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UPOV

INTERNATIONAL UNION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS

GENEVA

ADMINISTRATIVE AND LEGAL COMMITTEE

Twenty-third Session
Geneva, October 11 to 14, 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-third session from October 11 to 14, 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.

Adoption of the Agenda

3. The Committee adopted as its agenda the document CAJ/XXIII/1.

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

4. The Committee adopted as the report on the twenty-second session the document CAJ/XXII/8 Prov., subject to some minor amendments.

New Developments in the Field of Plant Variety Protection

5. The Chairman stated that the national reports to be given under this item should not be the same as those to be given to the twenty-second ordinary session of the Council. What was required for the present purposes were reports on matters of interest of a legal nature, new events and subjects which might be relevant to the discussions on revision of the Convention.

6. The Delegation of the Federal Republic of Germany stated that the ordinance mentioned at the twenty-second session of the Committee (referred to in paragraph 8 of document CAJ/XXII/8) had entered into force on July 27, 1988. This ordinance had the effect of extending protection almost to the whole plant kingdom.

7. The Delegation of Denmark said that protection had been extended to four further taxa (sweet pepper, eggplant, elm and cornsalad). A new Board for Plant Novelties had been appointed together with two committees to assist the Board in technical matters.

8. The Delegation of Spain said that, as from July 1988, protection had been extended to six further taxa (almond, red clover, lentil, melon, ryegrass, watermelon).

9. The Delegation of the United States of America said that the Department of Agriculture had produced a proposed regulation to define the term "saved seed" which was used in the Plant Variety Protection Act, in order to curb abuses which occurred under the "farmer's exemption." The proposed definition was to the effect that the saved seed would be a quantity not exceeding an amount which would be used to plant a certain acreage on one's own farm in the course of normal farm operations.

10. The Delegation of France said there was a firm intention to extend protection to about 30 further species including, in particular, vegetable and ornamental species. The decision of the Tribunal de Grande Instance of Nancy concerning the absence of a "farmer's privilege" in the French law had been confirmed on appeal. The structure of the GEVES was currently under review.

11. The Delegation of Italy said that a decree to be published on extension of protection would probably now cover 18 further species.

12. The Delegation of Japan stated that, as from May 18, 1988, there was no longer an obligation on applicants for F_1 varieties to submit seeds of the parent lines of the variety.

13. The Delegation of the Netherlands said that protection had been extended to 52 further species and preparations were being made for a further extension of protection.

14. The Delegation of New Zealand said that, in June 1988, the plant variety protection legislation had been substantially amended and fees had been increased by 106%. This increase in fees had had the effect of reducing the number of applications received. The amendments enabled the collection of royalties on trees and plants produced by a grower for production by himself of fruit or cut flowers, protected rights holders against compulsory licence applications for three years and extended the period of protection from 18 to 23 years for woody species and from 15 to 20 years for non-woody species. The control of unlicenced imports was facilitated and provisional protection introduced.

15. The Delegation of the United Kingdom stated that its country was in the process of extending protection to four further species (borage, Impatiens, Kalanchoë, x Festulolium) and extension of protection to further vegetable species was being considered. A government report on the testing and certification system had been submitted to ministers and, if approved, the 92 recommendations contained in it would be implemented.

16. The Delegation of Australia stated that the plant variety protection legislation was now fully operational and that 53 taxa were eligible for protection.

17. The Delegation of Canada said that there had been a Bill in Parliament concerning plant variety protection, but an election had been called with the result that the Bill had died. It would therefore be necessary to reintroduce the Bill after the election.

18. The Delegation of Finland stated that within the Ministry of Agriculture a working group concerned with plant breeding had been formed. The working group had proposed that plant breeders' rights should be recognized in Finland and that appropriate legislation should be prepared, and that furthermore such legislation should enable Finland to join UPOV. It was therefore envisaged that a Committee would soon be formed to prepare plant breeders' rights legislation.

19. The representative of the European Economic Community said that, during October 1988, the Commission of the European Communities had published a proposal for a Council Directive on the legal protection of biotechnological inventions. Also during October 1988, the Commission had made available to the governments of member States a draft Council Regulation on Community Breeders' Rights.

