

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

Geneva, 1991

UPOV

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

(UPOV)

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EDITOR'S NOTE

These **Records** contain the documents of lasting importance which were issued before, during and shortly after the **Diplomatic Conference for the Revision of the International Convention for the Protection of New Varieties of Plants** which was held in Geneva, at the headquarters of the International Union for the Protection of New Varieties of Plants (UPOV), from March 4 to 19, 1991.

The Convention was adopted initially in Paris on December 2, 1961. It was supplemented by an Additional Act adopted in Geneva on November 10, 1972. In 1978, it underwent its first comprehensive revision, which was reflected in the "Geneva Act of October 23, 1978" or "1978 Act."

The purpose of the Conference to which these Records relate was to revise the Convention once again. All the member States were represented by duly accredited Delegations; 27 non-member States were represented by Observer Delegations and 25 international organizations had delegated representatives.

On March 19, at the end of its discussions, the Conference adopted a revised Act of the International Convention for the Protection of New Varieties of Plants ("the 1991 Act"), a Resolution, a Recommendation and a Common Statement. The 1991 Act was signed immediately on adoption by the following ten member States: Belgium, Denmark, France, Germany, Italy, Netherlands, South Africa, Spain, Switzerland, United Kingdom. It was signed later by the following member States: Israel on October 23, 1991; the United States of America on October 25, 1991; Sweden on December 17, 1991; New Zealand on December 19, 1991; Ireland on February 21, 1992; Canada on March 9, 1992.

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This volume comprises the parts briefly described below.

Basic Texts

This part of the Records contains (*from page 12 to page 61*), on the *right-hand pages*, the final text—the text as adopted and signed—of the **International Convention for the Protection of New Varieties of Plants of December 2, 1961, as Revised at Geneva on November 10, 1972, on October 23, 1978, and on March 19, 1991**, and, on the *left-hand pages*, the corresponding text of the **Basic Proposal** (the text submitted to the Conference as the basis for its discussions). In order to facilitate comparisons, the full text of the draft provisions is replaced, where it is identical with that of the final text, by a reference to that fact.

It also contains (*on page 63*) the text of three further instruments adopted by the Conference, namely: a **Resolution on Article 14(5)** (on the establishment of draft standard guidelines on essentially derived varieties), a **Recommendation Relating to Article**

15(2) (on the extent of the possible exclusion of farm-saved seed from protection) and a **Common Statement Relating to Article 34** (on the territorial application of the 1991 Act in respect of Denmark and of the Netherlands).

Finally, it gives (*on pages 65 to 67*) the **list of the signatories of the 1991 Act**, which was open for signature until March 31, 1992.

Final Act

This part (*page 71*) contains the text of the Final Act adopted by the Conference and signed by 24 member and non-member States, and the list of those States.

Conference Documents

This part (*pages 75 to 158*) contains the full text of, or relevant indications concerning, the 143 documents which were issued before, during or shortly after the Conference. They include, in particular, the **Rules of Procedure of the Diplomatic Conference**, all the **written proposals for amendments** submitted by Member Delegations and the **reports of the subsidiary organs of the Conference**.

Summary Minutes

The **Summary Minutes of the Plenary Meetings of the Conference** were first written in provisional form by the Office of the Union on the basis of transcripts of the tape recordings which were made of all interventions. The tapes and the transcripts are preserved in the archives of the Office of the Union. The provisional minutes were then made available to the speakers with the invitation to make suggestions for changes where desired. The final minutes, published in this volume (*on pages 161 to 476*), take such suggestions into account.

Participants

This part (*pages 479 to 496*) lists the individuals who took part in the Conference as **representatives** of member States of the Union, observer (non-member) States or international organizations, or as **members of the Secretariat of the Conference** (the report of the Credentials Committee appears on pages 148 to 151 and is supplemented by paragraphs 1763 to 1769 and 1965 to 1967 of the Summary Minutes, appearing on pages 441 and 442, and 474, respectively). It also lists the **officers of the Conference and of the committees and working groups** established by it.

Indexes

The Records contain six indexes.

The first two indexes (*pages 501 to 533*) relate to the subject matter of the 1991 Act.

The *first index* (**Index to the Articles of the 1991 Act**) lists by number each Article of the Act and indicates, for each Article: the pages where the text of the draft and the

final text appear in these Records; the reference numbers of the documents containing the written proposals for amendments and the pages where they are reproduced; the serial numbers of the paragraphs of the Summary Minutes which reflect the discussion on and adoption of the Article; any other references that may assist the user of these Records.

The *second index (Catchword Index)* lists alphabetically the main subjects dealt with in the 1991 Act and indicates the corresponding Article(s). The first index is then to be consulted for further references concerning the Conference.

The last four indexes (*pages 535 to 567*) relate to the participants in the Conference.

The *third index (Index of Member Delegations)* is an alphabetical list of the member States of the Union showing, for each State, where to find: the names of the members of its delegation; the written proposals for amendments submitted by its delegation; the interventions made on its behalf in the Plenary meetings of the Conference; where relevant, the references to the signature on its behalf of the 1991 Act and the Final Act.

The *fourth index (Index of Observer Delegations)* is an alphabetical list of the non-member States of the Union which participated in the Conference, with the status of Observer Delegation, showing, for each State, where to find: the names of the members of its delegation; the interventions made on its behalf in the Plenary meetings of the Conference; where relevant, the reference to the signature on its behalf of the Final Act.

The *fifth index (Index of Organizations)* is a list—in the order adopted in Annex II to the Provisional Rules of Procedures of the Diplomatic Conference—of the organizations which participated in the Conference, with the status of Observer Organization or Observer Delegation, showing, for each organization, where to find: the names of its representatives; the interventions made on its behalf in the Plenary meetings of the Conference.

The *sixth index (Index of Participants)* is an alphabetical list of the participants indicating, for each of them: the State or organization which he represented; the place in these Records where his name appears as an officer of the Conference or of a subsidiary organ of the Conference, as a speaker in the Plenary, or as a plenipotentiary signing the 1991 Act or the Final Act.

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These Records exist also in French and German.

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on October 23, 1978, and on March 19, 1991

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BASIC PROPOSAL**BASIC PROPOSAL*
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NEW ACT OF THE INTERNATIONAL CONVENTION FOR THE
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* The Basic Proposal was adopted by the Council of UPOV on October 19, 1990, and distributed as document DC/91/3, dated November 9, 1990.

Pursuant to Rule 29(1) of the Rules of Procedure of the Diplomatic Conference, "Document DC/91/3 shall constitute the basis for the discussions of the Conference, and the text of the draft new Act appearing in that document shall constitute the 'Basic Proposal.' Where the Basic Proposal contains two or more alternatives or words in square brackets, only Alternative A and the text not between square brackets shall be regarded as forming part of the Basic Proposal, all the other alternatives and all the words in square brackets being regarded as proposals for amendments if they are submitted [by any Member Delegation]."

The Basic Proposal contained references to the corresponding provisions of the 1978 Act. These references have been adapted in these Records to the adopted text. (Editor's Notes)

ADOPTED TEXT**INTERNATIONAL CONVENTION
FOR THE PROTECTION OF NEW VARIETIES OF PLANTS**

of December 2, 1961,
as Revised at Geneva on November 10, 1972,
on October 23, 1978, and on March 19, 1991*

LIST OF ARTICLES**Chapter I: Definitions**

Article 1: Definitions

Chapter II: General Obligations of the Contracting Parties

Article 2: Basic Obligation of the Contracting Parties
Article 3: Genera and Species to be Protected
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Chapter III: Conditions for the Grant of the Breeder's Right

Article 5: Conditions of Protection
Article 6: Novelty
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Chapter IV: Application for the Grant of the Breeder's Right

Article 10: Filing of Applications
Article 11: Right of Priority
Article 12: Examination of the Application
Article 13: Provisional Protection

* The text as adopted was published as document DC/91/138, entitled "Final Draft" and dated March 19, 1991. (Editor's Note)

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ADOPTED TEXTChapter V: The Rights of the Breeder

- Article 14: Scope of the Breeder's Right
- Article 15: Exceptions to the Breeder's Right
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- Article 18: Measures Regulating Commerce
- Article 19: Duration of the Breeder's Right

Chapter VI: Variety Denomination

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Chapter VII: Nullity and Cancellation of the Breeder's Right

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- Article 30: Implementation of the Convention
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- Article 41: Original and Official Texts of the Convention
- Article 42: Depositary Functions

BASIC PROPOSAL**CHAPTER I****DEFINITIONS****Article 1*****Definitions**

For the purposes of this Act:

- (i) [Same as in the adopted text]

- (ii) [Same as in the adopted text]

- (iii) [Same as in the adopted text]

- (iv) "breeder" means
 - the person who bred or discovered a variety,
 - where the laws of the relevant Contracting Party provide that the breeder's right vests in the party who or which is the employer of such person or who or which has commissioned the work of such person, the said party, or
 - the successor in title of such person or the said party, as the case may be;

- (v) [Same as in the adopted text]

- (vi) "variety" means a group of plants, which group, irrespective of whether the conditions for the grant of a breeder's right are fully met,
 - can be defined by the characteristics that are the expression of a given genotype or combination of genotypes and
 - can be distinguished from other groups of plants of the same botanical taxon by at least one of the said characteristics.A particular variety may be represented by several plants, a single plant or by one or several parts of a plant, provided that such part or parts can be used for the production of entire plants of the variety;

- (vii) [Same as in the adopted text]

- (viii) [Same as in the adopted text]

* There is no corresponding provision in the 1978 Act.

ADOPTED TEXT

CHAPTER I

DEFINITIONS

Article 1Definitions

For the purposes of this Act:

(i) "this Convention" means the present (1991) Act of the International Convention for the Protection of New Varieties of Plants;

(ii) "Act of 1961/1972" means the International Convention for the Protection of New Varieties of Plants of December 2, 1961, as amended by the Additional Act of November 10, 1972;

(iii) "Act of 1978" means the Act of October 23, 1978, of the International Convention for the Protection of New Varieties of Plants;

(iv) "breeder" means

- the person who bred, or discovered and developed, a variety,
- the person who is the employer of the aforementioned person or who has commissioned the latter's work, where the laws of the relevant Contracting Party so provide, or
- the successor in title of the first or second aforementioned person, as the case may be;

(v) "breeder's right" means the right of the breeder provided for in this Convention;

(vi) "variety" means a plant grouping within a single botanical taxon of the lowest known rank, which grouping, irrespective of whether the conditions for the grant of a breeder's right are fully met, can be

- defined by the expression of the characteristics resulting from a given genotype or combination of genotypes,
- distinguished from any other plant grouping by the expression of at least one of the said characteristics and
- considered as a unit with regard to its suitability for being propagated unchanged;

(vii) "Contracting Party" means a State or an intergovernmental organization party to this Convention;

(viii) "territory," in relation to a Contracting Party, means, where the Contracting Party is a State, the territory of that State and, where the Contracting Party is an intergovernmental organization, the territory in which the constituting treaty of that intergovernmental organization applies;

BASIC PROPOSAL

- (ix) [Same as in the adopted text]
- (x) "Union" means the Union for the Protection of New Varieties of Plants constituted by the Act of 1961/1972 and further mentioned in the Act of 1978 and in this Convention;
- (xi) "member of the Union" means a State party to the Act of 1961/1972 or the Act of 1978, and a Contracting Party;
- (xii) "Secretary-General" means the Secretary-General of the Union.

CHAPTER II**GENERAL OBLIGATIONS OF THE CONTRACTING PARTIES****Article 2*****Basic Obligation of the Contracting Parties**

[Same as in the adopted text]

Article 3****Genera and Species to be Protected**

- (1) [Same as in the adopted text]
- (i) [Same as in the adopted text]
- (ii) at the latest by the expiration of a period of three years after the said date, to all plant genera and species.
- (2) [Same as in the adopted text]
- (i) at the date on which it becomes bound by this Convention, to at least 25 plant genera or species and,
- (ii) [Same as in the adopted text]

* Corresponding provision in the 1978 Act: Article 1(1).

** Corresponding provisions in the 1978 Act: Article 4.

ADOPTED TEXT

(ix) "authority" means the authority referred to in Article 30(1)(ii);

(x) "Union" means the Union for the Protection of New Varieties of Plants founded by the Act of 1961 and further mentioned in the Act of 1972, the Act of 1978 and in this Convention;

(xi) "member of the Union" means a State party to the Act of 1961/1972 or the Act of 1978, or a Contracting Party.

CHAPTER II**GENERAL OBLIGATIONS OF THE CONTRACTING PARTIES****Article 2****Basic Obligation of the Contracting Parties**

Each Contracting Party shall grant and protect breeders' rights.

Article 3**Genera and Species to be Protected**

(1) [States already members of the Union] Each Contracting Party which is bound by the Act of 1961/1972 or the Act of 1978 shall apply the provisions of this Convention,

(i) at the date on which it becomes bound by this Convention, to all plant genera and species to which it applies, on the said date, the provisions of the Act of 1961/1972 or the Act of 1978 and,

(ii) at the latest by the expiration of a period of five years after the said date, to all plant genera and species.

(2) [New members of the Union] Each Contracting Party which is not bound by the Act of 1961/1972 or the Act of 1978 shall apply the provisions of this Convention,

(i) at the date on which it becomes bound by this Convention, to at least 15 plant genera or species and,

(ii) at the latest by the expiration of a period of 10 years from the said date, to all plant genera and species.

BASIC PROPOSAL**Article 4*****National Treatment**

(1) [Treatment] Without prejudice to the rights specified in this Convention, nationals of a Contracting Party as well as natural persons resident and legal entities having their registered offices within the territory of a Contracting Party shall, insofar as the protection of varieties is concerned, enjoy within the territory of each other Contracting Party the same treatment as is accorded or may hereafter be accorded by the laws of each such other Contracting Party to its own nationals, provided that the said nationals, natural persons or legal entities comply with the conditions and formalities imposed on the nationals of the said other Contracting Party.

(2) ["Nationals"] For the purposes of the preceding paragraph, "nationals" means, where the Contracting Party is a State, the nationals of that State and, where the Contracting Party is an intergovernmental organization, the nationals of the States members of that organization.

CHAPTER III**CONDITIONS FOR THE GRANT OF THE BREEDER'S RIGHT****Article 5******Conditions of Protection**

(1) [Same as in the adopted text]

(2) [Same as in the adopted text]

* Corresponding provisions in the 1978 Act: Article 3(1) and (2).

** Corresponding provisions in the 1978 Act: Article 6(1), introduction and (e), and (2).

ADOPTED TEXT

Article 4

National Treatment

(1) [Treatment] Without prejudice to the rights specified in this Convention, nationals of a Contracting Party as well as natural persons resident and legal entities having their registered offices within the territory of a Contracting Party shall, insofar as the grant and protection of breeders' rights are concerned, enjoy within the territory of each other Contracting Party the same treatment as is accorded or may hereafter be accorded by the laws of each such other Contracting Party to its own nationals, provided that the said nationals, natural persons or legal entities comply with the conditions and formalities imposed on the nationals of the said other Contracting Party.

(2) ["Nationals"] For the purposes of the preceding paragraph, "nationals" means, where the Contracting Party is a State, the nationals of that State and, where the Contracting Party is an intergovernmental organization, the nationals of the States which are members of that organization.

CHAPTER III

CONDITIONS FOR THE GRANT OF THE BREEDER'S RIGHT

Article 5

Conditions of Protection

(1) [Criteria to be satisfied] The breeder's right shall be granted where the variety is

- (i) new,
- (ii) distinct,
- (iii) uniform and
- (iv) stable.

(2) [Other conditions] The grant of the breeder's right shall not be subject to any further or different conditions, provided that the variety is designated by a denomination in accordance with the provisions of Article 20, that the applicant complies with the formalities provided for by the law of the Contracting Party with whose authority the application has been filed and that he pays the required fees.

BASIC PROPOSAL**Article 6*****Novelty**

(1) [**Criteria**] The variety shall be deemed to be new if, at the date of filing of the application for a breeder's right, propagating or harvested material of the variety or any product directly obtained from the harvested material of the variety

(i) has not been sold or otherwise made available to others by or with the consent of the breeder, for purposes of exploitation of the variety, in the territory of the Contracting Party in which the application has been filed or, if the law of that Contracting Party so provides, earlier than one year before that date, and

(ii) has not been sold or otherwise made available to others by or with the consent of the breeder, for purposes of exploitation of the variety, in a territory other than that of the Contracting Party in which the application has been filed earlier than four years or, in the case of trees or of vines, earlier than six years before the said date.

(2) [**Varieties of recent creation**] Where a Contracting Party applies this Convention to a plant genus or species to which it did not previously apply this Convention or an earlier Act, it may consider a variety of recent creation existing at the date of such extension of protection to satisfy the condition of novelty defined in paragraph (1) even where the sale or making available to others described in that paragraph took place earlier than the time limits defined in that paragraph.

[There was no provision in the Basic Proposal corresponding to paragraph (3) of the adopted text.]

Article 7****Distinctness**

The variety shall be deemed to be distinct if it is clearly distinguishable from any other variety whose existence is a matter of common knowledge at the time of the filing of the application. In particular, the filing of an application for the granting of a breeder's right or for the entering of the variety in an official register of varieties, in any country, shall be deemed to render the variety a matter of common knowledge from the date of the application, provided that the application leads to the granting of a breeder's right or to the entering of the variety in the official register of varieties, as the case may be.

* Corresponding provisions in the 1978 Act: Articles 6(1)(b) and 38.

** Corresponding provision in the 1978 Act: Article 6(1)(a).

ADOPTED TEXT

Article 6

Novelty

(1) [Criteria] The variety shall be deemed to be new if, at the date of filing of the application for a breeder's right, propagating or harvested material of the variety has not been sold or otherwise disposed of to others, by or with the consent of the breeder, for purposes of exploitation of the variety

(i) in the territory of the Contracting Party in which the application has been filed earlier than one year before that date and

(ii) in a territory other than that of the Contracting Party in which the application has been filed earlier than four years or, in the case of trees or of vines, earlier than six years before the said date.

(2) [Varieties of recent creation] Where a Contracting Party applies this Convention to a plant genus or species to which it did not previously apply this Convention or an earlier Act, it may consider a variety of recent creation existing at the date of such extension of protection to satisfy the condition of novelty defined in paragraph (1) even where the sale or disposal to others described in that paragraph took place earlier than the time limits defined in that paragraph.

(3) ["Territory" in certain cases] For the purposes of paragraph (1), all the Contracting Parties which are member States of one and the same intergovernmental organization may act jointly, where the regulations of that organization so require, to assimilate acts done on the territories of the States members of that organization to acts done on their own territories and, should they do so, shall notify the Secretary-General accordingly.

Article 7

Distinctness

The variety shall be deemed to be distinct if it is clearly distinguishable from any other variety whose existence is a matter of common knowledge at the time of the filing of the application. In particular, the filing of an application for the granting of a breeder's right or for the entering of another variety in an official register of varieties, in any country, shall be deemed to render that other variety a matter of common knowledge from the date of the application, provided that the application leads to the granting of a breeder's right or to the entering of the said other variety in the official register of varieties, as the case may be.

BASIC PROPOSAL**Article 8*****Uniformity**

[Same as in the adopted text]

Article 9****Stability**

The variety shall be deemed to be stable if, so far as its relevant characteristics are concerned, it remains true to its description after repeated propagation or, in the case of a particular cycle of propagation, at the end of each such cycle.

CHAPTER IV**APPLICATION FOR THE GRANT OF THE BREEDER'S RIGHT****Article 10*******Filing of Applications**

(1) [Same as in the adopted text]

(2) [Same as in the adopted text]

[There was no provision in the Basic Proposal corresponding to paragraph (3) of the adopted text.]

* Corresponding provision in the 1978 Act: Article 6(1)(c).

** Corresponding provision in the 1978 Act: Article 6(1)(d).

*** Corresponding provisions in the 1978 Act: Article 11.

ADOPTED TEXT**Article 8****Uniformity**

The variety shall be deemed to be uniform if, subject to the variation that may be expected from the particular features of its propagation, it is sufficiently uniform in its relevant characteristics.

Article 9**Stability**

The variety shall be deemed to be stable if its relevant characteristics remain unchanged after repeated propagation or, in the case of a particular cycle of propagation, at the end of each such cycle.

CHAPTER IV**APPLICATION FOR THE GRANT OF THE BREEDER'S RIGHT****Article 10****Filing of Applications**

- (1) [Place of first application] The breeder may choose the Contracting Party with whose authority he wishes to file his first application for a breeder's right.
- (2) [Time of subsequent applications] The breeder may apply to the authorities of other Contracting Parties for the grant of breeders' rights without waiting for the grant to him of a breeder's right by the authority of the Contracting Party with which the first application was filed.
- (3) [Independence of protection] No Contracting Party shall refuse to grant a breeder's right or limit its duration on the ground that protection for the same variety has not been applied for, has been refused or has expired in any other State or intergovernmental organization.

BASIC PROPOSAL

Article 11*

Right of Priority

(1) [The right; its period] Any breeder who has duly filed an application for the grant of a breeder's right with the authority of [, or an application for another title of protection for a variety in,] one of the Contracting Parties (the "first application") shall, for the purpose of filing an application for the grant of a breeder's right for the same variety with the authority of any other Contracting Party (the "subsequent application"), 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) [Claiming the right] In order to benefit from the provisions of paragraph (1), the breeder shall, in the subsequent application, claim the priority of the first application. The breeder may be required to furnish, not earlier than three months from the filing date of the subsequent application, a copy of the documents which constitute the first application, certified to be a true copy by the authority with which that application was filed.

(3) [Supporting documents and material] The breeder shall be allowed a period of two years after the expiration of the period of priority or, where the first application is rejected or withdrawn, an appropriate time after such rejection or withdrawal, in which to furnish, to the authority of the Contracting Party with which he has filed the subsequent application, any additional documents and material supporting the priority claim, as required by the laws of that Contracting Party.

(4) [Same as in the adopted text]

Article 12**

Examination of the Application

Any decision to grant a breeder's right shall require an examination in the light of the criteria provided for in Articles 5 to 9. In the course of the examination, the authority may grow the variety or carry out other necessary tests, cause the growing of the variety or the carrying out of other necessary tests, or take into account the results of growing tests or other trials which have already been carried out. For the purposes of examination, the authority may require the breeder to furnish all the necessary information, documents or material.

* Corresponding provisions in the 1978 Act: Article 12.

** Corresponding provisions in the 1978 Act: Article 7(1) and (2).

ADOPTED TEXT

Article 11

Right of Priority

(1) [The right; its period] Any breeder who has duly filed an application for the protection of a variety in one of the Contracting Parties (the "first application") shall, for the purpose of filing an application for the grant of a breeder's right for the same variety with the authority of any other Contracting Party (the "subsequent application"), 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 the latter period.

(2) [Claiming the right] In order to benefit from the right of priority, the breeder shall, in the subsequent application, claim the priority of the first application. The authority with which the subsequent application has been filed may require the breeder to furnish, within a period of not less than three months from the filing date of the subsequent application, a copy of the documents which constitute the first application, certified to be a true copy by the authority with which that application was filed, and samples or other evidence that the variety which is the subject matter of both applications is the same.

(3) [Documents and material] The breeder shall be allowed a period of two years after the expiration of the period of priority or, where the first application is rejected or withdrawn, an appropriate time after such rejection or withdrawal, in which to furnish, to the authority of the Contracting Party with which he has filed the subsequent application, any necessary information, document or material required for the purpose of the examination under Article 12, as required by the laws of that Contracting Party.

(4) [Events occurring during the period] Events occurring within the period provided for in paragraph (1), such as the filing of another application or the publication or use of the variety that is the subject of the first application, shall not constitute a ground for rejecting the subsequent application. Such events shall also not give rise to any third-party right.

Article 12

Examination of the Application

Any decision to grant a breeder's right shall require an examination for compliance with the conditions under Articles 5 to 9. In the course of the examination, the authority may grow the variety or carry out other necessary tests, cause the growing of the variety or the carrying out of other necessary tests, or take into account the results of growing tests or other trials which have already been carried out. For the purposes of examination, the authority may require the breeder to furnish all the necessary information, documents or material.

BASIC PROPOSAL

Article 13*

Provisional Protection

Each Contracting Party shall provide measures designed to safeguard the interests of the breeder during the period between the filing or the publication of the application for the grant of a breeder's right and the grant of that right. Such measures shall have the effect that the holder of a breeder's right shall at least be entitled to equitable remuneration from any person who, during the said period, has carried out acts which, once the right is granted, require the breeder's authorization as provided in Article 14. A Contracting Party may provide that the said measures shall only take effect in relation to parties whom or which the breeder has expressly notified of the filing of the application.

CHAPTER V

THE RIGHTS OF THE BREEDER

Article 14**

Scope of the Breeder's Right

(1) [Acts requiring the breeder's authorization] Subject to Articles 15 and 16, the following acts shall require the authorization of the breeder:

- (a) in respect of the propagating material of the protected variety,
 - (i) production or reproduction,
 - (ii) [Same as in the adopted text]
 - (iii) [Same as in the adopted text]
 - (iv) sale or other putting on the market,
 - (v) [Same as in the adopted text]
 - (vi) [Same as in the adopted text]
- (vii) stocking for any of the purposes mentioned in (i) to (vi), above,
- (viii) use in any way other than those mentioned in (i) to (vii), above;

[There was no provision in the Basic Proposal corresponding to subparagraph (b) of the adopted text.]

* Corresponding provision in the 1978 Act: Article 7(3).

** Corresponding provisions in the 1978 Act: Article 5(1), (2) and (4).

ADOPTED TEXT

Article 13

Provisional Protection

Each Contracting Party shall provide measures designed to safeguard the interests of the breeder during the period between the filing or the publication of the application for the grant of a breeder's right and the grant of that right. Such measures shall have the effect that the holder of a breeder's right shall at least be entitled to equitable remuneration from any person who, during the said period, has carried out acts which, once the right is granted, require the breeder's authorization as provided in Article 14. A Contracting Party may provide that the said measures shall only take effect in relation to persons whom the breeder has notified of the filing of the application.

CHAPTER V

THE RIGHTS OF THE BREEDER

Article 14

Scope of the Breeder's Right

(1) [Acts in respect of the propagating material] (a) Subject to Articles 15 and 16, the following acts in respect of the propagating material of the protected variety shall require the authorization of the breeder:

- (i) production or reproduction (multiplication),
- (ii) conditioning for the purpose of propagation,
- (iii) offering for sale,
- (iv) selling or other marketing,
- (v) exporting,
- (vi) importing,
- (vii) stocking for any of the purposes mentioned in (i) to (vi), above.

(b) The breeder may make his authorization subject to conditions and limitations.

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(b) in respect of the harvested material of the protected variety, any of the acts referred to in (a), above, provided that the harvested material was obtained through the use of propagating material whose use, for the purpose of obtaining harvested material, was not authorized by the breeder [and if, but only if, the breeder has had no legal possibility of exercising his right in relation to the propagating material];

(c)

Alternative A

in respect of products made directly from harvested material of the protected variety, any of the acts referred to in (a), above, provided that such products were made using harvested material falling within the provisions of (b) above whose use, for the purposes of making such products, was not authorized by the breeder [and if, but only if, the breeder has had no legal possibility of exercising his right in relation to the harvested material].

Alternative B: no (c).

[There was no provision in the Basic Proposal corresponding to paragraph (4) of the adopted text.]

(2) [Same, in respect of essentially derived and certain other varieties] (a) Subject to Articles 15 and 16, the acts mentioned in paragraph (1) shall also require the authorization of the breeder in relation to

(i) [Same as in the adopted text]

(ii) [Same as in the adopted text]

(iii) [Same as in the adopted text]

(b) [Same as in the adopted text]

(i) it is predominantly derived from the initial variety, or from a variety that is itself predominantly derived from the initial variety, particularly through methods which have the effect of conserving the essential characteristics that are the expression of the genotype or of the combination of genotypes of the initial variety, such as the selection of a natural or induced mutant or of a somaclonal variant, the selection of a variant, backcrossings or transformation by genetic engineering,

(ii) [Same as in the adopted text]

(iii) it conforms to the genotype or the combination of genotypes of the initial variety, apart from the differences which result from the method of derivation.

ADOPTED TEXT

(2) [Acts in respect of the harvested material] Subject to Articles 15 and 16, the acts referred to in items (i) to (vii) of paragraph (1)(a) in respect of harvested material, including entire plants and parts of plants, obtained through the unauthorized use of propagating material of the protected variety shall require the authorization of the breeder, unless the breeder has had reasonable opportunity to exercise his right in relation to the said propagating material.

(3) [Acts in respect of certain products] Each Contracting Party may provide that, subject to Articles 15 and 16, the acts referred to in items (i) to (vii) of paragraph (1)(a) in respect of products made directly from harvested material of the protected variety falling within the provisions of paragraph (2) through the unauthorized use of the said harvested material shall require the authorization of the breeder, unless the breeder has had reasonable opportunity to exercise his right in relation to the said harvested material.

(4) [Possible additional acts] Each Contracting Party may provide that, subject to Articles 15 and 16, acts other than those referred to in items (i) to (vii) of paragraph (1)(a) shall also require the authorization of the breeder.

(5) [Essentially derived and certain other varieties] (a) The provisions of paragraphs (1) to (4) shall also apply in relation to

(i) varieties which are essentially derived from the protected variety, where the protected variety is not itself an essentially derived variety,

(ii) varieties which are not clearly distinguishable in accordance with Article 7 from the protected variety and

(iii) varieties whose production requires the repeated use of the protected variety.

(b) For the purposes of subparagraph (a)(i), a variety shall be deemed to be essentially derived from another variety ("the initial variety") when

(i) it is predominantly derived from the initial variety, or from a variety that is itself predominantly derived from the initial variety, while retaining the expression of the essential characteristics that result from the genotype or combination of genotypes of the initial variety,

(ii) it is clearly distinguishable from the initial variety and

(iii) except for the differences which result from the act of derivation, it conforms to the initial variety in the expression of the essential characteristics that result from the genotype or combination of genotypes of the initial variety.

(c) Essentially derived varieties may be obtained for example by the selection of a natural or induced mutant, or of a somaclonal variant, the selection of a variant individual from plants of the initial variety, backcrossing, or transformation by genetic engineering.

BASIC PROPOSAL**Article 15*****Exceptions to the Breeder's Right**

(1) [Acts not requiring the breeder's authorization] The breeder's right shall not extend to

(i) [Same as in the adopted text]

(ii) [Same as in the adopted text]

(iii) acts done for the purpose of breeding other varieties, and, except where the provisions of Article 14(2) apply, acts referred to in Article 14(1) in respect of such other varieties.

(2) [Farm-saved seed] Notwithstanding Article 14, each Contracting Party may, within reasonable limits and subject to the safeguarding of the legitimate interests of the breeder, restrict the breeder's right in relation to any variety in order to permit farmers** to use for propagating purposes, on their own holdings, the product of the harvest which they have obtained by planting, on their own holdings,** the protected variety or a variety covered by Article 14(2)(a)(i) or (ii).

Article 16*****Exhaustion of the Breeder's Right**

(1) [Exhaustion of right] The breeder's right shall not extend to acts concerning any material of the protected variety, or of a variety covered by the provisions of Article 14(2), which has been put on the market by the breeder or with his consent in the territory of the Contracting Party concerned, or any material derived from the said material, unless such acts

(i) involve further propagation of the variety in question, [or]

(ii) involve an export of material of the variety which enables the propagation of the variety into a country which does not protect varieties of the plant genus or species to which the variety belongs, except where the export is for consumption purposes [, or

(iii) fall outside the field of use for which the breeder put material on the market or gave his consent].

* Corresponding provision in the 1978 Act: Article 5(3) [for paragraph 1(iii)].

** The Basic Proposal stated the following in a footnote: "The words 'farmer' and 'holding' are translated into French as 'agriculteur' and 'exploitation' and into German as 'Landwirt' and 'Betrieb' in the French and German versions of this document." (Editor's Note)

*** There is no corresponding provision in the 1978 Act.

ADOPTED TEXT

Article 15

Exceptions to the Breeder's Right

- (1) [Compulsory exceptions] The breeder's right shall not extend to
- (i) acts done privately and for non-commercial purposes,
 - (ii) acts done for experimental purposes and
 - (iii) acts done for the purpose of breeding other varieties, and, except where the provisions of Article 14(5) apply, acts referred to in Article 14(1) to (4) in respect of such other varieties.
- (2) [Optional exception] Notwithstanding Article 14, each Contracting Party may, within reasonable limits and subject to the safeguarding of the legitimate interests of the breeder, restrict the breeder's right in relation to any variety in order to permit farmers to use for propagating purposes, on their own holdings, the product of the harvest which they have obtained by planting, on their own holdings, the protected variety or a variety covered by Article 14(5)(a)(i) or (ii).

Article 16

Exhaustion of the Breeder's Right

- (1) [Exhaustion of right] The breeder's right shall not extend to acts concerning any material of the protected variety, or of a variety covered by the provisions of Article 14(5), which has been sold or otherwise marketed by the breeder or with his consent in the territory of the Contracting Party concerned, or any material derived from the said material, unless such acts
- (i) involve further propagation of the variety in question or
 - (ii) involve an export of material of the variety, which enables the propagation of the variety, into a country which does not protect varieties of the plant genus or species to which the variety belongs, except where the exported material is for final consumption purposes.

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(2) [Same as in the adopted text]

(i) [Same as in the adopted text]

(ii) harvested material and

(iii) [Same as in the adopted text]

[There was no provision in the Basic Proposal corresponding to paragraph (3) of the adopted text.]

Article 17***Restrictions on the Exercise of the Breeder's Right**

(1) [Public interest] Except where expressly provided in this Convention, no Contracting Party may restrict the free exercise of a breeder's right otherwise than for reasons of public interest.

(2) [Same as in the adopted text]

Article 18****Measures Regulating Commerce**

[Same as in the adopted text]

* Corresponding provisions in the 1978 Act: Article 9.

** Corresponding provision in the 1978 Act: Article 14.

ADOPTED TEXT

(2) [Meaning of "material"] For the purposes of paragraph (1), "material" means, in relation to a variety,

- (i) propagating material of any kind,
- (ii) harvested material, including entire plants and parts of plants, and
- (iii) any product made directly from the harvested material.

(3) ["Territory" in certain cases] For the purposes of paragraph (1), all the Contracting Parties which are member States of one and the same intergovernmental organization may act jointly, where the regulations of that organization so require, to assimilate acts done on the territories of the States members of that organization to acts done on their own territories and, should they do so, shall notify the Secretary-General accordingly.

Article 17

Restrictions on the Exercise of the Breeder's Right

(1) [Public interest] Except where expressly provided in this Convention, no Contracting Party may restrict the free exercise of a breeder's right for reasons other than of public interest.

(2) [Equitable remuneration] When any such restriction has the effect of authorizing a third party to perform any act for which the breeder's authorization is required, the Contracting Party concerned shall take all measures necessary to ensure that the breeder receives equitable remuneration.

Article 18

Measures Regulating Commerce

The breeder's right shall be independent of any measure taken by a Contracting Party to regulate within its territory the production, certification and marketing of material of varieties or the importing or exporting of such material. In any case, such measures shall not affect the application of the provisions of this Convention.

BASIC PROPOSAL**Article 19*****Duration of the Breeder's Right**

- (1) [Same as in the adopted text]
- (2) [Same as in the adopted text]

CHAPTER VI**VARIETY DENOMINATION****Article 20******Variety Denomination**

- (1) [Same as in the adopted text]
- (b) [Same as in the adopted text]
- (2) [Same as in the adopted text]

(3) [Registration of the denomination] The denomination of the variety shall be submitted by the breeder to the authority. If it is found that the denomination does not satisfy the requirements of paragraph (2), the authority shall refuse to register it and shall require the breeder to propose another denomination within a prescribed period. The denomination accepted by the authority shall be registered by the authority at the same time as the breeder's right is granted.

* Corresponding provisions in the 1978 Act: Article 8.

** Corresponding provisions in the 1978 Act: Article 13.

ADOPTED TEXT**Article 19****Duration of the Breeder's Right**

- (1) [Period of protection] The breeder's right shall be granted for a fixed period.
- (2) [Minimum period] The said period shall not be shorter than 20 years from the date of the grant of the breeder's right. For trees and vines, the said period shall not be shorter than 25 years from the said date.

CHAPTER VI**VARIETY DENOMINATION****Article 20****Variety Denomination**

- (1) [Designation of varieties by denominations; use of the denomination] (a) The variety shall be designated by a denomination which will be its generic designation.
- (b) Each Contracting Party shall ensure that, subject to paragraph (4), no rights in the designation registered as the denomination of the variety shall hamper the free use of the denomination in connection with the variety, even after the expiration of the breeder's right.
- (2) [Characteristics of the denomination] The denomination must enable the variety to be identified. It may not consist solely of figures except where this is an established practice for designating varieties. 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 the territory of any Contracting Party, an existing variety of the same plant species or of a closely related species.
- (3) [Registration of the denomination] The denomination of the variety shall be submitted by the breeder to the authority. If it is found that the denomination does not satisfy the requirements of paragraph (2), the authority shall refuse to register it and shall require the breeder to propose another denomination within a prescribed period. The denomination shall be registered by the authority at the same time as the breeder's right is granted.

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(4) [Prior rights of third parties] Prior rights of third parties shall not be affected. If, by reason of a prior right, the use of the denomination of a variety is forbidden to a party who or which, in accordance with the provisions of paragraph (7), is obliged to use it, the authority shall require the breeder to submit another denomination for the variety.

(5) [Same as in the adopted text]

(6) [Same as in the adopted text]

(7) [Obligation to use the denomination] Any party who or which, within the territory of one of the Contracting Parties, offers for sale or markets propagating material of a variety protected within the said territory shall be obliged to use the denomination of that variety, even after the expiration of the breeder's right in that variety, except where, in accordance with the provisions of paragraph (4), prior rights prevent such use.

(8) [Same as in the adopted text]

CHAPTER VII**NULLITY AND CANCELLATION OF THE BREEDER'S RIGHT****Article 21*****Nullity of the Breeder's Right**

(1) [Same as in the adopted text]

(i) that the conditions laid down in Articles 6 and 7 were not complied with at the time of the grant of the breeder's right,

* Corresponding provisions in the 1978 Act: Article 10(1) and (4).

ADOPTED TEXT

(4) [Prior rights of third persons] Prior rights of third persons shall not be affected. If, by reason of a prior right, the use of the denomination of a variety is forbidden to a person who, in accordance with the provisions of paragraph (7), is obliged to use it, the authority shall require the breeder to submit another denomination for the variety.

(5) [Same denomination in all Contracting Parties] A variety must be submitted to all Contracting Parties under the same denomination. The authority of each Contracting Party shall register the denomination so submitted, unless it considers the denomination unsuitable within its territory. In the latter case, it shall require the breeder to submit another denomination.

(6) [Information among the authorities of Contracting Parties] The authority of a Contracting Party shall ensure that the authorities of all the other Contracting Parties are informed of matters concerning variety denominations, in particular the submission, registration and cancellation of denominations. Any authority may address its observations, if any, on the registration of a denomination to the authority which communicated that denomination.

(7) [Obligation to use the denomination] Any person who, within the territory of one of the Contracting Parties, offers for sale or markets propagating material of a variety protected within the said territory shall be obliged to use the denomination of that variety, even after the expiration of the breeder's right in that variety, except where, in accordance with the provisions of paragraph (4), prior rights prevent such use.

(8) [Indications used in association with denominations] When a variety is offered for sale or marketed, it shall be permitted to associate a trademark, trade name or other similar indication with a registered variety denomination. If such an indication is so associated, the denomination must nevertheless be easily recognizable.

CHAPTER VII**NULLITY AND CANCELLATION OF THE BREEDER'S RIGHT****Article 21****Nullity of the Breeder's Right**

(1) [Reasons of nullity] Each Contracting Party shall declare a breeder's right granted by it null and void when it is established

(i) that the conditions laid down in Articles 6 or 7 were not complied with at the time of the grant of the breeder's right,

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(ii) that, where the grant of the breeder's right has been essentially based upon information and documents furnished by the breeder, the conditions laid down in Articles 8 and 9 were not complied with at the time of the grant of the breeder's right, or

(iii) that the breeder's right has been granted to a person who is not entitled to it, unless it is transferred to the party who or which is so entitled.

(2) [Same as in the adopted text]

Article 22***Cancellation of the Breeder's Right**

(1) [Reasons for cancellation] (a) Each Contracting Party may cancel a breeder's right granted by it if it is established that the conditions laid down in Articles 8 and 9 are no longer fulfilled.

(b) [Same as in the adopted text]

(i) [Same as in the adopted text]

(ii) [Same as in the adopted text]

(iii) [Same as in the adopted text]

(2) [Same as in the adopted text]

CHAPTER VIII**THE UNION****Article 23******Members of the Union**

[Same as in the adopted text]

* Corresponding provisions in the 1978 Act: Article 10(2) to (4).

** Corresponding provision in the 1978 Act: Article 1(2).

ADOPTED TEXT

(ii) that, where the grant of the breeder's right has been essentially based upon information and documents furnished by the breeder, the conditions laid down in Articles 8 or 9 were not complied with at the time of the grant of the breeder's right, or

(iii) that the breeder's right has been granted to a person who is not entitled to it, unless it is transferred to the person who is so entitled.

(2) [Exclusion of other reasons] No breeder's right shall be declared null and void for reasons other than those referred to in paragraph (1).

Article 22**Cancellation of the Breeder's Right**

(1) [Reasons for cancellation] (a) Each Contracting Party may cancel a breeder's right granted by it if it is established that the conditions laid down in Articles 8 or 9 are no longer fulfilled.

(b) Furthermore, each Contracting Party may cancel a breeder's right granted by it if, after being requested to do so and within a prescribed period,

(i) the breeder does not provide the authority with the information, documents or material deemed necessary for verifying the maintenance of the variety,

(ii) the breeder fails to pay such fees as may be payable to keep his right in force, or

(iii) the breeder does not propose, where the denomination of the variety is cancelled after the grant of the right, another suitable denomination.

(2) [Exclusion of other reasons] No breeder's right shall be cancelled for reasons other than those referred to in paragraph (1).

CHAPTER VIII**THE UNION****Article 23****Members**

The Contracting Parties shall be members of the Union.

BASIC PROPOSAL**Article 24*****Legal Status and Seat of the Union**

- (1) [Same as in the adopted text]
- (2) [Same as in the adopted text]

- (3) [Headquarters] The headquarters of the Union and its permanent organs are at Geneva.
- (4) [Same as in the adopted text]

Article 25****Organs of the Union**

[Same as in the adopted text]

Article 26*****The Council**

- (1) [Same as in the adopted text]

- (2) [Same as in the adopted text]

- (3) [Same as in the adopted text]

* Corresponding provisions in the 1978 Act: Articles 24 and 1(3).

** Corresponding provision in the 1978 Act: Article 15.

*** Corresponding provisions in the 1978 Act: Articles 16 to 22.

ADOPTED TEXT

Article 24

Legal Status and Seat

- (1) [Legal personality] The Union has legal personality.
- (2) [Legal capacity] The Union enjoys on the territory of each Contracting Party, in conformity with the laws applicable in the said territory, such legal capacity as may be necessary for the fulfillment of the objectives of the Union and for the exercise of its functions.
- (3) [Seat] The seat of the Union and its permanent organs are at Geneva.
- (4) [Headquarters agreement] The Union has a headquarters agreement with the Swiss Confederation.

Article 25

Organs

The permanent organs of the Union are the Council and the Office of the Union.

Article 26

The Council

- (1) [Composition] The Council shall consist of the representatives of the members of the Union. Each member of the Union shall appoint one representative to the Council and one alternate. Representatives or alternates may be accompanied by assistants or advisers.
- (2) [Officers] 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. The President shall hold office for three years.
- (3) [Sessions] The Council shall meet upon convocation by its President. An ordinary 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 one-third of the members of the Union so request.

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(4) [Observers] [Same as in the adopted text]

(5) [Same as in the adopted text]

(i) [Same as in the adopted text]

(ii) [Same as in the adopted text]

(iii) [Same as in the adopted text]

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

(v) [Same as in the adopted text]

(vi) [Same as in the adopted text]

(vii) [Same as in the adopted text]

(viii) [Same as in the adopted text]

(ix) [Same as in the adopted text]

(x) [Same as in the adopted text]

(6) [Votes] Each member of the Union shall have one vote in the Council.

[There was no provision in the Basic Proposal corresponding to subparagraph (b) of the adopted text]

(7) [Majorities] 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 paragraphs (5)(ii), (vi) and (vii) and under Articles 29(5)(b) and 38(1) shall require three-fourths of the votes of the members present and voting. Abstentions shall not be considered as votes.

ADOPTED TEXT

(4) [Observers] States not members of the Union may be invited as observers to meetings of the Council. Other observers, as well as experts, may also be invited to such meetings.

(5) [Tasks] The tasks of the Council shall be to:

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

(ii) establish its rules of procedure;

(iii) appoint the Secretary-General and, if it finds it necessary, a Vice Secretary-General and determine the terms of appointment of each;

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

(v) give to the Secretary-General all necessary directions for the accomplishment of the tasks of the Union;

(vi) establish the administrative and financial regulations of the Union;

(vii) examine and approve the budget of the Union and fix the contribution of each member of the Union;

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

(ix) fix the date and place of the conferences referred to in Article 38 and take the measures necessary for their preparation; and

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

(6) [Votes] (a) Each member of the Union that is a State shall have one vote in the Council.

(b) Any Contracting Party that is an intergovernmental organization may, in matters within its competence, exercise the rights to vote of its member States that are members of the Union. Such an intergovernmental organization shall not exercise the rights to vote of its member States if its member States exercise their right to vote, and vice versa.

(7) [Majorities] Any decision of the Council shall require a simple majority of the votes cast, provided that any decision of the Council under paragraphs (5)(ii), (vi), and (vii) and under Articles 28(3), 29(5)(b) and 38(1) shall require three-fourths of the votes cast. Abstentions shall not be considered as votes.

BASIC PROPOSAL**Article 27*****The Office of the Union**

- (1) [Same as in the adopted text]
- (2) [Same as in the adopted text]
- (3) [Same as in the adopted text]

Article 28****Languages**

- (1) [Languages of the Office] The English, French and German languages shall be used by the Office of the Union in carrying out its duties.
- (2) [Languages in certain meetings] Meetings of the Council and of revision conferences shall be held in the three languages.
- (3) [Same as in the adopted text]

Article 29*****Finances**

- (1) [Same as in the adopted text]
 - (i) the annual contributions of the members of the Union,
 - (ii) [Same as in the adopted text]
 - (iii) [Same as in the adopted text]

* Corresponding provisions in the 1978 Act: Article 23.

** Corresponding provisions in the 1978 Act: Article 28.

*** Corresponding provisions in the 1978 Act: Articles 26 and 25.

ADOPTED TEXT**Article 27****The Office of the Union**

- (1) [Tasks and direction of the Office] The Office of the Union shall carry out all the duties and tasks entrusted to it by the Council. It shall be under the direction of the Secretary-General.
- (2) [Duties of the Secretary-General] The Secretary-General shall be responsible to the Council; he shall be responsible for carrying out the decisions of the Council. He shall submit the budget of the Union for the approval of the Council and shall be responsible for its implementation. He shall make reports to the Council on his administration and the activities and financial position of the Union.
- (3) [Staff] Subject to the provisions of Article 26(5)(iii), 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.

Article 28**Languages**

- (1) [Languages of the Office] The English, French, German and Spanish languages shall be used by the Office of the Union in carrying out its duties.
- (2) [Languages in certain meetings] Meetings of the Council and of revision conferences shall be held in the four languages.
- (3) [Further languages] The Council may decide that further languages shall be used.

Article 29**Finances**

- (1) [Income] The expenses of the Union shall be met from
- (i) the annual contributions of the States members of the Union,
 - (ii) payments received for services rendered,
 - (iii) miscellaneous receipts.

BASIC PROPOSAL

(2) [Contributions: units] (a) The share of each member of the Union in the total amount of the annual contributions shall be determined by reference to the total expenditure to be met from the contributions of the members of the Union and to the number of contribution units applicable to it under paragraph (3). The said share shall be computed according to paragraph (4).

(b) [Same as in the adopted text]

(3) [Same as in the adopted text]

(b) As far as any other Contracting Party is concerned, that Contracting Party shall, on joining the Union, indicate, in a declaration addressed to the Secretary-General, the number of contribution units applicable to it.

(c) Any member of the Union may, at any time, indicate, in a declaration addressed to the Secretary-General, a number of contribution units different from the number applicable to it under subparagraph (a) or (b). Such declaration, if made during the first six months of a calendar year, shall take effect from the beginning of the subsequent calendar year; otherwise, it shall take effect from the beginning of the second calendar year which follows the year in which the declaration was made.

(4) [Contributions: computation of shares] (a) For each budgetary period, the amount corresponding to one contribution unit shall be obtained by dividing the total amount of the expenditure to be met in that period from the contributions of the members of the Union by the total number of units applicable to those members of the Union.

(b) The amount of the contribution of each member of the Union shall be obtained by multiplying the amount corresponding to one contribution unit by the number of contribution units applicable to that member of the Union.

(5) [Arrears in contributions] (a) A member of the Union which is in arrears in the payment of its contributions may not, subject to subparagraph (b), 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. The suspension of the right to vote shall not relieve such member of the Union of its obligations under this Convention and shall not deprive it of any other rights thereunder.

(b) The Council may allow the said member of the Union 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) [Auditing of the accounts] The auditing of the accounts of the Union shall be effected by a member of the Union as provided in the administrative and financial regulations. Such member of the Union shall be designated, with its agreement, by the Council.

ADOPTED TEXT

(2) [Contributions: units] (a) The share of each State member of the Union in the total amount of the annual contributions shall be determined by reference to the total expenditure to be met from the contributions of the States members of the Union and to the number of contribution units applicable to it under paragraph (3). The said share shall be computed according to paragraph (4).

(b) The number of contribution units shall be expressed in whole numbers or fractions thereof, provided that no fraction shall be smaller than one-fifth.

(3) [Contributions: share of each member] (a) The number of contribution units applicable to any member of the Union which is party to the Act of 1961/1972 or the Act of 1978 on the date on which it becomes bound by this Convention shall be the same as the number applicable to it immediately before the said date.

(b) Any other State member of the Union shall, on joining the Union, indicate, in a declaration addressed to the Secretary-General, the number of contribution units applicable to it.

(c) Any State member of the Union may, at any time, indicate, in a declaration addressed to the Secretary-General, a number of contribution units different from the number applicable to it under subparagraph (a) or (b). Such declaration, if made during the first six months of a calendar year, shall take effect from the beginning of the subsequent calendar year; otherwise, it shall take effect from the beginning of the second calendar year which follows the year in which the declaration was made.

(4) [Contributions: computation of shares] (a) For each budgetary period, the amount corresponding to one contribution unit shall be obtained by dividing the total amount of the expenditure to be met in that period from the contributions of the States members of the Union by the total number of units applicable to those States members of the Union.

(b) The amount of the contribution of each State member of the Union shall be obtained by multiplying the amount corresponding to one contribution unit by the number of contribution units applicable to that State member of the Union.

(5) [Arrears in contributions] (a) A State member of the Union which is in arrears in the payment of its contributions may not, subject to subparagraph (b), exercise its right to vote in the Council if the amount of its arrears equals or exceeds the amount of the contribution due from it for the preceding full year. The suspension of the right to vote shall not relieve such State member of the Union of its obligations under this Convention and shall not deprive it of any other rights thereunder.

(b) The Council may allow the said State member of the Union 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) [Auditing of the accounts] The auditing of the accounts of the Union shall be effected by a State member of the Union as provided in the administrative and financial regulations. Such State member of the Union shall be designated, with its agreement, by the Council.

BASIC PROPOSAL

[There was no provision in the Basic Proposal corresponding to paragraph (7) of the adopted text.]

CHAPTER IX**IMPLEMENTATION OF THE CONVENTION; OTHER AGREEMENTS****Article 30*****Implementation of the Convention**

- (1) [Same as in the adopted text]
- (i) [Same as in the adopted text]
- (ii) [Same as in the adopted text]
- (iii) [Same as in the adopted text]
- (2) [Same as in the adopted text]

Article 31****Relations Between Contracting Parties and States Bound by Earlier Acts**

- (1) [Same as in the adopted text]

* Corresponding provisions in the 1978 Act: Article 30(1) and (3).

** Corresponding provisions in the 1978 Act: Article 34.

ADOPTED TEXT

(7) [Contributions of intergovernmental organizations] Any Contracting Party which is an intergovernmental organization shall not be obliged to pay contributions. If, nevertheless, it chooses to pay contributions, the provisions of paragraphs (1) to (4) shall be applied accordingly.

CHAPTER IX**IMPLEMENTATION OF THE CONVENTION; OTHER AGREEMENTS****Article 30****Implementation of the Convention**

(1) [Measures of implementation] Each Contracting Party shall adopt all measures necessary for the implementation of this Convention; in particular, it shall:

(i) provide for appropriate legal remedies for the effective enforcement of breeders' rights;

(ii) maintain an authority entrusted with the task of granting breeders' rights or entrust the said task to an authority maintained by another Contracting Party;

(iii) ensure that the public is informed through the regular publication of information concerning

- applications for and grants of breeders' rights, and
- proposed and approved denominations.

(2) [Conformity of laws] It shall be understood that, on depositing its instrument of ratification, acceptance, approval or accession, as the case may be, each State or intergovernmental organization must be in a position, under its laws, to give effect to the provisions of this Convention.

Article 31**Relations Between Contracting Parties and States Bound by Earlier Acts**

(1) [Relations between States bound by this Convention] Between States members of the Union which are bound both by this Convention and any earlier Act of the Convention, only this Convention shall apply.

BASIC PROPOSAL

(2) [Same as in the adopted text]

Article 32***Special Agreements**

[Same as in the adopted text]

CHAPTER X**FINAL PROVISIONS****Article 33******Signature**

This Convention shall be open for signature by any State which is a member of the Union at the date of its adoption. It shall remain open for signature for one year after that date.

Article 34*****Ratification, Acceptance or Approval; Accession**

(1) [Same as in the adopted text]

* Corresponding provision in the 1978 Act: Article 29.

** Corresponding provision in the 1978 Act: Article 31.

*** Corresponding provisions in the 1978 Act: Article 32.

ADOPTED TEXT

(2) [Possible relations with States not bound by this Convention] Any State member of the Union not bound by this Convention may declare, in a notification addressed to the Secretary-General, that, in its relations with each member of the Union bound only by this Convention, it will apply the latest Act by which it is bound. As from the expiration of one month after the date of such notification and until the State member of the Union making the declaration becomes bound by this Convention, the said member of the Union shall apply the latest Act by which it is bound in its relations with each of the members of the Union bound only by this Convention, whereas the latter shall apply this Convention in respect of the former.

Article 32**Special Agreements**

Members of the Union reserve the right to conclude among themselves special agreements for the protection of varieties, insofar as such agreements do not contravene the provisions of this Convention.

CHAPTER X**FINAL PROVISIONS****Article 33****Signature**

This Convention shall be open for signature by any State which is a member of the Union at the date of its adoption. It shall remain open for signature until March 31, 1992.

Article 34**Ratification, Acceptance or Approval; Accession**

(1) [States and certain intergovernmental organizations] (a) Any State may, as provided in this Article, become party to this Convention.

BASIC PROPOSAL

(b) Any intergovernmental organization may, as provided in this Article, become party to this Convention if it provides for the grant of breeders' rights with effect in its territory.

(2) [Same as in the adopted text]

(3) [Same as in the adopted text]

Article 35***Reservations**

(1) [Same as in the adopted text]

(2) [Same as in the adopted text]

(b) [Same as in the adopted text]

* Corresponding provisions in the 1978 Act: Articles 40 and 37.

ADOPTED TEXT

(b) Any intergovernmental organization may, as provided in this Article, become party to this Convention if it

(i) has competence in respect of matters governed by this Convention,

(ii) has its own legislation providing for the grant and protection of breeders' rights binding on all its member States and

(iii) has been duly authorized, in accordance with its internal procedures, to accede to this Convention.

(2) [Instrument of adherence] Any State which has signed this Convention shall become party to this Convention by depositing an instrument of ratification, acceptance or approval of this Convention. Any State which has not signed this Convention and any intergovernmental organization shall become party to this Convention by depositing an instrument of accession to this Convention. Instruments of ratification, acceptance, approval or accession shall be deposited with the Secretary-General.

(3) [Advice of the Council] Any State which is not a member of the Union and any intergovernmental organization 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 Convention. If the decision embodying the advice is positive, the instrument of accession may be deposited.

Article 35Reservations

(1) [Principle] Subject to paragraph (2), no reservations to this Convention are permitted.

(2) [Possible exception] (a) Notwithstanding the provisions of Article 3(1), any State which, at the time of becoming party to this Convention, is a party to the Act of 1978 and which, as far as varieties reproduced asexually are concerned, provides for protection by an industrial property title other than a breeder's right shall have the right to continue to do so without applying this Convention to those varieties.

(b) Any State making use of the said right shall, at the time of depositing its instrument of ratification, acceptance, approval or accession, as the case may be, notify the Secretary-General accordingly. The same State may, at any time, withdraw the said notification.

BASIC PROPOSAL**Article 36*****Communications Concerning Legislation and the Genera
and Species Protected; Information to be Published**

- (1) [Same as in the adopted text]
- (i) [Same as in the adopted text]
- (ii) [Same as in the adopted text]
- (2) [Same as in the adopted text]
- (i) [Same as in the adopted text]
- (ii) [Same as in the adopted text]
- (3) [Same as in the adopted text]
- (i) [Same as in the adopted text]
- (ii) [Same as in the adopted text]

Article 37****Entry into Force; Closing of Earlier Acts**

- (1) [Initial entry into force] This Convention shall enter into force one month after five States or intergovernmental organizations have deposited their instruments of ratification, acceptance, approval or accession, as the case may be, provided that at least three of the said instruments have been deposited by States party to the Act of 1961/1972 or the Act of 1978.
- (2) [Subsequent entry into force] Any State or intergovernmental organization not covered by paragraph (1) shall become bound by this Convention one month after the date on which it has deposited its instrument of ratification, acceptance, approval or accession, as the case may be.

* Corresponding provisions in the 1978 Act: Article 35.

** Corresponding provisions in the 1978 Act: Article 33.

ADOPTED TEXT

Article 36

**Communications Concerning Legislation and the Genera
and Species Protected; Information to be Published**

(1) [Initial notification] When depositing its instrument of ratification, acceptance or approval of or accession to this Convention, as the case may be, any State or intergovernmental organization shall notify the Secretary-General of

(i) its legislation governing breeder's rights and

(ii) the list of plant genera and species to which, on the date on which it will become bound by this Convention, it will apply the provisions of this Convention.

(2) [Notification of changes] Each Contracting Party shall promptly notify the Secretary-General of

(i) any changes in its legislation governing breeders' rights and

(ii) any extension of the application of this Convention to additional plant genera and species.

(3) [Publication of the information] The Secretary-General shall, on the basis of communications received from each Contracting Party concerned, publish information on

(i) the legislation governing breeders' rights and any changes in that legislation, and

(ii) the list of plant genera and species referred to in paragraph (1)(ii) and any extension referred to in paragraph (2)(ii).

Article 37

Entry into Force; Closing of Earlier Acts

(1) [Initial entry into force] This Convention shall enter into force one month after five States have deposited their instruments of ratification, acceptance, approval or accession, as the case may be, provided that at least three of the said instruments have been deposited by States party to the Act of 1961/1972 or the Act of 1978.

(2) [Subsequent entry into force] Any State not covered by paragraph (1) or any intergovernmental organization shall become bound by this Convention one month after the date on which it has deposited its instrument of ratification, acceptance, approval or accession, as the case may be.

BASIC PROPOSAL

(3) [Closing of earlier Acts] Once this Convention enters into force, no State may accede to the Act of 1978.

Article 38***Revision of the Convention**

(1) [Same as in the adopted text]

(2) [Quorum and majority] The proceedings of a conference shall be effective only if at least half of the members of the Union are represented at it. A majority of three-quarters of the members of the Union present and voting at the conference shall be required for the adoption of any revision.

Article 39****Denunciation**

(1) [Same as in the adopted text]

(2) [Same as in the adopted text]

(3) [Same as in the adopted text]

(4) [Same as in the adopted text]

* Corresponding provisions in the 1978 Act: Article 27.

** Corresponding provisions in the 1978 Act: Article 41(2) to (4).

ADOPTED TEXT

(3) [Closing of the 1978 Act] No instrument of accession to the Act of 1978 may be deposited after the entry into force of this Convention according to paragraph (1), except that any State that, in conformity with the established practice of the General Assembly of the United Nations, is regarded as a developing country may deposit such an instrument until December 31, 1995, and that any other State may deposit such an instrument until December 31, 1993, even if this Convention enters into force before that date.

Article 38

Revision of the Convention

(1) [Conference] This Convention may be revised by a conference of the members of the Union. The convocation of such conference shall be decided by the Council.

(2) [Quorum and majority] The proceedings of a conference shall be effective only if at least half of the States members of the Union are represented at it. A majority of three-quarters of the States members of the Union present and voting at the conference shall be required for the adoption of any revision.

Article 39

Denunciation

(1) [Notifications] Any Contracting Party may denounce this Convention by notification addressed to the Secretary-General. The Secretary-General shall promptly notify all members of the Union of the receipt of that notification.

(2) [Earlier Acts] Notification of the denunciation of this Convention shall be deemed also to constitute notification of the denunciation of any earlier Act by which the Contracting Party denouncing this Convention is bound.

(3) [Effective date] 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.

(4) [Acquired rights] The denunciation shall not affect any rights acquired in a variety by reason of this Convention or any earlier Act prior to the date on which the denunciation becomes effective.

BASIC PROPOSAL**Article 40*****Preservation of Existing Rights**

This Convention shall not affect existing rights under the laws of Contracting Parties or by reason of any earlier Act or any agreement other than this Convention concluded between members of the Union.

Article 41****Original and Official Texts of the Convention**

(1) [Same as in the adopted text]

(2) [Same as in the adopted text]

Article 42*****Depositary Functions**

(1) [Same as in the adopted text]

(2) [Same as in the adopted text]

* Corresponding provision in the 1978 Act: Article 39.

** Corresponding provisions in the 1978 Act: Article 42(1) and (3).

*** Corresponding provisions in the 1978 Act: Article 42(2) and (4).

ADOPTED TEXT**Article 40****Preservation of Existing Rights**

This Convention shall not limit existing breeders' rights under the laws of Contracting Parties or by reason of any earlier Act or any agreement other than this Convention concluded between members of the Union.

Article 41**Original and Official Texts of the Convention**

(1) [Original] This Convention shall be signed in a single original in the English, French 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) [Official texts] The Secretary-General shall, after consultation with the interested Governments, establish official texts of this Convention in the Arabic, Dutch, Italian, Japanese and Spanish languages and such other languages as the Council may designate.

Article 42**Depositary Functions**

(1) [Transmittal of copies] The Secretary-General shall transmit certified copies of this Convention to all States and intergovernmental organizations which were represented in the Diplomatic Conference that adopted this Convention and, on request, to any other State or intergovernmental organization.

(2) [Registration] The Secretary-General shall register this Convention with the Secretariat of the United Nations.



FURTHER INSTRUMENTS ADOPTED BY THE CONFERENCE**Resolution on Article 14(5)***

The Diplomatic Conference for the Revision of the International Convention for the Protection of New Varieties of Plants held from March 4 to 19, 1991, requests the Secretary-General of UPOV to start work immediately after the Conference on the establishment of draft standard guidelines, for adoption by the Council of UPOV, on essentially derived varieties.

Recommendation Relating to Article 15(2)**

The Diplomatic Conference recommends that the provisions laid down in Article 15(2) of the International Convention for the Protection of New Varieties of Plants of December 2, 1961, as Revised at Geneva on November 10, 1972, on October 23, 1978, and on March 19, 1991, should not be read so as to be intended to open the possibility of extending the practice commonly called "farmer's privilege" to sectors of agricultural or horticultural production in which such a privilege is not a common practice on the territory of the Contracting Party concerned.

Common Statement Relating to Article 34***

The Diplomatic Conference noted and accepted a declaration by the Delegation of Denmark and a declaration by the Delegation of the Netherlands according to which the Convention adopted by the Diplomatic Conference will not, upon its ratification, acceptance, approval or accession by Denmark or the Netherlands, be automatically applicable, in the case of Denmark, in Greenland and the Faroe Islands and, in the case of the Netherlands, in Aruba and the Netherlands Antilles. The said Convention will only apply in the said territories if and when Denmark or the Netherlands, as the case may be, expressly so notifies the Secretary-General.

* This Resolution was published as "Final Draft" in document DC/91/140.

** This Recommendation was published as "Final Draft" in document DC/91/139.

*** This Common Statement was published as "Final Draft" in document DC/91/141.

SIGNATAIRESSIGNATORIESUNTERZEICHNER

EN FOI DE QUOI, les soussignés, dûment autorisés à cette fin, ont signé le présent Acte.*

FAIT à Genève, le dix-neuf mars mille neuf cent quatre-vingt-onze.

IN WITNESS WHEREOF, the undersigned, being duly authorized thereto, have signed this Act.*

DONE at Geneva, this nineteenth day of March, one thousand nine hundred and ninety one.

ZU URKUND DESSEN haben die hierzu gehörig befugten Unterzeichneten diese Akte unterschrieben.*

GESCHEHEN zu Genf am neunzehnten März neunzehnhunderteinundneunzig.

Au nom de l'Afrique du Sud :
In the name of South Africa:
Im Namen Südafrikas:

Dirk C. Lourens

Au nom de l'Allemagne :
In the name of Germany:
Im Namen Deutschlands:

Fredo Dannenbring

* Sauf indication contraire, toutes les signatures ont été apposées le 19 mars 1991. (Note de l'éditeur)

All signatures were affixed on March 19, 1991, unless otherwise indicated. (Editor's Note)

Falls nichts anderes angegeben, wurde die Unterzeichnung am 19. März 1991 vorgenommen. (Anmerkung des Herausgebers)

Au nom de la Belgique :
In the name of Belgium:
Im Namen Belgiens:

Philippe Berg

Au nom du Canada :
In the name of Canada:
Im Namen Kanadas:

Paul G. Dubois

9 mars 1992 / March 9, 1992 / 9. März 1992

Au nom du Danemark :
In the name of Denmark:
Im Namen Dänemarks:

Flemming Espenhain

Au nom de l'Espagne :
In the name of Spain:
Im Namen Spaniens:

Pablo Barrios Almazor

Au nom des Etats-Unis d'Amérique :
In the name of the United States of America:
Im Namen der Vereinigten Staaten von Amerika:

H. Dieter Hoinkes

25 octobre 1991 / October 25, 1991 / 25. Oktober 1991

Au nom de la France :
In the name of France:
Im Namen Frankreichs:

Bernard Miyet

Au nom de l'Irlande :
In the name of Ireland:
Im Namen Irlands:

John F. Swift

21 février 1992 / February 21, 1992 / 21. Februar 1992

Au nom d'Israël :
In the name of Israel:
Im Namen Israels:

Menahem Zur

23 octobre 1991 / October 23, 1991 / 23. Oktober 1991

Au nom de l'Italie :
In the name of Italy:
Im Namen Italiens:

Marco G. Fortini

Au nom de la Nouvelle-Zélande :
In the name of New Zealand:
Im Namen Neuseelands:

Alastair M. Bisley

19 décembre 1991 / December 19, 1991 / 19. Dezember 1991

Au nom des Pays-Bas :
In the name of the Netherlands:
Im Namen der Niederlande:

Wilhelmus F.S. Duffhues

Au nom du Royaume-Uni :
In the name of the United Kingdom:
Im Namen des Vereinigten Königreiches:

John Harvey

Au nom de la Suède :
In the name of Sweden:
Im Namen Schwedens:

Lars Anell

17 décembre 1991 / December 17, 1991 / 17. Dezember 1991

Au nom de la Suisse :
In the name of Switzerland:
Im Namen der Schweiz:

Maria Jenni

FINAL ACT

FINAL ACT
OF THE
DIPLOMATIC CONFERENCE
FOR THE REVISION OF THE
INTERNATIONAL CONVENTION FOR THE PROTECTION
OF NEW VARIETIES OF PLANTS

In accordance with the decisions made by the Council of the International Union for the Protection of New Varieties of Plants (UPOV) at its twenty-fourth ordinary session in October 1990 and following preparations by member States and by the Office of the Union, the Diplomatic Conference for the Revision of the International Convention for the Protection of New Varieties of Plants was held from March 4 to 19, 1991, at Geneva.

The Diplomatic Conference adopted the Act of March 19, 1991, of the 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 23, 1978. The said Act was opened for signature on March 19, 1991.

IN WITNESS WHEREOF, the undersigned, being duly authorized thereto, have signed this Final Act.

DONE at Geneva, this nineteenth day of March, one thousand nine hundred and ninety one.

Argentina, Australia, Belgium, Canada, Colombia, Czechoslovakia, Denmark, Ecuador, France, Germany, Ireland, Italy, Japan, Morocco, Netherlands, New Zealand, Poland, Romania, South Africa, Spain, Sweden, Switzerland, United Kingdom, United States of America (24).

CONFERENCE DOCUMENTS

LIST OF THE CONFERENCE DOCUMENTS*

(DC/91 Series)

Number	Subject	Source
1	Provisional Agenda	UPOV Council
2	Provisional Rules of Procedure	UPOV Council
3	Basic Proposal	UPOV Council
4	Rules of Procedures	Plenary of the Conference
5	Article 1	United States of America
6	Article 7	United States of America
7	Article 11(1)	United States of America
8	Article 13	United States of America
9	Article 14(1), Introduction, and Article 14(2)(a), Introduction	United States of America
10	Article 14(1)(a)(iv)	United States of America
11	Article 14(1)(a)(viii)	United States of America
12	Article 14(1)(b)	United States of America
13	Article 14(1)(c)	United States of America
14	Article 14(2)(b)(i)	United States of America
15	Article 15(1)(i)	United States of America
16	Article 15(2)	United States of America
17	Article 20(2)	United States of America
18	Article 20(7)	United States of America
19	Article 26(6)	United States of America
20	Article 34(1)(b)	United States of America
21	Article 37(1)	United States of America
22	Introductory Part of Article 1(vi)	Italy
23	Article 1(vi)	United Kingdom
24	Article 14(1)(a)(viii)	Italy
25	Title of the New Act and Name of the Union	Poland
26	Article 1(vi), First Sentence	Poland

* Unless otherwise specified, the documents contain proposals for amendments to the provisions contained in the Basic Proposal. References to States are references to their delegations. Further documents were issued as "DC/DC/91" (documents of the Drafting Committee) and "DC/91/INF" (information documents); they are not listed here.

Number	Subject	Source
27	Article 1(iv), First Indent	Australia
28	Article 1(vi)	Sweden
29	Article 1	Poland
30	Article 1(x)	Germany
31	Article 1(xi)	United States of America
32	Article 1(xii)	Germany
33	Article 2	Denmark and Sweden
34	Article 3	Poland
35	Article 4(1)	Japan
36	Article 6(1)	Germany
37	Article 6(1)	Japan
38	Article 6(2)	Poland
39	Article 6(2)	Germany
40	Article 7	Poland
41	Article 7	Germany
42	Article 7	Japan
43	Article 8	Germany
44	Article 8	Poland
45	Article 9	Germany
46	Article 9	Poland
47	Article 11(2)	Japan
48	Article 12, First Sentence	Poland
49	Article 13	Poland
50	Article 14	United Kingdom
51	Article 40	Denmark and Sweden
52	Article 3	Canada
53	Article 6(1)(i)	Netherlands
54	Article 6(1), Introduction	Sweden
55	Article 7	Canada
56	Article 8	Canada
57	Article 9	Canada
58	Article 11(1), First Sentence	Netherlands
59	Article 11(2)	Germany
60	Article 14(1)(a)(viii)	Canada
61	Article 14(1)	Japan
62	Article 14(1)(c)	Poland

Number	Subject	Source
63	Article 14(2)	Poland
64	Article 12, First Sentence	Germany
65 Rev.	Article 14(2)	Japan
66	Article 14(2)(b)(iii)	Japan
67	Article 15(2)	Poland
68	Article 15(2)	Netherlands
69	Article 16(1)	Japan
70	Article 16(1), Introduction	New Zealand
71	Article 21(1)	Japan
72	Article 22(1)(b)(i)	Japan
73	Article 8	United Kingdom
74	Article 9	United Kingdom
75	Article 6(2)	Switzerland and United Kingdom
76	Article 26(7)	Germany
77	Article 29(5)(a)	Germany
78	Title of Article 34(2)	Sweden
79	Article 37(1) and (2)	Sweden
80	Article 39(1)	Sweden
81	Article 42	Sweden
82	Article 14(1)(b) and (c)	Spain
83	Article 10	United States of America
84	Article 15(2)	Spain
85	Article 19(2)	Sweden
86	Article 28(1) and (2)	Spain
87	Article 9	Germany
88	Article 15(2)	France
89 Rev.	Article 14(2)	Germany
90	Article 12	Germany
91	Article 14(1)	Germany
92	Article 15(1)	Germany
93	Amended Proposal for the Amendment of Article 11(1)	United States of America
94	Amended Proposal for the Amendment of Article 11(1) Submitted by the Delegation of the United States of America	Netherlands
95	Article 11(2) as Provisionally Adopted by the Conference	Denmark

Number	Subject	Source
96	Article 14(1)(a)(vii) and (viii)	Denmark
97	Article 14(1)(b)	Denmark
98	Article 14(1)(c)	Denmark
99	Article 40	New Zealand
100	Article 24	Japan
101	Article 26(7)	Japan
102	Article 30(1)(ii)	Japan
103	Article 32	Japan
104	Article 33	Japan
105	Article 39(4)	Japan
106	Report of the Working Group on Article 1	Mr. J. Guiard, Chairman of the Working Group on Article 1
107	Article 19	Canada and Denmark
108	Article 37(3)	Spain
109	Article 16(1)(i)	Denmark
110	Article 14(1)(a) as Provisionally Adopted by the Conference	United Kingdom
111	Article 14(2)(b)(i)	Japan
112	Agenda	(Adopted by the) Diplomatic Conference
113	Article 30	Netherlands
114	Article 15(1)(iii)	Denmark
115	Article 15(2)	Netherlands
116	Proposal for a Common Statement Relating to Article 34	Denmark
117	Proposal for a Common Statement Relating to Article 3	Sweden
118	Report of the Working Group on Article 14(1)(a) and (b)	Mr. J. Harvey, Chairman of the Working Group on Article 14(1)(a) and (b)
119	Proposal for a Common Statement Relating to Article 15(2)	Netherlands
120	Title of the New Act and Name of the Union	Poland
121	Article 34	Netherlands
122	Article 37(1) and (2)	United States of America
123	Report of the Credentials Committee	Credentials Committee
124	Article 1	Germany and New Zealand
125 Rev.	Article 34(1)(b)	Germany and New Zealand

Number	Subject	Source
126	Article 34(1)(b)	Canada
127	Article 26(6) and (7)	Australia, Canada, France, Germany, Japan, Netherlands, New Zealand, United Kingdom and United States of America
128	Article 29(3)(b)	Australia, Canada, France, Germany, Japan, Netherlands, New Zealand, United Kingdom and United States of America
129 Rev.	Draft Resolution on Article 14(5)	Drafting Committee
130	Draft 1991 Act	Drafting Committee
131	Draft Final Act	Secretariat
132	Articles 6 and 16	Netherlands
133	Article 11(3)	Germany
134	Article 6(1) as Provisionally Adopted by the Conference	France, Germany and United Kingdom
135	Article 6	Canada and United States of America
136	Draft Recommendation Relating to Article 15(2)	Drafting Committee
137	Draft Common Statement Relating to Article 34	Drafting Committee
138	Final Draft of the 1991 Act	Secretariat
139	Final Draft of the Recommendation Relating to Article 15(2)	Secretariat
140	Final Draft of the Resolution on Article 14(5)	Secretariat
141	Final Draft of the Resolution on Article 34	Secretariat
142	Final Act	(Adopted by the) Conference
143	Signatures	(Memorandum by the) Secretariat

TEXT OF THE CONFERENCE DOCUMENTS

DC/91/1

November 9, 1990 (Original: French)

Source: UPOV Council**PROVISIONAL AGENDA OF THE DIPLOMATIC CONFERENCE***

1. Opening of the Conference by the Secretary-General of UPOV
2. Address by the President of the Council of UPOV
3. Consideration and adoption of the Rules of Procedure
4. Election of the President of the Conference
5. Consideration and adoption of the agenda
6. Election
 - i) of the Vice-Presidents of the Conference
 - ii) of the members of the Credentials Committee
 - iii) of the members of the Drafting Committee
7. Opening declarations
8. Consideration of the first report of the Credentials Committee
9. Consideration of the draft new Act of the UPOV Convention
10. Consideration of the second report of the Credentials Committee
11. Adoption of the new Act of the UPOV Convention
12. Consideration and adoption of any recommendation, resolution or common statement, and of a final act, if any, of the Conference
13. Closing declarations
14. Closing of the Conference by the President

* The Conference adopted its agenda as appearing in this document. The agenda, as adopted, was published as document DC/91/112. Both documents referred to the fact that the final act of the Conference, if any, and the new Act of the UPOV Convention were to be laid open for signature immediately after the closing of the Conference. (Editor's Note)

DC/91/2

November 9, 1990 (Original: French)

Source: UPOV Council**PROVISIONAL RULES OF PROCEDURE OF THE DIPLOMATIC CONFERENCE***Contents**CHAPTER I: OBJECTIVE; COMPETENCE; COMPOSITION; SECRETARIAT**

- Rule 1: Objective and Competence
- Rule 2: Composition
- Rule 3: Secretariat

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- Rule 7: Letters of Appointment
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- Rule 19: Quorum
- Rule 20: General Powers of the Presiding Officer
- Rule 21: Speeches

* These Provisional Rules of Procedure will apply provisionally until such time as the Diplomatic Conference adopts its Rules of Procedure under the relevant agenda item. Under Rule 34(2), such adoption requires a simple majority of the Member Delegations present and voting.

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- Rule 22: Precedence
 - Rule 23: Points of Order
 - Rule 24: Limit on Speeches
 - Rule 25: Closing of List of Speakers
 - Rule 26: Adjournment or Closure of Debate
 - Rule 27: Suspension or Adjournment of the Meeting
 - Rule 28: Order of Procedural Motions; Content of Interventions on Such Motions
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- Rule 47: Amendments to the Rules of Procedure

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- Rule 48: Final Act

CHAPTER I: OBJECTIVE; COMPETENCE; COMPOSITION; SECRETARIAT**Rule 1: Objective and Competence**

(1) The objective of the Diplomatic Conference for the Revision of the International Convention for the Protection of New Varieties of Plants (hereinafter referred to as "the Conference") is to negotiate and adopt, on the basis of the proposal contained in document DC/91/3 and in accordance with Article 27 of the 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 23, 1978 (hereinafter referred to as "the Convention"), a revised text of the Convention.

(2) The Conference, meeting in Plenary, shall be competent to:

(i) adopt and amend these Rules of Procedure (hereinafter referred to as "these Rules");

(ii) adopt the agenda of the Conference;

(iii) decide on credentials, full powers, letters or other documents presented in accordance with Rules 6, 7 and 8 of these Rules;

(iv) adopt a revised text (hereinafter referred to as "the new Act") of the Convention;

(v) adopt any recommendation or resolution whose subject matter is germane to the new Act;

(vi) adopt any common statement to be included in the Records of the Conference;

(vii) adopt any final act of the Conference;

(viii) deal with all other matters either referred to it by these Rules or appearing on its agenda.

Rule 2: Composition

(1) The Conference shall consist of:

(i) delegations of the member States of the International Union for the Protection of New Varieties of Plants (hereinafter referred to as "the Union" or "UPOV");

(ii) delegations of States other than those referred to in (i) above, a list of which was drawn up by the Council of UPOV at its twenty-fourth ordinary session (see Annex I);

(iii) representatives of intergovernmental and international non-governmental organizations, a list of which was drawn up by the Council of UPOV at its twenty-fourth ordinary session (see Annex II).

(2) Hereinafter, the delegations referred to in paragraph (1)(i) are called "Member Delegations," the delegations referred to in paragraph (1)(ii) are

called "Observer Delegations" and the representatives referred to in paragraph (1)(iii) are called "representatives of Observer Organizations." The term "Delegations" as used hereinafter includes, unless expressly indicated otherwise, both Member Delegations and Observer Delegations; it does not include the representatives of Observer Organizations.

(3) The Conference may invite to any meeting any person whose technical advice it may consider useful for the work of that meeting.

(4) The representatives of the European Communities shall have the same status as Observer Delegations.

Rule 3: Secretariat

(1) The Conference shall have a Secretariat provided by the Office of UPOV.

(2) The Secretary-General and the Vice Secretary-General of UPOV, and any other official of the UPOV Office designated by the Secretary-General of UPOV, may participate in the discussions of the Conference, meeting in Plenary, as well as in any committee or working group thereof and may, at any time, make oral or written statements, observations or suggestions to the Conference, meeting in Plenary, and to any committee or working group thereof concerning any question under consideration.

(3) The Secretary-General of UPOV shall designate the Secretary of the Conference from among the staff of UPOV, and the Secretaries of the Credentials Committee and the Drafting Committee, and a Secretary for each working group, from among the staff of either UPOV or the International Bureau of the World Intellectual Property Organization (WIPO).

(4) The Secretary of the Conference shall direct the staff required by the Conference.

(5) The Secretariat shall provide for the receiving, translation, reproduction and distribution of the required documents, the interpretation of oral interventions and the performance of all other secretarial work required for the Conference.

(6) The Secretary-General of UPOV shall be responsible for the custody and preservation in the archives of UPOV of all documents of the Conference, the publication after the Conference of the summary minutes thereof and the distribution after the Conference of the final documents thereof.

CHAPTER II: REPRESENTATION

Rule 4: Representation of Governments

(1) Each Delegation shall consist of one or more delegates and may include alternate delegates and advisors. Each Delegation shall be led by a Head of Delegation and may have an Alternate or Deputy Head of Delegation.

(2) An alternate delegate or an advisor may act as a delegate on designation by the Head of his Delegation.

Rule 5: Representation of Observer Organizations

An Observer Organization may be represented by one or more representatives.

Rule 6: Credentials and Full Powers

- (1) Every Delegation shall present credentials.
- (2) Full powers shall be required for signing the new Act. Such powers may be included in the credentials.

Rule 7: Letters of Appointment

The representatives of Observer Organizations shall present a letter or other document appointing them.

Rule 8: Presentation of Credentials, etc.

The credentials and full powers referred to in Rule 6 and the letters or other documents referred to in Rule 7 shall be presented to the Secretary of the Conference, if possible within twenty-four hours after the opening of the Conference.

Rule 9: Examination of Credentials, etc.

- (1) The Credentials Committee referred to in Rule 11 shall examine the credentials, full powers, letters or other documents referred to in Rules 6 and 7 and shall report to the Conference, meeting in Plenary.
- (2) The final decision on the said credentials, full powers, letters or other documents shall be within the competence of the Conference, meeting in Plenary. Such decision shall be made as soon as possible and in any case before the adoption of the new Act.

Rule 10: Provisional Participation

Pending a decision on their credentials, letters or other documents of appointment, Delegations and representatives of Observer Organizations shall be entitled to participate provisionally in the deliberations of the Conference as provided in these Rules.

CHAPTER III: COMMITTEES AND WORKING GROUPS**Rule 11: Credentials Committee**

- (1) The Conference shall have a Credentials Committee.
- (2) The Credentials Committee shall consist of five members elected by the Conference, meeting in Plenary, from among the Member Delegations.

Rule 12: Drafting Committee

- (1) The Conference shall have a Drafting Committee.
- (2) The Drafting Committee shall consist of ten* members elected by the Conference, meeting in Plenary, from among the Member Delegations.
- (3) The Drafting Committee shall prepare drafts and give advice on drafting as requested by the Conference, meeting in Plenary. The Drafting Committee shall not alter the substance of texts submitted to it, but shall coordinate and review the drafting of all texts provisionally adopted by the Conference, meeting in Plenary, and shall submit the text so reviewed for final adoption by the Conference, meeting in Plenary.

Rule 13: Working Groups

- (1) The Conference, meeting in Plenary, may create working groups. On creating them, it shall specify their tasks.
- (2) The Conference, meeting in Plenary, shall decide on the number of members of any working group and shall elect them from among the Member Delegations and, exceptionally, also from among the Observer Delegations.

Rule 14: Steering Committee

- (1) The Steering Committee of the Conference shall consist of the President and Vice-Presidents of the Conference, the Chairmen of the Credentials Committee and Drafting Committee and also the chairman of any working group from the time of its creation until the completion of its task. The meetings of the Steering Committee shall be presided over by the President of the Conference.
- (2) If the Chairman of the Credentials Committee, of the Drafting Committee or of a working group is absent during a meeting of the Steering Committee, one of the Vice-Chairmen of the Committee or working group concerned, in the order of precedence indicated in Rule 15(3), shall sit and vote in the Steering Committee.
- (3) The Steering Committee shall meet from time to time to review the progress of the Conference and to make decisions with a view to furthering that progress, including in particular decisions on the coordinating of the meetings of the Plenary, the Credentials Committee, the Drafting Committee and the working groups.
- (4) The Steering Committee shall propose the text of any final act of the Conference for adoption by the Conference, meeting in Plenary.

CHAPTER IV: OFFICERS**Rule 15: Officers**

- (1) The Conference, meeting in Plenary and presided over by the Secretary-General of UPOV, shall elect its President and then, presided over by its President, shall elect two Vice-Presidents.

* This word was amended to "11" by the Conference. (Editor's Note)

(2) The Credentials Committee and the Drafting Committee shall each elect a Chairman and two Vice-Chairmen from among the delegates of those States whose Delegations are members of it. The Conference, meeting in Plenary, shall elect the officers of any working group.

(3) Precedence among the Vice-Presidents and Vice-Chairmen of a given body shall depend on the place occupied by the name of the State of each of them in the list of Member Delegations drawn up in the alphabetical order of the French names of the States, starting with the name of the State that has been drawn by lot by the President of the Conference.

(4) All officers must be members of Member Delegations.

Rule 16: Acting President or Acting Chairman

(1) If the President of the Conference or any Chairman is absent from any meeting of the body to be chaired by him (the Conference, meeting in Plenary, the Credentials Committee, the Drafting Committee or the working group), the meeting concerned shall be presided over, as Acting President or Acting Chairman, by that Vice-President or Vice-Chairman of the body concerned who, among the Vice-Presidents or Vice-Chairmen present, has precedence over the other.

(2) If all the officers of a body (the Conference, meeting in Plenary, the Credentials Committee, the Drafting Committee, the Steering Committee or a working group) are absent from any meeting of the body concerned, that body shall elect an Acting President or Acting Chairman, as the case may be.

Rule 17: Replacement of President or Chairman

If the President or any Chairman is unable to perform his functions for the remainder of the duration of the Conference, a new President or Chairman shall be elected.

Rule 18: Participation of Presiding Officers in Voting

(1) No President or Chairman, whether elected as such or acting (hereinafter referred to as "the Presiding Officer"), shall take part in voting. Another member of his Delegation may vote in its name.

(2) Where the Presiding Officer is the only member of his Delegation, he may vote, but only after all the other Delegations have voted.

CHAPTER V: CONDUCT OF BUSINESS

Rule 19: Quorum

(1) A quorum shall be required in the Conference, meeting in Plenary. It shall be constituted by one-half of the member States of the Union represented at the Conference.

(2) A quorum shall be required for the meetings of the Credentials Committee, the Drafting Committee and the working groups; it shall be constituted by one-half of the members of that Committee or working group.

Rule 20: General Powers of the Presiding Officer

(1) In addition to exercising the powers conferred on him elsewhere by these Rules, the Presiding Officer shall declare the opening and closing of the meetings, direct the discussions, accord the right to speak, put questions to the vote and announce decisions. He shall rule on points of order and, subject to these Rules, shall have complete control over the proceedings at any meeting and over the maintenance of order thereat.

(2) The Presiding Officer may propose to the Plenary of the Conference or to the Committee or working group concerned the limitation of the time allowed to each speaker, the limitation of the number of times each Delegation may speak on any question, the closure of the list of speakers or the closure of the debate. He may also propose the suspension or the adjournment of the meeting, or the adjournment of the debate on the question under discussion. Such proposals of the Presiding Officer shall be considered adopted unless immediately rejected.

Rule 21: Speeches

(1) No person may speak without having previously obtained the permission of the Presiding Officer. Subject to Rules 22 and 23, the Presiding Officer shall call upon speakers in the order in which they signify their desire to speak.

(2) The Presiding Officer may call a speaker to order if his remarks are not relevant to the subject under discussion.

Rule 22: Precedence

(1) Member Delegations asking for the floor are generally accorded precedence over Observer Delegations asking for the floor, and both categories of Delegation are generally given precedence over the representatives of Observer Organizations.

(2) The Chairman of the Credentials Committee, the Chairman of the Drafting Committee or the Chairman of a working group may be given precedence during discussions relating to the work of the Committee or working group concerned.

(3) The Secretary-General of UPOV or his representative may be given precedence for making statements, observations or suggestions.

Rule 23: Points of Order

(1) During the discussion of any matter, any Member Delegation may rise to a point of order, and the point of order shall be immediately decided by the Presiding Officer in accordance with these Rules. Any Delegation may appeal against the ruling of the Presiding Officer. The appeal shall be immediately put to the vote and, if it is not successful, the Presiding Officer's ruling shall stand.

(2) The Member Delegation that has risen to a point of order under paragraph (1) above may not speak on the substance of the matter under discussion.

Rule 24: Limit on Speeches

In any meeting, the decision may be taken to limit the time to be allowed each speaker and the number of times that each Delegation or each representative of an Observer Organization may speak on any question. When the debate is limited and a Delegation or representative of an Observer Organization has used up its allotted time, the Presiding Officer shall call it to order without delay.

Rule 25: Closing of List of Speakers

(1) During the discussion of any given question, the Presiding Officer may announce the list of participants who have signified their wish to speak and decide to close the list with respect to that question. The Presiding Officer may nevertheless give the right of reply to any speaker if a speech delivered after he has decided to close the list makes it desirable.

(2) Any decision made by the Presiding Officer under paragraph (1) may be the subject of an appeal under Rule 23.

Rule 26: Adjournment or Closure of Debate

Any Member Delegation may at any time move the adjournment or closure of the debate on the question under discussion, whether or not any other participant has signified his wish to speak. In addition to the proposer of the motion to adjourn or close the debate, permission to speak on that motion shall be given only to one Member Delegation seconding and two Member Delegations opposing it, after which the motion shall immediately be put to the vote. The Presiding Officer may limit the time allowed to speakers under this Rule.

Rule 27: Suspension or Adjournment of the Meeting

During the discussion of any matter, any Member Delegation may move the suspension or the adjournment of the meeting. Such motions shall not be debated, but immediately put to the vote.

Rule 28: Order of Procedural Motions; Content of Interventions on Such Motions

(1) Subject to Rule 23, the following motions shall have precedence in the order given over all other pending proposals or motions:

- (i) to suspend the meeting;
- (ii) to adjourn the meeting;
- (iii) to adjourn the debate on the question under discussion;
- (iv) to close the debate on the question under discussion.

(2) Any Member Delegation that has been given the floor on a procedural motion may speak on that motion only, and may not speak on the substance of the matter under discussion.

Rule 29: Basic Proposal and Proposals for Amendments

(1) Document DC/91/3 shall constitute the basis for the discussions of the Conference, and the text of the draft new Act appearing in that document shall constitute the "Basic Proposal." Where the Basic Proposal contains two or more alternatives or words in square brackets, only Alternative A and the text not between square brackets shall be regarded as forming part of the Basic Proposal, all the other alternatives and all the words in square brackets being regarded as proposals for amendments if they are submitted in accordance with paragraph (2) below.

(2) Any Member Delegation may propose amendments to the basic proposal.

(3) Proposals for amendments shall, as a rule, be submitted in writing and handed to the Secretary of the competent body (the Conference, meeting in Plenary, the Credentials Committee, the Drafting Committee or the working group). The Secretariat shall distribute copies to the Delegations and representatives of Observer Organizations forming part of the body concerned. As a general rule, a proposal for amendment cannot be taken into consideration and discussed or put to the vote at a meeting unless copies of it have been distributed not later than three hours before it is taken into consideration. The Presiding Officer may, however, permit the taking into consideration and discussion of a proposal for amendment even though copies of it have not been distributed or have been distributed less than three hours before it is to be taken into consideration.

Rule 30: Decisions on Competence

(1) If a Member Delegation moves that a duly seconded proposal should not be taken into consideration by the Conference because it is outside the latter's competence, that motion shall be decided upon by the Conference, meeting in Plenary, and shall be put to the vote before the proposal is called up for discussion.

(2) If the motion referred to in paragraph (1) above is proposed before a body other than the Conference, meeting in Plenary, it shall be referred to the Conference, meeting in Plenary, for a ruling.

Rule 31: Withdrawal of Procedural Motions and Proposals for Amendments

Any procedural motion and any proposal for amendment may be withdrawn by the Member Delegation that made it, at any time before voting on it has commenced, provided that no amendment to it has been proposed by another Member Delegation. Any motion or proposal thus withdrawn may be reintroduced by any other Member Delegation.

Rule 32: Reconsideration of Matters Decided

When any matter has been decided by a body (the Conference, meeting in Plenary, the Credentials Committee, the Drafting Committee or a working group), it may not be reconsidered by that body unless so decided by a two-thirds majority of the Member Delegations present and voting. In addition to the proposer of the motion to reconsider, permission to speak on that motion shall be given only to one Member Delegation seconding and two Member Delegations opposing it, after which the motion shall immediately be put to the vote.

CHAPTER VI: VOTING**Rule 33: Voting Rights**

All Member Delegations shall have the right to vote. Each one of them shall have one vote, may represent itself only and may vote in its name only.

Rule 34: Required Majorities

(1) Adoption of the new Act shall, in accordance with the second sentence of Article 27(2) of the Convention, require a majority of five-sixths of the States of the Union represented at the Conference.

(2) Subject to Rules 32 and 47(2), any other decision of the Conference, meeting in Plenary, and any decision of the Credentials Committee, the Drafting Committee or any working group shall require a simple majority of the Member Delegations present and voting.

(3) For the purposes of these Rules, references to Member Delegations "present and voting" shall be construed as references to Member Delegations present and casting an affirmative or negative vote. Express abstention, non-voting or absence during a vote shall not be regarded as the casting of a vote.

Rule 35: Requirement of Seconding; Method of Voting

(1) Any proposal for amendment made by a Member Delegation shall be put to a vote only if seconded by at least one other Member Delegation.

(2) Voting on any question shall be by show of hands unless a Member Delegation, seconded by at least one other Member Delegation, requests a roll call, in which case it shall be by roll call. The roll shall be called in the alphabetical order of the French names of the States, beginning with the Member Delegation whose name shall have been drawn by lot by the Presiding Officer.

Rule 36: Conduct During Voting

(1) After the Presiding Officer has announced the beginning of voting, the voting shall not be interrupted except on a point of order concerning the actual conduct of the voting.

(2) The Presiding Officer may permit a Member Delegation to explain its vote or its abstention, either before or after the voting.

Rule 37: Division of Proposals

Any Delegation* may move that parts of the basic proposal or of proposals for amendments be voted upon separately. If the request for division is objected to, the motion for division shall be put to a vote. In addition to the

* These words were corrected to "Any member Delegation" by the Conference.
(Editor's Note)

proposer of the motion for division, permission to speak on that motion shall be given only to one Member Delegation seconding and two Member Delegations opposing it. If the motion for division is carried, all parts of the basic proposal or of the proposal for amendment that have been separately approved shall again be put to the vote, together, as a whole. If all operative parts of the basic proposal or of the proposal for amendment have been rejected, the basic proposal or the proposal for amendment shall be considered rejected as a whole.

Rule 38: Voting on Proposals for Amendments

(1) Any proposal for amendment shall be voted upon before the text to which it relates is voted upon.

(2) Proposals for amendments relating to the same text shall be put to the vote in the order of their substantive remoteness from the said text, the most remote being put to the vote first and the least remote being put to the vote last. If, however, the adoption of any proposal for amendment necessarily implies the rejection of any other proposal for amendment or of the original text, such proposal or text shall not be put to the vote.

(3) If one or more proposals for amendment relating to the same text are adopted, the text as amended shall be put to the vote.

(4) Any proposal the purpose of which is to add to or delete from a text shall be considered a proposal for amendment.

Rule 39: Voting on Proposals on the Same Question

Subject to Rule 38, where two or more proposals relate to the same question, the body concerned (the Conference, meeting in Plenary, the Credentials Committee, the Drafting Committee or the working group) shall, unless it decides otherwise, vote on the proposals in the order in which they have been submitted.

Rule 40: Equally Divided Votes

(1) If a vote is equally divided on a matter--other than the election of officers--that calls for a simple majority, the proposal shall be considered rejected.

(2) If a vote is equally divided on a proposal for electing a given person as an officer, the vote shall be repeated, if the nomination is maintained, until either that nomination is adopted or rejected or another person is elected for the position in question.

CHAPTER VII: LANGUAGES AND MINUTES

Rule 41: Languages of Oral Interventions

(1) Subject to paragraph (2), oral interventions made at the meetings of any body (the Conference, meeting in Plenary, the Credentials Committee, the

Drafting Committee, the Steering Committee or any working group) shall be in English, French or German, and interpretation shall be provided by the Secretariat in the other two languages.

(2) The Credentials Committee, the Drafting Committee or any working group may, if none of its members objects, decide to dispense with interpretation or to limit it to fewer languages than are referred to in paragraph (1).

Rule 42: Summary Minutes

(1) Provisional summary minutes of the Plenary meetings of the Conference shall be drawn up by the Office of UPOV and shall be made available as soon as possible after the closing of the Conference to all speakers, who shall, within two months after the minutes have been made available, inform the Office of UPOV of any suggestions for changes to the minutes of their own interventions.

(2) The final summary minutes shall be published in due course by the Office of UPOV.

Rule 43: Languages of Documents and Summary Minutes

(1) Any written proposal shall be presented to the Secretariat in English, French or German.

(2) Subject to paragraph (3), all documents distributed during or after the Conference shall be made available in English, French and German.

(3)(a) Provisional summary minutes shall be drawn up in the language used by the speaker.

(b) The final summary minutes shall be made available in English, French and German.

CHAPTER VIII: OPEN AND CLOSED MEETINGS

Rule 44: Meetings of the Conference

The Plenary meetings of the Conference shall be open to the public unless the Conference, meeting in Plenary, decides otherwise.

Rule 45: Meetings of the Committees and Working Groups

The meetings of the Credentials Committee, the Drafting Committee, the Steering Committee and working groups shall be open to the members of the Committee or working group concerned and the Secretariat.

CHAPTER IX: OBSERVERS

Rule 46: Observers

(1) Observer Delegations may attend the Plenary meetings of the Conference and make oral statements at them.

(2) The representatives of Observer Organizations may attend the Plenary meetings of the Conference. On being invited to do so by the Presiding Officer, they may make oral statements at those meetings on questions within the scope of their activities.

(3) Written statements submitted by Observer Organizations on subjects for which they have a special competence and which are related to the work of the Conference shall be distributed to the participants by the Secretariat in the quantities and the languages in which the statements are made available.

CHAPTER X: AMENDMENTS TO THE RULES OF PROCEDURE

Rule 47: Amendments to the Rules of Procedure

(1) With the exception of Rule 34(1) and the present Rule, these Rules may be amended by the Conference, meeting in Plenary.

(2) The adoption of any amendment shall require a majority of three-fourths of the votes cast by the Member Delegations present and voting.

CHAPTER XI: FINAL ACT

Rule 48: Final Act

If a final act is adopted, it shall be open for signature by any Delegation.

ANNEX I

LIST OF THE NON-MEMBER STATES INVITED TO THE DIPLOMATIC CONFERENCE

Rule 1(ii)

Afghanistan	Botswana	Comoros
Albania	Brazil	Congo
Algeria	Brunei Darussalam	Costa Rica
Angola	Bulgaria	Côte d'Ivoire
Antigua and Barbuda	Burkina Faso	Cuba
Argentina	Burundi	Cyprus
Austria	Byelorussian SSR	Czechoslovakia
Bahamas	Cameroon	Democratic Kampuchea
Bahrain	Canada*	Democratic People's Republic of Korea
Bangladesh	Cape Verde	Djibouti
Barbados	Central African Republic	Dominica
Belize	Chad	Dominican Republic
Benin	Chile	Ecuador
Bhutan	China	Egypt
Bolivia	Colombia	

* This State was deleted from the list by the Conference. (Editor's Note)

El Salvador	Malaysia	San Marino
Equatorial Guinea	Maldives	Sao Tome and Principe
Ethiopia	Mali	Saudi Arabia
Fiji	Malta	Senegal
Finland	Mauritania	Seychelles
Gabon	Mauritius	Sierra Leone
Gambia	Mexico	Singapore
Ghana	Monaco	Solomon Islands
Greece	Mongolia	Somalia
Grenada	Morocco	Soviet Union
Guatemala	Mozambique	Sri Lanka
Guinea	Myanmar	Sudan
Guinea-Bissau	Namibia	Suriname
Guyana	Nauru	Swaziland
Haiti	Nepal	Syria
Holy See	Nicaragua	Thailand
Honduras	Niger	Togo
Iceland	Nigeria	Tonga
India	Norway	Trinidad and Tobago
Indonesia	Oman	Tunisia
Iran (Islamic Republic of)	Pakistan	Turkey
Iraq	Panama	Tuvalu
Jamaica	Papua New Guinea	Uganda
Jordan	Paraguay	Ukrainian SSR
Kenya	Peru	United Arab Emirates
Kiribati	Philippines	United Republic of Tanzania
Kuwait	Portugal	Uruguay
Laos	Qatar	Vanuatu
Lebanon	Republic of Korea	Venezuela
Lesotho	Republic of Yemen	Viet Nam
Liberia	Romania	Yugoslavia
Libya	Rwanda	Zaire
Liechtenstein	Saint Kitts and Nevis	Zambia
Luxembourg	Saint Lucia	Zimbabwe
Madagascar	Saint Vincent and the Grenadines	
Malawi	Samoa	(150)

ANNEX II

LIST OF INTERGOVERNMENTAL ORGANIZATIONS AND
INTERNATIONAL NON-GOVERNMENTAL ORGANIZATIONS
INVITED TO THE DIPLOMATIC CONFERENCE

Rule 1(iii)

UN	United Nations
WIPO	World Intellectual Property Organization
FAO	United Nations Food and Agriculture Organization
GATT	General Agreement on Tariffs and Trade
UNIDO	United Nations Industrial Development Organization

EC European Communities
EFTA European Free Trade Association
JUNAC Board of the Cartagena Agreement
OECD Organisation for Economic Co-operation and Development

* * * * *

ARIPO African Regional Industrial Property Organization
EPO European Patent Organisation
OAPI African Intellectual Property Organization

* * * * *

IBPGR International Board for Plant Genetic Resources
ICNCP International Commission for the Nomenclature of Cultivated Plants
 of the International Union of Biological Sciences
ISTA International Seed Testing Association
IUCN International Union for the Conservation of Nature and Natural
 Resources
SPS Panamerican Seed Seminar

* * * * *

AIPH International Association of Horticultural Producers
AIPPI International Association for the Protection of Industrial Property
ASSINSEL International Association of Plant Breeders for the Protection of
 Plant Varieties
CEETTAR European Federation of Agricultural and Rural Contractors
CIOPORA International Community of Breeders of Asexually Reproduced
 Ornamental and Fruit-Tree Varieties
COGECA General Committee for Agricultural Cooperation in the European
 Economic Community
COMASSO Association of Plant Breeders of the European Economic Community
COPA Committee of Agricultural Organisations in the European Economic
 Community
COSEMCO Seed Committee of the Common Market
EFPIA European Federation of Pharmaceutical Industries' Associations
FICPI International Federation of Industrial Property Attorneys
FIS International Federation of the Seed Trade
GIFAP International Group of National Associations of Agrochemical Manu-
 facturers
ICC International Chamber of Commerce
IFAP International Federation of Agricultural Producers
UEPIP Union of European Practitioners in Industrial Property
UNICE Union of Industrial and Employers' Confederations of Europe

DC/91/3 November 9, 1990 (Original: English/
French/German)
Source: UPOV Council

**BASIC PROPOSAL
FOR A
NEW ACT OF THE
INTERNATIONAL CONVENTION FOR THE
PROTECTION OF NEW VARIETIES OF PLANTS**

Editor's Note: This document is reproduced in the "Basic Texts" part, on the left-hand pages, starting from page 12, above.

DC/91/4 March 5, 1991 (Original: English/
French/German)
Source: Plenary of the Conference

RULES OF PROCEDURE

Editor's Note: This document is not reproduced here. It listed the changes made by the Conference to the Provisional Rules of Procedure; the changes which concern the English text are reflected as footnotes to the text of the latter (document DC/91/2--see pages 87, 92 and 95, above).

DC/91/5 March 4, 1991 (Original: English)
Source: Delegation of the United States of America

PROPOSAL FOR THE AMENDMENT OF ARTICLE 1

It is proposed that the following definition be added to Article 1:

"(viii) 'intergovernmental organization' means an organization constituted by, and composed of, States of any region of the world, which has competence in respect of matters governed by this Convention, has its own legislation providing for the grant of breeders' rights with effect in its territory and binding on all its member States, and has been duly authorized, in accordance with its internal procedures, to sign, ratify, accept, approve or accede to this Convention."

DC/91/6

March 4, 1991 (Original: English)

Source: Delegation of the United States of America**PROPOSAL FOR THE AMENDMENT OF ARTICLE 7***

It is proposed that Article 7 be worded as follows:

"The variety shall be deemed to be distinct if it is clearly distinguishable from any other variety whose existence is a matter of common knowledge at the time of the filing of the application. In particular, common knowledge of such other variety shall be inferred from the date of grant of a breeder's right for such other variety, or its entry in an official register of varieties, unless such grant or entry was effected in the same territory of a Contracting Party as the filing of the application. In the latter case, common knowledge of such other variety shall be inferred from the date of filing of the application for such grant or entry. [In particular, the filing of an application for the granting of a breeder's right or for the entering of the variety in an official register of varieties, in any country, shall be deemed to render the variety a matter of common knowledge from the date of the application, provided that the application leads to the granting of a breeder's right or to the entering of the variety in the official register of varieties, as the case may be.]"

* In this and the subsequent documents, the words whose addition was proposed are underlined and the words that were to be deleted appear in square brackets. (Editor's Note)

DC/91/7

March 4, 1991 (Original: English)

Source: Delegation of the United States of America**PROPOSAL FOR THE AMENDMENT OF ARTICLE 11(1)**

It is proposed that Article 11(1) be worded as follows:

"(1) [~~The right; its period~~] Any breeder who has duly filed an application for the grant of a breeder's right with the authority of, or an application for another title of protection for a variety in, one of the Contracting Parties (the "first application") shall, for the purpose of filing an application for the grant of a breeder's right for the same variety with the authority of any other Contracting Party (the "subsequent application"), 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."

DC/91/8 March 4, 1991 (Original: English)

Source: Delegation of the United States of America

PROPOSAL FOR THE AMENDMENT OF ARTICLE 13

It is proposed that the word "expressly" be deleted in the last sentence. Article 13 would then be worded as follows:

"Each Contracting Party shall provide measures designed to safeguard the interests of the breeder during the period between the filing or the publication of the application for the grant of a breeder's right and the grant of that right. Such measures shall have the effect that the holder of a breeder's right shall at least be entitled to equitable remuneration from any person who, during the said period, has carried out acts which, once the right is granted, require the breeder's authorization as provided in Article 14. A Contracting Party may provide that the said measures shall only take effect in relation to parties whom or which the breeder has [expressly] notified of the filing of the application."

DC/91/9 March 4, 1991 (Original: English)

Source: Delegation of the United States of America

**PROPOSAL FOR THE AMENDMENT OF ARTICLE 14(1), INTRODUCTION,
AND ARTICLE 14(2)(a), INTRODUCTION**

1. It is proposed that Article 14(1), introduction, be worded as follows:

"(1) [~~Acts requiring the breeder's authorization~~] Subject to Articles 15 and 16, the breeder's right shall confer on its owner the right to prevent others from exploiting the protected variety in the following manner [the following acts shall require the authorization of the breeder]:"

2. It is further proposed that Article 14(2)(a), introduction, be worded as follows:

"(2) [~~Same, in respect of essentially derived and certain other varieties~~] (a) Subject to Articles 15 and 16, the breeder's right shall also confer on its owner the right to prevent others from performing any of the acts mentioned in paragraph (1) [shall also require the authorization of the breeder] in relation to"

DC/91/10 March 4, 1991 (Original: English)

Source: Delegation of the United States of America

PROPOSAL FOR THE AMENDMENT OF ARTICLE 14(1)(a)(iv)

It is proposed that Article 14(1)(a)(iv) be worded as follows:

"(iv) selling or other marketing [sale or other putting on the market],"

DC/91/11 March 4, 1991 (Original: English)

Source: Delegation of the United States of America

PROPOSAL FOR THE AMENDMENT OF ARTICLE 14(1)(a)(viii)

It is proposed that Article 14(1)(a)(viii) be deleted.

DC/91/12 March 4, 1991 (Original: English)

Source: Delegation of the United States of America

PROPOSAL FOR THE AMENDMENT OF ARTICLE 14(1)(b)

It is proposed that Article 14(1)(b) be worded as follows:

"(b) in respect of the harvested material of the protected variety, any of the acts referred to in (a), above, provided that the harvested material was obtained through the unauthorized use of propagating material [whose use, for the purpose of obtaining harvested material, was not authorized by the breeder [and if, but only if, the breeder has had no legal possibility of exercising his right in relation to the propagating material]];"

DC/91/13 March 4, 1991 (Original: English)

Source: Delegation of the United States of America

PROPOSAL FOR THE AMENDMENT OF ARTICLE 14(1)(c)

It is proposed that Article 14(1)(c) be replaced by a new paragraph (2) as follows:

"(2) Subject to Articles 15 and 16, any Contracting Party may also provide that the breeder's right shall confer on its owner the right to prevent others from performing any of the acts mentioned in paragraph (1), above, in respect of products made directly from harvested material of the protected variety, provided that such products were made using harvested material falling within the provisions of paragraph (1)(b) above."

DC/91/14

March 4, 1991 (Original: English)

Source: Delegation of the United States of America**PROPOSAL FOR THE AMENDMENT OF ARTICLE 14(2)(b)(i)**

It is proposed that Article 14(2)(b)(i) be worded as follows:

"(i) it is predominantly derived from the initial variety, or from a variety that is itself predominantly derived from the initial variety, resulting in the conservation of the essential characteristics that are the expression of the genotype or of the combination of genotypes of the initial variety, particularly through methods [which have the effect of conserving the essential characteristics that are the expression of the genotype or of the combination of genotypes of the initial variety,] such as the selection of a natural or induced mutant or of a somaclonal variant, the selection of a variant, back-crossings or transformation by genetic engineering,"

DC/91/15

March 4, 1991 (Original: English)

Source: Delegation of the United States of America**PROPOSAL FOR THE AMENDMENT OF ARTICLE 15(1)(i)**

It is proposed that Article 15(1)(i) be worded as follows:

"(i) acts done privately and for non-commercial purposes, that do not unreasonably conflict with the exercise of the breeder's right,"

DC/91/16

March 4, 1991 (Original: English)

Source: Delegation of the United States of America**PROPOSAL FOR THE AMENDMENT OF ARTICLE 15(2)**

It is proposed that Article 15(2) be worded as follows:

"(2) [~~Farm-saved~~ seed] Notwithstanding Article 14, each Contracting Party may, within reasonable limits and subject to the safeguarding of the legitimate interests of the breeder, restrict the breeder's right in relation to any variety in order to permit farmers to use for propagating purposes, on their own holdings, the product of the harvest which they have obtained by planting, on their own holdings, propagating material of the protected variety, or a variety covered by Article 14(2)(a)(i) or (ii), placed on the market by the breeder or otherwise made available with his authorization."

DC/91/17 March 4, 1991 (Original: English)

Source: Delegation of the United States of America

PROPOSAL FOR THE AMENDMENT OF ARTICLE 20(2)

It is proposed that the second sentence of Article 20(2) be deleted.

The sentence reads as follows: "It may not consist solely of figures except where this is an established practice for designating varieties."

DC/91/18 March 4, 1991 (Original: English)

Source: Delegation of the United States of America

PROPOSAL FOR THE AMENDMENT OF ARTICLE 20(7)

It is proposed that Article 20(7) be worded as follows:

"(7) [Obligation to use the denomination] Any party that [who or which], within the territory of one of the Contracting Parties, offers for sale or markets as a protected variety propagating material of a variety protected within the said territory shall be obliged to use the denomination of that variety. No other denomination shall be used, even after the expiration of the breeder's right in that variety, except where, in accordance with the provisions of paragraph (4), prior rights prevent such use."

DC/91/19 March 4, 1991 (Original: English)

Source: Delegation of the United States of America

PROPOSAL FOR THE AMENDMENT OF ARTICLE 26(6)

It is proposed that Article 26(6) be worded as follows:

"(6) [Votes] (a) Each member of the Union that is a State shall have one vote in the Council and shall vote only in its own name.

