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UPOV

INTERNATIONAL UNION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS

GENEVA

ADMINISTRATIVE AND LEGAL COMMITTEE ADVISORY GROUP

Fourth Session
Geneva, October 23, 2009

EXPLANATORY NOTES ON ESSENTIALLY DERIVED VARIETIES UNDER THE UPOV CONVENTION (REVISION)

Document prepared by the Office of the Union

1. The Administrative and Legal Committee (CAJ), at its fifty-eighth session, held in Geneva, on October 27 and 28, 2008, approved document UPOV/EXN/EDV Draft 2 "Explanatory Notes on Essentially Derived Varieties under the UPOV Convention". However, the CAJ requested the Administrative and Legal Committee Advisory Group (hereinafter referred to as the "CAJ-AG") to consider the comments received from the International Community of Breeders of Asexually Reproduced Ornamental and Fruit-Tree Varieties (CIOPORA) and the International Seed Federation (ISF) on document UPOV/EXN/EDV Draft 2, as set out in document CAJ/58/4, Annexes I and II, respectively, with a view to proposing a future revision of the explanatory notes on essentially derived varieties, as considered appropriate. The CAJ agreed that CIOPORA and ISF should be invited to participate at the third session of the CAJ-AG, in order to discuss how to proceed with that process in a timely and effective way (see paragraphs 24 and 25 of document CAJ/58/6 "Report on the Conclusions").

2. The CAJ-AG, at its third session, held in Geneva, on October 28, 2008, concluded that it would be useful, as a first step, to gather information on the preparatory work concerning the provisions in Article 14(5)*(b)* of the Diplomatic Conference for the Revision of the International Convention for the Protection of New Varieties of Plants of 1991 (Diplomatic Conference of 1991). Particular reference was made to the explanatory note 6(ii) of document IOM/IV/2 (the relevant extract of document IOM/IV/2 had been posted in the CAJ-AG/08/3 and CAJ/59 sections of the UPOV website). It further requested the Office of

the Union to prepare, for its fourth session, a document containing available information that might help to explain, as requested by CIOPORA, the relationship between Article 14(5)(b)(i) and (iii) of the 1991 Act.

3. In relation to the request of ISF to amend paragraph 11 (third sentence) of document UPOV/EXN/EDV Draft 2 and to include a variety "D" in figures 3 and 4 of document UPOV/EXN/EDV Draft 2, the CAJ-AG agreed that the Office of the Union should prepare a draft guidance document on the situation with regard to variety "D", for consideration by the CAJ-AG at its fourth session.

4. At its fifty-ninth session, held in Geneva on April 2, 2009, the CAJ noted the work of the CAJ-AG at its third session and considered the conclusions of the CAJ-AG in relation to the work program for the fourth session of the CAJ-AG. The CAJ agreed that CIOPORA and ISF should be invited to participate at part of the fourth session of the CAJ-AG, on October 23, 2009, in order to present their comments and views on relevant matters.

5. Part I of the Annex to this document contains a compilation of the discussions on essentially derived varieties from documents and reports of relevant bodies during the preparatory work for the Diplomatic Conference of 1991, and the discussions from the Records of the Diplomatic Conference for the Revision of the International Convention for the Protection of New Varieties of Plants (Publication N° 346 (E)). Part II of the Annex to this document presents selected extracts, from the meetings after the Diplomatic Conference of 1991 for the development of draft standard guidelines on essentially derived varieties, which are considered to be particularly relevant to the comments made by CIOPORA and ISF.

(a) Request of CIOPORA to clarify the relationship between Article 14(5)(b)(i) and (iii) of the 1991 Act

6. The Records of the Diplomatic Conference for the Revision of the International Convention for the Protection of New Varieties of Plants (Publication N° 346 (E)) on page 30, provides the following (see also Annex pages 67, 68):

Basic Proposal for Article 14(2)(b)

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

(ii) [Same as in the adopted text]

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

7. The discussions on essentially derived varieties contained in the "Summary Minutes of the Plenary of the Diplomatic Conference" (Publication 346 (E), pages 161 to 478) are contained in the Annex to this document, from pages 73 to 84. In relation to Article 14, the

report of the Drafting Committee of the Diplomatic Conference of 1991 (recorded on paragraph 1852.4 (iii) (see page 84 of the Annex to this document)) provides as follows:

> 1852.4 (Continued from 1549, 1615 and 1636) In Article 14, the Committee had made the following amendments:
>
> [.....]
>
> (iii) The former Article 14(2) relating to essentially derived and certain other varieties thus became Article 14(5). The Committee had also been asked to consider its structure. The main problem involved the need to express the meaning of "essentially derived variety" in such a way that it was the expression of the essential characteristics of the initial variety and the retention of that expression that was important. It had also been felt important to ensure that the examples, such as the selection of a natural or induced mutant, were not definitive but were just examples. In view of the need for technical precision and internal consistency in this paragraph, the Committee had asked three of its members, Mr. Bould (United Kingdom), Mr. Guiard (France) and Mr. Roth (United States of America) to form a subcommittee to produce a revised wording together with the Secretary of the Committee. The text of paragraph (5)(b) was based largely upon their work.
>
> [...]

8. The Diplomatic Conference of 1991 adopted the following Resolution with regard to essentially derived varieties:

> **Resolution on Article 14(5)***
>
> The Diplomatic Conference for the Revision of the International Convention for the Protection of New Varieties of Plants held from March 4 to 19, 1991, requests the Secretary-General of UPOV to start work immediately after the Conference on the establishment of draft standard guidelines, for adoption by the Council of UPOV, on essentially derived varieties.

9. As part of the work on the development of draft standard guidelines on essentially derived varieties, the relationship between Article 14(5)*(b)*(i) and (iii) was discussed at the twenty-ninth session of the CAJ, held in Geneva on October 21 and 22, 1991, and at the sixth Meeting with International Organizations (IOM/6), held in Geneva on October 30, 1991. Document CAJ/29/2 “Guidelines to essentially derived varieties” and document IOM/6/2 “Essentially derived varieties” proposed the following:

> 9. "while retaining the expression of the essential characteristics": The essential characteristics are those which are indispensable or fundamental to the variety. "Characteristics" would seem to embrace all features of a variety including, for example, morphological, physiological, agronomic, industrial and biochemical characteristics. It is suggested that the result of a biochemical test conducted on a variety, for instance, a screening test using a genetic probe, is a characteristic of the variety. "while retaining" requires that the expression of the essential characteristics be derived from the initial variety.
>
> [.....]

12. "(iii) except for the differences which result from the act of derivation it conforms to the initial variety in the expression of the essential characteristics that result from the genotype or combination of genotypes of the original variety": The words "except for the differences which result from the act of derivation" do not set a limit to the amount of difference which may exist where a variety is considered to be essentially derived. A limit is, however, set by the words of paragraph (i). The differences must not be such that the variety fails "to retain the expression of the essential characteristics that result from the genotype or combination of genotypes of the initial variety." There is some inconsistency between subparagraphs (i) and (iii) of Article 14(5)(b) in that (i) would seem to require the whole of the expression of the essential characteristics that result from the genotype of the initial variety while (iii) requires only that the derived variety conforms to the initial variety except for differences resulting from the act of derivation (however, see the discussions in paragraph 13 below). The examples of essential derivation given in Article 14(5)(c) make clear that the differences which result from the act of derivation should be one or very few.

[.....]

21. To fulfill the conditions imposed by Article 14(5)(b)(iii) a later variety must conform to the initial variety in the expression of the essential heritable characteristics of the initial variety "except for the diffferences which result from the act of derivation". Theoretically, if variety A is crossed with variety B and variety X is selected from the resulting progeny, if variety X derives 45% of its essential characteristics from A and 55% from B, it will be essentially derived from B since apart from the 45% derived from A, it conforms to the expression of the essential characteristics of B. This is clearly not the intended interpretation. A later variety cannot fulfill the conditions of Article 14(5)(b)(i) unless it is predominantly derived from the initial variety while retaining, without qualification in Article 14(5)(b)(i), the expression of the essential heritable characteristics of the initial variety.

10. The records of the discussions at the IOM/6 on the above paragraphs of the draft standard guidelines on essentially derived varieties are contained in document IOM/6/5 “Report” (see pages 94 to 97 of the Annex to this document).

11. The CAJ, at its thirty-second session and the TC, at its twenty-ninth session, on April 21 and 22, 1993, decided as follows: (document CAJ/32/10-TC/29/9 “Report”, see Annex to this document, page 100):

Guidelines Relating to Essentially Derived Varieties

28. The Chairman asked whether a list of sample cases in which a variety would be essentially derived should be drawn up at the present stage, or whether one should rather await the entry into force of the provisions concerned and the accumulation of some initial practical experience. In the first hypothesis the question that arose was how to incorporate the advice of breeders in the Guidelines, as the Guidelines were addressed to them; in that case the form of the document would also have to be specified.

29. The Delegations of Germany, France and the Netherlands were of the opinion that one could not draw up a list in the abstract, which moreover would be liable to be taken as an exhaustive list, and that one should wait. It was also mentioned that the work of the Working Group on Biochemical and Molecular Techniques would greatly contribute to the definition of the essentially derived variety concept in practical cases.

30. The Chairman concluded that this agenda item could be adjourned sine die.

(b) Request of ISF to amend paragraph 11 (third sentence) of document UPOV/EXN/EDV Draft 2 and to include a variety "D" in figures 3 and 4 of document UPOV/EXN/EDV Draft 2.

12. The following example is reproduced in the annexes to documents CAJ/29/2 "Guidelines to essentially derived varieties", and IOM/6/2 "Essentially derived varieties" (see pages 88, 89, 92 and 93 of the Annex to this document):

Example 1: A pyramid

[Each $^+$ is a characteristic added by genetic engineering or complete backcrossing and controlled by a single gene or by a few closely linked genes]

Variety A – the initial protected variety

Variety A^+ – is distinct from and predominantly derived from A

Variety A^{++} – is distinct from A^+ and is predominantly derived from A^+

Variety A^{+++} – is distinct from A^{++} and is predominantly derived from A^{++}.

1.1 Question: Is variety A^+ essentially derived from A?

1.1 Answer:

Yes, if it is predominantly derived in such a way that it retains the expression of the essential inherited characteristics (that is the characteristics that "result from the genotype") of the initial variety AND if in the final result, except for the differences which result from the act of derivation (added characteristic$^+$ in this case) it conforms as required by Article 14(5)(b)(iii).

1.2 Question: Is variety A^{++} essentially derived from A^+?

1.2 Answer:

(i) Same answer as for 1.1. but with different consequences. Since variety A^+ is itself essentially derived from A, it fails to satisfy the requirement of Article 14(5)(a)(i). Accordingly the scope of protection of variety A^+ does not cover variety A^{++}.

(ii) Variety A^{++} may, however, be essentially derived from variety A if it retains the expression of the essential inherited characteristics of variety A and if it conforms as required by Article 14(5)(b)(iii).

1.3 Question: Is variety A^{+++} essentially derived from variety A and if so how many further characteristics can be added to it before it ceases to be essentially derived from A?

1.3 Answer:

Variety A^{+++} will be essentially derived from A if it satisfies the provision of Article 14(5)(b)(i) and (iii). Varieties with further added characteristics similarly derived would continue to be essentially derived until such time as a variety is developed which ceases to conform to the initial variety in the expressions of its essential characteristics inherited from A. A decision on this question in an infringement suit would be a value judgement based upon the available evidence.

13. The records of the discussions at the IOM/6 on the above Example 1 of the draft standard guidelines on essentially derived varieties are contained in document IOM/6/5 “Report” (see pages 97 to 99 of the Annex to this document).

[Annex follows]

ANNEX

INDEX

ADMINISTRATIVE AND LEGAL COMMITTEE

Eighteenth Session
Geneva, November 18 and 19, 1986

Document CAJ/XVIII/3

REPORT

Relevant paragraphs:

INTRODUCTION

1. At the sixteenth session of the Administrative and Legal Committee, the Office of the Union reported on discussions which had taken place at the Second Meeting with International Organizations, held on October 15 and 16, 1985. On the question of minimum distances between varieties, restricting itself to the administrative and legal points of view, it noted the following:

(i) One participant (from the ASSINSEL delegation) had pleaded in favor of having decisions on whether to grant protection based on a weighing of similarities and differences. The main argument was that the present system, in which protection was granted as soon as a clear difference for at least one important characteristic could be observed, facilitated the activities of both infringers and plagiarists. (Paragraph 14 of document IOM/II/8, reproduced herein at Annex I).

(ii) The Secretary General of CIOPORA said that courts had little experience in regard to plant variety protection and that it would be useful if UPOV would define a "perimeter of protection" (paragraph 21 of document IOM/II/8).

12. In that respect the Administrative and Legal Committee concluded, in the course of the work referred to in paragraph 10 above, that the expression "reproductive or vegetative propagating material of the variety" mentioned in Article 5(1) of the Convention covers:

[…]

(iii) Material which is not sufficiently distinguishable from the breeder's material to make it a distinct variety [which, typically, shows a clear difference in a non-important characteristic, an unclear difference in an important characteristic or an unclear difference in a non-important characteristic].

However, according to the Committee, this expression does not cover material which is clearly distinct in one or several important characteristics from the material of the breeder but which has been developed in all evidence in order to by-pass a breeder's right and constitutes a slavish imitation of the protected variety.

PLAGIARISM OF A PROTECTED VARIETY

The Situation Today

14. The problem mentioned in paragraph 1(i) above is in fact that of minimum distances between varieties but presented from an angle different to the one from which UPOV usually approaches it. In fact, the speaker has presented the point of view of a firm having achieved a technical breakthrough with one variety (a non-protected variety in the case in point!) which, according to that firm, is being slavishly imitated by competitors. UPOV, for its part, is interested in the matter mainly from the scientific and technical point of view.

15. Paragraph 12, and in particular its last sentence, shows that part of the criticism is appropriate. In the present situation, UPOV accepts that the plant variety protection system permits slavish imitation of a protected variety to the extent that there is at least one clear difference in one important characteristic. This point of view is in no way reprehensible: the "ground rules" for plant variety protection are in perfect harmony with scientific and technical ground rules, which are precisely that a clear difference in an important characteristic gives rise to a distinct variety. Moreover, these are also ground rules in other areas of intellectual property.

16. As the scientific and technical ground rules are invariable, the question arises, in the final analysis, of whether those elements of the rules liable to interpretation are correctly interpreted--bearing in mind the circumstances. This question in turn requires details of the circumstances. We will restrict ourselves here to pointing out that the situation varies from one species to another in function of scientific, technical, economic, legal, etc. data. For example, deliberate plagiarism is unlikely, almost impossible, for vegetatively propagated plants, at least in a general fashion, because the biology of the species concerned prevents it. It can occur however by exploitation of an accidental mutation which is slightly distinct from the parent variety (a problem which has already been extensively discussed). In the case of certain species, particularly forage plants, use has to be made of a very limited number of characteristics, which means that the concept of plagiarism has little meaning. However, this concept seems to be very important in the case of maize, which there can be little doubt is a very competitive sector where any innovation gives rise to imitation by other breeding firms as a means of survival (at least momentarily until they themselves achieve some innovation).

17. In such a situation, the innovating firm complains about plagiarism--and advocates larger distances--while the others concerned claim, on the contrary, that their work is creative (it is not in any case always unnecessary from the point of view of genetic diversity) and advocate smaller distances. Under these conditions it is inevitable that the plant variety protection system, like other legal systems relating to varieties, is at the same time criticized and drawn in one direction or another according to the respective weight of the economic forces concerned.

18. One of these forces having called upon UPOV, it is appropriate to reconsider the situation, i.e. the options taken under any form whatsoever (for example, by a positive decision or by the weight of use, on a scientific or empirical basis) in the interpretation of the concepts of clear distinctness or important characteristic.

23. It is obvious that to this end unimportant characteristics can prove to be extremely useful, even indispensable. It would therefore be wrong not to use them. However, it is precisely at this stage that the problem of minimum distances between varieties, or plagiarism, arises in the following form: should a characteristic of this type serve as a basis on which to grant protection? In other words, should the principles underlying the Test Guidelines, particularly those mentioned in paragraph 9 above, be revised?

(ii) Outline for a New Philosophy

24. Logic provides a negative reply to the first of the above questions. Such a characteristic should not serve as a basis on which to grant protection. In such a case, the purpose of each characteristic must be stated in the Test Guidelines.

CAJ/XVIII/3
Annex II, page 4

III. SCOPE OF PROTECTION

Article 5(1) of the UPOV Convention:

"The effect of the right granted to the breeder is that his prior authorisation shall be required for
- the production for purposes of commercial marketing
- the offering for sale
- the marketing
of the reproductive or vegetative propagating material, as such, of the variety.

Vegetative propagating material shall be deemed to include whole plants. The right of the breeder shall extend to ornamental plants or parts thereof normally marketed for purposes other than propagation when they are used commercially as propagating material in the production of ornamental plants or cut flowers."

1. What is meant by "propagating material of the variety" in this context?

(a) Only material corresponding to the variety description and deriving from material of the breeder (the owner of the plant breeder's right)?

(b) Also material which cannot be distinguished from that referred to in (a) above, and which originates from a "parallel breeder"?

(c) Also material that may only be distinguished from material of the breeder to such a small extent that it cannot constitute another, distinct, variety?

(d) Also material that is clearly distinguishable by one or more important characteristics from material of the breeder, but that has been developed manifestly to by-pass a breeders' right and that constitutes a slavish imitation of the protected variety?

The term "propagating material of the variety" covers the material referred to in items (a), (b) and (c) above. It does not cover the material referred to in item (d).

[End of Annex and of document]

ADMINISTRATIVE AND LEGAL COMMITTEE

Eighteenth Session
Geneva, November 18 and 19, 1986

Document CAJ/XVIII/7

MINIMUM DISTANCES BETWEEN VARIETIES

Relevant paragraphs:

Minimum Distances Between Varieties

29. Discussions were based on document CAJ/XVIII/3.

30. The representatives of the United States of America and the Federal Republic of Germany having stated that the proposals submitted by the Office of the Union as a basis for discussion raised more problems than they solved, the Committee agreed not to deal with the subject and only to take up the question again if the discussions in the Technical Committee so justified. It also reaffirmed its previous decisions contained in the first part of document CAJ/XVIII/3. Outside the meeting, the Chairmen of the two Committees in question agreed that document CAJ/XVIII/3 should be submitted to the Technical Committee.

31. The representative of France noted, however, that users were facing problems. He considered that, if the competent authorities were aware of the existence and the scope of those problems, they should pursue their reflection.

