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INTERNATIONAL UNION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS

GENEVA

ADMINISTRATIVE AND LEGAL COMMITTEE**Forty-Seventh Session
Geneva, April 10, 2003**

REPORT

*adopted by the Committee*Opening of the Session

1. The Administrative and Legal Committee (CAJ) held its forty-seventh session in Geneva on April 10, 2003, under the Chairmanship of Ms. Nicole Bustin (France).
2. The list of participants is given in Annex I to this report.
3. The session was opened by the Chairperson, who welcomed the participants. She extended a special welcome to the Delegation of Belarus, a State which had become the fifty-second member of the Union on January 5, 2003. The Delegation of Belarus expressed its gratitude to the Office of the Union and the members of the Union for the assistance given to Belarus in the process of its accession to the UPOV Convention (1991 Act).
4. The Chairperson also informed the CAJ of the accessions of the Czech Republic and Hungary to the 1991 Act of the UPOV Convention.

Adoption of the Agenda

5. The Chairperson noted that a new agenda item, entitled "Memorandum Prepared by the Office of UPOV on the Genetic Use Restriction Technologies" (document CAJ/47/7), had

been added to the revised draft agenda (document CAJ/47/1 Rev.). The Chairperson proposed to take this new item as the first item after the adoption of the agenda.

6. The CAJ adopted the revised agenda as given in document CAJ/47/1 Rev.

7. The Chairperson informed the CAJ that the report of the forty-sixth session (document CAJ/46/8) had been adopted by correspondence. She further added that the Technical Committee, during the discussion of document TC/39/11, entitled "Extension of Protection to Hybrid Varieties Through Protection of Parent Lines", had decided to delete the information footnote concerning the word "hybrid" which appeared on page 2 and in the Annex of document TC/39/11. For consistency, the Chairperson proposed the deletion of the same footnote which appeared twice in document CAJ/46/8, on page 8 and on page 1 of Annex III. The CAJ agreed with the proposal by the Chairperson and agreed that a revised version of the Report (document CAJ/46/8 Rev.) should be prepared.

Memorandum Prepared by the Office of UPOV on the Genetic Use Restriction Technologies

8. Discussions were based on document CAJ/47/7. The Vice Secretary-General introduced the document and informed the CAJ that the Conference of the Parties (COP) to the Convention on Biological Diversity (CBD) in its Decision VI/5, had invited UPOV to examine, in the context of its work, the specific intellectual property implications of the genetic use restriction technologies (GURTs), particularly in respect of indigenous and local communities, and to further study their potential impacts on small farmers, indigenous and local communities and on farmers' rights. UPOV was also invited to study the applicability of existing, or the need to develop new, legal mechanisms to address the application of GURTs.

9. The Vice Secretary-General explained that the Consultative Committee had been informed at its sixty-fourth session on October 23, 2002, of the aforementioned invitation and that the Vice Secretary-General had reported that the Office of the Union (the Office) would submit a paper on this issue. The Memorandum prepared by the Office was sent to the Secretariat of the CBD on January 10, 2003. In response to a request from the Delegation of the United States of America, and in order to discuss this Memorandum, a new item had been introduced in the agenda to this meeting.

10. The Vice Secretary-General noted that the decision of the COP addressed a broad question, but explained that the Office had seen an opportunity to present the advantages of the UPOV Convention and had sought to limit its comments to the intellectual property aspects. He recognized that the Memorandum had raised certain concerns, and it was advisable that the CAJ discuss this matter with the aim of developing a document, which could be adopted by the Council of UPOV as a UPOV Position and supersede the Memorandum of the Office.

11. The Chairperson invited the CAJ to use the Memorandum prepared by the Office as the basis for the development of a paper which could be submitted to the Consultative Committee and the Council, for adoption, as a UPOV Position. She further invited the Delegation of the United States of America to comment.

12. The Delegation of the United States of America indicated that its comments appear in Annex II of document CAJ/47/7. More precisely, the comments addressed two different

matters. One concerned procedural aspects and the other related to the substance of the Memorandum.

13. The Chairperson indicated that procedural aspects were the competence of the Consultative Committee and the Council of UPOV. Those were the bodies which delegated functions to the CAJ and defined the obligations for the functioning of the Office.

14. It was agreed that the procedural aspects would be referred to the Consultative Committee at its sixty-fifth session on April 11, 2003.

