourths of the votes of the members present and voting. Abstentions shall not be considered as votes.

[Comments on Article 22, continued]

fulfilled. The Secretary-General shall communicate the said decisions to the members of the Council which were not represented and shall invite them to express in writing their vote or abstention within a period of three months from the date of the communication. If, at the expiration of this period, the number of members having thus expressed their vote or abstention attains the number of members which was lacking for attaining the quorum in the session itself, such decisions shall take effect provided that at the time the required majority still obtains."

At the fifth session of the Committee of Experts, another proposal was also made, namely that the Council be authorized under the Convention to establish the quorum for its own decisions in the Rules of Procedure of the Council, and that, for adopting the Rules of Procedure, a quorum should be required in the Convention itself. This solution would have the relative advantage of being more flexible. It would allow the Council to adapt the quorum to the development of the Union. If this proposal is followed, the following paragraph could be added to Article 22:

"(2) The Rules of Procedure of the Council (Article 20(1)) shall fix the number of its members which have to be represented in any session of the Council in which a decision is to be taken (quorum). For the adoption or amending the rule on the quorum, the quorum shall be three-quarters of the member States of the Union."

Comments on Article 23

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

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

OBSERVATION

The WIPO Convention provides, inter alia, that "the Director General shall be the chief executive of the Organization" and that "he shall represent the Organization" (Article 9(4)(a) and (b)). The Committee of Experts may wish to examine the desirability to parallel these provisions in the new Act of the UPOV Convention.

Ad paragraph (3): It is proposed that this paragraph deal no longer with the appointment of the Secretary-General since that matter would, in the new text, be dealt with in Article 21(g). On the other hand, it would seem to be desirable that the Vice Secretary-General should be mentioned expressis verbis in the Convention in view of the special situation which exists at the present time, and which presumably will continue to exist as long as the arrangements with WIPO continue, namely that the Secretary-General is the same person as the Director General of WIPO. The proposed wording would mean that for the appointment of the Vice Secretary-General there would have to be an agreement between the Council and the Secretary-General. As far as the other staff of the UPOV Office is concerned, the proposal would mean that there would have to be an agreement between the Secretary-General and the Vice-Secretary-General. The agreement between UPOV and WIPO would continue to provide for safeguards concerning direct access in certain cases by the Vice Secretary-General to the Council.

As for the reasons of not mentioning the Swiss Government, see the comments 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) The Council shall appoint the Vice Secretary-General on the proposal of the Secretary-General. Other officials of the Office of the Union shall be appointed by the Secretary-General on the proposal of the Vice Secretary-General. The conditions of employment shall be fixed in the administrative and financial regulations referred to in Article 20(2).

Comments on Article 24

For the reasons stated in the comments on Article 15, it is proposed that this Article no longer provide for 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 (or of external auditors) designated, to this effect, by the Council. Such a State may be Switzerland, and it would have to be Switzerland as long as Switzerland is (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 or by external auditors as provided in the administrative and financial regulations referred to in Article 20(2). Such State or auditors shall be designated, with its or their agreement, by the Council.

0249

Comments on Article 25

For the reasons stated in the comments on Article 15, it is proposed to discontinue the special role of the Swiss Government provided for in the present text of the Article under consideration.

The new text would also have to discontinue to refer to "the United International Bureaux for the Protection of Industrial, Literary and Artistic Property" as WIPO has, since 1970, taken the place of those Bureaux (see the comments on Article 15).

The question arises whether the new text should refer to WIPO (Alternative B) or should merely speak about "another intergovernmental organization" (Alternative A). The former solution would, as the present text does, establish a link with a specific organization. The latter solution would open the possibility for the Council to replace the link UPOV has today with WIPO by a similar link with another organization.

The proposed text provides for both alternatives. A choice between the two will have to be made.

It is to be noted that the majority required in the Council for the conclusion and any amendment of the agreement would be three-fourths (see Article 22).

OBSERVATION

In its last session, the Committee of Experts arrived at the tentative conclusion that this Article should not refer to either BIRPI or WIPO but that it should leave open the question with which organization, if any, UPOV should establish administrative links. Alternative A in the proposed new text corresponds to this conclusion except that the text arrived at by the last session of the Committee of Experts* also referred to the Swiss Government since, at that time, the proposal to transfer the special functions of the Swiss Government on the Council was not yet made or discussed.

