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agreed by the Council of UPOV, only documents that have been adopted by the Council of UPOV and that have not been superseded can represent UPOV policies or guidance.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

PM/1/4
ORIGINAL: English
DATE: April 20, 1990

INTERNATIONAL UNION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS

GENEVA

FIRST PREPARATORY MEETING FOR THE REVISION OF THE UPOV CONVENTION

Geneva, April 23 to 26, 1990

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

Document prepared by the Office of the Union

1. Following the session of the (joint UPOV/WIPO) Committee of Experts on the Interface Between Patent Protection and Plant Breeders' Rights held from January 29 to February 2, 1990, the International Chamber of Commerce (ICC) organized mainly for the international non-governmental organizations a conference with a view to bringing further together the views of those organizations. The Conference was held on April 5 and 6, 1990, in the WIPO and UPOV headquarters building. The Conference was entirely organized by ICC and the involvement of UPOV and WIPO was limited to the provision of the meeting venue. Officials of UPOV and WIPO were invited and participated as observers.

2. The following non-governmental organizations were represented:

AIPH International Association of Horticultural Producers

AIPPI International Association for the Protection of Industrial Property

ASSINSEL International Association of Plant Breeders for the Protection of Plant Varieties

CIOPORA International Community of Breeders of Asexually Reproduced Ornamental and Fruit-Tree Varieties

COMASSO Association of Plant Breeders of the European Economic Community

EPI	Institute of Professional Representatives before the European Patent Office
FEMIPI	European Federation of Agents of Industry in Industrial Property
FICPI	International Federation of Industrial Property Attorneys
FIS	International Federation of the Seed Trade
GIFAP	International Group of National Associations of Agrochemical Manufacturers
ICC	International Chamber of Commerce
JPA	Japan Patent Association
MPI	Max Planck Institute for Foreign and International Patent, Copyright and Competition Law
PIPA	Pacific Industrial Property Association
UNICE	Union of Industrial and Employers' Confederations of Europe
VBN	Association of Dutch Flower Auctions

In addition, the Commission of the European Communities and the European Patent Office were also represented. A few States were also represented.

3. At the close of the Conference, the participants took note--for the majority with satisfaction--of a document, entitled "Final Communiqué", which is reproduced in Annex II to this document (only Mr. B. Le Buanec reminded the Conference that the compromise position could not be supported by the majority of ASSINSEL which considered that the protection system based on an improved UPOV Convention should be the sole system applicable to plant varieties; Mr. M. Kamps supported this view on behalf of COMASSO). Annex I gives more details on the nature and meaning of the final document as viewed by Mr. T.M. Clucas, President of ASSINSEL, who chaired the Conference.

4. The Conference broke on both days into groups to discuss specific matters. Annex III contains the reports on the discussions of those groups (in English only).

[Annexes follow]

ANNEX I

International Chamber of Commerce
Chambre de Commerce Internationale
38, Cours Albert 1er, 75008 PARIS
Telephone : (1) 49.53.28.28
Cables : Incomerc-Paris
Telex : 650770
Telefax : (1) 42.25.86.63

1990-04-11gz

Date :

Votre / Your reference :

Notre / Our reference :

Pièces jointes / Enclosures :

Dr. Arpad Bogsch
Director General
World Intellectual Property Organization
Geneva

Dear Dr. Bogsch,

ICC/WIPO-UPOV Conference on the Interface between Patent Protection and Plant Breeders' Rights - Geneva, 5 and 6 April 1990

First and foremost, may I reiterate warmest thanks on behalf of all the participants at last week's "Interface" meeting for the hospitality, facilities and generous support provided by your organisation.

Enclosed herewith are copies of the Agenda papers, a final Communiqué and the Reports of the various Working Parties. As you will be aware the final Communiqué got a rather mixed reception from the meeting: indeed delegates from two organisations of importance, Assinsel and Comasso, signalled serious reservations with the drafted text, at least in respect of the so-called "double protection" issue. Thus, it may be wise to give equal weight to the reports of the Working Parties and the Communiqué.

It should be stressed also that the meeting was essentially an informal one. As such the comments and views expressed do not constitute "adopted" organisational positions though it may be that, with further refinements, such a development could follow eventually. Finally, it should be borne in mind that all interests compromised to reach this point which it was felt offered the possibility of a balanced solution. Therefore, it is important to treat the matter as a "whole", since any attempt to be selective of the various components could risk introducing an unacceptable element of imbalance.