(b) Any Contracting Party that is an intergovernmental organization shall exercise its right to vote, in place of its member States, with a number of votes equal to the number of its member States which are Contracting Parties and are present at the time of voting. The intergovernmental organization may not, in a given vote, exercise the right to vote if any of its member States participates in the vote or expressly abstains.

(c) The right to vote of a State that is a Contracting Party may not, in a given vote, be exercised by more than one intergovernmental organization."

DC/91/20 March 4, 1991 (Original: English)

Source: Delegation of the United States of America

PROPOSAL FOR THE AMENDMENT OF ARTICLE 34(1)(b)

It is proposed that the following sentence be added to Article 34(1)(b):

"The intergovernmental organization shall inform the Secretary-General of its competence, and any subsequent changes in its competence, with respect to the matters governed by this Convention."

DC/91/21 March 4, 1991 (Original: English)

Source: Delegation of the United States of America

PROPOSAL FOR THE AMENDMENT OF ARTICLE 37(1)

It is proposed that Article 37(1) be worded as follows:

"(1) [Initial entry into force] This Convention shall enter into force one month after five States or intergovernmental organizations have deposited their instruments of ratification, acceptance, approval or accession, as the case may be, provided that at least three of the said instruments have been deposited by States party to the Act of 1961/1972 or the Act of 1978 and that any instrument deposited by an intergovernmental organization shall not be counted as additional to those deposited by member States of that organization."

DC/91/22 March 4, 1991 (Original: French)

Source: Delegation of Italy

**PROPOSAL FOR THE AMENDMENT OF
THE INTRODUCTORY PART OF ARTICLE 1(vi)**

It is proposed that the introductory part of Article 1(vi) be worded as follows:

"(vi) 'variety' means an individual or a group of plants within a species or a taxon of a rank lower than species, which group, irrespective of whether the conditions for the grant of a breeder's right are fully met,"

DC/91/23 March 4, 1991 (Original: English)

Source: Delegation of the United Kingdom

PROPOSAL FOR THE AMENDMENT OF ARTICLE 1(vi)

It is proposed that Article 1(vi) be worded as follows:

"(vi) 'variety' means a plant group [of plants] within a single botanical taxon, which group, [irrespective of whether the conditions for the grant of a breeder's right are fully met,]

- can be defined by the expression of characteristics [that are the expression of] resulting from a given genotype or combination of genotypes and
- can be distinguished from other plant groups [of plants of the same botanical taxon] by the expression of at least one of the said characteristics.

[A particular variety may be represented by several plants, a single plant or by one or several parts of a plant, provided that such part or parts can be used for the production of entire plants of the variety;]"

DC/91/24 March 4, 1991 (Original: French)

Source: Delegation of Italy

PROPOSAL FOR THE AMENDMENT OF ARTICLE 14(1)(a)(viii)

It is proposed that Article 14(1)(a)(viii) be worded as follows:

"(viii) use for purposes of cultivation in the field in any way other than those mentioned in (i) to (vii), above;"

DC/91/25 March 4, 1991 (Original: English)

Source: Delegation of Poland

**PROPOSAL FOR THE AMENDMENT OF THE TITLE OF THE NEW ACT
AND THE NAME OF THE UNION**

1. It is proposed that the title of the New Act be amended as follows:

"International Convention for the Protection of the Breeder's Right to the Cultivar* [New Varieties of Plants]."

* Or: "to the Variety of the Cultivated Plant."

2. It is further proposed that the name of the Union be amended as follows:

"International Union for the Protection of the Breeder's Right to the Cultivar* [New Varieties of Plants]."

* Or: "to the Variety of the Cultivated Plant."

DC/91/26

March 4, 1991 (Original: English)

Source: Delegation of Poland

PROPOSAL FOR THE AMENDMENT OF ARTICLE 1(vi), FIRST SENTENCE

It is proposed that Article 1(vi), first sentence, be worded as follows:

"(vi) 'cultivar'* ['variety'] means a population** [group] of plants of the same botanical taxon, which [group, irrespective of whether the conditions for the grant of a breeder's right are fully met,]

- can be defined by the characteristics that are the expression of a given genotype or combination of genotypes, [and]
- can be significantly distinguished from other populations** [groups] of plants of the same botanical taxon*** [by at least one of the said characteristics],
- retains its distinguishing characteristics after repeated propagations or at the end of each cycle of crossings and/or propagations and
- can be cultivated****;"

* Alternative: "variety."

** Alternative: "assemblage."

*** Possible addition: "of cultivated plant."

**** Alternative: "can be propagated for economic purposes."

DC/91/27

March 4, 1991 (Original: English)

Source: Delegation of Australia

PROPOSAL FOR THE AMENDMENT OF ARTICLE 1(iv), FIRST INDENT

It is proposed that Article 1(iv), first indent, be worded as follows:

"(iv) 'breeder' means

- the person who bred or developed [discovered] a variety,"

DC/91/28 March 4, 1991 (Original: English)

Source: Delegation of Sweden

PROPOSAL FOR THE AMENDMENT OF ARTICLE 1(vi)

It is proposed that Article 1(vi) be worded as follows:

"(vi) 'variety' means a group of plants within a species or a taxon of a rank lower than species, which group, irrespective of whether the conditions for the grant of a breeder's right are fully met,

- can be defined by the characteristics that are the expression of a given genotype or combination of genotypes and
- can be distinguished from other groups of plants of the same botanical taxon by at least one of the said characteristics.

[A particular variety may be represented by several plants, a single plant or by one or several parts of a plant, provided that such part or parts can be used for the production of entire plants of the variety;]"

DC/91/29 March 4, 1991 (Original: English)

Source: Delegation of Poland

PROPOSAL FOR THE AMENDMENT OF ARTICLE 1

It is proposed that the following definition be added to Article 1:

"(v) 'cultivated plant' means a species or interspecific botanical taxon, or any other botanical taxon belonging to one of those higher taxa that can be cultivated*;"

* Alternative: "can be propagated for economic purposes."

DC/91/30 March 4, 1991 (Original: German)

Source: Delegation of Germany

PROPOSAL FOR THE AMENDMENT OF ARTICLE 1(x)

It is proposed that Article 1(x) be worded as follows:

"(x) 'Union' means the Union for the Protection of New Varieties of Plants constituted by the Act of 1961[/1972 and further mentioned in the Act of 1978 and in this Convention];"

DC/91/31 March 4, 1991 (Original: English)

Source: Delegation of the United States of America

PROPOSAL FOR THE AMENDMENT OF ARTICLE 1(xi)

It is proposed that Article 1(xi) be worded as follows:

"(xi) 'member of the Union' means a State party to the Act of 1961/1972 or the Act of 1978, or [and] a Contracting Party;"

DC/91/32 March 4, 1991 (Original: German)

Source: Delegation of Germany

PROPOSAL FOR THE AMENDMENT OF ARTICLE 1(xii)

It is proposed that Article 1(xii) be deleted.

DC/91/33 March 4, 1991 (Original: English)

Source: Delegations of Denmark and Sweden

PROPOSAL FOR THE AMENDMENT OF ARTICLE 2

It is proposed that Article 2 be worded as follows:

"Each Contracting Party shall grant and protect breeders' rights as the sole and exclusive form of protection for plant varieties."

DC/91/34 March 4, 1991 (Original: English)

Source: Delegation of Poland

PROPOSAL FOR THE AMENDMENT OF ARTICLE 3

It is proposed that Article 3 be worded as follows:

"Plants to Which this Convention Shall be Applied
[Genera and Species to be Protected]

"(1) This Convention shall be applied to the varieties of cultivated higher plants belonging to the divisions of mushrooms (Musci), pteridophytes (Pteridophyta) and seed plants (Spermatophyta).

"(2) [(1)] [States already members of the Union] Each Contracting Party which is bound by the Act of 1961/1972 or the Act of 1978 shall apply the provisions of this Convention,

(i) at the date on which it becomes bound by this Convention, to all cultivated higher plants [plant genera and species] to which it applies, on the said date, the provisions of the Act of 1961/1972 or the Act of 1978 and,

(ii) at the latest by the expiration of a period of three years after the said date, to all cultivated higher plants [plant genera and species].

"(3) [(2)] [New members of the Union] Each Contracting Party which is not bound by the Act of 1961/1972 or the Act of 1978 shall apply the provisions of this Convention,

(i) at the date on which it becomes bound by this Convention, to at least 25 cultivated higher plants [plant genera and species] and,

(ii) at the latest by the expiration of a period of 10 years from the said date, to all cultivated higher plants [plant genera and species]."

DC/91/35

March 4, 1991 (Original: English)

Source: Delegation of Japan

PROPOSAL FOR THE AMENDMENT OF ARTICLE 4(1)

It is proposed that Article 4(1) be worded as follows:

"(1) [Treatment] Without prejudice to the rights specified in this Convention, nationals of a Contracting Party as well as natural persons resident and legal entities having their registered offices within the territory of a Contracting Party shall, insofar as the grant and protection of breeders' rights varieties is are concerned, enjoy within the territory of each other Contracting Party the same treatment as is accorded or may hereafter be accorded by the laws of each such other Contracting Party to its own nationals, provided that the said nationals, natural persons or legal entities comply with the conditions and formalities imposed on the nationals of the said other Contracting Party."

DC/91/36

March 4, 1991 (Original: German)

Source: Delegation of Germany

PROPOSAL FOR THE AMENDMENT OF ARTICLE 6(1)

It is proposed that Article 6(1) be worded as follows:

"(1) [Criteria] The variety shall be [deemed to be] new if, at the date of filing of the application for a breeder's right, plants or parts of plants that may be used for the production of plants of the variety [propagating or harvested material of the variety or any product directly obtained from the harvested material of the variety] have not been sold or otherwise made available to others for purposes of exploitation of the variety,

- (i) [has not been sold or otherwise made available to others by or with the consent of the breeder, for purposes of exploitation of the variety,] in the territory of the Contracting Party in which the application has been filed or, if the law of that Contracting Party so provides, more [earlier] than one year before [that date], and
- (ii) [has not been sold or otherwise made available to others by or with the consent of the breeder, for purposes of exploitation of the variety,] in the [a] territory of another [other than that of the] Contracting Party [in which the application has been filed earlier] more than four years or, in the case of trees or of vines, more [earlier] than six years before the said date,

unless the breeder can prove that the sale or otherwise making available took place without his consent."

DC/91/37

March 4, 1991 (Original: English)

Source: Delegation of Japan

PROPOSAL FOR THE AMENDMENT OF ARTICLE 6(1)

It is proposed that Article 6(1) be worded as follows:

"(1) [Criteria] The variety shall be deemed to be new if, at the date of filing of the application for a breeder's right, propagating or harvested material of the variety or any product directly obtained from the harvested material of the variety

- (i) has not been sold or otherwise made available to others by or with the consent of the breeder, otherwise than for private and non-commercial purposes or for experimental purposes, [for purposes of exploitation of the variety,] in the territory of the Contracting Party in which the application has been filed or, if the law of that Contracting Party so provides, earlier than one year before that date, and

(ii) has not been sold or otherwise made available to others by or with the consent of the breeder, otherwise than for private and non-commercial purposes or for experimental purposes, [for purposes of exploitation of the variety,] in a territory other than that of the Contracting Party in which the application has been filed earlier than four years or, in the case of trees or of vines, earlier than six years before the said date."

DC/91/38

March 4, 1991 (Original: English)

Source: Delegation of Poland

PROPOSAL FOR THE AMENDMENT OF ARTICLE 6(2)

It is proposed that Article 6(2) be worded as follows:

"(2) [Varieties of recent creation] Where a Contracting Party applies this Convention to a plant genus or species to which it did not previously apply this Convention or an earlier Act, it may consider a variety of which propagating material has not been sold or otherwise made available earlier than five* years before [of recent creation existing at] the date of such extension of protection to satisfy the condition of novelty defined in paragraph (1) even where the sale or making available to others described in that paragraph took place earlier than the time limits defined in that paragraph."

* Or any number of years between six and ten.

DC/91/39

March 4, 1991 (Original: German)

Source: Delegation of Germany

PROPOSAL FOR THE AMENDMENT OF ARTICLE 6(2)

It is proposed that Article 6(2) be worded as follows:

"(2) [Varieties of recent creation] Where a Contracting Party applies this Convention to a plant genus or species to which it did not previously apply this Convention or an earlier Act, it may consider a variety created shortly before [of recent creation existing at] the date of such extension of protection to satisfy the condition of novelty defined in paragraph (1) even where the sale or making available to others described in that paragraph took place earlier than the time limits defined in that paragraph."

DC/91/40 March 4, 1991 (Original: English)

Source: Delegation of Poland

PROPOSAL FOR THE AMENDMENT OF ARTICLE 7

It is proposed that Article 7 be worded as follows:

"The variety shall be deemed to be distinct if it is significantly [clearly] distinguishable by at least one of its characteristics from any other variety whose existence is a matter of common knowledge at the time of the filing of the application. In particular, the filing of an application for the granting of a breeder's right or for the entering of the variety in an official register of varieties, in any country, shall be deemed to render the variety a matter of common knowledge from the date of the application, provided that the application leads to the granting of a breeder's right or to the entering of the variety in the official register of varieties, as the case may be."

DC/91/41 March 5, 1991 (Original: German)

Source: Delegation of Germany

PROPOSAL FOR THE AMENDMENT OF ARTICLE 7

It is proposed that Article 7 be worded as follows:

"The variety shall be [deemed to be] distinct if it is clearly distinguishable from any other variety whose existence is a matter of common knowledge at the time of the filing of the application. In particular, the filing of an application for the granting of a breeder's right or for the entering of the variety in an official register of varieties, in any country, shall be deemed to render the variety a matter of common knowledge from the date of the application, provided that the application leads to the granting of a breeder's right or to the entering of the variety in the official register of varieties, as the case may be."

DC/91/42 March 5, 1991 (Original: English)

Source: Delegation of Japan

PROPOSAL FOR THE AMENDMENT OF ARTICLE 7

It is proposed that Article 7 be worded as follows:

"The variety shall be deemed to be distinct if it is clearly distinguishable from any other variety whose existence is a matter of common knowledge at

the time of the filing of the application. Common knowledge may be established by reference to various factors such as: cultivation or sale already in progress, inclusion in a reference collection, or precise description in a publication; furthermore, grant of a breeder's right or entry in an official register of varieties already made. However, the variety to which a breeder's right is granted or which is entered in an official register of varieties shall be deemed to be a matter of common knowledge from the date of the application in the Contracting Party in which the application was filed. [In particular, the filing of an application for the granting of a breeder's right or for the entering of the variety in an official register of varieties, in any country, shall be deemed to render the variety a matter of common knowledge from the date of the application, provided that the application leads to the granting of a breeder's right or to the entering of the variety in the official register of varieties, as the case may be.]"

DC/91/43

March 5, 1991 (Original: German)

Source: Delegation of Germany**PROPOSAL FOR THE AMENDMENT OF ARTICLE 8**

It is proposed that Article 8 be worded as follows:

"The variety shall be [deemed to be] uniform if, subject to the variation that may be expected from the particular features of its propagation, it is sufficiently uniform in its relevant characteristics."

DC/91/44

March 5, 1991 (Original: English)

Source: Delegation of Poland**PROPOSAL FOR THE AMENDMENT OF ARTICLE 8**

It is proposed that Article 8 be worded as follows:

"The variety shall be deemed to be uniform if, subject to [the variation that may be expected from] the particular features of its propagation, it satisfies particular requirements of variation among individual plants concerning characteristics relevant to its description at the time of grant of the breeder's right in respect of the variety [is sufficiently uniform in its relevant characteristics]."

DC/91/45 March 5, 1991 (Original: German)

Source: Delegation of Germany

PROPOSAL FOR THE AMENDMENT OF ARTICLE 9

It is proposed that Article 9 be worded as follows:

"The variety shall be [deemed to be] stable if, so far as its relevant characteristics are concerned, it remains true to its description after repeated propagation or, in the case of a particular cycle of propagation, at the end of each such cycle. For the purposes of granting a breeder's right, a variety may be assumed to be stable if there is no indication from the examination under Article 12 that it will not be stable."

DC/91/46 March 5, 1991 (Original: English)

Source: Delegation of Poland

PROPOSAL FOR THE AMENDMENT OF ARTICLE 9

It is proposed that Article 9 be worded as follows:

"The variety shall be deemed to be stable if, so far as the [its relevant] characteristics relevant to its description at the time of grant of the breeder's right are concerned, it remains unchanged [true to its description] after repeated propagation or, in the case of a particular cycle of propagation, at the end of each such cycle."

DC/91/47 March 5, 1991 (Original: English)

Source: Delegation of Japan

PROPOSAL FOR THE AMENDMENT OF ARTICLE 11(2)

It is proposed that Article 11(2) be worded as follows:

"(2) [Claiming the right] In order to benefit from the provisions of paragraph (1), the breeder shall, in the subsequent application, claim the priority of the first application. The breeder may be required to furnish, within a period of not less [not earlier] than three months from the filing date of the subsequent application, a copy of the documents which constitute the first application, certified to be a true copy by the authority with which that application was filed."

DC/91/48 March 5, 1991 (Original: English)

Source: Delegation of Poland

PROPOSAL FOR THE AMENDMENT OF ARTICLE 12, FIRST SENTENCE

It is proposed that Article 12, first sentence, be worded as follows:

"Any decision to grant a breeder's right shall require an examination in the light of the criteria provided for in Articles 6 [5] to 9."

DC/91/49 March 5, 1991 (Original: English)

Source: Delegation of Poland

PROPOSAL FOR THE AMENDMENT OF ARTICLE 13

It is proposed that the last sentence of Article 13 be deleted.

The sentence reads as follows:

"A Contracting Party may provide that the said measures shall only take effect in relation to parties whom or which the breeder has expressly notified of the filing of the application."

DC/91/50 March 5, 1991 (Original: English)

Source: Delegation of the United Kingdom

PROPOSAL FOR THE AMENDMENT OF ARTICLE 14

It is proposed to add the following provision after Article 14(1)(b):

"For the purposes of paragraphs (1)(a) and (b) 'propagating material' and 'harvested material' may comprise several plants, a single plant or one or several parts of a plant, including cells or cell-lines, provided that such part or parts can be used for the production of entire plants of the variety."

DC/91/51 March 5, 1991 (Original: English)

Source: Delegations of Denmark and Sweden

PROPOSAL FOR THE AMENDMENT OF ARTICLE 40

It is proposed that Article 40 be worded as follows:

Preservation of Existing Rights and Legislations

"(1) This Convention shall not affect existing rights under the laws of the Contracting Parties or by reason of any earlier Act or any agreement other than this Convention concluded between members of the Union.

"(2) Notwithstanding the provisions of Article 2, any State which at the time of signing this Act is protecting plant varieties under other forms of protection than breeders' rights may continue to do so if at the time of signing this Act or of depositing its instrument of ratification, acceptance or approval or accession to this Act, it notifies the Secretary-General of that fact.

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

DC/91/52 March 5, 1991 (Original: English)

Source: Delegation of Canada

PROPOSAL FOR THE AMENDMENT OF ARTICLE 3

It is proposed that Article 3 be worded as follows:

"(1) [States already members of the Union] Each Contracting Party which is bound by the Act of 1961/1972 or the Act of 1978 shall apply the provisions of this Convention,

(i) at the date on which it becomes bound by this Convention, to all plant genera and species to which it applies, on the said date, the provisions of the Act of 1961/1972 or the Act of 1978 and,

(ii) at the latest by the expiration of a period of ten [three] years after the said date, to all plant genera and species.

"(2) [New members of the Union] Each Contracting Party which is not bound by the Act of 1961/1972 or the Act of 1978 shall apply the provisions of this Convention,

(i) at the date on which it becomes bound by this Convention, to at least 5 [25] plant genera or species and,

(ii) at the latest by the expiration of a period of 10 years from the said date, to all plant genera and species."

DC/91/53 March 5, 1991 (Original: English)

Source: Delegation of the Netherlands

PROPOSAL FOR THE AMENDMENT OF ARTICLE 6(1)(i)

It is proposed that Article 6(1)(i) be worded as follows:

"(1) [Criteria] The variety shall be deemed to be new if, at the date of filing of the application for a breeder's right, propagating or harvested material of the variety or any product directly obtained from the harvested material of the variety

(i) has not been sold or otherwise made available to others by or with the consent of the breeder, for purposes of exploitation of the variety, in the territory of the Contracting Party in which the application has been filed [or, if the law of that Contracting Party so provides,] earlier than one year before that date, and"

DC/91/54 March 5, 1991 (Original: English)

Source: Delegation of Sweden

PROPOSAL FOR THE AMENDMENT OF ARTICLE 6(1), INTRODUCTION

It is proposed that Article 6(1), introduction, be worded as follows:

"(1) [Criteria] The variety shall be deemed to be new if, at the date of filing of the application for a breeder's right, propagating or harvested material of the variety [or any product directly obtained from the harvested material of the variety]"

DC/91/55 March 5, 1991 (Original: English)

Source: Delegation of Canada

PROPOSAL FOR THE AMENDMENT OF ARTICLE 7

It is proposed that Article 7 be worded as follows:

"The variety shall be deemed to be distinct if it is clearly distinguishable from any other variety whose existence is a matter of common knowledge at the time of the filing of the application. In particular, the filing of an application for the granting of a breeder's right or for the entering of the variety in an official register of varieties, in any country, shall be deemed to render the variety a matter of common knowledge from the date of the application, provided that the application leads to the granting of a breeder's

right or to the entering of the variety in the official register of varieties, as the case may be. Common knowledge may also be established by reference to factors such as cultivation or marketing already in progress."

DC/91/56 March 5, 1991 (Original: English)

Source: Delegation of Canada

PROPOSAL FOR THE AMENDMENT OF ARTICLE 8

It is proposed that Article 8 be worded as follows:

"The variety shall be deemed to be uniform if, subject to the variation that may be expected from the particular features of its propagation, it is sufficiently uniform in all important [its relevant] characteristics."

DC/91/57 March 5, 1991 (Original: English)

Source: Delegation of Canada

PROPOSAL FOR THE AMENDMENT OF ARTICLE 9

It is proposed that Article 9 be worded as follows:

"The variety shall be deemed to be stable if, so far as its essential [relevant] characteristics are concerned, it remains true to its description after repeated propagation or, in the case of a particular cycle of propagation, at the end of each such cycle."

DC/91/58 March 5, 1991 (Original: English)

Source: Delegation of the Netherlands

PROPOSAL FOR THE AMENDMENT OF ARTICLE 11(1), FIRST SENTENCE

It is proposed that Article 11(1), first sentence, be worded as follows:

"(1) [The right; its period] Any breeder who has duly filed an application for the grant of a breeder's right ... shall, for the purpose of filing an application for the grant of a breeder's right for the same variety with the authority of any other Contracting Party (the "subsequent application"), enjoy a right of priority for a period of eighteen [twelve] months."

DC/91/59 March 5, 1991 (Original: German)

Source: Delegation of Germany

PROPOSAL FOR THE AMENDMENT OF ARTICLE 11(2)

It is proposed that Article 11(2) be worded as follows:

"(2) [Claiming the right] In order to benefit from the right of priority [provisions of paragraph (1)], the breeder shall, in the subsequent application, claim the priority of the first application. The authority with which the subsequent application has been filed may require the breeder [may be required] to furnish, not earlier than three months from the filing date of the subsequent application, a copy of the documents which constitute the first application, certified to be a true copy by the authority with which that application was filed."

DC/91/60 March 5, 1991 (Original: English)

Source: Delegation of Canada

PROPOSAL FOR THE AMENDMENT OF ARTICLE 14(1)(a)(viii)

It is proposed that Article 14(1)(a)(viii) be worded as follows:

"(viii) commercial use of ornamental plants or parts thereof, normally marketed for purposes other than propagation, as propagating material in the production of ornamental plants or cut flowers [use in any way other than those mentioned in (i) to (vii), above];"

DC/91/61 March 5, 1991 (Original: English)

Source: Delegation of Japan

PROPOSAL FOR THE AMENDMENT OF ARTICLE 14(1)

It is proposed that Article 14(1) be worded as follows:

"(1) [Acts requiring the breeder's authorization] Subject to Articles 15 and 16, at least the following acts shall require the authorization of the breeder:

(a) in respect of the propagating material of the protected variety,

- (i) production or reproduction,
- (ii) conditioning for the purpose of propagation,
- (iii) offering for sale,
- (iv) sale or other putting on the market,
- (v) exporting,
- (vi) importing,
- (vii) stocking for any of the purposes mentioned in (i) to (v) [(vi)], above,
- [(viii) use in any way other than those mentioned in (i) to (vii), above];

(b) in respect of the harvested material of the protected variety, [any of the acts referred to in (a), above, provided that the harvested material was obtained through the use of propagating material whose use, for the purpose of obtaining harvested material, was not authorized by the breeder [and if, but only if, the breeder has had no legal possibility of exercising his right in relation to the propagating material];]

- (i) use,
 - (ii) offering for sale or for leasing,
 - (iii) sale or other putting on the market,
 - (iv) leasing,
 - (v) exporting,
 - (vi) importing,
 - (vii) stocking for any of the purposes mentioned in (i) to (v), above,
- provided that, in spite of all due care required by the circumstances, the breeder could not exercise his right in relation to any of the acts concerning the propagating material of the protected variety referred to in (a), above;

(c) in respect of the products made directly from harvested material of the protected variety, any of the acts referred to in (b) [(a)], above, provided that, in spite of all due care required by the circumstances, the breeder could not exercise his right in relation to any of the acts concerning the harvested material of the protected variety referred to in (b), above [such products were made using harvested material falling within the provisions of (b) above whose use, for the purposes of making such products, was not authorized by the breeder [and if, but only if, the breeder has had no legal possibility of exercising his right in relation to the harvested material]]."

DC/91/62

March 5, 1991 (Original: English)

Source: Delegation of Poland

PROPOSAL FOR THE AMENDMENT OF ARTICLE 14(1)(c)

It is proposed that item (c) be deleted.

DC/91/63

March 5, 1991 (Original: English)

Source: Delegation of Poland

PROPOSAL FOR THE AMENDMENT OF ARTICLE 14(2)

It is proposed that Article 14(2) be worded as follows:

"(2) [~~Same~~, in respect of essentially derived and certain other varieties]

(a) Subject to Articles 15 and 16, the acts mentioned in paragraph (1) shall also require the authorization of the breeder in relation to

(i) varieties which are essentially derived from the protected variety, where the protected variety is not itself an essentially derived variety,

(ii) varieties which are not significantly [clearly] distinguishable in accordance with Article 7 from the protected variety and

(iii) varieties whose production requires the repeated use of the protected variety.

(b) For the purposes of subparagraph (a)(i), a variety shall be considered to be essentially derived from another variety ("the initial variety") when

(i) it is predominantly derived from the initial variety, or from a variety that is itself predominantly derived from the initial variety, particularly through methods which have the effect of conserving the majority of the essential characteristics that are the expression of the genotype or of the combination of genotypes of the initial variety, such as the selection of a natural or induced mutant or of a somaclonal variant, the selection of a variant, backcrossings or transformation by genetic engineering,

(ii) it is significantly [clearly] distinguishable from the initial variety and

(iii) it conforms to the majority of the essential characteristics that are the expression of the genotype or the combination of genotypes of the initial variety, apart from the differences which result from the method of derivation."

DC/91/64

March 5, 1991 (Original: German)

Source: Delegation of Germany

PROPOSAL FOR THE AMENDMENT OF ARTICLE 12, FIRST SENTENCE

It is proposed that Article 12, first sentence, be worded as follows:

"Any decision to grant a breeder's right shall require an examination of the compliance with the conditions under Article 5 [in the light of the criteria provided for in] in conjunction with Articles 6 [5] to 9."

DC/91/65 Rev. March 9, 1991 (Original: English)

Source: Delegation of Japan

PROPOSAL FOR THE AMENDMENT OF ARTICLE 14(2)

1. It is proposed that the following provision be added to Article 14(2):

"(c) Each Contracting Party may implement the provisions of subparagraph (a)(i) progressively to the various plant genera and species in the light of the special economic, ecological or technical conditions prevailing on its territory."

2. It is further proposed that the Conference adopt the following resolution:

"To enable each Contracting Party to implement the provisions relating to essentially derived varieties without delay and on an internationally harmonized basis, the Diplomatic Conference for the Revision of the International Convention for the Protection of New Varieties of Plants held from March 4 to 19, 1991, requests the Secretary-General of UPOV to set in motion immediately after the closing of the Conference the establishment of draft standard guidelines, for adoption by the Council of UPOV, on essentially derived varieties."

DC/91/66 March 6, 1991 (Original: English)

Source: Delegation of Japan

PROPOSAL FOR THE AMENDMENT OF ARTICLE 14(2)(b)(iii)

It is proposed that Article 14(2)(b)(iii) be worded as follows:

"(iii) the characteristics that are the expression of its [it conforms to the] genotype or its [the] combination of genotypes conform to those of the initial variety, apart from the differences which result from the method of derivation."

DC/91/67 March 6, 1991 (Original: English)

Source: Delegation of Poland

PROPOSAL FOR THE AMENDMENT OF ARTICLE 15(2)

It is proposed that Article 15(2) be worded as follows:

"(2) [~~Farm-saved seed~~] Notwithstanding Article 14, each Contracting Party may, within reasonable limits and subject to the safeguarding of the legitimate interests of the breeder, restrict the breeder's right in relation to any

variety in order to permit natural or legal persons [farmers] to use for propagating purposes, in [on] their own agricultural (horticultural or silvi-cultural) enterprises [holdings], the product of the harvest which they have obtained by planting, in those enterprises [on their own holdings], the protected variety or a variety covered by Article 14(2)(a)(i) or (ii)."

DC/91/68

March 6, 1991 (Original: English)

Source: Delegation of the Netherlands**PROPOSAL FOR THE AMENDMENT OF ARTICLE 15(2)**

It is proposed that Article 15(2) be worded as follows:

"(2) [~~Farm-saved seed~~] (a) Notwithstanding Article 14, each Contracting Party may, within reasonable limits, [and] subject to the safeguarding of the legitimate interests of the breeder and provided that an equitable remuneration is paid to the breeder, restrict the breeder's right in relation to any variety in order to permit farmers to use for propagating purposes, on their own holdings, the product of the harvest which they have obtained by planting, on their own holdings, the protected variety or a variety covered by Article 14(2)(a)(i) or (ii).

(b) This provision shall apply only to varieties of cereals, peas and potatoes."

DC/91/69

March 6, 1991 (Original: English)

Source: Delegation of Japan**PROPOSAL FOR THE AMENDMENT OF ARTICLE 16(1)**

It is proposed that Article 16(1) be worded as follows:

"(1) [**Exhaustion of right**] The breeder's right shall not extend to acts concerning any material of the protected variety, or of a variety covered by the provisions of Article 14(2), which has been sold or otherwise put on the market by the breeder or with his consent in the territory of the Contracting Party concerned, or any material derived from the said material, unless such acts

(i) involve further propagation of the variety in question,

(ii) involve an export of material of the variety which enables the propagation of the variety into a country which does not protect varieties of the plant genus or species to which the variety belongs, except where the export is for consumption purposes, or

(iii) involves the use, as propagating material, of material which has not been sold or otherwise put on the market as propagating material."

DC/91/70 March 6, 1991 (Original: English)

Source: Delegation of the New Zealand

PROPOSAL FOR THE AMENDMENT OF ARTICLE 16(1), INTRODUCTION

It is proposed that Article 16(1), introduction, be worded as follows:

"(1) [Exhaustion of right] The breeder's right shall not extend to acts concerning any material of the protected variety, or of a variety covered by the provisions of Article 14(2), in respect of which the breeder has done or authorized any of the acts referred to in Article 14(1)(a) [which has been put on the market by the breeder or with his consent] in the territory of the Contracting Party concerned, or any material derived from the said material, unless such acts"

DC/91/71 March 6, 1991 (Original: English)

Source: Delegation of Japan

PROPOSAL FOR THE AMENDMENT OF ARTICLE 21(1)

It is proposed that Article 21(1) be worded as follows:

"(1) [Reasons of nullity] Each Contracting Party shall declare a breeder's right granted by it null and void in accordance with the provisions of its law when it is established

(i) that the conditions laid down in Articles 6 and 7 were not complied with at the time of the grant of the breeder's right,

(ii) that, where the grant of the breeder's right has been essentially based upon information and documents furnished by the breeder, the conditions laid down in Articles 8 and 9 were not complied with at the time of the grant of the breeder's right, or

(iii) that the breeder's right has been granted to a person who is not entitled to it [, unless]. However, if its law so provides, the breeder's right shall not be declared null and void when it is transferred to the party who or which is so entitled."

DC/91/72 March 6, 1991 (Original: English)

Source: Delegation of Japan

PROPOSAL FOR THE AMENDMENT OF ARTICLE 22(1)(b)(i)

It is proposed that Article 22(1)(b)(i) be worded as follows:

"(i) the breeder does not provide the authority with the information, documents or material deemed necessary for verifying the maintenance of the variety, or he does not allow inspection of the measures which have been taken for the maintenance of the variety,"

DC/91/73 March 6, 1991 (Original: English)

Source: Delegation of the United Kingdom

PROPOSAL FOR THE AMENDMENT OF ARTICLE 8

It is proposed that Article 8 be worded as follows:

"The variety shall be deemed to be uniform if, subject to the variation that may be expected from the particular features of its sexual reproduction or vegetative propagation, it is sufficiently uniform in its relevant characteristics."

DC/91/74 March 6, 1991 (Original: English)

Source: Delegation of the United Kingdom

PROPOSAL FOR THE AMENDMENT OF ARTICLE 9

It is proposed that Article 9 be worded as follows:

"The variety shall be deemed to be stable if, so far as its relevant characteristics are concerned, it remains true to its description after repeated reproduction or propagation or, in the case of a particular cycle of reproduction or propagation, at the end of each such cycle."

DC/91/75 March 6, 1991 (Original: English)

Source: Delegations of Switzerland and the United Kingdom

PROPOSAL FOR THE AMENDMENT OF ARTICLE 6(2)

It is proposed that Article 6(2) be worded as follows:

"(2) [Varieties of recent creation] Where a Contracting Party applies this Convention to a plant genus or species to which it did not previously apply this Convention or an earlier Act, it may consider a variety of which propagating or harvested material has not been sold or otherwise made available earlier than three years before [of recent creation existing at] the date of such extension of protection to satisfy the condition of novelty defined in paragraph (1) even where the sale or making available to others described in that paragraph took place earlier than the time limits defined in that paragraph."

DC/91/76

March 6, 1991 (Original: German)

Source: Delegation of Germany**PROPOSAL FOR THE AMENDMENT OF ARTICLE 26(7)**

It is proposed that Article 26(7) be worded as follows:

"(7) [**Majorities**] 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 paragraphs (5)(ii), (vi) and (vii) and under Articles 28(3), 29(5)(b) and 38(1) shall require three-fourths of the votes of the members present and voting. Abstentions shall not be considered as votes."

DC/91/77

March 6, 1991 (Original: German)

Source: Delegation of Germany**PROPOSAL FOR THE AMENDMENT OF ARTICLE 29(5)(a)**

It is proposed that Article 29(5)(a) be worded as follows:

"(5) [**Arrears in contributions**] (a) A member of the Union which is in arrears in the payment of its contributions may not, subject to subparagraph (b), exercise its right to vote in the Council if the amount of its arrears equals or exceeds the amount of the contribution[s] due from it for the preceding [two] full year[s]. The suspension of the right to vote shall not relieve such member of the Union of its obligations under this Convention and shall not deprive it of any other rights thereunder."

DC/91/78

March 6, 1991 (Original: English)

Source: Delegation of Sweden**PROPOSAL FOR THE AMENDMENT OF THE TITLE OF ARTICLE 34(2)**

It is proposed that the title of Article 34(2) be worded as follows:

"Instruments of ratification, acceptance, approval or accession [adherence]"

DC/91/79 March 6, 1991 (Original: English)

Source: Delegation of Sweden

PROPOSAL FOR THE AMENDMENT OF ARTICLE 37(1) and (2)

It is proposed that Article 37(1) and (2) be worded as follows:

"(1) [Initial entry into force] (a) This Convention shall enter into force on the first day of the month following the expiration of a period of one month after the date on which five States or intergovernmental organizations have deposited their instruments of ratification, acceptance, approval or accession, as the case may be, provided that at least three of the said instruments have been deposited by States party to the Act of 1961/1972 or the Act of 1978.

(b) [(2) [Subsequent entry into force] Any] In respect of any State or intergovernmental organization which subsequently deposits its instrument of ratification, acceptance, approval or accession, as the case may be, [not covered by paragraph (1) shall become bound by] this Convention shall enter into force on the first day of the month following the expiration of a period of one month after the date of the deposit of the said [on which it has deposited its] instrument [of ratification, acceptance, approval or accession, as the case may be]."

DC/91/80 March 6, 1991 (Original: English)

Source: Delegation of Sweden

PROPOSAL FOR THE AMENDMENT OF ARTICLE 39(1)

It is proposed that Article 39(1) be worded as follows:

"(1) [Notifications] Any Contracting Party may denounce this Convention by written notification addressed to the Secretary-General. The Secretary-General shall promptly notify all members of the Union of the receipt of that notification."

DC/91/81 March 6, 1991 (Original: English)

Source: Delegation of Sweden

PROPOSAL FOR THE AMENDMENT OF ARTICLE 42

It is proposed to add a paragraph (3) reading as follows to Article 42:

"(3) The Secretary-General shall notify the Governments of the member States of the Union and of the States, and the intergovernmental organizations, which, without being members of the Union, were represented in the Diplomatic Conference that adopted it of the signatures of this Convention, the deposit of instruments of ratification, acceptance, approval and accession, any date of entry into force of this Convention and any notification or communication relating to this Convention."

DC/91/82 March 6, 1991 (Original: English)

Source: Delegation of Spain

PROPOSAL FOR THE AMENDMENT OF ARTICLE 14(1)(b) AND (c)

It is proposed that Article 14(1)(b) and (c) be worded as follows:

"(b) Each Contracting Party may provide that the above provision shall also apply in respect of the harvested material of the protected variety [, any of the acts referred to in (a), above], provided that the harvested material was obtained through the use of propagating material whose use, for the purpose of obtaining harvested material, was not authorized by the breeder and if, but only if, the breeder has had no legal possibility of exercising his right in relation to the propagating material. [;]

"(c) Each Contracting Party may provide that the above provision shall also apply in respect of products made directly from harvested material of the protected variety [, any of the acts referred to in (a), above], provided that such products were made using harvested material falling within the provisions of (b) above whose use, for the purposes of making such products, was not authorized by the breeder and if, but only if, the breeder has had no legal possibility of exercising his right in relation to the harvested material."

DC/91/83 March 6, 1991 (Original: English)

Source: Delegation of the United States of America

PROPOSAL FOR THE AMENDMENT OF ARTICLE 10

It is proposed that the following paragraph be added to Article 10:

"(3) No Contracting Party shall refuse to grant a breeder's right or limit its duration on the ground that protection for the same variety has not been applied for, has been refused or has expired in any other Contracting Party or in a State that is not a member of the Union."

DC/91/84 March 6, 1991 (Original: English)

Source: Delegation of Spain

PROPOSAL FOR THE AMENDMENT OF ARTICLE 15(2)

It is proposed that Article 15(2) be worded as follows:

"(2) [~~Farm-saved seed~~] Notwithstanding Article 14, each Contracting Party may, within reasonable limits [and subject to the safeguarding of the legitimate interests of the breeder], restrict the breeder's right in relation to any variety in order to permit farmers to use for propagating purposes, on

DC/91/88 March 7, 1991 (Original: French)

Source: Delegation of France

PROPOSAL FOR THE AMENDMENT OF ARTICLE 15(2)

It is proposed that Article 15(2) be deleted.

DC/91/89 Rev. March 7, 1991 (Original: German)

Source: Delegation of Germany

PROPOSAL FOR THE AMENDMENT OF ARTICLE 14(2)

1. It is proposed that Article 14(2)(a) be worded as follows:

"(2) [~~Same, in respect of essentially derived and certain other varieties~~]
[(a)] Subject to Articles 15 and 16, the acts mentioned in paragraph (1) shall also require the authorization of the breeder in relation to varieties

[(i) varieties which are essentially derived from the protected variety, where the protected variety is not itself an essentially derived variety,]

[(ii) [varieties] which are not clearly distinguishable in accordance with Article 7 from the protected variety and

[(iii) [varieties] whose production requires the repeated use of the protected variety."]

2. It is further proposed that subparagraph (b) be deleted (see in this respect the proposal for the amendment of Article 15(1) in document DC/91/92).

DC/91/90 March 7, 1991 (Original: German)

Source: Delegation of Germany

PROPOSAL FOR THE AMENDMENT OF ARTICLE 12

It is proposed that the following sentence be added at the end of Article 12:

"The authority may consider the variety to be stable if there is no indication that the variety will not be stable."

DC/91/91

March 7, 1991 (Original: German)

Source: Delegation of Germany**PROPOSAL FOR THE AMENDMENT OF ARTICLE 14(1)**

It is proposed that Article 14(1) be worded as follows:

"(1) [**Acts requiring the breeder's authorization**] Subject to Articles 15 and 16, the breeder's right shall confer on its owner the right to prevent others from exploiting the protected variety in the following manner [the following acts shall require the authorization of the breeder]:"

(a) in respect of the propagating material of the protected variety, through

(i) production or reproduction,

[(ii) conditioning for the purpose of propagation,]

(iii) offering for sale,

(iv) sale or other putting on the market,

(v) exporting,

(vi) importing,

(vii) stocking for any of the purposes mentioned in (i) to (vi), above,

[(viii) use in any way other than those mentioned in (i) to (vii), above];

(b) in respect of the harvested material, including whole plants, of the protected variety, through any of the acts referred to in (a), above, provided that the harvested material was obtained through [the] unauthorized use of propagating material [whose use, for the purpose of obtaining harvested material, was not authorized by the breeder [and if, but only if, the breeder has had no legal possibility of exercising his right in relation to the propagating material];]."

"(2) [(c)] Each Contracting Party may provide that further specified acts shall be subject to the breeder's right of prohibition. It may also provide that the aforementioned acts in respect of products made directly from harvested material shall also require the authorization of the breeder [of the protected variety, any of the acts referred to in (a), above], provided that such products were made through unauthorized use of [using] harvested material [falling within the provisions of] referred to in (b) above [whose use, for the purposes of making such products, was not authorized by the breeder [and if, but only if, the breeder has had no legal possibility of exercising his right in relation to the harvested material]]."

DC/91/92

March 7, 1991 (Original: German)

Source: Delegation of Germany**PROPOSAL FOR THE AMENDMENT OF ARTICLE 15(1)**

It is proposed that Article 15(1) be worded as follows:

"(1) [Acts not requiring the breeder's authorization] (a) The breeder's right shall not extend to

(i) acts done privately and for non-commercial purposes,

(ii) acts done for experimental purposes [and],

(iii) acts done for the purpose of breeding other varieties [,] and [, except where the provisions of Article 14(2) apply,]

(iv) acts referred to in Article 14(1) in respect of [such other] varieties created pursuant to (iii), above; the breeder's right shall extend, however, to essentially derived varieties, unless the law of a Contracting Party provides that the breeder's right shall be subject to limitations in respect of certain kinds of such varieties.

(b) For the purposes of subparagraph (a)(iv), a variety shall be considered to be an essentially derived variety when

(i) it is the direct descendent of another variety ("the initial variety") and retains, subject to a very small number of modifications, the expressions of the characteristics which result from the genotype or combination of genotypes of the initial variety and

(ii) it is clearly distinguishable from the initial variety."

DC/91/93

March 7, 1991 (Original: English)

Source: Delegation of the United States of America**AMENDED PROPOSAL FOR THE AMENDMENT OF ARTICLE 11(1)**

It is proposed that Article 11(1) be worded as follows:

"(1) [The right; its period] Any breeder who has duly filed an application for the protection of a variety in [grant of a breeder's right with the authority of, or an application for another title of protection for a variety in,] one of the Contracting Parties (the "first application") shall, for the purpose of filing an application for the grant of a breeder's right for the same variety with the authority of any other Contracting Party (the "subsequent application"), 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."

DC/91/94 March 7, 1991 (Original: English)

Source: Delegation of the Netherlands

AMENDED PROPOSAL FOR THE AMENDMENT OF ARTICLE 11(1)

submitted by the Delegation of the United States of America
(and further amended by the Delegation of the Netherlands)

It is proposed that Article 11(1) be worded as follows:

"(1) [The right; its period] Any breeder who has duly filed an application for the protection of a variety in [grant of a breeder's right with the authority of, or an application for another title of protection for a variety in,] one of the Contracting Parties (the "first application") and deposited in connection with that application material of that variety shall, for the purpose of filing an application for the grant of a breeder's right for the same variety with the authority of any other Contracting Party (the "subsequent application"), 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."

DC/91/95 March 7, 1991 (Original: English)

Source: Delegation of Denmark

PROPOSAL FOR THE AMENDMENT OF ARTICLE 11(2)
AS PROVISIONALLY ADOPTED BY THE CONFERENCE

It is proposed that Article 11(2) be worded as follows:

"(2) [Claiming the right] In order to benefit from the right of priority, the breeder shall, in the subsequent application, claim the priority of the first application. The authority with which the subsequent application has been filed may require the breeder to furnish, not earlier than three months from the filing date of the subsequent application, a copy of the documents which constitute the first application, including proof of the deposit of material representative of the variety, certified to be a true copy by the authority with which that application was filed."

DC/91/96 March 7, 1991 (Original: English)

Source: Delegation of Denmark

PROPOSAL FOR THE AMENDMENT OF ARTICLE 14(1)(a)(vii) and (viii)

It is proposed that Article 14(1)(a)(vii) and (viii) be worded as follows:

"(vii) production of any product coming under the protection of the breeder's right, [stocking for any of the purposes mentioned in (i) to (vi), above,]

(viii) stocking for any of the purposes mentioned in (i) to (vii), above [use in any way other than those mentioned in (i) to (vii), above].

Each Contracting Party may provide that further specific acts shall also require the authorization of the breeder."

DC/91/97 March 7, 1991 (Original: English)

Source: Delegation of Denmark

PROPOSAL FOR THE AMENDMENT OF ARTICLE 14(1)(b)

It is proposed that Article 14(1)(b) be worded as follows:

"(b) in respect of other parts of plants or the harvested material of the protected variety, any of the acts referred to in (a), above, provided that the harvested material was obtained through the use of propagating material whose use, for the purpose of obtaining harvested material, was not authorized by the breeder and if, but only if, the breeder has had no legal possibility of exercising his right in relation to the propagating material;"

DC/91/98 March 7, 1991 (Original: English)

Source: Delegation of Denmark

PROPOSAL FOR THE AMENDMENT OF ARTICLE 14(1)(c)

It is proposed that Article 14(1)(c) be worded as follows:

"(c) Each Contracting Party may provide that the above provisions shall also apply in respect of products made directly from harvested material of the protected variety, [any of the acts referred to in (a), above,] provided that such products were made using harvested material falling within the provisions of (b) above whose use, for the purposes of making such products, was not authorized by the breeder and if, but only if, the breeder has had no legal possibility of exercising his right in relation to the harvested material."

DC/91/99 March 7, 1991 (Original: English)

Source: Delegation of New Zealand

PROPOSAL FOR THE AMENDMENT OF ARTICLE 40

It is proposed that Article 40 be worded as follows:

"This Convention shall not limit [affect] existing rights under the laws of Contracting Parties or by reason of any earlier Act or any agreement other than this Convention concluded between members of the Union."

DC/91/100 March 7, 1991 (Original: English)

Source: Delegation of Japan

PROPOSAL FOR THE AMENDMENT OF ARTICLE 24

It is proposed that Article 24 be worded as follows:

"Legal Status and Headquarters [Seat] of the Union

"(1) [Legal personality] The Union shall have [has] legal personality.

"(2) [Legal capacity] The Union shall enjoy[s] on the territory of each Contracting Party, in conformity with the laws applicable in the said territory, such legal capacity as may be necessary for the fulfillment of the objectives of the Union and for the exercise of its functions.

"(3) [Headquarters] The headquarters of the Union and its permanent organs shall be [are] at Geneva.

"(4) [Headquarters agreement] The Union shall conclude [has] a headquarters agreement with the Swiss Confederation."

DC/91/101 March 7, 1991 (Original: English)

Source: Delegation of Japan

PROPOSAL FOR THE AMENDMENT OF ARTICLE 26(7)

It is proposed that Article 26(7) be worded as follows:

"(7) [Majorities] 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 paragraphs (5)(ii), (vi) and (vii) and under Articles 28(3), 29(5)(b), 34(3) and 38(1) shall require three-fourths of the votes of the members present and voting. Abstentions shall not be considered as votes."

DC/91/102 March 7, 1991 (Original: English)

Source: Delegation of Japan

PROPOSAL FOR THE AMENDMENT OF ARTICLE 30(1)(ii)

It is proposed that Article 30(1)(ii) be worded as follows:

"(ii) set up and maintain an authority entrusted with the task of granting breeders' rights or entrust the said task to an authority maintained by another Contracting Party;"

DC/91/103 March 7, 1991 (Original: English)

Source: Delegation of Japan

PROPOSAL FOR THE AMENDMENT OF ARTICLE 32

It is proposed that Article 32 be worded as follows:

"Members of the Union reserve the right to conclude among themselves special agreements for the protection of new varieties of plants, insofar as such agreements do not contravene the provisions of this Convention."

DC/91/104 March 7, 1991 (Original: English)

Source: Delegation of Japan

PROPOSAL FOR THE AMENDMENT OF ARTICLE 33

It is proposed that Article 33 be worded as follows:

"This Convention shall be open for signature by any State which is a member of the Union at the date of its adoption. It shall remain open for signature until* [for one year after that date]."

* Date to be specified.

DC/91/105 March 7, 1991 (Original: English)

Source: Delegation of Japan

PROPOSAL FOR THE AMENDMENT OF ARTICLE 39(4)

It is proposed that Article 39(4) be worded as follows:

"(4) [**Acquired rights**] The denunciation shall not affect any rights acquired in a variety by reason of this Convention [Act] or any earlier Act prior to the date on which the denunciation becomes effective."

DC/91/106

March 8, 1991 (Original: French)

Source: Mr. J. Guiard, Chairman of the Working Group on Article 1

REPORT OF THE WORKING GROUP ON ARTICLE 1

I. Establishment and Activity of the Working Group

1. The Working Group on Article 1 (hereinafter referred to as "the Working Group") was established by the Conference meeting in Plenary on March 5, 1991. Its main task was to examine questions with respect to the definition of the term "variety" as laid down in Article 1 of the Basic Proposal for a new Act of the International Convention for the Protection of New Varieties of Plants.

2. In accordance with the decision of the Conference meeting in Plenary, the following member States:

Denmark, France, Germany, Hungary, Italy, Japan, Poland, Sweden, the United Kingdom

and the European Communities

were invited to delegate a representative to the Working Party.

3. The Conference meeting in Plenary also decided to invite Mr. Ch. Gugerell from the European Patent Organization in his personal capacity to participate as an expert in the discussions of the Working Group.

4. The Conference meeting in plenary elected Mr. J. Guiard (France) as Chairman of the Working Group. The Secretary-General of UPOV designated Mr. M.-H. Thiele-Wittig as Secretary. The Working Group met on March 6 and 7, 1991.

II. Basis of Discussion and Mandate Given

5. In accordance with the Rules of Procedure, the basis of the discussions was the basic text of the definition of "variety" as reproduced in Article 1(vi) of document DC/91/3, and documents DC/91/22, DC/91/23, DC/91/26 and DC/91/28, containing proposals for amendment submitted by the Delegations of Italy, the United Kingdom, Poland and Sweden. The Conference meeting in Plenary gave the Working Group the mandate to amend the definition of variety in order to reach a technically satisfactory and objective definition of the term "variety" keeping in mind the remarks made in the Plenary on the relevance of that definition to the status quo of the relationship between patents and plant variety rights.

III. Course of the Discussions

6. At the beginning the Chairman recalled the Rules of Procedure laid down in document DC/91/2 relevant to the Working Group, as well as the mandate given to the Working Group by the Conference as mentioned in paragraph 5 above.

7. The Working Group agreed when considering the definition of "variety" that it should make a clear distinction between a variety as an object which might be protected, which must be defined as a concept, and the scope of protection of a variety. The Working Group agreed to avoid any concrete term which could represent physical elements of the variety.

8. The different members of the Working Group were then given the opportunity to make general statements of their positions. During these statements the majority expressed its wish to use document DC/91/23, containing a proposal for amendment made by the United Kingdom, as the starting point for the discussions as it already partly reflected the preoccupations expressed in the Conference meeting in Plenary on the wording of the Basic Proposal for Article 1(vi) as laid down in document DC/91/3.

9. The Working Group agreed that the explanation in the second sentence of Article 1(vi) of what represented a variety should not be part of the definition of variety. It therefore proposed the transfer into Article 14 of the substance of the second sentence of subparagraph (vi).

10. In the course of the discussions, the Working Group received written proposals for amendments from Denmark and Poland.

11. The Working Group had a lengthy discussion on the terms "plant group", "group of plants," "set," "assemblage," "plant grouping," "ensemble végétal," "ensemble de plantes," "Pflanzenbestand," "Pflanzengesamtheit," "pflanzliche Gesamtheit." It was looking for a term which was not necessarily connected to the idea of a certain number. It finally agreed on the term "plant grouping"/"ensemble végétal"/"pflanzliche Gesamtheit."

12. Having chosen a rather broad term, the Working Group then considered it necessary to limit it.

13. To avoid the term "botanical taxon" being taken to mean any botanical taxon, the Working Group agreed to restrict it to the (botanical taxon) "of the lowest rank."

14. In order to ensure that plant groupings resulting from interspecific or intergeneric hybrids were covered, it considered whether to insert the term "existing" before "rank" but finally inserted the term "known." The Working Group confirmed, at the request of the Delegation of Denmark that the amended version covered, in its opinion, all possible cases of hybrids between taxa of whatever rank.

15. The Working Group accepted the proposal submitted by the Delegation of the United Kingdom as reproduced in document DC/91/23 with respect to the first and second indents subject to the following changes:

- The term "plant group" was changed to "plant grouping" [no change in the French text; in the German text, the term "Pflanzenbestand" was changed to "pflanzliche Gesamtheit"].
- The bracketed contents were deleted.
- In the second indent the words "other [plant groups]" were replaced by "any other [plant grouping]."

16. Having discussed several proposals for additional indents to further limit the broad term "plant grouping" and in order to take into account the notion of "reproduction and multiplication" connected with the variety, the

Working Group followed a proposal made by the chairman to insert a third indent reading:

"- considered as a unit with due regard to its suitability for being propagated unchanged."

At the request of the Delegation of Japan, the Working Group confirmed that in its opinion the wording of the third indent covered all types of varieties as it did not mention any type of propagation.

17. The Working Group did not follow a proposal from the Delegation of Poland to insert an indent regarding "propagation for economic purposes." The Working Group considered it to be incorrect to talk in a definition of the variety of economic criteria.

18. In searching for a definition of variety starting from a rather broad term and limiting it through the above three indents, the Working Group always kept in mind the difference between a definition of a variety and criteria required for protection. The acceptance of the above three indents already partly shows that difference. However, in order to avoid any misinterpretation, the Working Group agreed to include in the definition the bracketed text from document DC/91/23 reading:

"- irrespective of whether the conditions for the grant of a breeder's right are fully met..."

Of the nine Member Delegations, six were in favor of the above inclusion, one against and one considered the text superfluous (one Member Delegation was absent). The Delegation of the European Communities expressed itself in favor of the inclusion.

19. Although the mandate was limited to the definition of variety, the Working Group did not want to suggest the transfer of the second sentence of Article 1(vi) in the Basic Proposal to Article 14 without expressing its views on the consequences of that transfer. It therefore also considered document DC/91/50 containing a proposal from the Delegation of the United Kingdom to include the substance of the second sentence in Article 14. It came to the conclusion that:

(i) This was formerly part of the definition of the variety as the object of protection and now in the new context related to the scope of protection; any precise wording eventually adopted should reflect the new context and reflect the fact that the context now described material of the variety.

(ii) The material mentioned in the above sentence could refer to the propagating material as well as to harvested material; therefore it could relate to Article 14(1)(a) and/or 14(1)(b).

20. The eventual wording would depend on the final wording of Article 14 as a whole. Several delegations thought that wording of the above kind might no longer be necessary.

IV. Results of the Discussions

21. The Working Group approved the wording of the definition of "variety" to be included in Article 1(vi) with a majority of seven Member Delegations in

favor and one abstention (one Member Delegation was absent). The full text reads as follows:

"(vi) 'variety' means a plant grouping within a single botanical taxon of the lowest known rank, which grouping, irrespective of whether the conditions for the grant of a breeder's right are fully met, can be:

- defined by the expression of characteristics resulting from a given genotype or combination of genotypes,
- distinguished from any other plant grouping by the expression of at least one of the said characteristics, and
- considered as a unit with due regard to its suitability for being propagated unchanged."

22. The substance of the last sentence of the Basic Proposal for Article 1(vi) as reproduced in document DC/91/3 should be discussed in connection with Article 14.

DC/91/107 March 7, 1991 (Original: English)

Source: Delegations of Canada and Denmark

PROPOSAL FOR THE AMENDMENT OF ARTICLE 19

It is proposed that the following paragraph be added to Article 19:

"(3) For the purposes of paragraph (2), the date of grant of the breeder's right shall be deemed to be the date on which measures for provisional protection, provided for pursuant to Article 13, take effect."

DC/91/108 March 8, 1991 (Original: English)

Source: Delegation of Spain

PROPOSAL FOR THE AMENDMENT OF ARTICLE 37(3)

It is proposed that Article 37(3) be worded as follows:

"(3) [Closing of the 1978 Act] No instrument of accession to the Act of 1978 may be deposited after the entry into force of this Convention according to paragraph (1), except that any State that, in conformity with the established practice of the General Assembly of the United Nations, is regarded as a developing country may deposit such an instrument until December 31, 1995, and that any other State may deposit such an instrument until December 31, 1993, even if this Convention enters into force before that date. [[Closing of earlier Acts] Once this Convention enters into force, no State may accede to the Act of 1978.]"

DC/91/109 March 8, 1991 (Original: English)

Source: Delegation of Denmark

PROPOSAL FOR THE AMENDMENT OF ARTICLE 16(1)(i)

It is proposed that Article 16(1)(i) be worded as follows:

"(1) [**Exhaustion of right**] The breeder's right shall not extend to acts concerning any material of the protected variety, or of a variety covered by the provisions of Article 14(2), which has been put on the market by the breeder or with his consent in the territory of the Contracting Party concerned, or any material derived from the said material, unless such acts

(i) involve [further] propagation of the variety in question for purposes other than consumption,"

DC/91/110 March 8, 1991 (Original: English)

Source: Delegation of the United Kingdom

**PROPOSAL FOR THE AMENDMENT OF ARTICLE 14(1)(a)
AS PROVISIONALLY ADOPTED BY THE CONFERENCE**

It is proposed that the following subparagraph be added to Article 14(1)(a):

"(viii) use for the commercial production of cut flowers and fruit;"

DC/91/111 March 9, 1991 (Original: English)

Source: Delegation of Japan

PROPOSAL FOR THE AMENDMENT OF ARTICLE 14(2)(b)(i)

It is proposed that Article 14(2)(b)(i) be worded as follows:

"(b) For the purposes of subparagraph (a)(i), a variety shall be considered to be essentially derived from another variety ("the initial variety") when

(i) it is predominantly derived from the initial variety, or from a variety that is itself predominantly derived from the initial variety, particularly through methods which have the effect of conserving the essential characteristics that are the expression of the genotype or of the combination of genotypes of the initial variety, [such as the selection of a natural or induced mutant or of a somaclonal variant, the selection of a variant, backcrossings or transformation by genetic engineering,]"

DC/91/112 March 7, 1991 (Original: French)

Source: (Adopted by the) Diplomatic Conference

AGENDA OF THE DIPLOMATIC CONFERENCE

Editor's Note: This document is not reproduced here. Its contents is identical with the contents of the Provisional Agenda, which is reproduced as document DC/91/1, on page 81, above.

DC/91/113 March 11, 1991 (Original: English)

Source: Delegation of the Netherlands

PROPOSAL FOR THE AMENDMENT OF ARTICLE 30

1. It is proposed that the following paragraph (2) be added to Article 30:

"(2) Where reference is made in this Convention to acts done within the territory of a Contracting Party, each Contracting Party which is a member of an intergovernmental organization may, where required under the rules of that organization, treat acts done in other parts of the territory of that organization as if they were made within its own territory."

2. The current paragraph (2) would become paragraph (3).

DC/91/114 March 11, 1991 (Original: English)

Source: Delegation of Denmark

PROPOSAL FOR THE AMENDMENT OF ARTICLE 15(1)(iii)

It is proposed that the following sentence be added to Article 15(1)(iii):

"Where the provisions of Article 14(2) apply, the breeder's authorization shall be required for a period of 10 years from the date of granting of the breeder's right in respect of the initial variety."

DC/91/115 March 12, 1991 (Original: English)

Source: Delegation of the Netherlands

PROPOSAL FOR THE AMENDMENT OF ARTICLE 15(2)

It is proposed that the following subparagraph (b) be added to Article 15(2):

"(b) A Contracting Party shall apply this provision only to species or groups of species that are essential for the food production or the rural economy of that Contracting Party."

DC/91/116 March 12, 1991 (Original: English)

Source: Delegation of Denmark

PROPOSAL FOR A COMMON STATEMENT RELATING TO ARTICLE 34

It is proposed that the Diplomatic Conference adopt the following common statement to be included in the Records of the Conference (see Rule 1(2)(vi) of the Rules of Procedure):

"The Diplomatic Conference noted and accepted a declaration by the Delegation of Denmark according to which the Convention adopted by the Diplomatic Conference will not, upon its ratification, acceptance, approval or accession by Denmark, be automatically applicable in Greenland and the Faroe Islands but will only apply in the said two territories if and when Denmark expressly so notifies the depositary of the Convention."

DC/91/117 March 12, 1991 (Original: English)

Source: Delegation of Sweden

PROPOSAL FOR A COMMON STATEMENT RELATING TO ARTICLE 3

It is proposed that the Diplomatic Conference adopt the following common statement to be included in the Records of the Conference (see Rule 1(2)(vi) of the Rules of Procedure):

"The Diplomatic Conference declares that it shall belong to each Contracting Party to define the scope of the expression 'plant genera and species' for the purposes of the implementation of the International Convention for the Protection of New Varieties of Plants of December 2, 1961, as Revised at Geneva on November 10, 1972, on October 23, 1978, and on March 19, 1991. Whereas the expression shall include all that which is commonly called 'plant,' each Contracting Party shall be free to draw the borderline between plants and micro-organisms."

DC/91/118 March 12, 1991 (Original: English)

Source: Mr. J. Harvey, Chairman of the Working Group on Article 14(1)(a) and (b)

REPORT OF THE WORKING GROUP ON ARTICLE 14(1)(a) AND (b)

I. Establishment and Activity of the Working Group

1. The Working Group on Article 14(1)(a) and (b) (hereinafter referred to as "the Working Group") was established by the Conference meeting in Plenary on March 11, 1991. Its main task was to examine questions with respect to the wording of Article 14(1)(b) of the Basic Proposal for a new Act of the International Convention for the Protection of New Varieties of Plants, keeping in mind its implications for Article 14(1)(a).

2. In accordance with the decision of the Conference meeting in Plenary, the following member States:

Denmark, Germany, Japan, the Netherlands, Sweden, the United Kingdom, the United States of America

and the observer State Morocco

were invited to delegate a representative to the Working Group.

3. The Conference meeting in Plenary also decided to invite Mr. R. Teschemacher from the European Patent Organisation (EPO) and Mr. R. Royon from the International Community of Breeders of Asexually Reproduced Ornamental and Fruit-Tree Varieties (CIOPORA) in their personal capacities to participate as experts in the discussions of the Working Group.

4. The Conference meeting in Plenary elected Mr. J. Harvey (United Kingdom) as Chairman of the Working Group. The Secretary-General of UPOV designated Mr. M.-H. Thiele-Wittig as Secretary. The Working Group met on March 11 and 12, 1991.

II. Basis of Discussions and Mandate Given

5. In accordance with the Rules of Procedure, the basis of the discussions was the Basic Proposal for Article 14(1)(a) and (b) as reproduced in document DC/91/3, and documents DC/91/12, DC/91/24, DC/91/50, DC/91/60, DC/91/61, DC/91/82, DC/91/91, DC/91/97 and DC/91/110, containing proposals for amendments submitted by the Delegations of the United States of America, Italy, the United Kingdom, Canada, Japan, Spain, Germany and Denmark. The Conference meeting in Plenary gave the Working Group the mandate to amend Article 14(1)(b) in order to take into account the technical and juridical aspects involved and its relation to Article 14(1)(a) of the Basic Proposal as amended by the Conference meeting in Plenary according to documents DC/91/10 and DC/91/11 and keeping in mind the principle of "cascading" adopted by the Conference meeting in Plenary.

III. Course of the Discussions

6. At the proposal of the Chairman, the discussions started on the question of what kind of use should be authorized. All agreed that it was commercial use only and not the use for private or for non-commercial purposes as already spelled out in Article 15(1).

7. The second question addressed was whether a solution should be found only with respect to ornamental plants and fruits or whether a more general solution should be sought. It was stated that at present problems arose mainly in the field of ornamental plants and fruits but there was hesitation to limiting the solution to those crops, and thus a more general solution was preferred.

8. The Working Group had two options:

(a) to insert a new provision in paragraph (1)(a) concerning the use of propagating material for the production of harvested material;

(b) to adjust the wording in paragraph (1)(b).

Several delegations took the view that to amend paragraph (1)(a) could only be done in a way which would extend the right of the breeder beyond the circumstances discussed in paragraphs 6 and 7 above. It therefore decided not to propose an amendment to Article 14(1)(a).

9. However, resulting from those discussions, the Working Group recalled that Article 14(1)(a) was now silent on whether the authorization of the breeder was necessary for the production of harvested material from propagating material. Article 14(1)(a) also did not mention whether the breeder could make his authorization with respect to the acts mentioned in paragraphs (1)(a)(i) to (vii) subject to conditions.

10. Although it was understood that the freedom of contract for the breeder was implicit, the Working Group, on the basis of a proposal from the Delegation of Germany, agreed to insert at the end of paragraph (1)(a) an additional sentence, similar to paragraph 2 of the present text of Article 5 of the Convention, reading:

"The breeder may make his authorization of acts under subparagraphs (1)(a)(i) to (vii) subject to conditions and limitations."

11. Since several delegations explained that their understanding was quite close to the proposal for amendment submitted by the Delegation of the United States of America in document DC/91/12, the Working Group used that proposal as the basis for its further discussions on Article 14(1)(b).

12. The Delegation of Germany, in order to ensure that whole plants including, for example, pot plants but also parts of plants could be harvested material, proposed to include the wording of "entire plants" and "parts of plants" into the proposal from the Delegation of the United States of America.

13. On the basis of a composite text prepared by the Chairman of the Working Group, taking into account the above proposals and agreements, the Working Group continued its discussions and arrived at the proposal mentioned below.

14. The Working Group recognized a point raised by the Delegation of Denmark concerning propagating material used by a purchaser to produce more propagating material for use by himself to produce harvested material for sale. The

Working Group agreed that this was an issue which would need to be dealt with in Article 16 and noted the amendment already proposed by the Delegation of Denmark in document DC/91/109.

15. The Working Group considered a proposal from the Delegation of Japan to introduce the concept of "due care" into the text of paragraph (1)(b). The Working Group accepted the principle of the proposal but agreed that the concept was already included in the text by the use of the word "reasonable."

16. The Working Group considered carefully the final clause of paragraph (1)(b) agreed by the Conference meeting in Plenary. It noted the Conference decision to delete the square brackets from the text and its instruction to the Drafting Committee to propose a final text expressing the principles contained in the clause. The Working Group noted that the text was originally intended to cover a specific situation but that discussion had indicated a need to widen the text beyond the original intention whilst preserving that intention. The Working Group agreed that this was within its terms of reference, and the Working Group proposal contains an appropriate amendment.

17. The Working Group discussed the proposal from the Working Group on Article 1 to consider the possible inclusion in Article 14(1) of the sentence deleted from Article 1(vi) with respect to the definition of "propagating material." It finally agreed that there was no such need.

IV. Working Group Proposal

18. The Working Group agreed unanimously on the following text for Article 14(1)(a) and (b):

"Article 14

"Scope of the Breeder's Right

"(1) [Acts requiring the breeder's authorization] Subject to Articles 15 and 16, the following acts shall require the authorization of the breeder:

(a) in respect of the propagating material of the protected variety,

- (i) production or reproduction,
- (ii) conditioning for the purpose of propagation,
- (iii) offering for sale,
- (iv) selling or other marketing,
- (v) exporting,
- (vi) importing,

(vii) stocking for any of the purposes mentioned in (i) to (vi), above;

the breeder may make his authorization of acts under subparagraphs (1)(a)(i) to (vii) subject to conditions and limitations;

(b) in respect of harvested material of the protected variety, including entire plants and parts of plants, any of the acts referred to in paragraph (a) above provided that such harvested material was obtained through the unauthorized use of propagating material, unless the breeder has had reasonable opportunities to exercise his right in relation to the propagating material."

DC/91/119 March 12, 1991 (Original: English)

Source: Delegation of the Netherlands

PROPOSAL FOR A COMMON STATEMENT RELATING TO ARTICLE 15(2)

It is proposed that the Diplomatic Conference adopt the following common statement to be included in the Records of the Conference (see Rule 1(2)(vi) of the Rules of Procedure):

"The Diplomatic Conference declares that the provision laid down in Article 15(2) of the International Convention for the Protection of New Varieties of Plants of December 2, 1961, as Revised at Geneva on November 10, 1972, on October 23, 1978, and on March 19, 1991, is not intended to establish the possibility of extending the practice commonly called 'farmer's privilege' in areas of agricultural or horticultural production in which such a privilege is not a common practice on the territory of the Contracting Party concerned."

DC/91/120 March 12, 1991 (Original: English)

Source: Delegation of Poland

**PROPOSAL FOR THE AMENDMENT OF THE TITLE OF THE NEW ACT
AND THE NAME OF THE UNION**

1. It is proposed that the title of the New Act be amended as follows:

"International Convention for the Protection of the Breeder's Right to the New Variety."

2. It is further proposed that the name of the Union be amended as follows:

"International Union for the Protection of the Breeder's Right to the New Variety."

DC/91/121 March 12, 1991 (Original: English)

Source: Delegation of the Netherlands

PROPOSAL FOR THE AMENDMENT OF ARTICLE 34

It is proposed that the following paragraph be added to Article 34:

"(4) Any State may declare in its instrument of ratification, acceptance, approval or accession that this Convention shall be applicable to all or part of the territories designated in the declaration. This declaration shall take effect on the same date as the ratification, acceptance, approval or accession in the instrument of which it was included."

DC/91/122 March 12, 1991 (Original: English)

Source: Delegation of the United States of America

PROPOSAL FOR THE AMENDMENT OF ARTICLE 37(1) AND (2)

It is proposed that Article 37(1) and (2) be worded as follows:

"(1) [Initial entry into force] This Convention shall enter into force one month after five States [or intergovernmental organizations] have deposited their instruments of ratification, acceptance, approval or accession, as the case may be, provided that at least three of the said instruments have been deposited by States party to the Act of 1961/1972 or the Act of 1978.

"(2) [Subsequent entry into force] Any State [or intergovernmental organization] not covered by paragraph (1) or any intergovernmental organization shall become bound by this Convention one month after the date on which it has deposited its instrument of ratification, acceptance, approval or accession, as the case may be."

DC/91/123 March 14, 1991 (Original: English)

Source: Secretariat

REPORT OF THE CREDENTIALS COMMITTEE

1. The Credentials Committee (hereinafter referred to as "the Committee"), established on March 4, 1991, by the Diplomatic Conference for the Revision of the International Convention for the Protection of New Varieties of Plants (hereinafter referred to as "the Conference"), met on March 4, 1991, and on March 14, 1991.
2. The delegations of the following States members of the Committee attended the meetings: France, Germany, Italy, South Africa and United States of America.
3. The Committee unanimously elected Mr. Marco G. Fortini (Italy) as Chairman and Mr. Jean-François Prevel (France) and Mr. Tobias Kampmann (Germany) as Vice-Chairmen.
4. In accordance with Rule 9(1) of the Rules of Procedure adopted by the Conference on March 4, 1991 (hereinafter referred to as "the Rules of Procedure"), the Committee examined the credentials, full powers, letters or other documents of appointment presented for the purposes of Rules 6 and 7 by delegations of States members of the International Union for the Protection of New Varieties of Plants (UPOV), participating in the Conference in accordance with Rule 2(1)(i) of the Rules of Procedure (hereinafter referred to as "Member Delegations"), by delegations of States other than those members of UPOV, participating in the Conference in accordance with Rule 2(1)(ii) of the Rules of

Procedure (hereinafter referred to as "Observer Delegations"), and by the representatives of intergovernmental and international non-governmental organizations, participating in the Conference in accordance with Rule 2(1)(iii) of the Rules of Procedure (hereinafter referred to as "representatives of Observer Organizations").

5. On the basis of the information provided by the Secretariat as to the practice prevailing in other diplomatic conferences and in particular in diplomatic conferences convened by the World Intellectual Property Organization (WIPO), the Committee decided to recommend to the Conference, meeting in Plenary, that the following criteria should be applied by the Committee in its examination of, and should govern the decision of the Conference on, the credentials, full powers, letters or other documents presented for the purposes of Rules 6 and 7 of the Rules of Procedure:

(i) as far as any State is concerned, its delegation's credentials and full powers should be accepted if they were signed by that State's Head of State, Head of Government or Minister for Foreign Affairs; credentials, but not full powers, should be accepted if they were contained in a note verbale or letter of that State's Permanent Representative in Geneva or in a note verbale of that State's Permanent Mission in Geneva, and should not otherwise be accepted; in particular, a communication emanating from a Minister other than the Minister for Foreign Affairs or from an official other than the Permanent Representative or Chargé d'affaires a.i. of a Permanent Mission in Geneva should not be treated as credentials;

(ii) as far as any Organization is concerned, its representative's letter or other document of appointment should be accepted if it is signed by the Head (Director General, Secretary General or President) or Deputy Head or official responsible for external affairs of the Organization;

(iii) facsimile and telex communications should be accepted if, as to their source, the requirements stated in points (i) and (ii) were fulfilled.

6. Pending a final decision by the Conference, meeting in Plenary, on the said criteria, the Committee decided to apply those criteria to the documents received by it.

7. Accordingly, the Committee found in order

(a) as far as Member Delegations are concerned,

(i) the credentials and full powers (that is, credentials for participating in the Conference and full powers to sign a revised text of the International Convention for the Protection of New Varieties of Plants) of the delegations of the following 7 States:

Denmark	Italy	Spain	United States of
Israel	Netherlands	Switzerland	America

(ii) the credentials (without full powers) of the delegations of the following 13 States:

Australia	Germany	Japan	South Africa
Belgium	Hungary	New Zealand	Sweden
Canada	Ireland	Poland	United Kingdom
France			

(b) as far as Observer Delegations are concerned, the credentials of the delegations of the following 24 States:

Argentina	Chile	Ghana	Norway
Austria	Colombia	Indonesia	Republic of Korea
Benin	Côte d'Ivoire	Kenya	Samoa
Bolivia	Czechoslovakia	Luxembourg	Thailand
Brazil	Ecuador	Malawi	Turkey
Burundi	Finland	Morocco	Ukrainian SSR

(c) as far as the representatives of Observer Organizations are concerned, the letters or documents of appointment of representatives of the following Observer Organizations (listed in the order given in the French version of Annex II to document DC/91/2):

World Intellectual Property Organization (WIPO)
 Food and Agriculture Organization of the United Nations (FAO)
 General Agreement on Tariffs and Trade (GATT)
 Organisation for Economic Co-operation and Development (OECD)
 International Board for Plant Genetic Resources (IBPGR)
 International Seed Testing Association (ISTA)
 International Association of Horticultural Producers (AIPH)
 International Association for the Protection of Industrial Property (AIPPI)
 International Association of Plant Breeders for the Protection of Plant Varieties (ASSINSEL)
 International Chamber of Commerce (ICC)
 International Community of Breeders of Asexually Reproduced Ornamental and Fruit-Tree Varieties (CIOPORA)
 General Committee for Agricultural Cooperation in the European Economic Community (COGECA)
 Association of Plant Breeders of the European Economic Community (COMASSO)
 Committee of Agricultural Organisations in the European Economic Community (COPA)
 Seed-Committee of the Common Market (COSEMCO)
 European Federation of Pharmaceutical Industries' Associations (EFPIA)
 International Federation of Industrial Property Attorneys (FICPI)
 International Federation of Agricultural Producers (IFAP)
 International Federation of the Seed Trade (FIS)
 International Group of National Associations of Manufacturers of Agro-chemical Products (GIFAP)
 Union of Industrial and Employers' Confederations of Europe (UNICE)
 Union of European Practitioners in Industrial Property (UPEPI)

8. The Committee noted that a letter of appointment of representatives of the Commission of the European Communities had been received from the Commission of the European Communities and that a letter of appointment of representatives of the European Patent Office had been received from the European Patent Office.

9. The Committee noted that, in accordance with established practices, a designation of representation implied, in principle, in the absence of any express reservation, the right of signature, and that it should be left to each delegation to interpret the scope of its credentials.

10. The Committee recommends to the Conference, meeting in Plenary, to accept the credentials and full powers of the delegations mentioned in paragraph 7(a), above, the credentials of the delegations mentioned in paragraph 7(b), above, and the letters or documents of appointment of the representatives of the Organizations mentioned in paragraph 7(c), above.

11. The Committee expressed the wish that the Secretariat should bring Rules 6 ("Credentials and Full Powers"), 7 ("Letters of Appointment") and 10 ("Provisional Participation") of the Rules of Procedure to the attention of Member Delegations or Observer Delegations not having presented credentials or full powers and of the representatives of Observer Organizations not having presented letters or other documents of appointment.

12. The Committee decided that a report on its meeting should be prepared by the Secretariat and issued as its report, to be presented by the Chairman of the Committee to the Conference, meeting in Plenary.

13. The Committee authorized its Chairman to examine any further communications concerning Member Delegations, Observer Delegations or Observer Organizations which might be received by the Secretariat and to report thereon to the Conference, meeting in Plenary, unless the Chairman deemed it necessary to convene the Committee to examine and report on those communications.

DC/91/124

March 15, 1991 (Original: English)

Source: Delegations of Germany and New Zealand

PROPOSAL FOR THE AMENDMENT OF ARTICLE 1

It is proposed that the following item (xiii) be added to Article 1:

"(xiii) 'intergovernmental organization' means an organization constituted by and composed of independent States of any region of the world [which meets the requirements of Article 34(1)(b)]."

DC/91/125 Rev.

March 15, 1991 (Original: English)

Source: Delegations of Germany and New Zealand

PROPOSAL FOR THE AMENDMENT OF ARTICLE 34(1)(b)

It is proposed that Article 34(1)(b) be worded as follows:

"(b) Any intergovernmental organization may, as provided in this Article, become party to this Convention if it

- (i) has competence in respect of matters governed by this Convention,
- (ii) has its own legislation providing for the grant of breeders' rights binding on all its member States [provides for the grant of breeders' rights with effect in its territory] and
- (iii) has been duly authorized in accordance with its internal procedures, to accede to this Convention."

DC/91/126

March 15, 1991 (Original: English)

Source: Delegation of Canada**PROPOSAL FOR THE AMENDMENT OF ARTICLE 34(1)(b)**

It is proposed that Article 34(1)(b) be worded as follows:

"(b) Any intergovernmental organization, which has competence in respect of matters governed by this Convention, has its own legislation providing for protection of plant breeders' rights in accordance with this Convention and binding on or directly applicable in all its member States and has been duly authorized, in accordance with its internal procedures to accede to this Convention, may, in accordance with [as provided in] this Article, become a party to this Convention, if at the time of the accession by such intergovernmental organization at least one of its member States is a party to this Convention [if it provides for the grant of breeders' rights with effect in its territory]. Any such intergovernmental organization shall inform the Secretary-General of its competence, and any changes in its competence, with respect to the matters governed by this Convention. The intergovernmental organization and its member States may, without any derogation from the obligations under this Convention, decide on their respective responsibilities for the performance of their obligations under this Convention."

DC/91/127

March 15, 1991 (Original: English)

Source: Delegations of Australia, Canada, France, Germany, Japan, the Netherlands, New Zealand, the United Kingdom and the United States of America**PROPOSAL FOR THE AMENDMENT OF ARTICLE 26(6) AND (7)**

It is proposed that Article 26(6) and (7) be worded as follows:

"(6) [Votes] (a) Each member of the Union that is a State shall have one vote in the Council.

(b) Any Contracting Party that is an intergovernmental organization may, in matters within its competence, exercise the right to vote of its member States that are members of the Union. Such an intergovernmental organization shall not exercise its right to vote if its member States exercise their rights to vote, and vice versa.

"(7) [Majorities] Any decision of the Council shall require a simple majority of the votes cast [of the members present and voting], provided that any decision of the Council under paragraphs 5(ii), (vi), and (vii) and under Articles 28(3), 29(5)(b) and 38(1) shall require three-fourths of the votes cast [of the members present and voting]. Abstentions shall not be considered as votes."

DC/91/128

March 15, 1991 (Original: English)

Source: Delegations of Australia, Canada, France, Germany, Japan, the Netherlands, New Zealand, the United Kingdom and the United States of America

PROPOSAL FOR THE AMENDMENT OF ARTICLE 29(3)(b)

It is proposed that Article 29(3)(b) be worded as follows:

"(b) [As far as] Any other Contracting Party which is a State [is concerned, that Contracting Party] shall, on joining the Union, indicate, in a declaration addressed to the Secretary-General, the number of contribution units applicable to it. Any Contracting Party which is an intergovernmental organization shall not be obliged to pay any contribution."

DC/91/129 Rev.

March 15, 1991 (Original: English)

Source: Drafting Committee

DRAFT RESOLUTION ON ARTICLE 14(5)

Editor's Note: This document is not reproduced here. Its text is the same as the text of the Resolution adopted by the Conference and reproduced, in the "Basic Texts" part, on page 63, above.

own territory and, should it so do, it shall notify the Secretary-General accordingly."

DC/91/133

March 18, 1991 (Original: German)

Source: Delegation of Germany

PROPOSAL FOR THE AMENDMENT OF ARTICLE 11(3)

It is proposed that Article 11(3) be worded as follows:

"(3) [**Supporting documents and material**] The breeder shall be allowed a period of two years after the expiration of the period of priority or, where the first application is rejected or withdrawn, an appropriate time after such rejection or withdrawal, in which to furnish, to the authority of the Contracting Party with which he has filed the subsequent application, all the necessary information, [any additional] documents or [and] material required for the purpose of the examination under Article 12, [supporting the priority claim,] as required by the laws of that Contracting Party."

DC/91/134

March 19, 1991 (Original: English)

Source: Delegations of France, Germany and the United Kingdom

**PROPOSAL FOR THE AMENDMENT OF ARTICLE 6(1)
AS PROVISIONALLY ADOPTED BY THE CONFERENCE**

It is proposed that Article 6(1) be worded as follows:

"(1) [**Criteria**] The variety shall be deemed to be new if, at the date of filing of the application for a breeder's right, propagating or harvested material of the variety has not been sold or otherwise disposed of to others, by or with the consent of the breeder, for purposes of exploitation of the variety

(i) in the territory of the Contracting Party in which the application has been filed earlier than one year before that date and

(ii) in a territory other than that of the Contracting Party in which the application has been filed earlier than four years or, in the case of trees or of vines, earlier than six years before the said date.

Notwithstanding (ii) above and without prejudice to Article 4, any two or more States members of the Union may provide for a period of less than four years, or less than six years, as the case may be, but not less than one year, within their territories."

DC/91/135 March 19, 1991 (Original: English)

Source: Delegations of Canada and the United States of America

PROPOSAL FOR THE AMENDMENT OF ARTICLE 6

It is proposed that the following paragraph be added to Article 6:

"(3) For the purposes of paragraph (1), any Contracting Party which is a member State of an intergovernmental organization may, where the regulations of that organization so require, assimilate acts done on the territories of the States members of that organization to acts done on its own territory and, should it so do, shall notify the Secretary-General accordingly. Such assimilation shall only become effective when the intergovernmental organization has become a Contracting Party."

DC/91/136 March 19, 1991 (Original: English/
French/German)

Source: Drafting Committee

DRAFT RECOMMENDATION RELATING TO ARTICLE 15(2)

The Diplomatic Conference recommends that the Contracting Parties should not interpret Article 15(2) of the International Convention for the Protection of New Varieties of Plants of December 2, 1961, as Revised at Geneva on November 10, 1972, on October 23, 1978, and on March 19, 1991, as a provision intended to open the possibility of extending the practice commonly called 'farmer's privilege' to sectors of agricultural or horticultural production in which such a privilege is not a common practice on the territory of the Contracting Party concerned.

DC/91/137 March 19, 1991 (Original: English/
French/German)

Source: Drafting Committee

DRAFT COMMON STATEMENT RELATING TO ARTICLE 34

Editor's Note: This document is not reproduced here. Its text is the same as the text of the Common Statement adopted by the Conference and reproduced, in the "Basic Texts" part, on page 63, above.

DC/91/138 March 19, 1991 (Original: English/
French/German)

Source: Secretariat

F I N A L D R A F T

**INTERNATIONAL CONVENTION
FOR THE PROTECTION OF NEW VARIETIES OF PLANTS**

of December 2, 1961,
as Revised at Geneva on November 10, 1972,
on October 23, 1978, and on March 19, 1991

Editor's Note: This document is reproduced in the "Basic Texts" part, on the right-hand pages, starting from page 13, above.

DC/91/139 March 19, 1991 (Original: English/
French/German)

Source: Secretariat

F I N A L D R A F T

RECOMMENDATION RELATING TO ARTICLE 15(2)

Editor's Note: This document is reproduced in the "Basic Texts" part, on page 63, above.

DC/91/140 March 19, 1991 (Original: English/
French/German)

Source: Secretariat

F I N A L D R A F T

RESOLUTION ON ARTICLE 14(5)

Editor's Note: This document is reproduced in the "Basic Texts" part, on page 63, above.

SUMMARY MINUTES

SUMMARY MINUTES
OF THE
PLENARY MEETINGS OF THE DIPLOMATIC CONFERENCE

President: Mr. Wilhelmus F.S. Duffhues (Netherlands)

Vice-Presidents: Mr. Frank W. Whitmore (New Zealand)
Mr. Karl Olov Öster (Sweden)

Secretary: Mr. Barry Greengrass

<p><u>First Meeting</u> <u>Monday, March 4, 1991</u> <u>Morning</u></p>

OPENING OF THE CONFERENCE BY THE SECRETARY-GENERAL OF UPOV

1. Mr. BOGSCH (Secretary-General of UPOV) opened the Diplomatic Conference for the Revision of the International Convention for the Protection of New Varieties of Plants and welcomed the participants on behalf of the International Union for the Protection of New Varieties of Plants. He then invited the President of the Council of UPOV to address the Conference.

ADDRESS BY THE PRESIDENT OF THE COUNCIL OF UPOV

2. Mr. DUFFHUES (Netherlands) gave the following address to the Diplomatic Conference.

"We sometimes hear it suggested that the interests of plant breeders and of agriculturists are fundamentally opposed; that the protection of plant varieties only benefits the plant breeders and is always contrary to the interests of the persons who must pay to purchase the seed or propagating material of their chosen protected variety! I sometimes have the impression that even the most open-minded people feel bound to defend one or the other entrenched position wherever they are talking about patents or plant breeders'

rights. This kind of discussion often leaves me with the feeling that those involved are more interested in defending their institutional or sectoral interests than in having an in-depth, balanced discussion about the contents and rationale of the one or the other form of protection. Yet these are the very rights which provide the economic basis for the activities of innovators whose developments are essential to the well-being of agriculturists and of mankind in general! However, I only expect this kind of posturing, or position-taking, from those who have forgotten that the only way of achieving a good result in a discussion is to consider carefully the true pros and cons of an argument.

"I have taken the liberty of making this remark even before welcoming you warmly to this 1991 Diplomatic Conference for the Revision of the International Convention for the Protection of New Varieties of Plants, originally enacted in Paris in 1961, the "UPOV Convention." The UPOV Convention has already been revised in 1972 and 1978, and the goal of this Conference is to adapt it once more to the changed circumstances and opinions of today.

"As President of the Council, the governing body of UPOV, it is a great honor for me to welcome you to Geneva, to the headquarters of UPOV.

"First, I welcome the delegates from the member States of UPOV, and I note particularly the presence of Canada, which became a member of UPOV today, March 4, 1991. They will have the task of putting the new Convention into written form. They have a difficult task because they have to weigh the pros and cons, and also the remarks and wishes of all parties concerned; they must leave the door open for non-member States to become members; they have to resolve in a rather short period all the problems which will be encountered. They also have a rewarding task because they will be laying the foundations for the future development of plant breeding; plant breeding which will enable agriculture to take care of food, fiber and energy production and of the production of other materials that in good and bad times will contribute to the well-being of the people whilst providing employment, economic growth and social security for many on earth.

"I accordingly bid a hearty welcome to the representatives of the agricultural organizations.

"Plant breeding is accomplished by the creators of new varieties, the breeders, as they respond not only to the wishes and demands of practical agriculturists but also, more and more, to the needs of the very demanding consumer and, equally, to the need to protect nature, the environment, the air, water and soil. Varieties must be adapted to an agriculture which uses the minimum of insecticides, fungicides and herbicides; and a minimum of fertilizers, too. They must respond to the objective of low inputs, low energy usage, no waste products, versatility to climatic circumstances, but without sacrificing yielding capacity, nutritional quality or choice for consumers. An extremely high package of demands that requires a high level of practical and scientific skills, inventiveness and a continuing improvement of crossing processes, screening techniques and so on. All this is only possible

on the basis of adequate remuneration for the innovation-minded people. I accordingly bid a hearty welcome also to the representatives of the breeders' associations.

"The rights most widely granted to plant breeders take the form of breeders' rights in respect of varieties. But there are and surely will be techniques, genes, cells or other aspects of plants that can be and will be patented. It is in any case extremely important for both breeders and agriculturists to know exactly the possibilities or the lack of possibilities for protection on the basis of patent rights and to understand any problems arising from the boundary line of the two rights. On this account, I bid a hearty welcome also to the representatives from the world of patent rights.

"UPOV has at the present time 20 member States. The great majority of the countries of the world are thus not members. This may not be as strange as it seems. Many countries have no direct interest in plant breeding because they lack breeding enterprises. Yet it is of great importance that many more countries recognize the merits of the UPOV form of plant variety protection, since it can be of relevance for the improvement of their food supply and their agricultural position to create a form of protection for the products of plant breeding.

"Naturally, I understand the practical problems which often arise from a lack of resources to test varieties or from the lack of a suitable independent body for the examination of applications and the granting of rights. The presence here of so many non-member States shows the worldwide interest in this important field and gives UPOV the opportunity to explore with them the possibilities for close cooperation with existing member States in the examination of varieties and the granting of rights. Accordingly, I bid a hearty welcome to the observer delegates of States that are quite near to membership and have frequently attended UPOV meetings, and also to observer delegates from States which have been infrequent participants in UPOV meetings and conferences or who are attending for the first time.

"It would be a mistake if I forgot the representatives of intergovernmental organizations whose goals and interests are quite near to the aims of the Convention on which UPOV is based. I especially welcome the representatives of the Commission of the European Communities because of the proposed establishment in the near future of a Community breeder's right. Discussions on this subject have been very long and very heavy; this shows that reaching European unity is not simple. All the members of the Community and some other countries certainly know that they need each other, but it is not always clear on whose conditions! Perhaps the conclusion of the discussions within UPOV on the revision of the Convention will provide an opportunity to make faster progress; perhaps a revised Convention will provide opportunities for intergovernmental organizations which grant breeders' rights to become members of UPOV. A hearty welcome to you and to all the other representatives of intergovernmental organizations.

Biotechnology

"When, in 1953, Watson and Crick unraveled the structure of the DNA which is to be found in the nucleus of the cell and in which the genetic information is encoded, the foundation of the modern biotechnology was laid. 1953 was just a few years before the beginning, in 1957, of the discussions that led to the first Act of the UPOV Convention.

"These two events were unconnected at that time. During the 80's it became obvious that the influence of biotechnology on breeders' rights, and on the UPOV Convention, would become stronger and stronger.

"Modern biotechnology is about 40 years of age. I am using the word 'modern' because biotechnology, as such, is a very old science. At the end of the 50's and the beginning of the 60's, one began to be aware of what might become possible in this field. Some people dreamed of the most fantastic improvements to living organisms. In the 60's and 70's, many enterprises, mainly in the United States of America, some large, some small, developed programs aimed at biotechnological innovation. Some of them have disappeared or have been absorbed into other enterprises, but a fast, for many people unexpected rate of development was set going. In Western Europe, in particular, it led to a slight panic at the end of the 70's when it was realized that a gap existed between science and its practical application. In the Far East, especially in Japan, work proceeded quietly. In the early 80's, it became evident that the short-term expectations of biotechnology were too high. Yet the fast multiplication techniques based on tissue culture, the diagnostic techniques for diseases and the much clearer insight into where in the genetic system the genetic control of particular characters was located and how it operated, were enormous advances. Plant breeders benefit from these advances especially in speeding up breeding processes and addressing more precisely their objectives.

The UPOV System

"Within this same period, the UPOV system of breeders' rights was developed. In 1961, in Paris, the first Act was signed, and the UPOV Convention came into force in 1968, originally with three member States. In 1972 and 1978, the Convention was revised and supplemented. The initial growth of UPOV was slow but, in the last decade, the number of member States has expanded to 20. There are some States which are now knocking on the UPOV door, some which are interested, but also some which have difficulties with the principles of plant variety protection.

"The countries or people (individuals or organizations) which express these difficulties are often seeking to protect the genetic resources of the world or of specific parts of the world. We should all be very grateful that so many people exert themselves to the utmost on this particular issue. If we continue to be careless with our natural resources, including the tropical rain forests as an important gene supplier, future generations will not be grateful to us. But I fail to see a conflict between the objectives of the protectors of genetic resources and the way in which plant breeders use these resources.

"The goal of the conservation of plant genetic material is to preserve the potential for further evolution. Plant breeding intends to grasp a minor part of this potential with a view to developing and improving cultivated varieties, ensuring an adequate supply of food, fibre, energy and ornamental products of the desired quality and safety. The maximum genetic variability is required for the breeders' purposes and this, in turn, requires the stocking and maintenance of genetic material and cultivated varieties in gene banks or in another way. At this point, the goals of breeders and of the conservators of genetic resources are in principle not different, and it is absolutely necessary that the ones listen to the others and try to come to an agreement.

Strengthening the System

"The costs of deploying the new technologies and the costs of developing and producing varieties caused the public authorities in UPOV member States to ask themselves if the plant breeders' rights system was adequate and strong enough to secure the maintenance of the enormous, costly breeding work. The authorities are strongly convinced of the need to have a strong breeding industry, backed by a strong plant breeders' rights system, together with strong organizations for the protection of genetic resources.

"We are all familiar with the patent system. This system secures a right of intellectual property for inventors, and this right could, perhaps, also serve to provide a right for the breeders. Yet having looked carefully at both systems, it seems to me that there are many reasons to have both systems. It is in my view unimportant to have one legal system with two subsystems or two separate systems, well defined and distinguished. It is of great importance that any special system devoted to plant varieties be a strong system in itself so that the breeder's work, including the new biotechnological techniques, can continue. Therefore, the UPOV Council decided to study the Convention in the light of the new developments, and a decision was taken to revise the Convention on this account as well.

"The main goal of the revision is the strengthening of the breeder's right. At the same time, we are aware of the possibilities of patent protection for techniques and even for genes. But in these weeks, in this Diplomatic Conference here in Geneva, we shall only be concerned with breeders' rights.

"You have before you the Basic Proposal for a new Act of the International Convention for the Protection of New Varieties of Plants. This proposal has emerged after three meetings with international non-governmental organizations, one joint meeting of UPOV and WIPO and many national discussions between the representatives of the organizations and the authorities and consultations between authorities.

"The Council of UPOV asked the Administrative and Legal Committee of UPOV in 1986 to consider if a revision would be necessary and, if so, to act as the preparatory committee and elaborate a draft proposal. After ten meetings, the Committee prepared a

proposal, and, at its session in October 1990, the Council decided to convene this Diplomatic Conference on the basis of the Basic Proposal.

"It is clear that there is not unanimity on all points. In the very extensive discussions, it became clear, however, that, after careful weighing of all interests within the member States, there was unanimity about the following basic principles:

(i) It is important to protect effectively the work of all innovators in the field of plants and, of course, that of plant breeders in particular.

(ii) The protection afforded to plant breeders should be strengthened in certain very specific ways.

"In saying this, Honorable Delegates and Representatives, I am conscious of the necessity of some heavy discussions in the coming weeks. If we succeed, and I am sure we will, it will be necessary to consider how we shall implement the new Act of the UPOV Convention so that it will be possible for developed and developing countries to enact corresponding legislation. I would like to ask you all, but especially the member States, to think about a form of more intensive cooperation in the field of variety examination and the granting of plant breeders' rights. This will make it easier for countries with limited resources and so far limited breeding industries to be members of UPOV under the new Act. To this end, I wish you a lot of wisdom here in the next two weeks."

CONSIDERATION AND ADOPTION OF THE RULES OF PROCEDURE

3. Mr. BOGSCH (Secretary-General of UPOV) thanked the President of the Council of UPOV, Mr. Duffhues, for his inspiring speech and opened the discussions on item 3 of the Provisional Agenda of the Diplomatic Conference, "Consideration and Adoption of the Rules of Procedure." He introduced **document DC/91/2** (Provisional Rules of Procedure of the Diplomatic Conference) and stressed that they were based on the traditional principles for Diplomatic Conferences, with some specific features required by this Conference. He then called for observations on the individual Rules in their numerical sequence.

4. Except for the Rules referred to below, the individual Rules were adopted as appearing in document DC/91/2, without discussion.

Rule 2: Composition

5.1 Mr. BOGSCH (Secretary-General of UPOV) referred, in connection with paragraph (1)(ii), to the list of States in Annex I to the document under consideration and noted that, as a result of its accession to UPOV effective March 4, 1991, Canada had to be deleted from the list. The list thus comprised 149 States.

5.2 Concerning paragraph (4), Mr. Bogsch drew attention to the need to correct the German version to read: "Die Vertreter der Europäischen Gemeinschaften haben denselben Status wie die Beobachterdelegationen."

6. Subject to the amendment referred to in paragraph 5.1 above and the correction referred to in paragraph 5.2 above, Rule 2 and the annexes to the Rules of Procedure were adopted as appearing in document DC/91/2.

Rule 3: Secretariat

7. In relation to paragraph (3), Mr. BOGSCH (Secretary-General of UPOV) stated that he had designated Mr. Barry Greengrass (Vice Secretary-General of UPOV) as the Secretary of the Conference, Mr. Gust Ledakis (Legal Counsel and Director of the General Administrative Services of WIPO) as the Secretary of the Credentials Committee and Mr. André Heitz (Senior Counsellor, UPOV) as the Secretary of the Drafting Committee.

8. Rule 3 was adopted as appearing in document DC/91/2.

Rule 8: Presentation of Credentials, etc.

9. Mr. KAMPMANN (Germany) pointed out that the German wording should read: "... Schreiben oder andere Dokumente sind dem Sekretär der Konferenz vorzulegen."

10. Subject to the correction referred to in paragraph 9, Rule 8 was adopted as appearing in document DC/91/2.

Rule 19: Quorum

11. Mr. NAITO (Japan) questioned whether it was appropriate to count the Observer Delegations, which had no right to vote, in the quorum, especially in the case of working groups.

12. Mr. BOGSCH (Secretary-General of UPOV) explained that the Plenary, when deciding to constitute a working group, would ensure that the group would only comprise those delegations that wanted to participate in its work; therefore, Observer Delegations and, where appropriate, the Delegation of the European Communities, which had the same status as Observer Delegations, should count in the quorum. He observed that Mr. Naito's question implied in fact a proposal to discount Observer Delegations in relation to quorum and asked whether that proposal was seconded.

13. Mr. WALKER (Australia) seconded the implicit proposal of the Delegation of Japan as presented by Mr. Bogsch (Secretary-General of UPOV).

14. Mr. HEINEN (Germany) spoke on behalf of his Delegation against the proposal. According to Rule 13, working groups were to be put together from among the Member Delegations and, exceptionally, also from among the Observer Delegations. "Exceptionally" meant that the Member Delegations would represent a majority of the members. Furthermore, it was only logical for an Observer Delegation elected to a working group to have the status of a full member of that working group. Working groups were indeed only preparatory bodies and any decisions were taken in other instances.

15. Mr. ESPENHAIN (Denmark) endorsed the views expressed by Mr. Heinen (Germany).

16. Mr. WALKER (Australia) explained that his Delegation supported the proposal for two reasons: firstly, it was a correct procedure that a group which had a purely advisory or preparatory role should, not even theoretically, be open to possible domination by Observer Delegations. Secondly, a rule relating the quorum to Member Delegations, as impliedly proposed by the Delegation of Japan, would facilitate admitting Observer Delegations to working groups. Since they would probably make valuable contributions to the working groups' deliberations, his Delegation viewed the proposed amendment as desirable.

17. Mr. HARVEY (United Kingdom) emphasized that the Plenary would decide on the membership of the working groups and exercise the control over it before those groups met. It seemed logical that an Observer Delegation elected to a working group should count for the purposes of the quorum in that working group. His Delegation therefore supported the objections raised by the Delegation of Germany.

18. Mr. NAITO (Japan) observed that under Rule 34(2) ("Required Majorities") decisions in any working group would require a simple majority of the Member Delegations present and voting, excluding Observer Delegations. It therefore seemed logical to assess the quorum on the basis of the members with a voting right only.

19. Mr. BOGSCH (Secretary-General of UPOV) admitted that the argument was logical; he invited further observations.

20. Mr. KIEWIET (Netherlands) concurred with Mr. Bogsch (Secretary-General of UPOV), but felt that there should be no fear about an Observer Delegation hampering the proceedings of a working group by not appearing in its meeting and causing a lack of quorum; the membership of the working groups would be constituted essentially by Member Delegations. He therefore suggested to keep the Rule as proposed.

21. Mr. BOGSCH (Secretary-General of UPOV) recalled that the Delegation of Japan had not expressed a fear, but pursued a pertinent legal argument: it was a curiosity of the Rules of Procedure that delegations with no right to vote should have a part in the quorum. He then put the matter to a vote.

22. The proposal was rejected by five votes for, eight votes against and four abstentions. Rule 19 was thus adopted as appearing in document DC/91/2.

Rule 23: Points of Order

23. Mr. TOURKMANI (Morocco) announced that his Delegation would have liked it to have been possible for all Delegations, whether members or observers, to raise points of order.

24. Mr. BOGSCH (Secretary-General of UPOV) asked whether any Member Delegation wished to take up the remark made by Mr. Tourkmani (Morocco) and submit a proposal for amendment.

25. This not being the case, Rule 23 was adopted as appearing in document DC/91/2.

Rule 29: Basic Proposal and Proposals for Amendments

26. Mr. TOURKMANI (Morocco) would have liked paragraph (2) to be amended, to enable Observer Delegations to participate actively in the work of the Conference and to contribute their points of view, to read: "All Member and Observer Delegations may propose amendments."

27. Mr. BOGSCH (Secretary-General of UPOV) pointed out that Observer Delegations were able to express their points of view since they had the right to take the floor in meetings. However, the Rule in question did not permit them to make proposals to amend a Convention to which their States were not party. He asked whether a Member Delegation wished to take up the proposal of Mr. Tourkmani (Morocco).

28. That not being the case, Rule 29 was adopted as appearing in document DC/91/2.

Rule 37: Division of Proposals

29. Mr. NAITO (Japan) wondered whether Observer Delegations should be allowed to intervene in relation to the way in which proposals were dealt with. He proposed to insert the word "Member" between "any" and "Delegation" in the English text.

30. Mr. BOGSCH (Secretary-General of UPOV) noted that the proposal aimed at correcting a clerical error in the English text of document DC/91/2, the French and German texts already containing the reference to Member Delegations.

31. Subject to the correction referred to in paragraph 29, Rule 37 was adopted as appearing in document DC/91/2.

Rule 46: Observers

32. Mr. VON PECHMANN (International Association for the Protection of Industrial Property--AIPPI) noted that Rule 46(2) only provided for participation of the Observer Organizations in the Plenary. However, it was to be assumed that the intensive discussions on the wording of the individual articles would take place in working groups. He therefore wondered whether it would not be opportune for certain Observer Organizations to be able to participate in their meetings. It ought not to be necessary, once a given text had been agreed to in a working group, for the Observer Organizations to have to call the text into question in the Plenary. He asked whether it would not be possible to find a more liberal solution.

33. Mr. BOGSCH (Secretary-General of UPOV) stated that it was not yet known whether there would be any working groups and, if there were, how they would be constituted. In this Diplomatic Conference, the substantive work would be done in the Plenary, not in main committees. Moreover, those Member Delegations which were not members of a working group would be in exactly the same position as the Observer Organizations. He asked whether a Member Delegation endorsed the views expressed by Mr. von Pechmann (AIPPI) and wished to make a proposal.

34. This not being the case, Rule 46 was adopted as appearing in document DC/91/2.

Adoption of the Entire Rules of Procedure

35. Subject to the amendments and corrections referred to in paragraphs 5.1, 5.2, 9 and 29, the Rules of Procedure of the Diplomatic Conference were adopted as proposed in document DC/91/2. (Continued at 45)

ELECTION OF THE PRESIDENT OF THE CONFERENCE

36. Mr. HARVEY (United Kingdom) proposed that the President of the Council, Mr. Wilhelmus F.S. Duffhues, be elected President of the Conference.

37. The proposal being unanimously supported by all Member Delegations present, Mr. Wilhelmus F.S. Duffhues was elected President of the Diplomatic Conference.

[Suspension]

CONSIDERATION AND ADOPTION OF THE AGENDA

38. Mr. DUFFHUES (President) reopened the meeting and thanked all Delegations for the confidence placed in him. He then introduced **document DC/91/1** and offered the floor to any Delegation to make observations.

39. No delegation wanting the floor, the agenda was adopted as proposed in document DC/91/1.

ELECTION OF THE VICE-PRESIDENTS OF THE CONFERENCE

40. Mr. ESPENHAIN (Denmark), on behalf of his Delegation, congratulated Mr. Duffhues on his election as President of the Conference and proposed that Mr. Frank W. Whitmore (New Zealand) and Mr. Karl Olov Öster (Sweden) be elected Vice-Presidents of the Conference.

41. The proposed nominations were seconded by Mr. KIEWIET (Netherlands), Mr. PREVEL (France), Mr. HAYAKAWA (Japan) and Mr. O'DONOHUE (Ireland), after which the PRESIDENT asked whether any Delegation opposed the nominations.

42. This not being the case, the President declared Mr. Frank W. Whitmore (New Zealand) and Mr. Karl Olov Öster (Sweden) unanimously elected Vice-Presidents of the Conference.

ELECTION OF THE MEMBERS OF THE CREDENTIALS COMMITTEE

43. Mr. BOGSCH (Secretary-General of UPOV) proposed that, in view of the nature of the task to be accomplished by the Credentials Committee, Member Delegations should be encouraged to volunteer.

44. Following the observation by Mr. Bogsch (Secretary-General of UPOV), the following Member Delegations were elected members of the Credentials Committee: France, Germany, Italy, South Africa and the United States of America.

ELECTION OF THE MEMBERS OF THE DRAFTING COMMITTEE**REOPENING OF THE DEBATE ON THE RULES OF PROCEDURE OF THE DIPLOMATIC CONFERENCE**
(Continued from 35)

45. The following Member Delegations expressed interest in being members of the Drafting Committee: Australia, Canada, Denmark, France, Germany, Japan, Netherlands, Poland, Sweden, United Kingdom and United States of America.

46. The PRESIDENT observed that eleven Member Delegations had volunteered as members of the Drafting Committee, whereas Rule 12 of the Rules of Procedure of the Diplomatic Conference, as adopted, provided that the number of members be ten. He suggested reopening the debate on Rule 12 of the Rules of Procedure, replacing "ten" by "eleven" and thereafter the election of the Delegations mentioned in paragraph 45 as members of the Drafting Committee.

47. The Conference unanimously decided:

(i) to reopen the debate on Article 12 of the Rules of Procedure of the Diplomatic Conference;

(ii) to replace "ten" by "eleven" in Rule 12;

(iii) to elect the following Member Delegations members of the Drafting Committee: Australia, Canada, Denmark, France, Germany, Japan, Netherlands, Poland, Sweden, United Kingdom, United States of America.

OPENING DECLARATIONS

48. Mr. ESPENHAIN (Denmark) stated that the preparation of the Diplomatic Conference had been followed with great interest in Denmark, not only by the breeders' organization but also by the organizations of agricultural and horticultural producers, and also within industrial circles. The revision of the UPOV Convention had equally aroused interest at the political level and had been considered in relation to the society as a whole, and also in relation to the benefits for breeders, the interests of producers, and the ongoing debate and work on the preservation of genetic resources. The relationship with the patent system and the debate on the protection of biotechnological inventions had played an important role in the political discussions. The Delegation of Denmark hoped that the outcome of this Conference would be a balanced protection system with benefits for both breeders and users of new plant varieties. It would work in a constructive way towards that result.

49.1 Mr. BRADNOCK (Canada) stated that the Government of Canada was pleased to have been able to ratify the International Convention for the Protection of New Varieties of Plants, which it originally signed in 1979. His Delegation was touched by the special welcome extended to it at the opening of the Conference. Plant breeders' rights legislation was passed in Canada in 1990 in recognition of the importance of improved varieties, both from within Canada and from abroad, for agricultural and horticultural production. Support for the legislation was based on a consensus of the major national agricultural and horticultural organizations. The consensus recognized a benefit to Canada from such legislation, provided a balance was maintained: on the one hand, there should be compensation for breeders of new varieties; on the other hand, there should be ready access to varieties for producers at a reasonable price. The Canadian legislation based on the 1978 Act of the Convention was considered to achieve the desired balance between the rights of plant breeders and the general good of buyers of plant reproductive material.

49.2 Mr. Bradnock underlined that, in developing the legislation and presenting information on its intent and expected impact, the Government of Canada had wished to acknowledge the considerable assistance from the UPOV

Office and the UPOV staff, and also from representatives of member States. The visits received and the opportunity to visit and spend time at plant breeders' rights offices of member States had been appreciated. Most useful advice, explanation and training on legal, technical and administrative issues had been given.

49.3 Mr. Bradnock also wished to acknowledge the advantage for all countries of the development of a relatively uniform international system for the recognition of plant breeders' rights. Canada was pleased to participate in this Diplomatic Conference as a member State. The Conference was very timely. There was a need to clarify the rights of plant breeders. There was also a need for a mechanism to achieve a balance between the rights of originators of varieties and of those who modified such varieties; the concept of dependent rights seemed to meet this need. At the same time, in view of the consensus achieved in Canada on plant breeders' rights, the proposed inclusion of a provision in the Convention to allow farmers to save seed was noted with satisfaction. Canada appreciated the work that had been done in the past by others in the development of the draft new Convention. It looked forward to contributing in a positive way to the further development of the Convention.

50.1 Mr. HOINKES (United States of America) congratulated on behalf of his Delegation Mr. Duffhues on his election as President of the Conference. He expressed his confidence that Mr. Duffhues' abilities would greatly contribute to the successful outcome of the Diplomatic Conference, which had as its aim the promotion of progress in the field of plant breeding by improving the protection offered for new plant varieties. Progress was best furthered through the strong and effective legal protection of the results of invention and innovation. And, in that respect, an important advantage which effective protection conferred on the development process of any country was the encouragement of local inventive and innovative activity. This, in turn, improved the amount of a country's technological self-reliance. At the same time, no country could ever achieve total technological self-reliance and this made transfer of technology desirable and often indispensable; an effective system of protection encouraged transfer of technology because it made the foreign technology owner feel confident that his rights would be respected in the recipient country. Those considerations applied to all sectors of technology, including the important field of plant breeding.

50.2 Mr. Hoinkes went on to say that this Diplomatic Conference had to adopt a new Act of the UPOV Convention that would serve as the framework for legislation, enacted by its Contracting Parties. Such legislation would improve protection for the creative results of plant breeders while drawing a fair balance between the interests of all parties concerned. To that end his Delegation would do its utmost to assist in any effort to resolve the few remaining problems that were yet standing in the way of agreement.

51. Mr. PREVEL (France) congratulated Mr. Duffhues on his election as President of the Diplomatic Conference and said that Mr. Duffhues had expressed very well in his address the feelings that were certainly those of all the Delegations at the onset of the Conference.