15. With regard to substance, the Delegation of the United States of America gave a detailed explanation of its concerns about the way reference to the GURTs technology was made in the Memorandum, as provided in the proposal in Annex II of document CAJ/47/7. The Delegation was in favor of the adoption of a new document, but considered that, if consensus was not achieved during the present session, the Office should request the Secretariat of the CBD to retract the Memorandum.

16. The Delegation of Australia supported a review of the Memorandum.

17. The representatives of the International Seed Federation (ISF) and the International Community of Breeders of Asexually Reproduced Ornamental and Fruit-Tree Varieties (CIOPORA) also expressed concern with the way the GURTs technology was addressed in the Memorandum. The representative of ISF also indicated that the comparison between the GURTs technology and hybrids should be removed.

18. The Delegations of Germany and Sweden noted the difficulties there could be in reaching agreement which could provide a basis for a new document during the present session, due to the complexity of the matter and the time constraints.

19. The Delegation of Colombia was in favor of analyzing the Memorandum to enable the Council to adopt a UPOV Position on April 11, 2003.

20. The Delegation of Ireland indicated that there were difficulties in trying to reach an agreement now, but that there were also difficulties in trying to fully research the matter and reach an agreement at a later stage.

21. The Delegation of France was in favor of discussing the Memorandum and finding a way to reach consensus.

22. The Chairperson considered that withdrawal of the Memorandum without a document to replace it would not be a constructive solution. She invited the CAJ to develop a UPOV Position, based on the Memorandum, and requested the Office to prepare a proposal to facilitate discussions.

23. The Vice Secretary-General proposed modifications of the Memorandum in order to reflect the concerns and suggestions of improvements expressed during the discussion by delegations of members and representatives of observer organizations. More precisely, references to hybrids and GURTs that caused concern were removed and certain provisions of the UPOV Convention were further clarified. The Chairperson invited delegations and observers to comment on the draft paper. The final document which resulted from that exercise is reproduced in Annex II to this document.

24. The Delegations of Australia, Brazil, Colombia, Mexico and the United States of America and the representatives of CIOFORA, ISF and the World Intellectual Property Organization (WIPO) suggested various drafting proposals for the first sentence of the third paragraph for the “Background” section in page 2 of Annex II to this document. Three options were identified in those deliberations and it was agreed that the Consultative Committee should be invited to make the final recommendation to the Council after further consideration of these options.

25. Subject to the recommendation of the Consultative Committee, in relation to the three options identified by the CAJ in paragraph 24, above, the CAJ approved the final document (Annex II to the present document) as the “Position of the International Union for the Protection of New Varieties of Plants (UPOV) concerning Decision VI/5 of the Conference of the Parties to the Convention on Biological Diversity (CBD),” and recommended its adoption by the Council of UPOV on April 11, 2003.

The Notion of “Essentially Derived Variety” in the Breeding of Ornamental Varieties

26. The Chairperson informed the CAJ that, due to time constraints, it had not been possible to deal with this item during the forty-sixth session of the CAJ.

27. Discussions were based on document CAJ/46/7. The Vice Secretary-General introduced the document, which was a response to a request from the Technical Committee to consider the possibility that a breeder who develops an “improved form” of his own protected variety would, under the provisions of the 1991 Act of the UPOV Convention, have protection for his “improved form,” if it was considered to be an essentially derived variety.

28. The Chairperson clarified that discussions on this matter and the questions raised in the document did not refer exclusively to ornamentals, but were applicable to all varieties.

29. In reply to a question posed by the Delegation of the Netherlands, the Chairperson noted that the different situations explained in the document were not restricted to seed-propagated varieties and were applicable to different varieties, regardless of their propagation method.

30. The representative of ISF clarified the original context of the request to prepare this document, explaining that ISF had given advice on this matter to breeders of seed-propagated ornamental varieties, to seek legal protection for the improvements resulting from their breeding activities in recognition of their particular economic circumstances. It was explained to those breeders that the application of the provisions on essentially derived varieties of the 1991 Act of the UPOV Convention permitted, in some cases, extension of the protection of the initial variety to breeding results which conformed with the notion of an essentially derived variety. Those clarifications were reported in the Technical Working Party on Ornamental Plants and Forest Trees and the matter was brought to the Technical Committee, which referred it to the CAJ.