Notwithstanding the foregoing caveats, including the reservations expressed by some organisations, the meeting was viewed by participants to have been constructive, productive and helpful. Above all, it was felt that it had contributed to much improved mutual understanding amongst the different "Interests" present. It was also considered that much tangible progress has been achieved and that the raw basis of a solution might, perhaps, have emerged from the discussions.

It is not clear what the next development should or could be. It may well be appropriate to draft a refined concept (for all "Interests" to consider) which builds on the progress achieved at last week's meeting. It seems likely that such a move would be welcomed and, given the prevailing will to develop a solution, might give birth to multilateral acceptance of a relevant way forward.

If there should be any query in relation to the enclosures, please do not hesitate to contact Mr. T.W. Roberts or Mr. D. Croze of ICC or the writer.

Yours sincerely,

pp. T. Martin Clucas
Chairman
NGOs Interface Meeting

Copy: Messrs. Greengrass and Schäfers

[Annex II follows]

ANNEX II

ICC/WIPO-UPOV CONFERENCE ON THE INTERFACE BETWEEN PATENT PROTECTION AND PLANT BREEDERS' RIGHTS

Geneva, April 5 and 6, 1990

FINAL COMMUNIQUE

PROPOSALS FOR A BALANCED SYSTEM OF PROTECTION FOR INNOVATIONS IN THE FIELD OF PLANTS AND PLANT VARIETIES

A revised UPOV Convention should provide for protection for "plant varieties" subject to their fulfilling the DUS, commercial novelty and denominations requirements.

A broad protection covering all reproduction and, subject to exhaustion, all sales, import, export, stocking, etc., should be extended to the breeder. It is important that material of the variety may be included in the right.

The protection should embrace not only the initial variety but also varieties which are essentially derived from that variety, but protected varieties, as such, should be available, in all other aspects, as a source of initial variation in the breeding of other varieties.

The Convention should provide for protection by a special right (which could take the form of a patent) but would permit protection by industrial/utility patent where the additional criteria of the patent system were fulfilled. Whichever form is chosen, a variety, in order to be protected, must fulfill the DUS and denomination requirements. In all circumstances, the variety must be available as a source of initial variation in the development of other varieties.

It must be possible for a patent right and a plant breeder's rights to co-exist in a single plant variety.

Where a patent application is examined which relates to an innovation in the field of plants, and if a plant variety is expressly claimed, the DUS, commercial novelty and denomination requirements must be fulfilled in relation to that claimed variety. If the claims are for a plant or cell or for a process for producing a plant or cell and it is unclear whether the plant or cell is a representative of a variety, the examiner must invite the applicant to disclaim the plant variety. If he does so the DUS, commercial novelty and denomination requirements will be dispensed with. If he refuses to disclaim, then he must fulfil the additional requirements.

It is envisaged that the same technical resource would be used by both plant breeders' rights authorities and patent authorities for examinations for DUS. For denominations, both systems would use the same administrative resource.

Both systems would share a common data base for DUS requirements. The disclaimer procedure would ensure that all plant varieties howsoever protected would be clearly identified and included in a common data base.

The legal certainty inherent in the UPOV system would be preserved in these circumstances. The patent system would retain its ability to respond to technical change and, in the field of plants, would benefit from more appropriate treatment of claims for varieties.

Politically, a provision in the patent system permitting the use of varieties per se as an initial source of variation would rebut criticism from genetic conservation lobbies as well as meeting the widely felt needs of all plant breeders. The obligation to permit varieties to be used as an initial source of variation must be written into the patent law wherever necessary. Only if a resulting variety infringed the patent for the initial variety would there be a restriction on the exploitation of the resulting variety. In this respect patent law is no different from plant breeders' rights law. If a resulting variety protected by plant breeders' rights infringes (i.e., is not distinct from) the variety used as an initial source of variation, there will equally be restrictions on the exploitation of the resulting variety!

The revised UPOV Convention should allow only one derogation from the broad new breeder's right created by Article 5. States would be permitted, under the single permitted derogation, to create a defined right for the grower to produce seed of a protected variety of certain specified species on his own farm and using his own equipment.

