

Working group on harvested material and unauthorized use of propagating material**WG-HRV/2/2****Second Meeting
Geneva, September 6, 2022****Original:** English
Date: August 15, 2022**INFORMATION CONCERNING PROPAGATING MATERIAL, ACTS IN RESPECT OF HARVESTED MATERIAL AND PROVISIONAL PROTECTION UNDER THE UPOV CONVENTION***Document prepared by the Office of the Union**Disclaimer: this document does not represent UPOV policies or guidance***EXECUTIVE SUMMARY**

1. The purpose of this document is to provide an overview of matters to be considered by the Working group on harvested material and unauthorized use of propagating material (WG-HRV).

2. The WG-HRV is invited to:

(a) note the information provided in this document;

(b) note that the comments and proposals received from the members of the WG-HRV in reply to Circular E-22/058 are available on the UPOV website: https://www.upov.int/meetings/en/details.jsp?meeting_id=67773;

(c) consider the proposals agreed by the WG HRV, at its first meeting, and the proposals received in reply to UPOV Circular E 22/058, that are incorporated in documents WG HRV/2/3 (proposals concerning UPOV/EXN/PPM/1), WG HRV/2/4 (proposals concerning UPOV/EXN/HRV/1) and WG HRV/2/5 (proposals concerning UPOV/EXN/PRP/2); and

(d) consider the summary of the history of the cascade principle concerning provisions on propagating material, harvested material and exhaustion, provided in the Annex to this document, as a basis for further work on these topics.

3. The structure of this document is as follows:

EXECUTIVE SUMMARY	1
BACKGROUND	2
MATTERS TO BE CONSIDERED	2
Proposals agreed at the first meeting of the WG-HRV	2
Elements for further elaboration.....	2
Cascade principle	3
Additional comments	4

BACKGROUND

4. The CAJ agreed on September 21, 2021, by correspondence, to establish a working group on harvested material and unauthorized use of propagating material (WG-HRV) and approved the terms of reference (ToRs) for the WG-HRV. At its seventy-eighth session, held via electronic means on October 27, 2021, the CAJ approved the composition of the WG-HRV. The ToRs and composition for the WG-HRV are reproduced in Annex I of document WG-HRV/1/2 available at https://www.upov.int/edocs/mdocs/upov/en/wg_hrv_1/wg_hrv_1_2.pdf (see document CAJ/78/13 “Report”, paragraph 24).

5. In accordance with its ToRs, the purpose of the WG-HRV is to draft a revision of the “Explanatory Notes on Acts in Respect of Harvested Material under the 1991 Act of the UPOV Convention” (document UPOV/EXN/HRV/1), “Explanatory Notes on Propagating Material under the UPOV Convention” (UPOV/EXN/PPM/1), and “Explanatory Notes on Provisional Protection under the UPOV Convention” (UPOV/EXN/PRP/2), for consideration by the CAJ.

MATTERS TO BE CONSIDERED

6. The WG-HRV held its first meeting via electronic means on March 15, 2022.

Proposals agreed at the first meeting of the WG-HRV

7. The proposals agreed by the WG-HRV, at its first meeting (see document WG-HRV/1/6 “Report”), are incorporated in documents WG-HRV/2/3 (proposals concerning UPOV/EXN/PPM/1), WG-HRV/2/4 (proposals concerning UPOV/EXN/HRV/1) and WG-HRV/2/5 (proposals concerning UPOV/EXN/PRP/2).

Elements for further elaboration

8. The WG-HRV agreed the following on elements for further elaboration that are relevant for the revision of both documents UPOV/EXN/PPM/1 and UPOV/EXN/HRV/1 (see document WG-HRV/1/6 “Report”, paragraphs 8, 9, 12 and 13):

“8. The WG-HRV agreed the following possible new factor should be considered further:

[...]
 ‘(vii) when harvested material has the potential to be used as propagating material, it can be considered as propagating material; or
 [...]

“9. The WG-HRV agreed that further elaboration on the relationship of propagating material and harvested material, including the role of exhaustion, be prepared for consideration by WG-HRV at its next meeting to assist in its consideration of the above factor. It was agreed that illustrative examples could be included to facilitate the discussions and that the Office of the Union would consult those members of the WG-HRV that made interventions at the meeting on that topic.”

“12. The WG-HRV considered the proposals and comments in relation to document WG-HRV/1/4, Annex, section ‘(c) Unauthorized use of propagating material’ and agreed to discuss the following matters at its next meeting:

“(a) the cascade principle under the ‘Scope of the Breeder’s Right’, in Article 14 of the 1991 Act, and its relationship with the provisions on the ‘Exhaustion of the Breeder’s right’, under Article 16 of the 1991 Act;

“(b) the history of those provisions, including the notion of ‘unauthorized use’, under Article 14(2) and the notion of ‘consent’ under Article 16; and

“(c) clarifications on where the use had taken place and where the right can be exercised.

“It was agreed that the Office of the Union would collate information that members of the WG-HRV wished to share on the above topics and would provide background information on the above provisions as the basis for the discussion at the second meeting of the WG-HRV.

“13. The WG-HRV considered the proposals and comments in relation to document WG-HRV/1/4, Annex, section ‘(d) Reasonable opportunity to exercise his right’ and agreed to consider that matter further at the second meeting of the WG-HRV. It was agreed that illustrative examples of how the provision of information could work in practice would facilitate the discussions.”

Cascade principle

9. The Office of the Union has researched the history of the cascade principle under the UPOV Convention with a particular focus on the “Scope of the Breeder’s Right”, in Article 14 of the 1991 Act, and its relationship with the provisions on the “Exhaustion of the Breeder’s right”, under Article 16 of the 1991 Act; including the notion of “unauthorized use”, under Article 14(2) and the notion of “consent” under Article 16 (see document WG-HRV/1/6 “Report”, paragraphs 12 (a) and (b)). The result of that research with the historical documents in chronological order is provided in the Annex to this document (in English only).

10. The most relevant aspects are summarized below.

11. The 1988 proposal from the Delegation of Germany (see document CAJ/XXIII/4) was based on the principles of patent law (Article 29 of the Community Patent Convention), and presented the following wording for consideration by the CAJ:

“(1) A right granted in accordance with the provisions of this Convention shall confer on its owner the right to prevent all third parties not having his consent:

- (i) from reproducing the variety;
- (ii) from offering for sale, putting on the market or using, or importing or stocking for any of the aforementioned purposes, material of the variety.

“(2) The right shall not extend to:

- (i) acts described in paragraph (1)(ii) above concerning any material which has been put on the market in the member State of the Union concerned by the breeder or with his express consent, or material derived from the said material in accordance with the purpose intended when it was put on the market;”

12. The initial German draft and related discussions marked a turning point for the following: (a) the use of the term “consent” and not “authorization”; (b) the introduction for the first time of the notion of exhaustion of the breeder’s right; (c) the word “material” to be understood in its broadest sense (i.e. not be limited to propagating material in order to give the breeder rights in respect of end products of their variety when these were uniquely derived from their variety, whether transformed or not); (d) the scope of the right to be expressed negatively as a right to exclude others from doing certain acts rather than as a positive right for the breeder to do such acts (i.e. marking a change in relation to Article 5 of the 1978 Act).

13. In 1988, the notion of material that was under consideration was inserted in the draft article with the definitions and not in the provisions on exhaustion, which it is now the case (see Article 16(2) of the 1991 Act).

[(iv) “material” shall mean: reproductive or vegetative propagating material; [-material that has the potential of being used as reproductive or vegetative propagating material;] harvested material; products [directly] obtained from harvested material.]

14. The notion of the “cascade principle” is built on the concept that breeders could only exercise their right once, normally at an early stage. The extension of protection was designed to cover situations where it was not possible for the breeders to exercise their rights at the earlier stage.

15. In relation to the discussion on the “cascade principle”, during the preparatory work and discussions at the 1991 Diplomatic Conference:

(a) several delegations intervened in favor and against the cascade principle during the 1991 Diplomatic Conference (see Records of the 1991 Diplomatic Conference, paragraphs 917, 920, 950, 1594, 1598, 1600 and 1614);

(b) the text “unless the breeder has had reasonable opportunity to exercise his right in relation to the propagating material.” was developed during the 1991 Diplomatic Conference and was not part of the basic proposal (i.e. the basic proposal contained the following text in square brackets “[and if, but only if, the breeder has had no legal possibility of exercising his right in relation to the propagating material]”;

(c) it was noted that the cascade principle would oblige breeders to furnish proof that they had not been able to exercise their rights at an earlier stage. Breeders would thus be afforded a right that was extensive, but extremely difficult to exercise due to the need to furnish negative proof; and

(d) in addition to considering the principle of extending protection, it was necessary also to consider the practicability of extension.

The President of the 1991 Diplomatic Conference closed the debate on the cascade principle and put it to vote. The proposals in documents DC/91/61 and DC/91/82, to make the exercise of the breeder's right in respect of the harvested material dependent upon the fact that it had been impossible to exercise it in respect of the propagating material was accepted by 10 votes for and eight votes against" (see Records of the 1991 Diplomatic Conference, paragraph 934).

Additional comments

16. The WG-HRV, at its first meeting, agreed to invite additional comments on documents WG-HRV/1/3, WG-HRV/1/4 and WG HRV/1/5 within six weeks after its first meeting (see document WG-HRV/1/6 "Report", paragraph 15 and UPOV Circular E-22/058 of April 12, 2022).

17. In reply to UPOV Circular E-22/058, proposals were received from Japan, New Zealand and the International Association of Horticultural Producers (AIPH). AIPH also transmitted a paper from Mr. Huib Ghijsen "The history of protection of harvested material in UPOV 1991".

18. The comments and proposals received from the members of the WG-HRV, including the paper of Mr. Ghijsen, in reply to Circular E-22/058, are available on the UPOV website at: https://www.upov.int/meetings/en/details.jsp?meeting_id=67773.

19. The proposals received in reply to UPOV Circular E-22/058 are incorporated in documents WG-HRV/2/3 (proposals concerning UPOV/EXN/PPM/1), WG-HRV/2/4 (proposals concerning UPOV/EXN/HRV/1) and WG-HRV/2/5 (proposals concerning UPOV/EXN/PRP/2).

20. *The WG-HRV is invited to:*

(a) note the information provided in this document;

(b) note that the comments and proposals received from the members of the WG-HRV in reply to Circular E-22/058 are available on the UPOV website: https://www.upov.int/meetings/en/details.jsp?meeting_id=67773;

(c) consider the proposals agreed by the WG-HRV, at its first meeting, and the proposals received in reply to UPOV Circular E-22/058, that are incorporated in documents WG-HRV/2/3 (proposals concerning UPOV/EXN/PPM/1), WG-HRV/2/4 (proposals concerning UPOV/EXN/HRV/1) and WG-HRV/2/5 (proposals concerning UPOV/EXN/PRP/2); and

(d) consider the summary of the history of the cascade principle concerning provisions on propagating material, harvested material and exhaustion, provided in the Annex to this document, as a basis for further work on these topics.