ADMINISTRATIVE AND LEGAL COMMITTEE

Nineteenth Session
Geneva, March 31 and April 1, 1987

Document CAJ/XIX/4

REVISION OF THE CONVENTION

Relevant paragraphs:

Annex II

Article 5, paragraph (3)

(3) Authorisation by the breeder shall not be required either for the utilisation of the variety as an initial source of variation for the purpose of creating other varieties or for the marketing of such varieties. Such authorisation shall be required, however, when the repeated use of the variety is necessary for the commercial production of another variety.	It would be desirable to explore the means of introducing dependence on the holder of rights in a variety which is used as the basis for a slavish modification. By "slavish" the Committee means both: - resulting from mere observation in favorable circumstances; - easily repeated in a routine fashion on varieties of one or more species, even where the process underlying the modification is undeniably original.

CAJ/XIX/4

ANNEX III

MINISTERIE VAN LANDBOUW EN VISSERIJ

DIRECTIE JURIDISCHE EN
BEDRIJFSORGANISATORISCHE ZAKEN

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TO:
UPOV
Dr. W. Gfeller
34, Chemin Des Colombettes
1211 Geneve 20
Switzerland

Our ref.
J. 1798

Datum
February 23, 1987

Subject:
Proposals for possible amendments
to the UPOV Convention

Dear Dr. Gfeller,

Herewith I send you some first items which might be discused in the frame word of possible amendments to the UPOV Convention.

They concers the content and the consequences of the article 5.1., 5.1. jo. 5.4. and article 5.3. and could be subject of the study by the Administrative and Legal Committee.

[...]

C. The relation between the protected variety and the new variety wich is developed from this variety, either by conventional breeding terhmiques or by bioterhmological techniques.

Yours sincerely,

miss Y.E.T.M. Gefner

Annex IV

ARTICLE 5

- Paragraph (3)

The phrase "for the marketing of such varieties" could usefully be deleted. It adds nothing to the lawmaker's initial intention to allow full scope for research. Moreover its deletion would enable the notions of "minimum distances" and infringement to be strengthened. The right conferred on the breeder must enable him to prevent any marketing of infringing varieties, in particular varieties which, even if they are not slavish imitations of his variety, cannot be sufficiently distinguished from it and still remain within the bounds of protection defined by the "minimum distances."

Annex V

The principle of the freedom of plant breeding, as such, laid down in Article 5(3) of the UPOV Convention is considered inviolable. On the other hand, our internal discussions have related to the possible deletion of the phrase "or for the marketing of such varieties" in the first sentence of the Article. The purpose of the deletion would not be to introduce a dependency principle, but this undoubtedly requires a new definition of the distinctness criteria.

Annex VI

[...]

With regard to further plant breeding work, the principle of free access to varieties (even those containing patented genes) seems to be generally recognized.

However, access to varieties at commercial utilization level is still a debated point, reflecting the positions taken regarding the type of protection to be granted, notably to varieties developed by biotechnological means.

[...]

ADMINISTRATIVE AND LEGAL COMMITTEE

Nineteenth Session
Geneva, March 31 and April 1, 1987

Document CAJ/XIX/6

REVISION OF THE CONVENTION

Relevant paragraph:

CAJ/XIX/6
Annex I, page 4

Article 5

[…]

It is seen as important to retain Article 5.3. The public interest in the creation of new varieties absolutely requires that research with protected varieties is not inhibited. However, the rights of the owner of the variety should be strengthened by deleting the words " or for the commercialisation of such varieties" at the end of the first sentence. Sometimes (perhaps through error) a second variety receives a grant of rights when it differs only insignificantly from the variety from which it is derived. This amendment could enable the breeder of the earlier variety to assert his rights in such circumstances.

ADMINISTRATIVE AND LEGAL COMMITTEE

Nineteenth Session
Geneva, March 31 and April 1, 1987

Document CAJ/XIX/11

REPORT

Relevant paragraphs:

40. In view of the short time allowed for studying the proposals and comments, the Committee held a general exchange of views in order to identify those points for which a possible revision of the Convention should be studied. Those points--which in general corresponded to the points raised by the organizations--were the following, in the order of the corresponding Articles of the Convention:

[...]

(iii) Article 5: in general, an increase in the level of protection granted, in particular, along the lines of the protection afforded by a patent for an invention. More specifically:

[...]

(b) wider definition of the activities covered by protection (production and marketing, including importation, of agricultural produce, as well as medicines, flavorings, etc.; production of seeds or seedlings for the producer's own requirements ("farmer's privilege")) and restriction of the principle of freedom of use of a protected variety for the purposes of plant breeding; consequently, maintenance or deletion, as superfluous, of Article 5(4);

43. Future work.- The Committee agreed that the question of the Convention's revision should be included in the agenda for the third (next) meeting with international organizations. It proposed holding its next meeting on June 17 and 18 so as to prepare the third meeting. [At its thirty-fifth session held on April 2, 1987, the Consultative Committee approved that proposal.]

44. With regard to revision of the Convention, the documentation to be submitted to the above-mentioned meeting would include a synopsis of the proposals and comments submitted by organizations. [Regarding the provisional views of delegations of member States and the report of the Biotechnology Subgroup, the Consultative Committee, at its thirty-fifth session, decided that the Administrative and Legal Committee should decide at its next session whether one or two documents should be drawn up for the meeting with international organizations.]

ADMINISTRATIVE AND LEGAL COMMITTEE

Twentieth Session
Geneva, June 17 and 18, 1987

Document CAJ/XX/4

PROPOSALS OF MEMBER STATES FOR REVISION OF THE CONVENTION

Paragraph (3)

It would be desirable to explore the means of introducing dependence on the holder of rights in a variety which is used as the basis for a slavish modification. By "slavish" the Committee means both:

- resulting from mere observation in favorable circumstances;

- easily repeated in a routine fashion on varieties of one or more species, even where the process underlying the modification is undeniably original.

NETHERLANDS[2]

Paragraph (1)

The protection given by Article 5(1) should be enlarged so as to also cover multiplication on one's own premises.

[2] The proposals from the Netherlands were received from the Ministry of Agriculture and Fisheries.

ADMINISTRATIVE AND LEGAL COMMITTEE

Twentieth Session
Geneva, June 17 and 18, 1987

Document CAJ/XX/5

PROPOSALS OF NON-GOVERNMENTAL ORGANIZATIONS FOR REVISION OF THE CONVENTION

Relevant paragraphs:

CIOPORA

- Paragraph (3)

The phrase "for the marketing of such varieties" could usefully be deleted. It adds nothing to the lawmaker's initial intention to allow full scope for research. Moreover its deletion would enable the notions of "minimum distances" and infringement to be strengthened. The right conferred on the breeder must enable him to prevent any marketing of infringing varieties, in particular varieties which, even if they are not slavish imitations of his variety, cannot be sufficiently distinguished from it and still remain within the bounds of protection defined by the "minimum distances."

ADMINISTRATIVE AND LEGAL COMMITTEE

Twentieth Session
Geneva, June 17 and 18, 1987

Document CAJ/XX/9

REPORT

Relevant paragraphs:

Proposals of Member States for Revision of the Convention

33. Discussions concerned document CAJ/XX/4. The Committee decided that the proposals made by France and the Netherlands contained in document CAJ/XX/4 should not be put forward to the IOM meeting. The proposals would be kept for the Committee's own purposes. The representative of the Netherlands asked that other countries would submit proposals. These could then be compiled into an updated version of document CAJ/XX/4.

Proposals of Non-governmental Organizations for Revision of the Convention

34. Discussions concerned document CAJ/XX/5. The Committee decided that this document should be presented to the IOM meeting and it asked the Office of the Union to modify the document slightly to provide a table of contents and to put the list of abbreviations immediately after the table of contents. It was decided that the proposals of national organizations should be deleted, as should those of GIFAP since that organization was not to be invited to the IOM meeting.

ADMINISTRATIVE AND LEGAL COMMITTEE

Twenty-first Session
Geneva, October 8 and 9, 1987

Document CAJ/XXI/4

REPORT

Relevant paragraphs:

43. Mr. M. Heuver (Netherlands) proposed that the professional organizations should be given the possibility of discussing the question of minimum distances in a practical context with experts from the testing authorities. In that connection, he proposed that workshops relating to four or five species be organized on the premises of the testing authorities.

44. The Committee agreed to the proposal.

45. Mr. H. Kunhardt (Federal Republic of Germany) said that the meeting should attempt to clarify the areas of emphasis for the work of the Technical Working Parties and the discussions with professional organizations. In his view, those areas of emphasis should be the following:

(i) It should be made clear that the idea of distinguishing characteristics used for distinctness purposes and characteristics used for identification purposes should not be pursued: the statutory decision that was called for under the Convention was whether the variety was distinct on the basis of the relevant characteristics;

(ii) Where distances between varieties were too small, an examination should be made of the possibilities for enlarging the distances and of the consequences that this would have;

(iii) More generally, a study should be made of the system used for defining the minimum distances; the question was whether the present system, based on statistical significance, should be retained, whether there should be a lower limit for difference, whether that limit should be fixed individually for each characteristic and how it should be set;

(iv) More generally also, a study should be made to ascertain whether there was a system capable of securing the rights of the breeders by means of appropriate minimum distances and at the same time ensuring that breeding progress was not hampered.

ADMINISTRATIVE AND LEGAL COMMITTEE

Twenty-second Session
Geneva, April 18 to 21, 1988

Document CAJ/XXII/6

REVISION OF THE CONVENTION
PROPOSALS BY THE DELEGATION OF THE FEDERAL REPUBLIC OF GERMANY

Relevant paragraph follows:

CAJ/XXII/6

ANNEX

PROPOSALS FOR NEW TEXTS OR DRAFTING AMENDMENTS
FROM MR. H. KUNHARDT
(FEDERAL REPUBLIC OF GERMANY)

Proposal relating to Article 5

(1) The breeder of a variety protected in accordance with the provisions of this Convention shall enjoy the exclusive right of reproducing the variety.

(2)(a) The breeder shall also enjoy the exclusive right of offering for sale, disposing of or using material of the variety, or importing it for any one of the aforementioned purposes.

(b) Such right shall not extend, however, to acts concerning the material put on the market by the breeder or with his express consent or material derived from that material in accordance with its intended destination.

(3) The right granted in accordance with the provisions of this Convention shall not extend to:

(a) acts done privately for non-commercial purposes;

(b) acts done for experimental purposes;

(c) acts done for the purpose of creating new varieties and exploiting them, except where material of the protected variety must be used repeatedly for the production of material of the new variety.

(4) Any member State may:

(a) exclude further acts from the effects of the right granted pursuant to the provisions of this Convention, if this is necessary in the public interest and provided that the substance of the right is not unreasonably restricted;

(b) provide that the exploitation of a variety which is essentially based on material of a protected variety shall give rise to payment of equitable compensation to the holder of the rights in the protected variety.

(5) The acts concerning a variety for which a right has been granted pursuant to the provisions of this Convention and

(a) to which the right relates pursuant to paragraphs (1) and (2)(a);

(b) which are excluded from the effects of the right pursuant to paragraph (2)(b), (3) or (4)(a)

may not be prohibited on the basis of another industrial property right.

ADMINISTRATIVE AND LEGAL COMMITTEE

Twenty-second Session
Geneva, April 18 to 21, 1988

Document CAJ/XXII/2

REVISION OF THE CONVENTION

9. Exploitation of derived varieties (paragraph (4)).- The present text of the Convention sets out the principle that the exploitation of a variety bred from a protected variety is free. This principle has been criticized for years because it applies indiscriminately to the case where the daughter variety is very different from the mother variety and to the case where the difference is minimal, though pertaining to an "important characteristic" and being "clear" in the meaning of Article 6(1)(a). One case has been dealt with on several occasions under the expression "easy mutations": both varieties have the same genotype but for a mutated characteristic. Other cases could be obtained through backcrossing or through gene transfer, or again in the case of a hybrid by using a similar line or a combination of different lines producing a similar hybrid. This latter example shows that there would not always be a direct line--a mother-daughter relationship--between the varieties concerned.

10. On the other hand, the genetic engineers are concerned that an innovative gene or characteristic which they have introduced into a variety of a given species can be transferred freely, under the present text of the Convention, into other varieties.

11. These are the reasons for which it has become necessary to reconsider the principle of free exploitation laid down in Article 5(3) of the Convention (on the understanding that the free use of a variety for breeding purposes, which may be assimilated to the research exemption of the patent law, would not be questioned). The aim would be to introduce a kind of dependency. Two main questions arise in this respect:

(i) What would be the form of the dependency? The draft provision in paragraph (4) proposes that it should involve the payment of equitable compensation. It is to be expected that, at least once the system is well-established, the compensation would be determined in the vast majority of cases by an agreement between the parties concerned.

(ii) In which cases would there be dependency? Paragraphs 10 and 11 give examples of cases where a strong case is made in favor of dependency. They show that a precise definition of the cases would be arduous. In addition, a precise definition would unavoidably raise the question of the borderline cases and may be superseded by new developments. The draft provision in paragraph (4) therefore contains a general phrase, leaving it to private negotiations, arbitration by breeders' organizations and court decisions to define the cases and, for each case, the amount of the compensation.

ADMINISTRATIVE AND LEGAL COMMITTEE

Twenty-second Session
Geneva, April 18 to 21, 1988

Document CAJ/XXII/8

REPORT

Relevant paragraphs:

65. "Breeder's exemption" and dependency (paragraphs (3)(b) and (4) in the Office draft and paragraphs (3)(c) and (4)(b) in the German draft).- The Delegation of the Federal Republic of Germany explained that the proposed dependency system was to cover cases of small-scale changes in a variety, e.g. through gene transfer, discovery of a mutation, selection within a variety or backcrossing. The matter had been discussed at national level with breeders in an attempt to define the conditions that would produce dependency. The solution found so far was to limit dependency to cases where only one variety was used as the basis for the creation of the new, dependent one. The provision in question would therefore not apply where two varieties were crossed in the initial phase of a breeding process. The problems of drafting were serious, however, and not all implications had been considered so far. In particular, the legal consequences of the small-scale changes deserved further consideration, with a view to defining whether they should be restricted to an obligation to pay compensation or whether the breeder of the original variety should have a right in the derived variety, e.g. a right to be a joint breeder or a right to claim the transfer to him of the derived variety against compensation. In view of those outstanding issues, the Delegation had included a provision in the form of an option in its proposal.

66. One delegation stated that the same kind of discussion as reported by the Delegation of the Federal Republic of Germany had taken place in its country. Others indicated that no firm view could be given for the time being, although the principle involved was generally welcomed. In particular, reference was made to the fact that the provision concerned would raise problems of implementation because the cases in which there would be dependency were not clearly defined.

67. One delegation said that the cases to be covered by the dependency system could arguably be dealt with under Article 6(1)(a) of the Convention (requirement of distinctness) and that a case could be made for the payment of compensation in conventional breeding programs using two varieties as parents. It declared that it was prepared to accept such an extended dependency system.

68. The Delegation of the Federal Republic of Germany explained that the principle of dependency contemplated for the UPOV Convention was different from that applying in patent law. In particular, the working of a dependent invention was an intrusion into the scope of protection of the basic patented invention; in other words, dependency was inherent in the particular circumstances of the case. In the case of plant varieties, new varieties could be exploited without interfering with the protection afforded to their parents; in other words, the proposed dependency would arise from a legal provision to that effect. The proposal mentioned in the previous paragraph would mean that almost all varieties would be dependent on others as a result of the nature of breeding programs. Dependency would then become the rule, whereas it was the exception in the patent system, and a rule that could hardly be escaped, which was not desirable. The provisional conclusion from the discussions with interested circles in the Federal Republic of Germany was that a suitable basis for a restricted dependency system could be the case of derivation from a single variety. Conversely, it was felt that a crossing program lasting for several years and requiring much effort deserved full recognition in the form of an independent right, even if it did result in a variety that was close to another.

70. Concerning the proposed effects of the dependency system, it was mentioned that the system of compensation amounted to a kind of compulsory license and that some States might find it difficult to introduce it into their national law in view of their general attitude to compulsory licensing. It was also mentioned that the word "equitable" might cause problems and that words such as "reasonable," "appropriate" or "full" might be considered.

ADMINISTRATIVE AND LEGAL COMMITTEE

Twenty-third Session
Geneva, October 11 to 14, 1988

Document CAJ/XXIII/2

REVISION OF THE CONVENTION

Relevant paragraphs:

Article 5
Effects of the Rights Granted to the Breeder

(5) The exploitation of a variety which is essentially [Alternative 1: derived from a protected variety] [Alternative 2: based upon the material of a protected variety] shall give rise to the payment of equitable remuneration to the holder of the right in the protected variety.

20. Exploitation of derived varieties (paragraph (5)).- The present text of the Convention sets out the principle that the exploitation of a variety bred from a protected variety is not subject to the breeder's right in the protected variety. This principle has been criticized for many years since it applies equally to the case where the daughter variety is very different from the mother variety and to the case where the difference between them is minimal, although it lies in an "important characteristic" and is "clear" within the meaning of Article 6(1)(a). One case which has been examined on several occasions is that covered by the expression "easy mutations": the two varieties have the same genotype except for the mutant characteristic. Other cases can arise by backcrossing, by gene transfer, or again, in the case of a hybrid, by the use of a similar line or a combination of different lines which produces a similar hybrid. This last example shows that there is not necessarily a family connection between the varieties concerned.

21. On the other hand, the genetic engineers are preoccupied by the fact that a gene or a character which represents an innovation that they have introduced into a variety of a given species can be freely transferred by virtue of the present text of the Convention into other varieties.

22. These are the reasons why it has become necessary to reconsider the principle of free exploitation set out in Article 5(3) of the Convention (it being understood that one is not bringing into question the principle of the free utilization of varieties for breeding purposes, which can be likened to the exemption in favor of research in patent law). The objective will be to introduce a form of dependence. Two principle questions arise in this connection:

(i) What form should the dependence take? The draft provision in paragraph (5) proposes that this be the payment of equitable remuneration. One may expect that, at least once the system has been established, the remuneration will be established in the great majority of cases by agreements between the parties.

(ii) In what circumstances will dependence exist? Paragraphs 20 and 21 above give examples of cases in which the arguments for dependence are clearly set out. They show that a precise definition of all circumstances is difficult. Conversely, such a definition will not fail to raise the problem of borderline cases and would perhaps not facilitate a response to the future evolution of events. The provision proposed in paragraph (5) is for this reason of a general nature, the circumstances of individual cases and, for each of them, the amount of the remuneration being left to the judgment of the parties, to the arbitration of professional organizations and to the decision of judges.

23. In this respect, the "travaux préparatoires" for the revision of the Convention will play an extremely important role if the authors of the revision are to make clear their intentions. The proposed paragraph (5) includes two alternatives which were submitted to the twenty-second session of the Committee, in order to open a discussion on the subject. The major options sketched out by the twenty-second session of the Committee are as follows:

(i) The dependence should only arise in the case where the second variety is derived from a single mother variety as in the case of a mutation or the transfer of a gene by genetic engineering. In this option, the transfer of a gene arising from a work of backcrossing should be recognized and rewarded by an independent right.

