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INTERNATIONAL UNION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS

GENEVA

FOURTH MEETING WITH INTERNATIONAL ORGANIZATIONS

Geneva, October 9 and 10, 1989

RECORD OF THE MEETING

compiled by the Office of the Union and approved by the speakers

Opening of the Meeting

1. The President of the Council, Mr. W.F.S. Duffhues (Netherlands) opened the Meeting and welcomed the participants, of which the list is given in Annex I to this record, with the following words:

"I shall be your Chairman during these two days and, on behalf of UPOV, I welcome you here in Geneva. It is the fourth time that we have had an official meeting between UPOV, as an intergovernmental organization, and the international branch organizations dealing with plant breeders' rights. Of course, it is not only on these occasions that we meet each other and discuss the problems relating to plant breeders' rights encountered by the members of your various organizations and the way in which the various Governments can be of help in solving those problems.

"For Governments, for States, one way of supporting an internationally oriented branch of industry is to work together internationally, to try to come to a collective standpoint. UPOV, with 18 member States at this moment, is an organization where this can be achieved. That number seems to be quite high, but there are many more countries in the world in which plant breeding work is done. We know that many States are interested in joining UPOV, but we know also that many do not intend to do so. We also know that there is and always will be a certain discrepancy between the wishes of the various professional organizations and their members and the will of or the room available to Governments for action to satisfy the wishes of the international organizations. Apart from international discussion, there are discussions at the national level in the

fields of policy, research, examination of varieties and so on. I think that, although it takes some time, this way of working together in the light of our respective responsibilities is often very fruitful. Therefore, I am very glad to welcome you all here to discuss, not to decide, the revision of the Convention.

"Typically, we examine once in ten years the necessity of amending the Convention, unless the developments in the industry give cause for more frequent review. Both conditions are now fulfilled. The last revision took place in 1978, as you know, and developments have been very fast. The prospects from developments in biotechnology seem to be inexhaustible. The future will show whether they will become reality or not. However, it is clear, in my view, that the nature of plant breeding will not really change, but, with the new techniques, the results will be obtained faster, easier and with greater precision. The new techniques will enable incompatibilities or other difficulties encountered in plant breeding to be overcome and perhaps make possible crossings between genera or species never dreamed of before. So, I must say, we are at the crossroads, both the crossroads for science and the crossroads for legislation. The lawmaker has to follow the developments and try to foresee what may happen in the future. Technology and legislation therefore go hand in hand, and technicians and lawmakers have to cooperate intensively.

"It may be that some of the new techniques and new products used in plant breeding are patentable. That may be good or bad. I think, therefore, that it is necessary to make up our minds about the borders of the laws relating to inventions and to plant varieties, respectively, and about the responsibilities of Governments and intergovernmental organizations after, of course, consultations with the relevant branches of the industry. Accordingly, at the beginning of next year, there will be a meeting between experts in patents and in plant breeders' rights, organized jointly by UPOV and WIPO, to follow up the numerous informal contacts that exist. So I hope that, with this in mind, we will have a fruitful meeting today and tomorrow concerning the specific issues contained in document IOM/IV/2. Most organizations represented here today have commented in writing on these. It will not be possible to satisfy all the wishes of individuals, organizations and Governments, but we will be glad to hear your opinion, or the clarification of your opinion laid down in your written comments."

2. The Chairman then invited the international organizations that so wished to make opening statements.

Opening Statements

3. Mr. M.O. Slocock (International Association of Horticultural Producers - AIPH) stated that his organization had been unable to submit written comments in view of the fact that its annual congress was just taking place. AIPH looked for an expansion of the membership of UPOV, an essential element for the Convention's effectiveness and a priority objective in AIPH's view. AIPH included 24 countries in five continents, and was urging the Governments of all States not already members of UPOV to consider the question of plant breeders' rights and to make contact with UPOV.

4. In relation to the Convention, AIPH looked for the explicit prohibition of "double protection" and a clear definition of the interface between the plant breeders' rights and the patent system. It further looked for the mandatory inclusion of all commercially significant species among those to be protected and sought the clarification of the scope of the breeder's right to ensure that the protection which it conferred was clearly defined and that royalties were charged only once in the production system. It accepted the dependence principle and urged the elimination of the abuse of the "farmer's privilege" concession. AIPH sought a clearer separation of new varieties by the recognition of commercially important rather than botanically interesting characteristics as the basis for distinction. It wished that the periods of protection be harmonized within UPOV member States. It considered that it was necessary to recognize the importance of the public interest and of compulsory licenses in ensuring access to new varieties. Finally, it considered that the simplification of the provisions relating to variety denominations was necessary and that the use of trademarks to extend in any way the breeders' rights should be rejected.

5. Dr. E. von Pechmann (International Association for the Protection of Industrial Property - AIPPI) stated that the written comments from AIPPI (document IOM/IV/5) reflected the outcome of a detailed discussion on the proposals for revision of the UPOV Convention that had been held in June 1989 at the AIPPI Congress in Amsterdam. He added that the Director General of WIPO and Secretary-General of UPOV had been made an honorary member of AIPPI at that Congress. As stated in the written comments, AIPPI welcomed the intended reinforcement of breeders' rights. AIPPI was not a lobby, but an organization that dealt with fundamental issues in the field of industrial property and whose particular objective was to promote the protection of inventions since, in its view, such protection represented the best incentive for inventors. AIPPI welcomed many of the provisions proposed in document IOM/IV/2, but nevertheless had serious objections to a number of them, on which Dr. von Pechmann would comment in detail during the discussions.

6. Mr. T.M. Clucas (International Association of Plant Breeders for the Protection of Plant Varieties - ASSINSEL) commended, on behalf of ASSINSEL, those responsible for the preparation of the revision of the Convention and stated that ASSINSEL was much encouraged by the general direction of the revision proposals, although there were certain elements which remained of concern to ASSINSEL. ASSINSEL particularly supported the provisions contained in the document before the meeting concerning dependence. ASSINSEL's final views would be influenced by measures taken to extend patent rights to include biotechnological inventions and hoped for a successful outcome to the meeting which was to be held between UPOV and WIPO in January 1990. ASSINSEL sought a workable balance between the intellectual property systems involved which would avoid any undue or inappropriate domination. In this respect, some concern was felt within ASSINSEL about the effects of Article 5(5) in its present form.

7. Problems were being perceived by ASSINSEL in the treatment of hybrid varieties; a special working party had been set up to address the specific difficulties encountered and its conclusions and proposals would be made known to UPOV at a later stage.

8. ASSINSEL also supported the efforts being made to broaden the membership of UPOV; it recognized that some flexibility was desirable to facilitate the admission of new members by enabling them to adjust the plant variety protection system to their agricultural and economic conditions, but was of the view that any flexibility should be closely controlled.

9. In conclusion, Mr. Clucas stated that it was essential that the strengthened breeders' rights enshrined in a revised UPOV Convention should offer the breeder the opportunity to secure proper compensation whenever and however benefits were derived from the use of the breeder's intellectual property.

10. Mr. T.W. Roberts (International Chamber of Commerce - ICC) thanked UPOV for the opportunity to comment on the proposals for the revision of the Convention and commended the authors of document IOM/IV/2. He observed that in a meeting like this, it was inevitable that much more criticism than support would be voiced in view of the speakers' priorities. He stated that ICC generally supported the direction in which the revision proposals were taking UPOV. The main point of criticism of ICC related to the treatment of industrial property rights other than plant breeders' rights. ICC did not support a clear boundary between plant breeders' rights and other rights, but rather a balance between such rights. ICC strongly supported the strengthening of the breeder's right and particularly the introduction of dependence. However, this strengthening did not require a weakening of patents; in this respect, ICC was particularly concerned about some proposed provisions and especially about Article 5(5), the "collision norm," which paved the way for a collision rather than cooperation between patents and plant breeders' rights.

11. Mr. R. Royon (International Community of Breeders of Asexually Reproduced Ornamental and Fruit-Tree Varieties - CIOPORA) thanked UPOV for the invitation to participate in the meeting and joined with the speakers that had preceded him in congratulating the Administrative and Legal Committee on its efforts to reinforce breeders' rights. CIOPORA had been asking for such strengthening for a very long time, in fact practically since the Convention existed.

12. As far as the general orientation of the revision of the Convention was concerned, CIOPORA felt that the wish to define the boundary between the various legal arrangements for protection could derive from an undefined fear on the part of UPOV that its role would be lessened by the increased role afforded to patent protection. On the contrary, CIOPORA felt that UPOV would be an even stronger organization in future if accession was made easier for those countries that were not yet members. Furthermore, although the Convention defined the general framework of protection for new plant varieties, that should not mean that recourse to other forms of protection should be excluded; indeed, some countries could well wish to accede to UPOV on the basis of an already-existing form of protection and thus avoid the need to set up a special body which could cause financial problems.

13. As far as the interface between patent protection and plant variety protection was concerned, CIOPORA noted some confusion both in document IOM/IV/2 and document CAJ/XXIV/4; that confusion sprang from the lack of a clear and precise definition of the subject matter of protection under the Convention. It was necessary to bear in mind that the objective of the Convention was to protect plants at the variety level only.

14. Mr. J. Winter (Association of Plant Breeders of the European Economic Community - COMASSO) expressed his thanks for the opportunity to comment on the intended revision of the UPOV Convention. COMASSO represented the European plant breeders and was, actually, not only interested in the revision against the background of the special European circumstances, but also in an altogether general manner. The major items in COMASSO's comments were the prohibition on double protection, the strengthening of the effects of protection and the

collision norm. From the point of view of COMASSO, a collision norm was necessary, but would have to be balanced if it were to have any substance at all. COMASSO's interest in introducing the special European aspects into the discussion was all the greater for the fact that initiatives had been put in hand at Community level that anticipated the revision of the UPOV Convention and directly concerned plant variety protection (initiative for the creation of a Community breeders' right) or which would have implications in that field (initiative for the introduction of a Directive on the protection of biotechnological inventions).

15. Mr. F. Hofkens (Committee of Agricultural Organisations in the European Economic Community--COPA--and General Committee for Agricultural Cooperation in the European Economic Community--COGECA) thanked UPOV for the invitation to participate in the meeting and announced that he would submit throughout the meeting the joint positions of the two organizations he represented. Referring to document IOM/IV/6, he emphasized that COPA and COGECA were in favor of plant variety protection through the special system of breeders' rights and of a consequent reinforcement of the provision prohibiting the existence of "double protection" for the same variety. COPA and COGECA were of the opinion that breeders' rights should extend to all material enabling varieties to be reproduced or propagated, that was to say plants, parts of plants, cells and protoplasts. In their view, free access to a variety for experimental purposes with a view to creating a new variety had to be guaranteed, including in cases where the variety embodied an invention protected, for example, by a patent. The custom known as "farmer's privilege" was of prime importance in the farming sector and should be confirmed in the Convention; COPA and COGECA proposed a relevant definition. Finally, COPA and COGECA could accept the introduction of a derived right, but only on condition that plagiarism were excluded from protection.

16. Mr. D. King (International Federation of Agricultural Producers - IFAP) expressed IFAP's appreciation for having been invited to the meeting and stated that it was the first time IFAP was represented in a UPOV meeting. IFAP grouped together farmers' organizations from throughout the world, including all the member States of UPOV. Farmers in many countries were concerned about rumors that UPOV was about to require farmers to pay royalties on farm-saved seed. According to a number of national farmers' organizations, that was contrary to the commitments that had been made by Governments when the national plant variety protection system was introduced. IFAP also understood that it would be a departure from the spirit of the original UPOV Convention. It insisted that the UPOV Convention should retain a balance between the interests of farmers, consumers and breeders. It fully supported the need to adequately reward the creative efforts of plant breeders so that farmers worldwide would continue to benefit from new plant varieties.

17. Mr. M. Besson (International Federation of the Seed Trade - FIS) thanked UPOV for having associated FIS in its highly important work and congratulated UPOV on the progress achieved in revising the Convention. FIS had followed with close attention the relevant work, whilst leaving it to its sister association, ASSINSEL, that was more directly concerned, to examine in detail the issues raised by that most important project. At its last meeting, held in Jerusalem in May of the current year, the FIS Executive Council had decided to support most firmly the positions expressed by ASSINSEL as regards both the revision of the UPOV Convention and the protection of biotechnological inventions, whilst acknowledging that the concepts were liable to evolve somewhat

in future. As regards the protection of biotechnological inventions, FIS was convinced that a balance could be found between the rights of patentees and the rights of plant variety certificate holders. It welcomed the contacts established between WIPO and UPOV in that respect. As for the revision of the Convention, FIS held that the key element should be the strengthening of breeders' rights. That was a common aim for the whole of the profession and FIS shared the balanced views expressed by ASSINSEL in that matter.

18. However, the strengthening of breeders' rights had also to be accompanied by efforts to obtain the accession of the greatest possible number of countries to the Convention. That could only be an advantage to international trade in seed, for everyone's benefit, including the less favored countries. Those countries could also provide an appropriate and stable legal context for all levels of seed activity. The extension of the Convention to all species also constituted a major objective that was likely to promote the diversification of plant breeding work and of research, whilst offering the possibility of development to regions possessing rich genetic reservoirs.

19. The strengthening of breeders' rights should finally enable what is known as "farmer's privilege" to be limited since it seriously damaged the interest of breeders and seed merchants. That alleged privilege, that was to be found nowhere in the Convention as a principle of law, had enjoyed in certain circles an interpretation that was so broad that, in some cases, the use of certified seed from which the breeder could obtain a royalty constituted the exception rather than the rule. It was not reasonable that some farmers should benefit without counterpart from the lengthy, arduous and costly work of the breeder. A solution had therefore to be found in order to put a stop to abuse; a logical solution would be for all seed produced for resowing to be subject to an equitable fee to be paid to the breeder.

Article 1 (Constitution of a Union; Purpose of the Convention)

20. The Chairman opened the discussions on Article 1.

21. Mr. Slocock stated that the retention of the second sentence of paragraph (2) was fundamental to AIPH which could not accept any dilution of its wording or substance.

22. Dr. von Pechmann (AIPPI) stated that his Association had always held the view that the "prohibition on double protection" was not justified and that breeders should be given the possibility of applying in respect of their innovations for variety protection, that had certain advantages, or for patent protection that also had certain advantages. There were problems where two differing rights were available or would be provided, but those problems could be solved. It would be possible, for example, to provide that rights under parallel protection could not be asserted cumulatively against an infringer. It could also be stipulated that a breeder would have to choose between the stated forms of protection. In any event, that matter was open to discussion.

23. AIPPI was not able to support the second sentence of paragraph (2). The proposed "prohibition on double protection" in fact constituted a more stringent provision than the existing wording of Article 2(1). The sentence stipulated that the subject matter of protection involved could not be protected in a member State by both plant breeders' rights and patents. However, the present

wording of the Convention defined the subject matter of protection as being only the propagating material. The reference to Article 37 further showed that the "prohibition on double protection" was not intended to have general validity throughout UPOV. No uniform situation would be created: a State that had availed itself of the possibility provided in Article 37--that is to say the United States of America which was indeed the largest member State of UPOV--was to be treated differently from all other member States. Moreover, the representatives of the United States of America had stated in earlier debates that the possibility of making use of both forms of protection had clearly had positive effects, and no negative effects, for inventors in the field of plant breeding; furthermore, according to their statements, no difficulties had so far arisen from the availability of possible parallel protection. The AIPPI saw no reason to fear that those parallel forms of protection would not act to the advantage of the plant breeders in the other UPOV member States.

24. Dr. P. Lange (ASSINSEL) stated that ASSINSEL supported the proposed new Article 1, including the sentence in square brackets. It also supported the transformation of the first paragraph of the present wording into a binding provision. As for the "prohibition on double protection," ASSINSEL supported a strengthening of the rights deriving from variety protection and held that once those proposals had been put into effect, there would be no need for the patenting of plant varieties. ASSINSEL nevertheless had advocated the patenting of biotechnological developments, including genes, that were to be inserted in varieties protected under plant breeders' rights. For ASSINSEL, such patenting in no way raised the problem of "double protection."

25. Dr. Lange further pointed out that the numbering of the paragraphs would have to be corrected in the English version.

26. Mr. Roberts (ICC) commented that ICC had always supported the possibility of protecting plant varieties by both patents and plant breeders' rights and did not understand the objections to the co-existence of several systems of protection. It also did not understand how the international system could operate if at least two member States did not prohibit "double protection." It therefore supported the deletion of the sentence in square brackets in paragraph (2).

27. Mr. Royon (CIOPORA) stated that CIOPORA agreed with the content of Article 1 except for the sentence between square brackets which it wished to be deleted.

28. In that connection, Mr. Royon stated that the expression "double protection," which had been coined for ease of language, was a misleading expression and had perpetuated many misconceptions. "Double protection" would be totally improper where the plant variety constituted the subject matter of protection. Breeders did not want "double protection" in the sense of cumulated protection for the same variety. That would be costly and of no practical interest. Breeders wanted UPOV to be flexible to provide the largest opportunities for adherence by other countries. Countries should be able to join UPOV and grant rights to breeders by patents or by breeders' rights certificates. The only case where "double protection" could be cumulative would be where the subject matter of protection was genetic information rather than a variety. In that case, biotechnological inventors might wish to have protection through claims covering the genetic information and, in addition, claims to a variety. A more flexible UPOV system would enable people to make broad claims covering

the genetic information and the variety in one title without having to apply for two titles. The use of the expression "double protection" should be condemned, and this would be consistent with CIOPORA's wish that the UPOV Convention should be made broadly open to new member States. A new Article 37 should be introduced to give the opportunity to all member States, and not just to the United States of America, to provide protection for plant varieties by whichever means was most convenient.