The Committee of Experts may also wish to examine the desirability of including provisions on a headquarters agreement and on privileges and immunities.

* "In the event that the Union for the Protection of New Varieties of Plants considers it necessary to establish technical and administrative cooperation with another international organization, the procedures for such cooperation shall be governed by rules established by the Government of the Swiss Confederation in agreement with the said organization and the said Union."

[Present 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.

[New Text]

Article 25

Cooperation with [Another
Organization] [WIPO]

The Union may, pursuant to a decision of the Council, conclude an agreement with [Alternative A: another intergovernmental organization] [Alternative B: the World Intellectual Property Organization] for the purposes of technical and administrative cooperation between the two organizations.

0244

Comments on Article 26

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

Ad paragraph (2): No amendment is proposed in this paragraph, except that its two subparagraphs be identified by the letters "(a)" and "(b)".

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 be identified by the letters "(a)" and "(b)" and that the words "member" and "of the Union" be omitted in the first sentence since when the indication of the class is to be made the State is not yet a member of the Union.

Ad paragraph (5): It is proposed to omit the words "or until the Council revokes its decision" appearing at the end of the present text of this paragraph. A Council decision allowing a State to pay only one-half of the lowest contribution unit (Class V) may be decisive for that State to become a member of the Union. Such State should be able to rely on that decision. Such reliance would not be possible if the Council could--as the present text enables it to do so--revoke its decision and thereby double the financial obligations of that State.

The replacement of the words "applying for accession to the Convention according to Article 32" by the words "intending to ratify, or to accede to, the Convention" corresponds to the amendment proposed to Article 32 (see there). The required majority would be three-fourths (see Article 22).

OBSERVATION

The Committee of Experts may wish to consider two further possibilities for amending Article 26.

One would consist in introducing, in the first sentence of paragraph (5), the words "or any other smaller fraction" after the words "one-half." Such an amendment would give the right to the Council to allow a State to pay less than one half of the smallest contribution. The present ratio between the half of the lowest (Class V or I unit) contribution and the highest contribution (Class I or 5 units) is 1 to 10.

It is to be noted that the ratio between the lowest and the highest contribution is 1 to 25 under the Paris Convention for the Protection of Industrial Property; it is 1 to 1,250 in the United Nations.

The other possibility would consist in empowering the Council to amend paragraph (2) of the Article under consideration by a simplified procedure, as it is the case in some other comparable Conventions. This could be done through adding a new paragraph (7) which could be worded as follows:

"(7)(a) Any member State, the Council or the Secretary-General may propose amendments to the list of classes contained in paragraph (2)(a) which change the number of the classes and the number of the units assigned to each class.

(b) Such proposals shall be communicated by the Secretary-General to the member States of the Union at least six months in advance of their consideration by the Council.

(c) Any such amendment shall be adopted by the Council. It may also be adopted by a conference convened according to Article 27.

(d) Any such amendment adopted by the Council shall enter into force three months after written notifications of acceptance, effected in accordance with their respective constitutional processes, have been received by the Secretary-General from three-fourths of the States members of the Union at the time the Council adopted the amendment; it shall be applied from January 1 of the year subsequent to the date of its entry into force. Each member State shall, prior to the date from which the amendment shall be applied, notify the Secretary-General of the class of the new list in which it belongs; failing such notification, the State shall be assigned a class by the Council."

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

(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 the present text.]

(5) At the request of a member State of the Union or of a State intending to ratify, or accede to, the Convention 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.

0246

[Comments on Article 26, continued]

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

[Article 26, continued]

0247

(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.

(6) [No change]

0249

Comments on Article 27

Ad paragraph (1): Experience has shown that rules which require periodic--once every five years--revisions are not practical since the need for revisions 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 contained in paragraph (2) according to which, generally, each period is five years long. Furthermore, it is proposed to abandon the words "with a view to the introduction of amendments designed to improve the working of the Union" since this objective goes without saying and, at the same time, may not cover all the objectives of a revision.

Ad paragraph (2): As to the elimination of the five-year rule, see the comments on the preceding paragraph. The rule concerning the required majority would be transferred into Article 22 (see there); it would lower the majority from five-sixths to three-fourths.