20. The Delegation of Argentina stated that agriculture was an industry of great importance in its country and that it was studying the subject of the UPOV Convention and its revision with great interest. Argentina had a 10 years old law which was currently under review by a committee which would shortly be making recommendations.

Revision of the Convention

General

21. Discussions were based on documents CAJ/XXIII/2, 3, 4, 5 and 6. Document CAJ/XXIII/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 Article 5; document CAJ/XXIII/4, containing the proposals prepared by the Delegation of the Federal Republic of Germany, 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."

22. The Committee took note of the position of ASSINSEL on the protection of biotechnological inventions, reproduced in document CAJ/XXIII/3.

General Discussion

23. The Committee was very appreciative of document CAJ/XXIII/2.

24. Several delegations said that it was necessary, in the work on the revision of the Convention, to ensure that a proper balance was struck between the interests of plant breeders and those of other circles, such as growers and consumers.

25. Several delegations said that they were in favor of there being joint work by UPOV and WIPO to solve problems in their overlapping areas of interest. It was stated that such joint work could take into account discussions concerning ethical considerations which arose in relation to patent law, which could have implications for plant breeders' rights. It was also stated that the joint work could lead to a study of the need for a special protection system for achievements within the field of animal breeding.

Article 1

26. There was discussion as to whether paragraph (1) should specify the type of right to be granted rather than simply referring to "a right" since "law" and "right" were the same word in German. Accordingly, the following suggestions were made for a term to replace "a right": "a variety right," "a plant breeder's right," "an intellectual property right," "an industrial property right." It was also suggested that there be a definition of such a right in Article 2. Thus, for example, if the term "a plant breeder's right" were chosen, the definition might be "a plant breeder's right shall mean a right granted in accordance with the provisions of this Convention." There was also a suggestion that paragraphs (2) and (3) be put before paragraph (1).

27. The Committee noted these suggestions but agreed that the proposed text for Article 1 should be retained in the next draft.

Article 2 (Present)

28. The "ban on double protection".- The Committee discussed what was generally understood by the "ban on double protection" at present contained in Article 2(1) of the Convention. It was agreed that this meant that member States (except the United States of America) were obliged to give the same form of protection to all varieties of a given genus or species. The form of protection could be either a patent or a special title of protection, but once a choice had been made for a particular genus or species, varieties of that genus or species could only be protected under that form of protection. However, whether protection was afforded by means of a patent or a special title, it was required to conform to the provisions of the Convention.

29. The Chairman stated that the present proposals for revision of the Convention did not include a ban on double protection, although in paragraph 5 of the comments on Article 1 (document CAJ/XXIII/2, page 5) there was a possible provision setting out such a ban. One delegation said that if it were intended to maintain the ban on double protection as a rule with legally binding effect, it would be necessary for it to be explicitly set out in the text of the Convention.

30. The Committee discussed the reasons for and against having a ban on double protection. It was stated that one reason for having a ban was that it was desirable for varieties of the same species to be examined under the same system. Thus, if patents had been granted for varieties of the same species as that of a variety for which an application was filed for plant variety rights, variety testing work might be very difficult, since the testing authority might not have access to the patented varieties, the descriptions of them might not be sufficiently precise, the patented varieties might not be uniform and stable as required by plant variety protection legislation and it might be difficult to establish novelty.

31. Another reason given for maintaining the ban was that the UPOV plant breeders' rights system was very effective in practice; breeders knew that in nearly all cases where they applied for plant breeders' rights for a variety which was a product of original breeding, such rights were granted, and were enforceable, virtually without exception. Accordingly, it was not desirable for the excellent features of the UPOV system to be weakened by the existence alongside it of another system which was not truly complementary.

32. One delegation said that removal of the ban on double protection might cause confusion amongst consumers and the users of plant varieties. Thus, for example, if some varieties of wheat were protected by plant breeders' rights and others by patents, farmers might become confused through not knowing what their rights were.

33. Against having a ban on double protection, one delegation stated that the criteria for protection and the scope of protection were very different as between patents and plant breeders' rights, although in its opinion the systems were complementary. Accordingly, breeders should be able to make a choice as to the form of protection. The Convention should not try to regulate internationally a type of protection, namely patent protection, to which it was not addressed.