[Annex follows]

HISTORY OF PROVISIONS ON
PROPAGATING MATERIAL, HARVESTED MATERIAL AND EXHAUSTION

Table of contents

BACKGROUND	1
1961 UPOV CONVENTION AS AMENDED BY THE ACT OF 1972	2
1978 DIPLOMATIC CONFERENCE	2
1985 - 1986 - 1987 MEETINGS WITH INTERNATIONAL ORGANIZATIONS	4
1987, 1988, 1989, CAJ SESSIONS	7
1989 MEETING WITH INTERNATIONAL ORGANIZATIONS	20
1990 MEETING WITH INTERNATIONAL ORGANIZATIONS	27
1990 COUNCIL: ADOPTION OF THE BASIC PROPOSAL	30
1991 DIPLOMATIC CONFERENCE	32

BACKGROUND

1. The Working Group on Harvested Material and Unauthorized use of Propagating Material (WG-HRV), held its first meeting via electronic means on March 15, 2022 (WG-HRV/1). The WG-HRV considered the proposals concerning the explanatory notes on acts in respect of harvested material under the 1991 Act of the UPOV Convention and requested the Office of the Union to prepare the background information (see document WG-HRV/1/6 "Report", paragraph 12) reproduced below:

"12. The WG-HRV considered the proposals and comments in relation to document WG-HRV/1/4, Annex, section "(c) Unauthorized use of propagating material" and agreed to discuss the following matters at its next meeting:

"(a) the cascade principle under the 'Scope of the Breeder's Right', in Article 14 of the 1991 Act, and its relationship with the provisions on the 'Exhaustion of the Breeder's right', under Article 16 of the 1991 Act;

"(b) the history of those provisions, including the notion of 'unauthorized use', under Article 14(2) and the notion of 'consent' under Article 16; and

"(c) clarifications on where the use had taken place and where the right can be exercised.

"It was agreed that the Office of the Union would collate information that members of the WG-HRV wished to share on the above topics and would provide background information on the above provisions as the basis for the discussion at the second meeting of the WG-HRV."

2. The sections below present the results of research of historical documents, in chronological order, of the cascade principle under the UPOV Convention with a particular focus on the "Scope of the Breeder's Right", in Article 14 of the 1991 Act, and its relationship with the provisions on the "Exhaustion of the Breeder's right", under Article 16 of the 1991 Act.

1961 UPOV CONVENTION AS AMENDED BY THE ACT OF 1972

3. Article 5 of the 1961 UPOV Convention, as amended by the Act of 1972, provided the Rights Protected and the Scope of Protection as follows:

“(1) The effect of the right granted to the breeder of a new plant variety or his successor in title is that his prior authorization shall be required for the production, for purposes of commercial marketing, of the reproductive or vegetative propagating material, as such, of the new variety, and for the offering for sale or marketing of such material. Vegetative propagating material shall be deemed to include whole plants. The breeder’s right shall extend to ornamental plants or parts thereof normally marketed for purposes other than propagation when they are used commercially as propagating material in the production of ornamental plants or cut flowers.

“(2) The authorization given by the breeder or his successor in title may be made subject to such conditions as he may specify.

“(3) Authorization by the breeder or his successor in title shall not be required either for the utilization of the new variety as an initial source of variation for the purpose of creating other new varieties or for the marketing of such varieties. Such authorization shall be required, however, when the repeated use of the new variety is necessary for the commercial production of another variety.

“(4) Any member State of the Union may, either under its own law or by means of special agreements under Article 29, grant to breeders, in respect of certain botanical genera or species, a more extensive right than that set out in paragraph (1) of this Article, extending in particular to the marketed product. A member State of the Union which grants such a right may limit the benefit of it to the nationals of member States of the Union which grant an identical right and to natural and legal persons resident or having their headquarters in any of those States.”

1978 DIPLOMATIC CONFERENCE

4. At the Diplomatic Conference of the revision of the International Convention for the Protection of New Varieties of Plants (UPOV/DC/78/PCD), held in Geneva from October 9 to 23, 1978, the Delegation of France submitted a proposal for the amendment of Article 5(1) (see content from document [DC/17 Rev.](#) reproduced below):

“It is proposed to replace the third sentence of Article 5(1) by the following provisions:

“The right of the breeder shall extend to vegetatively reproduced plants or parts thereof normally marketed for purposes other than propagation, as well as to the case where they would be used as vegetative propagating material with a view to a commercial production. However, the remuneration of such right shall be limited to the first step of commercialization of the said plants or parts thereof.”

5. In addition, the Delegation of the Federal Republic of Germany submitted a proposal for the amendment of the first sentence of Article 5(1) (see content from document [DC/18](#) reproduced below):

“It is proposed that the words ‘of a variety’ be deleted. The first sentence of Article 5(1) would then read as follows:

“The effect of the right granted to the breeder [of a variety] is that his prior authorization shall be required for the production, for purposes of commercial marketing, of the reproductive or vegetative propagating material, as such, of the variety, and for the offering for sale or marketing of such material.”

6. The President of the Conference presented a Recommendation on Article 5 ([DC/77](#)) (see content of document DC/77 reproduced below):

“The Conference,

“Having regard to Article 5(1) and (4) of the Convention,

“Conscious of the special problems which may arise from the right of the breeder in certain genera and species,

“Considering it of great importance that breeders be enabled effectively to safeguard their interests,

“Recommends that, where, in respect of any genus or species, the granting of more extensive rights than those provided for in paragraph (1) of Article 5 is desirable to safeguard the legitimate interests of the breeders, the Contracting States take adequate measures, pursuant to paragraph (4) of Article 5.”

7. The Office of the Union summarized the main amendments in the document “Summary of the main amendments to the Convention incorporated in the revised text of 1978” (see relevant extract from document [DC/PCD/1](#), reproduced below):

“Article 5: Rights Protected; Scope of Protection

“34. The first sentence of Article 5(1) has been rearranged to make it clearer that all the three activities specified as requiring prior authorization by the breeder relate equally to the reproductive and vegetative propagating material as such.

“35. The Diplomatic Conference considered it desirable to draw greater attention to the possibilities provided for by Article 5(4) to grant “a more extensive right.” It adopted a Recommendation to the effect that, “where, in respect of any genus or species, the granting of more extensive rights than those provided for in Article 5(1) is desirable to safeguard the legitimate interests of the breeders, the Contracting States of the said Convention [should] take adequate measures pursuant to Article 5 (4).”

8. Text of Article 5 “Rights Protected; Scope of Protection” adopted at the 1978 Diplomatic Conference reads as follows:

“Article 5
“Rights Protected; Scope of Protection

- “(1) The effect of the right granted to the breeder is that his prior authorisation shall be required for
- the production for purposes of commercial marketing
 - the offering for sale
 - the marketing

of the reproductive or vegetative propagating material, as such, of the variety.

“Vegetative propagating material shall be deemed to include whole plants. The right of the breeder shall extend to ornamental plants or parts thereof normally marketed for purposes other than propagation when they are used commercially as propagating material in the production of ornamental plants or cut flowers.

“(2) The authorisation given by the breeder may be made subject to such conditions as he may specify.

“(3) Authorisation by the breeder shall not be required either for the utilisation of the variety as an initial source of variation for the purpose of creating other varieties or for the marketing of such varieties. Such authorisation shall be required, however, when the repeated use of the variety is necessary for the commercial production of another variety.

“(4) Any member State of the Union may, either under its own law or by means of special agreements under Article 29, grant to breeders, in respect of certain botanical genera or species, a more extensive right than that set out in paragraph (1), extending in particular to the marketed product. A member State of the Union which grants such a right may limit the benefit of it to the nationals of member States of the Union which grant an identical right and to natural and legal persons resident or having their registered office in any of those States.”

“Recommendation on Article 5 adopted by the Diplomatic Conference,
meeting in Plenary, on October 23, 1978”
(extract from document [DC/91](#))

“The Diplomatic Conference on the Revision of the International Convention for the Protection of New Varieties of Plants, held in 1978,

“Having regard to Article 5(1) and (4) of the International Convention for the Protection of New Varieties of Plants of December 2, 1961, as revised at Geneva, on November 10, 1972, and on October 23, 1978,

“Conscious of the fact that the scope of the protection laid down in Article 5(1) may create special problems with regard to certain genera and species,

“Considering it of great importance that breeders be enabled effectively to safeguard their interests,

“Recognizing at the same time that an equitable balance must be struck between the interests of breeders and those of users of new varieties,

“Recommends that, where, in respect of any genus or species, the granting of more extensive rights than those provided for in Article 5(1) is desirable to safeguard the legitimate interests of the breeders, the Contracting States of the said Convention take adequate measures, pursuant to Article 5(4).”

1985 - 1986 - 1987 MEETINGS WITH INTERNATIONAL ORGANIZATIONS

9. At the Second Meeting with International Organizations (UPOV/IOM/II), held in Geneva on October 15 and 16, 1985, ASSINSEL, CIOPORA and FIS¹ sent documents raising the issue of the need to expand the scope of protection of the Breeder's Right:

(a) see extract from document [UPOV/IOM/II/6](#), Annex I from ASSINSEL below:

"If produced by commercial growers or home gardeners the present legislation is such that one viable seed of a new variety would suffice to produce thousands of plantlets without payment of a Royalty and in fact it would ruin the seed industry specialized in the species concerned if a popular version of the method would be made available to growers and home gardeners.

"It would therefore be necessary to extend the scope of protection of these species to all material used for the commercial production of crops."

(b) see extract from the document [UPOV/IOM/II/6](#), Annex II from CIOPORA below:

"CIOPORA can add little to what it has reiterated for nearly 25 years.

"In this context, it draws attention to and confirms its past interventions:

October 1961: Comments on the Draft UPOV Convention (see Records of the Diplomatic Conference of November 1961,* page 92).

October 28, 1977: Letter from CIOPORA to the Secretary General of UPOV transmitting an analytical report on the problems caused by the inadequate wording of Article 5(1) of the 1961 Convention.**

June 1978: Comments by CIOPORA on the draft revised Convention – document DC/7.***

October 1978: Interventions by CIOPORA during the Diplomatic Conference on the Revision of the Convention (see Records of the Conference, pages 145, 146, 148, 149, 177, 178, 179).****

"CIOPORA confirms that for fruit trees, for example, the basic provisions of the Convention (Article 5 (1)) do not even allow 'minimum' control of varieties cultivated for fruit production.

"At the international level, this omission should be remedied at the next revision of the UPOV Convention."

(c) see extract from the document [UPOV/IOM/II/6](#), Annex III from FIS below:

"New quick multiplication techniques have been developed by which it is possible to produce plants of traditionally sexually reproduced species without sowing seed which could reduce for certain seed sales to an absolute minimum.

"In principle these methods (micro propagation/tissue culture) could be applied by anyone. In principle it is possible to start a commercial production of for instance cucumbers, tomatoes etc., on the basis of the tissue of a plant obtained from one seed.

"In several countries courses are organised where participants can learn how to do tissue culture.

"In so far this is done by commercial enterprises who sell plantlets most national legislation cover this situation and the plantlets thus produced would come under the plant breeders' rights legislation.

