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INTERNATIONAL UNION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS

GENEVA

FOURTH MEETING WITH INTERNATIONAL ORGANIZATIONS

Geneva, October 9 and 10, 1989

PROVISIONAL LIST OF PARTICIPANTS/LISTE PROVISOIRE DES PARTICIPANTS/
VORLAEUFIGE TEILNEHMERLISTE

(in English alphabetical order of the names
of the States and organizations)

(dans l'ordre alphabétique anglais des noms
des Etats et des organisations)

(in englischer alphabetischer Reihenfolge der Namen
der Staaten und der Organisationen)

Participants are requested to enter in this provisional list any proposed changes to be incorporated in the final list of participants and to hand over this document to the Secretariat.

Les participants sont priés d'indiquer dans la présente liste provisoire toute proposition de modification qui devrait être prise en considération lors de l'établissement de la liste définitive des participants et de remettre le présent document au Secrétariat.

Die Teilnehmer werden gebeten, Aenderungswünsche für die endgültige Teilnehmerliste in die vorliegende vorläufige Teilnehmerliste handschriftlich einzutragen und diese dem Sekretariat zu übergeben.

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INTERNATIONAL UNION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS

GENEVA

FOURTH MEETING WITH INTERNATIONAL ORGANIZATIONS

Geneva, October 9 and 10, 1989

DRAFT RECORD OF THE MEETING

compiled by the Office of the Union

Opening of the Meeting

1. The President of the Council, Mr. W.F.S. Duffhues (Netherlands) opened the Meeting and welcomed the participants, the list of which is given in Annex I to this record, with the following words:

> "I shall be your chairman during these two days and, on behalf of UPOV, I welcome you here in Geneva. It is the fourth time that we have had an official meeting between UPOV as an intergovernmental organization and the international branch organizations dealing with plant breeders' rights. Of course, it is not only on these occasions that we meet each other and discuss the problems relating to plant breeders' rights encountered by the members of your various organizations and the way in which the various Governments can be of help in solving those problems.
>
> For Governments, for States, one way of supporting an internationally oriented branch of industry is to work together internationally, to try to come to a collective standpoint. UPOV, with 18 member States at this moment, is an organization where this can be achieved. That number seems to be quite high, but there are many more countries in the world in which plant breeding work is done. We know that many States are interested in joining UPOV, but we know also that many do not intend to do so. We also know that there is and always will be a certain discrepancy between the wishes of the various professional organizations and their members and the will of or the room available to Governments for action to satisfy the wishes of the international organizations. Apart from international discussion, there are discussions at the national level in the

fields of policy, research, examination of varieties and so on. I think that, although it takes some time, this way of working together in the light of our respective responsibilities is often very fruitful. Therefore, I am very glad to welcome you all here to discuss, not to decide, the revision of the Convention.

Typically we examine once in ten years the necessity of amending the Convention, unless the developments in the industry give cause for more frequent review. Both conditions are now fulfilled. The last revision took place in 1978, as you know, and developments have been very fast. The prospects from developments in biotechnology seem to be inexhaustible. The future will show whether they will become reality or not. However, it is clear, in my view, that the nature of plant breeding will not really change, but, with the new techniques, the results will be obtained faster, easier and with greater precision. The new techniques will enable incompatibilities or other difficulties encountered in plant breeding to be overcome and perhaps make possible crossings between genera or species never dreamed of before. So, I must say, we are at the crossroads, both the crossroads for science and the crossroads for legislation. The lawmaker has to follow the developments and to try to foresee what may happen in the future. Technology and legislation therefore go hand in hand, and technicians and lawmakers have to cooperate intensively.

It may be that some of the new techniques and new products used in plant breeding are patentable. That may be good or bad. I think, therefore, that it is necessary to make up our minds about the borders of the laws relating to inventions and to plant varieties, respectively, and about the responsibilities of Governments and intergovernmental organizations after, of course, consultations with the relevant branches of the industry. Accordingly, at the beginning of next year, there will be a meeting between experts in patents and in plant breeders' rights, organized jointly by UPOV and WIPO, to follow up the numerous informal contacts that exist. So I hope that, with this in mind, we will have a fruitful meeting today and tomorrow concerning the specific issues contained in document IOM/IV/2. Most organizations represented here today have commented in writing on these. It will not be possible to satisfy all the wishes of individuals, organizations and Governments, but we will be glad to hear your opinion, or the clarification of your opinion laid down in your written comments.

2. The Chairman then invited the international organizations which so wished to make opening statements.

Opening Statements

3. Mr. M.O. Slocock (International Association of Horticultural Producers - AIPH) stated that his organization had been unable to submit written comments in view of the fact that its annual congress was just taking place. AIPH looked for an expansion of the membership of UPOV, an assential element for the Convention's effectiveness and a priority objective in AIPH's view. AIPH included 24 countries in five continents, and was urging the Governments of all States not already members of UPOV to consider the question of plant breeders' rights and to make contact with UPOV.

4. In relation to the Convention, AIPH looked for the explicit prohibition of "double protection" and a clear definition of the interface between the plant breeders' rights and the patent system. It further looked for the mandatory inclusion of all commercially significant species among those to be protected and sought the clarification of the scope of the breeder's right to ensure that the protection which it conferred was clearly defined and that royalties were charged only once in the production system. It accepted the dependence principle and urged the elimination of the abuse of the "farmer's privilege" concession. AIPH sought the clearer separation of new varieties by the recognition of commercially important rather than botanically interesting characteristics as the basis for distinction. It wished that the periods of protection be harmonized within UPOV member States. It considered that it was necessary to recognize the importance of the public interest and of compulsory licenses in ensuring access to new varieties. Finally, it considered that the simplification of the provisions relating to variety denominations was necessary, and that the use of trademarks to extend in any way the breeders' rights should be rejected.

5. Herr Dr. E. Freiherr von Pechmann (Internationale Vereinigung für gewerblichen Rechtsschutz - AIPPI) erklärte, dass die schriftliche Stellungnahme der AIPPI (Dokument IOM/IV/5) die Ergebnisse einer eingehenden Diskussion über die Vorschläge zur Revision des UPOV-Uebereinkommens wiedergebe, die im Juni 1989 anlässlich des Kongresses der AIPPI in Amsterdam stattgefunden habe. Auf diesem Kongress sei im übrigen der Generaldirektor der WIPO/Generalsekretär der UPOV zum Ehrenmitglied der AIPPI ernannt worden. Wie in der schriftlichen Stellungnahme zum Ausdruck gebracht, begrüsse die AIPPI die beabsichtigte Verstärkung der Rechte der Züchter. Die AIPPI sei keine Interessenvertretung sondern eine Organisation, die sich mit grundsätzlichen Fragen auf dem Gebiet des gewerblichen Eigentums befasse und insbesondere bestrebt sei, den Schutz von Erfindungen zu fördern, da ihrer Auffassung nach dieser Schutz den besten Anreiz für die Erfinder darstelle. Die AIPPI begrüsse sehr viele der in Dokument IOM/IV/2 vorgeschlagenen Bestimmungen, habe jedoch ernsthafte Bedenken gegen einige, und Herr Dr. von Pechmann werde im Laufe der Diskussion auf diese Bedenken näher eingehen.

6. Mr. T.M. Clucas (International Association of Plant Breeders for the Protection of Plant Varieties - ASSINSEL) commended, on behalf of ASSINSEL, those responsible for the preparation of the revision of the Convention and stated that ASSINSEL was much encouraged by the general direction of the revision proposals, although there were certain elements which remained of concern to ASSINSEL. ASSINSEL particularly supported the provisions contained in the document before the meeting concerning dependence. ASSINSEL's final views would be influenced by measures taken to extend patent rights to include biotechnological inventions and hoped for a successful outcome to the meeting which was to be held between UPOV and WIPO in January 1990. ASSINSEL sought a workable balance between the intellectual property systems involved which would avoid any undue or inappropriate domination. In this respect, some concern was felt within ASSINSEL about the effects of Article 5(5) in its present form.

7. Problems were being perceived by ASSINSEL in the treatment of hybrid varieties; a special working party had been set up to address the specific difficulties encountered and its conclusions and proposals would be made known to UPOV at a later stage.

8. ASSINSEL also supported the efforts being made to broaden the membership of UPOV; it recognized that some flexibility was desirable to facilitate the admission of new members by enabling them to adjust the plant variety protection system to their agricultural and economic conditions, but was of the view that any flexibility should be closely controlled.

9. In conclusion, Mr. Clucas stated that it was essential that the strengthened breeders' rights enshrined in a revised UPOV Convention should offer the breeder the opportunity to secure proper compensation whenever and however benefits were derived from the use of the breeder's intellectual property.

10. Mr. T.W. Roberts (International Chamber of Commerce - ICC) thanked UPOV for the opportunity to comment on the proposals for the revision of the Convention and commended the authors of document IOM/IV/2. He observed that in a meeting like this, it was inevitable that much more criticism than support would be voiced in view of the speakers' priorities. He stated that ICC generally supported the directions in which the revision proposals were taking UPOV. The main point of criticism of ICC related to the treatment of industrial property rights other than plant breeders' rights. ICC did not support a clear boundary between plant breeders' rights and other rights, but rather a balance between such rights. ICC strongly supported the strengthening of the breeder's right and particularly the introduction of the dependence. However, this strengthening did not require a weakening of patents; in this respect, ICC was particularly concerned about some proposed provisions and especially about Article 5(5), the "collision norm," which paved the way for a collision rather than a cooperation between patents and plant breeders' rights.

11. M. R. Royon (Communauté internationale des obtenteurs de plantes ornementales et fruitières de reproduction asexuée - CIOPORA) remercie l'UPOV de l'invitation à participer à cette réunion et s'associe aux orateurs qui l'ont précédé pour féliciter le Comité administratif et juridique des efforts qu'il a déployés en vue du renforcement du droit de l'obtenteur. Ce renforcement est demandé par la CIOPORA depuis très longtemps, pratiquement depuis que la Convention existe.

12. S'agissant de l'orientation générale de la révision de la Convention, la CIOPORA estime que la volonté d'établir une délimitation entre les divers régimes juridiques de protection pourrait provenir d'une crainte confuse de l'UPOV de voir son rôle diminué par un rôle accru conféré à la protection par brevet. La CIOPORA pense au contraire que l'UPOV sera une organisation d'autant plus forte à l'avenir que l'adhésion à celle-ci sera rendue plus facile aux pays qui n'en font pas encore partie. D'autre part, si la Convention définit un cadre général pour la protection des obtentions végétales, on ne devrait pas pour autant exclure le recours à d'autres formes de protection; en effet, certains pays pourraient bien souhaiter adhérer à l'UPOV sur la base d'une forme de protection existant déjà, et éviter ainsi l'obligation de mettre en place un organisme spécial qui pourrait leur poser éventuellement des problèmes financiers.

13. S'agissant enfin de l'interface entre la protection par brevet et la protection des obtentions végétales, la CIOPORA relève une certaine confusion tant dans le document IOM/IV/2 que dans le document CAJ/XXIV/4; cette confusion provient de l'absence d'une définition claire et précise de l'objet de la protection dans le cadre de la Convention. Il conviendrait de garder à l'esprit que la Convention a pour objet la protection des plantes au seul niveau de la variété.

14. Herr J. Winter (Vereinigung der Pflanzenzüchter der Europäischen Wirtschaftsgemeinschaft - COMASSO) dankte für die Gelegenheit, zu der beabsichtigten Revision des UPOV-Uebereinkommens Stellung nehmen zu dürfen. Die COMASSO vertrete die europäischen Pflanzenzüchter und sei naturgemäss nicht nur vor dem Hintergrund der besonderen europäischen Gegebenheiten, sondern auch ganz allgemein an dieser Revision interessiert. Die Hauptpunkte der Stellungnahme der COMASSO seien das "Doppelschutzverbot", die Stärkung der Schutzrechtswirkung und die Kollisionsnorm. In den Augen der COMASSO sei eine Kollisionsnorm nötig, müsse aber ausgeglichen sein, um überhaupt Bestand haben zu können. Hierbei habe die COMASSO um so mehr Interesse, die besonderen europäischen Gesichtspunkte in die Diskussion einfliessen zu lassen, als auf Gemeinschaftsebene Initiativen in die Wege geleitet worden seien, die im Vorgriff auf die Revision des UPOV-Uebereinkommens unmittelbar den Sortenschutz betreffen (Initiative zur Schaffung eines gemeinschaftlichen Züchterrechts) oder auf diesem Gebiet Auswirkungen haben würden (Initiative zur Einführung einer Richtlinie über den Schutz biotechnologischer Erfindungen).

15. M. F. Hofkens (Comité des organisations professionnelles agricoles de la Communauté économique européenne - COPA - et Comité général de la coopération agricole de la Communauté économique européenne - COGECA) remercie l'UPOV de l'invitation à participer à cette réunion et fait savoir qu'il présentera tout au long de la réunion des positions communes aux deux organisations qu'il représente. Faisant référence au document IOM/IV/6, il souligne que le COPA et le COGECA optent pour la protection des nouvelles variétés végétales par un système particulier de droit d'obtenteur et pour le renforcement conséquent de la disposition interdisant l'existence d'une "double protection" pour une même variété. Le COPA et le COGECA sont d'avis que le droit de l'obtenteur doit s'étendre à tout matériel qui permet de reproduire ou de multiplier les variétés, c'est-à-dire aux plantes, parties de plantes, cellules et protoplastes. A leur avis, il faut garantir le libre accès à la variété à des fins expérimentales, en vue de créer une nouvelle variété, y compris dans le cas où la variété incorpore une invention protégée par exemple par un brevet. La coutume dénommée "privilège de l'agriculteur" revêt une importance primordiale pour le secteur agricole et doit être consacrée dans la Convention; le COPA et le COGECA proposent une définition à cet effet. Enfin, le COPA et le COGECA acceptent l'introduction d'un droit dérivé, mais à la condition que le plagiat sera exclu de la protection.

16. Mr. D. King (International Federation of Agricultural Producers - IFAP) expressed IFAP's appreciation for having been invited to this meeting and stated that this was the first time it was represented in a UPOV meeting. IFAP grouped together farmers' organizations from throughout the world, including all the member States of UPOV. Farmers in many countries were concerned about rumors that UPOV was about to require farmers to pay royalties on farm-saved seed. According to a number of national farmers' organizations, this was contrary to the commitments that had been made by Governments when the national plant variety protection system was introduced. IFAP also understood that this would be a departure from the spirit of the original UPOV Convention. It insisted that the UPOV Convention should retain a balance between the interests of farmers, consumers and breeders. It fully supported the need to adequately reward the creative efforts of plant breeders so that farmers worldwide would continue to benefit from new plant varieties.

17. M. M. Besson (Fédération internationale du commerce des semences - FIS) remercie l'UPOV d'avoir associé la FIS à ses très importants travaux et félicite l'UPOV pour les progrès qu'elle a accomplis dans la révision de la Convention. La FIS a suivi avec une attention soutenue les travaux sur ce point, tout en laissant à son association soeur, l'ASSINSEL, plus directement intéressée, le soin d'examiner en détail les questions soulevées par ce très important dossier. A sa dernière réunion, tenue à Jérusalem, en mai de cette année, le Conseil exécutif de la FIS a décidé de soutenir très fermement les positions exprimées par l'ASSINSEL en ce qui concerne tant la révision de la Convention UPOV que la protection des inventions biotechnologiques, tout en reconnaissant que les conceptions sont susceptibles d'évoluer quelque peu à l'avenir. En ce qui concerne la protection des inventions biotechnologiques, la FIS est persuadée qu'un équilibre pourra être trouvé entre les droits des titulaires de brevets et les droits des titulaires de certificats d'obtention végétale. Elle se félicite des contacts établis entre l'OMPI et l'UPOV à cet égard. S'agissant de la révision de la Convention, la FIS estime que l'élément clé doit être le renforcement des droits de l'obtenteur. Il s'agit là d'un objectif commun à l'ensemble de la branche, et la FIS partage les vues équilibrées de l'ASSINSEL sur ce point.

18. Cependant, le renforcement des droits de l'obtenteur doit aussi être doublé d'un effort pour amener le plus grand nombre de pays possible à adhérer à la Convention. Le commerce international des semences ne pourrait qu'en profiter, au bénéfice de tous, y compris des pays défavorisés. Ceux-ci pourraient aussi offrir un cadre juridique approprié et stable pour tous les échelons de l'activité semencière. L'extension de la Convention à toutes les espèces est aussi un objectif majeur qui devrait favoriser la diversification des travaux d'amélioration des plantes et de recherche, tout en offrant des possibilités de développement aux régions qui disposent de riches réservoirs génétiques.

19. Le renforcement des droits de l'obtenteur doit enfin permettre une limitation de ce que l'on appelle le "privilège de l'agriculteur" qui lèse gravement les intérêts des obtenteurs et des marchands grainiers. Ce prétendu privilège, qui n'est nullement inscrit dans la Convention en tant que principe de droit, a connu dans certains milieux une interprétation tellement large que, dans certains cas, l'utilisation de semences certifiées, sur lesquelles l'obtenteur a pu toucher une redevance, constitue l'exception plutôt que la règle générale. Il n'est pas normal que certains agriculteurs bénéficient sans contrepartie du travail long, difficile et coûteux de l'obtenteur. Il faudra donc parvenir à une solution pour faire cesser les abus; une solution logique serait que toute semence produite en vue d'un réensemencement soit soumise à une redevance équitable payée à l'obtenteur.

Article 1 (Constitution of a Union; Purpose of the Convention)

20. The Chairman opened the discussions on Article 1.

21. Mr. Slocock stated that the retention of the second sentence of paragraph (1) was fundamental to AIPH which could not accept any dilution of its wording or substance.

22. Herr Dr. Freiherr von Pechmann (AIPPI) erklärte, die AIPPI habe von jeher die Auffassung vertreten, dass das "Doppelschutzverbot" nicht gerechtfertigt

sei, sondern dass man den Züchtern die Möglichkeit geben sollte, für ihre Innovationen den Sortenschutz, der gewisse Vorteile habe, oder den Patentschutz, der auch gewisse Vorteile habe, zu beantragen. Es sei zwar problematisch, wenn für die gleiche Erfindung zwei unterschiedliche Schutzrechte zur Verfügung stünden oder gestellt würden, aber man könne die Probleme lösen. Man könne beispielsweise vorsehen, dass Rechte aus parallelen Schutzrechten nicht kumulativ gegen einen Verletzer geltend gemacht werden könnten. Man könne auch vorsehen, dass der Züchter zwischen den genannten Schutzformen zu wählen habe. Auf jeden Fall könne dies ein Diskussionspunkt sein.

23. Die AIPPI könne den zweiten Satz von Absatz 2 nicht unterstützen. Das in diesem Satz vorgeschlagene "Doppelschutzverbot" stelle eigentlich eine Verschärfung gegenüber dem gegenwärtigen Wortlaut von Artikel 2 Absatz 1 dar. Dieser Satz besage, dass der betreffende Schutzgegenstand nicht sowohl durch Sortenschutz als auch durch Patent in einem Verbandsstaat geschützt werden solle. Nach dem gegenwärtigen Wortlaut des Uebereinkommens sei aber der Schutzgegenstand nur das Vermehrungsmaterial. Der Verweis auf Artikel 37 zeige ferner, dass dieses "Doppelschutzverbot" keine allgemeine Gültigkeit innerhalb der UPOV erlangen solle. Dadurch werde keine Einheitlichkeit geschaffen: Derjenige Staat, der die in Artikel 37 vorgesehenen Möglichkeiten in Anspruch genommen habe - die Vereinigten Staaten von Amerika, immerhin der grösste Verbandsstaat der UPOV - werde anders behandelt als alle anderen Verbandsstaaten. Im übrigen hätten die Vertreter der Vereinigten Staaten von Amerika bereits in früheren Diskussionen erklärt, dass die Möglichkeit der Heranziehung beider Schutzformen sich für die Erfinder auf dem Gebiet der Entwicklung von Pflanzensorten nicht negativ sondern offensichtlich nur positiv ausgewirkt habe; ferner seien nach ihren Aussagen durch das Angebot paralleler Schutzmöglichkeiten bisher keine Schwierigkeiten aufgetreten. Die AIPPI sehe keinen Grund zu befürchten, dass sich parallele Schutzformen in den anderen UPOV-Verbandsstaaten anders, nicht zum Vorteil der Pflanzenzüchter auswirken würden.

24. Herr Dr. P. Lange (ASSINSEL) erklärte, die ASSINSEL unterstütze den vorgeschlagenen neuen Artikel 1, und zwar mit dem in eckigen Klammern stehenden Satz. Sie unterstütze also die Umwandlung von Absatz 1 des gegenwärtigen Wortlauts in eine bindende Bestimmung. Bezüglich des "Doppelschutzverbots" unterstütze die ASSINSEL die Verstärkung der Rechte aus dem Sortenschutz und vertrete die Meinung, dass nach Verwirklichung der diesbezüglichen Vorschläge die Patentierung von Pflanzensorten als solchen unnötig sei. Die ASSINSEL spreche sich aber für die Patentierung von biotechnologischen Entwicklungen einschliesslich von Genen aus, die in sortenschutzrechtlich geschützte Pflanzensorten eingeschleust worden seien. Eine solche Patentierung stelle aber für die ASSINSEL keine Frage des Problemkreises "Doppelschutz" dar.

25. Ferner bemerkte Herr Dr. Lange, dass in der englischen Fassung die Numerierung der Absätze zu korrigieren sei.

26. Mr. Roberts (ICC) commented that ICC had always supported the possibility of protecting plant varieties by both patents and plant breeders' rights and did not understand the objections to the co-existence of more than one system of protection. It also did not understand how the international system could operate if at least two member States did not prohibit "double protection." It therefore supported the deletion of the sentence in square brackets in paragraph (1).