52.1 Mr. BOBROVSZKY (Hungary) congratulated on behalf of his Delegation Mr. Duffhues on his election as President of the Conference. He stated that the Government of the Republic of Hungary welcomed the Diplomatic Conference

and was confident that it would contribute to the strengthening of the protection of intellectual property in respect of plant varieties, to its further development in response to and in anticipation of the rapid progress of plant breeding and biotechnology, and also to the clarification of the interface between industrial patent protection and plant breeders' rights. The Government was pleased that, after in-depth debates, a Basic Proposal could be drawn up for discussion and finalization at this Conference.

52.2 Mr. Bobrovsky further indicated that the Delegation of Hungary had discussed the Basic Proposal with a wide circle of experts whose opinions had been taken into consideration when defining positions. In summary, they were as follows: the Basic Proposal was a suitable basis for discussion and for establishing the new Act of the Convention. Since the Convention had to keep abreast of modern biotechnology, the following proposed amendments were of paramount importance: the new definition of plant variety and its extension to parts of a plant; the broadening of the scope of the breeders' rights as laid down in Articles 14 and 15.

52.3 In general terms, the Hungarian authorities agreed with those amendments, which seemed to them to create more attractive and stimulating conditions for plant breeding. The new wording of Article 2 which eliminated the ban on double protection was also of particular interest; national legislation would be free in future to provide industrial property protection for the creations of plant breeders in addition to the protection conferred under the Convention. The Basic Proposal contained on the other hand certain proposed amendments that needed further discussions. The Delegation was convinced that an agreement would be reached on those controversial issues, and that by the end of the Conference there would be born a new text of the International Convention for the Protection of New Varieties of Plants that would ensure the high-level protection of intellectual property that was required in this field.

53. Mr. FORTINI (Italy) congratulated Mr. Duffhues, on behalf of his Delegation, on his election as President of the Conference. His Delegation was in agreement with a great part of the opinions expressed in the preceding introductory statements. It held the Basic Proposal to be an excellent basis for discussion. It was convinced that a successful outcome would be achieved, both for the member States and for those States that were not as yet members of the Union and which, it was to be hoped, would soon be able to accede.

54.1 Mr. O'DONOHUE (Ireland) congratulated Mr. Duffhues on his election as President of the Conference and stated that the revision of the UPOV Convention initiated in 1987 was now timely and had necessitated considerable debate so far. UPOV, with its 20 member States, was an ideal forum for Governments to work together internationally and to reach consensus on important issues. Ireland became a member of UPOV in 1980 and had participated in all of the revision work to date. Its Delegation was glad to be here and to participate in the revision of the Convention. Ireland was also participating in the preparation of an EC Regulation on Community plant variety rights, and looked forward to the Community becoming a Contracting Party to the UPOV Convention in the near future.

54.2 History showed, Mr. O'Donohue suggested, that one should examine every ten years or so the necessity of amending the Convention to take account of technical and other developments in industry. The last revision took place in

1978 and since then developments had been rapid, especially in the field of biotechnology. Its prospects and its effects on the plant breeding industry seemed inexhaustible. It was only with proper legal protection for intellectual property that research in biotechnology could be exploited commercially. However, it was likely that plant breeding per se would not really change and that the new techniques should mainly lead to more precise and faster results. From the legal point of view, those developments would have to be followed and as far as possible anticipated.

54.3 Many of the provisions proposed in document DC/91/3 to strengthen the rights of the plant breeder were acceptable to the Delegation of Ireland, Mr. O'Donohoe stated. They were necessary to prevent obvious infringements of the breeders' rights, especially the extension of the right to harvested material and products made directly from harvested material of the protected variety. It was, of course, essential to ensure that royalties were charged only once in the production system. They should generally be collected on propagating material--and only on harvested material where the breeder had had no legal possibility of exercising his right in relation to the propagating material.

54.4 The Delegation supported the need to adequately reward the creative efforts of plant breeders so that farmers worldwide could continue to benefit from new plant varieties. Traditionally, farmers had saved part of their own harvest to provide seed for the following year, especially in the case of some particular agricultural crop species. Whilst such seed was presently exempt from royalties, the Delegation of Ireland believed that this traditional practice should be permitted to continue within reasonable limits and subject to the safeguarding of the legitimate interests of the breeder. The introduction of the dependency concept was welcome and appeared to be a sensible outcome to the protracted debates on this issue over the past years. However, the Delegation of Ireland felt that in some circumstances the dependency principle may restrict the breeder's exemption unfairly. It looked forward to the debate on this item and, more generally, to participating in the discussions and contributing to them usefully.

55.1 Mr. KOBAYASHI (Japan) extended on behalf of his Delegation a hearty welcome to Canada as the 20th member State of UPOV and congratulated Mr. Duffhues on his election as President of the Conference. He then stated that, in Japan, 12 years had passed since the amendment of the Seeds and Seedlings Law to provide for plant breeders' rights, and eight years had passed since Japan joined the UPOV Convention. The plant variety protection system had developed steadily. However, the rapid progress of plant biotechnology caused some circles in Japan to request that the legal protection of plant varieties should be adapted to such progress. It was therefore very timely that the Council of UPOV had decided on the revision of the UPOV Convention.

55.2 Mr. Kobayashi added that the Government of Japan had carefully studied the proposed text and consulted the various industrial sectors concerned. The Delegation of Japan was convinced that the Diplomatic Conference would be successful and that the revised UPOV Convention would be the basis for a plant variety protection system which would be adapted to the needs of the 21st century. And last but not least, it heartily appreciated the efforts made by Mr. Bogsch (Secretary-General of UPOV) and the staff of UPOV who had been engaged in preparing and servicing the various committees of experts and in preparing the Diplomatic Conference.

56.1 Mr. KIEWIET (Netherlands) welcomed Canada as a new member of UPOV and congratulated Mr. Duffhues on his election as President of the Conference. He then recalled that the Netherlands were among the first countries to ratify the UPOV Convention of 1961. This had been an expression of the great importance that the Netherlands attached to the intellectual property right provided for in the Convention for plant breeders. This was also a reflection of the fact that, in the Netherlands, plant breeding had a long tradition and was now in fact one of the most important areas of agricultural activity. The UPOV Convention of 1961 and 1978 and its national precursors had fulfilled their objectives. Essentially as a result of the introduction of this form of intellectual property rights, the breeding industry had developed dramatically, not only in the Netherlands; it had done so not only for the benefit of breeders, but also for the benefit of agricultural producers and consumers.

56.2 There was still today a need for a specific right for the protection of plant varieties, and that need was perhaps greater than ever. Although the present system of plant variety protection served its purpose well, there were good reasons to strengthen the right. The Delegation of the Netherlands therefore welcomed this Diplomatic Conference and expressed the hope that the efforts to revise the UPOV Convention in a way that would serve the interests of all parties concerned--breeders, producers, consumers--in a balanced way would meet with success.

56.3 Mr. Kiewiet observed finally that, whenever possible, the Delegation of the Netherlands would bring its position on the various elements of the Basic Proposal in line with that of its partners in the European Communities. It expected that, after having adopted the proposed Regulation on Community plant variety rights, the European Communities would soon thereafter become a Contracting Party to the new Convention.

57. Mr. DMOCHOWSKI (Poland), on behalf of his Delegation, congratulated Mr. Duffhues on his election as President of the Conference. He stated that the Delegation of the Polish Republic viewed positively the Basic Proposal for a new Act of the UPOV Convention. In its opinion, the new Act would be well suited to the new situation in plant breeding arising mainly from the quick progress of the biotechnological methods and their application in the field of the creation of new varieties of cultivated plants. Nevertheless, it had some reservations on several basic concepts and also on some details of the proposed new text. Its comments and proposals for amendments concerned the object and the scope of the Convention, and the proper balance between the interests of breeders and those of users of varieties.

58. Mr. HARVEY (United Kingdom) congratulated Mr. Duffhues on his election as President of the Conference and welcomed Canada as the 20th member of UPOV. Rather than repeating many of the issues which Mr. Duffhues had addressed in his opening address, he wished to briefly highlight some of the points made: the history of UPOV and the importance of this Conference for the future of plant breeding; the biotechnological developments and the new breeding techniques which were so necessary to meet the new demands, not least the environmental demands; the need to strengthen the plant breeders' rights system and to do so in a balanced way, and also in a way which would not prevent States from adhering to the Convention. He thanked Mr. Duffhues for having made those points and he looked forward to a successful Conference.

59.1 Mr. ÖSTER (Sweden) conveyed to Mr. Duffhues the congratulations of the Delegation of Sweden on his election as President of the Diplomatic Conference and expressed appreciation at the fact that Canada had now become a member of the Union and become able to fully contribute to the success of plant breeding in general and of the Union in particular. He stated that it was natural that this Diplomatic Conference, like any other, would hear the clash of differing opinions until solutions were found. However, the aim of the revision of the UPOV Convention was to strengthen the position of the plant breeders, but that position required to be balanced with the interests of other groups in society like farmers, growers, consumers, and trade and industry in general.

59.2 Mr. Öster did not wish at this stage to go into the detail of Sweden's positions on the various Articles of the Basic Proposal. Those positions had already been expressed during the preparatory meetings within the Administrative and Legal Committee. The important Articles of the draft new Convention concerned the definition of "variety," the abolition of the so-called "ban on double protection," the scope of protection, the "farmer's privilege" and the duration of the breeder's right.

59.3 The Delegation of Sweden, Mr. Öster stated, would like to emphasize already in its opening statement that the safeguarding of plant breeders' rights implied a borderline with the field of patents. At the same time, plant breeders' rights should not offer a more extensive scope of protection than patents. The demands for a more extensive protection than was now available seemed to be based on the assumption that the future scope of use of plant varieties was hard to predict. Sweden did not share the view that the scope should be defined in a general way; such a scope would not be an acceptable foundation for the revision of the Convention.

59.4 Mr. Öster concluded by saying that the Delegation of Sweden was looking forward to fruitful discussions, leading to a result that could satisfy both present and future members of UPOV.

60. Mrs. JENNI (Switzerland) congratulated Mr. Duffhues, on behalf of the Delegation of Switzerland, on his election to the office of President of the Conference and welcomed Canada amongst the member States of UPOV. She announced that Switzerland basically supported the objectives of the present revision draft.

61. Mr. HEINEN (Germany) said that, following the excellent introductory address by Mr. Duffhues, the Delegation of Germany had no initial comments to make on substance. However, it did not wish to miss the opportunity of congratulating Mr. Duffhues on his election as President of the Conference and of also welcoming Canada as a new member State.

62. The PRESIDENT offered the floor to the representatives of the European Communities, and then to the Observer Delegations.

63. Mr. HUDSON (European Communities - EC) stated that the Delegation of the European Communities had no opening statement to make.

64. Mr. HRON (Austria) congratulated Mr. Duffhues on his election as President of the Conference and also Canada on its accession to UPOV. He announced that the authorities in Austria were preparing a new draft for a plant variety law. It was not at present possible to state a precise schedule for the further procedure.

65.1 Mr. GRANHOLM (Finland) joined previous speakers in congratulating Mr. Duffhues on his election as President of the Conference. He stated that the Government of Finland appreciated the opportunity to participate as an observer in this Diplomatic Conference which took place at a particularly important moment from the Finnish point of view. Finland was currently working on plant breeders' rights legislation which, for the first time, would meet the UPOV requirements and make it possible for Finland to accede to the Convention. The drafting of the Plant Breeders' Rights Bill had started some two years ago, on the basis of the present Convention of 1978, although it had already been obvious at that time that the UPOV Convention required and would undergo amendments.

65.2 However, it had not been expected that the preparations for this Conference would be so expeditious and that the Conference would take place so soon. Therefore, the Finnish authorities had run into the unexpected dilemma of going ahead with their preparations to accede to the present Convention or waiting for the new Convention to enter into force. On this point, unfortunately, opinions were still divided in Finland.

65.3 Mr. Granholm added that the Basic Proposal had been circulated for comments to all parties concerned. It appeared that there were strong voices, mainly from industrial and trade circles, suggesting that Finland should not accede to the UPOV Convention as long as it contained a ban on double protection. On the other hand, plant breeders in Finland and from abroad would like Finnish legislation to be introduced as soon as possible and Finland to accede to the present Convention without delay. What course of action would be taken could not be defined yet, in particular since the entry into force of the new Convention would take some time.

66. Mr. EKAR (Ghana) congratulated on behalf of his Delegation Mr. Duffhues and the other officers of the Conference on their election. He stated that his Delegation was pleased to participate in the Conference in an observer capacity and hoped that its participation would contribute to the decision, hopefully in a not too distant future, on whether to associate Ghana with what UPOV stood for and was doing.

67. Mr. SCHLESSER (Luxembourg) congratulated Mr. Duffhues on his election as President of the Conference. Luxembourg was happy to be able to participate in the revision Conference, which it wished every success. It was also following with interest the preparatory work for legislation at European Community level.

68. Mr. TOURKMANI (Morocco) congratulated Mr. Duffhues on his election as President of the Conference and Canada on its accession to UPOV. He then stated that the Delegation of Morocco wished to emphasize two points to which it attached importance: the provisions to be inserted into the Convention to ensure the legitimate rights of the breeders should also enable those countries

whose development prospects were essentially based on agriculture to have access to the technological progress represented by new varieties. They should further facilitate the accession of new countries to the Convention and give them an incentive to do so.

69. Mr. SKJOLDEN (Norway) congratulated Mr. Duffhues on his election as President of the Conference and thanked UPOV for the opportunity to attend the Conference. He then stated that Norway had started work on a Bill on the protection of new plant varieties. It was not yet possible to say when the work would be finished and when Norway would be able to become a member of UPOV.

70. Mr. KIM (Republic of Korea) congratulated Mr. Duffhues on his election as President of the Conference and stated that the Republic of Korea was interested in the revision of the UPOV Convention and hoped to make useful contributions to the Conference.

71. Mrs. PARASCHIV (Romania) congratulated on behalf of her Delegation Mr. Duffhues on his election as President of the Conference and stated that Romania was highly interested in the UPOV Convention because of the importance of plant breeding to it. The Delegation was pleased to be able to participate in the Conference and hoped that its participation would facilitate the accession of Romania to the Convention.

72.1 Mr. GÖKÇE (Turkey) associated the Delegation of Turkey with those that had already congratulated Mr. Duffhues on his election to the presidency of the Conference. He also congratulated the Vice-Presidents. He wished to commend Mr. Duffhues for his opening address, which had candidly put down the important tasks challenging the Conference and charted the way to its successful conclusion. He expressed his appreciation to Mr. Bogsch (Secretary-General of UPOV) and the Office of the Union for the excellent documentation that was before the Conference and for its timely distribution.

72.2 Mr. Gökçe observed that Turkey was not yet a member of the International Union; this should in no way be considered as an indication of a lack of interest. Indeed, the competent Turkish authorities and the scientific institutions dealing directly or indirectly with the various aspects of the relevant industry had been following the work of UPOV with interest since the adoption of the first Convention in 1961. UPOV played an important role in promoting and protecting the rights of breeders, thus expanding property rights into a relatively narrow and yet very important field. Turkey was a country endowed by nature with a rich variety of flora and fauna. This natural richness was used as a foundation to be built upon by Turkish breeders, whether enterprising individuals or research institutes. It was therefore only natural for Turkey to be interested in the work of UPOV, an international organization filling an important gap in a field of primary relevance to Turkey.

72.3 Mr. Gökçe added that Turkey intended to protect and promote the breeders' rights concerning new varieties of plants. In a free market based on a liberal economic environment, and within the context of a strict adherence to the rights of the breeders, more than 45 plant breeding, seed production and seed trade firms had started to operate in Turkey in the course of the last few years. The present legislation had been amended with a view to better protecting the rights of the breeders. The draft law had already been adopted

by the relevant parliamentary commission and had been presented to the general assembly of the Parliament. Turkey would continue to cooperate with UPOV in the further promotion of breeders' rights.

72.4 Mr. Gökçe concluded by saying that the Delegation of Turkey hoped that the new Convention would promote plant breeding activities, would not hamper the necessary transfer of technology and would strike a balance between the rights of breeders, on the one hand, and the needs of developing countries, the least developed countries in particular, on the other. It was confident that the new Convention to be adopted by the Conference would constitute yet another step in the promotion of the effective use of and compliance with the rules governing the rights of breeders on a global scale; that it would also be a guideline for those countries still lacking effective national laws in this field; that it would be the basis for both the universal protection of breeders' rights and the fulfillment of Governments' obligations.

Second Meeting Monday, March 4, 1991 Afternoon
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73. The PRESIDENT opened the meeting and gave the floor to the representatives of the Observer Organizations who wished to make an opening statement.

74.1 Mr. GEUZE (General Agreement on Tariffs and Trade - GATT) stated that the question of the protection of plant varieties had arisen in the negotiations on the Trade-Related Aspects of Intellectual Property Rights, usually referred to as "TRIPS", that had been under way in the context of the Uruguay Round of GATT. The question arose in connection with the issue of the admissible exclusions from patentability, if any. Since no agreement could be reached thereon, the present draft TRIPS agreement contained alternative approaches to this matter.

74.2 One of them would oblige the parties to a TRIPS agreement to provide for the protection of plant varieties, but would leave them free to decide whether to grant such protection through patents, through an effective sui generis system such as the UPOV system, or through any combination of the two. This approach would also envisage a review clause under which this provision would be reviewed by the body supervising the TRIPS agreement after a period that was yet to be determined. The other approach would leave each party free to exclude from patentability plants and animals, including microorganisms and parts thereof, as well as processes for their production. It would also provide that, as regards biotechnological inventions, further limitations would be permitted under national law.

74.3 As regards the current status of the Uruguay Round as a whole, which covered 15 areas, including TRIPS, Mr. Geuze stated that it had not been possible to complete the negotiations at a meeting of ministers that took place

in Brussels in December 1990. Participating countries needed more time to reconsider and reconcile their positions in some areas. A number of important issues in the TRIPS area, including the question of the field of application of the patent system, required decisions. As a result of consultations undertaken since the Brussels meeting, agreement had just been reached on a program of work which provided a basis for reopening the negotiations on areas in which there were still differences. Under that program, work was to resume on TRIPS later in March.

75.1 Mr. DEBOIS (Organisation for Economic Co-operation and Development - OECD) congratulated Mr. Duffhues on his election as President of the Conference and welcomed accession by Canada, which was moreover a member of OECD and a highly active member of the OECD Seed Certification Systems. OECD showed great interest in the work of UPOV, particularly through its Science and Technology Committee, which had undertaken considerable work in the intellectual property field in recent years, its Environment Committee, which was indirectly concerned by that work, and its Agriculture Committee.

75.2 With more particular regard to management of the OECD International Seed Certification Systems, in which 40 countries presently participated, there was no need to emphasize the interplay between the legal protection of varieties and certification. Frequently, the certification progressively implemented within a country was a point of departure for instituting effective legal protection; conversely, the existence of a well-defined property right that was capable of following the development of the economy constituted a guarantee of efficient working of certification and harmonization of its implementation at international level.

76.1 Mr. GUGERELL (European Patent Organisation - EPO) first wished to add the congratulations of his Delegation to Mr. Duffhues on his election as President of the Conference. He explained that participation to date by the European Patent Office in the preparatory work for the revision of the Convention had been determined by the fact that the Convention contained an interface between matter that had access to plant variety protection and matter that had access to patent protection. Any shift in that boundary would affect the EPO in the same way as the patent offices of its member States, the majority of whom were also States party to the UPOV Convention. Progress had been achieved in comparison with the initial drafts and therefore a whole series of earlier objections on the part of the EPO had been removed.

76.2 The EPO had advocated the deletion of the prohibition on double protection, which prohibition was no longer included in the Basic Proposal. That suppression of course had no direct consequence for the prohibitions on patentability to be found in currently applicable patent law. It therefore continued to be the interest of the EPO that inventions in the industrial field that had hitherto had access to patent protection should not be removed from such protection. The present draft was therefore still capable of improvement in that respect on some details.

77. Mr. SCHWARZENBACH (International Seed Testing Association - ISTA) observed that the matter of examination of seed quality and identification of seed arose repeatedly in connection with plant variety protection. Seed examination techniques were as yet in their development phase in a number of ISTA member States and considerable time was still required to acquire the

basic knowledge and set up the practical procedures. In view of its efforts to standardize seed examination, ISTA was therefore following discussions in UPOV with very great interest.

78.1 Mr. SLOCOCK (International Association of Horticultural Producers - AIPH) joined those who had already welcomed Canada as a new member of UPOV and congratulated Mr. Duffhues on his election as President of the Conference. He expressed to Mr. Duffhues his appreciation for his opening address and for the hearty welcome extended to the representatives of the international non-governmental organizations. He stated that the discussion on the Rules of Procedure may have wrongly given the impression that those representatives should perhaps be seen but not heard; he was confident, on the basis of past experience, that a more liberal atmosphere would in fact prevail.

78.2 Mr. Slocock stated that AIPH had clear views on a number of issues covered by the draft new Convention. It had prepared a statement for this Conference and sent it to the member States of UPOV; copies thereof would be made available to others attending this Conference. He did not wish to repeat the detailed comments contained in the statement; he would rather emphasize that, as a producers' organization, AIPH was concerned for the maintenance of a sensible balance between the various interests involved: farmers, growers, consumers, as well as breeders.

78.3 Much had been said about the need to strengthen plant breeders' rights, and AIPH accepted that there was a need to curtail infringements and to reflect the rapid progress now being made in the field of biotechnology. It also accepted the need to strengthen UPOV itself and appreciated that, to that end, a realistic approach to the role of patents in the field of plants had to be adopted. However, it was UPOV's responsibility to embody in the new text of the Convention provisions which would prevent confusion between plant breeders' rights and any other kind of rights. The Basic Proposal failed to do that, and AIPH sincerely hoped that those member States which clearly shared its concern on the present form of Article 2 would carry that concern into the discussion at the appropriate time.

78.4 Mr. Slocock hoped that there would be an opportunity for AIPH and other observer organizations to make a contribution to this and other discussions. It was the wish of AIPH to see a balanced system of plant breeders' rights, but it had real reservations about certain attitudes on which the proposed text was based. Parts of that text seemed to reflect an overreaction to the calls of those who would wish to see the development of new varieties in fewer and more powerful hands. This would not be in the long-term interest of the conservation of genetic resources, agriculture and horticulture worldwide and, most importantly, of the consumer and the public at large.

79.1 Mr. VON PECHMANN (AIPPI) congratulated Mr. Duffhues, on behalf of AIPPI, on his election as President of the Conference. He stated that in solving the problem of a balance between the interests of the breeders and those of the general public, already mentioned by Mr. Duffhues in his opening address, continuing account should be taken of the fact that the best incentive for innovation was provided by effective protection for that innovation. The present Conference was to set the path for developments in plant breeding in the new millennium. That should be borne in mind when debating the substantive articles.

79.2 The considerable investment required in the biotechnological field, particularly for the genetic engineering component of plant breeding, was primarily funded at present, and in the foreseeable future, by the industrial circles concerned since neither the member States nor the traditional breeders were likely to be in a position to provide the necessary funds. However, such an effort could only continue to be funded if there existed justified prospects of the amortization of the investments through effective protection. That was of course a platitude, but one which demanded of all participants at the Conference, in other words the Observer Organizations also, an awareness of their great responsibility towards breeders and also towards the general public. The representative of the European Patent Office had made reference to a particularly important item in Article 1, which it was essential to change in the view of AIPPI also.

80.1 Mr. CLUCAS (International Association of Plant Breeders for the Protection of Plant Varieties - ASSINSEL) congratulated Mr. Duffhues on his election as President of the Conference, and Canada on its accession to UPOV. He then expressed ASSINSEL's appreciation to the Council for the opportunity which had been afforded during the last two years to contribute to the discussions on the revision of the Convention. This had created a fertile debate and a creative momentum, and ASSINSEL hoped that the same climate of creativity would continue over the next two weeks.

80.2 ASSINSEL, like others, had made available a written statement, from which Mr. Clucas wished to highlight a few points. ASSINSEL warmly welcomed and applauded the considerable progress that had been made over the last two years. The revision of the Convention would be considered as a success and would achieve its objectives if it allowed a proper return on investment in plant breeding, which in its turn allowed producers, processors and consumers to share in the added value of new varieties. The return on investment, however, was a fundamental incentive for all in the chain who contributed to, and wished to partake in, the benefits from improved products. The UPOV Convention was already an excellent means to secure protection for plant varieties and would undoubtedly become still better if the proposed revised text was adopted, with perhaps one or two amendments which could still be made in the course of the Conference.

80.3 Two features constituted in ASSINSEL's view the strength of the UPOV Convention: the "breeder's exemption" in the present sense of the Convention and the system of distinctness, homogeneity and stability. It was important that the new text maintained those two principles. However, ASSINSEL was also strongly in favor of introducing the concept of dependency for essentially derived varieties and supported the proposed text. It also accepted that cases be mentioned in the text as examples. However, it would stress that those were not necessarily exhaustive and that the adoption of the principle of dependency should not weaken the "breeder's exemption."

80.4 As regards the definition of "variety," ASSINSEL supported strongly the need for greater precision and believed that it was important to take into account the special circumstances of hybrid varieties.

80.5 Concerning the scope of the rights, ASSINSEL strongly supported the strengthening of the scope of protection now defined in the proposed new Article 14, and its extension to propagating material, harvested material and products derived from the harvested material. However, ASSINSEL found unacceptable the obligation imposed on the breeder to exercise his right in the first

place on the propagating material. If the development of varieties possessing qualities tailored to industrial processing, which was one of the solutions to the world's agricultural problems, were to be encouraged, breeders should have the right to choose the point in the chain where it was most appropriate to exercise their right. At the same time, ASSINSEL would like to emphasize that it did not envisage payment of several royalties on a single product or indeed on a single cycle of production.

80.6 Finally, ASSINSEL appreciated that the new proposed text no longer used the expression "farmer's privilege." Nevertheless, ASSINSEL strongly opposed the establishment of a specific exemption to plant breeders' rights for farm-saved seed, and did so simply because it contradicted the basic principle of intellectual property rights that no exception should be allowed for a particular professional group. If, for political reasons, an exemption had to be introduced, the exemption should be made on a country-by-country basis. Moreover, in that case, clear conditions should be set to protect the legitimate rights of the plant breeder.

81.1 Mr. ROYON (International Community of Breeders of Asexually Reproduced Ornamental and Fruit-Tree Varieties - CIOPORA) expressed CIOPORA's gratitude for the invitation to participate in the Diplomatic Conference, which was the third such Conference in which it participated. He addressed his congratulations to Mr. Duffhues for his election to direct the work of the Conference, to Canada for its accession to UPOV and to the Office of the Union for the remarkable work it had done during the preceding two years.

81.2 The improvements contained in the Basic Proposal were noted with satisfaction by CIOPORA. They did much to remedy the inadequacies and legal vacuums of the current text. Nevertheless, CIOPORA hoped that the artisans of the expected revision would not content themselves with making corrections; on the contrary, it hoped that their intent would be to work for the long term and to ensure that UPOV would become a true international forum for the protection of new plant varieties by drafting a text that was sufficiently flexible to enable those countries that wished to accede to UPOV to do so by choosing the most appropriate forms of protection, whether plant breeders' rights, plant patents, conventional patents or a combination of those various forms. Only a Convention text with great flexibility would be able to accommodate all points of view and all problems.

82.1 Mr. WINTER (Association of Plant Breeders of the European Economic Community - COMASSO) addressed the congratulations of COMASSO to Mr. Duffhues on his election as President of the Conference. He pointed out that COMASSO's interests were determined by its involvement in the European Economic Community, in which concrete proposals had already been made on industrial property and, in part, in the field of plant varieties. The outcome of the present Conference would gain topicality much more rapidly in that way. The European Parliament had decided not to hold a final debate on the draft Directive on the Legal Protection of Biotechnological Inventions and the draft Regulation on European Plant Variety Rights until the outcome of the Conference was known in order to incorporate it as appropriate.

82.2 Mr. Winter referred to the discussion on the Rules of Procedure of the Conference and regretted that the admittance of observers to meetings of working groups had not been formally supported. COMASSO was of the opinion that for those items on which numerous matters of detail had still to be

decided, in the main, the broadest possible basis of expertise had to be selected; it therefore supported the wish expressed by Mr. Slocock (AIPH) that negotiations be conducted in a liberal manner.

83. Mr. GEERTMAN (Seed-Committee of the Common Market - COSEMCO) associated his Delegation with the congratulations already expressed and stated that COSEMCO welcomed the opportunity to attend the meetings of this Diplomatic Conference as an observer delegation. COSEMCO cooperated closely with COMASSO since the majority of COSEMCO members were also COMASSO members. For that reason, COSEMCO would not present separate opinions and, unless otherwise stated, it would endorse throughout the Conference the statements made on behalf of COMASSO.

84.1 Mr. BESSON (International Federation of the Seed Trade--FIS) thanked UPOV for having associated FIS with the Conference as an observer and congratulated Mr. Duffhues on his election as President. He pointed out that FIS comprised producers, importers, exporters and distributors of seed in 54 countries throughout the world and covered over 90% of international trade in seed over the five continents. Production and distribution of seed concerned the area from creation of a variety up to the exploitation of its qualities by the farmer. That required full and expensive infrastructure whose ramifications had to be numerous in order to reach widely dispersed customers.

84.2 Although the main concern of FIS was for the greatest possible freedom in seed trade, it had nevertheless followed very closely the intention of strengthening breeders' rights through a revision of the UPOV Convention since effective protection in the greatest possible number of countries was an essential condition for an extension of trade. FIS therefore welcomed the endeavors of UPOV to increase the number of its members. As for the strengthening of the protection provided, it supported the stance taken by its sister association, ASSINSEL, which had put forward balanced proposals following an indepth examination of all the matters raised.

85. Mr. ROTH (International Chamber of Commerce - ICC - and International Group of National Associations of Manufacturers of Agrochemical Products - GIFAP) stated that ICC and GIFAP had always supported the widest possible freedom in the use of different systems of protection, so that the breeder could be provided with the rights he needed. Accordingly, the proposed removal of the so-called "ban on double protection" was warmly welcomed. That removal opened the door for a modern and liberal Convention, free of unusual and unjustified prohibitions. It also implied recognition that both systems--the plant breeders' rights system and the patent system--had their justifications, merits and benefits, and that both systems could coexist without the need for one to exclude the other from certain areas of protection of intellectual property.

86.1 Mr. GROSS (Union of Industrial and Employers' Confederations of Europe - UNICE) wished to include UNICE also amongst those who had congratulated Mr. Duffhues on his election as President of the Conference. UNICE welcomed the opportunity of participating for the first time in a meeting of UPOV and in the Conference and was grateful for the invitation. It took the invitation to mean that the biotechnological industry had been counted amongst the so-called interested circles with relation to the UPOV Convention. Various of the

preceding speakers had already referred to the fact that a number of development possibilities arose from biotechnological work, which could make valuable contributions to the breeding of new and improved varieties. Mr. Gross wished to go along with those preceding speakers.

86.2 Mr. Gross further stated that the Basic Proposal was very balanced, but that it contained certain items that still required review. The most important step forward, in the view of UNICE, was suppression of what was known as "the prohibition of double protection." That did not mean that the difficulties were already removed in the individual countries, but the suppression of the prohibition of double protection in the UPOV Convention would improve the chances of an amendment to the national laws.

87.1 Mr. JOHNSON (International Federation of Industrial Property Attorneys - FICPI) joined his delegation's congratulations to those already expressed to Mr. Duffhues on his election as President of the Conference and stated that FICPI was very honored and grateful to be invited to take part as an observer in this important Conference. FICPI represented patent attorneys in private practice; its membership of several thousands was drawn from almost all countries of the world where a free profession existed.

87.2 FICPI had long been concerned with the protection of new living matter, including plant varieties, by means of intellectual property. A resolution relating to the protection of plants was passed by the Executive Committee of FICPI at its meeting in Venice in October 1989; a copy thereof was attached to a position paper which had been submitted to the Secretariat and made available to participants. That resolution criticized the level of protection at present available for novel plants, including plant varieties, and FICPI was pleased to note that many of the criticisms had been addressed and indeed met in the Basic Proposal. FICPI therefore welcomed this Diplomatic Conference, looked forward to making a positive contribution to the debate during the following weeks and hoped that the Conference would have a successful outcome leading to a new Act of the International Convention for the Protection of New Varieties of Plants which, once adopted, would benefit innovators and users alike.

88. Mr. DAVIES (Union of European Practitioners in Industrial Property - UPEPI) stated that UPEPI was a Union of European practitioners and of professional representatives before the European Patent Office; some of its members also provided professional advice and services to breeders wishing to obtain breeders' rights. UPEPI looked forward to a revised and improved international Convention with strong, effective and enforceable rights for breeders without conflict with patent laws. It thanked UPOV for its continuing invitations to UPEPI to be represented as an observer organization. Mr. Davies concluded by noting that the observer organizations were represented by many technical experts and, with reference to Rule 2(3) of the Rules of Procedure, hoped that the Conference would invite technical experts from the observer organizations to attend working group meetings and provide useful technical advice.

89.1 Mr. DOWNEY (European Federation of Agricultural and Rural Contractors - CEETTAR) congratulated Mr. Duffhues on his election to the presidency of the Conference and thanked UPOV for inviting CEETTAR to this Conference and for giving it the opportunity to give its views. He explained that CEETTAR represented a very large section of European grass-root contractors and farmers,

and that its membership was growing as a result of this Conference. Well over 50% of European agricultural seeds were farm-saved from harvest produce. In vast areas, farm-saved seeds were currently at the very basis of rural development. The question of farm-saved seed was also a historical one.

89.2 One of the reasons for the increasing support for the CEETTAR position was the very serious concern of contractors and farmers over some Articles of the draft revised Convention. CEETTAR had high hopes that member States would recognize the need to protect in this important Convention the rights of farmers as well as those of breeders. It was its concern that the Convention be flexible and recognize: (i) the work that the farming community, the first link in the food chain, had historically put into developing varieties; (ii) the enormous worldwide dependency on farm-saved seed; and (iii) the freedom for farmers to continue to influence food production.

89.3 Mr. Downey stressed that CEETTAR was not opposed to breeders' rights or to the funding of the breeding activity. It supported them. However, it felt that the main benefits of breeding were not necessarily to the farmers, but to the community at large; it would therefore ask the Conference to consider this important aspect in its discussions about the source of the funding. If all funding came from the commercial sale of plant material, then profit would be the only motive for plant breeding.

89.4 In the defense of farm-saved seed, CEETTAR had strongly opposed the deletion of the ban on double protection. The plant breeders' rights system was rightly tailored to the plant breeding activity. It provided a balance between the main interested parties. For those reasons, the ban should be maintained. If it were lifted, the whole future of the plant breeders' rights system would, in CEETTAR's opinion, be threatened and certainly its future as a major right.

89.5 CEETTAR was unclear about the extension to the processing stage as a point at which breeders could exercise their rights. It assumed that the rights were intended to be exercisable against owners of material only, and not against third parties. It asked for this point to be clarified. The reason for CEETTAR's concern was in particular the problem for such third parties to identify the variety and the eventual use of the material concerned. Any system that legislated against farm-saved seed would have problems of enforcement. It would also have four effects:

(i) professional contractors would not be able to compete against some farmers;

(ii) small farmers would not be able to process seed correctly, either legally or illegally, and they would lose out to large farmers who could afford their own seed-cleaning plant;

(iii) breeders might still not achieve the desired level of funding for their activity;

(iv) any law which could not be enforced would be ignored or abused, bringing the whole range of intellectual property laws into disrepute.

89.6 CEETTAR was also concerned at the attempts to extend the breeders' rights by specifying areas of permissible activity; for example, it had been suggested that only farmers with their own seed-cleaning plant would be allowed to process their own seed. It submitted that this would be restrictive in

legal terms: why should one group of suppliers of the farming community, e.g. the chemical manufacturers, bag suppliers or machinery suppliers, be able to benefit from farm-saved seed, whereas commercial contractors could not?

89.7 Mr. Downey expressed his thanks for the opportunity to make an opening statement and announced that a written statement of CEETTAR's position would be available later in the week.

90. The PRESIDENT provisionally closed agenda item 7 (Opening Declarations), noting that some Delegations and observer Organizations had asked informally for an opportunity to make a statement later on. (Continued at 145)

CONSIDERATION OF THE FIRST REPORT OF THE CREDENTIALS COMMITTEE

91. The PRESIDENT noted that the Credentials Committee had not yet had an opportunity to meet and to prepare its first report. He therefore suggested that consideration of this agenda item be postponed.

92. It was so decided. (Continued at 1763)

CONSIDERATION OF THE DRAFT NEW ACT OF THE UPOV CONVENTION

Article 1 - Definitions

93. The PRESIDENT opened the discussions on document DC/91/3, containing the Basic Proposal for a new Act of the UPOV Convention, and suggested that the Articles be taken in sequence. He therefore wished to open the discussions on Article 1.

94. Mr. HEINEN (Germany) considered that Article 1 and its definitions was only a technical aid for comprehension of the remaining contents of the Convention. It would therefore be welcomed by his Delegation if the definitions were not dealt with at the beginning to avoid the danger of spending too much time discussing formal matters without knowing whether the final substantive content of the new Act would require a definition. Mr. Heinen therefore proposed that no final discussion be yet held on Article 1.

95. Mr. BOGSCH (Secretary-General of UPOV) asked whether the proposal made by Mr. Heinen (Germany) meant that Article 1 was not to be finally dealt with or was not to be dealt with at all. In the former case, a start would have to be made with discussion of Article 1, it being obvious that where subsequent discussion showed the need for changes to definitions that had already been discussed, those definitions would be looked at again.

96. Mr. HEINEN (Germany) explained his proposal and proposed that treatment of the individual definitions be postponed until the time they were needed for substantive reasons.

97. Mr. BOGSCH (Secretary-General of UPOV) noted that one would soon perceive the need to discuss one or more definitions. Article 2 already required at least two definitions. He therefore suggested that Article 1 be discussed first on the basis of the understanding recorded in paragraph 95 above.

98. Mr. DMOCHOWSKI (Poland) stated that his Delegation opposed the motion of the Delegation of Germany. The definition of "variety" was essential for the contents of many Articles, and therefore it had to be discussed first.

99. Mr. BRADNOCK (Canada) stated that his Delegation would agree with the Delegation of Germany that it would be helpful to defer the decisions on definitions until the substance of the new Act had been decided upon.

100. Mr. HAYAKAWA (Japan) proposed that Article 1 be discussed first.

101. Mr. ÖSTER (Sweden) stated that his Delegation would prefer Article 1 to be discussed first under the conditions described by Mr. Bogsch (Secretary-General of UPOV) in his earlier intervention.

102. Mr. HEINEN (Germany) said that his Delegation did not wish to hold up the negotiations on account of a procedural question, but expressly requested that Article 1 be dealt with again at the end since it constituted a consequence of the as yet unadopted content of the new Act of the Convention. On that condition, his Delegation could agree to the procedure proposed by a number of other delegations.

Article 1(i) - Definition of "This Convention"

103. The PRESIDENT opened the debate on Article 1(i). He noted that there was no request for the floor on this definition.

104. Article 1(i) was thus adopted as appearing in the Basic Proposal.

Article 1(ii) - Definition of "Act of 1961/1972"

105. The PRESIDENT opened the debate on Article 1(ii). He noted that there was no request for the floor on this definition.

106. Article 1(ii) was thus adopted as appearing in the Basic Proposal.

Article 1(iii) - Definition of "Act of 1978"

107. The PRESIDENT opened the debate on Article 1(iii). He noted that there was no request for the floor on this definition.

108. Article 1(iii) was thus adopted as appearing in the Basic Proposal.

Article 1(iv) - Definition of "Breeder"

109. The PRESIDENT opened the discussions on item (iv) of Article 1. He authorized the Delegation of Australia to elaborate on its proposal contained in **document DC/91/27** although the document was still under preparation.

110.1 Mr. LLOYD (Australia) apologized for the delay in the presentation of a written proposal and stated that, following the very important meetings held in October 1990, his Delegation had consulted widely with industry and other interested circles in Australia, and a point had been raised about the use of the word "discovered" in the definition of the breeder. There had been considerable opposition to the word, not only on account of its emotive connotation for conservation groups in relation to the vast and as yet undiscovered array of indigenous species in Australia and other countries which had a rich, yet untapped flora.

110.2 It had also been submitted that discovery was essentially a chance process that fell outside the scope of systematic intellectual endeavours and that the outcome of the discovery should therefore not be subject to intellectual property rights. In addition, the process of discovery did not necessarily contribute as much as many inventions to plant breeding. His Delegation therefore proposed that the word "developed" be substituted for "discovered" in the definition which would then read: "breeder means the person who bred or developed a variety..."

111. Mr. DEMIR (Turkey) stated that several scientists who had been consulted on this particular definition had pointed out that the word "discovered" should definitely be excluded or replaced, in particular to avoid that old landraces could be protected. He added that he believed that FAO would also be against the proposed definition as possibly conflicting with the notion of farmers' rights.

112. Mr. HAYAKAWA (Japan) stated that his Delegation opposed the proposal of the Delegation of Australia and supported the text appearing in the Basic Proposal.

113. Mr. WHITMORE (New Zealand) lent his Delegation's support to the proposal of the Delegation of Australia to generate further discussion. He appreciated the underlying concerns and the suggestion to use a less provocative wording. However, his Delegation was not opposed to the notion of granting a breeder's right for a new variety based on a "discovery."

114. Mr. KIEWIET (Netherlands) stated that his Delegation was not in favor of the proposal of the Delegation of Australia. In its opinion, "developed" did not cover the same ground as "discovered," and the possibility of a discovery forming the basis for the grant of a breeder's right should be referred to in the Convention.

115. Mr. HARVEY (United Kingdom) also opposed the proposal of the Delegation of Australia. His Delegation felt that there were two alternatives: "breeding" and "discovery." The use of the word "discovered" in the Basic Proposal was deliberate because there were occasions when a new variety was actually discovered, e.g. in the case of a mutation. The Convention should be applied to a variety originating from a mutation. His Delegation therefore saw no difficulty in the use of the word "discovered" in the Convention.

116. Mr. ESPENHAIN (Denmark) supported the statement of Mr. Harvey (United Kingdom) and considered that replacing the word "discovered" by "developed" would change the basis of the right granted to the breeder under the Convention and raise questions about the amount of development work, the kind of methods used, etc. His Delegation accepted that "discovered" could be misunderstood and misinterpreted. Normally, a discovered mutant for example would not become immediately a variety; it would need to be "finalized" by the person who discovered it and there would be some kind of breeding activity or "development" subsequent to the discovery. But the amendment proposed by the Delegation of Australia would create more difficulties than it would solve. The Delegation of Denmark therefore supported the text as appearing in the Basic Proposal.

117. Mr. VIRION (Poland) felt that it would be preferable to leave the text as proposed, including the reference to discoveries. Fodder lupins were the result of a discovery which, retrospectively, appeared essential for the transformation of the species involved into fodder plants. That example showed that the word "discovered" was well chosen.

118. Miss BUSTIN (France) regretted that she did not have a written text of the proposal of the Delegation of Australia and would therefore have to express herself with some precaution. She feared that the use of the word "developed" would not resolve the difficulties that had been raised. The term "discovered" was definitely of value with relation to varieties of the spontaneous mutation or natural hybrid type. Moreover, anyone who found material in the existing genetic heritage and who proceeded with its development from a strictly economic point of view would qualify as a breeder, under the proposal of the Delegation of Australia, meaning that the problem behind the proposal would in no way have been resolved. Finally, from a strictly editorial point of view, it would be unfortunate to use the word "developed" since "discovered" already enjoyed over 25 years of interpretation.

119. Mr. BURR (Germany) said that his Delegation perceived the difficulties that the word "discovered" could represent for certain circles. However, failing a written proposal, it wished to go along at present with the statement made by the Delegation of Denmark.

120. Mr. HOINKES (United States of America) stated that his Delegation also recognized the problem which had been identified in Australia and realized that a person who simply came across a plant in an uncultivated state and "discovered" it could not become a breeder on this account. On the other hand, the Convention should apply to persons who had discovered and thereafter reproduced, either sexually or asexually, a variety. It was not just the mere act of discovering that made a person a breeder, there had to be the additional act of reproduction. Mr. Hoinkes therefore suggested that satisfaction might be given to the Delegation of Australia by drafting the relevant part of the definition as follows: "'breeder' means the person who bred or discovered and reproduced a variety."

121. Mr. DMOCHOWSKI (Poland), referring to the proposal just made by Mr. Hoinkes (United States of America), noted that, in the case of a discovered variety, the process not only involved the acts of discovering and reproducing but also those of assessing the value of the variety for further propagation and use.

122. Mr. VISSER (South Africa) observed that, whilst it fully appreciated the reasons put forward by the Delegation of Australia for deleting the word "discovered," his Delegation had a classical example to offer, namely that of a peach variety which had really been discovered in South Africa. It had resulted from prospecting among trees which had grown from seeds in nature and which had not been subjected to any breeding sensu stricto whatsoever.

123. Mr. VON PECHMANN (AIPPI) suggested that the problem be solved by making the following addition: "and made available to the public." In fact, the activity that deserved protection was only completed when a variety had been made available to the public.

124. Mr. BOGSCH (Secretary-General of UPOV) observed that the contribution of Mr. von Pechmann (AIPPI) was at best a suggestion, because observers had no right to make proposals. He wished to refer to this point of the Rules of Procedure because it was important for the observers to convince one of the Member Delegations to make a proposal, and for Member Delegations to take up suggestions from observers as proposals if they found them relevant. He also had the impression that the majority favored retention of the text as appearing in the Basic Proposal and, if that was the case, one ought not to use up time in making observations about the various proposals and suggestions.

125. Mr. LLOYD (Australia) referred to the suggestion of Mr. Hoinkes (United States of America) that "discovery" in itself would not lead to the point where the variety might be eligible for a breeder's right. He suggested that the word "developed" did not exclude "discovered." Discovery was an intrinsic part of the process whereby the variety reached the stage where it became eligible for protection.

126. The PRESIDENT observed that it was his impression that the majority of the Member Delegations wanted to keep the text as appearing in the Basic Proposal. He therefore proposed to move on to item (v) after a coffee break.

127. It was so decided. (Continued at 148)

[Suspension]

Article 1(v) - Definition of "Breeder's Right"

128. The PRESIDENT opened the debate on Article 1(v). He noted that there was no request for the floor on this definition.

129. Article 1(v) was thus adopted as appearing in the Basic Proposal.
(Continued at 161)

Article 1(vi) - Definition of "Variety"

130. The PRESIDENT opened the debate on Article 1(vi). He invited those Delegations which had made proposals for amendments to introduce them.

131. Mr. ÖSTER (Sweden) referred to the proposal of the Delegation of Italy tabled as document DC/91/22 and stated that his Delegation had submitted to the Secretariat a proposal pursuing the same objective (the proposal was subsequently tabled as document DC/91/28). His Delegation would in addition suggest deletion of the second sentence of the definition.

132.1 Mr. DMOCHOWSKI (Poland) stated that his Delegation had fundamental comments and proposals for amendments to make on the definition of the variety. The proposals were to be read in connection with the initial general comments on the object and scope of the Convention. The proposals were contained in document DC/91/26.

132.2 Mr. Dmochowski explained that his Delegation proposed firstly to replace the term "variety" by "cultivar." The definition proposed for the new Act of the Convention did not offer a sufficient and clear difference between an agricultural variety and a botanical variety, in Latin "varietas," which was a taxon of lower order in the classification system for the plant kingdom. The ambiguity of the definition of the variety was first and foremost the consequence of the deletion of the condition of suitability for cultivation. There were also too many differences with the term "cultivar" as accepted in the International Code of Nomenclature of Cultivated Plants, and those differences had to be eliminated.

132.3 The second sentence of the definition could remain unchanged, Mr. Dmochowski said. Concerning the first sentence, his Delegation wished the words in square brackets: "irrespective of whether the conditions for the grant of a breeder's right are fully met" to be deleted because they did not

convey any essential message, in particular in the light of Articles 5 to 9 of the draft Convention, and because they made the definition unnecessarily complex. The substitution of the term "population" (or, rather less satisfactory, "assemblage" as in the International Code of Nomenclature of Cultivated Plants) for "group" was advocated because "population" was commonly used in biometrical genetics, plant breeding and applied statistics, whereas "group" was not, and, in addition, because it was not precise enough.

132.4 The Delegation also wished to add the condition that the characteristics had to be retained after propagation. Such condition was an essential feature of all botanical taxa and was also included in the definition of "cultivar" in the International Code of Nomenclature of Cultivated Plants.

132.5 Finally, Mr. Dmochowski stated that his Delegation wished a definition of "cultivated plant" to be inserted in Article 1. Its text was reproduced in document DC/91/29.

133. Mr. FOGLIA (Italy) explained that the aim of the proposal of his Delegation was simply to avoid any ambiguity and any interference with patent protection, in particular through elimination of any reference to a taxon of a higher rank which could be protected under the patent system.

134. Mr. DMOCHOWSKI (Poland) wished to comment on the proposal of the Delegation of Italy and state that, in the opinion of his Delegation, a variety was always a population and not an individual plant; an individual plant may represent a variety, however, as stated in the second sentence of the text appearing in the Basic Proposal.

135.1 Mr. HOINKES (United States of America) found that the suggestions and proposals made by the Delegations of Italy and Poland were interesting and deserved serious consideration, especially as regards the term "botanical taxon." He agreed that the term might be somewhat too broad since it meant any unit of the taxonomic classification and could refer not only to a species, but also to a genus, a family, an order or even the kingdom in its entirety. His Delegation therefore welcomed the endeavors to define the term more closely to ensure that the varieties, as defined, were in fact subdivisions of a species.

135.2 As to the second sentence in the Basic Proposal, Mr. Hoinkes recalled that it had been stated in the course of the preparatory work that it was not intended to be part of the definition of the variety, but rather an explanatory sentence. He wished to be assured that the understanding remained so because, although a variety would include the elements referred to in the second sentence, the definition as such could not and should not include a reference to single cells. If it did, it would for instance contravene the provisions of Article 53(b) of the European Patent Convention which, although excluding plant varieties as such from patentability, did permit patents for single cell organisms and single cells of a plant. This contradiction between the Convention and the present wording of the European Patent Convention could be eliminated either through a clarification in the Records of the Conference or in any other way which would make it absolutely clear that the sentence had no implications for other conventions.

136.1 Mr. GUGERELL (EPO) noted that the previous speakers, representing the Delegations of Sweden, Italy and, above all, the United States of America, had in fact already said what he would have wished to say. He pointed out that the second sentence of the definition of variety, should it become a part of the definition--and thus state that plant cells, for instance, would also represent a variety--, would be in direct contradiction to the final part of Article 53(b) of the European Patent Convention. That provision explicitly excluded the products of microbiological processes from the exception and declared them patentable.

136.2 Mr. Gugerell was unable to imagine, at that point, how judicial decisions would go if, on the one hand, their own Convention, in which variety was not defined, made a perfectly clear statement that certain subject matters were patentable and, on the other hand, the UPOV Convention contained an opposing definition. Therefore, as proposed by the Delegation of Sweden, the sentence should be deleted or, at least, displaced in order to make clear that it was not a part of the definition. Finally, he pointed out that during a recent preparatory meeting in Munich, a representative of UPOV had said that the sentence in question was a part of the definition and therefore the Delegation of the EPO could not agree, for the reasons already stated, to any commitment to apply in patent law the definition of variety used in the UPOV Convention.

137.1 Mr. VON PECHMANN (AIPPI) observed that, in the practical application of the plant variety protection system, it had been the experience since 1961 and 1968 of AIPPI, as of most of the other Observer Organizations, that the lack of a definition of variety in the UPOV Convention and in the domestic laws had in no way led to problems. AIPPI therefore wondered whether it was at all necessary to change the Convention as it existed, and as it had operated well, and to burden it with a definition.

137.2 AIPPI was unable to perceive the innermost logic of a definition that stated that an object was to constitute a variety whether or not it met the conditions for the grant of a breeder's right. Such a statement in the definition of the subject matter of protection could obviously not serve to improve the legal position of either conventional or advanced breeders and no corresponding provision was to be found in any other industrial property right.

137.3 Furthermore, account had to be taken of the fact that the term "variety" or "plant variety" also appeared in patent law and that, therefore, the UPOV Convention, with its definition, also intervened in the patent law of certain States and particularly in that under the European Patent Convention. Mr. Gugerell (EPO) had referred to the problems that could arise under patent law. The proposed definition could also mean that in future important innovations in the field of plant biotechnology would remain without any protection whatsoever where at national or regional level the prohibition on double protection provisionally remained in force. Such a development would not be in the interests of either the breeders or of the Contracting Parties.

138. Mr. ROYON (CIOPORA) noted that the 1978 Act did not define "variety" and that this had never given rise to any difficulty. Moreover the introduction of too broad a definition might have an aggravating effect on the present, and hopefully temporary, restrictions enshrined in Article 53(b) of the European Patent Convention. CIOPORA was therefore of the opinion that such a definition was likely to create more problems than it might solve, and advocated its deletion. On the other hand, CIOPORA would welcome a definition of plant

material with the following wording: "'plant material,' in relation to a variety, means any plant or plant part, whatever its botanical or commercial function or form, and includes in particular cut flowers, fruit and seeds."

139. Mr. HAYAKAWA (Japan) sought confirmation, in relation to the second sentence of the proposed item (vi) of Article 1, that plant cells and calluses were not to be regarded as the variety itself, and that the decision taken at the twenty-eighth session of the Administrative and Legal Committee was still valid.

140. Mr. ROTH (GIFAP and ICC) reiterated the plea of GIFAP and ICC that the definition of the variety be omitted. It was not necessary, as demonstrated by the fact that the Convention had been applied successfully since 1978 without one. It was also far from clear and therefore likely to result in different and even inconsistent interpretations in the Contracting Parties. It would cause confusion if, as it seemed likely, it was to change the variety concept used in or for earlier Acts of the UPOV Convention, or the concept used to define the variety that was excluded from patent protection under the European Patent Convention. Finally, the question of what represented a variety was a question of the conditions for the granting of a breeder's right under Article 5.

141. Mr. GROSS (UNICE) stated that, with the necessary brevity, he wished to support in full the statements made by Mr. von Pechmann (AIPPI) and Mr. Roth (GIFAP and ICC).

142. Mr. WINTER (COMASSO) noted that the proposed definition would fully satisfy the interests of the breeders, but that COMASSO, as a number of previous speakers, acknowledged the risk of possible overlap with other rights. That particularly concerned the phrase concerning the meeting of the conditions for granting a breeder's right and the second sentence. COMASSO presumed that the scope of protection, as still to be determined, would meet the needs of the breeders in that it would provide the possibility of prohibiting, for example, unauthorized use of cell cultures in closed fermenters. However, the second sentence was not necessary for that purpose.

143. Mr. JOHNSON (FICPI) stated that FICPI was opposed to a definition of the variety embracing entities that were not protectable under the UPOV Convention. Any definition of the variety in the UPOV Convention would be dangerous. It might in particular lead to a situation in which an object that was not protectable under the UPOV Convention would also end up being excluded from patent protection; there would then be no protection at all. On the other hand, there had been no difficulty with the present Convention which contained no definition at all. FICPI therefore added its voice to the previous speakers who had addressed, in particular, the problems under the European Patent Convention.

144. Mr. SLOCOCK (AIPH) felt that if there were to be an Article setting out the definitions of the key terms used in the Convention, it would be extraordinary for the Conference not to show determination in seeking a satisfactory definition for the variety. He was attracted by certain features of the amend-

ment proposed by the Delegation of Poland, and could in particular understand the problems arising from the word "group"; he could also understand the reluctance of many speakers as regards the second sentence in the Basic Proposal as a part of the proposed definition. But he could not help thinking that there was usefulness and value in trying to produce a definition which was acceptable and helpful to the scope of the Convention. (Continued at 147 for the consideration of the draft new Act of the UPOV Convention and at 166 for the consideration of this Article)

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OPENING STATEMENTS (Continued from 90)

145. The PRESIDENT opened the meeting and offered an opportunity to make an opening statement to those Delegations and representatives of Observer Organizations who were present for the first time.

146. Mr. LEFEBURE (Committee of Agricultural Organisations in the European Economic Community--COPA--and General Committee for Agricultural Co-operation in the European Economic Community--COGECA) stated that the position of European farmers on the revision of the UPOV Convention had not changed for years and that it had already been expressed in October 1990, in particular, at the fifth Meeting with International Organizations. However, he wished to confirm that position and to ensure that the message would be heard and, above all, reflected in the forthcoming new Act. The position of COPA and COGECA on the legal protection of plant varieties was based on the following principles:

(i) On Article 2, COPA and COGECA reiterated that there could not be double protection for one and the same variety and that the sole form of protection should be breeders' rights.

(ii) On Article 14 and the following articles, breeders' rights should extend to all reproduction and propagation elements, that was to say plants, parts of plants, cells and protoplasts.

(iii) Free access to a variety for experimental purposes, with a view to creating a new variety, should be guaranteed, including in those cases where the variety incorporated an invention protected by a patent.

(iv) The custom in the world of plant breeding in accordance with which a farmer could freely use propagating material to replant his own land ("farmer's privilege") should be confirmed in the text of the Convention. COPA and COGECA proposed the following definition for that privilege: "Farmers' privilege shall cover acts of production of propagating material in the soil

and of processing carried out by the farmer using his agricultural production material, whether he carries out those acts himself or as part of free reciprocal assistance in agricultural services between farmers, in order to resow and replant his own land." In view of the general nature of that definition, COPA and COGECA requested that the implementing conditions for ornamentals and for potatoes be defined on a case-by-case basis.

(v) The introduction of a derived right was acceptable on condition that a sign of improvement to the variety was perceivable and that protection be excluded for plagiarism. (Continued at 243)

CONSIDERATION OF THE DRAFT NEW ACT OF THE UPOV CONVENTION (Continued from 144)

Article 1 - Definitions

147. The PRESIDENT stated that he would suspend the meeting for 15 minutes to enable the participants to examine the various proposals for the amendment of Article 1.

[Suspension]

Article 1(iv) - Definition of "Breeder" (Continued from 127)

148. The PRESIDENT summarized the previous discussions on Article 1, stating that there had been no discussion on items (i), (ii) and (iii). Those items were therefore provisionally adopted. On item (iv), an oral proposal had been made by the Delegation of Australia. It was now available in writing as document DC/91/27. In the course of the discussions, an amendment to that proposal had been proposed, i.e. to add "and reproduced" after "discovered." It had further been suggested by the representative of an Observer Organization to add: "and made available to the public." The President suggested that, although the previous discussion might have given the impression that the proposals had been rejected and that the suggestion had not been examined further, the discussion should be reopened.

149. There was no opposition to the reopening of the debate.

150. Mr. BURR (Germany) repeated his previous statement that his Delegation was altogether aware that extension of the system of protection to discoveries could be somewhat provocative for certain circles. For that reason, it could altogether accept a formulation which would add a further act to discovery, such as "discovered and developed."

151. Mr. LLOYD (Australia) observed that, if Delegates in the Conference had a common understanding of what the definition in the Basic Proposal meant, the wording may not convey exactly the intended meaning. The problem was thus entire. This had come out of comments from several Delegations and in subsequent discussions after the break of the previous day. He reiterated that the problem was with the word "discovered," and with the word only. Since its meaning in the context of plant breeding was clear to all interested parties, Mr. Lloyd suggested that the matter could perhaps be resolved by simply deleting the words "or discovered" altogether and stating that "breeder" meant the person who had bred a variety.

152. Mr. ESPENHAIN (Denmark) reiterated that his Delegation shared the concerns about the possible negative connotation of the word "discovered" and the misunderstandings it might create. He observed that development work was necessary before one could make an application for a variety, even in the case of the discovery of a mutant, for example. He wished to make it clear that the discovery of a mutant was not excluded from the scope of the plant variety protection systems under the Convention. If that were the common understanding of the Plenary, his Delegation could support deletion of the word "discovery" as just proposed by the Delegation of Australia.

153. Mr. ÖSTER (Sweden) stated that his Delegation shared the concerns expressed by the Delegations of Australia and Denmark and could support the proposal to delete the word "or discovered."

154. Mr. KIEWIET (Netherlands) opposed the proposal in the name of his Delegation. Delegates may perhaps know what they meant with the word "bred," but everybody should know in future what they had meant with the proposed definition. The word "discovered" would lift all ambiguity. However, he could accept going in the direction of the Delegation of Australia by adding "and developed" after "discovered." This addition might in fact improve the text.

155. Mrs. JENNI (Switzerland) supported the proposal to add the words "and developed" following "discovered."

156. Mr. HEINEN (Germany) said that his Delegation wished, in support of its proposal, to point to the telling inscription on the cupola in the entrance hall that had been devised by the Secretary-General of UPOV. Reipublicae studio perspiciendum est artes inventaque tutari. The "artes" in the field of new plant varieties were those that were bred and the "inventa" those that were discovered.

157. Mr. DMOCHOWSKI (Poland) stated that his Delegation supported the compromise proposal whereby "breeder" meant the person who bred or discovered and developed a variety.

158. The PRESIDENT wished to conclude the discussion and to put the various proposals to a vote.

159. The proposal to delete "or discovered" was rejected by two votes for, 11 against and three abstentions.
160. The proposal to add "and developed" after "discovered" was carried by 14 votes for and two against. Article 1(iv) was consequently adopted in the described amended form. (Continued at 1852.2(ii))

Article 1(v) - Definition of "Breeder's Right" (Continued from 129)

161. The PRESIDENT gave an opportunity to the representatives of CIOPORA to make a statement on Article 1(v).

162. Mr. ROYON (CIOPORA) thanked the President for the authorization to make a statement on the definition of "breeder's right," for which there had been no opportunity on the previous day. CIOPORA insisted that the term "breeder's right" was very confusing in the Convention since it referred at times to the title granted under the Convention and at others to the right conferred by the title. It felt moreover that "breeder's right" was not appropriate because, after the proposed deletion of the former Article 2(1), the Convention should clearly state in its opinion that protection under the Convention would be available under any form. It was also important to ensure that breeders may benefit from the right of priority under Article 11 in relation not only to breeders' rights certificates, but also to patents covering a variety. CIOPORA therefore suggested to change "breeder's right" into "title of protection" throughout the text and to define the latter as follows: "'Title of protection' means a plant variety right's certificate or a plant patent, or a utility patent protecting a new variety of plant."

163. Mr. HEINEN (Germany) said that his Delegation was opposed to an amendment of the term "breeder's right." During the preparatory work, it had already observed on a number of occasions that the completely abstract term "right" would frequently lead to difficulties due to its varying meanings. It was for that reason that the concrete term "breeder's right" had knowingly been used.

164. The PRESIDENT noted that no further Delegation wanted the floor on item (v).

165. The decision to provisionally adopt item (v) as appearing in the Basic Proposal was thus maintained.

Article 1(vi) - Definition of "Variety" (Continued from 144)

166. The PRESIDENT reopened the debate on Article 1(vi) and announced that three proposals for amendment had been tabled as documents DC/91/22, DC/91/26 and DC/91/28 by the Delegations of Italy, Poland and Sweden.

167. Mr. DMOCHOWSKI (Poland) underlined that, in the opinion of his Delegation, a plant variety was always a population with an undetermined number of individuals, to be considered as a continuum over the past, the present and the future. A particular plant or a part of plant was a sample of the population which constituted a variety. The proposed definition of "variety" therefore rightly contained in its second sentence an additional definition, that of a special sample from which the variety could be revealed, i.e., of a sample of propagating material of the variety. That sentence might be seen as a redundant addition to the definition of the variety.

168. Mr. FORTINI (Italy) observed that the proposal of his Delegation (document DC/91/22) was not all that different from the proposal of the Delegation of Sweden. He was convinced that his Swedish colleagues would be better able to explain the technical reasons behind those proposals. He simply wished to note that the difference between the two resided in the addition of the words "an individual or" in front of "a group of plants" in the proposal made by his Delegation. That addition was useful particularly in view of the second sentence of the definition. However, Mr. Fortini did not wish to insist on that proposal. Otherwise, the aim of the proposal was simply to eliminate any reference to higher ranking taxa that could be protected by a patent.

169. Mr. ÖSTER (Sweden) observed that the proposal in document DC/91/28 resulted from discussions at the session of the Administrative and Legal Committee held in October 1990. Like the Delegation of Italy, his Delegation thought that the use of the words: "within a species or a taxon of a rank lower than species" was a better way to express what should be expressed. The proposed addition of "an individual or" was considered unnecessary by his Delegation. As to the second sentence, it should be deleted since it was not part of the definition itself.

170. Mr. HARVEY (United Kingdom) announced that a proposal of his Delegation was forthcoming (document DC/91/23). It was very similar to the proposal made by the Delegation of Sweden and should perhaps be dealt with at the same time as that proposal.

171. The PRESIDENT suggested that the proposals should be dealt with in the order in which they were received. He then opened the floor on the proposal of the Delegation of Italy.

172. Mr. KIEWIET (Netherlands) supported the proposal.

173. Mr. HAYAKAWA (Japan) asked for clarification, before the proposal was discussed, as to whether an intergeneric hybrid would be included in: "within a species or a taxon of a rank lower than species."

174. The PRESIDENT expressed the view that this was the case.

175. Mr. ÖSTER (Sweden) stated that his Delegation shared this view.

176. Mr. HARVEY (United Kingdom) asked whether the proposal under consideration referred only to the first part of the definition in the Basic Proposal or whether it included the deletion of the second sentence.

177. Mr. FORTINI (Italy) stated that the original intention was not to delete the second sentence. However, a logical interpretation meant that that deletion became implicit. Indeed, adding the words "an individual or" implied, if they were to be chosen, that it would no longer be necessary to keep the second sentence. In such case, the Delegation of Italy would be able to support the proposal of the Delegation of Sweden.

178. Mr. ESPENHAIN (Denmark) stated that he fully shared the concern of the Delegation of Japan that intergeneric hybrids might not be referred to in the phrase: "a species or a taxon of a rank lower than species," whereas they should certainly be referred to. His Delegation would therefore oppose the insertion of that phrase. It could accept the proposal to insert "an individual plant or," and would certainly consider a proposal to transfer to another place--rather than to delete--the last part of the definition, for instance to the place where the material on which the breeder could exercise his rights was described.

179. Mr. GUIARD (France) also referred to the comment made by the Delegation of Japan concerning limitation of the botanical membership of a variety in a species or in a taxon of a rank lower than species. He was not at all sure whether varieties produced by interspecific crossing would indeed be covered by that expression. Indeed, he feared that they would be excluded and that the proposal under examination would therefore have to be rejected or amended. The proposal made by the Delegation of the United Kingdom--consisting in taking an element from the second indent and placing it in the introductory part of the definition and in referring to "a single botanical taxon" without presuming the rank of the botanical taxon with relation to the species--appeared to him of interest and preferable. That proposal had just been distributed with reference DC/91/23.

180. Mr. DMOCHOWSKI (Poland) stated that, as a result of the discussions, he would amend the proposal of his Delegation to incorporate elements of the proposals of the Delegations of Sweden and the United Kingdom. The introductory phrase would read: "'cultivar' [alternatively: 'variety'] means a population of plants within a species or a taxon of a rank lower than species..."; the first indent would then read: "can be defined by the expression of characteristics resulting from a given genotype or combination of genotypes..."

181. Mr. KÅHRE (Sweden) commented that there were not many interspecific hybrids in Sweden. One of them, however, was eligible for protection: triticale. It had been considered as a new species. It was against that background that his Delegation had made its proposal, which would very well cover such hybrids.

182. Mr. GUIARD (France) expressed his agreement with what had just been said by Mr. Kåhre (Sweden). He nevertheless wondered what would happen with the first variety of a species obtained by interspecific crossing.

183. Mr. KÄHRE (Sweden) replied that, from a technical point of view, it was the variety as such which was the unit and which formed the basis for the decision.

184. Mr. GUIARD (France) explained that he saw no disadvantage in not defining a maximum level and in speaking simply of a botanical taxon, without defining the level at which it was located. That would make it possible to have an unrestricted text.

185. Mr. GUGERELL (EPO) suggested that the problem of interspecific hybrids be resolved, as proposed by the Delegation of Sweden, by not referring to the species, but simply to the lowest botanical taxon.

186. Mr. SLOCOCK (AIPH) felt it of utmost importance not to allow the word "taxon" to appear unqualified in the definition. He had hoped that the Swedish point of view would be generally accepted. He commended the amendment put forward by the Delegation of the United Kingdom, but wondered whether its authors could accept the view that the unqualified word "taxon" would be inappropriate and the suggestion that elements of the Swedish and the Italian versions should be incorporated into their own definition.

187. Mr. ROYON (CIOPORA) observed that the ongoing discussion showed how difficult it was to arrive at a satisfactory definition of the word "variety." CIOPORA had already expressed its concern that a definition might well raise far more problems than it would solve. It strongly supported the remarks made by Mr. Guiard (France) concerning interspecific and intergeneric hybrids, and also the proposal made by the Delegation of Italy, perhaps in a different wording, namely: "'variety' means a plant or a group of plants..." Finally, it was in favor of deleting the second sentence because it considered that it referred to the scope of the rights: that was the reason why CIOPORA proposed a definition for plant material.

188. Mr. KIEWIET (Netherlands) concurred with Mr. Royon (CIOPORA) that many proposals had been made on the definition of the variety. He could not see how a conclusion could be reached in Plenary within a reasonable period of time. He was therefore hesitant to express the views of his Delegation on the subject, which differed on certain elements from the views already expressed and would complicate matters even further. He suggested that it would be wise to form a working group and give it the task of drafting a definition acceptable to all parties concerned present here, or perhaps suggesting the deletion of the definition altogether.

189. Mr. LLOYD (Australia) concurred with the views expressed by Mr. Kiewiet (Netherlands). A definition would assist in the administration of the new Act. However, the Convention had managed without such a definition for quite some time and would continue to do so. The Delegation of Australia supported the formation of a working group to consider the two points mentioned by Mr. Kiewiet.

190. Mr. BURR (Germany) emphasized that all endeavors should be used to achieve a definition of variety that would satisfy everyone or at least the largest possible number. The discussion so far had shown that a definition would have to be drafted by compiling certain elements from the various proposals. Mr. Burr doubted whether that could be done in the Plenary in the time available. A working group would therefore be the appropriate body and he supported the establishment of such a group.

191. Mr. HAYAKAWA (Japan) asked for confirmation that plant cells and calluses were not regarded as the variety itself. If this were not so, the status would not be in conformity with the decision of the 28th session of the Administrative and Legal Committee. He needed confirmation on this point prior to the definition of the position of his Delegation.

192. Mrs. JENNI (Switzerland) wished to make known the basic position of Switzerland without, however, taking a stance on the matter of establishing a working group. It would be altogether desirable to have a definition of plant variety. However, it was essential that the definition should satisfy both plant variety protection and patent law. If such were not the case, her Delegation would prefer to delete the definition of variety altogether.

193.1 Mr. HARVEY (United Kingdom) agreed that a working group should be set up; its mandate had to be specific, however. A number of separate issues had been addressed so far during the debate. The principle issue was whether there should be a definition or not. It was felt in the United Kingdom that there was no absolute necessity for a definition, but Mr. Harvey recognized that others might think otherwise. Secondly, it was clear that there were technical issues to be resolved; the definition had to be technically satisfactory. Thirdly, there was a to some extent non-spoken issue of status quo in the relations between plant breeders' rights and patents. Many difficulties presently faced in drafting the definition arose from that interface which appeared implicitly in the definition.

193.2 This latter issue raised a point of principle: should the definition maintain or change the current status. It would not be appropriate to ask the working group to come up with a definition until that point of principle was resolved. As far as the United Kingdom was concerned, the aim should be to maintain this status. Concluding, Mr. Harvey suggested that the working group should consider those three items, but, for the third item, the Plenary should lay down the principles on which the working group should work.

194. Mr. BROCK-NANNESTAD (Union of Industrial and Employers' Confederations of Europe - UNICE) agreed with the statement made by the representative of GIFAP and the ICC that the definition should be totally omitted. A definition would not be necessary unless it was needed for defining what was to be protected and what should be excluded from the protection system. The UPOV Convention had managed since 1978 without a definition. The present proposal and the proposals which had been tabled so far did not seem to clear up the situation very much. It was moreover clear that what represented a variety should not be defined here but in the context of the material of the variety in respect of which protection was afforded.

195. Mr. ÖSTER (Sweden) stated that his Delegation generally supported the views expressed by the Delegation of the United Kingdom. It also wanted to preserve the status quo in principle.

[Suspension]

196. The PRESIDENT reopened the discussions and suggested to the Plenary to set up a working group and give it the task: (i) to decide on the principle whether there should be a definition or not; (ii) if there should be one, to draft a technical definition--that would be technically satisfactory, especially in relation to intergeneric hybrids; (iii) to consider the relevance of the definition to the status of the relations between patents and plant breeders' rights.

197. Mr. KIEWIET (Netherlands) observed in relation to the third point mentioned by the President that there was no unique status quo in the world for the relations between patents and plant breeders' rights; there may be several, each in a different part of the world. It was therefore rather difficult to say that the Conference would accept a status quo, because then it would accept different situations in different parts of the world.

198. Mr. ESPENHAIN (Denmark) stated that his Delegation could agree to the setting-up of a working group, and it expected the points made in Plenary to flow into the discussions of the working group. He agreed with Mr. Kiewiet (Netherlands) that the question of the status quo might be difficult. The issue should be kept in mind, and the working group should not spend too much time on it. There was perhaps another question to be dealt by the working group, namely the structure of the definition and the implications of the definition. He wished to pass the floor on this point to Mr. Wanscher, from his Delegation.

199.1 Mr. WANSCHER (Denmark) explained that the Delegation of Denmark sought consequent definitions. All definitions were objective statements of what a particular word or expression meant. But when one came to define what a variety was, one would immediately turn one's mind to the limitations which the definition might create for patents and to a number of other issues; the result would not be a totally objective definition. The working group could be given the task of drafting an absolutely objective definition of what a variety was from a botanical point of view. The group might arrive at a definition including all plants and parts of plants, down to the single cell, which, from a botanical point of view, could be or represent a variety. This should be the working group's goal.

199.2 Mr. Wanscher added that this would raise two problems, however: the purpose of the Convention was to protect varieties, on the one hand, and there was a need to describe to what extent a protected variety could still be managed or governed by the breeder, on the other. In both instances, the problem could be solved by having a broad definition and, as far as relevant, exceptions in later Articles. In that way, the whole of Article 1 would be kept at a strictly objective and neutral level.

200. Mr. BURR (Germany) pointed out that he had already clearly stated that his Delegation was of the opinion on the first question that the working group should endeavor to draft a definition of variety and not, therefore, propose its deletion. As far as the relationship between patent law and plant variety protection was concerned, he went along with the statements made by Mr. Kiewiet (Netherlands) and Mr. Wanscher (Denmark). However, he assumed that if each member of the working group brought with him the legal situation in his own State, then the working group would eventually find a formulation to accommodate all the various points of view. The working group should beware the temptation to draft a national law and should take as its basis the fact that an international Convention was to be devised, which did not necessarily have to go into as much detail as a national law.

201. The PRESIDENT closed the debate and observed that there was general agreement for the setting-up of a working group. Its task would be to draft a technically satisfactory and objective definition of "variety," keeping in mind that it had some relevance to the relations between patents and plant breeders' rights--which relations could differ in different parts of the world--, and taking into account the discussions in Plenary.

202. The suggestion that there should be a working group with a task as described by the President was unanimously accepted, without a vote.

203. The PRESIDENT then suggested that the working group should consist of the Member Delegations which had contributed to the discussion in Plenary and of other interested Member Delegations.

204. Mr. FORTINI (Italy) felt it preferable to have a working group open to all Member and Observer Delegations. In that case there would be no problem of a quorum since the number of members of the group would be unknown, and there would be a guarantee that those with a contribution to make would have the possibility of participating in the work.

205. Mr. ÖSTER (Sweden) thought that it was important that the EPO could participate in the work of the working group.

206. Mr. KIEWIET (Netherlands) proposed that the EC should also be a member of the working group.

207. The PRESIDENT observed that, according to the Rules of Procedure, the EPO could not be a member of a working group, but one or more of its representatives could be invited as experts.

208. Mr. HOINKES (United States of America) proposed that a representative of the EPO be invited as an expert to the working group.

209. The PRESIDENT suggested, after an exchange of views involving several Member Delegations, that the working group should comprise the Delegations of

Denmark, France, Germany, Hungary, Italy, Japan, Poland, Sweden and the United Kingdom and representatives of the EC. He further suggested that the Plenary should invite the EPO to delegate an expert to the working group.

210. Mr. BROCK-NANNESTAD (UNICE) observed that, if the aim was to have an objective definition, then it was absolutely certain that the definition would be used in relation to the exclusions from patentability; it would probably not be used in the context of the Convention since the latter applied to plants and plant varieties anyway. He wished to ensure that the Member Delegations would take that fact into account in the working group when proposing a new draft definition. If the principles were cleared in Plenary through debate following his intervention, it would not be too difficult for the working group to find a suitable wording and that wording would subsequently not give rise to a big debate in Plenary.

211. Mr. WINTER (COMASSO) observed that the expert knowledge of the plant breeders could certainly make a contribution to the formulation of a definition of plant variety. He suggested that the Plenary might invite an expert from amongst the plant breeders.

212. Mr. ESPENHAIN (Denmark) said that his Delegation understood the concerns of the various organizations but considered it difficult to appoint an expert from one organization in addition to the expert to be nominated by the EPO. He was confident that the members of the working group would make the necessary consultations. He therefore suggested that the plea to have additional experts should not be entertained.

213. Mr. GUIARD (France) announced that the Delegation of France proposed that a representative of the breeders be invited as an expert to the working group and that he be allowed to participate in the same way as the expert from the EPO.

214. Mr. BURR (Germany) felt that it should be altogether possible for the members of the working group to proceed in the way suggested by Mr. Espenhain (Denmark). The economic circles concerned would thus be able to present their interests indirectly in the discussions.

215. The PRESIDENT wished to close the debate and reiterated his suggestion to have a working group of ten members and one expert.

216. The suggestion of the President was adopted by consensus.

217. Mr. GUGERELL (EPO) expressed his willingness to participate in the discussions of the working group. (Continued at 990)

Article 1(vii) - Definition of "Contracting Party"

218. The PRESIDENT opened the debate on Article 1(vii).

219. Mr. BURR (Germany) stated that his Delegation was unsure whether it was at all necessary to define Contracting Party. It was in fact evident that any party that had deposited an instrument of ratification, of accession and the like was a Contracting Party. That matter was further covered in detail in Article 34. His Delegation reserved the possibility of returning to that matter once Article 34 had been dealt with.

220. Mr. HOINKES (United States of America) recalled that his Delegation had submitted in document DC/91/5 a proposal for a definition of an "inter-governmental organization." He was prepared to delay discussion of that proposal until the substantive decision was taken in relation to Article 34 as to who may become a Contracting Party to the Convention. Under those circumstances he felt that the consideration of Article 1(vii) should be postponed altogether.

221. Mr. BRADNOCK (Canada) supported the view expressed by Mr. Hoinkes (United States of America) that that discussion could be deferred since it seemed logical to examine the definition and its consequences together.

222. It was decided by consensus to defer consideration of Article 1(vii).
(Continued at 1813)

Article 1(viii) - Definition of "Territory"

223. Mr. HOINKES (United States of America) submitted that the considerations pertaining to Article 1(vii) would also pertain to Article 1(viii).

224. Mr. ESPENHAIN (Denmark) recalled that under the Danish Constitution there were territories of Denmark with a very large degree of home rule. Denmark would need a possibility of making a limitation in respect of its territories in order to be able to ratify and perhaps even sign the new Act. He announced that his Delegation would make a written proposal for the amendment of Article 35 and might need to come back to Article 1(viii).

225. It was decided by consensus to defer consideration of item (viii).
(Continued at 1813)

Article 1(ix) - Definition of "Authority"

226. No Delegation wishing to have the floor, the PRESIDENT declared Article 1(ix) provisionally adopted as appearing in the Basic Proposal.

227. The conclusion of the President was noted by the Conference.

Article 1(x) - Definition of "Union"

228. The PRESIDENT opened the debate on Article 1(x).

229. Mr. BURR (Germany) pointed out that, according to item (ii), the "Act of 1961/1972" meant the International Convention of 1961 as amended by the Additional Act of 1972. However, the Union had been set up in 1968, that was to say before the 1972 Act even existed. Consequently, the definition of Union could not refer to the Additional Act, but only to the Convention of 1961. The proposed deletion of "/1972" was intended to make that clear. The further deletion of the words "and further mentioned in the Act of 1978 and in this Convention" proposed in document DC/91/30 derived from the fact that those words were superfluous.

230. Mr. BOGSCH (Secretary-General of UPOV) explained that, when it adopted the Basic Proposal and this definition, the Council had been confronted with the fact that there was no reference to the Act of 1961 only. More important, the Council had wanted to underline that the new Act would not create a different Union.

231. Mr. HEINEN (Germany) said that his Delegation could not agree, in effect, with the statement made by the Secretary-General. It was simply not the case that the Union had been set up by the Act of 1961 as amended by the Additional Act of 1972. If it was wished to express the fact--and if that was considered necessary--that the Union was identical with the Union set up by the 1961 Act and that that Act had been amended in 1972 and 1978, then it would have to be expressed somewhat differently.

232. Mr. BOGSCH (Secretary-General of UPOV) proposed to draft the definition as follows: "'Union' means the International Union for the Protection of New Varieties of Plants founded by the Act of 1961 and further mentioned in the Act of 1972, the Act of 1978 and in this Convention."

233. The text suggested by Mr. Bogsch (Secretary-General of UPOV) was adopted by consensus. (Continued at 1949)

Article 1(xi) - Definition of "Member of the Union"

234. The PRESIDENT opened the debate on the proposal of the Delegation of the United States of America reproduced in document DC/91/31.

235. Mr. HOINKES (United States of America) stated that the proposal of his Delegation was a matter of drafting. It sought to clarify the definition

in order to avoid the impression that a member of the Union would have to be a party to the Act of 1961/1972 or the Act of 1978 and, at the same time, a Contracting Party to the present Convention.

236. The amendment proposed by the Delegation of the United States of America in document DC/91/31 was adopted by consensus. Article 1(xi) was thus adopted in the amended form.

Article 1(xii) - Definition of "Secretary-General"

237. The PRESIDENT opened the debate on the proposal of the Delegation of Germany reproduced in document DC/91/32.

238. Mr. BURR (Germany) introduced the proposal made by his Delegation and explained that the Basic Proposal made it quite clear who the Secretary-General was. He was the person, according to Article 26(5)(iii), who was appointed by the Council as Secretary-General and the person who, according to the second sentence of Article 27(1), directed the Office of the Union. No one could doubt that the Secretary-General was the Head of the Office appointed by the Council. His Delegation therefore held a definition to be unnecessary.

239. Mr. BOGSCH (Secretary-General of UPOV) stated that he saw no objection to deleting the proposed definition.

240. The deletion of item (xii) proposed by the Delegation of Germany was accepted by consensus.

Proposed New Article 1(xiii) - Definition of "Intergovernmental Organization"

241. Mr. HOINKES (United States of America) suggested that discussions should be deferred as with Article 1(vii) and (viii) until Article 34 was considered.

242. The suggested deferral of discussions was accepted by consensus. (Continued at 248 for the consideration of the draft new Act of the UPOV Convention and at 1780.1 for the consideration of this Article)

Fourth Meeting
Tuesday, March 5, 1991
Afternoon

OPENING STATEMENTS (Continued from 146)

243. The PRESIDENT opened the meeting and invited the representative of IFAP to make his opening statement.

244.1 Mr. KING (International Federation of Agricultural Producers - IFAP) thanked the President for the opportunity to make an opening statement at this stage of the proceedings. A written text had been made available to Delegates, and Mr. King wished to highlight its main elements.

244.2 The International Federation of Agricultural Producers was the international organization of the world's farmers. It was pleased to have been involved in the consultation process relating to the revision of the 1978 UPOV Convention. It expressed its appreciation to UPOV for the excellent way in which it had promoted intersectoral cooperation throughout the process.

244.3 IFAP wished to draw attention to four general points as the revision process drew to a close. An effective 1991 UPOV Convention had to: (i) strengthen plant breeders' rights so that breeders did not feel the need to seek other forms of protection or double protection; (ii) be practical in application; (iii) be flexible enough to permit and encourage increased membership of UPOV, especially from the developing countries; and (iv) be fair and balanced with respect to the interests of farmers, consumers and breeders. IFAP had made comments on five articles.

244.4 The main concerns related first to the elimination of Article 2(1) on double protection. IFAP was not convinced that it improved the clarity of the text. On the contrary, it was likely to increase confusion and lead to an abundance of disagreements within the economic sector concerned. IFAP was strongly in favor of there being one predominant system of property rights in plant production, namely the plant breeder's right provided under the UPOV Convention. Article 2(1) had worked reasonably well in the past and IFAP hoped that it would continue under the new Convention. Secondly, it was important to guarantee free access to genetic material and avoid monopolies as well as plagiarism.

244.5 The main concerns were also about Article 15. IFAP, representing the world's farmers, was extremely concerned about having a strong Article 15(2) in the revised text. Since the very beginnings of agriculture, farmers had saved seeds on their farms for replanting. Many farmers' organizations supported plant breeders' rights legislation in their country on the understanding from their Government that royalties would not be paid on farm-saved seed. Countries which had given such undertakings had to abide by them. Inclusion of a paragraph in the UPOV Convention giving a clear interpretation of the exemption with respect to farm-saved seed was therefore essential.

244.6 IFAP considered the proposed text as a reasonable compromise balancing the interests of farmers and breeders, and allowing Governments to determine the reasonable limits of the application of this exemption. Obviously, IFAP would have preferred to see this exemption being made available to farmers in all countries. It would strongly oppose any modification of the proposed text that would unreasonably limit the flexibility offered to Governments in implementing this article, whether that modification was through adding further conditions on its application, rendering the provision unenforceable and unnecessarily costly for farmers or otherwise.

244.7 Concluding his statement, Mr. King thanked UPOV for the excellent collaboration during the revision process. IFAP was optimistic that the new UPOV Convention would correctly balance the interests of farmers, consumers and breeders so that society as a whole would benefit from the exploitation of plant genetic resources. (Continued at 857)

ELECTION OF THE CHAIRMAN OF THE WORKING GROUP ON ARTICLE 1

245. The PRESIDENT recalled that, under the Rules of Procedure, it was for the Plenary to elect the chairman of any working group. He suggested that the Delegation of France might provide the Chairman of the Working Group on Article 1.

246. Mr. PREVEL (France) announced that he would propose Mr. Guiard for the chairmanship of the Working Group.

247. Mr. Joël Guiard (France) was elected Chairman of the Working Group on Article 1(vi) by acclamation.

CONSIDERATION OF THE DRAFT NEW ACT OF THE UPOV CONVENTION (Continued from 242)

Article 2 - Basic Obligation of Contracting Parties

248. The PRESIDENT opened the debate on Article 2.

249.1 Mr. ESPENHAIN (Denmark) stated that the proposals of his Delegation reproduced in documents DC/91/33 and DC/91/51 had to be considered as a package. In his opening statement, he had referred to the fact that the preparatory work on the revision of the UPOV Convention had aroused great interest in Denmark, including interest at the political level. As was known from past discussions during the preparation stage, the representatives of Denmark had been very consistent in their position that plant varieties should be protected under one and the same system only. The proposal now tabled as document DC/91/33 was just a follow-up of that position. When the Basic Proposal was adopted by Council, the representatives of Denmark were in the minority on this point.

249.2 The proposal was based on a national political decision and had to be considered in conjunction with Article 1. Article 2 provided an obligation to grant plant breeders' rights, as defined in Article 1, similar to the rights provided under the present Convention. This position in favor of an exclusive protection system for plant varieties did not exclude in the opinion of the Danish authorities--and had never excluded, not even under the present Convention--the possibility of another form of protection applying to a plant variety, for example, as the result of the presence of a patented gene. The authorities had never seen any obstacle to a combination of the two forms of protection; they were convinced, however, that the final product--the plant variety as such--should only be covered by one system and that if a patent applied to a variety, whether that variety was protected or not, the variety was to be considered as a host for the patent, whatever its purport might be.

249.3 It was of course realized that there might be present member States which followed a different policy and that there might also be future member States which already had a different system and wished to maintain it. This was the reason for proposing an amendment to Article 40 to provide an exemption for those countries which wished to adhere to the new Convention and to enable them to notify at the time of signing the Convention that their intention was to apply a system other than that stated in the proposed new wording of Article 2.

249.4 Mr. Espenhain also commented that the present Convention might still give rise to misunderstandings: it was clear from the combination of Article 2 and Article 1 that the member States which had made no notification under Article 37 were under the obligation to protect plant varieties under the provisions of the UPOV Convention just as it was proposed in the Basic Proposal. The word "patent" in Article 2 of the 1978 Convention could therefore lead to misunderstandings. The proposal of his Delegation was not meant to rule what type of system, what kind of administration present and future member States should set up to have plant variety protection; it simply aimed at ensuring that plant varieties fell under one protection system only.

250. Mr. ÖSTER (Sweden) confirmed that the discussion concerned a common proposal for amendment and stated that Sweden had been on the same line as Denmark during all discussions before this Diplomatic Conference, within the Administrative and Legal Committee. He pointed out that, as explained in his opening statement on the preceding day, his Delegation believed that a strict borderline should be kept between a plant breeder's right and a patent concerning a plant variety. Moreover, Article 3 of the Basic Proposal envisaged the protection of all plant genera and species and introduced a change from the present Convention. Therefore, plant breeders' rights should, as stated in the proposal for amendment, be the sole and exclusive form of protection for plant varieties.

251.1 Mr. KIEWIET (Netherlands) expressed satisfaction at the fact that the ban on double protection which was laid down in a certain form in the present Article 2(1) of the Convention did not appear in the proposed text for a new Convention. The Convention should not attempt to give rules on forms of protection other than plant breeders' rights. The proposal of the Delegations of Denmark and Sweden did just that, however. Their proposal on Article 40--which was of course necessary to redress the proposal on Article 2--illustrated the complications to which it could lead.

251.2 Mr. KIEWIET wished to state very clearly that, in the opinion of his Delegation, plant varieties should not be patentable. That was a line which the Netherlands had also always taken. The patent system was not the right system for protecting plant varieties, but this was a matter to be dealt with solely in relation to patents--in the Netherlands on the basis of Article 53(b) of the European Patent Convention. In conclusion, therefore, his Delegation firmly opposed the proposal of the Delegations of Denmark and Sweden.

252. Mr. SKJOLDEN (Norway) stated that, as an Observer Delegation, Norway wished to lend strong support to the proposal submitted by the Delegations of Denmark and Sweden for a new wording of Articles 2 and 40.

253.1 Mr. BURR (Germany) considered that the meeting had so far heard a lot of controversial statements, and also some misleading ones, with regard to the deletion of the current Article 2. The representative of IFAP had previously said that a distinction had to be made between an international Convention and national legislation. That had also to apply extensively in that case.

253.2 His Delegation was able to agree to the deletion of the current Article 2 in view of the problems that had been experienced with that provision by the other member States. Deletion would in no way affect domestic German law. A proposal, that was still to be submitted to the legislators, was soon to extend breeders' rights to the whole plant kingdom. The problem of applying two systems of law would therefore disappear in Germany. Likewise, it was not intended, even in the long term, to depart from the present line, particularly in view of the problems arising from collision between two differing rights. For that reason, there was in Germany neither the intention to address Article 53(b) of the European Patent Convention in the foreseeable future nor the intention to undertake any amendments in that respect at national level.

254.1 Mr. LLOYD (Australia) stated that his Delegation was disappointed that this matter had again been raised. It strongly opposed, of course, the amendment to Article 2 submitted by the Scandinavian Delegations. Australia's position was to defend the right of breeders to choose the form of protection they desired for their property and to defend the prerogative of the State legislatures to limit the forms of protection to be afforded to a variety. UPOV should not impose constraints; strong exclusion principles might discourage new members, especially developing countries, from joining UPOV. His Delegation understood the proposed amendment to Article 40 as not addressing the issue that each State, especially new member States, should be allowed to develop intellectual property legislation in accordance with its special circumstances. It was not a matter for UPOV to define the form of legislation that a State had to adopt to protect breeders' rights.

254.2 Finally, it had to be stressed that, should the amendment to Article 2 be carried and the amendment to Article 40 not be carried, Australia would not be in a position to comply and be party to the revised Convention.

255. Mr. VIRION (Poland) announced that his Delegation would support the proposal made by the Delegations of Denmark and of Sweden.

256.1 Mr. HARVEY (United Kingdom) stated that his Delegation opposed the proposal of the Delegations of Denmark and Sweden for the following reasons: the plant breeders' rights system should be the principal system for those countries which had traditionally operated that system, and it was the aim of this Diplomatic Conference to strengthen it to such an extent that plant breeders would feel that it served their needs.

256.2 Mr. Harvey added that it was not right to include in the Convention a provision which affected patent law. The reason for opposing the proposal was therefore to be found in the underlying principle behind the proposal. There were a number of organizations and member States which felt that the choice of which intellectual property system should be used should be left with the breeder. That was not the view of the United Kingdom authorities because if there were such a choice, there would be implications for both systems since they would have to operate independently from each other. If there were such a choice, it would have to be made very clear in both the patent and the plant breeders' rights laws and conventions that the two systems should work in a way which did not harm each other.

257.1 Mr. HOINKES (United States of America) stated that when the Council had adopted the Basic Proposal, it had seen fit to delete Article 2 of the present Convention to make the Convention neutral regarding the type of protection that could be available for plant varieties. The Basic Proposal would neither encourage nor discourage member States on how to proceed. It would not, therefore, throw a road block in the way of progress as the proposal of the Delegations of Denmark and Sweden would do. It would permit member States to decide for themselves how they wanted to protect plant varieties.

257.2 Mr. Hoinkes agreed to a large extent with Mr. Harvey (United Kingdom), except on the point that the breeder should not have an unfettered right to decide for himself what type of protection to obtain: in fact, the breeder never had an unfettered right. The breeder only had the right which was permitted him by the laws of the country in which he obtained or sought to obtain protection. To that extent, the sovereign decision of member States on how to protect plant varieties should be maintained. The proposal under discussion was a retrogression to the concept of the 1978 text, and his Delegation therefore also had to oppose it.

258. Mrs. JENNI (Switzerland) stated that Switzerland's position was clearly and unambiguously in favor of removing the prohibition on double protection.

259. Mr. WHITMORE (New Zealand) stated that his Delegation could not support the proposal of the Delegations of Denmark and Sweden and indeed strongly supported the Basic Proposal. The New Zealand views had already been expressed by the Delegation of the Netherlands. In particular, it was held that it would be rather inappropriate for the UPOV Convention to attempt to have wording that affected patentability. There was also another aspect: it had been claimed at times that deleting the present Article 2 would create confusion to growers and in the market generally. Following comprehensive discussions in New Zealand, it had been concluded that this would not be so.

260. Mr. BRADNOCK (Canada) said that the position of Canada was to support the Basic Proposal and to oppose the proposal of the Delegations of Denmark and

Sweden, although Canada had just introduced a plant breeders' rights system and although it had not been possible so far to patent a variety in Canada. This was a matter for national jurisdiction, and there should not be a provision in the UPOV Convention preventing a national decision either to allow patenting or not to allow it.

261. Mr. BOBROVSZKY (Hungary) indicated that his Delegation supported the position expressed by the Delegations of Australia and the United States of America. The UPOV Convention should be neutral concerning the form of protection and should not impose a constraint on the national patent legislation. His Delegation therefore supported the Basic Proposal.

262. Mr. O'DONOHUE (Ireland) added his Delegation's voice in support of the text as appearing in the Basic Proposal. It should be left to member States to make their own decisions on the issue of the form of protection.

263. The PRESIDENT observed that, so far, all Delegations but one had spoken against the proposal of the Delegations of Denmark and Sweden. He asked the latter whether they could agree with what had been said about the relations between national legislation and the Convention, in the light of the fact that their lawmaker could always introduce what was being proposed at national level.

264.1 Mr. ESPENHAIN (Denmark) replied that his Delegation could not agree to withdraw the proposal for the reason he had indicated when introducing it. He was not sure that he understood completely some of the arguments which had been put forward. That people were disappointed to find the issue revived was simply not a fair viewpoint. The Danish position had been known for a long time, and the submission of a proposal was to be anticipated.

264.2 A majority was trying to ensure that the UPOV Convention would not regulate patent legislation, but the fact was that in most countries--not all but most--patent legislation took account of the fact that plant varieties should not be patentable. That was also the position under another international Convention, the European Patent Convention. Therefore, it was difficult to see the disharmony between the proposal and the reality of today. From a political point of view, the proposal also aimed at indicating clearly that the Danish authorities had no intention to make it possible to protect plant varieties, as such, by patents, but that they fully supported the patent system within the domain for which it was suitable.

265. Mr. ÖSTER (Sweden) also stated that his Delegation would wish to maintain the proposal, largely on the basis of the views just expressed by Mr. Espenhain (Denmark).

266.1 Mr. GUGERELL (EPO) wished to mention two items only in the interest of brevity of the discussions. The UPOV Convention as it had stood gave the member States a choice between special breeders' rights and patents. The proposal of the Delegations of Denmark and of Sweden went much further than the present legal situation since it stipulated exclusively breeders' rights for varieties. It therefore constituted a much greater intervention than was

hitherto the case in the sovereignty of the national lawmaker in another field of law. That was in contradiction to the situation that otherwise prevailed and under which each system of law laid down its own conditions for the requirements and effects of protection without intervening in another system of law.

266.2 The attempt to intervene in another field of law would have implications not only for domestic law, but also at regional level, that was to say for European patent law. Eventually, it would also have implications on the endeavors to harmonize legal provisions at international level or on the regional improvement of requirements for protection in certain areas. The proposal constituted the fixation for an unforeseeable future of a legal situation which, although certainly not today, was likely to be revisable in future under changed technical conditions.

266.3 Additionally, the proposed amendment would lead to an increase in the number of member States that would have been entitled under Article 37 of the existing text to grant patents and breeders' rights in parallel. Under the proposed Article 40, there would be new member States which, in view of their current legislation, would be able to continue to grant patents for varieties. That disintegration of the rights and obligations of the Contracting States did not seem to correspond with the spirit of an international Convention.

267. Mr. ESPENHAIN (Denmark) wished to return to the argument raised by Mr. Lloyd (Australia) that the proposal under consideration would deter future member States, and especially developing countries. The Delegation of Denmark did not agree to this view because the proposed amendment to Article 40 permitted future member States to notify, when depositing their instrument of ratification, etc., their intention to have more than one protection system.

268. The PRESIDENT declared that he wished to reach a conclusion. He observed that the great majority was against the proposed amendment and in favor of the text in the Basic Proposal, and suggested to the Plenary that it should consider the text in the Basic Proposal as adopted.

269.1 Mr. SLOCOCK (AIPH) observed that, for some Observer Organizations, Article 2 was perhaps the main reason for which they participated in the Conference and that they would welcome an opportunity to comment on it. AIPH did not oppose the possibility for certain member States to provide an alternative system of protection, and to that extent its position departed from the proposed amendment. It could not accept, however, a situation where double or cumulative protection was permitted. The problem was in the application of both systems to a single variety.

269.2 Mr. Slocock then addressed some of the points made by Member Delegations. Several had stated that their country would not apply patents to plant varieties. Mr. Slocock could not help thinking therefore that, somewhere in the Convention, that fact should be reflected. It had also been said that a non-exclusive system of protection would not create confusion in the marketplace; being engaged in the business, he could assure the Conference that there would be confusion. Others had said that it was not the responsibility of the UPOV Convention to legislate in a field other than its own; that might be so, but it did have a responsibility to contribute clarity in the interaction between its own system and others. It had also been said that the

Convention should not set out to dictate to the sovereign Parliaments of member States; taking that to its logical conclusion would presumably mean that one should do without a Convention at all.

269.3 What the Convention surely sought to do was to set up a structure within which a system of protection--or several systems of protection--could operate effectively and with clarity. The removal of any limitation on double protection from the Convention would merely contribute chaos.

270. Mr. ESPENHAIN (Denmark) stated that he understood the President's wish to conclude the discussion. He mentioned that he had firm instructions from his Government and would have to ask for new instructions. He wished to know whether a two-thirds majority would be required for the discussion of a possible recommendation.

271. Mr. BOGSCH (Secretary-General of UPOV) replied that a recommendation was a new matter which would be dealt with under agenda item 12, "Consideration and adoption of any recommendation, resolution or common statement, and of a final act, if any, of the Conference."

272. Article 2 was adopted as appearing in the Basic Proposal. (Continued at 1817)

Article 3 - Genera and Species to Be Protected

273. The PRESIDENT opened the debate on Article 3 and on the proposals of the Delegation of Poland reproduced in documents DC/91/29 and DC/91/34.

274.1 Mr. DMOCHOWSKI (Poland) stated that, in the absence of a preamble, the amendment of the scope of the Convention in Article 3 and the addition of a definition of "variety" in Article 1(vi) resulted in an exceedingly large possibility of applying the Convention to kinds of plants and varieties that were not cultivated or propagated for economic purposes. The plants and varieties referred to were not a factor in agricultural, horticultural or sylvi-cultural production or the subject of plant breeding, for the benefit of which the Convention had been created.

274.2 It seemed that the Convention was not and would not be applied to wild plants and their varieties, even those that were economically utilized, for example, in the form of gathering of raw plant materials. It was only for cultivated plants, i.e., plants propagated for economic purposes in the conditions chosen and/or created by man, that there existed a need to develop practical activity aiming at creating new varieties, varieties that were better suited to the challenging purposes and conditions of economic utilization. The application of the Convention to all kinds of plants and their varieties was therefore purposeless and was an example of redundant law.

274.3 Mr. Dmochowski emphasized that if it took into account the condition of usefulness for cultivation, the Convention would bring the conditions for the grant of a breeder's right close to the conditions of patentability; the

notion of "cultivated plant" indeed implied the condition of economic usefulness which was very close to the notion of industrial applicability. The condition of usefulness for cultivation could be fulfilled in the majority of cases by limiting the application of the Convention to the cultivated plants only, "cultivated plants" being taken in the sense of botanical taxa of a rank higher than the agricultural varieties created by plant breeders. Those were the reasons for which the Delegation of Poland sought to limit the application of the Convention to the taxa of cultivated plants and also to amend Article 3 and the definition of "variety."

274.4 Plant breeders' rights had been introduced in a number of countries and on the international scale in the form of the UPOV Convention to provide protection of the interests of plant breeders, whose objective was to deploy creative activity in the field of higher plants, mainly seed plants. The corresponding breeding activity in the field of lower plants such as bacteria, algae or fungi was now effectively protected by patents. It had not been intended so far to protect the breeding activity in the field of lower plants through plant breeders' rights. The Delegation of Poland therefore considered it appropriate to limit the Convention to the higher plants, i.e. mushrooms, pteridophyta and seed plants. Such a limitation would avoid a redundancy of the Convention in a field in which it could not be applied, and also many conflicts which might arise in the application and interpretation of plant breeders' rights in relation to patent rights.

274.5 His Delegation finally proposed, Mr. Dmochowski said, to amend the title of Article 3, which was considered improper because genera and species of plants were not protected. What was protected was the breeder's right to the variety of a particular species or of a taxon of a rank lower than species. To mention both genera and species, side by side, was also improper: a reference to the protection of the varieties of a genus automatically implied the protection of the varieties of all species belonging to that genus.

275. No Member Delegation wishing to second the proposals of the Delegation of Poland appearing in documents DC/91/29 and DC/91/34, the PRESIDENT declared them rejected.

276. The conclusion of the President was noted by the Conference.

277. Mr. ÖSTER (Sweden) stated that some elements of the proposals of the Delegation of Poland might be considered by the Working Group on Article 1.

278. The PRESIDENT opened the debate on the proposal of the Delegation of Canada reproduced in document DC/91/52.

279.1 Mr. BRADNOCK (Canada) stated that his Delegation proposed two small amendments having perhaps great significance. They dealt in fact with barriers to the extension of the membership of the Union. The first concerned the case of States which were already members of the Union and the rate at which they were going to be required to extend protection to all plant genera and species. Canada had examined very closely the rate at which other countries had adopted plant breeders' rights and succeeded in extending them to an increasing range of genera and species. No country had found it easy to cover all plant genera

and species in a very brief period of time, and none had apparently managed to do it within the proposed three years. Mr. Bradnock suggested that States might be forced to delay ratification of the new Convention on this account. Consequently, his Delegation recommended that the period of time should not be three years, but 10 years.

279.2 Turning to the issue of new members of the Union, States which were not yet bound by the present Convention, Mr. Bradnock recalled that Canada had just crossed the doorstep and was therefore very well aware of the benefits of accession to the Union and of the difficulty of implementing national legislation at a speedy rate. Canada had decided to cover, depending on how one computed them, six or eight genera and species initially. It was desirable that as many nations as possible should be members of UPOV; therefore, the doorstep should not be made too high, and the five genera and species required under the present text of the Convention seemed to be a good starting point, particularly since the thrust of the amended Convention was that countries should make a commitment to eventually cover all plant genera and species. Since there would be a time limit within which this should take place, the door should be easy to open and the doorstep should be low enough so that States could become members of UPOV.

280. Mr. HARVEY (United Kingdom) seconded the proposal of the Delegation of Canada. The view had been taken in previous discussions that insuperable fences ought not to be put in the way of new members of the Union. It would be wrong to deny a new member of UPOV the advantages of joining UPOV simply because it had introduced, for example, rights for five species only, but five species which were the most important for it. The fact that it had not extended its protection system to another 20 genera or species, which could be of no importance to that country, ought not to be a bar to its entry into UPOV. There was, as said by Mr. Bradnock (Canada), a commitment to extend the number of genera and species significantly and quickly. The requirement that a new Contracting Party should protect 25 genera or species initially was unreasonable and could prevent countries from acceding to the UPOV Convention.

281. Mr. LOPEZ DE HARO (Spain) recalled that, during the preparatory work on the Basic Proposal, the representatives of Spain had tried to amend this Article in the way proposed by the Delegation of Canada and to make it easier for States to adhere to the new Convention. His Delegation therefore strongly supported the proposal of the Delegation of Canada.

282. Mr. DMOCHOWSKI (Poland) added the support of his Delegation to the proposal of the Delegation of Canada.

283. Mr. VUORI (Finland) wished to inform the Conference in this connection that the intention was in Finland to extend protection under its proposed legislation to some 50 species initially.

284. Mr. KIEWIET (Netherlands) stated that his Delegation was of the opinion that the Convention should express ambition and that therefore the obligations resulting from Article 3 should be higher than in the proposal of the Delegation of Canada. The Basic Proposal might arguably be too firm and was perhaps creating fences for new member States. Mr. Kiewiet agreed with

Mr. Harvey (United Kingdom) that the new Convention should not be prohibitive for new member States, but the proposal under consideration went too far. He therefore suggested to look for a compromise solution, for instance, for a five-year rather than a three-year period in paragraph (1)(ii) and for 15 rather than 25 plant genera or species in paragraph (2)(i). The Article would thereby still be ambitious, but no longer prohibitive for new member States.

285. Mr. WHITMORE (New Zealand) stated that his Delegation had sympathy for the views expressed by the Delegation of Canada and supported its proposal.

286. Mr. TOURKMANI (Morocco) explained that his Delegation, as an Observer Delegation, felt that Article 3 should provide--to ease the accession of new States to the Convention--for the possibility for those States of reducing the number of genera or species that had to be protected, and also to extend the time limits set out in paragraph (2). The Delegation further questioned the feasibility of protecting within a short time limit, or even within longer time limits, the whole of cultivated species, particularly in view of the fact that, for ecological reasons, numerous species were not cultivated in the countries concerned.

287. Mr. VISSER (South Africa) also lent the support of his Delegation to the proposal of the Delegation of Canada. Although South Africa had been a member of UPOV for quite a number of years, it still found it very costly to set up facilities for the examination of varieties of rare species.

288. Mr. HRON (Austria) thanked the Delegation of Canada for its proposal and stated that, as an Observer Delegation, Austria would ask that the threshold for new member States should not be placed too high. His Delegation strongly welcomed the compromise proposal made by the Delegation of the Netherlands.

289. Mr. LLOYD (Australia) stated that his Delegation sympathized with the point of view of the Delegation of Canada, but opposed the proposal. Australia was in the somewhat comfortable position of having accomplished the extension of protection to all genera and species in three years. A far more important reason, however, was to minimise the problem that existed presently for breeders who were facing barriers in terms of genera and species when seeking protection for their varieties.

290. Mrs. PARASCHIV (Romania) stated that her Delegation fully supported the proposal of the Delegation of Canada because of the interest which Romania had in this problem.

291.1 Mr. ROYON (CIOPORA) declared that, although Article 3 of the Basic Proposal represented an improvement over Article 4 of the 1978 Act, it perpetuated the principle of progressive implementation of the Convention which CIOPORA had regarded from the very beginning as one of the basic flaws of the UPOV system. Such a selective approach which left many breeders without any protection at all in some countries made the reason for the rejection of the proposal of the Delegations of Denmark and Sweden for the amendment of

Article 2 all the more pressing. It showed also how essential it was for all Contracting Parties to be able to resort to any kind of protection vehicle, such as patents, in order to protect any species, including intergeneric hybrids which were bound to increase very much in number in the future, and to avoid a legal vacuum.

291.2 CIOPIORA had sympathy for the reasons advanced by the Delegation of Canada in support of its proposal, but it felt that with international cooperation in the field of examination, newcomers should at least be obliged to protect within as short a period as possible all the genera and species that were already protected in at least one of the UPOV member States. The Convention would otherwise perpetuate the existence of the so-called "infringement paradise countries."

292. Mr. WINTER (COMASSO) fully agreed with the statements made by Mr. Royon (CIOPIORA), particularly concerning the need to include hybrids of all botanical taxa. COMASSO was indeed aware of the problems that would arise from rapid extension of protection to the whole plant kingdom. It accepted the need for transitional rulings, but did not wish to comment specifically at that point on the proposed time limits. However, it would have to be ensured that the species which were to be first made protectable by a Contracting Party also had major significance within the territory of that Contracting Party.

293. Mrs. JENNI (Switzerland) supported the proposal made by the Delegation of the Netherlands. She commented, however, that cooperation between member States, particularly in testing in the technical area, operated very well and that such assistance in the technical field could also be of use to the new UPOV member States.

[Suspension]

294. Mr. HAYAKAWA (Japan) stated that the period of 10 years proposed by the Delegation of Canada for paragraph (1)(ii) was too long. It could lead many member States to refrain from making the necessary efforts to extend protection to all plant genera and species at an early stage.

295. Mr. CLUCAS (ASSINSEL) stated that whilst it had much sympathy for the comments made by the Delegation of Canada, ASSINSEL believed that the Delegation of Switzerland had made an excellent point regarding the possibilities of cooperation in examination. ASSINSEL was inclined to support Article 3 as proposed in the Basic Proposal and would like to have this position recorded. It shared, however, some of the views expressed on unnecessary barriers in the way of future member States.

296. Mr. BESSON (FIS) stated that FIS likewise held that the fastest possible increase in the number of protected species would promote trade, particularly for the benefit of those countries that extended protection to such species.

297. Mr. SLOCOCK (AIPH) hoped that at the end of the discussion, it would be found possible to retain the text in the Basic Proposal and that the Delegation of Canada would be encouraged by what had been said about the facilities offered by cooperation in examination. Like COMASSO, AIPH felt it extremely important for UPOV and the signatories of the Convention that the latter did their utmost to ensure that the 25 genera or species to be protected initially were economically significant. If it was not so and if there were economically and commercially significant varieties outside the protection system, the advantages conferred by the Convention would be of very little help during the interim period.

298.1 Mr. BRADNOCK (Canada) wished to make some remarks in conclusion, following the discussion. There was an interesting discrepancy between the two paragraphs of Article 3 which could be illustrated by the case of a State that would have acceded to the 1978 Act of the Convention on the opening day of the Conference and would proceed to ratify the new Convention at the end of the Conference; it would have three years in which to extend protection to all genera and species. If it had not acceded to the 1978 Act of the Convention, but directly to the new Convention, it would have 10 years to cover all genera and species.

298.2 The second point concerned countries which were not yet members of the Union. It needed to be understood, and perhaps remembered, by some of the member States that now had many years of experience, that most member States had introduced their legislation on a progressive basis. It was not just the establishment of testing facilities that took the time, but the whole establishment of the administrative and legal framework.

298.3 The problem in Canada was that each species had to be covered by a regulation which had to go through a very long and tedious administrative procedure; this was true of some of the other member States and would certainly also hold true of some States that were not yet members. One had to take account of the fact that, at the early stage, a new member State had to staff an office, to develop qualified staff, to write regulations with inexperienced staff, etc. It was very difficult to move quickly and to cover a whole range of species, notwithstanding the fact that the objective was the one stated by the representatives of the breeders' organizations. There were considerable national advantages in becoming a member of the Union; it had certainly helped a lot in Canada and it certainly would give impetus in applying legislation on a progressive basis to more and more species.

299. Mr. BOGSCH (Secretary-General of UPOV) asked whether those countries which had become members of UPOV in the last two years or so should not be treated like new members or as a third category, since there was a significant difference between them and those countries which had been members of UPOV for 20 years or more.