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

Ad paragraph (4) of the present text: It is proposed to omit this paragraph which, by the way, is unclear on several points (do accessions really not count? which member States are meant: the members at the time of the revision conference or at some later point in time? etc.). The conditions of the entry into effect of any revised text should--as is customary--be fixed by each 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 (it provides for an entry into effect date for one of the provisions (namely Article 26(6)), which is necessarily different from the entry into effect date of the other provisions, although Article 27(4) does not permit different entry into effect dates for different provisions; furthermore, it provides, for the said provision, for an entry into effect without any of the two waiting periods (30 days or two years) provided for in Article 27(4).)

[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 special conference of the member States of the Union.

(2) The convocation of any revision conference shall be decided by the Council.

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

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

0230

Comments 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 into Article 22 (see there).

[Present Text]

[New Text]

Article 28

Article 28

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

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.

- (1) [No change]
- (2) [No change]
- (3) If the need arises, the Council may decide that further languages shall be used.

Comments on Article 29

No amendment is proposed in this Article except to give numbers "(1)" and "(2)" to what are two unnumbered paragraphs in the present text.

[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

(1) [Same as the (unnumbered) first paragraph of the present text.]

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

Comments on Article 30

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

Ad paragraph (2): The only amendment proposed is to delete the word "new." For explanations, see the Observation under Article 1(1) in document IRC/VI/2.

Ad paragraph (3): It is proposed to omit the word "member" in the English text. That word has no counterpart either in the original French text or in the German text; on depositing its instrument of ratification or accession, such State is not yet a member of the Union.

[Present Text]

Article 30

Implementation of the Convention
on the Domestic Level; Special
Agreements on the Joint Utilisa-
tion 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; Special
Agreements on the Joint Utilisa-
tion of Examination Services

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

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

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

0256

Comments on Article 31

Ad paragraph (1): The proposed new text would enable any member State of the Union to sign the revised Act; this is only natural. It would also enable other States to sign the revised Act if they were represented in the Diplomatic Conference adopting that Act; this provision parallels the present text which enabled all States that were represented in the Diplomatic Conference of 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 Revision Conference, will have the possibility of actively participating in the said Conference.

Finally, States signing the new Act will, correctly, 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 Revision Conference is scheduled for October 1978, the date proposed in the new text would leave the revised Act open for signature for roughly six months. Any longer period, up to one year, would be conform to international practice.

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

[New Text]

Article 31

Signature

This Act may be signed 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 April 30, 1979.

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

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

Comments on Article 32

Ad paragraph (1) in the proposed new text: Since, according to Article 31, not only member States but also any non-member State represented in the Diplomatic Conference adopting the new Act could sign that Act, such a State would be entitled to ratify --rather than accede to--the new Act.

Ad paragraph (2) in the proposed new text: The possibility to accede to the new Act would be open for member States which did not sign the new Act, for non-member States represented in the Diplomatic Conference which did not sign the new Act and for non-member States which were not represented in the Diplomatic Conference.

There would be no provisions in the new text corresponding to the "admission procedure" provided for in Article 32(3) and (4), first subparagraph, of the present text. Under that procedure, any State other than the eight signatories of the 1961 Convention (Belgium, Denmark, France, Germany (Federal Republic of), Italy, Netherlands, Switzerland, United Kingdom), if it wishes to become a member of UPOV, must apply for membership and it is the Council of UPOV which decides on the application.

It is proposed to discontinue the said admission procedure mainly for the following two reasons:

(i) The present admission procedure--so far applied only in two cases (South Africa and Sweden)--apparently serves the purpose of making sure that only such States should become members of UPOV whose national law conforms with the UPOV Convention. The Council sits in judgement on the question. This fact is not very agreeable for the Government which is the applicant since it carries with it an implication that the said Government is not, or less, able to evaluate the conformity of its own law with the Convention than is the Council. Furthermore, the procedure is not guaranteeing that this conformity--judged just before the State's entry into the Union--will continue since the Council has no say when a member State modifies its legislation after its becoming a member of the Union. In particular, it has no power to expel any member State whose law becomes incompatible with the Convention.

(ii) An admission procedure, at least in treaties of a technical, rather than political, nature--and the UPOV Convention is certainly of such a nature--is unusual. By this mere fact, it may make States hesitate to submit themselves to such a procedure. If this is so--and it is believed that it is--maintaining the admission procedure might endanger the attainment of what is one of the aims of the proposed revision: to make it possible for the greatest number of non-member States to become members.

