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UPOV

INTERNATIONAL UNION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS

GENEVA

ADMINISTRATIVE AND LEGAL COMMITTEE

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

REPORT

adopted by the Committee

Opening of the Session

1. The Administrative and Legal Committee (hereinafter referred to as "the Committee") held its twenty-second session from April 18 to 21, 1988. The list of participants is given in the Annex to this report.

2. The session was opened by Mr. F. Espenhain (Denmark), Chairman of the Committee, who welcomed the participants.

3. The Chairman extended a particular welcome to the delegates who were participating for the first time in a session of the Committee and also introduced Mr. Barry Greengrass, the Vice Secretary-General designate of UPOV, and M. Yasuhiro Hayakawa, Associate Officer in the Office of the Union.

4. The Chairman also recalled that Mrs. E. Parragh (Hungary), Mr. M. Heuver (Netherlands) and Mr. S.D. Schlosser (United States of America) had taken up new positions and would no longer be participating in the sessions of the Committee. On behalf of the members of the Committee, he asked the delegations of Hungary, the Netherlands and the United States of America to convey to them the Committee's appreciation for their contribution to its work and to the progress of UPOV in general, and its best wishes for their future career.

Adoption of the Agenda

5. The Committee adopted the agenda as given in document CAJ/XXII/1 Rev.

6. The Committee agreed to the distribution of document CAJ/XXII/7, entitled "Cooperation Systems for Obtaining Intellectual Property Rights in Several States," the preparation of which had been requested by the Chairman. The document analyses eight systems in the field of patents and trademarks.

Adoption of the Report on the Twenty-first Session of the Committee

7. The Committee adopted the report on the twenty-first session as given in document CAJ/XXI/4 Prov., subject to amendments that had been communicated in writing by the authorities of France and New Zealand.

New Developments in the Field of Plant Variety Protection

8. The Delegation of the Federal Republic of Germany said that there was an increasing interest in its country in breeding on species that could be a source of pharmaceutical products or industrial raw materials and on seasonal plants and fungi. An ordinance was being prepared to extend protection to a large number of such species and to meet the needs and wishes of interested circles.

9. The Delegation of France mentioned that there was a feeling in its country that the extension of protection to species with few new varieties but very large reference collections was highly problematic. She asked how examination was being envisaged by the authorities of the Federal Republic of Germany. The Delegation of the Federal Republic of Germany replied that all appropriate technical means available would be resorted to. In particular, full use would be made of the cooperation arrangements. For some species, the examination would be conducted by the authorities on their own premises. For others, in particular those mentioned by the representative of France, the assistance of the breeder might be requested for the growing of the plants; decisions would then be based on the conclusions arrived at by the examiners on the breeders' premises.

10. The Delegation of Denmark said that a new Plant Variety Protection Law had been in force since January 1, 1988. Fees had been raised by around 5%, and in future they would be raised annually in line with the price index. Revised bilateral agreements with the Netherlands and the United Kingdom entered into force on January 1, 1988.

11. The Delegation of Spain said that an extension of protection to six further taxa (almond, red clover, lentil, melon, ryegrass, watermelon) was awaiting ministerial approval. Fees had been raised by 5% as of January 1, 1988.

12. The Delegation of the United States of America said that the first United States patent for an animal had been granted on April 12, 1988. It was a mouse with activated cancer genes which could be used in cancer research.

13. The Delegation of Hungary said that the Institute for Plant Cultivation and Qualification had been reorganized and was now called the Institute for Agricultural Qualifications. It now had wider competence that covered agricultural innovation in general. Dr. Szalóczy, Hungary's representative on the Council, had been appointed Deputy General Director of the Institute.

14. The Delegation of Ireland said that protection had been extended to Potentilla as of March 1988.

15. The Delegation of Italy said that fees had been increased and that a decree was being prepared which would extend protection to 16 further species.

16. The Delegation of the Netherlands said that fees had been increased with effect from November 1, 1987. Bilateral agreements had been concluded with Denmark and the United Kingdom and as of April 13, 1988, protection had been extended to some 50 further species.