(ii) This option would cause fundamentally identical situations to be treated differently on the basis of the differing routes used to arrive at the end-product. It should be noted in this respect that the work of transferring a gene by genetic engineering could turn out to be as difficult as the work of backcrossing and thus merit the same reward. It would thus seem more appropriate to pay more attention to the definition of the level of differences or of resemblance between the varieties concerned that is required in order that dependence should exist. Two cases seem to justify dependence:

(a) the case where the derived variety contains essentially the same genotype as the mother variety (or the variety taken as a model);

(b) the case where the derived variety has a different genotype but acquires from the mother variety a gene or a character which constitutes a real innovation (irrespective of the procedure, "classical breeding" or genetic engineering, by which this gene or this character has been introduced into the mother variety and irrespective of whether the gene or the character or yet again the procedure itself is patentable or not). An example of this case could be the transfer of male sterility from the first male sterile variety into a line.

Whatever solution is retained, no varieties bred according to a classical scheme of crossing followed by selection within the progeny would become the subject of dependence.

24. It must be recognized, however, that many arrangements are possible. Substantial bodies of opinion in breeding circles, whilst welcoming the concept of dependence, do not agree that the breeder of the dependent variety should invariably be entitled to commercialize the dependent variety. It might be inappropriate and unfair for a trivial change in a variety to entitle a party to compete with the first breeder; equitable remuneration may not always be an adequate recompense. It has been proposed for example that dependence in the case mentioned in paragraph 23(i) should take the form of a right, in favor of the breeder of the initial variety, to participate in the commercial exploitation of the derived variety (whilst in the case mentioned in paragraph 23(ii) there would only be a right to remuneration). The argument invoked is that the breeder of the initial variety has taken steps with a view to the exploitation of his variety from which the breeder of the derived variety profits largely (while in the case of genes and characters it is imperative not to stop genetic progress).

25. The decision of the Commission of the European Communities of December 13, 1985, relating to a Proceeding under Article 85 of the EEC Treaty (IV/30.017--Breeders' Rights--Roses) could be interpreted as an invitation addressed to breeders and their licensees who have bred a variety derived by mutation to explore co-breeding as a solution, that is, the division of the commercial exploitation of the derived variety. Reference is made in this respect to documents CAJ/XVII/6 and CAJ/XVII/10, paragraphs 57 to 60.

26. The proposed paragraph (5) would make a system of dependence obligatory in all the member States.

ADMINISTRATIVE AND LEGAL COMMITTEE

Twenty-third Session
Geneva, October 11 to 14, 1988

Document CAJ/XXIII/4

REVISION OF THE CONVENTION

Relevant paragraphs:

ANNEX

OBSERVATIONS AND PROPOSALS
FROM THE DELEGATION OF THE FEDERAL REPUBLIC OF GERMANY

Paragraph (3)(iii).- The exclusive right does not extend to the use of the protected variety for "breeding" new varieties. It may be concluded therefrom, without there being an express statement to that effect, that the right does not extend either to the commercialization of the newly created variety. Paragraph (5) provides, however, in form of an exception applying to the case mentioned therein, a duty to pay remuneration; in this respect it is not clear of which main provision (i.e. the free exploitation of the newly created variety) this provision is the exception.

Taking into account the above viewpoints, Article 5 could be drafted as follows:

Alternative I: Delete item (ii) in paragraph (2)(a), add the following sentence to the end of paragraph (3) and delete paragraph (5):

> "The owner of the right cannot prohibit the commercial exploitation of a variety created pursuant to subparagraph (iii) above, except where material of his variety must be used repeatedly for such exploitation. If a variety newly created pursuant to subparagraph (iii) above is essentially based upon the material of a single protected variety [alternatively: if a variety newly created pursuant to subparagraph (iii) above is essentially derived from a single protected variety], the owner of the right in the protected variety may demand equitable remuneration to be paid in respect of the commercial exploitation of the newly created variety."

Alternative II: On the basis of the principles of patent law (Article 29 of the Community Patent Convention), the breeder's right would be conceived altogether as a right of prohibition:

"(1) A right granted in accordance with the provisions of this Convention shall confer on its owner the right to prevent all third parties not having his consent:

(i) from reproducing the variety;

(ii) from offering for sale, putting on the market or using, or importing or stocking for any of the aforementioned purposes, material of the variety.

"(2) The right shall not extend to:

(i) acts described in paragraph (1)(ii) above concerning any material which has been put on the market in the member State of the Union concerned by the breeder or with his express consent, or material derived from the said material in accordance with the purpose intended when it was put on the market;

(ii) acts done privately and for non-commercial purposes;

(iii) acts done for experimental purposes;

(iv) acts done for the purpose of breeding new varieties, and acts done for the commercial exploitation of such varieties, unless the material of the protected variety must be used repeatedly for such exploitation.

"(3) If a variety is essentially based upon the material of a single protected variety [alternatively: if a variety is essentially derived from a single protected variety], the owner of the right in the protected variety may demand equitable remuneration to be paid in respect of the commercial exploitation of the new variety.

"(4) [Further national limitations].

"(5) [Collision norm]"

If, in the course of further work, the layout of the Convention were to be examined, it would be appropriate to consider dividing Article 5 in three main provisions relating to:

- the right;
- the limitations on the effect of the right;
- the exhaustion of the right.

ADMINISTRATIVE AND LEGAL COMMITTEE

Twenty-third Session
Geneva, October 11 to 14, 1988

Document CAJ/XXIII/3

REVISION OF THE CONVENTION

Relevant paragraphs:

8. That it is desirable to provide within the legislative framework the means through which the development of a distinct variety which is proven to be essentially derived from another variety or which makes use of a patented genetic component gives rise to the payment of a proper remuneration to the holder of the respective rights. In this context "essentially derived" will have to be defined on a crop by crop basis.

ADMINISTRATIVE AND LEGAL COMMITTEE

Twenty-third Session
Geneva, October 11 to 14, 1988

Document CAJ/XXIII/7

REPORT

Relevant paragraphs:

65. Dependency (paragraph (3) in the German draft).- The principle of dependency was generally welcomed by the Committee. It was stated that it would be a very important addition to the Convention and it was generally supported by plant breeders. The introduction of a dependency system would mean that the breeding history of a variety would become relevant and important but this history could now be checked by the use of new technologies. Several delegations said that they were not clear how a dependency system would work in practice and it was therefore suggested to discuss the principle and the effects of dependency with breeders and non-governmental organizations and that later on the Technical Committee should consider the technical aspects of dependency.

66. The question was raised as to why the proposed provision was limited to cases where only a single protected variety had been used. It was stated that this was in order to cover such situations as selection within a variety, discovery of a mutation or biotechnological transfer of a single gene to create a new variety.

67. One delegation said that it had reservations as to the limitation of the dependency provision to cases involving a single protected variety. The delegation said that it seemed that under this provision "stealing" from two varieties would not be covered. However, it was explained that the crossing of two protected varieties was the classic case of when the breeder's exemption should apply. Several delegations said that they agreed to the use of the word "single" in the proposed provision.

68. The question was raised as to whether the proposed provision would apply to new varieties created by backcrossing. Since two varieties were used in backcrossing, it could not be said that the resulting variety was essentially based upon or essentially derived from a single protected variety. Nevertheless, the practical effect of a backcrossing program might be to transfer one gene into an existing protected variety. Several delegations were of the view that dependency should also apply to varieties created by backcrossing. It was stated that the process for creating the variety should not make a difference as to whether dependency should apply. Furthermore, it was stated that since the next revised text of the Convention was intended to protect innovation, it would not be right to impose a restriction (under the dependency concept) on new technologies, such as gene transfer, which was greater than a restriction imposed on old technologies, such as backcrossing. Therefore, backcrossing should also be covered by dependency.

69. The Committee discussed the question of the so-called "pyramid of dependencies" which was first discussed at the UPOV Third Meeting with International Organizations in October 1987. One delegation stated that this whole question should be discussed in the Technical Committee since it involved technical aspects. An example given of when this question arose was where there was a protected variety A into which a gene was inserted to create variety B, and another gene was then inserted into variety B to create variety C.

It was suggested that there should only be dependency between two varieties, so that variety C would depend on variety B and variety B would depend on variety A. One delegation said that it would be difficult to get approval in its country for a system which involved "double dependency," i.e. where both varieties B and C depended on variety A.

70. One delegation stated that it would be unfair to the breeder of variety A if the breeder of variety C was only obliged to pay a royalty to the breeder of variety B, since the breeder of variety A might have done 15 years crossing work in order to create his variety whereas the breeder of variety B may have done very little work. Against this view it was stated that this situation would not create a problem because of the requirement of a payment of "equitable remuneration." This requirement would mean that the breeder of variety A would receive a substantial payment from the breeder of variety B which would compensate for the fact that variety B had been used to create another variety, variety C. Since a smaller amount of work had gone into the creation of variety B than into the creation of variety A, a smaller payment would be made to the breeder of variety B.

71. However, the view was expressed that the amount of remuneration to be paid should not depend upon the amount of work that went into the creation of the original variety, but rather upon the original variety's potential industrial value. It was also stated that the amount of remuneration should also depend on how much the new variety differed from the original one.

72. It was stated that the present proposal for a dependency system would create de facto compulsory licensing since the breeder of the original variety would receive equitable remuneration but would not be able to prevent the commercial exploitation of the dependent variety. It was stated that such a dependency system would not necessarily prevent plagiaristic breeding since a plagiaristic breeder would always, in effect, be able to obtain a licence. It was therefore suggested that the breeder of the original variety should be able to prevent the marketing of the dependent variety in cases where there had been real piracy and plagiarism of the original variety.

73. As to the specific wording of the proposed provision, one delegation said that it did not make clear enough that dependency, which was a limitation on the breeder's exemption, was necessary to deal with piracy and plagiaristic breeding. Several delegations stated that the wording which provided that the owner of the right in the protected variety "may demand" equitable remuneration was not strict enough, and that the words "may demand" should be replaced by the words "shall be entitled to."

74. Several delegations said that it was not clear what was meant by the words "essentially derived," and it was suggested that it should be for the Technical Committee to discuss how to determine in practice whether one variety was "essentially derived" from another.

75. In order to take into account the discussion which the Committee had had on dependency, a drafting group was formed which produced the following new proposed dependency provision:

> "If a variety is essentially derived from a [single] protected variety, the owner of the right in the protected variety
>
> Alternative 1: may prevent all third parties not having his consent from performing the acts described in paragraph (1) above in relation to the new variety.
>
> Alternative 2: shall be entitled to equitable remuneration in respect of the commercial exploitation of the new variety."

76. After examining this proposal, the Committee discussed the possibility of having a third alternative in the proposal which could be a combination of alternatives 1 and 2, whereby, under normal circumstances, the breeder of the original variety could prevent the use of the derived variety, but, under certain circumstances, he could only obtain equitable remuneration in respect of its commercial exploitation. For the purposes of this third alternative, the Committee discussed when there should be a right only to equitable remuneration. It was suggested that this should be when the derived variety was an improvement on the original variety, although this would then raise the question of what was an "improvement." In answer to this question, it was suggested that a derived variety would be an improvement if it was important from an economic or agricultural point of view. It was stated that a determination of economic or agricultural importance could be made, and it was made for the purposes of national listing systems. However, it would be easier to make this determination for agricultural and vegetable crops than for other crops.

77. In conclusion, it was agreed that a third alternative, reflecting the Committee's discussions, would be produced in the next draft.

ADMINISTRATIVE AND LEGAL COMMITTEE

Twenty-fourth Session
Geneva, April 10 to 13, 1989

Document CAJ/XXIV/2

REVISION OF THE CONVENTION

Relevant paragraphs:

ARTICLE 5

Effects of the Right Granted to the Breeder

(3) If a variety is essentially derived from a [single] protected variety, the owner of the right in the protected variety

[Alternative 1] may prevent all persons not having his consent from performing the acts described in paragraph (1) above in relation to the new variety.

[Alternative 2] shall be entitled to equitable remuneration in respect of the commercial exploitation of the new variety.

[Alternative 3] may prevent all persons not having his consent from performing the acts described in paragraph (1) above in relation to the new variety. However, where the new variety shows a substantial improvement over the protected variety, the owner of the right shall only be entitled to equitable remuneration in respect of the commercial exploitation of the new variety.

(3) If a variety is essentially derived from a [single] protected variety, the owner of the right in the protected variety

[Alternative 1] may prevent all persons not having his consent from performing the acts described in paragraph (1) above in relation to the new variety.

[Alternative 2] shall be entitled to equitable remuneration in respect of the commercial exploitation of the new variety.

[Alternative 3] may prevent all persons not having his consent from performing the acts described in paragraph (1) above in relation to the new variety. However, where the new variety shows a substantial improvement over the protected variety, the owner of the right shall only be entitled to equitable remuneration in respect of the commercial exploitation of the new variety.

18. Exploitation of derived varieties (paragraph (3)).- The present text of the Convention sets out the principle that the exploitation of a variety bred from a protected variety is not subject to the breeder's right in the protected variety. This principle has been criticized for many years since it applies equally to the case where the daughter variety is very different from the mother variety and to the case where the difference between them is minimal, although it lies in an "important characteristic" and is "clear" within the meaning of Article 6(1)(a) (if the difference does not meet those requirements, the plant material concerned would be within the perimeter of protection of the mother variety). One case which has been examined on several occasions is that covered by the expression "easy mutations": the two varieties have the same genotype except for the mutant characteristic. Other cases can arise by reselection, by backcrossing, by gene transfer, or again, in the case of a hybrid, by the use of a similar line or a combination of different lines which produces a similar hybrid. This last example shows that there is not necessarily a family connection between the varieties concerned.

19. On the other hand, the genetic engineers are preoccupied by the fact that a gene or a character which represents an innovation that they have introduced into a variety of a given species can be freely transferred by virtue of the present text of the Convention into other varieties. They wish that their rights in the gene or character--which they seek under the patent system--also extend to the transfer and to the material into which the gene or character has been transferred. It is therefore desirable to strike a balance between the rights in genes and characters and the rights deriving from the UPOV Convention in genotypes (varieties) serving as hosts for such genes and characters.

20. These are the reasons why it has become necessary to reconsider the principle of free exploitation set out in Article 5(3) of the Convention (it being understood that one is not bringing into question the principle of the free utilization of varieties for breeding purposes). The objective will be to introduce a form of dependence. Two principle questions arise in this connection:

(i) What form should the dependence take? The draft provision in paragraph (3) proposes three alternatives:

(a) Under alternative 1, the owner of the right in the mother variety would be granted a true right of prohibition relating to dependent derived varieties, whether protected or not. If a derived variety is protected and the right vested in another person, there will be two competing rights. Their owners will then have to seek agreement or arbitration on the conditions for exploitation of the derived variety. An unprotected derived variety could not be exploited without the consent of the owner of the right in the mother variety; should it be worth such exploitation, then its breeder would have to obtain protection or seek an agreement with the owner of the right in the mother variety. The latter, however, would enjoy automatically--without having to undergo a granting procedure--a full right in all derived varieties of his own. The Office of the Union considers that he should be obliged to file applications for protection.

(b) Under alternative 2, the owner of the right in the mother variety would only be entitled to equitable remuneration. This alternative has the drawback that it allows somebody who has introduced an irrelevant difference (albeit "clear" and relating to an "important" characteristic) into a variety, to obtain a relatively cheap share in the market of that variety.

(c) Alternative 3 is a combination of the preceding alternatives.

(ii) In what circumstances will dependence exist? Paragraphs 18 and 19 above give examples of cases in which the arguments for dependence are clearly set out. They show that a precise definition of all circumstances is difficult. Conversely, such a definition will not fail to raise the problem of borderline cases and would perhaps not facilitate a response to the future evolution of events. The provision proposed in paragraph (3) is for this reason of a general nature, the circumstances of individual cases and, for each of them, the conditions of the consent or the amount of the remuneration being left to the judgment of the parties, to the arbitration of professional organizations and to the decision of judges. One may expect that, at least once the system has been established, it will operate in the great majority of cases by agreement between the parties.

21. In this respect, the "travaux préparatoires" for the revision of the Convention will play an extremely important role if the authors of the revision are to make clear their intentions. At the present stage of the discussions, there seems to be general agreement on the following conditions:

(i) The difference between the two varieties involved must meet the requirement set out in Article 6(1)(a), that is, under the present text, be clear and relate to one or more important characteristics.

(ii) The derived variety must retain almost the totality of the genotype of the mother variety and be distinguishable from that variety by a very limited number of characteristics (typically by one). This results from the proposed text whether or not it contains the word "single".

(iii) The derived variety must have been obtained using a plant improvement method whose objective is the achievement of requirement (ii) above (mutation, gene transfer, full backcrossing scheme, selection of a variant within a variety, etc.); in other words, no varieties bred according to a classical or other scheme of crossing in which selection within the progeny is a major element would become the subject of dependence.

(iv) The mother variety must originate from true breeding work, that is, it must not itself be dependent; there should not be a "dependence pyramid". If variety C derives from variety B which derives from variety A, C would be dependent from A rather than B, since the very objective of dependence is to give to the breeder of an original genotype an additional source of remuneration; the collecting of that remuneration through a third party, in the example the breeder of variety B, does not seem very practicable.

22. Alternative 3 requires a judgment of the value of the derived variety in relation to the mother variety, or of the value of the added characteristic. The judgment should not cause insurmountable problems since it is very similar to the ones made in the operation of the systems of national lists of varieties admitted to trade. Moreover, alternatives 1 and 2 also require such a judgment for the definition of the conditions for exploitation or of the compensation payable.

23. The decision of the Commission of the European Communities of December 13, 1985, relating to a Proceeding under Article 85 of the EEC Treaty (IV/30.017--Breeders' Rights--Roses) could be interpreted as an invitation addressed to breeders and their licensees who have bred a variety derived by mutation to explore co-breeding as a solution, that is, the division of the commercial exploitation of the derived variety. Reference is made in this respect to documents CAJ/XVII/6 and CAJ/XVII/10, paragraphs 57 to 60.

24. The proposed paragraph (3) would make a system of dependence obligatory in all the member States.

ADMINISTRATIVE AND LEGAL COMMITTEE

Twenty-fourth Session
Geneva, April 10 to 13, 1989

Document CAJ/XXIV/4

THE INTERFACE BETWEEN PATENT PROTECTION AND PLANT BREEDERS' RIGHTS

Relevant paragraphs:

Particular Features of the Availability of Protection for Inventions Concerning Plants which have Attracted Criticism

71. The limitation of protection to the variety in its entirety and the non-availability of protection for an isolated characteristic of the variety is claimed by some (but disputed by others) to discourage breeding designed to introduce totally new features into plant varieties.