27. Mr. Royon (CIOPORA) stated that CIOPORA agreed with the content of Article 1 except for the sentence between square brackets which it wished to be deleted.

28. In that connection, Mr. Royon stated that the expression "double protection," which had been coined for ease of language, was a misleading expression and had perpetuated many misconceptions. "Double protection" would be totally improper where the plant variety constituted the subject matter of protection. Breeders did not want "double protection" in the sense of cumulated protection for the same variety. This would be costly and with no practical interest. Breeders wanted UPOV to be flexible to provide the largest opportunities for adhesion by third countries. Countries should be able to join UPOV and grant rights to breeders by patents or by breeders' rights certificates. The only case where "double protection" could be cumulative would be where the subject matter of protection was genetic information rather than a variety. In that case, biotechnological inventors might wish to have protection through claims covering the genetic information and, in addition, claims to a variety. A more flexible UPOV system would enable people to make broad claims covering the genetic information and the variety in one title without having to apply for two titles. The use of the expression "double protection" should be condemned, and this would be consistent with CIOPORA's wish that the UPOV Convention should be made broadly open to new member States. A new Article 37 should be introduced to give the opportunity to all member States, and not just to the United States of America, to provide protection for plant varieties by whichever means was most convenient.

29. Herr Winter (COMASSO) sagte, die COMASSO unterstütze die Absicht, die in Artikel 1 Absatz 1 des gegenwärtigen Wortlauts stehende deklaratorische Bestimmung in eine bindende Vorschrift umzuwandeln, so wie sie in Absatz 2 des zur Diskussion gestellten Dokuments vorgeschlagen werde. Zu dem Vorschlag, das Recht näher zu definieren, sei die COMASSO der Auffassung, dass dieses als "Sortenschutzrecht", nicht aber als "Züchterrecht" bezeichnet werden sollte; Gegenstand des Schutzes sei die Sorte. Sie unterstütze dagegen die Absicht, im Uebereinkommen durchgängig das Wort "Recht" anstelle von "Schutz" zu benutzen. Der Schutz sei nämlich die Folge der Gewährung eines Rechtes.

30. Zu dem Problemkreis "Doppelschutzverbot" sei die COMASSO der Meinung, dass der vorgeschlagene Satz 2 von Absatz 2 unbedingt Bestandteil des Uebereinkommens werden müsse. Diese Meinung ergebe sich ganz allgemein aus der Notwendigkeit, Rechtsunsicherheit zu vermeiden, und im besonderen aus der bestehenden europäischen Rechtslage, welche übrigens auch als Grundlage für die Ueberlegungen betreffend die vorgeschlagene Richtlinie des Rates der Europäischen Gemeinschaften über den Schutz biotechnologischer Erfindungen genommen worden sei.

31. M. Hofkens (COPA/COGECA) rappelle que le COPA et le COGECA sont d'avis qu'il est préférable de protéger les variétés végétales dans le cadre du système particulier de protection, notamment du fait que celui-ci prévoit le libre accès à une variété protégée en tant que source initiale de variation d'un programme de création variétale. Le COPA et le COGECA appuient donc la position de l'ASSINSEL et de COMASSO; ils s'expriment en faveur de l'intégralité du texte proposé pour l'article premier, paragraphe 2).

32. Mr. King (IFAP) noted that Article 1 now incorporated a binding rather than a declaratory provision. IFAP supported this change but noted that in respect of various Articles, such as 4 and 5, member States had to have the ability to exempt themselves from certain provisions since national circumstances differed widely and it was reasonable to expect some differences in national legislation. If Article 1 were to become a binding provision, the ability for member States to make exceptions should be stated explicitely in the relevant Articles.

33. IFAP was in favor of maintaining the present ban on "double protection." There should be only one system of industrial property rights for plant varieties, and that should be the plant breeders' rights system which had proved to be balanced in relation to the interests of breeders, farmers and consumers. For this reason, it was important that other systems did not interfere with the plant breeders' rights system and create confusion. Members from countries which were not yet members of UPOV had stated that the introduction of "double protection" would create difficulties for those countries in adhering to the Convention.

34. Herr Dr. Freiherr von Pechmann (AIPPI) sagte, der Hinweis auf die europäische Rechtslage sei richtig und in der Tat seien Pflanzensorten vom Schutz nach dem europäischen Patentübereinkommen ausgenommen. Die entsprechende Ausnahmebestimmung werde jedoch sehr heftig kritisiert. Deshalb sei ihre Streichung anlässlich einer Revision des europäischen Patentübereinkommens durchaus möglich. Herr Dr. von Pechmann sei daher der Meinung, dass man sich nicht an die gegenwärtige Fassung des genannten Uebereinkommens halten solle; man solle eher eine Umformulierung des Satzes 2 von Absatz 2 prüfen, um festzuhalten, dass durch die Einführung des Sortenschutzes das Recht der UPOV-Verbandsstaaten, für Erfindungen von Pflanzenzüchtungen auch Patente zu erteilen, unberührt bleibe. Dabei bliebe dann natürlich offen, in welcher Form und für welche Gegenstände Patente erteilt werden könnten; dies könnte später bei einer Revision des europäischen Patentübereinkommens bzw. der nationalen Patentgesetze festgelegt werden. Kurz gefasst sei also Herr Dr. von Pechmann der Meinung, man sollte bei der Revision des UPOV-Uebereinkommens unter dem Eindruck des gegenwärtigen Wortlauts des europäischen Patentübereinkommens fortschrittliche Ueberlegungen nicht einengen.

35. Mr. Roberts (ICC) stated that he could not agree with the statement made by Mr. King (IFAP). He could not see how the deletion of the sentence in brackets, which was a restrictive provision, could make it more difficult for countries to join UPOV.

36. Mr. Royon (CIOPORA) wished to explain in more detail the position of CIOPORA on the problem of choice of protection. The subject matter of protection under the UPOV Convention was the plant variety and, in this respect, Mr. Royon supported the view expressed by Mr. Winter for COMASSO, in connection with Article 4, that protection should be provided for all plant varieties rather than for plant species, etc. Where the subject matter of protection was the variety, there was no need for "double protection" in the sense of cumulative protection. Optional protection, however, was required so that countries could grant rights to breeders of varieties either by patents or by plant breeders' rights certificates, or again by any other means that conformed to the principles of the UPOV Convention. "Double protection" in the sense of cumulative protection would only arise as an issue in the case of an inventor

working in biotechnology and wishing to protect genetic information, a particular gene for instance, and also the variety or varieties into which that information was incorporated: if patent protection was completely excluded under the UPOV Convention, the inventor would have to file an application for a patent for the genetic information and one or more applications for plant breeders' rights. If no demarcation was established between the two systems, the inventor would be able to cover in a single title--the patent--both the genetic information and the variety or varieties. And there would be no conflict and, as demonstrated by the experience in the United States of America, no difficulties. If the scope of the UPOV Convention were to be confined to plant breeders' rights in the narrow sense, the Convention would not be truly international.

37. Mr. Clucas (ASSINSEL) sought to clarify the ASSINSEL position. ASSINSEL was opposed to "double protection" in the sense that a variety should not be protectable by both a patent and a plant breeder's right. ASSINSEL was very supportive, however, of complementary protection, that is to say, the protection by patent of a gene within a variety which was itself the subject of a plant breeder's right.

38. Mr. Slocock (AIPH) was of the view that there was agreement to the effect that "double protection" in the sense of cumulative protection was unacceptable. AIPH also accepted the patenting of genetic information but did not accept that plant varieties as such should be subject to any other system of protection than the UPOV Convention. It understood that Article 1 would clarify that, and not go any further. If a provision such as Article 37 was made widely available, member States would be able to derogate from essential features of plant breeders' rights, e.g. the conditions of protection as set out in Article 6 and the duration of protection as set out in Article 8, presently laid down in mandatory provisions of the Convention. This would jeopardize the objective of the Convention to secure an element of uniformity and consistency in the worldwide system of breeders' rights protection. And this was the reason why the deletion of the sentence between brackets was unacceptable to AIPH.

39. Mr. S. Williams (AIPPI) did not see why a variety should not be protected by a patent provided the conditions for protection were fulfilled. Once the basis for a protection system was established, there ought to be no exceptions. He agreed with M. Royon (CIOPORA) that there should be no necessity to take up two forms of protection when one was available. He suggested to use the term "multiple forms of protection for the same piece of property" to describe the issue under discussion, which was to be subdivided as follows: Firstly, should there be multiple forms of protection for the same piece of property? Secondly, should a member State be able to make two forms available at the same time? Thirdly, where multiple forms of protection are available, should a member State permit both forms at the same time?

40. Herr Dr. Freiherr von Pechmann (AIPPI) knüpfte an die Aeusserungen von Herrn Royon (CIOPORA) an und sagte, dass die anscheinend bei der UPOV sowie bei den Vertretern einiger Organisationen bestehende Angst vor dem Patentschutz unberechtigt sei. Wegen der Hürde der Erfindungshöhe sei die Erlangung eines Patents viel schwieriger als die Erlangung des Sortenschutzes. Eine sehr kleine Zahl von Anmeldungen würden somit zu Patenten führen. Die Eröffnung der Möglichkeit des Patentschutzes für Sorten würde also keineswegs zu einer Flut von Patenten führen.

41. Mr. Royon (CIOPORA) referred to his previous statements and to the statement of Mr. Williams (AIPPI) and added that a "traditional" breeder who sought protection for a variety only should be given the choice between the patent and the plant breeder's right.

42. M. Besson (FIS) renvoie à sa déclaration liminaire et rappelle que le Bureau exécutif de la FIS partage les vues équilibrées de l'ASSINSEL sur ce point.

43. Mr. B. Greengrass (Vice Secretary-General) asked the CIOPORA delegation whether, when it spoke of a flexible Convention that would permit the protection of plant varieties by both industrial patents and by plant breeders' rights, it was envisaging that UPOV criteria such as those of distinctness, uniformity and stability should be adopted by the patent system where plant varieties were the subject matter of protection. It was difficult to see how the two systems could work together if such criteria were not applied under the two systems.

44. Mr. Royon (CIOPORA) replied that breeders were essentially interested by the scope of the protection afforded. If the scope of the rights granted under the UPOV Convention were strengthened to the level sought by breeders, there would be no objection from CIOPORA's part to the basic principles of the UPOV Convention being applied in the granting of patents for plant varieties. Some adaptations would be necessary for the patent system, but also on the part of UPOV, including his suggestion of a more widely available Article 37.

45. M. B. Le Buanec (ASSINSEL) se réfère à l'intervention précédente de M. von Pechmann (AIPPI) et estime que l'on ne peut pas raisonner en termes de difficulté d'obtention d'un brevet ou d'un certificat d'obtention végétale. Les conditions de la protection et les droits conférés par ces deux titres sont différents.

46. Herr Dr. Freiherr von Pechmann (AIPPI) sagte, man müsse auch auf dem Gebiet des Patents das Erfordernis der Wiederholbarkeit berücksichtigen, dem hinsichtlich der Mikroorganismen durch eine Hinterlegung des betreffenden Organismus entsprochen werden könne. In den Vereinigten Staaten von Amerika sei als Folge des Hibberd-Falles das gleiche Erfordernis gestellt, und der Erfinder könne ebenfalls die Wiederholbarkeit seiner Erfindung durch Hinterlegung geeigneten Samenmaterials sicherstellen. Wenn im Laufe der Zeit die Sorte von dem ursprünglich hinterlegten Material abweiche, also nicht beständig sei, dann werde der Patentschutz verloren gehen. Aehnliches gelte für Mikroorganismen. Diesbezüglich bestehe nach Auffassung von Herrn Dr. von Pechmann kein Unterschied zwischen den Voraussetzungen für den Sortenschutz und den Voraussetzungen für einen Patentschutz für eine Sorte.

47. Herr Dr. D. Böringer (Bundesrepublik Deutschland) sagte, die Beiträge vieler Organisationen hätten deutlich gemacht, dass der Schutzgegenstand in dem neuen Uebereinkommen sehr genau definiert werden müsse. Ihm erscheine es, dass weites Einvernehmen darüber bestehe, dass die Sorte als solche der Schutzgegenstand sei. Seines Erachtens nach müsse der Verwaltungs- und Rechtsausschuss den Vorschlag von Herrn Royon (CIOPORA) genau prüfen, wonach einerseits die Voraussetzungen für die Erteilung eines Patents für eine Sorte die

gleichen sein sollten wie diejenigen, die im UPOV-Uebereinkommen für das besondere Schutzrecht vorgesehen seien, und andererseits eine Möglichkeit angeboten werden sollte, zusätzliche Ansprüche auf genetische Information zu formulieren. Die Gutheissung eines solchen Systems würde einige Probleme für den Antragsteller lösen. Die im Zusammenhang mit der Schutzrechtswirkung stehenden Probleme, wie der Umfang des Verbietungsrecht und die Tragweite des Grundsatzes der Erschöpfung, blieben jedoch ungelöst. Gleichwohl sollte dieser Vorschlag erörtert werden.

48. The Chairman concluded the discussions on Article 1. He supported the view expressed by Dr. Böringer (Federal Republic of Germany) and noted that it would be a difficult task for the delegates from member States to reconcile very different views and find a solution that would be acceptable to all.

Article 2 (Definitions)

49. The Chairman opened the discussions on the proposed new Article 2.

50. Mr. King (IFAP) said that IFAP recognized a necessity to adequately reward plant breeders for their plant breeding efforts but emphasized that some of its members opposed the payment of royalties for the discovery of naturally occurring plants. Concerning the defintion of "material," IFAP wished that the words "except farm-saved seed" be added to the words "harvested material."

51. M. Hofkens (COPA/COGECA) fait savoir que le COPA et le COGECA sont en faveur de l'exclusivité du système de la protection des obtentions végétales. Afin d'éviter que le droit des brevets ne s'applique au matériel de reproduction ou de multiplication végétative, il convient d'inscrire dans la Convention une définition du matériel de reproduction ou de multiplication qui précise que les plantes, parties de plantes, cellules et protoplastes constituent un tel matériel.

52. Herr Winter (COMASSO) sagte, die COMASSO begrüsse grundsätzlich die Aufnahme von Begriffsbestimmungen, da diese eine einheitliche Auslegung der Rechtsvorschriften fördere. Im einzelnen meine die COMASSO, dass die vorgeschlagene Begriffsbestimmung der Art unnötig sei, da die COMASSO sich für Alternative 3 in Artikel 4 ausspreche und dann, falls diese Alternative gewählt werde, in keinem Artikel des Uebereinkommens auf die Art Bezug genommen werde. Die vorgeschlagene Begriffsbestimmung der Sorte werde akzeptiert, sowie auch die Begriffsbestimmung des Züchters. Bezüglich der Ziffer iv) erscheine eine Begriffsbestimmung des Sortenmaterials unabdingbar, da nur mit ihrer Hilfe die vorgesehene Schutzrechtswirkung gemäss Artikel 5 klar verstanden werden könne. Allerdings müsse sie so breit wie möglich sein; die COMASSO schlage also vor, dass die gesamte Bestimmung übernommen werde.

53. Mr. S.D. Schlosser (CIOPORA) found a need for a definition of the term "material" but proposed an alternative broad definition as follows: "'Material' shall mean any plant or part of a plant, whatever its botanical or commercial function. The term shall include cut flowers, fruits and seeds."

54. Mr. Roberts (ICC) said that ICC found the definition of "variety" in Article 2(ii) somewhat too broad and indefinite. Varieties should be defined as being varieties which fulfilled the distinctness, homogeneity and stability criteria of Article 6. If varieties were so defined, then patents on plant varieties would, of necessity, have to be on varieties that were distinct, homogeneous and stable. If this requirement was not fulfilled, applications would be for something other than varieties. ICC also felt that a definition of "material" was necessary and supported the definition proposed by Mr. Schlosser (CIOPORA).

55. M. Le Buanec (ASSINSEL) fait savoir que l'ASSINSEL n'a pas de remarques particulières à formuler sur les trois premiers paragraphes de l'article 2. S'agissant de l'alinéa iv), de la définition du matériel de la variété, l'ASSINSEL estime que la référence au "matériel potentiellement utilisable en tant que matériel de reproduction ou de multiplication végétative" devrait être supprimée car le mot "potentiellement" manque de précision. Cette suppression pourrait être compensée en libellant le premier alinéa comme suit : "toutes les formes de matériel de reproduction ou de multiplication végétative". Les troisième et quatrième alinéas paraissent absolument indispensables à l'ASSINSEL; dans le quatrième alinéa, il conviendrait de maintenir le mot "directement". En d'autres termes, l'ASSINSEL souhaite que le droit s'applique au produit de la récolte ainsi qu'au produit transformé directement obtenu à partir du produit de la récolte.

56. Herr Dr. Freiherr von Pechmann (AIPPI) begrüsste namens der AIPPI die vorgschlagene Aufnahme von Begriffsbestimmungen. Bezüglich der Ziffer iv) sei die AIPPI der Auffassung, dass die Definition des Materials soweit wie möglich gehen solle, damit der Züchter den grösstmöglichen Schutz erhalte. Jedoch habe es innerhalb der AIPPI keine einheitliche Auffassung gegeben hinsichtlich des Wortes "unmittelbar" im Satzteil "unmittelbar vom Erntegut abgeleitete Erzeugnisse". Einige Vertreter hätten seine Streichung befürwortet, da auch mittelbar vom Erntegut abgeleitete Erzeugnisse geschützt werden sollten. Andere hätten sich für eine Beibehaltung dieses Wortes ausgesprochen, da es bereits im Patentrecht im Zusammenhang mit Erzeugnissen, die von einem geschützten Verfahren abgeleitet würden, zu finden sei. Die AIPPI begrüsse die vorgeschlagene Formulierung, da es notwendig sei, deutlich zu machen, was unter dem Begriff "Material" in Artikel 5 gemeint sei.

57. Mr. Slocock (AIPH) stated that AIPH welcomed the abandonment of the word "taxon" and, since there would be no reference in Article 4 to "species," there was no point in defining it. AIPH accepted the definition of the word "variety" but did not accept that the word "breeder" should include the discoverer of a plant found in nature. The word "material" should be defined to mean the reproductive or vegetative propagating material of the variety. The reference to material which "has the potential of being used as reproductive or vegetative propagating material" should be deleted as it would jeopardize the precision of the Convention.

58. Discussions on the definitions of "breeder" and "variety" were continued on the morning of the second day. The following remarks were made.

59. Dr. D. Gunary (ASSINSEL) said that ASSINSEL would appreciate it if the definition of "breeder" were to state clearly that the breeder could be either a natural or a legal person.

60. Mr. Besson (FIS) stated that his organization supported the position expressed by ASSINSEL.

61. Herr Dr. Freiherr von Pechmann (AIPPI) erklärte, dass der Hinweis auf andere Benutzungsarten in der Begriffsbestimmung der Sorte Probleme hervorrufen könnte. In der Tat könnte dem Züchter oder Biochemiker, der beispielsweise eine Pflanzenzellinie zur Erzeugung eines Farbstoffes gezüchtet habe, ein Patent für seine biochemische Erfindung mit der Einwendung verweigert werden, es handele sich bei seiner Zellinie um eine "... Gesamtheit von ... Pflanzenteilen, die ... als eine Einheit zum Zweck ... einer anderen Benutzungsart angesehen wird". Herr Dr. von Pechmann vertrat die Meinung, dass die vorgeschlagene Begriffsbestimmung bei der diplomatischen Konferenz oder später auf nationaler Ebene im parlamentarischen Verfahren zu Schwierigkeiten führen werde. Er schlug vor, den Satzteil "oder einer anderen Benutzungsart" zu streichen.

62. Herr Dr. Böringer (Bundesrepublik Deutschland) stimmte Herrn Dr. Freiherr von Pechmann insofern zu, dass die Frage sorgfältig zu prüfen sei. Er erklärte ferner, dass der strittige Satzteil aufgenommen worden sei, weil es im Pflanzenreich Sorten gebe, die nicht angebaut sondern in anderer Weise genutzt würden. So könnten beispielsweise im Bereich der Wasserpflanzen Algensorten in der Arzneimittelindustrie zur Extraktion eines Stoffes genutzt werden, ohne dass die Sorten im eigentlichen Sinne angebaut würden. In der Bundesrepublik Deutschland habe man bereits an einem praktischen Beispiel die Unzulänglichkeit der Formulierung "ausschliesslich zum Anbau bestimmt" feststellen können.

63. Mr. Williams (AIPPI), in follow-up to the statement of Dr. Freiherr von Pechmann (AIPPI), stated that the reference to groupings of plants in the definition of "variety" was also objectionable. That reference could be construed as applying to higher groupings than varieties. Traditionally, the term "variety" would be used in relation to individual plants.

64. Mr. Roberts (ICC) supported the views expressed by Dr. Freiherr von Pechmann. They concerned an area of interaction between patents and plant breeders' rights. It was UPOV's role and responsibility to define the notion of variety, but its definition had consequences in the field of patents. The problem lay in the reference to parts of plants. In Mr. Roberts' view, "plant variety" was related to an assemblage of plants over their whole life cycle. The parts of plants were to be considered in the context of the definition of "material."

65. Mr. Clucas (ASSINSEL) stated that ASSINSEL could not accept the deletion of the reference to groupings of plants. There were types of varieties which, by reason of the method by which thay had been bred and of the system by which they were reproduced, could only be represented by a number of plants.