17. The Delegation of the United Kingdom said that testing fees had been increased by 4.5% on average. For roses the fees had been reduced since they had been higher than the actual cost of testing. Bilateral agreements had been concluded with Denmark and the Netherlands. A government report on the testing and certification system had been completed and just published and industry and other interested circles had been given three months to comment on it. A proposal had been made for a scheme for protection of intergeneric grass hybrids.

18. The Delegation of Switzerland said that the number of protected species had been increased from 44 to 78 with effect from April 1, 1988.

19. The Delegation of Sweden said that the Committee on Biotechnological Inventions and Intellectual Property Rights of the Nordic Countries (Denmark, Finland, Norway and Sweden) was expected to issue a report by the end of May 1988. The Committee had just finished identifying differences in the Nordic countries' legislation concerning patents and plant breeders' rights, and was about to start on the most difficult part of its tasks, namely the formulation of proposals.

20. A report was given by the Office of the Union on the fourth Conference on Intellectual Property for New Plant Varieties and Biotechnological Inventions which was held in Huntingdon, United Kingdom, from January 21 to 23, 1988.

21. The Office of the Union announced that Australia had just put its Plant Variety Rights Act into effect and had published its first list of protected species.

22. Finally, the attention of the Committee was drawn to the following meetings:

(i) September 14 to 16, 1988: WIPO Worldwide Forum on the Impact of Emerging Technologies on the Law of Intellectual Property;

(ii) October 24 to 28, 1988: WIPO Committee of Experts on Biotechnological Inventions and Industrial Property (fourth session);

(iii) December 5 and 6, 1988: Cornell University Conference on Animal Patents.

Harmonization of the Lists of Protected Taxa

23. Discussions were based on document CAJ/XXII/4.

24. The Committee noted that the matter under discussion was largely within the competence of the authorities of the member States. It felt that it was difficult to go beyond the Recommendations on the Harmonization of the Lists of Protected Species, which had been adopted by the Council at its twentieth ordinary session on December 2, 1986, and were set out in Annex V of document C/XX/13. It therefore agreed to propose to the Council that the attention of

member States be drawn to those Recommendations and to the fact that differences in the lists of protected taxa could lead to distortions of competition in trade in plant material between member States.

International (FAO) Undertaking on Plant Genetic Resources

25. Discussions were based on documents CAJ/XXII/5 and 5 Add.

26. The Delegations of Ireland and Switzerland, referring to Annex III in document CAJ/XXII/5 Add., which was based on information dating back to 1985, said that their countries had also signed the Undertaking subject to the same reservations as those made by other European countries.

27. The Chairman said that it was a favorable development that UPOV's assistance was being sought by the FAO and that there was an appreciation of plant breeders' rights in connection with the Undertaking.

28. The Committee noted that member States had adopted different approaches to the Undertaking and to the various issues under consideration within the FAO, and that it was therefore difficult to establish a common UPOV view. It then gave some guidance for the reply to be given by the Secretary-General.

Revision of the Convention

General

29. Discussions were based on documents CAJ/XXII/2, 3 and 6. Document CAJ/XXII/2, containing the proposals for revision of the Convention prepared by the Office of the Union, is hereinafter referred to as "the Office draft," in the reporting of the discussions on Articles 5, 6, 7, 9 and 13; document CAJ/XXII/6, containing the proposals prepared by the Delegation of the Federal Republic of Germany on those articles, is hereinafter referred to as "the German draft"; the document to be prepared for the next session of the Committee is hereinafter referred to as "the next draft."

30. The Committee took note of the observations by the International Chamber of Commerce, reproduced in document CAJ/XXII/3.

General Discussion

31. The Committee was very appreciative of document CAJ/XXII/2.

32. In response to a question, it was stated that the introduction to document CAJ/XXII/2 did not set out the objectives of the revision of the Convention, because they were evident from earlier discussions and from the proposals themselves.