Abandoning the admission procedure would be particularly justified in the case of States which are represented in the Diplomatic Conference since they had ample opportunity to understand and, in most cases, participate in the actual formulation of the provisions of the Convention so that they will have the necessary, desired knowledge to judge whether their national laws conform to the Convention. Should one believe that States which are not represented in the Diplomatic Conference should be treated differently, one could provide for them a procedure which would require that, prior to accession, they have to ask for the advice of the Council on the conformity of their national laws with the Convention. Such an advisory procedure could be the subject of an additional paragraph in the proposed new text of Article 32 which could read as follows:

"(4) Any State which was not represented in the Diplomatic Conference which adopted this Act shall, before depositing its instrument of accession, transmit the text of its relevant laws to the Council, and the Council shall advise that State in respect of the conformity of such laws with the provisions of this Act."

Under this procedure, the instrument of accession could not be deposited before the advice is asked for and given. Once given, even if negative, the instrument could be deposited but it is unlikely that it would before the State eliminates, in its laws, any discrepancy with the Convention.

An alternative solution would consist in allowing any State, that is, not only those which were not represented in the Diplomatic Conference--wishing to accede to the Convention--to ask for advice and obliging the Council to give such advice. Such a solution could find expression among the tasks of the Council, could become a new point in Article 21, and could be worded as follows:

[Present Text]

Article 31

[... Ratifications ...]

- (1) [See opposite Article 31 of the proposed 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 proposed 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 having signed this Act may ratify it.

- (2) Any State which has not signed this Act may accede to it.

- (3) 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 proposed new text.]

[Article 32A follows]

[Comments on Article 32, continued]

"The duties of the Council shall be to:

"...

"(i) give advice to any State intending to accede to this Act on the conformity of the laws of that State with the provisions of this Act."

Ad paragraph (3) in the proposed 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 as far as 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, concerning treaties concluded under the aegis of 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 is promptly notified to the member States. Notifications are made not only in one but in various languages. Enquiries are promptly answered and replies are based on the Secretariat's own knowledge rather than on information received from other sources.

*

In respect of the present text, the French Government and the Swiss Government would continue to perform the depositing functions.

Comments on Article 32A

Ad paragraph (1) in the proposed new text: The Convention of 1961 required three ratifications for its entry into force. It is proposed that the new Act enter into force if five States have ratified or acceded to it. The number is still relatively low but it should result in a relatively early entry into force of the new Act. Such a result is desirable because if States presently non-members of the Union are among the said five, their membership in the Union would soon become a reality.

Ad paragraph (2) in the proposed new text: This paragraph would lead to practically the same results as Article 31(3), second sentence, and Article 34(2), of the present text.

Ad paragraph (3) in the proposed new text: This paragraph would "close" the Convention of 1961 and 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 that different texts may be applied among member States or that, once the new Act applies among all member States, the old texts may be revived 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 proposed new text.]
- (2) [See opposite Article 32 of the proposed 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 proposed new text.]
- [(3), 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 deposit of the fifth instrument of ratification or accession.

- (2) With respect to any State which deposits its instrument of ratification or accession to this Act after the date of its entry into force, this Act shall enter into force one month after the deposit of such instrument.

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

[Article 32B follows]

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

Comments 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--or that Convention 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 to the new members;

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

Thus, there could be protection in both directions, although their contents would (slightly) differ from each other.* 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 comments on Article 32(3).

* 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 [or that Convention]* 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 [or the said Convention]* as amended by the Additional Act [as the case may be]*.

(2) Any member State of the Union not bound by this Act but bound by the Convention of 1961 [or that Convention]* 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 [or the said Convention] as amended by the said Additional Act [, as the case may be,]* in its relation 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 [or that Convention]* as amended by the Additional Act of 1972, [as the case may be,]* 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]

* Only one State, the United Kingdom, is not yet bound by the Additional Act of 1972. Should, by the time of the Diplomatic Conference, the United Kingdom also be bound by that Act, the words in square brackets will become superfluous and should be deleted.

Comments 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 Comments on Article 32(2)). 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 Convention in its territory," it is to be noted that, according to Article 4(3)(a) 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 Convention enters into force on its territory. As to the transfer of the depositary functions on the Secretary-General, see the comments on Article 32(3).