"If however market growers/farmers would grow their own plantlets in this way one would be confronted with exactly the same problem existing for fruit orchards discussed during the revision Convention.

[...]

"Our organization is in the opinion that the time has come to adapt the Convention in an adequate way to the new situation which has arisen.

"We realize that there are certain political currents working against plant breeders' rights. This should however not be a sufficient reason to do what is necessary to avoid that the concept of plant breeders rights will be completely undermined by the development of techniques which could not been foreseen at the moment of the Convention and to which one cannot and should not in itself be opposed."

¹ [UPOV/IOM/II/6](#)

10. At the sixteenth session of the Administrative and Legal Committee, held in Geneva on November 14 and 15, 1985 (CAJ/XVI), the extension of the Scope of protection was discussed (see extract from document [CAJ/XVI/3](#), paragraphs 18 and 19 below). The decision was postponed to the Seventeenth Session of the CAJ (CAJ/XVII):

“18. Cases covered by extension to the end product.-The arguments in favor of the protection of the end product in the case of ornamental plants, mainly put forward by CIOPORA, are well known. It will be remembered that the purpose is not to allow breeders to charge royalties at every imaginable opportunity, at various stages in the exploitation of the variety, but to charge them also in connection with certain types of exploitation that escape protection. The main case aimed at is the import of cut flowers from countries that do not have a plant variety protection system. It also has to be observed that the majority of those countries, owing to their agro-climatic and economic circumstances, allow cut flowers to be produced at prices that defy all competition, even if the cost of transport (by special aircraft) is taken into account. Such distortion of competition produces a situation where, in certain member States, the production of cut flowers has become a secondary activity. Moreover, as has been stressed on many occasions already, extension is also in the interest of the users of the variety who usually pay royal ties; they will be better placed to handle the competition of those who do not pay any.

“19. While today the discussions have related to ornamental plants and cut flowers only, the time seems to have come to consider also the case of food and industrial plants. In fact breeders and producers, particularly breeders of fruit and vegetables, are in some cases in a position comparable to that prevailing in connection with cut flowers. In other words, their economic circumstances are made difficult by the import of fruit and vegetables from countries without protection and enjoying very favorable production conditions. However, the authorities and public opinion cannot be expected to take kindly to a situation where exclusive rights can limit the production of foodstuffs. Reference is made here to paragraph 11 above. In the case of industrial plants, the competition takes place often at the level of the basic industrial product, for instance essence of rose, and it is therefore down to that level that the extension of protection has to be considered.”

11. At the seventeenth session of the Administrative and Legal Committee, held in Geneva on April 16 and 17, 1986 (CAJ/XVII), the extension of the scope of protection (document [CAJ/XVI/3](#)) and the points of view of the ASSINSEL vegetable section (document [CAJ/XVII/5](#)) were discussed. (see extract from document [CAJ/XVII/10](#), paragraph 38 below):

“38. The Chairman recalled that the Consultative Committee, at its thirty-third session held on April 15, 1986, had accepted a proposal by the delegation of the Federal Republic of Germany that an item should be included in the agenda of that Committee’s next session to allow an exchange of views on possibilities for improving the Convention. The proposal had been based on the fact that developments in the field of plant breeding and seed production made such an exchange of views opportune. In his view, discussion on the scope of protection fitted into the framework of the larger work program adopted by the Consultative Committee.”

12. At the twentieth ordinary session of the Council, held in Paris on December 2, 1986, the Council discussed the progress of the work of the Administrative and Legal Committee (see extract from document [C/XX/13](#), paragraphs 20 and 21 below):

“20. Finally, the Chairman of the Committee pointed out that the Consultative Committee had agreed at its thirty-fourth session to request the Council to instruct the Administrative and Legal Committee to examine in more detail the possibilities of improving the UPOV Convention and had set out certain aspects of those terms of reference.

“21. The Council:

[...]

(iii) took note of the motion of the Vegetable Seed Section of FIS given at Annex IV hereto and stressed the importance of the Recommendation on Article 5 of the Convention adopted at the 1978 Diplomatic Conference.”

13. On October 21 and 22, 1987, at the Third Meeting with International Organizations (UPOV/IOM/III), proposals of international non-governmental organizations for revision of the Convention were received (see document [UPOV/IOM/III/3](#), pages 9 to 11)

“Article 5

“AIPH

“Article 5.1. The meaning of the last two sentences of this article is more accurately expressed as follows: ‘Propagating material shall be deemed to include whole plants, parts thereof and tissue culture, when they are used as propagating material in the production of plants.’

“Article 5.2. We would prefer the following text: ‘The authorization given by the breeder may be made subject to such conditions as he may specify, but these conditions shall be limited to the production and sale of the reproductive material of the new plant variety.’ Our organization is of the opinion that this supplement is more appropriate to the framework of the Convention.

“CIOPORA

“– Paragraph (1)

“CIOPORA considers the present wording of Article 5 difficult to improve owing to its shortcomings in both substance and form; CIOPORA therefore suggests that the wording of the Article should be reconsidered in its entirety. CIOPORA requests that protection of the breeder’s rights relate basically to any form of commercial exploitation of plants or parts of plants of his variety and, in particular, as in the field of patents, to their production, use for industrial purposes, offering for sale or marketing, introduction on the territory of the country in which the variety is protected or stocking with a view to industrial use or marketing.

“– Paragraph (3)

“The phrase ‘for the marketing of such varieties’ could usefully be deleted. It adds nothing to the lawmaker’s initial intention to allow full scope for research. Moreover its deletion would enable the notions of ‘minimum distances’ and infringement to be strengthened. The right conferred on the breeder must enable him to prevent any marketing of infringing varieties, in particular varieties which, even if they are not slavish imitations of his variety, cannot be sufficiently distinguished from it and still remain within the bounds of protection defined by the ‘minimum distances’.

“COMASSO

“The content and scope of protection under Article 5(1) of the UPOV Convention need to be extended to allow for structural developments and developments in the rapid propagation methods.

“Our reflections concern the effect of rights on commercial exploitation, i.e. the extension of the notion of exploitation to production with a view to commercial use, as well as the extension of protection to the varietal material, i.e. the material which may be regenerated from whole plants, or the end product where it does not belong to the food sector.

“The issue of the farmers’ privilege should be considered realistically; if maintained at all, this exemption should be limited to family farms, households, etc.

The principle of the freedom of plant breeding, as such, Article 5(3) of the UPOV Convention is considered inviolable. On the other hand, our internal discussions have related to the possible deletion of the phrase ‘or for the marketing of such varieties’ in the first sentence of the Article. The purpose of the deletion would not be to introduce a dependency principle, but this undoubtedly requires a new definition of the distinctness criteria.

“FIS

“First of all, the definition of the protected subject matter should be extended to include everything that enables whole plants to be regenerated. This conception is required by the new propagation techniques.

“The acts and commercial activities subject to authorization by the breeder should include:

- “– propagation with a view to commercial production of plants or parts thereof;
- “– use of plants or parts thereof with a view to production of material (for instance perennial basic products);
- “– transport, importation (including from countries where the variety is not protected), exportation, stocking for commercial purposes.

“The farmers’ privilege would remain limited to family farms and households. It would only be tolerated as regional usage.

“Finally, in view of the developments in multiplication techniques, it would be appropriate to delete the limitation to ornamental plants and cut flowers appearing in the second half of paragraph (1).

“With regard to further plant breeding work, the principle of free access to varieties (even those containing patented genes) seems to be generally recognized.

“However, access to varieties at commercial utilization level is still a debated point, reflecting the positions taken regarding the type of protection to be granted, notably to varieties developed by biotechnological means.

“A suggestion to reconcile the various points of view might be the following: if a royalty is to be paid for the commercial utilization of IOM/III/3 page 11 varieties containing patented genes, the varieties that host those genes and have been created by ‘conventional’ plant breeding should in return be given adequate financial compensation.”

“ICC

“Here again the ICC proposes a major recasting of this article. As it stands at present, the Convention prescribes a uniform but low level of protection of breeders’ rights. However, the level of protection may be raised in exceptional cases. The ICC feels that this order of priorities should be reversed. The Convention should provide for a uniform high level of protection, subject to derogations for special reasons or in particular circumstances.

“Experience has shown without doubt that to limit the rights of the breeder to the propagating material of his variety is inadequate. This permits the breeder to be exploited by those who buy a very small quantity of his new variety, multiply it, and harvest and sell the product. This is seen, for example, with fruit. An orchard grower can buy one specimen of a new apple variety, multiply it in his orchard, and in due course sell many tons of the new variety without paying anything further to its originator. With increasing industrial concentration, examples of this kind will increase. Further, the problem will be increased by biotechnology. In due course, plants will be adapted to produce special chemicals (oils, rubbers, drugs). Concerns would then be able to buy a single specimen of the genetically modified plant, multiply it, and thereafter plant it, crop it and process it to extract the chemical in question for sale, all without further payments to the grower. This is clearly unacceptable. Problems have likewise arisen with imports, for example of cut flowers. In some countries, local legislation has dealt with some of these problems, but a uniform treatment would be much better.

“Accordingly, the ICC proposes that the Convention should state that the breeder receives the exclusive right to exploit his variety commercially. This general principle may be subject to justified exceptions. The breeder would be in a much better position to recover the value of his efforts through specialized licensing arrangements, which would probably increase commercialization of his variety.

“Article 5. 2 should be maintained, but it should be made clear that the breeder is not obliged to authorize exploitation of his new variety. If he wishes, he should be able to retain a monopoly.

“It is seen as important to retain Article 5.3. The public interest in the creation of new varieties absolutely requires that research with protected varieties is not inhibited. However, the rights of the owner of the variety should be strengthened by deleting the words “or for the commercialization of such varieties” at the end of the first sentence. Sometimes (perhaps through error) a second variety receives a grant of rights when it differs only insignificantly from the variety from which it is derived. This amendment could enable the breeder of the earlier variety to assert his rights in such circumstances.”

1987, 1988, 1989, CAJ SESSIONS

14. On June 17 and 18, 1987, at the twentieth session of the CAJ (CAJ/XX), proposals of member States for revision of the Convention were submitted (see extract from document [CAJ/XX/4](#) below from France, page 4 and Netherlands, page 5):

“Article 5

[Page 4 –] “France

“Paragraph (1), first subparagraph

“It would perhaps be appropriate to delete the words ‘as such’ in order to facilitate verification and the provision of evidence for breeders wishing to enforce their rights.

Paragraph (1), second subparagraph

“In view of the ineffectiveness of Article 5(4), an amendment would be appropriate to extend to sexually reproduced plants the provisions currently applying to ornamental plants only: in the case of varieties for which only sexual reproduction is used at present, the progress made with in vitro multiplication in particular makes it necessary to extend the breeder’s rights to whole plants and parts of plants for which efficient in vitro multiplication may become possible. The Committee proposes a wording such as the

following: 'The right of the breeder shall extend to whole plants or parts thereof normally marketed for purposes other than propagation when they are used commercially as propagating or production material.'

[Page 5 –] "Netherlands

"Paragraph (1)

"The protection given by Article 5(1) should be enlarged so as to also cover multiplication on one's own premises."