33. The Delegation of the Federal Republic of Germany recalled that a proposal would be made to insert in the final provisions a clause on the notification of a member State's extension of the Convention to animal breeds.

34. The Committee generally felt that the proposals for revision of the Convention should not deal with the protection of animal breeds at the present time.

35. It was stated that it would be difficult to discuss Article 5 without representatives from patent circles.

36. It was proposed that the word "right" be used throughout the Convention instead of "rights" or "protection."

Article 1 and Article 2(1)

37. The proposed new text of Article 1(1) was generally welcomed as a strengthening of the Convention. However, the explanations given on both Articles were questioned by some delegations, in particular the link with the proposed deletion of Article 2(1) and the comment in paragraph 2 of the comments on Article 1.

38. Several delegations expressed the view that the policy of UPOV on the question of "double protection" should be clearly stated. One delegation spoke against the lifting of the "ban on double protection," and advocated a revision of the Convention that would make it unnecessary to resort to double protection. The Delegation of the United States of America spoke in favor of such lifting on the basis of experience in its country, which had shown that there were no interferences and certainly no undesirable interferences. In addition, the Convention should not in its view contain provisions which could hamper developments in intellectual property law.

39. It was underlined that the "double protection" issue might not be of great significance if it were taken in its strict meaning, i.e., restricted to the case of plant variety protection and a patent being both sought for one and the same variety as such. The simultaneous grant of two forms of protection was not possible in many countries because of the general principles of law, because of the provisions excluding plant varieties from patent protection that were to be found in patent laws and patent conventions, and because of the fact that plant varieties generally would not meet the patentability criteria. In addition, there might not be much interest in obtaining patent protection where plant variety protection was available. The deletion of Article 2(1) would therefore not cause many problems.

40. Several speakers were of the view that the more important issue concerned material that was not a variety, e.g. genes, plant populations not meeting the criteria of distinctness, homogeneity and stability, etc. More generally, the Delegation of the Federal Republic of Germany considered that a provision in the Convention prohibiting or restricting the grant of patents, such as the present Article 2(1), or directions given to member States, were not a suitable way of safeguarding the rights under the Convention. In particular, such a provision could be circumvented by appropriate formulation of the patent claims, and in many instances it would not be obvious for the authorities whether a claim did indeed cover in practice a variety or an array of varieties. It therefore advocated the inclusion of a collision norm as proposed in document CAJ/XXII/6, under Article 5, ensuring that rights under the Convention could also be exercised in the event of there being a conflicting patent. Provided that such a collision norm was introduced, it could agree to the proposed deletion of Article 2(1). That solution was supported by industry in the Federal Republic of Germany. It was also seconded by several delegations at the session.

Article 2(2) (Present)

41. The proposed deletion of Article 2(2) was supported by all delegations but one, which felt it desirable to maintain the provision and agreed to its being transferred, if maintained, to Article 4. Reference was made in that connection to the fact that the deletion of Article 2(2) did not necessarily have the effect of prohibiting a limitation of protection within a genus or species.

Article 2 (New)

42. General.- The proposal to introduce definitions in a new Article 2 was generally accepted.

43. Definition of "species".- It was explained, and agreed, that in that definition "plant material" would mean any kind of material down to cell level, including protoplasts but excluding cell parts.

44. It was suggested that if the definition were accepted, Article 4(1) should be modified to read "This Convention shall be applied to all botanical species."

45. It was suggested that there might be some merit in adopting into the Convention the definition contained in the International Code of Nomenclature for Cultivated Plants to achieve harmonization in the field of botany. The Office of the Union replied that the provision of the International Code had been considered but not retained, in particular because it meant that any characteristic might be used to establish distinctness and the existence of a different variety.

46. It was suggested that the words "created or discovered" should be inserted before the words "plant or plant material." Attention was drawn in that connection to the fact that the addition might exclude preexisting varieties from the scope of the definition.

