Disclaimer: unless otherwise agreed by the Council of UPOV, only documents that have been adopted by the Council of UPOV and that have not been superseded can represent UPOV policies or guidance.

This document has been scanned from a paper copy and may have some discrepancies from the original document.

———

Avertissement: sauf si le Conseil de l'UPOV en décide autrement, seuls les documents adoptés par le Conseil de l'UPOV n'ayant pas été remplacés peuvent représenter les principes ou les orientations de l'UPOV.

Ce document a été numérisé à partir d'une copie papier et peut contenir des différences avec le document original.

———

Allgemeiner Haftungsausschluß: Sofern nicht anders vom Rat der UPOV vereinbart, geben nur Dokumente, die vom Rat der UPOV angenommen und nicht ersetzt wurden, Grundsätze oder eine Anleitung der UPOV wieder.

Dieses Dokument wurde von einer Papierkopie gescannt und könnte Abweichungen vom Originaldokument aufweisen.

———

Descargo de responsabilidad: salvo que el Consejo de la UPOV decida de otro modo, solo se considerarán documentos de políticas u orientaciones de la UPOV los que hayan sido aprobados por el Consejo de la UPOV y no hayan sido reemplazados.

Este documento ha sido escaneado a partir de una copia en papel y puede que existan divergencias en relación con el documento original.

UPOV

CAJ/XXIII/ 4.
ORIGINAL: German
DATE: August 9, 1988

INTERNATIONAL UNION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS

GENEVA

ADMINISTRATIVE AND LEGAL COMMITTEE

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

REVISION OF THE CONVENTION

- - - - -

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

Document prepared by the Office of the Union

The Annex to this document contains the observations and proposals from the Delegation of the Federal Republic of Germany communicated by letter dated August 2, 1988, from Mr. H. Kunhardt to the Office of the Union.

[Annex follows]

ANNEX

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

...

Article 5:

Paragraph (2)(a)(ii).- The owner of the right in a line which must be used repeatedly for the production of a hybrid can only have the right to exclude others from using the line and not, in addition, the exclusive right to commercialize material of the hybrid. Such an extension to material produced by a third party goes much beyond the principle of dependence of patent law and is generally foreign to industrial property law.

The reservation in favor of "any right which may be granted to another breeder" would also extend to the owner of a right in another line which is repeatedly used in the production of the same hybrid. The latter owner would also have the exclusive right to commercialize hybrid seed. What rights then remain for the breeder of the hybrid is not dealt with in the proposal and remains unclear.

Conceptually, a right which is subject to the right of a third party or competes with a right of the same nature cannot be considered as "exclusive"; exclusive rights granted independently to several persons would be incompatible.

The rights of the owner of a line cannot therefore be described as a positive right of exploitation, but only as a right of prohibition, whereby the following observations are of relevance.

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.

Article 13(6), alternative 1

A provision like the second sentence should not be included. If identification of the variety is mandatory under national law in the cases mentioned, it need not be repeated in the Convention that the denomination must be used.

If it is not mandatory under national law, it should not be made so under the Convention simply because it is usual in the State concerned.

These comments do not relate, at the present stage, to proposals concerning

- the drafting of the proposed provisions;
- the systematic presentation of the provisions;
- the issues to be dealt with under articles 15 et seq.

[End of document]