Article 3 (National Treatment)

66. The Chairman opened the discussions on Article 3.

67. Support for the proposed deletion of paragraph (3), which provided for the possibility for member States to require reciprocity, was expressed by Mr. Slocock (AIPH), Dr. von Pechmann (AIPPI), Mr. Clucas (ASSINSEL), Mr. Roberts (ICC), Mr. Royon (CIOPORA), Mr. Winter (COMASSO) and Mr. Besson (FIS).

68. Dr. Gunary (ASSINSEL) suggested that consideration should be given to the deletion of the end of paragraph (2) starting with "provided that." ASSINSEL was of the view that a check on the multiplication was not a condition for the grant of a right and was thus of no relevance for national treatment.

69. Herr Winter (COMASSO) sagte, bezüglich Absatz 1 sei die COMASSO der Meinung, dass der besonderen europäischen Lage Rechnung getragen werden sollte und die Streichung des Satzteils "die den eigenen Staatsangehörigen auferlegt werden" in Erwägung gezogen werden sollte. Diese Streichung scheine ihr angesichts der angestrebten Vereinheitlichung des europäischen Marktes und der europäischen Rechtssituation unabdingbar zu sein, da es sonst zu Rechtsunsicherheit führen könnte.

70. Bezüglich Absatz 2 sei die COMASSO der Meinung, dass er überdacht werden sollte. Der Bezug auf die Ueberwachung der Vermehrung einer Sorte als Voraussetzung für die Inländerbehandlung scheine in der Tat nicht gerechtfertigt zu sein, da diese Ueberwachung keine Voraussetzung für die Erteilung des Züchterrechts darstelle.

71. M. Hofkens (COPA/COGECA) dit que le COPA et le COGECA n'ont pas d'observations à formuler au sujet de l'article 3.

72. Mr. King (IFAP) said that IFAP had no firm views on the proposed deletion of paragraph (3). It should be noted, however, that a member of IFAP from Finland had replied to the enquiry that if there were an application from Finland for membership in UPOV and if they were to support that application, they would prefer Finland to be free to define the extent of application of the reciprocity principle.

73. M. Besson (FIS) fait savoir que la FIS appuie la position exprimée par l'ASSSINSEL.

74. The Chairman concluded the discussions on Article 3 and noted that there was general agreement for the deletion of paragraph (3) and that the Administrative and Legal Committee would have to consider some minor aspects of paragraphs (1) and (2).

Article 4 (Scope of Application of the Convention)

75. The Chairman opened the discussions on Article 4.*

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* References to alternatives in the subsequent paragraphs are reference to the alternatives proposed for both paragraph (1) and paragraph (2) of Article 4.

76. M. Besson (FIS) fait savoir que la FIS préfère la variante 3, mais complétée comme suit : "toutes les variétés végétales".

77. Mr. King (IFAP) referred to his earlier comments made in relation to Article 1 concerning flexibility required in respect of the provisions of Articles 4 and 5. IFAP was of the view that elements of flexibility should be built into those Articles. Concerning Article 4, IFAP was opposed to the mandatory application of the Convention to all species and felt that individual States should be able to accede to the UPOV Convention even if they were in the position to grant plant breeders' rights for certain species only. IFAP favored the flexibility permitted in the text of the 1978 Convention. It did not see how the Council of UPOV could evaluate the exceptional difficulties faced by member States seeking to limit the application of the Convention.

78. M. Hofkens (COPA/COGECA) fait savoir que le COPA et le COGECA ont une position identique à celle de la FIS.

79. Herr Winter (COMASSO) sagte, die COMASSO sei, wie bereits angedeutet, der Meinung, Alternative 3 wäre dem Anwendungsbereich des Uebereinkommens angemessen. Sie begrüsse ausdrücklich die bedingungslose Anwendung des Uebereinkommens auf alle Sorten. Jedoch sei die in Absatz 2 vorgesehene Möglichkeit, von diesem Grundsatz wieder abzuweichen, vom Standpunkt der Züchter aus gesehen unbefriedigend. Die Züchter müssten überall dieselben Bedingungen für ihre Arbeit und für den Schutz dieser Arbeit vorfinden können. Die Diskussionen der Vergangenheit hätten gezeigt, dass selbst in den europäischen Verbandsstaaten durch die unterschiedliche Anwendung des Uebereinkommens auf einzelne Arten beträchtliche Wettbewerbsprobleme zwischen diesen Staaten aufgetreten seien. Sollte man jedoch aufgrund übergeordneter politischer Erwägungen an der Gewährung der Möglichkeit für die Verbandsstaaten festhalten müssen, das Uebereinkommen allmählich auf alle Arten anzuwenden, dann verstünde die COMASSO, dass auf jeden Fall keine "aussergewöhnlichen Schwierigkeiten" vorlägen, wenn in wenigstens einem Verbandsstaat Prüfungsmöglichkeiten vorhanden seien, angeboten würden oder geschaffen werden könnten.

80. Mr. Royon (CIOPORA) stated that CIOPORA believed that the Convention should be applied as broadly as possible and therefore felt that Alternative 3 in paragraph (1) would be the best of the three proposed. CIOPORA would propose, however, the following wording for paragraph (1) which would better express the intentions:

> "This Convention shall be applied to all new plant varieties irrespective of the plant species to which they belong."

81. CIOPORA believed that paragraph (2) should be applied as narrowly as possible and would object to or oppose any delayed application of the Convention to species that were commercially important and deserved protection.

82. Mr. Roberts (ICC) stated that ICC preferred Alternative 1 embracing all botanical species. It might be more logical to retain Alternative 3, but before opting for that suggestion, ICC would wish to see the definition of "variety" settled. ICC's proposal was that paragraph (2) should be deleted in its entirety since there was concern that it could be used to delay the full introduction of plant variety protection in new countries joining UPOV and form the basis for countless undesirable exceptions.

83. Dr. Gunary (ASSINSEL) stated that ASSINSEL fully supported the new text of Article 4 and favored Alternative 3.

84. Herr Dr. Freiherr von Pechmann (AIPPI) erklärte, die AIPPI spreche sich auch für Alternative 3 aus, denn sie würde eine klare Situation schaffen. Die anderen Alternativen könnten Probleme grundsätzlicher Art über den Schutzgegenstand des UPOV-Uebereinkommens aufwerfen.

85. Hinsichtlich des Absatzes 2 sei die AIPPI der Meinung, dass er gestrichen werden könnte, denn sie sehe nicht, welche "aussergewöhnlichen Schwierigkeiten" in einem Land auftauchen könnten. Sollte sich dieser Begriff auf einen Mangel von Prüfungsmöglichkeiten in dem betreffenden Land beziehen, so wäre auf den Austausch von Prüfungsergebnissen zwischen den Verbandsstaaten zu verweisen. Dieser erlaube, diese Schwierigkeiten zu überwinden. Desweiteren sei auch der vorgeschlagene Absatz 2 im Hinblick auf die Notwendigkeit einer Harmonisierung innerhalb der UPOV zu streichen.

86. Mr. Slocock (AIPH) stated that AIPH favored Alternative 3 in paragraph (1) and had reservations concerning paragraph (2) in the absence of knowledge of the likely attitude of the Council on a proposed progressive implementation of the Convention. It was only acceptable on the understanding that a strict timetable was accepted by the member State concerned for such implementation and that the paragraph was not allowed to delay the introduction of protection in new member States in respect of commercially important species.

Article 5 (Effects of the Right Granted to the Breeder)

Paragraph (1) (Definition of the Basic Rights)

87. The Chairman opened the discussions on Article 5, paragraph (1).

88. Mr. Slocock (AIPH) said that Article 5 was almost a Convention in itself. So far as paragraph (1) was concerned, AIPH fully recognized that it had to include a reference to exports. This seemed to be relevant and practical.

89. Herr Dr. Freiherr von Pechmann (AIPPI) erklärte, die AIPPI könne der Formulierung von Absatz 1 zustimmen, zumal das Erntegut auch in den Schutzumfang eines Sortenschutzrechts aufgenommen werden solle und, wie die Diskussion über die Begriffsbestimmung des Materials in Artikel 2 Ziffer iv) dies gezeigt habe, diese Aufnahme allgemeine Zustimmung gefunden habe.

90. Dr. Gunary (ASSINSEL) said that ASSINSEL saw Article 5 as a very important Article which would materially affect the confidence which breeders would have in their investments in the development of varieties. ASSINSEL very much appreciated the rewording of this Article and thought that it would be clearer if sub-paragraph (iii) of paragraph (1) were reworded as follows: "from importing or stocking material of the variety for any of the purposes defined in this paragraph."

91. Mr. Roberts (ICC) said that ICC supported Article 5(1) entirely.

92. Mr. Royon (CIOPORA) stated that in Article 5 the term "right" did not appear suitable because it lead to a repetition of the term "right." CIOPORA thought that it should be replaced by "title of protection." The first sentence would then read: "The title of protection granted confers the right ..." Also the term "title of protection" was able to cover the various different titles which would be used by member States if CIOPORA's earlier remarks concerning Article 1 were adopted.

93. Turning to paragraph (1), CIOPORA appreciated the proposed extension of the scope of protection but was not quite happy from a systematic point of view with the separation which was made between "reproduction" and other types of acts. CIOPORA considered that what should be covered was the "commercial exploitation" of the variety and notably the reproduction of the variety, the use for commercial purposes, the offering for sale or the sale of the variety or material thereof and the importation or stocking of the variety or material thereof. In relation to exports of material, CIOPORA greatly appreciated the proposed extension of the scope of protection since it was in favor of breeders, but wondered whether this did not represent the imposition of two protections on one and the same object. It was obvious to CIOPORA that, while material might be imported from a country without protection, because of the territorial limitation of the title of protection, exports could only concern material which had been propagated, produced or sold in, or imported into, the territory of the country concerned; such material therefore already fell under the protection covering such acts as "manufacture," "offer for sale," "sale" or "putting on the market."

94. Herr Winter (COMASSO) sagte, die COMASSO sei ebenfalls völlig in Uebereinstimmung mit dem Prinzip der Verstärkung des gewährten Rechtes, nämlich der Gewährung eines absoluten Rechtes mit klar definierten Ausnahmen. Sie könne dem Absatz 1 inhaltlich zustimmen, schlage jedoch vor, den Satzteil "zu einem der vorgenannten Zwecke" zu streichen, da ihrer Auffassung nach die Einfuhr oder der Besitz automatisch zu einem der in den Ziffern i) und ii) genannten Zwecke erfolge.

95. M. Petit-Pigeard (COMASSO) fait observer que, dans le texte français, le mot "concédé" dans le titre de l'article 5, dans le paragraphe 1) de cet article et dans d'autres dispositions proposées est incorrect.

96. M. Hofkens (COPA/COGECA) dit que le COPA et le COGECA n'ont pas d'observations à formuler au sujet du paragraphe 1).

97. Mr. King (IFAP) stated that IFAP could support the rewriting of Article 5 in order to clarify its interpretation. IFAP was of the view, however, that the proposed revision of what was known as the "farmer's privilege" was in the view of its members the betrayal of the original intent of the UPOV Convention. Many farmers' organizations accepted plant breeders' rights legislation in their country on the understanding from their Governments that royalties would not be paid on farm-saved seed. IFAP's member organizations were unanimous in their opinion that the breeder's right should be limited to propagating material for commercial purposes. In relation to paragraph (1), IFAP liked the wording "production for purposes of commercial marketing" in the presently applicable text. Accordingly, it proposed that that phrase be reinstated and that paragraph (1)(i) should read: "reproducing or propagating their variety for the purposes of commercial marketing." In relation to paragraph (2), IFAP

would propose to further clarify the "farmer's privilege" question by proposing the addition of sub-paragraph which would spell out in detail what IFAP had in mind.

98. M. Besson (FIS) dit que la FIS n'a pas d'observations à formuler au sujet du paragraphe 1).

99. Herr Dr. Freiherr von Pechmann (AIPPI) sagte, er habe Bedenken gegen den Vorschlag von Herrn King (FIPA). Sollte sich das Züchterrecht auf die Vermehrung der Sorte zum Zweck des gewerbsmässigen Absatzes beschränken, dann könnte der Züchter nicht unmittelbar gegen eine Vermehrung vorgehen, sondern müsste abwarten, bis das erzeugte Vermehrungsmaterial vertrieben werde. Der vorgeschlagene Wortlaut biete die Möglichkeit, das Recht bereits bei einer Vermehrung in grossem Umfang geltend zu machen, also wenn klar sei, dass sie nicht zu privaten Zwecken erfolge und somit gemäss Absatz 2 vom Schutz ausgenommen sei.

100. Mr. Royon (CIOPORA) stated that the wording proposed by CIOPORA for paragraph (1) was based on the wording of patent laws in relation to product patents, and CIOPORA believed that it was very important that this paragraph be worded in very broad terms. It concurred with COMASSO that exceptions from protection should be the subject of a different Article. It was of the view that instead of separating two aspects of the exploitation of a variety, that is to say "reproduction" and "offering for sale," "selling," etc., it would be much simpler to refer to the commercial exploitation of the variety. This drafting would eliminate some of the difficulties referred to by some associations in relation to exploitation which was not for commercial purposes. Another advantage of this wording would be that it would enable us to draw upon more than a century of important case law on the interpretation of patent legislation.

101. Mr. Clucas (ASSINSEL) stated that he would like to associate his organization with the comments made by Dr. Freiherr von Pechmann (AIPPI) with reference to the "purposes of commercial marketing" because if a breeder wished to police his product, the most convenient point at which policing could take place was the reproduction or propagation stage.

102. M. Petit-Pigeard (COMASSO), anticipant sur le débat qui portera sur la possibilité pour les Etats de limiter les effets du droit accordé à l'obtenteur, et d'intervenir dans la production et la commercialisation des semences et plants, souligne la distinction entre l'usage personnel, qui est à des fins non lucratives, et l'usage industriel, artisanal ou agricole, qui est à des fins lucratives. D'une manière générale, un agriculteur ne produit pas du matériel de reproduction ou de multiplication en vue de la production d'une récolte destinée à satisfaire les besoins de sa famille ou de son personnel, comme on pourrait le faire dans un jardin familial. Il paraît important à M. Petit-Pigeard de ne pas entrer dans un système de pensée qui assimile un agriculteur à une personne qui, au regard de la protection des obtentions végétales, n'exerce pas d'activité lucrative. Un tel système de pensée remettrait d'ailleurs en cause les principes régissant par exemple la photocopie d'oeuvres protégées par le droit d'auteur ou la copie de logiciels et, en fait, les principes régissant l'ensemble de la propriété intellectuelle. Par ailleurs, l'objectif de la révision de vrait être l'élaboration d'une

Convention qui soit efficace pour tous les types de variétés et qui ne pousse pas les obtenteurs à orienter leurs travaux de recherche vers la création de variétés hybrides.

Paragraph (2) (Exclusions from the Scope of the Right Granted to the Breeder)

103. The Chairman opened the discussions on paragraph (2).

104. Herr Dr. Freiherr von Pechmann (AIPPI) sagte, die AIPPI könne diesem Absatz im allgemeinen zustimmen. Die in Ziffer ii) und iii) vorgesehenen Ausnahmen seien Uebernahmen aus dem Gemeinschaftspatentübereinkommen, das zwar noch nicht in Kraft getreten sei, aber bereits in dem Patentgesetz einiger Staaten seinen Niederschlag gefunden habe. Sie würden eine Klarstellung darstellen, der man nur zustimmen könne.

105. Mme M. Cambolive (ASSINSEL) fait référence à une légère différence entre les versions française et anglaise de l'alinéa ii). Pour éliminer cette différence, il conviendrait de supprimer le mot "and" dans la version anglaise.

106. S'agissant de la question plus générale de la protection des hybrides et des lignées parentales, Mme Cambolive fait savoir que, pour l'ASSINSEL, celle-ci ne paraît pas avoir été suffisamment étudiée. Les problèmes soulevés par cette protection on été portés à plusieurs reprises à l'attention de l'UPOV. Si l'on excepte la référence à l'utilisation répétée d'une variété figurant à l'alinéa iv), ces problèmes ne sont toujours pas pris en compte. L'ASSINSEL propose d'adopter une définition des hybrides qui pourrait être fondée, selon les espèces et groupes d'espèces concernés, sur les constituants et la formule qui les associe. Une autre préoccupation de l'ASSINSEL réside dans l'utilisation des lignées parentales car leur mise à disposition pourrait conduire à de simples travaux de sélection. Des réflexions sont actuellemnt en cours au sein de l'ASSINSEL et celle-ci fera des propositions après son congrès qui aura lieu à Séville (Espagne) au printemps 1990.

107. Mr. Roberts (ICC) stated that ICC supported the wording of paragraph (2) as proposed.

108. Mr. Royon (CIOPORA) stated that CIOPORA wondered whether the principle of exhaustion of rights should be introduced into the Convention because the Convention should be a set of principles, rather than a model law. If it was to be introduced, CIOPORA insisted that it be strictly limited to the specific field of use for which the breeder might have sold or licensed material of his variety. CIOPORA was not satisfied with the text as proposed.

109. In relation to subparagraph (ii), CIOPORA agreed with the remarks made by other organizations. It had itself proposed that the provision should apply to acts done for domestic and non-commercial purposes. The two conditions had to be cumulative. An act could be done by a municipality in a private way for non-commercial purposes but it would still not be domestic.

110. In relation to sub-paragraph (iv), CIOPORA wished the words "and acts done for the commercial exploitation of such varieties" to be removed. CIOPORA

further suggested the merging of sub-paragraphs (iii) and (iv) as follows: "acts done for experimental purposes or for the purpose of breeding new varieties." CIOPORA was of the opinion that the expression "or for the marketing of such varieties" in Article 5(3) of the present text of the Convention and the expression "acts done for the commercial exploitation of such varieties" in Article 5(2)(iv) of the proposed new draft should be deleted: the Convention should not prejudge that a variety freely bred from an existing protected variety would not infringe the parent variety; it was therefore not possible to say in advance that it could be freely exploited. It was only where the new variety was clearly distinct and therefore outside of the ambit of protection of the existing protected variety that it could be freely exploited.

111. Herr Winter (COMASSO) sagte, Absatz 2 werde von der COMASSO als Ausdruck der Tatsache geschätzt, dass die klassischen Ausnahmetatbestände eines geistigen oder gewerblichen Schutzrechts auch in dem UPOV-Uebereinkommen übernommen würden. Zum Wortlaut von Ziffer ii) schlug er vor, das Wort "and" im englischen Wortlaut zu streichen, wie bereits von anderen Delegationen vorgetragen, um eine kumulative Wirkung der beiden Handlungszwecke zu erreichen.

112. M. Hofkens (COPA/COGECA) fait savoir que le COPA et le COGECA souhaiteraient que l'on ajoute au paragraphe 2) un alinéa traitant du "privilège de l'agriculteur". Il s'agit là d'une coutume qui est tolérée dans une plus ou moins grande mesure, qui crée une grande insécurité juridique et qui permet dans certains cas des abus. Pour le COPA et le COGECA, il serait préférable de définir cette exemption afin de délimiter les pratiques en cause et de garantir une plus grande sécurité juridique. Elles proposent d'ajouter un alinéa libellé comme suit : "[le droit ne s'étend pas :] aux actes de reproduction ou de multiplication du matériel de reproduction dans le sol et de traitement réalisés par l'agriculteur utilisant son matériel de production agricole, qu'il ait effectué ces actes lui-même ou dans le cadre de l'entraide en services mutuels agricoles à titre gratuit entre agriculteurs, afin de réensemencer ou replanter ses terres."

113. Mr. King (IFAP) stated that IFAP's proposal for paragraph (2) was very similar to what COPA had proposed. The existence of the "farmer's privilege" was not clearly expressed in the present text of the Convention, and IFAP was in favor of clarifying that text, without changing its substance. It was in this spirit that Mr. King offered a new subparagraph (v) reading:

> "(v) acts done under the farmer's privilege; the farmer's privilege encompasses the propagation and preparation of seed material by the farmer for his own use, from his own harvested crop, and using his own farm equipment, or these acts carried out in the framework of mutual agricultural assistance amongst farmers."

114. M. Besson (FIS) dit que la FIS s'oppose aux propositions faites par MM. Hofkens et King au nom du COPA, du COGECA et de la FIPA.

115. Herr Winter (COMASSO) bemerkte, dass die Begründung für die Vorschläge von COPA, COGECA und FIPA ein Versuch sei, durch eine exakte Formulierung Rechtsklarheit zu schaffen. Die COMASSO könne sich mit diesem Vorhaben nicht einverstanden erklären, denn es setze das Bestehen eines "Landwirteprivilegs"

voraus. Ein solches Privileg gebe es aber vom Gesetz her nicht, und die Aufnahme eines "Landwirteprivilegs" in das Uebereinkommen würde die Schaffung eines neuen rechtlichen Tatbestandes bedeuten.

116. M. Petit-Pigeard (COMASSO) ajoute qu'il est évidemment difficile pour les organisations d'obtenteurs d'accepter la proposition dont il s'agit. Mais au-delà du problème de perception, il existe un problème fondamental, qui est que le privilège n'existe pas. Il en a été jugé ainsi dans un certain nombre de pays, en particulier en France. A cet égard, il ne faut pas confondre le droit privé de la protection des obtentions végétales, pour lequel il ne saurait être question de privilège, et le droit public de la certification, qui peut prévoir un privilège portant sur la production et l'utilisation des semences certifiées.