47. Definition of "breeder".- It was proposed that the definition be deleted to avoid confusion.

48. It was further proposed that the words "natural or legal" be inserted before "person." However, it was stated in reply that the word "person" could be interpreted to mean "natural or legal person," while in certain legal systems the breeder could only be a natural person, legal persons being only entitled to a derived right, e.g. as a result of an employment contract. It was therefore suggested that the purpose of the definition should be analyzed and the definition amended accordingly if necessary.

49. It was pointed out that Article 1(1) contained an element that defined the concept of "breeder" that should be inserted in Article 2(iii).

50. The Office of the Union stated that, according to its understanding, the proposed definition of the breeder would also apply to a group of breeders, subject to the general rules governing the various situations (independent breeders, joint breeders, employee breeder).

Article 3

51. The Committee agreed to the proposed deletion of paragraph (3). One delegation stated, however, that its agreement was conditional on a satisfactory solution being found for Article 4, some of the proposals for which did not go far enough in its view.

Article 4

52. In the course of the discussions, the following proposal was put forward and agreed upon as a basis for further consideration:

> "(1) This Convention shall be applied to all botanical species.
>
> "(2) Notwithstanding the provisions of paragraph (1), any member State of the Union may, on account of special economic or ecological conditions prevailing in that State, decide to limit the application of the provisions of this Convention to the species for which the exploitation of plant material has acquired, or is expected to acquire, importance and for which the examination may be carried out in accordance with the provisions of Article 7."

The comments made that are relevant to the above proposal are given below.

53. Concerning paragraph (1), it was stated that it would be very difficult for some countries to extend protection to all or a large number of botanical species. Moreover, an obligation to do so might make it difficult to attract new member States. One delegation stated that it would be preferable to have a ten-year period for extending protection to all species as provided in the alternative proposal in the Office draft.

54. Concerning paragraph (2), it was stated that the criteria on which the relevant decision could be based were very subjective and could lead to too large an exclusion from protection. It was therefore suggested that exclusions on the ground of special economic conditions, mentioned in the main proposal of the Office draft, should require the consent of the Council (the suggestion also applied to exclusions under the above proposed text and under a provision similar to it contained in the present Article 2(2)). It was argued in that connection that the Council might not be the proper organ to judge whether the criteria were met at national level and, on the other hand, that such a rule would restrain member States from seeking and making exclusions.

55. Concerning the reference to "importance," it was stated that attempts to define further the concepts involved might just lead to the problem being shifted on to other concepts, and that the reference could be used by industry as an argument for seeking extension of protection to a given species.

56. Finally, it was mentioned that the reference to "species" (rather than to "botanical species") would allow for limitations of the kind at present provided for in Article 2(2).

Article 5

57. General.- In introducing its proposal contained in document CAJ/XXII/6, the Delegation of the Federal Republic of Germany stressed that it was based

on the same principles as the Office draft, but differed mainly in the following respects:

(i) Its terminology was taken over from patent law rather than copyright law. In particular, the breeder's right was extended to the use of material of the variety, since in some instances it could only be exercised at that stage (it being understood that, as a result of the principle of exhaustion, it could only be exercised once).

(ii) It distinguished more clearly in its layout between mandatory and optional exceptions to the breeder's right.

(iii) Mandatory exceptions comprised two cases drawn from patent law and the "breeder's exemption."

(iv) The "dependency" provision was made optional for the time being in view of the fact that it might be difficult for some States to introduce it and that there were other possibilities that had not yet been explored, e.g. a limitation on the right to apply for protection.

(v) A collision norm had been added to regulate the effects of other intellectual property rights.

58. Basic scope of protection (paragraphs (1) and (2)(a)).- It was stated that the right granted gave excessive control over the exploitation of the variety, and that another formulation, e.g. a right to exclude others from doing certain acts, should be considered.

59. Some delegations questioned the references to "material" and "derived material," as explained in paragraph 4 of the comments in the Office draft. One delegation suggested inserting the word "propagating" before the word "material" in paragraph (2)(a); it stated that it could not agree to extending protection to end-products and to giving an excessive right to the breeder if that gave rise to increases in prices and to a widening of the price differences between protected and non-protected products. On the other hand, it would agree to an extension of protection to products imported from countries without protection.