29. Mr. Winter (COMASSO) said that COMASSO supported the intention of transforming the present declaratory provision in Article 1(1) of the current wording into a binding provision as proposed in the second paragraph of the document under discussion. As for the proposal to give a more detailed definition of the right, COMASSO was of the opinion that it should be termed a "plant variety right" not a "breeder's right"; the subject matter of protection was a variety. On the other hand, it supported the intention of using the word "right" in place of "protection" throughout the Convention. Protection was indeed the consequence of granting a right.

30. As for the problem of the "prohibition on double protection," COMASSO was of the opinion that the proposed second sentence of paragraph (2) absolutely had to form a part of the Convention. That opinion was based quite generally on the need to avoid legal uncertainty and, more particularly, on the existing European legal situation, which had indeed also served as a basis for the considerations on the proposed Directive of the Council of the European Communities on the protection of biotechnological inventions.

31. Mr. Hofkens (COPA/COGECA) pointed out that both COPA and COGECA held it preferable to protect plant varieties within a special system of protection, particularly in view of the fact that the system provided for free access to a protected variety as an initial source of variation in a plant breeding program. COPA and COGECA therefore supported the position taken by ASSINSEL and COMASSO; they spoke in favor of the full text proposed for Article 1(2).

32. Mr. King (IFAP) noted that Article 1 now incorporated a binding rather than a declaratory provision. IFAP supported that change but noted that in respect of various Articles, such as 4 and 5, member States had to have the ability to exempt themselves from certain provisions since national circumstances differed widely and it was reasonable to expect some differences in national legislation. If Article 1 were to become a binding provision, the ability for member States to make exceptions should be stated explicitly in the relevant Articles.

33. IFAP was in favor of maintaining the present ban on "double protection." There should be only one system of industrial property rights for plant varieties, and that should be the plant breeders' rights system which had proved to be balanced in relation to the interests of breeders, farmers and consumers. For that reason, it was important that other systems should not interfere with the plant breeders' rights system and create confusion. Members from countries which were not yet members of UPOV had stated that the introduction of "double protection" would create difficulties for those countries in acceding to the Convention.

34. Dr. von Pechmann (AIPPI) stated that the reference to the European legal situation was correct and that indeed plant varieties were excluded from protection under the European Patent Convention. However, the relevant provision

on exception was heavily criticized. It was therefore altogether possible that it would be deleted in a revision of the European Patent Convention. Dr. von Pechmann therefore felt that it was not the present version of that Convention that should be taken into account, but that a reformulation of the second sentence of paragraph (2) should be examined in order to stipulate that the introduction of plant variety protection would not affect the right of UPOV member States to also grant patents for plant variety inventions. The form of patents and the subject matter for which patents could be granted would naturally remain open; such could be subsequently laid down in a revision of the European Patent Convention or of the domestic patent laws. Briefly therefore, Dr. von Pechmann was of the opinion that progressive concepts should not be restricted in the revision of the UPOV Convention on account of the current wording of the European Patent Convention.

35. Mr. Roberts (ICC) stated that he could not agree with the statement made by Mr. King (IFAP). He could not see how the deletion of the sentence in brackets, which was a restrictive provision, could make it more difficult for countries to join UPOV.

36. Mr. Royon (CIOPORA) wished to explain in more detail the position of CIOPORA on the problem of choice of protection. The subject matter of protection under the UPOV Convention was the plant variety and, in that respect, Mr. Royon supported the view expressed by Mr. Winter for COMASSO, in connection with Article 4, that protection should be provided for all plant varieties rather than for plant species, etc. Where the subject matter of protection was the variety, there was no need for "double protection" in the sense of cumulative protection. Optional protection, however, was required so that countries could grant rights to breeders of varieties either by patents or by plant breeders' rights certificates, or again by any other means that conformed to the principles of the UPOV Convention. "Double protection" in the sense of cumulative protection would only arise as an issue in the case of an inventor working in biotechnology and wishing to protect genetic information, a particular gene for instance, and also the variety or varieties into which that information was incorporated. If patent protection was completely excluded under the UPOV Convention, the inventor would have to file an application for a patent for the genetic information and one or more applications for plant breeders' rights. If no demarcation was established between the two systems, the inventor would be able to cover in a single title--the patent--both the genetic information and the variety or varieties. And there would be no conflict and, as demonstrated by experience in the United States of America, no difficulties. If the scope of the UPOV Convention were to be confined to plant breeders' rights in the narrow sense, the Convention would not be truly international.

37. Mr. Clucas (ASSINSEL) sought to clarify the ASSINSEL position. ASSINSEL was opposed to "double protection" in the sense that a variety should not be protectable by both a patent and a plant breeder's right. ASSINSEL was very supportive, however, of complementary protection, that is to say, the protection by patent of a gene within a variety which was itself the subject of a plant breeder's right.

38. Mr. Slocock (AIPH) held the view that there was agreement to the effect that "double protection" in the sense of cumulative protection was unacceptable. AIPH also accepted the patenting of genetic information, but did not

accept that plant varieties as such should be subject to any system of protection other than the UPOV Convention. It understood that Article 1 would clarify that, and not go any further. If a provision such as Article 37 was made widely available, member States would be able to derogate from essential features of plant breeders' rights, e.g. the conditions of protection as set out in Article 6 and the duration of protection as set out in Article 8, presently laid down in mandatory provisions of the Convention. That would jeopardize the objective of the Convention to secure an element of uniformity and consistency in the worldwide system of breeders' rights protection. And that was the reason why the deletion of the sentence between brackets was unacceptable to AIPH.

39. Mr. S. Williams (AIPPI) did not see why a variety should not be protected by a patent provided the conditions for protection were fulfilled. Once the basis for a protection system was established, there ought to be no exceptions. He suggested using the term "multiple forms of protection for the same piece of property" to describe the issue under discussion, which was to be subdivided as follows: Firstly, should there be multiple forms of protection for the same piece of property? Secondly, should a member State be able to make two forms available at the same time? Thirdly, where multiple forms of protection were available, should a member State permit both forms at the same time?

40. Dr. von Pechmann (AIPPI) referred to the intervention by Mr. Royon (CIOPORA) and stated that the apparent fear of patent protection that existed in UPOV and the representatives of a number of organizations was unjustified. The requirement of inventive step would mean that it would be much more difficult to obtain a patent than to obtain variety protection. A very small number only of applications would therefore result in patents. To open up the possibility of patent protection for varieties would therefore in no way lead to a flood of patents.

41. Mr. Royon (CIOPORA) referred to his previous statements and to the statement of Mr. Williams (AIPPI) and added that a "traditional" breeder who sought protection for a variety only should be given the choice between the patent and the plant breeder's right.

42. Mr. Besson (FIS) referred to his opening statement and repeated that the Executive Council of FIS shared the balanced views expressed by ASSINSEL in that respect.

43. Mr. B. Greengrass (Vice Secretary-General) asked the CIOPORA delegation whether, when it spoke of a flexible Convention that would permit the protection of plant varieties by both industrial patents and by plant breeders' rights, it was envisaging that UPOV criteria such as those of distinctness, homogeneity and stability should be adopted by the patent system where plant varieties were the subject matter of protection. It was difficult to see how the two systems could work together if such criteria were not applied under the two systems.

44. Mr. Royon (CIOPORA) replied that breeders were essentially interested by the scope of the protection afforded. If the scope of the rights granted under

the UPOV Convention was strengthened to the level sought by breeders, there would be no objection from CIOPORA's part to the basic principles of the UPOV Convention being applied in the granting of patents for plant varieties. Some adaptations would be necessary for the patent system, but also on the part of UPOV, including his suggestion of a more widely available Article 37.

45. Mr. B. Le Buanec (ASSINSEL) referred to the preceding statement by Dr. von Pechmann (AIPPI) and considered that it was not possible to argue in terms of the difficulty in obtaining a patent or a plant variety protection certificate. The conditions of protection and the rights afforded by those two titles were different.

46. Dr. von Pechmann (AIPPI) said that the reproducibility requirement had also to be satisfied in the patent field, a requirement that could be met in the case of microorganisms by a deposit of the relevant organism. Following the Hibberd case, the same requirement had been set in the United States of America and an inventor could also ensure the reproducibility of his invention by depositing suitable seed material. If the variety were to differ in time from the originally deposited material, that is to say was not stable, then it would lose its patent protection. The same applied to microorganisms. According to Dr. von Pechmann, there was no difference in this respect between the variety protection requirements and the patent protection requirements for a variety.

47. Dr. D. Böringer (Federal Republic of Germany) noted that the statements made by numerous organizations clearly showed that the subject matter of protection under the new Convention would have to be defined in detail. It seemed to him that agreement further existed that the variety as such should be the subject matter of protection. In his view, the Administrative and Legal Committee would have to examine with great care the proposal made by Mr. Royon (CIOPORA) that, firstly, the requirements for granting a patent for a variety should be the same as those laid down in the UPOV Convention for the special protection right and, secondly, a possibility should be given of formulating additional claims in respect of genetic information. The acceptance of such a system would solve a number of problems for applicants. However, the problems relating to the effects of protection, such as the scope of the right of prohibition and the extent of the principle of exhaustion, still remained without a solution. Nevertheless, that proposal would have to be discussed.

48. The Chairman concluded the discussions on Article 1. He supported the view expressed by Dr. Böringer (Federal Republic of Germany) and noted that it would be a difficult task for the delegates from member States to reconcile very different views and find a solution that would be acceptable to all.

Article 2 (Definitions)

49. The Chairman opened the discussions on the proposed new Article 2.

50. Mr. King (IFAP) said that IFAP recognized a necessity to adequately reward plant breeders for their plant breeding efforts, but emphasized that some of its members opposed the payment of royalties for the discovery of naturally

occurring plants. Concerning the definition of "material," IFAP wished that the words "except farm-saved seed" be added to the words "harvested material."

51. Mr. Hofkens (COPA/COGECA) stated that COPA and COGECA were in favor of the plant variety protection system being exclusive. To avoid patent law being applicable to plant reproductive or vegetative propagating material, it was necessary to enter in the Convention a definition of reproductive or vegetative propagating material setting out the fact that such material was constituted by plants, parts of plants, cells and protoplasts.

52. Mr. Winter (COMASSO) stated that COMASSO welcomed the principle of including definitions in order to promote the uniform interpretation of the legal provisions. As regards detail, it was COMASSO's opinion that the proposed definition of species was unnecessary since it was in favor of Alternative 3 in Article 4 and, were that alternative to be chosen, no reference to species would be included in any of the Articles of the Convention. The proposed definition of variety was acceptable as was the definition of breeder. As regards item (iv), it would seem essential to define variety material since the proposed effect of protection under Article 5 could only be clearly understood with the help of such a definition. However, it would have to be as broad as possible and COMASSO therefore proposed that the whole provision be adopted.

53. Mr. S.D. Schlosser (CIOPORA) found a need for a definition of the term "material," but proposed an alternative broad definition as follows: "'Material' shall mean any plant or part of a plant, whatever its botanical or commercial function. The term shall include cut flowers, fruits and seeds."

54. Mr. Roberts (ICC) said that ICC found the definition of "variety" in Article 2(ii) somewhat too broad and indefinite. Varieties should be defined as being varieties which fulfilled the distinctness, homogeneity and stability criteria of Article 6. If varieties were so defined, then patents for plant varieties would, of necessity, have to be for varieties that were distinct, homogeneous and stable. If that requirement was not fulfilled, applications would be for something other than varieties. ICC also felt that a definition of "material" was necessary and supported the definition proposed by Mr. Schlosser (CIOPORA).

55. Mr. Le Buanec (ASSINSEL) stated that ASSINSEL had no special comments to make on the first three items of Article 2. As regards item (iv), containing the definition of variety material, ASSINSEL considered that the reference to "material that has the potential for being used as reproductive or vegetative propagating material" should be deleted since the word "potential" was lacking in precision. Such deletion could be compensated for by wording the first item as follows: "all forms of reproductive or vegetative propagating material." The third and fourth items appeared absolutely indispensable to ASSINSEL; in the fourth item, the word "directly" should be maintained. In other words, ASSINSEL wanted the right to apply to the harvested material and to the product directly obtained from harvested material.

56. Dr. von Pechmann (AIPPI) welcomed on behalf of AIPPI the proposed inclusion of definitions. As regards item (iv), AIPPI was of the opinion that the

definition of material should extend as far as possible in order to provide breeders with the greatest possible protection. However, there had been no uniform view within AIPPI as regards the word "directly" in the phrase "products directly obtained from harvested material." A number of representatives had advocated deletion since protection should also be given to products indirectly obtained from the harvested material. Others had spoken in favor of maintaining that word since it was already to be found in patent law in connection with products derived from a patented process. AIPPI welcomed the proposed formulation since it was necessary to make quite clear what was meant by the word "material" in Article 5.

57. Mr. Slocock (AIPH) stated that AIPH welcomed the abandonment of the word "taxon" and, since there would be no reference in Article 4 to "species," there was no point in defining it. AIPH accepted the definition of the word "variety," but did not accept that the word "breeder" should include the discoverer of a plant found in nature. The word "material" should be defined to mean the reproductive or vegetative propagating material of the variety. The reference to material which "has the potential of being used as reproductive or vegetative propagating material" should be deleted as it would jeopardize the precision of the Convention.

58. Discussions on the definitions of "breeder" and "variety" were continued on the morning of the second day. The following remarks were made.

59. Dr. D. Gunary (ASSINSEL) said that ASSINSEL would appreciate it if the definition of "breeder" were to state clearly that the breeder could be either a natural or a legal person.

60. Mr. Besson (FIS) stated that his organization supported the position expressed by ASSINSEL.

61. Dr. von Pechmann (AIPPI) pointed out that the reference to other forms of use in the definition of variety could lead to problems. Indeed, a breeder or a biochemist who had, for example, bred a plant cell line to produce a colorant could be refused a patent for his biochemical invention on the grounds that it concerned a cell line that constituted "a ... grouping of ... parts of plants, which ... is regarded as an independent unit for the purposes of ... any other form of use." Dr. von Pechmann put forward the opinion that the proposed definition would raise difficulties at the Diplomatic Conference or subsequently at national level in parliamentary procedures. He proposed that the phrase "or any other form of use" be deleted.

62. Dr. Böringer (Federal Republic of Germany) agreed with Dr. von Pechmann to the extent that the matter would have to be carefully examined. He further explained that the contested phrase had been included since there were varieties in the plant kingdom that were not cultivated, but were used in some other manner. For instance, in the area of aquatic plants, varieties of seaweed were used by the pharmaceutical industry to extract substances without the varieties being cultivated in the normal sense. There had already been a practical example in the Federal Republic of Germany for the inadequacy of the wording "exclusively for the purposes of cultivation."

63. Mr. Williams (AIPPI), responding to the statement by Dr. von Pechmann (AIPPI), stated that the reference to groupings of plants in the definition of "variety" was also objectionable. That reference could be construed as applying to groupings higher than varieties. Traditionally, the term "variety" had been used in relation to individual plants.

64. Mr. Roberts (ICC) supported the views expressed by Dr. von Pechmann. They concerned an area of interaction between patents and plant breeders' rights. It was UPOV's role and responsibility to define the notion of variety, but its definition had consequences in the field of patents. The problem lay in the reference to parts of plants. In Mr. Roberts' view, "plant variety" was related to an assemblage of plants over their whole life cycle. The parts of plants were to be considered in the context of the definition of "material."

65. Mr. Clucas (ASSINSEL) stated that ASSINSEL could not accept the deletion of the reference to groupings of plants. There were types of varieties which, by reason of the method by which they had been bred and of the system by which they were reproduced, could only be represented by a number of plants.

Article 3 (National Treatment)

66. The Chairman opened the discussions on Article 3.

67. Support for the proposed deletion of paragraph (3), which provided the possibility for member States to require reciprocity, was expressed by Mr. Slocock (AIPH), Dr. von Pechmann (AIPPI), Mr. Clucas (ASSINSEL), Mr. Roberts (ICC), Mr. Royon (CIOPORA), Mr. Winter (COMASSO) and Mr. Besson (FIS).

68. Dr. Gunary (ASSINSEL) suggested that consideration should be given to the deletion of the end of paragraph (2) starting with "provided that." ASSINSEL was of the view that a check on multiplication was not a condition for the grant of a right and was thus of no relevance for national treatment.

69. Mr. Winter (COMASSO) stated in respect of paragraph (1) that COMASSO was of the opinion that the special European situation had to be accounted for and that the deletion of the phrase "imposed on such nationals" should be considered. That deletion would appear essential in view of the endeavors to unify the European market and the European legal situation and there would otherwise be a risk of legal uncertainty.

70. As regards paragraph (2), COMASSO felt that it should be reconsidered. The reference to a check on the multiplication of a variety as a requisite of national treatment did not indeed appear justified since that was not a requirement for granting breeders' rights.

71. Mr. Hofkens (COPA/COGECA) said that COPA and COGECA had no comments to make on Article 3.

72. Mr. King (IFAP) said that IFAP had no firm views on the proposed deletion of paragraph (3). It should be noted, however, that a member of IFAP from Finland had replied to the enquiry that if there were an application from Finland for membership in UPOV and if they were to support that application, they would prefer Finland to be free to define the extent of application of the reciprocity principle.

73. Mr. Besson (FIS) stated that FIS supported the position expressed by ASSINSEL.

74. The Chairman concluded the discussions on Article 3 and noted that there was general agreement on the deletion of paragraph (3) and that the Administrative and Legal Committee would have to consider some minor aspects of paragraphs (1) and (2).

Article 4 (Scope of Application of the Convention)

75. The Chairman opened the discussions on Article 4.*

76. Mr. Besson (FIS) stated that FIS preferred Alternative 3, but extended as follows: "all plant varieties."

77. Mr. King (IFAP) referred to his earlier comments made in relation to Article 1 concerning flexibility required in respect of the provisions of Articles 4 and 5. IFAP was of the view that elements of flexibility should be built into those Articles. Concerning Article 4, IFAP was opposed to the mandatory application of the Convention to all species and felt that individual States should be able to accede to the UPOV Convention even if they were only in a position to grant plant breeders' rights for certain species. IFAP favored the flexibility permitted in the text of the 1978 Convention. It did not see how the Council of UPOV could evaluate the exceptional difficulties faced by member States seeking to limit the application of the Convention.