300. Mr. HARVEY (United Kingdom) stated that he did not want to rule out the suggestion made by Mr. Bogsch (Secretary-General of UPOV) but wished to find a solution without creating a special category. The present discussion was one in which reasonable points were being made on both sides and which should lead to a compromise. Mr. Kiewiet (Netherlands) had proposed a compromise which was found acceptable by his Delegation and could be acceptable to other Delegations. Mr. Harvey wished to know whether that proposal was acceptable to the Delegation of Canada before pursuing Mr. Bogsch's suggestion.

301. Mr. BRADNOCK (Canada) responded that the proposal of Mr. Kiewiet (Netherlands) was certainly moving away from the figures appearing in the Basic Proposal and was obviously, therefore, an improvement. But he also considered that the proposal of Mr. Bogsch (Secretary-General of UPOV) had more merit from the point of view of his Delegation.

302. Mr. ELENA (Spain) observed, in relation to the proposal of Mr. Bogsch (Secretary-General of UPOV), that Spain had been a member of the Union for more than 10 years and still would have real difficulties to extend protection to the whole plant kingdom in a period of three years. The issue under discussion should be considered not only in relation to countries that had recently joined UPOV, but also in relation to "middle-aged" members.

303. Mr. BURR (Germany) observed that no problems were to be expected by Germany with Article 3 since the authorities were preparing an amendment to the legislation which would extend the system of protection to the whole plant kingdom. The main point of the debate was how the possible candidates for accession would react, particularly those States that were to accede to the 1978 Act in the near future. In that respect, he had full comprehension for a more liberal ruling. However, he had doubts as to any easing of the commitments of the existing member States.

304. Mr. BANNERMAN (FICPI) declared that FICPI was in favor of all measures that would strengthen the protection available under the UPOV Convention and would therefore like to see all member States encouraged to extend that protection to all genera and species as quickly as possible. It would therefore prefer to see the period mentioned in Article 3(2)(ii) shortened from 10 years to three years. It felt that there was a danger that, if Governments were allowed 10 years, they would take 10 years.

305. The PRESIDENT wished to close the discussion and to have a vote on the first element of the proposal of the Delegation of Canada, namely to amend "three years" into "10 years" in Article 3(1)(ii).

306. Mr. ESPENHAIN (Denmark) observed that he considered the proposal as a package. In addition, his Delegation would have preferred to have the proposal of Mr. Bogsch (Secretary-General of UPOV) in writing before a decision was taken on this question. It was well known that the Delegation of Denmark had been very insistent on harmonizing the lists of species as much as possible and as quickly as possible. However, the arguments put forward by certain Delegations needed careful consideration and it had to be decided whether Article 3 should be more flexible. The proposal of Mr. Bogsch constituted in that respect a package for the whole Article 3.

307. The PRESIDENT observed that there was nevertheless a need to vote on the various proposals. He then put to the vote the proposal to amend "three years" into "10 years" in Article 3(1)(ii).

308. The proposal to amend "three years" into "10 years" in Article 3(1)(ii) was rejected by seven votes for, eight against and two absences.

309. The PRESIDENT then put to the vote the proposal to amend "three years" into "five years" in Article 3(1)(ii).

310. The proposal to amend "three years" into "five years" in Article 3(1)(ii) was accepted by 11 votes for, two against and three abstentions.

311. Mr. BOGSCH (Secretary-General of UPOV) suggested that it would be a good compromise if the oral proposal of the Delegation of the Netherlands to amend "25 plant genera or species" into "15 plant genera or species" were accepted.

312. The proposal to amend "25 plant genera or species" into "15 plant genera or species" was accepted by 13 votes for, three against and one abstention.

313. Mr. HEINEN (Germany) observed that the titles in square brackets at the beginning of individual paragraphs were not a part of the text of the Convention, according to statements made by Mr. Bogsch (Secretary-General of UPOV), but simply described their basic content.

314. Mr. BOGSCH (Secretary-General of UPOV) confirmed for the Records of the Conference his declaration made in the course of the preparatory work that the subtitles at the beginning of each paragraph were for information purposes only.

315. Mr. HAYAKAWA (Japan) wished to hear the opinion of the other Member Delegations on the question whether the concept of "plant genera and species" under Article 3 should include intergeneric and interspecific hybrids.

316. The PRESIDENT noted that no Member Delegation wished to take the floor. He suggested that it would seem to be normal for the other Member Delegations that hybrids would be included.

317. Mr. BOGSCH (Secretary-General of UPOV) suggested to the President to make a formal declaration to this effect so that the Minutes of the Conference would show his interpretation as not being opposed by anyone.

318. No Member Delegation opposed the interpretation given in paragraph 316 above.

319. Mr. HAYAKAWA (Japan) asked the opinion of the other Member Delegations as to whether the concept of "all plant genera and species" included microorganisms such as bacteria and yeasts.

320.1 Mrs. VAN DER NEUT (Netherlands) stated that the phrase "all plant genera and species" could be understood to include microorganisms.

320.2 She further observed that there was a scientific discussion on the allocation of some organisms to a particular kingdom. In the case of the Convention, therefore, one had to take a flexible approach and to avoid to attempt to establish a clear definition.

321. Mr. ÖSTER (Sweden) stated that his Delegation was not willing to give a positive reply on account of the fact that it would change the interface between patents and plant breeders' rights. In addition, there had been no time to consider this matter.

322.1 Mr. TESCHEMACHER (EPO) remarked that the matter of the boundary between patentability and eligibility for breeders' rights had already been mentioned. The question of patentability had already been dealt with by the European Patent Office at the beginning of the 80s, at which time it had based itself on the view that microorganisms belonged neither to the plant kingdom nor to the animal kingdom, but were an independent group within the biological hierarchies. Correspondingly, the Office had been protecting microorganisms from that time onwards and had not seen any infringement of the exclusion contained in Article 53(b) of the European Patent Convention.

322.2 That was supported, in the view of the Office, by the fact that it had obviously been the wish of the legislator to make a general distinction in Article 53(b) between biological and microbiological inventions. The Office's practice had not been seriously criticized in the past and had been followed by numerous EPO Contracting States. Apparently no defensible objections had been made internationally. Article 3 should therefore give no reason to call into question that consensus.

323. Mr. DMOCHOWSKI (Poland) stated that, in all handbooks of plant and animal systematics, there was a clear difference between the plant and the animal kingdom. Bacteria, yeasts, algae and fungi were in the plant kingdom. That was taught to all students in biology, agriculture, etc. This was the reason why his Delegation was against this formulation.

324. Mr. LLOYD (Australia) stated that the question of dividing the living world into the various taxa was extremely complex. Modern taxonomy in fact distinguished between two superkingdoms, the prokaryota and the eukaryota, which had become the basic division. The bacteria fell into the prokaryota. Since the issue was extremely complex, it might perhaps be useful to have a definition of the particular taxa that were to be covered by the plant variety protection system.

325. Mr. BOGSCH (Secretary-General of UPOV) recommended to the Conference not to try to decide the question. Scientific views were not uniform and might change in the future. He advised to simply note that, in respect of the lower categories of organisms, there was some answer left to the national laws. This was a small imperfection of the Convention, and the Conference should note that member States may either protect or not protect lower organisms. Finally, he stated that there was no problem of interface involved.

326. Mr. ÖSTER (Sweden) stated that his Delegation concurred with the views expressed by Mr. Bogsch (Secretary-General of UPOV).

327. Mr. BRADNOCK (Canada) stated that his Delegation also shared the views expressed by Mr. Bogsch (Secretary-General of UPOV), but with one small reservation. A State which ratified the new Convention would make a commitment to cover all plant genera and species. The differences of opinion revealed by the discussion showed that there could be some concern that a member State was not covering all plant genera and species because it was not covering e.g. yeasts or bacteria. There was a need for clarification, even if such clarification was a statement that it would be up to national jurisdiction to decide what "all plant genera and species" meant in relation to the taxa whose classification was controversial.

328. The PRESIDENT suggested that the Conference should not try to elaborate on the meaning of "all plant genera and species," but to take note of the statement of Mr. Bogsch (Secretary-General of UPOV) and of concurring statements. (Continued at 1475)

329. Article 3 was adopted as appearing in the Basic Proposal with the amendments referred to in paragraphs 310 and 312 above.

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Article 4 - National Treatment

330. The PRESIDENT opened the meeting and the debate on the proposal of the Delegation of Japan reproduced in document DC/91/35.

331. Mr. NAITO (Japan), introducing the proposal of his Delegation, stated that his Delegation's concern only related to the wording. It thought it appropriate to amend the phrase in question to: "insofar as the grant and protection of breeders' rights are concerned," in order to be coherent with the wording in Article 2.

332. Mr. BOGSCH (Secretary-General of UPOV) stated that he fully shared this opinion and suggested that the proposal be accepted.

333. Mr. HEINEN (Germany) said that the Delegation of Germany shared that view in principle. However, it wondered whether the wording could be shortened

still further by saying: "insofar as breeders' rights are concerned." The substance remained the same and the Delegation wished to make that proposal.

334. Mr. LLOYD (Australia) stated that his Delegation also supported the proposal of the Delegation of Japan.

335. Mr. HARVEY (United Kingdom) stated that his Delegation also supported the proposal of the Delegation of Japan.

336. The proposal to amend: "insofar as the protection of varieties is concerned" into: "insofar as the grant and protection of breeders' rights are concerned" was unanimously accepted. Article 4 was thus adopted as appearing in the Basic Proposal subject to the amendment referred to in the preceding sentence.

Article 5 - Conditions of Protection

337. The PRESIDENT noted that there was no proposal for the amendment of Article 5.

338. Article 5 was adopted as appearing in the Basic Proposal.

Article 6 - Novelty

Article 6(1) - Criteria

339. The PRESIDENT opened the debate on Article 6. He offered an opportunity to those Delegations which had made a proposal for amendment to introduce it.

340.1 Mr. BURR (Germany) introduced the amendment proposed in **document DC/91/36** and explained that it contained four points. The first amendment was to adapt it to Article 5. Under Article 5, a breeder's right was granted where the variety was new, distinct, uniform and stable. In Article 6, as in the subsequent Articles 7, 8 and 9, the introductory words read: "The variety shall be deemed to be" new, distinct, uniform or stable. If Article 5 said that the condition for protection was to be that a variety was new, then Article 6 would also have to say when the variety was new and not when it was deemed to be new. The Delegation admitted that there could be difficulties with Article 9, but a proposal had been made to amend Article 9 to overcome those difficulties. The proposals therefore had to be seen as a whole.

340.2 As to the second part of the proposal, it had to be observed that the introduction said in the Basic Proposal that the variety was new if propagating or harvested material of the variety or any product directly obtained from the

harvested material of the variety fulfilled certain conditions. The choice of the wording: "propagating or harvested material of the variety or any product directly obtained from the harvested material of the variety" was very closely linked to Article 14. However, since the outcome of discussions on Article 14 was not yet known, his Delegation had endeavored to formulate that phrase in a more neutral fashion by using the formulation "plants or parts of plants that may be used for the production of plants of the variety." That corresponded basically to propagating material, whereby harvested material and products obtained therefrom had been left out.

340.3 The idea behind the proposal was that a step should be taken to come closer to patent law. If someone invented a machine, but did not immediately seek a patent and first used it in his own plant in a fully closed room in order to manufacture given products, that is to say he kept it secret, he could indeed sell those products manufactured by means of the machine without the fact of using the machine in his own plant being prejudicial to novelty in the event of a subsequent patent application.

340.4 The third part of the proposal referred to the passage in items (i) and (ii) which stated that sale was detrimental to novelty if it had been effected by the breeder or with his consent. When granting breeders' rights, the authorities were frequently faced with the problem that it was practically impossible to prove that sale was effected with the consent of the breeder. His Delegation therefore wished to shift the burden of proof to the breeder who would have to prove that the variety had been sold without his consent.

340.5 Finally, a simpler wording had also been proposed. Whether or not that simplification could also be applied in the other languages was perhaps a matter that would have to be discussed in more detail in the Drafting Committee.

341. Mr. VON ARNOLD (Sweden) introduced the proposal of his Delegation reproduced in document DC/91/54 and stated that it was similar to the proposal of the Delegation of Germany concerning the material whose sale should be detrimental to novelty. It was proposed to leave out the products directly obtained from harvested material from Article 6. His Delegation felt that it was quite unreasonable that, for example, the sale of canned peaches should be detrimental to novelty. On the other hand, it could accept that, for example, the sale of cut flowers as harvested material could be detrimental to novelty, hence the retention of the reference to harvested material. Mr. von Arnold finally indicated that his Delegation was not opposed to the proposal of the Delegation of Germany.

342.1 Mr. HIJMANS (Netherlands), commenting on the proposals of the Delegations of Germany and Sweden, observed that there were several problems to be solved in Article 6. Firstly, the words "deemed to be" had been inserted in the Basic Proposal because one could never be sure that a variety was really new. There was therefore a good reason to keep the words "deemed to be," and there was no contradiction of Article 5.

342.2 Concerning the kind of material the marketing of which should be detrimental to novelty, there were now three propositions. There were good reasons to oppose the proposal of the Delegation of Germany: the marketing of harvested material should also destroy novelty, since some kinds of harvested material could also be used as propagating material. In addition, the

comparison with patent law was not relevant because of the difference in the concept of novelty. In the plant breeders' rights system, the marketing itself was the relevant criterion.

342.3 On the other hand, his Delegation was wondering whether the products directly obtained from harvested material should be mentioned in the introductory part of paragraph (1) because it was not always easy to prove that a product was from the particular variety. It was moreover never possible to produce new plant material from such products. Incidentally, there was no parallelism with Article 14. It was conceivable that some acts could destroy novelty although they would not fall into the scope of protection; the opposite situation was even easier to conceive. Therefore, the proposal of the Delegation of Sweden should not be withdrawn since it was the best proposal for the introduction to Article 6.

342.4 Concerning the burden of proof, his Delegation agreed with the Delegation of Germany that it should be on the breeder and not on a possible third party, and certainly not on the plant breeders' rights office. Novelty was to be examined by the office and it was very difficult for it to establish whether or not the breeder had given his consent when material was already on the market; it was only logical then that the breeder should prove that he had not put the material on the market.

342.5 Finally, concerning the so-called period of grace in Article 6(1)(i), his Delegation was of the view that it should not be facultative but mandatory for member States. It was most important for breeders that the system operated in the same way in every country. It was also important for breeders to have the possibility of putting material for short periods on the market to test commercial interest in the variety before applying for a breeder's right.

343.1 Mr. NAITO (Japan) wished to make some comments on the proposal of the Delegation of Germany before introducing the proposal of his Delegation reproduced in document DC/91/37. Some points had already been made by Mr. Hijmans (Netherlands), for example on the deletion of the words "deemed to be." This deletion would change the meaning of the text, and his Delegation was very much concerned about the implications of the change. It was also concerned about the limitation of the novelty criterion to the use for the production of plants of the variety, which was not appropriate. Finally, it could not accept the shifting of the burden of proof on the breeder because, in practice, it might be very difficult for him to prove that he had not given his consent.

343.2 Turning to the proposal of his Delegation, Mr. Naito explained that the intention was to clarify the meaning of: "for purposes of exploitation of the variety." The current wording was not clear and the exceptions should be limited to acts done privately and for non-commercial purposes and acts done for experimental purposes. Two drafting improvements were also proposed: the heading should read "newness" in order to harmonize it with the adjective "new" used in Article 5(1) and the word "made" should be used instead of "obtained" in order to align Article 6(1) with Article 14(1)(c) and Article 16(2).

344.1 Mr. BOGSCH (Secretary-General of UPOV) stated that it was difficult to analyse the proposals because they addressed many different points. He suggested that the proposal of the Delegation of Germany should be considered first because it was the farthest from the Basic Proposal and contained many conceptual changes. He was particularly surprised at the proposal to put the

burden of a "negative" proof on the breeder. It was very unusual, if not unknown, in industrial property that an owner had to prove that he had not done something, an impossible task.

344.2 The proposal seemed to be based on a misunderstanding. It was not a question for the authority granting plant breeders' rights to make an investigation. Article 6(1) merely stated the criterion of protectability, and if an authority had granted protection without knowing that the variety had been used with the consent of the breeder, then, in a litigation in which the breeder would sue a third party, the third party would allege that the grant was invalid because he had received an authorization from the breeder to use his material. That was the normal procedure in intellectual property disputes.

345. Mr. SCHENNEN (Germany) replied that the proposal on the burden of proof resulted from the fact that his Delegation wished to avoid the phrase: "the variety shall be deemed to be new" and to draw up an objective definition. The proposal concerned cases in which it was clear that propagating material had been made available by the breeder, but where there was doubt whether it had taken place with the consent of the breeder or not. In such case, the Office would have to be able to decide whether there had been consent, particularly if, for instance, invoices had been submitted showing that the variety had already been made available. In such cases, it was impossible for third parties--whether private individuals or even the Office--to ascertain whether there had been consent. The burden of proof had therefore to rest on the breeder, who could provide such proof, for example, by explaining the circumstances of the making available by means of documents or witnesses.

346. Mr. BOGSCH (Secretary-General of UPOV) observed that this explanation assumed that there was a transfer of material with the knowledge of the breeder, whereas the third person could have obtained the material in a completely illegal way, without there being an invoice or other documentary evidence. He considered that no satisfactory reply had been given to the question of how one could prove that one had not given his consent.

347. Mr. BRADNOCK (Canada) stated that his Delegation had the same concerns as Mr. Bogsch (Secretary-General of UPOV). To prove through documentary evidence or even a witness that one had not done something was almost impossible. There were certainly cases where material was given with an undertaking that it would only be for non-commercial purposes and where the undertaking would be broken; in that case one could provide proofs of the undertaking. But in many cases, and certainly if the material was being exploited by somebody illegally, one could not. His Delegation therefore opposed the requirement put on the breeder to prove the absence of a fact, and also the suggestion to delete "deemed to be," since the two were linked.

348. Mr. WANSCHER (Denmark) stated that his Delegation shared the concerns expressed by Mr. Bogsch (Secretary-General of UPOV) and Mr. Bradnock (Canada) and also found that the reversal of the burden of proof was quite unusual and very difficult to implement. His Delegation would not be able to vote in favor of the proposal, which was contrary to legal tradition in Denmark.

349. Mr. HARVEY (United Kingdom) stated that his Delegation had the same position as the Delegation of Canada, for precisely the same reasons.

350. Mr. HOINKES (United States of America) stated that his Delegation was also in full agreement with the opposition expressed by the Delegation of Canada.

351.1 Mr. ROYON (CIOPORA) observed that, in the past, CIOPORA had had some practical experience with the problem under consideration and with a text that was by far not as negative as the proposal from the Delegation of Germany. CIOPORA fully supported the explanations given by Mr. Bogsch (Secretary-General of UPOV) and Mr. Bradnock (Canada).

351.2 Mr. Royon then wished to seize the opportunity of having the floor to make some general remarks on Article 6. CIOPORA was somewhat worried with the use of "novelty" as title for Article 6. Indeed in usual industrial property language, and also in plant breeders' rights language, "novelty" implied something which was different from "newness" and was very close to the notion of distinctness. In fact, the term "newness" had already been proposed during the past work of the Administrative and Legal Committee and was now being proposed by the Delegation of Japan. Yet the term "newness" was not any happier, and CIOPORA would therefore like to have a notion of non-disclosure or early disclosure to be introduced. The provision should then say: "The variety shall be deemed not to have been disclosed unless it is proven that, at the date of filing..." Finally, because the burden of proof had indeed to be on the party alleging the early disclosure, the word "express" should be added before "consent of the breeder" as had been done in one of the former drafts of the Basic Proposal.

352. Mr. VON PECHMANN (AIPPI) wished to make a comment on the phrase "shall be deemed to be new." That phrase introduced a fiction that also existed in patent law. For example, when a patent application had been filed and the fee had not been paid, the application was deemed to have been withdrawn although no declaration of withdrawal had been submitted. AIPPI therefore felt that the proposal of the Delegation of Germany was correct. As to the question whether one should ascertain on the basis of the harvested material whether that variety was involved, Mr. von Pechmann further commented that the proposal had been made to delete the reference to harvested material and to products obtained from harvested material. Finally, AIPPI was able to agree with the statements made by Mr. Bogsch (Secretary-General of UPOV).

353. Mr. WINTER (COMASSO) commented on the proposed reversal of the burden of proof that the plant breeders agreed with the view put by Mr. Bogsch (Secretary-General of UPOV) and various Delegations. The plant breeders resolutely opposed such a ruling.

354. Mr. GUNARY (ASSINSEL) endorsed the position taken by COMASSO.

355. The PRESIDENT concluded the discussions on the burden of proof and observed that, since only negative comments had been made by the Member Delegations, it could be concluded that the majority was opposed to the proposal.

356. The conclusion of the President was noted by the Conference.

357. The PRESIDENT then opened the debate on the proposal of the Delegation of Germany to delete "deemed to be." He recalled that the Delegation of the Netherlands had already commented on that proposal.

358. Mr. HEINEN (Germany) explained that the proposal referred only to a drafting question, that was to say to align the wording of Article 5(1) and Articles 6 to 9. If Article 5(1) stipulated that a breeder's right was to be granted where the variety was new, the logical question then arose as to when the variety was new and that was indeed the question to which Article 6 was to reply. If it was true that one could never exactly know whether a variety was indeed new or not, that uncertainty should not be the subject of Article 6, but of the already adopted Article 5. The proposal was in fact more a matter for the Drafting Committee.

359. Mr. HARVEY (United Kingdom) observed that it was for the courts to decide whether a variety was new. For the authority it was only to decide whether it was deemed to be new. Mr. Harvey did not want the authority to be put in the position of the courts. It could not be said in the Convention that, for the purpose of granting a breeder's right, a variety was new, but only that it was new to the best of the knowledge of the authority. The words "deemed to be" were therefore important.

360. Mr. BRADNOCK (Canada) supported the position taken by Mr. Harvey (United Kingdom). In effect, Article 6(1) defined what was happening under the provisions of Article 5 when an application was being processed; the authority had to make a decision, because novelty was one of the criteria for granting a breeder's right, under the circumstance that it would never have all relevant knowledge. The authority would therefore only deem a variety to be new on the basis of the evidence that was before it and subject to contrary evidence being produced.

361. Mr. ESPENHAIN (Denmark) stated that his Delegation associated itself with the Delegations of the United Kingdom and of Canada.

362. Mr. O'DONOHUE (Ireland) stated that his Delegation also associated itself with the comments made by the previous speakers.

363. The PRESIDENT concluded the discussion on the proposed deletion of "deemed to be." He observed that, since only negative comments had been made by the Member Delegations, it could be concluded that the majority was opposed to the proposal.

364. The conclusion of the President was noted by the Conference.

365. The PRESIDENT then opened the debate on the proposal of the Delegation of Germany to amend the reference to the material and products of the variety covered by the novelty rule. He recalled that the Delegation of the Netherlands had already commented on that proposal.

366.1 Miss BUSTIN (France) said that her Delegation was opposed to the amendment for the same reasons as the Delegation of the Netherlands. She was comforted in her view that the novelty requirement should not be restricted to such an extent since she had heard the representative of a professional organization asking that elements be introduced into Article 6 that concerned not novelty, but non-disclosure. If the requirements of non-commercialization set out in Article 6(1) were reduced too far by exempting breeders from compliance with those requirements on the grounds that, in some cases, the commercial act carried out had not implied disclosure of the variety, one would be opening the door to an extremely serious confusion with a neighboring right from the field of industrial property.

366.2 The Delegation of France wished to maintain the thinking behind the adoption of the novelty criterion in 1961. Any breeder who derived profits from the exploitation of his variety before submitting an application or outside the period of grace afforded to him should not be entitled to obtain protection, on the grounds that his variety had lost its novelty.

367. Mr. BRADNOCK (Canada) supported the proposal of the Delegation of Germany. To illustrate what was perceived as a problem with the text in the Basic Proposal, Mr. Bradnock took the example of potatoes grown in another country to produce e.g. frozen French fries which were then sold in the country of application. It did not seem to Mr. Bradnock that the variety had been available in that country, even where the frozen French fries had some unique characteristic. If, on the other hand, the fresh potatoes were shipped into that country, then the variety would be available there as parts of plants that could be used for propagation.

368. Mr. ROYON (CIOPORA) wished to add an explanation to what had been said by Miss Bustin (France). CIOPORA did not wish to reduce the content of the requirements stipulated by Article 6, but wished simply to emphasize that the word "novelty" did not seem the most appropriate.

369. Mr. BURR (Germany) observed that, under the existing Article 6, a variety might not have been sold in a member State on the date of submitting an application for protection. The Working Group on Article 1 would probably present a proposal on what a variety could be. The formulation in the Basic Proposal referred to propagating material, harvested material and directly obtained products. That was linked with other Articles as yet to be discussed. It would therefore probably be necessary to keep that matter open.

370. Mr. ELENA (Spain) stated that his Delegation shared the view of the Delegation of Germany. The amendment proposed by the Delegation of Germany should take into account the final wording of Article 14 in respect of propagating material, harvested material and products made directly from harvested material. For the moment, however, the Delegation of Spain was in favor of the text presented by the Delegation of Germany in document DC/91/36.

371. Mr. ESPENHAIN (Denmark) associated his Delegation with the previous speakers. In view of the link with Article 14 he felt that it might be premature to take a final decision at this stage. However, his Delegation had some sympathy for the proposal of the Delegation of Germany for the reasons described by Mr. Bradnock (Canada).

372.1 Mr. HOINKES (United States of America) agreed with the previous speakers concerning the deferral of the final decision on this Article until the outcome of the decisions on Article 14 was known. Concerning the question of linking, to some degree, novelty to the products directly obtained from harvested material of the variety concerned, his Delegation had some sympathy with, for instance, the proposal of the Delegation of Sweden or, for that matter, with the proposal of the Delegation of Germany.

372.2 However, as far as it would eliminate the possibility of destroying novelty with respect to certain varieties, specifically inbreds, the latter proposal may go beyond good public policy. In his Delegation's opinion, if an inbred was being kept secret and only the harvested material from that inbred was made available in the form of a hybrid, then it would seem rather unfair that after a number of years of exploitation, when there was a danger that that inbred may become known, the breeder should go to a plant variety protection office and obtain a further 20 or more years of protection. The protection of plant varieties should be more even-handed and, therefore, there should be no possibility of obtaining additional protection for certain varieties that were not obtainable for others on a routine basis. As a consequence, his Delegation had great difficulties with the proposal of the Delegation of Germany.

373. Mr. JOHNSON (FICPI) stated that FICPI supported the proposal of the Delegation of Germany to the extent that the marketing of products directly obtained from harvested material would no longer be regarded as novelty destructive. There was furthermore a difference between harvested material which contained the genetic information of the new variety and harvested material which did not. FICPI regarded it as unacceptable that the marketing of harvested material which did not contain the genetic information of the new variety--so that nothing could be learned about the new variety from it--should be regarded as novelty destructive prior art. An example would be sugar from a new variety of sugar beet. The sugar was chemically identical whether it came from a new variety or from an old one.

374. Mr. VON PECHMANN (AIPPI) said that the matter was one of disclosure and account would have to be taken of the fact that, where the variety could not be determined from the harvested material or direct products, the variety would still have to be deemed to be new. He had been convinced in that respect by the explanations given by the Delegation of Germany and therefore supported the proposal of that Delegation.

375. Mr. GUNARY (ASSINSEL) stated that ASSINSEL had some concern in relation to the established practice whereby breeding circles would make material of the variety available, prior to filing the application for a breeder's right, for purposes of trials and multiplication to build up seed stocks in anticipation of the introduction of the variety into the market. ASSINSEL feared that the wording of this element of Article 6 could lead to a situation in which established practices would be regarded as exploitation in the sense referred to Article 6(1)(i) and (ii) of the Basic Proposal.

376. Mr. VON ARNOLD (Sweden) stated that it would have been useful if the proposal of his Delegation had been discussed together with the proposal of the Delegation of Germany. One reason for this was the confusion about "harvested material" and "products obtained directly." The harvested material from sugar

beet would not be sugar as suggested by the representative of FICPI but the beets themselves. The beets should be relevant to novelty, for one could get the genetic information from them as stated by the representative of FICPI, who was therefore in line with the proposal of his Delegation.

377. The PRESIDENT wished to conclude the discussion on the proposal of the Delegation of Germany to amend the reference to the material and products of the variety covered by the novelty rule.

378. The proposal of the Delegation of Germany to amend: "propagating material or harvested material of the variety or any product directly obtained from the harvested material of the variety" to: "plants or parts of plants that may be used for the production of plants of the variety" was rejected by five votes for, 13 votes against and five abstentions.

379. The PRESIDENT then opened the floor on the proposal of the Delegation of Sweden, reproduced in document DC/91/54, to delete "products directly obtained from harvested material." He recalled that the Delegation of Spain had already seconded the proposal.

380.1 Mr. ESPENHAIN (Denmark) stated that his Delegation supported the proposal of the Delegation of Sweden for the same reason as it had supported the proposal of the Delegation of Germany. It was essential that material of the variety produced in the course of breeding or possibly multiplication could be sold and used as long as this did not imply a commercialization of the variety as such. If the words "or any product directly obtained from the harvested material of the variety" were included, the product of for example a new variety of apple, the apples, could never be used as apple juice because such use would be detrimental to novelty. That was going too far, and the Delegation of Denmark would not like to see that situation arising.

380.2 The representative of ASSINSEL had already expressed the concerns of his organization concerning multiplication contracts whereby the breeder retained full control over the variety. His Delegation had always considered that such contracts should not destroy novelty. The support for the proposal of the Delegation of Sweden was independent of the decision on Article 14, simply because the text in the Basic Proposal was considered as going too far.

381. Mr. NAITO (Japan) stated that the discussion was closely related to Article 14(1)(c) and suggested that it might be more effective to delay it until after the discussion on Article 14(1)(c).

382. Mr. VIRION (Poland) stated that his Delegation supported the point of view and proposal made by the Delegation of Sweden whilst also agreeing with postponement of the decision until after the discussion of Article 14.

383. Mr. HARVEY (United Kingdom) stated that his Delegation supported the proposal of the Delegation of Sweden and saw absolutely no reason at all for postponing the decision. The proposal had to be dealt with on its own merits, and the decision on Article 14 did not matter.

384. Mr. BRADNOCK (Canada) stated that his Delegation had concern with the term "harvested material." If it referred to harvested material that could be used for propagating the variety, then it would agree with the proposal of the Delegation of Sweden. Otherwise it would oppose it as not being sufficiently precise.

385. Mr. SCHLOSSER (CIOPORA) lent CIOPORA's support to the proposal of the Delegation of Sweden and expressed its concurrence with the view of Mr. Harvey (United Kingdom) that this position was not necessarily dependent on what might be decided later on in connection with Article 14(1)(c).

386. Mr. O'DONOHUE (Ireland) supported the views expressed by Mr. Harvey (United Kingdom).

387. Mr. JOHNSON (FICPI) stated that FICPI would support the proposal of the Delegation of Sweden and the observation made by Mr. Harvey (United Kingdom).

388. Mrs. JENNI (Switzerland) said that her Delegation supported the proposal of the Delegation of Sweden.

389. The PRESIDENT, noting that many Delegations had spoken in favor of the proposal of the Delegation of Sweden, wished to conclude the discussion and to take a vote, notwithstanding the suggestion by some Delegations that the decision might be postponed until after Article 14 had been decided upon.

390. The proposal of the Delegation of Sweden, reproduced in document DC/91/54, to delete "or any product directly obtained from the harvested material of the variety" was adopted by 13 votes for, two votes against and three abstentions.

[Suspension]

391. The PRESIDENT reopened the meeting and proposed that the remaining elements of the proposal of the Delegation of Germany be referred to the Drafting Committee.

392. The proposal of the President was noted by the Conference, with approval.

393. The PRESIDENT then opened the debate on the proposal of the Delegation of Japan reproduced in document DC/91/37. He noted that the proposal to use the word "made" instead of "obtained" was now superseded, following the

adoption of the proposal of the Delegation of Sweden reproduced in document DC/91/54. He invited comments on Article 6(1)(i) and (ii), where the proposal was to replace the phrase: "for purposes of exploitation of the variety" by: "otherwise than for private and non-commercial purposes or for experimental purposes."

394. Mr. BURR (Germany) said that his Delegation would go along with the first part of the proposal of the Delegation of Japan. However, it would not go so far as to include acts for experimental purposes. It therefore supported the proposed wording as far as acts in the private sphere for non-commercial purposes were concerned since experiments were already being used in some areas almost abusively and should therefore not be taken into account when examining novelty.

395. Mr. HOINKES (United States of America) stated that, when the text of the Basic Proposal had been adopted, it had been the understanding of the Administrative and Legal Committee and of the Council that the language: "for purposes of exploitation of the variety" was to permit breeders to enter into contract with a farmer for the purpose of growing out trials and to permit the farmer to sell the resulting harvested material under certain conditions in order to offset the cost of the testing as such, and also for the very reason that the harvested material could be used for food and should not just be thrown away. The proposal of the Delegation of Japan would put that particular situation into doubt. It might totally deny the possibility of harvested material obtained by growing out trials being sold, not for purposes of exploitation of the variety, but merely to offset costs or to preserve products that could be used for food. For that reason his Delegation had to oppose the proposal as presently drafted.

396. Mr. ESPENHAIN (Denmark) stated that his Delegation understood the reasoning behind the proposal, but that it agreed with Mr. Hoinkes (United States of America) concerning its drawbacks. He suggested on account of the detailed discussions held during the preparatory work that the text should be left as it stood on this point and that an explanation should be given in the Minutes on the intention behind the word "exploitation."

397. Mr. VON ARNOLD (Sweden) stated that his Delegation fully agreed with the views expressed by Mr. Hoinkes (United States of America) and could go along with the proposal of Mr. Espenhain (Denmark) to have some explanations in the Minutes.

398. Mr. KIEWIET (Netherlands) stated that his Delegation was in the same position.

399. Mr. BOBROVSZKY (Hungary) stated that his Delegation was in the same position.

400. Mr. BROCK-NANNESTAD (UNICE) stated that the word "exploitation," in connection with a variety, was at the basis of the whole UPOV Convention. He suggested that a definition should perhaps be inserted in Article 1, and that the term should not just be explained in the Minutes of the Conference.

401. The PRESIDENT concluded that there was a majority for retaining the text as it was in the Basic Proposal and for rejecting the proposal of the Delegation of Japan, having in mind the fact that the Acts of the Conference would clarify the position on this particular point.

402. It was decided to reject the proposal of the Delegation of Japan to replace the phrase: "for purposes of exploitation of the variety" by: "otherwise than for private and non-commercial purposes or for experimental purposes."

403. The PRESIDENT then opened the debate on the proposal of the Delegation of the Netherlands, reproduced in document DC/91/53, to delete the phrase: "or, if the law of that Contracting Party so provides."

404. Mr. ESPENHAIN (Denmark) stated that his Delegation would be opposed to make the so-called "period of grace" mandatory. The legal situation would be insecure for the producers if there were such a period.

405. Mrs. JENNI (Switzerland) said that her Delegation supported the proposal made by the Delegation of the Netherlands. Practice had shown how difficult it was when differing provisions existed. Applicants normally relied on the provisions in their home countries and were then unable to understand why it was perhaps too late in some other country for an application.

406. Mr. NAITO (Japan) stated that the practical experience over 13 years had not shown any difficulty in Japan arising out of the text in the Basic Proposal. Therefore, the Delegation of Japan saw no necessity to change it.

407. Mr. BRADNOCK (Canada) stated that his Delegation would prefer to retain the text in the Basic Proposal and to leave the matter to national choice.

408. Mr. ELENA (Spain) associated his Delegation to the position expressed by Mr. Espenhain (Denmark).

409. Mr. VON PECHMANN (AIPPI) observed that his Association had always taken a positive stance on efforts towards harmonization. It therefore supported the deletion of the phrase concerned.

410. Mr. SCHLOSSER (CIOPORA) stated that his Delegation lent its support to the proposal of the Delegation of the Netherlands.

411. Mr. WINTER (COMASSO) likewise spoke on behalf of COMASSO for acceptance of the proposal of the Delegation of the Netherlands.

412. Mr. JOHNSON (FICPI) declared that his Delegation would support the proposal of the Delegation of the Netherlands.

413. Mr. CLUCAS (ASSINSEL) stated that ASSINSEL would support the proposal of the Delegation of the Netherlands.

414. The PRESIDENT wished to conclude the debate and put the proposal to a vote.

415. The proposal of the Delegation of the Netherlands, reproduced in document DC/91/53, to delete the phrase: "or, if the law of that Contracting Party so provides" was accepted by eight votes for, five votes against and five abstentions.

416. The PRESIDENT then opened the discussion on the oral proposal of the Delegation of Japan to change the title "novelty" into "newness."

417. Mr. WHITMORE (New Zealand) wished to strongly support the proposal of the Delegation of Japan. He appreciated that a title was not part of the text but believed that the title "novelty" was very confusing. It would be more logical to use the title "newness," which would be consistent with the use of the word "new" in the text. The title "novelty" was confusing because the word "novelty" had two meanings in English: it could be taken to mean "new," which was what was intended here, or "different," in which case there was a risk of confusion with the criterion of distinctness. There was still another problem: the word "novelty" was used in the patent world in a rather different context, and the Delegation of New Zealand would be concerned about people having a casual look through the UPOV Convention, seeing the word "novelty" and arriving at the false conclusion that the UPOV Convention shared this criterion with the patent system.

418. Mr. HEINEN (Germany) wondered whether the question was not a typical matter for the Drafting Committee. It concerned a title and two words in the English language which basically meant the same thing and did not concern substance.

419. Mr. BRADNOCK (Canada) stated that he would agree with the proposal of the Delegation of Japan that the more appropriate word would be "newness."

420. Mr. LLOYD (Australia) also agreed with the point of view expressed by Mr. Whitmore (New Zealand).

421. Mr. HARVEY (United Kingdom) stated that he was opposed to changing "novelty" into "newness," which was one of the most dreadful words in the English language.

422. Mr. BOGSCH (Secretary-General of UPOV) observed that the question should not be left to the Drafting Committee unless it was sure that the Plenary would accept its decision.

423. Mr. HOINKES (United States of America) stated that his Delegation fully agreed with the point of view expressed by Mr. Harvey (United Kingdom).

424. The proposal of the Delegation of Japan to replace "novelty" by "newness" in the title of Article 6 was rejected by five votes for, ten votes against and three abstentions. (Continued at 1852.2(iv))

Article 6(2) - Varieties of Recent Creation

425. The PRESIDENT opened the floor on Article 6(2).

426. Mr. VIRION (Poland) introduced the proposal made by his Delegation in document DC/91/38 and emphasized that the term "recent creation" gave the member States too much freedom. It therefore appeared preferable to set a time limit and his Delegation had proposed five years. A maximum time limit of ten years would also be acceptable to his Delegation.

427. Mr. BURR (Germany) introduced the proposal made by his Delegation in document DC/91/39 and observed that it was basically a drafting amendment, although of a somewhat more extensive kind.

428. The PRESIDENT decided that the proposal of the Delegation of Poland would be dealt with first.

429. Mr. HARVEY (United Kingdom) stated that his Delegation could not agree with the proposal of the Delegation of Poland because it was going a bit too far.

430. Mr. KIEWIET (Netherlands) stated that what was recent and what was not was something to be discussed. His Delegation therefore appreciated that the Delegation of Poland tried to give an answer to that question and proposed five years. That would give certainty to the countries which had to implement the Convention in national legislation. Five years was perhaps too long, but the idea to mention a number of years was supported by his Delegation. Mr. Kiewiet had a further remark in respect of the proposal. It only dealt with propagating material; as a consequence of the rewording of paragraph (1), it should read: "propagating material or harvested material."

431. Mr. BRADNOCK (Canada) stated that his Delegation opposed the proposal of the Delegation of Poland. Canada was a country that had introduced plant breeders' rights legislation rather recently and its producers had faced the situation where they could not get access to certain varieties because they could not be protected in Canada. When legislation had been passed, one of its objectives had been to make those varieties available, but some of them had already been on the market in other countries for longer than four years. It was therefore decided to allow a longer period at the time of the introduction of the relevant plant breeders' rights scheme to make those varieties

available nonetheless and to allow the plant breeder to get a return. The same sort of situation would occur in other countries introducing legislation, and the situation might vary according to the crop. There should, therefore, be no attempt to secure international harmony, but national decisions should be allowed on the basis of the situation in the particular country.

432. Miss BUSTIN (France) drew attention to the fact that adoption of the amendment proposed by the Delegation of Poland would imply an amendment to the French legislation on a matter that had not been envisaged. The transitional provisions applicable in France to varieties that had lost their novelty were broad and it was not envisaged for the time being to amend them. Maintenance of the Basic Proposal would permit France to apply the Convention as amended and also the States who so wished to adopt more limited transitional provisions. It would therefore have the advantage of enabling all to ratify the new Convention in accordance with the common wish. Any restrictive amendment would imperil the chances of France being able to stay within the Union on the basis of the new text.

433. Mr. ÖSTER (Sweden) stated that his Delegation shared the views expressed by Miss Bustin (France).

434. Mrs. JENNI (Switzerland) stated that her Delegation had some understanding for the replacement of "recent" by a number of years. However, five years appeared somewhat too much.

435. Mr. ROYON (CIOPORA) pointed out that breeders placed great value on the possibility of recourse to the transitional provisions referred to by Miss Bustin (France). However, CIOPORA wondered whether the text given in the Basic Proposal, even without any amendment, would enable France to continue to apply the existing provisions since those were based on the criterion, not of recent creation of a variety, but recent extension of the legislation to a given species, meaning that a variety that was on the market without being of recent creation could enjoy the transitional provisions in France, although with a consequent reduction in the term of the title granted. Mr. Royon wished therefore to know what was meant by "recent creation."

436. Mr. BOGSCH (Secretary-General of UPOV) observed that the term "recent creation" was meant to refer to a certain number of years.

437. Mr. SLOCOCK (AIPH) observed that the unqualified word "recently" referred to a rather large range of time. AIPH hoped that the Conference would decide to specify the term along the lines of the amendment under discussion.

438. Mr. CLUCAS (ASSINSEL) stated that ASSINSEL would support a quantification in this particular provision.

439. The proposal of the Delegation of Poland, reproduced in document DC/91/38, to replace "of recent creation existing at" by a specified period of five years was rejected by two votes for, nine votes against and five abstentions. (Reconsidered at 442)

440. The PRESIDENT opened the floor on the proposal of the Delegation of Germany reproduced in document DC/91/39.

441. Mr. HEINEN (Germany) explained that the proposal made by his Delegation was, as already mentioned, of a drafting nature and in no way intended as a substantive amendment. To begin with, the words "a variety ... existing at" would be deleted as superfluous. Something that did not exist could not be covered by a regulation. Additionally, the words "of recent creation" appeared somewhat unclear. The Delegation of Germany therefore wished to state more specifically the point in time that was applicable, that was to say "[created shortly before the] date of such extension of protection." (Continued at 456)

442. (Continued from 439) Mr. HARVEY (United Kingdom) asked whether he would be allowed to follow up the proposal of the Delegation of Poland and suggest a different number of years. He stated that the debate concerned a provision which applied to a Contracting Party introducing a plant breeders' rights system or extending the rights to a particular species under the new Convention. There was therefore a case for examining how far the exception would be made under Article 6(2) to the fairly rigid rule of Article 6(1).

443. Mrs. JENNI (Switzerland) asked whether there was any experience. When the list of protected species was extended in Switzerland, a transitional period of four years was allowed. The Delegation of Switzerland would also prefer that "of recent creation" be replaced by a number of years.

444. The PRESIDENT suggested to the Delegations of the United Kingdom and of Switzerland to present written proposals after the lunch break.

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445. The PRESIDENT opened the discussion on the proposal of the Delegations of Switzerland and the United Kingdom reproduced in document DC/91/75. He stated that he would keep the debate short for the proposal was very close to the proposal of the Delegation of Poland reproduced in document DC/91/38.

446. Mr. LLOYD (Australia) observed that so far as the proposal of the Delegation of Germany was concerned, "shortly before" was not more precise than "recent" in the Basic Proposal. Concerning the proposal of the Delegations of Switzerland and the United Kingdom, he recalled that Article 6(2) was an enabling provision. His Delegation saw no necessity to go through this prolonged discussion on the number of years that should be associated with the provision. It should be left to member States to determine the time limits in accordance with national circumstances as outlined by Mr. Bradnock (Canada).

447. Mr. BRADNOCK (Canada) reiterated the position already taken on this issue. The proposal did not satisfy the concern of his Delegation because of its precision.

448. Mr. BURR (Germany) said that his Delegation welcomed an extensive part of the proposal since it contained elements from the proposal made by his Delegation. However, he was worried by the limitation to three years. For Germany there were two possibilities: either the period would be extended to four years--in conformity with German Law--or Germany would only be able to ratify the new Convention in some six years time, i.e., once the four-year term resulting from extension to the whole plant kingdom had expired.

449. Mr. KIEWIET (Netherlands) supported the proposal of the Delegations of Switzerland and the United Kingdom. In his Delegation's opinion, it would be worthwhile to introduce some limitations in an enabling provision in order to reach at least a certain level of harmonization and to limit to some extent the freedom of the member States.

450. Mr. VIRION (Poland) stated that his Delegation supported the proposal made by the Delegations of the United Kingdom and of Switzerland.

451. Mr. ESPENHAIN (Denmark) observed that paragraph (2) contained a possibility which member States may exercise or not. His Delegation thought that there might be good reasons for having different periods for different species, and that it would therefore be advisable to keep a degree of flexibility in the system in this respect. The Delegation thus preferred the text in the Basic Proposal and would not vote for the proposal.

452. Miss BUSTIN (France) observed that any restriction on the duration would delay, to say the least, any possibility of France ratifying the new text of the Convention. Just as Germany, France would be obliged to wait until it had extended protection to all species in the plant kingdom and had fully applied the transitional provisions contained in its legislation. The Delegation of France would therefore not support the amendment submitted by the Delegations of the United Kingdom and of Switzerland.

453. Mr. BRADNOCK (Canada) asked whether the period proposed for Article 6(2) related only to Article 6(1)(i), since subparagraph (ii) of the latter provided for a period of four or six years.

454. Mr. HEITZ (Senior Counsellor--UPOV) observed that the question put by Mr. Bradnock (Canada) raised a true problem. Under the normal application of the protection system, a variety could be protected if it had been marketed for no more than four years (six years in the case of a tree or vine variety) in a State other than the State of the application. Such variety could therefore have "existed" for four (or six) years. Where protection was extended for the first time to a species, the provisions to be applied had to be ascertained. If that was to be paragraph (2), only varieties existing for no more than three years could be taken into account; if it was to be paragraph (1), a variety that existed already for more than three years, but which had been

marketed abroad for no longer than four (or six) years could be protected. Therefore, under certain circumstances, the transitional provision, which was normally more generous for the breeder, could prove to be more restrictive in fact.

455. The proposal of the Delegations of Switzerland and of the United Kingdom, reproduced in document DC/91/75, to replace "of recent creation existing at" by a specific period of three years was rejected by five votes for, nine votes against and three abstentions.

456. (Continued from 441) The PRESIDENT then put to the vote the proposal of the Delegation of Germany reproduced in document DC/91/39.

457. The proposal of the Delegation of Germany reproduced in document DC/91/39 was rejected by one vote for, nine votes against and six abstentions.

458. Mr. NAITO (Japan) wished to have confirmed the interpretation of the phrase "otherwise made available" as not including the act of offering for sale propagating or harvested material of the variety. When merely offered for sale, such material was not in the hands of others; in addition, the act of offering for sale was very difficult to establish. Mr. Naito wished to know whether any other member States interpreted the words "otherwise made available" differently.

459. Mr. BOGSCH (Secretary-General of UPOV) stated that, in the opinion of the Office of the Union, the interpretation given by Mr. Naito (Japan) was an admissible one.

Article 7 - Distinctness

460. The PRESIDENT opened the debate on Article 7. He suggested that the proposals of the Delegations of Germany and Poland reproduced in documents DC/91/41 and DC/91/40 be treated before the proposals of the Delegations of the United States of America, Japan and Canada.

461. Mr. HEINEN (Germany) stated that the proposal made by his Delegation in document DC/91/41 was in fact a result of the proposal on Article 6 that had been dealt with in the preceding meeting. Following the result of the vote, his Delegation wished to withdraw its proposal. The same also applied to Article 8.

462. The Conference noted the withdrawal of the proposal of the Delegation of Germany reproduced in document DC/91/41.

463. Mr. DMOCHOWSKI (Poland) introduced the proposal of his Delegation reproduced in document DC/91/40 and underlined that the text in the Basic Proposal was close to the definition of distinctness in the International Code of Nomenclature of Cultivated Plants. However, his Delegation proposed a slight amendment, which was to replace "clearly distinguishable" by "significantly distinguishable." The term "significantly" was commonly used in genetics, biometrics and applied statistics. In addition, the officially used test of distinctness was the criterion of minimum distance whereby the minimum was established on the basis of statistical significance.

464. Mr. BOULD (United Kingdom) warned against the use of the word "significantly." It had statistical connotations which should perhaps not be introduced into the Convention. There were some characteristics to which no statistical test was applied; it would be difficult in their case to define and implement "significantly." The current wording of "clearly distinguishable" was probably more appropriate; it was general and did not try to relate the degree of difference to some significance level which was not actually defined.

465. Mr. KIEWIET (Netherlands) stated that his Delegation supported the views expressed by Mr. Bould (United Kingdom).

466. Mr. BURR (Germany) went along with the comments made by Mr. Bould (United Kingdom).

467. Mr. GUIARD (France) also shared the views expressed by Mr. Bould (United Kingdom) and held that, although the word "significantly" could be entertained in a technical examination protocol, that was hardly so in a text such as the Convention. In itself it signified nothing since it presupposed the existence of a well-defined context.

468. Mr. O'DONOHUE (Ireland) also supported the views expressed by Mr. Bould (United Kingdom).

469. Mr. DAVIES (UPEPI) observed that Mr. Bould (United Kingdom) had raised the interesting question of the need for a word having meaning before "distinguishable." He observed that in Article 1(vi), the word "distinguished" was without any further qualification. If a specific meaning was attached to "clearly" in Article 7, further discussions might be required before everyone understood what that meaning was.

470. Mr. BOGSCH (Secretary-General of UPOV) recalled that the word "clearly" had been in the Convention since 1961 and had been given a clear meaning in the practical operation of the plant variety protection system.

471. Mr. SLOCOCK (AIPH) noted that the discussion had so far centered on the replacement of "clearly" by "significantly." No mention had been made so far of the proposed reintroduction of the words: "by at least one of its characteristics," or perhaps: "by at least one of its important characteristics" which would be even closer to the current version of the Convention. He

wished to have recorded the disappointment of the growers at the fact that the word "important" was not retained. He also hoped that the Conference would consider the second part of the amendment proposed by the Delegation of Poland, which seemed to have much value in itself and at least accurately reflected the definition of "variety" inserted in Article 1(vi) of the Basic Proposal.

472. The PRESIDENT concluded the discussions on the proposal of the Delegation of Poland and noted that it had not received any support. He therefore declared it rejected.

473. The conclusion of the President was noted by the Conference.

474. The PRESIDENT then opened the discussion on the proposals of the Delegations of the United States of America and Japan reproduced in documents DC/91/6 and DC/91/42.

475.1 Mr. HOINKES (United States of America) introduced the proposal of his Delegation reproduced in document DC/91/6 and proposed an amendment to eliminate some potential lack of clarity: the phrase: "unless such grant or entry was effected in the same territory of a Contracting Party" should read: "unless such grant or entry was effected in the territory of the same Contracting Party."

475.2 Mr. Hoinkes then explained that the reason for the proposed amendment was basically two-fold: to clarify the text in the Basic Proposal and to make it somewhat less stringent. As to the clarification, the first sentence of Article 7 referred basically to two varieties: the variety that was under consideration for protection--and that was to be deemed to be distinct--and the "other variety" whose existence was a matter of common knowledge. The second sentence, however, contained no longer any reference to such "other variety," but used the expression "the variety." As a consequence, it could be interpreted as referring to the variety to be protected rather than to the "other variety" against which distinctness was to be established. For that reason the proposal used the expression "such other variety."

475.3 As to the proposed substantive amendment, Mr. Hoinkes explained that his country would have difficulty if common knowledge were inferred from the filing date of an application for the grant of a right in "any country," regardless of UPOV membership. That appeared to be too stringent a requirement. A breeder had basically no knowledge of the existence of another variety in another country until a breeder's right was issued in that country or at least until the application was published. Yet under the text in the Basic Proposal, the other breeder's right could be held against him from the filing date of the corresponding application. The United States of America had no problem with accepting common knowledge from the filing date of an application where the relevant applications were filed in the same country; it considered, however, that in relation to any other country, common knowledge should only be inferred from the date when such other variety either obtained a breeder's right or was entered in the register of varieties.

475.4 Mr. Hoinkes added that the second sentence of Article 7 basically stated an example of a case in which common knowledge could be presumed and specified from what point it could be presumed. There was nothing to prevent

a presumption of common knowledge, for instance, on the basis of growing trials of the "other variety" which could have been conducted even before the date of application for such other variety, or after that date but before the variety was for instance entered in the register of varieties. What was required was a substantiation of the common knowledge of an "other variety" and of the date on which its existence became a matter of common knowledge, relative to the date of application in respect of the variety to be protected. The proposal basically changed the exact date on which common knowledge in another country would reasonably be held against the breeder.

476. Mr. HAYAKAWA (Japan) stated that the difficulty in his country was rather similar to that which Mr. Hoinkes (United States of America) had explained. The situation would be very unstable for both breeders and authorities in Contracting Parties if, once a breeder's right had been granted for a variety in another Contracting Party, the date on which that variety became a matter of common knowledge was taken back to the filing date of the application. This would be very stringent and, therefore, this retroactive provision should be limited to the Contracting Party in which the application was filed. In addition, the text in the Basic Proposal no longer gave examples of cases where a variety was a matter of common knowledge. The Delegation of Japan considered that such examples should be included as in the present Convention.

477. Mr. HOINKES (United States of America) commented on the proposal of the Delegation of Japan and stated that his Delegation had no problem with the first sentence of the proposal, relating to the examples of cases where the existence of a variety would be a matter of common knowledge. He understood that the position of the Delegation of Japan was similar to that of his own with respect to the date from which common knowledge would be deemed to have existed. He feared, however, that the third sentence of the proposal of the Delegation of Japan would be unclear because it did not specify whether the backdated common knowledge based upon an application for protection or registration applied only within the territory of the Contracting Party in which the application had been filed or whether it applied to all other countries. The text proposed could be interpreted to extend that common knowledge to other countries.

478.1 Mr. BOGSCH (Secretary-General of UPOV) observed that there was a great difference between the Basic Proposal and the proposal of the Delegation of the United States of America, on the one hand, and the first sentence to be added under the proposal of the Delegation of Japan, on the other. The most important feature was that the sentence in question was in fact facultative. It had the same vague language as the present Convention, i.e., "common knowledge may be established by reference to various factors." It contained absolutely no obligation on Contracting Parties to "infer" common knowledge, to use the word appearing in the proposal of the Delegation of the United States of America.

478.2 The first issue was therefore to decide whether to go back to the present text and its examples which could be used, if so desired, by a Contracting Party as a reference, but as a reference only. Such a move would seem strange in view of the number of obligations written into the Convention.

478.3 Mr. Bogsch also wondered whether the Delegation of Japan really wanted to eliminate in the third sentence of its proposal the very liberal and flexible approach of the second sentence. As a matter of fact, the common

knowledge arising out of an application was not the most important instance of common knowledge. The more important instances were listed in the second sentence of the proposal.

479. Mr. BOULD (United Kingdom) wished to ask a question on the basis of a hypothetical example. Applications would be filed in countries A and B for two supposedly different varieties of the same species, and country A would carry out the tests for distinctness, homogeneity and stability at the same time for both varieties, in the case of the first variety on its own behalf and in the case of the second on behalf of country B under an agreement for cooperation in examination. Mr. Bould wished to know whether country A would be able to compare the variety being the subject of the second application with the other one or whether it would be forced to conclude that the two varieties were distinct even where this was not the case.

480. Mr. HOINKES (United States of America) replied that he supposed that common knowledge could be inferred from whatever date at which it was established with respect to the first variety. That was somewhat independent from the question whether the filing date should be used as a reference. Mr. Hoinkes finally wondered how often this case would happen in practice.

481. Mr. BOULD (United Kingdom) replied to the latter question that the case would actually be very frequent with certain species and that the frequency was likely to increase in Europe in the future.

482. Mr. URSELMANN (COMASSO) stated that COMASSO was not quite satisfied with the reply given by Mr. Hoinkes (United States of America). He wondered whether he was correct in concluding that, under the proposed amendment, a variety having been the subject of an application for protection in country A would be denied protection if a right had been granted in the meantime to an "identical variety" in country B on the basis of a later application. If that was the case, the proposal would not be acceptable to the breeders' organizations. In other words, the chances of obtaining a right would be dependent, in that particular situation and on the assumption that there would not be any other act or event making the existence of the varieties a matter of common knowledge, on the expeditiousness of the authorities.

483.1 Mr. KIEWIET (Netherlands) stated that his Delegation also had problems with the proposal of the Delegation of the United States of America. In its view, common knowledge was an absolute concept and it could not be that the existence of a variety was a matter of common knowledge in country A and not in country B. A number of examples of difficulties which would arise if the proposal was accepted had already been given. Mr. Kiewiet wished to give a further one. A breeder knowing that an application for a plant breeder's right had been made for a variety in country A could very well file an application in country B for a variety of which he knew that it was not distinguishable from the first one. In the event that the authority of country B was the quickest, he would not only be granted the right, but he would also prevent the granting of a right to his competitor in country A. That was not a situation to aim at and therefore the principle that common knowledge was universal should be maintained. His Delegation consequently opposed the proposal.

483.2 Mr. Kiewiet added that, in the Netherlands, applications for plant breeders' rights were published so that the difficulty arising from a lack of knowledge about an application was not as big as it might have been thought when the proposal of the Delegation of the United States of America was drafted.

484. Mr. VON PECHMANN (AIPPI) said that AIPPI had also stumbled over the expression "in any country" when discussing Article 7. AIPPI did not see any justification for invoking against an application in one of the member States an earlier application, that had not even been published, filed in a non-member State with which there were practically no relations. The proposal of the Delegation of the United States of America restricted that possibility to member States. AIPPI therefore held that it was reasonable to replace "in any country" by "in any Contracting Party."

485. Mr. ROYON (CIOPORA) observed that, in order to avoid an uncertain legal situation, CIOPORA held it preferable to refer to the filing date even if that date and the presumption of common knowledge could only be checked a posteriori in some cases.

486. Mr. HAYAKAWA (Japan) wished to give an example of the difficulties arising from the proposed criterion of common knowledge. If an application was received in Japan and the authority had doubts about the distinctness of the variety from a variety that was the subject of an earlier application filed in another member State, it would be very difficult to conduct the examination and the authority would have to wait until the variety being the subject of the first application was granted a breeder's right. That was not an acceptable situation.

487. Mr. HOINKES (United States of America) stated that he did not understand all the problems that had been raised with respect to the proposal of his Delegation. The largest problem arising out of the text in the Basic Proposal was that of secret prior art. Under the Basic Proposal, it was quite possible that somebody could make an application in a country which happened to have a plant breeders' rights law, but no office or only an understaffed office that was unable to examine the varieties and grant the rights in due course; and that a breeder having developed a variety in a UPOV member State and obtained a right in the meantime would be deprived of his right some years later because, in that first country, a plant breeder's right had finally been granted. It was not fair that the plant breeder should be deprived of his right in a UPOV member State under such circumstances.

488.1 Mr. KUNHARDT (Germany) observed that the present discussion was one that had been ongoing for some time. The problems mentioned by Mr. Bould (United Kingdom) were essentially those that had constituted the reasons for the text in the Basic Proposal. The Delegation of Germany fully shared the view expressed by the Delegation of the Netherlands. It should not be possible, in particular in the event of centralized examination, that a State use differing standards for itself and for other States in deciding which varieties had to be taken into consideration.

488.2 However, his Delegation was not unaware of the problems raised by the Delegations of the United States of America and of Japan. Those problems had already been discussed and the following ideas had nevertheless led to the Basic Proposal: those cases in which a variety submitted for protection was not distinguishable from a variety submitted for protection in another country in a different climatic zone were extremely rare. That fact resulted from experience in applying the Convention over what was now a number of decades. Secondly, no one in the present UPOV member States would wait such a long time until the question of registration of a variety in another State had been clarified. For such cases, the Convention foresaw subsequent annulment of protection.

488.3 Finally, Mr. Kunhardt also observed that every solution comprised problems that were specific to it. However, if a comparison were made of the problems that would be raised by the Basic Proposal on Article 7 and the problems that could be raised by another solution, one came to the conclusion that, in practice, the Basic Proposal would lead to considerably less problems than if the question of common knowledge of a variety were to be assessed in differing ways in differing countries. For that reason, the Delegation of Germany supported the position of the Delegation of the Netherlands that the matter of common knowledge be dealt with in the same way for all Contracting Parties.

489. Mrs. WALLEES (Sweden) observed that, in patent law, the concept of novelty could be different from country to country.

490. Mr. BOULD (United Kingdom) recognized that the subject was difficult and that the Delegations of Japan and of the United States of America were trying to solve the problem in a way which they considered the best possible but which was actually causing some difficulties for other member States. The problem was not simply of a legal and administrative nature; it was also technical. There was merit in retaining the text in the Basic Proposal and in recognizing that there were difficulties in determining how common knowledge might be established. He wondered whether the different ways of establishing common knowledge should not be dealt with in a technical guideline which could be used in conjunction with the Convention.

491. The PRESIDENT wished to conclude the discussion and to submit the proposals to a vote.

492. Mr. HAYAKAWA (Japan) indicated that his Delegation wished to withdraw its proposal, since it was the same in substance as the proposal of the Delegation of the United States of America.

493. The withdrawal of the proposal of the Delegation of Japan reproduced in document DC/91/42 was noted by the Conference.

494. The proposal of the Delegation of the United States of America reproduced in document DC/91/6, as amended according to the indications recorded in paragraph 475.1 above, was rejected by three votes for, 13 votes against and three abstentions.

495. Mr. HOINKES (United States of America) observed that the language of the Basic Proposal should be clarified in the Drafting Committee to make sure that the reference in the second sentence to "the variety" would be construed as a reference to "such other variety."

496. The Conference noted with approval the request of the Delegation of the United States of America.

497. The PRESIDENT opened the floor on the proposal of the Delegation of Canada reproduced in document DC/91/55.

498. Mr. BRADNOCK (Canada) stated that the proposal of his Delegation essentially aimed at introducing a clarification. Discussion had so far concerned a case which was mandatory when considering common knowledge. The deletion of the examples given in the 1978 Convention might create some confusion. His Delegation considered that the new Convention should not concentrate on one area and overlook the fact that there were other factors to be considered as creating common knowledge. It was, however, open to discussion on the way in which this complementary provision should be drafted.

499. Mr. HAYAKAWA (Japan) stated that his Delegation supported the proposal of the Delegation of Canada.

500. The PRESIDENT observed that the proposal was simple and decided to put it to a vote without further discussion.

501. The proposal of the Delegation of Canada reproduced in document DC/91/55 was rejected by three votes for, nine votes against and four abstentions. Article 7 was thus adopted as appearing in the Basic Proposal.

502. Mr. LLOYD (Australia) observed that the very prolonged and contorted discussion clearly showed that many Delegates were uneasy about the issue of distinctness. He wondered whether there could be an assurance from the Drafting Committee or the Secretariat that the suggestion of the Delegation of the United Kingdom that an accompanying guideline be published at some stage or other would be followed up to clarify and spell out some of the issues.

503. The PRESIDENT recalled that it was for the Conference to decide on this point.

504. Mr. GUNARY (ASSINSEL) noted that Article 7 as now adopted was very broadly worded. ASSINSEL would be very concerned if elements of the proposal of the Delegation of Canada were not covered by the Article as adopted. There were no national lists under certain circumstances, but the existence of the varieties which had clearly been marketed should surely be a matter of common knowledge.

505. Mr. GREENGRASS (Vice Secretary-General of UPOV) stated that the proposal of the Delegation of Canada clearly quoted examples of facts establishing common knowledge. The only reason why the filing of an application was singled out in the Basic Proposal was because in the normal course of events, the filing of the application did not make the variety generally available and known to the public. For that reason, it had to be identified as a specific case where common knowledge was presumed.

506. Mr. ESPENHAIN (Denmark) wondered, in reaction to the proposal of Mr. Bould (United Kingdom) supported by Mr. Lloyd (Australia), whether the Conference could decide on any guideline on common knowledge. Mr. Kunhardt (Germany) had indicated very clearly the difficulties which might arise in this context. In addition, it might be desirable to retain a certain flexibility under this Article. He therefore suggested recording in the Minutes that the issue had been raised and that the competent UPOV circles, the Council and the Technical Committee, would discuss at a later stage whether there was really a need for such guidelines. In any event, it would be very difficult for the Conference to go into all details.

507. Mr. LLOYD (Australia) concurred with Mr. Espenhain's (Denmark) statement. He agreed that it would probably be extremely difficult for the Plenary to draft even a general guideline. It should therefore be for one of the organs of UPOV to address the issue.

508. Mr. BRADNOCK (Canada) stated that the comments of Mr. Greengrass (Vice Secretary-General of UPOV) totally satisfied his Delegation.

[Suspension]

Article 8 - Uniformity

509. The PRESIDENT opened the debate on Article 8 and recalled that the proposal of the Delegation of Germany reproduced in document DC/91/43 had been withdrawn.

510. The withdrawal of the proposal of the Delegation of Germany reproduced in document DC/91/43 was noted by the Conference.

511. Mr. DMOCHOWSKI (Poland) introduced the proposal of his Delegation reproduced in document DC/91/44. The definition of the uniformity of a variety, he said, was too vague in the Basic Proposal and did not describe precisely under what conditions uniformity meant the minimal variation among individual plants within the population that constituted the variety. That variation had additionally to conform to the arbitrarily established norms or indexes, which depended on the particular features of the propagation of the variety and on other circumstances or criteria, related for instance to a particular group of cultivated plants or type of varieties.

512. Mr. GUIARD (France) emphasized that it did not appear correct to speak of variation requirements. One could not require a variety to show a certain degree of variation as a function of its reproduction mode. The variation that could be expected within a variety as a function of that reproduction mode was expressed more or less in accordance with the environmental conditions in which the variety was observed. Nothing could be required; one could only take note. The formulation proposed in the Basic Proposal was therefore preferable to that proposed by the Delegation of Poland.

513. Mr. BOULD (United Kingdom) agreed with Mr. Guiard (France). Uniformity was actually dealt with in detail in the General Introduction to the Test Guidelines (document TG/1/2). Some of the points which the Delegation of Poland had tried to encapsulate in its proposed definition were effectively expanded and dealt with in detail in that document. The Delegation of the United Kingdom therefore agreed with Mr. Guiard that the original wording was to be preferred to the proposed amendment.

514. The PRESIDENT noted that no support had been expressed for the proposal of the Delegation of Poland. He therefore suggested that the proposal should be considered as rejected.

515. The conclusion of the President was noted by the Conference.

516. The PRESIDENT then opened the debate on the proposal of the Delegation of Canada reproduced in document DC/91/56.

517. Mr. BRADNOCK (Canada) stated that his Delegation was concerned that the term "relevant" was not precise enough. One could imagine a new variety which had one distinguishing characteristic, for example a resistance to a particular disease. The variety could be unique and uniform in that characteristic, but heterogeneous in many others. The question then was what were the relevant characteristics in relation to the requirement of uniformity. His Delegation wanted to have all important characteristics considered since it would not be sufficient to have uniformity only in one important characteristic.

518. Mr. KIEWIET (Netherlands) noted that the Delegation of Canada had proposed to change the word "relevant" in Article 9 into "essential" and that Mr. Bradnock (Canada) had spoken of "important" characteristics. He asked whether there was a difference between "important" characteristics and "essential" characteristics.

519. Mr. BRADNOCK (Canada) replied that there was no significant difference between "important" and "essential."

520. Mr. BROCK-NANNESTAD (UNICE) wondered whether the same criteria should not be used for distinctness and homogeneity. If, under Article 7, "a variety shall be deemed to be distinct if it is clearly distinguishable from any other variety," it would be easier to express uniformity as the requirement that individual members of the variety should be indistinguishable from one another.

521. Mr. BOGSCH (Secretary-General of UPOV) stated that the word "relevant" had been chosen to refer to characteristics that were important for distinction. It had been preferred to "important," which was somewhat too subjective.

522. Mr. LLOYD (Australia) noted that, according to the intervention of Mr. Bogsch (Secretary-General of UPOV), there was no difference between "important" and "relevant." Under those circumstances, his Delegation could not support the proposed amendment.

523. Mr. BRADNOCK (Canada) stated that the reason for the proposed amendment was that his Delegation was not sure about the meaning of "relevant" in this particular context. If this word was simply another way of saying what Article 6(1)(c) currently did with respect to homogeneity, then his Delegation was quite content and would be ready to withdraw its proposal.

524. Mr. BOGSCH (Secretary-General of UPOV) stated that the change in wording did not imply an intention to change the substance. The words "relevant" or "important" were both used in a provision on uniformity and, in the context, could not mean anything else than: "sufficiently uniform in the characteristics which are relevant for judging uniformity."

525. Mr. BRADNOCK (Canada) stated that his Delegation withdrew its proposal reproduced in document DC/91/56.

526. The withdrawal of the proposal of the Delegation of Canada reproduced in document DC/91/56 was noted by the Conference.

527. The PRESIDENT opened the debate on the proposal of the Delegation of the United Kingdom reproduced in document DC/91/73.

528. Mr. BOULD (United Kingdom) introduced the proposal of his Delegation and stated that his Delegation had been concerned, when it read the proposed Article 8, about the use of the word "propagation" alone. It was a very important Article as far as the technical interpretation of the Convention was concerned, and, to avoid misunderstandings, it was essential to use the complete expression. There currently was a tendency to use the word "propagation" in the context of vegetative propagation only, and not in the context of sexual reproduction. The wording in the present text of the Convention, which referred to the particular features of the sexual reproduction or vegetative propagation of the variety, spelled out the situation very clearly and allowed an interpretation of the uniformity requirement in the light of the different methods of breeding new varieties. In addition, the proposed wording coincided exactly with the French text, and there was some value in the consistency of the various texts.

529. Mr. GREENGRASS (Vice Secretary-General of UPOV) recalled that the wording in the Basic Proposal resulted from a discussion on the expression: "sexual reproduction or vegetative propagation" and from a consensus over the fact that sexual reproduction was one form of propagation. There were a number

of other places in the Basic Proposal where the word "propagation" had been substituted for references to reproduction or propagation. The proposal, therefore, was not just relevant to Article 8.

530. Mr. DMOCHOWSKI (Poland) observed that the English text had been streamlined by the Administrative and Legal Committee in 1990, whereby "propagation" had been substituted for "sexual reproduction or vegetative propagation" and similar expressions. This was accepted by the Council of UPOV in October 1990. The French text used two words, and this was accepted as well. But it was not a good thing to have different formulations in English in the various Articles.

531. Mr. INGOLD (Switzerland) was disturbed by the use of formulations that differed from one language to another. Legal security would gain from greater uniformity of the texts.

532. Mr. BOGSCH (Secretary-General of UPOV) wondered whether the proposal of the Delegation of the United Kingdom implied the need to reopen the debate on Articles that had already been adopted, in particular on the expression "propagating material." As indicated by Mr. Dmochowski (Poland), the philosophy was that "propagation" in English--and "Vermehrung" in German--were general terms for which the French needed two words, namely "reproduction" and "multiplication." Mr. Bogsch emphasized that this was an important drafting point.

533. Mr. BOULD (United Kingdom) replied that there was no need to amend Article 6(1) because it referred to "propagating material," which included seed, tubers, cuttings, etc. But one could wonder whether the word "propagation" was strong enough to cover all the operations that were necessary to successfully produce the seed of the variety in question. What was actually done was to reproduce the variety, not simply to produce some kind of propagating material. That subtle refinement had to be reflected in this particular definition. As far as the use of "propagation" in other Articles was concerned, it had to be considered in relation to each of those Articles. Mr. Bould finally asked why the word "reproduction" had not been used instead of "propagation" for it would cover some of the problems arising for instance with synthetic and hybrid varieties.

534. Mr. HEINEN (Germany) said that the matter ought to be referred to the Drafting Committee. As far as the German wording was concerned, the text of the Basic Proposal should be maintained since "Vermehrung" covered all forms of propagation. The addition of "sexual or vegetative" in order to align the wording with the other texts would be superfluous and therefore a disadvantage. Furthermore, the question would then arise whether there was not another, excluded, type of propagation, which was not in fact the case.

535. Mr. KIEWIET (Netherlands) supported the proposal of Mr. Heinen (Germany) to refer the matter to the Drafting Committee. He was surprised to see that different opinions were being expressed about the meaning of "propagation" by people of English mother tongue. He was confident that the Drafting Committee, being chaired by an Englishman, would find a solution.

536. Mr. URSELMANN (COMASSO) suggested that the Drafting Committee might change "propagation" into "reproduction," which could be translated in French as "reproduction" and in German as "Vermehrung."

537. Miss BUSTIN (France) pointed out that the word "reproduction" covered only a part of what was referred to by the Article. The French wording of the Basic Proposal was perfectly correct and should not be changed by the Drafting Committee.

538. It was decided to refer the proposal of the Delegation of the United Kingdom reproduced in document DC/91/73 to the Drafting Committee. Article 8 was otherwise adopted as appearing in the Basic Proposal.
(Continued at 1852.2(v))

Article 9 - Stability

539. The PRESIDENT opened the debate on Article 9. He recalled that the Delegation of Germany had withdrawn the first part of its proposal reproduced in document DC/91/45, which was to delete the words "deemed to be." He invited comments on the second part of the proposal, which was to add a sentence indicating that the variety may be assumed to be stable under certain circumstances.

540. Mr. BURR (Germany) stated that the second part of the proposal was closely linked to the first part and thus superfluous if the first part was to continue to read: "The variety shall be deemed to be stable..." His Delegation therefore withdrew the complete proposal. However, it still had a number of other problems with the formulation in the Basic Proposal, but had not, however, as yet drafted a written proposal and would therefore like to have the possibility of returning subsequently to Article 9. The problem was that, according to Article 1(vi), the expression of characteristics was decisive for a variety, whereas Article 9 referred--and that was the first time--to the description. His Delegation was considering whether Article 9 ought not also to be related to the expression of the relevant characteristics.

541. The withdrawal of the proposal of the Delegation of Germany reproduced in document DC/91/45 was noted by the Conference.

542. The PRESIDENT invited the Delegation of Germany to submit its new proposal in time for consideration at the next meeting. He then opened the debate on the proposal of the Delegation of Poland reproduced in document DC/91/46.

543. Mr. DMOCHOWSKI (Poland) declared that the proposal of his Delegation to Article 9 reproduced in document DC/91/46 was linked with its proposal to Article 8, and since the latter had not been accepted, it should be regarded as void.

544. The Conference noted that the proposal of the Delegation of Poland reproduced in document DC/91/46 did not need further consideration.
545. The PRESIDENT then opened the debate on the proposal of the Delegation of Canada reproduced in document DC/91/57.
546. Mr. BRADNOCK (Canada) observed that the relevant discussion had already taken place in relation to Article 8. The proposal was therefore also withdrawn.
547. The withdrawal of the proposal of the Delegation of Canada reproduced in document DC/91/57 was noted by the Conference.
548. The PRESIDENT then opened the debate on the proposal of the Delegation of the United Kingdom reproduced in document DC/91/74.
549. Mr. HARVEY (United Kingdom) recalled that a decision to refer the matter to the Drafting Committee had been taken in relation to Article 8. That decision should also apply to the proposal relating to Article 9.
550. Consideration of Article 9 was suspended until the Delegation of Germany submitted a written proposal for amendment based on the explanations recorded in paragraph 540 above. (Continued at 563)

Article 10 - Filing of Applications

551. The PRESIDENT opened the debate on Article 10. He noted that no proposal for amendment had been tabled.
552. Mr. ROYON (CIOPORA) observed that Article 10 contained the provisions of Article 11 in the 1978 Act, with the exception of paragraph (3). CIOPORA saw no reason whatsoever for deleting that paragraph. If the principle of independence had not been included in the current text of the Convention, one could have inferred that it went without saying. But the fact that it appeared in the 1978 Act and was now deleted without any debate on the matter in the preparatory meetings might be interpreted as a demonstration of a specific will to depart from the principle. The legal notion of independence of national titles had been a valuable development in conventions concerning industrial property, and breeders considered that it was in their best interest that it be maintained as a fundamental principle. So, unless there should be serious and overwhelming reasons for deleting it, CIOPORA would welcome the maintenance of this principle by the Diplomatic Conference.
553. Mr. HOINKES (United States of America) indicated that his Delegation had recently submitted a proposal for Article 10 which had not yet been distributed. The proposal was in essence to incorporate the provisions of the

present Article 11(3) into the new Convention. It would say that the protection applied for with the authorities of different Contracting Parties by breeders should be independent of the protection obtained for the same variety in other Contracting Parties or in States that were not members of the Union.

554. The PRESIDENT invited the Delegation of the United States of America to submit its proposal for amendment in time for consideration at the next meeting.

555. Mr. WINTER (COMASSO) wished to take the opportunity of supporting the suggestion by CIOPORA and to thank the Delegation of the United States of America explicitly for the inclusion of that item.

556. Mr. ROTH (GIFAP) stated that GIFAP also supported the opinion of CIOPORA and thanked the Delegation of the United States of America.

557. Mr. DONNENWIRTH (ASSINSEL) stated that ASSINSEL also supported the position of the Delegation of the United States of America.

558. Mr. BOGSCH (Secretary-General of UPOV) drew the attention of the Conference to a few curiosities in the present text which were partly the reason for which the provision had been omitted. The first and foremost reason for the omission was of course that it went without saying that there was a principle of independence. But Article 11(3) of the present text related that principle to "the protection applied for in different member States." It then stated that the applications were independent "of the protection obtained," but not of the protection refused, which was far more important. If the principle of independence was to be expressed in the Convention, it should do so in a quite different way.

559. Mr. HOINKES (United States of America) stated that his Delegation would be more than happy to entertain any improvement that Mr. Bogsch (Secretary-General of UPOV) could lend to its proposal so that it would become a true expression of the principle of independence.

560. Mr. HEINEN (Germany) explained that it was the view of his Delegation that Article 11(3) of the present text was not reproduced in Article 10 of the Basic Proposal because it was both badly formulated and also superfluous. It was obvious that if a right was applied for and granted in a member State, then that could only be done under the law of that State.

561. Mr. BOGSCH (Secretary-General of UPOV) stated that the true meaning of independence was in his view the simple fact that one could not refuse protection in a country on the ground that protection had been refused in another one. But to provide in addition that it could be granted because it had been granted in another country was in contradiction to existing systems. Yet British patents could be re-registered in certain Commonwealth countries, and this was the most obvious negation of the principle of independence under the Paris Convention for the Protection of Industrial Property. However, this

was accepted by the patent community because it was to the advantage of the inventors. He reiterated in conclusion his advice that the drafting of the provision should be carefully considered.

562. Mr. SCHENNEN (Germany) referred, to complement the explanations given by Mr. Bogsch (Secretary-General of UPOV), to the fact that Article 4bis of the Paris Convention for the Protection of Industrial Property laid down an additional provision, that was to say with respect to the grounds for nullity and lapse, i.e., the negative facts referred to by him which could impair the legal validity of a right. The same applied to the duration. (Continued at 569)

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Article 9 - Stability (Continued from 550)

563. The PRESIDENT opened the debate on the proposal of the Delegation of Germany, which was now available in writing as document DC/91/87.

564. Mr. BURR (Germany) thanked the Secretariat for its willingness and for its drafting of the proposal for the meeting. He observed that he had already explained that the essential matter was improved harmonization of the formulation with the probable outcome of discussions in the Working Group on Article 1.

565. Mr. BOULD (United Kingdom) felt that the new proposed wording was a big improvement over the original one. He suggested, however, to delete the phrase "the expressions of" in order to be consistent with the wording used in the definition of uniformity given in Article 8. Otherwise his Delegation was content with the proposal.

566. Mr. LLOYD (Australia) also supported the amendment proposed by the Delegation of Germany since it gave a more precise definition of stability. However, he felt like Mr. Bould (United Kingdom) that the phrase "the expressions of" was somewhat superfluous, but he had no strong opinion about leaving or deleting it.

567. The PRESIDENT suggested that the Conference should adopt the amendment proposed by the Delegation of Germany without the words "the expressions of."

568. The proposal of the Delegation of Germany reproduced in document DC/91/87 was adopted by consensus, without the words "the expressions of." (Continued at 1852.2(v))

Article 10 - Filing of Applications (Continued from 562)

569. The PRESIDENT reopened the debate on Article 10 and invited the Delegation of the United States of America to introduce its proposal reproduced in document DC/91/83.

570. Mr. HOINKES (United States of America) stated that the notion of the independence of different titles of protection in different countries should continue to appear in the Convention, even though it could be said that this "went without saying." It was somewhat difficult to make that argument now in view of the fact that a provision on independence existed in the 1978 Act of the Convention. Mr. Royon (CIOPORA) and others had been convincing in arguing that a different conclusion could be drawn from the deletion of this particular provision from the Basic Proposal. Mr. Hoinkes further stated that he fully agreed with the comments made by Mr. Bogsch (Secretary-General of UPOV) that the present provision in Article 11(3) was not particularly well worded. He hoped that the proposal reproduced in document DC/91/83 represented an improvement over the existing text.

571. Mr. BOGSCH (Secretary-General of UPOV) stated that the proposal was a good one. He suggested that the final part should read: "in any other Contracting Party or in a State that is not a Contracting Party" because otherwise States which were members of the Union but not Contracting Parties would not be covered.

572.1 Mr. HEINEN (Germany) pointed out that his Delegation had already explained that it held such a provision to be superfluous. Such a provision also led to confusion insofar as Article 5(2) already stipulated quite clearly that the grant of a breeder's right could not be made dependent on any further or different conditions than those listed in Article 5(1). The authorities of the State with whom an application was filed had therefore only to examine whether those conditions had been met. That meant, without any doubt, that the possibility of a different authority deciding differently played no part in the decision of the competent authority. That competent authority could of course adopt the decision that had already been taken by the authority of another State, but then it would still take its own decision.

572.2 The effect of that comprehensive provision contained in Article 5 would be limited if further provisions on the same matter were contained in some other Article. Such provisions were unnecessary and, since they were unnecessary, should be deleted. Should a corresponding deletion be made in accordance with the Basic Proposal due to there being no need for such provisions--and not because it was wished to assume a basically different stance--then that would be recorded in the minutes and anyone could make a reference to it. It would therefore not lead to confusion. However, despite all that, should there be further discussion on such a superfluous provision, then it was the view of the Delegation of Germany that it belonged in Article 5 in view of the context.

573. Mr. BOGSCH (Secretary-General of UPOV) stated that he fully agreed with Mr. Heinen (Germany), but that exactly the same argument could be raised in respect of paragraphs (1) and (2). The only reason for the proposal of the

Delegation of the United States of America was that since Article 11 of the present text contained three superfluous paragraphs, it was not appropriate to retain only two of them.

574. Mr. SCHENNEN (Germany) replied that the concern of his Delegation was primarily to make it clear that Article 5 afforded the breeder a subjective right to the grant of a breeder's right if he satisfied the requirements stipulated therein, irrespective of whether a paragraph (3) was inserted in Article 10.

575. Mr. ROYON (CIOPORA) observed that CIOPORA did not share the views of the Delegation of Germany. It might go without saying that there was a principle of independence and that it was maintained; but it would be better to state the principle. Moreover, the provisions of Article 5 which had been referred to concerned the grant, whereas the principle of independence went beyond that into e.g. the enforcement of the right.

576. The PRESIDENT asked whether the proposal of the Delegation of the United States of America was supported.

577. Mr. LLOYD (Australia) stated that his Delegation fully supported the views of the Delegation of the United States of America and felt that the issue should be stated and not left to implication. It also understood the point raised by Mr. Bogsch (Secretary-General of UPOV) concerning the difference between "member of the Union" and "Contracting Party" and believed that the amendment proposed by him would be an improvement.

578. Mr. BRADNOCK (Canada) supported the proposal of the Delegation of the United States of America as edited by Mr. Bogsch (Secretary-General of UPOV).

579. Mr. ESPENHAIN (Denmark) stated that his Delegation thought that the issue should be covered or was covered in Article 5(2), but it nevertheless supported the proposal of the Delegation of the United States of America.

580. Mr. HARVEY (United Kingdom) stated that his Delegation supported the proposal of the Delegation of the United States of America as amended by Mr. Bogsch (Secretary-General of UPOV).

581. Mrs. JENNI (Switzerland) said that her Delegation supported the proposal made by the Delegation of the United States of America in the form amended by Mr. Bogsch (Secretary-General of UPOV).

582. Mr. O'DONOHUE (Ireland) stated that his Delegation also supported the proposal as amended.

583. Mr. DONNENWIRTH (ASSINSEL) stated that ASSINSEL supported the proposal of the Delegation of the United States of America as amended by Mr. Bogsch (Secretary-General of UPOV).

584. Mr. NAITO (Japan) stated that his Delegation equally supported the proposal of the Delegation of the United States of America with the amendment made by Mr. Bogsch (Secretary-General of UPOV). He further observed that Article 19 provided for the minimum duration of the breeder's right, without specifying the situation in the event of a longer period being offered by a Contracting Party. Without a provision as proposed by the Delegation of the United States of America, such Contracting Party might be free to shorten the duration in a particular case by reason of some event arising in another country. Therefore, the provision was not superfluous.

585. The proposal of the Delegation of the United States of America reproduced in document DC/91/83, as amended according to the suggestion of Mr. Bogsch (Secretary-General of UPOV) recorded in paragraph 571 above, was adopted by 12 votes for, two votes against and three abstentions.

Article 11 - Right of Priority

Article 11(1) - The Right; Its Period

586. The PRESIDENT opened the debate on Article 11(1) and invited the Delegation of the United States of America to introduce its proposal reproduced in document DC/91/7.

587. Mr. HOINKES (United States of America) stated that, as was well known from previous discussions on the Basic Proposal, the United States of America was in need of a provision to make clear that plant patents, on the basis of which protection was granted in the United States of America with respect to asexually reproduced plant varieties, could be the basis for priority claims in other Contracting Parties. For that reason, his Delegation proposed to include in the final text of Article 11(1) the words appearing in square brackets in the Basic Proposal.

588. Mr. PALESTINI (Italy) stated that his Delegation fully supported the proposal of the Delegation of the United States of America.

589.1 Mr. NAITO (Japan) stated that his Delegation was not in favor of the inclusion in the final text of the words in square brackets, as proposed by the Delegation of the United States of America. Its first concern was the treatment of utility patents. The proposal had been substantiated on the basis of a need arising from the existence of plant patents. However, the words: "another title of protection for a variety" might cover utility patents. The present text of the Convention was silent on the right of priority based on utility patents, and the Delegation of Japan considered that the treatment of utility patents was outside the scope of the Convention.

589.2 The second concern, Mr. Naito said, related to the plant patent itself. A breeder from the United States of America could enjoy a right of priority for asexually reproduced varieties in Japan. However, a breeder from Japan could not enjoy that right for asexually reproduced varieties being the subject of a plant patent application in the United States of America. Acceptance of the proposal might therefore entail the risk for the Government of Japan to be criticized of admitting unequal treatment. This might also be the case in other countries.

590. Mr. BURR (Germany) remarked that his Delegation had problems similar to those of the Delegation of Japan. The formulation "for another title of protection" went too far and would refer, for instance, also to a trademark. If it were to read "for another corresponding right," the member States would at least have the possibility of limiting the scope of the provision. However, there was a further problem with industrial patents: how could one ensure that the subject matter of a claim in a patent application was the same as the subject matter of an application for a breeder's right? How could one ensure that the subject matter of the claim satisfied the requirements of distinctness, uniformity and stability?

591. Mrs. JENNI (Switzerland) said that her Delegation supported the proposal made by the Delegation of the United States of America. In her country, priority was already dealt with in the manner proposed.

592. Mr. KIEWIET (Netherlands) stated that his Delegation could not support the proposal of the Delegation of the United States of America, mainly for the reasons explained by Mr. Naito (Japan) and Mr. Burr (Germany). The proposed text was too general and created problems not only in relation to plant patents, but also to utility patents and other forms of intellectual property rights. And as long as there was no guarantee of reciprocity, there should be no regulation like the one proposed in the Convention. Finally, the text as presented could be read at least as an acknowledgement of the possibility of granting, for instance, utility patents for plant varieties; in line with the considerations which led to the adoption of the new text of Article 2, the Convention should be silent on that point.

593. Mr. BRADNOCK (Canada) supported the proposal of the Delegation of the United States of America. If one wished to move towards reciprocity between different forms of protection, somebody had to move first. The proposal was a step in the right direction.

594. Mr. VON ARNOLD (Sweden) stated that, although his Delegation was sympathetic to the wish of the Delegation of the United States of America to have plant patents treated as plant breeders' rights in other UPOV member States, it had the same concern as the Delegations of Japan, Germany and of the Netherlands concerning utility patents and other intellectual property rights, and also concerning the matter of reciprocity. It could therefore not support the proposal in its present form.

595. Mr. WHITMORE (New Zealand) declared that the concept of allowing priority to be claimed in respect of an earlier patent application, as distinct

from an earlier application for plant variety protection, was interesting and worthy of consideration. However, it gave rise to a number of questions as explained by previous speakers. His Delegation felt that for UPOV to recognize earlier patent applications, the patent authorities should reciprocate. It suspected that patent authorities might face greater difficulties in this matter than would plant variety protection authorities. The proposal, as interesting as it was, came too late to allow adequate time to study it and its consequences. His Delegation could not, therefore, support the proposal, but the concept could perhaps be studied further by interested parties and brought up at a future UPOV Diplomatic Conference.

596.1 Mr. HOINKES (United States of America) wished to address some of the points made by the previous speakers. First of all, the proposal, although not part of the Basic Proposal, was certainly reflected in that document and had been so for the better part of one year. It therefore did not come as a surprise. Furthermore, if it was left to a future Diplomatic Conference, there would be a problem in the United States of America with respect to the ability to claim priority on the basis of plant patent applications, and then, obviously, a problem with respect to the ratification of the new UPOV Convention.

596.2 With respect to utility patents, Mr. Hoinkes admitted that there was a lack of symmetry in the proposal, but, for the purposes under consideration, that was unimportant. The possibility that a utility patent application for a plant variety would be used as a priority document in another country in respect of a plant breeder's right application and that the variety disclosed in the utility patent application might not meet the requirements of distinctness, uniformity and stability should not give rise to any concern. In such a case, the variety may not have been adequately disclosed in the utility patent application, and therefore the granting of the priority could very well be questioned in the second country.

596.3 Concerning the fact that Article 11 as amended could be seen as an encouragement to grant utility patents, there was only one answer, namely that it was a fact that, in some countries, including the United States of America, the possibility of granting utility patents for plant varieties did exist. That did not mean, however, that there had been a rush on the patent office and a flow of applications for the grant of utility patents for plant varieties. As a matter of fact, there were very few such applications. And since the proposed wording did not specifically refer to utility patents, it could hardly be interpreted as an encouragement to file such applications.

596.4 The reported unfairness resulting from the fact that plant patent applicants in the United States of America might be able to obtain priority in other countries while breeders from other countries could not obtain priority in the United States of America in respect of plant patent applications had to be rejected. Mr. Hoinkes showed in this respect that a United States plant patent had been granted to a Japanese breeder on July 11, 1989, in which the foreign application claimed for priority was a Japanese plant breeder's right application. He concluded that the charge of unfairness was more than amply rebutted by this particular evidence.

596.5 Finally, Mr. Hoinkes reaffirmed that the amendment proposed by his Delegation was needed and would not hurt anybody. As a matter of fact, the present Convention already provided for the suggested solution since it

referred to "a breeder who has duly filed an application for protection." The same was true for the proposed EC regulation for Community plant variety rights.

597.1 Mr. ESPENHAIN (Denmark) said that his authority had carefully discussed with the patent office the possibility of granting reciprocity in relation to priority. Like many others, his Delegation had difficulties with the very broad formulation that was being proposed. For the proposal to be acceptable, it would have to be amended properly, and probably be supplemented by the requirement that material of the variety should be deposited. Priority was commonly used by breeders, and the Delegation of Denmark fully supported this possibility. But it was up to the breeder to ensure that the material for which he claimed priority did exist, and did exist in the form of a variety. His Delegation was very strict on this condition.

597.2 With respect to plant patents, Mr. Espenhain stated that there was no problem. In the implementation of Danish legislation, the plant patent applications of the United States of America were already fully recognized as priority documents because that kind of patent conformed to the UPOV Convention. Problems arose, however, in relation to other rights, such as utility patents and trademarks, as mentioned by the Delegation of Germany. His own Delegation could not support the proposal. If it were to be pursued, his Delegation wished to reserve its right to submit a proposal on the deposit of plant material.

598.1 Miss BUSTIN (France) observed that Article 11 constituted a whole. Its paragraph (3) afforded advantages to applicants who had submitted an application comprising a priority claim derived from the implementation of the system established by the Convention, in particular the existence of technical examination. The amendment proposed by the Delegation of the United States of America could be acceptable if it were altered in such a way as to make it either more restrictive with respect to the other applications for titles of protection on which the claim could be based or to make it optional in order to free a State receiving such a priority claim from the related obligations laid down in paragraph (3).

598.2 It was in fact not sure whether France would be able to grant in all cases the advantages deriving from paragraph (3) nor even whether it would be able to decide unilaterally now to open up, without reciprocity, the priority system to applications for industrial patents. Therefore, the amendment in its present state could not be supported by the Delegation of France.

599. Mr. HEINEN (Germany) asked the Delegation of the United States of America whether it would be able to accept, in order to introduce a restriction, the replacement of "another title of protection" by "a corresponding right."

600. Mr. NAITO (Japan) reiterated his point on the importance of reciprocity. It would not be sufficient for reciprocity to exist as a result of the practice of the administration of another State; it was of utmost importance to ensure reciprocity in the provision itself.

601. Mr. HOINKES (United States of America) observed that trademarks were not titles of protection for plant varieties. A trademark, by definition, did not protect the goods themselves, but only identified the source of those goods. He recalled that the present Convention already granted priority for plant patent applications from the United States of America, so that Article 11 as appearing in the Basic Proposal would in fact change the status quo. However, he understood that there might be some discomfort with the language as presently proposed and he wondered whether a formulation such as: "Any breeder who has duly filed an application for the protection of a plant variety in one of the Contracting Parties" might not be more acceptable to the other Delegations.

602. Mr. KIM (Republic of Korea) stated that his Delegation supported the proposal made by the Delegation of the United States of America concerning Article 11(1) because the patent law of his country provided for the protection of asexually propagated plants in a way similar to the United States plant patent system.

603. Mr. ORDOÑEZ (Argentina) said that the plant variety protection office of his country applied the priority rules in relation to the United States plant patents. He noted with satisfaction that the example given by Mr. Hoinkes (United States of America) showed that the United States of America was providing reciprocity. Yet his Delegation looked with sympathy to the proposal of the Delegations of Denmark, France and Germany to restrict the scope of "another title of protection."

604. Mr. KIEWIET (Netherlands) asked the Delegation of the United States of America whether its new amendment was in essence another proposal. He considered that the proposal remained the same, just with different words. He therefore maintained his objections. He suggested, however, that a solution might be to link Article 11 to Article 35, which dealt with the specific situation in the United States of America in relation to plant patents for asexually reproduced plants.

605.1 Mr. VON PECHMANN (AIPPI) said that the matter raised was of absolute significance for his organization. AIPPI fully supported the proposal made by the Delegation of the United States of America and considered that the formulation of document DC/91/7 with regard to the relevant title of protection was clear. The use of the term "corresponding title of protection" suggested by the Delegation of Germany would not defuse the problems that had arisen and it would not be necessary to choose a different formulation. The point was in fact whether the original application on which priority was based contained sufficient disclosure for the variety. It was a fact, however, that the requirements for a patent application were considerably more stringent with regard to written disclosure than for an application for plant variety protection. There would therefore be no difficulty in that respect.

605.2 Mr. von Pechmann further pointed out that the principle of claiming priority of a patent application already existed in Germany in connection with the extension of the list of species under the Plant Variety Protection Law. In the case of species that had not been already included in the list, it had been possible in Germany to submit an application for a patent. As soon as the species in question had been included in the list, it had been possible to

convert the patent application into an application for plant variety protection and to claim the priority of that first application. That had never lead to any practical difficulties. The objections that had been raised were therefore unfounded.

606. Mr. ROYON (CIOPORA) recalled that he had already referred to the inappropriateness of the expression "breeder's right" and pointed out that "title of protection," with an appropriate definition, would have been much better. CIOPORA feared that the Convention would suffer for many years from a wrong choice of words. It therefore supported the proposal and the idea that the right of priority should be independent from the form of protection. The members of CIOPORA deployed their activities on an international level in ornamental and fruit tree varieties. They wished to obtain protection on the American continent first, mostly on the basis of plant patents and occasionally on the basis of utility patents, and wished to be able to resort to the priority provisions of the Convention with their first applications filed in the United States of America. It was therefore essential to do something immediately, without deferring the decision as suggested in a previous intervention by Mr. Whitmore (New Zealand).

607.1 Mr. TESCHEMACHER (EPO) observed that the discussion gave the impression that the only issue under consideration in relation to the proposal of the Delegation of the United States of America was the problem arising from the fact that the United States of America granted utility patents for varieties. This was not the only problem. In future, there would be patent applications disclosing not only a broad genetic development, e.g. concerning a specific gene, but also a specific variety, e.g. in the form of a known variety transformed with the gene. The maintainance of the attractions of the plant variety protection system required that priority also be given to such kind of applications.

607.2 Mr. Teschemacher further observed that the question of reciprocity only arose when the patent system in a given country provided that plant varieties were eligible for a patent. Where a patent system allowed varieties to be patented, it was also necessary to enhance the attractions of the patent system by granting priority on the basis of an earlier application for a breeder's right. It was thus in its own interest that the patent system should accept the priority of an application for a breeder's right as far as this was applicable. But, in most countries, the question did not arise, and therefore it was not relevant in the context of this Conference, for those countries.

608. Mr. GROSS (UNICE) expressed UNICE's firm support for the proposal made by the Delegation of the United States of America. Mr. Hoinkes (United States of America) had given convincing justification for the proposal. Mr. Gross felt that the doubts expressed by various Delegations had been removed by the explanations given by Mr. Teschemacher (EPO). In addition, it had also to be pointed out that whether or not a priority right was recognized was decided on a case-by-case basis even if that right was anchored in a Convention. Finally, Mr. Gross had some doubts as to the use of the term "corresponding title of protection," as proposed by the Delegation of Germany, particularly since that would create more confusion than clarity.

609. Mr. JOHNSON (FICPI) indicated that FICPI fully supported the proposal of the Delegation of the United States of America for the reasons given by the representatives of AIPPI, the EPO and UNICE.

610. Mr. SCHUMACHER (GIFAP) announced that GIFAP fully supported the proposal made by the Delegation of the United States of America. The reasons for the proposal had been very clearly set out by that Delegation as also by the representatives of the EPO and of AIPPI.

611. Mr. DAVIES (UPEPI) stated that UPEPI also agreed that the proposal was a good one in either version. He further stressed again that a legitimate claim to priority was only one which could be supported under the terms of paragraph (3) of Article 11.

612. Mr. SMOLDERS (ICC) said that ICC also fully supported the proposal for the reasons given by the Delegation of the United States of America and the representatives of the EPO, AIPPI and UNICE.

613. The PRESIDENT wished to concentrate the debate on the proposal reproduced in document DC/91/7 as subsequently amended by the Delegation of the United States of America to read: "Any breeder who has duly filed an application for the protection of a plant variety in one of the Contracting Parties..." (The proposal as amended was subsequently tabled as **document DC/91/93.**)

614. Mr. HOINKES (United States of America) confirmed that his Delegation would be pleased to amend its original proposal in order to come closer to the wishes expressed by other Delegations.

615. Mr. NAITO (Japan) stated that the amended proposal of the Delegation of the United States of America had not dissolved the basic concerns of his Delegation with regard to the change of the status quo. In the current text of the Convention, reciprocity existed between plant patents and plant breeders' rights. In the Basic Proposal, there was no longer any reciprocity with plant patents. However, the proposal of the Delegation of the United States of America implied two changes: one was the possible extension of the right of priority to utility patents and the other was the possible grant of the right of priority to plant patents and not to breeders' rights. It was therefore necessary in the opinion of his Delegation to fill the gap in order to make the situation balanced.

616. Mr. BURR (Germany) requested postponement of further discussion and of the decision until the amended proposal was available in writing.

617. Mr. BOGSCH (Secretary-General of UPOV) stated that he was deeply impressed by the fact that all the users of the system were in favor of liberalizing or confirming the liberal status of the priority system. He wondered why their wish should not prevail. He admitted, however, that the deletion of the present Article 2(1) caused some apprehension, but it had to be recognized

that the present text of Article 12(1) read as follows: "Any breeder who has duly filed an application for protection..." The amended proposal of the Delegation of the United States of America was to add the words "of a variety," which was in fact an unnecessary clarification. The essence of the proposal was therefore to go back to the present text, which had been found satisfactory for some 30 years.

618. The PRESIDENT suspended the discussion on the amended proposal of the Delegation of the United States of America pending distribution of its text in written form. (Continued at 665)

[Suspension]

619. The PRESIDENT opened the debate on the proposal of the Delegation of the Netherlands reproduced in **document DC/91/58**.

620. Mr. HIJMANS (Netherlands) explained that the period of one year which was in the present text should be extended to 18 months for the following reasons. The right of priority under breeders' rights laws was not the same as the right of priority under patent laws. In relation to plant varieties, the right of priority was intended to give a breeder who had applied for a breeder's right the possibility of testing the variety further before making applications in other countries. Such testing by the breeder himself took one growing season. One year, as in the present text, was in fact not enough to cover that season, not only because of its length and of climatic vagaries, but also because additional time was needed to exploit the data of the tests and make the relevant applications for protection.

621. Mr. VISSER (South Africa) stated that his Delegation supported the proposal of the Delegation of the Netherlands. For a country in the southern hemisphere, it was quite relevant to have a longer period to take account of the inversion of seasons.

622. Mr. WINTER (COMASSO) said that COMASSO also supported, without reservation, for technical reasons, the proposal made by the Delegation of the Netherlands although it was of the opinion that there was also a technical justification for a 24-month time limit. Nevertheless, the proposed 18 months were indeed an acceptable compromise.

623. Mr. LE BUANEC (ASSINSEL) said that ASSINSEL likewise considered the proposal to be a good one, although it would have preferred a 24-month limit.

624. The proposal of the Delegation of the Netherlands reproduced in document DC/91/58 was rejected by six votes for, seven votes against and five abstentions.

Article 11(2) - Claiming the Right of Priority

625. The PRESIDENT opened the debate on Article 11(2) and invited the Delegation of Japan to introduce its proposal reproduced in document DC/91/47.

626. Mr. NAITO (Japan) explained that, according to the discussion held at the 27th session of the Administrative and Legal Committee, the words "not earlier than" had been inserted in the second sentence in order to enable Contracting Parties to lay down a time limit of their choice, provided that it was not less than three months. His Delegation wished to propose simply to make the sense clearer to avoid misunderstandings.

627. Mr. WHITMORE (New Zealand) stated that his Delegation was unhappy with the wording in the Basic Proposal. The suggestion of the Delegation of Japan was constructive and represented an improvement which was seconded by his Delegation.

628. The PRESIDENT put the proposal to a vote. He noted that there was no objection to it.

629. The proposal of the Delegation of Japan reproduced in document DC/91/47 was adopted by consensus.

630. The PRESIDENT then opened the debate on the proposal of the Delegation of Germany reproduced in document DC/91/59.

631. Mr. HEINEN (Germany) explained that the aim of the proposal, as also that of the proposal of the Delegation of Japan that had just been dealt with, was to formulate the wording in a clearer fashion. No substantive change was intended. Use of the term "right of priority" made the reference to paragraph (1) unnecessary and improved the readability of the provision. His Delegation further wished to draft the beginning of the second sentence in a clearer manner. In place of the passive statement: "the breeder may be required" it should read: "the authority ... may require the breeder." The authority concerned had also been specified, that was to say the authority with which the subsequent application had been filed.

632. Mr. BURR (Germany) added that in the introduction, that was to say the reference to the priority right under paragraph (1), the English and French versions had originally differed from the German version and that his Delegation had endeavored to achieve uniformity.

633. Mr. BOGSCH (Secretary-General of UPOV) underlined that both elements of the proposal were improvements to the Basic Proposal.

634. The proposal of the Delegation of Germany reproduced in document DC/91/59 was adopted by consensus.

635. Mr. ESPENHAIN (Denmark) wished to ensure that he might have an opportunity to come back to this paragraph as a follow-up to the still outstanding discussion on paragraph (1) and the amended proposal of the Delegation of the United States of America. If the principle of allowing priority from various kinds of applications for protection was accepted, his Delegation would wish to have some guarantees on the validity of the priority claims. It might propose to add to paragraph (2) some words to the effect that the authority could also require a proof of the deposit of plant material of the variety as a proof of the existence of the variety.

636. The PRESIDENT stated that the Delegation of Denmark would be able to come back to Article 11(2) in the circumstances described. (Continued at 719)

Article 11(3) and (4) - Documents and Material; Events Occurring During the Period of Priority

637. The PRESIDENT observed that no proposal for the amendment of Article 11(3) and (4) had been tabled. He therefore declared those provisions adopted as appearing in the Basic Proposal.

638. The conclusion of the President was noted by the Conference. (Continued at 1852.3)

639. Mr. ROYON (CIOPORA) stated that CIOPORA would prefer the word "acts" rather than "events" because the latter suggested something beyond one's control and the former would be more appropriate in the context of this Article. Paragraph (4) had also been truncated by the deletion of the phrase: "or to any right of personal possession" which was in the original text of the Convention. As in the case of the independence of titles of protection (Article 10), CIOPORA was concerned that that deletion might de facto represent, or be interpreted as, a specific limitation to the right of priority granted under the Convention, while such a problem had never been raised or discussed. Therefore, unless there was an overwhelming reason for it, CIOPORA would object to the deletion.

Article 12 - Examination of the Application

640. The PRESIDENT opened the debate on Article 12 and invited the Delegation of Germany to introduce its proposal reproduced in document DC/91/64.

641. Mr. HEINEN (Germany) explained that an attempt had been made to improve the text. The concern was how to best make reference to other provisions. Article 5 enumerated the requirements for protection and Articles 6 to 9 set out the detail. One could therefore proceed in different manners by referring solely to Article 5, by referring to Articles 5 to 9 or also by referring to Articles 6 to 9. The reference to Articles 5 to 9 had the disadvantage of not expressing the fact that Article 5 summarized the requirements

set out in greater detail in the subsequent Articles. The aim of the proposed new drafting was to express that point clearly.

642. The PRESIDENT asked whether the proposal was seconded.

643. Mr. ÖSTER (Sweden) seconded the proposal.

644. The PRESIDENT then asked whether the proposal was opposed. This not being the case, he declared it adopted and concluded that the proposal of the Delegation of Poland reproduced in document DC/91/48 had become redundant.

645. The conclusion of the President was noted with approval by the Conference.

646. Mr. BURR (Germany) pointed out that his Delegation had submitted a further proposal to the Secretariat. It concerned the addition of a sentence at the end of the Article to correspond with the sentence that had been withdrawn during the discussions on Article 9 (see document DC/91/45). The withdrawal had resulted from the view that the sentence was not in its right place in Article 9 and that it belonged in Article 12. Mr. Burr asked to be given the opportunity of returning once more to Article 12. (Continued at 740)

Article 13 - Provisional Protection

647. The PRESIDENT opened the debate on Article 13 and invited the Delegation of the United States of America to introduce its proposal reproduced in document DC/91/8.

648. Mr. HOINKES (United States of America) stated that there were several reasons for the proposed deletion of the word "expressly" in the last sentence. The concept of a notification was certainly useful, but that of an express notification by the breeder to each and every potential or actual infringer being required before provisional protection took effect would put the breeder at a distinct disadvantage. It appeared to his Delegation unreasonable to require express notification of all potential infringers; Contracting Parties should be free to provide that a notice by the breeder to the public should suffice. In the United States of America for instance, the notice to the public could be done by fixing some warning to the material enjoying provisional protection. If there was no such warning, then express notice to a particular party who was an infringer should or might be required in order to activate provisional protection; but that particular situation could be left to implementing legislation.

649. Mr. VIRION (Poland) introduced the proposal made by his Delegation in document DC/91/49 and emphasized that, just as the Delegation of the United States of America, his Delegation had felt that it would be somewhat exaggerated to require a breeder to enter into contact, particularly in another

country, with all potential users of his variety. It had therefore proposed that the last sentence be deleted. However, it would be able to go along with the proposal made by the Delegation of the United States of America since a public notification could suffice.

650. Mr. BOGSCH (Secretary-General of UPOV) wondered whether the proposal of the Delegation of the United States of America achieved what was intended. If the text said that the measure "shall only take effect in relation to parties whom ... the breeder has notified of the filing of the application," a public notice could not be called a notification to a given party.

651. Mr. HOINKES (United States of America) said that he took the point made by Mr. Bogsch (Secretary-General of UPOV). In the United States of America, a notification on a sack of seed, for instance, that protection had been applied for was considered to be a constructive notice by which parties were presumed to have been informed of the particular situation. Therefore, the sentence without the term "expressly" could stay as it was.

652. Mr. VON ARNOLD (Sweden) stated that, in view of the reference made by Mr. Virion (Poland) to the difficulties to be faced by a breeder having to make notifications to potential infringers in a country other than his own, his Delegation would be inclined to support the proposal of the Delegation of Poland in the event that it was still on the table.

653. Mr. VIRION (Poland) said that once applications for protection had been published, all persons and undertakings concerned would be informed of the applications. It should not therefore be necessary to have a special notification.

654. Mr. KIEWIET (Netherlands) stated that the Conference should endeavor to harmonize as much as possible the regulations made by Contracting Parties under the Convention. His Delegation was therefore in principle opposed to a provision which gave member States a possibility to deviate from certain rules laid down in the Convention and favored the proposal of the Delegation of Poland. The deletion of the last sentence would also strengthen the position of the breeder and be consistent with the general objective of the Conference.

655. Mr. HOINKES (United States of America) stated that his Delegation had some problems with the proposal of the Delegation of Poland because it would unnecessarily punish the innocent infringer, who had absolutely no idea that an application had been filed for the protection of a plant variety. The innocent infringer should not be hit with the same measures as should one who knew that an application had been filed and who knowingly committed an infringement. For that reason, the concept of a notice was a valuable one. The notification might either be a constructive notification--a notification to the public--or an express notification. If the applicant saw that somebody else was using his plant variety without authorization, there was nothing in the last sentence of Article 13, with or without the word "expressly," to preclude him from notifying the user and asking him to desist. If the user did not desist, the provisional protection rules would apply in full from the date of notification.

656. Miss BUSTIN (France) stated that, from a strictly legal point of view, her Delegation was altogether able to support the proposal made by the Delegation of Poland. From a practical point of view, however, it had to oppose the proposal. Whether the sentence be maintained or deleted, in numerous countries only a person who had acted knowingly or in bad faith was guilty of an infringement. Application of that condition by the various judicial instances in France took the form of the requirement, in relation with infringement proceedings, that notification be made to the alleged infringer. The sentence could therefore be deleted, but that would not be intellectually honest since it would give breeders the illusion that they could do without such notification.

657. Mr. WINTER (COMASSO) stated that his organization considered that the proposal of the Delegation of Poland certainly warranted reflection and that it was best for the interests of breeders. Since the grant of protection did not have to be the subject of a specific communication to any users of seed of the protected variety, deletion of the last sentence would establish the same situation for infringements during the period in which the application was pending. The proposal was therefore justified.

658. Mr. GOUGÉ (France) wished to emphasize the fact that the alleged infringer could only be prosecuted and convicted if he had indeed known of the rights he was infringing. That applied just as much to new plant varieties as to patents and trademarks, as far as the provisional protection was concerned.

659. Mr. ROYON (CIOPORA) said that his organization shared the point of view expressed by the Delegates of France. However, in some cases the fact of having knowledge, under the principles of domestic legislation, could be assessed differently depending on the position of the alleged infringer within the trade circuit. It was interesting to note that in Germany a court decision had established as a principle that a farmer who released new varieties as a profession was presumed to know whether a given new variety was protected. CIOPORA therefore felt, generally, that omission of the last sentence was likely to create the false illusion--as very well explained by Miss Bustin (France)--for the breeders that they had gained an advantage.

660. Mr. BOGSCH (Secretary-General of UPOV) observed that there was a difference between being responsible only when one knew and being responsible only when one had been notified by the breeder. Mr. Winter (COMASSO) had indicated that one could know from other sources, in particular from the official journal of the authority. The user might be told by the seller who was not the breeder that he had bought a protected variety. Knowledge did not therefore have to come necessarily and exclusively from a notification from the breeder.

661. The PRESIDENT wished to close the debate on Article 13 and to put the proposals to a vote.

662. The proposal of the Delegation of Poland reproduced in document DC/91/49 was rejected by three votes for, ten votes against and five abstentions.