117. Par ailleurs, il faut garder à l'esprit les objectifs généraux de la filière variétale. Si l'on veut qu'il y ait une recherche performante - et que les exploitants agricoles puissent bénéficier du progrès génétique - il faut en donner les moyens aux obtenteurs. Il doit donc y avoir des redevances. Lorsque le taux d'utilisation de semences de ferme atteint par exemple 70%, comme c'est le cas dans certains pays pour certaine espèces telles que le blé, il est difficile de parler de privilège; la protection serait l'exception plutôt que la règle. Une telle situation ne peut que favoriser la création de variétés hybrides pour lesquelles le privilège ne peut exister faute de reproductibilité à l'identique du matériel végétal.

118. Enfin, M. Petit-Pigeard dit que l'on ne peut pas demander, sous prétexte que la loi n'est pas claire et n'a pas été précisée par la jurisprudence, un éclaircissement de cette loi, au nom de la sécurité juridique, à son propre profit. Cette observation vaut également pour d'autres domaines du droit de la propriété intellectuelle. On ne saurait faire droit à une telle demande sans encourir le risque que les obtenteurs ne se détournent du système de la protection des obtentions végétales.

119. Dr. Gunary (ASSINSEL) stated that ASSINSEL shared very firmly the views expressed by Mr. Winter and Mr. Petit-Pigeard (COMASSO) and was opposed to the proposals of COPA and IFAP. Plant breeders were in the business of creating for growers an opportunity to make more money from growing their crops, and it seemed totally unreasonable that growers should have access to the breeders' property and the fruits of their research without regard to the investment which they had made. ASSINSEL felt that it was right and appropriate for breeders to seek proper compensation for the development of their intellectual property. ASSINSEL was therefore opposed to the establishment of a definition of the kind which COPA and IFAP were seeking.

120. M. Hofkens (COPA/COGECA) fait remarquer que les milieux intéressés ont conlu une convention en France par laquelle ils reconnaissent l'usage dont il s'agit en des termes très proches de ceux de la proposition qu'il a faite au nom du COPA et du COGECA. Par ailleurs, il constate que la proposition faite par la Commission des communautés européennes en vue de l'instauration d'un droit d'obtenteur communautaire contient une disposition permettant de réglementer le "privilège de l'agriculteur".

121. M. Desprez (COMASSO) rappelle qu'il est l'un des signataires de l'accord auquel M. Hofkens vient de se référer et souligne qu'il s'agit d'un accord de droit public et non de droit privé.

122. M. Prével (France) souhaite apporter des éclaircissements sur l'accord conclu en France, lequel a des conséquences importantes, puisqu'il implique une modification des habitudes des agriculteurs et de leurs fournisseurs. Cet accord a été signé sous l'égide du Ministère de l'agriculture sous la forme d'un accord interprofessionnnel qui comporte effectivement les termes utilisés par les représentants du COPA, du COGECA et de la FIPA. Cependant, il s'agit d'un accord de droit public qui ne remet nullement en cause le droit privé dans sa totalité. Il s'ensuit que les utilisateurs qui ne respecteraient pas l'accord seraient susceptibles de poursuites au titre du droit privé.

123. Mr. King (IFAP) stated that his organization was inspired by what had been done in France to establish a clear definition of what the "farmer's privilege" should be. IFAP was not in favor of abuses whereby 70% of the seed in France was outside the system. As a farmers' organization IFAP was in favor of breeders getting sufficient remuneration to produce new varieties since this was in the interest of farmers and society in general. But Mr. King would like to tell his friends in ASSINSEL that, in approaching this question, the debate could not start from their objectives, but from the situation as it was at present; and the fact was that, according to the members of IFAP, there was a prior commitment in certain member States that farm-saved seed should be exempt from royalty payments. The debate had to start from there. The proposal of IFAP was not to create a new privilege, but to avoid the abuse, and he suggested that the debate should attempt to clarify what that meant.

124. Herr Dr. Freiherr von Pechmann (AIPPI) hielt die Bemerkungen der COMASSO und der ASSINSEL für richtig und unterstützte daher den Standpunkt, dass man das "Landwirteprivileg" in dem Uebereinkommen nicht näher definieren sollte. Der in Dokument IOM/IV/2 vorgeschlagene Wortlaut dürfte zufriedenstellend sein.

125. M. Royon (CIOPORA) fait observer que les obtenteurs membres de la CIOPORA ne sont pas aussi touchés que les membres de l'ASSINSEL par les problèmes soulevés par le "privilège de l'agriculteur". La CIOPORA soutient néanmoins pleinement les points de vue exprimés par les représentants de l'ASSINSEL et de COMASSO. Elle insiste à nouveau pour que l'on se réfère à l'article 5.1) à l'exploitation commerciale de la variété. Une telle référence permettra de mettre à profit la jurisprudence établie pour contrôler les abus commis par des personnes qui multiplient une variété à des fins commerciales, en prétendant qu'elles le font à des fins personnelles.

126. Mr. J. Harvey (United Kingdom) pointed out that the paragraph under discussion did not exempt farmers from the scope of the breeder's right. Exemption was an option under Article 5(4). The question that arose in relation to the proposed text was whether or not it should establish a position in relation to the "farmer's privilege" that would be uniform throughout all UPOV member States. The provision might be to the effect that the "farmer's privilege" should be maintained, modified or eliminated. The proposed text of Article 5(4) allowed each member State to do as it chose. Mr. Harvey would welcome the views of the professional organizations on whether each member State should be allowed to do as it chose or whether the Convention should establish a position that applied to all member States.

127. Mr. Roberts (ICC) stated that ICC strongly supported the position of COMASSO and ASSINSEL on this subject. In relation to Mr. Harvey's question,

which was very important, the position of ICC was that it would like UPOV to take a position on the question of "farmer's privilege." It was very important that there be common rules across the whole of UPOV, that there be a standard which individual Governments could adhere to.

128. Herr Winter (COMASSO) verwies auf die Ausführungen von Herrn Hofkens (COPA/COGECA), wonach das Prinzip eines "Landwirteprivilegs" auch in dem in Vorbereitung stehenden Gemeinschaftszüchterrecht verankert sein werde. Er unterstrich, dass es sich hierbei zur Zeit nur um eine Vorlage handele, die im Rahmen der zuständigen Dienststelle der Kommission der Europäischen Gemeinschaften diskutiert werde und noch aufbereitet werden müsse, um ein dem Ministerrat zur Diskussion gestellter Kommissionsvorschlag zu werden. Insofern könne man hier nicht mit Fug und Recht auf eine bereits verankerte Institution des "Landwirteprivilegs" hinweisen.

129. M. Le Buanec (ASSINSEL) fait référence à la question posée par M. Harvey (Royaume-Uni) ainsi qu'à la déclaration faite antérieurement par le Président de l'ASSINSEL, M. Clucas. L'ASSINSEL souhaite qu'une position soit prise au niveau de l'UPOV, et non par chacun des Etats membres; elle souhaite également que le droit de l'obtenteur soit défini de manière très forte et dans des termes très précis.

130. The Chairman concluded the discussions on paragraph (2), noting that the Administrative and Legal Committee would have to consider the matter on which the views were divided between COPA, COGECA and FIPA, on the one hand, and the other organizations, on the other.

Paragraph (3) (Essentially Derived Varieties)

131. The Chairman opened the discussions on paragraph (3).

132. Mr. Slocock (AIPH) said that AIPH accepted the principle of dependence. In relation to the alternatives, AIPH noted that Alternative 1 and Alternative 3 would vest in the holder of the right an ability to interfere with the free exploitation of the dependent variety; it believed that this was inherently wrong. AIPH felt that the breeder should be equitably compensated in relation to a dependent variety and that the simple wording of Alternative 2 represented the balance which AIPH, from the user side, wished to see.

133. Herr Dr. Freiherr von Pechmann (AIPPI) erklärte, dass die AIPPI die Aufnahme einer Bestimmung zur Regelung der Abhängigkeiten begrüsse. Bezüglich der Einschränkung der Bestimmung auf die Ableitung aus einer einzigen geschützten Sorte sei die AIPPI der Auffassung, dass eine Ableitung von zwei Sorten sehr wohl denkbar sei und dass es keinen Grund gebe, warum dies in der vorgeschlagenen Bestimmung nicht berücksichtigt werden sollte. Sei eine Sorte aus der Kreuzung zweier geschützter Sorten entstanden und weise sie die Eigenschaften der beiden Sorten auf, so sehe Herr Dr. von Pechmann keinen Grund, diese Sorte anders zu bewerten, als wenn sie von einer einzigen geschützten Sorte abgeleitet worden sei.

134. Bezüglich der vorgeschlagenen Alternativen spreche sich die AIPPI, wie bereits in Dokument IOM/IV/5 dargelegt, für Alternative 1 aus. Sollte sich diese nicht durchsetzen, so sollte nach Ansicht der AIPPI der Alternative 3 zugestimmt werden.

135. Dr. Gunary (ASSINSEL) stated that ASSINSEL particularly welcomed the introduction of the concept of dependence. ASSINSEL saw it as a means whereby the interface between the forms of intellectual property protection in plant varieties and plant genetic components might be most effectively handled. To make the definition of "essentially derived" easier, ASSINSEL suggested the removal of the brackets around "single" in the first part of paragraph (3) since it believed that there were very few circumstances under which it was realistic to consider a variety being essentially derived from more than one variety. ASSINSEL awaited the outcome of the discussions between UPOV and WIPO concerning the interface between the two systems of protection and the extent to which patent rights should be granted for biotechnological inventions. If the result of those discussions led to a position where the exploitation of varieties containing patented components or produced by patented processes was only possible with the permission of the patent holder, then ASSINSEL wished to reserve the right to allow access to a protected variety on the same basis and accordingly selected Alternative 1 for Article 5(3).

136. Mr. Roberts (ICC) stated that the introduction of dependence into the plant variety protection system was one of the most important proposed amendments to the UPOV Convention. ICC joined with other organizations in welcoming this concept that was new in the field of plant breeders' rights. It felt that it was an extremely important concept which added a major element of balance and equity in the relations between breeders, on the one hand, and between plant variety rights' holders and patent holders, on the other.

137. Concerning the first situation, it was generally recognized that it was not adequate and not fair that a breeder could produce a new variety, using only one variety protected in favor of another breeder as a parent. The proposed dependence clearly offered great scope for remedies to that situation, although the practical difficulties in defining its scope had to be recognized. However, those difficulties had to be faced and would be solved with the progressive application of the principle.

138. Concerning the second situation, ICC wanted the protection available for plant varieties to be improved, but not at the expense of the protection available for inventions. It was therefore essential to adopt Alternative 1, which provided a right to prevent the exploitation of a dependent variety. It was now possible for genetic engineers to introduce a single new gene conferring an important agronomic character into a variety protected in favor of a plant breeder; under the present legal system, the plant breeder had no redress against that. Industry (both the biotechnological and the plant breeding industry) wished that a proper ground for negotiations be introduced, i.e. that the rights of both parties be equal.

139. Mr. Royon (CIOPORA) stated that CIOPORA was very much in favor of the idea of dependence, but was at a loss when having to take a position on the proposed text.

140. The first reason for this was connected with the notion of subject matter of protection and interface between e.g. patented genes and protected varieties. In CIOPORA's opinion, there should be no misunderstanding as to the subject matter of protection under the UPOV Convention. In some cases quoded as examples of dependence situations (in particular that of a gene being inserted into a variety by a genetic engineer), the problem involved was not one of dependence, but rather one of direct infringement through propagation, commercial use or sale of the variety into which the gene claimed in the patent had been inserted. In relation to the second aspect, CIOPORA wanted, of course, that the rights of "traditional" breeders be respected. To that effect, it had prepared a position paper on the draft EC Directive on the legal protection of biotechnological inventions.

141. The second reason was that the proposed concept of derivation was entirely different from the concept of dependence under patent law. CIOPORA believed that an adequate solution to the problem of interface between patented genetic information and protected plant varieties required that equal rights be granted on both sides and that the same rules for dependence applied on both sides. Any other system would give rise to unsurmountable difficulties.

142. The third reason was that breeders, notably within CIOPORA, had different opinions on dependence.

(i) For some members of CIOPORA, the main if not unique concern was to make it a matter of principle that mutations of a protected variety automatically reverted to the breeder of the protected mother variety. Conversely, they did not wish to be limited by any so-called "minimum distances" when deciding to protect and market their own hybridized varieties. Considering themselves as the rightful owners of the mutations, they wanted to be free to unilaterally decide, depending on their commercial requirements, whether to release a mutation which had been granted back to them by a third party (a licensee for example). Those breeders justified their attitude by the fact that, according to them, discovering a mutation was not actual breeding work and did not deserve the same protection status. They considered further that mutations were in fact already virtually existent in a latent state in their varieties.

(ii) Other members of CIOPORA on the contrary considered that provisions concerning examination or infringement, or both, had to be incorporated into the Convention in order to put a final stop to parasitic mini-variations of already protected varieties through the creation of new requirements of minimum distances between varieties. This would apply equally whether those mini-variations had been obtained through the discovery of a mutation--a case where derivation was involved--or through a known breeding process. This position might in some extreme cases lead to the grant of a title of protection to a mutation, if it was clearly distinct from the original variety, and, on the contrary, to the refusal of protection to a hybridized variety, if it was not distinct enough from an already known variety.

143. To conclude, in CIOPORA's opinion, the problem of dependence had to be further studied, resorting to the true notion of dependence under patent rights. Cases of slavish imitation or trivial modification of protected varieties should not come under the dependence system, but barred from protection.

144. Herr Winter (COMASSO) begrüsste ebenfalls namens der COMASSO die vorgeschlagene Aufnahme eines Abhängigkeitsprinzips in das UPOV-Uebereinkommen. Zu den Erläuterungen des Verbandsbüros zum vorgeschlagenen Wortlaut sei die

COMASSO ebenfalls der Meinung, dass die abhängige Sorte die Voraussetzung der Unterscheidbarkeit erfüllen müsse. Desweiteren stimme sie der Aussage zu, dass die abhängige Sorte im wesentlichen den Genotyp der Muttersorte aufweisen müsse und dass die Unterscheidbarkeit sich aus einer beschränkten Anzahl von Merkmalen ergeben müsse. Jedoch müsse diese sich nicht typischerweise aus einem Merkmal ergeben. Ferner müsse die zur Schaffung der abhängigen Sorte benutzte Züchtungsmethode unabhängig von den Einzelheiten der benutzten Verfahren auf die Beibehaltung der wesentlichen Merkmale der Muttersorte hinzielen. Die Abhängigkeit sollte mindestens in den Fällen eintreten, die in Dokument IOM/IV/2 Absatz 6 Unterabsatz iii) der erläuternden Anmerkungen zu Artikel 5 als Beispiele aufgeführt seien.

145. Die COMASSO erkenne durchaus das Problem der Abhängigkeitspyramide. Die vorgeschlagene Lösung scheine ihr jedoch nicht praktikabel zu sein. [Diese Aussage wurde nachträglich abgeändert.] Als Ansatz für eine Lösung könnte sich die COMASSO vorstellen, dass die Abhängigkeit nicht von einer administrativen Entscheidung abhänge, sondern dass der Züchter der Muttersorte diese beanspruche oder geltend mache.

146. Zu den Einzelheiten des vorgeschlagenen Wortlauts sei die COMASSO der Meinung, dass das Wort "einzige" gestrichen werden sollte, da man sich auch Fälle vorstellen könne, in denen die Benutzung mehrerer Muttersorten auch zu einer Abhängigkeit führen könne. Zumindestens sei dies nicht auszuschliessen. [Diese Aussage wurde nachträglich abgeändert.] Zu der Wirkung der vorgeschlagenen Abhängigkeit sei die COMASSO als Züchterorganisation fast gezwungen, Alternative 1 zu wählen.

147. M. Hofkens (COPA/COGECA) se réfère à son intervention liminaire et souligne qu'il faut veiller à ce que le plagiat ne soit pas susceptible d'être protégé par un droit indépendant ou un droit soumis à l'article 5.3) proposé; c'est pourquoi le COPA et le COGECA optent pour la variante 3.

148. Mr. King (IFAP) stated that IFAP supported the concept of dependence since it felt that it was only reasonable that the owner of an original variety should be entitled to a reasonable remuneration from the person who developed a dependent variety. IFAP supported Alternative 3 because it found it inappropriate that the person who developed a new dependent variety should be prevented by the owner of the original variety from exploiting his variety, and that there should be a monopoly in respect of all similar varieties in the hands of one person. Where a substantial difference was involved, the person who developed the dependent variety should be able to market it after having remunerated the breeder of the original variety.

149. M. Besson (FIS) fait savoir que la FIS se rallie à la position de l'ASSINSEL et, s'agissant du principe général de la dépendance, à la déclaration du représentant de la FIPA.

150. Herr Dr. Freiherr von Pechmann (AIPPI) wollte auf den Satzteil "im wesentlichen von einer geschützten Sorte abgeleitet" zurückkommen. Ihm scheine, dass man die Frage in einfacherer Weise stellen sollte: Eine Sorte ist entweder von einer geschützten Sorte abgeleitet oder nicht. Herr Winter (COMASSO) habe darauf hingewiesen, dass die betreffende Nachzüchtung die wesentlichen Merkmale der geschützten Muttersorte aufweisen müsse. Dabei stelle sich wiederum die Frage der Bedeutung des Begriffs "wesentliche Merkmale". Auf der letzten

Sitzung sei bereits angeregt worden, eine klarere Definition aufzustellen, etwa in dem Sinne, dass die Nachzüchtung diejenigen Merkmale der Muttersorte aufweisen müsse, die für die Schutzerteilung massgebend oder für die Unterscheidung der geschützten Sorte gegenüber dem Stand der Technik wesentlich gewesen seien. Denn wesentliche Merkmale könnten auch aus Sorten einer weiteren Stufe des Stammbaums hergeleitet werden; sie sollten dann dem Inhaber der geschützten Muttersorte nicht das Recht geben, die Nachzüchtung mit einer Benutzungs- oder Lizenzgebühr zu belasten. Herr Dr. von Pechmann wollte diese Frage zur Diskussion stellen, weil ohne klare Formulierung die Bestandsaufnahme im Durchsetzungsverfahren sehr problematisch sein werde. Es stelle sich somit die Frage, ob man die Rechtsverhältnisse nicht klarer definieren oder den Begriff "wesentlich" streichen sollte.

151. Dr. Gunary (ASSINSEL) wished to reply to the statement of Dr. Freiherr von Pechmann. ASSINSEL could not agree to retaining the word "derived" without qualification since a variety created by conventional breeding would be "derived" in most cases from a number of other varieties. The expression "essentially derived" implied that someone was taking over the breeding effort of another breeder as the basis for a further variety, and that the genome of the new variety would be almost the same as the genome of the mother variety. Having established that, one was forced to define the particular circumstances under which there might be a case of dependence. ASSINSEL had suggested three examples in a position paper:

(i) the introduction of recombinant DNA, i.e. the insertion of a new gene, into a variety;

(ii) the exploitation of natural or induced mutations;

(iii) the situation where the majority of the genome of the original variety was transferred into the new one by a series of back-crosses.

152. Mr. Slocock (AIPH) wished to revert to his comments on the three alternatives proposed for the effects of dependence. Being the only one to support Alternative 2, he felt that there was a need for substantiating his position. It seemed to him that Alternative 3, which had been advocated by his colleagues from COPA/COGECA and IFAP, introduced a totally new concept, namely that of "substantial improvement." Whereas it might be easy to understand and apply it in quantitative terms in the field of agriculture, although a subjective evaluation would be required in many cases, this was much more difficult in the field of ornamental plants. All organizations were anxious to ensure that there would be no plagiarism, but this might be more a matter of minimum distances and distinctness, a matter which might not be appropriately dealt with in the paragraph under discussion. Alternative 2 had the great merit of allowing reasonable access by users to the new material by requiring that equitable remuneration be paid to the breeder of the original material, without resorting to a totally new concept.

153. Herr Winter (COMASSO) wünschte, im Lichte der Diskussionen auf seine Stellungnahme zurückzukommen. Es erscheine ihm jetzt höchst unwahrscheinlich, dass eine Sorte von mehr als einer Ausgangssorte abhängig sein könne. Demzufolge sei der Vorschlag der COMASSO, das Wort "einzigen" zu streichen, nicht zu berücksichtigen. Hinsichtlich der in Dokument IOM/IV/2 Absatz 6 Unterabsatz iv) der erläuternden Anmerkungen zu Artikel 5 erwähnten "Abhängigkeitspyramide" hätten ebenfalls die Diskussionen gezeigt, dass die vorgeschlagene Lösung entgegen seiner früheren Aussage durchaus praktikabel sein könne.

154. Mr. Harvey (United Kingdom) noted that one of the primary reasons for introducing the concept of dependence was not to deal with the interface with the patent system, but with the practice whereby a small alteration was made to a single variety to produce a new one. He had noted with interest that the only reasons that had been advanced in favor of retention of Alternative 1 were connected with the interface with patent protection. Whilst he could accept that those reasons were valid in the circumstances, he wondered whether the organizations which had supported Alternative 1 would also accept it in relation to conventional breeding.

155. Mr. King (IFAP) referred to the explanations given by Mr. Slocock (AIPH) in relation to the three proposed alternatives. IFAP was totally opposed to Alternative 1 because it was very important for it that there be no monopoly on dependent varieties. Alternative 2 satisfied the concerns of IFAP as a farmers' organization. One had nevertheless to be reasonable, and ASSINSEL had made a good case for providing a larger scope to avoid plagiarism. There was no reason why a dependent variety which did not show a substantial improvement should be protected.