31. The representative of the European Community recommended that the use of the term “improved” in “improved form” should be avoided and suggested the use of a more neutral term such as “another form” or a “further development.” He proposed to clarify that paragraph 5 of the document related to the viewpoint of the breeder of the initial variety, to provide a basis which was more consistent with the examples given later in the document.

32. The Delegation of the United States of America agreed with the Chairperson that the document did not only relate to ornamentals, and proposed to delete the word “ornamentals” from the title. It further proposed a minor drafting change in paragraph 5 of the document to substitute the word “which” by the word “where” as provided in Article 14(5)(i) of the 1991 Act. The Delegation was also in favor of a change of the term “improved.”

33. The Delegation of France suggested that some reformulation in paragraph 3 might be necessary to avoid conveying the message that the initial variety might not be uniform. The Delegation also proposed the modification of the first sentence of paragraph 11 as the current drafting “cannot be commercially exploited” created some confusion.

34. The Chairperson agreed that the term “improved form” was not appropriate, whilst noting that it seemed difficult to find a suitable alternative.

35. In reply to the suggestion by the representative of ISF to use the term “derived form,” the Technical Director suggested that that might create confusion with the concept of essentially derived variety.

36. The representative of the European Community suggested “selected form.”

37. The Delegation of Germany noted that breeding did not always lead to an improved result, but sometimes only to a change.

38. Subject to minor redrafting in paragraphs 3, 5 and 11, as provided above, the removal of the word “ornamental” in the title of the document and the replacement of the term “improved form” by a suitable alternative, the CAJ approved the substance of document CAJ/46/7. The amended version of document CAJ/46/7, as approved by the CAJ, appears in revision mode in Annex III to this document.

Specific Issues Concerning the Interface Between Patents and Breeders Rights

39. The Chairperson introduced the first part of document CAJ/47/2 dealing with the recommendation concerning the adoption by the Council of UPOV of a position paper on “Specific Issues Concerning the Interface Between Patents and Breeders’ Rights,” based on document CAJ/46/2, as modified and approved by the CAJ, which appeared in the Annex to document CAJ/47/2. She invited the CAJ to express its views in relation to the above recommendation.

40. The representative of the European Community referred to paragraph 21 of the Annex to document CAJ/47/2 and indicated that the European Community had adopted a Directive on Biotechnological Inventions providing for the possibility of cross-compulsory licensing between plant breeders’ rights and patents. He noted that the condition governing this provision was not the public interest requirement, but a similar notion to the one provided in paragraph 21 of the Annex to document CAJ/47/2: “significant technical progress of considerable economic interest.” That Directive had had legislative consequence for the States of the European Community and for the Basic Regulation of the Community Plant Variety Office. In the opinion of the representative, the condition governing the cross-compulsory license system was not contrary to the principles of the UPOV Convention. He expressed some concern in relation to paragraph 21 of the Annex to document CAJ/47/2

because it suggested a tension between the criteria of technical progress of economic importance and the notion of public interest. As a consequence, he proposed the deletion of paragraph 21.

41. The Chairperson, whilst understanding the concerns of the representative of the European Community, recalled that the paper in the Annex to document CAJ/47/2 reflected considerations in relation to the UPOV Convention and that the Convention was only concerned with the notion of public interest. She concluded that a decision on this matter could not be reached during the present session due to time constraints and further discussions on this item would take place at the forty-eighth session of the CAJ in October 2003.

Program for the Forty-Eighth Session

42. It was agreed that the program for the forty-eighth session would include the following items:

1. Specific issues concerning the interface between patents and breeders rights
2. Publication of variety descriptions
3. Transfer of material for the purposes of examination of distinctness, uniformity and stability: proposed model agreements
4. Recommendations to ensure the independence of those DUS examination centers which have, or have links to, breeding activities
5. Review of the UPOV-ROM Plant Variety Database
6. UPOV information databases
7. Variety denominations

43. The present report has been adopted by correspondence.

[Annex I follows]

ANNEXE I / ANNEX I / ANLAGE I / ANEXO I

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[L'annexe II suit/
Annex II follows/
Anlage II folgt/
Sigue el Anexo II]