60. It was explained in that connection that the proposal was not to grant additional rights, but to enable the breeder to exercise his right once--and once only--on some material other than propagating material in the event of his having been unable to exercise it on the propagating material; there was therefore no question of increasing prices. The possibility of extending rights to imported products had been considered but rejected: there were also cases in domestic production activities in which the breeder was not able to assert his right at the level of the propagating material because information on its production and use was not readily available. One particular case was that of cell cultures used in the pharmaceutical industry. In addition, limitation to imported material would create different situations in terms of burden of proof and enforcement of the right, depending on the species and the production technique. The only solution possible was therefore a general extension of the right to the end-product combined with adequate provision for exhaustion of the right.

61. Exclusions from protection (paragraph (3) in the Office draft and paragraphs (3) and (4)(a) in the German draft).- It was agreed that the next draft would be based on the German draft.

62. The Committee discussed at length whether the Convention should deal specifically with the so-called "farmer's privilege." The Delegation of the Federal Republic of Germany explained that the present text of the Convention did not provide for a "farmer's privilege"; it merely defined the scope of protection in such a way that, under Article 5(1) of the Convention, a farmer could freely produce seed for sowing in the following year. In this respect, national laws differed quite noticeably. That was the reason for the Delegation's proposal of mandatory exclusion from protection of "acts done privately for non-commercial purposes" in paragraph (3)(a) and the possibility of making further exclusions in paragraph (4)(a). The "farmer's privilege" would be covered by the latter. Paragraph (3)(a) was based on patent law so as to benefit from existing case law; the same applied to paragraph (3)(b).

63. One delegation explained that, with respect to agricultural species, there was an increase in its country in commercial seed processing with mobile seed cleaners, a situation that was comparable to that obtaining in other countries with cooperatives processing the seed under contract. That was in its view a problem that had to be dealt with. However, it was not felt proper to go too far in preventing farmers from producing their own seed and processing it with their own equipment, both on political grounds and in view of the enforcement problems.

64. It was stated in reply that the issue was whether or not the Convention should be burdened with an issue that it had not addressed so far. If it were, some member States would have to amend their legislation to introduce limitations on the breeder's right that were not provided at present. On the other hand, the limitation introduced into the Convention might be too restrictive for some member States. Attention was also drawn to the difficulty of introducing a provision that would be fair for all species, all production systems and all national circumstances obtaining at present and in the future.

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.

69. It was stated in that connection that a system enabling plant breeding "piracy" to be combated was welcome, but that the proposal under discussion seemed to treat essentially similar situations differently.

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.

71. Collision norm (paragraph (5) of the German draft).- The Delegation of the Federal Republic of Germany explained that patents, e.g. for genes, would in future have a greater influence on the plant varieties and seeds industry. There were attempts and a general tendency to lay down patent claims that would go very far along the normal production chain, and in fact circumvent the exhaustion principle. There was therefore a need to establish some safeguards to ensure peaceful and undisturbed operation of the seed industry without thereby hampering the normal enforcement of patent rights. The question could also be considered from the point of view of legal rationality: the respective fields of application of the various legislative texts had to be preserved. The purpose of the proposed text was to give the owner of a plant breeder's right a possibility of defending himself against a patent owner who used his right in a way that went beyond the normal effects of the patent. It was not intended, on the other hand, that the normal effects of the patent should be regulated in the Convention.

72. Several delegations expressed doubts as to the possibility of regulating the effects or the exercise of patent rights in the UPOV Convention. It was also stated that it could be a matter to be solved by private agreement between the parties and that the whole issue should be discussed in a wider forum.

Article 6

73. Order of the provisions.- It was agreed that the order proposed in the German draft should be followed in the next draft.

74. Origin of initial variation (paragraph (1)(a)).- It was agreed that the phrase "whatever may be the origin, artificial or natural, of the initial variation from which it has resulted" should deleted in the next draft in view of the proposed definition of "variety" in the new Article 2.