156. Herr Dr. Böringer (Bundesrepublik Deutschland) wünschte, an die Vertreter der Züchterverbände eine Frage zu stellen. Es seien auch Fälle vorstellbar, in denen eine neue Sorte sehr nahe an eine bestehende Sorte komme, obwohl ihre Züchtungsgeschichten sehr unterschiedlich seien. Herr Dr. Böringer möchte von den Verbänden wissen, ob ihrer Meinung nach die Möglichkeit auch eingeräumt werden sollte, die Auswertung der neuen Sorte durch die Geltendmachung des Rechtes an der bestehenden Sorte zu verhindern.

157. Mr. Royon (CIOPORA) referred to the remarks made by Mr. Harvey (United Kingdom) and Mr. King (IFAP) which, in his view, clearly illustrated the difficulty of solving a problem of derivation or dependence if the scope of the cases to be taken into consideration was limited. CIOPORA had clearly stated that slavish or trivial modification, i.e. plagiarism, of protected varieties should be barred from protection completely, and should not give rise to dependent protection. Those remarks were also a reason why CIOPORA was unable to chose one of the proposed alternatives in respect of varieties which brought an improvement but were dependent; they were also a reason why CIOPORA thought that the principles of dependence based on patent legislation could bring a better understanding of and a better solution to the problem.

158. Replying to the question raised by Dr. Böringer (Federal Republic of Germany), Mr. Royon said that it would be extremely rare that a breeder would, by traditional cross-breeding, come up with a variety that was very close to an already existing variety. He had only knowledge of one such case where the same rose variety had been developed from entirely different parents by two breeders.

159. Dr. Gunary (ASSINSEL) wished to make it very clear that ASSINSEL was in no way in favor of protecting plagiarism. The subject of the discussions was one in which positions were not yet firmly established, in particular within ASSINSEL where discussions were ongoing as to the scope of application and the effects of dependence.

160. Replying to the question raised by Dr. Böringer (Federal Republic of Germany), Dr. Gunary commented that technological developments would soon

enable an assessment of the degree of similarity of two genomes where two phenotypes were compared at present. Under those circumstances it would be extremely unlikely that a variety produced by an alternative breeding method would come close to with a variety and present a genome that was sufficiently similar to that of the other variety to lead to a case of dependence.

161. Herr Dr. Lange (ASSINSEL) schloss eine persönliche Ansicht an Herrn Gunarys Aussage an. Er glaube, dass der von Herrn Dr. Böringer (Bundesrepublik Deutschland) erwähnte Fall in der Praxis relativ selten vorkommen werde. Sollte er aber vorkommen, dann sollte durchaus ein unabhängiges Recht gewährt werden. Im übrigen würde die Frage des Beweises eine grosse Rolle spielen. Nach den üblichen Grundsätzen der Beweislast müsste der Inhaber der geschützten Sorte beweisen, dass die zweite Sorte von seiner abgeleitet sei. Sollte die Ableitung glaubhaft gemacht werden, dann könne nur noch eine Umkehr der Beweislast stattfinden und der zweite Züchter müsse beweisen, dass er auf eine andere Art und Weise zu seinem Ergebnis gekommen sei.

162. Mr. Roberts (ICC) supported the views put forward by Dr. Gunary (ASSINSEL) with regard to the three situations in which there might be cases of dependence, namely the introduction of a recombinant gene into a variety, the exploitation of natural or induced mutations and the use of back-crosses. These were three excellent examples, and ICC hoped that, as a minimum, the system of dependence would give protection to the owner of the original variety in those cases.

163. Reverting to the question put by Mr. Harvey (United Kingdom), Mr. Roberts stated that ICC was firmly of the view that the same standards should be applied to dependent varieties resulting from biotechnology and to dependent varieties created by means of conventional breeding processes for two reasons: firstly, there should be no discrimination either for or against biotechnology. Industry generally had grave reservations about judging a product on its production process rather than on its merits. If one variety was essentially derived from another, that would be shown by the respective genomes and would be demonstrated scientifically. Secondly, if a distinction were to be made, one would have to define the conventional processes and the biotechnological processes, and the definition would very rapidly become out of date.

164. Herr Dr. Freiherr von Pechmann (AIPPI) sagte, dass die zweite Sorte offensichtlich eine eigenständige Sorte sei, wenn sie sich deutlich unterscheide. Könne ihr Züchter nachweisen, dass sie nicht von der älteren geschützten Sorte abgeleitet sei, dann falle sie nicht unter Artikel 5 Absatz 3.

165. Mr. Royon (CIOPORA) repeated in reference to the remark of Dr. Böringer (Federal Republic of Germany) that, in his view, dependence should not be limited to cases of derivation but should be made broader because, if a variety that was essentially derived from another variety was so close to that other variety that it could not be clearly distinguished, then it would be an infringement of that other variety. In relation to the question asked by Mr. Harvey (United Kingdom), Mr. Royon fully agreed with the comment made by Mr. Roberts (ICC) to the effect that there should be no distinction between the technology used to create varieties in the application of the dependence principle.

166. Mr. Greengrass (Vice Secretary-General) informed the meeting that UPOV had held a series of workshops on variety examination dealing with the question of minimum distances and that inevitably discussions concerning minimum distances developed into discussions about dependence. When the meeting moved on to Article 6, which dealt with distinctness and thus with minimum distances, it was likely that the dependence question would arise once more. Mr. Greengrass referred to data presented by a private company to the workshop on maize in Versailles which suggested that varieties of maize that were not distinguishable using normal morphological criteria but which were distinguishable using biochemical techniques were in fact very different in their performance. On the basis of purely morphological criteria, some parties would have said that they were the same variety, but in fact they were genetically distinct on the basis of RFLP data. These would be examples of varieties that were independently developed, but genetically distinct, which situation was of some relevance to the question of Dr. Böringer (Federal Republic of Germany).

167. Mr. Slocock (AIPH) asked how the words "substantial improvement" would be applied to the breeding of rhododendrons.

168. Mr. Greengrass (Vice Secretary-General), in response to Mr. Slocock, suggested that a rhododendron breeder, in establishing his breeding program, would presumably set down its objectives. A substantial improvement in the case of rhododendrons would be some significant progress towards the achievement of any of these objectives.

169. Mr. Royon (CIOPORA), referring to the example given by Mr. Greengrass, noted that distinctness could not only be established on the basis of morphological characteristics, but also on the basis of physiological characteristics and performance.

Paragraph (4) (Possibility for Member States to Make Further Limitations to the Right Granted to the Breeder)

170. The Chairman opened the discussions on paragraph (4).

171. Mr. Slocock (AIPH) expressed concern that the proposed wording of the paragraph allowed individual member States excessive flexibility in the implementation of Article 5. It might be appropriate to ask the authors of this paragraph for examples of its application because it clearly was a permissive paragraph which had the potential to reintroduce the question of the "farmer's privilege." It seemed to introduce general permissiveness in circumstances where the Convention was trying to introduce uniformity. Flexibility was not welcome in this context. As to the reference to "public interest," Mr. Slocock felt that it would be more appropriately dealt with in a later Article.

172. Herr Dr. Freiherr von Pechmann (AIPPI) sagte, die AIPPI habe sich gegen diesen Absatz aufgrund der Tatsache ausgesprochen, dass er Unterschiede in den jeweiligen nationalen Rechtslagen erlaube, die sie nicht unterstützen könne. Ferner sei dieser Absatz auch deshalb nicht notwendig, weil Artikel 9 bereits den Verbandsstaaten die Befugnis gebe, die Ausübung des Züchterrechts aufgrund einer hoheitlichen Entscheidung aus Gründen des öffentlichen Interesses zu

beschränken. Sollte der in Klammern stehende Satzteil gestrichen werden, dann würde Absatz 4 nicht mehr in Einklang mit Artikel 9 stehen. Sollte er hingegen beibehalten werden, dann wäre Absatz 4 eigentlich unnötig. Im übrigen sei das vorgeschlagene Verfahren unklar und unwirksam; der Rat könne wohl zu einer unerwünschten Einschränkung Stellung nehmen, könne sie aber nicht ablehnen. Infolgedessen sollte der ganze Absatz gestrichen werden.

173. Dr. Gunary (ASSINSEL) stated that, in Article 5, UPOV seemed prepared to give a right in paragraphs (1) to (3) on one hand and to take it away in paragraph (4) on the other hand. The net effect was to create a degree of uncertainty which was not welcome. In principle, ASSINSEL would rather prefer that paragraph (4) did not exist. Insofar as factors existed in member States which required its introduction, ASSINSEL would only be prepared to accept the proposed wording if the words within brackets were included. There should be a very clear requirement for member States to indicate why they were taking an exceptional position and why it was necessary in the public interest. Dr. Gunary stated as an afterthought that perhaps the whole of the content of this Article should be dealt with under Article 9.

174. Mr. Greengrass (Vice Secretary-General), in commenting on Dr. Gunary's suggestions concerning Article 9, explained that Article 9 dealt with an individual breeder's right which was affected by a State intervention for reasons of public policy. Article 5(4) was dealing with a general exception which was not the same thing at all.

175. Mr. Roberts (ICC) agreed with the comments of all previous speakers on this paragraph. ICC felt that the paragraph, as presently drafted, gave a very great degree of freedom to member States to do exactly as they chose. When considering this provision, some of ICC's members who were less familiar with the background were very interested to discover that it was thought to deal with the "farmer's privilege" since they had not appreciated this from the wording at all. This illustrated the very broad scope of the proposed text, and for this reason ICC proposed that the Article should be deleted.

176. Mr. Royon (CIOPORA) said that CIOPORA agreed with those delegations that had spoken in favor of deleting this paragraph in its entirety. The language was hard to understand, and CIOPORA felt that if the provision were put into a final text it would be ignored by Governments and courts which would do what they thought was in the public interest, regardless of the wording of this provision.

177. Herr Winter (COMASSO) sagte, dass die COMASSO sich eindeutig für eine Streichung dieses Absatzes ausgesprochen habe. Ferner stellte er fest, dass für die Mehrheit der Delegationen dieser Absatz entgegen der erläuternden Anmerkung hierzu nicht eindeutig sei.

178. M. Hofkens (COPA/COGECA) fait savoir que, dans l'hypothèse où une définition du "privilège de l'agriculteur" ne sera pas reprise dans le texte de la Convention comme proposé par sa délégation, celle-ci sera en faveur du maintien du texte, tel que proposé, afin de permettre aux différents Etats de légiférer en la matière. Le COPA et le COGECA appuient le principe selon lequel les limitations ne doivent pas causer un préjudice excessif aux intérêts légitimes des obtenteurs; ils sont en faveur de la suppression du texte entre crochets.

179. Mr. King (IFAP) stated that it was essential that there be flexibility in the Convention. It was impossible for countries to have the same legislation with their differing national circumstances, objectives, policies and histories. Mr. King added that there seemed to be a degree of authoritarism amongst the breeders' organizations and ICC which made him uncomfortable. Those organizations were in favor of the mandatory application of Articles 1 and 4, but of the elimination of Article 5(4). This did not seem to be the way to secure willing support of countries. UPOV was not a police force, it was a Union in which States participated because it was to their advantage. He suggested that paragraph (2) be made so clear in relation to the "farmer's privilege" that countries would not need to use paragraph (4). Paragraph (4) would seem to make the existence of the "farmer's privilege" discretionary for national Governments. IFAP felt that the farmer should be treated in the same way in all countries with respect to the "farmer's privilege" by the addition of a subparagraph (v) to Article 5(2) which would spell out the rights and obligations under and the limitations of the "farmer's privilege." For the sake of flexibility, IFAP supported the inclusion of paragraph (4).

180. M. Besson (FIS) fait observer que la mise en oeuvre de ce paragraphe pourra entraîner des distorsions de la concurrence et qu'il s'agit là d'un aspect qu'il conviendra d'examiner.

181. M. Petit-Pigeard (COMASSO) estime que, compte tenu de l'article 9 et de la jurisprudence bien établie en matière d'abus de droit, il est inutile de prévoir ce que les Etats doivent faire lorsqu'ils imposent une certaine pratique pour des raisons d'intérêt national. La combinaison des références à la limitation des droits, à l'intérêt public et à un préjudice excessif lui paraît très contestable. En fait, chacune de ces références est contestable en elle-même : la limitation des droits équivaut en pratique à une soustraction de certains droits; l'intérêt public sera souvent un paravent pour une mesure d'opportunité politique; enfin, l'appréciation de ce qu'est un préjudice excessif sera nécessairement difficile. D'une manière générale, il n'y a pas lieu de créer une insécurité au détriment des obtenteurs, ni de limiter leurs droits. S'agissant du prétendu "privilège de l'agriculteur", il n'y a pas de raison d'accorder une situation privilégiée aux agriculteurs par rapport à d'autres catégories d'agents économiques.

182. D'autre part, il paraît inopportun à M. Petit-Pigeard de confier au Conseil de l'UPOV un rôle d'arbitre dans la définition d'une solution à un problème purement national. Ce problème est aussi purement jurisprudentiel : c'est à la justice de dire à qui s'applique le droit et, si le gouvernement a invoqué la nécessité, pour des raisons d'intérêt national, de ne pas l'appliquer, de décider si l'application ou la non-application de ce droit est licite ou non. Il en résulte qu'il appartient à la profession d'en tirer les conséquences et de faire préciser par les tribunaux la portée du droit. C'est ce qui a été fait en France, où le concept de "privilège de l'agriculteur" a été nié.

183. M. Royon (CIOPORA) s'associe pleinement aux déclarations de M. Petit-Pigeard.

184. Mr. Slocock (AIPH) intervened to point out that those seeking the deletion of paragraph (4) were concerned that it introduced uncertainty into the whole of Article 5. It seemed possible that others would also accept the deletion

if their particular problem of the "farmer's privilege" was dealt with elsewhere in the Article.

Paragraph (5) (Collision Norm)

185. The Chairman opened the discussions on paragraph (5).

186. Mr. Slocock (AIPH) stated that paragraph (5) was inevitably contentious and perhaps not inappropriately labelled as a "collision norm." Its role in the Convention would largely depend on the wording finally adopted in Article 1(2). The retention of a clear separation between the patent and plant breeders' rights systems was essential, but Mr. Slocock felt that a paragraph of the nature of paragraph (5) was still required to deal with the interaction between plant breeders' rights and other systems. He could understand that delegates from other organizations might feel that the present wording was brutal, but he welcomed the thinking behind the paragraph and urged its retention in a form which would clearly separate plant breeders' rights from other systems of protection.

187. Herr Dr. Freiherr von Pechmann (AIPPI) sagte, die AIPPI habe ernsthafte Bedenken gegen Absatz 5, denn diese Bestimmung könne zu einer Zwangslizenz an einem älteren gewerblichen Schutzrecht führen. Die AIPPI sei der Auffassung, dass Zwangslizenzen nur aus Gründen des öffentlichen Interesses erteilt werden sollten, nicht aber automatisch in Bezug auf jedes andere gewerbliche Schutzrecht (Patent oder Warenzeichen).

188. Zum Verhältnis zwischen Sortenschutz und Warenzeichen erinnerte Herr Dr. von Pechmann daran, dass das UPOV-Uebereinkommen die Benutzung einer Sortenbezeichnung bei dem Vertrieb der Sorte oder dessen Vermehrungsmaterials vorschreibe. Gäbe es ein älteres, mit der Sortenbezeichnung übereinstimmendes oder verwechselbares Warenzeichen, dann würde dieses ebenfalls mit einer Zwangslizenz belastet sein.

189. Zum Verhältnis zwischen Sortenschutz und Patent verwies Herr Dr. von Pechmann auf Artikel 14 des Entwurfs der Kommission der Europäischen Gemeinschaften für eine Richtlinie des Rates über den Schutz biotechnologischer Erfindungen. Dieser laute wie folgt:

> "Kann der Inhaber eines Pflanzenzüchterrechts oder eines Sortenschutzrechts seine Ausschliesslichkeitsrechte nur unter Verletzung der Rechte aus einem früher erteilten nationalen Patent nutzen oder ausüben und stellt die geschützte Sorte einen bedeutenden technischen Fortschritt dar, dann ist dem Inhaber des Pflanzenzüchterrechts in dem Umfang wie es für die Nutzung seines Züchterrechts erforderlich ist, eine nicht ausschliessliche Lizenz zu erteilen, und zwar gegen Zahlung einer angemessener Lizenzgebühr."

190. Diese Bestimmung sei übrigens in ihrer Wirkung mit Artikel 5 Absatz 3 Alternative 3 vergleichbar. Folgende Aeusserung des Bundesministeriums der Justiz der Bundesrepublik Deutschland zu dieser Bestimmung sei bei der Beurteilung der Frage, ob der Vorschlag in Artikel 5 Absatz 5 überhaupt eine Chance habe, angenommen zu werden, von Bedeutung:

"Die von der Kommission im Artikel 14 vorgeschlagene zwangsweise Lizenzregelung begegnet erheblichen Bedenken. Eine solche Regelung ist dem deutschen Recht, das eine Zwangslizenz nur bei öffentlichem Interesse vorsieht, fremd. Auch vor dem Hintergrund, dass die Kommission bei der vorgeschlagenen erweiterten Patentierfähigkeit im Pflanzenbereich eine Ausgleichsbestimmung zugunsten der Inhaber von Sortenschutzrechten für notwendig hält, kann der im Artikel 14 liegende zwangsweisen Beschränkung des Ausschliesslichkeitsrechts eines Patentinhabers zugunsten privater Interessen des Sortenzüchters schwerlich zugestimmt werden." ... "Ausgehend von der derzeitigen Rechtslage hält die Bundesregierung die Einräumung von Abhängigkeitslizenzen im hier vorgeschlagenen Sinne gegenwärtig weder für erforderlich noch für sinnvoll."

191. Auch der Ausschuss des Bundesrats für die Fragen der Europäischen Gemeinschaft, der Agrarausschuss und der Rechtsausschuss hätten eine Stellungnahme abgegeben, die laute:

"Der durch Artikel 14 bewirkten zwangsweisen Beschränkung der Ausschliesslichkeitsrechte eines Patentinhabers zugunsten privater Interessen von Sortenzüchtern sollte nicht zugestimmt werden. Eine solche Regelung erscheint nicht erforderlich und würde im übrigen einen Fremdkörper im deutschen Recht darstellen."

192. Mit diesen Zitaten wollte Herr Dr. von Pechmann die Gefahr deutlich machen, dass es bei Beibehaltung dieser Bestimmung bereits in der diplomatischen Konferenz oder später in dem Ratifizierungsverfahren zu Schwierigkeiten führe.

193. Herr D. Brouër (Bundesrepublik Deutschland) bemerkte, dass es vergleichbare Aussagen über Artikel 5 Absatz 5 noch nicht gebe. Unabhängig von der Frage, ob eine Abgrenzungsbestimmung oder Kollisionsnorm sich als wünschenswert oder sogar notwendig erweise, müsse festgehalten werden, dass es gerade im deutschen Recht noch im Jahre 1953 eine mit der erörterten Bestimmung praktisch identische Regelung für die Wirksamkeit und Geltendmachung von Patenten für nach dem Saatgutverkehrsgesetz geschützte Sorten gegeben habe. Ferner erklärte Herr Brouër, dass, ohne eine endgültige Stellungnahme zu dieser Bestimmung abgeben zu wollen, der Vergleich zwischen dieser Bestimmung und einer Zwangslizenz etwas übertrieben sei: Natürlich müsse ein Züchter, der ein patentiertes Gen oder Verfahren benutze, durch eine Lizenz dazu berechtigt sein und Lizenzgebühren zahlen. Die vorgeschlagene Abgrenzungsbestimmung würde nur dann gelten, wenn die Sorte einmal gezüchtet worden sei. Mit anderen Worten wäre der Patentinhaber gezwungen, seinen vollständigen Aufwendungsersatz bereits bei der Lizenzerteilung zu verlangen. Diese Regelung sei durchaus nicht mit einer Zwangslizenz zu vergleichen.

194. Mr. Clucas (ASSINSEL) said that ASSINSEL believed that there should be clarification of the way in which rights in patented plant genetic components and plant breeding processes, on the on hand, and plant breeders' rights, on the other, should interact. This needed to be clear and balanced. ASSINSEL did not think that the present wording achieved this and it would not favor compulsory licensing of patents if there were any hint in paragraph (5) that this should be so. ASSINSEL's wish was that it should be quite possible for a variety protected by plant breeders' rights to contain a gene which in turn was the subject matter of a valid patent.

195. Mr. Roberts (ICC) stated that ICC had a very clear and strong view on this paragraph. It felt that the paragraph should be deleted. What was at stake here was not a compulsory license but expropriation. Under this paragraph, a patentee's rights ceased when a plant breeder's right had been granted. The patent right was a right to prevent others from doing certain acts and that right was effectively taken away under this paragraph on the registration of a plant breeder's right. There was therefore no basis for the systems to interact in this paragraph.

196. It had been stated that a breeder had to seek a license from the patentee to use the patented gene, and presumably the patentee was able to refuse such a license. Thus, the paragraph did not create a situation where the use of a gene was free, subject to the payment of royalty. However, if a breeder used the gene without a license, without knowing that he was infringing the patent, and obtained a plant breeder's right on his variety, the patentee had lost all opportunity to obtain any return from his patent. That situation could arise quite often and would be of great concern to patent holders.

197. The great advantage of the plant breeders' rights system, in Europe at least, was that there had been very little litigation concerning the rights, and one of the concerns of plant breeders was that they should not be subject to harrassing litigation from patentees, particularly during the breeding phase. The effect of this paragraph, however, would be that patentees would know that once a plant breeder's right was granted they would have no further redress and therefore, in cases of doubt, they would seek to take out injunctions against plant breeders or even against testing authorities to prevent the grant of rights. This could not be good for the plant breeders' rights system.