663. The proposal of the Delegation of the United States of America reproduced in document DC/91/8 was adopted by consensus. Article 12 was thus adopted as appearing in the said document.

664. Mr. SLOCOCK (AIPH) stated that AIPH felt very strongly that the provisional protection period--certainly if it was exercised in favor of the breeder and if he received additional remuneration--should form part of the duration of protection as defined under Article 19. It was fully aware that there was no proposal to that effect in relation to Article 13, but hoped that if any of the member States were attracted to this idea, it would take it up in relation to Article 19.

Article 11(1) - Right of Priority; Its Duration (Continued from 618)

665. The PRESIDENT reopened the debate on Article 11(1) and referred to the fact that the amended proposal of the United States of America was now available as document DC/91/93.

666. Mr. WHITMORE (New Zealand) stated that his Delegation agreed with the view expressed earlier by Mr. Kiewiet (Netherlands) that the amended proposal of the Delegation of the United States of America was the same in substance as the previous one. It therefore could still not support it. He pointed out for the purpose of clarifying the position of his Delegation that its misgivings would be overcome if it were assured by utility patent authorities that they would recognize applications for breeders' rights as priority-establishing documents.

667. Mr. LLOYD (Australia) stated that his Delegation fully supported the proposal for the reasons outlined by the Delegation of the United States of America and the representative of the EPO, since Australia granted patent protection to plant varieties.

668.1 Mr. KIEWIET (Netherlands) stated that, whilst it had expressed itself rather firmly against the proposal of the Delegation of the United States of America, his Delegation had changed its mind in the meantime. It now had more sympathy for the proposal since it was realized that its wording did not differ significantly from the text in the 1978 Act. It still felt that the proposal could be amended even further so that it would be more acceptable to his and other Delegations.

668.2 The problem was the fear that the right of priority might be derived from an application for a utility patent which might not be related to an existing variety. To avoid that a so-called "paper application" would be the basis for a right of priority, his Delegation would like to introduce the following in the text of the proposal of the Delegation of the United States of America after "(the 'first application')": "and deposited in connection with that application material of that variety." Then it would be clear that only an application for an existing variety could create a right of priority.

669. Mr. HOINKES (United States of America) wondered whether the concern expressed by Mr. Kiewiet (Netherlands) was not fully taken care of in paragraph (3), which enabled the Contracting Party with which the subsequent application was filed to require that the breeder furnish the material supporting the priority claim and to set a period of time for that purpose. Since the period was not specified, there was nothing in the Convention that denied national legislation of a particular Contracting Party to make certain requirements along the lines suggested by Mr. Kiewiet. The addition proposed by him might therefore not be necessary.

670. Mr. KIEWIET (Netherlands) did not agree fully with Mr. Hoinkes (United States of America). His proposal was to introduce a mandatory provision whereas the provision in paragraph (3) was optional and, in addition, came to play at a later stage, after the filing of the second application. His proposal was to request the deposit of plant material already in relation to the first application. It differed in this respect from the suggestion of Mr. Espenhain (Denmark) to make an obligation to deposit material in relation to the second application, which was not good enough.

671. Mr. HOINKES (United States of America) replied that he did not see any language in paragraph (3) that was not mandatory: the authority of the Contracting Party in which the subsequent application had been filed was able to require any additional documents and material supporting the priority claim. The only limit was that the breeder was allowed a certain period of time in which to do what the authority had required. Mr. Hoinkes added that he was not aware of any mandatory deposit of plant material in connection with the filing of an application for a plant breeder's right. The question therefore was why there should be one with respect to priority documents.

672. Mr. BOGSCH (Secretary-General of UPOV) stated that it was a basic and fundamental rule of priority that, to be valid, a priority claim had to concern the invention or the variety that was the subject matter of the first application, and that this had to be proved. In his view, every office could refuse a priority claim if the applicant did not prove to it that the variety in question was the same. If the applicant could not prove it because, for example, he had not made a deposit at the moment of filing his first application, then he had made a claim that would not be honored.

673. The PRESIDENT closed the meeting at this stage and invited the Delegation of the Netherlands to submit its proposal in writing in time for consideration at the next meeting. (Continued at 719)

Eighth Meeting
Thursday, March 7, 1991
Afternoon

Article 17 - Restrictions on the Exercise of the Breeder's Right

674. The PRESIDENT opened the discussion on Article 17 and, noting that no proposal had been tabled, suggested that the Conference might adopt it as appearing in the Basic Proposal.

675. Mr. DE LA CIERVA (Spain) stated that his Delegation was working on a proposal for amendment and asked for deferral of the debate.

676. Mr. HOINKES (United States of America) stated that his Delegation had no proposal to Article 17 but felt that it would be helpful if there were an explanation on record of what public interest meant. His Delegation had some concern regarding possible governmental interference with the free exercise of the breeder's right using reasons of public interest as an excuse. Consideration should be given to clarify the intent of this Article in the following manner:

(i) any restriction of the free exercise of the breeder's right should be considered on its individual merit;

(ii) any restriction should only be permitted if the breeder was unwilling or unable to supply the public need for material of the variety at a price which may reasonably be deemed fair;

(iii) the scope and the duration of such restriction should be limited to the purpose for which it was authorized;

(iv) any restriction of the breeder's right should be non-exclusive and non-assignable;

(v) any restriction should be authorized only for the supply of the domestic market of the Contracting Party that was restricting the breeder's right;

(vi) any restriction should be terminated when the circumstances which led to it ceased to exist and were unlikely to recur;

(vii) any restriction of the breeder's right and also the amount of compensation or remuneration arising out of it should be subject to judicial review.

677.1 Mr. BOGSCH (Secretary-General of UPOV) proposed that the declaration of Mr. Hoinkes (United States of America) be made part of the record of the Conference as the understanding of what public interest meant. He did not think that it was possible to bring about an agreement on all aspects of the conditions of a restriction on the exercise of a breeder's right.

677.2 Mr. Bogsch also noted that the text appearing in the Basic Proposal was the same as the text in the current Convention, which had never raised any problem, and that the interpretation given by Mr. Hoinkes (United States of America) was a reasonable one.

678. Mr. VON ARNOLD (Sweden) wished to mention some concerns raised among Swedish industry circles that Article 17 could be interpreted as a norm regulating the interface between patents and plant breeders' rights. For example, if a patented gene was inserted into a variety, the grant of a plant breeder's right in that variety should not terminate the rights of the patent holder. Assurances had been given during the preparatory work that this understanding was correct, but his Delegation would be happy if those assurances could be confirmed by the Conference.

679. Mr. ROYON (CIOPORA) stated that CIOPORA shared the concern expressed by Mr. Hoinkes (United States of America). The provision of Article 17(1) would be easier to interpret in CIOPORA's opinion if the right conferred on the breeder by the title of protection were of an exclusionary nature, that is, a right to exclude others from doing certain acts, as suggested by CIOPORA for Article 14(1) and (2). Concerning Article 17(2), CIOPORA submitted that the words "equitable remuneration" should be changed to "full compensation."

680. The PRESIDENT suggested that those questions should be addressed once the proposal of the Delegation of Spain had been tabled. (Continued at 766)

Article 18 - Measures Regulating Commerce

681. The PRESIDENT noted that no proposal for the amendment of Article 18 had been submitted. He therefore declared Article 18 adopted as appearing in the Basic Proposal.

682. The conclusion of the President was noted by the Conference.

Article 19 - Duration of the Breeder's Right

683. The PRESIDENT opened the debate on Article 19.

684. Mr. ÖSTER (Sweden) stated that his Delegation proposed in document DC/91/85 that the duration of protection should not be shorter than 15 years and not longer than 30 years from the date of the grant of the breeder's right. The main reason for the proposal was that the Conference should try to eliminate monopoly situations as far as possible and to adjust the duration to the situation in the patent field.

685. Mr. ELENA (Spain) indicated that his Delegation seconded the proposal.

686. Mr. LLOYD (Australia) stated that, whilst it did not fully agree with the minimum period of 15 years, his Delegation was inclined to support the longer period of 30 years. He added that this would be useful in relation to excessive claims from some plant breeders who argued that, because of the length of the commercial life of their varieties and the time needed for the breeding and seed production processes, the period of 25 years was insufficient for the crops on which they worked.

687. Mr. ESPENHAIN (Denmark) wished to propose a uniform minimum period of 25 years for all species and all types of varieties. This would mean that the second sentence of paragraph (2) would be deleted. The reason for a uniform period was that separating ornamental trees from, for example, ornamental shrubs might not be fully justified today. There were also overlaps between ornamental trees and fruit trees.

688. Mr. BURR (Germany) observed that forests normally stood for more than 100 years and the breeders of forest trees therefore would certainly not come to terms with a 30-year period of protection. His Delegation therefore opposed the proposal made by the Delegation of Sweden.

689. The proposal of the Delegation of Sweden reproduced in document DC/91/85 was rejected by three votes for, 13 votes against and two abstentions.

690. The oral proposal of the Delegation of Denmark to have a uniform minimum duration of protection of 25 years was rejected by six votes for, seven votes against and five abstentions.

691. Mr. BRADNOCK (Canada) wished to have the adoption of Article 19 postponed because the Delegation of Denmark and his own Delegation were preparing a proposal for an additional paragraph. (Continued at 969)

Article 20 - Variety Denomination

692. The PRESIDENT opened the debate on Article 20 and stated that he wished to deal with it paragraph by paragraph.

Article 20(1) - Designation of Varieties by Denominations; Use of the Denomination

693. Article 20(1) was adopted as appearing in the Basic Proposal.

Article 20(2) - Characteristics of the Denomination

694.1 Mr. HOINKES (United States of America) introduced the proposal of his Delegation reproduced in document DC/91/17 and stated that his Delegation

was in favor of the deletion of the second sentence of paragraph (2), which provided that the denomination could not consist solely of figures except where this was an established practice. The problem was that this practice was established in the United States of America; an American breeder who filed an application for protection in another country and was to comply with the spirit of Article 20--which was that the variety denomination should be the same in all countries--would thus immediately run into a problem in the countries which did not accept variety denominations consisting solely of figures: he would have to change the denomination. The change of denomination was quite often artificial since the applicable provision could be satisfied simply by adding a letter before the figures. The fact remained, however, that one would have to change the variety denomination.

694.2 Mr. Hoinkes added that, in the past, the use of figures solely might very well have been somewhat inappropriate for a variety denomination. However, in the United States of America, it had proven in fact very useful because such denominations could indicate for instance the number of days that a particular variety required from sowing to harvest. There had been absolutely no problem with distinguishing one set of figures from another.

695. Mr. VON PECHMANN (AIPPI) remarked that AIPPI shared the considerations expressed by Mr. Hoinkes (United States of America). AIPPI was also of the opinion that where a practice existed, then, in view of paragraph (5)--that was to say the need for uniformity of denominations in all Contracting Parties--it should be respected in all Contracting Parties.

696. The PRESIDENT noted that no Member Delegation seconded the proposal of the Delegation of the United States of America. He therefore declared it rejected.

697. The conclusion of the President was noted by the Conference. Article 20(2) was thus adopted as appearing in the Basic Proposal.

Article 20(3) - Registration of the Denomination

698. Article 20(3) was adopted as appearing in the Basic Proposal.

Article 20(4) - Prior Rights of Third Parties

699. Article 20(4) was adopted as appearing in the Basic Proposal.

Article 20(5) - Same Denomination in All Contracting Parties

700. Article 20(5) was adopted as appearing in the Basic Proposal.

Article 20(6) - Information Among the Authorities of Contracting Parties

701. Article 20(6) was adopted as appearing in the Basic Proposal.

Article 20(7) - Obligation to Use the Denomination

702.1 Mr. HOINKES (United States of America), introducing the proposal of his Delegation reproduced in document DC/91/18, stated that his Delegation considered an amendment of paragraph (7) necessary in order to permit the sale of material of a variety without stating its denomination. Somebody who sold material of a variety without stating its denomination obviously would not be permitted to state that the material was from a protected variety; it was in fact only generic material, and if there was a buyer for such generic material, then certainly the public would not be confused by this practice.

702.2 The proposal had the effect that a breeder, for instance, could sell material of a variety that may have been over-produced at a price that was lower than that which would be charged for the variety when specifically identified by its denomination. Certainly, the public would not be misled because the proposed text would require that if the variety was sold with the denomination, that denomination would remain the same with respect to the variety concerned, but if somebody was just selling generic seeds, he should not be forced to specify that it was the seed of a particular variety; if somebody wanted to buy that seed in a brown bag without any identification, obviously at a much reduced price, the price alone would lead him to believe that he may not have something of the quality that might be demanded if the variety were stated.

702.3 Mr. Hoinkes added that there had been opposition to a similar proposal in the past, but that the practice of selling something as a generic product at a lower price was common with producers, for example in the case of wine.

703. The PRESIDENT asked whether the proposal was seconded. He found that it was not.

704. Mr. HOINKES (United States of America) asked for the reasons why the proposal was not seconded.

705. Mr. BRADNOCK (Canada) replied that his Delegation had reservations about this proposal. There had been a case in the United States of America where somebody had been selling seed of a protected variety, as permitted in that country, as "variety not stated." It was in fact the seed of a protected variety which the seller had managed to get hold of through a complicated route. The owner of the right in the variety successfully prosecuted him, and the case was based on the fact that it did not matter what the seed was called; if it was from the protected variety, nobody had the right to sell it without authorization and the sale was considered an infringement. It seemed to Mr. Bradnock that the proposal would legitimize the practice of not using variety names on protected varieties and thereby create an avenue for infringements. If it was the plant breeder only who was selling off the seed stock without the variety name, then obviously he could not infringe his own right; but that was not what the proposal said.

706. Mr. ORDOÑEZ (Argentina) supported the position expressed by Mr. Bradnock (Canada) because there were similar problems in his country.

707.1 Mr. HOINKES (United States of America) replied that the proposal was not intended to give others the license to steal the protected variety and sell it in brown bags. The sale of seed of a protected variety without the authorization of the breeder was an infringement whether or not there was any indication of the variety denomination on the bag. The thrust of the proposal was that paragraph (7) provided that any time that propagating material of a variety was put on the market, it had to be so under the variety denomination and that there were situations in which somebody might want to sell propagating material of a protected variety without advertising that it was from a protected variety, as generic propagating material. This was in particular the case when a breeder had over-produced and did not want to dilute the price that he generally got for his protected variety.

707.2 Mr. Hoinkes added that he was surprised that this particular problem would not exist in other countries. The proposal would not take anything away from the role of the variety denomination or anything from the protected variety. It would simply enable somebody to just sell off stocks without mentioning what it was.

708. Mr. BOGSCH (Secretary-General of UPOV) asked what was the sanction if somebody did not comply with the requirements of Article 20(7), which he considered to be a seed trade provision unrelated to plant breeders' rights.

709.1 Mr. LLOYD (Australia) stated that his Delegation found the arguments of Mr. Hoinkes (United States of America) very persuasive. It had reservations on it, but nevertheless wished to put forward a further argument in support of the proposal despite the problems raised by the proposed amendment. On occasions, it might be necessary for material of a protected variety with a denomination to be sold to offset the costs of experimentation and it might be desirable to sell it or dispose of it in a manner that would not indicate to the purchaser or the user of the product that it was from a known variety with a recognized denomination.

709.2 However, his Delegation was also conscious of the problem raised by Mr. Bradnock (Canada). It had a further problem with paragraph (7) in that it wondered how the obligation to use the variety denomination could be enforced after the expiration of the breeder's right and which was the agency that enforced that particular provision within a Contracting Party. Therefore, his Delegation was not fully supporting the proposed amendment to a provision with which it was not entirely happy anyway. It suggested that the amendment could perhaps be redrafted to take into consideration the issues raised by Mr. Bradnock (Canada).

710. Mr. KIEWIET (Netherlands) stated that he still had some problems in understanding the proposal, especially the wording: "markets as a protected variety." As far as he could see it, acceptance of the proposal would imply that anybody could market a protected variety without using its name, claiming that he would market it as a non-protected variety or generic material. The whole Article about the denomination would then have no sense at all. If the provision that a protected variety had to be marketed under its denomination

was to be maintained, the exception proposed by the Delegation of the United States of America was not acceptable. Mr. Kiewiet admitted, however, the point made by Mr. Bogsch (Secretary-General of UPOV) about the value of this in a Convention on plant breeders' rights, but he was not in a position to propose its deletion. For this reason also, he had to oppose the proposal of the Delegation of the United States of America.

711. Mr. HEINEN (Germany) had gained the impression that no one had supported the proposal made by the Delegation of the United States of America and that it had therefore already been rejected. However, should that not be the case, he would wish to briefly state his position. In reply to the question put by Mr. Bogsch (Secretary-General of UPOV), he observed that Article 40 of the German law made a sale without correct marking an offense which could be liable to a fine of up to 10,000 DM. His Delegation was quite definitely in favor of maintaining the text in the Basic Proposal, which was the same as the text in the existing Convention.

712. Mr. ORDOÑEZ (Argentina) stated that, in Argentina, one could not sell seed of varieties of important species without a proper denomination. The amendment proposed by the Delegation of the United States of America was quite dangerous for the health of the seed trade.

713. Mr. SLOCOCK (AIPH) said that he was also concerned with the effects of the proposed amendment outside the seed trade, in the field of ornamentals; he could imagine that some of his colleagues from the breeding industry would also be concerned. Either a variety was protected, had a denomination and was marketed as such, or it was not. All sorts of abuses would be permitted if, for some temporary commercial reason, somebody could take it upon himself to distribute propagating material without indicating the variety denomination simply because he wanted to dispose of it below the market price.

714.1 Mr. SCHLOSSER (CIOPORA) said that he wished to speak in support of the proposal of the Delegation of the United States of America, realizing, however, that the matter was not of direct interest to CIOPORA. It was a seed trade issue, and this raised the question of why there was an Article 20 in the first place and, since there was one, how it would be implemented.

714.2 The text proposed by the Delegation of the United States of America caused some problems, but those could be taken care of if the principle could be agreed upon. It had been mentioned that third parties would be able to infringe by not identifying the variety on sale. That was not true and did not really deserve the Conference's consideration. Third parties who trafficked in seed of a protected variety were liable for infringement whatever else they might be liable for. Concerning enforcement, Article 20 was lax, but it had been so since the very beginning. The basic reason for the proposal should not be overlooked: if a breeder had leftover material, he had to do something with it if he was to stay in business. If he sold the surplus material at a discounted price, he would preserve the normal price for the next season.

715. Mr. HARVEY (United Kingdom) indicated that the reason why his Delegation had not supported the proposal was that the amendment would negate the need for Article 20 altogether.

716. The PRESIDENT concluded the debate and, noting that it had not been seconded by any Member Delegation, stated that the proposal of the Delegation of the United States of America was not accepted.

717. The conclusion of the President was noted by the Conference. Article 20(7) was thus adopted as appearing in the Basic Proposal.

Article 20(8) - Indications Used in Association with Denominations

718. Article 20(8) was adopted as appearing in the Basic Proposal.

Article 11 - Right of Priority (Continued from 636 and 673)

719. The PRESIDENT reopened the debate on the question of priority claims based upon first applications for a right other than a breeder's right.

720. Mr. KIEWIET (Netherlands) stated by way of introduction to the proposal of his Delegation reproduced in document DC/91/94 for the amendment of paragraph (1) that it was not necessary to repeat what had been said before lunch. In his opinion, the proposal of his Delegation and the proposal relating to paragraph (2) of the Delegation of Denmark could be considered as complementary; they were not mutually exclusive but strengthened each other.

721.1 Mr. ESPENHAIN (Denmark) stated that the concern of the Delegation of the United States of America had been discussed very carefully in his country and that his Delegation was prepared to work on the problem. Before the debate on Article 11 had been suspended earlier on, Mr. Hoinkes (United States of America) had concluded that the proposal of the Delegation of Denmark would not be necessary because it would be covered by paragraph (3). His Delegation could not agree to that since Article 11(3) provided for a time limit within which the applicant had to submit the documentation or the material. It attached much importance to this question because, while it fully supported the possibility for breeders to claim priority, it should be clear that they claimed priority in respect of existing material. The proposal of his Delegation reproduced in document DC/91/95 was therefore designed to ensure that the authority which received an application which included a priority claim would be able to ask for documentation including proof of the deposit of material representative of the variety.

721.2 Mr. Espenhain finally observed that, if the proposal of his Delegation was accepted, it would not be absolutely necessary to amend paragraph (1) as proposed by the Delegation of the Netherlands since it would be logical to assume that proof of the deposit of material implied that material had indeed been deposited.

722. The PRESIDENT recalled that the proposal of the Delegation of Denmark was linked with the proposal of the Delegation of the United States of America reproduced in document DC/91/93.

723.1 Mr. HOINKES (United States of America) declared, with respect to the proposal of the Delegation of the Netherlands, that his Delegation could not agree that matters of priority be made as stringent as that proposal would require. Any claim for priority only became important when there was an intervening act between the earliest filing date and the second filing date. If there were none, the priority claim did not have to be "activated" and did not necessarily have to be substantiated.

723.2 The problem with the proposal of the Delegation of the Netherlands was that in the overwhelming majority of cases, the priority claim was not really relevant because the intervening acts were very limited in number. However, where it became relevant, it was the authority's right to ensure that the variety for which the claim was made had existed already at the time of the first application. Whether the proof of the existence of the variety was secured by the deposit of material or by any other means should not make any difference. In conclusion, his Delegation was of the opinion that the proposal of the Delegation of the Netherlands very much overstated the case, which was not in its favor.

723.3 As far as the proposal of the Delegation of Denmark was concerned, Mr. Hoinkes observed that it incorporated a greater amount of flexibility and responded to the needs which he had described in relation to the proposal of the Delegation of the Netherlands. The only question was whether, and if yes, at what time, the proof of the deposit of the material had to be produced. In some instances, there was no need to deposit material in order to prove the existence of a variety, e.g. where the variety was available on the market. For that reason, the proposal was too narrow and might be extended to a proof of the existence of the variety at the time when the priority date was claimed.

723.4 In some countries, the priority question was apparently examined earlier than would normally be permitted under Article 11(3). If that were the case, the existence of Article 11(3) would have to be questioned since it provided that the breeder was to be allowed a period of two years in which to furnish the additional documents and material supporting the priority claim. There was a difference and a possible inconsistency between that provision and the proposal of the Delegation of Denmark because, under the latter, the authority could request certain things after only three months.

723.5 Mr. Hoinkes therefore wondered whether it was really necessary to refer to deposits of material; it might perhaps be preferable to reexamine Article 11(3) in order to ensure that an authority could have, at the time when it needed it, an assurance that the priority claim was valid, in the form of supporting documentation or material. In conclusion, the matter under consideration was basically a question for Article 11(3) rather than one for Article 11(2). Mr. Hoinkes therefore asked whether the Delegation of Denmark could accept a formulation based on the proof of the existence of the variety.

724.1 Mr. BOGSCH (Secretary-General of UPOV) proposed a middle way between the two proposals now being on the table, based upon the proposal of the Delegation of Denmark. It would consist in adding the following words to paragraph (2): "including samples or other evidence that the variety which is the subject matter of both applications is the same." This would entitle those authorities which wanted samples to have samples, and others to have other evidence.

724.2 What was important in the case of priority was that the later application related to the same subject matter as the first application. This could be proven by documents or, in the case of plant varieties, by samples or other evidence. In certain cases, the sample would have to be a sample of living material, and in others it would not. The proposed text was very flexible in that respect. It did not specify either that the sample or other evidence had to be attached to the first application. It simply referred to a proof of the identity of the subject matters of the two applications and left all details of implementation to national law.

725. Mr. BURR (Germany) said that his Delegation was able to support extensive parts of the proposal made by Mr. Bogsch (Secretary-General of UPOV). However, it wondered whether the reference to samples was not too broad. A bunch of flowers could also be a sample. The Delegation would prefer samples to be restricted to propagating material.

726. Mr. BOGSCH (Secretary-General of UPOV) observed that his proposed formulation would allow any authority to ask for samples of propagating material deemed necessary to check the identity. It was therefore not indispensable to narrow down the formulation.

727. Mr. HOINKES (United States of America) wondered whether acceptance of the proposal of Mr. Bogsch (Secretary-General of UPOV) might not make the reference to the protection of a variety in paragraph (1) superfluous, so that the text for paragraph (1) could be that appearing in the Basic Proposal.

[Suspension]

728. Mr. ESPENHAIN (Denmark) declared that the amended text proposed by Mr. Bogsch (Secretary-General of UPOV) before the suspension was a compromise which would overcome the problems for the United States of America and satisfy the other Delegations. His Delegation would accept the amended text.

729. The PRESIDENT then wished to go back to the proposal of the Delegation of the United States of America reproduced in document DC/91/7. He asked whether the proposal was supported.

730. Mr. HOINKES (United States of America) stated that, in the light of the previous discussions, the question should be whether the proposal reproduced in document DC/91/7, together with the text suggested by Mr. Bogsch (Secretary-General of UPOV) as a compromise for paragraph (2), might be acceptable to the Conference.

731. Mr. BROCK-NANNESTAD (UNICE) wished to expand on what he considered to be the faults at the base of both proposals under consideration. The faults concerned the very concept of priority, which was only a matter of securing a

date for any subsequent application. What happened in the first country was actually immaterial. It was for the second authority to examine the proof of the existence of the material and by implication the validity of the date claimed as priority date. The role of the first authority was limited to issuing documents relating to the first application, and it was up to the applicant to prove, if need be, that he had a better right in the second country. The deposit of plant material and the proof of the deposit were not matters upon which the first authority should act.

732. The PRESIDENT asked whether the proposal of the Delegation of the United States of America reproduced in document DC/91/7 and the proposal of the Delegation of Denmark reproduced in document DC/91/95, as amended pursuant to a suggestion of Mr. Bogsch (Secretary-General of UPOV), would be supported. Four Delegations indicated support.

733. Mr. BURR (Germany) said that his Delegation, faced with a choice between the proposal in document DC/91/7 and the proposal in document DC/91/93, would prefer the latter since its wording and structure were closest to the current wording of Article 12(1).

734. The PRESIDENT then asked whether the proposal of the Delegation of the United States of America reproduced in document DC/91/93 and the proposal of the Delegation of Denmark reproduced in document DC/91/95, as amended pursuant to a suggestion of Mr. Bogsch (Secretary-General of UPOV), would be supported. Three Delegations indicated support, whereupon the President put the proposals to a vote.

735. The proposal of the Delegation of the United States of America reproduced in document DC/91/93 and the proposal of the Delegation of Denmark reproduced in document DC/91/95, as amended pursuant to a suggestion of Mr. Bogsch (Secretary-General of UPOV), were adopted by 12 votes for, two against and four abstentions. (Continued at 1852.3)

736. Mr. KIEWIET (Netherlands) stated that, as a consequence of the vote, his Delegation withdrew its proposal reproduced in document DC/91/94.

737. The withdrawal of the proposal of the Delegation of the Netherlands reproduced in document DC/91/94 was noted by the Conference.

738. Mr. NAITO (Japan) stated that his Delegation was anxious to establish fair and equal treatment of breeders in the different countries and sought an instruction on this issue.

739. Mr. BOGSCH (Secretary-General of UPOV) replied that he understood the wish of the Delegation of Japan that the priority rules be reciprocal, but considered that the UPOV Convention was not the proper place for that. He suggested that Japan or another country could propose in the Diplomatic Conference for the Conclusion of a Treaty Supplementing the Paris Convention as Far as Patents Are Concerned, to be held in The Hague (Netherlands) from June 3

to 28, 1991, that the priority of plant breeders' rights applications should be recognized in relation to patent applications. That Conference was the place where equality of treatment could be established.

Article 12 - Examination of the Application (Continued from 646)

740. The PRESIDENT reopened the debate on Article 12 and invited the Delegation of Germany to introduce its proposal reproduced in **document DC/91/90**.

741. Mr. BURR (Germany) observed, as an introduction to the proposal of his Delegation, that he had already mentioned that his Delegation had no problems with Article 12 in the form in which it had been adopted. However, it felt that consideration should at least be given to making allowance in Article 12 for certain difficulties. Those resulted from the fact that the authority had already to decide after two or three years whether the variety was to be deemed stable despite the fact that such was not at all possible in the case, in particular, of perennial crops. A sentence had therefore to be added to take account of that special situation and which would say that an authority could deem a variety to be stable at the normal end of the examination if there had been no indication during that short examination that the variety would not be stable in future.

742. Mr. DMOCHOWSKI (Poland) stated that his Delegation supported the proposal of the Delegation of Germany.

743. Miss BUSTIN (France) perfectly understood the concern that had been frequently repeated by the Delegation of Germany. She nevertheless felt that the present wording of Article 12 was sufficiently broad to enable the technical services that carried out true growing trials of a variety to make what was basically a forecast with regard to stability. She had doubts as to the interpretations that could be made of all the technical articles if Article 12 comprised a specific mention of one of the typical conditions to be met by a variety. The fact of highlighting one single condition would be hazardous. For that reason, her Delegation was not in favor of the amendment submitted by the Delegation of Germany.

744. Mr. HAYAKAWA (Japan) asked why the additional sentence was proposed by the Delegation of Germany to be added to Article 12 rather than to Article 9.

745. Mr. HEINEN (Germany) replied that the provision concerned more the matter of procedure than of substance and therefore belonged in Article 12.

746. Mr. KIEWIET (Netherlands) stated that he had problems with the text proposed by the Delegation of Germany. Whereas he understood the background to the proposal, he considered that the text should say: "The authority shall--rather than 'may'--consider the variety to be stable..." The word "may" was open to interpretation as to the procedure to be followed by an authority.

747. Mr. BOGSCH (Secretary-General of UPOV) asked whether the Delegation of Germany would care to explain at the same time why its proposal used the future in: "the variety will not be stable" and whether it implied that the authority could disregard the fact that the variety had been unstable in the past or was currently unstable, provided that it was able to predict that it would be stable. He felt that "is not" would be more appropriate.

748.1 Mr. HEINEN (Germany) replied that those two points were related in a certain way. The phrase "the authority may" made the question of evidence and decisions easier for the authority. If the authority ascertained on examination that the variety was not stable, then the variety did not satisfy the requirement and the application would be rejected. To do so did not require the proposed sentence, but derived directly from Article 5 in conjunction with Article 9.

748.2 However, a problem could arise where the variety had been examined with regard to the other requirements and no adequate data was available with respect to stability in order to determine whether the variety was durably stable. The fact that no lack of stability had occurred in the past should be recognized for the benefit of the breeder by the authority as fulfillment of the requirement and be taken into account. Should it later transpire, after protection had been granted, that the variety was not in fact stable, then protection would be withdrawn.

749. Mr. BOGSCH (Secretary-General of UPOV) observed that the explanation of Mr. Heinen (Germany) did not answer the question of Mr. Kiewiet (Netherlands). Mr. Kiewiet had suggested that, once the authority was convinced that the variety would not be unstable, it should not have a discretionary right to refuse to grant the breeder's right for non-stability, or a right to continue the tests until such time as it had demonstrated that the variety was indeed stable. This suggestion seemed to Mr. Bogsch to be fully justified.

750. Mr. BURR (Germany) replied that the proposal made by his Delegation was not to be understood in the way suggested by Mr. Bogsch (Secretary-General of UPOV). The Delegation was considering whether the meaning and purpose of the proposal could not be made more clear by an addition reading: "The authority may consider the variety to be stable if there is no indication during examination that..." His Delegation was examining whether that would altogether deal with the doubts that had been expressed. It wished only to refer to the case where the other tests had been completed and where further tests would be necessary to ascertain whether the variety was also stable. There would be no justification for postponing the decision and the Delegation therefore wished to insert into Article 12 the presumption that a variety was stable if there was no evidence to the contrary.

751. Mr. KIEWIET (Netherlands) indicated that he was not convinced that the proposed addition would solve the problem. It was not right to leave it to the discretion of the authority to decide whether a variety should be considered as stable when there was no indication at the end of the normal examination period that it would not be stable. This was not acceptable to his Delegation.

752. Mr. BURR (Germany) proposed the following wording: "The authority may limit the examination for stability to a certain period of time. If there is no indication during that period of time that the variety will not be stable, the authority shall deem the variety to be stable."

753. Mr. BOGSCH (Secretary-General of UPOV) asked the Delegation of Germany whether there was anything in the text of Article 12 as provisionally adopted which would prevent an authority from proceeding as proposed.

754. Mr. HEINEN (Germany) explained that his Delegation was convinced that there was good reason for its proposal. The Convention laid down a condition in Article 5 and Article 9 and a breeder normally had to prove that that condition was fulfilled. The authority had also to be convinced on the basis of the breeder's statements and of the samples of the variety that had been submitted. The particularity of stability, however, was that it involved the future. That would lead to difficulties when it was not adequately shown that the variety was indeed stable at the time the examination of the other requirements had reached a positive outcome. An advantage should therefore be introduced for the breeders in those cases where there was no indication of the future instability of the variety.

755. Mr. ROYON (CIOPORA) did not wish to speak on the proposal of the Delegation of Germany, but on the last sentence of the Basic Proposal. Although that could be obvious to some, CIOPORA would prefer it to be specified that the authority could only require from the breeder information, documents or material concerning the variety.

756. Mr. SLOCOCK (AIPH) wondered whether it would be possible and helpful to substitute "remain" for "be" in the final phrase: "the variety will not be stable." As to the introductory phrase, he observed that it would be difficult for the users of the system to accept a text other than: "The authority shall consider the variety to be stable."

757. Mr. HARVEY (United Kingdom) stated that his Delegation did not disagree with what the Delegation of Germany was attempting to achieve. In its view, however, there was no difficulty in achieving that under the text appearing in the Basic Proposal because Article 9 only required the authority to establish that stability was deemed to exist, and Article 22(1) permitted the breeder's right to be withdrawn if it was established after the grant that the variety was not stable. The remark of Mr. Bogsch (Secretary-General of UPOV) was therefore right.

758. Mr. LLOYD (Australia) said that his Delegation also had difficulty in understanding why the Delegation of Germany wished to introduce a new provision in Article 12. Should an examiner have no evidence of instability, then there was no alternative for him but to deem the variety to be stable.

759. The PRESIDENT wished to close the debate and to have a vote on the proposal of the Delegation of Germany as appearing in document DC/91/90.

760. Mr. BURR (Germany) stated that his Delegation could also accept a change to its proposal in order to meet the wishes of the Delegation of the Netherlands. The proposal would then read as follows: "The authority shall consider the variety to be stable..."

761. The PRESIDENT asked whether the proposal, as amended orally, was seconded.

762. Mr. DMOCHOWSKI (Poland) stated that his Delegation supported the text as appearing in document DC/91/90, with "may consider," but opposed the amended text, with "shall consider."

763. The proposal of the Delegation of Germany reproduced in document DC/91/90 was rejected by two votes for, nine votes against and seven abstentions.

764. The proposal of the Delegation of Germany as amended was not seconded.

765. Article 12 was thus adopted as amended in the course of the previous discussions (see at 645).

Article 17 - Restrictions in the Exercise of the Breeder's Right (Continued from 680)

766. Mr. LOPEZ DE HARO (Spain) declared that his Delegation would not submit any proposal for the amendment of Article 17.

767. Article 17 was thus adopted as appearing in the Basic Proposal.

Article 21 - Nullity of the Breeder's Right

768. Mr. NAITO (Japan) introduced the proposal of his Delegation reproduced in document DC/91/71 and observed that it consisted of two elements. With the first element, his Delegation wished to ensure that each Contracting Party could implement the provision in accordance with the provisions of its national law and, in particular, freely define the following: the governmental agency or the authority that may declare a breeder's right null and void; the parties who could claim a breeder's right to be null and void and seek its annulment; the rights and duties of the various interested parties; the effects of nullity, in particular the date as from which the effects would be deployed. Concerning the second element, his Delegation could understand the effect of paragraph (1)(iii), but was not convinced of its necessity as a mandatory reason for nullity. It therefore wished to amend it as indicated in document DC/91/71.

769. Mr. BOGSCH (Secretary-General of UPOV) underlined that the proposal addressed two different problems. The first element of the proposal was to reserve the procedure to national law, e.g. to leave it to the Contracting Party to decide whether a breeder's right was to be annulled by the authority which had granted it and/or by a court. He suggested that the amended text should be drafted differently, for instance as follows: "Each Contracting Party shall declare a breeder's right granted by it null and void, in accordance with the procedure provided by its law..." The text appearing in document DC/91/71 might be interpreted as giving freedom as to the reasons for annulment. With regard to the second question, Mr. Bogsch stated that it was a very substantial change, since it made the transfer of the breeder's right to the person entitled to it optional rather than legally mandatory.

770. The PRESIDENT asked the Delegation of Japan whether it would accept the amendment suggested by Mr. Bogsch (Secretary-General of UPOV) for the first point of its proposal.

771. Mr. HAYAKAWA (Japan) asked for consideration of the first point to be deferred. Concerning the second point, his Delegation accepted that the breeder's right should become null and void if it had been granted to a person who was not entitled to it. It had to carefully examine whether it was possible to transfer it from the person who was not entitled to it to the person who was so entitled. For that reason, it proposed that the provision on transfer be made facultative.

772. Mr. SCHENNEN (Germany) said that his Delegation also had some difficulty in understanding the proposal on paragraph (1)(iii). Was it the intention that national law should be at liberty to provide only the remedy of transfer in place of annulment? He was not able to imagine how national law would then appear. Was it to be possible to stipulate that annulment was excluded if transfer had already taken place or only if it could take place? It was not clear from the proposed wording what was in fact meant and what the reservation under national law was.

773. The PRESIDENT asked again the Delegation of Japan whether it would accept the amendment to the first point of its proposal suggested by Mr. Bogsch (Secretary-General of UPOV).

774. Mr. HAYAKAWA (Japan) replied that his Delegation agreed with the amendment.

775. The PRESIDENT then asked whether the proposal, as amended, was seconded.

776. Mr. KIEWIET (Netherlands) stated that his Delegation seconded the proposal.

777. Mr. HOINKES (United States of America) wondered whether an amendment to the introductory part of paragraph (1) was really necessary considering the

fact that it provided that a Contracting Party had to declare a breeder's right granted by it null and void when certain facts were established, without specifying by whom, under what circumstances or in what form such facts had to be established.

778. Mr. FOGLIA (Italy) stated that his Delegation could not agree to the proposal because many parts of the Convention made provisions to be implemented pursuant to national procedures and there was no reason to single out Article 21 in this respect.

779. Mr. BOGSCH (Secretary-General of UPOV) agreed that the amendment was, strictly speaking, not necessary. But the provisions of the national law played a greater role in respect of annulment--for instance the competent body could be the authority acting on the basis of administrative procedure or a court acting on the basis of judicial procedures. There was therefore some justification for the proposal.

780. Mr. HAYAKAWA (Japan) recalled that the present Convention already contained the reference to the national laws of the member States. The Government of Japan considered this provision as very important and wished to retain the text of the present Convention.

781. The PRESIDENT put the various proposals to a vote.

782. The first part of the proposal of the Delegation of Japan reproduced in document DC/91/71 was rejected by three votes for, four against and 11 abstentions.

783. The second part of the proposal was not seconded.

784. Article 21 was thus adopted as appearing in the Basic Proposal.

<p><u>Ninth Meeting</u> <u>Friday, March 8, 1991</u> <u>Morning</u></p>

Article 14 - Scope of the Breeder's Right

Article 14(1), Introductory Part - Nature of the Breeder's Right

785. The PRESIDENT opened the meeting and the debate on Article 14. He invited the Delegation of the United States of America to introduce its proposal reproduced in document DC/91/9.

786. Mr. HOINKES (United States of America) introduced the proposal of his Delegation and stated that its purpose was simply to return to a preferred formulation whereby the breeder was able to prevent others from doing certain acts. In the opinion of his Delegation that particular formulation was inadvertently abandoned at the 27th session of the Administrative and Legal Committee, in June 1990, when the Article was substantially reorganized. That formulation offered a more even-handed way of expressing what flowed from a breeder's right.

787. The PRESIDENT observed that the proposal of the Delegation of Germany reproduced in document DC/91/91 was exactly the same as that of the Delegation of the United States of America. He then invited the Delegation of Japan to introduce its proposal reproduced in document DC/91/61.

788. Mr. HAYAKAWA (Japan) indicated that his Delegation proposed to insert the words "at least" in the introductory part of Article 14(1) to compensate for the deletion of item (viii). His Delegation felt that the list of acts requiring the authorization of the breeder should not contain a vague element but should provide legal certainty. However, if the vaguely-defined act being the subject of item (viii) was deleted, it would not be adequate to exclude the possibility for Contracting Parties to specify additional acts to those mentioned in paragraph (1)(a). It was therefore proposed to have a precise list of seven kinds of acts as a minimum to be implemented by Contracting Parties.

789. Mr. BOGSCH (Secretary-General of UPOV) stated that the proposal of the Delegation of Japan should be discussed in connection with item (viii). As far as the proposal of the Delegations of Germany and of the United States of America was concerned, it was not an accident that the text in the Basic Proposal had been adopted. There were two reasons for that text: some laws used the words "to prevent" as proposed by the said Delegations, but their meaning was unclear. The breeder had not only a right to prevent, but also a right to remedies when he had been unable to exercise his right to prevent and was facing an infringement. A more important argument was perhaps that the present Convention used the term "authorization," and that was not an oversight or, if it was, a 30 years old oversight. "Authorization" was a classical term in intellectual property and in the UPOV Convention; besides, it appeared in the proposals under consideration in the title of the paragraph.

790. The PRESIDENT agreed with Mr. Bogsch (Secretary-General of UPOV) concerning the deferral of the further discussion of the proposal of the Delegation of Japan. He also observed that that proposal and the proposal of the Delegation of Denmark, reproduced in document DC/91/96, to add a sentence had the same aim. He would put them up for discussion together at a later stage.

791. Mr. BURR (Germany) observed in that connection that the proposal made by his Delegation contained a similar passage.

792. Mr. ARDLEY (United Kingdom) stressed that the proposal of the Delegations of Germany and of the United States of America was fundamental. Having attended all the sessions of the Administrative and Legal Committee which had

the revision of the Convention on their agendas, his recollection was that there had been no intention, at least as far as the United Kingdom was concerned, to change the form of the basic right contained in the present Convention, i.e., to turn a positive into a negative right. It might well be that in other areas of intellectual property, one might be granted a right to exclude or prohibit others, but, as Mr. Bogsch (Secretary-General of UPOV) had stated, this was not the case with Article 5 of the present Convention, and certainly was not the common intention of the drafters of the Basic Proposal. For that reason the Delegation of the United Kingdom would oppose any change to the text in the Basic Proposal.

793. Mr. ÖSTER (Sweden) stated that his Delegation supported the statement made by Mr. Ardley (United Kingdom).

794. Mr. HEINEN (Germany) stated that his Delegation attached no fundamental significance to that matter. It could see no basic difference in the differing versions. His Delegation had proposed that the word "right" be inserted to create a mental connection with the term "breeder's right," as determined with respect to its requirements in Article 5, and then be determined with regard to its content. It was solely that mental bridge that was the reason for the proposed formulation. His Delegation therefore assumed an open stance.

795. Mr. KIEWIET (Netherlands) stated that his Delegation would prefer the text as proposed in the Basic Proposal. It supported the statement of Mr. Ardley (United Kingdom).

796. Mr. WHITMORE (New Zealand) indicated that his Delegation also agreed with the views expressed by Mr. Ardley (United Kingdom).

797. Mr. ESPENHAIN (Denmark) declared that his Delegation also shared the wish to maintain the text of the Basic Proposal, i.e., the positive statement that the breeder's authorization should be required before a third party entered into any of the activities concerned.

798. Mr. O'DONOHUE (Ireland) stated that his Delegation also supported the point of view expressed by Mr. Ardley (United Kingdom).

799. Mr. HOINKES (United States of America) stated that, like the Delegation of Germany, his Delegation could adopt a flexible approach on this matter, which was not really a matter of principle. The formulation suggested by his Delegation was not new and had appeared in successive drafts considered in the fall of 1989 and in the spring of 1990. His Delegation went along with its change in June 1990 for reasons of organization. On reflection, however, it had thought that a better way of expressing the effects of a breeder's right would be as suggested in its proposal. If other Delegations felt more comfortable with the text of the Basic Proposal, although it might be more complicated to administer, his Delegation would not stand in the way of a consensus.

800. Mr. BRADNOCK (Canada) stated that his Delegation preferred the text in the Basic Proposal.

801. The PRESIDENT noted that the first part of the proposal of the Delegation of Germany reproduced in document DC/91/91 and the proposal of the Delegation of the United States of America reproduced in document DC/91/9 were not supported and that the said Delegations were prepared to take a flexible approach in relation to the introductory part of Article 14(1). He concluded that the proposals were therefore not accepted.

802. The conclusion of the President was noted by the Conference.

803.1 Mr. ROYON (CIOPORA) wished to make a general statement on Article 14(1). Despite the general trend revealed by the discussions, CIOPORA firmly believed that the rights of the breeder should be expressed as a right to exclude others from doing certain acts. It would appreciate an explanation of the fundamental difference between a positive and a negative right because this might shed some light on the basic reasons for the change mentioned by Mr. Hoinkes (United States of America).

803.2 The wording of Article 14(1) was found to be very complicated. It should permit the breeder to control the commercial exploitation of his variety--for which a definition was still awaited--by means of a phrase such as: "making"--that is propagating--, "reproducing, using and selling." There could perhaps be an addition concerning exporting and importing because of the specific reasons underlying this addendum. That phrase would cover all situations much better than the long and complicated list of acts and the distinction between "propagating material" and "harvested material."

804. Mr. ORDÓÑEZ (Argentina) observed that Article 27 of the seed law of Argentina defined the scope of the breeder's right in a way similar to that in Article 14(1) of the Basic Proposal. His Delegation therefore fully supported the Basic Proposal.

805. Mr. VON PECHMANN (AIPPI) wished to observe, on the matter of whether the breeder's right should be formulated as a right of prohibition, that a right of prohibition could possibly be of advantage since, in general, the courts would be required to deal with infringement of breeders' rights on very rare occasions only. Where there was a case, they could then rely on case law under parallel patent law, in which the right was already defined as a right of prohibition. Additionally, AIPPI also went along with the proposal of CIOPORA to define the right of prohibition in a single paragraph without making a distinction between propagating material and harvested material. The wording contained in the Basic Proposal could possibly lead to differing interpretations of the effects of protection.

806. Mr. HARVEY (United Kingdom) observed that the preceding interventions were not directed against the substance of the text in the Basic Proposal but concerned the nature of the right granted to the breeder. The points that had been made were valid insofar as the Convention did not specify that the breeder was entitled to exercise an exclusive right in relation to the exploitation of the variety. His Delegation would not object to a positive formulation on those terms. Whether Article 14 was the right place for such a provision was, however, another matter.

807. Mr. HEINEN (Germany) said that his Delegation shared the concern of Mr. Harvey (United Kingdom). If the wording in the Basic Proposal were to be maintained, the breeder would have to give himself consent to carry out certain acts. That was of course possible, but somewhat complicated.

808. Mr. SCHUMACHER (GIFAP) said that GIFAP fully agreed with the statements made by Mr. von Pechmann (AIPPI).

Article 14(1), Introductory Part - Exhaustive or Non-exhaustive Nature of the List of Acts Under Subparagraph (a) - And Possible Additional Provision on the Non-exhaustive Nature of the List [Article 14(4) of the Text as Adopted]

Article 14(1)(a) - List of Acts Covered by the Breeder's Right

809. The PRESIDENT opened the debate on the proposal of the Delegation of Japan reproduced in document DC/91/61 to add the words "at least" in the introductory part of Article 14(1) and on the proposal of the Delegation of Denmark reproduced in document DC/91/96 to add a sentence to Article 14(1)(a). He recalled that the proposals had the same objective.

810. Mr. HAYAKAWA (Japan) confirmed that the additional sentence proposed by the Delegation of Denmark had the same objective as the proposal of his Delegation.

811. Mr. ESPENHAIN (Denmark) also confirmed that the effect of the two proposals was more or less the same. He added that the proposal of his Delegation was linked with the problem arising from the lack of clarity of paragraph (1)(a)(viii).

812. Mr. BOGSCH (Secretary-General of UPOV) observed that it was difficult to discuss those proposals without knowing the fate of item (viii) of Article 14(1)(a). If item (viii) was maintained, the proposals should not be entertained because it would be difficult to imagine acts other than those already listed. He therefore suggested that consideration of those proposals be deferred. (Continued at 841)

813. The PRESIDENT endorsed the suggestion of Mr. Bogsch (Secretary-General of UPOV) and opened the debate on the items of Article 14(1)(a).

814. Mr. BOGSCH (Secretary-General of UPOV) stated that the proposal of the Delegation of the United States of America reproduced in document DC/91/10 concerned a point of drafting. It was to be supported in his opinion since it unified the definition of the acts enumerated in items (i) to (viii).

815. Mr. SCHENNEN (Germany) said that his Delegation was of the opinion that the translation of the proposal into German, as contained in document DC/91/10, comprised a shift in the meaning. He proposed that the matter be clarified in the Drafting Committee since the proposal obviously concerned a drafting improvement only.

816. Mr. ORDOÑEZ (Argentina) stated that his Delegation preferred the wording in the Basic Proposal.

817. Mr. ESPENHAIN (Denmark) said that, personally, he would support the proposal. He did not know, however, whether it implied any amendment of substance.

818. Mr. HOINKES (United States of America) confirmed the observation made at the opening of the debate on Article 14(1)(a)(iv) by Mr. Bogsch (Secretary-General of UPOV). The proposal aimed at introducing a consistent formulation, with no effect on substance.

819. Mr. DMOCHOWSKI (Poland) stated that his Delegation supported the proposal, but felt that it might be referred to the Drafting Committee.

820. Mr. ORDOÑEZ (Argentina) stated that his preference for the text in the Basic Proposal was based on the meaning which the translation into Spanish would have. "Putting on the market" would have a wider scope in Spanish than "marketing," which could be meant as applying to "normal" commercial activities only. In Argentina, it was felt that some kinds of delivery of seeds should need the authorization of the breeder. Those kinds might not be embraced by "marketing."

821. Mr. DAVIES (UPEPI) wondered whether, for the sake of consistency, item (i) should not be amended from "production or reproduction" into "producing or reproducing."

822. The proposal of the Delegation of the United States of America, reproduced in document DC/91/10, to amend Article 14(1)(a)(iv) to read: "selling or other marketing" was adopted by consensus.

823. The PRESIDENT opened the debate on the proposal of the Delegation of Denmark reproduced in document DC/91/96 and concerning a new item (vii) in Article 14(1)(a).

824. Mr. ESPENHAIN (Denmark) introduced the proposal and stressed that it was linked, on the one hand, with the lengthy discussion which item (viii) had caused in the course of the preparatory work and with the proposal to delete it and, on the other hand, with the proposal to make the protection of products directly made from harvested material (Article 14(1)(c)) optional. The proposal aimed at establishing consistency insofar as only the production of the products coming under the protection of the breeder's right would be covered under Article 14(1)(a).

825. Mr. KIEWIET (Netherlands) stated that his Delegation could not support the proposal of the Delegation of Denmark concerning a new item (vii).

826. Mr. BRADNOCK (Canada) explained that it would be inappropriate to include a reference to products, as suggested by the Delegation of Denmark, in

a part devoted to the propagating material of the protected variety. His Delegation could not support the proposal from the point of view of either drafting or substance.

827. Mr. BURR (Germany) shared the view expressed by Mr. Bradnock (Canada) regarding the articulation of the provision. The reference to products did not belong under "propagating material," but in a new paragraph (2) in accordance with the proposal made by his Delegation in document DC/91/91.

828. The PRESIDENT noted that there was no support for the proposal of the Delegation of Denmark. He therefore declared it rejected.

829. The conclusion of the President was noted by the Conference.

830. The PRESIDENT opened the debate on the proposal of the Delegation of Japan, reproduced in document DC/91/61, to amend the end of item (vii) to read: "mentioned in (i) to (v), above."

831. Mr. HAYAKAWA (Japan) recalled that the reference to item (vi) had been explained as relating to the case where material was stocked in bonded warehouses for purposes of importation. His Delegation considered that that situation was outside the scope of the Convention and that the obligations to be met in relation to the breeder's right were to fall exclusively on the importer.

832. Mr. KIEWIET (Netherlands) stated that his Delegation supported the proposal. Like the Delegation of Japan, it could not see the meaning of "stocking" in relation to "importing."

833. Mr. DMOCHOWSKI (Poland) indicated that his Delegation supported the proposal of the Delegation of Japan both as concerned the deletion of the reference to item (vi) in item (vii) and the deletion of item (viii).

834. Mr. HOINKES (United States of America) asked that it be clarified whether amending "(vi)" to "(v)," so as to exclude the act of stocking in relation to importation, meant that if the material was being stocked within a customs zone for the purpose of importation into the country, the breeder could not proceed against that material; whether he would have to wait until the material was released all over the country and to act against a multiplicity of users, whereas he could have stopped the infringement with one single procedure. Without having come to a position yet on this issue, he wondered whether it was desirable to take the proposed course of action.

835. Mr. BRADNOCK (Canada) stated that his Delegation shared some of the concerns expressed by Mr. Hoinkes (United States of America). There were quite often differing legal concepts concerning when an import took place. In some cases, it was considered that the material was imported when it arrived in a country; in other cases when it was released from customs. The concern was that, once it was released from customs, it might indeed go in many different directions. It would be more convenient to be able to act at the first point, particularly when the material was stocked for the purpose of importation.

836. Mr. ORDOÑEZ (Argentina) declared that his Delegation preferred the reference to item (vi) to stay for the reason explained by Mr. Hoinkes (United States of America).

837. Mr. HAYAKAWA (Japan) observed that material released from the customs would indeed be distributed, but stocking for customs purposes was not facultative, but obligatory, in the case of importations. His Delegation therefore felt that it did not fall within the scope of the Convention.

838. Mr. BOGSCH (Secretary-General of UPOV) observed that there was not much difference between stocking for one purpose or the other. The customs free territory being part of the territory of the Contracting State, it seemed difficult to imagine that the law did not apply on it. There was therefore no harm with maintaining the reference to item (vi). On the contrary, it would preserve the more effective possibility of intervening to stop infringement.

839. Mr. TESCHEMACHER (EPO) concurred with Mr. Bogsch (Secretary-General of UPOV). Industrial property rights extended to the whole territory of the State. If the right extended to the importing of goods, then it necessarily extended to storage in a customs-free area since that was a result of import. Therefore, the reference to item (vi) in item (vii) did not add much.

840. The proposal of the Delegation of Japan, reproduced in document DC/91/61, to amend the end of item (vii) to read: "mentioned in (i) to (v), above," was rejected by three votes for, 13 votes against and two abstentions.

841. (Continued from 812) The PRESIDENT opened the discussion on the proposals of the Delegations of Canada, Denmark, Germany, Japan and the United States of America, reproduced in documents DC/91/60, DC/91/96, DC/91/91, DC/91/61 and DC/91/11, to delete item (viii).

842. Mr. HOINKES (United States of America) suggested that it might be appropriate to consider at the same time the proposal of the Delegation of Japan, reproduced in document DC/91/61, to add "at least" in the introductory part of Article 14(1) and to make the list of acts non-limitative.

843. Mr. BURR (Germany) observed that the number of identical proposals meant that there was support for deleting item (viii), and also that his Delegation had submitted a further proposal for deletion with regard to item (ii).

844. Mr. KIEWIET (Netherlands) observed that since the list of acts was limitative in nature, it should end with an open clause of the kind appearing in item (viii). The Conference could not and should not pretend to be able to foresee all the acts that should be covered by the breeder's right. Item (viii) should therefore not be deleted. If that view were not to be shared by the majority, his Delegation would support the proposal made by the Delegation of Japan to add the words "at least" in the introductory part of Article 14(1). That Delegation's proposal to delete item (viii) should be taken in combination with the proposal to add "at least," as a package. In that respect, Mr. Kiewiet supported the views expressed by Mr. Hoinkes (United States of America).

845. Mr. HAYAKAWA (Japan) confirmed that what Mr. Kiewiet (Netherlands) had said in the latter part of his intervention reflected the intentions of the Delegation of Japan.

846.1 Mr. BURR (Germany) remarked that both matters should be discussed together irrespective of how the voting would proceed. It was not possible in the discussion to separate the deletion of item (viii) and the possibility of subjecting further acts to protection. In that respect, his Delegation was also altogether in agreement with the basic idea contained in the proposal of the Delegation of Japan. However, it did have a problem with its formulation. The proposal to insert in the introductory sentence only "at least" did not answer the question of who was to effect the addition to the list of acts. That was why his Delegation proposed in document DC/91/91 a new, explicit paragraph (2) on the basis of which any Contracting Party could provide that certain further acts would be subject to the breeder's right of prohibition.

846.2 To summarize, the Delegation of Germany supported all motions that aimed at deleting item (viii) and which would leave it to the member States, through a provision of a general nature, to subject certain other acts to the right of prohibition.

847. Mr. BRADNOCK (Canada) stated that his Delegation supported the proposal of the Delegation of Japan. The addition of "at least" in the introductory part of Article 14(1) meant that further rights could be given by the national lawmaker to the breeder. Item (viii) did not define who would decide on the other rights arising from acts that were not yet mentioned.

848. Mr. HARVEY (United Kingdom) observed that there were very clear differences between the proposals under consideration. The deletion of item (viii), which was favored by his Delegation, would leave the Contracting Parties with no discretion to include other acts. The inclusion of the words "at least" in the introductory part of Article 14(1) would partly resolve the problem; but it would give the discretion to the breeder, not to the Contracting Party. His Delegation would find it difficult to accept a text which contained an item (viii) or the words "at least," which both gave a blank check to the breeder. The necessary flexibility could be built into the Convention, following the deletion of item (viii), on the basis of the proposals of the Delegations of Denmark and Germany.

849.1 Mr. ÖSTER (Sweden) stated that the item under consideration was one of the most important subjects to be discussed during the whole Conference. He recalled that he had already made some comments on it in his opening statement. Plant breeders' rights should not afford a more far-reaching scope of protection than patents. Demands for a more far-reaching scope than the one that was now offered seemed to be based on the assumption that the future scope of "use" was hard to predict and that this should lead to a generous definition of the scope of protection. That view was not shared by Sweden, and was not an acceptable basis for the revision of the Convention. There were many reasons for that point of view.

849.2 An aim of the revision of the Convention should be to harmonize legislation, Mr. Öster said, particularly in respect of the scope of the protection

which was both the key to the protection that a breeder could obtain and the essence of the plant breeder's right. His Delegation therefore felt that it was not appropriate to leave to the Contracting Parties the possibility of defining a wider scope of protection at their discretion. The future consequences of allowing an option were very unclear. Therefore, his Delegation could not support the proposal to add the words "at least" in the introductory part of Article 14(1), but supported the proposal to delete item (viii).

850. Mr. BOGSCH (Secretary-General of UPOV) observed that it was very difficult to make decisions because the addition of "at least" in the introductory part of Article 14(1) would indeed give a blank check to the member States to add any number of rights, however exaggerated. He agreed with Mr. Harvey (United Kingdom) that the intention of the proposal of the Delegation of Japan was better expressed in the proposals of the Delegations of Denmark and Germany. He was confident that that was the decision which the Conference wanted to make; it was certainly in favor of the private circles that member States had the latitude to grant stronger rights.

851. Mr. FOGLIA (Italy) stated that his Delegation could not support for the moment the proposals to give freedom to Contracting Parties. The words "at least" or the proposed permissive clause could raise problems in relation to the list of acts. It could support the deletion of item (viii) since it had proposed in document DC/91/24, which was still to be considered, a different provision for that item.

852. Mr. VIRION (Poland) said that his Delegation was of the opinion that item (viii) would have to be deleted and the sentence proposed by the Delegation of Denmark added, rather than adding the words "at least."

853.1 Mr. SCHENNEN (Germany) stated that an international Convention for the protection of intellectual property in the field of breeders' rights could indeed content itself with stipulating minimum rights as also done in other conventions. The problem of item (viii) was twofold. Item (viii) basically subjected all acts to plant variety protection and thereby made items (i) to (vii) superfluous. Secondly, it had been attempted to cover all conceivable acts of use in item (viii). The Delegation of Germany held that either the Convention or, better still, national law should determine precisely the individual acts of use that were prohibited. National law should give detailed account in order to ensure a clear balance with the limitations of protection provided for in Articles 15 and 16. For that reason, his Delegation held it to be most important that item (viii) be replaced by a ruling that would permit national law to extend protection to further acts of use.

853.2 Finally, Mr. Schennen wished to refer again to the proposal of his Delegation to delete item (ii). That would produce a substantive difference. As a consequence of the overall proposal made by his Delegation, national law would have the choice of covering the act of use constituted by processing to produce propagating material. It was most important to his Delegation that no obligation be placed on the Contracting Parties with regard to processing to produce propagating material.

854. Mr. HOINKES (United States of America) concurred with the views expressed by Mr. Schennen (Germany). Many national laws provided for a floor, but not necessarily for a ceiling. But the absence of a ceiling did not mean that there was no limit. And item (viii) was about as indefinite as anything could be; the Convention should not be drafted in that fashion. If a new use was to be discovered later that should require the authorization of the breeder, the Convention should not prohibit Contracting Parties to extend protection to that use. Mr. Hoinkes fully understood the problem raised by Mr. Harvey (United Kingdom), but that was just a matter of drafting which could be resolved as follows: "Subject to Articles 15 and 16, each Contracting Party shall provide that at least the following acts shall require the authorization of the breeder."

855. Mr. WHITMORE (New Zealand) stated that his Delegation agreed that item (viii) should be deleted and that each Contracting Party should be allowed to provide that further specific acts required the authorization of the breeder. How the latter could be written into the Convention was largely a matter of drafting for which several solutions were possible.

856. Mrs. JENNI (Switzerland) said that it was also the view of her Delegation that the Convention should constitute a framework. The minimum rights were already well defined in items (i) to (vii) and the sentence proposed by the Delegation of Denmark would ensure a certain amount of elbow room for the member States. (Continued at 859)

[Suspension]

OPENING STATEMENTS (Continued from 244.7)

857. The PRESIDENT reopened the meeting and gave an opportunity to the representative of the Food and Agriculture Organization of the United Nations (FAO) to make an opening statement.

858.1 Mr. BOMBIN (FAO) welcomed the opportunity to make a general statement and said that it would be on Article 14 in relation to Article 15. Both Articles had a particular importance for FAO since they could affect the present situation as regards the "research exemption" and the "farmer's privilege." The "farmer's privilege" was widely used, especially in developing countries where many farmers could not afford to buy new seeds every year. In some countries, over 50% of the food supply depended on the use of seed harvested by the farmer and for which the farmer had paid some royalty in a previous year--when he had not received the initial seed stock from State seed certification agencies.

858.2 Mr. Bombín recalled that it was in fact the existence of the "research exemption" and of the "farmer's privilege" that had allowed FAO member States to conclude that plant breeders' rights as provided for under the UPOV Conven-

tion were not incompatible with the FAO International Undertaking on Plant Genetic Resources. The scope of the protection envisaged in the Basic Proposal under Article 14(1)(a)(i) ("production or reproduction") was much wider than the scope provided in Article 5 of the present Convention ("production for purposes of commercial marketing"). Article 14 of the Basic Proposal eliminated the "farmer's privilege" as a principle, although Article 15(2) reinstated it as an exception. FAO was not very happy about this downgrading of the "farmer's privilege," but understood that the UPOV member States wished to limit abuses or too wide interpretations of both the "research exemption" and the "farmer's privilege."

858.3 Mr. Bombín concluded his statement by saying that FAO considered it essential that both principles be kept in the new text of the Convention. This would surely favor acceptance by some developing countries of the UPOV Convention and would be in accordance with the principle of free availability of germplasm of the FAO International Undertaking on Plant Genetic Resources.

CONSIDERATION OF THE DRAFT NEW ACT OF THE UPOV CONVENTION

Article 14 - Scope of the Breeder's Right

Article 14(1), Introductory Part - Exhaustive or Non-exhaustive Nature of the List of Acts Under Subparagraph (a) - And Possible Additional Provision on the Non-exhaustive Nature of the List [Article 14(4) of the Text as Adopted]

Article 14(1)(a) - List of Acts Covered by the Breeder's Right

(Continued from 856)

859. Mr. ORDOÑEZ (Argentina) stated that item (viii) should be deleted and that the scope of protection should be defined with precision in the Convention, but as a minimum. His Delegation had some sympathy with the proposals of the Delegations of Denmark and Germany to let a Contracting Party decide whether further uses should be protected.

860. Mr. TOURKMANI (Morocco) suggested adding "for the purpose of marketing" to item (i) ("production or reproduction"). That would leave the "farmer's privilege" intact. As for item (vi), relating to importing, it seemed to Mr. Tourkmani that it was not for the importer to request the breeder's authorization, but rather for the exporter. He therefore proposed deleting item (vi).

861.1 Mr. TESCHEMACHER (EPO) said that he well understood those for whom item (viii) went too far and was unclear. The provision could, for instance, lead to a dispute whether protection had to be afforded not only on import or export but also, for example, on the transit of seed. He also understood those who feared that forms of utilization would arise in future that would not be covered by items (i) to (vii). However, he wondered whether an explicit provision in Article 14 was necessary for that purpose.

861.2 Mr. Teschemacher further wondered what the legal nature of the Convention was, that was to say whether it committed the member States, as did other treaties in the field of industrial property, to afford minimum protection whilst not depriving them of the right to afford more extensive protection. He asked himself that question also in connection with the possibility that item (viii) would be deleted without being compensated in part by an addition to the introductory sentence in Article 14(1) or by an additional paragraph. If a Contracting State did not infringe the Convention by extending protection at national level to a new form of utilization not covered by the Convention, then it would appear to be misleading to him, for instance, to insert the words "at least" in the introductory sentence. If Article 14(1) was only to define a minimum scope of protection, then it would be altogether sufficient to describe that legal situation in the notes on the provision.

862.1 Mr. ROYON (CIOPORA) recalled that CIOPORA considered it as an essential principle of the definition of the scope of protection of an industrial property right covering a new product that not only the making and selling of the product, but also its use for commercial purposes should be under the control of the right owner. If item (viii) was deleted from Article 14(1)(a), CIOPORA could not see how the use of propagating material for the commercial production of cut flowers and fruit could ever be licensed by the breeder. Indeed, Article 14(1)(a) was strictly limited to propagating material and only provided an indirect possibility of control for the breeder in respect of produce.

862.2 Mr. Royon further stated that it was essential for breeders of vegetatively propagated ornamental and fruit tree varieties that they should be able to license specific fields of use of their varieties; licensing for example a rose plant for the use by an amateur gardener or for the production of cut flowers were two completely different matters. Although CIOPORA had understanding for the various explanations given in support of the deletion of item (viii), it believed that there would be a dramatic loophole in the Convention for the varieties mentioned if breeders were not given the possibility of controlling the use of the propagating material and of licensing such use for the production of cut flowers or fruit.

863. Mr. O'DONOHUE (Ireland) stated that his Delegation strongly supported the deletion of item (viii). It was sure that there would be developments in the future that would not be covered by the Convention and, like other Delegations, it could go along with the sentence as proposed for instance by the Delegation of Denmark to cover such eventuality.

864. Mr. ELENA (Spain) associated his Delegation to the position stated by Mr. O'Donohoe (Ireland).

865. Mr. WINTER (COMASSO) stated that COMASSO, as an organization of breeders, had been altogether happy with the Basic Proposal. It had seen it as a sign that a serious intention existed to afford to breeders a reinforced right, and one that was indeed necessary. The ongoing discussion, however, showed up tendencies not to go so far as was desirable and necessary. That was regretted by COMASSO. He wished to place great emphasis on the fact that item (viii) was essential for various reasons. Should it be decided, however, for political considerations and, possibly, due to fears that had nothing to

do with propagating material, to delete item (viii), it would then be necessary in any event to provide the possibility of subjecting further acts to the breeder's right of prohibition at national level.

866.1 Mr. SLOCOCK (AIPH) recalled that Article 14 was the most important provision of the Convention for the horticultural producers. One of the main objectives of the Conference was to define the scope of the breeder's right, and failure to define it made it pointless to discuss details in other provisions. AIPH had been somewhat surprised to see in the Basic Proposal a clause such as that in item (viii), the sort of thing one would put at the bottom of a shopping list. If one really believed in the value of item (viii), there would be no reason to bother with the preceding items.

866.2 Moreover, Mr. Slocock said, it was hard to believe that, after many years of hard work, there would still be any act relating to the propagating material that was not already listed. And if one arose in the distant future, it would not be right that a particular breeder or the breeders in a particular country should alone benefit from an extended protection, with all the distortions in trade and industry to which this would lead. The revision of the Convention should, as Mr. Öster (Sweden) had pointed out, bring clarity and harmony. If at some future and distant point in time, other acts appeared which should require the breeder's authorization, the UPOV member States should collectively identify them in a revision of the Convention and should not leave individual States to take different and independent actions.

867. Mr. VAN DE LINDE (ASSINSEL) stated that ASSINSEL was of the opinion that the Conference should agree on a Convention for the future, covering future developments. For that reason, ASSINSEL was in favor of maintaining item (viii) in the text. If, however, that could not be accepted, then ASSINSEL supported the proposal to insert an additional sentence.

868. Mr. BANNERMAN (FICPI) voiced FICPI's concern at the proposal to delete item (viii). If Article 14(1)(a) was made into a closed list, it would simply encourage third parties to try to find ways of exploiting protected varieties without recourse to acts covered by the breeder's right. The proposal of the Delegation of Japan was an improvement in that it enabled national authorities to cover further acts, but this detracted from the general trend towards harmonization. Any use made by a third party of the material referred to in Article 14 should be under the control of the owner of the breeder's right and the only exceptions to that should be those acts which were specifically excluded by the Convention under Articles 15 and 16.

869. Mr. VON PECHMANN (AIPPI) said that AIPPI was of the opinion that item (viii) should remain in the Convention as a safety net. It was the breeder's "last defense" in the event of an as yet unperceivable utilization of his propagating material.

870. Mr. SCHUMACHER (GIFAP) said that GIFAP held that breeders' rights should be strengthened as far as ever possible. They should gain attractiveness. Item (viii) should therefore remain. Should that not be possible, for political reasons, then GIFAP would favor the proposal made by the Delegation of Germany.

871. Mr. SMOLDERS (ICC) said that ICC was also strongly in favor of maintaining item (viii), in particular for the reasons explained by Mr. Royon (CIOPORA). ICC was very concerned about the protection of ornamental plants and fruit trees and wondered whether the new Convention as it was proposed was not drawing back from earlier texts.
872. Mr. DAVIES (UPEPI) stated that UPEPI was also in favor of retaining item (viii), which gave stronger rights to breeders.
873. Mr. KING (IFAP) stated that IFAP, as was predictable, strongly supported the view expressed by Mr. Slocock (AIPH) in favor of the deletion of item (viii).
874. Mr. BESSON (FIS) said that FIS was in favor of maintaining item (viii) which would serve to interpret the elements covered by items (i) to (vi).
875. The PRESIDENT wished to close the debate on the proposals under consideration.
876. The proposal to delete item (viii) of Article 14(1)(a) was adopted by 13 votes for, one vote against and two abstentions.
877. The PRESIDENT observed that the adoption of the proposal to delete item (viii) of Article 14(1)(a) implied that the proposals of the Delegations of Canada and Italy, reproduced in documents DC/91/60 and DC/91/24, to amend that item were not longer relevant.
878. The Conference noted that the proposals of the Delegations of Canada and Italy, reproduced in documents DC/91/60 and DC/91/24, to amend that item would not be considered. (Continued at 955)
879. The PRESIDENT then wished to have a vote on the principle that Contracting Parties could make further acts subject to the authorization of the breeder.
880. Mr. VON ARNOLD (Sweden) wished the Conference to revert to the question put by Mr. Teschemacher (EPO) concerning the character of the Convention before a vote was taken on the proposal to specify that further acts could be covered on a national basis. If the Convention was only a minimum standard and if the parties to the Convention could extend the scope of protection beyond what was prescribed in the Convention, the vote would not have much meaning.
881. Mr. BOGSCH (Secretary-General of UPOV) stated that in his opinion the spirit of many industrial property conventions was indeed as described by Mr. Teschemacher (EPO). They provided for minimum rights. But the modern trend was to state that expressly, in particular since other provisions of

such conventions were intended to be exhaustive. It would therefore be useful to state in the Convention that the list of acts could be supplemented if it was the wish of the Conference that it should be so.

882. The proposal to add to the text of Article 14(1) a reference to the fact that the list of acts appearing in subparagraph (a) was only a minimum list and could be supplemented on a national basis was adopted by consensus.

883. The PRESIDENT opened the debate on the proposal of the Delegation of Germany, reproduced in document DC/91/91, to delete item (ii) in Article 14(1)(a), i.e., the reference to: "conditioning for the purpose of propagation."

884. Mr. BURR (Germany) explained that deletion of the act of conditioning for the purpose of propagation from the list of acts subject to the breeder's right was based on the fact that it constituted a follow-up act to production. Furthermore, production was a circumstance that could indeed be controlled whereas conditioning on the farmer's own holding was very difficult to apprehend. His Delegation was aware that farmers in a number of member States increasingly made use of conditioning installations outside their own holdings and that those installations were able to serve as a bottleneck for the levying of fees. In view of that situation, it had proposed an additional provision, the principle of which had just been accepted, under which the member States could subject further acts to the breeder's right in their own national law.

885. Mr. BOGSCH (Secretary-General of UPOV) wished to recall the history of item (ii). "Conditioning for the purpose of propagation" was a step in the manipulation of the propagating material which was particularly propitious for the establishment of infringement and for the lodging of a complaint.

886. Mr. ORDOÑEZ (Argentina) fully supported the statement of Mr. Bogsch (Secretary-General of UPOV). Conditioning was a very important point in Argentina and had to be kept in the Convention. He wished the item to be further defined so that the farmer who was saving seed for his own use was protected and that the farmer who used the "farmer's privilege" to trade in seeds would be caught.

887. Mr. HARVEY (United Kingdom) also endorsed the remark made by Mr. Bogsch (Secretary-General of UPOV). Item (ii) was a very important provision; it was very important for the United Kingdom. It should not be optional, but all Contracting Parties should have a uniform provision entitling the breeder to authorize conditioning. His Delegation therefore opposed the proposal of the Delegation of Germany.

888. Mr. KIEWIET (Netherlands) associated his Delegation with the statements of the previous speakers.

889.1 Mr. KUNHARDT (Germany) wished to explain the proposal again in the light of previous statements. It was not a matter of obliging breeders, in principle, to accept or authorize conditioning--or to remove the conditioning of material to produce propagating material from protection. Conditioning did not lie on the same logical level as the other activities listed in Article 14(1)(a). A farmer who conditioned plant material to produce propagating material or who had such material conditioned as propagating material by a contractor was producing propagating material within the meaning of item (i) and was therefore subject to the breeder's right.

889.2 Mr. Kunhardt further explained that all other acts listed under subparagraph (a) were those which someone undertook with material that was under his power of disposal. Conditioning could go beyond that. It could oblige a State to provide penalties for infringement not only with regard to a farmer who had propagating material conditioned without consent but also in respect of the contractor who had undertaken the conditioning. Germany did not wish to be obliged to use breeders' rights against contractors who conditioned material for farmers and in no way had ownership in the seed nor would be able to know whether the farmer had a license from the breeder or not. It was therefore not a matter of removing conditioning from the scope of protection, but simply of ensuring that the right of prohibition was addressed only to those parties who had such conditioning effected for their own seed.

890.1 Miss BUSTIN (France) said that her Delegation had perfectly understood the various objections raised by the Delegation of Germany, but that France had great experience in the sector of application of the Convention in question. There had been problems of interpretation in France as to the place of the seed cleaning and conditioning stage in the production or reproduction sequence. The first instance courts, as also the appeal courts, had concluded that the act covered by item (ii), as presently proposed, was indeed an integral part of the acts referred to in item (i). That had nevertheless required a court interpretation that had been long to obtain.

890.2 Miss Bustin added that it was essential for France that the breeder should have a means of acting directly with regard to the cleaning and conditioning activities and that such activities clearly constituted an infringing act when carried out other than for private purposes on seed obtained from harvested material. For that reason, the Delegation of France favored the maintaining of item (ii). It could indeed be useful to supplement that item by inserting the words "cleaning and" before "conditioning."

891. Mr. ÖSTER (Sweden) supported the proposal of the Delegation of Germany.

892. The proposal of the Delegation of Germany, reproduced in document DC/91/91, to delete item (ii) of Article 14(1)(a) was rejected by three votes for, 14 votes against and one abstention.

Tenth Meeting
Friday, March 8, 1991
Afternoon

Article 14(1)(b) of the Basic Proposal [Article 14(2) of the Text as Adopted]
- Scope of the Breeder's Right in Respect of Harvested Material

893. The PRESIDENT opened the debate on the proposal of the Delegation of Spain reproduced in document DC/91/82.

894.1 Mr. LOPEZ DE HARO (Spain) explained that the proposal of his Delegation aimed at making it optional for Contracting Parties to include in their national laws and regulations provisions corresponding to those appearing in the Basic Proposal and relating to harvested material and products obtained from harvested material. It would permit the special circumstances of each country--social or political--to be taken into account. Spain could not accept today mandatory rules for the inclusion of acts in relation to harvested material and products obtained from harvested material in the acts that required the authorization of the breeder.

894.2 In addition, in order to prevent the breeder from exercising his rights at his discretion at any of the steps defined in subparagraphs (a), (b) and (c), his Delegation proposed to add the phrase now appearing in square brackets in the Basic Proposal both in subparagraph (b) and in subparagraph (c). It had to be clear also in what cases these two options could be used. Mr. Lopez de Haro stressed that Spain's future accession to the revised Convention would be difficult if Article 14(1)(b) and (c) were kept as appearing in the Basic Proposal.

895. Mr. BRADNOCK (Canada) stated that his Delegation supported the position of Spain.

896. Mr. LLOYD (Australia) stated that his Delegation also supported the amendment proposed by the Delegation of Spain.

897. Mr. BROCK-NANNESTAD (UNICE) stated that UNICE expressed itself in favor of strengthening the rights to be available upon the grant of a breeder's right. However, if such strengthening were obtained to the detriment of the possibilities of protecting new developments other than new varieties, the position would be different. In particular, if the definition of the subject matter that might only qualify for a breeder's right became too broad, it would enable for instance Article 53(b) of the European Patent Convention to be invoked to deny protection even when the UPOV Convention could not provide protection; there would then be a large gap of unprotectable subject matter. There was thus a balance to be struck.

898. Mr. KIEWIET (Netherlands) stated that the proposal of the Delegation of Spain concerned the very heart of the new Convention. Article 14(1)(b) and (c) was one of the main provisions designed to strengthen the position of the breeder. His Delegation was opposed to the proposal in all its aspects.

899. Mr. HAYAKAWA (Japan) stated that, concerning the first part of the proposal of the Delegation of Spain, his Delegation was in favor of strengthening the breeder's right and therefore opposed to the proposed amendment. Concerning the second part, his Delegation had proposed a similar amendment. He suggested that the two parts be discussed separately, the second in conjunction with similar amendments proposed by other Delegations.

900. Mr. BURR (Germany) stated that his Delegation did not favor making subparagraph (b) optional. It shared the viewpoint of the Delegation of the Netherlands that breeders' rights should compulsorily extend to harvested material. However, a question arose whether the words "harvested material" were adequate in such case, for instance in order to cover pot plants. In that connection, Mr. Burr referred to the proposal of his Delegation reproduced in document DC/91/91 to supplement the words "harvested material" with the words "including whole plants."

901. Miss BUSTIN (France) said that her Delegation was opposed to making the provision on the extension of breeders' rights to the harvested material optional and therefore to the first part of the amendment proposed by the Delegation of Spain.

902. Mr. HARVEY (United Kingdom) stated that his Delegation shared the position expressed by the previous speakers.

903.1 Mr. DMOCHOWSKI (Poland) said that his Delegation supported the proposal of the Delegation of Spain concerning subparagraph (b). It was against the proposal concerning subparagraph (c) for it supported Alternative B in the Basic Proposal. The problem under consideration was also, in his opinion, connected with the contents of Article 15; some general comments were therefore appropriate.

903.2 The Delegation of Poland expressed itself against an excessively increased breeder's right, in particular against the increase of the material benefits through the sale of products made directly from harvested material of the protected variety. It also declared itself against the limitation of the "farmer's privilege" and shared the opinion of organizations such as FAO, AIPH, COGECA and COPA. A plant breeder's right extended to industrial products--and consequently also to animal products obtained through use of the crop as fodder--would be very difficult or even impossible to exercise in practice. The identification of particular varieties in those products would mostly be impossible, even with the help of complex and costly examination procedures. Such a breeder's right would then be a privilege for a small number of breeders, and that was contrary to the fundamental principle of equality before the law.

903.3 The proposed extension of the breeder's right to the products obtained from the harvested material of the protected variety and also the proposed restriction of the concept of "farmer's privilege" were insufficiently argued

concessions to the claims of plant breeders. Plant breeders considered themselves as the exclusive creators of new varieties, on an equal footing with inventors in the technical or industrial field. However, the creation of a new plant variety was always, unlike a technical invention, the result of an interaction between the conscious and creative ideas and actions of a breeder, on the one hand, and the uncontrolled and random forces of nature, on the other. Therefore, it was not reasonable to reserve the material benefits from the creation of new varieties to the breeders. All human beings had an unquestionable right to a profit from the action of natural forces. In this particular case, those human beings were in the first place the agriculturists, horticulturists and sylviculturists, and also those who transformed the plant material. It was thus necessary to retain in the Convention a proper balance between the rights and the interests of plant breeders and variety users.

903.4 Mr. Dmochowski concluded his statement by saying that his Delegation advocated a limitation of the scope of the breeder's right to the propagation, storage and sale of propagating material of the protected variety and to the licensing of those activities. Only exceptionally should the harvested material derived from the use of propagating material of the protected variety also be covered, and then only with the reservation appearing in the square brackets in the Basic Proposal.

904.1 Mr. HOINKES (United States of America) declared that his Delegation could not accept the proposal under discussion. It believed that the breeder's right should extend to the harvested material of the protected variety. In addition, the breeder should be able to proceed against the unauthorized harvested material directly; in other words, he should not be obliged to seek redress in respect of the propagating material first and invoke the extension of the right only if he were unsuccessful.

904.2 The structure of the proposal was another point of concern: since the proposal opened up an option for Contracting Parties and added a condition, it was to be interpreted as permitting a particular Contracting Party not to adopt protection with respect to the harvested material and forcing all other Contracting Parties that wanted such protection to introduce the additional condition governing that protection. If the extension of the breeder's right was to become optional, then the additional condition would really not be necessary.

905. Mrs. JENNI (Switzerland) stated that her Delegation was in favor of compulsory extension of protection to the harvested material and therefore opposed the proposal made by the Delegation of Spain.

906. Mr. WHITMORE (New Zealand) said that his Delegation could not support the first part of the proposal of the Delegation of Spain.

907. Mr. ÖSTER (Sweden) stated that his Delegation was basically against extending protection to the harvested material but, for the sake of harmonization, was prepared to vote for the text as presented in the Basic Proposal.

908. Mr. ESPENHAIN (Denmark) stated that his Delegation was in favor of keeping the principle underlying the text appearing in the Basic Proposal.

909. Mr. ORDÓÑEZ (Argentina) supported in the name of his Delegation the text presented in the Basic Proposal.
910. Mr. ROYON (CIOPORA) recalled that his impression from the past two years of work and cooperation with UPOV was that it was the intention of this Conference to improve the contents and scope of the breeder's right. If the proposal of the Delegation of Spain was to be accepted, the situation under Article 5(4) of the present Convention would be restored, which was not acceptable to CIOPORA. In addition, CIOPORA wished the second part of the proposal to be deleted.
911. Mr. WINTER (COMASSO) expressed the opinion that it was essential in the interest of the intended reinforcement of breeders' rights that the mandatory extension of breeders' rights to the harvested material be laid down in the Convention. For the same reason, it appeared just as essential to delete the sentence given in square brackets in the Basic Proposal.
912. Mr. O'DONOHUE (Ireland) stated that his Delegation supported the view that subparagraph (b) should be a mandatory provision.
913. Mr. VAN DE LINDE (ASSINSEL) stated that ASSINSEL agreed with the Delegations which had stated that Article 14 was one of the core elements of the new Convention from the standpoint of strengthening the rights of the plant breeder. Article 14(1)(a) effectively covered only propagating material. There might be occasions, for instance in relation to farm-saved seed, when it would be politically or administratively more convenient to exercise the breeder's right on the harvested material. It was therefore important for the breeder to have flexibility. ASSINSEL supported the text in the Basic Proposal with the deletion of the words between square brackets.
914. The proposal of the Delegation of Spain, reproduced in document DC/91/82, to make the provision in Article 14(1)(b) optional was rejected by four votes for, 13 votes against and one abstention.
915. The PRESIDENT opened the debate on the second part of the proposal of the Delegation of Spain reproduced in document DC/91/82 and on the corresponding proposal of the Delegation of Japan reproduced in document DC/91/61. Both proposals aimed at making the exercise of the breeder's right in respect of the harvested material dependent upon the fact that it had been impossible to exercise it in respect of the propagating material.
916. Mr. HAYAKAWA (Japan) observed that his Delegation was in favor of strengthening the breeder's right but felt that, if a mandatory provision were to be accepted to the effect that the breeder would be able to exercise his right in relation to harvested material and other products, it would not lead to the establishment of a smooth relationship between the breeders and the users of varieties. The breeder should exercise his right at the earliest possible stage. If the breeder could freely choose the stage at which he exercised his right, there would be a very uncertain situation for the trade. Therefore, the Delegation of Japan proposed to introduce a so-called "cascade

principle." It was only on that condition that Japan would be able to accept a broadening of the scope of the breeder's right.

917. Mr. LOPEZ DE HARO (Spain) said that his Delegation fully endorsed the statement made by Mr. Hayakawa (Japan).

918. Miss BUSTIN (France) observed that the second part of the amendment proposed by the Delegation of Spain appeared to introduce some confusion as between the scope of the breeder's rights and a theory taken from another field of intellectual property law, that was to say exhaustion, to be found in Article 16 of the Basic Proposal. To say that a right could only be exercised when it had not been exercised previously was tantamount to saying that it could only be exercised when it was not exhausted. That confusion raised certain problems. Moreover, the proposed amendment would oblige a breeder to furnish proof that he had not been able to exercise his right at an earlier stage. He would thus be afforded a right that was extensive, but extremely difficult to exercise due to the need to furnish negative proof. That was why the Delegation of France preferred the wording given in the Basic Proposal.

919. Mr. BURR (Germany) said that his Delegation had some sympathy for the principle behind the proposals made by the Delegations of Japan and of Spain, even if one could argue, like the Delegation of France, that exhaustion resolved that question. One could nevertheless, in the provision discussed, once more set out the principle of exhaustion with clarity. However, the Delegation of Germany would by far prefer the formulation contained in the proposal of the Delegation of the United States of America in document DC/91/12. It wished therefore to request that a vote first be taken on the principle and that the question of formulation be postponed.

920. Mr. KIEWIET (Netherlands) observed that the words: "was not authorized by the breeder" appearing in the Basic Proposal were sufficient to establish the so-called "cascade system." To accept a stronger form of the "cascade principle" as proposed by the Delegations of Japan and Spain would create all kinds of problems when the breeder would try to exercise his right in relation to harvested material; it would be very difficult for him to prove that he had not been in a position to exercise his right at an earlier stage. In fact, the breeder might just possess a worthless right.

921. Mr. VON PECHMANN (AIPPI) stated that, if one was agreed that harvested material should be protected, then the breeder should not bear the burden of having to determine where and how given harvested material had been produced. The burden of proof could be difficult to such a degree that he would not be in a position at all to take action against the infringement of his right by that harvested material. The formulation "no legal possibility" would put any good lawyer acting for the defendant in a position to cast doubt at any time on the justification for the action.

922. Mr. ÖSTER (Sweden) recalled that during the preparatory work of the Administrative and Legal Committee, the representatives of Sweden were the ones who had introduced the proposal now appearing in square brackets in the

Basic Proposal. To that extent, his Delegation supported the proposal of the Delegation of Spain. Its position was that the breeder should not have the possibility to choose the stage at which he would collect his royalties.

923. Mr. WHITMORE (New Zealand) declared that the views of his Delegation were similar to those eloquently expressed by Miss Bustin (France) and Mr. Kiewiet (Netherlands).

924. Mr. BRADNOCK (Canada) stated that his Delegation supported, like that of Sweden, the proposal of the Delegation of Spain. The focus of the plant breeder's right should be on propagating material, and only exceptionally should the right be exercised on harvested material.

925. Mr. LLOYD (Australia) stated that his Delegation supported the views of the Delegations of Canada and Sweden. If the provisions of both Article 14(1)(b) and Article 14(1)(c) were made obligatory in the revised Convention, Australia would not be in a position to amend its legislation and to ratify the Convention because of the strength of certain national interest groups. This did not mean, however, that the Delegation of Australia was not sympathetic to the strengthening of the rights of the breeders or to the harmonization of those rights. Australia would endeavour to amend its Act, but the circumstances had to be borne in mind.

926. Mr. ESPENHAIN (Denmark) recalled that, during the whole preparatory work on the proposed revised text, his Delegation had supported the objective to strengthen the breeder's right. At the same time, it had consistently taken the view that the royalties should be collected at the first possible stage. That also corresponded to a recommendation adopted at the 1978 Diplomatic Conference. His Delegation therefore supported the proposal of the Delegation of Spain.

927. Mr. O'DONOHUE (Ireland) endorsed the position taken by Mr. Espenhain (Denmark).

928. Mr. SLOCOCK (AIPH) stated that it might appear surprising that, as a representative of a producers' organization, he should welcome the fact that Article 14(1)(b) should become obligatory; but this was realistic and marked a sensible progress in the development of plant variety protection legislation. However, in the market and in the horticultural world, it was an incorrect approach to suggest that the collection of the royalty or the exercise of the breeder's right should take place anywhere but at the propagation stage. A choice for the breeder as to where he would exercise his right would be inappropriate in practice and doubtful in law.

929. Mr. ORDÓÑEZ (Argentina) stated that his Delegation supported Article 14(1)(b) in all its aspects because if the breeder could not collect his royalty at the proper stage, he should be able to get it at the next stage in the economic chain.

930. Mr. HRON (Austria) informed the Conference that debates in Austria were strongly oriented towards reinforcement of breeders' rights, but they should be assertible as early as possible--that was to say, where possible, at the stage of propagating material. The rights should only be assertible at a later phase, that is to say for harvested material, in exceptional cases.

931. Mr. ROYON (CIOPORA) stated that CIOPORA was in favor of the strengthening of the breeder's right because of the many loopholes that existed in many UPOV member States at the present time. The various interventions made so far only indirectly touched upon the contents of the right; they concerned essentially the commercial stage at which the breeder may collect his royalty. Provided that there was an exhaustion of the right, the question whether the breeder collected his royalty at one stage or another should be of no concern to the Conference in the opinion of CIOPORA. In France, for instance, under the currently applicable law, royalties were collected at different stages depending on the species and this had not raised any difficulty. The problem of control was also to be considered; the breeder should be able to collect his royalty where the control was the easiest.

932. Mr. SMOLDERS (ICC) stated that his Delegation supported the statements made by the Delegation of France and the representative of CIOPORA. It was essential that the breeder was able to decide himself at which stage he could and would collect his royalties.

933. The PRESIDENT proposed to close the debate and vote on the principle of the proposals of the Delegations of Japan and Spain, leaving it to the Drafting Committee to finalize the wording if the proposals were accepted.

934. The principle of the proposals of the Delegations of Japan and Spain, reproduced in documents DC/91/61 and DC/91/82, to make the exercise of the breeder's right in respect of the harvested material dependent upon the fact that it had been impossible to exercise it in respect of the propagating material was accepted by 10 votes for and eight votes against.

935. The PRESIDENT opened the debate on the proposal of the Delegation of Japan, reproduced in document DC/91/61, to specify the acts covered by the breeder's right in relation to the harvested material.

936. Mr. HAYAKAWA (Japan) explained that, having examined the text in the Basic Proposal, his Delegation had tried to pick up the acts concerning the propagating material that were appropriate in the context of harvested material. The first was "use," namely to produce the product. Concerning: "offering for sale or for leasing," it was to be noted that, in Japan, the business of leasing ornamental plants or flowers had become quite significant, hence the need for a reference to it. Concerning item (vii), "stocking," the proposed text had to be amended according to the decision taken in respect of Article 14(1)(a)(vii) to read: "mentioned in (i) to (vi), above," rather than: "mentioned in (i) to (v), above."

937. Mr. WHITMORE (New Zealand) stated that his Delegation was very interested in the proposal. It seemed logical to have different lists in subparagraphs (a) and (b) since the acts carried out in respect of propagating material were not necessarily the same as the acts carried out in respect of harvested material. In principle, it supported the proposal, although it might be possible to make some minor improvements.

938. Miss BUSTIN (France) said that her Delegation did not understand the sequence of the proposal made by the Delegation of Japan. In particular, it was unable to say what was added by item (iv) over and above item (ii); both referred to the "leasing" of harvested material, which was moreover a concept that would need defining. The Delegation of France was therefore unable to support the proposal and opposed it.

939. Mr. HAYAKAWA (Japan) explained that, in Japan, great quantities of ornamental plants and cut flowers were leased--and not sold--by special leasing traders, for example for receptions in hotels or offices. This practice was becoming a big business in Japan.

940. Miss BUSTIN (France) said that, in view of the amendment the Conference had just adopted in order to introduce the "cascade" principle, it was difficult to imagine how a breeder could exercise his right with regard to that type of activity. Her Delegation clearly preferred the broader wording in the Basic Proposal.

941. Mr. FOGLIA (Italy) stated that his Delegation had the same problem as the Delegation of France. Additionally, the terms "location" in French and "leasing" in English might refer to two different contracts under Italian law. His Delegation was in favor of the text as appearing in the Basic Proposal.

942. The proposal of the Delegation of Japan, reproduced in document DC/91/61, to list in Article 14(1)(b) the acts in respect of the harvested material covered by the breeder's right was rejected by five votes for, eight votes against and four abstentions.

943. The PRESIDENT opened the debate on the proposals of the Delegations of Germany and of the United States of America, reproduced in documents DC/91/91 and DC/91/12, to substitute "unauthorized [use]" for: "whose use, for the purpose of obtaining harvested material, was not authorized by the breeder."

944. Mr. HOINKES (United States of America) stated that the thrust of the proposal of his Delegation was merely to clarify the provision.

945.1 Miss BUSTIN (France) said that it seemed to her Delegation that the proposal appeared to meet the wishes expressed by certain Delegations to ensure that breeders could not levy a royalty on harvested material unless they had not been able to exercise their rights at an earlier stage. Indeed, if a breeder had not exercised his right at an earlier stage, one was faced with two types of situation: either he had refused authorization, and by that fact

exercised a right in accordance with what the Convention authorized him; or his right had been violated as a result of the acts authorized under a license he had granted having been exceeded.

945.2 The wording under discussion did not obligatorily say that the breeder had to levy a royalty at that stage; however, whether it concerned infringement by lack of authorization or violation of a contract, a breeder should be able to exercise his right in the manner proposed by the Delegation of the United States of America, whilst providing in Article 14(1)(b) certain assurances to those States who wished to have a certainty that the rights would be exercised at the earliest possible stage. It was difficult to imagine a breeder voluntarily permitting reproduction or propagation to be undertaken in violation of his rights and reserving for a later time the possibility of acting by concluding a licensing contract only at a late stage. He would be putting himself in serious danger of insecurity. That, it would seem, was what had been highlighted by the Delegation of the United States of America in its proposal. The Delegation of France supported that proposal as a proposal to improve the wording of the amendment accepted beforehand.

946. Mr. BOGSCH (Secretary-General of UPOV) wondered whether the proposal achieved its purpose. It seemed to him that if a person obtained the breeder's authorization for one act only, for example for conditioning for the purpose of propagation, the proposal implied that he could do anything with the propagating material because an authorization had been obtained. The text in the Basic Proposal was more precise: the authorization had to refer to the use which was to be made under subparagraph (b).

947. Mr. ESPENHAIN (Denmark) observed that the Conference had already voted in favor of the last part of Article 14(1)(b). To accept the proposal under consideration would in fact be a step backwards, even if the proposal was considered a matter of drafting. His Delegation would not vote for it.

948. Mr. HOINKES (United States of America) stated that he disagreed with Mr. Bogsch (Secretary-General of UPOV). If the use of the propagating material was authorized for conditioning purposes, and for conditioning purposes only, then there was no authorization for the use for any other purposes, in particular for obtaining harvested material.

949. Mr. KIEWIET (Netherlands) felt that Mr. Hoinkes (United States of America) was right. If someone had the authorization to do something with propagating material other than to produce harvested material, and produced such material, then it could be said that he had obtained harvested material through unauthorized use of propagating material. However, the discussion had shown that it might be preferable to keep the text appearing in the Basic Proposal, which was very specific.

950.1 Mr. ROYON (CIOPORA) stated that CIOPORA was not happy with the proposal because the right of the breeder should be exhausted only after a specifically qualified authorization had been given by him. If the wording and the interpretation of Article 14(1)(b) were to lead to the conclusion that the breeder could only collect his royalty at the stage of propagation, then a lot of the present commercial transactions in plant novelties would be disrupted.

950.2 In the case of rose varieties used for the production of cut flowers, the breeder may grant a qualified authorization to a propagator to sell plants of the variety to cut-flower growers. The propagator would have his own customers to whom he would sell propagating material, but the latter may wish to be in direct contact with the breeder concerning the right to exploit the variety, for instance because they may find the immediate payment of a royalty too high after all the investments they had made to start production. Other producers would renew their plantations after three or four years only, instead of keeping them for seven or ten years, and prefer to pay to the breeder a yearly royalty. In many instances, the propagator was just an intermediate caring for the production of the material from which one would derive the basic product which made the interest of the variety, namely the cut flower or the fruit.

950.3 Mr. Royon therefore wished to express his strong opposition to any exhaustion of the breeder's right after a non-qualified general authorization and to any obligation whatsoever to collect a royalty at any particular stage. That position was in keeping with the freedom of commerce and, provided there was no cascade of royalties, the marketing of varieties should be left to its own rules and competition should be allowed to play its role.

951. Mr. SMOLDERS (ICC) stated that his Delegation felt that Mr. Bogsch (Secretary-General of UPOV) had a point and that it was a reason for rejecting the proposal. It also strongly supported the observations made by Mr. Royon (CIOPORA).

952. Mr. HOINKES (United States of America) stated that he did not wish to insist on the proposal of his Delegation; but considering Article 14(1)(a) as amended by the Conference, there were only certain acts that required the breeder's authorization with respect to propagating material. One of them did not happen to be the use for the purpose of obtaining harvested material from propagating material. In other words, his authorization was not required under Article 14(1)(a) to obtain harvested material from propagating material. He wondered whether the present wording of Article 14(1)(b) was still consistent with that of Article 14(1)(a).

[Suspension]

953. Mr. BURR (Germany) wished once more to explain the purpose of the proposal made by his Delegation, that had the same content as that of the Delegation of the United States of America. In his view, there was agreement that authorization also implicitly covered the production of harvested material if the breeder had authorized the production and sale of propagating material. That was a case of harvested material that had been produced by authorized use of propagating material. However, where the breeder had not authorized sale and propagating material had nevertheless been sold and had been sown, for instance by the breaking of a licensing agreement, then that was a case of harvested material that had been produced by unauthorized use of propagating material. That was exactly the case that his Delegation wished to subject to intervention by the breeder.

954. The PRESIDENT suggested that the discussion be suspended on this proposal until the next meeting. (Continued at 1529.4)

Article 14(1)(a) - List of Acts in Respect of Propagating Material Covered by the Breeder's Right (Continued from 878)

955. The PRESIDENT opened the debate on the proposal of the Delegation of the United Kingdom reproduced in **document DC/91/110**.

956. Mr. HARVEY (United Kingdom) recalled that his Delegation made this proposal because of the point raised by the representative of CIOFORA before lunch and of the impression that something was lacking in the text of Article 14(1)(a) to cover what was a valid point. Article 14(1)(a), being devoted to propagating material, the act of "production or reproduction" concerned propagating material, and not harvested material. Article 14(1)(b) gave the breeder a right only when unauthorized use of propagating material was made for producing harvested material, but there was actually no requirement for anyone to obtain the authorization of the breeder for the use of propagating material for the purposes of producing harvested material. An amendment was therefore needed to Article 14(1)(a).

957. Mr. BOGSCH (Secretary-General of UPOV) said that, in his opinion, the proposal was very useful and in fact necessary.

958. Mr. BURR (Germany) wished to put a question to the Delegation of the United Kingdom. Was the agreement of the breeder to use for the purpose referred to to be required in addition to his agreement to the sale of the propagating material? In his preceding statement he had assumed it to be obvious that one could sow the propagating material where the breeder had given his agreement to its sale. Why should one otherwise have sold it? The question could be answered in both directions. Nevertheless, there had to be clarity.

959. Mr. HIJMANS (Netherlands) stated that the proposal of the Delegation of the United Kingdom seemed to be very useful. On the other hand, it raised questions. The first concerned exhaustion of the right. When someone sold propagating material, for instance fruit trees, and collected his royalty at that stage, his right became exhausted; that was a principle of the intellectual property systems, including plant breeders' rights. The second question was whether the limitation to cut flowers and fruit was useful or whether the proposed provision should apply to all plants. The third was whether, if there really was a problem, it was not covered by Article 14(1)(b).

960. Mr. ARDLEY (United Kingdom) replied that the question concerning exhaustion was a good point. However, as illustrated by an example given earlier in the discussion, the breeder would have to charge such an enormous royalty on the sale of rose bushes to cover the fact that they would be used for seven or eight years for the production of cut flowers that it would be unworkable. There was a question of exhaustion involved, which might need a specific provision. As far as the scope of Article 14(1)(b) was concerned,

his Delegation's expectation had been that the Article would in fact cover this situation, but it did not provide for an express authorization by the breeder for the use of propagating material for the purpose of producing harvested material. That Article, as worded, made it much more difficult for the breeder to enforce his rights in the case of such use. Finally, the limitation to cut flowers and fruit was being proposed in response to CIOPORA's concern. The question did not arise in the case of most agricultural crops, but the Delegation had an open mind on this issue.

961. Mr. FOGLIA (Italy) wondered whether the proposal of the Delegation of the United Kingdom was really necessary. The use of propagating material might be covered implicitly by Article 14(1)(a). Another question was the reason for using the expression "commercial production" when Article 14(1)(a)(i) referred to "production," unspecified.

962. Mr. DMOCHOWSKI (Poland) stated his opinion that the remarks of the representative of CIOPORA aimed at covering in the new text of the Convention the matter dealt with in the present Convention in Article 5(1), third sentence, namely the extension of the right of the breeder to ornamental plants and parts thereof normally marketed for purposes other than propagation when they were used as propagating material in the production of ornamental plants or cut flowers. The proposal of the Delegation of the United Kingdom had a different purpose, however. Mr. Dmochowski therefore proposed to address the problem raised by CIOPORA, which was also that of retaining the scope of the present Convention.

963.1 Mr. ESPENHAIN (Denmark) wished to speak on the proposal of his Delegation reproduced in document DC/91/97, although it was not yet under discussion, in view of the links with the question under consideration. He thought that the proposal covered the point raised by the representative of CIOPORA through its reference to: "other parts of plants or the harvested material." The wish was to cover the cases where a producer multiplied propagating material, not for marketing, but for use of the propagating material so multiplied on his own holding on a commercial scale. For example, a producer could buy ten strawberry plants, multiply them by tissue culture and lay out a very large plantation. He would use the ten plants commercially, but would never sell propagating material, and the breeder would receive a royalty for ten plants only in relation to what eventually became a commercial production on a very large scale.

963.2 The amendment of Article 14(1)(b) proposed by the Delegation of Denmark would cover this situation; in addition, it was restricted to ornamental plants and fruit crops. The Delegation realized that those two categories of products were the most important ones in terms of the problem to be solved. However, it did not wish other products to be excluded. In view of this, the Delegation supported the intention behind the proposal of the Delegation of the United Kingdom, but wondered whether it fully covered the problem.

964.1 Mr. KUNHARDT (Germany) explained that the proposal of the Delegation of the United Kingdom did not directly concern propagating material and that it had the following effect: if someone bought a rose bush from a breeder, the latter received compensation for that rose bush. If the purchaser used

the rose bush in order to cut flowers off it and sell them, then the proposal would mean that a new authorization and a new license would be required. The Delegation of the United Kingdom felt that to be appropriate since flowers would be able to be cut from such a rose bush for over ten years. However, that contravened a principle of industrial property.

964.2 Someone who bought a machine, the making of which had been subject to payment of a license, could subsequently use the machine for dozens of years, for as long as the machine lasted, to produce goods and to sell them without the inventor having any claim whatsoever to a further share in the proceeds of those products. There was indeed nothing to stop the breeder laying down a license fee to be paid on sale of the rose bush that would fully cover his breeding work. The principle of levying royalties continuously for one and the same object was alien to the thinking of the Delegation of Germany. The proposal under discussion no longer involved a particular problem in the plant area, but went far beyond what was usual in the field of patents.

964.3 The other case that had been mentioned, that was to say the case of someone buying individual plants, propagating them and obtaining cut flowers or fruit from the propagated plants, corresponded to the third sentence of the present Article 5(1) of the Convention. That case was covered by the provisions in the Basic Proposal. However, the Delegation of Germany shared the view of the Delegation of Denmark that an addition would perhaps be warranted in respect of parts of plants and, perhaps, whole plants also. It would be able to agree to an amendment as proposed by that Delegation. The proposal made by the Delegation of the United Kingdom, however, contained more possibilities than the Delegation of Germany could admit.

965.1 Mr. ROYON (CIOPORA) stressed that the Delegation of the United Kingdom had altogether understood the spirit of the statement made on behalf of CIOPORA at the preceding meeting. It had precisely defined the circumstances under which there could be abuse with regard to a breeder who would not obtain his just remuneration for use of his variety. It was not at all a question, as said by Mr. Dmochowski (Poland), of repeating the provision in the third sentence of Article 5(1) of the present text of the Convention. That provision concerned problems of utilization of final products for propagation and was included in a different manner in the new draft Convention.

965.2 Mr. Royon added that the proposal made by the Delegation of Denmark was in itself interesting, but did not solve the specific problem he had raised and which was satisfactorily solved in the proposal made by the Delegation of the United Kingdom. As to the comments made by Mr. Kunhardt (Germany), with respect to the patented machine, it had not to be forgotten that, under patent law, that machine could be licensed for a restricted field of use and that the inventor's remuneration could be calculated, not only on the price of the machine, but also on the price and quantity of articles that were sold.

965.3 The problem to be solved was the following: rose bushes could be sold either for the retail trade or for the production of cut flowers. Garden rose bushes obviously bore a much lower royalty. There had already been cases of florists buying rose bushes intended for the general public and using them for the production of cut flowers. That was therefore a case of propagating material being used beyond what the breeder had potentially authorized when granting a propagating license. It appeared only equitable to CIOPORA that such case be covered in the new Convention.

966. Mr. ÖSTER (Sweden) stated that his Delegation was not sure whether the amendment proposed by the Delegation of the United Kingdom was needed and whether the problem could not be covered by Article 14(1)(a)(i) in one way or another. It was, however, conscious of the problem which had been raised. Another question concerned the reference to the "commercial production" and had to be seen in relation to Article 15, under which the breeder's right did not extend to non-commercial activities.

967.1 Mr. SCHENNEN (Germany) wished to make an addition, in the light of the statements made by Mr. Royon (CIOPORA), to the position already taken by his Delegation. The proposal made by the Delegation of the United Kingdom created a non-exhaustible right since each subsequent use for the production of flowers generated not only an obligation to payment, but also an obligation to obtain authorization. The question was whether that was intended. Where acts in respect of propagating material were concerned for which no authorization had been given by the breeder, those fell under Article 14(1)(b).

967.2 With regard to the example quoted by Mr. Royon (CIOPORA) in respect of rose bushes that were bought at a lower price and then used to produce cut flowers, that appeared to Mr. Schennen to be a matter for Article 16(1)(iii) of the Basic Proposal, namely a matter of the scope of exhaustion. It was therefore his opinion that the proposal concerned solely a matter of exhaustion and would therefore be better dealt with in the context of Article 16, although his Delegation would still be unable to accept the content of the proposal. Moreover, there arose the question whether a breeder in practice could define or restrict the area of utilization.

968. The PRESIDENT observed that the provision of Article 16 referred to by Mr. Schennen (Germany) was in square brackets; it was not to be considered as part of the Basic Proposal for the moment, in the absence of any proposal for amendment. He suggested to postpone the issue until the next meeting. He had not heard any support for the proposal, but only questions and suggestions for alternative solutions. (Continued at 1005)

Article 19 - Duration of the Breeder's Right (Continued from 691)

969. The PRESIDENT opened the debate on the proposal of the Delegations of Canada and Denmark reproduced in **document DC/91/107**.

970. Mr. BRADNOCK (Canada) explained that the proposal had to be seen in the context of the decision to make it mandatory for Contracting Parties to provide for provisional protection. It was now possible for an applicant to collect royalties as soon as the application had been filed. Since the period of protection was limited, it was then in the applicant's interest to defer as long as possible the grant of the right and thereby extend the period of protection. It therefore seemed to the Delegations of Canada and Denmark that the period of protection should be the same for all and that the clock should start to run as soon as protection was available on a provisional basis.

971. Mr. BOGSCH (Secretary-General of UPOV) observed that Article 13 had the effect that Contracting Parties had to provide for provisional protection for the period between the filing (or another date) and the grant. The effect of the proposal under consideration was that the period of protection would start at the filing date and would be shortened in practice by the period between the filing and the grant. It would be rather strange to provide for a period of protection of 20 years from the grant and then specify that "date of grant" should be understood to mean "date of application."

972. Mr. WANSCHER (Denmark) observed that the system proposed by the Delegations of Canada and Denmark already existed in Denmark. If an applicant wanted to exploit his variety on a commercial basis from the date of filing, he could do so in Denmark. He would have to act as if he was granted the right and supply any producer who wanted to use the variety with sufficient propagating material. He could also require a license from the producers on the understanding that, if the grant was eventually denied, the producers had a right under the law to a refunding of the royalties. In practice, the total period of protection would be 20 years, on the assumption that the breeder had been acting as if he had been granted the right on the date of application and that he had yielded to the pressure from the producers who wanted to exploit the variety immediately rather than to wait for the grant. This was a practical solution, and the Delegation of Denmark was of the opinion that it should also be introduced in the Convention.

973. Mr. HIJMANS (Netherlands) stated that his Delegation was opposed to the proposal since it led to a shortening of the duration of the breeder's right.

974. The proposal of the Delegations of Canada and Denmark reproduced in document DC/91/107 was rejected by six votes for, eight votes against and four abstentions.

Article 22 - Cancellation of the Breeder's Right

975. The PRESIDENT opened the debate on the proposal of the Delegation of Japan reproduced in document DC/91/72.

976. Mr. HAYAKAWA (Japan) stated that his Delegation proposed to provide in paragraph (1)(b)(i) a further reason for cancellation of the breeder's right, namely the case where a breeder would not allow an on-site inspection by the authority of the measures taken for the maintenance of the variety. It might take a lot of time for an authority to verify the maintenance of a variety on the basis of documents and material submitted by the breeder, for instance because insufficient documents and material would be submitted repeatedly. The verification might also not be sufficiently decisive on the basis of documents and material, whereas an on-site inspection would be more expedient.

977. Mr. BOGSCH (Secretary-General of UPOV) asked whether, on the basis of the proposal, there could be an on-site inspection by an authority in a foreign country.

978. Mr. HAYAKAWA (Japan) replied that the inspection could be made on the basis of an agreement on cooperation in examination.

979. Mr. BOGSCH (Secretary-General of UPOV) observed that the proposal did not provide for cooperation in the field of on-site inspections.

980. Mr. BURR (Germany) observed that, although the proposal did not contain any special agreement with regard to verification, such agreement was altogether possible. Indeed, he considered it necessary to do all that was possible in order to carry out the verification since, if a variety should not be stable, it ought to be possible to determine the reasons for the lack of stability before cancelling the breeder's right. In those cases where the breeder carried out his maintenance breeding in the same country, the matter was simple. If, against his own interests, he did not permit verification, the authority would be obliged to cancel the right. The possibility of cancellation derived in fact from Article 22(1)(a). However, there had to be a possibility for putting pressure on a breeder who did not permit verification, particularly since paragraph (2) stipulated that breeders' rights could not be cancelled for reasons other than those listed in paragraph (1). The Delegation of Germany therefore supported the proposal made by the Delegation of Japan.

981. Mr. BOGSCH (Secretary-General of UPOV) noted that the case referred to by the Delegation of Germany was not really a matter for a Convention. In relation to an international situation he draw attention to the general principles of Constitutions and police regulations. If it were to adopt the proposal of the Delegation of Japan, the Conference had to be prepared to say that a foreign authority was to be allowed to enter a country and the breeder's premises in that country to make an investigation.