95. An important development is proposed in paragraph (3) of Article 5. It provides that where a variety is essentially derived from a protected variety, the owner of the protected variety may prevent all third parties not having his consent from exploiting the derived variety. In a possible proposed alternative, he would be entitled to equitable remuneration in respect of the commercial exploitation of the derived variety. This provision addresses the problem whereby, under the existing UPOV Convention, simple reselection or other manipulation, e.g. transformation by genetic engineering of individual characteristics, which enables a new variety to be clearly distinguished from the variety from which it is derived, forms the basis for an independent grant of protection. The objective of the provision is to reduce the attractions of breeding approaches totally based upon the "structure" of an existing variety and so to remove the most criticized aspect of the present breeder's exemption. The breeder's exemption remains in effect in all other respects so that varieties remain available as an initial source of variation in the breeding of other varieties but since the breeding of varieties by methods not involving "essential derivation" from another variety is time-consuming and expensive and since any resulting variety will not be reliant for its characteristics on any one parent variety, a period of de facto protection will exist before a breeder can experience competition based upon any element of his protected variety.

ADMINISTRATIVE AND LEGAL COMMITTEE

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Document CAJ/XXIV/5

REVISION OF THE CONVENTION

Relevant paragraphs:

Article 5 (5) (new)[6]

For breeders it is essential that their varieties be protected against "would-be" new varieties which can be distinguished only by minor, trivial characteristics, with no other economic purpose than that of living as parasites on well-known, already protected varieties.

The text proposed by 5 (5) of Document CAJ XXIII/2 does not address the case where dependence may exist even where a variety is not "derived" from a protected variety.

Also in many cases the point at issue for the breeder is not whether he may be entitled to a remuneration but rather whether he can oppose the sale of a variety which, because it is too close to his already protected variey, constitutes an infringement.

Consequently CIOPORA considers that dependency should be organized within the framework of a system of "minimum distances" (the equivalent of nonobviousness in patent laws). In patent language, dependence is determined on the basis of the interpretation of the claims. In order to build up a consistent dependency principle for plant varieties it is necessary that protection under the UPOV Convention should extend to a certain *"perimeter"* "around" the variety and not only to the variety as strictly defined by its description.

This should enable breeders to take legal action not only against slavish reproductions ("contrefaçon à l'identique") of their varieties but also against varieties (whether mutations or not) which, although representing a minor variation from a protected variety, have the same function and are within the said perimeter of protection.

[6] Paragraph (3), alternative 2, in document CAJ/XXIV/2.

ADMINISTRATIVE AND LEGAL COMMITTEE

Twenty-fourth Session
Geneva, April 10 to 13, 1989

Document CAJ/XXIV/6

REPORT

Relevant paragraphs:

77. Paragraph (3) [dependency].- No delegation spoke against the inclusion of a principle of dependency in the Convention. However, a number of delegations wished for a clear statement in the commentary on the draft revised text that it constituted a de jure and de facto exception, and reference was made to paragraph 95 of document CAJ/XXIV/4 in that context. One delegation held that the proposed text of paragraph (3) was sufficiently clear; a further delegation emphasized that, for one or other species, the principle could become of frequent application if the most regularly used plant breeding methods were those that led to dependency.

78. A large majority spoke in favor of maintaining the word "single" in the phrase "if a variety is essentially derived from a [single] protected variety." It was nevertheless decided to maintain the square brackets in the next document. One delegation stated that the professional circles in its country favored a system of dependency that was restricted to those cases where the relationship of the two varieties concerned was obvious.

79. Each of the three alternatives proposed as regards the effects that dependency would have was supported by at least one delegation. It was therefore decided to maintain them in the next document. Two additional alternatives were also proposed, but were not included as yet:

(i) add to alternative 1 the following phrase: "unless equitable remuneration has been offered";

(ii) invert the order, in alternative 3, of the rights listed there in order to emphasize that payment of equitable remuneration would constitute the usual situation and that the right of prohibition would be the exception.

FOURTH MEETING WITH INTERNATIONAL ORGANIZATIONS

Geneva, October 9 and 10, 1989

Document IOM/IV/10

RECORD OF THE MEETING

Relevant paragraphs:

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 to be 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. Dr. von Pechmann (AIPPI) stated that AIPPI welcomed the inclusion of a provision to regulate dependency. As regards the limitation of the provision to derivation from a single protected variety, AIPPI considered that derivation from two varieties was indeed conceivable and that there was no reason why that fact should not be taken into account in the proposed provision. If a variety was created from the crossing of two protected varieties and if it possessed the properties of both varieties, Dr. von Pechmann saw no reason to treat that variety differently from a variety that had been derived from a single protected variety.

134. As regards the proposed alternatives, AIPPI was in favor of Alternative 1 as already stated in document IOM/IV/5. If that alternative were not to be accepted, AIPPI would then support Alternative 3.

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 the 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 to 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 basis 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 that 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 quoted 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, the rights of "traditional" breeders to 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 equal rights to be granted on both sides and the same rules for dependence to be 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 sole, 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 in 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. That 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. That 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 or, 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 should be barred from protection.

144. Mr. Winter (COMASSO) likewise welcomed, on behalf of COMASSO, the proposed inclusion of the dependency principle in the UPOV Convention. As to the explanations given by the Office of the Union to the proposed wording, COMASSO was also of the opinion that the dependent variety would have to satisfy the distinctness requirement. It further agreed with the statement that the dependent variety would have to essentially demonstrate the genotype of the mother variety and that the distinctness must result from a limited number of characteristics. That, however, did not have to be the result of typically one characteristic. Additionally, the breeding method used to create the dependent variety had to aim at retaining the essential characteristics of the mother variety irrespective of the details of the process used. Dependency should exist in at least those cases listed as examples in the explanatory notes to Article 5 in document IOM/IV/2, paragraph 6(iii).

145. COMASSO was altogether aware of the problem of a dependency pyramid. The proposed solution did not however seem practicable. [This statement was subsequently amended.] As an approach to a solution, COMASSO could well imagine that dependency would not depend on an administrative decision, but that it would be claimed or asserted by the breeder of the mother variety.

146. As to the detail of the proposed wording, COMASSO felt that the word "single" should be deleted since cases were also conceivable in which the use of more then one mother variety could also lead to dependency. In any event, that was not to be excluded. [This statement was subsequently amended.] As to the effects of the proposed dependency, COMASSO was almost obliged, as a breeders' organization, to choose Alternative 1.

147. Mr. Hofkens (COPA/COGECA) referred to his opening statement and stressed the fact that it had to be ensured that a plagiary could not be protected by an independent right or by a right subject to the proposed Article 5(3); that was why COPA and COGECA had opted for Alternative 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 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. Mr. Besson (FIS) stated that FIS went along with the position adopted by ASSINSEL and, as far as the general principle of dependency was concerned, with the statement made by the IFAP representative.

150. Dr. von Pechmann (AIPPI) wished to return to the phrase "essentially derived from a protected variety." It seemed to him that the question should be put in a somewhat simpler manner: a variety was either derived from a protected variety or it was not. Mr. Winter (COMASSO) had pointed out that the subsequent variety concerned had to contain all the essential characteristics of the protected mother variety. That again raised the question of what was meant by "essential characteristics." It had already been suggested at the last meeting to establish a clearer definition, for instance, that the derived variety should possess all those characteristics of the mother variety that had been found relevant for granting protection or for distinguishing the protected variety from the existing state of the art. It was possible for essential characteristics to have been derived from varieties at a different level in the genealogy and those should not give the owner of the protected mother variety the right to charge fees for use or royalties for the subsequent variety. Dr. von Pechmann wished to raise that matter for discussion since it would prove highly problematic to take stock in infringement proceedings without a clear formulation. The question thus arose whether the legal situation should not be more clearly defined or whether the word "essential" should not be deleted.

151. Dr. Gunary (ASSINSEL) wished to reply to the statement made by Dr. 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, that 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. Mr. Winter (COMASSO) wished, in view of the discussions, to return to his comments. It appeared to him, in the meantime, highly improbable that a variety could be dependent on more then one initial variety. Consequently, COMASSO's proposal to delete the word "single" was not to be taken into account. As for the "dependency pyramid" referred to in paragraph 6(iv) of the explanatory notes to Article 5 in document IOM/IV/2, the discussions had also shown that the proposed solution, contrary to his previous statement, could be altogether practicable.

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 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. Dr. Böringer (Federal Republic of Germany) wished to put a question to the representatives of the breeders' associations. Cases were also conceivable in which a new variety would come very close to an existing variety although their breeding histories were very different. Dr. Böringer wanted to know from the associations whether the possibility should be provided, in their view, for preventing exploitation of the new variety by assertion of the right in the existing variety.

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 choose 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 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 in cases 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 a variety and present a genome that was sufficiently similar to that of the other variety to lead to a case of dependence.

161. Dr. Lange (ASSINSEL) added a personal view to the statement of Dr. Gunary. He believed that the case referred to by Dr. Böringer (Federal Republic of Germany) would only arise quite seldom in practice. Should that happen, however, then an independent right should indeed be granted. Moreover, the question of proof would play a big part. Under the normal rules of onus of proof, the owner of a protected variety would have to prove that the second variety was derived from his own. Where derivation was reasonably shown, then the onus of proof would have to be reversed and the second breeder would have to prove that he had obtained his result in a different way.

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. Those 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 opinion 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 serious 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. Dr. von Pechmann (AIPPI) stated that the second variety was obviously an independent variety if it was clearly distinct. If its breeder could prove that it was not derived from the earlier protected variety, then it would not be subject to Article 5(3).

165. Mr. Royon (CIOPORA) repeated in reference to the remark by 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 put 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. Those would be examples of varieties that were independently developed, but genetically distinct; a situation that was of some relevance to the question put by 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 those 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.

FOURTH MEETING WITH INTERNATIONAL ORGANIZATIONS

Geneva, October 9 and 10, 1989

Document IOM/IV/2

REVISION OF THE CONVENTION

Relevant paragraphs:

Present [1978] Text

Article 5

Rights Protected;
Scope of Protection

(1) The effect of the right granted to the breeder is that his prior authorisation shall be required for

- the production for purposes of commercial marketing
- the offering for sale
- the marketing

of the reproductive or vegetative propagating material, as such, of the variety.

Vegetative propagating material shall be deemed to include whole plants. The right of the breeder shall extend to ornamental plants or parts thereof normally marketed for purposes other than propagation when they are used commercially as propagating material in the production of ornamental plants or cut flowers.

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

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

(4) Any member State of the Union may, either under its own law or by means of special agreements under

Proposed New Text

Article 5

Effects of the Right Granted
to the Breeder

(1) A right granted in accordance with the provisions of this Convention shall confer on its owner the right to prevent all persons not having his consent:

(i) from reproducing or propagating the variety;

(ii) from offering for sale, putting on the market, exporting or using material of the variety;

(iii) from importing or stocking material of the variety for any of the aforementioned purposes.

(2) The right shall not extend to:

(i) acts described in paragraph (1)(ii) and (iii) above concerning any material which has been put on the market in the member State of the Union concerned by the breeder or with his express consent, or material derived from the said material in accordance with the purpose intended when it was put on the market;

(ii) acts done privately and for non-commercial purposes;

(iii) acts done for experimental purposes;

(iv) acts done for the purpose of breeding new varieties, and acts done for the commercial exploitation of such varieties, unless the material of the protected variety must be used repeatedly for such exploitation.

Present [1978] Text	Proposed New Text
Article 29, grant to breeders, in respect of certain botanical genera or species, a more extensive right than that set out in paragraph (1), extending in particular to the marketed	(3) If a variety is essentially derived from a [single] protected variety, the owner of the right in the protected variety
Article 5 [Cont'd]	Article 5 [Cont'd]
product. A member State of the Union which grants such a right may limit the benefit of it to the nationals of member States of the Union which grant an identical right and to natural and legal persons resident or having their registered office in any of those States.	[Alternative 1] may prevent all persons not having his consent from performing the acts described in paragraph (1) above in relation to the new variety. [Alternative 2] shall be entitled to equitable remuneration in respect of the commercial exploitation of the new variety. [Alternative 3] may prevent all persons not having his consent from performing the acts described in paragraph (1) above in relation to the new variety. However, where the new variety shows a substantial improvement over the protected variety, the owner of the right shall only be entitled to equitable remuneration in respect of the commercial exploitation of the new variety. (4) Each member State of the Union may exempt other acts from the effects of the right granted in accordance with the provisions of this Convention, [if this is necessary in the public interest and] provided that the exemption does not cause excessive prejudice to the legitimate interests of breeders. Any member State of the Union making use of the faculty provided for in this paragraph shall notify the Secretary-General of this fact, stating the reasons therefor. The Council shall state its position thereon.

[(5) No acts concerning a variety for which a right has been granted in accordance with the provisions of this Convention shall be prohibited on the basis of some other industrial property right

(i) where the acts fall within the right in accordance with the provisions of paragraph (1), or

(ii) which are exempt from the scope of the right in accordance with the provisions of paragraph (2).]

Explanatory Notes

5. Paragraph (3).- This paragraph introduces a new concept into the law of plant variety protection: the exploitation--but not the breeding--of a variety that is essentially derived from a protected variety would be subject to the right granted to the breeder of the latter variety ("dependence").

6. The Committee has not yet taken a final position on the question whether the word "single" would be inserted or omitted; at the present stage of the discussions, there seems to be general agreement on the fact that the following conditions should be met for there to be dependence:

(i) The difference between the two varieties involved must meet the requirement set out in Article 6(1)(a), that is, under the present text, be clear and relate to one or more important characteristics.

(ii) The derived variety must retain almost the totality of the genotype of the mother variety and be distinguishable from that variety by a very limited number of characteristics (typically by one).

(iii) The derived variety must have been obtained using a plant improvement method whose objective is the achievement of requirement (ii) above (mutation, gene transfer, full backcrossing scheme, selection of a variant within a variety, etc.); in other words, no varieties bred according to a classical or other scheme of crossing in which selection within the progeny is a major element would become the subject of dependence.

(iv) The mother variety must originate from true breeding work, that is, it must not itself be dependent; there should not be a "dependence pyramid". If variety C derives from variety B which derives from variety A, C would be dependent from A rather than B, since the very objective of dependence is to give to the breeder of an original genotype an additional source of remuneration; the collecting of that remuneration through a third party, in the example the breeder of variety B, does not seem very practicable.

7. The Committee has not yet taken a final position on the question of the nature of the right that would be granted to the breeder under the principle of dependence. Three alternatives are proposed for discussion.

ADMINISTRATIVE AND LEGAL COMMITTEE

Twenty-fifth Session
Geneva, October 11 to 13, 1989

Document CAJ/XXV/2

REPORT

Relevant paragraphs:

Paragraph (3) (essentially derived varieties)

78. **Number of parent varieties**. Opinions were divided as to whether the word "single" should be retained or deleted. The Delegation of the Netherlands stated that, according to the specialists, a variety could be essentially derived from several varieties and therefore proposed that the introductory part of paragraph (3) read "if a variety is essentially derived from one or more protected varieties." The Delegation of France recalled that the expression "essentially derived" meant "genetically related," and the Vice Secretary-General that the derived variety had to retain most of the genotype of the parent variety, so that a variety could not possibly "depend" on two varieties simultaneously.

79. The Delegation of the United Kingdom recalled that the purpose of the word "single" was to provide information on the plant breeding methods capable of producing essentially derived varieties; in its opinion, the deletion of that word would create uncertainty. The Delegation of the Federal Republic of Germany asked whether it might not be preferable to spell out those methods in the provision itself. Its point of view was supported by the Delegation of the United States of America, which considered that explanations in a commentary were not sufficient.

82. **Effects of the subsidiary right in an essentially derived variety.** Alternative 1 was supported by the Delegations of the Federal Republic of Germany (provided that the plant breeding methods were enumerated), the United States of America, France (first option) and Sweden. No delegation was against it.

83. The Delegation of the Netherlands proposed that the words "unless equitable remuneration is offered" should be added to Alternative 1. Alternative 1, thus amended, was supported by the Delegations of the Federal Republic of Germany (if the plant breeding methods were not enumerated), Denmark, France (as a second option, in so far as it was a satisfactory compromise) and the United Kingdom (together with Alternative 2). The Delegation of the United States of America considered that it merely amounted to a variation of Alternative 2.

84. Alternative 2 was supported by the Delegation of the United Kingdom (together with Alternative 1 as amended), but rejected by that of France (because it was not balanced).

85. No delegation supported Alternative 3. It was rejected by the Delegations of France and the Netherlands. The former considered that its interpretation gave rise to many difficulties, the latter that the concept of "a substantial improvement" was foreign to the protection of new varieties of plants. It was further observed that that alternative was analogous to Article 14 of the proposal for an EC Council Directive on the Legal Protection of Biotechnological Inventions.

86. The Delegation of the EC indicated that the EC Commission might not be in a position to endorse the proposed effects of the subsidiary right in an essentially derived variety.

87. **Status of essentially derived varieties in terms of protection.** It was pointed out that the effects of the subsidiary right in an essentially derived variety were the same, whether it was protected or not (on the understanding that the right existed only if the variety from which it derived was protected). However, the facility of exercising that right would depend on the alternative adopted.

FIRST PREPARATORY MEETING FOR THE REVISION OF THE UPOV CONVENTION

Geneva, April 23 to 26, 1990

Document PM/1/2

DRAFT REVISED SUBSTANTIVE LAW PROVISIONS OF THE CONVENTION

Relevant paragraphs:

Present [1978] Text	**Proposed New Text**
Article 5 [Cont'd]	Article 17 [Cont'd]
(2) The authorisation given by the breeder may be made subject to such conditions as he may specify.	[The new text does not contain any corresponding provision.]
	(2) The breeder's right shall in addition confer on its owner the right to prevent all persons not having his consent from undertaking the above-mentioned acts in relation to:
	(i) varieties which are not distinguishable in accordance with Article 12(1)(b) from the protected variety;
	(ii) varieties which are essentially derived, whether directly or indirectly, from the protected variety, where the protected variety is not itself an essentially derived variety;
(3) Authorisation by the breeder shall not be required either for the utilisation of the variety as an initial source of variation for the purpose of creating other varieties or for the marketing of such varieties. Such authorisation shall be required, however, when the repeated use of the variety is necessary for the commercial production of another variety.	(iii) varieties whose production requires the repeated use of the protected variety.
[Cont'd]	[Cont'd]

Explanatory Notes

17.6. Paragraph (2).- The Office of the Union proposes a structural change which consists of regrouping into one paragraph those cases in which the effects of a breeder's right granted for one variety extend to other varieties.

17.7. There was broad agreement in the fourth Meeting with International Organizations (with the exception of agricultural users' organizations) in favor of the extension of the right of prohibition granted to a breeder to essentially derived varieties. The discussions in the twenty-fifth session of the Administrative and Legal Committee suggest that this solution was also that which was most favorably received by the delegations of member States; furthermore, no delegation was opposed to it. It is accordingly proposed to adopt this solution in the text which will be submitted to the Diplomatic Conference.