75. Important characteristics (paragraph (1)(a)).- The basic concept of each of the three alternatives set out in the Office draft was supported by at least one delegation. It was therefore agreed they would be included again in the next draft (with "relevant" being replaced by "important" in Alternative 2).

76. Common knowledge (paragraph (1)(a)).- It was agreed that the next draft would be based on the German draft, subject to the addition of a reference to protection being also a circumstance establishing common knowledge.

77. Homogeneity (paragraph (1)(c) in the Office draft and paragraph (1)(b) in the German draft).- The principles underlying the proposed new text were accepted after it had been made clear that the characteristics to be considered were all those that were used in the testing of distinctness (in practice all those mentioned in the Test Guidelines).

78. Stability (paragraph (1)(d) in the Office draft and paragraph (1)(c) in the German draft).- The principles underlying the text proposed in the German draft were accepted. It was also proposed that the present introductory phrase of the paragraph ("the variety must be stable") be kept, but it was replied that that would cause problems in relation to forfeiture.

79. Concerning the deletion of the reference to the breeder in relation to the particular cycles of reproduction or multiplication, it was explained that it was felt that the breeder should not be able to make special conditions in respect of such cycles.

80. Novelty (paragraph (1)(b) in the Office draft and paragraph (1)(d) in the German draft).- It was agreed that the novelty condition should be based on acts of commercial exploitation, and no longer solely on acts of commercialization.

81. Reference was made in that connection to a possible difficulty arising from the above amendment in relation to exhibitions of varieties, since they could be considered acts of exploitation.

82. Concerning the deletion of the reference to the agreement of the breeder, it was explained that the reason was to avoid arguments over the circumstances of an act which destroyed novelty, it being understood that the proposed text would not prevent member States from protecting the rights of the breeder against abusive acts of third parties. Some delegations expressed reservations on this proposal.

83. Concerning the "period of grace" embodied in subparagraph (i), reservations were expressed as to its being made mandatory.

84. Concerning the extension of the six-year period embodied in subparagraph (ii) to cereals (and other species), it was indicated that the logical consequence of the proposal was that the period would have to be extended to all species, whereas the Convention already provided for a liberal requirement of novelty.

85. In conclusion, it was agreed that the next draft would be based on the German draft with the addition of the final sentence appearing in the Office draft.

Article 7

86. Title.- The amendment proposed in the German draft was agreed to.

87. Paragraph (1).- It was agreed that the next draft would be based on the German draft, although several delegations considered that the Convention should not go into details of a subordinate nature on which, moreover, there was already a common understanding.

88. It was proposed that a reference to "any other means appropriate to each species" be added. It was argued against this proposal that the reference to "other trials" would cover all possibilities and make the addition redundant.

89. Paragraph (3).- The proposal to move the provision at present contained in Article 30(2) to Article 7 was agreed to. The addition of a reference to growing tests was not agreed to.

90. It was proposed that "by" be substituted for "between" in the phrase "contracts may be concluded between the competent authorities." It was argued, however, that the provision's purpose was to offer to authorities a basis for escaping the normal treaty law provisions applying to international agreements, and that it did not concern contracts with private persons and bodies.

91. Concerning the obligation to base decisions on the results of growing tests already conducted or in the course of being conducted by another member State, referred to in paragraph 3 of the comments in the Office draft, one delegation stated that it would prefer that there be no obligation in the Convention and that the matter be dealt with in contracts between authorities.

92. Paragraph (4).- It was agreed that the new draft should establish in a first sentence the obligation to provide for provisional protection. The sentence should provide flexibility for the starting date of such protection in view of the various existing practices. The present reference to abusive acts should be deleted, since it was not appropriate in the context and required interpretation. A second sentence should then define the minimum scope of provisional protection along the lines of the proposal in the German draft, in view of the fact that some member States already had a system providing for a wide scope.

93. It was noted that the Convention should not address the question of the consequences of a failure to obtain the grant of the right because there were already different systems in the member States, and even several systems in one and the same State.