[Annex III follows/
L'annexe III suit/
Anlage III folgt]

ANNEX III/ANNEXE III/ANLAGE III

ICC/WIPO-UPOV CONFERENCE ON THE INTERFACE BETWEEN PATENT PROTECTION AND PLANT BREEDERS' RIGHTS

Geneva, April 5 and 6, 1990

REPORTS FROM GROUPS

REPORT OF GROUP 1: "DEFINITION OF VARIETY"

(Rapporteur: Gérard J. Ureelmann)

In view of the general purpose of these days' meeting, the discussion was focused and thereby limited to "plant varieties." Some members did feel that it was appropriate to have a definition, some did not. Reasons to have a definition were expressed for the following reasons:

(a) The bare existence of the exclusion provision for plant varieties in EPC and some national patent legislations;

(b) the sake of the PBR system itself.

Specifically in relation to (b) it has been taken aboard that the removal of a definition by UPOV in 1978 has not changed the world dramatically.

As the people who handle plant material apply the word variety from their specific point of view, e.g., taxonomists, botanists, growers, processors, consumers, it was felt appropriate that for the purpose of this meeting the definition should be sought for legal reasons.

It was felt that, from that viewpoint, "variety" could be seen as a concept in relation to plants.

So indicating a group of plants (no limitations to the number of plants) sharing roughly all characteristics in common, which are dealt with by the agriculture community (in a broad sense, so including, for example, horticulture and forestry) as an independent unity for their cultivation.

So to be a variety, the group of plants:

- has to be independent, so DISTINCT;
- has to share the characteristics, so UNIFORM;

and, of course,

- has to stay to its characteristics through subsequent generations, so STABLE;

In conclusion, the Group felt it appropriate to define a plant variety as follows:

> "A group of plants which fulfills the specific legal requirements concerning Distinction, Uniformity and Stability."

The Chairman feels it appropriate to thank both the NGO members and the GO members for their valuable contributions to the discussion.

REPORT OF GROUP 2: "SCOPE OF PROTECTION"

(Rapporteur: Richard C.F. Macer)

The Group decided, because of many overlaps with areas allocated to other discussion groups, that it would deal with broad issues only and with the proposed wording of the draft Convention, in particular Article 5.

The initial feeling of the Group was that scope of protection for PVP was becoming more carefully defined as a result of drafting of Article 5 which overall was helpful.

If the definitions proposed in Article 2 were adopted, then the combination of Articles 2 and 5, with the two provisos, below, would give sufficient scope of protection for PVP. There was a majority view that Article 5(5) should be removed, or substantially modified to make it clear that patents on genes could be infringed by plant varieties and that a modified Article 5(4) could be more appropriately accommodated within Article 9 which already dealt with matters of "public interest."

The identification in Article 2(iv) of subdivisions of "material" into:

- reproductive or vegetative propagating material,
- harvested material,
- products,

greatly enhanced the right and would help in clarifying difficulties anticipated in defining the point of "exhaustion of rights." Uncertainties in the product area were recognised. However, the Group believed that a more thorough study of the new text of the draft Convention would establish that the problems might be less substantial and the scope might be adequate. The resolution could be arranging appropriate terms in licences issued by the Holder of Rights. Such problems could not necessarily be dealt with within the terms of the Convention (for a variety of reasons) but care would need to be exercised in drafting licences to ensure that restraints did not conflict with other laws, e.g., Competition Law.

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

Classes of essentially derived varieties were agreed as:

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

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

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

Article 5(2)(iv) emphasised the reality of the plant breeding industry and the "breeders" exemption. This was the cornerstone of the PVP system and the free flow of germplasm was important. It was the major difference with the patent system.

A view was expressed that with a clarification that the use of a variety for breeding purposes would not infringe a patent, then there would be no problem with the establishment of a "breeder's exemption" in the patent system. This would be dependent upon "compulsory licences" being confined to requirements of over-riding national interest because the resulting variety may infringe an earlier patent and that right needed to have its normal effect.

If in some way there was a possibility of clarifying, and equating, the breeder's exemption and the research exemption then some of the entrenched objections to doubled protection would disappear.

The answers to the two questions posed to the Group are:

1. Does an increased scope of protection (as in proposed new Article 5) have any implications for the interface?

   Yes - the increased scope of protection (as is proposed in new Article 5) does have implications for the interface.

2. Does the increased scope strenghten PVP to the point at which it provides a protection sufficient for the introducer of a biotechnological innovation - a novel gene?