[Cont'd]

FIRST PREPARATORY MEETING FOR THE REVISION OF THE UPOV CONVENTION

Geneva, April 23 to 26, 1990

Document PM/1/4

CONFERENCE OF THE INTERNATIONAL CHAMBER OF COMMERCE (ICC)
ON THE INTERFACE BETWEEN PATENT PROTECTION
AND PLANT BREEDERS' RIGHTS

Relevant paragraphs:

Annex III

REPORT OF GROUP 2: "SCOPE OF PROTECTION"
(Rapporteur: Richard C.F. Macer)

With regard to Article 5(3), there was a unanimous feeling that the word "single" should be retained in the text in the first sentence dealing with derivation from a protected variety, because of the practical difficulty of judging dependency from more than one variety. The word "essentially" needed elaboration.

Classes of essentially derived varieties were agreed as:

1. **mutations (subject to satisfying minimal distance criteria);**
2. **insertions of biotechnologically generated material;**
3. **conventional back-crossing (repeated).**

After discussion, Alternative 1 emerged as the preferred option in the belief that it provided the basis for a better balance between protection provided by patents and by PVP. Also, it was suggested that in cases of disputes over dependency there could well be reasons to justify a "Reversal of the Burden of Proof" which would be close to the situation being developed in the Draft Regulation for the Legal Protection of Biotechnological Innovations in the EC.

Again, the realistic view of the conditions in the market place would establish a "modus vivendi." Pressure of competition would ensure commercial interaction and the timing of discussions (early) would be crucial.

ADMINISTRATIVE AND LEGAL COMMITTEE

Twenty-sixth Session
Geneva, April 23 to 26, 1990

Document CAJ/26/1

SUMMARY REPORT

Relevant paragraphs:

Revision of the Convention

General

7. Discussions were based on document PM/1/2 (Draft Revised Substantive Law Provisions) (hereinafter referred to as the "Draft"). Documents PM/1/3 (Variety Notion) and PM/1/4 (Conference of the International Chamber of Commerce (ICC) on the Interface Between Patent Protection and Plant Breeders' Rights) were also referred to in the consideration of certain Articles of the Draft.

Paragraph (2) - Extension of Right to Other Varieties

43. The discussions hinted to the desirability of adding "clearly" before "distinguishable" in subparagraph (i). The Secretary-General suggested to say "even if they are not essentially derived varieties."

44. The Representative of the EPO suggested that the case of varieties that were not sufficiently distinct from the protected variety, which should in fact be part of the latter variety for all intents and purposes, could be more appropriately dealt with in paragraph (1). There would then be no 'extension' of the breeder's right to such varieties or material.

45. In relation to subparagraph (ii), the Delegation of the Federal Republic of Germany suggested that the final part starting with "where" might be deleted. It was suggested that the matter should be considered after the document containing worked examples of essential derivation had been studied.

46. In relation to the same subparagraph, the said Delegation suggested that the term "essentially derived variety" should be defined in the paragraph under consideration.

47. Several delegations were of the opinion that subparagraph (iii) should also refer to the repeated use of varieties of the kind considered in the foregoing subparagraphs. In relation to subparagraph (ii), the Delegation of the Netherlands stated that the owner of the right should have the right to prevent all persons not having his consent from undertaking the acts mentioned in paragraph (1) in relation to varieties which were essentially derived unless equitable renumeration was paid.

ADMINISTRATIVE AND LEGAL COMMITTEE

Twenty-seventh Session
Geneva, June 25 to 29, 1990

Document CAJ/27/2

REVISION OF THE CONVENTION:

DRAFT SUBSTANTIVE LAW PROVISIONS

Relevant paragraphs:

Proposed New Text

(Article 14, continued)

(2) The breeder's right shall in addition confer on its owner the right to prevent all persons not having his consent from undertaking the acts mentioned in paragraph (1) in relation to:

(i) varieties which are not clearly distinguishable in accordance with Article 8(4) from his variety,

(ii) varieties which are essentially derived, whether directly or indirectly, from his variety, where his variety is not itself an essentially derived variety,

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

(3)(a) The breeder's right shall not extend to:

(i) acts done privately and for non-commercial purposes,

(ii) acts done for experimental purposes,

[...]

ADMINISTRATIVE AND LEGAL COMMITTEE

Twenty-seventh Session
Geneva, June 25 to 29, 1990

Document CAJ/27/8

REPORT

Relevant paragraphs:

Paragraph (2) - Extension of the Breeder's Right to Other Varieties

79. The great majority of delegations expressed satisfaction with the wording proposed in the Draft.

80. The Delegation of the Netherlands stated that it could not accept the proposed sub-paragraph (ii). It suggested that the words "unless equitable remuneration be offered" be added. In its opinion, the absolute nature of the right presently contained in the Draft ran counter to one of the aims of the system of plant variety protection, i.e. to promote plant plant breeding activities. Moreover, it was not compatible with the principle of free availability of reproductive or propagating material of protected varieties for the purposes of creating new varieties. The proposal of that Delegation would be linked to a modification of the patent system to introduce the principle of granting of a compulsory license for patented genes in order to establish a strict balance between the holders of breeders' rights and the holders of patents. The Delegation of Ireland supported the view expressed by the Delegation of the Netherlands.

81. The Delegation of Australia would have preferred the extension of the breeder's right to essentially derived varieties to have been optional and not compulsory.

82. The Delegation of the Federal Republic of Germany proposed that the words "whether directly or indirectly" be deleted in sub-paragraph (ii).

83. As regards the wording of the paragraph, the following proposals were made: replace "owner" by "breeder" in the introductory part; repeat the reference to varieties, in the German text, in each of the sub-paragraphs; specify in sub-paragraph (i) that they are new (subsequent) varieties.

FIFTH MEETING WITH INTERNATIONAL ORGANIZATIONS
Geneva, October 10 and 11, 1990

Document IOM/5/2 Rev.

REVISION OF THE CONVENTION: DRAFT SUBSTANTIVE LAW PROVISIONS

Relevant paragraphs:

Proposed New Test

[Article 12, continued]

(2) [Same, in respect of essentially derived and certain other varieties] (a) Subject to paragraphs (3) and (4), the acts mentioned in paragraph (1) shall also require the authorization of the breeder in relation to

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

(ii) varieties which are not clearly distinguishable in accordance with Article 7(3) from the protected variety and

[...]

[Article 12(2), continued]

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

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

(ii) it is clearly distinguishable from the initial variety in accordance with Article 7(3) and

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

FIFTH MEETING WITH INTERNATIONAL ORGANIZATIONS
Geneva, October 10 and 11, 1990

Document IOM/5/4

REVISION OF THE CONVENTION: COMMENTS FROM GIFAP

Relevant paragraphs:

Article 12(2)

The introduction of the provisions relating to "essentially derived" varieties will considerably improve the protection under this Convention. However, we consider the definition in Article 12(2)(b)(i) unbalanced and suggest inserting in line 5 of paragraph (i) the wording "without adding essential new characteristics".

It is possible to introduce a new gene into a plant, thereby preserving the essential characteristics of the original variety but also adding new valuable characteristics which increase the market value of the new variety considerably and it no longer can be considered as "essentially derived".

FIFTH MEETING WITH INTERNATIONAL ORGANIZATIONS
Geneva, October 10 and 11, 1990

Document IOM/5/7

FIFTH MEETING WITH INTERNATIONAL ORGANIZATIONS

REVISION OF THE CONVENTION: COMMENTS FROM COMASSO

Relevant paragraphs:

Article 12 Effects

(2) (a) (I)
COMASSO cannot accept a situation that the initial variety in the sense of the Convention can be a derived variety.

Therefore we propose to put the word "a" instead of "the protected variety" in the first line of this provision.

(2) (a) (II)
COMASSO accepts this provision as it stands. There might be an implication, however, that no genuine innovation is encouraged but plagiarism. If this interpretation is right, **we ask for deletion of Article 12(2)(a)(II).**

(2) (a) (III)
COMASSO proposes to add the following sentence:
"Using components for seed production purposes or giving them to third parties on the basis of licencing agreements does not constitute an offer for sale"
- see our comments under Article 7 (2) (i) - .

(2) (b)
We agree with the contents, but strongly recommend simplification.

(2) (b) (I)
We propose to delete contents and brackets in the 5th line.
(2) (b) I, II, III to be included as definition into Article 1 as proposed Art (1) (VII)

FIFTH MEETING WITH INTERNATIONAL ORGANIZATIONS
Geneva, October 10 and 11, 1990

Document IOM/5/8

REVISION OF THE CONVENTION: COMMENTS FROM CIOPORA

Relevant paragraphs:

Article 12 – Effects of the breeder's right

(2) [essentially derived varieties]	* CIOPORA expresses its satisfaction with the introduction of the principle of "dependency" and of the principle of infringement of closely resembling varieties.
(2) (a) (iii)	* CIOPORA notes with pleasure that the suggestion of its comments of 25/9/89 on IOM/IV/2 (page 6) concerning the incorporation of this provision into the subparagraph on dependency has been retained.
(2) (b) (iii)	* It would be advisable to clarify the exact purport of the words "it conforms to the genotype.."

FIFTH MEETING WITH INTERNATIONAL ORGANIZATIONS
Geneva, October 10 and 11, 1990

Document IOM/5/9

REVISION OF THE CONVENTION: COMMENTS FROM ICC

Relevant paragraphs:

Article 12 – Effects of the Breeder's Rights

(2)(a)(i)	We propose replacement by "varieties which are essentially derived from a protected variety", i.e. deletion of the 2nd line of this paragraph.
(2)(a)(ii)	We propose replacing the term "not clearly distinguishable" by "not distinct". It is assumed that the paragraph intends to refer to varieties which are only distinguishable from the protected variety by secondary features (i.e. features being essentially introduced to become distinct from the protected variety without however adding value to said variety) and/or to a variety not distinct from another variety but obtained from parental lines which are distinguishable from those of the other variety.
(2)(a)(iv)	We propose to add the following sentence: "Using components for seed production purposes or giving them to a third party for seed production on behalf of the variety right holder under a production licence agreement does not constitute an offer for sale".
(2)(b)	We agree with the introduction of the dependency principle at least with respect to essentially derived varieties. If at all possible, the wording should be made more clear and concise.
(2)(b)(i)	We propose to delete the square brackets and its content in line 4.
(2)(b)(iii)	Clarification of the words "it conforms" seems necessary.

FIFTH MEETING WITH INTERNATIONAL ORGANIZATIONS
Geneva, October 10 and 11, 1990

Document IOM/5/12

RECORD OF THE MEETING

Relevant paragraphs:

Article 12 – Effects of the Breeder's Rights

180. As for paragraph (2)(b), COMASSO proposed in general that the Secretariat should examine whether the definition could not be drafted in a way that was somewhat easier to understand. For item (i), it proposed that the square brackets and their contents be deleted. It further proposed that the whole provision be moved to Article 1 as a definition.

181. Mr. Ehkirch (COSEMCO) said that COSEMCO supported all of the comments and proposals made by Mr. Winter (COMASSO).

182. Mr. Bannerman (FICPI) stated that since the text of Article 12(1) and (2) greatly strengthened the rights of the breeder, it was strongly supported by FICPI.

188. Dr. Roth (GIFAP) welcomed the introduction of the notion of an "essentially derived variety," but felt that the present definition was too detailed for a Convention and suggested that the text be shortened in a revised version.

189. Dr. Gross (UNICE) said that he would like to be informed by the Secretariat as to the difference between "essentially derived" and "predominantly derived."

190. Mr. Greengrass (Vice Secretary-General) stated that the word "predominantly" was used in the definition to make it clear that in order to be essentially derived, the derived variety had to have a genetic structure that was overwhelmingly derived from the initial variety.

191. Dr. Gross (UNICE) observed that the explanation did not satisfy him, but that he had made a note of it.

196. As for paragraph (2), Dr. von Pechmann wished to raise doubts, however, with respect to the extension of protection in the case of a derived variety that was formulated in subparagraph (a)(i). That could prove a disadvantage, and he wished to give an example. Assuming that someone finally succeeded in incorporating the property of nitrogen fixation from the air, by means of rhizobia, in a specific variety of wheat, that was protected as such, belonging to a first breeder. That would be of great importance for the whole of wheat breeding and production. As a result of that new genetic engineering measure by the second breeder, the wheat variety derived from the protected variety would have become a new variety of worldwide significance. Were then a third breeder to modify that likewise protected variety in respect of a clear, albeit economically unimportant, characteristic, then he would have created a further new variety and could claim that he was thus liberated from the protected variety of the second breeder since the protection for the second breeder's variety was limited under the provision in paragraph 2(i) to the variety itself since it was a variety that had been derived from that of the first breeder. It would have to be examined in such a case whether the limitation should be agreed to or whether such a new variety should also be subject to the protection of the derived variety if it also contained that variety's special properties.

197. Patent law was familiar with multiple dependency. That had not led to any great difficulties in practice since agreement had always been reached and licenses or cross-licenses had been granted. The same should happen in the case of varieties and it should therefore be considered whether the strong limitation contained in paragraph 2(a)(i) should really be included in the Convention.

201. With regard to paragraph (2)(a)(i), ASSINSEL considered that the initial variety could not be a derived variety. It therefore proposed that the English version be drafted as follows: "... derived from a protected variety, where that variety is not itself an essentially derived variety." ASSINSEL did not altogether understand the significance of the provision in item (ii). Although it would be desirable to prevent any kind of plagiary, it had doubts whether that could be achieved by means of that provision. The case referred to in that provision was in fact a genuine infringement of a breeder's right and the ruling was therefore in fact superfluous.

202. In paragraph (2)(b), ASSINSEL would like to supplement the expression "from another variety" with the word "protected." The sequence of items (i) and (ii) should be inverted.

203. ASSINSEL had a further basic observation to make on the matter of examining the derivation of a variety. It was of the opinion that the question of whether a variety was essentially derived from another protected variety should not be examined by the authorities. Where a dispute arose and outside help was needed to answer the question, the advice of plant breeders having relevant experience should be sought. ASSINSEL therefore proposed an additional provision with more or less the following content, as paragraph 2(c): "Each Contracting Party shall provide that the burden of proof of the absence of derivation from another variety shall be borne by the breeder of a variety if the breeder of the initial variety has shown that the variety essentially corresponds to the genotype or combination of genotypes of the initial variety."

204. Finally, ASSINSEL made two proposals for amendments to paragraph (2)(b)(i). The words "elements of" in square brackets should be deleted. Furthermore, change of ploidy should be given as an additional example.

208. ICC noted that UPOV had elected in Article 12(2) for a strong form of dependence, i.e. the form which permitted the first plant variety right holder to control commercialization of the second, dependent variety. He considered that as a specific instance where it was necessary to strengthen the rights of the plant variety right holder in order that they should be in balance with those of a biotechnology patent holder.

212. In relation to Article 12(2)(i), CIOPORA had some problem with the words "where the protected variety is not itself an essentially derived variety." The definition of an essentially derived variety stated that a variety was considered to be essentially derived from another variety when it was "predominantly derived, whether directly or indirectly." CIOPORA would like to know what was meant by "whether directly or indirectly" in this context. One could have a situation where a variety produced a mutation and the mutated variety, in turn, produced another mutation. Would the mutation of the mutation be essentially derived from the first variety? If the answer to the question was "yes," CIOPORA did not have too much problem with the second part of the sentence. However, the case where the initial variety was no longer protected because it had been put out of the market by the first mutation ought to be considered carefully.

213. CIOPORA welcomed the concept of dependency which was now introduced into the Convention but regretted that the general principles of dependency under the patent laws had not been more fully incorporated into the Convention. Dependency involved not only dependency proper, whereby even a dependent product was eligible for protection, but also the question of the person entitled to apply; there seemed to be no specific provision in the proposed text on this question.

214. Mr. Royon was surprised to hear that some breeders' organizations were opposed to Article 12(2)(a)(ii), since it was the only place in the revised Convention where the concept of "minimum distances" was introduced. It gave the breeder an opportunity to sue for infringement those who propagated any variety which was a mini-variation of his variety; CIOPORA welcomed this provision and wished that it be maintained. In relation to Article 12(2)(b)(iii), CIOPORA wondered whether the word "conforms" in the expression "it conforms to the genotype or the combination of genotypes" was not too loose. CIOPORA did not understand its legal meaning.

216. Dr. M. Roth (ASSINSEL) stated that his delegation had the impression that its previous comments on the reversal of the burden of proof might have created some confusion. The basic assumption was that the breeder of an initial variety would only have access to limited evidence regarding the presence or absence of derivation. The evidence that could conclusively establish derivation from an essentially derived variety would be in the possession of the breeder of the second variety. ASSINSEL accordingly proposed to add to Article 12(2) an additional sub-paragraph (c) which stated:

> "Each Contracting Party shall provide measures for the implementation of this Article under which the burden shall fall upon the breeder of a variety to establish the absence of a relationship of dependence, once the breeder of the initial variety has established that the variety conforms to the genotype or combination of genotypes of the initial variety."

Once the breeder of the initial variety had crossed some threshold level of proof regarding the similarity of the two varieties, the burden would shift to the second breeder to establish the absence of derivation.

ADMINISTRATIVE AND LEGAL COMMITTEE

Twenty-eighth Session
Geneva, October 12 to 16, 1990

Document CAJ/28/6

REPORT

Relevant paragraphs:

Substantive Law Provisions

6. Discussions were based on document IOM/5/2 Rev. (hereinafter referred to as "the Draft").

Article 1 - Definition

Item (iv) - Definition of "Breeder"

Paragraph (2) - Acts Requiring the Breeder's Authorization in Respect of Essentially Derived and Certain Other Varieties

43. The Committee accepted the text proposed in the Draft after having deleted the words "whether directly or indirectly", replaced the words "result of [elements of]" by "expression of" in subparagraph (b)(i), and deleted the words "specific or incidental" in subparagraph (b)(iii).

44. The representative of the European Communities (EC) said that the proposed provision relating to essentially derived varieties would cause difficulties for his organization because it went too far.

RECORDS OF THE 1991 DIPLOMATIC CONFERENCE
FOR THE REVISION OF THE
INTERNATIONAL CONVENTION
FOR THE PROTECTION
OF NEW VARIETIES OF PLANTS

Geneva, 1991

Article 14

Relevant paragraphs:

BASIC PROPOSAL

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

(c)

Alternative A

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

Alternative B: no (c).

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

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

(i) [Same as in the adopted text]

(ii) [Same as in the adopted text]

(iii) [Same as in the adopted text]

(b) [Same as in the adopted text]

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

(ii) [Same as in the adopted text]

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

ADOPTED TEXT

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

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

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

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

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

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

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

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

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

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

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

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

CONFERENCE DOCUMENTS

DC/91/89 Rev. March 7, 1991 (Original: German)

Source: Delegation of Germany

PROPOSAL FOR THE AMENDMENT OF ARTICLE 14(2)

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

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

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

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

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

2. It is further proposed that subparagraph (b) be deleted (see in this respect the proposal for the amendment of Article 15(1) in document DC/91/92).