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

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) in the present text, or paragraph (6) of the proposed new text, of Article 4, deals with the possibility of reciprocity among member States not protecting the same genera and species.

Item (iii) 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 (iv) 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 (v) 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 comments on Article 6(1)(b), in document IRC/VI/2, page 16).

Item (vi) 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 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 Convention in its territory, 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 4(6),

(iii) 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,

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

(v) 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,

(vi) 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.

Comments on Article 34

It is proposed that Article 34 of the present text be omitted in the new text. Any relevant information could be communicated by the interested member State, through the Secretary-General, to the other member States.

[Present Text]

[New 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.

[There would be no provision in the new text corresponding to Article 34 of the present text.]

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.

[For Articles 34A, 35, 36 and 36A, see document IRC/VI/2; in the present document, Article 37 follows]

[Present Text]

Article 37

[Preservation of Existing Rights]

This Convention shall not affect existing rights under the national laws of member States of the Union or under agreements concluded between such States.

[New Text]

Article 37

Preservation of Existing Rights

[No change]

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Comments on Article 38

Ad paragraphs (1) to (6): No amendment is proposed in any of the provisions of this Article.

See, however, the proposed new text of Article 39 which would allow any State to make a reservation as to this Article (namely Article 38).

[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) [No change]

(3) [No change]

(4) [No change]

(5) [No change]

(6) [No change]

Comments on Article 39

Ad paragraph (1) in the new text: Except as to a reference to paragraph (2) ("Subject to paragraph (2)"), this paragraph in the new text would be the same as the only paragraph of the present text.

Ad paragraph (2): It is proposed that any State may be allowed to exclude the application of Article 38. That Article provides for compulsory arbitration. Such a clause may cause insurmountable difficulties in some States for the ratification or accession to the UPOV Convention. In order to avoid the risk of such a difficulty, it is proposed to allow, on this one point, reservation, the more so as it is unlikely that the need or desire to have recourse to arbitration will occur in matters regulated by a treaty of the kind of the UPOV Convention.

OBSERVATION

This is a new proposal, not emanating from the Committee of Experts.

An alternative solution would consist of allowing the reservation to be made only in respect of paragraphs (2) to (6) of Article 38. Such a solution would leave intact the conciliation procedure before the Council, provided for in paragraph (1) of that Article.

[Present Text]

Article 39

[Reservations]

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

[There is no provision in the present text which corresponds to the proposed paragraph (2) in the new text.]

[New Text]

Article 39

Reservations

(1) Subject to paragraph (2), signature and ratification of and accession to this Act shall not be subject to any reservation.

(2) Any State may, at the time it signs this Act or deposits its instrument of ratification or accession, declare that it does not consider itself bound by the provisions of Article 38. Any State having made the said declaration may, at any time, withdraw it by notification addressed to the Secretary-General.

Comments on Article 40

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

Ad paragraph (2) of the proposed 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 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 comments on Article 32(3).

Ad paragraph (3) of the proposed 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 the denunciation 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 of UPOV.

It is to be noted that the new text would contain no provisions corresponding to paragraph (3) of the present text since that paragraph deals with Article 34, and the provisions appearing in Article 34 of the present text would not appear in the new text.

Ad paragraph (4): The essence of this paragraph would remain unchanged.

[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.

[There would be no provision in the new text corresponding to the provisions of paragraph (3) of the present 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.

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Comments on Article 41

Ad paragraph (1) of the proposed 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 comments on Article 32(3).

Ad paragraph (2) of the proposed 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) of the proposed 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 comments made in the preceding paragraph apply here too.

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

Ad paragraph (5) of the proposed new text: The comments made on paragraph (2) apply here too. Article 34A deals with protection under two forms, Article 36A with denominations consisting solely of figures and Article 39(2) with settlement of disputes.

OBSERVATION

It is proposed that the revised Act be established in the three working languages of the Union, the French text prevailing in case of discrepancies among the texts. The other proposed provisions follow established practice.

[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 that Diplomatic Conference that has adopted it, of the signature of this Act, the deposit of instruments of ratification, accession and any denunciation, as well as of any notification received under Article 34A or Article 36A or of any declaration made under Article 39(2).

[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.