   No, there is a basic difference in the nature of patent and PVP rights, their bases, i.e., variety or invention, and the point in time when such protection is sought.

REPORT OF GROUP 3: "FARMER'S PRIVILEGE

(Rapporteur: Walter Smolders)

The Group noted that there exists no clear definition of the term "farmer's privilege" (FP)

The legal basis for FP is depending on the country narrow or not-existing (see Denmark). In countries where the FP principle is accepted, it is essentially derived from the equivalent of Article 5(1) of the UPOV Convention. Said Article can be understood to allow a farmer to regrow seeds under certain circumstances (whereby the circumstances are not specified, and it is not stated that regrowth is allowed without compensation to the breeder).

In certain countries, and for a number of species, FP has deteriorated to excesses that were certainly not envisaged by the legislator. The PBR system was i.a. set up to secure an adequate remuneration to the plant breeder. The prospective of an adequate remuneration constitutes the major incentive for a breeder to invest in plant breeding. The regrowth of seeds by the farmer without remuneration of the breeder under the alleged FP should therefore be stopped. It is however accepted that farmers do save seeds provided the breeder gets an adequate royalty.

It is noted that in particular in politically less sensitive areas (fruit trees) the FP has in certain countries been abolished or may de-facto be abolished. Major problems remain, i.a. with respect to cereals, grasses, potatoes, berries and in the horticultural area, but encouraging developments curtailing or aiming to curtail excesses under the FP are noted (see e.g. Nancy decision and Article 13(4), second paragraph, of the 6 star version of the Commission proposal for a Council Regulation (EEC) on Community Plant Variety Rights).

Seed cleaners and breeders and farmers' associations should be encouraged to develop a fair and feasible system to secure a royalty income for the breeder. Such system will presumably have to vary, depending on the plant species involved. For cereals, royalties may probably be set up such that there is a guarantee that both smaller farmers employing the services of mobile seed cleaners and "industrial" farmers having their own seed cleaning equipment pay their contribution. For other species, it would probably be more suitable to recoup a royalty based on sales of material of the variety, or else.

It seemed clear to the Group that there is no equivalent of the FP in the patent system. It is however admitted that it is very problematic to try and enforce patent rights against a (small) farmer.

It is not felt that the non-existence of FP in the patent system is in itself a sufficient reason for allowing patents for plant varieties. Rather should this difference be an incentive for UPOV to improve the PBR system such that the exemption is made equivalent to the exemption for private non-commercial purposes taking into account the public interest.

REPORT OF GROUP 4: "EXHAUSTION OF RIGHTS"

(Rapporteur: George Brock-Nannestad)

It was recognized that exhaustion of rights belongs rather to competition regulation by Society (anti-monopoly and anti-trust) than to patents and PBR. For instance, many states do not regulate exhaustion of patents in their patent laws.

Exhaustion was felt to mean the inability of a right to function against an act that would have constituted an infringement, had not the rights' holder already obtained a financial gain from his right.

It was recognized that in protected living material both the material as such and its function as a generator of more living material were protected by a right, and that exhaustion could be separate for each feature.

In view of the discussion of interface, a series of practical examples was discussed, and the following was taken as the current position:

Be they patents or PBRs, the only point of conflict between them is the instance when some patented biotechnological feature (material or process) is found useful for inclusion in a new variety. Such would require the consent of the patent holder before commercialisation.

Exhaustion could apply in each area as currently established.

The following condensed Statement was agreed upon as a workable definition common to patents and PBRs:

If no restriction is made at the point of sale or licence as to use (and if any restriction made is lawful), then the sale or licence exhausts the rights as far as material as such sold or licensed is concerned, be they patents and/or PBRs.

REPORT OF GROUP 5: "DOUBLE PROTECTION"

(Rapporteur: Dr. Brian W. Nash)

It was agreed that patent is a good way of protecting inventions relating to technology.

It was understood that if you want a bicycle with a dynamo you may need to take a licence from a person who owns a patent for a bicycle and to take a licence from a person who owns a patent for a dynamo.

We all are opposed to patents which are too broad or obviously invalid.

We noted in passing that if someone discovers a machine he can protect it simultaneously in Germany, by means of a patent or a Gebrauchmuster".

We notice that the system as it exists today is working reasonably well and we felt there was no need to start completely from scratch.