15. From April 18 to April 21, 1988, at the twenty-second session of the CAJ (CAJ/XXII), the revision of the Convention was discussed (see extract from document [CAJ/XXII/2](#) prepared by the Office of the Union reproduced below and [CAJ/XXII/3](#) with comments from the international Chamber of Commerce (ICC)). In the document prepared by the Office of the Union, it was proposed to delete the whole article 2 and to create a new Article 2 with definitions and modifications to Article 5:

Extract from document CAJ/XXII/2:

"3. The proposals are based in part on those that have already been made on earlier occasions, in particular in the Third Meeting with International Organizations held on October 12 and 13, 1987."

[Proposals to Article 2]

"Article 2 (Present)
"Forms of Protection

"Proposal: Delete the whole article.

"Comments :

"1. The proposed deletion of paragraph (1) is compensated for by an amendment of Article 1(1). An alternative proposal to the deletion--which would take account of the wish that the meaning of Article 2 (1) of the present text be clarified-- is dealt with in paragraph 3 of the comments to the proposed amendment of Article 1(1). The consequences for Article 37 are dealt with in paragraph 4 of the said comments.

"2. The proposed deletion of paragraph (2) is based on the following considerations:

"(i) the purpose of the Convention should be to provide for protection as wide and as effective as possible. Exceptions should therefore be limited to the strict minimum;

"(ii) there are more and more difficulties in distinguishing varieties according to their manner of reproduction or multiplication or their end-use;

"(iii) in particular, the argument that hybrid varieties benefit from 'biological protection' is no longer valid.

"3. An alternative to the deletion of paragraph (2) could be to provide the possibility for the Council to authorize a limitation. If this alternative were to be pursued, it should be in Article 4 in the form of a new final paragraph.

"Article 2 (New)
"Definitions

"For the purposes of this Convention:

"(i) 'species' shall mean a botanical species or, where relevant, a subdivision of a species or a grouping of species known by one common name;

"(ii) 'variety' shall mean any grouping of plants or plant material which, by reason of its characteristics, is regarded as an independent unit for the purposes of cultivation or any other form of use;

"(iii) 'breeder' shall mean the person who created or discovered a variety.

"Description of Proposal and Comments

"1. Paragraph (i).- It has been proposed that 'genus and/or species' be replaced by 'taxon.' This proposal causes problems, however, in some cases where reference is made to a taxon of a lower rank, typically a species. It is therefore proposed at this stage to retain the word 'species' and to qualify it. The proposed definition is inspired by the laws of the Federal Republic of Germany and the United States of

America. It should be noted that it is possible that the revision of the Convention would make a definition unnecessary. In some instances, for example in the alternative proposal for Article 4, reference will be made to 'botanical genera or species.'

"2. Paragraph (ii).- The wish has been expressed, in connection with the proposed deletion of the present Article 2 (2), that a definition of the 'variety' be reinstated (the 1961 text contained examples of types of varieties, i.e., cultivar, clone, line, stock and hybrid). It was also suggested to introduce a general definition.

"3. The proposal is based on the law of the Netherlands, with the following additions: a reference to plant material since a variety may be represented by material that is not a whole plant; a reference to characteristics in line with the International Code of Nomenclature for Cultivated Plants and in order to suggest a link with Article 6 (1) (a); a reference to forms of use other than cultivation to take account of, for instance, use as a cell culture in a biotechnological process. The reference to a grouping would include a reference to a single specimen.

"4. Paragraph (iii).- One of the essential features of the UPOV Convention is that it provides also for the protection of varieties that have been 'discovered.' This is suggested at present by the phrase 'whatever may be the initial variation from which it has resulted' in Article 6(1) (a). On the other hand, the word 'breeder' may be construed restrictively. A definition of 'breeder' is therefore proposed to clarify the situation.

[Proposals to Article 5]

"Article 5
"Rights and Their Limitations

"(1) The breeder of a variety protected in accordance with the provisions of this Convention shall enjoy the exclusive right of reproducing the variety.

"(2) (a) The breeder shall also enjoy the exclusive right of offering for sale, selling or importing material of the variety and, subject to the rights of any other breeder, material of any other variety produced by means of repeated use of the variety.

"(b) Such right shall not extend, however, to the offering for sale or selling of material put on the market by the breeder or with his express consent or of material derived from that material in accordance with its intended destination.

"(3) Notwithstanding the provisions of paragraph (1), any member State of the Union may restrict in certain special cases the rights guaranteed to the breeders, provided that such restrictions do not conflict with a normal exploitation of the varieties and do not unreasonably prejudice the legitimate interests of the breeders. In particular, under normal circumstances, the following acts of reproduction shall not require the authorization of the breeder:

"(a) acts of reproduction for consumption or use in the household of the person doing such acts;

"(b) acts of reproduction for the purposes of research or the breeding of new varieties.

"(4) The exploitation of a variety which is essentially derived from a protected variety shall give rise to payment of equitable compensation to the holder of the rights in the protected variety.

"Comments

"1. General.- The proposed new text of Article 5 is based on the principle that the rights granted to the breeder should be reinforced. The enlargement of the catalogue of rights that must be granted (present paragraphs (1) and (3), second sentence) would be cumbersome and would have some further disadvantages (see in this respect document CAJ/XVIII/6) which are overcome if the definition of the rights is based on the largest possible scope which, in a second stage, is made subject to limitations and to the principle of the exhaustion of rights. The final paragraph deals with the rights over varieties bred from the protected variety.

"2. Right of reproduction (paragraph (1)).- The proposal made in document CAJ/XVIII/6 was based on a patent approach. The proposal above is based on a copyright approach in view of the fact that varieties, like many literary and artistic works, are exploited through reproduction. Paragraph (1) therefore provides an exclusive right of reproduction. Reproduction of a variety may take place in various forms, in particular: sexual reproduction, vegetative propagation, repeated use of other varieties for the production of material of the variety, use of creative breeding methods to "recreate" the variety, second occurrence of a mutation. All forms of reproduction would be covered by the right provided in paragraph (1). That right is limited in paragraph (3).

"3. Sale of plant material (paragraph (2)(a)).- The second essential feature of the exploitation of varieties is the fact that plant material of the variety, typically reproductive or vegetative propagating material and the

harvested crop, is the subject of commercial operations. Paragraph (2)(a) provides an exclusive right to such operations (offering for sale, sale and importation), subject to the exhaustion principle defined in subparagraph (b).

"4. The kind of material is not specified; taking into account the effects of the exhaustion principle, this would allow the right to be extended also to importation of transformed products, for example essential oils of perfume plants or a chemical compound produced by means of a biotechnological process. The proposed text specifies on the other hand that the right applies also to material of a variety produced by means of repeated use of the protected variety, typically a hybrid variety. The right presently provided in the second sentence of the present text of Article 5 (3) in the form of an exception to the principle of freedom of further breeding is thus incorporated into the basic rights in a positive form.

"5. Exhaustion of rights principle (paragraph (2)(b)).- Paragraph (2)(b) states the exhaustion principle which would apply with respect to further sales only. It follows that the right of reproduction is not subject to exhaustion.

"6. The exhaustion principle would apply with respect to the material initially sold and to derived material, but on the condition that the derivation follows fair practices. For example, the sale of cut flowers produced from rose bushes or tulip bulbs sold to the public for planting in private gardens would not be covered by the exhaustion principle.

"7. Limitation of the right of reproduction (paragraph (3)).- The first sentence of paragraph (3), which is inspired by Article 9 (2) of the Berne Convention for the Protection of Literary and Artistic Works, states the general principle that rights may be limited to some extent. That extent would be defined at the national level, within the limits set by the proposed text and on the basis of the circumstances prevailing, by means of legislative or administrative provisions and/or following judicial decisions. The proposed text has the advantage that controversial issues--in particular, the question of the farmers' seeds--would not be regulated in the Convention itself but left to the judgement of each member State of the Union, which could also decide to have them settled by the judiciary rather than by Parliament. This would provide a useful element of flexibility.

"8. However, the proposed text would set a limit to that flexibility in the second sentence: each member State would be required to exempt reproductions made, under normal circumstances, for private use or for research purposes, including for the creation of new varieties. This sentence thus retains the principle of free use of varieties for breeding purposes which is presently contained in the first sentence of paragraph (3).

"9. Exploitation of derived varieties (paragraph (4)).- The present text of the Convention sets out the principle that the exploitation of a variety bred from a protected variety is free. This principle has been criticized for years because it applies indiscriminately to the case where the daughter variety is very different from the mother variety and to the case where the difference is minimal, though pertaining to an "important characteristic" and being "clear" in the meaning of Article 6 (1) (a). One case has been dealt with on several occasions under the expression "easy mutations": both varieties have the same genotype but for a mutated characteristic. Other cases could be obtained through backcrossing or through gene transfer, or again in the case of a hybrid by using a similar line or a combination of different lines producing a similar hybrid. This latter example shows that there would not always be a direct line--a mother-daughter relationship--between the varieties concerned.

"10. On the other hand, the genetic engineers are concerned that an innovative gene or characteristic which they have introduced into a variety of a given species can be transferred freely, under the present text of the Convention, into other varieties.

"11. These are the reasons for which it has become necessary to reconsider the principle of free exploitation laid down in Article 5(3) of the Convention (on the understanding that the free use of a variety for breeding purposes, which may be assimilated to the research exemption of the patent law, would not be questioned) . The aim would be to introduce a kind of dependency. Two main questions arise in this respect:

"(i) What would be the form of the dependency? The draft provision in paragraph (4) proposes that it should involve the payment of equitable compensation. It is to be expected that, at least once the system is well-established, the compensation would be determined in the vast majority of cases by an agreement between the parties concerned.

"(ii) In which cases would there be dependency? Paragraphs 10 and 11 give examples of cases where a strong case is made in favor of dependency. They show that a precise definition of the cases would be arduous. In addition, a precise definition would unavoidably raise the question of the borderline cases and may be superseded by new developments. The draft provision in paragraph (4) therefore contains a general phrase, leaving it to private negotiations, arbitration by breeders' organizations and court decisions to define the cases and, for each case, the amount of the compensation."

16. From October 11 to 14, 1988, at the twenty-third session of the CAJ (CAJ/XXIII), the revision of the Convention and observations and proposals from the Delegation of the Federal Republic of Germany, were

discussed. In the report, references were made to “the German draft” and “the Office draft” (see extract of document [CAJ/XXIII/7](#) “Report”, paragraph 21, reproduced below):

“21. Discussions were based on documents CAJ/XXIII/2, 3, 4, 5 and 6. Document CAJ/XXIII/2, containing the proposals for revision of the Convention prepared by the Office of the Union, is hereinafter referred to as ‘the Office draft’ in the reporting of the discussions on Article 5; document CAJ/XXIII/4, containing the proposals prepared by the Delegation of the Federal Republic of Germany, is hereinafter referred to as ‘the German draft’; the document to be prepared for the next session of the Committee is hereinafter referred to as ‘the next draft’.”

