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UPOV

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

GENEVA

## ADMINISTRATIVE AND LEGAL COMMITTEE

Eighth Session

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PROTECTION, IN THE CASE OF MAIZE, OF LINES AND COMMERCIAL HYBRIDS,  
EXCLUDING PARENT HYBRIDSDocument prepared by the Office of the UnionIntroduction

1. This document is complementary to the note drawn up by the Delegation of France and reproduced in the Annex to document CAJ/VIII/4. It is recalled that the French authorities are considering "whether the protection of hybrid genitors, which are merely intermediate material in the production of commercial hybrids, should not be discontinued in order to discourage "pseudo-breeding," the purpose of which is to appropriate cross-breeds from public domain lines."<sup>1</sup>

Desirability of Discontinuing the Protection of Intermediate Hybrids

2. The majority of commercial maize hybrids are either single cross hybrids [products of A x B crosses, the capital letters denoting lines], or three-way hybrids [products of (A x B) x C crosses], or double cross hybrids [products of (A x B) x (C x D) crosses]. The single cross A x B hybrid, which comes into the formula of a three-way hybrid, and also the single cross hybrids A x B and C x D, which come into the formula of a double-cross hybrid, are intermediate hybrids. Any person with a list of existing lines can obviously work out all possible hybrids on paper. If that person also has seed of the various lines, he can actually produce the hybrids. This shows the ease with which pseudo-breeding work can be done.

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<sup>1</sup> Detailed report of the fourteenth ordinary session of the Council (document C/XIV/17), paragraph 8.21.

3. The protection of an intermediate hybrid enables the owner of protection to involve himself in the commercial production of all the varieties--the more complex intermediate hybrids of the (A x B) x B type for instance and the commercial hybrids--that stem from that hybrid, by virtue of the second sentence of Article 5(3) of the Convention ("such authorization [for the use of the variety] shall be required, however, when the repeated use of the new variety is necessary for the commercial production of another variety"). This involvement consists for the most part in some control over the use that is made of the intermediate hybrid, through recourse to the "right of prohibition," and in the collection of fees. It is clearly in conflict with the rights of the owners of the protection of the commercial hybrid and of its other component elements. For instance, in an extreme case which could arise with a double cross hybrid, (A x B) x (C x D), there could in fact be seven rights involved, namely those in the A, B, C and D lines, those in the single cross hybrids A x B and C x D, and that in the double cross hybrid itself.

4. The protection of an intermediate hybrid can be the reward for genuine plant improvement work, for instance where a really unanticipated formula is devised, or where the technical barrier to the large-scale production of a hybrid that is constituted by the flowering dates of the component lines is overcome. In the case of pseudo-breeding, however, it results in a form of parasitic activity, the possibility of which the French authorities are planning to eliminate.<sup>1</sup>

5. The problem of the misappropriation of hybrids arises also in connection with commercial hybrids, albeit on a smaller scale: for one thing, the appropriation of an intermediate single cross hybrid allows control to be exercised over a set of commercial hybrids (those produced from it), whereas the control exercised by way of the appropriation of a commercial hybrid is confined to that hybrid alone. For another thing, the protection of a commercial hybrid has no sense unless the hybrid is also included in the catalogue of varieties of which commercialization is allowed. The cost is therefore far higher, and this serves as a virtually absolute deterrent to pseudo-breeders. Nevertheless, it is difficult to contemplate abolishing the protection of commercial hybrids where it already exists: for it does have the advantage of providing breeders with a better system for the safeguarding of their interests than does the protection of lines in relation to imports of commercial seed, and it is significant that, in countries that are not producers of maize seed, like the Netherlands,<sup>2</sup> a very great majority of protected varieties, if not all of them, are commercial varieties.

#### Legal Aspects of Discontinuing the Protection of Intermediate Hybrids

6. With regard to the possibility of discontinuing the protection of intermediate hybrids, or of confining it to inbred lines and commercial hybrids, which comes to the same thing:-

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<sup>1</sup> It should be noted in this connection that the French authorities place emphasis on the appropriation of intermediate hybrids from public domain lines owing to a feature of French legislation which moreover is also found in the laws of Italy, South Africa and Spain: any application for the protection of a hybrid one or more of the components of which are protected in favor of third parties has to include, on pain of unacceptability, the authorization of those third parties for the repeated use of the components. Consequently, misappropriation of such hybrids is more difficult in those countries. In the remainder of the present member States, such prior authorization is not necessary, and applications for the protection of hybrids embodying protected lines are on an equal footing with applications for the protection of hybrids consisting solely of public domain lines.

<sup>2</sup> See Publikatieblad van de Raad voor het kwekersrecht, No. 167 (April 16, 1981), pp. 69 and 70.

(i) the 1978 text of the Convention provides, in its Article 2(2), that "each member State of the Union may limit the application of this Convention within a genus or species to varieties with a particular manner of reproduction or multiplication, or a certain end-use";

(ii) the 1961 text of the Convention, while not containing this provision, has always been applied by all the member States as if it did contain it, including for species appearing in the Annex to that text, of which maize is one.

7. For the exclusion of intermediate hybrids from protection to be effective, it is important that the use of a commercial--or allegedly commercial--hybrid as an intermediate hybrid should not be subject to authorization. In other words, hybrids have to be removed from the purview of the second sentence of Article 5(3). Such exclusion could be based on Article 2(2) of the 1978 text ("each member State of the Union may limit the application of this Convention...").

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