CAJ/47/8

ANNEX II



INTERNATIONALER
VERBAND
ZUM SCHUTZ VON
PFLANZENZÜCHTUNGEN
GENÈVE, SCHWEIZ

UNION INTERNATIONALE
POUR LA PROTECTION
DES OBTENTIONS
VÉGÉTALES
GENÈVE, SUISSE

UNIÓN INTERNACIONAL
PARA LA PROTECCIÓN
DE LAS OBTENCIONES
VEGETALES
GINEBRA, SUIZA

INTERNATIONAL UNION
FOR THE PROTECTION
OF NEW VARIETIES
OF PLANTS
GENEVA, SWITZERLAND

April 10, 2003

POSITION OF THE INTERNATIONAL UNION
FOR THE PROTECTION OF NEW VARIETIES OF PLANTS (UPOV)
CONCERNING DECISION VI/5 OF THE CONFERENCE
OF THE PARTIES TO THE CONVENTION
ON BIOLOGICAL DIVERSITY (CBD)

communicated to the Secretariat of the CBD

Background

This document supersedes the memorandum prepared by the Office of the Union on the genetic use restriction technologies (GURTs) and sent to the CBD, dated January 10, 2003.

In its decision VI/5, adopted at its sixth session held in The Hague in April 2002, the Conference of the Parties to the CBD invited UPOV to examine, in the context of its work, the specific intellectual property implications of GURTs, particularly in respect of indigenous and local communities, and to further study their potential impacts on small farmers, indigenous and local communities and on farmers' rights. UPOV was also invited to study the applicability of existing, or the need to develop new, legal mechanisms to address the application of GURTs.

Option 1

UPOV is not in a position, in the context of its work or otherwise, to [pronounce]/[advise] on the intellectual property implications of GURTs, as identified in the decision above.

Option 2

UPOV is not in a position, in the context of its work or otherwise, to express an opinion on the intellectual property implications of GURTs, as identified in the decision above.

Option 3

UPOV has not to-date, in the context of its work or otherwise, examined substantively the intellectual property implications of GURTs, as identified in the decision above.

However, UPOV would like to take the opportunity of this invitation to comment on the need for breeders to have a system of protection to be able to recover their investment and to receive incentives in order to be able to continue their breeding activities. In this respect, UPOV notes that the UPOV Convention provides an effective and well balanced system for the protection of new plant varieties which assures the breeders interest. Where effective systems of protection are in place, breeders may not have to rely on other systems of protection.

With respect to varieties containing GURTs, it should be noted that such varieties may be granted plant breeders' rights if they satisfy the conditions.

Summary

Breeders need to recover their investment and to receive incentives in order to be able to continue their breeding activities. The introduction of a legal framework according to the International Convention for the Protection of New Varieties of Plants (UPOV Convention) is suitable approach to encourage the breeding of new varieties of plants for the benefit of society. In this respect, UPOV notes that the UPOV Convention provides an effective and well balanced system for the protection of new plant varieties which assures the breeders interest. Where effective systems of protection are in place, breeders may not have to rely on other systems of protection.

Introduction

1. The following sections highlight the key features of the UPOV Convention, and which UPOV considers appropriate to provide an effective and well-balanced system for the protection of new varieties of plants. All references to the UPOV Convention in this document refer to the 1991 Act of the UPOV Convention.

2. The development of improved varieties demands a considerable investment in terms of human and financial resources. Sustainable breeding programs require a return of the investment through the commercialization of the resulting varieties. Protection of intellectual property rights on new plant varieties according to the UPOV Convention facilitates such a return by providing a legal basis to prevent, under well-defined conditions, unauthorized exploitation of plant varieties by others.

3. The UPOV Convention provides a legal basis for the protection of new plant varieties. The UPOV Convention is a *sui generis* system for plant variety protection tailored for this purpose, reflecting the specific features of the subject of protection, which is a new plant variety, and the circumstances under which this plant variety is used. The scope of protection under the UPOV Convention has been carefully defined to provide an incentive for breeders to develop new varieties of plants beneficial for both farmers and consumers. A key feature of the UPOV system is that protected varieties, as a most important plant genetic resource, may be freely used by the worldwide community of breeders for further breeding. The UPOV Convention, furthermore, provides for an option for saving of seed by farmers in some situations. The protection given under the UPOV Convention can be analyzed under the following parameters:

- subject of the protection/extension of the protection,
- acts covered by the protection (1991 Act),
- materials covered by the protection,
- duration of the protection,
- exceptions,
- restriction to protection/compulsory licensing.