78. Mr. Hofkens (COPA/COGECA) stated that COPA and COGECA had a position that was identical to that of FIS.

79. Mr. Winter (COMASSO) said that COMASSO was of the opinion, as already mentioned, that Alternative 3 would be appropriate to the scope of application of the Convention. It explicitly welcomed the unrestricted application of the Convention to all varieties. However, the possibility given by paragraph (2) to then derogate from that principle was unsatisfactory from the point of view of the breeders. Breeders had to be able to enjoy the same conditions for their work and the same protection for that work in all places. Past debates had shown that differing application of the Convention to individual species,

* References to alternatives in the subsequent paragraphs are references to the alternatives proposed for both paragraph (1) and paragraph (2) of Article 4.

even in the European member States, had led to considerable problems of competition between those States. Should it, however, prove necessary for overriding political reasons to continue to offer the possibility for member States to apply the Convention progressively to all species, then COMASSO would understand that no "exceptional difficulties" applied in any event if in at least one member State facilities for examination existed, had been offered or could be created.

80. Mr. Royon (CIOPORA) stated that CIOPORA believed that the Convention should be applied as broadly as possible and therefore felt that Alternative 3 in paragraph (1) would be the best of the three proposed. CIOPORA would propose, however, the following wording for paragraph (1) which would better express that intention:

"This Convention shall be applied to all new plant varieties irrespective of the plant species to which they belong."

81. CIOPORA believed that paragraph (2) should be applied as narrowly as possible and would object to or oppose any delayed application of the Convention to species that were commercially important and deserved protection.

82. Mr. Roberts (ICC) stated that ICC preferred Alternative 1 embracing all botanical species. It might be more logical to retain Alternative 3, but before opting for that suggestion, ICC would wish to see the definition of "variety" settled. ICC's proposal was that paragraph (2) should be deleted in its entirety since there was concern that it could be used to delay the full introduction of plant variety protection in new countries joining UPOV and form the basis for countless undesirable exceptions.

83. Dr. Gunary (ASSINSEL) stated that ASSINSEL fully supported the new text of Article 4 and favored Alternative 3.

84. Dr. von Pechmann (AIPPI) stated that AIPPI also advocated Alternative 3 since it would create a clear situation. The other alternatives could raise problems of a fundamental nature as regards to subject matter of protection under the UPOV Convention.

85. As regards paragraph (2), AIPPI felt that it could be deleted since it was not obvious which "exceptional difficulties" could occur in a country. If it was intended to refer to a lack of examination facilities in the country concerned, reference should then be made to the exchange of test results between member States. That exchange made it possible to overcome such difficulties. Moreover, in view of the need to harmonize within UPOV, the proposed paragraph (2) should also be deleted.

86. Mr. Slocock (AIPH) stated that AIPH favored Alternative 3 in paragraph (1) and had reservations concerning paragraph (2) in the absence of knowledge of the likely attitude of the Council on a proposed progressive implementation of the Convention. It was only acceptable on the understanding that a strict timetable was accepted by the member State concerned for such implementation and that the paragraph was not allowed to delay the introduction of protection in new member States in respect of commercially important species.

Article 5 (Effects of the Right Granted to the Breeder)

Paragraph (1) (Definition of the Basic Rights)

87. The Chairman opened the discussions on Article 5, paragraph (1).

88. Mr. Sloccock (AIPH) said that Article 5 was almost a Convention in itself. So far as paragraph (1) was concerned, AIPH fully recognized that it had to include a reference to exports. This seemed to be relevant and practical.

89. Dr. von Pechmann (AIPPI) stated that AIPPI could agree to the wording of paragraph (1), particularly since harvested material was to be included in the scope of protection under plant breeders' rights and, as had been shown in the debate on the definition of material in Article 2(iv), inclusion had met with general approval.

90. Dr. Gunary (ASSINSEL) said that ASSINSEL saw Article 5 as a very important Article which would materially affect the confidence which breeders would have in their investments in the development of varieties. ASSINSEL very much appreciated the rewording of the Article and thought that it would be clearer if subparagraph (iii) of paragraph (1) were reworded as follows: "from importing or stocking material of the variety for any of the purposes defined in this paragraph."

91. Mr. Roberts (ICC) said that ICC supported Article 5(1) entirely.

92. Mr. Royon (CIOPORA) stated that in Article 5 the term "right" did not appear suitable because it led to a repetition of the term "right." CIOPORA thought that it should be replaced by "title of protection." The first sentence would then read: "The title of protection granted confers the right ..." Also the term "title of protection" was able to cover the various different titles which could be used by member States if CIOPORA's earlier remarks concerning Article 1 were adopted.

93. Turning to paragraph (1), CIOPORA appreciated the proposed extension of the scope of protection, but was not quite happy from a systematic point of view with the separation made between "reproduction" and other types of acts. CIOPORA considered that what should be covered was the "commercial exploitation" of the variety and notably the reproduction of the variety, the use for commercial purposes, the offering for sale or the sale of the variety or material thereof and the importation or stocking of the variety or material thereof. In relation to exports of material, CIOPORA greatly appreciated the proposed extension of the scope of protection since it was in favor of breeders, but wondered whether this did not represent the imposition of two protections on one and the same object. It was obvious to CIOPORA that, while material might be imported from a country without protection, because of the territorial limitation of the title of protection, exports could only concern material which had been propagated, produced or sold in, or imported into, the territory of the country concerned; such material therefore already fell under the protection covering such acts as "manufacture," "offer for sale," "sale" or "putting on the market."

94. Mr. Winter (COMASSO) said that COMASSO was likewise in complete agreement with the principle of reinforcing the right afforded, that is to say the grant of an absolute right with clearly defined exceptions. It was able to agree to the content of paragraph (1), but would propose that the phrase "for any of the aforementioned purposes" be deleted since, in its opinion, importing or stocking automatically occurred for one of the purposes referred to in items (i) and (ii).

95. Mr. R. Petit-Pigeard (COMASSO) remarked that the word "concedé" in the French title of Article 5 and in paragraph (1) of the Article, as in other proposed provisions, was incorrect.

96. Mr. Hofkens (COPA/COGECA) stated that COPA and COGECA had no comments to make on paragraph (1).

97. Mr. King (IFAP) stated that IFAP could support the rewriting of Article 5 in order to clarify its interpretation. IFAP was of the view, however, that the proposed revision of what was known as the "farmer's privilege" was in the view of its members the betrayal of the original intent of the UPOV Convention. Many farmers' organizations accepted plant breeders' rights legislation in their country on the understanding from their Governments that royalties would not be paid on farm-saved seed. IFAP's member organizations were unanimous in their opinion that the breeder's right should be limited to propagating material for commercial purposes. In relation to paragraph (1), IFAP liked the wording "production for purposes of commercial marketing" in the presently applicable text. Accordingly, it proposed that that phrase be reinstated and that paragraph (1)(i) should read: "reproducing or propagating the variety for the purposes of commercial marketing." In relation to paragraph (2), IFAP would suggest further clarifying the "farmer's privilege" question by proposing the addition of a subparagraph which would spell out in detail what IFAP had in mind.

98. Mr. Besson (FIS) said that FIS had no comments to make on paragraph (1).

99. Dr. von Pechmann (AIPPI) had doubts as to the proposal made by Mr. King (IFAP). Were breeders' rights to be limited to the propagation of the variety for the purposes of commercial exploitation, then breeders could not directly act against propagation, but would have to wait until the produced propagating material was marketed. The proposed wording gave the possibility of asserting the right already in the case of propagation on a large scale, that is to say when it was obvious that it was not for private purposes and thus excepted from protection under paragraph (2).

100. Mr. Royon (CIOPORA) stated that the wording proposed by CIOPORA for paragraph (1) was based on the wording of patent laws in relation to product patents. CIOPORA believed that it was very important that the paragraph be worded in very broad terms. It concurred with COMASSO that exceptions from protection should be the subject of a different Article. It was of the opinion that instead of separating two aspects of the exploitation of a variety, that is to say "reproduction" and "offering for sale," "selling," etc., it would be much simpler to refer to the commercial exploitation of the variety. That drafting would eliminate some of the difficulties referred to by various associations in relation to exploitation which was not for commercial purposes.

Another advantage of such a wording was that it would make it possible to draw upon more than a century of important case law on the interpretation of patent legislation.

101. Mr. Clucas (ASSINSEL) stated that he would like to associate his organization with the comments made by Dr. von Pechmann (AIPPI) with reference to the "purposes of commercial marketing" because if a breeder wished to police his product, the most convenient point at which policing could take place was the reproduction or propagation stage.

102. Mr. Petit-Pigeard (COMASSO), looking ahead to the discussions on the possibility given to States to limit the effects of the right granted to breeders and to intervene in the production and marketing of seed and plantlets, laid emphasis on the distinction between personal use, which was for non-lucrative purposes, and industrial, craft or agricultural use which was for lucrative purposes. As a general rule, a farmer did not produce propagating material with a view to the production of a harvest to satisfy the needs of his family or his staff such as he might do in a domestic garden. Mr. Petit-Pigeard considered important not to enter into a system of thought which assimilated a farmer to a person who, as far as the protection of new plant varieties was concerned, did not carry out a lucrative activity. Indeed, such a system of thinking would call into question the principles that governed, for example, the photocopying of copyrighted works or the copying of computer programs and, indeed, those principles that governed the whole of intellectual property. Moreover, the purpose of the revision should be to draw up a Convention that was effective for all types of varieties and which did not incite breeders to focus their research work on the creation of hybrid varieties.

Paragraph (2) (Exclusions from the Scope of the Right Granted to the Breeder)

103. The Chairman opened the discussions on paragraph (2).

104. Dr. von Pechmann (AIPPI) said that AIPPI was generally able to agree to that paragraph. The exceptions contained in items (ii) and (iii) had been adopted from the Community Patent Convention which, although it had not yet entered into force, had already been reflected in the patent legislation of a number of States. They would represent a clarification that could but be approved.

105. Mrs. M. Cambolive (ASSINSEL) pointed to a slight difference in the French and English versions of item (ii). In order to suppress that difference, the word "and" would have to be deleted in the English version.

106. As to the more general matter of protection for hybrids and parent lines, Mrs. Cambolive expressed ASSINSEL's view that the matter had not seemed to have been given sufficient study. Problems raised by such protection had been brought to UPOV's attention on a number of occasions. Except for the reference to repeated use of a variety in item (iv), those problems had still not been taken into account. ASSINSEL proposed that a definition of hybrid be adopted that could be based, depending on the species and groups of species concerned, on the components and the formula associating them. A further concern of

ASSINSEL was the use of parent lines since to make them available could lead to simple selection work. The matter was currently under consideration within ASSINSEL and proposals would be made after the Congress of the Association to be held in Seville, Spain, in Spring 1990.

107. Mr. Roberts (ICC) stated that ICC supported the wording of paragraph (2) as proposed.

108. Mr. Royon (CIOPORA) stated that CIOPORA wondered whether the principle of exhaustion of rights should be introduced into the Convention since the Convention should be a set of principles, rather than a model law. If it was to be introduced, CIOPORA insisted that it be strictly limited to the specific field of use for which the breeder might have sold or licensed material of his variety. CIOPORA was not satisfied with the text as proposed.

109. In relation to subparagraph (ii), CIOPORA agreed with the remarks made by other organizations. It had itself proposed that the provision should apply to acts done for domestic and non-commercial purposes. The two conditions had to be cumulative. An act could be done by a municipality in a private way for non-commercial purposes, but it would still not be domestic.

110. In relation to subparagraph (iv), CIOPORA wished the words "and acts done for the commercial exploitation of such varieties" to be removed. CIOPORA further suggested the merging of subparagraphs (iii) and (iv) as follows: "acts done for experimental purposes or for the purpose of breeding new varieties." CIOPORA was of the opinion that the expression "or for the marketing of such varieties" in Article 5(3) of the present text of the Convention and the expression "acts done for the commercial exploitation of such varieties" in Article 5(2)(iv) of the proposed new draft should be deleted. The Convention should not prejudge whether a variety freely bred from an existing protected variety would not infringe the parent variety. It was therefore not possible to say in advance that it could be freely exploited. It was only where the new variety was clearly distinct and therefore outside the ambit of protection of the existing protected variety that it could be freely exploited.

111. Mr. Winter (COMASSO) stated that paragraph (2) was appreciated by COMASSO as an expression of the fact that the traditional situations of exception to intellectual or industrial property rights would also be included in the UPOV Convention. He proposed in respect of the wording of item (ii) that the word "and" in the English version be deleted, as already suggested by other delegations, in order to achieve a cumulative effect for the two purposes.

112. Mr. Hofkens (COPA/COGECA) stated that COPA and COGECA wanted a subparagraph to be added to paragraph (2) dealing with "farmer's privilege." That was a custom tolerated to a varying degree, which created considerable legal uncertainty and, in some cases, led to abuse. It was preferable, for COPA and COGECA, to define the exception in order to identify the practice involved and to ensure greater legal certainty. They proposed adding a subparagraph worded as follows: "[the right shall not extend to:] acts of reproduction or propagation of reproductive material in the ground and processing carried out by the farmer using his own agricultural production equipment, whether carried out by the farmer himself or as part of mutual agricultural service assistance free of cost between farmers, in order to resow or replant his land."

113. Mr. King (IFAP) stated that IFAP's proposal for paragraph (2) was very similar to what COPA had proposed. The existence of the "farmer's privilege" was not clearly expressed in the present text of the Convention, and IFAP was in favor of clarifying that text, without changing its substance. It was in that spirit that Mr. King offered a new subparagraph (v) reading:

"(v) acts done under the farmer's privilege; the farmer's privilege encompasses the propagation and preparation of seed material by the farmer for his own use, from his own harvested crop, and using his own farm equipment, or these acts carried out in the framework of mutual agricultural assistance amongst farmers."

114. Mr. Besson (FIS) said that FIS was opposed to the proposals made by Mr. Hofkens and Mr. King on behalf of COPA, COGECA and IFAP.

115. Mr. Winter (COMASSO) noted that the grounds given for the proposals by COPA, COGECA and IFAP was an attempt to achieve legal clarity by means of a precise formulation. COMASSO could not agree with that aim since it presupposed the existence of a "farmer's privilege." No such privilege was to be found in the law, however, and the inclusion of a "farmer's privilege" in the Convention would be tantamount to the establishment of a new legal situation.

116. Mr. Petit-Pigeard (COMASSO) added that it was obviously difficult for the breeders' organizations to accept the proposals under discussion. However, beyond the problem of perception, there existed a basic problem which was that the privilege did not exist. That had been the outcome in a certain number of countries, including France. There should be no confusion in that respect between the private law of plant variety protection, for which there could be no question of a privilege, and the public law of seed certification, which could give a privilege in respect of the production and use of certified seed.

117. Moreover, the general aims of the variety and seed industry had to be borne in mind. If it was wished for research to be effective--and for farmers to enjoy the advantage of genetic progress--breeders had to be given the necessary means. Therefore royalties had to exist. Where the percentage of farm-saved seed reached 70%, for example, as was the case in certain countries for various species such as wheat, it was hard to speak of a privilege; protection was more the exception than the rule. Such a situation could but promote the creation of hybrid varieties for which the privilege could not exist for lack of reproducibility of the plant material.

118. Finally, Mr. Petit-Pigeard held that one could not require, on the grounds that the law was not clear and had not been clarified by the courts, clarification of that law in the name of legal certainty for one's own profit. That remark also applied to other fields of intellectual property law. Such a demand could not be admitted without running the risk of breeders deserting the plant variety protection system.

119. Dr. Gunary (ASSINSEL) stated that ASSINSEL shared very firmly the views expressed by Mr. Winter and Mr. Petit-Pigeard (COMASSO) and was opposed to the proposals of COPA and IFAP. Plant breeders were in the business of creating for growers an opportunity to make more money from growing their crops and it seemed totally unreasonable that growers should have access to the breeders' property and the fruit of their research without regard to the investment which

they had made. ASSINSEL felt that it was right and proper for breeders to seek appropriate compensation for the development of their intellectual property. ASSINSEL was therefore opposed to the establishment of a definition of the kind sought by COPA and IFAP.

120. Mr. Hofkens (COPA/COGECA) observed that the concerned circles had concluded an agreement in France in which they acknowledged the practice under discussion in terms that were very close to those of the proposal made by him on behalf of COPA and COGECA. He further noted that the proposal made by the Commission of the European Communities with a view to the establishment of Community breeders' rights contained a provision to regulate "farmer's privilege."

121. Mr. V. Desprez (COMASSO) observed that he was one of the signatories to the agreement referred to by Mr. Hofkens and emphasized that it was a public law agreement and not one of private law.

122. Mr. J.-F. Prével (France) wished to give a number of explanations as regards the agreement concluded in France and which had significant implications since it meant a change in the habits of farmers and their suppliers. The agreement had been signed under the aegis of the Ministry of Agriculture in the form of an interprofessional agreement containing, indeed, the terms used by the representatives of COPA, COGECA and IFAP. However, it was a public law agreement which in no way called into question private law as a whole. The result was that users who did not comply with the agreement would be liable to private law action.

123. Mr. King (IFAP) stated that his organization was inspired by what had been done in France to establish a clear definition of what the "farmer's privilege" should be. IFAP was not in favor of abuses whereby 70% of the seed in France was outside the system. As a farmers' organization IFAP was in favor of breeders getting sufficient remuneration to produce new varieties since this was in the interest of farmers and society in general. But Mr. King would like to tell his friends in ASSINSEL that, in approaching this question, the debate could not start from their objectives, but from the situation as it was at present; and the fact was that, according to the members of IFAP, there was a prior commitment in certain member States that farm-saved seed should be exempt from royalty payments. The debate had to start from there. The proposal of IFAP was not to create a new privilege, but to avoid abuse, and he suggested that the debate should attempt to clarify what that meant.