Decision in paragraph 1069

DC/91/92 March 7, 1991 (Original: German)

Source: Delegation of Germany

PROPOSAL FOR THE AMENDMENT OF ARTICLE 15(1)

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

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

(i) acts done privately and for non-commercial purposes,

(ii) acts done for experimental purposes [and],

(iii) acts done for the purpose of breeding other varieties [,] and [, except where the provisions of Article 14(2) apply,]

(iv) acts referred to in Article 14(1) in respect of [such other] varieties created pursuant to (iii), above; the breeder's right shall extend, however, to essentially derived varieties, unless the law of a Contracting Party provides that the breeder's right shall be subject to limitations in respect of certain kinds of such varieties.

(b) For the purposes of subparagraph (a)(iv), a variety shall be considered to be an essentially derived variety when

(i) it is the direct descendent of another variety ("the initial variety") and retains, subject to a very small number of modifications, the expressions of the characteristics which result from the genotype or combination of genotypes of the initial variety and

(ii) it is clearly distinguishable from the initial variety."

Decisions in paragraphs 1092, 1636

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

Source: Delegation of Japan

PROPOSAL FOR THE AMENDMENT OF ARTICLE 14(2)

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

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

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

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

Decision in paragraph 1117

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

Source: Delegation of Japan

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

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

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

Decision in paragraph 1113

DC/91/111 March 9, 1991 (Original: English)

Source: Delegation of Japan

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

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

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

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

Decision in paragraph 1081

DC/91/63 March 5, 1991 (Original: English)

Source: Delegation of Poland

PROPOSAL FOR THE AMENDMENT OF ARTICLE 14(2)

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

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

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

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

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

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

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

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

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

Decisions in paragraphs 1057 and 1095

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

Source: Delegation of the United States of America

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

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

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

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

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

Withdrawal in paragraph 1052

DC/91/14 March 4, 1991 (Original: English)

Source: Delegation of the United States of America

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

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

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

Decision in paragraph 1097

SUMMARY MINUTES OF THE
PLENARY MEETINGS OF THE DIPLOMATIC CONFERENCE

Relevant paragraphs:

Article 14(2) of the Basic Proposal [Article 14(5) of the Text as Adopted] - Acts Requiring the Breeder's Authorization in Respect of Essentially Derived and Certain Other Varieties

1050. The PRESIDENT indicated that Article 14(1)(c) would be dealt with after the working group had tabled its report. He then opened the debate on the proposals of the Delegations of Germany and of the United States of America reproduced in **documents DC/91/89 Rev.** and **DC/91/9.**

1051. Mr. HOINKES (United States of America) stated that, in the light of the rejection of the proposal of his Delegation regarding Article 14(1)(a), the proposal reproduced in document DC/91/9 would be unsuccessful. He therefore withdrew it.

1052. The Conference noted the withdrawal of the proposal of the Delegation of the United States of America reproduced in document DC/91/9.

1053. Mr. BURR (Germany) explained that the proposal made by his Delegation in document DC/91/89 Rev. had to be seen in conjunction with the proposal made in document DC/91/92. The two proposals together constituted one concept. His Delegation proposed that the provisions on derived varieties, including subparagraph (b), be removed from Article 14(2) and that the matter of such varieties be regulated in Article 15(1). Of course, it could be argued that the matter was more of an editorial nature and that it could be left to the Drafting Committee.

1054.1 Mr. KIEWIET (Netherlands) observed that the derived right of the breeder over other varieties was part of his right rather than the result of an exception to another principle. From a systematic point of view, it was not correct to place the provision on derived varieties in Article 15, which was dealing with exceptions to the breeder's right. His Delegation could therefore not agree to the proposal of the Delegation of Germany.

1054.2 Mr. Kiewiet added that his Delegation also opposed the second aspect of the proposal reproduced in document DC/91/92, which was to make the regulation concerning derived varieties optional and to enable the law of a Contracting Party to have a provision which was not in conformity with the Convention. It considered the provisions on derived varieties as an essential part of the new Convention and of the endeavours to strengthen the position of the breeder. It would not like to open the possibility for the Contracting Parties to take back what would be granted to the breeder in the Convention.

1055.1 Miss BUSTIN (France) observed that the proposal made by the Delegation of Germany also raised a number of problems for her Delegation. Her Delegation believed that the reason for which the Delegation of Germany wished to present the derived right as an exception to the breeder's exemption stemmed from the fact that certain circles upheld that that right would lead to the annulment of one of the fundamental bases of the Convention, concerning free access to genetic variability. However, despite its understanding, it seemed to the Delegation, as to the Delegation of the Netherlands, that dependency was one of the rights afforded to breeders by the Convention; it therefore preferred it to be included in the Article dealing with the scope of the rights afforded by a title of protection granted in conformity with the new Convention.

1055.2 Again like the Delegation of the Netherlands, the Delegation of France was opposed to any provision that would permit national legislation, under conditions that were indeed not laid down by the Convention and for which the categories of varieties were not identified, to restrict the new right that appeared fundamental and which was one of the most salient innovations of the Conference.

1056. Mr. DMOCHOWSKI (Poland) stated that his Delegation was in favor of retaining the text in the Basic Proposal with some drafting amendments as proposed by the Delegation of Germany for Article 14(2)(a) and perhaps with the deletion of the end of Article 14(2)(b)(i) as suggested by the Delegation of Japan in document DC/91/111. Concerning the proposal of his Delegation reproduced in **document DC/91/63**, Mr. Dmochowski observed that the suggestion to substitute "significantly" for "clearly" was to be disregarded in view of the earlier discussions.

1057. The Conference noted that part of the proposal of the Delegation of Poland reproduced in document DC/91/63 was no longer relevant.

1058. Mr. BURR (Germany) stated that, since Mr. Kiewiet (Netherlands) and Miss Bustin (France) had referred in their statements to document DC/91/92, he should briefly explain what had moved his Delegation to propose the right in derived varieties as an exception under Article 15(1)(a)(iv). Informal talks had shown that the debate on essentially derived varieties was not terminated. It was also still ongoing between the professional organizations and there was as yet no fully assured opinion. That was why the Convention should here lay down the principle of dependency of essentially derived varieties, but should also provide that national legislations be able to react to future thinking.

1059. Mr. HAYAKAWA (Japan) requested that the proposals of the Delegation of Germany be discussed separately.

1060.1 Mr. ROYON (CIOPORA) stated that, whatever may be the reasons for the proposal of the Delegation of Germany, CIOPORA wished to express its strong support for the opinions expressed by Miss Bustin (France) and Mr. Kiewiet (Netherlands). Concerning Article 14(2), CIOPORA welcomed the principle of dependency. However, it considered that item (ii) was not at the right place in paragraph (2)(a); it referred rather to a case of minimum distances and infringement, whereas items (i) and (iii) referred to true cases of dependency. Paragraph (2)(b) should also be linked more closely to subparagraph (a)(iii). CIOPORA considered that the title of paragraph (2) was confusing. It would prefer it to read "dependency," with subparagraph (a)(ii) becoming a new paragraph (3) entitled "minimum distances" and reading: "The right conferred on the breeder by the title of protection shall extend to varieties which are not clearly distinguishable, in accordance with Article 7, from the protected variety."

1060.2 This proposal was not just a matter of drafting or presentation. While the breeder of a protected variety would indeed be open to a reasonable proposal from the breeder of a derived variety which constituted a significant improvement, he would be fully justified in opposing the marketing of a variety which was not clearly distinguishable from his variety.

1061. Mr. ORDOÑEZ (Argentina) stated that, although his Delegation considered the Basic Proposal to be quite fair as regards essentially derived varieties, his country and perhaps other developing countries might prefer the solution suggested by the Delegation of Germany.

1062. Mr. ESPENHAIN (Denmark) recalled that the Danish Parliament had discussed matters which touched upon the proposal regarding essentially derived varieties. In principle, his Delegation supported the concepts laid down in the Basic Proposal, but was concerned that paragraph (2) might lead in the long term to a lesser flow of new varieties. For that reason, it had prepared an amendment to the present Article 15 to specify a time limit of 10 years within which the dependency principle would be applicable. In general, his Delegation would follow the approach proposed by the Delegation of Germany.

Twelfth Meeting
Monday, March 11, 1991
Afternoon

1063. The PRESIDENT opened the meeting.

1064. Mr. BRADNOCK (Canada) stated that the position of his Delegation was similar to that of the Delegations of France and of the Netherlands. It supported the Basic Proposal and did not wish it to be amended.

1065. Mrs. JENNI (Switzerland) also went along with that point of view on behalf of her Delegation. The Basic Proposal should be adopted as it stood.

1066. Mr. ELENA (Spain) stated that his Delegation could support the ideas proposed by the Delegations of Germany and Denmark.

1067. Mr. IANNANTUONO (Italy) said that his Delegation supported the Basic Proposal.

1068. Mr. ÖSTER (Sweden) stated that his Delegation also supported the Basic Proposal.

1069. The proposal of the Delegation of Germany, reproduced in document DC/91/89 Rev., to remove the provisions on essentially derived varieties from Article 14(2) was rejected by six votes for, 10 votes against and three abstentions.

1070. The PRESIDENT concluded that, with this decision, the Conference had adopted Article 14(2)(a) as appearing in the Basic Proposal.

1071. The conclusion of the President was noted by the Conference. (Continued at 1616)

1072. The PRESIDENT then opened the debate on Article 14(2)(b) and invited the Delegations of Japan, Poland and of the United States of America to present their proposals reproduced in **documents DC/91/111, DC/91/63** and **DC/91/14**, respectively.

1073. Mr. HOINKES (United States of America) stated that the proposal of his Delegation was not intended to depart in substance from the Basic Proposal but to clarify that an essentially derived variety would be "predominantly derived from the initial variety" when the derivation resulted in the conservation of the essential characteristics of the initial variety. It was only then that one would go on to give examples of methods of derivation.

1074. Mr. HAYAKAWA (Japan) stated that also his Delegation did not intend to change the substance; but it felt that it was not appropriate to include examples of methods for creating essentially derived varieties in the Convention because those examples might be wrongly interpreted as meaning that the varieties created by those methods would automatically be essentially derived varieties. It therefore proposed to delete the examples.

1075.1 Mr. DMOCHOWSKI (Poland) recalled that some amendments had to be made to the proposal of his Delegation reproduced in document DC/91/63. The essence of the proposal was to refer to the majority of the essential "characteristics." That formulation was more correct in the opinion of his Delegation.

1075.2 His Delegation supported the proposal of the Delegation of Japan to delete the examples of methods at the end of Article 14(2)(b)(i). They concerned a technical problem that would be better solved by guidelines and, therefore, his Delegation was also in favor of the proposal of the Delegation of Japan, reproduced in document DC/91/65 Rev., that the Conference adopt a resolution.

1076. The PRESIDENT then opened the debate on the proposal of the Delegation of Japan reproduced in **document DC/91/111**.

1077. Mr. BURR (Germany) observed that, although the proposal of the Delegation of Japan was certainly on the right lines, it did not go far enough. Definitions should be clear and a formulation such as "particularly through methods ... such as" was anything but clear. The whole formulation was defective since it rested on methods and not on the result. That meant that the proposal of the Delegation of Japan was too hesitant. Item (iii) made

that clear since it referred to the differences resulting from the relevant method of derivation. What was decisive was the aim and not the method. For that reason, his Delegation had proposed a narrower formulation in document DC/91/92. That meant that the Delegation could indeed support the proposal of the Delegation of Japan, although it did not go far enough.

1078. Mr. LLOYD (Australia) stated that his Delegation also had some reservations about the definition of essentially derived varieties, which was legally imprecise and technically flawed. As it was drafted in Article 14(2)(b), it would be difficult to administer and could lead to extensive claims for infringement and litigation procedures. The definition was not based on reality in breeding practice. For those reasons, his Delegation also supported the proposal of the Delegation of Japan and believed that the definition should be based on more rational grounds and possibly be examined by a working group.

1079. Mr. BOBROVSZKY (Hungary) said that his Delegation also supported the proposal of the Delegation of Japan, as the mentioning of methods would not clarify the point, and associated itself to the comments of the Delegation of Germany.

1080. Mr. KIEWIET (Netherlands) said that his Delegation could support the proposal made by the Delegation of the United States of America, which was mainly a drafting amendment. It had sympathy for the proposal made by the Delegation of Japan, but was not in favor of the proposal of the Delegation of Poland. A majority of the essential characteristics was not good enough, since the majority started at 51%; there should be many more essential characteristics in common between the initial variety and the essentially derived variety. Finally, the Delegation would not go as far as the Delegation of Germany would like to.

1081. The proposal of the Delegation of Japan, reproduced in document DC/91/111, to delete the examples of methods from Article 14(2)(b)(i) was rejected by eight votes for, nine votes against and three abstentions.

1082. The PRESIDENT then opened the debate on the proposal of the Delegation of Germany reproduced in document DC/91/92, as far as it related to the definition of essentially derived varieties.

1083. Mr. BURR (Germany) pointed out that his Delegation aimed at the clearest possible formulation based on the result and which entailed nothing that could possibly be misleading.

1084. Mr. GUIARD (France) said that it seemed to his Delegation that the word "direct" could lead to confusion. Indeed, it could lead to the belief that there could not be a variety that had been derived by the intermediary of a derived variety; it could also be interpreted as a reference to breeding methods. Consequently, the wording could be risky.

1085. Mr. HAYAKAWA (Japan) asked whether varieties created by backcrossing were included in the notion of "direct descendants."

1086. Mr. BURR (Germany) replied that, even after five generations, the product of backcrossing still descended directly from the recurrent parent in the crossing. His Delegation therefore felt that it came within the definition. On the comments made by Mr. Guiard (France), he further observed that the proposal was naturally related to the first part that had already been

rejected and in which the possibility had been proposed of providing for certain limitations. That sort of limitation could have been considered in the case of indirectly derived varieties. In that respect, however, his Delegation could accept the wish expressed by the Delegation of France.

1087. Mr. ARDLEY (United Kingdom) stated that his Delegation had some difficulty with the proposal because it felt that the words in the Basic Proposal: "conserving the essential characteristics that are the expression of the genotype..." were very important. He was not sure that the words "direct descendant" and: "a very small number of modifications" used in the proposal conveyed the same meaning. In addition, "direct descendant" was unclear and "very small number" did not have any regard for the relative importance of the modifications. A small number of modifications might have a large effect on the variety. In conclusion, his Delegation preferred to retain the Basic Proposal.

1088. Mr. ÖSTER (Sweden) supported the statement of Mr. Ardley (United Kingdom).

1089. Mr. BURR (Germany) replied that his Delegation did not insist on the word "direct." However, it would have to be clear that the derived variety had to be related in some way with the initial variety. He further underlined the statement made by Mr. Kiewiet (Netherlands). It was not enough for the derived variety to contain only 51% of the characteristics of the initial variety. On the contrary, there should be only a very small number of deviations from the expression of the characteristics of the genotype of the initial variety. Those were, in the view of his Delegation, the two criteria on which was based the difference between an essentially derived variety and a normally bred variety. That was what his Deleqtion had attempted to express in the proposal.

1090. Mrs. JENNI (Switzerland) said that her Delegation had a preference for the original wording in the Basic Proposal. It did not wish a differing text to make a change to the concept of essentially derived varieties.

1091. Mr. HAYAKAWA (Japan) observed that the proposal contained a very good formulation and stated that his Delegation supported it.

1092. The proposal of the Delegation of Germany, reproduced in document DC/91/92, concerning the definition of essentially derived varieties was rejected by four votes for, 14 votes against and two abstentions.

1093. The PRESIDENT opened the debate on the proposal of the Delegation of Poland, reproduced in **document DC/91/63**, to refer to "the majority of the essential characteristics."

1093. The PRESIDENT opened the debate on the proposal of the Delegation of Poland, reproduced in **document DC/91/63**, to refer to "the majority of the essential characteristics."

1094. No delegation seconded the proposal. The PRESIDENT therefore declared it rejected.

1095. The conclusion of the President was noted by the Conference.

1096. The PRESIDENT noted that the only remaining proposal concerning Article 14(2)(b)(i) was that of the Delegation of the United States of America reproduced in **document DC/91/14**. In view of its nature, he suggested that it should be referred to the Drafting Committee.

1097. The suggestion of the President to refer the proposal of the Delegation of the United States of America reproduced in document DC/91/14 to the Drafting Committee was noted by the Conference with approval.

1098. The PRESIDENT opened the debate on the proposal of the Delegation of Japan reproduced in **document DC/91/66.**

1099. Mr. HAYAKAWA (Japan) observed that Article 14(2)(b)(iii) raised two difficulties. Firstly, it was incorrect to provide that "it," namely the essentially derived variety, conformed to a genotype. Secondly, there was the problem of how one could actually check the conformity with the genotype. The Delegation of Japan would prefer a text expressing a conformity with the expression of the genotype.

1100. Mr. KIEWIET (Netherlands) wondered whether the proposal concerned only a drafting matter, in which case it could be referred to the Drafting Committee, or whether a change in substance was intended.

1101. Mr. HOINKES (United States of America) stated that his Delegation had the same question. It felt, however, that the proposal had some merit considering the fact that, when one had to define whether a variety was an essentially derived variety, one would look at the characteristics that were the expression of the genotype of the initial variety and check whether those characteristics were also expressed in the derived variety. In that respect, the proposal was somewhat clearer than the text in the Basic Proposal. His Delegation supported it.

1102. Mr. BURR (Germany) also felt that the proposal could be left to the Drafting Committee. The introductory words had been an attempt to adapt the provision to the outcome of the Working Group on Article 1 and such adaptation was certainly appropriate.

1103. The PRESIDENT asked the Delegation of Japan whether it accepted that the proposal was only a matter of drafting.

1104. Mr. HAYAKAWA (Japan) replied that he did not think so. It was very difficult to check the similarity between genotypes. Relating the provision to characteristics rather than genotypes was therefore a matter of substance.

1105. Mr. KIEWIET (Netherlands) admitted that the Delegation of Japan had a point concerning the comparison of genotypes; it was perhaps more practical to say that the characteristics that were the expression of the genotype had a resemblance. On this basis, he considered that it was a good proposal, but he wished to have some more time to think it over.

1106. Mr. GUIARD (France) said that, following the additional explanations given by the Delegation of Japan, it was indeed important to give thought to the scope of that amendment.

1107. Mr. ÖSTER (Sweden) stated that his Delegation supported the proposal but thought that it needed some drafting improvements. In particular, the words "the characteristics" could perhaps be replaced by "its characteristics."

1108. Mr. WHITMORE (New Zealand) stated that his Delegation would agree with the proposal for the reasons given by the Delegation of Japan.

1109. Mr. ARDLEY (United Kingdom) stated that, on the basis of the stated intention of the proposed amendment, his Delegation could support its principle.

1110. Mr. PALESTINI (Italy) stated that his Delegation supported the principle of the proposal. It also concurred with the proposal of the Delegation of Sweden.

1111. Mr. ORDOÑEZ (Argentina) stated that the idea behind the proposal of the Delegation of Japan was quite clear. The proposal might perhaps be revised as concerns its drafting.