Subject of the Protection/Extension of the Protection

4. Under the UPOV Convention, a protection title can only be granted to a plant variety, which is defined by the expression of the characteristics resulting from a given genotype or combination of genotypes, distinguished from any other plant grouping by the expression of at least one of the said characteristics and considered as a unit with regard to its suitability for being propagated unchanged and which satisfies the criteria established in the UPOV Convention. The protection granted to a variety does not extend to other varieties, except in the case of:

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

- (ii) varieties which are not clearly distinguished from the protected variety; and
- (iii) varieties whose production requires the repeated use of the protected variety.

Acts Covered by the Protection (1991 Act)

5. The nature of the right granted by the UPOV Convention is that the following acts with respect to the propagating material of the protected variety require the authorization of the breeder:

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

6. Furthermore, subject to the exception to, and exhaustion of, the breeder's right, the acts referred to in respect of harvested material, including entire plants and parts of plants, obtained through the unauthorized use of propagating material of the protected variety shall require the authorization of the breeder, unless the breeder has had reasonable opportunity to exercise his right in relation to the said propagating material.

7. In addition, each Contracting Party may provide that, subject to the acts referred to in respect of products made directly from harvested material of the protected variety falling within the provisions for harvested material mentioned above through the unauthorized use of the said harvested material shall require the authorization of the breeder, unless the breeder has had reasonable opportunity to exercise his right in relation to the said harvested material.

Materials Covered by the Protection

8. As stated in paragraph 5 above, plant variety protection according to the UPOV Convention covers the propagating material of the protected varieties, such as seeds, bulbs, tubers, seedlings, etc.

Duration of the Protection

9. Under the UPOV Convention (1991 Act), the breeder's right is granted for a fixed period, which shall not be shorter than 20 years from the date of the grant of the breeder's right. For trees and vines, the said period shall not be shorter than 25 years from the said date.

Exceptions

10. Under the UPOV Convention, the breeder's right shall not extend to:

- (i) acts done privately and for non-commercial purposes,
- (ii) acts done for experimental purposes, and
- (iii) acts done for the purpose of breeding other varieties.

The exclusion of acts done privately and for non-commercial purposes is of particular relevance for subsistence farmers who use plant varieties for their own food production. The research exemption and the breeders' exemption, as mentioned in (ii) and (iii) above, are important features of the UPOV Convention, which provide for the established practice amongst breeders whereby varieties produced by other breeders may be used for breeding new varieties.

11. Under the UPOV Convention, each member may, within reasonable limits and subject to the safeguarding of the legitimate interests of the breeder, restrict the breeder's right in relation to any protected variety in order to permit farmers to use, for propagating purposes, on their own holdings, the product of the harvest, which they have obtained by planting on their own holdings. This provision enables each member of UPOV to decide, according to its own national circumstances, on whether or not, and to what extent, to recognize the practice of farmers to use a part of the harvest derived from the protected variety for the next year's planting, known as "farmers' privilege."

Restriction to Protection/Compulsory Licensing

12. The UPOV Convention provides that a member may restrict the free exercise of a breeder's right for public interest. This provision allows a Government, for example in the case of an unforeseeable disaster in a country, to take measures to provide farmers with such planting material, as is necessary to reestablish the agricultural production, by limiting the exercise of the breeder's right.

[Annex III follows]

THE NOTION OF “ESSENTIALLY DERIVED VARIETY”
IN THE CERTAIN BREEDING OF ORNAMENTAL VARIETIES ACTIVITIES

Document prepared by the Office of the Union Document approved by the CAJ at its forty-seventh session on April 10, 2003

1. The purpose of this document is, in response to a request from the Technical Committee (hereinafter referred to as “the TC”), to consider the possibility that a breeder who develops ~~an~~ a “improved-changed form” of his own protected variety would, under the terms of the 1991 Act of the UPOV Convention, have protection for his “improved-changed form,” if it was considered to be an essentially derived variety.

“Improved-Changed forms” of varieties

2. It is first necessary to seek to clarify what is understood by the term “improved-changed form.” However, it must be emphasized that this is not a recognized term. It is only used in this document as a convenient generic term, because it is a term already used in the industry as a starting point to explore the situation for protection of varieties which arise out of a breeding activity of particular interest for the ornamental sector.