124. Dr. von Pechmann (AIPPI) thought that the observations made by COMASSO and ASSINSEL were correct and therefore supported the viewpoint that "farmer's privilege" should not be more precisely defined in the Convention. The wording proposed in document IOM/IV/2 would appear satisfactory.

125. Mr. Royon (CIOPORA) observed that the breeders who were members of CIOPORA were not as affected as the members of ASSINSEL by the problems raised by "farmer's privilege." CIOPORA nevertheless fully supported the views expressed by the representatives of ASSINSEL and COMASSO. It again insisted that Article 5(1) should refer to commercial exploitation of the variety. That reference would enable established case law to be used to check abuse committed

by those who propagated the variety for commercial purposes under the pretense that they were doing so for personal purposes.

126. Mr. J. Harvey (United Kingdom) pointed out that the paragraph under discussion did not exempt farmers from the scope of the breeder's right. Exemption was an option under Article 5(4). The question that arose in relation to the proposed text was whether or not it should establish a position in relation to the "farmer's privilege" that would be uniform throughout all UPOV member States. The provision might be to the effect that the "farmer's privilege" should be maintained, modified or eliminated. The proposed text of Article 5(4) allowed each member State to do as it chose. Mr. Harvey would welcome the views of the professional organizations on whether each member State should be allowed to do as it chose or whether the Convention should establish a position that applied to all member States.

127. Mr. Roberts (ICC) stated that ICC strongly supported the position of COMASSO and ASSINSEL on that subject. In relation to Mr. Harvey's question, which was very important, the position of ICC was that it would like UPOV to take a position on the question of "farmer's privilege." It was very important that there be common rules across the whole of UPOV, that there be a standard which individual Governments could adhere to.

128. Mr. Winter (COMASSO) referred to the statement by Mr. Hofkens (COPA/COGECA) that the principle of "farmer's privilege" was also to be laid down in the Community breeders' right under preparation. He emphasized that it was at present only a draft submission that was being discussed within the appropriate service of the Commission of the European Communities and still had to be finalized before it became a Commission proposal submitted for discussion to the Council. That meant that one could not rightfully refer to an already established institution of "farmer's privilege."

129. Mr. Le Buanec (ASSINSEL) returned to a question put by Mr. Harvey (United Kingdom) and a declaration made previously by the President of ASSINSEL, Mr. Clucas. ASSINSEL wanted a position to be adopted at the level of UPOV and not of each member State; it also wanted the breeder's right to be defined in a very strong manner and in most precise terms.

130. The Chairman concluded the discussions on paragraph (2), noting that the Administrative and Legal Committee would have to consider the matter on which the views were divided between COPA, COGECA and FIPA, on the one hand, and the other organizations, on the other.

Paragraph (3) (Essentially Derived Varieties)

131. The Chairman opened the discussions on paragraph (3).

132. Mr. Slocock (AIPH) said that AIPH accepted the principle of dependence. In relation to the alternatives, AIPH noted that Alternative 1 and Alternative 3 would vest in the holder of the right an ability to interfere with the free exploitation of the dependent variety; it believed that to be inherently

wrong. AIPH felt that the breeder should be equitably compensated in relation to a dependent variety and that the simple wording of Alternative 2 represented the balance which AIPH, from the user side, wished to see.

133. Dr. von Pechmann (AIPPI) stated that AIPPI welcomed the inclusion of a provision to regulate dependency. As regards the limitation of the provision to derivation from a single protected variety, AIPPI considered that derivation from two varieties was indeed conceivable and that there was no reason why that fact should not be taken into account in the proposed provision. If a variety was created from the crossing of two protected varieties and if it possessed the properties of both varieties, Dr. von Pechmann saw no reason to treat that variety differently from a variety that had been derived from a single protected variety.

134. As regards the proposed alternatives, AIPPI was in favor of Alternative 1 as already stated in document IOM/IV/5. If that alternative were not to be accepted, AIPPI would then support Alternative 3.

135. Dr. Gunary (ASSINSEL) stated that ASSINSEL particularly welcomed the introduction of the concept of dependence. ASSINSEL saw it as a means whereby the interface between the forms of intellectual property protection in plant varieties and plant genetic components might be most effectively handled. To make the definition of "essentially derived" easier, ASSINSEL suggested the removal of the brackets around "single" in the first part of paragraph (3) since it believed that there were very few circumstances under which it was realistic to consider a variety being essentially derived from more than one variety. ASSINSEL awaited the outcome of the discussions between UPOV and WIPO concerning the interface between the two systems of protection and the extent to which patent rights should be granted for biotechnological inventions. If the result of those discussions led to a position where the exploitation of varieties containing patented components or produced by patented processes was only possible with the permission of the patent holder, then ASSINSEL wished to reserve the right to allow access to a protected variety on the same basis and accordingly selected Alternative 1 for Article 5(3).

136. Mr. Roberts (ICC) stated that the introduction of dependence into the plant variety protection system was one of the most important proposed amendments to the UPOV Convention. ICC joined with other organizations in welcoming the concept that was new in the field of plant breeders' rights. It felt that it was an extremely important concept which added a major element of balance and equity to the relations between breeders, on the one hand, and between plant variety rights holders and patent holders, on the other.

137. Concerning the first situation, it was generally recognized that it was not adequate and not fair that a breeder could produce a new variety, using only one variety protected in favor of another breeder as a parent. The proposed dependence clearly offered great scope for remedies to that situation, although the practical difficulties in defining its scope had to be recognized. However, those difficulties had to be faced and would be solved with the progressive application of the principle.

138. Concerning the second situation, ICC wanted the protection available for plant varieties to be improved, but not at the expense of the protection available for inventions. It was therefore essential to adopt Alternative 1, which provided a right to prevent the exploitation of a dependent variety. It was

now possible for genetic engineers to introduce a single new gene conferring an important agronomic character into a variety protected in favor of a plant breeder; under the present legal system, the plant breeder had no redress against that. Industry (both the biotechnological and the plant breeding industry) wished that a proper basis for negotiations be introduced, i.e. that the rights of both parties be equal.

139. Mr. Royon (CIOPORA) stated that CIOPORA was very much in favor of the idea of dependence, but was at a loss when having to take a position on the proposed text.

140. The first reason for that was connected with the notion of subject matter of protection and interface between e.g. patented genes and protected varieties. In CIOPORA's opinion, there should be no misunderstanding as to the subject matter of protection under the UPOV Convention. In some cases quoted as examples of dependence situations (in particular that of a gene being inserted into a variety by a genetic engineer), the problem involved was not one of dependence, but rather one of direct infringement through propagation, commercial use or sale of the variety into which the gene claimed in the patent had been inserted. In relation to the second aspect, CIOPORA wanted, of course, the rights of "traditional" breeders to be respected. To that effect, it had prepared a position paper on the draft EC Directive on the legal protection of biotechnological inventions.

141. The second reason was that the proposed concept of derivation was entirely different from the concept of dependence under patent law. CIOPORA believed that an adequate solution to the problem of interface between patented genetic information and protected plant varieties required equal rights to be granted on both sides and the same rules for dependence to be applied on both sides. Any other system would give rise to unsurmountable difficulties.

142. The third reason was that breeders, notably within CIOPORA, had different opinions on dependence.

(i) For some members of CIOPORA, the main, if not sole, concern was to make it a matter of principle that mutations of a protected variety automatically reverted to the breeder of the protected mother variety. Conversely, they did not wish to be limited by any so-called "minimum distances" when deciding to protect and market their own hybridized varieties. Considering themselves as the rightful owners of the mutations, they wanted to be free to unilaterally decide, depending on their commercial requirements, whether to release a mutation which had been granted back to them by a third party (a licensee for example). Those breeders justified their attitude by the fact that, according to them, discovering a mutation was not actual breeding work and did not deserve the same protection status. They considered further that mutations were in fact already virtually existent in a latent state in their varieties.

(ii) Other members of CIOPORA on the contrary considered that provisions concerning examination or infringement, or both, had to be incorporated in the Convention in order to put a final stop to parasitic mini-variations of already protected varieties through the creation of new requirements of minimum distances between varieties. That would apply equally whether those mini-variations had been obtained through the discovery of a mutation--a case where derivation was involved--or through a known breeding process. That position might in some extreme cases lead to the grant of a title of protection to a mutation if it was clearly distinct from the original variety or, on the

contrary, to the refusal of protection to a hybridized variety if it was not distinct enough from an already known variety.

143. To conclude, in CIOPORA's opinion, the problem of dependence had to be further studied, resorting to the true notion of dependence under patent rights. Cases of slavish imitation or trivial modification of protected varieties should not come under the dependence system, but should be barred from protection.

144. Mr. Winter (COMASSO) likewise welcomed, on behalf of COMASSO, the proposed inclusion of the dependency principle in the UPOV Convention. As to the explanations given by the Office of the Union to the proposed wording, COMASSO was also of the opinion that the dependent variety would have to satisfy the distinctness requirement. It further agreed with the statement that the dependent variety would have to essentially demonstrate the genotype of the mother variety and that the distinctness must result from a limited number of characteristics. That, however, did not have to be the result of typically one characteristic. Additionally, the breeding method used to create the dependent variety had to aim at retaining the essential characteristics of the mother variety irrespective of the details of the process used. Dependency should exist in at least those cases listed as examples in the explanatory notes to Article 5 in document IOM/IV/2, paragraph 6(iii).

145. COMASSO was altogether aware of the problem of a dependency pyramid. The proposed solution did not however seem practicable. [This statement was subsequently amended.] As an approach to a solution, COMASSO could well imagine that dependency would not depend on an administrative decision, but that it would be claimed or asserted by the breeder of the mother variety.

146. As to the detail of the proposed wording, COMASSO felt that the word "single" should be deleted since cases were also conceivable in which the use of more than one mother variety could also lead to dependency. In any event, that was not to be excluded. [This statement was subsequently amended.] As to the effects of the proposed dependency, COMASSO was almost obliged, as a breeders' organization, to choose Alternative 1.

147. Mr. Hofkens (COPA/COGECA) referred to his opening statement and stressed the fact that it had to be ensured that a plagiary could not be protected by an independent right or by a right subject to the proposed Article 5(3); that was why COPA and COGECA had opted for Alternative 3.

148. Mr. King (IFAP) stated that IFAP supported the concept of dependence since it felt that it was only reasonable that the owner of an original variety should be entitled to reasonable remuneration from the person who developed a dependent variety. IFAP supported Alternative 3 because it found it inappropriate that the person who developed a new dependent variety should be prevented by the owner of the original variety from exploiting his variety, and that there should be a monopoly in respect of all similar varieties in the hands of one person. Where a substantial difference was involved, the person who developed the dependent variety should be able to market it after having remunerated the breeder of the original variety.

149. Mr. Besson (FIS) stated that FIS went along with the position adopted by ASSINSEL and, as far as the general principle of dependency was concerned, with the statement made by the IFAP representative.

150. Dr. von Pechmann (AIPPI) wished to return to the phrase "essentially derived from a protected variety." It seemed to him that the question should be put in a somewhat simpler manner: a variety was either derived from a protected variety or it was not. Mr. Winter (COMASSO) had pointed out that the subsequent variety concerned had to contain all the essential characteristics of the protected mother variety. That again raised the question of what was meant by "essential characteristics." It had already been suggested at the last meeting to establish a clearer definition, for instance, that the derived variety should possess all those characteristics of the mother variety that had been found relevant for granting protection or for distinguishing the protected variety from the existing state of the art. It was possible for essential characteristics to have been derived from varieties at a different level in the genealogy and those should not give the owner of the protected mother variety the right to charge fees for use or royalties for the subsequent variety. Dr. von Pechmann wished to raise that matter for discussion since it would prove highly problematic to take stock in infringement proceedings without a clear formulation. The question thus arose whether the legal situation should not be more clearly defined or whether the word "essential" should not be deleted.

151. Dr. Gunary (ASSINSEL) wished to reply to the statement made by Dr. von Pechmann. ASSINSEL could not agree to retaining the word "derived" without qualification since a variety created by conventional breeding would be "derived" in most cases from a number of other varieties. The expression "essentially derived" implied that someone was taking over the breeding effort of another breeder as the basis for a further variety and that the genome of the new variety would be almost the same as the genome of the mother variety. Having established that, one was forced to define the particular circumstances under which there might be a case of dependence. ASSINSEL had suggested three examples in a position paper:

(i) the introduction of recombinant DNA, i.e. the insertion of a new gene, into a variety;

(ii) the exploitation of natural or induced mutations;

(iii) the situation where the majority of the genome of the original variety was transferred into the new one by a series of back-crosses.

152. Mr. Slocock (AIPH) wished to revert to his comments on the three alternatives proposed for the effects of dependence. Being the only one to support Alternative 2, he felt that there was a need for substantiating his position. It seemed to him that Alternative 3, which had been advocated by his colleagues from COPA/COGECA and IFAP, introduced a totally new concept, namely that of "substantial improvement." Whereas it might be easy to understand and apply it in quantitative terms in the field of agriculture, although a subjective evaluation would be required in many cases, that was much more difficult in the field of ornamental plants. All organizations were anxious to ensure that there would be no plagiarism, but this might be more a matter of minimum distances and distinctness, a matter which might not be appropriately dealt with in the paragraph under discussion. Alternative 2 had the great merit of allowing reasonable access by users to the new material by requiring that equitable remuneration be paid to the breeder of the original material, without resorting to a totally new concept.

153. Mr. Winter (COMASSO) wished, in view of the discussions, to return to his comments. It appeared to him, in the meantime, highly improbable that a variety could be dependent on more than one initial variety. Consequently, COMASSO's proposal to delete the word "single" was not to be taken into account. As for the "dependency pyramid" referred to in paragraph 6(iv) of the explanatory notes to Article 5 in document IOM/IV/2, the discussions had also shown that the proposed solution, contrary to his previous statement, could be altogether practicable.

154. Mr. Harvey (United Kingdom) noted that one of the primary reasons for introducing the concept of dependence was not to deal with the interface with the patent system, but with the practice whereby a small alteration was made to a single variety to produce a new one. He had noted with interest that the only reasons that had been advanced in favor of Alternative 1 were connected with the interface with patent protection. Whilst he could accept that those reasons were valid in the circumstances, he wondered whether the organizations which had supported Alternative 1 would also accept it in relation to conventional breeding.

155. Mr. King (IFAP) referred to the explanations given by Mr. Slocock (AIPH) in relation to the three proposed alternatives. IFAP was totally opposed to Alternative 1 because it was very important for it that there be no monopoly on dependent varieties. Alternative 2 satisfied the concerns of IFAP as a farmers' organization. One had nevertheless to be reasonable and ASSINSEL had made a good case for providing a larger scope to avoid plagiarism. There was no reason why a dependent variety which did not show a substantial improvement should be protected.

156. Dr. Böringer (Federal Republic of Germany) wished to put a question to the representatives of the breeders' associations. Cases were also conceivable in which a new variety would come very close to an existing variety although their breeding histories were very different. Dr. Böringer wanted to know from the associations whether the possibility should be provided, in their view, for preventing exploitation of the new variety by assertion of the right in the existing variety.

157. Mr. Royon (CIOPORA) referred to the remarks made by Mr. Harvey (United Kingdom) and Mr. King (IFAP) which, in his view, clearly illustrated the difficulty of solving a problem of derivation or dependence if the scope of the cases to be taken into consideration was limited. CIOPORA had clearly stated that slavish or trivial modification, i.e. plagiarism, of protected varieties should be barred from protection completely and should not give rise to dependent protection. Those remarks were also a reason why CIOPORA was unable to choose one of the proposed alternatives in respect of varieties which brought an improvement, but were dependent; they were also a reason why CIOPORA thought that the principles of dependence based on patent legislation could bring a better understanding and a better solution to the problem.

158. Replying to the question raised by Dr. Böringer (Federal Republic of Germany), Mr. Royon said that it would be extremely rare that a breeder would, by traditional cross-breeding, come up with a variety that was very close to an already existing variety. He had only knowledge of one such case where the same rose variety had been developed from entirely different parents by two breeders.

159. Dr. Gunary (ASSINSEL) wished to make it very clear that ASSINSEL was in no way in favor of protecting plagiarism. The subject of the discussions was one in which positions were not yet firmly established, in particular within ASSINSEL where discussions were ongoing as to the scope of application and the effects of dependence.

160. Replying to the question raised by Dr. Böringer (Federal Republic of Germany), Dr. Gunary commented that technological developments would soon enable an assessment of the degree of similarity of two genomes in cases where two phenotypes were compared at present. Under those circumstances it would be extremely unlikely that a variety produced by an alternative breeding method would come close to a variety and present a genome that was sufficiently similar to that of the other variety to lead to a case of dependence.

161. Dr. Lange (ASSINSEL) added a personal view to the statement of Dr. Gunary. He believed that the case referred to by Dr. Böringer (Federal Republic of Germany) would only arise quite seldom in practice. Should that happen, however, then an independent right should indeed be granted. Moreover, the question of proof would play a big part. Under the normal rules of onus of proof, the owner of a protected variety would have to prove that the second variety was derived from his own. Where derivation was reasonably shown, then the onus of proof would have to be reversed and the second breeder would have to prove that he had obtained his result in a different way.

162. Mr. Roberts (ICC) supported the views put forward by Dr. Gunary (ASSINSEL) with regard to the three situations in which there might be cases of dependence, namely the introduction of a recombinant gene into a variety, the exploitation of natural or induced mutations and the use of back-crosses. Those were three excellent examples and ICC hoped that, as a minimum, the system of dependence would give protection to the owner of the original variety in those cases.