982. Mr. WANSCHER (Denmark) stated that his Delegation opposed the proposal of the Delegation of Japan and wished to support the text appearing in the Basic Proposal. The main reason for that position was that there was no official control as such in the Danish system. To allow inspections would mean that Denmark would have to institute a corps of inspectors and to breach a long-established tradition, which his Delegation was not authorized to accept at this stage.

983. Mr. HOINKES (United States of America) stated that the proposal of the Delegation of Japan also raised concerns for his Delegation. The concept of inspections had appeared in early drafts of the Basic Proposal, but had been rejected in particular because inspections interfered with trade secrets or other confidential information that bore no relationship with the actual maintenance of the specific variety concerned. It should be enough for an authority to be able to request the information and material which it deemed necessary to verify the maintenance of the variety. What measures were actually taken for the maintenance of the variety should not be the concern of the authority.

984. Mr. HEINEN (Germany) observed that the proposal of the Delegation of Japan corresponded literally to the present text in Article 10(3)(a) and therefore advanced nothing that was new.

985. The proposal of the Delegation of Japan reproduced in document DC/91/72 was rejected by six votes for, 10 votes against and two abstentions.

Article 23 - Members

986. The PRESIDENT opened the debate on Article 23, noting that there was no proposal on the table for its amendment.

987. Mr. NAITO (Japan) wished to have an explanation of the reasons for the change of wording.

988. Mr. BOGSCH (Secretary-General of UPOV) replied that the word "State" used in the present text of the Convention in relation to the members of the Union could no longer be used since membership was now open to intergovernmental organizations. The second reason was that the Union already existed and that it would be curious to provide that the Contracting Parties constituted now a Union, whose membership, in addition, would include States parties to e.g. the 1978 Act of the Convention.

989. Article 23 was adopted as appearing in the Basic Proposal, by consensus.

<p><u>Eleventh Meeting</u> <u>Monday, March 11, 1991</u> <u>Morning</u></p>

Article 1(vi) - Definition of "Variety" (Continued from 217)

990. The PRESIDENT opened the meeting and invited Mr. Guiard (Chairman of the Working Group on Article 1) to introduce the report of the Working Group reproduced in document DC/91/106.

991.1 Mr. GUIARD (Chairman of the Working Group on Article 1) said that he would endeavor to emphasize the essential points that had emerged from the discussions in the Working Group, which had met on March 6 and 7.

991.2 Discussions within the Working Group had been marked by the wish of the participants to approach the definition of variety--in order to define the subject matter of protection--essentially on a conceptual basis; therefore, a

clear distinction had been made with the scope of protection, an aspect which the Working Group felt should not be treated in the definition (paragraph 7 of the report). Mr. Guiard mentioned in that context that the English wording of the report was perhaps somewhat stronger with regard to the common wish to define a conceptual object. The French wording appeared a little less specific with its reference to a "base conceptuelle" ("conceptual basis"). The Working Group was indeed aware that it was defining an object, but wished to do so in a neutral fashion with regard to the materiality of the variety.

991.3 As for the definition proposed in chapter IV of the report, Mr. Guiard wished to give some additional information on the following: "plant grouping"; "botanical taxon of the lowest known rank"; "irrespective of whether the conditions for the grant of a breeder's right are fully met"; "considered as a unit with due regard to its suitability for being propagated unchanged."

(i) Following a lengthy discussion during which various terms had been proposed to define that matter, the Working Group finally chose "plant grouping," "ensemble végétal," and "pflanzliche Gesamtheit," thus avoiding specific reference to "plants" or "groups of plants." The Working Group had been aware that those terms were perhaps too broad, but had preferred to use them with a subsequent narrowing of the grouping concerned by means of the indents. That had appeared the optimum approach for ensuring neutrality with regard to the materiality of the variety.

(ii) The concept of "botanical taxon of the lowest known rank" constituted a first limitation on the concept of "plant grouping" whilst meeting the concern to encompass within the definition those varieties produced by inter-specific or intergeneric crossing. A simple reasoning had shown to the Working Group that the taxon in which a variety derived from such crossing was included could be very rapidly identified. In the case of triticale, for example, there was, initially, neither question of the species level nor of the genus level (since triticale belonged neither to the genus Triticum nor the genus Secale), but--speaking only of the major ranks--to the family of Gramineae or--to be more precise--the subtribe of Triticineae. A place could therefore always be found for such a variety and the aim of the Conference should of course be to ensure that it was covered by the system of protection for new plant varieties.

(iii) The Working Group had been well aware that, in defining variety with the clause: "irrespective of whether the conditions for the grant of a breeder's right are fully met," the definition of the concept of variety became very broad and covered, in principle, a grouping that was not necessarily protectable under breeders' rights. Even with the restrictive indents that followed, it was still possible to discover plant groupings meeting the definition, but which were not protectable. The Working Group had considered it important to maintain that clause since it enabled anyone reading the definition to fully apprise the situation. The fact that a variety did not meet the criteria for protection, as defined subsequently in the Convention, did not mean that such variety did not exist.

(iv) As for the indent: "considered as a unit with due regard to its suitability for being propagated unchanged," the Working Group became aware, as its discussions progressed, that a variety was characterized both by its characteristics and by the fact that it could be propagated. It had appeared essential to the Working Group to include in the definition an indent that highlighted that capability. In-depth discussions had been held to ensure that all types of varieties were indeed covered by that indent, whatever the propagation mode considered. Such was indeed the case.

991.4 As a result of all those remarks, the Working Group--on the basis of the nine States designated as members of the Group, of which eight were present, seven in favor of the definition and one abstaining--proposed to the Conference that it adopt the definition given in paragraph 21 of document DC/91/106. The abstention resulted basically from the absence of any mention of the fact that a variety was an object produced for economic purposes. The Working Group had deemed that it was not appropriate to deal with that aspect.

991.5 Finally, the Group had decided, in view of the working basis referred to at the beginning of the statement, to delete the second sentence in the definition given in the Basic Proposal and to propose that it be transferred to Article 14(1) since that sentence mentioned the material of the variety, but was not exhaustive. The Working Group had wished to detail its views on the manner of transferring that sentence, but that approach very rapidly transpired to be premature since the final structure of Article 14 was still unknown. Furthermore, it could indeed be held that the items covered by that sentence had already been dealt with in Article 14 as proposed in the Basic Proposal. Several delegations had been of that opinion.

992. Mr. BOGSCH (Secretary-General of UPOV) observed that, as a matter of drafting, "with due regard" in the third point of the proposal was much stronger than "eu égard."

993. Mr. ROYON (CIOPORA) wondered whether, as a result of the proposed deletion of the second sentence of the original definition, the second point of the definition--namely: "[plant grouping ... which ... can be] distinguished from any other plant grouping by the expression of at least one of the said characteristics"--took into account in a sufficient way the fact that the main characteristics of a new variety might be expressed in the fruit, in the final product, which certainly did not serve for the production of further plants of the variety.

994. Mr. TESCHEMACHER (EPO) wished first to express the satisfaction of his Delegation at the fact that the Working Group had reached a conclusion despite the highly differing points of departure and one which his Delegation considered an acceptable compromise for all the interests represented at the Conference. As far as the wording of the first indent was concerned, he wished to mention the expressions "expression of characteristics," "l'expression des caractères" and "Ausprägung der Merkmale". It seemed to him that the English version lacked the article that needed to be used since all characteristics were taken into account for distinctness.

995. Mr. BROCK-NANNESTAD (UNICE) shared the view of Mr. Teschemacher (EPO) that the proposal appeared to be a reasonable compromise if a definition had to be provided. However, it should not be forgotten that certain Delegations had expressed the opinion that a definition was not at all necessary. Concerning the third point of the definition, Mr. Brock-Nannestad wondered about the meaning of "propagated unchanged." Did it refer to a complete cycle of propagation as referred to in Article 9, that is, to a plant performing its normal functions or could it also mean the multiplication of cells in a cell culture? The latter would be found problematic, whereas the former seemed reasonable in a Convention on plant variety protection.

996.1 Mr. GUIARD (Chairman of the Working Group) replied that it was the propagation of the variety, as defined as a plant grouping, that was meant. The Working Group had not wished to go into detail. A variety was an entity which had no meaning if it could not be reconstituted at each cycle, identical to itself. It represented a vector of progress and that progress could only be transmitted if the vector could be maintained in one way or another.

996.2 In reply to Mr. Teschemacher (EPO), Mr. Guiard emphasized that the definition of variety was based on the expression "of characteristics," without it being possible to be exhaustive. It was true that, in French, the expression "des caractères," which was in fact imposed by grammar, gave a much more general view and one which should be kept since there was absolutely no way of prejudging either the number or type of characteristics involved.

997. Mr. PERCY (UPEPI) supported the point made by Mr. Teschemacher (EPO) and wished to make sure that "genotype" referred to the entire genetic constitution of an individual and not merely a change at one particular locus.

998. Mr. GUIARD (Chairman of the Working Group) replied that the word "genotype" had not caused any particular problems for the Working Group. It did indeed refer to a set of genetic information.

999. Mr. LLOYD (Australia) stated that his Delegation wondered whether the expression "combination of genotypes" could not be taken as covering also the specific physiological combinations such as the parasitic or symbiotic combinations, or the rootstock-scion combinations which were essential for conserving genotypes in the derived plant. His Delegation envisaged that this complication could cause some administrative difficulties and therefore sought clarification on the issue.

1000. Mr. GUIARD (Chairman of the Working Group) replied that the first example was excluded by the reference to a plant grouping of the same taxon. The second example was excluded for the same reason if the rootstock and the scion were not of the same species. If they were of the same species, a distinction could in fact be made between two separate, but associated, plant groupings meeting all the specifications required by the definition.

1001. Mr. LANGE (ASSINSEL) asked for clarification as to whether the third indent in the definition, concerning the suitability of the variety for propagation unchanged, was to be understood as meaning that the type of propagation was not taken into account. That question arose, in particular, for hybrid varieties in which propagation required the use of parent lines.

1002. Mr. GUIARD (Chairman of the Working Group) replied that the Group had held a detailed discussion on whether hybrid varieties could be covered by the sentence as proposed. It had seemed to the Group that the answer was yes--whereby the Delegation of Japan had reserved its reply--since the sentence referred to a "suitability," that was to say a very broad notion, and used the passive form ("for being propagated" and not "for propagating"). That suggested the possibility of outside intervention making use either of plant groupings that were not necessarily included in the variety or of special techniques.

The fact that the wording enabled outside intervention to be envisaged made it possible to cover all types of varieties whatever their propagation mode. If it had been wished to go further and to specify details concerning the various propagation modes, reference would have certainly had to be made to material elements of the varieties and it would therefore have been necessary to depart from the line of conduct decided at the beginning.

1003. The PRESIDENT noted that this point was dealt with in paragraph 16 of the report of the Working Group. In the absence of further questions, he put the proposal to a vote.

1004. The definition of "variety" proposed by the Working Group on Article 1 in paragraph 21 of document DC/91/106 was adopted by 19 votes for and one abstention. (Continued at 1852.2(iii))

Article 14 - Scope of the Breeder's Right

Article 14(1)(a) - List of Acts in Respect of Propagating Material Covered by the Breeder's Right (Continued from 968)

1005. The PRESIDENT reopened the debate on the proposal of the Delegation of the United Kingdom, reproduced in document DC/91/110, to add the "use for the commercial production of cut flowers and fruit" to the list of acts in respect of propagating material covered by the breeder's right.

1006. Mr. DMOCHOWSKI (Poland) stated that, after reconsideration of the problem, his Delegation now supported the proposal.

1007.1 Mr. ROYON (CIOPORA) wished to make a very firm statement concerning the wrong that would be done to breeders of asexually reproduced plants, particularly the creators of cut flower varieties and fruit tree varieties, by deleting item (viii) without any replacement. The solution proposed by CIOPORA, and obligingly taken up by the Delegation of the United Kingdom, seemed to CIOPORA to constitute a compromise that would make it possible to obtain for asexually reproduced ornamentals and fruit tree varieties the equivalent of patent protection, that was to say protection covering fabrication, sale and use for commercial purposes, a protection which CIOPORA had been demanding since 1961 and in respect of which it had continuously pointed out that there existed no legal, commercial or economic reason for refusal.

1007.2 As he had explained at the preceding meeting, it was essential that a breeder should be able, under his licensing contract, to gain direct access to the person exploiting his variety industrially for the production of flowers or of fruit. He could not rely on simple controls by the propagator since, at the propagation level, the final purpose of propagated plants, which could differ greatly depending on the variety, was not known.

1007.3 Mr. Royon repeated the example he had given of the florist who bought rose bushes normally sold on the gardening market and then exploited them for commercial purposes for the production of cut flowers. It did not seem proper

for that type of industrial or commercial user to be able to appropriate the added value inherent in the creation of a variety; where a breeder had spent between ten and fifteen years in creating a variety for the production of cut flowers or fruit, then it was indeed the cut flower or the fruit that was the significant element in that creation. The second reason for the request was that, when a license was granted for such products, it was important to be able to monitor the industrial exploitation of the product. It was important to be able to assist or control production, for example in the form of technical assistance or quality control.

1007.4 Finally, Mr. Royon concluded that, if the proposal of the Delegation of the United Kingdom was not accepted, then once more, as in 1961, the Conference would have deliberately accepted a reduction in the rights of breeders of ornamental plants and fruit trees for reasons which could no longer be understood after thirty years of the existence of protection.

1008. Mr. ROBERTS (ICC) stated that the ICC supported the proposal for amendment submitted by the Delegation of the United Kingdom for the reasons forcefully stated by Mr. Royon (CIOPORA). It was a matter of injustice to breeders of varieties used for the production of cut flowers and fruit that they should have no method of control over the commercial products, which were the fundamental expression of the variety. It was difficult to see that breeders' rights would be of much help if the breeder was not able to control this type of exploitation. Mr. Roberts hoped that those countries which did not support the proposal would give their reasons and perhaps propose alternative amendments to deal with this important problem.

1009. Mr. HARVEY (United Kingdom) wished to point out that the concern on which the proposal of his Delegation was based arose from Article 14(1)(b) and its reference to: "provided that the harvested material was obtained through the use of propagated material whose use ... was not authorized by the breeder." There was nothing in Article 14(1)(a), or anywhere else in the Convention, which specified that the authorization of the breeder was required to produce harvested material from propagating material. If the proposed amendment or a similar amendment was rejected, Article 14(1)(b) would make no sense, Mr. Harvey suggested.

1010.1 Mr. KUNHARDT (Germany) stated that his Delegation had already taken a position on that proposal and had expressed its objections to the wording. The proposal would add a further act of utilization under subparagraph (a), that was to say in relation to propagating material of the protected variety, which would not however directly concern propagating material, meaning that one could gain the impression that a breeder's right could be asserted twice, in a cumulative manner, with respect to one and the same object. That would mean that the breeder's right with respect to ornamentals and fruit trees would never be exhausted.

1010.2 However, his Delegation assumed from the discussions that the proposal was possibly not quite clear. It had been interpreted in differing manners. His Delegation agreed that a ruling would have to be found in the area of cut flowers and fruit to avoid the present abusive situation. In order to do so, it would be necessary, in particular, to forbid any acquirer of plants from carrying out propagation on his own holding. The Delegation had assumed that the Basic Proposal had covered that matter. Should such not be the case, then

it was willing to reflect again on the wording of subparagraph (b) and to consider an addition such as that proposed in document DC/91/97 by the Delegation of Denmark. Indeed, the term "parts of plants" in respect of ornamentals and fruit trees was perhaps a better expression than "harvested material."

1011.1 Miss BUSTIN (France) observed that French law already contained a provision such as that proposed by the Delegation of the United Kingdom. However, that provision applied within the framework of the law established by the 1978 Convention. It had the drawback of applying only to certain categories of plants, whereas others would warrant the same treatment. However, it seemed to the Delegation of France that the Delegation of the United Kingdom had above all accepted to present a proposal for amendment in view of the development of discussions on Article 14(1)(b); it could but regret finally having to support a suppletive provision that would, in fact, be less than the provision put forward in the Basic Proposal.

1011.2 Miss Bustin added that the Delegation of Germany had wished to refer the Conference to the amendment proposed in document DC/91/97 by the Delegation of Denmark. That proposed amendment, however, also had a drawback, which was to make the extension of rights to the harvested material a suppletive provision due to the inclusion of the phrase given between square brackets in the Basic Proposal. The Delegation of France might therefore be obliged to support the proposal of the Delegation of the United Kingdom as a suppletive; however, it would have preferred the broader provision--applicable to all plant species and compulsory--that was given in Article 14(1)(b) of the Basic Proposal.

1012. Mr. HAYAKAWA (Japan) stated that his Delegation supported the opinion of the Delegation of Germany.

1013. Mr. KIEWIET (Netherlands) stated that his Delegation was in the same position as the Delegations of Germany and Japan. One of the questions raised by Mr. Harvey (United Kingdom) was about the sense of Article 14(1)(b) if Article 14(1)(a) would not cover the use for the purpose specified in the proposal. In the opinion of his Delegation, it made a sense because, if propagating material was put on the market, the putting on the market implied an authorization by the seller to the buyer to produce harvested material from that propagating material, otherwise the selling of the propagating material would make no sense.

1014. Mr. PERCY (UPEPI) stated that UPEPI would support the proposed amendment, but was extremely puzzled why item (viii) had been deleted in the first place and why an amendment had been proposed as a substitute that was much narrower. It did not cover, for example, use for the purpose of producing leaves which in turn were used to produce chemicals.

1015. Mr. ORDOÑEZ (Argentina) stated that his Delegation shared the opinion of the Delegation of Germany.

1016. Mr. ROYON (CIOPORA) held that the Delegation of Germany was mixing two completely different concepts: that of propagation beyond what was permitted--which appeared to be well covered by the draft Convention as it stood--and

the problem of the extension asked for by CIOPORA. Mr. Royon did not see how the addition of that use in Article 14(1)(a) would limit application of exhaustion of the right. In patent law, where manufacture, sale and use were covered by the basic right, there also existed a principle of exhaustion of the right and that principle was applied without problems. He could not see why exhaustion of the right could not be applied in the same way to new plant varieties. And if it were not to apply under the same conditions, would one accept separate protection for production and reproduction, offering for sale, exporting, and the like?

1017. Mr. KIEWIET (Netherlands) wished to clarify his earlier statement. The opinion of his Delegation was that when propagating material was put on the market or sold without any conditions accompanying that selling, then the buyer of that propagating material was free to do what he wanted with that material. The problem raised by CIOPORA could of course be solved by the seller of propagating material making it a condition of contract that the buyer pay him a royalty in respect of each crop.

1018. Mr. BOGSCH (Secretary-General of UPOV) observed that one had to be realistic. The law on intellectual property was a substitute for contracts because one could not regulate all situations by contract.

1019.1 Mr. ESPENHAIN (Denmark) recalled that his Delegation had fully supported at the previous meetings the wish of the representative of CIOPORA that the particular situation should be covered. But it also fully shared the concern of the Delegation of Germany that the breeder's right should be exhausted somewhere and that the proposal of the Delegation of the United Kingdom might provide an open-ended right. It was for that particular reason that it had made its proposal reproduced in document DC/91/97.

1019.2 His Delegation fully shared the view that if propagating material, for example an apple tree, had been put on the market by the breeder and the licence fee had been paid, the owner of the orchard in which the tree was then planted had a full right to harvest the apples and to do with them what he liked. What should not be possible and what his Delegation would like to cover in Article 14(1)(b) was the situation where somebody bought one apple tree and planted a whole orchard therefrom. Mr. Percy (UPEPI) had mentioned the production of parts of plants to extract oil or chemicals; the proposal of the Delegation of Denmark to introduce a reference to parts of plants in Article 14(1)(b) would cover such production whatever its purpose was.

1020.1 Mr. BURR (Germany) wished also to set out once more the position of his Delegation. Article 14(1)(a) basically covered two types of acts, the production of propagating material, including conditioning, and the putting on the market of propagating material, including offering for sale, importing, exporting, and so on. In the case of the second type of act, the question of the purpose of the putting on the market arose. That was doubtlessly the production of harvested material. That would be viewed by the Delegation of Germany as the normal use of propagating material. It had to be possible to exploit all plant products that arose from such use, except for the purpose of propagation. For instance, in the case of fruit trees, that meant that the production of fruit, but also the cutting of twigs in blossom or the use of the trunk as wood for veneers. The cutting of scions for grafting, on the other hand, should be excluded. Indeed grafting was a further act of propagation.

1020.2 As for the wording of Article 14(1)(b), Mr. Burr further observed that, in German at least, the term "harvested material" had a very narrow meaning. It would imply that, when buying a fruit tree, one would also need authorization, even after years, if protection was still valid, to use the trunk for the veneer wood. That was the reason for the proposal of the Delegation of Germany that subparagraph (b) should practically only concern harvested material obtained from propagating material that had been produced and used unlawfully.

1021. Mr. ÖSTER (Sweden) wondered whether the examples given by Mr. Espenhain (Denmark) were not already covered by Article 14(1)(a) since they constituted a propagation and therefore whether the proposal of the Delegation of Denmark was necessary for the purpose indicated by it.

1022. Mr. KIEWIET (Netherlands) agreed with Mr. Öster (Sweden): the propagation of a fruit tree was indeed covered by Article 14(1)(a)(i). In addition, the selling of the fruit obtained from the propagated trees was covered by Article 14(1)(b). He added that his Delegation felt that the purchase of the fruit tree implied the authorization to produce and sell fruit from that tree, unless otherwise provided in a contract.

1023. Mr. ESPENHAIN (Denmark) conceded that it might be a question of interpretation of Article 14(1), but the case to be covered concerned the production of propagating material that would never be commercialized, but used on the premises of the person who produced it.

1024. Mr. HOINKES (United States of America) observed that the discussion concerned a fundamental question, and that that question had already been raised by Mr. Harvey (United Kingdom). Article 14(1)(b) made reference to harvested material obtained through the use of propagating material, which use had not been authorized by the breeder. There was thus a requirement for an authorization from the breeder to obtain harvested material from propagating material. And yet Article 14(1)(a) made no reference to that authorization. Article 14(1)(a) clearly implied that an authorization to obtain harvested material from propagating material was not necessary. But, all of a sudden, Article 14(1)(b) specified that the control by the breeder was extended to harvested material if an authorization had not been obtained from him to use the propagating material for the purpose of producing the harvested material; it added another authorization because, if it did not, it would be totally inoperative. The crucial question was thus: what does Article 14(1)(b) mean?

1025. Mr. GREENGRASS (Vice Secretary-General of UPOV) observed that the difficulty highlighted by Mr. Hoinkes (United States of America) arose from the deletion of the item (viii) from Article 14(1)(a) which referred to the use of propagating material. It might indeed be necessary to reinstate an item on the use for the purpose of obtaining harvested material if the drafting was to follow through consistently from subparagraph (a) to subparagraph (b).

1026. Mr. ROYON (CIOPORA) said that his Delegation very strongly supported the statements by Mr. Hoinkes (United States of America) and Mr. Greengrass (Vice Secretary-General of UPOV) who had explained the undesirable consequences

of the proposed deletion of item (viii) in Article 14(1)(a). Furthermore, he wished to emphasize, with regard to the concern expressed by Mr. Espenhain (Denmark), that the request made by CIOPORA did not affect reproduction, but utilization. A breeder possessing a large propagation installation had the possibility of granting licenses for the production of cut flowers or fruit and therefore of recovering his part in the added value of his variety. Therefore, why should a small breeder, who needed to use a propagator, have his possibility of intervening suppressed at the propagation stage?

[Suspension]

1027. The PRESIDENT reopened the meeting and noted that, at this point of the debate, several interlinked questions were being considered at the same time and that several courses of action could be envisaged: make a proposal for a new Article 14(1)(a)(viii) and then come back to Article 14(1)(b); decide on the latter and then reconsider the former; set up a working group.

1028. Mr. DMOCHOWSKI (Poland) supported the setting-up of a working group and observed that the working group should also discuss the second sentence of the definition of a variety appearing in the Basic Proposal, that is, the definition of "propagating material," and perhaps also of "harvested material."

1029. Mr. HEINEN (Germany) likewise advocated the setting up of a working group.

1030. The setting-up of a working group was decided by the Conference by consensus.

1031. Mr. ESPENHAIN (Denmark) asked whether the working group should consider only Article 14(1)(b) in relation to a new Article 14(1)(a)(viii) or discuss all the proposals made so far, including on Article 14(1)(c).

1032. Mr. ÖSTER (Sweden) stated that the working group should not reopen the debate on the issues decided upon in the previous meeting, and that it should receive a clear mandate in that respect.

1033. Mr. ELENA (Spain) supported the view expressed by Mr. Öster (Sweden).

1034. Mr. BRADNOCK (Canada) felt that the working group should not be given the task to discuss Article 14(1)(c), but rather to sort out the issues that had already been discussed in Plenary. In particular, the group might look at the rights granted under Article 5 of the present Convention and consider why it had been specified in Article 5(2) that: "The authorization given by the breeder may be made subject to such conditions as he may specify" and whether the deletion of that provision was one of the reasons for the present difficulties.

1035. The PRESIDENT concluded that the main element of the mandate of the working group would be to reconcile Article 14(1)(b) with Article 14(1)(a), possibly through the addition of a new item (viii) to the latter, so that the objective of strengthening the Convention would be achieved in a manner that was satisfactory both technically and legally.

1036. The conclusion of the President was noted by the Conference.

1037. The PRESIDENT then proposed that the working group be composed of seven member Delegations and one observer Delegation.

1038. The Delegations of Denmark, Germany, Japan, the Netherlands, Sweden, the United Kingdom, the United States of America and Morocco indicated their readiness to participate in the working group.

1039. The Conference decided that the working group would comprise the Delegations mentioned in the previous paragraph, by consensus.

1040. The PRESIDENT then suggested that the chairmanship of the working group be assumed by the Delegation of the United Kingdom.

1041. The Conference decided, with the agreement of the Delegation of the United Kingdom, that the latter would assume the chairmanship of the working group.

1042. Mr. KIEWIET (Netherlands) observed that the discussion arose from the remarks of one of the professional organizations. He suggested that it would be wise to add a representative of the professional interests as expert to the working group.

1043. Mr. LANGE (ASSINSEL) suggested that, should the Conference wish to take up that suggestion, a representative of CIOPORA be designated as expert.

1044. The PRESIDENT suggested that the Delegation of CIOPORA should nominate an expert.

1045. Mr. ROYON (CIOPORA) said that, as the sole representative of CIOPORA, he would have difficulty in following both the meetings of the Plenary and the work of the group. He asked whether, in view of that, the working group could not call upon him as representative of CIOPORA once the matter had been whittled down. He could then give his view on specific points and his presence would, perhaps, not be necessary for the whole duration of the work.

1046. Mr. HOINKES (United States of America) suggested that, in view of the far-reaching scope of the task of the working group, the Conference might invite a representative of the EPO to participate in his personal capacity in the sessions of the working group to give technical advice.

1047. Mr. TESCHEMACHER (EPO) stated that he would be pleased to take part as an expert in the deliberations of the working group.

1048. The PRESIDENT then suggested that two experts be invited to join the working group, it being understood that it would be their responsibility to make the necessary arrangements so that they would participate in the whole work of the group.

1049. The Conference decided by consensus to invite Mr. Royon (CIOPORA) and Mr. Teschemacher (EPO) to participate as experts in the deliberations of the working group. (Continued at 1527)

Article 14(2) of the Basic Proposal [Article 14(5) of the Text as Adopted] - Acts Requiring the Breeder's Authorization in Respect of Essentially Derived and Certain Other Varieties

1050. The PRESIDENT indicated that Article 14(1)(c) would be dealt with after the working group had tabled its report. He then opened the debate on the proposals of the Delegations of Germany and of the United States of America reproduced in documents DC/91/89 Rev. and DC/91/9.

1051. Mr. HOINKES (United States of America) stated that, in the light of the rejection of the proposal of his Delegation regarding Article 14(1)(a), the proposal reproduced in document DC/91/9 would be unsuccessful. He therefore withdrew it.

1052. The Conference noted the withdrawal of the proposal of the Delegation of the United States of America reproduced in document DC/91/9.

1053. Mr. BURR (Germany) explained that the proposal made by his Delegation in document DC/91/89 Rev. had to be seen in conjunction with the proposal made in document DC/91/92. The two proposals together constituted one concept. His Delegation proposed that the provisions on derived varieties, including subparagraph (b), be removed from Article 14(2) and that the matter of such varieties be regulated in Article 15(1). Of course, it could be argued that the matter was more of an editorial nature and that it could be left to the Drafting Committee.

1054.1 Mr. KIEWIET (Netherlands) observed that the derived right of the breeder over other varieties was part of his right rather than the result of an exception to another principle. From a systematic point of view, it was not correct to place the provision on derived varieties in Article 15, which was dealing with exceptions to the breeder's right. His Delegation could therefore not agree to the proposal of the Delegation of Germany.

1054.2 Mr. Kiewiet added that his Delegation also opposed the second aspect of the proposal reproduced in document DC/91/92, which was to make the regulation concerning derived varieties optional and to enable the law of a Contract-

ing Party to have a provision which was not in conformity with the Convention. It considered the provisions on derived varieties as an essential part of the new Convention and of the endeavours to strengthen the position of the breeder. It would not like to open the possibility for the Contracting Parties to take back what would be granted to the breeder in the Convention.

1055.1 Miss BUSTIN (France) observed that the proposal made by the Delegation of Germany also raised a number of problems for her Delegation. Her Delegation believed that the reason for which the Delegation of Germany wished to present the derived right as an exception to the breeder's exemption stemmed from the fact that certain circles upheld that that right would lead to the annulment of one of the fundamental bases of the Convention, concerning free access to genetic variability. However, despite its understanding, it seemed to the Delegation, as to the Delegation of the Netherlands, that dependency was one of the rights afforded to breeders by the Convention; it therefore preferred it to be included in the Article dealing with the scope of the rights afforded by a title of protection granted in conformity with the new Convention.

1055.2 Again like the Delegation of the Netherlands, the Delegation of France was opposed to any provision that would permit national legislation, under conditions that were indeed not laid down by the Convention and for which the categories of varieties were not identified, to restrict the new right that appeared fundamental and which was one of the most salient innovations of the Conference.

1056. Mr. DMOCHOWSKI (Poland) stated that his Delegation was in favor of retaining the text in the Basic Proposal with some drafting amendments as proposed by the Delegation of Germany for Article 14(2)(a) and perhaps with the deletion of the end of Article 14(2)(b)(i) as suggested by the Delegation of Japan in document DC/91/111. Concerning the proposal of his Delegation reproduced in document DC/91/63, Mr. Dmochowski observed that the suggestion to substitute "significantly" for "clearly" was to be disregarded in view of the earlier discussions.

1057. The Conference noted that part of the proposal of the Delegation of Poland reproduced in document DC/91/63 was no longer relevant.

1058. Mr. BURR (Germany) stated that, since Mr. Kiewiet (Netherlands) and Miss Bustin (France) had referred in their statements to document DC/91/92, he should briefly explain what had moved his Delegation to propose the right in derived varieties as an exception under Article 15(1)(a)(iv). Informal talks had shown that the debate on essentially derived varieties was not terminated. It was also still ongoing between the professional organizations and there was as yet no fully assured opinion. That was why the Convention should here lay down the principle of dependency of essentially derived varieties, but should also provide that national legislations be able to react to future thinking.

1059. Mr. HAYAKAWA (Japan) requested that the proposals of the Delegation of Germany be discussed separately.

1060.1 Mr. ROYON (CIOPORA) stated that, whatever may be the reasons for the proposal of the Delegation of Germany, CIOPORA wished to express its strong support for the opinions expressed by Miss Bustin (France) and Mr. Kiewiet (Netherlands). Concerning Article 14(2), CIOPORA welcomed the principle of dependency. However, it considered that item (ii) was not at the right place in paragraph (2)(a); it referred rather to a case of minimum distances and infringement, whereas items (i) and (iii) referred to true cases of dependency. Paragraph (2)(b) should also be linked more closely to subparagraph (a)(iii). CIOPORA considered that the title of paragraph (2) was confusing. It would prefer it to read "dependency," with subparagraph (a)(ii) becoming a new paragraph (3) entitled "minimum distances" and reading: "The right conferred on the breeder by the title of protection shall extend to varieties which are not clearly distinguishable, in accordance with Article 7, from the protected variety."

1060.2 This proposal was not just a matter of drafting or presentation. While the breeder of a protected variety would indeed be open to a reasonable proposal from the breeder of a derived variety which constituted a significant improvement, he would be fully justified in opposing the marketing of a variety which was not clearly distinguishable from his variety.

1061. Mr. ORDÓÑEZ (Argentina) stated that, although his Delegation considered the Basic Proposal to be quite fair as regards essentially derived varieties, his country and perhaps other developing countries might prefer the solution suggested by the Delegation of Germany.

1062. Mr. ESPENHAIN (Denmark) recalled that the Danish Parliament had discussed matters which touched upon the proposal regarding essentially derived varieties. In principle, his Delegation supported the concepts laid down in the Basic Proposal, but was concerned that paragraph (2) might lead in the long term to a lesser flow of new varieties. For that reason, it had prepared an amendment to the present Article 15 to specify a time limit of 10 years within which the dependency principle would be applicable. In general, his Delegation would follow the approach proposed by the Delegation of Germany.

<p><u>Twelfth Meeting</u> <u>Monday, March 11, 1991</u> <u>Afternoon</u></p>
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1063. The PRESIDENT opened the meeting.

1064. Mr. BRADNOCK (Canada) stated that the position of his Delegation was similar to that of the Delegations of France and of the Netherlands. It supported the Basic Proposal and did not wish it to be amended.

1065. Mrs. JENNI (Switzerland) also went along with that point of view on behalf of her Delegation. The Basic Proposal should be adopted as it stood.
1066. Mr. ELENA (Spain) stated that his Delegation could support the ideas proposed by the Delegations of Germany and Denmark.
1067. Mr. IANNANTUONO (Italy) said that his Delegation supported the Basic Proposal.
1068. Mr. ÖSTER (Sweden) stated that his Delegation also supported the Basic Proposal.
1069. The proposal of the Delegation of Germany, reproduced in document DC/91/89 Rev., to remove the provisions on essentially derived varieties from Article 14(2) was rejected by six votes for, 10 votes against and three abstentions.
1070. The PRESIDENT concluded that, with this decision, the Conference had adopted Article 14(2)(a) as appearing in the Basic Proposal.
1071. The conclusion of the President was noted by the Conference. (Continued at 1616)
1072. The PRESIDENT then opened the debate on Article 14(2)(b) and invited the Delegations of Japan, Poland and of the United States of America to present their proposals reproduced in documents DC/91/111, DC/91/63 and DC/91/14, respectively.
1073. Mr. HOINKES (United States of America) stated that the proposal of his Delegation was not intended to depart in substance from the Basic Proposal but to clarify that an essentially derived variety would be "predominantly derived from the initial variety" when the derivation resulted in the conservation of the essential characteristics of the initial variety. It was only then that one would go on to give examples of methods of derivation.
1074. Mr. HAYAKAWA (Japan) stated that also his Delegation did not intend to change the substance; but it felt that it was not appropriate to include examples of methods for creating essentially derived varieties in the Convention because those examples might be wrongly interpreted as meaning that the varieties created by those methods would automatically be essentially derived varieties. It therefore proposed to delete the examples.
- 1075.1 Mr. DMOCHOWSKI (Poland) recalled that some amendments had to be made to the proposal of his Delegation reproduced in document DC/91/63. The essence of the proposal was to refer to the majority of the essential "characteristics." That formulation was more correct in the opinion of his Delegation.

1075.2 His Delegation supported the proposal of the Delegation of Japan to delete the examples of methods at the end of Article 14(2)(b)(i). They concerned a technical problem that would be better solved by guidelines and, therefore, his Delegation was also in favor of the proposal of the Delegation of Japan, reproduced in document DC/91/65 Rev., that the Conference adopt a resolution.

1076. The PRESIDENT then opened the debate on the proposal of the Delegation of Japan reproduced in document DC/91/111.

1077. Mr. BURR (Germany) observed that, although the proposal of the Delegation of Japan was certainly on the right lines, it did not go far enough. Definitions should be clear and a formulation such as "particularly through methods ... such as" was anything but clear. The whole formulation was defective since it rested on methods and not on the result. That meant that the proposal of the Delegation of Japan was too hesitant. Item (iii) made that clear since it referred to the differences resulting from the relevant method of derivation. What was decisive was the aim and not the method. For that reason, his Delegation had proposed a narrower formulation in document DC/91/92. That meant that the Delegation could indeed support the proposal of the Delegation of Japan, although it did not go far enough.

1078. Mr. LLOYD (Australia) stated that his Delegation also had some reservations about the definition of essentially derived varieties, which was legally imprecise and technically flawed. As it was drafted in Article 14(2)(b), it would be difficult to administer and could lead to extensive claims for infringement and litigation procedures. The definition was not based on reality in breeding practice. For those reasons, his Delegation also supported the proposal of the Delegation of Japan and believed that the definition should be based on more rational grounds and possibly be examined by a working group.

1079. Mr. BOBROVSZKY (Hungary) said that his Delegation also supported the proposal of the Delegation of Japan, as the mentioning of methods would not clarify the point, and associated itself to the comments of the Delegation of Germany.

1080. Mr. KIEWIET (Netherlands) said that his Delegation could support the proposal made by the Delegation of the United States of America, which was mainly a drafting amendment. It had sympathy for the proposal made by the Delegation of Japan, but was not in favor of the proposal of the Delegation of Poland. A majority of the essential characteristics was not good enough, since the majority started at 51%; there should be many more essential characteristics in common between the initial variety and the essentially derived variety. Finally, the Delegation would not go as far as the Delegation of Germany would like to.

1081. The proposal of the Delegation of Japan, reproduced in document DC/91/111, to delete the examples of methods from Article 14(2)(b)(i) was rejected by eight votes for, nine votes against and three abstentions.

1082. The PRESIDENT then opened the debate on the proposal of the Delegation of Germany reproduced in document DC/91/92, as far as it related to the definition of essentially derived varieties.

1083. Mr. BURR (Germany) pointed out that his Delegation aimed at the clearest possible formulation based on the result and which entailed nothing that could possibly be misleading.

1084. Mr. GUIARD (France) said that it seemed to his Delegation that the word "direct" could lead to confusion. Indeed, it could lead to the belief that there could not be a variety that had been derived by the intermediary of a derived variety; it could also be interpreted as a reference to breeding methods. Consequently, the wording could be risky.

1085. Mr. HAYAKAWA (Japan) asked whether varieties created by backcrossing were included in the notion of "direct descendants."

1086. Mr. BURR (Germany) replied that, even after five generations, the product of backcrossing still descended directly from the recurrent parent in the crossing. His Delegation therefore felt that it came within the definition. On the comments made by Mr. Guiard (France), he further observed that the proposal was naturally related to the first part that had already been rejected and in which the possibility had been proposed of providing for certain limitations. That sort of limitation could have been considered in the case of indirectly derived varieties. In that respect, however, his Delegation could accept the wish expressed by the Delegation of France.

1087. Mr. ARDLEY (United Kingdom) stated that his Delegation had some difficulty with the proposal because it felt that the words in the Basic Proposal: "conserving the essential characteristics that are the expression of the genotype..." were very important. He was not sure that the words "direct descendant" and: "a very small number of modifications" used in the proposal conveyed the same meaning. In addition, "direct descendant" was unclear and "very small number" did not have any regard for the relative importance of the modifications. A small number of modifications might have a large effect on the variety. In conclusion, his Delegation preferred to retain the Basic Proposal.

1088. Mr. ÖSTER (Sweden) supported the statement of Mr. Ardley (United Kingdom).

1089. Mr. BURR (Germany) replied that his Delegation did not insist on the word "direct." However, it would have to be clear that the derived variety had to be related in some way with the initial variety. He further underlined the statement made by Mr. Kiewiet (Netherlands). It was not enough for the derived variety to contain only 51% of the characteristics of the initial variety. On the contrary, there should be only a very small number of deviations from the expression of the characteristics of the genotype of the initial variety. Those were, in the view of his Delegation, the two criteria on which was based the difference between an essentially derived variety and a normally bred variety. That was what his Delegation had attempted to express in the proposal.

1090. Mrs. JENNI (Switzerland) said that her Delegation had a preference for the original wording in the Basic Proposal. It did not wish a differing text to make a change to the concept of essentially derived varieties.

1091. Mr. HAYAKAWA (Japan) observed that the proposal contained a very good formulation and stated that his Delegation supported it.

1092. The proposal of the Delegation of Germany, reproduced in document DC/91/92, concerning the definition of essentially derived varieties was rejected by four votes for, 14 votes against and two abstentions.

1093. The PRESIDENT opened the debate on the proposal of the Delegation of Poland, reproduced in document DC/91/63, to refer to "the majority of the essential characteristics."

1094. No delegation seconded the proposal. The PRESIDENT therefore declared it rejected.

1095. The conclusion of the President was noted by the Conference.

1096. The PRESIDENT noted that the only remaining proposal concerning Article 14(2)(b)(i) was that of the Delegation of the United States of America reproduced in document DC/91/14. In view of its nature, he suggested that it should be referred to the Drafting Committee.

1097. The suggestion of the President to refer the proposal of the Delegation of the United States of America reproduced in document DC/91/14 to the Drafting Committee was noted by the Conference with approval.

1098. The PRESIDENT opened the debate on the proposal of the Delegation of Japan reproduced in document DC/91/66.

1099. Mr. HAYAKAWA (Japan) observed that Article 14(2)(b)(iii) raised two difficulties. Firstly, it was incorrect to provide that "it," namely the essentially derived variety, conformed to a genotype. Secondly, there was the problem of how one could actually check the conformity with the genotype. The Delegation of Japan would prefer a text expressing a conformity with the expression of the genotype.

1100. Mr. KIEWIET (Netherlands) wondered whether the proposal concerned only a drafting matter, in which case it could be referred to the Drafting Committee, or whether a change in substance was intended.

1101. Mr. HOINKES (United States of America) stated that his Delegation had the same question. It felt, however, that the proposal had some merit considering the fact that, when one had to define whether a variety was an essen-

tially derived variety, one would look at the characteristics that were the expression of the genotype of the initial variety and check whether those characteristics were also expressed in the derived variety. In that respect, the proposal was somewhat clearer than the text in the Basic Proposal. His Delegation supported it.

1102. Mr. BURR (Germany) also felt that the proposal could be left to the Drafting Committee. The introductory words had been an attempt to adapt the provision to the outcome of the Working Group on Article 1 and such adaptation was certainly appropriate.

1103. The PRESIDENT asked the Delegation of Japan whether it accepted that the proposal was only a matter of drafting.

1104. Mr. HAYAKAWA (Japan) replied that he did not think so. It was very difficult to check the similarity between genotypes. Relating the provision to characteristics rather than genotypes was therefore a matter of substance.

1105. Mr. KIEWIET (Netherlands) admitted that the Delegation of Japan had a point concerning the comparison of genotypes; it was perhaps more practical to say that the characteristics that were the expression of the genotype had a resemblance. On this basis, he considered that it was a good proposal, but he wished to have some more time to think it over.

1106. Mr. GUIARD (France) said that, following the additional explanations given by the Delegation of Japan, it was indeed important to give thought to the scope of that amendment.

1107. Mr. ÖSTER (Sweden) stated that his Delegation supported the proposal but thought that it needed some drafting improvements. In particular, the words "the characteristics" could perhaps be replaced by "its characteristics."

1108. Mr. WHITMORE (New Zealand) stated that his Delegation would agree with the proposal for the reasons given by the Delegation of Japan.

1109. Mr. ARDLEY (United Kingdom) stated that, on the basis of the stated intention of the proposed amendment, his Delegation could support its principle.

1110. Mr. PALESTINI (Italy) stated that his Delegation supported the principle of the proposal. It also concurred with the proposal of the Delegation of Sweden.

1111. Mr. ORDONÑEZ (Argentina) stated that the idea behind the proposal of the Delegation of Japan was quite clear. The proposal might perhaps be revised as concerns its drafting.

1112. Mr. O'DONOHUE (Ireland) also lent the support of his Delegation to the proposal.

1113. The proposal of the Delegation of Japan reproduced in document DC/91/66 was adopted by consensus.

1114. The PRESIDENT opened the debate on the proposal of the Delegation of Japan, reproduced in document DC/91/65 Rev., to add a subparagraph (c) to Article 14(2).

1115. Mr. HAYAKAWA (Japan) stated that his country supported the introduction of the principle of dependency. However, his Delegation, having carefully studied it, felt that it was not easy to apply it immediately to all plant genera and species. It therefore proposed an amendment to Article 14(2) to the effect that each Contracting Party may implement the provisions on essentially derived varieties progressively to the various plant genera and species in the light of the special economic, ecological and technical conditions prevailing on its territory.

1116. Mr. ORDÓÑEZ (Argentina) said that his Delegation fully supported the subparagraph (c) proposed by the Delegation of Japan. It would be very important for developing countries to have a possibility to apply progressively the provisions on essentially derived varieties.

1117. No member Delegation seconded the proposal of the Delegation of Japan, reproduced in document DC/91/65 Rev., to add a subparagraph (c) to Article 14(2). (Continued at 1140)

CONSIDERATION AND ADOPTION OF ANY RECOMMENDATION, RESOLUTION OR COMMON STATEMENT OF THE CONFERENCE

Resolution on Article 14(2) of the Basic Proposal [Article 14(5) of the Text as Adopted] - Essentially Derived Varieties

1118. The PRESIDENT opened the debate on the proposal of the Delegation of Japan, reproduced in document DC/91/65 Rev., to adopt a resolution concerning essentially derived varieties.

1119. Mr. HAYAKAWA (Japan) explained that the principle of dependency was a very important one but, from a technical point of view, it was rather difficult to decide what was an essentially derived variety and what was not. To ensure that the criteria for essentially derived varieties would be harmonized internationally, the Delegation of Japan proposed a resolution to the effect that UPOV would establish some standard guidelines on the subject.

1120. Mr. BOGSCH (Secretary-General of UPOV) stated that the Office of the Union would be glad to do all in order to hasten the adoption of guidelines; but the adoption of such guidelines should not be a condition for any Contracting Party to apply the provisions of the new Convention. The resolution would constitute a clearer decision if the introductory phrase were deleted.

1121. Mr. ARDLEY (United Kingdom) asked for further clarification of the intention of the resolution. Guidelines were being established for each species or subspecies as regards the examination of distinctness, homogeneity and stability. He was not sure whether further or different guidelines would be needed to deal with essentially derived varieties. It was for the parties, essentially the breeders, to come to an agreement as to whether a variety was essentially derived and, where relevant, to a contractual arrangement. He had not believed that it was a matter for the authorities or the testing services to decide upon.

1122. Mr. HAYAKAWA (Japan) replied that the draft standard guidelines contemplated in the proposed resolution were not test guidelines of the kind currently available. His Delegation felt that it was very important to have criteria common to all member States on the distinction between essentially derived and other varieties.

1123. Miss BUSTIN (France) observed that the guidelines published by UPOV, of whatever kind, were only intended for the Contracting Parties, that was to say the States, and in future for intergovernmental organizations. Article 14 dealt in full with the rights of the breeder and the scope of those rights. To whom were the guidelines proposed by the Delegation of Japan to be addressed, having the purpose of stipulating not the content, but the conditions for the exercise of a right by the breeder? The Delegation of France was not opposed to the resolution proposed by the Delegation of Japan, but wondered whether UPOV was in fact in a position to address guidelines to breeders for the exercise of their rights. It wondered what the legal value of those guidelines would be in view of the fact that they were not addressed to administrative bodies responsible for implementing the Convention in one of the Contracting Parties.

1124. Mr. BOGSCH (Secretary-General of UPOV) interpreted the proposal of the Delegation of Japan as meaning guidelines with no binding effect. They would be a set of typical examples of what could be regarded as an essentially derived variety, leaving complete sovereignty to each State. The draft guidelines would be submitted to the Council of UPOV for approval. There would be therefore a first safety valve insofar as the Council would have to endorse the guidelines. It would also be clearly understood from the records of the Conference that the guidelines would have no legally binding force.

1125. Mr. DMOCHOWSKI (Poland) expressed the support of his Delegation for the proposal of the Delegation of Japan without the introductory phrase.

1126. Mr. BRADNOCK (Canada) observed that the provisions on essentially derived varieties were potentially controversial: varieties that would be considered essentially derived in the future were at present considered new

varieties which were totally the property of the persons who produced them and could be exploited without control by the breeder of the initial variety. It was therefore useful to have some guidelines that could be used in that situation.

1127. Mr. WHITMORE (New Zealand) stated that his Delegation supported the proposal of the Delegation of Japan. There would be merit in producing a guideline which clarified and spelled out in greater detail than the Convention what exactly was meant by the term "essentially derived variety."

1128. Mr. LLOYD (Australia) stated that if the proposal of the Delegation of Japan lead to a better definition that would be more uniformly implemented by Contracting Parties, then his Delegation fully supported the proposal.

1129. Mr. KIEWIET (Netherlands) said that the proposal of the Delegation of Japan reflected a realistic approach to the implementation of the provisions on essentially derived varieties that were not absolutely clear. There was a need for some guidance on how to deal with those provisions in practice. If such guidance could be given by guidelines from UPOV, his Delegation would agree with the proposal to have a resolution as worded in the operative part of the proposal of the Delegation of Japan. In any event, the guidelines could not change the essence of the provisions of the Convention.

1130. Mr. ORDÓÑEZ (Argentina) said that his Delegation considered it also quite useful to have UPOV guidelines.

1131. Mr. LANGE (ASSINSEL) observed that, quite apart from the question whether the proposed guidelines were to be introduced or not, the view of ASSINSEL was that it should not be the task of authorities to determine whether a variety was essentially derived or not.

1132. The PRESIDENT wondered whether he could conclude that the proposal was fully supported by the Conference.

1133. Mr. BURR (Germany) said that his Delegation would abstain in the voting.

1134. Mr. ESPENHAIN (Denmark) stated that his Delegation fully associated itself with the comments made by Mr. Bogsch (Secretary-General of UPOV). It would have some concern if the guidelines were meant to be an explanation of the concept of essentially derived varieties and an interpretation of the text of the new Convention. It would therefore also abstain.

1135. Mr. VISSER (South Africa) stated that his Delegation supported the views expressed by Mr. Kiewiet (Netherlands).

1136. Mr. ÖSTER (Sweden) stated that his Delegation would abstain.

1137. Mr. ARDLEY (United Kingdom) stated that his Delegation would also abstain.

1138. The PRESIDENT noted that no Delegation opposed the proposal of the Delegation of Japan. He therefore declared it adopted subject to the deletion of the introductory phrase.

1139. The conclusion of the President was noted by the Conference. (Continued at 1973)

CONSIDERATION OF THE DRAFT NEW ACT OF THE UPOV CONVENTION

Article 14(2) of the Basic Proposal [Article 14(5) of the Text as Adopted] - Acts Requiring the Breeder's Authorization in Respect of Essentially Derived and Certain Other Varieties (Continued from 1117)

1140. Mr. LANGE (ASSINSEL) wished to make the following clarification, since subparagraphs (a) and (b) of Article 14(2) had been dealt with separately: where it had been determined that a variety was essentially derived from the initial variety in accordance with subparagraph (b), then it remained an essentially derived variety even on expiry of the term of protection for the initial variety.

1141. The PRESIDENT confirmed this interpretation. (Continued at 1616)

Article 15 - Exceptions to the Breeder's Right

Article 15(1) - Act not Requiring the Breeder's Authorization

1142. The PRESIDENT opened the debate on the proposal of the Delegation of Denmark reproduced in **document DC/91/114**.

1143.1 Mr. ESPENHAIN (Denmark) recalled that he had already explained the reasons for the proposal of his Delegation. His Delegation fully agreed with the principle of dependency, but wondered whether it was fair in all cases to have dependency for the whole period in which the initial variety was protected. It had concerns as to whether this would block the development of new varieties. That was why it proposed to add to Article 15 a provision to the effect that the breeder's authorization would only be required for a period of 10 years from the date of granting of the breeder's right in respect of the initial variety. This would give the breeder of such an initial variety a launching period of 10 years. If the variety had already been protected for eight years when an essentially derived variety came up, there would be only two years of dependency.

1143.2 The proposal was intended to ensure fairness to the breeder of an initial variety and at the same time to make sure that the development of other varieties would not be blocked, whatever breeding method might be used for that purpose. The Delegation was flexible on the period of 10 years, which was half the minimum period of protection. Having half the national period of protection would be an alternative.

1144. Mr. ELENA (Spain) supported the proposal of the Delegation of Denmark.

1145. Mr. HOINKES (United States of America) asked the Delegation of Denmark what would happen if the breeder of the initial variety had been unsuccessful for 12 years and if somebody produced a successful essentially derived variety. Was it really intended to give him no recourse?

1146. Mr. BRADNOCK (Canada) observed that, with the developments in biotechnology, a lot of conventional plant breeders were very concerned that the balance may suddenly switch against them because their new varieties could be taken over very easily. The proposed principle of essential derivation was therefore welcomed as redressing the balance. The period proposed by the Delegation of Denmark, which was somewhat arbitrary and might vary from crop to crop, would take away half of the benefit from the new principle. His Delegation would therefore oppose this proposal.

1147. The proposal of the Delegation of Denmark reproduced in document DC/91/114 was rejected by two votes for, 14 votes against and three abstentions.

[Suspension]

1148. The PRESIDENT opened the debate on the proposal of the Delegation of the United States of America reproduced in **document DC/91/15**.

1149. Mr. HOINKES (United States of America) stated that his Delegation understood the reasons for excluding from the breeder's right acts that were done privately and for non-commercial purposes. However, just as in many other fields of activity, something might be done privately and for non-commercial purposes that would in fact create a hardship for the breeder; for that reason, his Delegation proposed that subparagraph (i) of Article 15(1) be amended as proposed in document DC/91/15. Acts done for private and non-commercial purposes should only be exempted if they did not unreasonably conflict with the exercise of the breeder's right. His Delegation considered that the provision as expressed in the Basic Proposal did not go far enough.

1150. Mr. DMOCHOWSKI (Poland) stated that his Delegation supported the proposal of the Delegation of the United States of America, which, in its opinion, was more precise than the text in the Basic Proposal.

1151. Mr. ELENA (Spain) stated that his Delegation could not go along with this proposal.

1152. Mr. HAYAKAWA (Japan) said that his Delegation was opposed to the proposal.

1153. Mr. IANNANTUONO (Italy) said that his Delegation was also not in favor of the proposal made by the Delegation of the United States of America. In practice, it would be rather difficult to distinguish that which was reasonable from that which was not.

1154. Mr. BURR (Germany) said that his Delegation took the same position as the Delegation of Italy.

1155. Mr. ESPENHAIN (Denmark) said that his Delegation associated itself with the Delegation of Italy.

1156. The proposal of the Delegation of the United States of America reproduced in document DC/91/15 was rejected by five votes for, 12 votes against and three abstentions. (Continued at 1289)

Article 15(2) - Farm-saved Seed

1157. The PRESIDENT opened the debate on Article 15(2), noting that the proposal of the Delegation of the United States of America reproduced in document DC/91/16 had been withdrawn. He invited the Delegation of France to introduce its proposal reproduced in document DC/91/88.

1158. The withdrawal of the proposal of the Delegation of the United States of America reproduced in document DC/91/16 was noted by the Conference.

1159.1 Mr. PREVEL (France) observed that the proposal called for a number of explanations since the provisions in the Basic Proposal essentially reproduced those of the interprofessional agreement concluded in France on July 4, 1989. The three reasons for the proposal were as follows:

(i) The Delegation of France wished to give to a breeder's right the same strength that the law gave to a patent. To include an exemption in the Convention would compromise the balance that it was seeking.

(ii) The considerable case law that had evolved in France following the decisions of the Court of Appeal of Nancy in 1987 and 1988 had shown that breeders' rights applied to farm-saved seed in the case of a protected variety. The Delegation had no intention of calling that case law into question.

(iii) Observation of the situation of private research endeavors with respect to self-pollinating plants, particularly cereals, in those countries in which the practice of farm-saved seed was the most widespread, had convinced his Delegation of the need to adopt that stance.

1159.2 Mr. Prevel added that his Delegation could perhaps be asked whether the interested circles in France were prepared to relinquish the above mentioned agreement. That was not at all the case, quite the contrary, since it had just been decided to maintain the agreement and to reinforce the conditions for its application; it was a public law agreement and in no way impaired the exercise of breeders' rights since breeders remained free to exercise their rights or to waive them in part as could be done with any other type of property.

1160. Mr. KIEWIET (Netherlands) wished to express his sympathy with the proposal. However, as demonstrated by the fact that his Delegation had submitted its own proposal, the proposal of the Delegation of France was going one step too far. Therefore, his Delegation could not support it.

1161. No Delegation seconded the proposal of the Delegation of France reproduced in document DC/91/88.

1162. The PRESIDENT opened the debate on the proposal of the Delegation of Poland reproduced in document DC/91/67.

1163. Mr. VIRION (Poland) explained that his Delegation wished to be able to give the same rights, whatever the form of agricultural property, to farmers and to State enterprises, to small farms and to large-sized farms, as also to cooperative undertakings. For that reason, it proposed using the notion of enterprise since it happened frequently that an enterprise would own a number of farms including one specialized in producing seed and seedlings for the whole enterprise. The wording of the Basic Proposal, by referring to "farmers" and to "their own holdings," could suggest that the right to the production of own seed was limited to individual private farms only.

1164. No Delegation seconded the proposal of the Delegation of Poland reproduced in document DC/91/67.

1165. The PRESIDENT opened the debate on the proposal of the Delegation of the Netherlands reproduced in document DC/91/68.

1166.1 Mr. KIEWIET (Netherlands) recalled that the main goal of the revision of the UPOV Convention was to strengthen the position of the breeder in relation to varieties developed by him and protected under the plant breeders' rights system. His Delegation was of the opinion that the provision laid down in Article 15(2), relating to farm-saved seed or to the "farmer's privilege," was not consistent with that goal. It restricted the breeder's right in order to permit farmers to use the protected variety for propagation purposes, whereas the farmers were the main buyers and users of propagating material. It therefore created a major loophole in the protection offered under the

Convention to the breeder. And it was the experience of his country in relation to its dike system that loopholes in protection systems tended to become bigger and bigger, and that all the protection potential vanished very soon without it being noticed. In principle, his Delegation was therefore opposed to any provision which would give the farmer a privilege in relation to a protected variety.

1166.2 However, it was also realistic, Mr. Kiewiet said. The "farmer's privilege" had been established in many countries and this process was probably not reversible. But where a "farmer's privilege" existed, equitable remuneration should be paid to the breeder when a farmer made use of that privilege. Furthermore, this privilege should be restricted to the areas of agricultural activity in which it had already become an established practice, that is to the production of cereals, peas and potatoes, and by no means extended to other areas, in particular to the horticultural sector.

1166.3 Mr. Kiewiet concluded by referring to the biotechnical methods such as in vitro propagation; they made it possible to reproduce plant material very easily, even in the case of hybrid seeds, and therefore made it easier for the farmer to make use of the privilege.

1167. Mr. BOGSCH (Secretary-General of UPOV) suggested that discussion might be facilitated if the second proposal, namely the addition of a subparagraph (b), were taken first. The Conference would then see what would be the scope of the modification proposed for subparagraph (a). The proposal to add a subparagraph (b) touched upon the meaning of the word "farmer." If that word were interpreted to exclude people who grew for instance roses or forest trees, the privilege would be applicable to a part only of the plant world, and this would come close to the wish expressed by the Delegation of the Netherlands.

1168. Mr. BRADNOCK (Canada) observed that there were other crops in Canada in which farm-saved seed was of significance in Canada, such as flax or linseed, buckwheat, field beans, soybeans, rape seed (canola), Canary seed and lentils.

1169. Mr. ARDLEY (United Kingdom) stated that his Delegation also saw problems in specifying a list of species in an international Convention. Some of the States which might become members of the Union in the future might have to face problems different from those currently encountered by the present member States from Europe and perhaps North America. To produce a closed list restricted to three particular species or groups of species could possibly restrict accessions to the new Convention. Whereas his Delegation had every sympathy with the wish to limit the practice of saving seed on the farm free of obligation to the breeder, it did not see any reasonable solution to the problem for inclusion in the Convention, but did see dangers in the proposal of the Delegation of the Netherlands.

1170. Mr. BOGSCH (Secretary-General of UPOV) asked whether the title had a specific meaning. Did the provision concerned refer to seeds only or not? If it did not, the title should be changed because it would be misleading.

1171. Mr. DMOCHOWSKI (Poland) stated that his Delegation was against the proposal of the Delegation of the Netherlands. There were no reasons to treat differently different groups of plants, and therefore different groups of agricultural, horticultural or silvicultural producers and users.

1172. Mr. ELENA (Spain) stated that his Delegation certainly agreed with the suggestion of Mr. Bogsch (Secretary-General of UPOV) to change the title of the provision. The provision was indeed not restricted to seeds. In addition, the Delegation would find it very difficult to establish a list of the species for which farm-saved seed was traditional in the current and future member States of UPOV.

1173. Mr. ÖSTER (Sweden) stated that his Delegation's concerns were similar to those expressed by Mr. Ardley (United Kingdom). Herbage crops might also be important in relation to farm-saved seed.

1174. Mr. HAYAKAWA (Japan) shared the opinion expressed by Mr. Öster (Sweden).

1175. Mr. IANNANTUONO (Italy) said that his Delegation could not support the proposal.

1176. Mr. ESPENHAIN (Denmark) stated that his Delegation as well could not support the proposal. It had been essential, when the preparation of this Conference started, that the Convention should be kept open to allow further States to adhere to it. His Delegation therefore preferred to stick to the Basic Proposal. It had had a discussion on the title: "farm saved seed," which represented a limitation compared to the text of the provision. It wondered, particularly in the light of the arguments brought forward by Mr. Ardley (United Kingdom), whether it was really wise to limit the scope of the provision, which might be of importance in other parts of the world in relation to vegetative propagating material.

1177. Mr. PREVEL (France) remarked that his Delegation understood the intention of the Delegation of the Netherlands, but felt that a limitation would present a legal problem within an international Convention. On the other hand, it supported the proposed amendment to subparagraph (a) that introduced an obligation to pay equitable remuneration.

1178. Mr. BOGSCH (Secretary-General of UPOV) asked the Delegation of the Netherlands whether it would not help to exclude expressis verbis horticultural varieties and whether such an exclusion would not hurt any existing tradition or come in the way of any future accession to the Convention.

1179.1 Mr. KIEWIET (Netherlands) replied that Mr. Bogsch (Secretary-General of UPOV) had made a relevant suggestion. His Delegations's intention was to make sure that the "farmer's privilege" would not be extended to areas of agricultural activity in which it played no role at present. It was improper in the context of the strengthening of the breeder's right to make a provision

that would open the way for a "farmer's privilege" in sectors in which it was not an established practice. Mr. Kiewiet conceded that the proposed list might be too limited; his Delegation could therefore agree to a text which would say that the provision concerned would apply only to species other than horticultural species.

1179.2 Mr. Kiewiet added that if the price of securing further accessions to the Convention was that further member States would not effectively protect breeders by giving farmers the permission to use the "farmer's privilege" in all fields of agricultural activity, then that price would be too high. The Conference should not try to make a Convention with all kinds of loopholes so that every State could become a member of UPOV without taking the protection system seriously.

1180.1 Mr. BRADNOCK (Canada) observed that, in Canada, potatoes were considered as a horticultural crop. This illustrated the difficulty of finding a vocabulary that would be generally acceptable.

1180.2 Mr. Bradnock added that his Delegation supported the basic concept underlying the proposal of the Delegation of the Netherlands, namely that plant breeders should get as effective protection as possible. It also recognized that there was a long-standing tradition of farmers saving seed in certain crops. He wondered whether Article 20(2) and its phrase: "except where this is an established practice for designating varieties" might not serve as a basis for a solution.

1181. Mr. LLOYD (Australia) wished to add to the observation of Mr. Bradnock (Canada) that, in Australia, potatoes, but also tomatoes, were considered as an agricultural crop.

1182. Mr. HOINKES (United States of America) stated that his Delegation would also find it difficult to establish a limitation along the lines that had been proposed so far. It could agree to a limitation of the "farmer's privilege" to seed-propagated varieties; that was about as far as it could go.

1183. Mr. ELENA (Spain) stated that his Delegation would have difficulties in drawing up a limited list of species, and also in limiting the relevant provision to sexually reproduced species. The "farmer's privilege" was a tradition in Spain for a number of species of fruit trees.

1184. Mr. HAYAKAWA (Japan) stated that his country would also have some very serious problems if the "farmer's privilege" were limited to certain species.

1185. Mr. ORDÓÑEZ (Argentina) stated that his Delegation shared the objective of granting strong protection to breeders as mentioned by Mr. Kiewiet (Netherlands). But its strong position in favor of the breeder's right was also in balance with a strong position in favor of the farmer's privilege to save seed on his own farm. Those two rights were expressly mentioned in the first Article of the national law. Under those circumstances, his Delegation could not support a limitation on the number of species, nor could it support

the obligation to pay an equitable remuneration to the breeder. In Argentina, attempts were made to stop the practice of saving seed for it was not the true farmers who saved seed but big companies or groups of farmers. The principle that was to be followed was that the "farmer's privilege" should not be violated or restricted by an abusive recourse to it. In conclusion, the Delegation of Argentina could not support any amendment of the kind proposed by the Delegation of the Netherlands.

1186.1 Mr. ETZ (Austria) explained that it was usual in farming in Austria, and would also continue to be necessary, to permit farmers to use seed and planting material produced on their own holdings even in the case of protected varieties. His Delegation therefore supported the maintenance of Article 15(2) as given in the Basic Proposal.

1186.2 As an Observer Delegation, it put the question whether improved formulations could be found for the following passages: "within reasonable limits," "safeguarding of the legitimate interests of the breeder," "farmers" and "own holdings." Those terms should effectively limit the free use of seed produced on the farmers' own holdings to those own holdings and exclude use in certain communities of holdings or contractual communities. Austrian breeders also had doubts as to the unjustified exploitation of the "farmer's privilege" by the large-scale holdings and the cooperatives.

1186.3 As an explanation of the term "contractual community," Mr. Etz reported on the following actual case: an agricultural holding had unlawfully produced hybrid seed on a surface of some 10 hectares. To get around the statutory provisions on plant variety protection, the propagation surface was split up into allotments of 0.2 hectares and leased to numerous other farmers. The aim was to make it seem that those farmers were producing seed on their own holdings and would therefore not need the authorization of the breeder. No decisions had yet been given in the resultant legal proceedings. The Delegation of Austria requested the Member Delegations to consider those arguments in order to avoid the creation of a grey market in seed and prejudice the interests of the breeders.

1187. Mr. O'DONOHUE (Ireland) stated that his Delegation also had sympathy with the position put forward by the Delegation of the Netherlands but saw the difficulties in arriving at a definitive list of species for which the practice of saving seed would be acceptable.

1188. Mr. GUTIERREZ DE LA ROCHE (Colombia) stated that his Delegation shared the sentiment expressed by Mr. Ordoñez (Argentina) and Mr. Etz (Austria) and would suggest that Article 15(2) remain as it was in the Basic Proposal.

1189. Mr. GRANHOLM (Finland) stated that the question of farm-saved seed was of special interest in Finland in the context of the introduction of plant breeders' rights legislation. Farmers in Finland had for a long time been opposed to the whole plant breeders' rights system, and that was the main reason for which the legislation had not been introduced so far. The farming community was currently reconsidering its position. The concept of plant breeders' rights was now generally recognized. However, the question of farm-saved seed would remain a key issue from the farmers' point of view. Taking into account the fact that agriculture was under hard pressure from

Finnish society because of its high costs, it would seem unacceptable in Finland that farmers should pay for farm-saved seed. The breeders in Finland accepted the idea that farmers should not pay for farm-saved seed and they considered that it would not be possible in practice to collect fees for such seed. It seemed therefore appropriate that the question of farm-saved seed be solved at national level as proposed in the Basic Proposal.

1190. Mrs. KINNON (IFAP) wished to stress the importance of Article 15(2). If UPOV was seriously considering an increase in its membership, it should pay attention in the Convention to the situation of the seed users. Farmers felt very strongly about being able to save seed on their farms for sowing. IFAP was not the only organization making that point. In his previous statement, the representative of FAO, representing 150 countries, had made it very clear that an exemption for farm-saved seed was necessary to enable developing countries to adhere to the Convention.

1191.1 Mr. BESSON (FIS) wished to express the concern of the members of FIS at the phenomenon of farm-saved seed and the draft Article 15(2). The draft not only threatened the rights of breeders, but also those of seed merchants since, if the farmers reached agreement with breeders, it would be to the detriment of the seed distribution networks set up by seed merchants over the years. As far as international trade was concerned, the proposal would potentially distort competition as a function of the scope of exemption the countries would afford to their farmers. The question therefore arose whether it was wished to set an upper limit to the exemption--and in such case the drafting of the provision was not adequate--or whether one wished to let the countries act as a function of the national situation--and in that case it was a matter of public policy that escaped the hold of the Convention.

1191.2 As far as taxation was concerned, exemption was tantamount to a subsidy since the farmer was permitted to reduce his costs by infringing the rights of others. What was unacceptable was the fact that the subsidy was not covered by the State, but taken from the pockets of breeders and seed merchants. Finally, it was not opportune to afford an out-of-date right to agriculture since the latter had set out on the path of liberalization under the auspices of GATT. Moreover, the more severe conditions of competition would already lead to massive recourse to farm-saved seed without it being necessary to encourage it.

1191.3 However, the members of FIS were realistic and realised that certain political and social situations had to be taken into account and that, in order to increase its membership, UPOV had to accommodate those situations and find transitional measures. However, that could be dealt with by the public interest clause. Now that the Conference had to take decisions for the long term, FIS wished to make it attentive to the implications of recognizing farm-saved seed in the Convention.

1192. Mr. HANSEN (Norway) said that the situation in his country was the same as that described by Mr. Granholm (Finland) and that the position of his Delegation on this question was also the same as that of the Delegation of Finland.

1193. Mr. KIM (Republic of Korea) said that, traditionally, the Republic of Korea had permitted farmers to use part of their crop for propagating purposes on their own holdings. His Delegation was therefore opposed to the proposal of the Delegation of the Netherlands.

1194.1 Mr. WINTER (COMASSO) welcomed the opportunity of dealing with that matter in a thorough and definitive way. As an organization of breeders, COMASSO advocated the viewpoint that had served as a basis for the proposal of the Delegation of France: the introduction of a privilege for a specific professional group was alien to any system of industrial property. On the other hand, COMASSO nevertheless recognized the political constraints that could lead to the introduction of such an instrument.

1194.2 The unprecise formulation of the Basic Proposal could, however, lead to differing implementations in the various UPOV member States. To avoid that, it was urgently necessary to set out certain cornerstones, as for instance the limitation of the privilege to certain species, and discussions had already pointed to problems of demarcation. COMASSO would indeed be able to accept the criterion of established practice that had been referred to in the discussions by the Delegation of Canada. A further, essential cornerstone was that the obligation for the user of farm-saved seed to pay remuneration should be explicitly stipulated. There could be no question of the product of inventive work being available for free use for a specific professional group.

1194.3 It was to be pointed out in that context that in certain national discussions between the professional organizations of farmers, breeders and the seed trade, agreement in principle could already be ascertained: according to that agreement, the cost of breeding was to be carried by broader shoulders. In so far the principle of an obligation to remuneration had been recognized.

1195.1 Mr. EHKIRCH (COSEMCO) pointed out that UPOV's mission was to define the breeder's right in his varieties. However, Article 15(2) would appear to, officially, introduce a notion that was exactly the opposite of the provisions in the Convention. One could well understand that there existed ancient practices in certain countries with regard to certain species, under certain conditions and for certain farmers. It would therefore be preferable to let each government legislate in that field in accordance with the features of the domestic situation, without setting out measures in an international Convention which would then give the relevant provisions a legal strength they had not hitherto possessed.

1195.2 As for the wording of Article 15, Mr. EHKIRCH remarked that it could be interpreted as meaning that the farmer had the right to reproduce seed in any quantity whatsoever. If for political reasons the Conference was to deem appropriate that the farmer be able to produce his own seed of varieties protected by a plant breeder's right, it would then be necessary to provide for fair compensation for the owner of the right by paying a royalty for the use of that protected variety. That would be a guarantee for the farmer that research into the varieties he used would continue.

1196. Mr. LANGE (ASSINSEL) explained that he would be brief, in view of the lateness of the hour, and simply confirm on behalf of ASSINSEL the views put forward by Mr. Winter (COMASSO).

1197. Mr. ROBERTS (ICC) stated that, very briefly, ICC also supported the position of COMASSO on this point.

1198. Mr. BROCK-NANNESTAD (UNICE) stated that his Delegation shared the views expressed by the previous speakers from observer organizations. He also asked why potential candidates for UPOV membership should want to commit to the Convention if tradition already ensured a good seed supply. One might also ask why UPOV would wish to attract such countries. The answers may lay in the basic weakness of UPOV which had been demonstrated by the attitudes to the proposal of the Delegation of the United States of America, reproduced in document DC/91/15, to exclude from the scope of the breeder's right only those acts done privately and for non-commercial purposes "that do not unreasonably conflict with the exercise of the breeder's right." That was a very moderate statement which should have been promoted.

1199. Mr. HJERTMAN (EFPIA) stated that EFPIA supported the position expressed by the representative of the ICC.

1200. Mr. KORDES (CIOPORA) said that CIOPORA, as an association of breeders of asexually reproduced ornamental and fruit-tree varieties, considered the extension of breeders' rights to be a step in the right direction. It was not acceptable that horticultural products should not be subject to the new provisions in certain countries and that they should enjoy an exception.

1201. Mr. ROTH (GIFAP) stated that GIFAP supported ICC's position.

1202. The PRESIDENT concluded the debate on the proposal of the Delegation of the Netherlands reproduced in document DC/91/68. He observed that the proposal had not been seconded by any member Delegation although much sympathy had been expressed for the intention behind it. He therefore invited the member Delegations to reflect on the problem and, if relevant, to submit another proposal as regards the limitation of the provision to certain species. (Continued at 1246)

<p><u>Thirteenth Meeting</u> <u>Tuesday, March 12, 1991</u> <u>Morning</u></p>
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Article 26 - The Council

1203. The PRESIDENT opened the meeting and stated that he would invite the Conference to consider as a matter of priority Article 26.

Article 26(1) to (5) - Composition of the Council; Officers; Sessions; Observers; Tasks

1204. The PRESIDENT noted that no proposal for amendment had been submitted for paragraphs (1) to (5) of Article 26. He therefore declared those paragraphs adopted.

1205. The conclusion of the President was noted by the Conference.

Article 26(6) - Votes in the Council

1206. The PRESIDENT opened the debate on Article 26(6). He observed that he had gathered from private discussions that the political implications of the provision created such difficulties to some Delegations that there was danger that the Conference would not be successful if it were to remain unchanged, whereas other Delegations had great difficulties to accept its amendment. He further observed that the question of the number of votes was not so important in UPOV because, normally, the Council did not vote but worked on the basis of consensus. However, it had to be recognized that the matter was one of principle and that it was always difficult to find compromises on such matters. He asked the member Delegations to make their declarations during this meeting, on the understanding that there would be no vote yet.

1207.1 Mr. HOINKES (United States of America) stated that Article 26(6) had caused a great deal of concern in his country. He stressed that, in principle, his Delegation had no objection to the possibility of specific intergovernmental organizations, in particular the EC, becoming Contracting Parties of the UPOV Convention. However, certain formalities needed to be defined in the Convention and observed by such organizations. The reason for this was that the provisions in the Basic Proposal were not limited to just one organization, specifically the EC, but related to all intergovernmental organizations which had certain qualifications, in particular competence in the subject matter covered by the Convention.

1207.2 Mr. Hoinkes recalled in that respect that the proposal for the amendment of Article 26(6) made by his Delegation (document DC/91/19) was not the only one that addressed the question of intergovernmental organizations becoming members of UPOV. There were also a proposal for a definition of "intergovernmental organization" in Article 1 (document DC/91/5), a proposal with respect to Article 34(1)(b) (document DC/91/20) and a proposal with respect to Article 37(1) (document DC/91/21).

1207.3 Mr. Hoinkes added that the basic question that his Delegation sought to address was the question of the votes of an intergovernmental organization that was a Contracting Party at the same time as its or some of its member States. This particular situation had already been clarified in other areas, such as the Treaty on Intellectual Property in Respect of Integrated Circuits. The fact that an intergovernmental organization had its own plant breeders' rights system did not obviate the fact that that system was in force in the territories of UPOV member States which had their own national plant breeders' rights systems. And the fact that more than one system was available to plant breeders in any given territory should not entitle the sovereign authorities

of that territory to have more than one vote through the mere adherence to an intergovernmental organization. An intergovernmental organization and its member States should not be entitled to exercise rights under the UPOV Convention concurrently, and it was for that reason that the Delegation of the United States of America had made the proposals referred to earlier.

1207.4 In general, those proposals paralleled the provisions of the Treaty on Intellectual Property in Respect of Integrated Circuits. The Delegation was however ready to explore other solutions, for instance along the lines of the provisions of the draft Treaty Supplementing the Paris Convention as far as Patents are Concerned. What was important was the concept, and, as long as the concept was upheld, the Delegation would be pleased to contribute to the Conference's achieving a formulation that would be satisfactory to all.

1208.1 Mr. BUTLER (Canada) stated that his Delegation also had concern with Article 26(6). It was of the opinion that the 1989 Washington Treaty on Intellectual Property in Respect of Integrated Circuits established the right precedent, namely that intergovernmental organizations could become party to an international agreement but that an organization could cast only the votes of its member States without having an extra vote in its own right. As had been pointed out by Mr. Hoinkes (United States of America), the question of the participation of intergovernmental organizations cut across a number of Articles; incidentally, the proposal of the Delegation of the Netherlands distributed as document DC/91/113 also dealt with that question.

1208.2 Mr. Butler wished to underline that the concern of his Delegation went beyond the UPOV Convention. The provisions in that Convention dealing with intergovernmental organizations raised important questions of international public law and of treaty law and would create precedents. At the 1989 Washington Diplomatic Conference, a working group of interested States had worked out a carefully balanced package and a good set of precedents which were now included in the Treaty on Intellectual Property in Respect of Integrated Circuits. The Delegation of Canada wished to make a procedural suggestion: a working group open to interested Delegations should also be established at this Conference to work out a package similar to that of the 1989 Washington Conference. His Delegation was certainly ready to participate in the discussions in a spirit of cooperation.

1209. Mr. WHITMORE (New Zealand) recalled that the position of New Zealand had been explained during the last Council session, in October 1990. His country was opposed to the idea of an intergovernmental organization having a vote in addition to the votes of its member States. On the other hand, it would certainly welcome a qualified intergovernmental organization joining UPOV. His Delegation was therefore opposed to Article 26(6) in the Basic Proposal and supported the proposal of the Delegation of the United States of America, and also the suggestion made by the Delegation of Canada that a working group be set up to discuss the issue.

1210. Mr. HANNOUSH (Australia) said that his Delegation had in principle no difficulty with the accession of an intergovernmental organization to the Convention but felt that the question of the voting rights possessed by such an organization needed to be considered very carefully. It would oppose the text as it stood in the Basic Proposal and could support the amendments, in particular on Article 26(6), proposed by the Delegation of the United States

of America. Finally, it supported the setting up of a working group and was willing to take part in its proceedings.

1211. Mr. HAYASHI (Japan) stated that the position of the Government of Japan was the same as that of the United States of America. His Delegation strongly supported the proposal of the Delegation of the United States of America and would also like to participate in the working group proposed by the Delegation of Canada.

1212. Mr. ORDÓÑEZ (Argentina) shared the views expressed by Mr. Whitmore (New Zealand) and stated that his Delegation supported the amendment proposed by the Delegation of the United States of America.

1213. Mr. BURR (Germany) said that he altogether shared the view expressed by Mr. Hannoush (Australia) that the matter had to be treated with extreme prudence. Although the present discussion was of a general nature, it was not possible to avoid introducing certain considerations of detail which had a decisive influence on the basic stance of the Delegation of Germany. One of the main problems with the proposal made by the Delegation of the United States of America was that Germany as a member State of UPOV could not permit an intergovernmental organization to appropriate its vote, for instance, in a vote on its contributions to the budget. On the other hand, Mr. Burr could understand those organizations that could not have their member States appropriate those votes from it. As far as contributions were concerned, a solution would have to be found.

1214. Mr. KIEWIET (Netherlands) stated that he could support the views expressed by Mr. Burr (Germany). His Delegation supported the text in the Basic Proposal and agreed that the issue should be dealt with very carefully because of its political implications. It was therefore a very good idea to have a general round of discussions on this issue and come back to it later. Mr. Kiewiet wondered whether a working group would be the right forum to discuss a matter of such political importance. Most member Delegations would have to reconsider their positions and to consult their capitals; most certainly, the outcome of a working group would not influence their positions.

1215. Mr. PREVEL (France) said that his Delegation shared the views expressed by the Delegations of Germany and of the Netherlands: the matter demanded great prudence. His Delegation had initial instructions to support the Basic Proposal; it was now awaiting instructions on the proposal for amendment made by the Delegation of the United States of America. After having heard the statements by the Delegations that supported that proposal, it felt with the Delegation of the Netherlands that it was difficult to deal with such a problem in a working group. The search for the compromise which would doubtlessly be necessary to resolve the problem would have to be postponed until the States that supported the Basic Proposal had received precise instructions.

1216. Mr. ARDLEY (United Kingdom) supported the views expressed by the Delegations of Germany, of the Netherlands and France. The discussion showed that the issue was not of the kind that a working group could resolve. It would also be difficult to decide on a suitable composition of the working

group. A day or two should be allowed to member Delegations to seek instructions from their Governments, and the issue should be taken up again thereafter in Plenary.

1217. Mr. O'DONOHUE (Ireland) indicated that the position of his Delegation was the same as that stated by Mr. Ardley (United Kingdom). A working group would not be able to solve the problems, and his Delegation also had to get instructions from the capital.

1218. Mr. ESPENHAIN (Denmark) stated that his Delegation had the instruction to support the Basic Proposal, which represented a package.

1219. Mr. BARRIOS (Spain) stated that, although it would support many of the amendments proposed by the Delegation of the United States of America, in particular concerning the definition of an intergovernmental organization and the entry into force of the Convention, his Delegation had serious problems with the proposed amendment concerning voting rights in Article 26. This was a very delicate matter which required very careful consideration.

1220. Mr. VAN ORMELINGEN (Belgium) announced that, at present, the position of his Delegation was to favor the Basic Proposal. Additional instructions had been requested on the amendments proposed by the Delegation of the United States of America.

1221. Mr. ESPENHAIN (Denmark) asked whether member Delegations would indicate whether they were waiting for instructions or whether they already had a definite position at this stage. He also asked whether they could indicate what the new position might be.

1222. Mr. BOGSCH (Secretary-General of UPOV) observed that Delegations could not be forced to speak; silence was sometimes very significant. He welcomed the fact that the member States of the EC had met and discussed among themselves the next steps to be taken. He observed that their position would not be very much influenced by what the countries outside the Community would have to say.

1223. Mrs. JENNI (Switzerland) said that her Delegation tended towards the Basic Proposal.

1224. Mr. KIEWIET (Netherlands) confirmed that the member States of the EC were in the process of coordinating their views on this issue. There would be an important meeting tomorrow in Brussels and its outcome would also influence the positions which would be taken in the Conference. This was one of the reasons for which no decision should be taken at this point. On the other hand, it would be worthwhile to know what the positions of the States that were not members of the EC would be if the Basic Proposal were to meet with a majority in the Conference; it would be useful for the UPOV member States that were also members of the EC to know exactly the consequences of the adoption of the text in the Basic Proposal.

1225. Mr. ESPENHAIN (Denmark) emphasized that the text in the Basic Proposal provided the possibility for any intergovernmental organization meeting the requirements, and not only the EC, to become a member of UPOV. This should be kept in mind.

1226. Mr. VISSER (South Africa) indicated that his Delegation had no firm standpoint at this point in time. However, it was aware of the fact that, in future, the relations between developing countries in Africa would probably be organized on a regional basis. It would therefore favor a flexible Convention offering as many options as possible. For that reason, it was inclined to support a text based on the Basic Proposal.

1227. Mr. VIRION (Poland) said that his Delegation was rather in favor of the amendment proposed by the Delegation of the United States of America.

1228. Mr. ÖSTER (Sweden) observed that, at this stage, he could only underline that, during the preparatory work which led to the Basic Proposal, Sweden had no opinion against the text in the Basic Proposal.

1229.1 Mr. HOINKES (United States of America) wished to comment on the points made by Mr. Burr (Germany). He could fully understand that a member State of UPOV could not give up its right to vote in favor of an intergovernmental organization, especially when finances were concerned. It was for that reason that he had tried to explain that the proposal of his Delegation concerning Article 26(6) was one that merely expressed the concept that there should not be concurrent voting of an organization and its member States. That did not mean that the specific text proposed had to be accepted, although it should be borne in mind that, at the time when the Treaty on Intellectual Property in Respect of Integrated Circuits had been negotiated, this specific text had been agreed to by the Commission of the European Communities.

1229.2 On the other hand, his Delegation had no problem with a text along the lines of the Basic Proposal for a Treaty Supplementing the Paris Convention as far as Patents are Concerned, which would state that any intergovernmental organization that was a Contracting Party may exercise the right to vote of its member States that were Contracting Parties. In either proposal, any State could preserve its right to vote simply by exercising it, since the exercise of a right to vote or the express abstention of a State would cancel the ability of the organization to vote on its behalf. The concerns of the Delegation of Germany were thus taken care of.

1229.3 As far as financial contributions were concerned, Mr. Hoinkes also fully understood the concerns arising from the fact that the Basic Proposal called for contributions by all Contracting Parties, regardless of whether they were States or intergovernmental organizations. If the concept of its proposal with respect to voting rights was adopted, his Delegation would not oppose any amendment of the Basic Proposal that would exempt intergovernmental organizations from the payment of contributions.

1230. The PRESIDENT closed the exchange of views on Article 26(6) and recalled that the matter would be taken up again on Thursday, March 14. He invited the Member Delegations to explore the possibilities for a mutually acceptable solution on the basis of this exchange of views. (Continued at 1721).

Article 26(7) - Majorities

1231. The PRESIDENT opened the discussion on Article 26(7). He observed that the proposal of the Delegation of Japan reproduced in document DC/91/101 included the proposal of the Delegation of Germany reproduced in document DC/91/76. He suggested that the discussion should be based on the first-mentioned document.

1232. Mr. HAYASHI (Japan) explained that his Delegation would like to insert a reference to Article 28(3) and Article 34(3) in Article 26(7) because it was of the opinion that there was no reason to change the required majority in the case of those two provisions. In particular, the addition of working languages affected the finances of the Union, which justified an amendment keeping the new Convention in line with the present one.

1233. Mr. BURR (Germany) said that his Delegation supported the first part of the proposal made by the Delegation of Japan since it coincided with the proposal of his Delegation. As for the second part of that proposal, his Delegation was open-minded, at least. In the past, the accession of States to the Union had always been decided unanimously. However, majority decisions should not be excluded for the future. Those cases in which more than one fourth of the member States expressed doubts would be fairly rare. In view of experience so far, it should be possible to live with both types of majority. The Delegation of Germany would therefore go along with the majority.

1234. Mr. ELENA (Spain) stated that his Delegation was opposed to a provision whereby the addition of further working languages would require a three-fourths majority.

1235. Mr. ARDLEY (United Kingdom) stated that his Delegation had no problem with the first part of the proposal which concerned languages. Concerning the reference to Article 34(3), he observed that it provided that if the Council advised that the legislation of a potential member was in conformity with the provisions of the Convention, then the State or organization concerned might be admitted to the Union whatever majority had decided in favor of conformity. However, Mr. Ardley felt that its wording did not make it clear, that this was the only condition to be taken into account and that a decision based on other reasons was not permitted.

1236. Mr. BOGSCH (Secretary-General of UPOV) stated that Article 34(3) could not be interpreted as allowing other reasons than the conformity of the legislation. That was the only question which was put before the Council.

1237. Mr. ARDLEY (United Kingdom) thanked Mr. Bogsch (Secretary-General of UPOV) for his assurances on that point.

1238. The PRESIDENT noted that the proposal to require a three-fourths majority for any decision on the conformity of the legislation of a State or organization wishing to accede to the Convention was not seconded. He therefore declared it rejected.

1239. The conclusion of the President was noted by the Conference.
1240. Mr. BURR (Germany) pointed out that a three-fourths majority was needed to adopt the annual budget under the current text of the Convention, that was to say Article 22 in conjunction with Article 21(c). That was also provided in the Basic Proposal. That majority should also be required for decisions on principles which would set major budgetary constraints. The inclusion of further languages in the list of official languages had a major impact on the budget and should therefore be subject to a three-fourths majority as well. Any decision by the Diplomatic Conference to include a further language would in fact require a five-sixths majority on final adoption of the new Convention. In view of those circumstances, it would not be unjustified to require at least a three-fourths majority.
1241. Mr. HAYASHI (Japan) stated that his Delegation supported the proposal.
1242. Mr. ELENA (Spain) stated that his Delegation was against the proposal.
1243. Mr. ESPENHAIN (Denmark) stated that his Delegation supported the proposal.
1244. Mr. ORDOÑEZ (Argentina) stated that his Delegation was against the proposal.
1245. The proposal to require a three-fourths majority for a decision to use a further working language was adopted by 12 votes for, one vote against and seven abstentions. (Continued at 1795)

Article 15(2) - Optional Exception to the Breeder's Right (Continued from 1202)

1246. The PRESIDENT reopened the debate on Article 15(2).
1247. Mr. KIEWIET (Netherlands) explained that the new proposal of his Delegation reproduced in document DC/91/115 only related to subparagraph (b) of the proposal which had been the subject of document DC/91/68. The proposal relating to subparagraph (a) and appearing in the latter document remained relevant. As for the new proposal, its text was clear: member States would be able to introduce the so-called "farmer's privilege," but would have to limit it to those areas in which it was of real importance.
1248. Mr. INGOLD (Switzerland) requested that, before resuming discussion on that extremely important matter, the scope of the expression "farm-saved seed" be defined. Was "seed" to be taken in the restricted sense or did it also include vegetative propagating material?

1249. Mr. BOGSCH (Secretary-General of UPOV) recalled that he had said that the title of the provision would have to be revised once the contents of the paragraph was known. In any case, it was not good because the paragraph as appearing in the Basic Proposal went beyond it.

1250. Mr. ORDÓÑEZ (Argentina) stated that his Delegation was also opposed to the new proposal of the Delegation of the Netherlands.

1251.1 Mr. ARDLEY (United Kingdom) recalled that the Administrative and Legal Committee had had some difficulties in finding a title for the paragraph in question, even against the background that the title had no status as such; the alternative had been "farmer's privilege," but it had been recognized that one could not use such a title. A simple solution would be to have no title at all for this paragraph which provided for a possible exception to the breeder's right.

1251.2 Turning to the proposal of the Delegation of the Netherlands, Mr. Ardley stated that his Delegation had great sympathy with the attempt to ensure that the use of farm-saved seed should not grow to unacceptable proportions. However, the proposal was rather subjective and did not add anything to the text in the Basic Proposal. That text left it to Contracting Parties to decide whether and how to limit the breeder's right; under the proposal of the Delegation of the Netherlands, Contracting Parties would judge what crops were of importance either to food production or the rural economy. There were no significant differences between the two approaches to the exception. Mr. Ardley wondered whether the point might not be pursued by providing either in the minutes of the Conference or in a common statement additional clarification to Contracting Parties as to the intention behind this particular paragraph and guidance for its interpretation.

1252. Mr. DMOCHOWSKI (Poland) said that his Delegation also opposed the proposal of the Delegation of the Netherlands.

1253. Mr. HAYAKAWA (Japan) stated that his Delegation could not accept the proposal of the Delegation of the Netherlands because countries had different domestic problems. It considered the Basic Proposal as the best compromise.

1254. Mr. LLOYD (Australia) stated that his Delegation was conscious that the provision concerning farm-saved seed went against the goals of plant breeders' rights, but it was a political reality that any reduction of the flexibility of the provision would have adverse repercussions in Australia. At the present time, there had to be a provision on farm-saved seed with a great measure of flexibility in its national legislation. Once farmers were convinced of the benefits that could accrue to them by rewarding breeders for their efforts, work could be started towards reducing the scope of the provision. The Delegation of Australia could therefore not support the proposal of the Delegation of the Netherlands and preferred the more neutrally worded Basic Proposal.

1255. M. ROYON (CIOPORA) stated that CIOPORA saw no valid reason for introducing in the new UPOV Convention a notion that did not appear in the present

text and for encouraging or extending thereby a practice which had been condemned recently by the Courts of a member State. If there were political reasons in some countries for making proper exemptions for the saving of seeds by farmers, there was in CIOFORA's opinion no need for a specific text since the exemption would be covered by Article 15(1)(i). In any case, the "farmer's privilege" should be rejected for asexually reproduced ornamental and fruit varieties; its acceptance would represent an unacceptable step backwards compared with the present Convention. CIOFORA could not support the proposal of the Delegation of the Netherlands because of the possibility of giving a too broad interpretation to the term "rural economy."

1256. Mr. ELENA (Spain) stated that his Delegation did not support the proposal of the Delegation of the Netherlands. On the other hand, it would agree to the deletion of the title.

1257. Mr. ESPENHAIN (Denmark) regretted that his Delegation could not support the proposals of the Delegation of the Netherlands reproduced in documents DC/91/68 (concerning subparagraph (a)) and DC/91/115. It had a preference for the Basic Proposal, which was a compromise which had been discussed on several occasions. It could agree to the deletion of the heading, noting that it would not imply any substantive change. Finally, in reply to the statement made on behalf of CIOFORA, it would not like to see the question of farm-saved seed covered by Article 15(1)(i). That provision should not be interpreted as covering farm-saved seed.

1258. The PRESIDENT noted that there was no support for the proposal of the Delegation of the Netherlands reproduced in document DC/91/115. He therefore declared it not accepted.

1259. The conclusion of the President was noted by the Conference.

[Suspension]

1260. The PRESIDENT reopened the debate on the proposal of the Delegation of the Netherlands, reproduced in document DC/91/68, to require the payment of equitable remuneration to the breeder in respect of farm-saved seed.

1261. Mr. KIEWIET (Netherlands) recalled that he had already explained the proposal. It was the view of his Delegation that if a "farmer's privilege" was established in certain areas of agricultural production, an equitable remuneration should be paid to the breeder by any farmer who made use of the privilege. Contrary to what had been said on the previous day, that was not giving something with one hand and taking it away with the other: the "farmer's privilege" enabled the farmer to use seed without buying it from the trade, and this entailed a cost reduction even if he had to pay the equitable remuneration to the breeder.

1262. The PRESIDENT recalled that the Delegations of Australia, Denmark, Japan and Spain had opposed the proposal on the previous day.

1263. Mr. IANNANTUONO (Italy) observed that the proposal raised difficulties in deciding what was equitable remuneration. That should proceed from the agreement between the parties or, in the event of a dispute between the parties, from a court decision. It was to be feared that litigation could become the normal process for fixing the amount. Since the proposed provision was likely to encourage litigation, the Delegation of Italy was not in favor of the proposal made by the Delegation of the Netherlands. Moreover, the text of the Basic Proposal already contained a commitment to safeguard the legitimate interests of breeders and stipulated that the privilege could only be afforded within reasonable limits.

1264. Mr. ORDÓÑEZ (Argentina) observed that, in Argentina, farmers were authorized by the law to produce seeds on their own holdings, but not to sell them. Cooperatives, groups of farmers and traders were not allowed to use the "farmer's privilege." There were thus already limitations on the farm-saved seed in the meaning of Article 15(2). His Delegation was against the obligation to pay equitable remuneration in respect of the use of the "farmer's privilege."

1265. Mr. HOINKES (United States of America) stated that his Delegation preferred the text in the Basic Proposal and felt that no further specific limitations should be included therein, considering that the provision already recited that the breeder's right could only be restricted within reasonable limits and subject to the safeguarding of the legitimate interests of the breeder. It was then up to the individual Contracting Party to see how it would implement that provision.

1266. The PRESIDENT noted that the proposal of the Delegation of the Netherlands, reproduced in document DC/91/68, to require the payment of an equitable remuneration to the breeder for the production and use of farm-saved seed was not seconded. He therefore declared it rejected.

1267. The conclusion of the President was noted by the Conference.

1268. The PRESIDENT opened the debate on the proposal of the Delegation of Spain reproduced in document DC/91/84.

1269.1 Mr. LOPEZ DE HARO (Spain) explained that his Delegation proposed to delete the phrase: "and subject to the safeguarding of the legitimate interests of the breeder" because it was not clear in its opinion. There was a contradiction with the real privilege that was to be regulated in Article 15(2) since, if the legitimate interests of the breeder were to be safeguarded, there would be no privilege for the farmers. In general, the new text of the Convention offered to the breeder a major consolidation of his rights; for that reason, it was necessary to leave the door open for the privilege of the farmers.

1269.2 Mr. Lopez de Haro recalled that the Delegation of Spain had stated in different fora that it was a tradition in Spain for the farmers to use on their own holdings the product of their harvest as propagating material in the case of certain species. For political and economic reasons, this system had to be maintained. It would surely permit new member States to accept the Convention more easily. In any event, the intention of the Spanish authorities was to use the possibility given in the new Convention, if maintained, to restrict the right of the breeder only in the case of those agricultural species that were cultivated in marginal areas and represented a certain importance socially. It would not be used for instance for vegetables, ornamental plants or fruit crops.

1270.1 Mr. BRADNOCK (Canada) stated that the Delegation of Canada supported the proposal of the Delegation of Spain for two reasons. Firstly, the phrase at issue introduced a degree of confusion in the Basic Proposal and in the basic concept of the exemption concerned.

1270.2 Secondly, Mr. Bradnock recalled that he had mentioned in his opening statement that the Canadian plant breeders' rights legislation was passed with the support of the agricultural organizations. It may seem unusual to have the farmers' organizations lobbying the Government in favor of a plant breeders' rights legislation which was obviously going to lead to royalties on seeds. They had been persuaded that it was important to encourage plant breeders and that a balance would be maintained because farmers would be able, if they wished, to save seed for sowing on their own farms. Their perception of the issue of farm-saved seed was important; even farmers who did not intend to save their own seed considered that there should be this possibility, that it had a regulating effect on the market, etc.

1270.3 Mr. Bradnock concluded by saying that he had the impression, from listening to the discussion, that the position of his Delegation was not very different from that of others: farmers wanted the new varieties and wanted the breeders to breed them, but they were also conscious of their economic position and considered that there had to be a provision on farm-saved seed.

1271. Mr. PREVEL (France) said that, in view of the position it had already expressed, his Delegation was firmly opposed to the proposed amendment. If it pursued the reasoning behind that amendment, and the support it had received, a breeder's right would be an exemption to the "farmer's privilege." One had to be reasonable. The present wording of the text of the Basic Proposal was well balanced.

1272. Mr. ARDLEY (United Kingdom) stated that his Delegation would also have to oppose the proposed amendment. In previous discussions, attempts had been made to find a form of words that did make it clear that, in providing for this exception to the breeder's right, Contracting Parties had to take into account the interests of the breeder. The previous proposal by the Delegation of the Netherlands to require payment of equitable remuneration had specific problems, but to remove the phrase at issue from the Basic Proposal was going much too far.

1273. Mr. KIEWIET (Netherlands) observed that his Delegation was of course not in favor of the proposal of the Delegation of Spain. Whatever good reasons

there may exist to grant it in certain areas of agricultural production, a "farmer's privilege" always meant a breach in the right given to the breeder. It was therefore a good thing that Article 15(2) reflected at least the intention of Contracting Parties to take the interests of the breeders into consideration if they were to provide for such a breach.

1274. Mr. VAN ORMELINGEN (Belgium) observed that the Basic Proposal was well balanced.

1275. Mr. WHITMORE (New Zealand) stated that any exemption from the breeder's right under Article 15(2) should be limited as much as possible. If farmers were to be allowed to do things that had the effect of eroding the breeder's right, it was important that the legitimate interests of the breeder should be safeguarded. His Delegation therefore did not support the proposal of the Delegation of Spain.

1276. Mr. GUTIERREZ DE LA ROCHE (Colombia) supported the amendment presented by the Delegation of Spain.

1277. Mr. ORDÓÑEZ (Argentina) stated that his Delegation supported the position of the Delegation of Spain and endorsed the description made by Mr. Bradnock (Canada) of the political and economic situation in Canada as being similar to the situation in Argentina. In the past months, the authorities had the full support of the farmers' organizations, seed traders and cooperatives in respect of breeders' rights, but the latter had also requested a provision to maintain the "farmer's privilege." For that reason, the Delegation fully supported the proposed amendment.

1278. Mr. EHKIRCH (COSEMCO) stated that, in view of the potential risks incurred in deleting the phrase concerned, as proposed by the Delegation of Spain, his organization was unable to support that proposal.

1279. Mr. DMOCHOWSKI (Poland) stated that his Delegation supported the proposal.

1280. Mr. O'DONOHUE (Ireland) recalled that he had mentioned in his opening declaration that his Delegation supported the text of Article 15(2) in the Basic Proposal.

1281. Mr. LANGE (ASSINSEL) said that it was altogether inappropriate to delete the phrase in question. ASSINSEL was therefore opposed to the proposal of the Delegation of Spain.

1282. The proposal of the Delegation of Spain reproduced in document DC/91/84 was rejected by three votes for, 12 votes against and four abstentions.

1283. Mr. KIEWIET (Netherlands) stated, at the risk of being accused of circling around Article 15(2), that his Delegation felt it necessary to make a statement in relation to that Article. In its opinion, Article 15(2) as drafted in the Basic Proposal was not intended to establish the so-called "farmer's privilege" in areas of agricultural or horticultural production in which such a privilege was not a common practice in the Contracting Party concerned. Mr. Kiewiet wished this statement to be recorded in the minutes of the Conference or, if it found support from other Delegations, to be raised to the level of a common declaration.

1284. Mr. GUIARD (France) said that his Delegation supported the statement made by the Delegation of the Netherlands.

1285. Mr. BOGSCH (Secretary-General of UPOV) wondered whether it would not be a good thing to have the declaration in writing so that the Conference could decide whether it would be a declaration by a number of Delegations only or by the whole Conference.

1286. Mr. KIEWIET (Netherlands) declared that his Delegation would of course be willing to prepare a written text for discussion at a later stage. (Continued at 1486)

1287. The PRESIDENT observed that, subject to the proposed declaration referred to above, the only issue left with respect to Article 15(2) was that of its title.

1288. Mr. ESPENHAIN (Denmark) recalled that it had been proposed to have no title at all for paragraph (2) and wondered whether the Drafting Committee would have to consider that proposal as well.

1289. Mr. BOGSCH (Secretary-General of UPOV) stated that it was not possible to single out a paragraph of the whole Convention by not giving it a title. A very simple solution would be to have (Continued from 1156) "compulsory exceptions" for paragraph (1) and "possible exception" for paragraph (2).

1290. Mr. HEINEN (Germany) supported the proposal made by Mr. Bogsch (Secretary-General of UPOV). It was not at all possible to omit a title from one single paragraph if every other paragraph had such a title. His proposed wording was impartial and reflected the difference between the content of those two paragraphs.

1291. Mr. PREVEL (France) observed that it had been the understanding of his Delegation that the titles of the paragraphs were simply indicative and that the Conference had yet to decide on whether to maintain the titles. He asked whether the adoption of the various articles implied adoption of the titles or whether a decision had yet to be made on the principle of adding titles.

1292. Mr. BOGSCH (Secretary-General of UPOV) recalled that the question had been raised and answered in the general debate. He repeated that the titles had no legal importance. This had been noted and therefore carried a strong implication that the principle of having titles, and the titles themselves, had been accepted. He strongly advised against reopening the issue and doing away with the titles; they were very useful and appeared in all modern treaties.

1293. Mr. VIRION (Poland) said that his Delegation supported the proposal of Mr. Bogsch (Secretary-General of UPOV). He emphasized that the word "seed" was inappropriate since it should have covered not only seed as such, but also, for example, seed potatoes.

1294. Mr. ESPENHAIN (Denmark) stated that his Delegation supported the statement of Mr. Bogsch (Secretary-General of UPOV). It wanted to have a title for this paragraph because titles improved the legibility of the text. He supported the proposal that the Drafting Committee should look at the proposal of Mr. Bogsch.

1295.1 Mr. ARDLEY (United Kingdom and Chairman of the Drafting Committee) agreed that it was sensible to have titles, although they were only indicative. The proposal to have "possible exception" or "optional exception" was a good one.

1295.2 Mr. Ardley further wished to raise the question of the use of the word "farmers" for the guidance of the Drafting Committee. There had been a discussion during the preparatory work on the scope of Article 15(2). The title "farm-saved seed" implied a narrow scope. Without that title one had to decide whether it was meant to apply to people who were called in English "farmers," as opposed to "growers" such as horticultural producers. From the point of view of his Delegation, the use of the word "farmers" was not intended to imply any particular group of growers. Mr. Ardley wished to make sure that the Conference accepted that broad interpretation.

1296. The PRESIDENT observed that this had indeed been discussed in the preparatory meetings. Since no proposal had been tabled on this wording, he wished the matter to stand as it was.

1297. Mr. ORDÓÑEZ (Argentina) observed that, although all the exceptions were under the title: "acts not requiring the breeder's authorization" in the legislation of his country, he would suggest that, for political reasons, the title could be "farmer's privilege."

1298. The PRESIDENT recalled that this title had raised a lot of discussions and would certainly be rejected. He proposed that the title of Article 15(1) should be "compulsory exceptions" and the title of Article 15(2), "optional exception."

1299. The proposal to have the titles "compulsory exceptions" and "optional exception" for the paragraphs of Article 15 was adopted by the Conference by consensus. Subject to this amendment, Article 15 was adopted as appearing in the Basic Proposal. (Continued at 1616)

Article 24 - Legal Status and Seat of the Union

1300. The PRESIDENT opened the debate on the proposal of the Delegation of Japan reproduced in document DC/91/100.

1301. Mr. HAYASHI (Japan) stated that the proposal of his Delegation aimed at improving the drafting.

1302. The PRESIDENT suggested that the proposal of the Delegation of Japan reproduced in document DC/91/100 should be referred to the Drafting Committee.

1303. The suggestion of the President was noted, with approval, by the Conference.

Article 25 - Organs of the Union

1304. The PRESIDENT noted that there was no proposal for the amendment of Article 25. He therefore declared Article 25 adopted as appearing in the Basic Proposal.

1305. The conclusion of the President was noted by the Conference.

Article 27 - The Office of the Union

1306. The PRESIDENT noted that there was no proposal for the amendment of Article 27. He therefore declared Article 27 adopted as appearing in the Basic Proposal.

1307. The conclusion of the President was noted by the Conference.

Article 28 - Languages

1308. The PRESIDENT announced that the Delegation of Spain had asked that the discussion on Article 28 be postponed until the following day and that he had granted the request. (Continued at 1512)

Article 29 - Finances

1309. The PRESIDENT opened the debate on Article 29.

1310. Mr. HAYASHI (Japan) sought a clarification in relation to Article 29(2)(b). He wished to know whether the small change in drafting, whereby the words "no fraction" had been substituted for "such number," implied a substantive change.

1311. Mr. BOGSCH (Secretary-General of UPOV) replied that there was no substantive change intended. It was only because the previous phrase differentiated between numbers and fractions, and did not consider a fraction to be a number, that it had been thought that it would be more logical to refer to a fraction in the phrase at issue.

1312.1 Mr. BURR (Germany) referred to the proposal made by his Delegation in document DC/91/77 and explained that his Delegation had been obliged to ascertain repeatedly in previous years that contributions had not always been paid on time and that arrears of almost two years had occurred. The majority of member States that paid punctually therefore lost, as a minimum, the interest on the amounts that had been punctually paid compared with those that took more time to make their payments. The Union also lost interest when it had to advance funds from the reserve fund or from the appropriations due to bad payers.

1312.2 In that context, Mr. Burr observed that his Delegation had repeatedly criticized the amount of the reserve fund in Council sessions. That had some relation to the proposal: the reserve fund could only be reduced if all member States paid on time. His Delegation therefore considered appropriate to reduce the period of time stipulated in Article 29(5)(a) during which a member State could be in arrears without any consequence. Moreover, there had already been precedents in other international Conventions.

1313. Mr. ESPENHAIN (Denmark) stated that, in view of subparagraph (b) of Article 29(5)--of the possibility for the Council to decide on the basis of a satisfactory explanation that the arrears in contributions would not be held against a member State--his Delegation could support the proposal of the Delegation of Germany.

1314. The PRESIDENT noted that there was no opposition to the proposal of the Delegation of Germany reproduced in document DC/91/77. He therefore declared it adopted.

1315. The conclusion of the President was noted by the Conference.

1316. Mr. HOINKES (United States of America) observed that it might be prudent to keep open paragraph (3)(b), at least for the reason that it may very well be that the financial obligations of intergovernmental organizations becoming Contracting Parties may not be identical to those of member States.

1317. Mr. BOGSCH (Secretary-General of UPOV) stated that Mr. Hoinkes (United States of America) was right, but that there were also other provisions of Article 29 that might be affected by the decisions taken in relation to the voting rights and financial obligations of intergovernmental organizations that were Contracting Parties.

1318. The PRESIDENT concluded that Article 29 should be considered as adopted subject to any consequential change that might be required by the final decision regarding Article 26(6).

1319. The conclusion of the President was noted by the Conference. (Continued at 1777)

Article 30 - Implementation of the Convention

1320. The PRESIDENT opened the debate on the proposal of the Delegation of Japan reproduced in document DC/91/102.

1321. Mr. HAYASHI (Japan) stated that his Delegation was of the opinion that, in relation to the new member States that would become parties to the new Convention, the words "set up and" should be inserted before "maintain" in Article 30(1)(ii).

1322. Mr. BOGSCH (Secretary-General of UPOV) explained that those words did not appear in the said provision because the authority had to be in existence at the moment when a State or an organization adhered to the Convention. If there were only an obligation as from the date of accession, one would have to specify a time period within which the authority would have to be set up.

1323. The PRESIDENT noted that the proposal was not seconded. He therefore declared it not accepted.

1324. The conclusion of the President was noted by the Conference.

1325. The PRESIDENT opened the debate on the proposal of the Delegation of the Netherlands reproduced in document DC/91/113.

1326.1 Mr. HIJMANS (Netherlands) explained that the proposal of his Delegation was intended to solve a problem that was specific to the EC. It had therefore been made on behalf of all its member States that were members of UPOV. The provision proposed for insertion in Article 30 had nothing to do with the eventual accession of intergovernmental organizations to UPOV; it was a provision related to the completion of the internal market in the EC in 1992 and the consequent abolition of distinct national markets. After that date, the marketing of a variety in one EC member State would affect the others.

1326.2 For example, in relation to the period of grace in Article 6, the marketing of a variety in another member State would have to have the same consequences for the novelty of the variety as the marketing in the member State in which an application for a plant breeder's right had been filed. The same would be the case for the exhaustion of the right once material of a variety had been put on the market with the consent of the breeder: when it was put on the market somewhere in the EC, the consequence would be the same throughout the EC since there would be no distinct markets any longer.

1326.3 Since the obligations arising from the rules of the EEC and other intergovernmental organizations were not all foreseeable at this stage, the Delegation of the Netherlands proposed a special general provision to be inserted in Article 30 rather than specific provisions to be inserted elsewhere in the Convention.

1327. Mr. BOGSCH (Secretary-General of UPOV) wondered whether it would not be appropriate to postpone discussions until Article 16 concerning the exhaustion of the breeder's right had been discussed, because that was the most important aspect covered by the proposal.

1328. Mr. HIJMANS (Netherlands) saw no reason for postponing the discussion because the decision on the exhaustion of the breeder's right would not affect the proposal.

1329. Mr. BRADNOCK (Canada) observed that "intergovernmental organization" was not defined in the Basic Proposal and that States were members of many intergovernmental organizations of one sort or another. This created a need for a definition before the particular provision could be accepted.

1330. Mr. HIJMANS (Netherlands) replied that there was no need for a definition in his opinion because the proposed provision would only be applicable if there was a requirement under the rules of the organization. The provision was only relevant in the context of the EC or of an organization which went as far as the EC in economic integration.

1331. Mr. BOGSCH (Secretary-General of UPOV) stated that one had to reflect carefully on the proposal because it was a blank cheque. What the rules of the unknown intergovernmental organization were going to be was unknown to the Conference. He felt that the Conference should first establish the instances in which the provision was relevant and then treat the proposed provision, as applicable to each of those cases, on its merits.

1332. Mr. HIJMANS (Netherlands) observed that it might be a good idea if the representative of the Commission of the EC could further clarify the provision and the need for it.

1333. Mr. HOINKES (United States of America) stated that his Delegation agreed with the position expressed by Mr. Bradnock (Canada) and Mr. Bogsch (Secretary-General of UPOV). This was one of the instances in which a definition would be useful, perhaps a definition along the lines of the one proposed by his Delegation in document DC/91/6 in respect of Article 1. It was very difficult to really understand, from the proposal taken in isolation, what kind of intergovernmental organization was referred to and what rules were relevant. While it fully understood that there may be a particular situation within the EC, his Delegation requested that consideration on the proposal be postponed until all the proposals concerned with other aspects of intergovernmental organizations becoming Contracting Parties to the Convention had been dealt with.