17. The 1988 proposal from the Delegation of the Federal Republic of Germany (see extract from document [CAJ/XXIII/4](#)) is reproduced below:

“Article 5:

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

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

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

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

“Paragraph (3)(iii).- The exclusive right does not extend to the use of the protected variety for ‘breeding’ new varieties. It may be concluded therefrom, without there being an express statement to that effect, that the right does not extend either to the commercialization of the newly created variety. Paragraph (5) provides, however, in form of an exception applying to the case mentioned therein, a duty to pay remuneration; in this respect it is not clear of which main provision (i.e. the free exploitation of the newly created variety) this provision is the exception.

“Taking into account the above viewpoints, Article 5 could be drafted as follows:

“Alternative I: Delete item (ii) in paragraph (2)(a), add the following sentence to the end of paragraph (3) and delete paragraph (5):

‘The owner of the right cannot prohibit the commercial exploitation of a variety created pursuant to subparagraph (iii) above, except where material of his variety must be used repeatedly for such exploitation. If a variety newly created pursuant to subparagraph (iii) above is essentially based upon the material of a single protected variety [alternatively: if a variety newly created pursuant to subparagraph (iii) above is essentially derived from a single protected variety], the owner of the right in the protected variety may demand equitable remuneration to be paid in respect of the commercial exploitation of the newly created variety.’

“Alternative II: On the basis of the principles of patent law (Article 29 of the Community Patent Convention), the breeder’s right would be conceived altogether as a right of prohibition:

‘(1) A right granted in accordance with the provisions of this Convention shall confer on its owner the right to prevent all third parties not having his consent:

- (i) from reproducing the variety;
- (ii) from offering for sale, putting on the market or using, or importing or stocking for any of the aforementioned purposes, material of the variety.

‘(2) The right shall not extend to:

- (i) acts described in paragraph (1)(ii) above concerning any material which has been put on the market in the member State of the Union concerned by the breeder or with his express consent, or material derived from the said material in accordance with the purpose intended when it was put on the market;

- (ii) acts done privately and for non-commercial purposes;
- (iii) acts done for experimental purposes;
- (iv) acts done for the purpose of breeding new varieties, and acts done for the commercial exploitation of such varieties, unless the material of the protected variety must be used repeatedly for such exploitation.

'(3) If a variety is essentially based upon the material of a single protected variety [alternatively: if a variety is essentially derived from a single protected variety], the owner of the right in the protected variety may demand equitable remuneration to be paid in respect of the commercial exploitation of the new variety.

'(4) [Further national limitations].

'(5) [Collision norm]'

"If, in the course of further work, the layout of the Convention were to be examined, it would be appropriate to consider dividing Article 5 in three main provisions relating to:

- the right;
- the limitations on the effect of the right;
- the exhaustion of the right."

18. Extracts of the report adopted by CAJ at its twenty-third session (document [CAJ/XXIII/7](#)) are reproduced below:

[Extract on Article 2]

"Article 2 (Present)

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

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

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

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

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

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

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

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

"Article 2 (New)

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

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

"38. Definition of 'variety'.- One delegation said that confusion could arise from the use of the word 'variety' in the Convention which could mean either a cultivated variety or a botanical variety. The use of 'variety' could imply that the Convention was intended to provide protection for botanical varieties. Since the Convention only concerned cultivated varieties, the delegation suggested that the word 'cultivar' should be used instead of 'variety'. However, it was pointed out that since the word 'variety' was used in other legal texts, in particular in seeds laws and in patents laws, a change to the word 'cultivar' would create even more confusion.

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

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

[Extract on Article 5]

"Article 5

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

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

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

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

patent law in relation to the directly obtained product of a patented process. It was also stated that, in addition to considering the principle of extending protection, it was necessary also to consider the practicability of extension.

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

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

- '(iv) 'material' shall mean:
- reproductive or vegetative propagating material;
 - [- material that has the potential of being used as reproductive or vegetative propagating material;]
 - harvested material;
 - produce [directly] obtained from harvested material.'

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

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

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

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

"63. Concerning paragraph 2(iii), it was asked whether 'acts done for experimental purposes' meant acts done for breeding purposes. If so, it would be unnecessary to have paragraph 2(iii) because of paragraph 2(iv). However, it was explained that 'experimental purposes' could cover activities which were not connected with breeding, such as, for example, assessment of the value of the variety or study of the variety for academic purposes. It was stated that a university carrying out an academic study on the variety should not have to seek a license from the breeder. It was therefore agreed that paragraph 2(iii) should be retained.

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

"65. Dependency (paragraph (3) in the German draft).- The principle of dependency was generally welcomed by the Committee. It was stated that it would be a very important addition to the Convention and it was generally supported by plant breeders. The introduction of a dependency system would mean that the breeding history of a variety would become relevant and important but this history could now be checked by the use of new technologies. Several delegations said that they were not clear how a dependency system

would work in practice and it was therefore suggested to discuss the principle and the effects of dependency with breeders and non-governmental organizations and that later on the Technical Committee should consider the technical aspects of dependency.

"66. The question was raised as to why the proposed provision was limited to cases where only a single protected variety had been used. It was stated that this was in order to cover such situations as selection within a variety, discovery of a mutation or biotechnological transfer of a single gene to create a new variety.

"67. One delegation said that it had reservations as to the limitation of the dependency provision to cases involving a single protected variety. The delegation said that it seemed that under this provision 'stealing' from two varieties would not be covered. However, it was explained that the crossing of two protected varieties was the classic case of when the breeder's exemption should apply. Several delegations said that they agreed to the use of the word 'single' in the proposed provision.

"68. The question was raised as to whether the proposed provision would apply to new varieties created by backcrossing. Since two varieties were used in backcrossing, it could not be said that the resulting variety was essentially based upon or essentially derived from a single protected variety. Nevertheless, the practical effect of a backcrossing program might be to transfer one gene into an existing protected variety. Several delegations were of the view that dependency should also apply to varieties created by backcrossing. It was stated that the process for creating the variety should not make a difference as to whether dependency should apply. Furthermore, it was stated that since the next revised text of the Convention was intended to protect innovation, it would not be right to impose a restriction (under the dependency concept) on new technologies, such as gene transfer, which was greater than a restriction imposed on old technologies, such as backcrossing. Therefore, backcrossing should also be covered by dependency.

"69. The Committee discussed the question of the so-called 'pyramid of dependencies' which was first discussed at the UPOV Third Meeting with International Organizations in October 1987. One delegation stated that this whole question should be discussed in the Technical Committee since it involved technical aspects. An example given of when this question arose was where there was a protected variety A into which a gene was inserted to create variety B, and another gene was then inserted into variety B to create variety C.

"It was suggested that there should only be dependency between two varieties, so that variety C would depend on variety B and variety B would depend on variety A. One delegation said that it would be difficult to get approval in its country for a system which involved 'double dependency,' i.e. where both varieties B and C depended on variety A.

"70. One delegation stated that it would be unfair to the breeder of variety A if the breeder of variety C was only obliged to pay a royalty to the breeder of variety B, since the breeder of variety A might have done 15-years crossing work in order to create his variety whereas the breeder of variety B may have done very little work. Against this view it was stated that this situation would not create a problem because of the requirement of a payment of 'equitable remuneration.' This requirement would mean that the breeder of variety A would receive a substantial payment from the breeder of variety B which would compensate for the fact that variety B had been used to create another variety, variety C. Since a smaller amount of work had gone into the creation of variety B than into the creation of variety A, a smaller payment would be made to the breeder of variety B.

"71. However, the view was expressed that the amount of remuneration to be paid should not depend upon the amount of work that went into the creation of the original variety, but rather upon the original variety's potential industrial value. It was also stated that the amount of remuneration should also depend on how much the new variety differed from the original one.

"72. It was stated that the present proposal for a dependency system would create de facto compulsory licensing since the breeder of the original variety would receive equitable remuneration but would not be able to prevent the commercial exploitation of the dependent variety. It was stated that such a dependency system would not necessarily prevent plagiaristic breeding since a plagiaristic breeder would always, in effect, be able to obtain a licence. It was therefore suggested that the breeder of the original variety should be able to prevent the marketing of the dependent variety in cases where there had been real piracy and plagiarism of the original variety.

"73. As to the specific wording of the proposed provision, one delegation said that it did not make clear enough that dependency, which was a limitation on the breeder's exemption, was necessary to deal with piracy and plagiaristic breeding. Several delegations stated that the wording which provided that the owner of the right in the protected variety 'may demand' equitable remuneration was not strict enough, and that the words 'may demand' should be replaced by the words 'shall be entitled to.'

"74. Several delegations said that it was not clear what was meant by the words 'essentially derived,' and it was suggested that it should be for the Technical Committee to discuss how to determine in practice whether one variety was 'essentially derived' from another.

"75. In order to take into account the discussion which the Committee had had on dependency, a drafting group was formed which produced the following new proposed dependency provision:

'If a variety is essentially derived from a [single] protected variety, the owner of the right in the protected variety

Alternative 1: may prevent all third parties not having his consent from performing the acts described in paragraph (1) above in relation to the new variety.

Alternative 2: shall be entitled to equitable remuneration in respect of the commercial exploitation of the new variety.'

"76. After examining this proposal, the Committee discussed the possibility of having a third alternative in the proposal which could be a combination of alternatives 1 and 2, whereby, under normal circumstances, the breeder of the original variety could prevent the use of the derived variety, but, under certain circumstances, he could only obtain equitable remuneration in respect of its commercial exploitation. For the purposes of this third alternative, the Committee discussed when there should be a right only to equitable remuneration. It was suggested that this should be when the derived variety was an improvement on the original variety, although this would then raise the question of what was an 'improvement.' In answer to this question, it was suggested that a derived variety would be an improvement if it was important from an economic or agricultural point of view. It was stated that a determination of economic or agricultural importance could be made, and it was made for the purposes of national listing systems. However, it would be easier to make this determination for agricultural and vegetable crops than for other crops.

"77. In conclusion, it was agreed that a third alternative, reflecting the Committee's discussions, would be produced in the next draft.

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

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

'Each member State may provide for a farmer's exemption and may limit the application of this Convention within a genus or species to varieties with a particular manner of reproduction or multiplication, or a certain end-use, provided that such exemption or limitation does not cause excessive prejudice to the legitimate interests of breeders.'

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

"81. The Delegation of the United States of America said that in its country a proposed regulation had been drafted to define the term 'saved seed' which was used in the Plant Variety Protection Act, in order to curb abuses which occurred under the 'farmer's privilege.' The proposed definition was to the effect that the saved seed would be a quantity not exceeding an amount which would be used to plant a certain acreage on one's own farm using normal farm operations. Several other delegations stated that in their countries there were laws regulating commercial seed cleaning.

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

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

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

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

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

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

"88. The Delegation of the Federal Republic of Germany explained that it was necessary to ensure that the user of a variety had a clear legal basis for his activities. It was clearly a question dealing with plant breeders' rights and a collision norm could therefore be included in the Convention. It could equally be included in the patent law, notwithstanding the fact that patent law did not normally deal with the scope of protection, if a binding rule for patents could be established. The present provision should be maintained to highlight the issue, but it should ideally be discussed in a joint UPOV/WIPO meeting.