163. Reverting to the question put by Mr. Harvey (United Kingdom), Mr. Roberts stated that ICC was firmly of the opinion that the same standards should be applied to dependent varieties resulting from biotechnology and to dependent varieties created by means of conventional breeding processes, for two reasons. Firstly, there should be no discrimination either for or against biotechnology. Industry generally had serious reservations about judging a product on its production process rather than on its merits. If one variety was essentially derived from another, that would be shown by the respective genomes and would be demonstrated scientifically. Secondly, if a distinction were to be made, one would have to define the conventional processes and the biotechnological processes, and the definition would very rapidly become out of date.

164. Dr. von Pechmann (AIPPI) stated that the second variety was obviously an independent variety if it was clearly distinct. If its breeder could prove that it was not derived from the earlier protected variety, then it would not be subject to Article 5(3).

165. Mr. Royon (CIOPORA) repeated in reference to the remark by Dr. Böringer (Federal Republic of Germany) that, in his view, dependence should not be limited to cases of derivation, but should be made broader because, if a variety that was essentially derived from another variety was so close to that

other variety that it could not be clearly distinguished, then it would be an infringement of that other variety. In relation to the question put by Mr. Harvey (United Kingdom), Mr. Royon fully agreed with the comment made by Mr. Roberts (ICC) to the effect that there should be no distinction between the technology used to create varieties in the application of the dependence principle.

166. Mr. Greengrass (Vice Secretary-General) informed the meeting that UPOV had held a series of workshops on variety examination dealing with the question of minimum distances and that inevitably discussions concerning minimum distances developed into discussions about dependence. When the meeting moved on to Article 6, which dealt with distinctness and thus with minimum distances, it was likely that the dependence question would arise once more. Mr. Greengrass referred to data presented by a private company to the workshop on maize in Versailles which suggested that varieties of maize that were not distinguishable using normal morphological criteria, but which were distinguishable using biochemical techniques were in fact very different in their performance. On the basis of purely morphological criteria, some parties would have said that they were the same variety, but in fact they were genetically distinct on the basis of RFLP data. Those would be examples of varieties that were independently developed, but genetically distinct; a situation that was of some relevance to the question put by Dr. Böringer (Federal Republic of Germany).

167. Mr. Slocock (AIPH) asked how the words "substantial improvement" would be applied to the breeding of rhododendrons.

168. Mr. Greengrass (Vice Secretary-General), in response to Mr. Slocock, suggested that a rhododendron breeder, in establishing his breeding program, would presumably set down its objectives. A substantial improvement in the case of rhododendrons would be some significant progress towards the achievement of any of those objectives.

169. Mr. Royon (CIOPORA), referring to the example given by Mr. Greengrass, noted that distinctness could not only be established on the basis of morphological characteristics, but also on the basis of physiological characteristics and performance.

Paragraph (4) (Possibility for Member States to Make Further Limitations to the Right Granted to the Breeder)

170. The Chairman opened the discussions on paragraph (4).

171. Mr. Slocock (AIPH) expressed concern that the proposed wording of the paragraph allowed individual member States excessive flexibility in the implementation of Article 5. It might be appropriate to ask the authors of this paragraph for examples of its application because it clearly was a permissive paragraph which had the potential to reintroduce the question of the "farmer's privilege." It seemed to introduce general permissiveness in circumstances where the Convention was trying to introduce uniformity. Flexibility was not welcome in this context. As to the reference to "public interest," Mr. Slocock felt that it would be more appropriately dealt with in a later Article.

172. Dr. von Pechmann (AIPPI) said that AIPPI had spoken against that paragraph in view of the fact that it allowed differences in the legal situation in each country, which AIPPI could not support. Furthermore, the paragraph was not necessary since Article 9 already authorized the member States to limit the exercise of breeders' rights by a decision of the authorities for reasons of public interest. If the phrase in brackets was to be deleted, paragraph (4) would no longer be compatible with Article 9. Were it to be maintained, on the other hand, then paragraph (4) would in fact be unnecessary. Furthermore, the proposed procedure was unclear and ineffective; the Council could indeed comment on an undesirable restriction, but could not refuse it. Consequently, the whole paragraph should be deleted.

173. Dr. Gunary (ASSINSEL) stated that, in Article 5, UPOV seemed prepared to give a right in paragraphs (1) to (3) with one hand and to take it away in paragraph (4) with the other hand. The net effect was to create a degree of uncertainty which was not welcome. In principle, ASSINSEL would rather prefer paragraph (4) not to exist. Insofar as factors existed in member States which required its introduction, ASSINSEL would be prepared to accept the proposed wording only if the words within brackets were included. There should be a very clear requirement for member States to indicate why they were taking an exceptional position and why it was necessary in the public interest. Dr. Gunary stated as an afterthought that perhaps the whole of the content of this Article should be dealt with under Article 9.

174. Mr. Greengrass (Vice Secretary-General), in commenting on Dr. Gunary's suggestions concerning Article 9, explained that Article 9 dealt with an individual breeder's right which was affected by State intervention for reasons of public policy. Article 5(4) was dealing with a general exception which was not the same thing at all.

175. Mr. Roberts (ICC) agreed with the comments of all previous speakers on that paragraph. ICC felt that the paragraph, as presently drafted, gave a very great degree of freedom to member States to do exactly as they chose. When considering the provision, some of ICC's members who were less familiar with the background had been very interested to discover that it was thought to deal with the "farmer's privilege" since they had not realized that from the wording at all. This illustrated the very broad scope of the proposed text and for that reason ICC proposed that the Article should be deleted.

176. Mr. Royon (CIOPORA) said that CIOPORA agreed with those delegations that had spoken in favor of deleting the paragraph in its entirety. The language was hard to understand and CIOPORA felt that if the provision were put into a final text it would be ignored by Governments and courts who would do what they thought was in the public interest, regardless of the wording of the provision.

177. Mr. Winter (COMASSO) said that COMASSO had unequivocally spoken in favor of deleting that paragraph. He further noted that for the majority of delegations the paragraph was not clear despite the relevant explanatory note.

178. Mr. Hofkens (COPA/COGECA) stated that, if a definition of "farmer's privilege" was not included in the text of the Convention as proposed by his Delegation, they would be in favor of maintaining the text as proposed to

enable the various States to legislate correspondingly. COPA and COGECA supported the principle that restrictions should not lead to excessive prejudice to breeders' legitimate interests; they were in favor of deleting the words in brackets.

179. Mr. King (IFAP) stated that it was essential that there be flexibility in the Convention. It was impossible for countries to have the same legislation with their differing national circumstances, objectives, policies and histories. Mr. King added that there seemed to be an excessive stress on acquiring rights amongst the breeders' organizations and ICC. Those organizations were in favor of the mandatory application of Articles 1 and 4, but of the elimination of Article 5(4). That did not seem to be the way to secure willing support of countries. UPOV was not a police force, it was a Union in which States participated because it was to their advantage. He suggested that paragraph (2) be made so clear in relation to the "farmer's privilege" that countries would not need to use paragraph (4). Paragraph (4) would seem to make the existence of the "farmer's privilege" discretionary for national Governments. IFAP felt that the farmer should be treated in the same way in all countries with respect to the "farmer's privilege" by the addition of a subparagraph (v) to Article 5(2) which would spell out the rights and obligations under "farmer's privilege" and the limitations. For the sake of flexibility, IFAP supported the inclusion of paragraph (4).

180. Mr. Besson (FIS) observed that the implementation of that paragraph could lead to distortion of competition and that aspect would have to be examined.

181. Mr. Petit-Pigeard (COMASSO) held that, in view of Article 9 and of the well-established case law in respect of abuse of the right, it was unnecessary to lay down what States were to do when they imposed a given practice for reasons of national interest. The conjunction of references to restriction of rights, public interest and excessive prejudice seemed highly debatable to him. Indeed each of those references was in itself debatable: the restriction of rights amounted in practice to the removal of certain rights; public interest would frequently be a screen for measures of political convenience; finally, it would of necessity be difficult to assess what was an excessive prejudice. Generally, there was no reason to create uncertainty to the detriment of breeders nor to restrict their rights. As regards the alleged "farmer's privilege" there was no reason to place farmers in a privileged situation compared with other categories of economic agents.

182. Furthermore, it appeared inadvisable to Mr. Petit-Pigeard to make the UPOV Council an arbiter in defining the solution to a purely national problem. That problem was also purely one of case law: it was for the courts to say to whom the law applied and, if the government invoked reasons of national interest for not applying the law, to decide whether application or non-application was lawful or not. It was therefore up to the profession to draw its consequences and to obtain a definition of the scope of that right from the courts. That was what had been done in France, where the notion of "farmer's privilege" had been denied.

183. Mr. Royon (CIOPORA) fully supported the statement made by Mr. Petit-Pigeard.

184. Mr. Slocock (AIPH) intervened to point out that those seeking the deletion of paragraph (4) were concerned that it introduced uncertainty into the whole of Article 5. It seemed possible that others would also accept the deletion if their particular problem of the "farmer's privilege" was dealt with elsewhere in the Article.

Paragraph (5) (Collision Norm)

185. The Chairman opened the discussions on paragraph (5).

186. Mr. Slocock (AIPH) stated that paragraph (5) was inevitably contentious and perhaps not inappropriately labelled as a "collision norm." Its role in the Convention would largely depend on the wording finally adopted in Article 1(2). The retention of a clear separation between the patent and plant breeders' rights systems was essential, but Mr. Slocock felt that a paragraph of the nature of paragraph (5) was still required to deal with the interaction between plant breeders' rights and other systems. He could understand that delegates from other organizations might feel that the present wording was brutal, but he welcomed the thinking behind the paragraph and urged its retention in a form which would clearly separate plant breeders' rights from other systems of protection.

187. Dr. von Pechmann (AIPPI) stated that AIPPI had serious objections to paragraph (5) since it could lead to compulsory licensing of earlier industrial property rights. AIPPI considered that compulsory licenses could only be granted on the grounds of public interest, but not automatically in respect of any other industrial property right (patents or trademarks).

188. As regards the relationship between plant variety protection and trademarks, Dr. von Pechmann pointed out that the UPOV Convention required the use of a variety denomination when marketing the variety or its propagating material. Where an earlier trademark existed that was identical with the variety denomination or confusingly similar to it, that would also be subject to a compulsory license.

189. As for the relationship between plant breeders' rights and patents, Dr. von Pechmann made reference to Article 14 of the European Communities Commission draft for a Council Directive on the Legal Protection of Biotechnological Inventions, it read as follows:

"If the holder of a plant breeder's right or a variety certificate can exploit or exercise his exclusive rights only by infringement of the rights attached to a prior national patent, a non-exclusive license of right shall be accorded to the breeder's right holder to the extent necessary for the exploitation of such breeder's right where the variety protected represents a significant technical progress, upon payment of reasonable royalties having regard to the nature of the patented invention and consistent with giving the proprietor of such patent due reward for the investment leading to and developing the invention."

190. That provision was indeed comparable in its effect with Article 5(3), Alternative 3. The following comments made by the German Federal Ministry of Justice on that provision were of significance in assessing whether the proposal in Article 5(5) in fact had any chance of being accepted:

"The ruling on compulsory licensing proposed by the Commission in Article 14 meets with considerable objections. Such a ruling is alien to German law that only permits compulsory licensing in the public interest. Even taking into account the fact that the Commission, in proposing extended patentability in the plant kingdom, holds it necessary to provide a compensatory provision in favor of the owners of plant breeders' rights, the compulsory restriction of a patentee's exclusive rights contained in Article 14 in favor of the private interest of plant breeders can hardly be accepted." ... "On the basis of the current legal situation, the Federal Government considers the granting of dependency licenses in the manner proposed to be neither necessary nor purposeful at present."

191. The Federal Council's Committee on European Community Affairs, the Agricultural Committee and the Legal Committee had also expressed a position, worded as follows:

"The compulsory restriction of patentees' exclusive rights resulting from Article 14 in favor of the private interest of plant breeders should not be accepted. Such a ruling does not appear necessary and would furthermore constitute an alien element in German law."

192. In quoting those statements, Dr. von Pechmann wished to make it obvious that the maintenance of the provision would lead to difficulties, be it at the Diplomatic Conference or, subsequently, during the ratification procedure.

193. Mr. D. Brouër (Federal Republic of Germany) noted that no comparable comments were as yet available on Article 5(5). Irrespective of the question whether a provision on delimitation or a collision norm would prove desirable or even necessary, it had to be noted that in German law there had indeed been a ruling in 1953, that was practically identical with the provision under discussion, as regards the effectiveness and assertion of patents for varieties protected under the Seed Trade Law. Mr. Brouër further stated that, without wishing to give final comments on that provision, the comparison between the provision and compulsory licensing was somewhat exaggerated. Naturally, a breeder who used a patented gene or process would have to have a license to be authorized to do so and would have to pay royalties. The proposed provision on delimitation would only apply where the variety had already been bred. In other words, the patentee would be obliged to require full compensation for his outlay at the time of the grant of the license. That ruling was in no way to be compared with compulsory licensing.

194. Mr. Clucas (ASSINSEL) said that ASSINSEL believed that there should be clarification of the way in which rights in patented plant genetic components and plant breeding processes, on the one hand, and plant breeders' rights, on the other, should interact. That needed to be clear and balanced. ASSINSEL did not think that the present wording achieved that aim and it would not favor compulsory licensing of patents if there were any hint of it in paragraph (5). ASSINSEL's wish was that it should be quite possible for a variety protected by plant breeders' rights to contain a gene which in turn was the subject matter of a valid patent.

195. Mr. Roberts (ICC) stated that ICC had very clear and strong views on the paragraph. It felt that the paragraph should be deleted. What was at stake was not a compulsory license but expropriation. Under that paragraph, a

patentee's rights ceased when a plant breeder's right had been granted. The patent right was a right to prevent others from doing certain acts and that right was effectively taken away under that paragraph on registration of a plant breeder's right. There was therefore no basis for the systems to interact in the paragraph.

196. It had been stated that a breeder had to seek a license from the patentee to use the patented gene, and presumably the patentee was able to refuse such a license. Thus, the paragraph did not create a situation where the use of a gene was free, subject to the payment of royalty. However, if a breeder used the gene without a license, without knowing that he was infringing the patent, and obtained a plant breeder's right on his variety, the patentee had lost all opportunity of obtaining any return on his patent. That situation could arise quite often and would be of great concern to patent holders.

197. The great advantage of the plant breeders' rights system, in Europe at least, was that there had been very little litigation concerning the rights, and one of the concerns of plant breeders was that they should not be subject to harrasing litigation from patentees, particularly during the breeding phase. The effect of that paragraph, however, would be that patentees would know that once a plant breeder's right was granted they would have no further redress and therefore, in cases of doubt, they would seek to take out injunctions against plant breeders or even against testing authorities to prevent the grant of rights. That could not be good for the plant breeders' rights system.

198. Mr. Royon (CIOPORA) could not understand why, whilst strengthening the right granted to the breeder, UPOV proposed to limit other industrial property rights. Paragraph (5) in its present wording was a clear encroachment of other industrial property laws and could affect not only patents but also utility models, trademarks, trade secrets, copyright, etc. That was totally unjustified since it would deprive all other types of industrial property rights of any legal certainty. That would be an unprecedented attempt to further erode industrial property rights. If the intention was only to regulate the interface between biotechnological inventions and plant varieties, then once again the definition of the subject matter of protection presented problems. The concern could be best addressed by providing within Article 5(3) a dependence system based on patent principles and by thus bringing closely together the patent and plant breeders' rights systems when applied to plant varieties. In that respect, CIOPORA would like to refer to the comments and remarks which it had made on Article 14 of the proposed EC Directive on the Legal Protection of Biotechnological Inventions where it had made it clear that a solution to problems arising from the interface could be found only if the two systems were regulated by the same dependence system.

199. Mr. Winter (COMASSO) said that it was COMASSO's view that a collision norm to regulate possible overlapping between differing systems of protective rights was basically necessary, but that the proposed norm was not satisfactory. In any event, the collision norm should in no way expropriate the owner of rights and simply leave him with an empty shell. The collision norm should be balanced; it should moreover be of identical content in the UPOV system and in the patent system. The proposed provision should therefore be reconsidered in that light.

200. Miss F. Comte (COPA/COGECA) supported the position expressed by Mr. Sloccock (AIPH). COPA and COGECA indeed considered that a collision norm

was absolutely necessary to govern the relationship between breeders' rights and other industrial property rights, particularly patents. Having spoken, in the context of Article 1, against the possibility of double protection for one and the same variety, in view of the fact that breeders' rights were alone adapted to protecting new plant varieties, COPA and COGECA were of the opinion that it was extremely important to also have a provision in the Convention prohibiting any interference between patents and breeders' rights.

201. Mr. King (IFAP) associated his organization with the views of AIPH and COPA/COGECA in stating that it was important to maintain paragraph (5). In relation to Article 1(2), IFAP was in favor of plant breeders' rights being exclusive of any other form of protection of plant varieties as such. The view of farmers was that it was important for the purposes of plant production that there be only one system of industrial property rights, and that should be the plant breeders' rights system. He asked the Vice Secretary-General to clarify two questions: (i) To what extent was it necessary to patent new plant varieties? Was IFAP asking for something totally unreasonable when we said that plant breeders' rights were the rational system of industrial property for plant varieties? (ii) The Uruguay Round of GATT was discussing for the first time what they called TRIPS, trade-related aspects of intellectual property rights. It seemed possible that the patenting of all new plant varieties could be traded off in those negotiations as concessions in relation to services or some other provision under the TRIPS negotiations so that there would be no point in discussing the UPOV Convention.