198. Mr. Royon (CIOPORA) could not understand why, whilst strengthening the right granted to the breeder, UPOV proposed to limit other industrial property rights. Paragraph (5) in its present wording was a clear encroachment into other industrial property laws and could affect not only patents but also utility models, trademarks, trade secrets, copyright, etc. This was totally unjustified since it would deprive the whole of other types of industrial property rights of any legal certainty. This would be an unprecedented attempt to further erode industrial property rights. If the intention was only to regulate the interface between biotechnological inventions and plant varieties, then once again the definition of the subject matter of protection presented problems. This concern could be best addressed by providing within Article 5(3) for a dependence system based on patent principles and by thus bringing closely together the patent and plant breeders' rights systems when applied to plant varieties. In that respect, CIOPORA would like to refer to the comments and remarks which it had made on Article 14 of the proposed EC Directive on the Legal Protection of Biotechnological Inventions where it had made it clear that a solution to problems arising from the interface could be found only if the two systems were regulated by the same dependence system.

199. Herr Winter (COMASSO) sagte, dass nach Auffassung der COMASSO eine Kollisionsnorm zur Regelung möglicher Ueberschneidungen zwischen unterschiedlichen Schutzrechtssystemen grundsätzlich nötig sei, dass aber die vorgeschlagene Norm nicht zufriedenstellend sei. Auf jeden Fall sollte keineswegs eine Kollisionsnorm den Inhaber eines Rechtes letztlich enteignen und ihm lediglich eine Rechtshülse überlassen. Die Kollisionsnorm solle ausgeglichen sein; ferner solle sie im UPOV-System und in dem Patentsystem inhaltsgleich sein. Insofern sollte die vorgeschlagene Vorschrift neu überdacht werden.

200. M. Hofkens (COPA/COGECA) s'associe à la position exprimée par M. Slocock (AIPH). En effet, le COPA et le COGECA estiment qu'une norme de collision est absolument nécessaire afin de régir les rapports entre le droit d'obtenteur et les autres droits de propriété industrielle, notamment le brevet. Ayant plaidé, dans le cadre de l'article premier, contre la possibilité d'une double protection pour une même variété, étant donné que le droit d'obtenteur est le seul droit adapté à la protection des nouvelles variétés, le COPA et le COGECA sont d'avis qu'il est extrêmement important de prévoir également une disposition dans la Convention qui interdirait toute interférence entre le brevet et le droit d'obtenteur.

201. Mr. King (IFAP) associated his organization with the views of AIPH and COPA/COGECA in stating that it was important to maintain paragraph (5). In relation to Article 1(2), IFAP was in favor of plant breeders' rights being exclusive of any other form of protection of plant varieties as such. The view of farmers was that it was important for the purposes of plant production that there be only one system of industrial property rights, and that should be the plant breeders' rights system. He asked the Vice Secretary-General to clarify two questions: (i) To what extent was it necessary to patent new plant varieties? Was IFAP asking for something totally unreasonable when we said that plant breeders' rights were the rational system of industrial property for plant varieties? (ii) The Uruguay Round of GATT was discussing for the first time what they called TRIPS, trade-related aspects of intellectual property rights. It seemed possible that the patenting of all new plant varieties could be traded off in those negotiations as concessions in relation to services or some other provision under the TRIPS negotiations so that delegates could be wasting their time in discussing the UPOV Convention.

202. Mr. Greengrass (Vice Secretary-General) stated that his personal opinion was of no significance. It was the UPOV Council which reached decisions on questions of this nature. However, dealing with Mr. King's first question, there plainly was a view widely held in plant breeders' rights circles that plant varieties could be adequately protected under a revised Convention and that, if strong enough protection were provided, it would not be necessary to protect plant varieties in another system with different criteria. That was a view that was widely held, and indeed if that view had not been widely held, then the meeting would not have been looking at provisions such as those of Article 1(2). In relation to the second question, there was some interest in Government circles in the possibility of including plant breeders' rights within the category of forms of intellectual property that were currently being discussed within GATT. There were no definitive views on this complex question at the present time. It was purely under consideration.

203. Mr. King (IFAP) asked the Vice Secretary-General if there were any implications for the UPOV Convention in the TRIPS discussions taking place as part of the Uruguay Round.

204. Mr. Greengrass (Vice Secretary-General) stated that he could not answer that question today in relation to the complex TRIPS discussions.

205. M. Besson (FIS) est d'avis que la complexité des questions soulevées par les relations entre le brevet et le droit d'obtenteur est telle qu'une solution

ne pourra pas être trouvée dans le cadre de la présente réunion. Un vaste effort de concertation est à faire pour définir les frontières entre les différents droits de propriété intellectuelle, notamment dans le cadre de la prochaine réunion d'un comité d'experts qui sera organisée conjointement par l'OMPI et l'UPOV.

206. Mr. F.W. McLaughlin (FIS) stated that he was Executive Vice-President of the Association of Official Seed Certifying Agencies (AOSCA). AOSCA was the organization that coordinated seed certification throughout the United States of America and Canada. It had recently considered the general subject of the relationship betweeen the patent and plant breeders' rights systems and, whilst he did not intend to raise the viewpoints before the meeting, he did have a paper that could be of interest to UPOV and to the delegations present in the meeting. With the Chairman's permission, he proposed to make it available to delegates for their information.

207. The Chairman invited Mr. McLaughlin to distribute his paper (see Annex II).

208. Mr. Roberts (ICC) wished to come back briefly to a point raised by Mr. King (IFAP) who asked whether it would become necessary to patent all plant varieties. The answer to that question was quite certainly "no," but it was desirable in ICC's opinion to have the opportunity to patent plant varieties. There was a considerable body of opinion in the plant world that thought that it would be difficult to get a patent for a plant variety unless there was something exceptional about that variety. It was important that broader protection was available for really new developments in the biotechnology area. In that area, the possibility existed of taking genes from completely different organisms which might have useful properties and an invention of this nature could confer that useful property to many kinds of plants. It might cover hundreds of plant varieties which would in turn be separately protectable by the plant breeders' rights system.

209. Herr Dr. Freiherr von Pechmann (AIPPI) sagte, er könne die Ansicht nicht teilen, wonach die vorgeschlagene Bestimmung nicht eine Zwangslizenz zum Inhalt habe. Eine Lizenz habe die Wirkung, dass der Lizenzgeber gegenüber dem Lizenznehmer sein Verbietungsrecht nicht ausübe, und eine Zwangslizenz, dass dieses Recht ausgeklammert werde. Die vorgeschlagene Bestimmung habe genau diese Wirkung: Aufgrund eines anderen gewerblichen Schutzrechts, hauptsächlich eines Patents, könnten bestimmte Handlungen, wie die Vermehrung der Sorte oder die Einfuhr von Material, nicht mehr untersagt werden. Man nehme beispielsweise das in der Bundesrepublik Deutschland zugunsten der Max-Planck-Gesellschaft erteilte Patent an eine gentechnologisch veränderte Petunie mit einer für Petunien neuen Farbe, nämlich lachsrot. Dem Züchter einer neuen lachsroten Petunie mit unterschiedlichem Wuchsstand könne natürlich ein Sortenschutzrecht erteilt werden. Dann könne aber der Patentinhaber, also die Max-Planck-Gesellschaft, sein Recht gegenüber dieser Neuzüchtung nicht mehr geltend machen, obgleich die im Patentanspruch erwähnten Merkmale auch in der Neuzüchtung vorhanden seien. Es sei nicht einmal vorgesehen, dass er für die Benutzung dieser Merkmale bei der neuen Sorte eine Vergütung verlangen könne. Dies stehe übrigens im Gegensatz zu der in Absatz 3 Alternative 1 vorgeschlagenen Regelung.

Article 6 (Conditions Required for the Granting of the Right)

Paragraph (1)(a) (Novelty)

210. The Chairman opened the discussions on Article 6(1)(a).

211. Mr. Slocock (AIPH) stated that AIPH welcomed the introduction of the concept of novelty in the new wording proposed for paragraph (1)(a). AIPH did not like the periods of grace and would prefer a return to the text of the original Convention which used the words "at the time of the application for protection in a member State of the Union, the new variety must not have been offered for sale or marketed, with the agreement of the breeder or his successor in title." AIPH did not feel that the changes in circumstances which had taken place since the 1961 Act of the Convention was adopted justified the permissive nature of subparagraph (i) or the extended period in subparagraph (ii).

212. Herr Dr. Freiherr von Pechmann (AIPPI) sagte, die AIPPI habe keine Bemerkungen zu diesem Absatz. Die Beibehaltung einer Neuheitsschonfrist, die man im Patentgesetz wieder einzuführen bestrebe, werde begrüsst.

213. Herr Dr. Lange (ASSINSEL) sagte, die ASSINSEL stimme mit dem vorgeschlagenen Wortlaut überein, rege aber an, das Wort "Zustimmung" durch "ausdrücklichen" zu ergänzen.

214. Mr. Roberts (ICC) commented that ICC was pleased to see the proposed grace period but felt that it would be better if the grace period was uniform for all States. This was an area where uniformity could be achieved. ICC also asked that consideration be given to extending the grace period from one year to two years.

215. Mr. Royon (CIOPORA) reported that CIOPORA was very pleased that its request to maintain the requirement that exploitation be "with the agreement of the breeder" had been met. However, CIOPORA, like ASSINSEL, suggested that the provision in question should read "with the express agreement of the breeder" since the more precise wording might avoid unnecessary litigations and shift the burden of proof away from the plant breeder.

216. Herr Winter (COMASSO) sagte, die COMASSO befürworte ebenfalls die Bezugnahme auf die ausdrückliche Zustimmung des Züchters. Ferner rege sie im Hinblick auf eine anzustrebende Harmonisierung an, die Neuheitsschonfrist überall gleichmässig auszurichten, und schliesslich, dessen Dauer auf zwei Jahre festzulegen.

217. Mlle Comte (COPA/COGECA) fait savoir que le COPA et le COGECA n'ont pas d'observations à formuler sur les articles 6 à 14 de la Convention.

218. Mr. King (IFAP) stated that IFAP had no official view on paragraph (1)(a).

219. M. Besson (FIS) dit que la FIS partage le point de vue de l'ASSINSEL.

Paragraph (1)(b) (Distinctness)

220. The Chairman opened the discussions on paragraph (1)(b).

221. Mr. Slocock (AIPH) referred to his opening statement where he had called for a clearer separation of new varieties by the recognition of commercially important rather than botanically interesting differences between them. Too often in the past, features of minor botanical significance had been considered in the establishment of distinctness rather than characteristics which were significant commercially, economically or aesthetically. In discussions on Article 5(3), Alternative 3, efforts had been made to eliminate plagiaristic developments by introducing the idea of "substantial improvement." Whilst welcoming the thinking behind this, Mr. Slocock did not regard it as acceptable to separate the treatment of derived varieties in this respect from the treatment of other varieties. To ensure that Article 6(1)(b) contributed to wider minimum distances, it would be useful to reintroduce the wording of Article 6(1)(a) of the original Convention which referred to a new variety being distinguished by morphological or physiological characteristics which were to be capable of precise description and recognition. Above all, there needed to be a reference to the commercial or economic significance of the distinguishing characteristics. Mr. Slocock urged the Administrative and Legal Committee to consider that aspect.

222. Herr Dr. Freiherr von Pechmann (AIPPI) sagte, dass nach Auffassung der AIPPI der Abstand zwischen einer bekannten und einer neuen Sorte sich nicht in einfachen Merkmalen erschöpfen sollte, die keinerlei wirtschaftliche Bedeutung besässen. Ferner sei auf die Tatsache hinzuweisen, dass bei der Beurteilung der Wirkung der Abhängigkeit nach Artikel 5 Absatz 3 Alternative 3 die Frage des Bestehens eines wesentlichen Fortschritts eine Rolle spiele. Der Verweis auf eine "deutliche Unterscheidung" sei natürlich auslegungsbedürftig, die Problematik sei aber möglicherweise durch die Einführung einer Abhängigkeitsnorm verringert. Jedoch möchte Herr Dr. von Pechmann den Wunsch der AIPPI zum Ausdruck bringen, dass sich der Abstand zwischen zwei Sorten nach einer deutlichen wirtschaftlichen Unterscheidbarkeit richte.

223. Herr Dr. Lange (ASSINSEL) sagte, die ASSINSEL sei mit dem vorgeschlagenen Wortlaut einverstanden.

224. Mr. Roberts (ICC) stated that his organization had no comments on this Article.

225. Mr. Royon (CIOPORA) stated that, for CIOPORA, what was critical was that protection should be granted only to varieties distinguished by important morphological characteristics from known varieties. Such important characteristics would naturally be assessed differently for ornamental varieties, fruit varieties, cereals, industrial crops, etc. In relation to subparagraph (iii), Mr. Royon stated that this provision was tautologous, especially in the French text, because it said that a variety was "notoire" when it had been exploited "de manière notoire." CIOPORA did not see how "de manière notoire" could be considered as an explanation of "notoire."

226. Herr Winter (COMASSO) sagte, die COMASSO habe keine Bemerkungen zu diesem Absatz.

227. Mr. King (IFAP) stated that IFAP had the same position as AIPH. It was important to avoid plagiarism and new varieties had not simply to be clearly distinguishable but had to show an essential improvement. It was for that reason that IFAP had opted for Alternative 3 in Article 5(3). Similarly, under Article 6(1)(b), there should be a substantial improvement and, in this respect, there seemed to be a consensus among some delegations. Mr. Slocock (AIPH) had referred to "commercially important" rather than "botanically interesting" characteristics. Mr. Royon (CIOPORA) had suggested eliminating "trivial modifications" and Dr. Freiherr von Pechmann (AIPPI) had referred to "significant economic differences." Other organizations, such as ASSINSEL, COMASSO and ICC, had not addressed this question. Although IFAP had opted for Alternative 3 in Article 5(3), its inclination was more towards Alternative 2 on the understanding that it was right to try to avoid plagiarism, for which purpose a new variety should be an improvement and not just different. If it was not the wish of UPOV to add this further requirement to paragraph (1)(b), then IFAP should be recorded as favoring Alternative 2 under Article 5(3).

228. Mr. Royon (CIOPORA) stated that he wished to clarify CIOPORA's position on the differences between varieties. When saying that protection should be granted only to varieties displaying an important modified characteristic, CIOPORA sought the establishment of minimum distances but did not seek the assessment of the merits of a new variety. It was for the market to decide whether a variety was better than an existing variety.

229. M. Besson (FIS) fait savoir que la FIS n'a pas d'observations à formuler sur ce paragraphe.

230. Herr Dr. Lange (ASSINSEL) sagte, er möchte ausdrücklich im Namen der ASSINSEL die Aussage von Herrn Royon (CIOPORA) zur Unterscheidbarkeit bestätigen und unterstützen. Bei der Feststellung der Unterscheidbarkeit solle es nicht auf Wertmerkmale ankommen müssen.

231. Herr Dr. Böringer (Bundesrepublik Deutschland) möchte die Stellung der COMASSO zu dieser Frage kennen.

232. Herr Winter (COMASSO) erklärte, die COMASSO habe sich zu dieser Frage nicht geäussert. Persönlich meine er, sie könnte ebenfalls der Aussage von Herrn Royon zustimmen.

233. Mr. Roberts (ICC) stated that ICC did not support plagiarism and therefore supported maximum minimum distances, but those should be defined. ICC was strongly in favor of CIOPORA's contention that it was for the market place to determine the merit of a variety.

234. M. Le Buanec (ASSINSEL) revient sur la déclaration faite antérieurement par l'ASSINSEL au sujet des écarts minimaux entre les variétés et précise ce qui suit : premièrement, afin d'éviter les possibilités de plagiat, les écarts

minimaux doivent être suffisamment grands; deuxièmement, pour qu'une variété puisse être protégée, il est important qu'elle soit nouvelle, inédite, les caractères agronomiques ou économiques n'ayant pas d'importance particulière à cet égard.

Paragraph (1)(c) (Homogeneity)

235. The Chairman opened the discussions on paragraph (1)(c). He noted that none of the organizations had comments to submit on it.

236. Mr. Hoinkes (United States of America) noted that this paragraph contained a reference to characteristics which were "considered for the purposes of the application of subparagraph (b)" and that the latter made no reference to characteristics. He wondered whether this was acceptable or whether an adjustment was necessary.

237. Herr Dr. Böringer (Bundesrepublik Deutschland) sagte, der Verwaltungs- und Rechtsausschuss müsse die von Herrn Hoinkes angeschnittene Frage überprüfen.

Paragraph (1)(d) (Stability)

238. The Chairman opened the discussions on paragraph (1)(d). He noted that AIPPI, ICC, CIOPORA, COMASSO, IFAP and FIS had no comments to submit on it.

239. Mr. Slocock (AIPH) said that the proposed new wording, which linked the condition of stability for the purpose of the grant of the right to the performance of the variety during the testing period, was an improvement on the present text.

240. Herr Dr. Lange (ASSINSEL) sagte, die ASSINSEL stimme der vorgeschlagenen Neuformulierung inhaltlich zu, schlage jedoch vor, den Satzteil "oder im Falle eines besonderen Vermehrungszyklus" durch "oder falls der Züchter einen bestimmten Vermehrungszyklus definiert hat" zu ersetzen. Die ASSINSEL sei der Auffassung, dass es Aufgabe des Züchters sei, den Vermehrungszyklus zu bestimmen.

Paragraph (2) (Variety Denomination)

241. The Chairman opened the discussions on paragraph (2). He noted that AIPH, AIPPI, ICC, IFAP and FIS had no comments to submit on it.

242. Herr Dr. Lange (ASSINSEL) sagte, die ASSINSEL sei mit der vorgeschlagenen Formulierung unter der Bedingung einverstanden, dass der Vorschlag der ASSINSEL zur Neuformulierung von Artikel 13 akzeptiert werde.

243. Mr. Royon (CIOPORA) stated that the phrase starting with "as provided" would only be acceptable to CIOPORA if Article 13 was either left unchanged or amended according to the requests made by CIOPORA in its position paper (document IOM/IV/7).

244. Herr Winter (COMASSO) sagte, die COMASSO habe die gleiche Position wie die ASSINSEL.

Paragraph (3) (Limitation of the Conditions for the Granting of the Right)

245. The Chairman opened the discussions on paragraph (3). He noted that AIPH, AIPPI, ASSINSEL, COMASSO, IFAP and FIS had no comments to submit on it.

246. Mr. Roberts (ICC) questioned whether this paragraph was essential and suggested that it might be deleted.

247. Mr. Royon (CIOPORA) said that CIOPORA would share the view expressed by Mr. Roberts on behalf of ICC.

Article 7 (Examination of the Application; Provisional Protection)

248. The Chairman opened the discussions on Article 7. He noted that ICC and IFAP had no comments on this Article.

249. Mr. Slocock (AIPH) stated that AIPH welcomed the removal of the word "official" from the heading of Article 7 and the specific reference to the taking into account of the results of growing trials and other trials which had already been carried out. AIPH had no comments on paragraph (2). It welcomed the reference in paragraph (3) to international cooperation. In the present economic climate, the question of international cooperation and the pooling of testing resources would play an important role in the machinery of plant variety protection. AIPH welcomed the uniformity which would be established by the new paragraph (4) with its clearer definition of the scope of provisional protection, but it insisted that the period of provisional protection form part of the period of duration of the right defined in Article 8. This could be achieved either by amending Article 8 or by a specific reference in Article 7(4).

250. Herr Dr. Freiherr von Pechmann (AIPPI) sagte, die AIPPI begrüsse den Hinweis auf den Austausch von Prüfungsergebnissen in Absatz 1 sowie die Eröffnung in Absatz 4 eines Anspruchs auf eine angemessene Vergütung bei Benutzung der Sorte in der Zeit zwischen Antrag und Gewährung des Rechtes. Ein vorläufiger Schutz bestehe bereits im Patentrecht in fast allen Staaten, in denen eine vorzeitige Veröffentlichung der Patentanmeldung vorgesehen sei.

251. Dr. J. van de Linde (ASSINSEL) said that ASSINSEL agreed in general with the proposed text of Article 7. In relation to paragraph (1), ASSINSEL proposed the replacement of the word "trials," when not associated with "growing,"

by "tests" because it felt that "trials" was too closely linked to trials carried out in the fields. ASSINSEL agreed fully with the drafting of paragraph (2). It wished to replace the word "may" by "should" in paragraph (3); in relation with this provision it sought a full harmonization of national procedures and files. In relation to paragraph (4), ASSINSEL proposed the replacement of "equitable remuneration" by "full compensatory remuneration."

252. Mr. Royon (CIOPORA) reminded the meeting that CIOPORA preferred the use of the expression "title of protection" rather than "right" throughout the text and would accordingly prefer that paragraph (1) commenced with the words "The title of protection shall be granted" rather than "The right shall be granted."

253. In relation to the general substance of Article 7, CIOPORA would like to see the UPOV-type of examination providing more legal security by creating a perimeter of protection around a variety based on minimum distances. If protection related to the variety as such only, "minivariations" would represent a distinct variety and will not fall within the scope of protection of the original variety.

254. CIOPORA's view was that paragraph (3) should make a clear reference to Article 4 and to the obligation placed upon member States, proposed by CIOPORA, to protect any species for which technical examination facilities existed in any UPOV member State.

255. CIOPORA welcomed the efforts made in paragraph (4) to improve protection between application and grant. However, it was not in favor of a system of "protective directions" as in the United Kingdom Plant Varieties and Seeds Act. CIOPORA was of the view that, as in the patent system or for instance in the French plant variety protection system, it should be possible for the breeder to make assignments or grant licenses not only under granted titles of protection but also under applications for protection. Accordingly, CIOPORA proposed that the period of the breeders' rights should start with the date of filing of the application for rights since it was important that it should be possible for the breeder to institute legal proceedings against infringements on the basis of an application that had been published or notified to the infringer.