We understood how it came about that Section 53(b) was written before modern biotechnology was born.

The patent and PBR system have worked reasonably well. PBR have the advantage that they can have a longer life than a patent.

There was some lack of understanding concerning the meaning and the consequences flowing from the ban in the UPOV Convention. Someone said it was like an uncertain boundary between countries. One person said leave it out of UPOV and leave it to the nations to decide.

If a new PV is developed some members wanted the right of choice between PBR or patent or the right to obtain both. It is nowadays possible to describe genetic data and to deposit seeds or plant cells and if a Patent Office felt unable to decide on whether or not a PV met the criteria for a PV it could pass this work out to a PBR office.

We all need new varieties and breeders need access to genetic material and if a PV is patented then the PV is not free for a breeder to work on and produce a new commercial variety. To put it another way if the source variety is covered by a patent then production of the new variety would need a licence.

We asked ourselves the question if someone develops by genetic engineering a better sugar beet which produces more sucrose and patents his invention, will the breeders who develop the PV display this characteristic have to take a licence: the consensus was yes.

REPORT OF GROUP 6: "COLLISION NORM"

(Rapporteur: Dr. Karl F. Gross)

Since the relation between patents and PVRs appeared to be of particular interest, we limited the term "collision" to the situation where a product falls under both titles i.e. a patent and a PVR.

What is the main concern?

Apparently this concern is that patentees might use their patents to prevent breeders from exploiting their PVRs.

Therefore the question is:

Is a collision norm necessary?

Experience from all other sectors suggests that this is not the case. It was felt that there is no need for such a norm at least as far as collision as defined above is concerned.

The main reasons for this attitude are:

1) The patentees' interest to earn a return on their investment in making and developing their inventions.

2) Interested parties are likely to solve such collision problems by voluntary licensing as for instance suggested in the Sydney Resolution of AIPPI of 1988.

3) To a large extent R & D in gen-technology is done by rather small highly specialized enterprises who would depend on cooperation with experienced breeders mainly through licensing.

4) The compulsory license regimes provided by existing patent laws are believed to be sufficient to cope with problems that might arise. In particular whenever there is a case of public interest a compulsory licence will be available in all major countries.

5) A patent is not an unlimited monopoly.

As a result of the discussion the Work Group came to the conclusion that a specific dependency licence for instance as the one suggested in Article 14 of the Draft Directive on Biotechnology is not necessary. It is believed that the circles concerned will behave reasonably. Should it turn out that this is not the case, then appropriate steps could be taken.

REPORT OF GROUP 7: "RESEARCH EXEMPTION"

(Rapporteur: Jasper E. Veldhuyzen van Zanten

The research exemption under patent laws sets free the use of a disclosed patent for developments and for scientific purposes.

Preparation for commercialization of a product, although it may be called an infringement, in practice leads to the situation that a new invention in the scope of an earlier patent can be patented, be it that consent of the patent holder should be obtained for the use of his earlier patent.

Under present UPOV legislation research exemption exists automatically, because a breeder does not need the authorization from a holder of PBR in order to develop a new variety.

It was concluded, that under both patent and PBR legislation the research, meaning the development of new materials and methods, is free on the basis of either a disclosed patent or a released plant variety.

Disclosure and plant genotype being the subjects of release to "free" use by new developers, are wanted by the legislator for the sake of public interest.

Attention was drawn to the case in PBR of hybrid varieties. The release of the hybrid means the availability of the total genotype; therefore protective measures can and should be taken for the parent lines, that constitute the hybrid.

Breeder Y, using the research exemption, could be confronted with three different cases:

1. The use of Variety X, PBR protected.

   a) Any new variety, meeting the DUS requirements, will be free without obligations.

   b) Under dependency, Y may obtain PBR, but he needs authorization from X.

2. The use of variety X, patented variety.

   a) A new variety meeting DUS requirements, may obtain PBR, but Y needs authorization from X under patent law.

   b) A new variety meeting novelty and obviousness requirements may obtain a product patent, but Y needs authorization from X under patent law.

      Y needs to pay a royalty to X to the extent in which Y's new variety will fall under the technical scope of X's patent, and to what extent Y's new variety will damage X's financial interests.

3. The use of variety X, variety containing a patented structure.

   Mutatis mutandis, case 2 will apply.