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

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

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

19. From April 10 to 13, 1989, at the twenty-fourth session of the CAJ (CAJ/XXIV), CIOPORA presented proposals and comments on the revision of the Convention ([CAJ/XXIV/5](#)). The CAJ agreed the following (see extract from document [CAJ/XXIV/6](#) "Report"):

[Extract on Article 2]

"Article 2 (new)

"46. Paragraph (i) [definition of species].- It was pointed out that current thinking on the revision of the Convention meant that it would probably not be necessary to include a definition of species.

"47. Paragraph (ii) [definition of variety].- A number of delegations spoke in favor of a definition of variety since it was needed in order to define the interface with patents.

"48. However, some doubts were expressed as to the advisability of including two definitions of the same matter in the Convention, one in Article 2 and the other in Article 6. It was explained in that context that the word 'variety' designated a concept covering physical objects having special properties, that is to say, from a technical point of view, a degree of distinctness, homogeneity and stability. Article 6 of the Convention and its implementing provisions specified that degree in respect of varieties for which an application was filed. However, the variety trade (breeders, seedsmen, users) also independently evaluated that degree and there were cases where its perception was quite different; thus, the International Maize and Wheat Improvement Center (CIMMYT) circulated material that it considered to constitute a variety, but which did not meet the

UPOV requirements as regards homogeneity. In such case, it could be advisable to take into account in the administration of the plant variety protection system, and more particularly in the examination for distinctness, varieties such as defined on the criteria of the variety trade. In that connection, the Committee had considered at its twelfth session that 'any other variety' within the meaning of Article 6(1)(a) of the Convention did not necessarily have to be 'finished' and the Council had taken note of that opinion at its eighteenth session in 1984 (see at annex to document C/XVIII/9² and paragraph 81 of document C/XVIII/14). That situation, together with the widespread opinion that Article 6 contained a definition of variety, meant that it was highly desirable to reintroduce a general definition of variety and to state that Article 6 referred more specifically to conditions for protection.

"49. In that respect, the Delegation of the EPO asked whether the proposed definition was to include within the field of application of the UPOV Convention, by its scope, plant elements at present excluded therefrom and whether it would consequently be such as to oblige the EPO to change its patent granting practice; that practice was based on the 'propagating material/ CIBA-GEIGY' decision (see paragraph 32 above) and more particularly on the statement that 'Article 53 (b) EPC prohibits only the patenting of plants or their propagating material in the genetically fixed form of the plant variety.'³

"50. The Delegation of the United Kingdom observed that the same question had arisen in its country. No conclusions had as yet been drawn. The Ministry of Agriculture held that any cell containing the complete genotype was per se a part of a variety and should be treated as such. The problem was that that opinion would oblige the Patent Office to refuse grant of patents in those cases where the European Patent Office had already established a contrary practice; the Ministry of Agriculture would then be in the position of someone who imposed a restriction that did not exist at that juncture or that did not exist as yet. In fact, it would seem that the solution was to be found rather in agreement on a reasonable interface between the two systems of protection.

"51. The Delegation of the Federal Republic of Germany expressed the opinion that the proposed new Article 2(ii) would oblige patent offices to change their granting practice. Offices currently held that the purpose of the UPOV Convention was to protect the plant varieties that were genetically fixed and that possessed the other required characteristics; all others could be the subject matter, according to those offices, of a patent.

"52. The Vice Secretary-General felt that it would be illogical to give the possibility of a patent to a breeder who had not had access to plant variety protection on the grounds, for example, that his material did not meet the requirements in respect of homogeneity. There was therefore reason for the patent offices to reconsider their practice in that respect.

"53. As regards the wording of the proposed provision, it was agreed that the words 'plant material' should be replaced by 'parts of plants' since the word 'material' was also used, with a different meaning, in Article 5.

"54. Paragraph (iii) [definition of breeder].- The Delegation of Sweden explained that, in its country, a successor in title could enjoy protection only if the breeder himself was also able to enjoy it by reason of his nationality, his place of residence or his place of business. The proposed definition would require a revision to the Swedish legislation on that point, which Sweden was prepared to do.

"55. Definition of material.- The matter was examined in relation to Article 2(ii) and Article 5(1) in which the word 'material' appeared, but with differing meanings. It was explained that, in Article 2(ii), the word designated a plant element containing all the genetic information that was characteristic of the variety and that was capable of regeneration (with exceptions) and multiplication; such element had to be, as a minimum, a cell or a protoplast. As stated in paragraph 53 above, it was agreed to replace the word by 'parts of plants.' In Article 5(1), the word designated any form under which a variety could exist; it therefore also applied to transformed products. However, for the practical definition of the scope of protection and the exercise of the right, account would have to be taken of the circumstances of each case, particularly as regards the principle of exhaustion and of the possibility or impossibility of identifying the variety from which the product derived.

"56. As regards the scope of the word 'material' in Article 5, the following observations were made:

² That text was worded as follows:

"2. What conditions must be fulfilled by the 'other variety'? Must the 'other variety' with which the variety that is the subject of an application for protection has to be compared when the latter is tested for distinctness be a 'finished' variety, that means a variety that is sufficiently homogeneous, or can it be a plant population that does not--yet--fulfill the requirements for homogeneity (a so-called "quasi-variety," as for instance most of the varieties distributed by CIMMYT)?

"The 'other variety' must not necessarily be 'finished,' that is to say meet the standards set for the protection of new plant varieties in the member State of the Union concerned (these standards are often identical with those set in other fields of law such as the regulations on production and trade in seed and seedlings). In the case of the 'other variety,' this must be material which already fulfills the usual criteria accepted by the trade for the notion of variety; in particular, the variety must at least be able to be described as such."

³ In view of the forthcoming discussions on this matter and the approach adopted for the next document, it should be noted decision explains the concept of plant variety as follows: in view also of that this same "The skilled person understands the term 'plant varieties' to mean a multiplicity of plants which are largely the same in their characteristics and remain the same within specific tolerances after every propagation or every propagation cycle."

“(i) For one delegation, it had to be limited to the product of the harvest. For another, it would be difficult to go beyond the material potentially usable as reproductive or vegetative propagating material.

“(ii) One delegation stated that its professional circles were unanimously in favor of a definition extending to at least the product directly obtained from the product of the harvest. It was indeed at that stage that certain varieties were truly involved in trade and could be identified (for example in the case of aromatic plants). Another delegation was also in favor of a broad definition.

“57. As regards the incorporation of a definition in the Convention, three delegations were in favor, whereas one further delegation preferred for the time being to refrain from defining the word ‘material.’ That delegation had ascertained, during discussions at national level, that it was most difficult to draft a definition satisfying all situations and making it possible, in particular, to exclude certain products from protection where such was advisable for reasons of general interest. It stressed that it was important to specify that the breeder could receive a royalty once only, at the first stage of the exploitation process of the variety. However, it was possible in future, particularly due to the impact of new technologies, that the right should be exercisable at the last stage, that is to say in relation to the final product. To make such an extension acceptable, it would be necessary, however, to stipulate that the onus of proof was to lie with the breeder.”

[Extract on Article 5]

“Article 5

“74. Paragraph (1) [fundamental right].- In view of the ability of certain material of a variety to reproduce or to propagate and the facility with which a parallel market could be created in certain cases, the Committee agreed to add exportation to the acts concerned by the breeder’s fundamental right.

“75. As regards the drafting, particularly the meaning of the words ‘using’ and ‘aforementioned purposes,’ it was explained that the proposed text was based on the Community Patent Convention, itself largely based on European domestic legislation, in order to profit from patent case law. In the context of the UPOV Convention, ‘utilization’ had to be understood as activities such as growing or the use of the product of the harvest for food or industrial purposes. To ensure that the term ‘aforementioned purposes’ would indeed apply to all activities, including reproduction or propagation of the variety referred to in subparagraph (i), it was agreed to introduce a new subparagraph (iii) devoted to the stocking of variety material.

“76. Paragraph (2)(i) [exhaustion of right].- A discussion ensued on the phrase ‘material which has been put on the market in the member State of the Union Concerned’, that is to say the question whether a breeder who had placed material on the market in one country should still have the possibility of exercising his right of prohibition in another country to oppose imports of the material into the latter country. That question was answered affirmatively in view of the nature, that is to say domestic, of the titles of protection issued and of the independence of protection afforded in the various member States. The proposed text was held to be satisfactory on that point.

“77. Paragraph (3) [dependency].- No delegation spoke against the inclusion of a principle of dependency in the Convention. However, a number of delegations wished for a clear statement in the commentary on the draft revised text that it constituted a de jure and de facto exception, and reference was made to paragraph 95 of document CAJ/XXIV/4 in that context. One delegation held that the proposed text of paragraph (3) was sufficiently clear; a further delegation emphasized that, for one or other species, the principle could become of frequent application if the most regularly used plant breeding methods were those that led to dependency.

“78. A large majority spoke in favor of maintaining the word ‘single’ in the phrase ‘if a variety is essentially derived from a [single] protected variety.’ It was nevertheless decided to maintain the square brackets in the next document. One delegation stated that the professional circles in its country favored a system of dependency that was restricted to those cases where the relationship of the two varieties concerned was obvious.

“79. Each of the three alternatives proposed as regards the effects that dependency would have was supported by at least one delegation. It was therefore decided to maintain them in the next document. Two additional alternatives were also proposed, but were not included as yet:

“(i) add to alternative 1 the following phrase: ‘unless equitable remuneration has been offered’;

“(ii) invert the order, in alternative 3, of the rights listed there in order to emphasize that payment of equitable remuneration would constitute the usual situation and that the right of prohibition would be the exception.

“80. Paragraph (4) [possibility of limiting the scope of protection].- A number of delegations emphasized the need for that provision on account of the needs of the countries that wished to become members of the

Union and also of the political necessity that could exist in some countries for maintaining 'farmer's privilege' or even on account of the breeders' wish to maintain good relations with the farmers.

"81. A number of delegations suggested that an attempt should be made to achieve greater harmonization or to specify 'farmer's privilege' in the paragraph under discussion if it was the intention of that paragraph to specifically permit such privilege. It was replied that such was not the case: in view of the broad scope of the right afforded in the initial paragraphs of that Article, a State could feel a need to provide for other limitations, for example to exclude certain products from protection. As far as the 'farmer's privilege' in particular was concerned, it would be extremely difficult to define in the Convention those species to which it should apply or the possible conditions and limitations of its application. It had to be agreed that situations could be highly different from one country to another and that the Convention could not deal equitably with all those situations.

"82. The suggestion made in session to have a provision on 'farmer's privilege' and another on the other possible limitations met with the objection that a detailed list of exceptions was likely to encourage member States to incorporate those exceptions in their domestic laws. It was therefore agreed to maintain the general nature of paragraph (4).

"83. However, the Committee agreed to add a procedure for notification and statement of a position by the Council on the lines of that proposed for Article 4.

"84. It was also agreed to place in square brackets the phrase 'if this is necessary in the public interest' on the grounds that a 'farmer's privilege' would probably not be in the public interest.