256. Herr Winter (COMASSO) sagte, die COMASSO habe keine Bemerkungen zu Absatz 1 und 2 und unterstütze die Vorschläge der ASSINSEL zu Absatz 3 und 4.

257. M. Besson (FIS) dit que la FIS n'a pas de remarques particulières à formuler au sujet de l'article 7, sauf à insister, comme l'a fait le représentant de l'ASSINSEL, sur la nécessité du développement de la coopération internationale, notamment en vue d'un abaissement des coûts des examens et de la protection.

Article 8 (Duration of the Right)

258. The Chairman opened the discussions on Article 8.

259. Mr. Slocock (AIPH) had three points to make. First, he wished his earlier remarks concerning Article 7(4) (which concerned any period of provisional protection being included in the period of duration of a right) to be taken into account either in Article 7(4) or in Article 8. Secondly, AIPH was in favor of uniformity in the duration of the rights in UPOV member States and looked for agreement on a specific number of years, rather than a minimum number as provided by the present and proposed texts. The third wish of AIPH was that rights for any one variety should terminate simultaneously in the various countries where rights had been granted. The continued existence of protection for a variety in one country when it had terminated in another country had led to misunderstandings and even abuse in the field of ornamental plants and the only way of tackling the problem seemed, in the opinion of AIPH, to ensure that the rights terminated simultaneously in the various member States of UPOV for any one variety.

260. Mr. Greengrass (Vice Secretary-General) asked Mr. Slocock how he thought such a system would work in practice because if all rights were to terminate simultaneously, this would mean that the actual period of protection for the variety would be significantly shorter in some countries than in others. This could arise for many reasons that would not necessarily be the fault of the breeder. How did Mr. Slocock justify a shorter period of protection in some countries under such circumstances?

261. Mr. Slocock (AIPH), responding to the Vice Secretary-General, stated that an additional paragraph (3) in Article 8 could deal with his particular request. The justification lay in the fact that where a variety continued to be protected in one country but where protection had lapsed in another country, distortions arose in the marketing of the variety concerned, particularly as a much more international community would develop in the 1990's. The distortions arising from the differing dates of application and grant could be considerable.

262. Mr. D. Hoinkes (United States of America) asked if Mr. Slocock's proposal was that the duration of the right should not only be identical in all countries, but that the right once granted would cease in all countries at the same time. If this was the AIPH proposal, then the question was what would happen to the right of priority which allowed a one-year time lag between the filings in different countries.

263. Mr. Slocock (AIPH), in responding to Mr. Hoinkes, stated that narrowing down the issue to a question of priority was a step in the right direction. That question was again a matter of drafting. The first important step was to accept the principle and the justification therefor.

264. Mr. Hoinkes (United States of America) felt that it was easy to lay down a policy, but it may be impossible to implement it. He felt that the policy suggested by Mr. Slocock would be difficult to implement.

265. Herr Dr. Freiherr von Pechmann (AIPPI) sagte, dass prinzipiell eine einheitliche Schutzdauer zu begrüssen sei. Jedoch, wie bereits von Herrn Hoinkes angedeutet, würde es aufgrund der Zeitspanne zwischen der Erstanmeldung und den nachfolgenden Anmeldungen und der Prioritätsfrist eine Verschiebung geben.

266. Dr. Gunary (ASSINSEL) stated that ASSINSEL was prepared to accept the proposed wording of Article 8. In relation to the intervention of Mr. Slocock (AIPH), ASSINSEL would perhaps accept the situation where the breeders' rights terminated simultaneously in all countries, provided that the date of termination was the date from the last country where the right was granted and not the first.

267. Mr. Roberts (ICC) supported on behalf of ICC the proposed extension of the minimum terms of protection. He suggested that for reasons of simplification and legal security, the minimum term should be the same for all species, and ICC would suggest 25 years rather than 20 for this purpose. Whilst there was some merit in the suggestion that the term of protection should end on the same date in all countries, Mr. Roberts thought that it would be extremely difficult administratively to organize this and that it might be better to retain the simple proposal that was embodied in the proposed text.

268. Mr. Royon (CIOPORA) stated that CIOPORA was in favor of the harmonization of the duration of protection. In the horticultural field, the average commercial life of a variety tended to shorten, but there were exceptions where varieties lasted for a very long time, and the longer period was appropriate for these. Mr. Royon referred to his comments on the proposed Article 7(4) and proposed the following simple wording for Article 8.

> "(1) The title of protection shall be granted to the breeder for a limited period.
>
> "(2) This period may not be less than [...] years computed from the date of filing of the application for the title of protection."

269. Herr Winter (COMASSO) sagte, die COMASSO begrüsse die Verlängerung der Mindestschutzdauer. Insbesondere aufgrund der besonderen Lage in Europa schlage die COMASSO vor, die Schutzdauer auf 25 bzw. 30 Jahre zu verlängern. Dies entspräche der gegenwärtigen Rechtslage in der Bundesrepublik Deutschland. Ferner werde in der Vorlage für ein Gemeinschaftszüchterrecht eine wesentlich längere Schutzdauer vorgeschlagen.

270. Mr. King (IFAP) found himself in agreement with the statement of Mr. Royon (CIOPORA). IFAP also had noted that the average commercial life of varieties was less than the 15 years referred to in the original UPOV Convention. It would be unwise for breeders to assume the recovery of their investment over 25 years, especially in the case of agricultural crops, since varieties of such crops were obsolete long before the 15 years presently set out in Article 8 expired. IFAP saw no reason for changing the present periods of protection of 15 and 18 years. Perhaps some special provision could be added for ornamentals, roses for example, which might have a commercial life of 25 or 30 years; but as far as farm crops were concerned, IFAP was opposed to any extension of the period of protection. There might even be a case for a shorter period of protection than the present 15 years.

271. M. Le Buanec (ASSINSEL) fait observer qu'il n'y a pas que les variétés de plantes ornementales qui aient des durées de vie supérieures à 15, 18 ou 20 ans; chez certaines plantes de grande culture, notamment chez la pomme de

terre, on trouve également des variétés à durée de vie très longue. On ne peut donc pas faire de différence du point de vue de la durée de la protection entre les différentes catégories de plantes.

272. The Chairman agreed with Mr. Le Buanec but pointed out that there were some varieties that had a lifetime of more than a century, but it was not possible to grant plant breeders' rights for that length of time. He asked the breeders' organizations ASSINSEL and COMASSO why they sought a longer period of protection, and stated that the legal situation in the Federal Republic of Germany, or any other country for that matter, was no justification in that respect.

273. Dr. Gunary (ASSINSEL) stated that ASSINSEL was not seeking any longer periods than those mentioned in the proposed text.

274. M. Besson (FIS) fait observer qu'il faut aussi tenir compte de l'augmentation du volume des investissements que nécessite la création variétale, en particulier lorsque de nouveaux moyens technologiques sont mis en oeuvre. C'est pourquoi les nouvelles variétés doivent pouvoir faire l'objet d'une perception de rémunération sur une plus longue période.

275. Herr Winter (COMASSO) sagte, er müsse natürlich gestehen, dass die gegenwärtige Rechtslage in der Bundesrepublik Deutschland keine Begründung für eine Verlängerung der in Artikel 8 vorgesehenen Schutzdauern darstelle. Dagegen sei eine sachliche Begründung die vorgeschlagene Einführung der Abhängigkeit in das Uebereinkommen.

276. Mr. Slocock (AIPH) welcomed the contribution of Mr. Royon (CIOPORA) to the rewording of paragraph (2) of Article 8, where the words "granting of the right" had been replaced with the words "the filing of the application" since that would help to meet his point on the provisions of Article 7(4).

277. Secondly, in calling for a greater uniformity in the duration of protection, Mr. Slocock was not suggesting that one should adopt the highest common denominator as the period of protection. The proposal in the draft Article 8(2) was in his view the maximum which should be considered. In the vast majority of cases, the commercial life of new varieties fell well ashort of the figures which were now proposed.

278. Mr. Royon (CIOPORA) said that there were two ways of considering a long period of protection. One might object to it because of a wish to be able to cultivate the variety free of royalties. On the other hand, one might object to it because most varieties cease to be marketed after a shorter period. In the latter case, however, Mr. Royon did not see the cause for concern since, if the variety was no longer in the market place, the breeder would probably surrender his rights.

279. Mr. King (IFAP) stated that the logical conclusion to be drawn from this argument would be to grant a right for an indefinite period of time.

280. Mr. Clucas (ASSINSEL) concurred with Mr. Winter (COMASSO) that in a situation where there was dependence, a longer duration might be required than at present in order to enable the breeder of the original variety to be properly compensated.

Article 9 (Restrictioins on the Exercise of the Right)

281. The Chairman opened the discussions on Article 9.

282. Mr. Slocock (AIPH) stated that AIPH saw public interest playing an important role in the plant variety protection system and therefore welcomed the retention of Article 9 and its more precise wording.

283. Mr. Williams (AIPPI) stated that the proposed wording of Article 9 was acceptable to AIPPI.

284. M. Le Buanec (ASSINSEL) rappelle que l'article 9 préoccupe beaucoup l'ASSINSEL. S'agissant du paragraphe 1), l'ASSINSEL aimerait s'assurer que le mot "droit" s'applique à l'ensemble des prérogatives conférées à l'obtenteur. Par ailleurs, elle estime qu'il serait utile d'ajouter la phrase suivante : "L'Etat de l'Union concerné devra notifier cette limitation au Secrétaire général, en indiquant ses motifs. Le Conseil devra prendre position sur cette limitation." S'agissant du paragraphe 2), l'ASSINSEL estime que l'intervention des Etats ne peut se concevoir que pour assurer la diffusion de la variété, lorsqu'elle est jugée insuffisante. C'est pourquoi elle formulerait le paragraphe comme suit : "Si l'intérêt public exige une large diffusion de la variété, l'Etat de l'Union intéressé doit prendre toutes mesures nécessaires pour que l'obtenteur reçoive une rémunération équitable pour l'exploitation éventuelle de la variété par des tiers."

285. Mr. Roberts (ICC) stated that ICC recognized that States had to have the right to interfere with the free exercise of the breeder's right when the public interest was affected, but hoped that it was fully recognized that this occurred in exceptional situations and should not be the normal or frequent practice. ICC was not sure how this Article would operate in practice. Was it the intention that the State should have the right to grant to third parties a right to sell the variety to the exclusion of the rights of the holder of the plant breeder's right, thus granting exclusive compulsory licenses under plant breeders' rights and depriving the breeder of his normal right to sell his own variety? If that was the effect of the Article, ICC was most concerned.

286. Mr. Royon (CIOPORA) said that CIOPORA thought that the proposed new text represented a serious step backwards when compared with the corresponding text in document CAJ/XXIV/2. CIOPORA recognized that the free exercise of the rights conferred by the title of protection granted to a breeder should be capable of restriction in the public interest, but only for reasons of public interest. CIOPORA proposed the following text for Article 9:

> "The free exercise of the title of protection granted to a breeder may not be restricted otherwise than for reasons of public interest. In such a case, the breeder shall be fully compensated."

287. Herr Winter (COMASSO) sagte, auch die COMASSO finde diese Vorschrift etwas unbefriedigend. Sie habe eine gewisse Sympathie für den von der ASSINSEL unterbreiteten Vorschlag, sähe aber das Problem der Erteilung einer besonderen Funktion, die man mit einer supranationalen Gerichtsbarkeit vergleichen könne, an den Rat der UPOV. Bezüglich Absatz 2 fragte Herr Winter, warum eine Anpassung an den vorgeschlagenen neuen Inhalt von Artikel 5 vorgenommen werden müsse. Ziel des gegenwärtigen Artikels 9 sei es, die Verbreitung der geschützten Sorte sicherzustellen. Nach der vorgeschlagenen Neuformulierung solle einem Dritten die Auswertung der Sorte erlaubt werden. Ein Einzelinteresse werde also als Begründung in den Vordergrund gestellt, und nicht mehr das öffentliche Interesse, das man in der Verbreitung der Sorte sehen könne.

288. Mr. Greengrass (Vice Secretary-General) stated that there was no intention in using the words "third person" to suggest the exclusion of the breeder himself. The language could be modified to make this clearer. The words "widespread distribution of the variety" used in the currently applicable text of Article 9(2) were thought to establish an inappropriate criterion for an interference under Article 9 in the rights of the breeder. The lack of widespread distribution of a variety would not be the sole case in which Article 9 could be resorted to; retaining the present text of Article 9 would thus give excessive prominence to that case.

289. Herr Winter (COMASSO) sagte, die von Herrn Greengrass vorgetragenen Gründe überzeugten ihn nicht, und er müsse deswegen seine Vorbehalte aufrechterhalten.

290. Mr. Royon (CIOPORA) stated that, for ornamental varieties, CIOPORA could not accept any system of compulsory licenses other than for reasons of public interest.

291. M. Besson (FIS) dit que la FIS partage les inquiétudes exprimées par l'ASSINSEL, la CCI et la CIOPORA.

292. M. Le Buanec (ASSINSEL) souligne, à la suite de l'échange de vues qui vient d'avoir lieu entre le Secrétaire général adjoint et M. Winter (COMASSO) que, selon l'ASSINSEL, seule une absence ou une insuffisance de diffusion de la variété devrait constituer un motif de limitation selon l'article 9. L'ASSINSEL insiste sur ce point.

293. M. Petit-Pigeard (COMASSO) fait observer que dans l'expression "le libre exercice du droit" le mot "libre" est superflu, tout en reconnaissant qu'il figurait déjà dans le texte de 1961 de la Convention. Il n'est pas convaincu par l'opportunité d'une disposition, telle que proposée par l'ASSINSEL, créant un pouvoir supranational pour juger, ou du moins vérifier, les motifs d'intérêt public qui ont présidé à une limitation de l'exercice du droit d'un obtenteur. Il rappelle que des dispositions similaires à celles de l'article 9 figurent dans tous les textes régissant des droits de propriété intellectuelle, et ce, pour prévenir les abus de droit et sauvegarder l'intérêt national, par exemple en cas de conflit entre Etats. Il est évident, qu'en ce cas, un Etat doit pouvoir concéder des licences obligatoires pour des variétés protégées en faveur d'un étranger ressortissant d'un pays partie au conflit. Ce sont là, en règle générale, les deux seuls motifs de limitation de l'exercice du droit de l'obtenteur. Il conviendrait de s'en tenir à ces dispositions et de laisser

à la justice de chaque pays le soin de contrôler l'existence d'un intérêt public dans l'expropriation d'un droit.

294. Mr. Greengrass (Vice Secretary-General) stated that the phrase "widespread distribution of the variety" had also been replaced because, in many cases, it might not be appropriate that a variety be distributed on a widespread basis. One could think of inbred lines of maize and of highly specialized vegetable markets where varieties might be distributed in a limited volume to a very small number of producers. The change that was made to the text was effected to ensure that the breeders were protected from this kind of inappropriate interference.

Article 10 (Nullity and Forfeiture of the Right)

295. The Chairman opened the discussions on Article 10. He noted that AIPPI, IFAP and FIS had no comments on this Article.

296. Mr. Slocock (AIPH) welcomed the more specific wording concerning the maintenance of the protected variety and sought the retention of the words in parentheses in paragraph (3)(a).

297. Herr Dr. Lange (ASSINSEL) sagte, die ASSINSEL sei mit dem neuen vorgeschlagenen Wortlaut von Artikel 10 einverstanden, schlage aber vor, in Absatz 3 Unterabsatz a den Satzteil in der Klammer zu streichen.

298. Mr. Roberts (ICC) stated that ICC wondered why it was only possible to annul a right where it was shown either not to be new or not to be distinct. It appeared to ICC that it would be desirable to have the power to annul a right when the variety was shown not to have met the other requirements of sufficient homogeneity and stability set out in Article 6.

299. Mr. Royon (CIOPORA) stated that the words "with its characteristics as defined when the right was granted" in paragraph (2) could, in the opinion of CIOPORA, be deleted. CIOPORA also thought that paragraph (3)(a) was redundant in view of the provisions of paragraph (2).

300. Herr Winter (COMASSO) sagte, die COMASSO sei mit Absatz 1 und 2 einverstanden und schlage vor, in Absatz 3 Unterabsatz a den Satzteil in der Klammer zu streichen, da die Berufsgeheimnisse der Züchter in der Tat durch diesen Satzteil umfasst seien.

Article 11 (Free Choice of the Member State in Which the First Application is Filed; Application in Other Member States; Independence of Rights Granted in Different Member States; Special Agreements)

301. The Chairman noted that none of the organizations wished to make comments on Article 11.

Article 12 (Right of Priority)

302. The Chairman opened the discussions on Article 12.

303. Mr. Slocock (AIPH) stated that AIPH definitely preferred the 12-month priority period in paragraph (1).

304. Mr. Williams (AIPPI) stated that AIPPI would support Alternative 3 in paragraph (1), i.e. a 24-month period. Personally, he was cncerned that such period would require amendment of legislation, but it had been pointed out to him that the patentability criteria, if applied, would take care of his concern.

305. Mr. Clucas (ASSINSEL) fully supported the proposed text of Article 12. ASSINSEL favored the period of 24 months specified in Alternative 3 in paragraph (1).

306. Mr. Roberts (ICC) stated that ICC supported the remarks of ASSINSEL on this question.

307. Mr. Royon (CIOPORA) stated that CIOPORA did not think that the present period of four years provided in paragraph (3) should be reduced without some very serious justification. Concerning the period of priority, CIOPORA felt that if the Convention was to be kept open to different forms of protection, it might be difficult to provide for a period that would require an amendment of national legislation. In general, it favored the 24-month period proposed in Alternative 3 in paragraph (1).

308. Herr Winter (COMASSO) sagte, die COMASSO spreche sich für Alternative 3, nämlich für eine 24-monatige Prioritätsfrist aus. Bezüglich Absatz 3 rege sie die Beibehaltung der gegenwärtigen Vierjahresfrist an, da es in der Tat, wie bereits von Herrn Royon erwähnt (CIOPORA), Situationen gebe, die eine solche Frist rechtfertigten.

309. Mr. King (IFAP) supported Alternative 1 in Article 12(1) which corresponded to the present text of the Convention, and he saw no reason for changing it. In all respects, IFAP was in favor of the new text of Article 12(3).

310. M. Besson (FIS) dit que la FIS soutient la position de l'ASSINSEL.

311. Mr. G.J. Urselmann (COMASSO), in relation to the alternatives in paragraph (1), stated that this issue had been discussed before and that breeders needed to have an extension of the 12-month period in order to carry out proper trials, evaluate those trials and do the necessary administration. This could not be done within the existing period of 12 months.

Article 13 (Variety Denomination)

312. The Chairman opened the discussions on Article 13 and invited the organizations to make general comments if they so wished.

General Comments

313. Mr. Slocock (AIPH) welcomed the opportunity to make a general statement on this Article, which was one of the most important in the Convention for AIPH. AIPH welcomed the way in which the UPOV Secretariat had addressed the question. The Secretariat had clearly given the matter a great deal of thought and had taken account of the real practical problems which had arisen in the implementation of the present Convention. AIPH welcomed the Article and hoped that there would be general support for the more uniform and more restrictive interpretation placed on paragraph (7) by Alternative 1.

314. Dr. Gunary (ASSINSEL) stated that ASSINSEL was seeking the minimum degree of regulation in this area and recognizing that there would be different needs for different crops; ASSINSEL would be speaking specifically for the agricultural, vegetables and field crops sectors. It proposed that Article 13 be simplified and worded as follows:

"(1) The variety shall be designated by a denomination.

"(2) The denomination shall be proposed by the breeder to the authority referred to in Article 30(1)(b), which shall register it at the same time as the right is granted.

"(3) A denomination shall not be suitable if a third party proves that this denomination infringes his prior rights.

"(4) When the 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 recognized."

315. Mr. Roberts (ICC) stated that there had been some discussion and differences of view within ICC. Some had queried whether this Article was really necessary at all, but the ultimate conclusion of the majority was that it was probably desirable to have an Article of this kind. But, taking into account difficulties that had occurred under the existing Article 13, ICC would like the Article to be as short and simple as possible and that the requirements under the Article should be the minimum. In this context, the proposal of ASSINSEL would seem to be very suitable.

316. Mr. Schlosser (CIOPORA) stated that, as a general statement, CIOPORA agreed with and supported the positions taken by ASSINSEL and ICC. He could see no reason why denominations should be regulated in such detail.

317. Herr Winter (COMASSO) sagte, er stimme voll seinen drei Vorrednern zu. Es sei wirklich erstaunlich, wie aus der Frage der Sortenbezeichnung ein Problem gemacht werde.

318. M. Besson (FIS) dit que la FIS s'aligne sur la position de l'ASSINSEL, et demande une simplification de la réglementation actuelle, laquelle suscite des problèmes commerciaux très importants.

319. Mr. Slocock (AIPH) referred to the use of trademarks in relation to the proposed new text. Paragraph (8) of the present text of the Convention made reference to trademarks and their relationship to registered variety denominations. The proposed new text made no reference to trademarks and the fact was that in ornamental horticulture the significance which was often vested in trademarks as a result of their promotion conferred on the variety to which they related an element of protection which went beyond that which was accorded by the Convention. The simple elimination of any reference to trademarks in the new text did not improve the situation and AIPH hoped that the final version of the Convention take the problem into account. This was a problem that had been drawn to UPOV's attention on many occasions in the past. The absence of any reference to trademarks did not seem to AIPH to be helpful.