Article 8

94. Paragraph (1).- It was agreed that the paragraph would be split into two, in view of the fact that the first sentence might be interpreted as calling for a specification of the maximum, and not the minimum, period of protection.

95. It was also agreed that the Convention should not specify mandatory periods, and that decisions on the lengths of the minimum periods and on the species concerned by each period should be left to the Diplomatic Conference. It was noted in that connection that the proposals made by international organizations might create a need to include many more species in the list of those to which the longer minimum period applied. It was also explained that the proposal to increase the minimum period for trees was based on the fact that there was a proposal to extend the scope of protection to the final product (subject to exhaustion), and that the breeder should have an opportunity to exercise his right in respect of final products such as timber coming on the market after a very long time.

96. Paragraph (2).- The Committee rejected this paragraph.

Article 9

97. It was explained that the Office draft was based on proposals made at the third Meeting with International Organizations to the effect that the provisions on compulsory licensing should be strengthened.

98. In introducing its proposals, the Delegation of the Federal Republic of Germany stated that general restrictions should only be made if they were clearly in the public interest, e.g. for competition or phytosanitary reasons. Individual restrictions should be considered pragmatically. Compulsory licenses did not just imply an authorization to exploit, as in the case of patents, but also placed the breeder under the obligation to produce and deliver a certain quantity of plant material; they were not an efficient tool for ensuring the exploitation of a variety since they would not exert enough pressure on the breeder to ensure that the obligation was met. To that extent the general policy should be to do away with compulsory licenses altogether. However, if compulsory licensing provisions were necessary for political reasons, they should be restricted to the cases where the exploitation of the variety was necessary in the public interest and where there was no substitute for the variety. In any event, it was not for the State to intervene in marketing strategies and to enable anyone interested to obtain a share of the market for a variety.

99. The preceding views were generally shared by the Committee. Some delegations stated that their States were opposed to the concept of compulsory licenses; however, they could accept some provisions in the Convention based on the concept of public interest.

100. In conclusion, it was agreed that paragraph (1) of the new draft should be based on the present text of the Convention and paragraph (2) on the Office draft.

Article 10

101. Paragraph (2).- It was stated that the proposal did not represent a real change in practice from the present text of the Convention. Nevertheless, it was agreed that the proposal should be maintained in the next draft.

102. Paragraph (3)(a).- It was asked whether the final part was necessary, since what mattered was the fact that the variety was being maintained, not so much how it was being maintained. In addition, it was stated that the provisions concerned might jeopardize trade secrets.

Article 11

103. The proposal to refer to special agreements in paragraph (3) was generally welcomed as a means of stimulating cooperation between member States and as a clarification. It was suggested, however, that one might examine whether the provisions concerned should not be inserted in Article 29.

Article 12

104. Paragraph (1).- The proposal to extend the priority period was supported, but several delegations reserved their position, particularly on account of the relation to and consequences for the (industrial) patent system and on account of examination aspects.

105. Paragraph (3).- Several delegations referred to the fact that the four-year period provided in that paragraph could delay for too long a period a decision to annul a right on account of an application enjoying priority. It was therefore suggested that the period should be reduced or the breeder requested at least to submit material permitting the existence of the variety to be checked. Concerning the second proposal, it was recalled that it would go against the purpose of the provision in question, which was to enable the breeder to file applications at a time when he had only a limited stock of propagating material.

Article 13 and Article 6(1)(e)

106. General discussion.- Two delegations spoke in favor of deleting Article 13 of the Convention and five against; the general sentiment was that Article 6(1)(e), namely the provision making the grant of a right dependent on the variety having already been given a denomination, should be deleted.

107. Introducing its proposal, the Delegation of the Federal Republic of Germany recalled that scientific and common language provided designations only for botanical categories of plants. There was a need to provide also for designations at the variety level for administrative and commercial purposes to ensure that varietal material was properly identified. The Convention was not the proper place to deal with such things as product liability matters, but legislation on those matters would not have a starting point if there were no obligation to provide a designation. It was therefore useful and necessary to provide in the Convention for an identification system that was generally mandatory. On the basis of those considerations, the substantive provisions could be drastically reduced as proposed in the German draft.