1112. Mr. O'DONOHOE (Ireland) also lent the support of his Delegation to the proposal.

1113. The proposal of the Delegation of Japan reproduced in document DC/91/66 was adopted by consensus.

1114. The PRESIDENT opened the debate on the proposal of the Delegation of Japan, reproduced in **document DC/91/65 Rev.**, to add a subparagraph (c) to Article 14(2).

1115. Mr. HAYAKAWA (Japan) stated that his country supported the introduction of the principle of dependency. However, his Delegation, having carefully studied it, felt that it was not easy to apply it immediately to all plant genera and species. It therefore proposed an amendment to Article 14(2) to the effect that each Contracting Party may implement the provisions on essentially derived varieties progressively to the various plant genera and species in the light of the special economic, ecological and technical conditions prevailing on its territory.

1116. Mr. ORDOÑEZ (Argentina) said that his Delegation fully supported the subparagraph (c) proposed by the Delegation of Japan. It would be very important for developing countries to have a possibility to apply progressively the provisions on essentially derived varieties.

1117. No member Delegation seconded the proposal of the Delegation of Japan, reproduced in document DC/91/65 Rev., to add a subparagraph (c) to Article 14(2). (Continued at 1140)

[...]

CONSIDERATION OF THE DRAFT NEW ACT OF THE UPOV CONVENTION

Article 14(2) of the Basic Proposal [Article 14(5) of the Text as Adopted] - Acts Requiring the Breeder's Authorization in Respect of Essentially Derived and Certain Other Varieties (Continued from 1117)

1140. Mr. LANGE (ASSINSEL) wished to make the following clarification, since subparagraphs (a) and (b) of Article 14(2) had been dealt with separately: where it had been determined that a variety was essentially derived from the initial variety in accordance with subparagraph (b), then it remained an essentially derived variety even on expiry of the term of protection for the initial variety.

1141. The PRESIDENT confirmed this interpretation. (Continued at 1616)

[...]

Article 14(2)(a) of the Basic Proposal [Article 14(5) of the Text as Adopted] - Scope of the Breeder's Right in Respect of Essentially Derived and Certain Other Varieties

Article 15(1) - Acts not Requiring the Breeder's Authorization

(Continued from 1071, 1141 and 1299)

1616. The PRESIDENT opened the meeting and stated that, at the request of the Delegations of Denmark and Germany, he would start with the link between Article 14(2)(a) and Article 15(1).

1617.1 Mr. BURR (Germany) said that one passage in the proposal of his Delegation with regard to Article 15 reproduced in **document DC/91/92** was still unresolved; that was the passage that was intended to replace the following phrase in Article 15(1)(iii) in the Basic Proposal: "except where the provisions of Article 14(2) apply." His Delegation had suggested in its proposal that the condition be made clearer by means of the following formulation: "The breeder's right shall extend, however, to essentially derived varieties, unless the law of a Contracting Party provides that the breeder's right shall be subject to limitations in respect of certain kinds of such varieties."

1617.2 However, that formulation had to be adapted to decisions already taken. Taking into account the adoption of the proposal of the Delegation of the United States of America made in document DC/91/13, it could read as follows: "The breeder's right shall extend, however, to varieties under Article 14(3), unless the law of a Contracting Party provides that the breeder's right shall be subject to certain limitations." That would leave a certain amount of elbow room to deal with future developments at national level. The principle behind the proposal was, therefore, that certain limitations be left to the law of the Contracting Party.

1618. Mr. KIEWIET (Netherlands) recalled that he had already given his opinion on the proposal of the Delegation of Germany and stated that his Delegation was against giving a possibility to the Contracting Parties to limit the provisions on dependency on a national basis. It was not a good idea to make these essential provisions more or less optional.

1619. Mr. ESPENHAIN (Denmark) recalled that he had asked that this part of the proposal of the Delegation of Germany reproduced in document DC/91/92 be brought up for final discussion in connection with the proposal of his Delegation to introduce a "launching period" (document DC/91/114). The reason for having a more flexible system than that proposed in Article 14(2) of the Basic Proposal was that, on a political level, there had been concern in Denmark to find a proper balance between the interests of the breeder of the initial variety and of the breeder of the derived variety. The balance was necessary to make sure that it was possible for breeders to create new varieties on the basis of already protected varieties, used as genetic resources. Since his Delegation had been unsuccessful with its proposal, it strongly supported the proposal of the Delegation of Germany.

1620. Miss BUSTIN (France) said that her Delegation, just as the Delegation of the Netherlands, was not able to support the proposal made by the Delegation of Germany. It appeared to the Delegation that, to ensure a balance between the rights of the breeder of an initial variety and those of other breeders who had recourse to his protected variety as a source of genetic variation, all the necessary precautions had been taken in defining an essentially derived variety. Once the interpretation of what constituted a dependent derived

variety was already given in the text of the Convention, it seemed hazardous to make any limitation whatsoever to the exercise of dependent rights by the breeder of a protected variety; such limitations were in fact capable of disturbing the delicate balance which the Conference had been attempting--and was required--to establish between those and other industrial property rights. The preservation of mutual interests could only be achieved by means of strict equality in the exercise of the rights of the parties concerned.

1621. Mr. ORDOÑEZ (Argentina) stated that, since the idea of dependency was new, his Delegation would support the proposal of the Delegation of Germany.

1622. The PRESIDENT noted that there was support for and opposition to the proposal, on which there had already been a debate. He therefore decided to take a vote on it.

1623. Mr. HAYAKAWA (Japan) wished to know exactly the amendment of the Delegation of Germany on which the vote would be taken.

1624. The PRESIDENT replied that the essence of the proposal was to introduce a possibility for Contracting Parties to make limitations, leaving the exact wording to the Drafting Committee.

1625. Mr. BOGSCH (Secretary-General of UPOV) stated that the proposal was tantamount to a blank cheque. It would be most unusual to vote on a subject of this importance without the benefit of a written text. In addition, a decision had already been made on Article 14(2). To reopen the debate would therefore require a two-thirds majority.

1626. Mr. ESPENHAIN (Denmark) stated that he still believed that this part of the proposal of the Delegation of Germany reproduced in document DC/91/92 had never been discussed. He therefore pleaded that it should be taken up again. He understood, however, that it was difficult to vote on a proposal that was not written. He added--and asked the Delegation of Germany for confirmation--that the proposal would be to the effect that the breeder's right should extend to essentially derived varieties unlesss the law of a Contracting Party provided that it was subject to a specified limitation.

1627. Mr. KIEWIET (Netherlands) objected to a vote on such an important proposal if it were to be worded along the lines indicated by Mr. Espenhain (Denmark) and in the absence of a written text. He could agree to a vote on the original proposal laid down in document DC/91/92 if the meeting agreed with the Delegation of Denmark that it had not been discussed previously. To his recollection, however, it had been discussed and rejected.

1628. Miss BUSTIN (France) said that she also had the impression that the Conference had already taken a decision on that part of the proposal made by the Delegation of Germany. She noted that it was still not known what limitations would be permitted nor to what categories of varieties they would apply. The Conference had already incorporated numerous exceptions into the text of the Convention; a great part of the additional rights were linked with optional provisions. One of the major innovations of the text currently under negotiation was the right of dependency in derived varieties. It seemed clear to the Delegation of France that to adopt an already uncertain text on the basis of a proposal that had not yet been laid down in writing would be extremely dangerous. The Delegation was already opposed to the proposed amendment as it had been presented in document DC/91/92; it could in no case pronounce on a redrafted proposal in the absence of a written text.

1629. Mr. BOGSCH (Secretary-General of UPOV) asked the Delegation of Germany whether its proposal allowed any kind of limitations in respect of certain or all kinds of varieties. The proposal seemed to him to be extraordinarily vague and to allow in fact a Contracting Party to take away totally the right over essentially derived varieties.

1630. Mr. BURR (Germany) replied that the original proposal made by his Delegation had been limited to specific varieties. However, since future developments could not be presumed, his Delegation had not been able to be that precise. In any case, one ought not to be that precise. That was indeed the problem in a situation in which one could not yet forecast for which type of variety certain exceptions could possibly be necessary.

1631. Mr. BOGSCH (Secretary-General of UPOV) noted that he did not see any reference to the present situation, i.e., an indication of what varieties would be the subject under the present circumstances of a limitation or of what that limitation would be. In other words, there was no guarantee.

1632. Mr. BURR (Germany) replied that his Delegation saw the situation differently. Although the matter would be left to the national legislator, he in turn would naturally take a decision after having balanced the interests of the various parties. For the present, Mr. Burr was not in a position to be concrete. It was possible that no problems would arise at all during the next ten years or even until the next Diplomatic Conference. However, he had doubts whether the provisions in the Basic Proposal would be sufficient in all future cases.

1633. Mr. STRAUS (AIPPI) stated that AIPPI fully supported the views expressed by Mr. Bogsch (Secretary-General of UPOV) and the Delegations of France and of the Netherlands. AIPPI was deeply concerned at the fact that, if the

1634. Mr. ROYON (CIOPORA) announced that CIOPORA was also opposed to the proposal made by the Delegation of Germany and, more generally, to any proposal for a recommendation or statement which was likely to distort decisions that had already been taken or to reduce the small number of improvements in the Convention to a simple booby prize.

1635. Mr. LANGE (ASSINSEL) said that ASSINSEL fully went along with the statements made by Mr. Straus (AIPPI) and Mr. Royon (CIOPORA).

1636. The proposal of the Delegation of Germany, reproduced in document DC/91/92, to allow Contracting Parties to introduce limitations to the breeder's right in respect of essentially derived varieties was rejected by three votes for, 12 votes against and four abstentions.
(Continued at 1852.4)

REPORT ON THE WORK OF THE DRAFTING COMMITTEE

1852.4 (Continued from 1549, 1615 and 1636) In Article 14, the Committee had made the following amendments:

(i) In paragraph (1)(a)(i), it had added the word "multiplication" in brackets after "reproduction" in the English text to ensure that the meaning was clear and to overcome what was identified as a possible difference of interpretation between the three languages.

(ii) The Committee had also been asked to look at the best way of framing Article 14(1), in a way that would best separate out the various acts and their subject matter whilst making it clear, firstly, that the protection relating to propagating material was mandatory but could be added to by Contracting Parties, secondly, that the protection relating to harvested material was mandatory and, thirdly, that the extension to directly made products was optional. The Committee had therefore restructured the former paragraph (1) into paragraphs (1) to (4) and provided in paragraph (4) that Contracting Parties may add to the acts mentioned in items (i) to (vii) of the former paragraph (1)(a) (new paragraph (1)).

(iii) The former Article 14(2) relating to essentially derived and certain other varieties thus became Article 14(5). The Committee had also been asked to consider its structure. The main problem involved the need to express the meaning of "essentially derived variety" in such a way that it was the expression of the essential characteristics of the initial variety and the retention of that expression that was important. It had also been felt important to ensure that the examples, such as the selection of a natural or induced mutant, were not definitive but were just examples. In view of the need for technical precision and internal consistency in this paragraph, the Committee had asked three of its members, Mr. Bould (United Kingdom), Mr. Guiard (France) and Mr. Roth (United States of America) to form a subcommittee to produce a revised wording together with the Secretary of the Committee. The text of paragraph (5)(b) was based largely upon their work.

[…]

1947. Mr. DELLOW (New Zealand) referred to Article 14(5), which corresponded to Article 14(2) in the Basic Proposal. Article 14(2) began with: "Subject to Articles 15 and 16, the acts mentioned in paragraph (1) shall also require the authorization of the breeder..."; the new draft was restricted to: "The provisions of Articles 15 and 16 shall also apply in relation to..." That seemed to change the whole sense of the paragraph.

1948. Mr. BOGSCH (Secretary-General of UPOV) replied that this was an obvious clerical mistake. The text should read: "The provisions of paragraphs (1) to (4) shall also apply in relation to..." as in the French and German versions. He expressed his gratitude to Mr. Dellow for having discovered that mistake.

Adoption: paragraph 1852.4 (reproduced on page 80 of this Annex)

Text as adopted: page 31 (reproduced on page 64 of this Annex)

Proposal for a Resolution:

- Japan (DC/91/65 Rev.) (reproduced on page 68 of this Annex)
- Discussion: paragraphs 1118-1139 (reproduced on pages xxxx of this Annex)
- Adoption: paragraphs 1139-1974 (reproduced on pages xxxx of this Annex)

Text as adopted:

FURTHER INSTRUMENTS ADOPTED BY THE CONFERENCE

Resolution on Article 14(5)*

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

Recommendation Relating to Article 15(2)**

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

Common Statement Relating to Article 34***

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

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

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

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

ADMINISTRATIVE AND LEGAL COMMITTEE

Twenty-ninth Session
Geneva, October 21 and 22, 1991

Document CAJ/29/7 Prov.

DRAFT REPORT

Relevant paragraphs:

11. Several delegations felt that it would be useful to hold a discussion with the breeders' organizations--particularly ASSINSEL, which had already begun examining that matter--in view of the part the breeders would be required to play in managing the system of essentially derived varieties. A symposium could be held for that purpose on the occasion of the 1992 session of the Council and document CAJ/29/2 could be considered as an initial discussion paper, which in no way committed UPOV.

ADMINISTRATIVE AND LEGAL COMMITTEE

Twenty-ninth Session
Geneva, October 21 and 22, 1991

Document CAJ/29/2

GUIDELINES RELATING TO ESSENTIALLY DERIVED VARIETIES

Relevant paragraphs:

8. "predominantly derived from the initial variety" (Article 14(5)(b)(i): These words require that an essentially derived variety be more than 50% derived from an initial variety. It is suggested that the word "predominantly" requires that well over 50% should be so derived. The fact that well over 50% of its derivation must be from an initial variety means that a variety can be essentially derived from only one variety. Discussions of the revision proposals in the sessions of the Administrative and Legal Committee which preceded the adoption by the Council in October 1990 of a draft Convention consistently showed that the intention was that a variety should only be essentially derived from another variety when it retained virtually the whole genotype of the other variety. This is confined by the words commented upon in paragraph 9 below. A derived variety could not in practice retain the expression of the essential characteristics of the variety from which it is derived unless it is almost entirely derived from that variety.

9. "while retaining the expression of the essential characteristics": The essential characteristics are those which are indispensable or fundamental to the variety. "Characteristics" would seem to embrace all features of a variety including, for example, morphological, physiological, agronomic, industrial and biochemical characteristics. It is suggested that the result of a biochemical test conducted on a variety, for instance, a screening test using a genetic probe, is a characteristic of the variety. "while retaining" requires that the expression of the essential characteristics be derived from the initial variety.

12. "(iii) except for the differences which result from the act of derivation it conforms to the initial variety in the expression of the essential characteristics that result from the genotype or combination of genotypes of the original variety": The words "except for the differences which result from the act of derivation" do not set a limit to the amount of difference which may exist where a variety is considered to be essentially derived. A limit is, however, set by the words of paragraph (i). The differences must not be such that the variety fails "to retain the expression of the essential characteristics that result from the genotype or combination of genotypes of the initial variety." There is some inconsistency between subparagraphs (i) and (iii) of Article 14(5)(b) in that (i) would seem to require the whole of the expression of the essential characteristics that result from the genotype of the initial variety while (iii) requires only that the derived variety conforms to the initial variety except for differences resulting from the act of derivation (however, see the discussions in paragraph 13 below). The examples of essential derivation given in Article 14(5)(c) make clear that the differences which result from the act of derivation should be one or very few.

21. To fulfill the conditions imposed by Article 14(5)(b)(iii) a later variety must conform to the initial variety in the expression of the essential heritable characteristics of the initial variety "except for the diffferences which result from the act of derivation". Theoretically, if variety A is crossed with variety B and variety X is selected from the resulting progeny, if variety X derives 45% of its essential characteristics from A and 55% from B, it will be essentially derived from B since apart from the 45% derived from A, it conforms to the expression of the essential characteristics of B. This is clearly not the intended interpretation. A later variety cannot fulfill the conditions of Article 14(5)(b)(i) unless it is predominantly derived from the initial variety while retaining, without qualification in Article 14(5)(b)(i), the expression of the essential heritable characteristics of the initial variety.

CAJ/29/2

ANNEX

Example 1: A pyramid

[Each $^+$ is a characteristic added by genetic engineering or complete backcrossing and controlled by a single gene or by a few closely linked genes]

Variety A - the initial protected variety

Variety A^+ - is distinct from and predominantly derived from A

Variety A^{++} - is distinct from A^+ and is predominantly derived from A^+

Variety A^{+++} - is distinct from A^{++} and is predominantly derived from A^{++}.

1.1 Question: Is variety A^+ essentially derived from A?

1.1 Answer:

Yes, if it is predominantly derived in such a way that it retains the expression of the essential inherited characteristics (that is the characteristics that "result from the genotype") of the initial variety AND if in the final result, except for the differences which result from the act of derivation (added characteristic$^+$ in this case) it conforms as required by Article 14(5)(b)(iii).

1.2 Question: Is variety A^{++} essentially derived from A^+?

1.2 Answer:

(i) Same answer as for 1.1. but with different consequences. Since variety A^+ is itself essentially derived from A, it fails to satisfy the requirement of Article 14(5)(a)(i). Accordingly the scope of protection of variety A^+ does not cover variety A^{++}.

(ii) Variety A^{++} may, however, be essentially derived from variety A if it retains the expression of the essential inherited characteristics of variety A and if it conforms as required by Article 14(5)(b)(iii).

1.3 Question: Is variety A^{+++} essentially derived from variety A and if so how many further characteristics can be added to it before it ceases to be essentially derived from A?

1.3 Answer:

Variety A^{+++} will be essentially derived from A if it satisfies the provision of Article 14(5)(b)(i) and (iii). Varieties with further added characteristics similarly derived would continue to be essentially derived until such time as a variety is developed which ceases to conform to the initial variety in the expressions of its essential characteristics inherited from A. A decision on this question in an infringement suit would be a value judgement based upon the available evidence.

ADMINISTRATIVE AND LEGAL COMMITTEE

Thirtieth Session
Geneva, April 8 and 9, 1992

Document CAJ/30/6

REPORT

Relevant paragraphs:

27. **Document to be Submitted to the Sixth Meeting with International Organizations.**- The Committee agreed that document CAJ/29/2, without Part VII, should be the basis for the document to be submitted to the sixth meeting with international organizations, it being understood that such document would not be a draft for the guidelines referred to in the Resolution on Article 14(5) adopted by the Diplomatic Conference. It was emphasized, in particular, that the guidelines should not enter into the detail given in paragraphs 6 et seq of document CAJ/29/2.