34. Concerning the argument put forward that the existence of the patent system alongside the plant variety protection system weakened the latter, it was stated that the question should not be whether the system was weakened but whether the interests of plant breeders were weakened; the interests of plant breeders would not be weakened by the availability of two systems of protection. The response to this latter point of view was that if the plant variety protection system was weakened (by the existence alongside of a non-complementary patent system), the result would be a weakening of the position of plant breeders.

35. As a general point, several delegations stated that if the rights given under the Convention were strengthened in line with the present proposals for Article 5, it would be unlikely that breeders would wish to use anything other than the plant breeders' rights system.

Article 2 (New)

36. General.- The proposed definitions were generally accepted as being satisfactory at the present time, although it was agreed that they would have to be reviewed before a diplomatic conference and at that time it might be considered necessary to include further definitions. The Committee's discussions in relation to the proposed definitions are set out below.

37. Definition of "species".- The inclusion in the definition of species of "a subdivision of a species known by a common name" was questioned. It was explained that the reason for defining "species" in this way was because, in the proposals for revision, the word "species" was used instead of the term "genus or species" which was used in the present text of the Convention. Accordingly, it was necessary to define "species" so as also to cover a genus.

38. Definition of "variety".- One delegation said that confusion could arise from the use of the word "variety" in the Convention which could mean either a cultivated variety or a botanical variety. The use of "variety" could imply that the Convention was intended to provide protection for botanical varieties.

Since the Convention only concerned cultivated varieties, the delegation suggested that the word "cultivar" should be used instead of "variety". However, it was pointed out that since the word "variety" was used in other legal texts, in particular in seeds laws and in patents laws, a change to the word "cultivar" would create even more confusion.

39. It was pointed out that the definition of "variety" depended upon the meaning of the word "material" which was used in the definition. The meaning of "material" was discussed in connection with Article 5. It was suggested that the definition of "variety" should be left open until a meaning was agreed upon for the word "material."

40. Since the meaning of the term "essentially derived variety" was discussed, and would in future be discussed, in connection with Article 5, it was suggested that it might also be necessary to have a definition of this term.

Article 3

41. The Committee agreed to the proposed deletion of paragraph (3).

Article 4

42. Paragraph (1).- There was general sympathy for the principle of the mandatory application of the Convention to all botanical species, although it was stated that this might cause difficulties for some existing member States and it might make it difficult to attract new member States. One delegation stated that the possibility of having time periods for the extension of protection, as in the present text of the Convention, should still be considered.

43. It was pointed out that the increased testing which would result from the extension of protection to further species could be dealt with by the conclusion of bilateral testing agreements between member States, by using existing reference collections in institutions, or by having the breeder grow the test for the purposes of the examination.

44. The question was raised as to whether the requirement that the Convention be applied to all botanical species meant that, as a matter of principle, national legislation was to apply to all botanical species or that, in practice, national legislation was to apply to all botanical species. One delegation replied that the requirement should relate to the principle and not the practicalities, since a member State could not be expected to set up a protection scheme for a species when it was not known whether there was any commercial interest in it. In line with this view, it was suggested to change paragraph (1) so that it read "this Convention shall be applicable to all botanical species." However, it was stated that such a change might make the Convention more restrictive than it should be, and it was necessary to give further consideration to whether paragraph (1) was to deal with the principle or the practicalities.

45. One point of view expressed was that it should be possible to make an application for plant breeders' rights for any variety in any member State. A State should be obliged to introduce a scheme of protection for a species if there was a demand from a breeder of any member State, unless there were good reasons for not introducing such a scheme. Breeders needed to know that protection would invariably be available if they embarked upon a breeding programme in a species for which breeders' rights had not hitherto been granted.

46. Paragraph (2).- The Committee discussed whether a member State should itself decide whether it should be exempted from the requirement to extend protection to the whole plant kingdom or whether this should be a Council decision. One delegation was of the view that a member State should always be able to exclude protection of certain species, without seeking the Council's consent, where questions of public interest might be involved. Another suggestion was that any member State should be able to notify the Council, within a certain period, if it was not happy with a limitation of protection made by another member State.

47. It was stated that allowing member States to limit the application of the provisions of the Convention "on account of special economic or ecological conditions prevailing in that State" would allow a member State to ignore the interests of foreign breeders. It was therefore proposed to find an alternative to the words "in that State."