202. Mr. Greengrass (Vice Secretary-General) stated that his personal opinion was of no significance. It was the UPOV Council which reached decisions on questions of that nature. However, dealing with Mr. King's first question, there plainly was a view widely held in plant breeders' rights circles that plant varieties could be adequately protected under a revised Convention and that, if strong enough protection were provided, it would not be necessary to protect plant varieties in another system with different criteria. That was a view that was widely held, and indeed if that view had not been widely held, then the meeting would not have been looking at provisions such as those of Article 1(2). In relation to the second question, there was some interest in Government circles in the possibility of including plant breeders' rights within the category of forms of intellectual property that were currently being discussed within GATT. There were no definitive views on that complex question at the present time. It was simply under consideration.

203. Mr. King (IFAP) asked the Vice Secretary-General if there were any implications for the UPOV Convention in the TRIPS discussions taking place as part of the Uruguay Round.

204. Mr. Greengrass (Vice Secretary-General) stated that he could not answer that question today in relation to the complex TRIPS discussions.

205. Mr. Besson (FIS) felt that the complexity of the matters raised in the relationship between patents and plant breeders' rights was such that a solution could not be found within the framework of the current meeting. An enormous concerted effort had to be made to define boundaries between the various intellectual property rights, particularly in the forthcoming meeting of a Committee of Experts to be organized jointly by UPOV and WIPO.

206. Mr. F.W. McLaughlin (FIS) stated that he was Executive Vice-President of the Association of Official Seed Certifying Agencies (AOSCA). AOSCA was the organization that coordinated seed certification throughout the United States of America and Canada. It had recently considered the general subject of the relationship between the patent and plant breeders' rights systems and, whilst he did not intend to raise the viewpoints before the meeting, he did have a paper that could be of interest to UPOV and to the delegations present in the meeting. With the Chairman's permission, he proposed to make it available to delegates for their information.

207. The Chairman invited Mr. McLaughlin to distribute his paper (see Annex II).

208. Mr. Roberts (ICC) wished to come back briefly to a point raised by Mr. King (IFAP) who asked whether it would become necessary to patent all plant varieties. The answer to that question was quite certainly "no," but it was desirable in ICC's opinion to have the opportunity to patent plant varieties. There was a considerable body of opinion in the plant world that thought that it would be difficult to get a patent for a plant variety unless there was something exceptional about that variety. It was important for broader protection to be available for really new developments in the biotechnology area. In that area, the possibility existed of taking genes from completely different organisms which might have useful properties and an invention of such a nature could confer that useful property to many kinds of plants. It might cover hundreds of plant varieties which would in turn be separately protectable by the plant breeders' rights system.

209. Dr. von Pechmann (AIPPI) was unable to share the view that the proposed provision did not contain a compulsory license. The effect of a license was that the licensor did not exercise his right of prohibition in respect of the licensee and a compulsory license meant that the right was suspended. The proposed provision had just that effect: on the basis of another industrial property right, namely a patent, certain acts such as the propagation of a variety or the importing of material could not be prohibited. He gave the example of a patent granted in the Federal Republic of Germany in the name of the Max Planck Society for a genetically engineered petunia which had a color that was new for petunias, that was to say salmon pink. A breeder of a new salmon pink petunia with differing growth could obviously obtain plant breeders' rights. Subsequently, however, the patentee, that was to say the Max Planck Society, could no longer assert its rights in respect of that new variety despite the fact that the characteristics claimed in the patent were also present in the new variety. There was not even a provision that he could require remuneration for use of those characteristics in the new variety. Moreover, it was contrary to the ruling proposed in Alternative 1 to paragraph (3).

Article 6 (Conditions Required for the Granting of the Right)

Paragraph (1)(a) (Novelty)

210. The Chairman opened the discussions on Article 6(1)(a).

211. Mr. Slocock (AIPH) stated that AIPH welcomed the introduction of the concept of novelty in the new wording proposed for paragraph (1)(a). AIPH did not

like the periods of grace and would prefer a return to the text of the original Convention which used the words "at the time of the application for protection in a member State of the Union, the new variety must not have been offered for sale or marketed, with the agreement of the breeder or his successor in title." AIPH did not feel that the changes in circumstances which had taken place since the 1961 Act of the Convention was adopted justified the permissive nature of subparagraph (i) or the extended period in subparagraph (ii).

212. Dr. von Pechmann (AIPPI) said that AIPPI had no comments to make on that paragraph. The maintenance of the period of grace in respect of novelty, which one was also trying to reintroduce into patent law, was welcomed.

213. Dr. Lange (ASSINSEL) said that ASSINSEL agreed with the proposed wording, but would suggest that the word "agreement" be qualified by the word "express."

214. Mr. Roberts (ICC) commented that ICC was pleased to see the proposed grace period but felt that it would be better if the grace period were uniform for all States. This was an area where uniformity could be achieved. ICC also asked that consideration be given to extending the grace period from one year to two years.

215. Mr. Royon (CIOPORA) reported that CIOPORA was very pleased that its request to maintain the requirement that exploitation be "with the agreement of the breeder" had been met. However, CIOPORA, like ASSINSEL, suggested that the provision in question should read "with the express agreement of the breeder" since the more precise wording might avoid unnecessary litigation and shift the burden of proof away from the plant breeder.

216. Mr. Winter (COMASSO) said that COMASSO was likewise in favor of the reference to the breeders' express agreement. It further suggested, with a view to the desirable harmonization, that the period of grace should be the same everywhere and, finally, that its duration should be two years.

217. Miss Comte (COPA/COGECA) stated that COPA and COGECA had no comments to make on Articles 6 to 14 of the Convention.

218. Mr. King (IFAP) stated that IFAP had no official view on paragraph (1)(a).

219. Mr. Besson (FIS) said that FIS shared the view expressed by ASSINSEL.

Paragraph (1)(b) (Distinctness)

220. The Chairman opened the discussions on paragraph (1)(b).

221. Mr. Slocock (AIPH) referred to his opening statement where he had called for a clearer separation of new varieties by the recognition of commercially important rather than botanically interesting differences between them. Too

often in the past, features of minor botanical significance had been considered in the establishment of distinctness rather than characteristics which were significant commercially, economically or aesthetically. In discussions on Article 5(3), Alternative 3, efforts had been made to eliminate plagiaristic developments by introducing the idea of "substantial improvement." Whilst welcoming the thinking behind that, Mr. Slocock did not regard it as acceptable to separate the treatment of derived varieties in that respect from the treatment of other varieties. To ensure that Article 6(1)(b) contributed to wider minimum distances, it would be useful to reintroduce the wording of Article 6(1)(a) of the original Convention which referred to a new variety being distinguished by morphological or physiological characteristics which were to be capable of precise description and recognition. Above all, there needed to be a reference to the commercial or economic significance of the distinguishing characteristics. Mr. Slocock urged the Administrative and Legal Committee to consider that aspect.

222. Dr. von Pechmann (AIPPI) stated AIPPI's view that the distance between a known and a new variety should not be based solely on simple characteristics that possessed no economic significance. He also wished to point out that, when assessing the effect of dependency under Article 5(3), Alternative 3, the existence or not of a substantial improvement had a part to play. The reference to "clearly distinguishable" would naturally need interpretation, although the problem could possibly be simplified by introducing a provision on dependency. However, Dr. von Pechmann wished to emphasize AIPPI's wish that the distance between two varieties should be based on clear economic distinctness.

223. Dr. Lange (ASSINSEL) said that ASSINSEL was in agreement with the proposed wording.

224. Mr. Roberts (ICC) stated that ICC had no comments on this Article.

225. Mr. Royon (CIOPORA) stated that, for CIOPORA, what was critical was that protection should be granted only to varieties distinguished by important morphological characteristics from known varieties. Such important characteristics would naturally be assessed differently for ornamental varieties, fruit varieties, cereals, industrial crops, etc. In relation to subparagraph (iii), Mr. Royon stated that this provision was tautologous, especially in the French text, because it said that a variety was "notoire" when it had been exploited "de manière notoire." CIOPORA did not see how "de manière notoire" could be considered as an explanation of "notoire."

226. Mr. Winter (COMASSO) said that COMASSO had no comments to make on that paragraph.

227. Mr. King (IFAP) stated that IFAP had the same position as AIPH. It was important to avoid plagiarism and new varieties had not simply to be clearly distinguishable, but had to show an essential improvement. It was for that reason that IFAP had opted for Alternative 3 in Article 5(3). Similarly, under Article 6(1)(b), there should be a substantial improvement and, in this respect, there seemed to be a consensus among some delegations. Mr. Slocock (AIPH) had referred to "commercially important" rather than "botanically interesting" characteristics. Mr. Royon (CIOPORA) had suggested eliminating

"trivial modifications" and Dr. von Pechmann (AIPPI) had referred to "significant economic differences." Other organizations, such as ASSINSEL, COMASSO and ICC, had not addressed that question. Although IFAP had opted for Alternative 3 in Article 5(3), its inclination was more towards Alternative 2 on the understanding that it was right to try to avoid plagiarism, for which purpose a new variety should be an improvement and not just different. If it was not the wish of UPOV to add that further requirement to paragraph (1)(b), then IFAP should be recorded as favoring Alternative 2 under Article 5(3).

228. Mr. Royon (CIOPORA) stated that he wished to clarify CIOPORA's position on the differences between varieties. When saying that protection should be granted only to varieties displaying an important modified characteristic, CIOPORA sought the establishment of minimum distances but did not seek the assessment of the merits of a new variety. It was for the market to decide whether a variety was better than an existing variety.

229. Mr. Besson (FIS) stated that FIS had no comments to make on the paragraph.

230. Dr. Lange (ASSINSEL) wished to explicitly confirm and support on behalf of ASSINSEL the statement made by Mr. Royon (CIOPORA) on distinctness. Distinctness should not be established on the basis of value characteristics.

231. Dr. Böringer (Federal Republic of Germany) wished to know COMASSO's position on that question.

232. Mr. Winter (COMASSO) stated that COMASSO had not given a view on that matter. He personally could also go along with the statement made by Mr. Royon.

233. Mr. Roberts (ICC) stated that ICC did not support plagiarism and therefore supported maximum minimum distances, but those should be defined. ICC was strongly in favor of CIOPORA's contention that it was for the market place to determine the merit of a variety.

234. Mr. Le Buanec (ASSINSEL) returned to the previous statement made on behalf of ASSINSEL on the minimum distances between varieties and explained that, firstly, to avoid possible plagiary, the minimum distances had to be sufficiently big; secondly, if a variety was to be protected, it was important for it to be new and unknown, whereby the agricultural or economic characteristics were of no special significance in that respect.

Paragraph (1)(c) (Homogeneity)

235. The Chairman opened the discussions on paragraph (1)(c). He noted that none of the organizations had comments to submit on it.

236. Mr. H.D. Hoinkes (United States of America) noted that the paragraph contained a reference to characteristics which were "considered for the purposes

of the application of subparagraph (b)" and that the latter made no reference to characteristics. He wondered whether that was acceptable or whether an adjustment was necessary.

237. Dr. Böringer (Federal Republic of Germany) said that the Administrative and Legal Committee would have to look at the question raised by Mr. Hoinkes.

Paragraph (1)(d) (Stability)

238. The Chairman opened the discussions on paragraph (1)(d). He noted that AIPPI, ICC, CIOPORA, COMASSO, IFAP and FIS had no comments to submit on it.

239. Mr. Slocock (AIPH) said that the proposed new wording, which linked the condition of stability for the purpose of the grant of the right to the performance of the variety during the testing period, was an improvement on the present text.

240. Dr. Lange (ASSINSEL) said that ASSINSEL agreed with the content of the proposed new wording, but nevertheless proposed that the phrase "in the case of a particular cycle of reproduction or multiplication" be replaced by the words "where the breeder has defined a particular cycle of reproduction or multiplication." ASSINSEL held that it was the job of the breeder to determine the propagation cycle.

Paragraph (2) (Variety Denomination)

241. The Chairman opened the discussions on paragraph (2). He noted that AIPH, AIPPI, ICC, IFAP and FIS had no comments to submit on it.

242. Dr. Lange (ASSINSEL) said that ASSINSEL was in agreement with the proposed formulation on condition that its proposal for a rewording of Article 13 was accepted.

243. Mr. Royon (CIOPORA) stated that the phrase starting with "as provided" would only be acceptable to CIOPORA if Article 13 was either left unchanged or amended according to the requests made by CIOPORA in its position paper (document IOM/IV/7).

244. Mr. Winter (COMASSO) said that the position of COMASSO was the same as that of ASSINSEL.

Paragraph (3) (Limitation of the Conditions for the Granting of the Right)

245. The Chairman opened the discussions on paragraph (3). He noted that AIPH, AIPPI, ASSINSEL, COMASSO, IFAP and FIS had no comments to submit on it.

246. Mr. Roberts (ICC) questioned whether the paragraph was essential and suggested that it might be deleted.

247. Mr. Royon (CIOPORA) said that CIOPORA would share the view expressed by Mr. Roberts on behalf of ICC.

Article 7 (Examination of the Application; Provisional Protection)

248. The Chairman opened the discussions on Article 7. He noted that ICC and IFAP had no comments on that Article.

249. Mr. Slocock (AIPH) stated that AIPH welcomed the removal of the word "official" from the heading of Article 7 and the specific reference to the taking into account of the results of growing trials and other trials which had already been carried out. AIPH had no comments on paragraph (2). It welcomed the reference in paragraph (3) to international cooperation. In the present economic climate, the question of international cooperation and the pooling of testing resources would play an important role in the machinery of plant variety protection. AIPH welcomed the uniformity which would be established by the new paragraph (4) with its clearer definition of the scope of provisional protection, but insisted that the period of provisional protection should form part of the duration of the right defined in Article 8. This could be achieved either by amending Article 8 or by a specific reference in Article 7(4).

250. Dr. von Pechmann (AIPPI) said that AIPPI welcomed the reference to the exchange of examination results in paragraph (1) as also the introduction in paragraph (4) of a claim to equitable remuneration where the variety was used in the time between application and grant of the right. Provisional protection existed under patent law already in almost all States in which there was preliminary publication of patent applications.

251. Dr. J. van de Linde (ASSINSEL) said that ASSINSEL agreed in general with the proposed text of Article 7. In relation to paragraph (1), ASSINSEL proposed the replacement of the word "trials," when not associated with "growing," by "tests" because it felt that "trials" was too closely linked to trials carried out in the fields. ASSINSEL agreed fully with the drafting of paragraph (2). It wished to replace the word "may" by "should" in paragraph (3); in relation with this provision it sought full harmonization of national procedures and files. In relation to paragraph (4), ASSINSEL proposed the replacement of "equitable remuneration" by "full compensatory remuneration."

252. Mr. Royon (CIOPORA) reminded the meeting that CIOPORA preferred the use of the expression "title of protection" rather than "right" throughout the text and would accordingly prefer that paragraph (1) commence with the words "The title of protection shall be granted" rather than "The right shall be granted."

253. In relation to the general substance of Article 7, CIOPORA would like the UPOV-type examination to provide more legal security by creating a perimeter of protection around a variety based on minimum distances. If protection related to the variety as such only, "minivariations" would represent a distinct variety and would not fall within the scope of protection of the original variety.

254. CIOPORA's view was that paragraph (3) should make a clear reference to Article 4 and to the obligation placed upon member States, proposed by CIOPORA, to protect any species for which technical examination facilities existed in any UPOV member State.

255. CIOPORA welcomed the efforts made in paragraph (4) to improve protection between application and grant. However, it was not in favor of a system of "protective directions" as in the United Kingdom Plant Varieties and Seeds Act. CIOPORA was of the view that, as in the patent system or for instance in the French plant variety protection system, it should be possible for the breeder to make assignments or grant licenses not only under granted titles of protection but also under applications for protection. Accordingly, CIOPORA proposed that the period of the breeders' rights should start with the date of filing of the application for rights since it was important that it should be possible for the breeder to institute legal proceedings against infringements on the basis of an application that had been published or notified to the infringer.

256. Mr. Winter (COMASSO) said that COMASSO had no comment to make on paragraphs (1) and (2) and that it supported the proposals made by ASSINSEL on paragraphs (3) and (4).

257. Mr. Besson (FIS) said that FIS had no special observations to make on the subject of Article 7, except to emphasize, as had done the representative of ASSINSEL, the need to develop international cooperation, particularly in order to lower the cost of examination and protection.

Article 8 (Duration of the Right)

258. The Chairman opened the discussions on Article 8.

259. Mr. Slocock (AIPH) had three points to make. First, he wished his earlier remarks concerning Article 7(4) (which concerned any period of provisional protection being included in the duration of a right) to be taken into account either in Article 7(4) or in Article 8. Secondly, AIPH was in favor of uniformity in the duration of the rights in UPOV member States and looked for agreement on a specific number of years, rather than a minimum number as provided by the present and proposed texts. The third wish of AIPH was that rights for any one variety should terminate simultaneously in the various countries where rights had been granted. The continued existence of protection for a variety in one country when it had terminated in another country had led to misunderstandings and even abuse in the field of ornamental plants and the only way of tackling the problem seemed, in the opinion of AIPH, to ensure that the rights terminated simultaneously in the various member States of UPOV for any one variety.

260. Mr. Greengrass (Vice Secretary-General) asked Mr. Slocock how he thought such a system would work in practice because if all rights were to terminate simultaneously, that would mean that the actual period of protection for the variety would be significantly shorter in some countries than in others. This could arise for many reasons that would not necessarily be the fault of the breeder. How did Mr. Slocock justify a shorter period of protection in some countries under such circumstances?

261. Mr. Slocock (AIPH), responding to the Vice Secretary-General, stated that an additional paragraph (3) in Article 8 could deal with his particular request. The justification lay in the fact that where a variety continued to be protected in one country, but where protection had lapsed in another country, distortions arose in the marketing of the variety concerned, particularly as a much more international community would develop in the 1990's. The distortions arising from the differing dates of application and grant could be considerable.