SIXTH MEETING WITH INTERNATIONAL ORGANIZATIONS

Geneva, October 30, 1992

Document IOM/6/2

ESSENTIALLY DERIVED VARIETIES

Relevant paragraphs:

8. "predominantly derived from the initial variety" (Article 14(5)(b)(i): The requirement of predominant derivation from an initial variety means that a variety can only be essentially derived from one variety. Discussions of the revision proposals in the sessions of the Administrative and Legal Committee which preceded the adoption by the Council in October 1990 of a draft Convention consistently showed that the intention was that a variety should only be essentially derived from another variety when it retained virtually the whole genotype of the other variety. This is confined by the words commented upon in paragraph 9 below. A derived variety could not in practice retain the expression of the essential characteristics of the variety from which it is derived unless it is almost entirely derived from that variety.

9. "while retaining the expression of the essential characteristics": The essential characteristics are those which are indispensable or fundamental to the variety. "Characteristics" would seem to embrace all features of a variety including, for example, morphological, physiological, agronomic, industrial and biochemical characteristics. It is suggested that the result of a biochemical test conducted on a variety, for instance, a screening test using a genetic probe, is a characteristic of the variety. "while retaining" requires that the expression of the essential characteristics be derived from the initial variety.

12. "(iii) except for the differences which result from the act of derivation it conforms to the initial variety in the expression of the essential characteristics that result from the genotype or combination of genotypes of the original variety": The words "except for the differences which result from the act of derivation" do not set a limit to the amount of difference which may exist where a variety is considered to be essentially derived. A limit is, however, set by the words of subparagraph (i). The differences must not be such that the variety fails "to retain the expression of the essential characteristics that result from the genotype or combination of genotypes of the initial variety." A comparison between subparagraphs (i) and (iii) of Article 14(5)(b) is somewhat problematic in that (i) would seem to require the whole of the expression of the essential characteristics that result from the genotype of the initial variety while (iii) requires only that the derived variety conform to the initial variety except for differences resulting from the act of derivation (however, see the discussions in paragraph 13 below). The examples of essential derivation given in Article 14(5)(c) make clear that the differences which result from the act of derivation should be one or very few.

21. To fulfill the conditions imposed by Article 14(5)(b)(iii) a later variety must conform to the initial variety in the expression of the essential heritable characteristics of the initial variety "except for the differences which result from the act of derivation". Theoretically, if variety A is crossed with variety B and variety X is selected from the resulting progeny, if variety X derives less than half of its essential heritable characteristics (i.e. of its genotype) from A and more than half from B, it will be essentially derived from B since apart from the characteristics derived from A, it conforms to the expression of the essential characteristics of B. This is clearly not the intended interpretation. A later variety cannot fulfill the conditions of Article 14(5)(b)(i) unless it is predominantly derived from the initial variety while retaining, without qualification in Article 14(5)(b)(i), the expression of the essential heritable characteristics of the initial variety.

IOM/6/2
ANNEX

Example 1: A pyramid

[Each $^+$ is a characteristic added by genetic engineering or complete backcrossing and controlled by a single gene or by a few closely linked genes]

Variety A	- the initial protected variety
Variety A^+	- is distinct from and predominantly derived from A
Variety A^{++}	- is distinct from A^+ and is predominantly derived from A^+
Variety A^{+++}	- is distinct from A^{++} and is predominantly derived from A^{++}.

1.1 Question: Is variety A^+ essentially derived from A?

1.1 Answer:

Yes, if it is predominantly derived in such a way that it retains the expression of the essential inherited characteristics (that is the characteristics that "result from the genotype") of the initial variety AND if in the final result, except for the differences which result from the act of derivation (added characteristic$^+$ in this case) it conforms as required by Article 14(5)(b)(iii).

1.2 Question: Is variety A^{++} essentially derived from A^+?

1.2 Answer:

(i) Same answer as for 1.1. but with different consequences. Since variety A^+ is itself essentially derived from A, it fails to satisfy the requirement of Article 14(5)(a)(i). Accordingly the scope of protection of variety A^+ does not cover variety A^{++}.

(ii) Variety A^{++} may, however, be essentially derived from variety A if it retains the expression of the essential inherited characteristics of variety A and if it conforms as required by Article 14(5)(b)(iii).

1.3 Question: Is variety A^{+++} essentially derived from variety A and if so how many further characteristics can be added to it before it ceases to be essentially derived from A?

1.3 Answer:

Variety A^{+++} will be essentially derived from A if it satisfies the provision of Article 14(5)(b)(i) and (iii). Varieties with further added characteristics similarly derived would continue to be essentially derived until such time as a variety is developed which ceases to conform to the initial variety in the expressions of its essential characteristics inherited from A. A decision on this question in an infringement suit would be a value judgement based upon the available evidence.

SIXTH MEETING WITH INTERNATIONAL ORGANIZATIONS

Geneva, October 30, 1992

Document IOM/6/5

RECORD OF THE MEETING

Relevant paragraphs:

Paragraph 8

19. Mr. LANGE (ASSINSEL) said that ASSINSEL was basically in agreement with the statements in paragraph 8. It also went along with the interpretation that the words "predominantly derived from the initial variety" meant that derivation could only exist from one variety. However, it had discussed a case, in relation to that paragraph, in which a variety A was crossed with a variety B and the progeny was selected in such a way that the new variety came very close to the genome of variety B. It was ASSINSEL's view that such a case was to be dealt with rather like the case of backcrossing and could indeed be covered by the phrase in question. ASSINSEL felt, however, that such cases should be examined with great prudence and that the question of the threshold value had to play a decisive part.

20. Mr. WINTER (COMASSO) informed the meeting of COMASSO's view that the interpretation of the Act reproduced in paragraph 8 was correct and that indeed only one variety could be the initial variety.

21. Mr. Dirk BÖRINGER (Germany) observed that the case set out by Mr. Lange (ASSINSEL) presented no problems for him. The decisive fact was whether the new variety essentially contained the genome of one of the parent varieties. The method of breeding was not laid down at any point.

Paragraph 9

22. Mr. LANGE (ASSINSEL) said that ASSINSEL was of the opinion that the word "essential" should not contain any connotation of the value of the corresponding characteristics. Nor should it in any way constitute a limitation to certain properties. ASSINSEL had already made observations on that question in its written comments; for it, the words "essential characteristics" referred as it were to the essence of the genotype of the initial variety and meant that the whole genome of the initial variety had to be used as a basis for assessing genetic conformity.

23.1 Mr. ROYON (CIOPORA) recalled that CIOPORA had already underlined in the discussions on the draft revised UPOV Convention that it was of the view that the expression of the essential characteristics was really the overwhelming matter to be considered in dependency. However, it again felt that the wording of the 1991 Act was very confusing indeed. Despite the explanations given in paragraph 12 of document IOM/6/2, it felt that there was an unnecessary repetition and even a discrepancy in Article 14(5)(b) between: "while retaining the expression of the essential characteristics ... of the initial variety" in item (i) and "it conforms" in item (iii), the latter being laxer than the former. CIOPORA had already made many comments in the past on the word "conform."

23.2 It was therefore important for this meeting to define what was really necessary for an essentially derived variety to reproduce the essential characteristics of the initial one. As to the word "essential" itself, CIOPORA did not fully agree with the explanations or interpretations given by Mr. Lange (ASSINSEL), because it considered it premature, at this stage, to say that elements of value--"value" being a very broad term--should be excluded from the scope of the word "essential." That scope should evolve only through judicial interpretation.

Paragraph 12

33. Mr. LANGE (ASSINSEL) stated that ASSINSEL was generally in agreement with the statements in paragraph 12, although their formulation appeared somewhat complicated. However, it did have a question, particularly with regard to the final sentence: what was the meaning of the phrase "the differences which result from the act of derivation should be one or very few"? ASSINSEL felt that that statement should not impair the question of threshold values in any event. Furthermore, the term "threshold value" was nowhere to be found. The question therefore arose why that term had not been used.

34.1 Mr. GREENGRASS (Vice Secretary-General of UPOV) observed that in discussions that had taken place within UPOV thus far, there had been a certain reluctance to resort to mathematical formulations, and the notion of a threshold value would just require that. It should be recognized that not every implication of a new concept of this kind could be anticipated; for that reason, the tendency had been to refrain from putting forward a figure or elements leading to a figure. One had to be conscious of the fact that a significant portion of the genotype was "sleeping," i.e. was not expressed. Percentages and thresholds would only be meaningful if they related to an appropriate, well-defined basis. Most member States would like to keep the concept very general, at least at this stage, so that it remained flexible in its application.

34.2 As far as the last sentence was concerned, Mr. Greengrass stated that its purpose was merely to emphasize the fact that varieties would not be essentially derived unless they were extremely close to the initial variety.

35.1 Mr. LE BUANEC (ASSINSEL) observed that discussions on paragraphs 10 to 12 had shown the importance of the interplay between the concepts of distinctness and of derivation. ASSINSEL, for its part, felt that there was no reason to change the work that was currently being done on distinctness under the 1978 Act. As far as derivation was concerned, it felt that it had to be judged after distinctness had been determined, and probably on the basis of criteria that were not necessarily the same.

35.2 To follow up the comments made by Mr. Greengrass (Vice Secretary-General of UPOV), Mr. Le Buanec pointed out that the aim and the wish of ASSINSEL were not to have quantified values already shown in a document. That would be far too premature and, in any event, progress had to be species by species and genetic structure by genetic structure in order to arrive at reliable data. What it would like, on the other hand, was for the concept of threshold to be discussed at some point or other, but without greater detail. To members of ASSINSEL, the members of the profession to whom the Convention was addressed by priority, obviously within the general framework of law, it appeared that the concept of threshold was altogether fundamental.

36.1 Mr. ROYON (CIOPORA) stated that CIOPORA felt very uneasy about the wording of Article 14(5)(b). It had opposed this wording during the discussions before the Diplomatic Conference; it needed to know what the UPOV experts really meant by saying in item (i): "while retaining the expression of the essential characteristics" and then in item (iii): "it conforms to the initial variety." Did they mean that virtually all the characteristics--or only most of them--had to be retained? Was "conform" less stringent? Clarifications should be given on this point to the users of the Convention, and at least to the Governments which would have to give effect to the Convention domestically, to avoid great insecurity in the implementation of the 1991 Act.

36.2 Mr. Royon then again repeated that the discussion on the problem of distinctness could not be separated from that on the problem of dependency because there were examples under the 1978 Act of cases where very minute differences had been accepted in some countries to grant protection and where, from the point of view of infringement, no one was able, either in the trade or in the public at large, to distinguish the two varieties concerned.

37. Mr. Gérard URSELMANN (ASSINSEL) wondered whether the statement of Mr. Greengrass (Vice Secretary-General of UPOV) in reply to the question from ASSINSEL had made the position clear for the audience. He had understood the statement in the sense that, to be essentially derived, a variety had to be very close to the initial variety and had in fact to differ only in one or a very small number of expressions of characteristics, i.e., in ASSINSEL's understanding, two or three. If that were to be the position, then the principle of dependency would apply in a very small number of cases in practice and would be void of any significance. ASSINSEL was in the process of establishing thresholds for the various species and groups within species, and if the statement made in document IOM/6/2 were to be the principle underlying UPOV's work, then there would hardly be any need for discussions on thresholds. ASSINSEL would propose to delete the reference to "should be one or very few" and to pave the way for discussions on thresholds and a formulation thereof.

Paragraph 21

58.1 Mr. Timothy ROBERTS (ASSINSEL) wished to take up the suggestion, made previously by the Delegation of ASSINSEL, that there might be a problem where varieties A and B were crossed and where breeding was conducted on the hybrid that resulted from the progeny, and eventually led to a variety that conformed to B but was distinct from it. That case raised an important theoretical question, namely whether it satisfied the legal requirements for there being dependency from B. A clear opinion had been expressed on this by Mr. Böringer (Germany). Mr. Roberts suggested, however, that the question might require more consideration. It had been his experience that smaller breeders were very concerned about the concept of dependence coming to play when they crossed A with B and ended up with progeny fairly similar to B.

58.2 There was always a need for a proper balance, Mr. Roberts observed, in intellectual property matters between a fair degree of protection for the owner of the right and clarity for third parties, so that the latter knew what they could do and what they could not. It was clear that until the Convention had been amended, the situation was out of balance and that the protection afforded to the breeder was not sufficient. But that did not mean that one should go too far the other way. Most of the examples given in the Annex to document

IOM/6/2 referred to rather special situations. For instance, somebody who undertook to insert a new gene by genetic technology into an existing variety, was clearly on notice that his work was likely to lead to a situation of dependency. But it would be very good if a breeder who crossed A and B could be reasonably confident that he would not have to face the prospect of being dependent on either variety.

58.3 Mr. Roberts wished to go a step further and to suggest that the 1991 Act could be read to say that there was no dependency in the case at issue, because the initial cross resulted in a hybrid which was clearly dependent on neither A nor B, being 50% of A and 50% of B. He suggested that the hybrid was a variety, an independent one, and hence anything derived from it could not be dependent on either A or B.

59. Mr. ROYON (CIOPORA) went along with Mr. Roberts (ASSINSEL) in stating that paragraph 21 provided a necessary and obvious clarification. However, one could not simply deduce that a variety obtained by crossing A and B would never infringe either one of the parents. Indeed, the breeder of the parent concerned could always invoke, where appropriate, application of Article 14(5)(a)(ii).

[...]

Example 1 in the Annex

60. Mr. GREENGRASS (Vice Secretary-General of UPOV) introduced the example at the request of the CHAIRMAN and stated that it referred to the so-called pyramid in which an initial variety was progressively transformed by genetic engineering, backcrossing or as a result of a succession of mutations.

61. Mr. LANGE (ASSINSEL) agreed, on behalf of ASSINSEL, with the statements made on example 1.

62. Mr. ROYON (CIOPORA) simply wished to repeat what he had said at the beginning of the meeting, i.e., that it appeared unfair to CIOPORA not to establish dependency between, for example, A^+ and A^{++}, where A was no longer protected, but where A^+ was still protected in the name of the breeder of A. Indeed, it seemed essential to him that a protected variety should be able to control any other variety that reproduced its essential characteristics. However, it agreed that, in the context of the 1991 Act, the example was altogether correct.

63. Mr. WINTER (COMASSO) likewise noted, on behalf of COMASSO, that the representation given in example 1 was correct and that it therefore also corresponded to the statements in paragraph 7 of document IOM/6/4.

64. Mr. PERCY (UPEPI) also agreed that the example was correct, although the resulting consequences might be viewed as terrible.

65.1 Mr. VON PECHMANN (AIPPI and CNIPA) stated that he likewise was not enthusiastic about that example since unfair situations could arise which one should not in fact tolerate and which he had pointed out clearly in a preceding intervention. He therefore wondered whether the provision concerned had in fact to be interpreted as narrowly as had been done in example 1, namely that variety A^{++} was not dominated by A^{+}. The matter of the pyramid of protection had long since been approached in the field of variety protection, but had not in fact brought with it any difficulties under patent law. In the event of a truly useful innovation, it ought indeed to be possible to exploit it by means of an exchange of licenses.

65.2 Mr. von Pechmann also wondered whether an attempt had not been made to solve a spurious problem, i.e. that of a multiplicity of dependencies, irrespective of whether it occurred due to a pyramid or due to the fact that dependency was advocated for the result of crossing two protected varieties. In the latter case, it had to be determined whether both parents had contributed something to the production of the hybrid.

66. Mr. LANGE (ASSINSEL) wished to state once more, as representative of ASSINSEL, of the breeders, that ASSINSEL did not share the view expressed by Mr. von Pechmann (AIPPI and CNIPA). Breeding was something apart from technical inventions. The aim when introducing the concept of derivation had been to protect the true breeder--and not the person who made plagiaries or copies. Beyond that, differentiated provisions depending on the origin of minor differences could not be accepted; indeed, there was no basis for so doing in the 1991 Act.

67. Mr. VON PECHMANN (AIPPI and CNIPA) replied that AIPPI and CNIPA were in favor of strong protection and wished to prevent the way for plagiaries and copies being smoothed out and to prevent variations, that possibly had no economic significance at all, escaping the scope of protection of a truly important new variety. The considerations on the concept of "initial variety" appeared, in any event, to be misleading since in fact only those varieties that could be found in nature could be designated initial varieties. Apart from that, as in the case of technical inventions, one variety more or less based itself on others. One variety was used for further breeding, whether the title of protection had expired or not. If he had correctly understood it, the issue of the existence of protection was not intended to play any part. Nevertheless, the newly discovered or newly developed variety was a further development of such original variety and protection for that variety would not be effective in relation to a further derivation. Indeed, that did not seem altogether logical.

68.1 Mr. LE BUANEC (ASSINSEL) noted that Mr. von Pechmann (AIPPI and CNIPA) had referred on several occasions in his last two interventions to the economic or industrial value. ASSINSEL had always asserted that such a consideration should not be involved in the granting of a title nor subsequently in determining the existence of an essentially derived variety. One had to get away from that economic value and if one continued to speak of it in relation to the generation of the right, one could but enter into most difficult discussions. The economic value was pertinent, on the other hand, for the exercise of the right, particularly with regard to licenses.

68.2 Returning to what had been said by Mr. Royon (CIOPORA), Mr. Le Buanec said that he understood the problem facing the breeder of A where he was also the breeder of A^{+}; it was nevertheless his responsibility to maintain his title to A in order to maintain his right in the subsequent essentially derived varieties. Naturally, that incurred costs, but everyone was aware that effective intellectual property could not be had without paying to maintain the titles in force.

69. Mr. VON PECHMANN (AIPPI and CNIPA) stated that he had obviously been misunderstood. It had not been a matter of the granting of rights, but the question whether it was correct for the breeder of A^{++} not to have to pay license fees to the breeder of A^{+} despite the fact that he had made full use of the other breeder's innovation for his work.

70. Mr. KOCH (AIPH) stated that the suggestion of Mr. von Pechmann (AIPPI and CNIPA) concerning hybrids (see paragraph 65.2 above) would entail an extension of the scope of protection which AIPH would strongly oppose.

ADMINISTRATIVE AND LEGAL COMMITTEE
Thirty-second Session
Geneva, April 21 and 22, 1993

TECHNICAL COMMITTEE
Twenty-ninth Session
Geneva, April 21, 1993

Document CAJ/32/10-TC/29/9

REPORT

[…]

Guidelines Relating to Essentially Derived Varieties

28. The Chairman asked whether a list of sample cases in which a variety would be essentially derived should be drawn up at the present stage, or whether one should rather await the entry into force of the provisions concerned and the accumulation of some initial practical experience. In the first hypothesis the question that arose was how to incorporate the advice of breeders in the Guidelines, as the Guidelines were addressed to them; in that case the form of the document would also have to be specified.

29. The Delegations of Germany, France and the Netherlands were of the opinion that one could not draw up a list in the abstract, which moreover would be liable to be taken as an exhaustive list, and that one should wait. It was also mentioned that the work of the Working Group on Biochemical and Molecular Techniques would greatly contribute to the definition of the essentially derived variety concept in practical cases.

30. The Chairman concluded that this agenda item could be adjourned sine die.

[End of Annex and of document]