48. It was also proposed to delete the words "on account of special economic or ecological conditions prevailing in that State" because they would cause confusion in interpretation.

49. As a result of the foregoing discussion concerning paragraph (2), the following further proposal for that paragraph was put forward:

> "(2) Where, in a member State of the Union, the application of this Convention to a particular species is contrary to public interest or causes exceptional economic difficulties, that State may exclude the application of this Convention to that species. The member State of the Union concerned shall notify the exclusion to the Secretary-General, stating the reasons therefor. The Council shall state its position on this exclusion."

50. In relation to this proposal, it was stated that if there was to be an obligation on a member State to notify the Council of species it was excluding from protection, such notification should be made before the species was excluded from protection since there would not be any point in having notification after the event.

51. One delegation suggested that there should be a further possible reason for a State to exclude the application of the Convention to a particular species, namely lack of commercial interest. This delegation was, however, in the light of the discussion, prepared to accept a formula where the public interest was the only ground for exclusion. The next draft should set out the arguments. If it was intended to be possible to apply for breeders' rights for, for example, a coffee bush in any member State, the relevant principle should be spelled out.

52. The Chairman concluded the discussion by stating that member States should recognize that to implement a revised Convention it would be necessary to change their laws. Where UPOV member States currently defined narrowly the species to which the law was applicable, it might in future be necessary to use higher taxa which covered hundreds of species with a view to covering the whole kingdom of plants. It was agreed that both the proposal set out in document CAJ/XXIII/2 and the one produced during the course of the discussion should be included in the next draft, subject to amendments to reflect the Committee's deliberations.

Article 5

53. Basic scope of protection (paragraph (1) in the German draft).- After briefly discussing the proposal for the basic scope of protection set out in paragraphs (1) and (2) in the Office draft, the Committee decided that further discussion should be based upon paragraph (1) of the Alternative II proposal of the German draft, that is to say the breeder's right should be expressed negatively as a right to exclude others from doing certain acts rather than as a positive right for the breeder to do such acts.

54. The Committee discussed in detail what was meant by the term "material of the variety" in paragraph (1)(ii). There were differing opinions as to the meaning to be given.

55. It was stated that the word "material" should be understood in its broadest sense and should not be limited to propagating material in order to give the breeder rights in respect of end products of his variety when these were uniquely derived from his variety, whether transformed or not.

56. Two examples were given to show why end products should be covered. The first example concerned cut flowers of a rose variety which were produced in a country where there was no protection for the variety and then imported into a country where the variety was protected. It was agreed that the breeder should have rights in respect of the cut flowers in the importing country, and therefore the term "material of the variety" should cover such cut flowers. The second example given concerned starch produced from a potato variety in a country where there was no protection for the variety, which was then imported into a country where the variety was protected. In relation to this example it was asked where protection would end. One delegation said that the starch could be used in the production of shirts, and the question arose as to whether breeders' rights should prevent the importation of the shirts. In relation to this question it was stated that it should be considered whether plant variety rights should be any less extensive than other intellectual property rights. The question of where to cut off the breeders' right was the same as that which arose in patent law in relation to the directly obtained product of a patented process. It was also stated that, in addition to considering the principle of extending protection, it was necessary also to consider the practicability of extension.

57. One delegation suggested that protection should extend to the first direct product of the variety. Another suggestion was that protection should extend only to material which could be reproduced into the variety, which would include cut blooms but exclude starch as this was an extract. However, in relation to this suggestion, it was stated that it would be desirable to extend protection further, in order to prevent the import of processed plant material from countries where there was no plant variety protection.

58. The following definition, which distinguished various possible cut-off points was prepared at the request of the Committee:

"(iv) "material" shall mean:

- reproductive or vegetative propagating material;

[- material that has the potential of being used as reproductive or vegetative propagating material;]

- harvested material;

- produce [directly] obtained from harvested material."