262. Mr. Hoinkes (United States of America) asked if Mr. Slocock's proposal was that the duration of the right should not only be identical in all countries, but that the right once granted would cease in all countries at the same time. If that was the AIPH proposal, then the question was what would happen to the right of priority which allowed a one-year time lag between the filings in different countries.

263. Mr. Slocock (AIPH), in responding to Mr. Hoinkes, stated that narrowing down the issue to a question of priority was a step in the right direction. That question was again a matter of drafting. The first important step was to accept the principle and the justification therefor.

264. Mr. Hoinkes (United States of America) felt that it was easy to lay down a policy, but may be impossible to implement it. He felt that the policy suggested by Mr. Slocock would be difficult to implement.

265. Dr. von Pechmann (AIPPI) said that a uniform term of protection was to be welcomed in principle. However, as already mentioned by Mr. Hoinkes, the period of time between the first application and subsequent applications and the priority period would result in differences.

266. Dr. Gunary (ASSINSEL) stated that ASSINSEL was prepared to accept the proposed wording of Article 8. In relation to the intervention by Mr. Slocock (AIPH), ASSINSEL would perhaps accept the situation where the breeders' rights terminated simultaneously in all countries, provided that the date of termination was the date in the last country in which the right was granted and not the first.

267. Mr. Roberts (ICC) supported, on behalf of ICC, the proposed extension of the minimum term of protection. He suggested that for reasons of simplification and legal security, the minimum term should be the same for all species, and ICC would suggest 25 years rather than 20 for this purpose. Whilst there was some merit in the suggestion that the term of protection should end on the same date in all countries, Mr. Roberts thought that it would be extremely difficult to organize administratively and that it might be better to retain the simple proposal that was embodied in the proposed text.

268. Mr. Royon (CIOPORA) stated that CIOPORA was in favor of the harmonization of the duration of protection. In the horticultural field, the average commercial life of a variety tended to shorten, but there were exceptions where varieties lasted for a very long time, and the longer period was appropriate for those. Mr. Royon referred to his comments on the proposed Article 7(4) and suggested the following simple wording for Article 8:

"(1) The title of protection shall be granted to the breeder for a limited period.

"(2) This period may not be less than [...] years computed from the date of filing of the application for the title of protection."

269. Mr. Winter (COMASSO) said that COMASSO welcomed the extension of the minimum term. In view of the special situation in Europe, in particular, COMASSO proposed that the term of protection be extended to 25 or 30 years. That corresponded to the current situation in the Federal Republic of Germany. Moreover, the proposal for a Community breeders' right contained a considerably longer term of protection.

270. Mr. King (IFAP) found himself in agreement with the statement of Mr. Royon (CIOPORA). IFAP had also noted that the average commercial life of varieties was less than the 15 years referred to in the original UPOV Convention. It would be unwise for breeders to assume the recovery of their investment over 25 years, especially in the case of agricultural crops, since varieties of such crops were obsolete long before the 15 years presently set out in Article 8 expired. IFAP saw no reason for changing the present periods of protection of 15 and 18 years. Perhaps some special provision could be added for ornamentals, roses for example, which might have a commercial life of 25 or 30 years. However, as far as farm crops were concerned, IFAP was opposed to any extension of the period of protection. There might even be a case for a shorter period of protection than the present 15 years.

271. Mr. Le Buanec (ASSINSEL) remarked that not only ornamental varieties enjoyed a lifetime of more than 15, 18 or 20 years. Certain agricultural crops, particularly in the case of potatoes, could also have an extremely long lifetime. It was therefore not possible to make a difference as regards the term of protection between the various categories of plants.

272. The Chairman agreed with Mr. Le Buanec but pointed out that there were some varieties that had a lifetime of more than a century, but it was not possible to grant plant breeders' rights for that length of time. He asked the breeders' organizations ASSINSEL and COMASSO why they sought a longer period of protection, and stated that the legal situation in the Federal Republic of Germany, or any other country for that matter, was no justification in that respect.

273. Dr. Gunary (ASSINSEL) stated that ASSINSEL was not seeking any longer periods than those mentioned in the proposed text.

274. Mr. Besson (FIS) observed that the increased volume of investment required by variety breeding would also have to be taken into account, particularly where new technological means were employed. That was why new varieties would have to be able to enjoy remuneration over a longer period.

275. Mr. Winter (COMASSO) naturally admitted that the current legal situation in the Federal Republic of Germany could not be a justification for extending

the terms of protection proposed in Article 8. A relevant justification was, however, to be found in the proposed introduction of dependency in the Convention.

276. Mr. Slocock (AIPH) welcomed the contribution of Mr. Royon (CIOPORA) to the rewording of paragraph (2) of Article 8, where the words "granting of the right" had been replaced with the words "the filing of the application" since that would help to meet his point on the provisions of Article 7(4).

277. Secondly, in calling for greater uniformity in the duration of protection, Mr. Slocock was not suggesting that one should adopt the highest common denominator as the period of protection. The proposal in the draft Article 8(2) was in his view the maximum which should be considered. In the vast majority of cases, the commercial life of new varieties fell well short of the figures which were now proposed.

278. Mr. Royon (CIOPORA) said that there were two ways of considering a long period of protection. One might object to it because of a wish to be able to cultivate the variety free of royalties. On the other hand, one might object to it because most varieties ceased to be marketed after a shorter period. In the latter case, however, Mr. Royon did not see the cause for concern since, if the variety was no longer in the market place, the breeder would probably surrender his rights.

279. Mr. Clucas (ASSINSEL) concurred with Mr. Winter (COMASSO) that in a situation where there was dependence, a longer duration might be required than at present in order to enable the breeder of the original variety to be properly compensated.

Article 9 (Restrictions on the Exercise of the Right)

280. The Chairman opened the discussions on Article 9.

281. Mr. Slocock (AIPH) stated that AIPH saw public interest playing an important role in the plant variety protection system and therefore welcomed the retention of Article 9 and its more precise wording.

282. Mr. Williams (AIPPI) stated that the proposed wording of Article 9 was acceptable to AIPPI.

283. Mr. Le Buanec (ASSINSEL) pointed out that Article 9 was of great concern to ASSINSEL. As regards paragraph (1), ASSINSEL would like to ensure that the word "right" applied to all the prerogatives afforded to the breeder. It further held that it would be useful to add the following sentences: "The member State of the Union concerned shall notify such restriction to the Secretary-General and shall state its reasons. The Council shall take position on such restriction." As for paragraph (2), ASSINSEL felt that intervention by States could only be entertained to ensure distribution of a variety where judged inadequate. That was why it would word the paragraph as follows: "Where public interest demands broad distribution of the variety, the member

State of the Union concerned shall take all measures necessary to ensure that the breeder receives equitable remuneration for any exploitation of the variety by third parties."

284. Mr. Roberts (ICC) stated that ICC recognized that States had to have the right to interfere with the free exercise of the breeder's right when the public interest was affected, but hoped that it was fully recognized that this occurred in exceptional situations and should not be a normal or frequent practice. ICC was not sure how the Article would operate in practice. Was it the intention that the State should have the right to grant to third parties a right to sell the variety to the exclusion of the rights of the holder of the plant breeder's right, thus granting exclusive compulsory licenses under plant breeders' rights and depriving the breeder of his normal right to sell his own variety? If that was the effect of the Article, ICC was most concerned.

285. Mr. Royon (CIOPORA) said that CIOPORA thought that the proposed new text represented a serious step backwards when compared with the corresponding text in document CAJ/XXIV/2. CIOPORA recognized that the free exercise of the rights conferred by the title of protection granted to a breeder should be capable of restriction in the public interest, but only for reasons of public interest. CIOPORA proposed the following text for Article 9:

"The free exercise of the title of protection granted to a breeder may not be restricted otherwise than for reasons of public interest. In such a case, the breeder shall be fully compensated."

286. Mr. Winter (COMASSO) said that the provision was also somewhat unsatisfactory to COMASSO. COMASSO had some understanding for the proposal submitted by ASSINSEL, but perceived the problem of entrusting a special function, that could be compared with supranational jurisdiction, to the UPOV Council. As for paragraph (2), Mr. Winter asked why it had to be adapted to the proposed new wording of Article 5. The aim of the present Article 9 was to ensure distribution of a protected variety. Under the proposed new wording, a third party was to be permitted to exploit the variety. The justification advanced was therefore an individual interest and no longer the public interest that could be seen in the wide distribution of the variety.

287. Mr. Greengrass (Vice Secretary-General) stated that there was no intention in using the words "third person" to suggest the exclusion of the breeder himself. The language could be modified to make that clearer. The words "widespread distribution of the variety" used in the currently applicable text of Article 9(2) were thought to establish an inappropriate criterion for interference under Article 9 in the rights of the breeder. The lack of widespread distribution of a variety would not be the sole case in which Article 9 could be resorted to; retaining the present text of Article 9 would thus give excessive prominence to that case.

288. Mr. Winter (COMASSO) was not totally convinced by the reasons presented by Mr. Greengrass and was therefore obliged to maintain his reservations.

289. Mr. Royon (CIOPORA) stated that, for ornamental varieties, CIOPORA could not accept any system of compulsory licenses other than for reasons of public interest.

290. Mr. Besson (FIS) said that FIS shared the concern expressed by ASSINSEL, ICC and CIOPORA.

291. Mr. Le Buanec (ASSINSEL) emphasized that, following the exchange of views that had taken place between the Vice Secretary-General and Mr. Winter (COMASSO), in the view of ASSINSEL only the absence or the inadequacy of distribution of a variety should constitute grounds for restriction under Article 9. ASSINSEL wished to underline that view.

292. Mr. Petit-Pigeard (COMASSO) remarked that the word "free" was superfluous in the phrase "the free exercise of the right," whilst admitting that it did in fact appear in the 1961 text of the Convention. He was not convinced of the need for a provision as proposed by ASSINSEL that would set up a supra-national instance to judge, or at least check, the public interest grounds that had led to a restriction on the exercise of the breeder's right. He pointed out that provisions similar to those in Article 9 were contained in all texts that governed intellectual property rights in order to prevent abuse of the right and to safeguard national interests, for example in the event of a conflict between States. It was obvious that, in such case, a State should have the possibility of granting compulsory licenses for varieties that were protected on behalf of a foreigner who was a national of a country party to the conflict. Those were generally the only two grounds for restricting the exercise of the breeder's right. Those provisions should therefore be left as they were and the courts of each country entrusted with checking the existence of public interest when a right was expropriated.

293. Mr. Greengrass (Vice Secretary-General) stated that the phrase "widespread distribution of the variety" had also been replaced because, in many cases, it might not be appropriate that a variety be distributed on a widespread basis. One could think of inbred lines of maize and of highly specialized vegetable markets where varieties might be distributed in a limited volume to a very small number of producers. The change that was made to the text was effected to ensure that the breeders were protected from this kind of inappropriate interference.

Article 10 (Nullity and Forfeiture of the Right)

294. The Chairman opened the discussions on Article 10. He noted that AIPPI, IFAP and FIS had no comments on that Article.

295. Mr. Slocock (AIPH) welcomed the more specific wording concerning the maintenance of the protected variety and sought the retention of the words in parentheses in paragraph (3)(a).

296. Dr. Lange (ASSINSEL) said that ASSINSEL was in agreement with the proposed new wording of Article 10, but proposed that the phrase in square brackets in paragraph 3(a) be deleted.

297. Mr. Roberts (ICC) stated that ICC wondered why it was only possible to annul a right where it was shown either not to be new or not to be distinct.

It appeared to ICC that it would be desirable to have the power to annul a right when the variety was shown not to have met the other requirements of sufficient homogeneity and stability set out in Article 6.

298. Mr. Royon (CIOPORA) stated that the words "with its characteristics as defined when the right was granted" in paragraph (2) could, in the opinion of CIOPORA, be deleted. CIOPORA also thought that paragraph (3)(a) was redundant in view of the provisions of paragraph (2).

299. Mr. Winter (COMASSO) said that COMASSO agreed to paragraphs (1) and (2) and proposed that the phrase in square brackets be deleted from paragraph 3(a) since that wording indeed affected the breeder's professional secrets.

Article 11 (Free Choice of the Member State in Which the First Application is Filed; Application in Other Member States; Independence of Rights Granted in Different Member States; Special Agreements)

300. The Chairman noted that none of the organizations wished to make comments on Article 11.

Article 12 (Right of Priority)

301. The Chairman opened the discussions on Article 12.

302. Mr. Slocock (AIPH) stated that AIPH definitely preferred the 12-month priority period in paragraph (1).

303. Mr. Williams (AIPPI) stated that AIPPI would support Alternative 3 in paragraph (1), i.e. a 24-month period. Personally, he was concerned that such a period would require amendment of legislation, but it had been pointed out to him that the patentability criteria, if applied, would take care of his concern.

304. Mr. Clucas (ASSINSEL) fully supported the proposed text of Article 12. ASSINSEL favored the period of 24 months specified in Alternative 3 in paragraph (1).

305. Mr. Roberts (ICC) stated that ICC supported the remarks of ASSINSEL on that question.

306. Mr. Royon (CIOPORA) stated that CIOPORA did not think that the present period of four years provided in paragraph (3) should be reduced without some very serious justification. Concerning the period of priority, CIOPORA felt that if the Convention was to be kept open to different forms of protection, it might be difficult to provide for a period that would require an amendment of national legislation. In general, it favored the 24-month period proposed in Alternative 3 in paragraph (1).

307. Mr. Winter (COMASSO) said that COMASSO was in favor of Alternative 3, that was to say a 24-month period of priority. As for paragraph (3), it advocated maintenance of the present 4-year period since, as indeed already mentioned by Mr. Royon, there were situations in which that period was justified.

308. Mr. King (IFAP) supported Alternative 1 in Article 12(1) which corresponded to the present text of the Convention and he saw no reason for changing it. In all respects, IFAP was in favor of the new text of Article 12(3).

309. Mr. Besson (FIS) stated that FIS supported the position of ASSINSEL.

310. Mr. G.J. Urselmann (COMASSO), in relation to the alternatives in paragraph (1), stated that the issue had been discussed before and that breeders needed to have an extension of the 12-month period in order to carry out proper trials, evaluate those trials and do the necessary administration. That could not be done within the existing period of 12 months.

Article 13 (Variety Denomination)

311. The Chairman opened the discussions on Article 13 and invited the organizations to make general comments if they so wished.

General Comments

312. Mr. Slocock (AIPH) welcomed the opportunity to make a general statement on that Article, which was one of the most important in the Convention for AIPH. AIPH welcomed the way in which the UPOV Secretariat had addressed the question. The Secretariat had clearly given the matter a great deal of thought and had taken account of the real practical problems which had arisen in the implementation of the present Convention. AIPH welcomed the Article and hoped that there would be general support for the more uniform and more restrictive interpretation placed on paragraph (7) by Alternative 1.

313. Dr. Gunary (ASSINSEL) stated that ASSINSEL was seeking the minimum degree of regulation in that area and recognized that there would be different needs for different crops; ASSINSEL would be speaking specifically for the agricultural, vegetables and field crop sectors. It proposed that Article 13 be simplified and worded as follows:

"(1) The variety shall be designated by a denomination.

"(2) The denomination shall be proposed by the breeder to the authority referred to in Article 30(1)(b), which shall register it at the same time as the right is granted.

"(3) A denomination shall not be suitable if a third party proves that this denomination infringes his prior rights.

"(4) When the variety is offered for sale or marketed, it shall be permitted to associate a trademark, trade name or other similar

indication with a registered variety denomination. If such an indication is so associated, the denomination must nevertheless be easily recognized."

314. Mr. Roberts (ICC) stated that there had been some discussion and differences of view within ICC. Some had queried whether the Article was really necessary at all, but the ultimate conclusion of the majority was that it was probably desirable to have an Article of that kind. But, taking into account difficulties that had occurred under the existing Article 13, ICC would like the Article to be as short and simple as possible and that the requirements under the Article should be the minimum. In that context, the proposal of ASSINSEL would seem to be very suitable.

315. Mr. Schlosser (CIOPORA) stated that, in a general manner, CIOPORA agreed with and supported the positions taken by ASSINSEL and ICC. He could see no reason why denominations should be regulated in such detail.

316. Mr. Winter (COMASSO) agreed fully with the preceding three speakers. It was truly astonishing how the issue of variety denominations was turned into a problem.

317. Mr. Besson (FIS) said that FIS went along with the position of ASSINSEL and requested simplification of the current ruling which gave rise to considerable commercial problems.

318. Mr. Slocock (AIPH) referred to the use of trademarks in relation to the proposed new text. Paragraph (8) of the present text of the Convention made reference to trademarks and their relationship to registered variety denominations. The proposed new text made no reference to trademarks and the fact was that in ornamental horticulture the significance which was often vested in trademarks as a result of their promotion conferred on the variety to which they related an element of protection which went beyond that which was accorded by the Convention. The simple elimination of any reference to trademarks in the new text did not improve the situation and AIPH hoped that the final version of the Convention take the problem into account. That was a problem that had been drawn to UPOV's attention on many occasions in the past. The absence of any reference to trademarks did not seem to AIPH to be helpful.

319. Dr. von Pechmann (AIPPI) said that AIPPI welcomed the proposed deletion of the reference to "generic designation" in paragraph (1). As for paragraph (2), it suggested, in view of the desired uniformity of the variety denomination in all member States, that the phrase "in another member State of the Union" be replaced by "in one or more other member States of the Union."

320. As regards paragraph (5)(a), the purpose of the provision, under which a prior right was effective in the procedure for registration of a variety denomination, was fully recognized. However, Article 5(5) raised a problem in respect of trademarks (which, as already explained, also represented an industrial property right) or at least did so if AIPPI had correctly interpreted that most unclear provision. The consequence of the provision was that where a protected variety was exploited, that is to say after the grant of the right, a prior trademark could no longer be asserted against an identical or confusingly

similar registered variety denomination. Further, in paragraph 5(c) mention was made only of the case of identical denominations. The word "identical" should be supplemented by "or confusingly similar."