<p><u>Fourteenth Meeting</u> <u>Tuesday, March 12, 1991</u> <u>Afternoon</u></p>
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1334. The PRESIDENT opened the meeting.

1335. Mr. HIJMANS (Netherlands), referring to the request made by Mr. Hoinkes (United States of America) before the break, stated that his Delegation could accept that the proposal be postponed after the discussion on the position of intergovernmental organizations vis-à-vis the Convention.

1336. The PRESIDENT decided that the proposal of the Delegation of the Netherlands reproduced in document DC/91/113 would be taken up again on Thursday, March 14. (Continued at 1820)

Article 31 - Relations Between Contracting Parties and States Bound by Earlier Acts

1337. The PRESIDENT opened the debate on Article 31. He observed that there was no proposal to amend it.

1338. Mr. HAYASHI (Japan) sought a clarification. He observed that paragraph (1) dealt with the relations between States which were bound by the new Convention and earlier Acts and paragraph (2), the relations between a Contracting Party which was bound by the new Convention only and a State which was bound only by an earlier Act. He asked why there was no provision in this Article which dealt with the relations between a Contracting Party which was bound both by the new Convention and any earlier Act and a State which was bound only by that earlier Act. He sought confirmation that the latest Act binding both the Contracting Party and the State would apply in that case.

1339. Mr. BOGSCH (Secretary-General of UPOV) confirmed that the two would be bound in their mutual relations by the latest common text.

1340. Article 31 was adopted as appearing in the Basic Proposal.

Article 32 - Special Agreements

1341. The PRESIDENT opened the debate on the proposal of the Delegation of Japan reproduced in document DC/91/103.

1342. Mr. HAYASHI (Japan) explained that the proposal aimed at improving the drafting and bringing the text in line with the title of the Convention.

1343. Mr. KIEWIET (Netherlands) doubted whether it was just a drafting matter. He felt that there was a difference of substance between the text presented in the Basic Proposal and the text as proposed by the Delegation of Japan. "New varieties of plants" was more restrictive than "varieties."

1344. Mr. HEINEN (Germany) observed that, contrary to "Pflanzenzüchtungen" ("new varieties of plants"), the term "Sorte" ("variety") was the standard term throughout the Convention and was defined in Article 1. The term "Sorte" should therefore remain in Article 32.

1345. Mr. IANNANTUONO (Italy) shared the view expressed by the Delegation of the Netherlands. It was not a matter of drafting, but of substance, which ought to be decided by the Conference in Plenary.

1346. The PRESIDENT asked whether the proposal of the Delegation of Japan was supported.

1347. Mr. BOGSCH (Secretary-General of UPOV) stated that he did not see the substantive difference between the two texts. He asked the Delegation of Japan whether it intended to introduce a difference in substance or to improve the drafting.

1348. Mr. HAYASHI (Japan) stated that his Delegation had no intention to change the substance. In the 1978 Act, the words "of new varieties of plants" were already used in the corresponding Article, namely Article 29, and there was no reason to depart from that choice of words.

1349. Mr. GUIARD (France) said that his Delegation wished to associate itself with the statement made by Mr. Kiewiet (Netherlands), who had observed that there could be a problem of substance, and the statement made by Mr. Heinen (Germany), who had noted that a broad wording was needed in Article 32. Since one could not prejudge whether they would be new varieties or not, it would be wiser to keep the word "variétés" rather than the words "obtentions végétales" ("new varieties of plants"). In addition, that would comply with the definition that had been given in Article 1.

1350. Mr. BOGSCH (Secretary-General of UPOV) replied that the definition of "variety" did not relate to new varieties. There was a logic in the proposal of the Delegation of Japan because Article 32 referred to special agreements concerning the protection of new varieties, since no member of the Union would want to protect old ones. The text of the 1978 Act was just as good, if not better than the text in the Basic Proposal.

1351. Mr. KIEWIET (Netherlands) stated that it was conceivable and that it should be possible for member States to have an agreement for the protection

of existing varieties. There should therefore be no limitation of Article 32 to new varieties. In addition, agreements on the protection of varieties could also extend to varieties that were already protected in one country, if they provided, for instance, that protection would be extended to the other countries party to the agreement.

1352. The PRESIDENT noted that there was no support for the proposal of the Delegation of Japan reproduced in document DC/91/103. He therefore declared it rejected.

1353. The conclusion of the President was noted by the Conference. Article 32 was thus adopted as appearing in the Basic Proposal.

Article 33 - Signature

1354. The PRESIDENT opened the debate on the proposal of the Delegation of Japan reproduced in document DC/91/104.

1355. Mr. HAYASHI (Japan) stated that the proposal was based on the fact that the deadline for signature was very important and that other treaties, including the 1978 Act of the Convention, specified the closing date for signature.

1356. Mr. BOGSCH (Secretary-General of UPOV) stated that the proposal of the Delegation of Japan was very practical and made it easier to consult the Convention. He proposed that the Convention should remain open for signature until March 31, 1992.

1357. The PRESIDENT noted that there was no opposition to the suggestion of Mr. Bogsch (Secretary-General of UPOV). He therefore declared it adopted.

1358. The conclusion of the President was noted by the Conference. Article 33 was thus adopted with the second sentence reading: "It shall remain open for signature until March 31, 1992."

Article 34 - Ratification, Acceptance or Approval; Accession

1359. The PRESIDENT opened the debate on Article 34.

1360. Mr. KIEWIET (Netherlands) drew the attention of the Conference to the fact that his Delegation had made a proposal on this Article. The Netherlands had the same problems as Denmark in relation to certain parts of its kingdom with a high degree of home rule; the Delegation had tried to tackle it in a proposal of a more general nature than the proposal of the Delegation of

Denmark. Mr. Kiewiet therefore asked that the discussions be postponed, at least on the subject which the proposal of the Delegation of Denmark addressed, until the proposal of his Delegation was also available. The proposal was to add a paragraph (4) to Article 34; the Conference could therefore discuss the first three paragraphs.

1361. The PRESIDENT agreed to the proposed postponement and opened the debate on the proposal of the Delegation of the United States of America reproduced in document DC/91/20.

1362. Mr. HOINKES (United States of America) recalled that his Delegation had no objection to an intergovernmental organization becoming party to the Convention, especially if it provided for the grant of breeders' rights with effect in its territory. However, for the sake of clarity, it would make sense if the Secretary-General were informed of its competence in that particular field. The proposal of his Delegation merely ensured that that information was given.

1363. Mr. BOGSCH (Secretary-General of UPOV) observed that if an inter-governmental organization wanted to become a member of UPOV, it would have to go through the Council and the Council would examine the conformity of its legislation with the Convention. It followed from that that the Council would have ample opportunity to examine the question of competence. To that extent, the proposal of the Delegation of the United States of America was superfluous. The proposal, if it were to be retained, was also much too broad because it did not specify what competence was at issue, namely the competence to grant breeders' rights.

1364. Mr. HOINKES (United States of America) said that he understood that, before acceding to the Convention, one would have to go through the Council. The proposal of his Delegation was not as broad as Mr. Bogsch (Secretary-General of UPOV) might have implied because it was about informing the Secretary-General of its competence "with respect to the matters governed by this Convention." But his Delegation was also concerned about the subsequent changes in competence. After all, it was quite possible that that competence might change, and it might change in a manner that was not consistent with the Convention. It was for that reason that it might be useful for the Secretary-General to be informed.

1365. Mr. BOGSCH (Secretary-General of UPOV) replied that that competence would have to be defined if it were to be relevant. What was relevant was, however, that the legislation was in conformity with the Convention, which was something more than competence.

1366. Mr. BURR (Germany) noted that Article 36(2) also applied to inter-governmental organizations. That Article provided that all Contracting Parties, therefore such organizations also, were required to notify any change in their legislation on breeders' rights. The proposal therefore appeared superfluous.

1367. Mr. KIEWIET (Netherlands) observed that Mr. Bogsch (Secretary-General of UPOV) was right: if an intergovernmental organization adopted legislation on the matters governed by the Convention, the UPOV Council should take it as a fact that it had the competence to do so, and neither the Secretary-General nor any other organ of UPOV was in a position to check whether the organization had the competence to legislate and eventually to take a position on that competence. Therefore, the proposal of the Delegation of the United States of America should not be supported.

1368. Mr. HARVEY (United Kingdom) stated that the points made by Mr. Bogsch (Secretary-General of UPOV) were very compelling. He agreed with Mr. Burr (Germany) and Mr. Kiewiet (Netherlands) that one ought not to include in Article 34 any provision which was not also applicable to States. His Delegation did not seek to include in Article 34 a requirement that the member States should also demonstrate their competence; there was no reason why any organization should be required to do so. The questions of competence and of conformity of legislation, whether national or international, were a matter for Council.

1369. Mr. HOINKES (United States of America) stated that, in the spirit of compromise, his Delegation was willing to withdraw the proposal.

1370. The Conference took note of the withdrawal of the proposal of the Delegation of the United States of America reproduced in document DC/91/20.

1371. The PRESIDENT opened the debate on the proposal of the Delegation of Sweden reproduced in **document DC/91/78.**

1372. Mr. ÖSTER (Sweden) stated that the proposal of his Delegation concerned a matter of drafting.

1373. The PRESIDENT proposed that the proposal be referred to the Drafting Committee.

1374. The proposal of the President was accepted by the Conference by consensus.

1375. The PRESIDENT noted that Article 34 was thus provisionally adopted as appearing in the Basic Proposal, subject to editing by the Drafting Committee and to the outcome of the debate on the matter of territories.

1376. The conclusion of the President was noted by the Conference. (Continued at 1452)

Article 35 - Reservations

1377. The PRESIDENT opened the debate on Article 35. He observed that no proposal for amendment had been tabled.

1378. Mr. ROBERTS (ICC) asked for some clarification on this Article. It had been interpreted by some of the interested circles as limiting severely the right of the countries which were not currently members of UPOV to apply patent rights in the future for plant varieties. It would be helpful if it could be stated that this was not the intention of this Article.

1379. Mr. BOGSCH (Secretary-General of UPOV) replied that, as far as the Secretariat was concerned, he could confirm that this was not the intention. Any new countries would have to have at least one form of protection for all varieties, namely a form affording the protection provided for in the Convention.

1380. The PRESIDENT declared Article 35 adopted.

1381. The declaration of the President was noted by the Conference.

Article 36 - Communications Concerning Legislation and the Genera and Species Protected; Information to be Published

1382. The PRESIDENT noted that there was no proposal for the amendment of Article 36. He therefore declared it adopted.

1383. The conclusion of the President was noted by the Conference.

Article 37 - Entry into Force; Closing of Earlier Acts

1384. The PRESIDENT opened the debate on the proposal of the Delegation of the United States of America reproduced in document DC/91/21.

1385.1 Mr. HOINKES (United States of America) suggested that the proposal of his Delegation on Article 37(1) be part and parcel of the discussions with respect to the voting rights. The reason for the proposed amendment was that one ought to take into account the fact that an intergovernmental organization and its member States by themselves should not be able to bring this, or for that matter any other, treaty into force, when it would take more States that were not members of that organization to accomplish this. The Basic Proposal had the net effect that only four EC member States and the European Community could accomplish what would in fact require five non-member States of the EC. The problem at issue was of the same order as that of the voting rights.

1385.2 Mr. Hoinkes added that the proposal to remedy the problem was really nothing new. He referred in that respect to Article 17 of the 1985 Vienna Convention for the Protection of the Ozone Layer, to Article 16 of the 1987 Montreal Protocol on Substances that Depleted the Ozone Layer, and to Article 25 of the 1989 Basle Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal.

1386. Mr. BOGSCH (Secretary-General of UPOV) asked the Delegation of the United States of America whether the result would not be the same if one deleted the reference to intergovernmental organizations.

1387. Mr. HOINKES (United States of America) stated that the desired result would indeed be the same. In addition, this would simplify the text.

1388. Mr. HEINEN (Germany) said that his Delegation did not necessarily view that problem as being linked with the problems of Article 26. It was altogether able to go along with the proposal made by the Delegation of the United States of America in the proposed shortened version of Mr. Bogsch (Secretary-General of UPOV).

1389. Mr. NAITO (Japan) stated that his Delegation had the same concerns as the Delegation of the United States of America. It wondered, however, whether they might be solved by the suggestion made by Mr. Bogsch (Secretary-General of UPOV). It felt that the phrase proposed by the Delegation of the United States of America was necessary and therefore preferred the text proposed by that Delegation.

1390. Mr. HARVEY (United Kingdom) expressed the view that the discussion ought to be postponed. Either proposal would put the members of intergovernmental organizations on a different level than other member States. He saw absolutely no reason why such a distinction should be made, why an intergovernmental organization which complied with the rules of UPOV should not have the same rights in this regard as any member State complying with the same rules. The discussion on Article 26(6) would determine not only whether an intergovernmental organization would be able to become a member of UPOV but also what its rights under the Convention would be. If the Conference decided that it had--or did not have--the same rights as a member State, then the decision with respect to this Article would follow.

1391. The PRESIDENT observed that Article 26(6) concerned only the voting rights in the Council. That intergovernmental organizations could become members of the Union was an accepted principle which raised some problems at different levels. He did not see how the discussion on Article 26(6) would contribute to settling the problem at issue here.

1392. Mr. ZUIJDWIJK (Canada) stated that his Delegation saw the discussion on Article 37 as part of the package to be addressed in respect of intergovernmental organizations. It would therefore prefer the debate to be postponed.

1393. Mr. KIEWIET (Netherlands) stated that his Delegation shared the views expressed by Mr. Zuijdwijk (Canada) and Mr. Harvey (United Kingdom).

1394. Mr. O'DONOHUE (Ireland) stated that his Delegation also shared those views.

1395.1 The PRESIDENT decided to postpone the debate on this issue until Thursday, March 14. (Continued at 1418)

1395.2 He then opened the debate on the proposal of the Delegation of Sweden reproduced in **document DC/91/79**.

1396. Mr. ÖSTER (Sweden) stated that the proposal concerned the drafting only and should be referred to the Drafting Committee.

1397. Mr. WANSCHER (Denmark) stated that his Delegation was not convinced that the proposal concerned a drafting question only. According to the Basic Proposal, the Convention would come into force one month after five countries had ratified it. According to the proposal of the Delegation of Sweden, if the fifth instrument of ratification was received on January 3, the Convention would come into force on March 1, that is, almost two months later. His Delegation was eager to see the Convention coming into force as soon as possible; it preferred the text in the Basic Proposal.

1398. Mr. BURR (Germany) shared the position advocated by Mr. Wanscher (Denmark). As for the proposal on paragraph (2), he observed that if there had already been such a ruling in the 1978 Act, Canada would not yet have been entitled to vote in the Conference as a member State. The Basic Proposal should therefore be maintained.

1399. The PRESIDENT noted that the proposal of the Delegation of Sweden reproduced in document DC/91/79 was not supported. He therefore declared it rejected.

1400. The conclusion of the President was noted by the Conference.

1401. The PRESIDENT opened the debate on the proposal of the Delegation of Spain reproduced in **document DC/91/108**.

1402. Mr. ELENA (Spain) said that it was well known that the preparation of legal texts took a long time; it was in particular difficult to obtain parliamentary time. Some States were currently seeking parliamentary approval of plant breeders' rights Bills, and if the revised text of the Convention were to enter into force quickly, some of them who had worked towards accession to the 1978 Act would be barred from accession. After some discussions with the representatives of some of those States, his Delegation had decided to make the proposal that was before the Conference now.

1403. Mr. REKOLA (Finland) stated that his Delegation appreciated the proposal made by the Delegation of Spain. The authorities of Finland were presently in the process of preparing plant breeders' rights legislation in conformity with the present Convention. It would be extremely useful for the planning of legislative work to know a time limit.

1404. Mr. ETZ (Austria) pointed out that his Delegation had already had occasion to refer in a short statement to the specific timing problems connected with the reintroduction of the Plant Variety Protection Law before Parliament following the elections at the end of 1990. It therefore addressed to the Member Delegations the request that they accept the proposal made by the Delegation of Spain to introduce a fixed date not only for developing countries, but also for other candidates, such as Austria, in order to facilitate the planning and implementation of the measures required for accession to UPOV.

1405. Mr. GUTIERREZ DE LA ROCHE (Colombia) stated that Colombia was also in the process of revising laws relating to the varieties and seeds industry; his Delegation would therefore like to support the proposal of the Delegation of Spain.

1406. Mr. ORDOÑEZ (Argentina) observed that, in his country, the work on adapting the plant breeders' rights legislation to the 1978 Act of the Convention was well advanced; the authorities had been helped in this by the Office of the Union and by advice from the EEC. Nevertheless, the proposal presented by the Delegation of Spain could be useful for his country and he therefore fully supported it.

1407. Mr. HANSEN (Norway) stated that his Delegation also supported the proposal presented by the Delegation of Spain.

1408. The PRESIDENT noted that, so far, no member Delegation had supported the proposal.

1409. Mr. ROYON (CIOPORA) said that CIOPORA was not in favor of the proposal made by the Delegation of Spain since it feared that it would encourage certain countries to continue benefiting from the inadequacies and legal vacuums that existed in the present Convention.

1410.1 Mr. ESPENHAIN (Denmark) stated that his Delegation was somewhat divided on the proposal. It did understand its reasoning. It recognized that a number of States were in the process of preparing plant breeders' rights legislation on the basis of the 1978 Convention and also realized that some of those States might have great problems to pass their laws and might also have political difficulties in adhering to the 1991 Act which the Conference was currently negotiating.

1410.2 However, his Delegation would prefer to have the dates amended to: "December 31, 1992." In view of the statements just made by Observer Delegations, his Delegation felt that it should not be absolutely necessary to have a longer time period, ending on December 31, 1993. That should make it easier

for those States working on draft legislation to finalize it and hopefully to adhere to the Convention. His Delegation would certainly prefer that, for the sake of harmonization, as many countries as possible adhered to the 1991 Act as soon as possible. It would support the proposal of the Delegation of Spain to meet the concerns of some States wishing to have sufficient time to join UPOV on the basis on which they were currently working, but with the amendment of the date to: "December 31, 1992."

1411.1 Mr. BRADNOCK (Canada) stated that the proposal of the Delegation of Spain addressed what had been a continuing nightmare for Canada. There had been five plant breeders' rights Bills, three of which had made it to Parliament, one of which had been debated and accepted. The first Bill was in Parliament in 1980 and the fifth Bill was passed in 1990. This demonstrated that one could not regulate the agenda of Parliaments. They had many other issues to deal with, and the maximum amount of time was needed to enable countries to complete the passing of their legislation. The other problem was that, suddenly, there might be a time slot and that the Government might decide to have a particular issue discussed; if a Bill was ready, the unexpected parliamentary time could be used to get it passed. The obligation to redraft a Bill because of the closing of the 1978 Act might deprive some authorities of such an opportunity. The degree of flexibility provided in the proposal of the Delegation of Spain was therefore very good.

1411.2 However, the Delegation of Canada had some concern about having two closing dates; the December 31, 1993, deadline for those countries that were trying to get legislation passed was indeed very close.

1412. The PRESIDENT asked whether the Delegation of Canada proposed to have December 31, 1995, for all countries.

1413. Mr. BRADNOCK (Canada) replied that he was not making a proposal but a comment, at this point.

1414. Mr. ELENA (Spain) observed that his Delegation had envisaged a deadline of December 31, 1992, but had extended it to December 31, 1993, after discussions with some Delegations.

1415. Mr. BURR (Germany) said that his Delegation would prefer a simpler rule, such as an increased number of States to be required for entry into force, rather than the ruling that had been proposed by the Delegation of Spain.

1416. The PRESIDENT stated that he would take this comment as an opposition to the proposal, which thus required a vote. In view of the comment made by Mr. Elena (Spain) in reply to Mr. Bradnock (Canada), he would put the original proposal--with "December 31, 1993"--to the vote.

1417. The proposal of the Delegation of Spain was adopted by eight votes for, two votes against and 10 abstentions.

1418. The PRESIDENT noted that this vote provisionally closed the debate on Article 37. (Continued from 1395.1) It would be reopened on Thursday, March 14, to deal with the amendment proposed by the Delegation of the United States of America. He stated that it would be useful if that Delegation could make a new proposal on the basis of the suggestion of Mr. Bogsch (Secretary-General of UPOV) recorded in paragraph 1386 above. (Continued at 1773.6)

Article 38 - Revision of the Convention

1419. The PRESIDENT noted that no proposal had been presented for the amendment of Article 38. He therefore declared it adopted.

1420. The conclusion of the President was noted by the Conference.

Article 39 - Denunciation

1421. The PRESIDENT opened the debate on the proposal of the Delegation of Sweden reproduced in document DC/91/80.

1422. Mr. ÖSTER (Sweden) stated that the proposal concerned a drafting matter.

1423. The PRESIDENT suggested that the proposal should be referred to the Drafting Committee.

1424. It was so decided.

1425. The PRESIDENT then opened the debate on the proposal of the Delegation of Japan reproduced in document DC/91/105.

1426. Mr. HAYASHI (Japan) stated that the proposal also concerned a drafting matter.

1427. The PRESIDENT suggested that the proposal should also be referred to the Drafting Committee and that Article 39 should thus be considered adopted.

1428. It was so decided.

Article 40 - Preservation of Existing Rights

1429. The PRESIDENT opened the debate on the proposal of the Delegation of New Zealand reproduced in document DC/91/99.

1430. Mr. WHITMORE (New Zealand) recalled that the 1991 UPOV Convention would provide for improved breeders' rights. When Contracting Parties amended their laws to bring them in conformity with the new Convention, there was no reason for not improving existing rights correspondingly. If this was done, existing rights might well be "affected," but in a positive way. It was therefore preferable to say in the first part of Article 40 that: "This Convention shall not limit existing rights..."

1431. Mr. LLOYD (Australia) stated that his Delegation agreed with the reasoning of the Delegation of New Zealand and also believed that the new Convention should enhance existing rights, but not affect them in a negative way.

1432. Mr. HEINEN (Germany) said that his Delegation wondered whether the proposal of the Delegation of New Zealand did not go beyond drafting. As far as the German text was concerned, that proposal clearly worsened the situation. In the present German version, that also corresponded to the present version of the Convention, it was clearly stated that other rights remained unaffected. That was the usual, repeatedly employed terminology in such situations.

1433. The PRESIDENT observed that he had not the impression that the Delegation of New Zealand considered its proposal as a matter for the Drafting Committee.

1434. Mr. WHITMORE (New Zealand) confirmed that the proposal touched upon the substance. His Delegation saw no reason why breeders with existing rights should not be given the benefit of the provisions of the new Convention.

1435. The proposal of the Delegation of New Zealand reproduced in document DC/91/99 was rejected by four votes for, nine votes against and six abstentions. (Reconsidered at 1690)

1436. Mr. LLOYD (Australia) asked that, before the debate was closed on this proposal, clarification be given on the points mentioned by the Delegation of New Zealand. Was it correct that existing rights would be unaffected by the benefits accruing from the new Convention?

1437. Mr. BOGSCH (Secretary-General of UPOV) took the example of the period of protection. He assumed that a member State granting 15 years under the existing Convention would extend the duration to 20 years as required under the new Convention. The sense of the proposal of the Delegation of New Zealand was that "affect" meant that that State could not grant 20 years in respect of rights already granted, i.e., a five-year extension, and that that State should grant it. Of course, one could argue that what was good for the breeder was bad for some of his competitors who may have counted that the right would expire after 15 years. One could therefore argue on both sides.

[Suspension]

1438. The PRESIDENT opened the debate on the proposal of the Delegations of Denmark and Sweden reproduced in document DC/91/51.

1439. Mr. ESPENHAIN (Denmark) stated that the proposal had to be taken in conjunction with the proposal for the amendment of Article 2 reproduced in document DC/91/33. In view of the fate of the latter, he wished to withdraw the former on behalf of both Delegations. In addition, the substance of the proposal was already included in Article 35.

1440. The PRESIDENT concluded that Article 40 was adopted as appearing in the Basic Proposal.

1441. The conclusion of the President was noted by the Conference. (Reconsidered at 1690)

Article 41 - Original and Official Texts of the Convention

1442. The PRESIDENT noted that Article 41 was not the subject of any proposal for amendment. He therefore declared it adopted.

1443. The conclusion of the President was noted by the Conference.

Article 42 - Depositary Functions

1444. The PRESIDENT opened the debate on the proposal of the Delegation of Sweden reproduced in document DC/91/81.

1445. Mr. ÖSTER (Sweden) stated that the proposal should be read in comparison with Article 42(5) of the 1978 Act of the Convention, which contained provisions on the same subject and was almost identical with the proposal. Treaty-law experts at home had indicated that it would be appropriate to have such provisions in the Convention.

1446. The PRESIDENT noted that there was no support for the proposal of the Delegation of Sweden reproduced in document DC/91/81. He therefore declared Article 42 adopted as appearing in the Basic Proposal.

1447. The conclusion of the President was noted by the Conference.

1448. Mr. KIEWIET (Netherlands) stated that he was not a specialist of treaty law and asked Mr. Bogsch (Secretary-General of UPOV) whether a provision of the kind proposed by the Delegation of Sweden should be part of the Convention in his opinion.

1449. Mr. BOGSCH (Secretary-General of UPOV) replied that it would suffice to reflect in the records of the Conference that the Secretary-General of UPOV would inform the States and organizations of the events mentioned in the proposal of the Delegation of Sweden, even if there was no corresponding provision in the Convention.

1450. The PRESIDENT stated that the Conference could take note of the declaration of Mr. Bogsch (Secretary-General of UPOV).

1451. It was so decided.

Article 34 - Ratification, Acceptance or Approval; Accession (Continued from 1376)

1452. The PRESIDENT opened the debate on the proposal of the Delegation of the Netherlands reproduced in document DC/91/121.

1453. Mr. KIEWIET (Netherlands) stated that the proposal of his Delegation was intended to deal with the fact that parts of the territories of the Netherlands, namely Aruba and the Netherlands Antilles, had a high degree of home rule. For the moment, those parts of the Kingdom were not in a position to accept the Convention, and his Delegation therefore wished to be in a position to exclude the territories of those islands from any consent given by the Netherlands to the Convention. Mr. Kiewiet further observed that the proposal also dealt with the problems that Denmark had in relation to some parts of its territories.

1454.1 Mr. BOGSCH (Secretary-General of UPOV) stated that he fully realized the question that had to be resolved for Denmark and the Netherlands, and maybe other countries. However, the solution offered by the Delegation of the Netherlands was too vague because it did not specify the kind of territories which could be excluded. Moreover, the proposal concerned matters which had become delicate in international treaties because the notion of territories which were not part of a country and for which that country made certain decisions was raising doubts.

1454.2 This problem had been resolved in different ways over the years, one of which was reflected in the 1961 and 1978 Acts of the Convention. In 1883, the Paris Convention for the Protection of Industrial Property spoke of colonies; later on, it referred to territories which were not sovereign and were under the control of the member country, etc. None of the past examples was convincing today, and the developing countries were very much against the notion of territory. A straightforward solution could therefore be to name the entities concerned, without specifying their status.

1455. Mr. KIEWIET (Netherlands) observed that he had already mentioned the territories concerned by name and that his Delegation had no problem with the principle of naming the territories or the parts of the Kingdom of the Netherlands, but it would become a large list if other countries had the same

problems with parts of their territories. It was for that reason that it had proposed a general text which, except for shortening, was essentially the same as in the present Article 36.

1456. Mr. LLOYD (Australia) regretted that the short time available since the proposal had been tabled did not allow him to consult with his colleagues from Australia. He was concerned that the proposal might create problems in Australia, where the relatively independent States often tended to operate in their own ways and could perhaps decide that they would not like to be party to the Convention. This would destroy the whole system of plant variety rights in Australia. For that reason, he opposed the general statement as outlined in the proposal.

1457. Mr. NAITO (Japan) stated that his Delegation understood the concerns of the Delegation of the Netherlands but felt that the formulation proposed was too generous. He therefore invited the Delegation of the Netherlands to propose a limitation to the notion of territory.

1458. Mr. ROYON (CIOPORA) stated that, as a breeders' organization, CIOPORA found the proposal as worded a very dangerous one; it might indeed be considered as a built-in loophole in the Convention whereby some countries might exempt from protection some territories in which, for instance, the intensive production of cut flowers could be organized to the detriment of the breeders. Mr. Royon wondered whether a country like Spain might consider the Canary Islands as such a territory.

1459. The PRESIDENT noted that there was no support for the proposal of the Delegation of the Netherlands reproduced in document DC/91/121. He therefore declared it rejected.

1460. Mr. KIEWIET (Netherlands) insisted that there was a real problem in his country. His Delegation did not have the competence to speak on behalf of some parts of the country because plant breeders' rights were within their own jurisdiction. Every State had its own structure and, whereas his Delegation could not and would not speak about the structure of other States, the Netherlands had a problem which had to be solved. It would not be a good thing if it could not sign the Convention because the problem had not been dealt with in a proper way. His Delegation was ready to amend its proposal, but it hoped that the other Delegations would realize that there was a real problem to be solved.

1461. Mr. LOPEZ DE HARO (Spain) reminded the representative of CIOPORA that Spain had not presented any proposal similar to that of the Delegation of the Netherlands.

1462. Mr. BOGSCH (Secretary-General of UPOV) observed, in reply to Mr. Kiewiet (Netherlands), that nothing was lost yet because, if the proposal of the Delegation of Denmark reproduced in document DC/91/116 was accepted, the two territories which caused problems for the Netherlands could also be named in the statement. He added that there was such a clear understanding of

the problem that nobody would object to the possibility for the Netherlands to exclude Aruba and the Netherlands Antilles from the territorial scope of application of the Convention or to include them only later. (Continued at 1473 for the consideration of the draft new Act of the UPOV Convention)

CONSIDERATION AND ADOPTION OF ANY RECOMMENDATION, RESOLUTION OR COMMON STATEMENT OF THE CONFERENCE

Common Statement Relating to Article 34 - Ratification, Acceptance or Approval; Accession

1463. The PRESIDENT proposed to consider the proposal of the Delegation of Denmark reproduced in document DC/91/116. He asked the Delegation of the Netherlands whether it could join in that proposal by adding some words to the proposed common statement.

1464. Mr. KIEWIET (Netherlands) replied that his Delegation was already working on an amendment of the proposal of the Delegation of Denmark.

1465. The PRESIDENT asked the Delegation of Denmark to introduce its proposal.

1466. Mr. ESPENHAIN (Denmark) stated that the Faroe Islands and Greenland had a very strong home rule. The current national legislation was already not applicable to them and Denmark would not be able to ratify the new Convention unless the home rule of the Faroe Islands and Greenland was acknowledged under the Convention. He therefore requested that the Conference adopt the proposed declaration. He added that his Delegation understood that other countries, in particular the Netherlands, had the same problem, and it would readily accept a declaration relating to all member States concerned.

1467. The PRESIDENT asked whether other member States had the same problem and wished to join in the proposed declaration relating to the cases of Denmark and of the Netherlands. He noted that there were none. He then invited the Delegation of the Netherlands to announce its proposal.

1468. Mr. KIEWIET (Netherlands) stated that his Delegation proposed to add to the proposal of the Delegation of Denmark a reference to the Netherlands each time Denmark was mentioned, and a reference to Aruba and the Netherlands Antilles after the reference to Greenland and the Faroe Islands. He proposed that, if the Conference accepted the principle of the proposal, the latter could be given to the Drafting Committee.

1469. The PRESIDENT asked whether there was opposition to the proposed common statement.

1470. Mr. BURR (Germany) said that his Delegation was not opposed, but that it would like the German text to be editorially revised. The phrase: "nahm Erklärungen der Delegationen Dänemarks und der Niederlande zur Kenntnis und genehmigte sie" should be replaced by: "nahm die Erklärung ... zustimmend zur Kenntnis."

1471. The PRESIDENT concluded that, subject to editing by the Drafting Committee, the proposed common statement was adopted.

1472. The conclusion of the President was noted by the Conference. (Continued at 1475 for this agenda item and at 1963 for the adoption of the common statement)

CONSIDERATION OF THE DRAFT NEW ACT OF THE UPOV CONVENTION (Continued from 1462)

Article 34 - Ratification, Acceptance or Approval; Accession

1473. The PRESIDENT noted that the discussion on the proposed common statement relating to Article 34 concluded the debate on that Article, which was thus adopted as appearing in the Basic Proposal.

1474. The conclusion of the President was noted by the Conference. (Reconsidered at 1780.1)

CONSIDERATION AND ADOPTION OF ANY RECOMMENDATION, RESOLUTION OR COMMON STATEMENT OF THE CONFERENCE (Continued from 1472)

Common Statement Relating to Article 3 - Genera and Species to be Protected
(Continued from 328)

1475. The PRESIDENT opened the debate on the proposal of the Delegation of Sweden reproduced in document DC/91/117.

1476. Mr. ÖSTER (Sweden) recalled that there had been a discussion in the preceding week on the meaning of: "all plant genera and species" and a comment made by his own Delegation and also by Mr. Bogsch (Secretary-General of UPOV) that the discussion was to be reflected in the minutes of the Conference. The proposal of his Delegation was to be seen in the light of that discussion. A common statement would be the proper way of reflecting the discussion in the minutes.

1477. Mr. BOGSCH (Secretary-General of UPOV) stated that a different expression had been used in the previous discussion, namely "lower categories of organisms." The agreement was that every country would have the right to exclude those lower categories of organisms from the plant breeders' rights system or include them in the system, but certainly not that it had complete freedom in defining what was a plant genus or species. It had not been mentioned in the previous discussions that this was going to affect not only the UPOV Convention but also other treaties. The expression "commonly called 'plant'" had not been suggested as the key of a possible definition. The proposal therefore went too far.

1478. Mr. DMOCHOWSKI (Poland) stated that his Delegation fully supported the proposal of the Delegation of Sweden.

1479. Mr. BURR (Germany) said that his Delegation held that proposal to be superfluous and therefore had to oppose it.

1480. Mr. PERCY (UPEPI) stated that UPEPI would be concerned about this proposal if it had any effect on patent rights. A patent application for mushrooms had been allowed by the EPO and the patent, if granted, would extend to all the EPO member countries. UPEPI had no objection to plant breeders' rights for mushrooms but did not wish to see this Conference giving any credence to the idea that one might not be able to obtain a patent for mushrooms because, in the view of the Conference, they could be considered to be plants. In other words, it was concerned that the Conference should attempt to alter dictionary definitions.

1481. Mrs. GAUYE WOLHÄNDLER (EPO) said that the EPO supported the proposal made by the Delegation of Sweden.

1482. Mr. GUIARD (France) said that it was not opportune to make a distinction between plants and microorganisms with regard to Article 3; that would provide no clarification, but would create confusion. His Delegation was therefore opposed to the proposal.

1483. Mr. STRAUS (AIPPI) stated that AIPPI would be most concerned for the reasons given by the previous speakers if the proposal of the Delegation of Sweden were to be accepted.

1484. Mr. ROYON (CIOPORA) stated that his Delegation supported the views expressed by Mr. Guiard (France) and Mr. Straus (AIPPI).

1485. The proposal of the Delegation of Sweden reproduced in document DC/91/117 was rejected by three votes for, 12 votes against and five abstentions.

Common Statement Relating to Article 15(2) - Optional Exception to the Breeder's Right (Continued from 1286)

1486. The PRESIDENT opened the debate on the proposal of the Delegation of the Netherlands reproduced in document DC/91/119. He asked that Delegation to introduce it.

1487. Mr. KIEWIET (Netherlands) stated that his Delegation had already spoken abundantly on the subject. It wished the Conference to make a declaration of the kind proposed. The proposal defined the widest circle that could be drawn around Article 15(2).

1488. Mr. PREVEL (France) said that the proposal altogether reflected the preceding discussions and set out the spirit in which Article 15(2) had been proposed. His Delegation therefore warmly supported the proposed statement.

1489. Mr. TROMBETTA (Argentina) stated that the proposal of the Delegation of the Netherlands introduced in fact an amendment to Article 15(2), because it limited the possibility of making an exception to the part of the territory of the member State in which the practice of the "farmer's privilege" was established. In practice, it would be very difficult to define the part of the territory concerned. On the other hand, there were some practical difficulties in establishing the current and future scope of the practice. The "farmer's privilege" basically was a private right that was or should be available to every farmer in any part of the territory.

1490. Mr. ARDLEY (United Kingdom) stated that his Delegation supported the principle behind the proposal and indeed the proposal itself. However, he was concerned about the exact effect of the statement in relation to non-member States. The situation was clear as far as the present member States and Contracting Parties to the new Convention were concerned. The time at which there had to be a common practice on the territory of a potential member State was not clear. Should it be the time when it acceded to the Convention or some other point in time such as the date on which the Convention would be signed? There was therefore a need to look at the wording to clarify the issue.

1491. Mr. HAYAKAWA (Japan) stated that his Delegation could not accept the proposed statement, which would create confusion about the scope of Article 15(2).

1492. Mr. DMOCHOWSKI (Poland) stated that his Delegation was against the proposal of the Delegation of the Netherlands.

1493. Mr. LLOYD (Australia) stated that his Delegation considered that the proposed common statement was, perhaps not intentionally, directly reducing the effectiveness of Article 15(2). It therefore could not support the proposal.

1494. Mr. ESPENHAIN (Denmark) stated that his Delegation would not be able to support the proposal.

1495. Mr. BRADNOCK (Canada) stated that his Delegation supported the general principle of the proposal. Its wording may perhaps not convey its exact intention, which was that there should be no possibility of expanding the practice commonly called "farmer's privilege" in agricultural or horticultural production, or of encouraging farmers to save seed and reduce the effectiveness of protection. But the general intent of the proposal was to make sure that the balance was retained. The Conference had recognized that there should be an exception for farmers to enable them to save seed; at the same time, it should not try to drive things towards that exception because there would be no justification in that case for a Convention for the protection of new varieties of plants.

1496. Mr. PALESTINI (Italy) stated that his Delegation was opposed to the proposed common statement, which pursued the amendments that had been proposed by the Delegation of the Netherlands and rejected by the Conference.

1497. Mr. KIEWIET (Netherlands) wished to answer the question raised by Mr. Ardley (United Kingdom). The proposal was indeed silent on the time at which the "farmer's privilege" should be a common practice; in the opinion of his Delegation, it should be at the time when the Contracting Party concerned acceded to the Convention. Mr. Kiewiet added that, whatever the outcome of this discussion would be, it would have given at least a very good insight into what the member Delegations saw as the main thrust of the provision laid down in Article 15(2); the discussion did not make his Delegation optimistic.

1498. Mr. LOPEZ DE HARO (Spain) wished to know the legal effect of a statement of the kind proposed.

1499. Mr. KIEWIET (Netherlands) replied that the statement would not have any binding legal effect. It would be of assistance to those who wanted to implement Article 15(2) in national legislation and to know at a later stage what had been the intention of the Conference when it drafted the new Convention.

1500. Mr. BOGSCH (Secretary-General of UPOV) observed that, having heard the declarations of the various member Delegations, it would perhaps be more realistic to adopt the proposed text as a recommendation rather than as a reflection of the intention which presided over the adoption of Article 15(2). The Conference should recommend that the "farmer's privilege" should not be extended beyond its scope at the moment when a State became party to the Convention. The recommendation would not be legally binding and would not reflect any intention which, obviously, some of the member States did not have.

1501. Mr. LANGE (ASSINSEL) said that ASSINSEL fully and completely supported the proposed statement.

1502. Mr. BESSON (FIS) said that FIS also strongly supported the amendment, particularly in the light of the explanations given by Mr. Bradnock (Canada).

1503. Mr. BROCK-NANNESTAD (UNICE) wished to make a point of clarification in relation to the statement of Mr. Trombetta (Argentina). The word "areas" in the proposal of the Delegation of the Netherlands was not to be understood as a reference to territories, but to sectors of economic activity. He further stated that UPOV, as a mature organization, should, at least for educational purposes, make a statement to the effect that the restriction of the rights of the breeders was in contradiction with the raison d'être of the Convention.
1504. Mr. EHKIRCH (COSEMCO) announced that COSEMCO supported the proposal made by the Delegation of the Netherlands.
1505. Mr. WINTER (COMASSO) said that COMASSO also supported the proposal made by the Delegation of the Netherlands as being truly the smallest solution that could still be achieved on that point.
1506. Mr. ROYON (CIOPORA) recalled that Article 15(2) was the result of a compromise and that those who advocated it had something in mind. It was absolutely essential, at least for horticultural crops, that a statement be made in order to clarify the meaning of Article 15(2). Since it seemed hardly possible for the Working Group on Article 14 to cover the use of propagating material for the commercial production of cut flowers, there was a risk of creating an absence of protection in a major industrial activity.
1507. Mr. STRAUS (AIPPI) stated that AIPPI also supported the proposal of the Delegation of the Netherlands. Anything less than that would mean a step backwards as compared with the present legal situation in the member States.
1508. The PRESIDENT asked the Delegation of the Netherlands whether it would accept the suggestion of Mr. Bogsch (Secretary-General of UPOV) to make the statement into a recommendation.
1509. Mr. KIEWIET (Netherlands) replied that his Delegation accepted the suggestion.
1510. The PRESIDENT then submitted the proposal of the Delegation of the Netherlands to a vote on the understanding that the Drafting Committee would be requested to transform it into a recommendation.
1511. The proposal of the Delegation of the Netherlands reproduced in document DC/91/119 was accepted, on the understanding referred to above, by 10 votes for, eight votes against and two abstentions. (Continued at 1959.2)

Fifteenth Meeting
Wednesday, March 13, 1991
Morning

CONSIDERATION OF THE DRAFT NEW ACT OF THE UPOV CONVENTION

Article 28 - Languages (Continued from 1308)

1512. The PRESIDENT opened the debate on the proposal of the Delegation of Spain reproduced in document DC/91/86.

1513.1 Mr. LOPEZ DE HARO (Spain) stated that this was the second time that Spain presented an amendment to Article 28; the first was during the 1978 Diplomatic Conference and had been unsuccessful. The reasons for making the same proposal were the same as in 1978; but 12 years later, more experience was available on the usefulness of introducing Spanish as an official language in addition to those mentioned in the Basic Proposal. No Latin American country had joined UPOV so far; one of the principal reasons for that was the question of languages. Moreover, intergovernmental organizations with competence in plant breeders' rights would be able to become a Contracting Party. The possibility of instituting a plant breeders' rights system at the level of the Andian Pact or of other Latin American regional organizations was being considered. From this perspective it would be a good idea to introduce Spanish as an official language.

1513.2 Mr. Lopez de Haro added that Spain would cooperate with the Office of the Union in translating documents to reduce the cost of the introduction of Spanish as an official language. Spain would also increase its participation in the budget. The fact that Spanish would be the fourth language of UPOV would be a very strong argument to convince its authorities to decide upon such an increase.

1514. Mr. RIVADENEIRA (Ecuador) said that, as an observer, his Delegation wished to support the proposal made by the Delegation of Spain. It felt that Spanish would be a most useful language for the work of the Union and would permit more active participation by many Spanish-speaking countries like his own.

1515. Mrs. MOLINOS ABREU (Venezuela) said that her Delegation wished also to support the amendment proposed by the Delegation of Spain due to the contribution that Spanish would make for the Latin American countries.

1516. Mrs. BANZER (Bolivia) also supported the proposal to include the Spanish language as a further working language of UPOV. That would remove many problems of comprehension.

1517. Mr. ORDOÑEZ (Argentina) recalled that the authorities of his country had worked quite hard during the last months to amend the implementing decree to enable accession to the Convention. Argentina was in a special situation since it already had its plant breeders' rights law. But for the other countries in Latin America, it would be quite a big cultural step in the future to adopt such laws. It would be much easier for them to take this if there was not the cultural difficulty for them caused by the obligation to use a language that was not their mother tongue. Mr. Ordoñez added that Argentina was on the verge of becoming a member of the Union. It would make a big effort in selecting its level of contribution if Spanish was to become an official language.

1518.1 Mr. BOGSCH (Secretary-General of UPOV) said that he was accustomed to this kind of discussion in WIPO, not with Spanish because it was a language that was used extensively in WIPO, but, for example, with Arabic or Russian. He stated that he always said on those occasions that, in the interest of an international organization, the more languages were used by it the better it was. For obvious reasons, the understanding of the activity of the organization in Spanish-speaking countries and the cooperation with Spanish-speaking representatives would increase and become more effective. In the case of Spanish, there was also the good argument that it was one of the official languages in most of the large international organizations. UPOV was growing and was no longer a small organization. Adopting Spanish as an official language would undoubtedly have a positive effect on the prospects of UPOV in Latin America.

1518.2 Mr. Bogsch added that the only argument against was the cost. But he was much encouraged, and he hoped that the member Delegations were also much encouraged, by the declaration of Mr. Lopez de Haro (Spain) that his country would assist in the field of translations and would have a good reason to increase its number of contribution units. And the Latin American countries that would adhere to the Union would reduce the share of each member State in the cost through their contributions.

1518.3 If Spanish were introduced fully, on an equal footing with the other languages, the cost would be about 1 million Swiss francs per biennium, that is, an increase of the budget of about 25%. Such an increase would be too high and therefore the introduction of Spanish should be gradual. In view of the declarations of the Delegation of Spain, the cost would in any case be less. Mr. Bogsch suggested that a decision should be taken on the understanding that, if the proposal of the Delegation of Spain were accepted, the actual implementation would be gradual; not all the documents would be translated in the first year and not all the meetings would have simultaneous interpretation immediately. This was how WIPO handled Russian and Arabic. He hoped that the other Delegations would consider this matter with sympathy because, for political and practical reasons, the proposal was very important.

1519. Mr. HAYASHI (Japan) stated that it was also difficult for his Delegation to explain its position in the English language. Its attitude was therefore not positive. This was closely linked with the budget. At present, only one member State would use Spanish. Therefore, it would prefer that the matter be decided by the Council under Article 28(3) when it became relevant.

1520. Mr. BRADNOCK (Canada) stated that his Delegation was very sympathetic to the proposal of the Delegation of Spain, particularly as amplified by Mr. Bogsch (Secretary-General of UPOV) in terms of progressive implementation. If one considered where the developments were occurring in seed programs and who the potential new members of UPOV were, then one could measure the importance of adopting Spanish as a further official language. Its adoption would facilitate the enlargement of the Union and developments in the movement of improved varieties.

1521.1 Mr. ESPENHAIN (Denmark) wished to express the sympathy of his Delegation with the proposal of the Delegation of Spain. It fully understood the importance of the Spanish language, taking into account the many people speaking that language around the world and its own experience of the handicap resulting from the obligation to use a foreign language in international relations.

1521.2 However, despite its sympathy with the proposal and of the importance of the Spanish language in the long term, it was not at present in a position to vote for it, if it meant an increase in the Danish contribution to the UPOV budget. That was the instruction received from his capital. The proposal of Mr. Bogsch (Secretary-General of UPOV) was a very constructive one, and the Delegation could agree with the Council considering a progressive introduction of the Spanish language as an official language in connection with the discussions on the budget. It therefore associated itself with the Delegation of Japan since there might be the possibility to introduce Spanish at zero cost. In this respect, it welcomed the declaration of the Delegation of Spain concerning increased contributions and of the Delegation of Argentina concerning accession to UPOV. The ensuing increases in the total income of UPOV might make it possible to have Spanish as an official language on the same footing as the others very soon.

1522.1 Mr. HARVEY (United Kingdom) stated that the issue should be considered in terms of the future of UPOV rather than in narrow budgetary terms. If UPOV intended to increase its membership, and it should do so in the interests of all, the Conference should not, in all conscience, maintain the three current languages--English, French and German--and pretend that that would solve the problem.

1522.2 His Delegation had therefore a point of principle to make in relation to the proposal of the Delegation of Spain regarding the timing and the procedure for the adoption of the Spanish language, and indeed any further language as UPOV expanded. Mr. Harvey urged the Delegation of Spain to consider the advice of Mr. Bogsch (Secretary-General of UPOV), which did not address the principle of the matter but rather the problem of the implementation. The implementation had to be satisfactory for the interested new members of UPOV without imposing too rigorous a burden on the current members who had to bear the brunt of the budget. The proposal of Mr. Bogsch would achieve that, and his Delegation supported it.

1523. Mr. PERCY (UPEPI) stated that UPEPI wished to see Spanish introduced as an official language at the earliest opportunity by whatever means the Conference deemed most suitable.

1524. The proposal of the Delegation of Spain, reproduced in document DC/91/86, to add a reference to Spanish in Article 28(1) was accepted by three votes for, no vote against and 17 abstentions.
1525. The proposal of the Delegation of Spain, reproduced in document DC/91/86, to add a reference to Spanish in Article 28(2) was accepted by four votes for, no vote against and 16 abstentions.
1526. Subject to the amendments referred to above, Article 28 was adopted as appearing in the Basic Proposal.

Article 14 - Scope of the Breeder's Right

Article 14(1)(a)(viii) and (b) - Report of the Working Group (Continued from 1049)

1527. The PRESIDENT opened the debate on Article 14(1)(a)(viii) and (b). He proposed to suspend the meeting for 10 minutes to enable the participants to read the report of the Working Group on Article 14(1)(a) and (b) reproduced in document DC/91/118.

[Suspension]

1528. The PRESIDENT invited Mr. John Harvey (Chairman of the Working Group) to introduce the report.

1529.1 Mr. HARVEY (Chairman of the Working Group) stated that he could be brief in view of the comprehensiveness of the report and limit himself to explaining some points.

1529.2 Following the suggestion, made by the Delegation of the United Kingdom in Plenary, to insert in Article 14(1)(a) a provision on the use of propagating material for the purpose of producing harvested material, many Delegations had pointed out that such a provision would extend the scope of Article 14(1)(a) beyond that which was needed to address the problem, and would therefore require a subsequent limitation. To give a suitable wording to that limitation had been found to be very difficult and the Working Group therefore decided unanimously that it was better to tackle the problem in Article 14(1)(b).

1529.3 The discussion on this issue had raised the question of whether or not the provision of Article 5(2) of the 1978 Act of the Convention should be included in the revised Convention. That provision made it clear that the breeder, in giving his authorization, may put conditions and limitations on the licences granted. The Working Group thought that it was useful to include that provision in Article 14(1)(a), particularly as the Conference had decided to delete Article 14(1)(a)(viii) and had therefore restricted the list of acts subject to authorization under Article 14(1)(a).

1529.4 (Continued from 954) Concerning Article 14(1)(b), the Working Group had been conscious of the fact that the decision had been taken to remove the square brackets from the last clause appearing in the Basic Proposal. It therefore proposed a system in which the harvested material of the protected variety could be the basis of a royalty collection where two conditions were met: (i) that the breeder had not authorized the use of propagating material for the purpose of producing that harvested material; and (ii) that the breeder had had no reasonable opportunities to exercise his right in relation to the propagating material.

1529.5 Mr. Harvey added that, quite understandably, the report had been drafted quite hurriedly and that a number of Delegations which had participated in the Working Group had proposed some very slight changes in the text which did not alter its meaning. The changes concerned the end of Article 14(1)(b), which should read as follows: "provided that such harvested material was obtained through the unauthorized use of propagating material, and that [unless] the breeder has not had reasonable opportunity [opportunities] to exercise his right in relation to the propagating material." Those changes would make it clearer that the second provision ("and that...") referred to the whole provision rather than to the clause immediately preceding it and beginning with: "provided that."

1530. Miss BUSTIN (France) did not wish to speak on the substance of the proposal, which satisfied her Delegation, but on the editorial modifications that had just been read out. The Delegation of France was strongly attached to the wording of subparagraph (b) as it had been proposed by the Working Group, since the modifications alleged to be purely editorial did in fact have considerable effect on the onus of proof.

1531. Mr. PERCY (UPEPI) observed that Article 14(1)(b) talked about "any of the acts referred to in paragraph (a) above." Were it not for other portions of that provision, one might think that the acts referred to were the acts in respect of propagating material contemplated in subparagraph (a). To avoid any misunderstanding, he suggested that the reference should be supplemented by a mention of the items (i) to (vii).

1532. Mr. HAYAKAWA (Japan) stated that he did not wish to speak on the substance of the proposal but to seek clarification as to whether "propagating material" included undifferentiated plant cells, such as calluses, which had the ability to be regenerated into whole plants but were cultivated in tanks without being regenerated.

1533. Mr. ORDÓÑEZ (Argentina) stated that his Delegation was quite satisfied with the result of the deliberations of the Working Group. It further agreed to the amendments presented orally by Mr. Harvey (Chairman of the Working Group).

1534.1 Mr. ROYON (CIOPORA) observed that he had been seconded to the Working Group as an expert. He pointed out that, although paragraph 18 of the report stated that the Working Group had taken a unanimous decision, he was not part of the group since CIOPORA had not approved that text.

1534.2 Mr. Royon then wished to make a general statement on Article 14 which constituted the very foundation of the Convention. CIOPORA had always demanded that the protection afforded under the UPOV Convention should extend to new products created and marketed by the breeder. However, in the case of ornamental varieties intended for the production of cut flowers and of fruit tree varieties, the new product was not the propagating material, but the cut flower or the fruit. That was why, in the same way as a patent for a product protected the manufacture, placing on the market and use of the product covered by the patent, the breeder's right should enable a breeder to exercise his right with respect to those who, as industrial horticulturists, exploited for commercial purposes the new product constituted by such cut flower or fruit. The reason for which CIOPORA held Article 14(1)(a) to be necessarily incomplete was that it did not cover use of propagating material for the commercial or industrial production of cut flowers or of fruit.

1534.3 As for Article 14(1)(b), despite the praiseworthy efforts of the Working Group, it did no more than to give the breeder an indirect means--through the cut flower or fruit--of controlling after the act any propagating material that had escaped his control under Article 14(1)(a). It did not afford protection to cut flowers or to fruit as was demanded by the breeders concerned.

1534.4 The present Convention, in Article 5(4), opened the possibility to member States to afford protection to the marketed product. CIOPORA had understood that the aim of the present Conference was to reinforce the rights of the breeder and to give him protection equivalent to that under a product patent. CIOPORA had welcomed that aim during the two years of collaboration with UPOV and had continually repeated that the important matter for it was the content of protection and not the means for the protection. CIOPORA noted with regret and bitterness that the statements of intent had not been followed by an effect and that the Conference, if it did not improve the content of the right in the last instance, would not have fully accomplished its mission.

1535. The PRESIDENT gave the floor to the Delegation of Poland and stated that he would then proceed to the vote.

1536. Mr. DMOCHOSWKI (Poland) stated that his Delegation supported the new formulation of Article 14(1)(a) and (b) as appearing in the report of the Working Group. To the question of the Delegation of Japan, he observed that cells and also parts of cells such as protoplasts were parts of plants.

1537. The PRESIDENT put the proposal reproduced in paragraph 18 of document DC/91/118 to the vote on the understanding that the question of the drafting of the end of Article 14(1)(b) would be submitted to the Drafting Committee.

1538. Mr. HAYAKAWA (Japan) insisted that his Delegation needed an answer to its question raised earlier. He invited the member Delegations which had an idea about the question to share it.

1539. Mr. HARVEY (United Kingdom) replied that his Delegation did not fully understand the point made by the Delegation of Japan. If the question was whether cells and cell lines were parts of plants, the answer was yes; if they were harvested material, the answer would probably be no, though they could be.

1540. Mr. HAYAKAWA (Japan) recalled that the question was about calluses which had the ability to be regenerated but were used in fermentation vats without being regenerated. Could they be considered as propagating material or not?

1541. Mr. HEINEN (Germany) noted that the President had already repeatedly called for a vote. His Delegation wished to support the President in that endeavor. He proposed that questions be raised once the Conference had dealt finally with Articles 1 to 42.

1542. Mr. HARVEY (Chairman of the Working Group) stated that he believed that the question of the Delegation of Japan related to what was meant by "propagating material," and not what was meant by "harvested material." The question was therefore appropriate to paragraph (1)(a) which had already been adopted by the Plenary. In addition, it related to a matter which had not been discussed in the Working Group, except that it had considered whether it should suggest the definition of "propagating material" and had decided not to do so.

1543. The PRESIDENT noted that there was no real opposition to the proposal. He concluded that it was therefore accepted. He thanked the Working Group and its Chairman, Mr. Harvey (United Kingdom).

1544. The conclusion of the President was noted by the Conference.

1545. Mr. BOGSCH (Secretary-General of UPOV) wished to ask for the benefit of the Drafting Committee whether the phrase: "the breeder may make his authorization of acts under subparagraphs (1)(a)(i) to (vii) subject to conditions and limitations," appearing in paragraph (1)(a), was intended to apply to that paragraph only or also to paragraph (1)(b). In the latter case, it should be made into a separate sentence referring to both.

1546. Mr. HARVEY (Chairman of the Working Group) replied that the intention had been to include the phrase in paragraph (1)(a) because paragraph (1)(b) referred to "the acts referred to in paragraph (a)." It followed that those acts could also be subject to conditions and limitations. To that extent, the phrase applied to both without this being explicit in paragraph (1)(b).

1547. Mr. BOGSCH (Secretary-General of UPOV) stated that this was now clear, but that the Drafting Committee would have to take out the words "subparagraphs (1)(a)(i) to (vii)" because they constituted a reference to the same provision. He added that his question had been motivated by the fact that, when this phrase had been proposed, reference had been made to the 1978 Act and the fact that the 1978 Act did not limit in any way the principle that the authorization given by the breeder could be made subject to such conditions as he might specify. On the basis of the answer received, the Drafting Committee would have to maintain the phrase inside paragraph (1)(a).

1548. Mr. HOINKES (United States of America) observed that the text proposed by the Working Group for the introductory part of Article 14(1) was the same

as the original wording ("Subject to Articles 15 and 16, the following acts shall require the authorization of the breeder"). He wondered whether the Conference had not adopted a different introductory phrase and wished to make sure that earlier decisions were not lost sight of.

1549. The PRESIDENT replied that the Conference had indeed accepted the principle of the proposals of the Delegations of Denmark, Germany and Japan reproduced in document DC/91/96, DC/91/91 and DC/91/61. Those proposals had been referred to the Drafting Committee which had the task of finding a suitable formulation for the principle that the list of acts in paragraph (1)(a) was not exhaustive. (Continued at 1852.4)

[Suspension]

Article 14(1)(c) of the Basic Proposal [Article 14(3) of the Text as Adopted]
- Scope of the Breeder's Right in Relation to Certain Products

1550. The PRESIDENT opened the debate on Article 14(1)(c). He noted that the Conference had five proposals before it, namely from the Delegations of the United States of America (document DC/91/13), Poland (document DC/91/62), Spain (document DC/91/82), Germany (document DC/91/91) and Denmark (document DC/91/98). He gave the floor to the Delegation of Poland to introduce its proposal, which was the most far-reaching and whose adoption would close the consideration of Article 14(1)(c).

1551. Mr. VIRION (Poland) said that his Delegation was opposed to an excessive broadening of breeders' rights and to the extension of those rights to the products made directly from harvested material. The exercise of breeders' rights in an industrial or animal product obtained by using the harvested material of the protected variety was impossible or at least extremely difficult in practice. Identification of the variety in those products would rarely be possible and would demand a control process that was likely to be costly and complicated. In fact, only a small number of breeders would be able to enjoy it and that was not a good thing in international law. Furthermore, Mr. Virion feared that the Lower House of his country would oppose such a right and that Poland would have great difficulty in acceding to the new text of the Convention.

1552. Mr. DMOCHOWSKI (Poland) added that in 99.9% of the cases, the varietal differences would disappear in the industrial products and that a provision such as that in Article 14(1)(c) was therefore not opportune. The remuneration of special achievements which would be reflected in industrial products should be obtained through higher prices of propagating material or through special licensing agreements.

1553.1 Mr. KIEWIET (Netherlands) stated that his Delegation was in favor of including a provision in the Convention concerning products directly obtained from harvested material as proposed in alternative A. Such a provision was

the necessary complement to the protection to which the breeder was entitled in relation to a variety. It was only meaningful in the cases where it could be proven that a protected variety formed the basis of the product concerned. For those cases, even if they were limited in number, there should be a provision in the Convention.

1553.2 Mr. Kiewiet added that the text of Alternative A should be brought in line with the text of paragraph (1)(b) as worded in the proposal of the Working Group which had just been adopted. That could be a matter for the Drafting Committee. Mr. Kiewiet concluded by saying that in reacting to the proposal of the Delegation of Poland, he had also reacted to the other proposals made in relation to Article 14(1)(c).

1554. Mr. IANNANTUONO (Italy) said that his Delegation supported the proposal made by the Delegation of Poland.

1555. Mr. ÖSTER (Sweden) emphasized that his Government was vigorously opposed to including products made directly from harvested material in the scope of the breeder's right. The reasons for this were as follows:

(i) Firstly, the notion of products made directly from harvested material was very unclear and could be interpreted to embrace a wide range of products which had only a limited connection with the plant breeder's right in the traditional meaning. The introduction of that concept would lead to litigation on the meaning of "products made directly..."

(ii) Secondly, the possibility for the breeder to exercise his rights in respect of such products would depend very much on the species to which the variety belonged and the product in question. Thus, such a protection would be of a different value for different types of breeders in a quite arbitrary way.

(iii) Thirdly, the Delegation of Sweden was concerned about the interface between patent protection and plant variety protection. The proposed provision in Alternative A would give far-reaching protection in respect of products coming from the plant kingdom, even in respect of products which were not available to the breeder when he applied for a plant breeder's right. In the patent field, only those products would be covered by a patent that were included in the patent claim or were very similar to those. It was not reasonable to give a protection almost as broad as patent protection for plant varieties protected by a plant breeder's right.

(iv) Finally, such a provision could only be harmful to developing countries. For example, there should be no royalty on canned fruit or fruit derived from a protected variety and produced in a non-member State. The Delegation of Sweden was therefore supporting Alternative B in the Basic Proposal, which was similar to the proposal of the Delegation of Poland.

1556.1 Miss BUSTIN (France) said that, just as the Delegation of the Netherlands, her Delegation was in favor of the Basic Proposal and, consequently, opposed to the proposed amendment submitted by the Delegation of Poland. It seemed to her that the claimed inequalities--linked to the provision of proof in order to exercise the supplementary right that would be afforded by paragraph (1)(c)--were not sufficient reason to refuse that right to breeders working on species for which proof of infringement could be provided under that provision. It had not to be forgotten that the text to be adopted

in 1991 would have to apply for a sufficiently large number of years and that technical and scientific progress would enable that new right to be applied to an ever growing number of species.

1556.2 The Delegation of France was further not unaware that certain industrial uses of plant varieties fell--as was traditional--under patent law. That likewise did not appear a valid reason to terminate the right afforded to breeders at the point where their varieties were used for industrial purposes. It held that, in such case, the advantages attaching to the two rights should be shared, if necessary, between the patentee and the breeder of the variety which served as a basis for a new industrial utilization since it was only in that case that the right under the patent would apply.

1556.3 Miss Bustin concluded by saying that her Delegation remained concerned at certain situations, particularly the impossibility for breeders in certain sectors, such as aromatic or perfume plants, to exercise their rights at either of the earlier stages laid down in paragraphs (1)(a) and (b). It could possibly envisage amendments that would make the provision optional, but would in no event accept its omission from the Convention.

1557.1 Mr. HAYAKAWA (Japan) stated that his Delegation was in favor of Alternative A in the Basic Proposal. The reason was that plant breeders' rights should also be exercisable when propagating material had been exported without the authorization of the breeder to a country where it was reproduced and used to produce products which were then imported into the country of origin, or when propagating material was reproduced and used to produce products and when those products were the only ones to be put on the market.

1557.2 However, Mr. Hayakawa felt that Alternative A should not be interpreted too widely; in particular, the word "directly" was very important. His Delegation interpreted it as meaning that this provision should only apply when certain characteristics of the variety were conserved to some extent in those products and when the variety could be identified through those characteristics and through the processing method leading to the product concerned. Otherwise the scope of the breeder's right would become unjustifiedly too wide and the interests of a bona fide third party who had engaged in the distribution of the product concerned would be affected.

1558. Mr. HARVEY (United Kingdom) stated that his Delegation would have to support the amendment proposed by the Delegation of Poland because it believed that Alternative A would go too far in a Convention which dealt with plants. Alternative A concerned industrial products, manufactured products; only in very rare cases would there be a justification for allowing the breeder to collect a royalty on the manufactured or industrial products. Most of the royalties would be collected at the two previous stages, either on propagating material or on harvested material. Mr. Harvey finally asked the President to clarify his statement that, if the amendment was accepted, the other amendments would automatically fall.

1559. The PRESIDENT stated that if a majority was in favor of the proposal of the Delegation of Poland, i.e., of omitting any reference to products directly made from harvested material in Article 14, there would be no point in discussing the other proposed amendments.

1560. Mr. HARVEY (United Kingdom) replied that if that was the case--and that the other proposals designed to make this an option for the Contracting Parties would not be discussed and would not be considered for inclusion in the Convention--his Delegation might take the view that, although it would wish to support the proposal of the Delegation of Poland, it would have to oppose it to be able to consider the possibility of an optional provision for Contracting Parties.

1561. Mr. BOGSCH (Secretary-General of UPOV) observed that the Rules of Procedure provided that the proposal which was the furthest removed from the Basic Proposal should be put to the vote first. This was difficult to apply in the present case because there were two alternatives in the Basic Proposal; there was thus room to discuss whether one should not vote on both of them. If Alternative B was carried, then there would still be room for checking whether an amended Alternative A could be acceptable. Mr. Bogsch concluded that this was tortuous and that the position expressed by the President was just as good. However, it had to be noted that some countries might wish to make a step in the direction of a compromise.

1562. Mr. LOPEZ DE HARO (Spain) recalled that his Delegation had submitted a proposal for this provision. For the time being, however, it would like to support strongly the proposal made by the Delegation of Poland for the reasons given by Mr. Harvey (United Kingdom).

1563. Mr. BURR (Germany) stated that it had already been ascertained in the preparatory meetings that certain member States would experience difficulties with certain products derived from harvested material where it was evidently possible to attribute the product to the variety. So far, it had been good practice, where it was discovered that one or the other member State would have difficulties, to help them, wherever possible, to overcome those problems. His Delegation was therefore in favor of not making the provisions binding, meaning that the legal system of the member State concerned could provide for extension of protection.

1564.1 Mr. ESPENHAIN (Denmark) stated that his Delegation wished to follow the advice of Mr. Bogsch (Secretary-General of UPOV) because it was important that at least the arguments be put on the table before a vote was taken. It could associate itself to the position expressed by Mr. Burr (Germany). Alternative A in the Basic Proposal had indeed caused many difficulties in some member States, and even his Delegation had had some doubts whether a provision should be included.

1564.2 On the other hand, during discussions at the national level, it was realized that there might be cases where it would be justified to have the possibility to include products made directly from harvested material in the scope of the breeder's right. The Delegation of France had already pointed out such cases. The Delegation of Denmark therefore proposed that the provision be made optional so that an extension of the breeder's right could be made under national law in specific situations, should it be realized at a later stage that such an extension was relevant and possible. The proposal reproduced in document DC/91/98 was already partly adjusted to the decisions on Article 14(1)(b), but would have to be revised in the light of the latest decisions.

1565.1 Mr. GUIARD (France) wished to underline, following the statements by Mr. Burr (Germany) and Mr. Espenhain (Denmark), the opening made by his Delegation in its first statement with regard to possible acceptance of an optional provision.

1565.2 He further pointed out that, although one could today consider such cases to be relatively rare, the situation was likely to develop. Indeed, it had to be admitted that production on an integrated scale was growing with varieties that increasingly satisfied the very specific needs of that form of production. Failing a provision within the Convention providing for protection applied to the product, breeders of such varieties could find themselves in an extremely delicate situation if they wished to assert their rights. It therefore appeared essential to maintain such a provision. Moreover, identification of varieties at the stage of the industrial product was altogether possible without difficulty and without having recourse to expensive techniques.

1566. Mr. KIEWIET (Netherlands) wished to add that there were also other ways of finding out whether a protected variety had been used to make a certain product. The products had a paper trail, so to speak, which could also lead to a protected variety without there being a need to identify that variety on a scientific basis.

1567. Mr. ORDÓÑEZ (Argentina) stated that, on the basis of its law and its administrative and technical procedures, and with the political support of farmers, traders and breeders, it was quite easy for Argentina to grant breeders' rights under the provisions of Article 14(1)(a) and (b). However, it would be quite difficult to grant such rights if they were to cover products made directly from harvested material. His Delegation therefore shared the view of the Delegations of Sweden and of the United Kingdom that the provision was perhaps going a bit too far and should not be included in the Convention.

1568. Mr. ROYON (CIOPORA) stated that, in the opinion of CIOPORA, discussions were difficult because the wording of the whole of Article 14 was inadequate and because paragraph (1)(c) gave the impression that the rights under the Convention might extend to any industrial product downstream. But that provision was just another illustration of the necessity already underlined by him for the breeder to be fully compensated for his creative work and for the added value which benefited those who used plant material of his variety commercially. The wording of paragraph (1)(c) being what it was, CIOPORA was of the opinion that it had to be maintained, but without the text between the square brackets.

1569. Mr. STRAUS (AIPPI) stated that AIPPI supported the views expressed by Mr. Royon (CIOPORA) and especially by the Delegations of France and of the Netherlands. He added that the most likely case in which Article 14(1)(c) would apply was that of the importation of products from countries where there were no plant breeders' rights.

1570. Mr. DOS SANTOS TARRAGO (Brazil) stated that the extension of the rights envisaged in Article 14 already presented a considerable amount of difficulties for non-member States. Those difficulties would be even greater if paragraph (1)(c) were included.

1571. Mr. BRADNOCK (Canada) stated that his Delegation supported the proposal of the Delegation of Poland, largely for the reasons explained by Mr. Öster (Sweden). The proposed Article 14(1)(c) seemed to be a very broad and sweeping proposal that was intended to regulate a few specific cases. The Delegation felt that it was inappropriate in the Convention.

1572. Mr. WINTER (COMASSO) said that COMASSO advocated the Basic Proposal and proposed deletion of the part in square brackets. As far as the technical justification was concerned, he referred to the statements made by the Delegations of France and of the Netherlands.

1573. Mr. LANGE (ASSINSEL) stated that ASSINSEL, as an international organization of breeders, was probably affected more than anyone else by the proposed provision and supported Alternative A most emphatically. Plant varieties would increasingly become of interest, as Mr. Guiard (France) had quite rightfully mentioned, for the technical processing and extraction of spices, raw materials for pharmaceutical products, oils, lubricants and olfactants. His Delegation did not attach decisive importance to the difficulties cited by a number of Delegations since they were simply questions of the burden of proof which concerned breeders alone. Furthermore, the breeders were now obliged by the fundamental structure of Article 14 to initially exercise their rights at the stage of propagating material. That was already a considerable obstacle. Nevertheless, current developments in plant breeding had to incite general support for Alternative A. Those contemporary developments should not be hampered.

1574. Mr. CHRÉTIEN (GIFAP) said that GIFAP favored Alternative A for the reasons set forth by the Delegation of France and the representative of ASSINSEL. It also shared the viewpoints presented by the representatives of AIPPI and of CIOPORA.

1575. Mr. GUTIERREZ DE LA ROCHE (Colombia) stated that his Delegation wished to support the proposal of the Delegation of Poland, mainly for the reasons given by the Delegation of Brazil.

1576. Mr. REKOLA (Finland) stated that the proposal to extend plant breeders' rights to material obtained directly from harvested material of the protected variety had aroused concern in Finland. It seemed to be impossible to evaluate its consequences on the trade and economy. Therefore, there was a large body of opinion in Finland that believed that plant breeders' rights should not be extended in the way proposed.

1577. Mr. PERCY (UPEPI) stated that his Delegation wished to be associated with Alternative A and strongly supported the remarks made by Mr. Lange (ASSINSEL) and Mr. Straus (AIPPI).

1578. Mr. BOBROVSZKY (Hungary) stated that his Delegation supported the proposal of the Delegation of Poland for the reasons given mainly by the Delegations of Sweden and Finland.

1579. The PRESIDENT suggested that the Conference vote on the proposal of the Delegation of Poland reproduced in document DC/91/62.

1580. Mr. VAN ORMELINGEN (Belgium) would have liked to have the subject of the vote and its implications explained to him. He wished to know in particular whether acceptance of the amendment proposed by the Delegation of Poland would still permit a debate to be held on the inclusion in the Convention of a provision of an optional nature.

1581. The PRESIDENT replied that, to his understanding, voting in favor of the proposal of the Delegation of Poland would mean a deletion of Article 14(1)(c) and the closure of the debate on this Article. Since there would then be no opportunity for a new discussion on an optional provision, those who were in favor of such a provision would have to oppose the proposal.

1582. Mr. HOINKES (United States of America) stated that he did not want to confuse the discussion further but felt that there was another way of tackling the problem in view of the fact that the Basic Proposal contained two alternatives. One might take up Alternative A first, since it appeared first, and consider whether or not it ought to be amended in accordance with the proposals made by several Delegations. The question would then be whether it was acceptable in its amended form. If it was not acceptable either in its original or in its amended form, then Alternative B would be accepted. The procedure now proposed might just be tantamount to putting the cart before the horse.

1583. The PRESIDENT suggested that, on this basis, the vote should be postponed to give way to a discussion on the possibility of adopting a facultative provision. He observed that there were four proposals aiming at making Article 14(1)(c) optional, namely from the Delegations of the United States of America (document DC/91/13), Spain (document DC/91/82), Germany (document DC/91/91) and Denmark (document DC/91/98). The proposals of the Delegations of Spain and Denmark were exactly the same. The proposal of the Delegation of Germany went somewhat further in covering also the possible extension to further acts--which had already been discussed and accepted in principle. Finally, the Delegation of the United States of America proposed to have a new paragraph 14(2). The proposal being different from the others, he asked the Delegation of the United States of America to introduce it.

1584.1 Mr. HOINKES (United States of America) stated that the proposal of his Delegation was to a large degree parallel to that of the Delegation of Germany. The reason for proposing a new paragraph (2) was simply that one could not leave the proposed optional provision in paragraph (1) because the latter's introductory phrase provided that "the following acts ... shall require the authorization of the breeder." In other words, paragraph (1) was mandatory and a non-mandatory provision had to be in a free-standing paragraph.

1584.2 As for the reason for which his Delegation made that proposal, Mr. Hoinkes stated that it was quite similar to that indicated by the Delegation of Germany: it had basically tried to bridge the gap between fundamentally opposed positions, the position of those who wanted to have products directly obtained from harvested material covered at any cost and those who wanted them to be excluded from the scope of the breeder's right at any cost.

It thought that it might be helpful to leave it to the Contracting Parties which felt very strongly about extending the breeder's right to products directly obtained from harvested material to so provide in their implementing legislation on the basis of the proposed provision. As for the actual wording of the proposal, the Delegation was now in the hands of the Conference. Obviously, the phrase: "the acts ... shall require the authorization of the breeder" would have to be reinstated since the Conference had not accepted the concept of a "right to prevent."

1584.3 Mr. Hoinkes then elaborated on the proposed deletion of: "whose use, for the purpose of making such products, was not authorized by the breeder" after: "provided that such products were made using harvested material falling within the provisions of paragraph (1)(b) above." Since the harvested material was to fall under paragraph (1)(b) for the provision to be applicable, its obtaining was already something that the breeder had not authorized. If one were to leave the language as appearing in Alternative A, one would have to raise the rather amazing question of when and under what circumstances a breeder would ever authorize the making of products from harvested material whose production he had not authorized in the first place.

1584.4 Finally, Mr. Hoinkes stated that the reference to "the acts mentioned in paragraph (1), above," should be completed to read: "... paragraph (1)(a)(i) to (vii), above."

1585. The PRESIDENT stated that the discussion should be limited at this stage to the possibility of having an optional provision. He invited the Delegations of Denmark, Spain and Germany to introduce their proposals.

1586. Mr. ESPENHAIN (Denmark) recalled that he had already spoken on the proposal of his Delegation, and in fact introduced it, when he took the floor to show the spirit of cooperation which guided that Delegation. To make discussions easier, it would withdraw its proposal since the principle was in fact covered by the proposal that was already on the table and support the principles outlined by Mr. Hoinkes (United States of America). He commended him on his enlightening description of complicated matters and said that he was sure that Mr. Hoinkes was right on the point of the successive authorizations.

1587. The withdrawal of the proposal of the Delegation of Denmark reproduced in document DC/91/98 was noted by the Conference.

1588. Mr. LOPEZ DE HARO (Spain) stated that the proposal of his Delegation was to make the provision optional for each Contracting Party and to delete the brackets surrounding the last phrase. Since the Working Group on Article 14(1)(a) and (b) had drafted a new phrase, the Delegation would study the possibility of having the same phrase in this provision.

1589. Mr. BURR (Germany) said that his Delegation wished to act in exactly the same way as the Delegation of Denmark. It also withdrew its proposal in favor of the proposal made by the Delegation of the United States of America, but, just as the Delegation of Spain, it requested that the Drafting Committee should adapt the provision to the formulation drafted by the Working Group on Article 14(1)(a) and (b).

1590. The withdrawal of the proposal of the Delegation of Germany, reproduced in document DC/91/91, concerning the subject under discussion was noted by the Conference.
1591. The PRESIDENT noted that there were two proposals left. He asked the Delegation of Spain whether it could go along with the proposal of the Delegation of the United States of America and withdraw its own proposal.
1592. Mr. LOPEZ DE HARO (Spain) replied in the affirmative.
1593. The withdrawal of the proposal of the Delegation of Spain reproduced in document DC/91/82 was noted by the Conference.
1594. Mr. VON ARNOLD (Sweden) stated that his Delegation was not fully clear whether the proposal of the Delegation of the United States of America was intended to include what had been called the "cascade principle," namely the following phrase that had been proposed by the Working Group on Article 14(1)(a) and (b): "unless the breeder has had reasonable opportunities to exercise his right in relation to the propagating material."
1595. The PRESIDENT replied that this phrase was to be included.
1596. Mrs. JENNI (Switzerland) stated that her Delegation would have in fact preferred Alternative A in the Basic Proposal, that was to say a provision binding on all Contracting Parties. However, if it created so much difficulty for certain countries, then her Delegation could also support its formulation as an optional provision.
1597. Mr. KIEWIET (Netherlands) stated that, quite understandably, his Delegation was not in favor of the proposal of the Delegation of the United States of America because it wanted a mandatory provision on this subject in the Convention. But if a mandatory provision did not find a majority, it would, of course, prefer that proposal to the proposal of the Delegation of Poland to keep the Convention silent on the matter. Mr. Kiewiet asked the President whether it was possible to vote on the inclusion of a mandatory provision for his Delegation would, in the absence of that vote, be in a dilemma in relation to the proposal of the Delegation of the United States of America, which was its fall-back position.
1598. Mr. HARVEY (United Kingdom) declared that his Delegation could support the amendment proposed by the Delegation of the United States of America. He added that he was not sure that he could agree with the argument that the "cascade clause" was not necessary. The fact that the provision referred to paragraph (1)(b) did not automatically mean that it referred to non-authorized harvested material. Paragraph (1)(b) actually referred to harvested material

of any kind, with a clause that it would only apply if the harvested material was not authorized as a result of an authorization given in respect of propagating material. And where that paragraph was invoked, the harvested material would become authorized, and the provision now under consideration would not be applicable.

1599. Mr. BRADNOCK (Canada) stated that his Delegation would support the comments of Mr. Kiewiet (Netherlands) with regard to the sequence of events in voting, but for the exact opposite reasons. It would prefer that there be no provision at all, and only as a fall-back position would it consider an optional provision.

1600. Mr. HAYAKAWA (Japan) wished to state the position of his Delegation. He recalled that it had made a proposal concerning paragraph (1)(c) (document DC/91/61). The proposal was to have a mandatory provision with the "cascade principle," which would have to be formulated in accordance with the proposal of the Working Group on Article 14(1)(a) and (b). His Delegation would not insist on the proposal in view of the direction taken by the Conference.

1601. Mr. ORDÓÑEZ (Argentina) stated that his Delegation supported the comments of Mr. Bradnock (Canada).

1602. Mr. STRAUS (AIPPI) stated that AIPPI supported the comments of the Delegations of Switzerland and of the Netherlands. He added that AIPPI had always found it extremely unfortunate when an international Convention prevented its parties from offering a higher level of protection. The proposal of the Delegation of the United States of America was therefore the minimum that should be done for breeders.

1603. Mr. ROYON (CIOPORA) said that he supported the statement by Mr. Straus (AIPPI) as also the approach suggested by Mr. Kiewiet (Netherlands). Indeed, it seemed to him that if a vote was taken on accepting or rejecting Alternative A, the possibility of having that alternative accepted with a different wording would perhaps be lost.

1604. The PRESIDENT invited the Delegation of the United States of America to comment on the question raised by the Delegation of the United Kingdom.

1605. Mr. HOINKES (United States of America) replied that, in his opinion, the question raised by the Delegation of the United Kingdom referred to paragraph (1)(b) which indeed started with a reference to harvested material of whatever kind; but it then continued with a statement that the breeder could only exercise his rights with respect to harvested material that had been obtained through the unauthorized use of propagating material. In the opinion of his Delegation, a cross-reference to the provisions of paragraph (1)(b) did not permit a selective approach limited to the words "harvested material." Those provisions were to be considered altogether and therefore the only valid reference would be to harvested material that was obtained through the unauthorized use of propagating material. But if that seemed unclear, then it would just be a matter of drafting to bring clarity.

1606. The PRESIDENT stated that he now wished to take a vote on the proposal of the Delegation of the United States of America.

1607. Mr. DMOCHOWSKI (Poland), referring to Rule 38(2) of the Rules of Procedure, stated that the vote should first pertain to the proposal of his Delegation.

1608. Mr. HARVEY (United Kingdom) wondered whether the provision under consideration was not one for which the President might wish to exercise his prerogative to ask for a show of hands to establish whether the feeling of the meeting was in favor of an optional provision or not and how the formal vote should be taken under the Rules of Procedure.

1609. Mr. ESPENHAIN (Denmark) stated that his Delegation supported the proposal of Mr. Harvey (United Kingdom).

1610. The PRESIDENT decided to follow the proposal of Mr. Harvey (United Kingdom). Having asked the Delegations which were in favor of an optional provision to raise their plates, he noted that there were nine such Delegations against six Delegations which opposed it.

1611. Mr. KIEWIET (Netherlands) invited the President to also sound the opinion of the Conference on a mandatory provision.

1612. The PRESIDENT decided to follow the proposal of Mr. Kiewiet (Netherlands). He counted five Delegations in favor of a mandatory provision and 13 Delegations which were opposed. He then proceeded to the vote on the proposal of the Delegation of Poland reproduced in document DC/91/62.

1613. The proposal of the Delegation of Poland reproduced in document DC/91/62 was rejected by five votes for, 12 votes against and three abstentions.

1614. The PRESIDENT then proceeded to the vote on the proposal of the Delegation of the United States of America reproduced in document DC/91/13, on the understanding that it would be referred to the Drafting Committee for the necessary adaptation, in particular in relation to the "cascade principle."

1615. The proposal of the Delegation of the United States of America reproduced in document DC/91/13 was accepted by 10 votes for, four votes against and six abstentions. (Continued at 1852.4)

<p><u>Sixteenth Meeting</u> <u>Wednesday, March 13, 1991</u> <u>Afternoon</u></p>

Article 14(2)(a) of the Basic Proposal [Article 14(5) of the Text as Adopted]
- Scope of the Breeder's Right in Respect of Essentially Derived and Certain
Other Varieties

Article 15(1) - Acts not Requiring the Breeder's Authorization

(Continued from 1071, 1141 and 1299)

1616. The PRESIDENT opened the meeting and stated that, at the request of the Delegations of Denmark and Germany, he would start with the link between Article 14(2)(a) and Article 15(1).

1617.1 Mr. BURR (Germany) said that one passage in the proposal of his Delegation with regard to Article 15 reproduced in document DC/91/92 was still unresolved; that was the passage that was intended to replace the following phrase in Article 15(1)(iii) in the Basic Proposal: "except where the provisions of Article 14(2) apply." His Delegation had suggested in its proposal that the condition be made clearer by means of the following formulation: "The breeder's right shall extend, however, to essentially derived varieties, unless the law of a Contracting Party provides that the breeder's right shall be subject to limitations in respect of certain kinds of such varieties."

1617.2 However, that formulation had to be adapted to decisions already taken. Taking into account the adoption of the proposal of the Delegation of the United States of America made in document DC/91/13, it could read as follows: "The breeder's right shall extend, however, to varieties under Article 14(3), unless the law of a Contracting Party provides that the breeder's right shall be subject to certain limitations." That would leave a certain amount of elbow room to deal with future developments at national level. The principle behind the proposal was, therefore, that certain limitations be left to the law of the Contracting Party.

1618. Mr. KIEWIET (Netherlands) recalled that he had already given his opinion on the proposal of the Delegation of Germany and stated that his Delegation was against giving a possibility to the Contracting Parties to limit the provisions on dependency on a national basis. It was not a good idea to make these essential provisions more or less optional.

1619. Mr. ESPENHAIN (Denmark) recalled that he had asked that this part of the proposal of the Delegation of Germany reproduced in document DC/91/92 be brought up for final discussion in connection with the proposal of his Delegation to introduce a "launching period" (document DC/91/114). The reason for having a more flexible system than that proposed in Article 14(2) of the Basic Proposal was that, on a political level, there had been concern in Denmark to

find a proper balance between the interests of the breeder of the initial variety and of the breeder of the derived variety. The balance was necessary to make sure that it was possible for breeders to create new varieties on the basis of already protected varieties, used as genetic resources. Since his Delegation had been unsuccessful with its proposal, it strongly supported the proposal of the Delegation of Germany.

1620. Miss BUSTIN (France) said that her Delegation, just as the Delegation of the Netherlands, was not able to support the proposal made by the Delegation of Germany. It appeared to the Delegation that, to ensure a balance between the rights of the breeder of an initial variety and those of other breeders who had recourse to his protected variety as a source of genetic variation, all the necessary precautions had been taken in defining an essentially derived variety. Once the interpretation of what constituted a dependent derived variety was already given in the text of the Convention, it seemed hazardous to make any limitation whatsoever to the exercise of dependent rights by the breeder of a protected variety; such limitations were in fact capable of disturbing the delicate balance which the Conference had been attempting--and was required--to establish between those and other industrial property rights. The preservation of mutual interests could only be achieved by means of strict equality in the exercise of the rights of the parties concerned.

1621. Mr. ORDÓÑEZ (Argentina) stated that, since the idea of dependency was new, his Delegation would support the proposal of the Delegation of Germany.

1622. The PRESIDENT noted that there was support for and opposition to the proposal, on which there had already been a debate. He therefore decided to take a vote on it.

1623. Mr. HAYAKAWA (Japan) wished to know exactly the amendment of the Delegation of Germany on which the vote would be taken.

1624. The PRESIDENT replied that the essence of the proposal was to introduce a possibility for Contracting Parties to make limitations, leaving the exact wording to the Drafting Committee.

1625. Mr. BOGSCH (Secretary-General of UPOV) stated that the proposal was tantamount to a blank cheque. It would be most unusual to vote on a subject of this importance without the benefit of a written text. In addition, a decision had already been made on Article 14(2). To reopen the debate would therefore require a two-thirds majority.

1626. Mr. ESPENHAIN (Denmark) stated that he still believed that this part of the proposal of the Delegation of Germany reproduced in document DC/91/92 had never been discussed. He therefore pleaded that it should be taken up again. He understood, however, that it was difficult to vote on a proposal that was not written. He added--and asked the Delegation of Germany for confirmation--that the proposal would be to the effect that the breeder's right should extend to essentially derived varieties unless the law of a Contracting Party provided that it was subject to a specified limitation.

1627. Mr. KIEWIET (Netherlands) objected to a vote on such an important proposal if it were to be worded along the lines indicated by Mr. Espenhain (Denmark) and in the absence of a written text. He could agree to a vote on the original proposal laid down in document DC/91/92 if the meeting agreed with the Delegation of Denmark that it had not been discussed previously. To his recollection, however, it had been discussed and rejected.

1628. Miss BUSTIN (France) said that she also had the impression that the Conference had already taken a decision on that part of the proposal made by the Delegation of Germany. She noted that it was still not known what limitations would be permitted nor to what categories of varieties they would apply. The Conference had already incorporated numerous exceptions into the text of the Convention; a great part of the additional rights were linked with optional provisions. One of the major innovations of the text currently under negotiation was the right of dependency in derived varieties. It seemed clear to the Delegation of France that to adopt an already uncertain text on the basis of a proposal that had not yet been laid down in writing would be extremely dangerous. The Delegation was already opposed to the proposed amendment as it had been presented in document DC/91/92; it could in no case pronounce on a redrafted proposal in the absence of a written text.

1629. Mr. BOGSCH (Secretary-General of UPOV) asked the Delegation of Germany whether its proposal allowed any kind of limitations in respect of certain or all kinds of varieties. The proposal seemed to him to be extraordinarily vague and to allow in fact a Contracting Party to take away totally the right over essentially derived varieties.

1630. Mr. BURR (Germany) replied that the original proposal made by his Delegation had been limited to specific varieties. However, since future developments could not be presumed, his Delegation had not been able to be that precise. In any case, one ought not to be that precise. That was indeed the problem in a situation in which one could not yet forecast for which type of variety certain exceptions could possibly be necessary.

1631. Mr. BOGSCH (Secretary-General of UPOV) noted that he did not see any reference to the present situation, i.e., an indication of what varieties would be the subject under the present circumstances of a limitation or of what that limitation would be. In other words, there was no guarantee.

1632. Mr. BURR (Germany) replied that his Delegation saw the situation differently. Although the matter would be left to the national legislator, he in turn would naturally take a decision after having balanced the interests of the various parties. For the present, Mr. Burr was not in a position to be concrete. It was possible that no problems would arise at all during the next ten years or even until the next Diplomatic Conference. However, he had doubts whether the provisions in the Basic Proposal would be sufficient in all future cases.

1633. Mr. STRAUS (AIPPI) stated that AIPPI fully supported the views expressed by Mr. Bogsch (Secretary-General of UPOV) and the Delegations of France and of the Netherlands. AIPPI was deeply concerned at the fact that, if the

newly introduced principle of dependence was left to national legislators, it might be limited or even suppressed on the basis of vague considerations pertaining to agricultural policies, at the expense of the breeders.

1634. Mr. ROYON (CIOPORA) announced that CIOPORA was also opposed to the proposal made by the Delegation of Germany and, more generally, to any proposal for a recommendation or statement which was likely to distort decisions that had already been taken or to reduce the small number of improvements in the Convention to a simple booby prize.

1635. Mr. LANGE (ASSINSEL) said that ASSINSEL fully went along with the statements made by Mr. Straus (AIPPI) and Mr. Royon (CIOPORA).

1636. The proposal of the Delegation of Germany, reproduced in document DC/91/92, to allow Contracting Parties to introduce limitations to the breeder's right in respect of essentially derived varieties was rejected by three votes for, 12 votes against and four abstentions.
(Continued at 1852.4)

Article 16 - Exhaustion of the Breeder's Right

1637. The PRESIDENT opened the debate on Article 16 and on the proposal of the Delegation of New Zealand reproduced in document DC/91/70.

1638. Mr. WHITMORE (New Zealand) stated that, as a result of the discussions on Article 14, his Delegation had decided to withdraw its proposal and to support the proposal of the Delegation of Japan.

1639. The Conference noted the withdrawal of the proposal of the Delegation of New Zealand reproduced in document DC/91/70.

1640. The PRESIDENT then opened the discussion on the proposal of the Delegation of Japan, reproduced in document DC/91/69, which concerned the introductory phrase of Article 16(1).

1641. Mr. HAYAKAWA (Japan) stated that, in order to align that provision with Article 14(1)(a), his Delegation proposed to use the words: "sold or otherwise put on the market." The proposal only concerned a drafting matter.

1642. Mr. BOGSCH (Secretary-General of UPOV) stated that the proposal represented a clarification and, without involving a change in substance, certainly reflected better the intentions.

1643. The PRESIDENT proposed to refer the proposal to the Drafting Committee.

1644. It was so decided.

1645. The PRESIDENT then opened the debate on the proposal of the Delegation of Denmark reproduced in **document DC/91/109**.

1646.1 Mr. ESPENHAIN (Denmark) stated that his Delegation did not intend to change the substance of the Article, but to clarify it. Paragraph (1)(i) could be understood in the sense that the breeder's right would not be exhausted if anyone was using the material purchased from the breeder for normal propagation. If somebody bought seed, it was for propagation to produce a harvest; in that case, of course, the breeder's right should be exhausted. His Delegation felt that the text in the Basic Proposal might create some doubts about this. It therefore proposed that the words: "for purposes other than consumption" be included. This would mean that if anyone was to use the material put on the market by the breeder for purposes other than consumption--for propagating purposes--then, of course, the breeder would have an opportunity of exercising his right.

1646.2 Mr. Espenhain added that his Delegation also believed that this proposed amendment would cover the situation, discussed under Article 14, of material bought for use on a person's own property--not with the intention to sell or put on the market new propagating material--but for the purpose of having propagating material for the production of, for example, fruit. It believed that this would not be a consumption purpose.

1647. Miss BUSTIN (France) confessed that she had perhaps not altogether followed the explanations given by Mr. Espenhain (Denmark), particularly towards the end of his statement. She would like him to explain what was achieved by adding the words: "for purposes other than consumption" by comparison with the exemption from the right of the breeder for acts done privately and for non-commercial purposes as presently proposed in Article 15(1)(i). From the explanations given, she had understood that, in fact, Article 16(1) would repeat the provision already included in the Article on exceptions to the right.

1648. Mr. ESPENHAIN (Denmark) replied that he did not know whether he could really add anything. In the preceding meeting, the Conference had adopted a revised version of Article 14(1) on the basis of the report of the Working Group on Article 14(1)(a) and (b). The proposal in fact had been drafted before that revision had taken place. On the other hand, his Delegation still felt that Article 16 left some doubt because the breeder's right would not exhaust when somebody bought propagating material, because he propagated it thereafter. A farmer who bought 100 kg of cereal seed would produce harvest of, say, one tonne, and this was propagating. The provision might therefore lead to misunderstandings and that was the reason for seeking a clarification.

1649. Miss BUSTIN (France) said that, following the statement by Mr. Espenhain (Denmark), she could but oppose that proposed amendment. Indeed, it appeared extremely dangerous to her to provide for exhaustion of a right that did not exist since, in fact, consumption for private purposes was exempted from the breeder's right. The proposed amendment would be likely to cause confusion in a case where, for the moment, there was none, unless the

"consumption" that was to be referred to in Article 16 was something else. However, the Delegation of Denmark had just assured her that it presumed that it added nothing to the existing text. The provision was therefore pointless and the Delegation of France was opposed to it.

1650. Mr. ESPENHAIN (Denmark) apologized for having created a possible misunderstanding. He stated that he had not used the words: "consumption for private use." His Delegation fully shared the view that that use was covered by Article 15(1); when somebody bought seeds or fruit trees for commercial use, he would of course have to propagate it in the case of cereals, and his Delegation wanted to make sure that that case was covered as well as regards the exhaustion of the right. This was the example which was given in the report of the Working Group on Article 14(1)(a) and (b), namely the commercial use of propagating material for the production of fruit.

1651. Miss BUSTIN (France) said that she was becoming more and more lost. Was the Conference in the process of inserting Article 15(2) into Article 16(1) or did it wish to introduce an exception that was currently neither in Article 15(1) nor in Article 15(2)? Are we saying that the breeder's right had to be exhausted although there was a new reproduction or propagation of the variety for the purpose of selling the harvested material? Miss Bustin admitted that she failed to understand. For her, the amendment was linked either to Article 15(1), particularly the provision on acts done privately and for non-commercial purposes, or to Article 15(2).

1652. Mr. HARVEY (Chairman of the Working Group on Article 14(1)(a) and (b)) drew the attention of the Conference to the wording of Article 14 proposed by the Working Group. That wording explained the issue raised by the Delegation of Denmark. He understood that its position was to say that if reproductive material was sold to a purchaser, whereby of course a royalty was collected, and if the purchaser multiplied one rose bush up into one thousand for the purpose of producing cut flowers, it could be argued that the exhaustion of the right took place on the one rose bush in the first instance. The explanation of the position of the Delegation of Denmark, as given to the Working Group, was that this was unfair: had the breeder known when he sold the rose bush that it was to be used to produce a thousand rose bushes to produce cut flowers, he would not have agreed to the sale in that form. The Delegation of Denmark was seeking to redress that injustice if it were to occur. Whether it had chosen the right words was for it to say.

1653. Miss BUSTIN (France) said that she had at last obtained the explanation she wanted. The Delegation of France could give very broad support to the intentions behind that proposed amendment.

1654. Mr. KIEWIET (Netherlands) stated that his Delegation could also, of course, support the idea behind the proposal. However, it was of the opinion that this idea was already covered by the present text of Article 16(1)(i) for the propagation at issue--buying one rose bush and multiplying it into one thousand--was "further propagation of the variety." The additional words proposed by the Delegation of Denmark gave--at least--the impression that they were a restriction to the restriction. Therefore, although it supported fully the idea behind the proposal, the Delegation of the Netherlands considered that the proposal was not up to its purpose.

1655. Mr. GUIARD (France) said that the explanations given by Mr. Harvey (Chairman of the Working Group on Article 14(1)(a) and (b)) had clarified the proposal but that, on reading the text, it would seem that the breeder's right did not extend to acts of utilization unless those acts implied reproduction or propagation. The breeder's rights did not therefore apply to acts of consumption. The fact of referring solely to "consumption" caused great concern to the Delegation of France since it did not know what that term implied. The expression was much too vague.

1656. Mr. ESPENHAIN (Denmark) stated that this was an example of the problems arising when one had to use a language that was not his mother tongue. His Delegation might have used the wrong term, but the reason for which it used it was that it was also used in the next subparagraph. The same interpretation would have to be given in relation to both subparagraphs (i) and (ii), and therefore the term "consumption" might perhaps be misunderstood. Mr. Espenhain at least understood from the Delegation of France that this could be the case because of the link between the two provisions. His Delegation had no intention to link those provisions. Those who had one of the official languages as mother tongue could perhaps say whether the wrong term was used in both of them. His Delegation was concerned at the use of "further propagation" because it believed that if a breeder put seed on the market for the production of for example fodder, that seed would be put on the market for that purpose, and it understood that this was consumption.

1657. Mr. BOGSCH (Secretary-General of UPOV) stated that he was of the same view as the Delegation of France and did not understand the word "consumption" in the context described. He asked whether it meant eating or using in any other way.

1658.1 Mr. KUNHARDT (Germany) said that his Delegation had understood the aim of the proposal, on the basis of the explanations given, but that it shared the concern as to the term "consumption." It had understood that the Delegation of Denmark wished to ensure that material put on the market as propagating material, could also be used as such, that was to say could be grown. Although normal cultivation in the biological sense was or could be propagation, it should not fall under the provision under discussion.

1658.2 In order to ensure that the provision had to be inverted and it had to be stated that the item concerned only use of material as propagating material in those cases where the material was not intended as propagating material. Such a provision was contained, under item (iii), in the proposal made by the Delegation of Japan in document DC/91/69. It would be conceivable to merge items (i) and (iii), for instance as follows: "... unless material had been used as propagating material although it was not intended as such when put on the market."

1658.3 To summarize: the suggestion made by the Delegation of Denmark was covered by the proposal of the Delegation of Japan on paragraph (1)(iii). That latter provision could be merged with paragraph (1)(i). The Delegation of Germany supported the principle behind it, but had doubts as to whether it was well expressed in the proposal made by the Delegation of Denmark.

1659. Mr. ROYON (CIOPORA) said that CIOPORA shared the views expressed by the Delegation of France and considered that the proposal of the Delegation of Denmark, as it was worded at present, might represent a further limitation of the already restricted right granted to the breeder. The proposal mentioned: "further propagation of the variety in question," but Article 14(1)(a)(ii) mentioned not only "propagation" but also "reproduction." And it might well be that a cut-flower grower, for instance, bought material only once and reproduced it to the same amount every year in order to escape royalty payment. The proposal would add another loophole in the Convention.

1660. Mr. LLOYD (Australia) stated that the proposal could be more specific if it were drafted along the following lines: "propagation of the variety in question for multiplying propagating material."

1661.1 Mr. WANSCHER (Denmark) recalled that he had been a member of the Working Group and wished to repeat the example he had given to that Group, although its Chairman, Mr. Harvey, had made a very good reference to it. His Delegation thought that there was a loophole in the draft Convention. If the Conference could assure it that there was none, then it would be prepared to accept that, but the loophole which it saw was to the detriment of the breeder, and it wanted to be of help to the breeder.

1661.2 The example he had given was that of a breeder who put apple trees on the market on the assumption that they would be planted in a garden and grown to produce apples. The shopkeeper would of course never ask a customer whether he bought the trees to plant them directly in his private garden or to use them as the basis for establishing a commercial orchard. If the latter happened, it would be reasonable to say that it was infringement and that the breeder's right to some kind of royalty had not been exhausted. One might face the difficulty that the royalty could not be claimed by counting the apple trees in the orchard because nobody could prove the origin of the trees. The breeder might only be able to say that they were from his variety and had been propagated without his authorization. It would then be reasonable for him to have some kind of remuneration based on an agreement with the illegal grower, based, for instance, on the turnover of apples, because the purpose of all this was to harvest apples, not just once as with grain or other annual crops, but as long as the apple trees would produce apples. The same thing could happen with rose bushes.

1661.3 This was what the Delegation of Denmark tried to solve and meant with "consumption." The apples and the cut flowers were the products for consumption, but the multiplication had been carried out without authorization. If one followed the text as the Delegation read it, the breeder's right would be exhausted at the time when the plants were sold to the flower shop, and there was no natural link between the breeder and the grower. The grower might be in good faith as to the breeder's right, but this was not fair to the breeder.

1662. Mr. GREENGRASS (Vice Secretary-General of UPOV) stated that he wished to try to elucidate this question because he had been present in the Working Group, where Mr. Wanschler (Denmark) had referred to that example on more than one occasion. When somebody bought some apple trees from a retailer and reproduced them, then the reproduction was an act under Article 14(1)(a) which was an infringement of the breeder's right. Pursuant to the text under consideration on the exhaustion of the breeder's right, there was indeed a sale of apple

trees; but, notwithstanding the fact that the original sale involved an act that exhausted the right, there was a further propagation of the variety and the breeder's right in relation to that further propagation was not exhausted. The text in the Basic Proposal was thus perfectly satisfactory and enabled the breeder to assert his rights without the addition that was proposed.

1663. Miss BUSTIN (France) said that her Delegation could but share the analysis made by Mr. Greengrass (Vice Secretary-General of UPOV).

1664. Mr. ESPENHAIN (Denmark) stated that the discussion showed that there was a difficulty with the language. For example, the word "consumption" was used in paragraph (1)(ii), and he wondered whether that "consumption" was really meant to be as narrow as it had been suggested in relation to the proposal of his Delegation. Could material put on the market by the breeder be exported for the production of fodder? Was that production not meant to be "consumption"?

1665. The PRESIDENT stated that there was no need to elaborate on the meaning of "consumption." The proposal had now been debated at length and its purpose was now understood. He therefore proceeded to the vote on the understanding that the proposal would be submitted, if adopted, to the Drafting Committee which would have to find a better wording.

1666. The proposal of the Delegation of Denmark reproduced in document DC/91/109 was rejected by two votes for, 12 votes against and five abstentions. (Continued at 1852.5)

1667. The PRESIDENT then opened the debate on the proposal of the Delegation of Japan reproduced in document DC/91/69 and relating to paragraph (1)(iii).

1668. Mr. HAYAKAWA (Japan) stated that the text of paragraph (1)(iii) in the Basic Proposal was too broad and too imprecise. For example, if seeds were sold as propagating material and somebody bought those seeds to use them as animal feed, the right would not be exhausted under this paragraph. His Delegation therefore proposed to limit it to the case where material was used as propagating material which had not been sold or otherwise put on the market as propagating material.

1669. Mr. VON ARNOLD (Sweden) stated that, after having heard the debate on the proposal of the Delegation of Denmark, his Delegation wondered whether it was really necessary to have a subparagraph (iii) as proposed by the Delegation of Japan, that is, whether its concern was not covered by other Articles and paragraphs. It felt that Article 16(1)(iii) should be deleted altogether. In such an important field as the exhaustion of rights it was particularly important to have rules that were practical to apply. There had been talks during the preparation work of potatoes put on the market for the production of pommes frites and then used to produce chips. Although this was perhaps not a very serious interpretation of the provision, it showed that it was not practical and could lead to litigation. In the view of his Delegation it should be deleted.

1670. Mr. BURR (Germany) observed that those parts of the Basic Proposal in square brackets were not a part of the proposal, but simply reproduced a minority opinion for further consideration. His Delegation could therefore go along with the Basic Proposal, i.e., with deletion of that part that corresponded to item (iii). On the other hand, the Delegation had some sympathy for the proposal made by the Delegation of Japan which made what could have been meant in that subparagraph somewhat clearer. However, it was of the same opinion as the Delegation of Sweden. Nevertheless, as already mentioned, the proposal should perhaps be linked with item (i) in order to make the legal situation clear.

1671. Mr. WHITMORE (New Zealand) stated that the proposal was very easy to follow but, like the Delegation of Sweden, his Delegation wondered whether it was really necessary. He asked Mr. Greengrass (Vice Secretary-General of UPOV) to give his opinion on the proposal.

1672.1 Mr. GREENGRASS (Vice Secretary-General of UPOV) stated that he could give an example that might be relevant to the proposal and that would differ slightly from the example that had been used by the Delegation of Denmark. Rose bushes could be placed on the market through two very different channels of trade: the sale to the consumer and the sale to cut-flower producers. A rose breeder might well choose to distinguish between those two outlets because, plainly, the commercial importance of an outstanding cut-flower producer and his potential commercial return would be very different. What could happen in that case was that somebody who wished to use the variety for producing cut flowers bought bushes at the retail outlet. That example would be covered only by the proposal of the Delegation of Japan, and not by the reference to "production or reproduction" in Article 14(1)(a). In that sense the proposal would be useful.

1672.2 Another example would be the consumption potato--that is, potatoes that were destined to be consumed and to disappear--that were diverted into the channels of seed. Then, once again, the normal commercial arrangements would be disrupted and that example would also be covered by the proposal. The proposal had some merit. It was more specific than the original paragraph (1)(iii) which had disturbed some people because it was too general.

1673. Mr. KIEWIET (Netherlands) stated that his Delegation could not support the provision laid down in paragraph (1)(iii) for the following reasons: if the use of a variety or of material thereof fell outside the field of use for which the breeder put it originally on the market, it was in the opinion of his Delegation a matter to be solved between the breeder and the parties concerned on the basis of private law. Third parties who acted in good faith in obtaining material of a protected variety from others than the breeder without knowing under what conditions this material was originally put on the market should not be the victim of abuses in relation to that material committed by others. His Delegation could not accept that provision either in the form in which it appeared in the Basic Proposal or in the more restricted form that was proposed by the Delegation of Japan.

1674. Mr. PALESTINI (Italy) stated that his Delegation would go along with the comments of the Delegations of Sweden and Germany and would favor the deletion of Article 16(1)(iii), without substitution of another text.

1675.1 Mr. HOINKES (United States of America) observed that Article 16(1)(iii) was within square brackets in the Basic Proposal and was therefore not part of the Basic Proposal. There was thus no question of deletion. So the Conference could safely dispose of the ghost of Article 16(1)(iii).

1675.2 Turning to the proposal of the Delegation of Japan, Mr. Hoinkes observed that it did have some utility in that it could serve as a matter of clarification; but the question remained whether it was necessary in the light of the drafting of the introductory phrase of Article 16(1) and of subparagraph (i). It was provided that: "The breeder's right shall not extend to acts concerning any material ... which has been ... put on the market ... unless such acts involve further propagation of the variety"; according to paragraph (2), "material" could be propagating material of any kind, harvested material, etc. The result was that when any material, whether it was put on the market as propagating material or not, was used in such a manner as to involve further propagation of the variety, the breeder's right did not exhaust.

1675.3 Mr. Hoinkes wished to quote in this respect the example of the use as seed--and not as a spice--of celery seed sold in jars in groceries. The act of using that celery seed that was put on the market as a spice to grow celery was covered by the right. The proposal of the Delegation of Japan might therefore be considered as unnecessary.

1676. Miss BUSTIN (France) said that the text of the Basic Proposal appeared to her Delegation to comprise only two subparagraphs in Article 16(1). The additional subparagraph proposed by the Delegation of Japan would represent, according to its interpretation, a restriction in the existing contractual freedom that had in fact been confirmed by the sentence that corresponded to Article 5(2) of the 1978 Act which the Working Group on Article 14(1)(a) and (b) had added to Article 14(1). Consequently, it was unable to support the proposition and had to oppose it.

1677. Mr. HAYAKAWA (Japan) recalled that the concern of his Delegation which led to the proposal was simple. It related to the case of somebody who bought grain or soya beans sold for consumption and used them for growing a harvest for sale. In that case, there was no propagation, the process of producing a plant from a seed not being propagation. That case was not covered by Article 16(1)(i).

[Suspension]

1678. Mr. ORDOÑEZ (Argentina) stated that his Delegation supported the proposal of the Delegation of Japan for the same reason as it had supported the proposal of the Delegation of Denmark.

1679. Mr. STRAUS (AIPPI), having heard a number of examples of practical cases, wished to draw the attention of the Conference to a substantial difference between the texts of Article 16(1)(ii), where the words "consumption" and "Ernährung" had a different meaning. He wondered whether this was only a drafting matter or a substantial difference.

1680.1 Mr. ROYON (CIOPORA) observed that when Article 16(1)(iii), which was not part of the Basic Proposal, had been proposed for inclusion between square brackets, the Basic Proposal contained an item (viii) in Article 14(1)(a). As stated by the Delegation of the Netherlands, the matter could be left to contractual law. However, since Article 14(1)(a)(viii) had been deleted, CIOPORA considered that there were good reasons for introducing paragraph (1)(iii) in Article 16. It supported the text now appearing between square brackets.

1680.2 Mr. Royon then turned to the proposal of the Delegation of Japan and the example given by Mr. Greengrass (Vice Secretary-General of UPOV) of a professional florist who would buy rose bushes from a wholesaler selling plants for amateur gardening, to exploit them for the sale of cut flowers. He stated that this was clearly a form of exploitation of the variety which the breeder had not permitted when he had granted a license to propagate his variety as garden plants. In that case the breeder had not received an adequate remuneration, and his right should not be exhausted.

1680.3 However, he could not draw the same conclusion as the Vice Secretary-General on that example because, Mr. Royon stated, the proposal of the Delegation of Japan did not cover that case. Indeed the proposal was nothing but a remake of the third sentence of Article 5(1) of the 1978 Act, except that it was no longer limited to ornamental plants. In the particular example concerned, the rose bushes bought by the professional florist were not used as propagating material; they were not at all propagated, but simply used for the commercial production of cut flowers. Therefore, for the proposal to be acceptable as some form of response to the needs of breeders of ornamental plants, the words "as propagating material" should be deleted after the word "use."

1681.1 Mr. ESPENHAIN (Denmark) stated that his Delegation supported the proposal of the Delegation of Japan. The examples given by Mr. Greengrass (Vice Secretary-General of UPOV) in fact showed that there was a similarity between that proposal and the proposal of his Delegation. Mr. Espenhain further observed that the amendment proposed by Mr. Royon (CIOPORA) was very interesting, but would have to be considered further.

1681.2 Mr. Espenhain then elaborated on the meaning of words such as "propagation" and "consumption." Mr. Straus (AIPPI) had correctly stated that there was a difference between the texts. For his Delegation, "further propagation" appearing in Article 16(1)(i) might convey a false impression. An explanation should be given at a later stage as to whether it would cover the case where one just planted a seed and obtained a crop for the production of fodder, for example--a case which his Delegation would consider to be consumption in the broad sense, as opposed to the meaning that underlayed this discussion, which was: "consumption by human beings in accordance with Article 16(1)(ii)." There had to be "consumption" in a broad sense when somebody put on the market seeds which were used for production of animal feed, for example, and the breeder's right should be exhausted in that case because the seeds had been put on the market for that purpose.

1681.3 But then, the word "propagation" might create difficulties because, if one considered propagation to be a whole cycle, then one could say that somebody who bought seed of a barley variety, for example, would buy it for the purpose of producing seed. There would be a full cycle of seed production. If the new seed was intended for malt and beer production, and if the beer had been drunk, there would, in the opinion of his Delegation, be "consumption"

and the breeder's right would be exhausted. But if the seed was reused commercially, there would be two possibilities: either it was used on a farmer's own premises, and the act of use would be covered by Article 15(2) (the so-called "farmer's privilege"), or it would fall under Article 14(1)(a), "production or reproduction" of new seed.

1681.4 His Delegation therefore believed that the Conference ought to be very careful about the word "propagation," which the Delegation understood to refer to the case where one obtained a crop, or a crop of seed, i.e., a full cycle. It also ought to be careful about the word "consumption." His Delegation certainly understood Article 16(1)(ii) to mean that the breeder's right was also exhausted when, for example, grass seed was exported for the production of a fodder crop. In its view, that would also be "consumption."