59. The Committee examined this proposed definition. Some delegations were against the inclusion in it of "produce obtained from harvested material." It was stated that including such produce made the definition open-ended and changed the nature of the plant breeder's right in a very fundamental way; it gave breeders a choice of the point in the production system where they would exercise their right. It was stated that if the breeder were to have a right over produce obtained from harvested material, parts of the trading community such as supermarkets and importers, which had not hitherto had to consider plant breeders' rights, would now be directly affected by them. The view was expressed that such an extension was going too far. It was emphasized that the breeder could only exercise his right once, normally at an early stage. The definition was designed to cover situations where it was not possible for the breeder to exercise his rights at the earlier stage. It was agreed that the proposed definition should be included in the present report so that it could be discussed further at the national level, but with a full explanation, emphasizing that the definition was for discussion purposes only.

60. Exclusions from protection (paragraph (2) in the German draft).- Concerning the last line of paragraph 2(i), it was asked how it was possible to determine the purpose intended when material was put on the market as, for example, soya beans could be used for a number of purposes. In response to this question, the example of seed was given to show that certain types of material had generally accepted intended purposes. It was stated that the normal intended purpose of seed was for sowing and it was also intended that the resulting crop would be harvested and taken for crushing. Furthermore, it was stated that if, as a result of the language of paragraph 2(i), the intended purpose of the material was to become important in determining the extent of the right, the breeder would be obliged to make his intention clear by, for example, having a statement of the intended purpose on the bag in which material was sold.

61. Concerning paragraph 2(ii), it was asked whether it was necessary to have both the terms "privately" and "for non-commercial purposes." It was explained that a situation could be envisaged where a commercial activity was carried on in a private garden and that should not be covered by the exclusion of paragraph 2(ii).

62. There was discussion whether paragraph 2(ii) should be deleted provided that paragraph (1) was amended so as to make it clear that the right granted only covered commercial acts. The Delegation of the Federal Republic of Germany explained, however, that the structure of its proposal for paragraphs (1) and (2) was based on patent law and the advantage of using this structure would be that the jurisprudence of patent law could be applied. Several delegations said that it would be advantageous to have access to the jurisprudence of patent law and they therefore supported the proposed structure of paragraphs (1) and (2). It was therefore agreed to keep paragraph (2) at the present time and to reconsider its wording later.

63. Concerning paragraph 2(iii), it was asked whether "acts done for experimental purposes" meant acts done for breeding purposes. If so, it would be unnecessary to have paragraph 2(iii) because of paragraph 2(iv). However, it was explained that "experimental purposes" could cover activities which were not connected with breeding, such as, for example, assessment of the value of

the variety or study of the variety for academic purposes. It was stated that a university carrying out an academic study on the variety should not have to seek a license from the breeder. It was therefore agreed that paragraph 2(iii) should be retained.

64. In conclusion, it was agreed that the proposed text of paragraph (2), as a whole, was acceptable as drafted.

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.

78. Further limitations on the right at the national level; "farmer's privilege" (paragraph (4) in the Office draft).- Several delegations spoke against the broad wording of paragraph (4) on the grounds that the effects of the Convention should be uniform in the member States and breeders wished to see a strengthening of their rights. It was stated that the broad wording of this paragraph would not encourage such uniformity and the strengthening of rights.

79. One delegation proposed that paragraph (4) should be deleted entirely. Another delegation proposed that paragraph (4) be drafted more explicitly, so that if it were intended that this paragraph cover the "farmer's privilege" and the limitation at present provided for in Article 2(2) of the Convention, the paragraph could be drafted as follows:

"Each member State may provide for a farmer's exemption and 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, provided that such exemption or limitation does not cause excessive prejudice to the legitimate interests of breeders."

80. The Committee also had a general discussion of the "farmer's privilege," and it considered, in particular, the question of where to draw the line between acts which should be allowed to fall under the "farmer's privilege" and acts which should not. One delegation said that there was no pressure from breeders in its country to prevent farmers from saving and using their own seed for sowing. On the other hand, the delegation stated that the use of mobile or static seed cleaners was an abuse of the "farmer's privilege" since the cleaned seed was equivalent to certified seed. Another delegation could see no rationale for penalizing farmers who did not own a seed cleaner but purchased a cleaning service.

81. The Delegation of the United States of America said that in its country a proposed regulation had been drafted to define the term "saved seed" which was used in the Plant Variety Protection Act, in order to curb abuses which

occurred under the "farmer's privilege." The proposed definition was to the effect that the saved seed would be a quantity not exceeding an amount which would be used to plant a certain acreage on one's own farm using normal farm operations. Several other delegations stated that in their countries there were laws regulating commercial seed cleaning.