"85. Paragraph (5) [collision norm].- On the question whether it was necessary to have provisions to govern the relationship between patents and plant breeders' rights, it was explained that the choice was one between legislating--as was the case in the paragraph under discussion or in the EC drafts mentioned by a number of delegations--or noting that there existed two independent rights and possibly two owners who would need to settle between themselves the conditions for exercising their respective rights. If it was possible to agree on a system of reciprocal dependence it could then possibly be enough to note its existence.

"86. Two delegations were formally opposed to paragraph (5); it was also observed that it could be inadvisable to exercise control over another intellectual property right in the Convention, that it would perhaps be impossible to legislate on that right in the Convention and that the proposed text was not yet adequate as a final solution. The Committee nevertheless proposed that it be maintained, in square brackets, in the next document as a provocative basis for discussion at the Fourth Meeting with International Organizations."

1989 MEETING WITH INTERNATIONAL ORGANIZATIONS

20. At the Fourth Meeting with International Organizations (UPOV/IOM/IV) held in Geneva, on October 9 and 10, 1989, the following new text was proposed (see extracts from document [UPOV/IOM/IV/2](#) reproduced below):

[Extract on Article 2]

"Present [1978] Text

"Article 2

"Forms of Protection

"(1) Each member State of the Union may recognise the right of the breeder provided for in this Convention by the grant either of a special title of protection or of a patent. Nevertheless, a member State of the Union whose national law admits of protection under both these forms may provide only one of them for one and the same botanical genus or species.

"(2) Each member State of the Union may limit the application of this Convention within a genus or species to varieties with a particular manner of reproduction or multiplication, or a certain end-use."

"Explanatory Notes

"1. Paragraph (1).- See under Article 1(2).

"2. Paragraph (2).- It is proposed to delete this paragraph.

“Proposed New Text

“Article 2

“Definitions

“For the purposes of this Convention:

“(i) ‘species’ shall mean a botanical species or, where relevant, a subdivision of a species or a grouping of species known by one common name;

“(ii) ‘variety’ shall mean any plant or part of plant, or any grouping of plants or parts of plants, which, by reason of its characteristics, is regarded as an independent unit for the purposes of cultivation or any other form of use;

“(iii) ‘breeder’ shall mean the person who created or discovered a variety, or his successor in title;

“[(iv) ‘material’ shall mean: reproductive or vegetative propagating material; [-material that has the potential of being used as reproductive or vegetative propagating material;] harvested material; products [directly] obtained from harvested material.]

“Explanatory Notes

“1. Paragraph (i).- It has been proposed that ‘genus and/or species’ be replaced by ‘taxon.’ This proposal causes problems, however, in some cases where reference is made to a taxon of a lower rank, typically a species. It is therefore proposed at this stage to retain the word ‘species’ and to qualify it. It is possible, however, that the revision of the Convention would make a definition unnecessary.

“2. Paragraph (ii).- It is proposed to reintroduce a general definition of the term ‘variety’ (the 1961 text of the Convention contained examples of types of varieties, i.e., cultivar, clone, line, stock and hybrid).

“3. Paragraph (iii).- It is proposed to introduce a definition of ‘breeder’ in order, on the one hand, to simplify the wording of Article 1 and streamline the wording of the Convention and, on the other, to underline that the Convention also provides for the protection of varieties that have been ‘discovered.’

“4. Paragraph (iv).- The definition of the term ‘material’ is included in the present document as a basis for discussions for the Committee has not yet taken a final position on the propriety of a definition, nor has it done so in respect of its scope. This definition supplements the definition, given in Article 5, of the effects of the right granted to the breeder (see in particular paragraph (1) (ii) thereof).”

[Extract on Article 5]

“Present [1978] Text

“Article 5

“Rights Protected; Scope of Protection

“(1) The effect of the right granted to the breeder is that his prior authorisation shall be required for

- the production for purposes of commercial marketing
- the offering for sale
- the marketing

of the reproductive or vegetative propagating material, as such, of the variety.

“Vegetative propagating material shall be deemed to include whole plants. The right of the breeder shall extend to ornamental plants or parts thereof normally marketed for purposes other than propagation when they are used commercially as propagating material in the production of ornamental plants or cut flowers.

“(2) The authorisation given breeder may be made subject conditions as he may specify.

“(3) Authorisation by the breeder shall not be required either for the utilisation of the variety as an initial source of variation for the purpose of creating other varieties or for the marketing of such varieties. Such authorisation shall be required, however, when the repeated use of the variety is necessary for the commercial production of another variety.

“(4) Any member State of the Union may, either under its own law or by means of special agreements under Article 29, grant to breeders, in respect of certain botanical genera or species, a more extensive right than that set out in paragraph (1), extending in particular to the marketed product. A member State of the

Union which grants such a right may limit the benefit of it to the nationals of member States of the Union which grant an identical right and to natural and legal persons resident or having their registered office in any of those States.

“Proposed New Text

“Article 5

“Effects of the Right Granted to the Breeder

“(1) A right granted in accordance with the provisions of this Convention shall confer on its owner the right to prevent all persons not having his consent:

“(i) from reproducing or propagating the variety;

“(ii) from offering for sale, putting on the market, exporting or using material of the variety;

“(iii) from importing or stocking material of the variety for any of the aforementioned purposes.

“(2) The right shall not extend to:

“(i) acts described in paragraph (1)(ii) and (iii) above concerning any material which has been put on the market in the member State of the Union concerned by the breeder or with his express consent, or material derived from the said material in accordance with the purpose intended when it was put on the market;

“(ii) acts done privately and for non-commercial purposes;

“(iii) acts done for experimental purposes;

“(iv) acts done for the purpose of breeding new varieties, and acts done for the commercial exploitation of such varieties, unless the material of the protected variety must be used repeatedly for such exploitation.

“(3) If a variety is essentially derived from a [single] protected variety, the owner of the right in the protected variety

“[Alternative 1] may prevent all persons not having his consent from performing the acts described in paragraph (1) above in relation to the new variety.

“[Alternative 2] shall be entitled to equitable remuneration in respect of the commercial exploitation of the new variety.

“[Alternative 3] may prevent all persons not having his consent from performing the acts described in paragraph (1) above in relation to the new variety. However, where the new variety shows a substantial improvement over the protected variety, the owner of the right shall only be entitled to equitable remuneration in respect of the commercial exploitation of the new variety.

“(4) Each member State of the Union may exempt other acts from the effects of the right granted in accordance with the provisions of this Convention, [if this is necessary in the public interest and] provided that the exemption does not cause excessive prejudice to the legitimate interests of breeders. Any member State of the Union making use of the faculty provided for in this paragraph shall notify the Secretary-General of this fact, stating the reasons therefor. The Council shall state its position thereon.

“[(5) No acts concerning a variety for which a right has been granted in accordance with the provisions of this Convention shall be prohibited on the basis of some other industrial property right

“(i) where the acts fall within the right in accordance with the provisions of paragraph (1), or

“(ii) which are exempt from the scope of the right in accordance with the provisions of paragraph (2).]

“Explanatory Notes

“1. It is proposed to strengthen the right granted to the breeder by redrafting completely Article 5.

“2. Paragraph (1).- This paragraph sets out the fundamental rights of the breeder using, in adapted form, the terminology of the Luxembourg Convention for the European patent for the common market (Community Patent Convention). It further differs from that Convention in that it extends the right of the breeder to exportation of material of the variety.

"3. Concerning the scope of the term 'material', reference is made to Article 2 [new].

"4. Paragraph (2).- This paragraph sets out three types of limitations of the right of the breeder: the principle of the exhaustion of the rights, which would not be applicable to the reproduction or multiplication of the variety (subparagraph (i)); two limitations that are commonplace in the field of industrial property (subparagraphs (ii) and (iii)); the 'principle of free access to genetic resources', similar to that presently contained in paragraph (3) of Article 5 (subparagraph (iv)).

"5. Paragraph (3).- This paragraph introduces a new concept into the law of plant variety protection: the exploitation--but not the breeding--of a variety that is essentially derived from a protected variety would be subject to the right granted to the breeder of the latter variety ('dependence').

"6. The Committee has not yet taken a final position on the question whether the word 'single' would be inserted or omitted: at the present stage of the discussions, there seems to be general agreement on the fact that the following conditions should be met for there to be dependence:

"(i) The difference between the two varieties involved must meet the requirement set out in Article 6(1)(a), that is, under the present text, be clear and relate to one or more important characteristics.

"(ii) The derived variety must retain almost the totality of the genotype of the mother variety and be distinguishable from that variety by a very limited number of characteristics (typically by one).

"(iii) The derived variety must have been obtained using a plant improvement method whose objective is the achievement of requirement (ii) above (mutation, gene transfer, full backcrossing scheme, selection of a variant within a variety, etc.): in other words, no varieties bred according to a classical or other scheme of crossing in which selection within the progeny is a major element would become the subject of dependence.

"(iv) The mother variety must originate from true breeding work, that is, it must not itself be dependent: there should not be a 'dependence pyramid'. If variety C derives from variety B which derives from variety A, C would be dependent from A rather than B, since the very objective of dependence is to give to the breeder of an original genotype an additional source of remuneration: the collecting of that remuneration through a third party, in the example the breeder of variety B, does not seem very practicable.

"7. The Committee has not yet taken a final position on the question of the nature of the right that would be granted to the breeder under the principle of dependence. Three alternatives are proposed for discussion.

"8. Paragraph (4).- This paragraph is self-explanatory. The Committee has not yet taken a final position on the question whether a reference to public interest should be inserted or omitted.

"9. Paragraph (5).- This paragraph sets out a 'collision norm' governing the interactions with other industrial property rights. The Committee has not yet taken a final position on the propriety of such a provision, nor on its contents."

21. From October 11 to 13, 1989, at the twenty-fifth session of the CAJ (CAJ/XXV), held in Geneva, the CAJ revised the text proposed at the Fourth Meeting with International Organizations (UPOV/IOM/IV) as follows (see extract from document [CAJ/XXV/2](#) reproduced below):

"Article 2 (Definitions)

[...]

Paragraph (iv) (definition of 'material')

"52. The Delegation of the United States of America wondered whether the definition of 'material' would prove as useful as was hoped.

"53. With regard to the scope of the definition, and hence the scope of the right granted to the breeder, it was stressed that, by operation of the principle of exhaustion, the breeder would not exercise the right in the later stages of the production process (and such exercise would not result in him collecting royalties at various stages) unless he had been unable to exercise it at an earlier stage; for example, that situation would arise if products of the variety were imported. However, that option given to the breeder would have political implications and therefore called for a political decision. In that connection, the Delegation of New Zealand stated that Article 5(2) (i) (principle of exhaustion) was very difficult to understand; it requested that it be reworded more clearly.

"54. With the exception of the Delegation of France, all delegations were in favor of deleting the reference to products obtained from harvested material (fourth subparagraph). The Delegation of the EC then asked whether the member States could individually extend protection to such products. The

Vice Secretary-General pointed out that the proposed new text contained no provision on the lines of the present Article 5(4).