108. Concerning a double system of nomenclature, referred to in the Office draft, the Delegation of the Federal Republic of Germany had some reservations. It considered that the Convention should be restricted to the international denomination, leaving the matter of regional denominations to the breeder. It further considered it problematic to provide trademark-type protection for denominations.

109. Several delegations stated that they would be prepared to examine amendments to Article 13 provided that the need for them was demonstrated. On that basis, the Committee examined the proposal made in the German draft.

110. Paragraph (1).- The Committee discussed at length the consequences of the proposed text. The Delegation of the Federal Republic of Germany explained that, in essence, its proposal was a consequence of the proposed deletion of Article 6(1)(e) and provided the possibility for authorities to determine the denomination where the applicant failed to propose one. Several delegations emphasized that the authorities should not under any circumstances establish a variety denomination on their own initiative. It was therefore proposed that the first part of the present text be reverted to.

111. Concerning the second part, it was indicated that it could be omitted without prejudice to the generic character of the denomination; that character was a natural consequence of the obligation to use the denomination. Consequently member States could maintain in their national law the provision declaring the denomination generic if it were to be deleted from the Convention.

112. In connection with the same paragraph, it was suggested that provisions might be introduced on the exchange of information between authorities of member States (present paragraph (6)).

113. Paragraph (2).- It was proposed that the reference to "a member State of the Union" be deleted to ensure that the denomination established in a member State was the same as the denomination established or in use in certain non-member States. It was further recalled that reference would also be made to protection, in line with the decision taken on Article 6(1)(a) (see paragraph 76 above).

114. Paragraph (4).- The Delegation of the Federal Republic of Germany explained that this paragraph was a summary of the essential rules embodied in the UPOV Recommendations on Variety Denominations. Subparagraph (b) concerned confusions with other indications which might appear on a seed bag or on a label, and not the intrinsic features of the denomination and the ease with which it could be pronounced and remembered. Its purpose was to prescribe that the denomination should not be liable to confusion with, for instance, a date or the reference number of the producer. The Delegation noted in that respect that a distinctive, commonly understood symbol characterizing the denomination would considerably reduce the risk of confusion; such symbols already existed in some States.

115. Several delegations supported the idea of introducing a special symbol for variety denominations.

116. It was noted that some elements of the present paragraph (2) should be introduced into the proposed paragraph (4).

117. It was further noted that, depending on the final form of the paragraph, the UPOV Recommendations on Variety Denominations might become redundant and could then be abolished.

118. Paragraph (5).- It was suggested that the provisions on the use of variety denominations should be left to national legislation and that, in any event, the proposed paragraph went into too much detail concerning denominations indicated in writing. Concerning the first comment, it was stated that a large proportion of the protected varieties were not subject to the seed trade laws and that there were no rules outside the Convention on the use of the denomination for those varieties. It was therefore proposed that one simply state the rule that the variety denomination was to be used in the exploitation of the variety.

119. It was noted that both the present text of paragraph (7) and the proposed paragraph (5) restricted the obligation to use the variety denomination to propagating material, whereas such use also extended to some other kinds of material. It was therefore proposed that at least the present text of paragraph (7) should be maintained, that if the variety was mentioned in connection with the marketing of plant material, either because of legal provisions or in line with common practice, the variety denomination should be used, and that in all other cases there should be an obligation to give information, if requested, on the identity of the variety concerned.

Article 14

120. The Committee agreed to the deletion of this Article.

Program for the Twenty-third Session of the Committee

121. The Committee agreed that, subject to any new matters that might arise, the twenty-third session would be devoted mainly to the revision of the Convention.

122. This report was adopted by the Comittee at its twenty-third session, on October 11, 1988

[Annex follows]

CAJ/XXII/8

ANNEX/ANNEXE/ANLAGE

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