82. Reference was made to the practice of farmers acquiring a single fruit plant, multiplying that plant and harvesting and selling the fruit produced. In such a situation the breeder of the variety of fruit would receive only a single license payment for the sale of the single plant although a large quantity of fruit of the variety could be sold. It was stated that at present this situation was covered by the "farmer's privilege," although it was not desirable that it should be covered. Some delegations had difficulty in principle in accepting the "farmer's privilege" for some species and abolishing it for others. One delegation was of the view that the "farmer's privilege" should be removed and that the method by which a royalty was collected was the real problem.

83. The representative of the European Economic Community said that the "farmer's privilege" was important in the Community's agricultural policy but that it was too early to say where its limits would be drawn.

84. It was stated that the Committee should not give up on the possibility of having a specific term in the Convention covering the "farmer's privilege" since it might be beneficial to both sides, farmers and breeders, to know where the limits of the "farmer's privilege" lay.

85. In concluding the discussion on the "farmer's privilege," the Chairman stated that a new text of the Convention should still allow for the "farmer's privilege" to exist in member States. Most delegates wanted the "farmer's privilege" to be restricted as much as possible and to be harmonized throughout the member States, although at the present time it was not clear how it should be harmonized.

86. Collision norm (paragraph 6 in the Office draft).- The Delegation of the Federal Republic of Germany introduced this provision and stated that there were attempts, particularly in connection with the WIPO Committee of Experts on Biotechnological Inventions and Industrial Property, to extend the protection of a patent on a gene so as to cover all material in which the gene was present. The reason for the inclusion of paragraph (6) was that it was important to create a borderline between patent rights and plant breeders' rights so that right holders would be clear as to the material on which they could exercise their rights. Furthermore, users of varieties should be given a clear indication of how far rights went. In the patent law it was possible to make claims of doubtful validity; with breeders' rights the scope was clearly established at the outset so that users understood their position.

87. It was agreed that the wording of paragraph (6) would have to be changed in order to take into account the fact that the Committee had decided to follow the proposal for Article 5(1) set out in Alternative II of the German draft.

88. The Delegation of the Federal Republic of Germany explained that it was necessary to ensure that the user of a variety had a clear legal basis for his activities. It was clearly a question dealing with plant breeders' rights and a collision norm could therefore be included in the Convention. It could equally be included in the patent law, notwithstanding the fact that patent

law did not normally deal with the scope of protection, if a binding rule for patents could be established. The present provision should be maintained to highlight the issue, but it should ideally be discussed in a joint UPOV/WIPO meeting.

89. One delegation said that if patent law did not limit patent rights, such activities as were covered by the "farmer's privilege" or the "breeder's exemption" would fall within the scope of patents.

90. Some delegations expressed doubts as to the inclusion of paragraph (6) on the grounds that the Convention should only address plant breeders' rights and should not try to limit other industrial property rights. One delegation stated that if, because of paragraph (6), a patentee could not refuse the use of a patented invention, there would in effect be a compulsory licence. For this reason, that delegation could not support the concept of paragraph (6). It was also questioned whether it was necessary to have a collision norm in the Convention in view of the fact that licences were possible between the owners of patent rights and plant breeders' rights where there was an overlap of those rights.

91. On the other hand, it was stated that if the question of the interface between patents and plant breeders' rights was left to be dealt with at the national level, there would not be harmonization between the approaches adopted. Several delegations said that they were in favor of having a joint meeting between UPOV and WIPO to discuss this whole question but emphasized that national delegates should seek to agree prior to attending a joint meeting.

Article 6

92. Order of the provisions.- It was suggested that the order could be changed so that the requirement of novelty at present set out in paragraph (1)(d) appeared before the requirements of distinctness, homogeneity and stability set out in paragraphs (1)(a), (b) and (c). It was stated that such an order might be more logical since it was first necessary to determine whether a variety was novel before testing for distinctness, homogeneity and stability. It was agreed that this suggestion should be considered further.