320. Herr Dr. Freiherr von Pechmann (AIPPI) sagte, die AIPPI begrüsse die vorgeschlagene Streichung des Hinweises auf die Gattungsbezeichnung in Absatz 1. Zu Absatz 2 werde im Hinblick auf die gewünschte Einheitlichkeit der Sortenbezeichnung in allen Verbandsstaaten angeregt, den Satzteil "in einem anderen Verbandsstaat" durch "in einem oder mehreren anderen Verbandsstaaten" zu ersetzen.

321. Zu Absatz 5 Unterabsatz a werde Sinn und Zweck der Bestimmung, wonach ein älteres Recht im Rahmen des Verfahrens zur Eintragung einer Sortenbezeichnung durchgreife, voll anerkannt. Jedoch werfe Artikel 5 Absatz 5 hinsichtlich von Warenzeichen, die, wie bereits dargestellt, ebenfalls ein gewerbliches Schutzrecht darstellten, ein Problem auf, und zwar insoweit, dass die AIPPI diese sehr unklare Bestimmung richtig ausgelegt habe. Diese Bestimmung habe zur Folge, dass bei der Auswertung einer geschützten Sorte, also nach dem Erteilungsverfahren, ein älteres Warenzeichen gegen eine gleichlautende oder verwechselbare eingetragene Sortenbezeichnung nicht mehr geltend gemacht werden könne. Ferner sei bei Absatz 5 Unterabsatz c nur der Fall der übereinstimmenden Bezeichnung berücksichtigt. Das Wort "übereinstimmt" sollte mit "oder direkt verwechselbar ist" ergänzt werden.

322. Bezüglich Absatz 7 erscheine Alternative 1 aufgrund ihrer Klarheit die geeignetere. Alternative 2, die es dem nationalen Gesetzgeber überlasse, die Benutzung der Sortenbezeichnung zu regeln, bringe die Gefahr mit sich, dass nach nationalen Rechtsvorschriften auch Material mit der Sortenbezeichnung zu versehen sei, das eigentlich nicht sinnvollerweise mit dieser Bezeichnung vertrieben werden müsse.

323. Schliesslich meine die AIPPI ebenfalls, dass der gegenwärtige Absatz 8 beizubehalten sei. Es gebe keinen erkennbaren Grund, die Benutzung einer Handelsmarke zusätzlich zu der Sortenbezeichnung nicht weiter zu tolerieren. Gesetzliche Aenderungen sollten nur im Falle eines dringenden Bedürfnisses vorgenommen werden; hier bestehe kein Bedürfnis.

324. Mr. Royon (CIOPORA) stated that CIOPORA would have preferred that a breeders' rights certificate or a plant patent be referred to by its serial number. Because of the inclusion of an Article relating to denominations in the original text of the Convention and because of the way that some authorities and pressure groups had tried to influence the subject of denominations, CIOPORA had been forced to make strong representations to preserve the right for breeders to use trademarks for the marketing of their varieties. Just as patent holders had the possibility of using trademarks for the marketing of their patented products, CIOPORA did not agree that trademarks conferred certain elements of protection going beyond the scope of the protection under the Convention. Trademarks was an entirely different field of industrial property rights which conferred rights which were granted under trademark legislation and within the scope of that legislation.

325. The present wording of Article 13 was a compromise reached after very lengthy discussions and much negotiation. CIOPORA thought that it would be better not to change it since clearly it could not accept some of the modifications that were proposed. Although it did not correspond fully to its views, CIOPORA would also be prepared to accept as a possible alternative, provided it was taken word for word and without any change, the excellent text of the Swiss legislation which was reproduced in CIOPORA's submission.

326. Herr Winter (COMASSO) sagte, die COMASSO empfehle eine Ueberprüfung der Möglichkeit, im englischen Wortlaut das Wort "designation" anstelle von "denomination" zu benutzen. Das erstere wäre klarer in dem Sinne, dass das letztere hohe Anforderungen an die Bezeichnung durchblicken lasse. Ferner spreche sich die COMASSO für die Beibehaltung von Absatz 8 aus, um sowohl für den Verwender als auch für einige Behörden Rechtsklarheit zu schaffen.

327. Mr. Royon (CIOPORA) stated that CIOPORA supported the proposal made by Mr. Winter (COMASSO) since CIOPORA had already made a proposal in 1961 that "designation" rather than "denomination" was the appropriate word.

Proposal by ASSINSEL

328. Mr. F. Espenhain (Denmark) wished to ask a question to the ASSINSEL delegation concerning paragraph (3) of its proposal which provided that a denomination should not be suitable if a third party proved that the denomination infringed his prior rights. It seemed that the text took for granted that a third party had a right arising out of a plant variety protection certificate or a trademark or a trade name. This did not seem to cover the case of varieties that were not protected by plant breeders' rights, in which case their breeder had no legal right in their names but did have a commercial interest in them. Mr. Espenhain asked if the ASSINSEL delegation could explore those circumstances and perhaps improve its text.

329. Dr. Gunary (ASSINSEL) stated that the objective of ASSINSEL was to simplify the text of the Article as much as possible and also its administration which would be best handled by the establishment of a centralized data base relating to variety denominations. What ASSINSEL meant by "infringing prior rights" was that a party should not have a name that was already given to another variety of the same species.

330. Herr Dr. Freiherr von Pechmann (AIPPI) beglückwünschte die ASSINSEL zu ihrem Vorschlag und insbesondere zu ihrer klaren und knappen Formulierung. Absatz 3 scheine alle älteren Rechte mit dem Vorteil zu erfassen, dass der Anmelder wisse, was er bevor der endgültigen Wahl einer Sortenbezeichnung zu prüfen habe. Dieser Vorschlag von der ASSINSEL sollte ernsthaft vom Rat geprüft werden.

331. Mr. Royon (CIOPORA) stated that the question raised by Mr. Espenhain (Denmark) prompted him to point out in relation to paragraph (3) that it is not up to a third party who already had a registered trademark to prove that its registered trademark was infringed. A modification in the wording might be necessary to establish upon which party lay the burden of proof.

332. Herr Winter (COMASSO) bezog sich auf die schriftliche Stellungnahme der COMASSO in Dokument IOM/IV/4 und auf den Vorschlag der ASSINSEL. Die Verwirklichung der schriftlich vorgelegten Vorschläge zur Streichung, Ersetzung oder Hinzufügung habe zur Folge, dass die Vorschläge mit dem Vorschlag der ASSINSEL deckungsgleich seien. Die COMASSO unterstütze somit voll den Vorschlag der ASSINSEL.

333. Mr. Harvey (United Kingdom) expressed the view that the ASSINSEL proposal did not cover, as had been claimed, all possibilities. It did not provide for the possibility that the authority could refuse the denomination/designation. Was it the intention of ASSINSEL that the authority should not be allowed to refuse a denomination? In paragraph (3) it was stated that a denomination should not be suitable if a third party proved that the denomination infringed its prior rights. Mr. Harvey asked to whom should this be proved and how? A final question arose from paragraph (4) which would seem to allow a misleading or confusing denomination. Was this ASSINSEL's intention?

334. Herr Burr (Bundesrepublik Deutschland) stellte fest, dass als Folge der neuen Gestaltung von Artikel 6 die Sortenbezeichnung kein Recht mehr darstelle. Er fragte, wie das Verhältnis einer Sortenbezeichnung zu früheren Sortenbezeichnungen nach dem von der ASSINSEL vorgeschlagenen Absatz 3 geregelt würde.

335. Dr. Gunary (ASSINSEL) responded to the questions from Mr. Harvey (United Kingdom). ASSINSEL thought that it was a matter for agreement between breeders and not for the authorities whether a right had been infringed. On the subject of the precise wording of the ASSINSEL proposal and in response to the comment by Mr. Royon (CIOPORA), it might be better if the phrase "it is found that" was substituted for the phrase "a third party proves," so that a denomination would not be suitable if it was found that it infringed the prior rights of a third party. Concerning the questions of misleading or confusing denominations, Dr. Gunary wished to have further clarification.

336. Mr. J. Ardley (United Kingdom) gave the example of a dwarf wheat being called "Tallest of all." It was this kind of situation that the authorities would consider in deciding whether a particular name was suitable or whether the name was likely to mislead the purchaser into thinking that the variety possessed qualities when this was not in fact the case.

337. Mr. Clucas (ASSINSEL) stated that ASSINSEL was not certain whether that was important.

338. Mr. Slocock (AIPH) stated that there were a number of issues that were not addressed in the new proposal of ASSINSEL. Mr. Harvey (United Kingdom) had pointed to some of them. In paragraphs (5) and (6) of the proposed new Article 13, UPOV had tied up a number of loose ends for the benefit of member States. The ASSINSEL version untied those loose ends and contented itself with summarizing the spirit of these paragraphs. AIPH preferred to retain the text set out in document IOM/IV/2, to retain Alternative 1 in paragraph (7) and to reinstate paragraph (8) of Article 13 of the present text of the Convention.

339. Herr Dr. Freiherr von Pechmann (AIPPI) schlug folgende Formulierung für Absatz 3 als Kompromiss vor:

> "Eine Bezeichnung ist als Sortenbezeichnung nicht geeignet, wenn sie mit einer bestehenden Sortenbezeichnung oder einem älteren Recht eines Dritten übereinstimmt oder verwechselbar ist."

Damit wären sowohl die älteren Sortenbezeichnungen als auch die älteren Rechte berücksichtigt. Ferner sei ein Beweis ihres Bestehens, wozu ein gerichtliches Verfahren notwendig sein könnte, nicht hervorzubringen, sondern die prüfende Behörde habe die Aufgabe, die praktischen Tatbestände festzustellen.

340. Herr Winter (COMASSO) bezweifelte im Anschluss an die Ausführungen von Herrn Burr (Bundesrepublik Deutschland), ob die Sortenbezeichnung zur Zeit ein Recht darstelle. Seinem Verständnis nach sei sie höchstens eine Schutzrechtsvoraussetzung.

341. Herr Burr (Bundesrepublik Deutschland) gestand, dass Herrn Winter's Bemerkung zu überdenken sei. Er sei sich aber sicher, dass als Folge der Schaffung eines neuen Absatzes 2 in Artikel 6 die Sortenbezeichnung kein Recht mehr verkörpere und dass der Vorschlag von ASSINSEL zu Artikel 13 sich auf frühere Rechte beschränke. Möglicherweise biete der Vorschlag von Herrn Dr. von Pechmann (AIPPI) eine Lösung.

Proposal to Take Over Relevant Provisions from the Swiss Plant Variety Protection Law

342. Mr. Royon (CIOPORA) stated that CIOPORA was very supportive of the proposed revision of the UPOV Convention but could not understand why UPOV should have as one of the objectives of the revision the amendment of the existing Article 13. The new text proposed for Article 13 was a clear restriction of the rights of breeders in the field of denominations, and CIOPORA could not accept that.

343. The text of the Swiss law which CIOPORA had recommended could be adopted since it was precise and to the point and covered all the points made by ASSINSEL, whilst at the same time meeting the needs of some of the national delegates and of the delegate of AIPH. For instance, it stated that "in

addition to the denomination, a trademark differing from the denomination may be used in connection with the variety." In relation to rights of third parties, it set out that "the rights of third parties shall remain unaffected." In relation to the concerns expressed by AIPH, it stated that "anyone offering for sale or marketing propagating material on a commercial basis shall use the denomination of the variety, even after the termination of protection." In relation to the conditions attaching to the acceptability of denominations, it stated very simply that denominations "shall not be liable to mislead or to cause confusion with another denomination which has already been filed or registered in a member State for a variety of the same or a botanically related species," or "be contrary to public order or morality or infringe national laws or international conventions." CIOPORA strongly urged UPOV to consider this proposal in its ongoing work.

344. Mr. Clucas (ASSINSEL) stated that ASSINSEL would have no problem with the proposal quoted by Mr. Royon. ASSINSEL sought simply that the breeder should have the right to name his own variety with the understanding that breeders acted responsibly in the naming of their varieties so that there was no necessity for a huge amount of regulation. ASSINSEL understood that there were some other dangers that needed to be covered in drafting a text and felt that they were covered in the ASSINSEL proposal and in the text quoted by Mr. Royon (CIOPORA).

Principle of Revising Article 13

345. Mr. Espenhain (Denmark) stated that since the breeders' organizations and producers' organizations were present, he would like, for the purposes of UPOV's future discussions, to seek some clarification concerning the present Article 13. It had been stated that the retention of the present Article 13 would be acceptable to CIOPORA. Were all other organizations present of the same opinion?

346. Mr. Royon (CIOPORA) stated that whilst CIOPORA could live with the present Article 13, this did not mean that it liked it; it was an acceptable compromise for CIOPORA's members.

347. Mr. Slocock (AIPH) stated, in response to Mr. Espenhain's question, that AIPH preferred the new text proposed for Article 13, which was more helpful than the present text.

348. Mr. Clucas (ASSINSEL) stated that ASSINSEL was not happy with Article 13 as it stood. It felt that the subject was over-regulated and some members were of the view that Article 13 should be eliminated altogether. It was only after discussions that the members of ASSINSEL reached the proposal that had been put forward.

349. Herr Winter (COMASSO) sagte, die COMASSO teile die von Herrn Royon (CIOPORA) geäusserte Meinung, dass der gegenwärtige Artikel 13 bereits einen Kompromiss darstelle. Die Beibehaltung dieses Artikels mit dem gegenwärtigen Wortlaut werde durchaus vorgezogen, sollte überhaupt keine Möglichkeit gefunden werden, den von der COMASSO gemachten Vereinfachungsvorschlägen zu folgen.

Article 14 (Protection Independent of Measures Regulating Production, Certification and Marketing)

350. The Chairman opened the discussions on Article 14.

351. Herr Winter (COMASSO) sagte, die COMASSO könne eine Streichung von Artikel 14 nicht unterstützen, und zwar im Hinblick auf die Absicht der UPOV, neue Mitglieder zu gewinnen. Dabei könne eine solche Vorschrift, die jedenfalls nicht schädlich sei, durchaus von Nutzen sein.

352. Mr. Clucas (ASSINSEL) stated that his organization was equally happy with the deletion or the retention of Article 14.

353. Mr. Royon (CIOPORA) stated that his organization strongly supported the deletion of Article 14.

354. Mr. Slocock (AIPH) stated that his organization did not oppose the deletion of Article 14.

355. M. Besson (FIS) appuie la proposition du COMASSO de maintenir l'article 14.

Closing of the Session

356. Mr. Royon (CIOPORA) expressed the thanks of CIOPORA for the opportunity to participate in the meeting and congratulated the Secretariat and the Administrative and Legal Committee of UPOV for the excellent work that had been done. CIOPORA appreciated the general approach to the revision of the Convention whereby proposals were being placed before associations and organizations prior to the diplomatic conference. Mr. Royon thought that the opportunity to exchange views in relation to successive drafts of documents would provide an ultimate result that was positive.

357. Mr. Royon asked if the comments of CIOPORA in its communication of May 22, 1989, to UPOV had been circulated. If not, he would be grateful if the Secretariat could distribute that document which incorporated a proposed new wording for Article 37.*

358. Mr. Clucas (ASSINSEL) associated himself, on behalf of ASSINSEL, to the congratulations and thanks expressed by Mr. Royon to the Chairman.

359. Mr. Clucas added that it would be helpful to have some guidance on the future course of events and, in particular, to know whether the organizations would have an opportunity to consider another document before the diplomatic conference. Concerning the joint UPOV/WIPO meeting that was scheduled for January 1990, he also sought information as to whether the professional organizations would be invited.

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* see next page

360. The Chairman replied that these matters would be discussed in the following days, in the Consultative Committee and the Council. He personally thought that new documents would be distributed to the organizations.

361. The Chairman then concluded the meeting by stating that it had permitted progress to be achieved in the definition of the objectives of the revision of the Convention. Both the professional organizations and the representatives of member States had had intensive discussions and had come to certain standpoints. This meeting had shown that breeders and users had sometimes very different opinions, but that also the organizations from the same branch did not always share the same views. It was certainly fruitful for Government representatives to hear all the opinions. On some points, they would have to reconsider their own opinion; on others that were still to be decided, the decision would be easier; in still others it would be more difficult after this meeting. If the representatives of the member States had not been very active in this meeting, it was because this was their role. Listening carefully, make up their minds and try to come to decisions within the next days, that was their task. Their overall responsibility was to reconcile the wishes of the industry and the public interest as a whole. The time had now come to take those decisions. The objective being contemplated was to hold a diplomatic conference at the end of 1990 or the beginning of 1991. Any organization which asked for further discussions or time for further internal discussions would have to take this objective into consideration. Their future contribution would be as much welcome as the contributions made in preparation for and during this meeting, for which the chairman expressed his sincere thanks on behalf of UPOV.

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* This wording is as follows:

"(1) Any State which provides or intends to provide for protection under the different forms referred to in Article 1(4) for one and the same species [or taxon, depending on definitions], must notify such fact or intention to the Secretary-General at the time of signing this Act or of depositing its instrument of ratification or approval or of accession to this Act.

"(2) Where, in a member State of the Union to which paragraph (1) applies, protection is sought under patent legislation, the said State may apply the patentability criteria and the period of protection of the patent legislation to the varieties protected thereunder, notwithstanding the provisions of Articles ...

"(3) [Unchanged]"

The Article 1(4) quoted above is as follows in CIOPORA's proposed text:

"(4) Each member State of the Union may recognize the protection of the breeder provided for in this Convention by the grant either of a 'sui generis' title of protection or of a patent."

[Annexes follow]

ANNEX I/ANNEXE I/ANLAGE I

LIST OF PARTICIPANTS/LISTE DES PARTICIPANTS/TEILNEHMERLISTE

I. MEMBER STATES/ETATS MEMBRES/VERBANDSSTAATEN

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WORLD INTELLECTUAL PROPERTY ORGANIZATION (WIPO)/ORGANISATION MONDIALE DE LA PROPRIETE INTELLECTUELLE (OMPI)/WELTORGANISATION FUER GEISTIGES EIGENTUM (WIPO)

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ASSOCIATION OF PLANT BREEDERS OF THE EUROPEAN ECONOMIC COMMUNITY (COMASSO)/ ASSOCIATION DES OBTENTEURS DE VARIETES VEGETALES DE LA COMMUNAUTE ECONOMIQUE EUROPEENNE (COMASSO)/VEREINIGUNG DER PFLANZENZUECHTER DER EUROPAEISCHEN WIRTSCHAFTSGEMEINSCHAFT (COMASSO)

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[Annex II follows/
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ANNEX II/ANNEXE II/ANLAGE II

STATEMENT OF PRINCIPLES

FOR

INTELLECTUAL PROPERTY RIGHTS

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Association of Official Seed Certifying Agencies
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STATEMENT OF PRINCIPLES FOR INTELLECTUAL PROPERTY RIGHTS

The development and application of new biotechnology in crop research has resulted in complex genetical as well as legal problems. Basic elements of plant variation and propagation involving genes and genetic components are being patented. The legal and biological restrictions of such actions will have an increasingly critical impact on the seed industry and production agriculture.

It is recognized:

(1) that continued improvements through plant breeding are essential and must be continued through the unrestricted use of existing varieties and germplasm as building blocks

(2) that new biotechnological developments can provide extremely valuable new tools to achieve plant breeding objectives

(3) that plant variety protection (PVP) and patents provide an incentive for variety development and manipulation of genes and genetic components (through genetic engineering), but unrestricted rights granted under patent law could create possible restrictions on their wider use.

The following points are considered essential for the application of PVP and patents in granting intellectual property rights:

(a) Varieties should be protected only under the PVP Act (not by utility patents)

- farmers should have the right to produce seed of protected varieties for their own use but not for sale without the permission of the owner
- varieties derived from a protected variety and differing from the "mother" variety in only one or a few minor inconsequential traits should not be entitled to the same rights as independently developed varieties

(b) New inventive genetic components of plants, useful plant characteristics (traits) or processes should be eligible for patents provided

- they have been isolated, enhanced or created through biotechnological methods or be an inventive biological process

- they express useful genetic traits of actual or potential value in agriculture (not minor or inconsequential genetic traits making cosmetic differences)
- the genetic components or genes directly serve to cause the expression of a useful plant characteristic
- the plant characteristic to be patented is identified as being caused by a patentable genetic component or gene (and not cover a broad characteristic of a variety caused by an unknown or unidentified genetic component)

(c) Patent rights should extend to other plant material to which the manipulated genetic components (or genes) have been transferred and in them have been shown to express equal or similar genetic traits

(d) Variances in the patent law should be developed to provide:

- that alternative genetic approaches to achieve the same characteristic (or trait) in crops not be an infringement on a prior patent
- a research clause or exemption from seeking approval for research use of patented material
- a waiver of certain dominance rights of a patent over future patents on materials derived from the initial patented material
- that holders of patents on marketed materials derived from an earlier patent be required to compensate the holder of that earlier patent during the first (5 or 8) years of the life of the patent (rather than the 17 years stipulated in the law)

alternate (to indent above)

- a patent holder with exclusive right for (3 or 4) years, then the holder would be entitled to renumeration for the life of the patent from those which make use of the patented material

- for the use of any patented processes of genetic manipulation by others with reasonable compensation to the holder of the patent
- that a farmer have restricted rights to save and plant seed of a variety containing a patented component or characteristic (but not to sell)

(e) All variances in the patent laws and a mechanism for arbitrating disputes should be implemented soon (so that plant breeding is not stymied and those with limited financial resources are not unfairly disadvantaged)

* Approved by the Directors of the Association of Official Seed Certifying Agencies, August, 1989.

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