3. For the purpose of this document, ~~an-a~~ “improved-changed form” of a variety is understood to be one arising-developed from ~~selection within~~ an existing variety, which has resulted in ~~some~~ slightly improved-different performance, e.g. slightly better-different flower color or slightly improved-different growth rate, but in all other respects is unchanged from the existing variety. Immediately, it becomes apparent that some of these changes (e.g. flower color) might be changes in the expression of characteristics used for the examination of distinctness, uniformity and stability (“DUS”), whereas others (e.g. slightly improved growth rate) may not be directly examined for DUS. Therefore, it is probably more useful to consider different possible situations which can arise from the breeding activity of selection from within existing varieties.

Selection from within existing varieties

4. The process of selecting varieties from within existing variation, including the variation which exists in the form of protected varieties, is recognized and accepted within UPOV. This issue is considered in depth in document C(Extr.)/19/2 Rev. “Notion of Breeder and Common Knowledge,” which was adopted as a position paper by the Council of UPOV in April 2002.

5. This document ~~will concentrate on~~ considers the situation where a breeder selects ~~an-a~~ “improved-changed form” from within *his own protected variety*, ~~which~~ where the protected variety is not itself an essentially derived variety from the viewpoint of the breeder concerned. In addition, it is assumed that the “improved-changed form” is *uniform and stable*. Furthermore, it will only address the situation in terms of the *1991 Act of the UPOV Convention*.

6. The cases below are intended to identify the situations which can occur and the consequences for the breeder. In particular, it considers whether the breeder's authorization will be required for exploitation of the "~~improved-changed~~ form." However, it also considers the possibility of a breeder, other than the breeder of the original variety and its "~~improved-changed~~ form," being able to obtain protection on the "~~improved-changed~~ form." Although it is unlikely to occur often, this latter situation might occur, for example, if the "~~improved-changed~~ form" is the result of a simple mutation which occurs from time to time in the population of the variety. In this circumstance, the same type of mutant plant might be found by both the original breeder and independently by another breeder with plants of the variety.

7. On the basis of the assumptions in paragraph 5, the situations which can arise from selection of ~~an a~~ "~~improved-changed~~ form" of an existing protected variety "X" are the following:

Case 1: The "~~improved-changed~~ form" is distinct and is not an essentially derived variety

8. The "~~improved-changed~~ form" will be distinct, but in accordance with Article 14(5) of the 1991 Act of the Convention, will not be an essentially derived variety and, therefore, will not be covered by the scope of protection of variety X if:

(a) it is clearly distinguishable from variety X *and*,

either,

(b) it is *not* predominantly derived from variety X,

or,

(c) it *does not* conform to variety X in the expression of the essential characteristics that result from the genotype or combination of genotypes of the variety X.

9. In this case, the "~~improved-changed~~ form" can be commercially exploited without the authorization of the breeder of variety X, unless protection is obtained on the "~~improved-changed~~ form" itself. If the conditions are fulfilled, the possibility of obtaining protection of the "~~improved-changed~~ form" is open to any person, and not just the breeder of variety X, who has independently bred the "~~improved-changed~~ form." In such a situation, the novelty condition would be of particular relevance.

Case 2: The "~~improved-changed~~ form" is an essentially derived variety

10. The "~~improved-changed~~ form" will, in accordance with Article 14(5) of the 1991 Act of the Convention, be a variety essentially derived from variety X and covered by the scope of protection of variety X if:

(a) it is clearly distinguishable from variety X

and

(b) it is predominantly derived from variety X, while retaining the essential characteristics that result from the genotype or combination of genotypes of the initial variety

and

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

11. In this case, commercialization of the “improved-changed form” ~~cannot be commercially exploited without requires~~ the authorization of the breeder of variety X. It would be possible for another breeder, who had obtained the “improved-changed form” independently, to obtain protection of the “improved-changed form” as a new variety, if all the conditions were fulfilled, but this other breeder would still require the authorization of the breeder of variety X to be able to commercially exploit the variety.

12. The benefit for the breeder of variety X of using the provision for essentially derived varieties is that, for as long as variety X is protected, he has control of the “improved-changed form” without the cost of seeking protection for the new variety. However, there are certain aspects which should be considered by this breeder before deciding not to protect the “improved-changed form” itself.

13. Firstly, it is important to note that the control of the “improved-changed form” only exists for as long as the protection on variety X exists. As soon as the protection on variety X expires, the control over the “improved-changed form” also expires. This is particularly relevant because the breeder may start to maintain only the “improved-changed form” and discontinue maintenance of variety X. In this situation, the authority may decide to cancel the breeder’s right for variety X, on the basis that the breeder could not “... provide the authority with the information, documents or material deemed necessary for verifying the maintenance of the variety,” (Article 22(1)(b)(i) of the 1991 Act of the Convention).