93. Important characteristics (paragraph (1)(a)).- The majority of delegations were in favor of alternative 1. It was stated that, of the alternatives, it gave the simplest and most clean-cut rule. It was pointed out that it allowed for a determination of distinctness on the basis of a combination of characteristics. With respect to alternative 2, it was stated that the concept of originality, which it brought in, would create new difficulties. It was agreed that alternative 2 should be deleted. Several delegations were in favor of alternative 3. However, one delegation stated that this alternative involved the concept of important characteristics and the delegation said that it thought one objective of revising Article 6 was to remove that concept. It was pointed out that alternative 3 did not allow for a determination of distinctness on the basis of a combination of characteristics.

94. It was agreed that further discussion should be based upon alternatives 1 and 3.

95. Common knowledge (paragraph (1)(a)).- Both alternatives A and B were supported by several delegations. A third possible alternative, set out in

document CAJ/XXIII/6, was put forward by the Delegation of Sweden. It was agreed that all three alternatives should be included in the next draft. As a general point, it was stated that problems arose when descriptions were available but plant material was not; such descriptions might not be adequate. In practice some countries restricted consideration to their reference collections and this meant that they considered only varieties which were in existence.

96. Homogeneity (paragraph (1)(b)).- The principles underlying the text of paragraph (1)(b) 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.

97. Stability (paragraph (1)(c)).- The principles underlying the text of paragraph (1)(c) were accepted.

98. Novelty (paragraph (1)(d)).- The question was raised whether to replace the word "novel" in the first line of paragraph (1)(d) by the word "new" since "novel" could mean "different" and the use of the word "novel" could therefore cause confusion with the requirement of distinctness in paragraph (1)(a). It was replied, however, that the more normal meaning of "novel" was "new." No decision was taken on whether to amend the text on this point.

99. It was agreed that a one year grace period for the commercial exploitation of the variety should be optional since several delegations stated that it did not exist in their countries. The square brackets in the second and third lines of subparagraph (1)(d)(i) would therefore be deleted.

100. The question was raised as to what exactly would be covered by the term "vine" in the second line of subparagraph (1)(d)(ii). It was suggested in this connection to use the Latin name "Vitis" in order to avoid any misunderstanding. It was suggested by one delegation, but refuted by another, that the true distinction should be between woody and non-woody plants. It was agreed that this question should be discussed further at the national level with technical experts.

101. It was suggested that the word "abusive" in the penultimate line of paragraph (1)(d) be replaced by the word "unauthorized."

102. Several delegations stated that they preferred the proposal set out in document CAJ/XXIII/6 to that of document CAJ/XXIII/2 since they wished to keep the phrase "with the agreement of the breeder." It was stated that the use of the words "with the agreement of the breeder" would facilitate proof in litigation.

103. It was agreed that both the proposals set out in documents CAJ/XXIII/2 and 6 should be presented as alternatives in the next draft.

104. Requirement of giving a denomination (paragraph (1)(e)).- It was agreed that paragraph (1)(e) should not be deleted at the present time, since the decision as to whether to delete it should be taken after further discussion of Article 13.

105. Other conditions for protection (paragraph (2)).- One delegation suggested that consideration be given to having some standardization of the formalities referred to in paragraph (2). The Committee took note of this suggestion.

Article 7

106. Paragraph (1).- This paragraph was generally accepted by the Committee. One delegation asked whether it was necessary to refer to the kinds of activity which the competent authority could undertake, as was done in the second sentence. It was explained that the purpose of the second sentence was to make it more obvious that the testing needed not be carried out by an official body and to emphasize closer cooperation between member States in testing work.

107. Paragraph (2).- This paragraph was generally accepted by the Committee. In connection with this paragraph it was stated that if a dependency system were established in line with the proposals for Article 5, the competent authorities might need to require applicants to submit documents, which would become part of the publicly available record, showing the variety's breeding history. At present, breeders might feel that such documents should be confidential, but a requirement to submit such documents could be considered to be akin to the disclosure requirements of the patent system. The Office should elaborate this principle in a future document.

108. Paragraph (3).- This paragraph was generally accepted by the Committee.

109. Paragraph (4).- Several delegations stated that they supported the principle set out in the first sentence and that this principle was already contained in the national laws of their countries.

110. The Delegation of the United States of America stated that in its country there would be difficulties in introducing provisional protection as far as utility and plant patents for plant varieties were concerned.