The group's recommendations were:

1. **A protective provision for constituents of hybrid varieties.**

2. **A provision in patent legislation to define "plant variety" in the same way as UPOV, and create a common data base by obliging patented varieties to pass through the DUS examination procedure.**

3. **A clear statement on patent law that the use of patented genetic structures in research prior to commercialization will not be an infringement of either a patentholder's or a PBR holder's right.**

There seems to be no need to define a special "breeders' exemption", as the word research exemption would cover in principle the same area of activitity under both patent and PBR law.

REPORT OF GROUP 8:"DEPENDENCY (PVPs)

(Rapporteur: Dr. Douglas Gunary)

The current UPOV proposals (Article 5.3) introduce the idea of dependency between two plant variety rights. In order to answer more effectively the questions posed in the briefing document the group first considered the following questions:

1. What is essentially derived?

2. What is the relationship between dependency in Patents and in the Proposed Convention?

What is essential derived?

It was agreed that for a variety to be derived it should retain almost the totality of the genotype of the source variety. It should be understood that the objective is to take over the substantial amount of breeding effort which has gone into producing the initial variety and benefit by some small (in genetic terms) alteration.

The likely ways by which this might be achieved are:

- by mutation, which could, especially for ornamentals, lead to a dependent discovery;

- by back crossing)

- by gene insertion)

What is the relationship between dependency in Patents and in the Proposed Convention?

It was agreed that the use of the word "dependency" for both situations is misleading. In Patent Law dependency has a precise meaning. The concept exists of a patented invention which cannot be worked without making use of an already existing patent. Provided the patent criteria have been met, the second invention gives rise to a dependent patent. Case Law has been established as to the rights of the owners of the respective patents.

In the proposed revision of the convention the concept is of a derived variety. The concept has however frequently been referred to as a dependency system. There is no established Case Law and no relationship at all with the patent system.

The particular questions posed in the briefing document were then answered as follows:

1. Does the dependency system as in UPOV give an answer to the biotechnologist's demand for genuine protection?

If the biotech invention is protected by patent the answer is YES. This is because the biotechnologist wishes to ensure that biotechnology inventions are protected even though they exist in protected varieties. Thus the group accepted that, for example, a patent holder for a gene would have the exclusive right to license the use of that gene, wherever it performed the function for which the patent was granted, including in protected varieties.

2. Is the UPOV dependency system necessary to enable balance between inputs of:

- breeders (varieties)

- patentees (genes)?

YES - provided that in Art 5 (3) of the proposed Revision Alternative I is selected. Thus the exclusive right of a patent holder to grant licences for the use of a gene is matched by the exclusive right of the breeder to grant licences for the use of a genotype. The precise arrangement between the holders of the respective rights would be a matter of normal commercial negotiation.

Public interest should be the only justification for issuing a compulsory licence.

3. Should a close similarity between varieties give rise to dependency?

If we mean phenotype - NO. It is a minimum distance issue.
If we mean genotype - YES. Precise details will have to be worked out on a species by species basis. New technology including RFLPs should be helpful here.

4. Should the owner of the source variety be able to preven all use of the dependent variety?

The group's view was NO - because they wish to retain the research/breeder's exemption.

Should the owner of the source variety be able to prevent exploitation of the dependent variety?

The group's answer here was YES because of their views on Article 5(3). Alternative 1, expressed earlier. There was a single minority view who expressed some reservation on this position.

Infringement

As a final comment the group wished to refer to the practical implementation of the dependency system. They felt that it was up to the owner of the source variety to make the claim of infringement and to provide the necessary evidence.

REPORT OF GROUP 9: "DEFINITION OF MATERIAL OF THE VARIETY"

(Rapporteur: Gérard J. Urselmann)

The Group, after a short discussion, concluded that the above subject relates to the scope of protection and should not be referred to in the definition of "variety".

It was expressed that all product obtained from the variety fall under a potential definition. As these products on one hand consists of reproductive material, enabling regeneration into the whole plants, and otherwise could be extractions from the variety (like e.g. oil, perfume, protein, etc.), it was felt appropriate to keep them separate in a definition.

So in conclusion the group felt it appropriate to define "material to the variety" as follows:

"Reproductive products of the variety plus all other products obtained directly or indirectly from the variety".

Many valuable remarks were made during the discussions for which both NGO and GO members are thanked for.

[End of document/
Fin du document/
Ende des Dokuments]