14. Secondly, the risk for the breeder of variety X is that, whilst he may consider the “improved-changed form” to be essentially derived from variety X, this may be challenged by someone wishing to exploit the “improved-changed form” without the authorization of the breeder. It may also be challenged by another breeder who, having obtained the “improved-changed form” independently, wishes to obtain protection of the “improved-changed form” subject to being able to satisfy the conditions.

15. The balance of risks and benefits in choosing whether to protect the “improved-changed form” will be a matter for the breeder to decide according to his own circumstances.

16. If the breeder decides, on the balance of benefits and risks, that it would be better to protect the “improved-changed form” as a new variety, he can do so, if the conditions for protection are fulfilled. However, it should be noted that if the “improved-changed form” of variety X is protected, say as variety Y, this variety Y will still be an essentially derived variety. Therefore, any “improved-changed form” of variety Y which is considered to be essentially derived from variety Y, will *not* be covered by the scope of protection of variety Y. This is because, according to Article 14(5)(a)(i) of the 1991 Act of the Convention, the scope of protection of varieties, which are essentially derived from a protected variety, only applies “where the protected variety is not itself an essentially derived variety”. It is possible that ~~an a~~ “improved-changed form” of variety Y might also fulfil the conditions required to be considered to be essentially derived from variety X and would then be covered by the scope of protection of variety X.

Case 3: The “improved-changed variety-form” is not distinct

17. In accordance with Article 14(5) of the 1991 Act of the Convention, the “improved changed form” will be covered by the scope of protection of variety X if it is not clearly distinguishable (Article 7 of the 1991 Act of the Convention) from variety X.

18. If the “improved-changed form” is not distinct, it is covered by the scope of protection of variety X and anyone wishing to exploit the “improved-changed form” would require the authorization of the breeder. No other breeder would be able to obtain protection of the “improved-changed form” as a new variety because it would not be distinct.

19. This situation might occur if the breeder applies for protection of the “improved-changed form,” but is refused on the basis that the variety is not distinct. In this case, the situation is clearly as explained in paragraph 18.

20. However, it may be the breeder who considers that the “improved-changed form” is very similar to variety X and does not consider it to be distinct. In this case, which may be the result of an unintended drift in the maintenance of the variety X, there is the risk that the view of the breeder that the “improved-changed form” is not distinct might be challenged. If the authority decides that the “improved-changed form” is distinct and variety X is no longer being maintained it may decide to cancel the breeder’s right for variety X on the basis that the breeder could not “... provide the authority with the information, documents or material deemed necessary for verifying the maintenance of the variety” (Article 22(1)(b)(i) of the 1991 Act of the Convention). The breeder would then have no protection for variety X and may not be able to obtain protection of the “improved-changed form” on the grounds of lack of novelty. In the absence of protection of variety X, regardless of whether the “improved-changed form” is essentially derived from variety X, the “improved-changed form” could be commercially exploited without the authorization of the breeder.

21. It will be a matter for each breeder to ensure that his “improved-changed form” does not become distinct from variety X.

Summary

22. The three cases explained above are summarized in the form of a table in the [Annex Appendix](#) to this document.

~~23. The Administrative and Legal Committee is invited to note the possible situations which can arise regarding protection of “improved forms” of existing protected varieties, on the basis of the 1991 Act of the Convention, and to advise the TC accordingly.~~

[[Annex Appendix](#) follows]

APPENDIX TO ANNEX IIISummary of Situations Which Can Arise from the Selection of a “~~Improved~~ Changed Form” of Variety X

“ Improved Changed Form” of Variety X					
	Distinct?	Essentially Derived?	Can be Protected by Another Breeder?	Can be Commercially Exploited Without the Authorization of the Breeder of Variety X?	Comment
Case 1	Yes	No	Yes [*]	Yes	
Case 2	Yes	Yes ¹	Possibly Yes [*]	No ²	¹ . No guarantee that the “ improved changed form” will be accepted as an essentially derived variety ² . Only for as long as variety X is protected
Case 3	No ³	No	No	No ²	³ . Dependent on whether the competent authority accepts the “ improved changed form” is not distinct

[End of Annex III and of document]

* Subject to satisfying all other conditions for protection.