111. It was stated that it might be unfair to potential infringers that provisional protection commenced upon the filing of an application if there was no publication of that application. It was suggested that it be considered whether there should be notification to potential infringers before they became potentially liable.

112. One delegation said that the second sentence of this paragraph should be more clearly linked to the first, and that it should be made clear that the second sentence was a specific application of what was set out in general in the first sentence.

Article 8

113. In relation to paragraph (2), the question was raised as to whether it should be stated that vines and trees included their rootstocks, as was done in the present text of the Convention. It was replied that any rootstock of a vine or a tree was itself a vine or a tree, and therefore it was not necessary to have an explicit reference to rootstocks in the text.

114. It was stated that the discussion which had taken place under Article 6 in relation to the meaning of the word "vine" would also apply to Article 8.

Article 9

115. The Delegation of the United States of America stated that the proposal for Article 9 might cause problems in its country because it would adversely

affect patent rights. However, the Delegation's position on the proposal would depend upon how the scope of the right was defined in Article 5. The Delegation suggested the following alternative proposal for paragraph (1):

> "The free exercise of the right may not be restricted except to the extent provided for in the national law of the member States of the Union."

Article 10

116. Paragraph (1).- The question was raised whether there should be a reference to a right being annulled because another breeder established priority in accordance with the provisions of Article 12. It was replied that this situation was already covered by paragraph (1) because the variety (whose right was to be annulled) would not be distinct from another variety which was deemed to be one of common knowledge because of the priority application.

117. Paragraph (3).- Concerning subparagraph (3)(a), it was stated that the method of maintaining the variety was not relevant and that the important question was whether the variety was being maintained. It was therefore proposed to replace all the words after "propagating material" in the third line by the words "or he does not provide evidence that the variety is maintained."

Article 11

118. Concerning subparagraph 3(c), one delegation stated that the rule that it implied, whereby the refusal of protection in one country of the group would lead to refusal in the others, was too inflexible. The delegation stated that it could however agree to the last two lines of the subparagraph which would cover the case of a small country making use of the examination facilities of another country and recognizing the right granted by that other country.

Article 12

119. Paragraph (1).- Several delegations said that they were in favor of a 24 month priority period. The Delegation of the United States of America stated that the 12 month priority period at present provided for in the Convention was in line with the Paris Convention for the Protection of Industrial Property and its national patent law. Since its country provided protection for plant varieties under, inter alia, utility patents, it would have to express a reservation on any extension of the priority period beyond 12 months as far as utility and plant patents were concerned. Several other delegations said that they did not wish the priority period to be extended beyond 12 months.

120. Paragraph (3).- Several delegations said that they were in favor of a period of two years for the furnishing of documents and material. One delegation said that even a four year period would seem to be too short in cases where overseas material had been held up in plant quarantine procedures. However, in relation to this view, it was stated that once the material was in the quarantine procedures, the breeder could be deemed to have satisfied the requirement to furnish plant material.

Article 13

121. It was agreed that the first proposal should be deleted for reasons of presentation, since at the twenty-second session of the Committee, a majority of delegations had spoken in favor of maintaining Article 13 in the Convention.

122. Concerning the second proposal, one delegation stated that paragraph 4(b) might be too subjective. The delegation stated that it would prefer this paragraph if it were understood that variety denominations consisting only of figures or letter/figure combinations were acceptable, and would not be prohibited under this paragraph.

Article 14

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

Program for the Twenty-fourth Session of the Committee

124. The Committee agreed that, subject to any new matters that might arise, the twenty-fourth session would be devoted mainly to the revision of the Convention. After discussion it was decided to recommend to the Consultative Committee that a fresh document be produced for the next meeting of the Committee which would be used in turn as the basis of a document to be discussed in a meeting with international organizations in October 1989. This recommendation was accepted by the Consultative Committee at its thirty-eighth session held on October 17, 1988.

Chairmanship of the Committee

125. The Committee expressed its thanks to Mr. F. Espenhain (Denmark) upon the termination of his term of three years as Chairman and congratulated him on the progress achieved during his period in office.

126. This report was adopted by the Committe at its twenty-fourth session, on April 10, 1989.

[Annex follows]

CAJ/XXIII/7

ANNEX/ANNEXE/ANLAGE

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