1682. Mr. ROBERTS (ICC) stated that ICC endorsed the remarks made by Mr. Royon (CIOPORA). It shared CIOPORA's disappointment at this Conference turning out so disappointing for breeders of ornamental plants and fruit crops. More specifically on the proposal of the Delegation of Japan, ICC commended the solution suggested by the Delegation of Germany to incorporate the proposed subparagraph (iii) into subparagraph (i). This would have the great advantage that it would be clearly legal for the farmer who bought seed from the breeder to sow it.

1683. The proposal of the Delegation of Japan, reproduced in document DC/91/69, to add a subparagraph (iii) to Article 16(1) was rejected by six votes for, 10 votes against and four abstentions.

Title of the New Act and Name of the Union

1684. The PRESIDENT opened the debate on the proposal of the Delegation of Poland reproduced in document DC/91/120. He observed that the word "New" should be deleted from the proposed language.

1685. Mr. DMOCHOWSKI (Poland) confirmed that the word "New" should be deleted. He then explained that the present title of the Convention and denomination of the Union were not suited to the present contents and purpose of the Convention, which were the granting and the protection of the breeder's right to the variety, and not the protection of a variety. That unsuitability was even more obvious in the new text of the Convention in which the term "breeder's right to the variety" was used throughout, whereas the 1978 Act used different terms such as "the right of protection," "grant of protection" or "application for protection." The present names also contained very vague terms such as "obtentions végétales" or "Pflanzenzüchtungen." The notion of the protection of a variety suggested that the Convention had to do with plant protection and not plant breeders' rights.

1686. Mr. KIEWIET (Netherlands) stated that the present denominations had some shortcomings, but they were now well established. It was out of some conservatism that his Delegation wished the name of the Union to remain unchanged.

1687. Mr. HEINEN (Germany) said that his Delegation was also in favor of maintaining the title, not only for reasons of a conservative approach, but also because the proposal made by the Delegation of Poland contained numerous shortcomings. It read: "for the protection of the breeder's right to a variety." However, breeders' rights had in fact been created to protect what had been bred, in other words plant varieties. The proposed name therefore contained a quadrature of the circle which made it more complicated than it need be. That was a reason for his Delegation to leave the present name as it was.

1688. The PRESIDENT asked whether the proposal of the Delegation of Poland was seconded. He noted that there was no support and declared the proposal rejected.

1689. The conclusion of the President was noted by the Conference.

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Article 40 - Preservation of Existing Rights (Continued from 1435 and 1441)

1690. The PRESIDENT opened the meeting and stated that he had been informed by the Delegation of New Zealand that the latter had obtained a majority of two thirds in favor of reopening the debate on Article 40. He consequently reopened the debate and asked the said Delegation to expose the problem.

1691. Mr. WHITMORE (New Zealand) referred to the proposal of his Delegation, contained in document DC/91/99, to amend Article 40 and recalled that it had been discussed on Tuesday, March 12, and rejected. Some other Delegations had indicated to him that they wished this matter to be reconsidered, and one of the breeders' organizations had also expressed that wish. He therefore requested that this matter be reconsidered. He asked the President whether he should speak on the substance of the proposed amendment or whether he should have to wait until the President had determined that there was indeed a two-thirds majority supporting the request for reconsideration of the matter.

1692. The PRESIDENT stated that he was confident that there was the required majority and invited Mr. Whitmore (New Zealand) to speak on the substance.

1693.1 Mr. WHITMORE (New Zealand) stated that the proposal was a very simple one: it was to replace "affect" by "limit." This was more than a drafting proposal; it was a change of substance. The reason for the proposal was that when national laws were amended to conform with the new Convention, his Delegation wished to allow existing breeders' rights, as well as the new rights, to benefit from the improvements contained in the 1991 Convention.

1693.2 If one took a literal interpretation of the Basic Proposal for Article 40, the lawmaker would be prevented from reinforcing the existing breeders' rights. The 1991 Convention would for example provide for a longer duration of the breeder's right and the New Zealand authorities would want to expand existing rights accordingly. The Convention would provide for a wide scope of the breeder's right; and they would want existing rights to also have this extended scope. Should they decide to limit the "farmer's privilege," then the limited privilege should apply to existing rights as well as to new rights. Indeed, if this was not so, the situation would be somewhat confusing: with some rights the "farmer's privilege" would be absolute while for others it would be limited.

1693.3 Mr. Whitmore added that he appreciated that other countries may have different views and might feel it more appropriate to leave existing rights unchanged. It would be presumptuous for him to suggest that they should do otherwise. But the way the proposed amendment was worded was such that it would not prevent those countries from doing as they wished.

1693.4 Mr. Whitmore concluded his statement by suggesting another drafting amendment: before the word "existing" the word "breeders'" should be inserted. This would make it clear that the reference was to breeders' rights only and not for example to "farmers' rights."

1694. Mr. LLOYD (Australia) stated that his Delegation had agreed with the proposal of the Delegation of New Zealand on the first occasion and reiterated that it believed that the provisions about enhanced and extended breeders' rights should apply retrospectively to existing rights.

1695.1 Mr. BURR (Germany) said that the basic view of his Delegation was that if a member State had significant problems with a decision, then it should have the possibility of a further discussion. That was why it had requested resumption of the discussion on that item.

1695.2 On the substance, however, the Delegation of Germany was of the opinion, which it had already expressed at the last vote, that it should be left to the national legislation in each case. Mr. Burr could indeed conceive of cases in which the national legislator would naturally decide that the new circumstances should also benefit breeders of varieties that had been protected under previous law and also other cases in which it could be decided, for whatever reason, that the new circumstances would only apply to varieties that would be protected after the entry into force of the amended law. That was why his Delegation continued to oppose the proposal made by the Delegation of New Zealand.

1696. Mr. KIEWIET (Netherlands) stated that his Delegation was now more inclined to support the proposal made by the Delegation of New Zealand than it was in the first round of discussions.

1697. Mr. HARVEY (United Kingdom) stated that his Delegation supported the principle behind the proposed amendment. It seemed that the amendment was designed to prevent a two-tier system of rights, and that system would certainly not be something it would favor. Whether the precise wording achieved that intention could be left to the Drafting Committee to consider.

1698. Mr. ESPENHAIN (Denmark) recalled that his Delegation did not support the proposal in the first round of discussions because it considered that the text in the Basic Proposal in fact allowed member States to decide at national level what the consequences of the amendment of the legislation on existing rights should be. Having heard the explanations just given by Mr. Whitmore (New Zealand), it would however not oppose the proposal.

1699. Mr. BOGSCH (Secretary-General of UPOV) stated that the crucial point was that the Conference should be absolutely clear about the cases, if any, in which the new Convention would give lesser rights than the 1978 Act. The language: "shall not limit existing rights" would imply that the Convention limited rights. If the "farmer's privilege" was a limitation that was relevant to this Article, it would mean that Contracting Parties could not apply the "farmer's privilege" to existing rights. The proposal of the Delegation of New Zealand gave a rather bad flavor to this Convention; it gave the impression that the Convention had started to limit the rights when the intention was just the contrary.

1700. Mr. IANNANTUONO (Italy) said that his Delegation was opposed to reopening the debate on Article 40. It would like the Conference to decide first on a reopening of discussions.

1701. The PRESIDENT observed that the debate had already taken place to a large degree, and that was so because two thirds of the member Delegations had requested a reopening of the debate. He suggested that, this being so, it would be more expedient to vote on the proposal now.

1702. Mr. HOINKES (United States of America) wished to have clarified that the vote would pertain to the proposal of the Delegation of New Zealand as contained in document DC/91/99 with a further amendment consisting in inserting the word "breeders'" before the word "rights."

1703. Mr. WHITMORE (New Zealand) replied that he had suggested that addition more as a recommendation to the Drafting Committee, for it implied no change in substance.

1704. Mr. BOGSCH (Secretary-General of UPOV) stated that, on the contrary, there had to be a change in substance because also other people had rights, e.g. the right to use certain material without permission. The revision of national laws would thus affect the rights of the competitors, but not affect the rights of the breeders.

1705. The PRESIDENT stated that there should be a vote, under those circumstances, only on the proposal of the Delegation of New Zealand as reproduced in document DC/91/99, without the addition of "breeders'" before "rights."

1706. The proposal of the Delegation of New Zealand reproduced in document DC/91/99 was accepted by nine votes for, seven votes against and three abstentions.

1707. Mr. NAITO (Japan) wished to know how the proposal would be treated under the Rules of Procedure. A two-thirds majority was required to reopen the debate, and the proposal had not received a two-thirds majority. He therefore wondered whether the vote was in accordance with the Rules of Procedure.

1708. The PRESIDENT observed that it was not the same thing to vote on the reopening of a debate and to vote on the proposal itself. The Delegation of New Zealand had informed him that 16 member Delegations had been in favor of a new debate, and he had had no reason to cast doubt about this.

1709. Mr. IANNANTUONO (Italy) repeated that the view of his Delegation was that there would have to be a vote on the reopening of the debate. It asked that the vote be taken in order to determine the position of Delegations with regard to reopening the debate.

1710. The PRESIDENT observed that there had been no objection to the reopening of the debate when he had reopened it. He recalled that the Delegation of New Zealand, which provided a Vice-President of the Conference, had informed him that there was a majority of 16 member Delegations in favor of reopening the debate, and nobody had asked for the floor when he had announced that. He suggested that the Delegation of New Zealand should hand over the list of the member Delegations that had been in favor of reopening the debate to the Secretariat for inclusion in the records.

1711. Mr. WHITMORE (New Zealand) handed over the following list of member Delegations to the Secretariat: Australia, Canada, Denmark, Germany, Hungary, Ireland, Israel, Netherlands, New Zealand, Poland, South Africa, Spain, Sweden, Switzerland, United Kingdom, United States of America.

1712. Mr. ORDOÑEZ (Argentina) sought clarification about the contents of the proposal that had just been accepted. Was it with or without the word "breeders'?"

1713. The PRESIDENT replied that the amendment, as accepted, was without the word "breeders'."

1714. Mr. HOINKES (United States of America) stated that his Delegation now formally proposed--albeit not in writing, because the proposal was so simple--to add the word "breeders'" between the words "existing" and "rights" so that this Article would read: "This Convention shall not limit existing breeders' rights under the laws of Contracting Parties..." Without that word, which certainly clarified the intent of the provision, his country would have great difficulties with the application of its laws as they existed now.

1715. Mr. WHITMORE (New Zealand) stated that his Delegation seconded the proposal of the Delegation of the United States of America.

1716. Mr. NAITO (Japan) stated that he had missed the chance of opposing the comment of the President that there was a two-thirds majority in favor of reopening the discussion on Article 40. He requested that the names of the countries which supported the reopening be stated in the records (see paragraph 1711 above).

1717. The PRESIDENT confirmed that this would be done (see paragraph 1711 above). He asked whether any member Delegation was opposed to the consideration of the proposal of the Delegation of the United States of America. Not seeing any opposition he asked whether any member Delegation was opposed to the proposal.

1718. Mr. IANNANTUONO (Italy) said that his Delegation opposed the proposal made by the Delegation of the United States of America.

1719. The PRESIDENT then proceeded to the vote.

1720. The oral proposal of the Delegation of the United States of America to substitute "existing breeders' rights" for "existing rights" was adopted by nine votes for, five votes against and five abstentions. Article 40 was thus adopted as amended according to the indications given in paragraph 1714 above.

Article 26(6) - Number of Votes in the Council (Continued from 1230)

1721. The PRESIDENT reopened the debate on Article 26(6) and on the related Articles, and on the proposal of the Delegation of the United States of America reproduced in **document DC/91/19**. He asked whether there had been any change in the positions of member States since the last debate which took place on Tuesday, March 12, as a result of contacts with capitals and meetings, especially in Brussels.

1722. Mr. HOINKES (United States of America) stated that he did not want to report any change in the position of his Delegation but to clarify it. His Delegation remained of the firm opinion that an intergovernmental organization and its member States should not be entitled to exercise voting rights under the Convention concurrently. While it was prepared to try to come to an acceptable wording of that concept that was not necessarily identical with that in document DC/91/19, he had to inform the Conference that, if the end result would be that an intergovernmental organization and its member States would be entitled to exercise voting rights concurrently, his Delegation would not be in a position to vote in favor of the revised Convention.

1723. Mr. BOGSCH (Secretary-General of UPOV) asked the Delegation of the United States of America whether it would vote against it or abstain.

1724. Mr. HOINKES (United States of America) replied, in order to leave no doubt in anyone's mind, that his Delegation was prepared to vote against the Convention.

1725. Mr. ORDOÑEZ (Argentina) stated that, in various parts of America, attempts were made to establish a common market. In the Southern part of America, work was under way to harmonize seed certification, seed quality analysis, and it had been proposed by Argentina that there should also be a harmonization in the granting of breeders' rights. In the near future, there would probably be a regional market, and it was also probable that there would be a regional plant breeders' rights system of the kind currently developed in Europe. If that were to materialize, the authorities concerned should work on the basis of the proposal of the Delegation of the United States of America. His Delegation fully supported that proposal.

1726.1 Mr. DELLOW (New Zealand) observed that it was perhaps unfortunate that the most controversial point in this Conference concerned a matter which had not much to do with plant breeders' rights. His Delegation was among those which regarded the general issue of membership by intergovernmental organizations in treaties as a fundamental one and were most concerned at the possibility that an organization would have a vote in addition to those of the member States of which it was obviously an emanation. It was disappointed to see that it was not possible, or had not been possible so far, for the purposes of this Convention, to reach the sort of accommodation that had been reached several times in the past and that had been acceptable both to the members of the EC and to other parties. It still thought that such an arrangement would be appropriate and continued to support the amendment proposed by the Delegation of the United States of America.

1726.2 Mr. Dellow added that his Delegation had similar instructions to those stated by Mr. Hoinkes (United States of America). His Delegation would vote against the Convention if the text of the Basic Proposal was adopted.

1727. Mr. HANNOUSH (Australia) stated that the position of his Delegation had not changed. It continued to oppose the proposition that an intergovernmental organization should have an extra vote of its own over and above those of its member States. As already stated, this was an important issue for his country; it was a political issue, which had to be handled with care. Mr. Hannoush concluded by saying that his Delegation also had instructions that, given the nature of this issue, it should be prepared to vote against adoption of the revised Act should a generally acceptable outcome not be possible.

1728. Mr. BUTLER (Canada) recalled that the Articles that were still unsettled in the draft Convention defined the kind of intergovernmental organizations that could adhere to the Convention and the conditions under which they could do so. They dealt with something that applied generally and not to one particular intergovernmental organization only. They therefore raised issues of principle regarding Canada's treaty-making practice with intergovernmental organizations generally. From Canada's perspective, the correct precedents were contained in the Washington Treaty on Intellectual Property in Respect of Integrated Circuits and also in the draft patent harmonization treaty. As indicated earlier this week, Canada was opposed to giving intergovernmental

organizations an extra vote in their own right, in addition to any votes of their member States. The instructions given to the Delegation on this point were firm. His Delegation supported the amendment proposed by the Delegation of the United States of America.

1729. The PRESIDENT asked the Delegation of Canada whether it would also vote against the revised Act.

1730. Mr. BUTLER (Canada) replied that if this matter was not settled to the satisfaction of his Delegation, the Delegation was bound to seek further instructions from Ottawa.

1731. Mr. NAITO (Japan) stated that his Delegation supported the proposal of the Delegation of the United States of America on this critical issue. It also wished to continue its efforts to find a compromise. There were some precedents in existing treaties which had been negotiated between the States and international organizations concerned. The Delegation therefore wished to follow the precedents and was strongly opposed to the text in the Basic Proposal.

1732. The PRESIDENT asked the Delegation of Japan whether, in the event that there was a majority in favor of the text in the Basic Proposal, it would also vote against the new Convention.

1733. Mr. NAITO (Japan) replied that he would not like to express the definitive position of his Delegation. It first needed clarification. However, it had to consider seriously the possibility of voting against the revised Act.

1734. Mr. VISSER (South Africa) recalled that he had stated earlier during this Conference that South Africa could live with both the Basic Proposal as regards Article 26 and the proposal of the Delegation of the United States of America. If, however, his Delegation had to choose between the two options, it would prefer an option that was more neutral and more flexible.

1735. Mr. GUTIERREZ DE LA ROCHE (Colombia) stated that his Delegation fully supported the proposal of the Delegation of the United States of America.

1736.1 Mr. BURR (Germany) regretted that the signals that had been given during the preceding half an hour had not already been perceived two days previously. That could have indeed brought about an earlier reflection and earlier and more precise instructions could have been obtained from the capitals.

1736.2 Mr. Burr then observed that his Delegation was in favor, for easily understandable reasons, of the Basic Proposal that had been drafted in two years of work and with respect to which there had never been any signs of wishes for amendments. On the other hand, it of course did not wish to risk the success of the work carried out during the preceding ten days. He was unable to say at that point what the new instructions from his Government

would be. He had already made it clear previously that for his Delegation, in any event, the proposal made by the Delegation of the United States of America was not acceptable in that form.

1736.3 The proposal contained a whole number of pitfalls which, although already accepted, had been so accepted in a different context. Those problems had to be solved, however, from case to case. In the Washington Treaty on Intellectual Property in Respect of Integrated Circuits, that had been repeatedly cited, there existed no parallel competence of the member States and of the European Economic Community, whereas in the field of plant variety protection the EC was planning to establish a parallel right. That also led to certain problems for those member States.

1736.4 Mr. Burr recalled that he had already mentioned some days previously that it was simply not acceptable in certain matters that a material case concerning his country--for instance, with regard to the national plant variety protection law or the relationship of Germany to UPOV--the Community should vote for his country. It was just as impossible in certain other cases that one or more UPOV member States that were also members of the EC should vote in place of the EC. Solutions had to be sought that would satisfy both interests. So far, there had not been sufficient incentive or sufficient time to do so. However, if it was wished to save the outcome of the Conference, one would have to endeavor to develop a compromise solution.

1737. Mr. KIEWIET (Netherlands) stated that, like the Delegation of Germany, his Delegation was in favor of the text in the Basic Proposal, and if there was a vote at this moment, it would vote for that proposal. It considered that, in a situation of parallel competence of both the States and the intergovernmental organizations in respect of plant breeders' rights, the text of Article 26(6) proposed by the Delegation of the United States of America would cause difficulties. Since the EC would probably be in such a situation in the future, his Delegation had difficulties with the acceptance of that proposal.

1738. Mr. ESPENHAIN (Denmark) recalled that he had already indicated the position of his Delegation in favor of the Basic Proposal. It could associate itself fully with the comments made by the Delegation of Germany. Should another text need to be developed, it would have to seek new instructions. Mr. Espenhain concluded by making the plea that if the Conference were to move away from the Basic Proposal, not only those Delegations which were in favor of the Basic Proposal should have to reconsider their position, but the others as well.

1739. Mr. HARVEY (United Kingdom) stated that if the matter were put to vote, his Delegation would have to maintain its previous position and vote against the amendment proposed by the Delegation of the United States of America. He agreed with the statement just made by Mr. Espenhain (Denmark). It appeared that certain member Delegations had sought very tight instructions at a point in which the discussion was still continuing. That was unfortunate.

1740. Mr. BONNEVILLE (France) said that the position of his Delegation had been perfectly reflected in the statements made by the Delegations of Germany, the Netherlands, Denmark and the United Kingdom. The draft Convention had been under discussion for several years and it was not possible to ask Delegations

to take a stance at the last moment on a matter that was so important without them first having obtained full instructions.

1741. Mr. O'DONOHUE (Ireland) stated that the position of his Delegation was the same as that of the Delegations of Denmark, France, Germany and of the United Kingdom. It reflected the instructions received and those were to be followed for the moment.

1742. Mr. LOPEZ DE HARO (Spain) stated that his Delegation was in favor of the Basic Proposal.

1743. Mr. PALESTINI (Italy) stated that his Delegation was also in favor of the Basic Proposal.

1744. Mr. VAN ORMELINGEN (Belgium) said that his Delegation was in favor of the basic text, as things stood, and that as a result of new events it would have to seek new instructions.

1745. Mr. NAITO (Japan) stated that, having listened to the interventions made by the Delegations of several States deeply involved in the issue of international organizations becoming a member of UPOV, his Delegation had to express its position more explicitly. It was prepared to vote against the revised Act if the Basic Proposal was maintained on this matter. Mr. Naito urged the other Delegations to reconsider this issue and not to stick to the Basic Proposal.

1746. Mr. BUTLER (Canada) wished to clarify his earlier statement. Although his Delegation had been instructed to check with its capital once more before a vote on the final text took place, it should be clear that the adoption of an extra vote would in all likelihood result in Canada voting against the adoption of the new Act.

1747. Mr. ORDOÑEZ (Argentina) observed that the Conference had been working very hard towards a new Convention to strengthen the breeder's right. As things were at the moment, there might be in future a 1991 Convention that would be a European Convention, and a worldwide Convention that would be the 1978 Act. He asked the European countries and breeders whether that was what they wanted. The European attempt to establish a common market had been one of the most useful and successful endeavors for mankind in the past years, but perhaps there was today an attempt to pull the rope too much.

1748. The PRESIDENT concluded the round of statements and noted that the positions indicated by quite a few Delegations were, to the exception of that indicated by the Delegation of South Africa, fairly rigid, which did not augur well for the adoption of the new Convention. He proposed to suspend the meeting to permit informal discussions and a search for a compromise.

[Suspension]

1749.1 The PRESIDENT reopened the meeting and stated that the long break had been necessary to think over the problems facing the Conference at this point. He said that it was not acceptable that all the work done in the last days and during the preceding years should be lost because of political questions. The Conference had to find a way out of the deadlock. To this end, he proposed the following for consideration: the Conference could perhaps decide to add to Article 34(3)--which was concerned with advice given by the Council to a State or an intergovernmental organization--a provision to the effect that, if the advice related to an intergovernmental organization, it would also indicate whether the organization would have the right to vote in the Council. Any decision granting the right to vote would require that no member State of the Union voted against.

1749.2 The President emphasized that his suggestion was not a final proposal that could already be the subject of a vote. It was merely food for thought, on the understanding, however, that there was not much room for a compromise in view of the fact that more than one sixth of the member Delegations were under instruction to vote against the new Convention if it followed the lines of the Basic Proposal. Since the Conference could not make any decision now about the right to vote of an intergovernmental organization, a solution could be to postpone that decision to the point in time when it became really relevant.

1749.3 The President then observed that the EC member States had met together during the break. He invited them to tell the Conference about the progress achieved in their thinking.

1750.1 Mr. KIEWIET (Netherlands) confirmed that the Delegations of the member States of UPOV which were also members of the EC had had a discussion on this subject to find a possible solution. They had developed ideas which could form the basis for a compromise which could be acceptable to all parties concerned. They felt that, before they would ask for approval of the proposed compromise by their capitals and by the relevant EC organs, it would be a good thing to explore whether the compromise solution would be supported by the member Delegations that had so far taken another position, namely by those of Australia, Canada, Japan, New Zealand and of the United States of America.

1750.2 The idea was that the Conference should form an informal working group in which the member Delegations representing EC member States would outline a possible solution. The other Delegations could then informally express their opinion on the proposed compromise. If the outcome of the discussions in the working group were to be promising, the member Delegations representing EC member States would seek approval from their capitals and the competent EC organs.

1750.3 Mr. Kiewiet concluded by saying that he did not wish to outline the contents of the proposal. He observed, however, that it had a certain similarity to the suggestion made by the President, which had not been known when the consultation had taken place at EC level. That suggestion would also be the subject of discussions in the informal working group which he proposed to establish without delay and in which all interested member Delegations should be able to participate.

1751. The PRESIDENT stated that it was a good thing to have an informal group. He observed, however, that the timing was an important factor. Not only the Delegations of the EC member States, but also those of the other States would have to consult their capitals; the time differences would have

to be taken into account. The informal working group would have to formulate a proposal still today. On this assumption he planned to reconvene the Plenary on the next day at 3 p.m. This would allow time for a final decision to be made on Monday, March 18.

1752. Mr. HOINKES (United States of America) wondered whether it might not be useful for those States that had similar interests, in particular the EC member States, to meet among themselves before the meeting of the informal working group in order to discuss what particular proposal they would be willing to discuss within that group. It would not serve the purpose to have several proposals before the informal working group.

1753. Mr. KIEWIET (Netherlands) agreed with Mr. Hoinkes (United States of America) and stated that the EC member States would meet before the informal working group started. He invited the other member Delegations to also try to set their clocks at the same time to facilitate an agreement in the working group.

1754. The PRESIDENT asked who would chair the meeting of the informal working group.

1755. Mr. KIEWIET (Netherlands) replied that it should be as neutral a person as possible, perhaps from a member Delegation that had so far no definite position.

1756. The PRESIDENT asked Mr. Öster (Sweden) whether he would be willing to chair the informal working group.

1757. Mr. ÖSTER (Sweden) replied that, if it was a general wish, he would willingly accept the task.

1758. It was decided to establish an informal working group under the chairmanship of Mr. Öster (Sweden) and comprising the following Delegations: Australia, Belgium, Canada, Denmark, France, Germany, Ireland, Israel, Japan, Netherlands, South Africa, Sweden, United Kingdom, United States of America; and representatives of the EC.

<p><u>Eighteenth Meeting</u> <u>Friday, March 15, 1991</u> <u>Afternoon</u></p>

1759. The PRESIDENT opened the meeting and asked the Delegation of the Netherlands to inform the Conference on the stage of progress of the discussions at the EC level.

1760.1 Mr. KIEWIET (Netherlands) regretted that he would have to disappoint the meeting. The problem of the right to vote of an intergovernmental organization had been keeping many Delegations busy for the last few days. So far, no solution could be found that would satisfy the wishes of some Delegations of non-EC-member States. New instructions had been received from the competent organs in Brussels, and it would be worthwhile if a group of Delegates tried in an informal gathering to discuss the possibilities to reach a compromise on the basis of the mandate that the Delegations of the EC member States had received.

1760.2 Mr. Kiewiet felt that such a compromise could be reached, but it was necessary to have an exchange of views as informal as possible. He therefore suggested that the discussions be postponed on all the Articles relating to the intergovernmental organizations until the informal gathering had come to a conclusion. He further suggested--noting that the Delegations concerned had already agreed--that the group should comprise Delegates from Australia, Canada, France, Germany, Japan, the Netherlands, New Zealand, the United Kingdom and the United States of America. Finally, all the parties concerned wished to invite Mr. Greengrass (Vice Secretary-General of UPOV) to be present on an informal basis during the discussions. Mr. Kiewiet hoped that he could accept that invitation.

1761. The PRESIDENT suggested that the group should meet immediately and that the Plenary should resume discussions on the Articles concerned at 4.30 p.m.

1762. It was so decided. (Continued at 1770)

CONSIDERATION OF THE REPORT OF THE CREDENTIALS COMMITTEE (Continued from 92)

1763. The PRESIDENT stated that, in view of the circumstances, the Credentials Committee had only prepared one report. He invited Mr. Jean-François Prevel (Vice-Chairman of the Committee) to introduce it (document DC/91/123).

1764.1 Mr. PREVEL (Vice-Chairman of the Credentials Committee) said that, in the absence of the Chairman of the Committee, Mr. Fortini (Italy), he would give a brief report on the work of the Credentials Committee. The terms of reference of the Committee had been to examine the credentials and other accreditation documents and the full powers required to sign the Convention. Those documents were accepted in accordance with the criteria set out in paragraph 5 of the report. The result of the examination was recorded in paragraph 7:

(i) For the Member Delegations, the credentials and full powers had been duly accepted for seven States. In the meantime, the full powers of the Delegation of the United Kingdom had reached the Secretariat. The full powers of the Delegation of France had also been transmitted, by telex. They were therefore to be added to the full powers of Denmark, Israel, Italy, the Netherlands, Spain, Switzerland and the United States of America. Credentials without full powers had been presented by the Delegations of the following

11 States: Australia, Belgium, Canada, Germany, Hungary, Ireland, Japan, New Zealand, Poland, South Africa and Sweden.

(ii) As for the Observer Delegations, the credentials of the Delegations of the following 24 States reached the Secretariat prior to the meeting of the Committee: Argentina, Austria, Benin, Bolivia, Brazil, Burundi, Chile, Colombia, Côte d'Ivoire, Czechoslovakia, Ecuador, Finland, Ghana, Indonesia, Kenya, Luxembourg, Malawi, Morocco, Norway, the Republic of Korea, Samoa, Thailand, Turkey and the Ukrainian Soviet Socialist Republic. Since then, the Secretariat had also received the credentials of Yugoslavia.

(iii) In the case of the Observer Organizations, Mr. Prevel did not wish to give the list since it would be much too long. He nevertheless drew the attention of the Conference to paragraph 8 of the report in which the Committee noted that a letter of appointment of representatives of the Commission of the European Communities had been received from the Commission of the European Communities and that a letter of appointment of representatives of the European Patent Office had been received from the European Patent Office.

1764.2 Mr. Prevel concluded his statement by inviting those delegations that were not in a position to sign the Convention to endeavor to be able to do so at the outcome of the Conference.

1765. Mr. BURR (Germany) announced that the full powers of his Delegation to sign were on the way and that his Delegation assumed that it would be able to submit them in good time before the signing ceremony.

1766. Mr. VISSER (South Africa) indicated that his Delegation had received notice that an addition to the credentials providing full powers was on the way to Geneva.

1767. Mr. LEDAKIS (Secretary of the Credentials Committee) recalled that, because of the possible delays in the forwarding of letters, it would be extremely helpful if a facsimile or a telex were transmitted. As indicated in the report, the full powers received in that form could be accepted for the purposes of the signature of the Revised Act.

1768. The Conference noted the report of the Credentials Committee as reproduced in document DC/91/123 and supplemented by Mr. Prevel (Vice-Chairman of the Committee).

1769. The PRESIDENT noted that a supplementary report would probably be given later on, on the basis of the procedure outlined in paragraph 13 of the report of the Credentials Committee. (Continued at 1965)

[Suspension]

CONSIDERATION OF THE DRAFT NEW ACT OF THE UPOV CONVENTION**Article 26(6) - Number of Votes in the Council - and Other Articles Concerned with Intergovernmental Organizations** (Continued from 1762)

1770. The PRESIDENT reopened the meeting at 5 p.m., half an hour later than planned. He observed that the informal meeting was still continuing. He proposed therefore to suspend the meeting until 5.30 p.m.

1771. It was so decided.

[Suspension]

1772. The PRESIDENT reopened the meeting and invited one of the members of the informal group to report on its conclusions.

1773.1 Mr. KIEWIET (Netherlands) stated that the group had decided that he would inform the Conference on the results of its discussions. He invited the members of what used to be the "other block" and which was now the same block to give additional explanations should he present an incomplete report.

1773.2 The informal group had discussed the provision laid down in Article 26 of the new Convention and the corresponding proposal of the Delegation of the United States of America reproduced in document DC/91/19. In fact, the issue was whether or not an intergovernmental organization should have a vote, over and above the votes of its member States that were members of the Union. The point of view of a number of Delegations had been and still was that it should have an extra vote, but the flexibility and the realism that guided their attitude during the meeting had led them to a compromise under which there would no longer be an extra vote for an intergovernmental organization.

1773.3 They did not accept though the proposal of the Delegation of the United States of America reproduced in document DC/91/19 but proposed another solution based on the Vienna Convention on the protection of the ozone layer, which had been accepted by the other Delegations.

1773.4 An essential difference between the proposal of the Delegation of the United States of America and the provision proposed as a compromise was that, in the first, an intergovernmental organization could only exercise the right to vote of those of its members that were present in the meeting, whereas the compromise text provided for a voting right in favor of an intergovernmental organization for the full number of its member States that were also members of the Union. To make it clear, if only three of the nine members of an intergovernmental organization were present in a Council meeting, the organization would be able to exercise the right to vote of its nine members. The second essential point was that there would be no extra vote for an intergovernmental organization. The proposal was therefore a real compromise.

1773.5 Mr. Kiewiet then read out the text of the compromise proposal, which was subsequently reproduced in document DC/91/127. (Continued at 1787)

1773.6 (Continued from 1418) Mr. Kiewiet added that Article 37, which was concerned with the entry into force of the Convention, was related to the issue of the number of votes. A proposal had been made by the Delegation of the United States of America (document DC/91/21) to the effect that any instrument deposited by an intergovernmental organization should not be counted as additional to those deposited by member States of that organization. As a result of the discussion, the Delegation of the United States of America had made another proposal which was reproduced in document DC/91/122. The informal group had been able to agree with that proposal.

1774. The PRESIDENT asked whether that meant that the Delegation of the United States of America withdrew its proposal reproduced in document DC/91/21.

1775. Mr. HOINKES (United States of America) replied that this was the case.

1776. The Conference took note of the withdrawal of the proposal of the Delegation of the United States of America reproduced in document DC/91/21. (Continued at 1842)

1777.1 (Continued from 1319) Mr. KIEWIET (Netherlands) stated that there was a third related issue, namely that of finances. All parties concerned had agreed on a provision for which the Delegation of Germany would make a formal proposal, to the effect that an intergovernmental organization would not have to contribute financially to the Union.

1777.2 Mr. Kiewiet concluded by thanking all participants in the discussions for their constructive attitude.

1778. The proposal mentioned by Mr. Kiewiet (Netherlands) was eventually published in document DC/91/128 as a proposal from the Delegations of Australia, Canada, France, Germany, Japan, the Netherlands, New Zealand, the United Kingdom and the United States of America. (Continued at 1798)

1779. The PRESIDENT observed that it would not be useful to have a discussion at this point in time in the absence of written proposals. However, the fact that nine member Delegations had worked together and agreed on the proposals was very promising. He therefore suggested the adjournment of the debate until Monday, March 18.

1780.1 (Continued from 242 and 1474) Mr. HOINKES (United States of America) wondered whether, before the meeting was closed, the Delegations could not give their opinion on the definition of an intergovernmental organization. If any report was to be prepared for the meeting on Monday, March 18, it might be useful to have this information so that the various issues could progress at about the same pace.

1780.2 He recalled that the informal group had devoted quite some energy under the very able chairmanship of Mr. Öster (Sweden) to the question of the definition of an intergovernmental organization. On the basis of those discussions, two additional proposals had been tabled by the Delegations of Germany

and New Zealand acting jointly (documents DC/91/124 and DC/91/125 Rev.). In view of the proposal reproduced in the latter document, his Delegation was prepared to withdraw its proposal reproduced in document DC/91/5. It was also of the opinion that if the proposal reproduced in document DC/91/125 Rev. was accepted by the Plenary, the proposal contained in document DC/91/124 might be superfluous. The definition of an international organization qualifying for membership in UPOV would then be dealt with exclusively in Article 34(1)(b). Mr. Hoinkes concluded by saying that the matter might perhaps be settled now.

1781. The PRESIDENT stated that, in view of the late hour, the matter should be postponed.

1782. Mr. BOGSCH (Secretary-General of UPOV) added that opening a discussion on the definition of "intergovernmental organization" and related matters would be to ask too much from those Delegations which had just taken cognizance of the proposals.

1783. Mr. ZUIJDWIJK (Canada) indicated that his Delegation had also made a proposal on Article 34 (document DC/91/126) and had also decided to withdraw it in favor of the proposal submitted by the Delegations of Germany and New Zealand in document DC/91/125 Rev.

1784. Mr. DELLOW (New Zealand) informed the meeting that the Delegations of Germany and his own country had agreed to withdraw the proposed amendment reproduced in document DC/91/124.

1785. The Conference took note of the withdrawal of the proposals reproduced in documents DC/91/5, DC/91/124 and DC/91/126.

1786. The PRESIDENT concluded that the only proposed amendment to be considered in relation to the definition of an intergovernmental organization was that reproduced in document DC/91/125 Rev. and relating to Article 34(1)(b). He then closed the meeting. (Continued at 1805)

<p>Nineteenth Meeting Monday, March 18, 1991 Morning</p>
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1787. (Continued from 1773.5) The PRESIDENT opened the meeting and the debate on the proposal of the Delegations of Australia, Canada, France, Germany, Japan, the Netherlands, New Zealand, the United Kingdom and the United States of America reproduced in document DC/91/127.

1788. Mr. BOGSCH (Secretary-General of UPOV) stated that he only had a small drafting proposal. An intergovernmental organization could not "exercise its right to vote" since it had no right to vote. The second sentence of

Article 26(6)(b) should then read as follows: "Such an intergovernmental organization shall not so vote if any of its member States votes, and vice versa." That proposal incorporated a second correction: it would be enough for the intergovernmental organization to be deprived of the possibility of voting in lieu of its member States if only one of them voted.

1789. Mr. KIEWIET (Netherlands) concurred with Mr. Bogsch (Secretary-General of UPOV). The text presented in the document was not correct. He thought, he had presented the following text on Friday, March 15: "... shall not exercise the right to vote of its member States..." The text proposed by Mr. Bogsch had the same effect and was acceptable.

1790. The PRESIDENT proposed to base the discussions on the text proposed by Mr. Bogsch (Secretary-General of UPOV). He asked whether any Delegation wanted to speak on the proposal. In the absence of any request for the floor to oppose the proposal he declared it adopted.

1791. The conclusion of the President was noted by the Conference. Article 26(6) was thus adopted as appearing in document DC/91/127, subject to the amendment suggested by Mr. Bogsch (Secretary-General of UPOV) and recorded in paragraph 1788 above. (Continued at 1945)

1792. Mr. DELLOW (New Zealand) pointed out that it would be necessary to adjust Article 38(2) on the revision of the Convention to the decision taken on Article 26(6). He suggested that the Drafting Committee should be entrusted with that task.

1793. The PRESIDENT observed that the same kind of problem arose in connection with Article 29. He suggested that the Drafting Committee should examine the whole issue of consistency.

1794. The Conference endorsed the suggestion of the President.

Article 26(7) - Majorities (Continued from 1245)

1795. Mr. ZUIJDWIJK (Canada) sought confirmation that, in adopting the proposal reproduced in document DC/91/127, concerning Article 26(6), the Conference had also adopted the consequential amendment of Article 26(7).

1796. The PRESIDENT confirmed that this had been the case.

1797. The statement of the President was noted by the Conference, with approval.

Article 29 - Finances (Continued from 1778)

1798. The PRESIDENT opened the debate on the proposal for the amendment of Article 29(3)(b) submitted by the Delegations of Australia, Canada, France, Germany, Japan, the Netherlands, New Zealand, the United Kingdom and the United States of America and reproduced in document DC/91/128.

1799. Mr. DMOCHOWSKI (Poland) stated that his Delegation supported this proposal, which represented a very good compromise.

1800. The PRESIDENT noted that no member Delegation objected to this proposal. He therefore declared it adopted.

1801. The conclusion of the President was noted by the Conference.

1802. Mr. BOGSCH (Secretary-General of UPOV) wished to speak on other parts of Article 29 to clarify the task of the Drafting Committee.

(i) Paragraph (3)(c) stated: "Any member of the Union may, at any time, indicate, in a declaration addressed to the Secretary-General, a number of contribution units..." This meant that if an intergovernmental organization wanted to contribute, it would have to do the same thing.

(ii) Paragraph (4)(b) stated: "The amount of the contribution of each member of the Union..." This would have to be qualified because some members of the Union might not pay contributions.

(iii) Paragraph (5)(a) stated: "A member of the Union which is in arrears in the payment of its contributions may not ... exercise its right to vote..." An intergovernmental organization would not be able to vote whether it paid voluntary contributions or not.

(iv) Paragraph (5)(b) stated: "The Council may allow the said member of the Union to continue to exercise its right to vote..." Again, this could not refer to all members of the Union, but only to States.

1803. The PRESIDENT noted that the points made by Mr. Bogsch (Secretary-General of UPOV) were clear and that the Conference would certainly agree.

1804. The conclusion of the President was noted by the Conference.

Article 34 - Ratification, Acceptance or Approval; Accession (Continued from 1786)

1805. The PRESIDENT opened the debate on the proposal for the amendment of Article 34(1)(b) submitted by the Delegations of Germany and New Zealand acting jointly and reproduced in document DC/91/125 Rev.

1806. Mr. BURR (Germany) explained that the proposal went back to an earlier suggestion that Article 34 should include elements that had originally been contained in the proposal made by the Delegation of the United States of America on Article 1 (document DC/91/5--definition of an intergovernmental organization).

1807. Mr. HOINKES (United States of America) stated that his Delegation supported the proposal.

1808. Mr. NAITO (Japan) stated that his Delegation also supported the proposal. He further proposed that, in subparagraph (ii), the words "and protection" be inserted after "grant" in order to be consistent with Article 2.

1809. Mr. BOGSCH (Secretary-General of UPOV) proposed that the drafting improvement be adopted.

1810. Mr. ESPENHAIN (Denmark) supported the proposal as amended by the Delegation of Japan. His Delegation being one of those which had been eager to provide for the possibility for intergovernmental organizations to become members of UPOV, he wished to thank the Delegations which, through their constructive attitude, had made this possible.

1811. The PRESIDENT concluded that the proposal reproduced in document DC/91/125 Rev., as amended by the Delegation of Japan, was adopted.

1812. The conclusion of the President was noted by the Conference.

Article 1(vii) and (viii) - Definitions of "Contracting Party" and "Territory"
(Continued from 222 and 225)

1813. The PRESIDENT asked the Delegation of the United States of America whether, in view of the decisions just taken, it still wished the Conference to come back to Article 1(vii) and (viii).

1814. Mr. HOINKES (United States of America) replied that his Delegation had no longer any objection to or query about Article 1(vii) and (viii).

1815. The PRESIDENT then declared Article 1(vii) and (viii) adopted as appearing in the Basic Proposal.

1816. The conclusion of the President was noted by the Conference.

Article 2 - Basic Obligation of the Contracting Parties (Continued from 272)

1817. The PRESIDENT recalled that the Delegation of Denmark had wished to come back to Article 2 and informed him that it wanted to make a declaration.

1818. Mr. ESPENHAIN (Denmark) apologized that he had been unable to inform the President on the latest developments. After consultation with his capital, it had been decided not to ask for a declaration on Article 2. The matter was a political question for his country, but his Delegation would take note of the conclusion of the discussion and simply ask that the discussion be duly reflected in the Acts of the Conference, including the President's conclusion.

1819. The PRESIDENT stated that this would be done.

Article 30 - Implementation of the Convention (Continued from 1336)

1820. The PRESIDENT reopened the debate on the proposal of the Delegation of the Netherlands reproduced in document DC/91/113.

1821.1 Mr. HIJMANS (Netherlands) recalled that he had already explained this proposal on Tuesday, March 12, and that the Conference had been unable to reach an agreement. The matter had been postponed until after the other institutional questions were solved.

1821.2 Mr. Hijmans recalled that this provision was needed to solve a problem that was specific to an intergovernmental organization providing for a single market. As was well known, there would be such an organization soon. In the context of a single market, the marketing of a variety in one State had to have the same consequences as the marketing in another State of that organization since one could no longer make a distinction between the national markets inside that organization.

1821.3 The provision therefore did not at all concern an international plant breeders' rights scheme or for that matter a European plant breeders' rights scheme. It was a provision that was needed in the Convention as an option to be used to accommodate the internal rules of the organization. In its absence, it would be very difficult for the EC member States which ratified the UPOV Convention to meet their obligations towards the EC. The proposed Article 30(2) related specifically to the marketing of varieties in the territory of an organization contemplated in Article 16 (exhaustion of the breeder's right) and in Article 6 (novelty).

1821.4 To conclude, Mr. Hijmans emphasized again that the provision was needed to solve a specific internal problem of the EC, that it had nothing to do with the possible accession of an intergovernmental organization to UPOV and that its use would be limited to those States belonging to an organization which required such a provision for the purpose of its internal market.

1822. Mr. BURR (Germany) stated that his Delegation supported the proposal subject to a small editorial change in the German text.

1823. Mr. BOGSCH (Secretary-General of UPOV) asked the Delegations of the States that were not members of an intergovernmental organization creating a single market whether it was acceptable to them to create a situation in which the decision of a country or an intergovernmental organization would not be known at all, or at least not in advance.

1824. Mr. HOINKES (United States of America) stated that Mr. Bogsch (Secretary-General of UPOV) had rightfully pointed to the implications of this particular proposal. When an intergovernmental organization had a particular plant breeders' rights scheme, it had the right to assume that any act done on the territory of one of its member States would have the same consequences on the whole territory of the organization. But as long as there were, side by side, national and Community breeders' rights, the proposal had rather far-reaching consequences which even European breeders might not want. They might not be particularly happy to find out that, all of a sudden, some Articles of the Convention, for instance Article 6, would no longer be applicable to them in relation to a national application for a plant breeder's right because the economic integration would have implications on that application which would normally only attach to a Community right application. For that reason, his Delegation had great trouble with the proposal. As long as a national plant breeders' rights system subsisted within a particular intergovernmental organization, it would be premature to make a provision of this nature.

1825. Mr. BOGSCH (Secretary-General of UPOV) added that the example given by Mr. Hoinkes (United States of America) could be extended further. Mr. Hoinkes had spoken in his intervention about the EC having a parallel system. The issue arose as of today irrespective of whether the EC ever became a member of UPOV and it arose not only in relation to the EC, but to any intergovernmental organization. The issue was particularly important in connection with the exhaustion of the rights in the circumstance where there was no supranational breeders' rights system.

1826. Mr. HIJMANS (Netherlands) wished to reply to the remarks made by Mr. Hoinkes (United States of America) and Mr. Bogsch (Secretary-General of UPOV). It was true that the provision related to the national plant breeders' rights system, and not to the Community plant breeders' rights system, because once there was a Community system and once it was exclusive, then the provisions of Articles 6 and 16 would by necessity cover the whole Community. But since there were only national plant breeders' rights systems at present and since the EC member States wanted to operate those national systems, they wanted a provision of the kind proposed because, as from the moment when the internal borders disappeared within the EC, creating a single market, the marketing of something in one part of that community had to have the same consequences in all other parts. That was the only way for those States to comply with their EC obligations.

1827. Mr. ZUIJDWIJK (Canada) agreed with Mr. Hoinkes (United States of America) that the particular proposal was cast too broadly in that it simply talked in terms of acts. He understood the last comment made by Mr. Hijmans (Netherlands) to mean that the primary concern was whether or not the rights of a breeder would be exhausted within the Community, in accordance with the rulings of the European Court of Justice in respect of intellectual property rights, and whether or not the owners of those rights had the ability to

prevent the free circulation of goods within the Community. If that was the case, the proposal should have been directed to Article 16 and a proposal should have been made to extend that particular Article to incorporate the concept that was being put forward. Mr. Zuijdwijk further wondered whether it should be an option for any Contracting Party to adopt international exhaustion. He had no firm instructions on this.

1828. Mr. VON ARNOLD (Sweden) asked whether it would be possible to solve this problem with a special agreement between the EC member States under Article 32 of the draft Convention.

1829. Mr. HIJMANS (Netherlands) replied to Mr. Von Arnold (Sweden) that the special agreements were meant for other circumstances, namely international cooperation. A special agreement could not solve the problem of the need for a special provision that would be contrary to a major Article in the Convention. There had to be a special provision in the Convention itself. Concerning the point raised by Mr. Zuidwijk (Canada), Mr. Hijmans stated that it would be possible to relate the proposed provision to Article 16, as regards exhaustion, and Article 6, as regards novelty. If that were to solve the problem, his Delegation could amend its proposal accordingly.

1830. Mr. BOGSCH (Secretary-General of UPOV) stated that if this was done and accepted, it would be a good thing to introduce an obligation to notify the Secretary-General of the contents of the law so that people outside the intergovernmental organization might also know that if they sold, say, in France, they would lose their rights in, say, Italy.

1831. Mr. HOINKES (United States of America) stated that he continued to have a problem with the proposal, not so much with the exhaustion, which intervened once the right had already been granted and exercised; certainly there were decisions within intergovernmental organizations, specifically within the EC, which had settled the matter. He had problems with the possibility that one would not be able to obtain a right under a national plant breeders' rights system because acts done in a particular country would be equated to those done in another.

1832.1 Mr. HIJMANS (Netherlands) replied that, as regards novelty, there was a specific problem which could not be ignored: once a variety had been marketed in the EC, then it could circulate freely on the whole territory of the EC and one could no longer say, in the context of a single market, that the marketing had taken place, say, in Italy and not, say, in the Netherlands. The problem to be dealt with in fact concerned all provisions relating to the acts of marketing.

1832.2 Mr. Hijmans added in reply to the point made by Mr. Bogsch (Secretary-General of UPOV) that his Delegation was of course prepared to have a provision in the Convention on the mandatory notification of any use made of the proposed Article 30(2).

1833. Mr. BOGSCH (Secretary-General of UPOV) observed that, as far as Article 6 was concerned, the proposal, if accepted, would imply that the deadline

for making an application would be one year instead of four years or six years as from the first date of marketing in a country other than the country of application. This difference was not so dramatic if the interested circles were notified by the competent authorities of the Contracting Party, that is, the individual State, since the intergovernmental organization would not necessarily be a party to the Convention. In any case, if the proposal was to be accepted, he would much prefer to have it limited to specified Articles, that is, to Articles 6 and 16.

1834. Mr. HOINKES (United States of America) stated that a limitation to Article 16 could be acceptable, but its extension to Article 6 was not necessarily acceptable. Mr. Hoinkes stated that he took the point that when something had been sold in a particular Community country, it was subject to the rules on free circulation. He could also imagine that once it had been put on the market with the consent of the breeder in any one country, nobody could keep it out of another one. But he could not see why a breeder should be deprived of the right to make an application with the full benefit of the provisions of Article 6 if the variety had been kept out of the country of application.

1835. Mr. HARVEY (United Kingdom) stated that the discussion had progressed to a point where his Delegation could support the proposal of the Delegation of the Netherlands, bearing in mind the specification of the Articles referred to and the obligation to notify. It was important for the members of the Community to have a provision of this kind in the Convention so that they did not act against the Convention when applying EC provisions, and also important for those members of the Union which were not members of the EC because what was being proposed would happen anyway within the Community; it was therefore better to be specific and to require notification than to do nothing at all.

1836. Mr. PREVEL (France) said that his Delegation supported the proposal for the same reasons that had been given by other speakers. He added that, in addition to the Community Regulation that would be binding on all member countries as a single law, a Directive would doubtlessly be established requiring the member States to harmonize their legislation and to align it on Community law, particularly with regard to Articles 6 and 16.

1837. The PRESIDENT observed that the position of the EC countries was now clear. He asked the Delegation of the Netherlands whether they could make a new proposal incorporating a reference to Articles 6 and 16 and an obligation to notify for discussion in the afternoon.

1838. Mr. BOGSCH (Secretary-General of UPOV) asked the Delegation of the Netherlands to consider whether, as far as Article 6 was concerned, such a provision would not be necessary until there was a Community plant breeders' rights system and the EC had become a member of UPOV.

1839. Mr. HIJMANS (Netherlands) replied that the need also existed before those conditions were met.

1840. Mr. BOGSCH (Secretary-General of UPOV) observed that the Netherlands, or for that matter any other EC member State which currently was a member of UPOV, only had a national plant breeders' rights system. Yet it had no difficulty whatsoever, in the context of a Common Market which imposed a special situation in respect of exhaustion, in applying a novelty criterion which provided for different grace periods in relation to domestic sales and sales abroad (including in other EC member States).

1841. The PRESIDENT adjourned the debate on the proposal of the Delegation of the Netherlands reproduced in document DC/91/113. (Continued at 1847)

Article 37 - Entry into Force; Closing of Earlier Acts (Continued from 1776)

1842. The PRESIDENT opened the debate on the proposal of the Delegation of the United States of America reproduced in document DC/91/122.

1843. Mr. HOINKES (United States of America) recalled that the proposal was a consequential amendment resulting from the decisions made with respect to Article 26.

1844. Mr. KIEWIET (Netherlands) supported the statement of Mr. Hoinkes (United States of America). The proposal was indeed part of the compromise on the issue of intergovernmental organizations.

1845. The PRESIDENT concluded that the proposal was then to be considered as adopted.

1846. The conclusion of the President was noted by the Conference.

<p>Twentieth Meeting Monday, March 18, 1991 Afternoon</p>

Article 6 - Novelty - and Article 16 - Exhaustion of the Breeder's Right
(Continued from 1841)

1847. The PRESIDENT opened the meeting and recalled that it had been agreed that the Delegation of the Netherlands was to submit a revised proposal on the question of territories in relation to Articles 6 and 16. Since no new proposal was before the Conference, he asked the Delegation of the Netherlands to inform the Conference on the state of affairs.

1848.1 Mr. KIEWIET (Netherlands) explained that there had been some difficulties in drafting a proposal on Articles 6 and 16 because it had been suggested at the previous meeting that a provision was only necessary in relation to Article 16. The discussion would have been much more easy if the provision could have been restricted to Article 16, and it had taken quite some time to study the problems involved and to get the necessary information from the legal services of the Commission. His Delegation had therefore not been in a position to submit the proposal on time; as a matter of fact, it had just been given to the Secretariat and it was only a matter of minutes until it could be tabled.

1848.2 Mr. Kiewiet added that the proposal was to insert a new paragraph in Articles 6 and 16. The paragraph would not require much study because it followed the suggestions made in the previous meeting. He concluded by apologizing for the inconvenience caused.

1849. Mr. BROCK-NANNESTAD (UNICE) observed that the proposal of the Delegation of the Netherlands reproduced in document DC/91/113 and now to be split into provisions to be inserted in Articles 6 and 16 highlighted the difficulties caused by the current state of affairs within the EC to the trade, and it was unfortunate that an international treaty such as the Convention had to face those difficulties. The problem would not be solved until there was a single breeders' rights system in the EC replacing all national systems. By then, of course, the EC member States would collectively exercise one vote only and also pay a contribution commensurate with the importance of the region. That was a development that was to be faced with open eyes, and the interested parties would need some time to learn to live with it.

1850. The PRESIDENT adjourned the discussion. (Continued at 1868)

REPORT ON THE WORK OF THE DRAFTING COMMITTEE

1851. The PRESIDENT invited Mr. John Ardley (Chairman of the Drafting Committee) to report on the work carried out by the Drafting Committee and reflected in document DC/91/130.

1852.1 Mr. ARDLEY (Chairman of the Drafting Committee) stated that he would simply highlight the most important items discussed by the Drafting Committee. The Committee would still have to complete that work, as the Conference would understand, in respect of the outstanding institutional provisions and also on one or two other points. The Committee had met so far on March 14, 15 and 18, with representatives of eleven member States attending. Except in one case, it had not changed the sense or intention of the principles agreed by the Plenary. There was one point on which it had some questions.

1852.2 As regards small points, Mr. Ardley drew the attention of the Conference to the following:

(i) The Committee found it difficult to use the word "party" in the meaning of "person, including corporate bodies." There was a risk of confusion with "Contracting Parties." The Committee had therefore substituted the expression "person who" for "party who or which."

(ii) (Continued from 160) In Article 1(iv), the Committee had tried to tidy up the definition of "breeder," particularly in relation to employed persons.

(iii) (Continued from 1004) In Article 1(vi), except for a very minor change, the Committee had retained the definition of "variety" agreed by the Working Group that had been specifically set up to find a definition.

(iv) (Continued from 424) The Committee had also tried to improve the structure of Article 6(1) (the novelty criterion) by reducing the degree of repetition in subparagraphs (i) and (ii). The Committee would have to come back to Article 6 since there was still an outstanding question.

(v) (Continued from 538) Concerning Article 8 (homogeneity), the Committee debated the drafting, particularly whether it should refer to the manner of the variety's propagation rather than its features. It decided on balance to retain the word "features." It also debated whether that Article and Article 9 (stability) (Continued from 568) should refer to the "expression of the characteristics" in the light of a change proposed in Article 14(2) relating to essentially derived varieties. It still had to reach a conclusion on this point.

1852.3 (Continued from 638 and 735) The major problem encountered by the Committee was in Article 11 (priority). There was some inconsistency between the requirements of paragraphs (2) and (3) as a result of the adoption of the amendment reproduced in document DC/91/95, which introduced the possibility of requiring the provision of samples or other evidence to confirm that the subject matter of the second application was the same as that of the first. This appeared to overlap the requirements in paragraph (3), which allowed up to two years for the provision of additional documents and material. It would be helpful to the Committee to receive some guidance from the Plenary as to what exactly was intended. To expand on this question, the understanding of the Committee was that the information and samples possibly required under paragraph (2) related specifically to the claim of the right of priority and that the elements referred to in paragraph (3) related to other materials that might be required, not necessarily but possibly, in support of the priority claim. This would not be clear to those who read the Convention unless it was clarified in the text what kind of material or information was to be provided within the three-month period and what was the difference between that and the material or information required within the two-year period. For the time being the same words appeared in square brackets in paragraphs (2) and (3). (Continued at 1853)

1852.4 (Continued from 1549, 1615 and 1636) In Article 14, the Committee had made the following amendments:

(i) In paragraph (1)(a)(i), it had added the word "multiplication" in brackets after "reproduction" in the English text to ensure that the meaning was clear and to overcome what was identified as a possible difference of interpretation between the three languages.

(ii) The Committee had also been asked to look at the best way of framing Article 14(1), in a way that would best separate out the various acts and their subject matter whilst making it clear, firstly, that the protection relating to propagating material was mandatory but could be added to by Contracting Parties, secondly, that the protection relating to harvested material was mandatory and, thirdly, that the extension to directly made products was

optional. The Committee had therefore restructured the former paragraph (1) into paragraphs (1) to (4) and provided in paragraph (4) that Contracting Parties may add to the acts mentioned in items (i) to (vii) of the former paragraph (1)(a) (new paragraph (1)).

(iii) The former Article 14(2) relating to essentially derived and certain other varieties thus became Article 14(5). The Committee had also been asked to consider its structure. The main problem involved the need to express the meaning of "essentially derived variety" in such a way that it was the expression of the essential characteristics of the initial variety and the retention of that expression that was important. It had also been felt important to ensure that the examples, such as the selection of a natural or induced mutant, were not definitive but were just examples. In view of the need for technical precision and internal consistency in this paragraph, the Committee had asked three of its members, Mr. Bould (United Kingdom), Mr. Guiard (France) and Mr. Roth (United States of America) to form a subcommittee to produce a revised wording together with the Secretary of the Committee. The text of paragraph (5)(b) was based largely upon their work.

1852.5 (Continued from 1666) In Article 16 (exhaustion of the breeder's right), paragraph (1)(ii) now referred to the export for food consumption purposes. The Committee believed that this term would include feed for animal production purposes. In paragraph (2), the term "harvested material" had been expanded to include entire plants and parts of plants, to be consistent with Article 14(2). (Continued at 1941)

1852.6 Concerning the administrative and treaty-law provisions, the Committee had incorporated most of the decisions taken at the Conference during the morning. It would have to look more closely at some specific questions on the basis of the decisions taken at this meeting of the Conference. It had considered one of the three supplementary documents.

1853. (Continued from 1852.4) The PRESIDENT stated that the Conference would have to deal with the question of Article 11 first. He invited Mr. Ardley (Chairman of the Drafting Committee) to explain again the nature of the problem.

1854.1 Mr. ARDLEY (Chairman of the Drafting Committee) stated that the Committee required guidance on what exactly were the requirements under paragraph (2). Its assumption was that anything that was to be provided in accordance with paragraph (2) should relate specifically to the priority claim and might include, in addition to the documentary evidence to confirm that the first application was lodged in another country, samples of some kind to confirm that the variety which was the subject of the priority claim was in fact the same variety as that which was the subject of the original application. The Contracting Party could demand some plant material at the time that the priority claim was lodged or within three months of that date.

1854.2 Paragraph (3) then appeared to be saying that the breeder was allowed a period of two years after the expiration of the period of priority to supply information, documents or material required by that Contracting Party. The intention behind that provision, which was taken over from the former Article 12, had been to allow breeders who did not have enough plant material to furnish to the authorities of all the Contracting Parties time to multiply their plant material and provide it to those authorities. On the other hand,

one could argue, although Mr. Ardley would not follow that view, that paragraph (3) was simply stating that the breeder had up to two years to provide the material required for the purpose of the examination under Article 12. The Committee needed to be sure that Article 11(3) related solely to the priority claim, and if it did, it needed to be clear about what was required in the three-month period and what was required in the two-year period.

1855.1 Mr. ESPENHAIN (Denmark) stated that he should at least try to explain why his Delegation made its proposal. As the Conference might recall, there had been no problem with the Basic Proposal and the provision without the text in square brackets. The Conference had tried to overcome a problem which existed in the United States of America. His Delegation had said that, compared to the present situation and the present Convention, member States would in future deal with applications for the protection of varieties claiming the priority of applications for various forms of protection. Its argument was that, because priority was very commonly used within the plant breeders' rights systems, it would like to ensure that the authorities of its country would not grant priority to applications of a more abstract nature which in fact would not cover a variety--or to ensure that the variety existed as such, as it would normally under the plant breeders' rights system.

1855.2 Mr. Espenhain added that he saw the problem arising from the fact that paragraph (3) gave another period for the submission of plant material for the examination. Mr. Ardley (Chairman of the Drafting Committee) had very correctly pointed out that this might be related to the national requirements under Article 12, although that Article was not explicit; the practice normally was to give the breeder a certain deadline for furnishing the material, and if the deadline was not met, he could not keep his application valid.

1855.3 The concern of his Delegation would be fully taken away if it were specified in Article 12 that the acceptance of an application implied the requirement to furnish material. The proposal of his Delegation aimed at solving the problem in a practical way. There might be reasons why one would not require such material, but it would have to be left to the authority granting the priority to satisfy itself of the validity of the explanation or the evidence given. The only way to overcome that problem, Mr. Espenhain repeated, was, as Mr. Ardley (Chairman of the Drafting Committee) had pointed out, to have a stricter provision in Article 12, although he did not know whether this would in fact cover the situation for other forms of protection, in particular where the applicant was not required to furnish material. He wished to hear reactions to that point.

1855.4 Mr. Espenhain concluded by emphasizing that the reason for which his Delegation was so strict with this provision was that if one was not sure about the existence of material in respect of which priority was granted, one might be forced to postpone the decision on the grant of a plant breeder's right in respect of another variety for three or four years--since one could not take a decision on distinctness unless one was sure to have all the material in the reference collection. If the right under Article 11(3) was to be commonly used by breeders in future, the authorities would simply be forced to postpone decisions. That was surely not the wish of the breeders or of the authorities.

1856.1 Mr. BURR (Germany) said that three matters had to be dealt with:

(i) Firstly, the copies of the documents constituting the first application had to be furnished as was the case under the present Convention.

(ii) Secondly, there were now, additionally, samples and other evidence that the variety which was the subject matter of both applications was the same, which had been the proposal of the Delegation of Denmark and had been adopted by the Conference. It was not clear whether those samples or other evidence had to go so far that the examination under Article 12 could be carried out with them. His view was that such should not be the case and he wished to say that straight away. They could be quite simple samples and evidence.

(iii) The third aspect was mentioned in paragraph (3), that provided for deferred examination.

1856.2 Anyone retracing the history of that provision would discover that the 1961 Convention had quite obviously, although not altogether clearly, provided that in the event of a priority, the breeder should have the possibility of submitting material for the examination at a later date. The examination did not therefore have to start already in the year of the application or in the following year. That could be accommodated in the wording by laying down that the breeder was entitled to an appropriate period of time to submit to the authorities of the Contracting Party, with which he had filed the subsequent application, the information, documents and material required under the regulations of the Contracting Party for examination under Article 12. All that was required therefore was a reference to Article 12 in order to clarify the meaning and purpose of Article 11(3).

1857. The PRESIDENT asked Mr. Ardley (Chairman of the Drafting Committee) whether this explanation would enable the Committee to complete its work.

1858. Mr. ARDLEY (Chairman of the Drafting Committee) replied that this had indeed been one of the options considered in the Drafting Committee; but at least one Delegation had said that it was not its understanding at all of the intention behind the proposal, which was why the Committee had submitted a problem to the Plenary rather than a solution. He suggested that, in the absence of any other intervention, the Drafting Committee should take the suggestion of Mr. Burr (Germany) as a mandate from the Plenary.

1859.1 Miss BUSTIN (France) said that it was quite obvious that the background explanations given by Mr. Burr (Germany) would not be satisfied by the present wording of paragraph (3) of Article 11. That paragraph permitted Contracting Parties to afford to breeders a two-year period for furnishing the documents and material intended, not for the technical examination required by Article 12 in relation to a subsequent application, but for examining the claim to priority itself.

1859.2 The situation that resulted was as follows: a breeder whose priority right had been recognized would have his subsequent application examined immediately, without any delay. He would have to furnish plant material in a quantity sufficient to carry out the technical examination. And then, quite abnormally, after a period of two years the authority that had registered the subsequent application would again receive a sample of the plant material connected, in that case, with examination of the priority claim, in order to verify the material existence of a variety which it had already examined in full in accordance with the technical criteria laid down by the Convention. It was therefore obvious that paragraph (3) would have to be completely redrafted.

1860.1 Mr. HOINKES (United States of America) stated that his Delegation had some difficulty with reconciling paragraphs (2) and (3), considering the fact that paragraph (3) provided a two-year period in which a Contracting Party could require that any additional documents and material supporting the priority claim be filed. It might be, Mr. Hoinkes said, that the wording "supporting the priority claim" had not been in the 1978 text and had been inserted in some way or other in paragraph (3) before paragraph (2) was amended. He wondered whether the authorities that had a certain concern regarding the validity of the priority claim could accept that the wording in paragraph (2) be amended for the following reasons: it was one thing to claim priority; it was another thing altogether for priority to be needed in the course of examination.

1860.2 In many instances, the claim of priority would never be needed because, during the period of up to one year between the first filing and the subsequent filing, no intervening act occurred that would prejudice the obtaining of protection within the second Contracting Party. The claim of priority only became important when, in the course of the examination in the second Contracting Party, the question arose whether or not acts that occurred during that year should or should not be prejudicial to the obtaining of protection. If that was so, it would perhaps not be unreasonable to depart from the present wording about an authority being able to obtain, within not less than three months, samples or other evidence that the variety that was the subject matter of both applications was the same.

1860.3 In making a proposal here and now, and orally, Mr. Hoinkes was conscious that the time was late. He wondered, however, whether it might be acceptable to meet the concerns that had been expressed. The proposal was that, in paragraph (2), after the words: "a copy of the documents which constitute the first application, certified to be a true copy by the authority with which that application was filed," there should be a new sentence, as follows: "Samples or other evidence that the variety which is the subject matter of both applications is the same may be required by the authority when the claim of priority becomes necessary in the course of examination." If that were accepted, then paragraph (3) would have to be appropriately amended, and possibly moved into Article 12. Any reference to "supporting the priority claim" would then become superfluous in paragraph (3).

1861. Mr. KIEWIET (Netherlands) stated that he would not react on the proposal just made orally by Mr. Hoinkes (United States of America). His Delegation was on the same line as the Delegation of Denmark, namely that the words between square brackets should be included in paragraph (2) without the square brackets and deleted from paragraph (3). If samples or other evidence that the variety was the same in both applications were requested under paragraph (2), there would be no necessity to request them under paragraph (3). The suggestion made by Mr. Hoinkes (United States of America) was perhaps a better proposal than the one of the Delegation of Denmark adopted by the Conference. But that had to be studied further.

1862.1 Mr. ESPENHAIN (Denmark) stated that there might be a problem of language or understanding. The reason why his Delegation had been so insistent on this paragraph was that it wanted to overcome the problem of the United States of America. Priority claims were dealt with every day in the Danish office, and it was not a question for it to ask for proofs only where they might be necessary to substantiate the priority. In fact, the office asked for proof systematically because, when the priority right was claimed, the claim was always relevant.

1862.2 Present legislation did not provide for the one-year period of grace under Article 6; the marketing or selling of the variety, as such, thus destroyed novelty. Very often, breeders would market the variety and subsequently make an application on the basis of the priority of a prior application in another country to overcome the novelty problem. Priority was therefore not an abstract provision.

1862.3 The Delegation of Denmark wanted to be sure that, if an adjustment was made, not only the priority claim, but also the application were valid. It wanted to be able to determine in a very short period whether the application was valid and whether the novelty requirement was satisfied. That was where the language problem cropped up. The situation in the field of patents might be different.

1863. The PRESIDENT stated that he would adjourn the debate in view of the late hour. He stated that the text proposed in square brackets in Article 11(2), in document DC/91/130, had been decided by the Plenary. The text should therefore be kept without the square brackets. Concerning paragraph (3), he suggested that the Delegation of Germany should submit its proposal in writing for consideration at the next meeting.

1864. Mr. BURR (Germany) said that he would willingly submit a written proposal to the Secretariat. He added that he would also be able to accept the phrase in square brackets presently being made an option, thus combining the wishes of the Delegation of Denmark and the wishes of the Delegation of the United States of America.

1865. Mr. LLOYD (Australia) stated that his Delegation would support such an objective.

1866. Mr. HOINKES (United States of America) observed that the relevant sentence was already optional. He wondered, however, whether it might be possible to hold open paragraph (2) to see whether some private discussions after the close of the meeting might yield a more satisfactory language.

1867. The PRESIDENT stated that this would be acceptable if the proposed wording did not entail an overhauling of the text. (Continued at 1881 for the consideration of Article 11 and at 1939 for the report on the work of the Drafting Committee)

CONSIDERATION OF THE DRAFT NEW ACT OF THE UPOV CONVENTION

Article 6 - Novelty - and Article 16 - Exhaustion of the Breeder's Right (Continued from 1850)

1868. The PRESIDENT opened the debate on the proposal of the Delegation of the Netherlands reproduced in document DC/91/132.

1869.1 Mr. BRADNOCK (Canada) stated that his Delegation had no problem with the proposal insofar as it related to Article 16, the exhaustion of the right. With regard to Article 6, however, the proposal created some peculiarities and some difficulties. It meant that anybody who wanted to protect a variety in several countries in Europe would have to apply within one year in all those countries, because once a sale had taken place in one country, there would only be one year allowed for applications in any of the other countries. Those countries would then work on a different basis than the others, where the four-year or six-year period would be applicable.

1869.2 Mr. Bradnock also wondered how well this amendment to Article 6 would work out with regard to Article 11; if he understood the way the Convention was worded, a breeder might sell a variety for a year and then claim priority for a year so that he would be able to have two years of sale within a country. What rule would then prevail? The proposal had a lot of implications and his Delegation had to oppose it as regards Article 6.

1870.1 Mr. HOINKES (United States of America) concurred with Mr. Bradnock (Canada). If there were a system that covered the whole territory of an intergovernmental organization, his Delegation would not have a problem with the proposal in Article 6. But since there was no such system, it would make a shambles of several Articles of the Convention; Mr. Bradnock (Canada) had mentioned Article 11 in that respect, but who could know what else lurked in the depths of the Convention? With respect to Article 6, it would be a very bad precedent to accept the proposal in anticipation of something that had not occurred yet and might not occur at all. While his Delegation had no problem with its application to Article 16, it considered that its application to Article 6 was very difficult, if not impossible.

1870.2 Mr. Hoinkes added that it was not the fault of the Delegation of the Netherlands that this subject had been brought up so late. Nevertheless, it was rather unfortunate to have to discuss so late in the proceedings something as fundamental as this proposal.

1871. The PRESIDENT observed that there was no opposition to the proposal with respect to Article 16. He proposed to declare it adopted with respect to Article 16 and come back to Article 6 at the next meeting.

1872. Mr. HAYASHI (Japan) stated that his Delegation would like to reserve its position on Article 16.

1873. The PRESIDENT asked the Delegation of Japan whether it opposed the proposal.

1874. Mr. HAYASHI (Japan) replied that his Delegation needed more time to consult the capital.

1875. The PRESIDENT stated that, although he understood the wish of the Delegation of Japan, he wished to close the matter, otherwise the discussion could go on for days.

1876. Mr. HAYASHI (Japan) stated that his Delegation wished it to be recorded that there was no unanimous acceptance at this stage.

1877. The PRESIDENT stated that if any Delegation opposed the proposal, he would put it to a vote, and one would then know exactly who was in its favor and who was opposed.

1878. Mr. LLOYD (Australia) observed that document DC/91/132 had been tabled an hour ago, and it was not fair to pressure a Delegation into committing itself in a very short time on an issue which may be very important to it.

1879. The PRESIDENT replied that the matter was not new and that the Delegation of Japan had not given its answer as to what it meant by reserving its position. He wished to conclude that the proposal was accepted with respect to Article 16 with a reservation from the Delegation of Japan and that, with respect to Article 6, the decision on the proposal would be deferred to the next meeting.

1880. The conclusion of the President was noted by the Conference. (Continued at 1918 and 1968)

<p><u>Twenty-first Meeting</u> <u>Tuesday, March 19, 1991</u> <u>Morning</u></p>
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Article 11 - Priority (Continued from 1867)

1881. The PRESIDENT opened the meeting and the debate on the proposal of the Delegation of Germany reproduced in **document DC/91/133**.

1882. Mr. BURR (Germany) referred to the discussion on the meaning of paragraph (3) that had taken place in the preceding meeting. In the light of what he had already read into that paragraph, he had attempted to make it clear that paragraph (3) referred to examination under Article 12. Consequently, he had then attempted to adapt the wording in respect of the required information, documents and material as closely as possible to the text of Article 12(3).

1883. Mr. ESPENHAIN (Denmark) stated that his Delegation supported the proposal.

1884. Mr. BRADNOCK (Canada) stated that his Delegation agreed with the proposal. In terms of consistency between paragraphs (2) and (3), however, there was an oddity since the first referred to documents and samples and the second to documents or material. It seemed to him that "material" should be referred to in both.

1885. The PRESIDENT asked what would be the fate of the reference to samples.

1886. Mr. BUTLER (Canada) observed that the proposal of the Delegation of Germany referred to "documents or material," when paragraph (2) just talked in terms of documents when referring to the same sort of things. The word "documents" did not adequately cover the submission of samples and, to be consistent, paragraph (2) should read: "documents or material which constitute the first application." This was not a matter of substance.

1887. Mr. GUIARD (France) wished firstly to give the support of his Delegation to the proposal made by the Delegation of Germany. With regard to paragraph (2), he added that the request for samples to supplement the reference collections for examining other varieties ought to be maintained. The difference between "sample" and "material" derived from the fact that, depending on the species concerned, a sample was sufficient to include the variety in the reference collections and that, for examination of a variety, more material was needed than just a sample. The difference ought therefore to be maintained.

1888. Mr. ESPENHAIN (Denmark) observed, for the benefit of the Drafting Committee, that the heading of paragraph (3) might no longer be adequate in view of the deletion of the reference to "supporting the priority claim."

1889. Mr. BOGSCH (Secretary-General of UPOV) asked the Delegation of Germany whether its proposal had anything to do with the right of priority under Article 11. If it had nothing to do with it, the title should not be changed because, if the word "priority" appeared in paragraph (3), it was only for the purpose of computing a time limit.

1890. Mr. BURR (Germany) replied that the proposal concerned the priority insofar as for those varieties for which priority was claimed, the examination was not to begin immediately after the filing of the application. It was intended to give the breeder an opportunity of furnishing over a period of some years the material required for examination in those countries in which he had claimed priority. The proposal was of course connected with examination under Article 12. It was therefore quite possible to include the provision in either Article 11 or Article 12.

1891. Mr. ARDLEY (United Kingdom) stated that his Delegation supported the amendment proposed by the Delegation of Germany. The provision was in its proper place in Article 11, since it related to the priority date and since the longer period should not be allowed in all cases, but only where a priority claim was involved. As to the meaning of "samples," he observed that the word referred to plant material and not documents. The addition of the word

"material" after "documents" would not change the sense, but would make it clear that one was talking about plant material, which was the intention of the word "samples." Mr. Ardley supported therefore the inclusion of the words "or material."

1892. The PRESIDENT proposed to settle first the question of Article 11(3) and to come back to Article 11(2) thereafter to see whether there was sufficient support for adding "or material."

1893. Mr. HOINKES (United States of America) wondered why, if paragraph (3) were adopted, somebody who claimed priority should have the obligation to provide all the necessary information and material required for the purpose of examination after a period of two years while, if priority was not claimed, the last sentence of Article 12 would apply, which only said that: "for the purposes of examination, the authority may require the breeder to furnish all the necessary information, documents and material." Was not there a discrimination against a breeder who claimed priority? Or should the last sentence of Article 12 be understood to imply that, for purposes of examination, the authorities would require a breeder to furnish the necessary information or material before two years or for that matter within one year after he had filed his application?

1894. The PRESIDENT invited the Delegation of the United States of America to clarify its wish in the form of a drafting proposal.

1895. Mr. BURR (Germany) replied that the matter of time limits, subject to Article 11(3), was a matter for the legislation of the individual member of the Union. From a practical point of view, the breeder had an interest in obtaining protection as rapidly as possible after filing his application. The breeder would therefore not necessarily insist on a later commencement of the examination. Where he did that, however, when claiming priority, he would indeed have the possibility, under German law, of requiring a deferred examination. There was therefore no inequality in treatment.

1896. Mr. ARDLEY (United Kingdom) emphasized that there was a difference between Article 11 and Article 12. The last sentence of Article 12 did not say when the authority might require the necessary information, etc. That was left, as Mr. Burr (Germany) had said, to the member States. One could, for purpose of clarity, add something like "within such period of time as they may specify" to make it clear that it was for the member States to decide on the deadline, but that was not necessary. Where a subsequent application was filed with a priority claim, the breeder was granted an additional period of two years for the reason already discussed, namely that he might not have enough material to furnish to all the authorities with which he had made an application with a priority claim.

1897. The PRESIDENT wished to conclude the debate on Article 11(3), noting that since there was no opposition to the proposal of the Delegation of Germany reproduced in document DC/91/133, it could be declared adopted. He wished to open the debate on the proposal to add the words "or material" after "documents" in Article 11(2).

1898. Mr. GUIARD (France) asked for clarification of the proposal. He was unsure as to the meaning of the word "material" in the phrase "a copy of the documents or material which constitute the first application."

1899. Mr. HEITZ (Office of the Union) said that the proposal could be to draft the second sentence of paragraph (2) as follows: "The authority ... may require the breeder to furnish ... a copy of the documents which constitute the first application ... including material [samples] or other evidence that the variety which is the subject matter of both applications is the same."

1900. Mr. HOINKES (United States of America) recalled that the President had asked its Delegation for a proposal reflecting its wishes in respect of Article 11(3). He noted that the last sentence of Article 12 provided that "the authority may require the breeder to furnish ..." while Article 11(3) provided in effect that the breeder had to furnish ... within a period of two years. In order to harmonize those provisions so that a greater onus would not be put on the breeder who claimed priority, the suggestion would be to amend the text proposed by the Delegation of Germany to the effect that the authority of the Contracting Party with which the breeder had filed the subsequent application, may require that the breeder furnish material, etc. within a period of not less than two years after the expiration of the period of priority... In other words, the intent of the proposal was to permit the authorities to require something, but not before the expiration of two years.

1901. The PRESIDENT asked whether any member Delegation supported the idea. He observed that if there was support, the proposal would have to go back to the Drafting Committee.

1902. Mr. HOINKES (United States of America) stated that his proposal was only a small drafting point which would make the two provisions concerned more balanced.

1903. The PRESIDENT replied that the proposal could not be considered as a small drafting point in view of the importance of the changes suggested.

1904. Mr. ESPENHAIN (Denmark) stated that the proposal was not a drafting point in his opinion. He supported the proposal of the Delegation of Germany. He reiterated his earlier comment that he would like to propose the deletion of the words "supporting" in the title of Article 11(3).

1905. Mr. HEITZ (Office of the Union) emphasized that paragraph (3) commenced with the words: "The breeder shall be allowed a period of two years"; that in fact fixed a deadline. It continued with: "in which to furnish ... any additional documents and material"; the words "any additional" suggested that there might be cases where nothing additional would be required. Furthermore, the proposal of the Delegation of Germany included a reference to Article 12 which used the phrase "the authority may require the breeder..." Finally, the last words of paragraph (3) were: "as required by the laws of that Contracting Party," which again referred to an option to require or not require documents and material. He wondered therefore whether paragraph (3)

did not include so many references to possibilities that the point raised by the Delegation of the United States of America was amply covered, in which case there would be no need for an additional document and for an additional meeting of the Drafting Committee.

1906. Mr. HOINKES (United States of America) stated that this clarification certainly went a long way towards meeting the concerns of his Delegation. He added that the proposal of the Delegation of Germany referred to a breeder having to submit "all the necessary information...", while the original text of Article 11(3) spoke of "any." He wondered what would happen if, for instance, after the expiration of the two years, it turned out that a small sample or a minor document had been omitted. Under the proposal of the Delegation of Germany, the breeder would not have met the requirement to submit "all the necessary information..." and his application would be rejected. There was a certain amount of inflexibility in the proposal that gave rise to some concern. The text could perhaps be improved by replacing "all the necessary information" by "any necessary information."

1907. Mr. BURR (Germany) said that the proposed amendment presented no problems to him. The wording would depart a little from the wording of Article 12, but that was no problem.

1908. The PRESIDENT asked whether the proposal of the Delegation of Germany reproduced in document DC/91/133 as amended by the Delegation of the United States of America was acceptable. In the absence of any opposition, he declared it adopted.

1909. The conclusion of the President was noted by the Conference.

1910. Mr. BOGSCH (Secretary-General of UPOV) wished to clarify the text approved for paragraph (2) because there would be no Drafting Committee meeting. The President had suggested an addition to the end of the paragraph whereas Mr. Heitz (Office of the Union) had proposed in essence to substitute the word "material" for "samples."

1911. Mr. BUTLER (Canada) stated that he had not expected that his comments would result in such a long discussion. The problem arose out of the word "including" which preceded the word "samples." If the word "including" were amended to "and," then there would be no need to deal with material at all. That was another solution.

1912. The PRESIDENT asked the Delegation of Canada to indicate its choice.

1913. Mr. BUTLER (Canada) replied that, for the sake of simplicity, he would prefer the word "including" to be substituted. The text would then read: "documents ... and samples."

1914. The PRESIDENT asked whether this amendment was agreeable. In the absence of any opposition he declared it adopted.

1915. Mr. ESPENHAIN (Denmark) asked whether the Conference also agreed to delete the word "supporting" in the title.

1916. The PRESIDENT stated that the word was of course to be deleted in view of the new contents of the provision.

1917. The Conference noted the conclusions of the President.

Article 6 - Novelty (Continued from 1880)

1918. The PRESIDENT reopened the debate on the proposal of the Delegation of the Netherlands reproduced in **document DC/91/132**.

1919. Mr. KIEWIET (Netherlands) stated that the proposal had already been amply discussed in and outside the meeting room and that he could not add much to clarify it. He wished to stress, however, that the provision was not intended to give the possibility to the States belonging to an intergovernmental organization to discriminate against foreign breeders. The fear that had been expressed in that respect was not justified. In addition, the proposed provision was only permissive. It would still have to be discussed within the EC whether the provision would be used.

1920. The PRESIDENT noted that **document DC/91/134**, containing a joint proposal of the Delegations of France, Germany and of the United Kingdom, was being distributed and that there would be a proposal from the Delegations of Canada and the United States of America (document DC/91/135). He invited a sponsoring Delegation to introduce the first proposal.

1921. Mr. HARVEY (United Kingdom) stated that there was not much difference between the proposal of the Delegation of the Netherlands and the proposal reproduced in document DC/91/134. Both were permissive and designed to allow member States acting jointly to make a uniform provision for their countries. The difference was that the latter proposal was not referring specifically to member States of an intergovernmental organization. The Delegations submitting the proposal saw no reason why the enabling provision should be limited to member States of an intergovernmental organization.

1922.1 Mr. HOINKES (United States of America) stated that the joint proposal of the Delegations of France, Germany and of the United Kingdom, while it did not make any reference to intergovernmental organizations, appeared to have some rather strange consequences. What was the meaning of: "Any two or more States members of the Union may provide for a period of less than four years..."? Would a reduction of the period of grace decided by a State, member of the Union, not come into force until a second State provided--in agreement with the first one or independently--for the same reduction? Furthermore, he wondered why this provision had been made non-specific with respect to intergovernmental organizations. He would imagine that countries outside an intergovernmental organization were not worried about this kind of situation in the first place, so that the proposal would not find any favor with them.

1922.2 Turning back to the proposal of the Delegation of the Netherlands, Mr. Hoinkes asked whether the permissive clause really made sense if one Contracting Party within an intergovernmental organization could suddenly decide to assimilate acts done on the territories of the other member States while the others would not. The proposed amendment should at least ensure that the situation proposed would not take effect until all member States of the intergovernmental organization that were also members of UPOV had exercised the possibility under consideration. To that effect, a proposal was being made by the Delegation of Canada and his Delegation. The proposal was to add another sentence that said that this would come into force only once the intergovernmental organization became a Contracting Party itself.

1923.1 Mr. NAITO (Japan) stated that his Delegation was very embarrassed by the proposal of the Delegation of the Netherlands even after having received detailed clarifications and explanations on the previous day. It was even more embarrassed by the proposal of the Delegations of France, Germany and of the United Kingdom. It had not expected this sort of proposals to be submitted at the last minute before the adoption of the new Act.

1923.2 Concerning the latter proposal, Mr. Naito stated that his Delegation could not understand its background. If any two or more States were permitted to deviate from the provisions of the Convention, great problems would be caused to other countries. The Delegation could not understand why this should be permitted.

1923.3 Concerning the proposal of the Delegation of the Netherlands, Mr. Naito stated that his Delegation had now begun to understand the basic situation behind the proposal. However, it still had concerns about its consequences for countries outside the EC. It therefore needed more time to reach a conclusion amongst its members.

1924. The PRESIDENT suspended the meeting for a coffee break and invited the Delegations to discuss among themselves the various proposals under consideration.

[Suspension]

1925.1 Mr. KIEWIET (Netherlands) stated that there had been a discussion amongst the member States of the EC that were also members of the Union, as a result of which his Delegation would like to propose an amendment to its proposal reproduced in document DC/91/132 in the hope that it would make it possible for more Delegations to support the position of those States. The background of the amendment was one of the objections raised against the proposal, namely that it gave the Contracting Parties the possibility to act in isolation. The proposal would be changed in the sense that only a joint effort of all the Contracting Parties that were members of an intergovernmental organization would be permitted.

1925.2 The proposal would read as follows: "For the purposes of paragraph (1), the Contracting Parties which are member States of one and the same intergovernmental organization may assimilate jointly acts done on the territories

of the States members of that organization to acts done on their own territories and, should they so do, shall notify the Secretary-General accordingly."

1925.3 Turning to the proposal of the Delegations of Canada and of the United States of America reproduced in document DC/91/135, Mr. Kiewiet recalled that the purpose of the proposal of his Delegation was to cover a situation which would exist in the period in which an intergovernmental organization was not yet a member of the Union. The situation to be covered was especially that in the EC after the date of January 1, 1993. So, although his Delegation appreciated the efforts made by the Delegations of Canada and of the United States of America to find a solution for the EC problem, it regretted that the solution could not be retained.

1926.1 Mr. BURR (Germany) first explained that, if the amended proposal made by the Delegation of the Netherlands was well accepted, his Delegation would of course be willing to withdraw the proposal made jointly in document DC/91/134.

1926.2 As to the matters that had been raised by the Delegations of Japan and of the United States of America before the coffee break, Mr. Burr wished to present the question in somewhat more detail. The difficulty lay in Article 6(1)(ii), i.e., in the four or six-year period of grace for novelty. He wished to take the example of the United States of America.

1926.3 It was obvious that a breeder in Pennsylvania could not enjoy a four-year period of grace under American law for an application in Texas or in California. Perhaps that had not always been the case in the history of the United States of America. In Europe, however, the present situation was much more complex since an attempt was being made to do something that had occurred in America over a century ago. Unfortunately, the situation at the present moment was one in which the member States still had considerable sovereignty, including the right to introduce their own systems for plant variety protection. Although a draft Regulation on Community plant variety rights had been submitted, it had not yet been adopted. It was therefore to be expected that for a number of years Community breeders' rights and national breeders' rights would continue to exist side by side.

1926.4 It was foreseeable that some time in the future the day would come on which the EC member States in UPOV would no longer speak with nine voices or so, but with one only. At present, however, they were faced with the situation that from January 1, 1993, onwards they could possibly no longer be in a position to reconcile the undertaking under Article 6(1)(ii) with certain regulations of the single market. That would require more flexibility than Article 6(1)(ii) could offer at present. His Delegation wished to avoid the Government of Germany having at some point to decide that it had to fulfill its obligations under the Common Market and announce its withdrawal from UPOV due to that provision.

1926.5 Mr. Burr observed finally that his Delegation had been prepared throughout the whole Conference and also during the preparatory work, when other member States had experienced difficulties, to seek a solution that offered the necessary flexibility. He expected other Delegations to act in the same way in that matter.

1927.1 Mr. BRADNOCK (Canada) stated that he fully understood the difficulties encountered by the member States that were members of the EC while they were

in this stage of transition to a federal State or to whatever the Community might become. There was, however, something that had to be looked at from the point of view of national interest, that is, the consequences of the proposed rule on plant breeders outside of the EC. Mr. Bradnock realized that the consequences would be the same for plant breeders inside and outside of the EC. There had been for 30 years, since the original Convention, the possibility for a plant breeder to exploit a variety for four years in one country before applying in another. There would be at some point in time a Community breeders' rights system under which all the Community would be treated as one territory.

1927.2 The difficulty which his Delegation saw in terms of national interests in the proposal was that some parts of the transitional arrangements would become effective immediately, and some would not. In the particular case, the period of marketing in another country would be reduced from four years to two, or may be one, but the requirement to protect the variety in every country separately would remain, and all applications would have to be made within a year from the first act of marketing within the EC. With its proposed amendment, his Delegation proposed to counterbalance the change. It would recognize that sales anywhere in the Community would destroy novelty throughout the Community, but on condition that there would be one place to apply rather than nine, in order not to erode the access to rights for plant breeders from outside of the Community.

1928. Mr. HOINKES (United States of America) declared that his Delegation fully supported the position just stated by Mr. Bradnock (Canada).

1929. Mr. ORDÓÑEZ (Argentina) stated that his Delegation shared the views expressed by Mr. Bradnock (Canada).

1930. The PRESIDENT wished to close the debate and to come to a vote.

1931. Mr. HOINKES (United States of America) stated that, before coming to a vote, the Conference first needed to know exactly what was the subject of the vote. The amendment offered by the Delegation of the Netherlands still left an amount of ambiguity because of the language: "... the Contracting Parties which are member States of one and the same intergovernmental organization may assimilate jointly..." That text left open the possibility for just two of them to avail themselves of the possibility. The proposal as amended might be clarified as follows: "... all the Contracting Parties which are members of one and the same intergovernmental organization may act jointly to assimilate acts..." That suggestion would at least clarify the proposal, without implying that his Delegation would endorse it.

1932. Mr. KIEWIET (Netherlands) thanked Mr. Hoinkes (United States of America) for his clarification which corresponded exactly to what his Delegation had in mind. It should be a joint effort of all the Contracting Parties which were member States of one and the same intergovernmental organization to derogate from Article 6(1)(ii).

1933. The PRESIDENT asked for a new recitation of the whole amended proposal before a vote was taken on it.

1934. Mr. KIEWIET (Netherlands) read the following text: "For the purposes of paragraph (1), all the Contracting Parties which are member States of one and the same intergovernmental organization may act jointly to assimilate acts done on the territories of the States members of that organization to acts done on their own territories and, should they so do, shall notify the Secretary-General accordingly."

1935. Mr. BOGSCH (Secretary-General of UPOV) observed that "one and the same intergovernmental organization" was not specific.

1936. Mr. KIEWIET (Netherlands) agreed with Mr. Bogsch (Secretary-General of UPOV). As far as he had understood it, the Drafting Committee had considered a proposal to meet this problem with a phrase such as: "where the regulations of that intergovernmental organization so require." He suggested that this might be something for the Drafting Committee to consider.

1937. The PRESIDENT stated that he would like to avoid another meeting of the Drafting Committee. He consequently put to the vote the proposal read out by Mr. Kiewiet (Netherlands) with the addition of: "where the regulations of that intergovernmental organization so require."

1938. The proposal referred to above was adopted by 10 votes for, seven votes against and two abstentions.

REPORT ON THE WORK OF THE DRAFTING COMMITTEE (Continued from 1867)

1939. The PRESIDENT invited Mr. Ardley (Chairman of the Drafting Committee) to report on the progress achieved in the Drafting Committee.

1940. Mr. ARDLEY (Chairman of the Drafting Committee) stated that he was grateful to the Plenary for having completed its debate on the remaining open points without calling upon the Drafting Committee for finalization. He could thus say that the Drafting Committee had completed its work. He did not consider it necessary to go through the detail of its discussions. He thanked the other members of the Committee for their help in completing the text on time.

1941. (Continued from 1825.5) Mr. ESPENHAIN (Denmark) asked whether it was appropriate to ask now for consideration of Article 16.

1942. The PRESIDENT indicated that the wording "for food consumption purposes" appearing in Article 16(1)(ii) had been the subject of a discussion in the Drafting Committee and that the Delegation of Denmark had proposed to substitute "final" for "food." The Drafting Committee had been of the opinion that this was a point to be decided in Plenary. He therefore asked whether this little change was agreeable.

1943. Mr. DMOCHOWSKI (Poland) stated that his Delegation supported the proposal of the Delegation of Denmark.

1944. The PRESIDENT asked whether the proposal was opposed. In the absence of any opposition, he declared it accepted.

1945. The conclusion of the President was noted by the Conference.

1946. The PRESIDENT asked whether there were other questions on the draft new Act.

1947. Mr. DELLOW (New Zealand) referred to Article 14(5), which corresponded to Article 14(2) in the Basic Proposal. Article 14(2) began with: "Subject to Articles 15 and 16, the acts mentioned in paragraph (1) shall also require the authorization of the breeder..."; the new draft was restricted to: "The provisions of Articles 15 and 16 shall also apply in relation to..." That seemed to change the whole sense of the paragraph.

1948. Mr. BOGSCH (Secretary-General of UPOV) replied that this was an obvious clerical mistake. The text should read: "The provisions of paragraphs (1) to (4) shall also apply in relation to..." as in the French and German versions. He expressed his gratitude to Mr. Dellow for having discovered that mistake.

1949. (Continued from 233) Mr. HAYASHI (Japan) recalled the previous intervention of Mr. Bogsch (Secretary-General of UPOV) relating to Article 1(x) concerning the replacement of "constituted" by "founded."

1950. Mr. BOGSCH (Secretary-General of UPOV) replied that this would be done. The intervention had been made in the morning in the Drafting Committee, after document DC/91/130 had been issued.

1951. Mr. DELLOW (New Zealand) referred to the definition of the variety in Article 1(vi). There was another clerical error in the English text. The words "can be" appeared twice.

1952. Mr. BOGSCH (Secretary-General of UPOV) concurred with Mr. Dellow (New Zealand). Those words had to be deleted at their second occurrence.

1953. Mr. ESPENHAIN (Denmark) indicated that in Article 15(1)(iii), the last reference should read: "Article 14(1) to (4)" instead of "... to (5)."

1954. The PRESIDENT stated that that was correct.

1955. (Continued from 1791) Mr. WHITMORE (New Zealand) wished to clarify what the position was regarding Article 26(6)(b) since the draft before the Conference was incomplete.

1956. Mr. GREENGRASS (Vice Secretary-General of UPOV) replied that the text should read: "Such an intergovernmental organization shall not exercise the rights to vote of its member States if its member States exercise their right to vote, and vice versa."

1957. Mr. HAYASHI (Japan) recalled that his Delegation had proposed in document DC/91/101 that the decision on the advice of the Council under Article 34(3) should require a three-fourths majority in line with the current Convention. That proposal had been rejected. His Delegation could easily imagine that there could be some difficulty arising from this decision. It would therefore like the Office of the Union to study the procedure for any decision embodying the advice of the Council and to answer its concern.

1958. Mr. BOGSCH (Secretary-General of UPOV) recalled that the Delegation of Japan had repeatedly brought up this point and never received an appropriate reply. Under the present text, the advice on the conformity of the legislation of a State required a three-fourths majority; under the proposed new text, it required a simple majority. It was thus perfectly appropriate for the Delegation of Japan to ask which majority would apply in one and the same assembly of States bound by different texts. This could not be solved by a study of the Secretariat. It was in fact impossible to solve it otherwise than by going back to the old text.

1959.1 The PRESIDENT stated that the alternative was to try to live with the contradiction and to accept the risk that a difficulty would occur if a decision was taken at a majority of less than three fourths.

1959.2 (Continued from 1511) He then opened the floor on the draft recommendation relating to Article 15(2). That draft, as edited by the Drafting Committee, was reproduced in document DC/91/136.

1960. Mr. KIEWIET (Netherlands) stated that the text of the recommendation before the Conference was a somewhat watered down version of the statement which his Delegation had proposed during the first part of the Conference. His Delegation could of course accept that the recommendation was somewhat different in wording from the statement, but it would like it to be reinforced as follows: "The Diplomatic Conference recommends that the provisions laid down in Article 15(2) ... should not be read so as to be intended to open the possibility..."

1961. The PRESIDENT asked whether this amendment was acceptable. No member Delegation wanting the floor, he declared it accepted.

1962. The conclusion of the President was noted by the Conference. (Continued at 1973)

1963. (Continued from 1472) The PRESIDENT then opened the floor on the draft common statement relating to Article 34. That draft, as edited by the Drafting Committee, was reproduced in document DC/91/137. No member Delegation wanting the floor, he declared it adopted.

1964. The conclusion of the President was noted by the Conference. (Continued at 1973)

Twenty-second (Final) Meeting
Tuesday, March 19, 1991
Afternoon

CONSIDERATION OF THE SECOND REPORT OF THE CREDENTIALS COMMITTEE (Continued from 1769)

1965. The PRESIDENT invited Mr. Tobias Kampmann (Vice-Chairman of the Credentials Committee) to present the second report of the Credentials Committee.

1966. Mr. KAMPMANN (Vice-Chairman of the Credentials Committee) mentioned that Mr. Prevel (Vice-Chairman of the Credentials Committee) had presented the report of the Credentials Committee reproduced in document DC/91/123, on March 15, 1991, on behalf of the Chairman. He now had the pleasure to report to the Plenary, in accordance with paragraph 13 of that report, that the Secretariat had in the meantime received the full powers to sign from the Governments of Belgium, France, Germany and South Africa.

1967. The Conference took note of the report given by Mr. Kampmann (Vice-Chairman of the Credentials Committee).

[Suspension]

ADOPTION OF THE NEW ACT OF THE UPOV CONVENTION

1968. The PRESIDENT reopened the meeting. (Continued from 1880) He observed that the Conference had discussed almost up to the last minute a proposal of the Delegation of the Netherlands to add a paragraph to Articles 6 and 16. Although the discussion had been concluded in respect of Article 16 earlier than in respect of Article 6, it had been intended that the paragraph should have the same wording in both Articles. He therefore proposed to the Conference to accept the wording of Article 6(3) as appearing in **document DC/91/138**, entitled "Final Draft - International Convention for the Protection of New Varieties of Plants of December 2, 1961, as Revised at Geneva on November 10, 1972, on October 23, 1978, and on March 19, 1991," as the wording of Article 16(3).

1969. The Conference adopted the proposal of the President by consensus.
1970. A replacement page was subsequently issued by the Secretariat and document DC/91/138 was reassembled.
1971. The PRESIDENT then put the text reproduced in the reassembled document DC/91/138 to the vote. He noted that no member Delegation wished to vote against this text and that no member Delegation wished to abstain. He therefore declared the text unanimously adopted as the International Convention for the Protection of New Varieties of Plants of December 2, 1961, as Revised at Geneva on November 10, 1972, on October 23, 1978, and on March 19, 1991.
1972. The text reproduced in document DC/91/138 was unanimously adopted as the International Convention for the Protection of New Varieties of Plants of December 2, 1961, as Revised at Geneva on November 10, 1972, on October 23, 1978, and on March 19, 1991.

[Applause]

ADOPTION OF A RECOMMENDATION, A RESOLUTION, A COMMON STATEMENT AND A FINAL ACT
(Continued from 1139, 1962 and 1964)

1973. The PRESIDENT observed that the relevant documents had been available for some time and partly considered by the Plenary. He therefore suggested to the Plenary to adopt them en bloc.
1974. The Recommendation Relating to Article 15(2), the Resolution on Article 14(5), the Common Statement Relating to Article 34 and the Final Act were unanimously adopted as appearing in documents DC/91/139, DC/91/140, DC/91/137 and DC/91/131, respectively.

CLOSING DECLARATIONS

1975. Mr. ESPENHAIN (Denmark) stated that he had said in his opening statement that his Delegation had considered the Basic Proposal very carefully and had wished to work constructively during this Diplomatic Conference. The Conference was now over and he wished to take this opportunity to thank everyone from the other Delegations and the other persons in the room or behind the scene for their constructive work. On behalf of the Conference, he congratulated the President on his successful conduct of business. The result was the text just adopted by all the member States, without exception. It was the best possible compromise and all Delegations would now have to consider how it could best be implemented and soonest ratified.

CLOSING OF THE CONFERENCE BY THE PRESIDENT

1976.1 The PRESIDENT first reviewed the various events that had taken place during two weeks and two days, some of which had kept the Conference in suspense up to the last minute, whereas the substantive points, based on concrete assessments rather than abstract principles, had been dealt with rather quickly. He stated that we had a new Convention; a Convention with an open eye on the future; a Convention that expressly allowed a "farmer's exemption"; and a Convention which imposed no restrictions on the way in which plant varieties were protected, but had the necessary strength to convince breeders that breeders' rights were the right choice.

1976.2 He then thanked the Secretariat and the interpreters for their invaluable contribution to the success of the Conference, and the participants in the Conference for their contributions to the debate and for their constructive attitude which had made his task as President so easy.

1976.3 Wishing good luck to the new Convention and expressing the hope that, thanks to the work done in this Conference, plant breeders' rights would spread over the world to the benefit of the breeders, the agriculturists and indeed all mankind, he declared the Diplomatic Conference for the Revision of the International Convention for the Protection of New Varieties of Plants closed.

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** See also under Articles 16(3) and 30 (proposal reproduced in document DC/91/113).

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* A number of proposals or elements of proposals have been the subject of implicit decisions by the Working Group on Article 14(1)(a) and (b) which were subsequently endorsed by the Conference in paragraph 1544.

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Adoption: paragraphs 1544, 1852.4

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Discussion: paragraphs 1550-1615; 1852.4

Adoption: paragraph 1852.4

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* A number of proposals were decided in the course of the discussions on the preceding provisions.

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Discussion: paragraphs 809-812; 841-856; 859-882; 1852.4

Adoption: paragraph 1852.4

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- Germany (DC/91/89 Rev.), page 130 (decision in paragraph 1069)
- Germany (DC/91/92), page 132 (decisions in paragraphs 1092, 1636)
- Japan (DC/91/65 Rev.), page 122 (decision in paragraph 1117)
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- United States of America (DC/91/9), page 100 (withdrawal in paragraph 1052)
- United States of America (DC/91/14), page 102 (decision in paragraph 1097)

Discussion: paragraphs 1050-1117; 1140-1141; 1616-1636; 1852.4; 1947-1948

Adoption: paragraph 1852.4

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Adoption: paragraphs 1139-1974

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- Germany (DC/91/92), page 132 (decision in paragraph 1636)**
- United States of America (DC/91/15), page 102 (decision in paragraph 1156)

Discussion: paragraphs 1142-1156; 1289-1299; 1616-1636

Adoption: paragraphs 1299, 1636

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* See also, under Article 15(1), the proposal reproduced in document DC/91/114.

** See also under Article 14(5).

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- France (DC/91/88), page 130 (decision in paragraph 1161)
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Discussion: paragraphs 1157-1202; 1246-1299

Adoption: paragraph 1299

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- Netherlands (DC/91/119), page 147

Discussion: paragraphs 1486-1511; 1959.2-1962; 1973-1974

Adoption as a Recommendation: paragraphs 1511, 1962, 1974

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- Japan (DC/91/69), page 123 (decisions in paragraphs 1644, 1683)
- New Zealand (DC/91/70), page 124 (withdrawal in paragraph 1639)

Discussion: paragraphs 1637-1683; 1852.5; 1941-1945

Adoption: paragraphs 1852.5, 1945

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Adoption: paragraph 1852.5

Text as adopted: page 35

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Discussion: paragraphs 1847-1850; 1868-1880; 1968-1969

Adoption: paragraphs 1880, 1969

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Adoption: paragraph 767

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Adoption: paragraph 682

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- Denmark (oral proposal), paragraph 687 (decision in paragraph 690)

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Adoption: paragraph 784

Text as adopted: pages 39 and 41

Article 22: Cancellation of the Breeder's Right**Article 22(1): Reasons for cancellation****Article 22(2): Exclusion of other reasons**

Proposals for amendments:

- Japan (DC/91/72), page 124

Discussion: paragraphs 975-985

Adoption: paragraph 985

Text as adopted: page 41

Article 23: Members

Discussion: paragraphs 986-989

Adoption: paragraph 989

Text as adopted: page 41

Article 24: Legal Status and Seat**Article 24(1): Legal personality****Article 24(2): Legal capacity****Article 24(3): Seat****Article 24(4): Headquarters agreement**

Proposals for amendments:

- Japan (DC/91/100), page 135

Discussion: paragraphs 1300-1303

Adoption: paragraph 1303

Text as adopted: page 43

Article 25: Organs

Discussion: paragraphs 1304-1305

Adoption: paragraph 1305

Text as adopted: page 43

Article 26: The Council**Article 26(1): Composition****Article 26(2): Officers****Article 26(3): Sessions****Article 26(4): Observers****Article 26(5): Tasks**

Discussion: paragraphs 1204-1205

Adoption: paragraph 1205

Text as adopted: pages 43 and 45

Article 26(6): Votes

Proposals for amendments:

- Australia, Canada, France, Germany, Japan, the Netherlands, New Zealand, the United Kingdom and the United States of America (DC/91/127), pages 152-153 (decision in paragraph 1791)
- United States of America (DC/91/19), page 103 (implicit withdrawal through participation of the Delegation in the group which elaborated the above proposal)

Discussion: paragraphs 1206-1230; 1721-1762; 1770-1773.5; 1787-1794; 1955-1959.1

Adoption: paragraph 1791

Text as adopted: page 45

Article 26(7): Majorities

Proposals for amendments:

- Australia, Canada, France, Germany, Japan, the Netherlands, New Zealand, the United Kingdom and the United States of America (DC/91/127), pages 152-153 (decision in paragraph 1797)
- Germany (DC/91/76), page 126 (decision in paragraph 1245)
- Japan (DC/91/101), page 135 (decisions in paragraphs 1239, 1245)

Discussion: paragraphs 1231-1245; 1795-1797

Adoption: paragraph 1797

Text as adopted: page 45

Article 27: The Office of the Union**Article 27(1): Tasks and direction of the Office****Article 27(2): Duties of the Secretary-General****Article 27(3): Staff**

Discussion: paragraphs 1306-1307

Adoption: paragraph 1307

Text as adopted: page 47

Article 28: Languages**Article 28(1): Languages of the Office****Article 28(2): Languages in certain meetings****Article 28(3): Further languages**

Proposals for amendments:

- Spain (DC/91/86), page 129

Discussion: paragraphs 1308; 1512-1526

Adoption: paragraph 1526

Text as adopted: page 47

Article 29: Finances**Article 29(1): Income****Article 29(2): Contributions: units****Article 29(3): Contributions: share of each member****Article 29(4): Contributions: computation of shares****Article 29(5): Arrears in contributions****Article 29(6): Auditing of the accounts****Article 29(7): Contributions of intergovernmental organizations**

Proposals for amendments:

- Australia, Canada, France, Germany, Japan, the Netherlands, New Zealand, the United Kingdom and the United States of America (DC/91/128), page 153 (decision in paragraph 1801)

- Germany (DC/91/77), page 126 (decision in paragraph 1315)

Discussion: paragraphs 1309-1319; 1777-1778; 1798-1804

Provisional adoption: paragraph 1319

Adoption: paragraphs 1315, 1801, 1804

Text as adopted: pages 47, 49 and 51

Article 30: Implementation of the Convention**Article 30(1): Measures of implementation****Article 30(2): Conformity of laws**

Proposals for amendments:

- Japan (DC/91/102), page 135 (decision in paragraph 1324)

- Netherlands (DC/91/113), page 142*

Discussion: paragraphs 1320-1336; 1820-1841

Adoption: paragraph 1324

Text as adopted: page 51

Article 31: Relations Between Contracting Parties and States Bound by Earlier Acts**Article 31(1): Relations between States bound by this Convention****Article 31(2): Possible relations with States not bound by this Convention**

Discussion: paragraphs 1337-1340

Adoption: paragraph 1340

Text as adopted: pages 51 and 53

* This proposal eventually led to Articles 6(3) and 16(3) and the discussion on the subject continued at paragraph 1847.

Article 32: Special Agreements

Proposals for amendments:
- Japan (DC/91/103), page 136
Discussion: paragraphs 1341-1353
Adoption: paragraph 1353
Text as adopted: page 53

Article 33: Signature

Proposals for amendments:
- Japan (DC/91/104), page 136
Discussion: paragraphs 1354-1358
Adoption: paragraph 1358
Text as adopted: page 53

Article 34: Ratification, Acceptance or Approval; Accession

Article 34(1): States and certain intergovernmental organizations*

Article 34(2): Instrument of adherence

Article 34(3): Advice of the Council

Proposals for amendments:
- Canada (DC/91/126), page 152 (withdrawal in paragraph 1785)
- Germany and New Zealand (DC/91/124), page 151 (withdrawal in paragraph 1785)
- Germany and New Zealand (DC/91/125 Rev.), pages 151-152 (decision in paragraph 1812)
- Netherlands (DC/91/121), page 147 (implicit withdrawal in paragraphs 1463, 1464)
- Sweden (DC/91/78), page 126 (decision in paragraph 1374)
- United States of America (DC/91/5), page 98 (withdrawal in paragraph 1785)
- United States of America (DC/91/20), page 104 (withdrawal in paragraph 1370)
Discussion: paragraphs 241-242; 1359-1376; 1452-1462; 1473-1474; 1780.1-1786; 1805-1812
Provisional adoption: paragraphs 1376, 1474
Adoption: paragraph 1812
Text as adopted: pages 53 and 55

Proposal for a Common Statement:
- Denmark (DC/91/116), page 143
Discussion: paragraphs 1463-1472; 1963-1964; 1973-1974
Provisional adoption: paragraph 1472
Adoption: paragraphs 1964, 1974
Text as adopted: page 63

* Including the issue of the definition of "intergovernmental organization" which was also dealt with under Article 1.

Article 35: Reservations**Article 35(1): Principle****Article 35(2): Possible exception**

Discussion: paragraphs 1377-1381

Adoption: paragraph 1381

Text as adopted: page 55

Article 36: Communications Concerning Legislation and the Genera and Species Protected; Information to be Published**Article 36(1): Initial notification****Article 36(2): Notification of changes****Article 36(3): Publication of the information**

Discussion: paragraphs 1382-1383

Adoption: paragraph 1383

Text as adopted: page 57

Article 37: Entry into Force; Closing of Earlier Acts**Article 37(1): Initial entry into force****Article 37(2): Subsequent entry into force****Article 37(3): Closing of the 1978 Act**

Proposals for amendments:

- Spain (DC/91/108), page 140 (decision in paragraph 1417)
- Sweden (DC/91/79), page 127 (decision in paragraph 1400)
- United States of America (DC/91/21), page 104 (withdrawal in paragraph 1776)
- United States of America (DC/91/122), page 148 (decision in paragraph 1846)

Discussion: paragraphs 1384-1418; 1773.6-1776; 1842-1846

Adoption: paragraph 1846

Text as adopted: pages 57 and 59

Article 38: Revision of the Convention**Article 38(1): Conference****Article 38(2): Quorum and majority**

Discussion: paragraphs 1419-1420

Adoption: paragraph 1420

Text as adopted: page 59

Article 39: Denunciation**Article 39(1): Notifications****Article 39(2): Earlier Acts****Article 39(3): Effective date****Article 39(4): Acquired rights**

Proposals for amendments:

- Japan (DC/91/105), page 136 (decision in paragraph 1428)
- Sweden (DC/91/80), page 127 (decision in paragraph 1424)

Discussion: paragraphs 1421-1428

Adoption: paragraphs 1424, 1428

Text as adopted: page 59

Article 40: Preservation of Existing Rights

Proposals for amendments:

- Denmark and Sweden (DC/91/51), page 116 (withdrawal in paragraph 1441)
- New Zealand (DC/91/99), page 134 (decisions in paragraphs 1435, 1706)

Discussion: paragraphs 1429-1441; 1690-1720

Adoption: paragraph 1720

Text as adopted: page 61

Article 41: Original and Official Texts of the Convention

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Article 41(2): Official texts

Discussion: paragraphs 1442-1443

Adoption: paragraph 1443

Text as adopted: page 61

Article 42: Depositary Functions

Article 42(1): Transmittal of copies

Article 42(2): Registration

Proposals for amendments:

- Sweden (DC/91/81), page 127

Discussion: paragraphs 1444-1451

Adoption: paragraph 1447

Text as adopted: page 61

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* Unless otherwise indicated, the numbers refer to Articles of the 1991 Act as appearing on the right hand pages of the "Basic Texts" part of these Records (from page 13 to page 61). Where relevant, key words refer also to words in the plural or to kindred words.

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