321. As regards paragraph (7), Alternative 1 would seem the most appropriate in view of its clarity. Alternative 2, that left it to the national legislators to regulate the use of variety denominations, ran the risk that material would have to bear a variety denomination under national regulations that should not reasonably be marketed with that denomination.

322. Finally, AIPPI also considered that the present paragraph (8) should be maintained. There was no perceivable reason not to continue to tolerate the use of a trademark in addition to the variety denomination. Legislative amendments should only be undertaken in the case of an urgent need; such was not the case.

323. Mr. Royon (CIOPORA) stated that CIOPORA would have preferred that a breeders' rights certificate or a plant patent be referred to by its serial number. Because of the inclusion of an Article relating to denominations in the original text of the Convention and because of the way that some authorities and pressure groups had tried to influence the subject of denominations, CIOPORA had been forced to make strong representations to preserve the right for breeders to use trademarks for the marketing of their varieties. Just as patent holders had the possibility of using trademarks for the marketing of their patented products, CIOPORA did not agree that trademarks conferred certain elements of protection going beyond the scope of the protection under the Convention. Trademarks was an entirely different field of industrial property rights which conferred rights which were granted under trademark legislation and within the scope of that legislation.

324. The present wording of Article 13 was a compromise reached after very lengthy discussions and much negotiation. CIOPORA thought that it would be better not to change it since clearly it could not accept some of the modifications that were proposed. Although it did not correspond fully to its views, CIOPORA would also be prepared to accept as a possible alternative, provided it was taken word for word and without any change, the excellent text of the Swiss legislation which was reproduced in CIOPORA's submission.

325. Mr. Winter (COMASSO) stated that COMASSO recommended consideration of the possibility of using the word "designation" in the English text in place of the word "denomination." The first-mentioned word corresponded better to the purpose of the variety denomination and would prevent high demands in relation to the admissibility of a variety denomination. COMASSO further advocated maintenance of paragraph (8) in order to create legal clarity for both the user and for some authorities.

326. Mr. Royon (CIOPORA) stated that CIOPORA supported the proposal made by Mr. Winter since CIOPORA had already made a proposal in 1961 that "designation" rather than "denomination" was the appropriate word.

Proposal by ASSINSEL

327. Mr. F. Espenhain (Denmark) wished to put a question to the ASSINSEL delegation concerning paragraph (3) of its proposal which provided that a

denomination would not be suitable if a third party proved that the denomination infringed his prior rights. It seemed that the text took for granted that a third party had a right arising out of a plant variety protection certificate or a trademark or a trade name. This did not seem to cover the case of varieties that were not protected by plant breeders' rights, in which case their breeder had no legal right in their names, but did have a commercial interest in them. Mr. Espenhain asked if the ASSINSEL delegation could explore those circumstances and perhaps improve its text.

328. Dr. Gunary (ASSINSEL) stated that the objective of ASSINSEL was to simplify the text of the Article as much as possible and also its administration which would be best handled by the establishment of a centralized data base relating to variety denominations. What ASSINSEL meant by "infringing prior rights" was that a party should not have a name that was already given to another variety of the same species.

329. Dr. von Pechmann (AIPPI) congratulated ASSINSEL on its proposal and particularly on its clear and concise formulation. Paragraph (3) appeared to advantageously cover all prior rights since the applicant would know what he had to check before taking a final decision on his variety denomination. The proposal made by ASSINSEL should be seriously studied by the Council.

330. Mr. Royon (CIOPORA) stated that the question raised by Mr. Espenhain (Denmark) prompted him to point out in relation to paragraph (3) that it was not up to a third party who already had a registered trademark to prove that his registered trademark was infringed. A modification in the wording might be necessary to establish upon which party lay the burden of proof.

331. Mr. Winter (COMASSO) referred to the written comments of COMASSO in document IOM/IV/4 and to the proposal made by ASSINSEL. Realization of the proposals submitted in writing on deletion, replacement or addition meant that those proposals covered the same ground as the proposal by ASSINSEL. COMASSO therefore fully supported the proposal made by ASSINSEL.

332. Mr. Harvey (United Kingdom) expressed the view that the ASSINSEL proposal did not cover, as had been claimed, all possibilities. It did not provide for the possibility that the authority could refuse the denomination/designation. Was it the intention of ASSINSEL that the authority should not be allowed to refuse a denomination? In paragraph (3) it was stated that a denomination would not be suitable if a third party proved that the denomination infringed his prior rights. Mr. Harvey asked to whom that should be proved and how. A final question arose from paragraph (4) which would seem to allow a misleading or confusing denomination. Was that ASSINSEL's intention?

333. Mr. W. Burr (Federal Republic of Germany) pointed out that the new wording of Article 6 meant that the variety denomination no longer constituted a right. He asked how the relationship of a variety denomination to earlier variety denominations would be regulated under the paragraph (3) proposed by ASSINSEL.

334. Dr. Gunary (ASSINSEL) responded to the questions from Mr. Harvey (United Kingdom). ASSINSEL thought that it was a matter for agreement between breeders

and not for the authorities to determine whether a right had been infringed. On the subject of the precise wording of the ASSINSEL proposal and in response to the comment by Mr. Royon (CIOPORA), it might be better if the phrase "it is found that" was substituted for the phrase "a third party proves," so that a denomination would not be suitable if it was found that it infringed the prior rights of a third party. Concerning the questions of misleading or confusing denominations, Dr. Gunary wished to have further clarification.

335. Mr. J. Ardley (United Kingdom) gave the example of a dwarf wheat variety being called "Tallest of all." It was that kind of situation that the authorities would consider in deciding whether a particular name was suitable or whether the name was likely to mislead the purchaser into thinking that the variety possessed qualities when that was not in fact the case.

336. Mr. Clucas (ASSINSEL) stated that ASSINSEL was not certain whether that was important.

337. Mr. Slocock (AIPH) stated that there were a number of issues that were not addressed in the new proposal by ASSINSEL. Mr. Harvey (United Kingdom) had pointed to some of them. In paragraphs (5) and (6) of the proposed new Article 13, UPOV had tied up a number of loose ends for the benefit of member States. The ASSINSEL version untied those loose ends and contented itself with summarizing the spirit of those paragraphs. AIPH preferred to retain the text set out in document IOM/IV/2, to retain Alternative 1 in paragraph (7) and to reinstate paragraph (8) of Article 13 of the present text of the Convention.

338. Dr. von Pechmann (AIPPI) proposed the following wording for paragraph (3) as a compromise:

"A denomination shall not be suitable as a variety denomination if it is identical or confusingly similar to an existing variety denomination or the prior right of another person."

In that way, both prior variety denominations and prior rights would be accounted for. Additionally, it would not be necessary to provide proof of their existence, thus requiring a possible court action, but it would be the task of the examining authority to determine the practical situation.

339. Mr. Winter (COMASSO) had doubts, following the explanations given by Mr. Burr (Federal Republic of Germany), as to whether a variety denomination currently constituted a right. It was his understanding that it constituted, at the most, a prerequisite for a right.

340. Mr. Burr (Federal Republic of Germany) admitted that thought would have to be given to Mr. Winter's remarks. He was, however, certain that, as a result of the creation of a new paragraph (2) in Article 6, a variety denomination no longer constituted a right and that the proposal made by ASSINSEL on Article 13 was restricted to prior rights. It was possible that the proposal by Dr. von Pechmann (AIPPI) offered a solution.

Proposal to Take Over Relevant Provisions from the Swiss Plant Variety Protection Law

341. Mr. Royon (CIOPORA) stated that CIOPORA was very supportive of the proposed revision of the UPOV Convention, but could not understand why UPOV should have as one of the objectives of the revision the amendment of the existing Article 13. The new text proposed for Article 13 was a clear restriction of the rights of breeders in the field of denominations, and CIOPORA could not accept that.

342. The text of the Swiss Law which CIOPORA had recommended could be adopted since it was precise and to the point and covered all the points made by ASSINSEL, whilst at the same time meeting the needs of some of the national delegates and of the delegate of AIPH. For instance, it stated that "in addition to the denomination, a trademark differing from the denomination may be used in connection with the variety." In relation to rights of third parties, it set out that "the rights of third parties shall remain unaffected." In relation to the concerns expressed by AIPH, it stated that "anyone offering for sale or marketing propagating material on a commercial basis shall use the denomination of the variety, even after the termination of protection." In relation to the conditions attaching to the acceptability of denominations, it stated very simply that denominations "shall not be liable to mislead or to cause confusion with another denomination which has already been filed or registered in a member State for a variety of the same or a botanically related species," or "be contrary to public policy or morality or infringe national laws or international conventions." CIOPORA strongly urged UPOV to consider that proposal in its ongoing work.

343. Mr. Clucas (ASSINSEL) stated that ASSINSEL would have no problem with the proposal quoted by Mr. Royon. ASSINSEL sought simply that the breeder should have the right to name his own variety with the understanding that breeders acted responsibly in the naming of their varieties so that there was no necessity for a huge amount of regulation. ASSINSEL understood that there were some other dangers that needed to be covered in drafting a text and felt that they were covered in the ASSINSEL proposal and in the text quoted by Mr. Royon.

Principle of Revising Article 13

344. Mr. Espenhain (Denmark) stated that since the breeders' organizations and producers' organizations were present, he would like, for the purposes of UPOV's future discussions, to seek some clarification concerning the present Article 13. It had been stated that the retention of the present Article 13 would be acceptable to CIOPORA. Were all other organizations present of the same opinion?

345. Mr. Royon (CIOPORA) stated that whilst CIOPORA could live with the present Article 13, that did not mean that it liked it; it was an acceptable compromise for CIOPORA's members.

346. Mr. Slocock (AIPH) stated, in response to Mr. Espenhain's question, that AIPH preferred the new text proposed for Article 13, which was more helpful than the present text.

11-24

347. Mr. Clucas (ASSINSEL) stated that ASSINSEL was not happy with Article 13 as it stood. It felt that the subject was over-regulated and some members were of the view that Article 13 should be eliminated altogether. It was only after discussions that the members of ASSINSEL reached the proposal that had been put forward.

348. Mr. Winter (COMASSO) stated that COMASSO shared the view expressed by Mr. Royon (CIOPORA) that the present Article 13 already constituted a compromise. The maintenance of that Article with the present wording would be altogether preferred should there be no possibility at all of following the proposals made by COMASSO for simplification.

Article 14 (Protection Independent of Measures Regulating Production, Certification and Marketing)

349. The Chairman opened the discussions on Article 14.

350. Mr. Winter (COMASSO) said that COMASSO could not support the deletion of Article 14 on the grounds of UPOV's intention to win new members. Such a provision, that was not harmful in any event, could indeed be of use in that perspective.

351. Mr. Clucas (ASSINSEL) stated that ASSINSEL was equally happy with the deletion or the retention of Article 14.

352. Mr. Royon (CIOPORA) stated that CIOPORA strongly supported the deletion of Article 14.

353. Mr. Slocock (AIPH) stated that AIPH did not oppose the deletion of Article 14.

354. Mr. Besson (FIS) supported COMASSO's proposal to maintain Article 14.

Closing of the Session

355. Mr. Royon (CIOPORA) expressed the thanks of CIOPORA for the opportunity to participate in the meeting and congratulated the Secretariat and the Administrative and Legal Committee of UPOV for the excellent work that had been done. CIOPORA appreciated the general approach to the revision of the Convention whereby proposals were being placed before associations and organizations prior to the diplomatic conference. Mr. Royon thought that the opportunity to exchange views in relation to successive drafts of documents would provide an ultimate result that was positive.

356. Mr. Royon asked if the comments of CIOPORA in its communication of May 22, 1989, to UPOV had been circulated. If not, he would be grateful if

the Secretariat could distribute that document which incorporated a proposed new wording for Article 37.*

357. Mr. Clucas (ASSINSEL) associated himself, on behalf of ASSINSEL, with the congratulations and thanks expressed by Mr. Royon to the Chairman.

358. Mr. Clucas added that it would be helpful to have some guidance on the future course of events and, in particular, to know whether the organizations would have an opportunity to consider another document before the diplomatic conference. Concerning the joint UPOV/WIPO meeting that was scheduled for January 1990, he also sought information as to whether the professional organizations would be invited.

359. The Chairman replied that those matters would be discussed on the following days, in the Consultative Committee and the Council. He personally thought that new documents would be distributed to the organizations.

360. The Chairman then concluded the meeting by stating that it had permitted progress to be achieved in the definition of the objectives of the revision of the Convention. Both the professional organizations and the representatives of member States had had intensive discussions and had come to certain stand-points. This meeting had shown that breeders and users had sometimes very different opinions, but that also the organizations from the same branch did not always share the same views. It was certainly fruitful for Government representatives to hear all the opinions. On some points, they would have to reconsider their own opinion; on others that were still to be decided, the decision would be easier; in still others it would be more difficult after the meeting. If the representatives of the member States had not been very active in the meeting, it was because that was their role. To listen carefully, make up their minds and try to come to decisions within the next few days, that was their task. Their overall responsibility was to reconcile the

* This wording is as follows:

"(1) Any State which provides or intends to provide for protection under the different forms referred to in Article 1(4) for one and the same species [or taxon, depending on definitions], must notify such fact or intention to the Secretary-General at the time of signing this Act or of depositing its instrument of ratification or approval or of accession to this Act.

"(2) Where, in a member State of the Union to which paragraph (1) applies, protection is sought under patent legislation, the said State may apply the patentability criteria and the period of protection of the patent legislation to the varieties protected thereunder, notwithstanding the provisions of Articles ...

"(3) [Unchanged]"

The Article 1(4) quoted above is as follows in CIOPORA's proposed text:

"(4) Each member State of the Union may recognize the protection of the breeder provided for in this Convention by the grant either of a 'sui generis' title of protection or of a patent."

wishes of the industry and the public interest as a whole. The time had now come to take those decisions. The objective being contemplated was to hold a diplomatic conference at the end of 1990 or the beginning of 1991. Any organization which asked for further discussions or time for further internal discussions would have to take that objective into consideration. Their future contribution would be as much welcome as the contributions made in preparation for and during this meeting, for which the Chairman expressed his sincere thanks on behalf of UPOV.

[Annexes follow]

ANNEX I/ANNEXE I/ANLAGE I

LIST OF PARTICIPANTS/LISTE DES PARTICIPANTS/TEILNEHMERLISTE

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IOM/IV/10
Annex I/Annexe I/Anlage I
page 7, Seite 7

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IOM/IV/10
Annex I/Annexe I/Anlage I
page 9, Seite 9

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[Annex II follows/
Annexe II suit/
Anlage II folgt]

IOM/IV/10

[Original: English]

ANNEX II

STATEMENT OF PRINCIPLES
FOR
INTELLECTUAL PROPERTY RIGHTS

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Association of Official Seed Certifying Agencies

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STATEMENT OF PRINCIPLES FOR INTELLECTUAL PROPERTY RIGHTS

The development and application of new biotechnology in crop research has resulted in complex genetical as well as legal problems. Basic elements of plant variation and propagation involving genes and genetic components are being patented. The legal and biological restrictions of such actions will have an increasingly critical impact on the seed industry and production agriculture.

It is recognized:

- (1) that continued improvements through plant breeding are essential and must be continued through the unrestricted use of existing varieties and germplasm as building blocks
- (2) that new biotechnological developments can provide extremely valuable new tools to achieve plant breeding objectives
- (3) that plant variety protection (PVP) and patents provide an incentive for variety development and manipulation of genes and genetic components (through genetic engineering), but unrestricted rights granted under patent law could create possible restrictions on their wider use.

The following points are considered essential for the application of PVP and patents in granting intellectual property rights:

- (a) Varieties should be protected only under the PVP Act (not by utility patents)
 - farmers should have the right to produce seed of protected varieties for their own use but not for sale without the permission of the owner
 - varieties derived from a protected variety and differing from the "mother" variety in only one or a few minor inconsequential traits should not be entitled to the same rights as independently developed varieties
- (b) New inventive genetic components of plants, useful plant characteristics (traits) or processes should be eligible for patents provided
 - they have been isolated, enhanced or created through biotechnological methods or be an inventive biological process

- they express useful genetic traits of actual or potential value in agriculture (not minor or inconsequential genetic traits making cosmetic differences)
 - the genetic components or genes directly serve to cause the expression of a useful plant characteristic
 - the plant characteristic to be patented is identified as being caused by a patentable genetic component or gene (and not cover a broad characteristic of a variety caused by an unknown or unidentified genetic component)
- (c) Patent rights should extend to other plant material to which the manipulated genetic components (or genes) have been transferred and in them have been shown to express equal or similar genetic traits
- (d) Variances in the patent law should be developed to provide:
- that alternative genetic approaches to achieve the same characteristic (or trait) in crops not be an infringement on a prior patent
 - a research clause or exemption from seeking approval for research use of patented material
 - a waiver of certain dominance rights of a patent over future patents on materials derived from the initial patented material
 - that holders of patents on marketed materials derived from an earlier patent be required to compensate the holder of that earlier patent during the first (5 or 8) years of the life of the patent (rather than the 17 years stipulated in the law)
- alternate (to indent above)
- a patent holder with exclusive right for (3 or 4) years, then the holder would be entitled to remuneration for the life of the patent from those which make use of the patented material
 - for the use of any patented processes of genetic manipulation by others with reasonable compensation to the holder of the patent
 - that a farmer have restricted rights to save and plant seed of a variety containing a patented component or characteristic (but not to sell)
- (e) All variances in the patent laws and a mechanism for arbitrating disputes should be implemented soon (so that plant breeding is not stymied and those with limited financial resources are not unfairly disadvantaged)

* Approved by the Directors of the Association of Official Seed Certifying Agencies, August, 1989.