“55. The Delegation of Spain indicated that the extension of protection to harvested material also posed a problem. That of Canada explained that the draft law now before the Canadian Parliament was based on the present text of Article 5(1) of the Convention, and that an extension of protection seemed out of the question. The Delegation of France stressed that the deletion of the reference to harvested material would effectively defeat the work done on revising the Convention to give the breeder a right with a certain amount of economic weight in the light of scientific and technological developments.

“56. The Delegation of the United Kingdom stressed the importance of the reference to ‘material that has the potential of being used as reproductive or vegetative propagating material’ for the exercise of the right in the event of infringement. The Delegation of France preferred to have the reference deleted and the first subparagraph reworded, in accordance with the proposal made by ASSINSEL at the fourth Meeting with International Organizations, to read: ‘all forms of reproductive or vegetative propagating material.’

“57. The Office of the Union was then requested to prepare a new proposal for the definition of ‘material’ and the extent of protection. To that end, the Chairman suggested working on the proposal referred to in the preceding paragraph and arranging for harvested material and products obtained therefrom to qualify as evidence and grounds for an infringement action.

“58. However, it was eventually the Delegation of the Federal Republic of Germany that submitted a proposal. Its proposal is recorded in Annex II to this document. It was examined during the discussion on Article 5.”

22. From June 25 to 29, 1990, at the twenty-seventh session of the CAJ (CAJ/27), draft administrative provisions and final clauses were considered (see document [CAJ/27/2](#)) and the definitions that were in draft Article 2 were placed in draft Article 1 and the provisions of the Scope of Protection in draft Article 5 were placed in draft Article 14 (see extracts from document [CAJ/27/8](#) "Report", reproduced below):

Article 1 - Definitions

[Extract of document CAJ/27/2, page 11]

- "(x) 'material' means, in relation to a variety:
- reproductive or vegetative propagating material of any kind,
 - harvested material,
 - [the product directly obtained from harvested material];⁴"

[Extract of document CAJ/27/8, page 3]

"Item (x) – Definition of 'Material'"

"18. No agreement was reached on the wording proposed in the Draft or on the type of material that the plant breeder's right should concern. After in-depth discussion, that highlighted the reservations held by a number of delegations as regards extension of breeders' rights to the product directly obtained from harvested material, the Delegation of France spoke in favor of deleting the third indent in order to submit a realistic draft to the international nongovernmental organizations at the meeting to be held in October next. No objection was raised to that proposal.

"19. Examination of the matter was resumed in relation to Article 14(1). The Committee adopted a new version of the Article making a definition of 'material' superfluous."

[Extract of document CAJ/27/8, pages 10 to 13]

Article 14 - Effects of the Breeder's Right

"Paragraph (1) - Nature of the Rights Afforded

"68. Discussions were initially based on the Draft.

"69. During the first exchange of views, several delegations pointed to the difficulties that would be occasioned for their countries by the extension of the rights afforded to the breeder. The Delegation of Australia nevertheless stressed that those difficulties should not prevent it from adopting a revised text, even if ratification were to be delayed until those difficulties had been overcome at national level.

"70. The main difficulties referred to concerned:

(i) the fact, according to certain delegations, that the text did not clearly show that the breeder had to 'exercise his rights' and collect his royalty at the first stage of exploitation that was feasible: those delegations would like a 'hierarchy' of rights;

(ii) the fact that certain delegations were unable to approve a right that extended to the product directly obtained from harvested material;

(iii) the fact that the practical impact of words such as 'conditioning' and 'using' was not clear or had not been fully examined at national level;

(iv) the fact that a right extending to export and import could have consequences for non-member States and that those two acts were not among those normally affected by a patent;

"71. To remove the first difficulty, the Delegations of the Federal Republic of Germany and of Switzerland each submitted a written proposal for a new text. On the basis of the discussions on those two proposals, the Office of the Union then submitted a further proposal drafted as follows:

'(1) Subject to paragraphs (3) and (4), the following acts shall require the authorization of the breeder:

(a) in respect of the propagating material of the protected variety

- (i) production [or reproduction]
- (ii) conditioning

⁴ The words within square brackets present an alternative. The retention of these words will call for the deletion of the words in square brackets in Article 16 (1).

- (iii) offering for sale
- (iv) sale or other putting on the market
- (v) exporting
- (vi) importing
- (vii) stocking for any of the purposes mentioned in (i) to (vi) above
- (viii) use in any way other than those mentioned in (i) to (vii) above;

(b) in respect of harvested material of the protected variety, any of the acts referred to in (a) above, provided that the harvested material was obtained through the use of a propagating material whose use, for the purposes of obtaining harvested material, was not authorized by the breeder:

(c) in respect of products directly obtained from harvested material, any of the acts referred to in (a) above, provided that such products were made using harvested material whose use, for the purposes of making such products, was not been authorized by the breeder.

'(2) Any Contracting Party may also require the authorization of the breeder for performing acts additional to those mentioned in paragraph (1).'

"72. That proposal was supported both by delegations that had pronounced in favor of the text proposed in the Draft and by delegations that had entered reservations in that respect. The Committee therefore decided that it should be taken as a basis for the next Draft.

"73. The Delegation of Australia, however, would have preferred maintaining a reference, for the limitation contained in sub-paragraphs (b) and (c), to material obtained in infringement of the breeder's right as had been contained in the proposal by the Federal Republic of Germany.

"74. Several delegations observed that the wording proposed by the Office of the Union now spoke of 'authorization' whereas the draft was based on the notion of 'consent.' It was noted that the intention was not to modify the text in substance. Certain members of the Committee considered that the word 'authorization'--given in the present text of the Convention--could have a more formal connotation and, for example, exclude implicit consent; others felt that the two notions could be used indifferently. The representative of the EC drew attention to the link with 'farmer's privilege' under which no authorization or consent was required for acts of production and subsequent acts of exploitation. The Delegation of France drew attention to the fact that, under patent law, those problems had sometimes been avoided by a reference to the lawfulness of the product involved.

"75. The Delegation of the United Kingdom suggested that the reference to selling or any other form of putting on the market be supplemented by a reference to any other form of making available to third parties.

"76. As regards the reference to using, the Secretary-General remarked that subject to closer examination, it could perhaps be deleted in view of the existence of sub-paragraph (b). The Delegation of the United States of America held the reference to be useful in the context of inbred lines and hybrid varieties. The Committee then examined how it could be maintained in the next Draft. The majority of delegations were in favor of inclusion without square brackets.

"77. The Delegation of the United States of America noted that all the acts referred to in sub-paragraph (a) were not relevant in the context of subparagraphs (b) and (c). Thus, there could hardly be any question of conditioning the harvested material. The Delegation of France considered that the problems did not give reason for concern.

"78. As regards the inclusion of the product directly obtained from harvested material, that certain delegations likewise questioned in relation to the proposal under examination, the Committee agreed to place the provision under sub-paragraph (c) in square brackets, either in the form of a sub-paragraph (c) or a supplement to paragraph (2) to introduced by 'in particular.'

"Paragraph (2) - Extension of the Breeder's Right to Other Varieties

"79. The great majority of delegations expressed satisfaction with the wording proposed in the Draft.

"80. The Delegation of the Netherlands stated that it could not accept the proposed sub-paragraph (ii). It suggested that the words 'unless equitable remuneration be offered' be added. In its opinion, the absolute nature of the right presently contained in the Draft ran counter to one of the aims of the system of plant variety protection, i.e. to promote plant breeding activities. Moreover, it was not compatible with the principle of free availability of reproductive or propagating material of protected varieties for the purposes of creating new varieties. The proposal of that Delegation would be linked to a modification of the patent system to introduce the principle of granting of a compulsory license for patented genes in order to establish a strict balance between the holders of breeders' rights and the holders of patents. The Delegation of Ireland supported the view expressed by the Delegation of the Netherlands.

"81. The Delegation of Australia would have preferred the extension of the breeder's right to essentially derived varieties to have been optional and not compulsory.

"82. The Delegation of the Federal Republic of Germany proposed that the words 'whether directly or indirectly' be deleted in sub-paragraph (ii).

"83. As regards the wording of the paragraph, the following proposals were made: replace 'owner' by 'breeder' in the introductory part; repeat the reference to varieties, in the German text, in each of the sub-paragraphs; specify in sub-paragraph (i) that they are new (subsequent) varieties.

"Paragraph (3) - Limitations on the Breeder's Right

"84. Subparagraph (a) was approved by the Committee.

"85. In respect of sub-paragraph (b) ('farmer's privilege'), the Committee agreed on the following formulation:

'(b) By derogation from the provisions of paragraphs (1) and (2)(i) and (ii),⁵ each Contracting Party may [, within reasonable limits and provided that due consideration is given to the need for the breeder to obtain adequate remuneration,] restrict the breeder's right in relation to any variety in order to permit farmers to use for reproductive or propagating purposes on their own holdings, the product of the harvest which they have obtained by planting, on their own holdings, the protected variety or a variety covered by paragraph (2)(i) or (ii) [, provided that such use is limited to the quantity equivalent to the quantity of propagating material of the variety originally purchased.]'

"86. The Delegation of France proposed that the proposal under examination should be included in Article 15; it was of the opinion that the provision was not in its right place in an Article dealing with the effects of the breeder's right and that the 'farmer's privilege' resulted in part from public interest.

"87. The Committee did not examine the words 'farmer' and 'holding.'

"Paragraph (4) - Exhaustion of the Breeder's Right

"88. It was noted that 'in the territory of the Contracting Party concerned' would have to be added in the introductory part of the English text.

"89. The representative of the EC drew attention to the fact that the expression previously mentioned could raise problems as regards the principle of free movement of goods applicable within the European Economic Community. He announced that it would perhaps be necessary to insert a provision that would enable the European Communities to provide for a derogation.

"90. The Committee agreed to delete the word 'express' preceding the word 'consent' in the introductory part and in sub-paragraph (ii). At the suggestion of the Delegation of the United States of America, it was also agreed to add in the English version the word 'or' at the end of sub-paragraph (ii) and to supplement sub-paragraph (iii) by a reference to the taxon to which the variety belonged; in other words, the principle of exhaustion would also not apply where export took place towards a country that protected plant varieties, but not the taxon involved.

"Article 15 - Restrictions on the Exercise of the Right

"91. At the suggestion of the Secretary-General, the Committee agreed to insert in paragraph (1) a reservation in respect of the restrictions provided for elsewhere in the Convention (particularly that of 'farmer's privilege')

1990 MEETING WITH INTERNATIONAL ORGANIZATIONS

23. On October 10 and 11, 1990, at the Fifth Meeting with International Organizations, document "Revision of the Convention: Draft Substantive Law Provisions" was presented (see the relevant extracts of document [UPOV/IOM/5/2 Rev.](#) reproduced below):

⁵ The references to the preceding paragraphs will have to be modified in view of the decisions taken in respect of paragraph (1).

“Article 12

“Effects of the Breeder’s Right

“(1) [Acts requiring the breeder’s authorization] Subject to paragraphs (3) and (4), the following acts shall require the authorization of the breeder:

- (a) in respect of the reproductive or vegetative propagating material of the protected variety,
 - (i) production or reproduction,
 - (ii) conditioning,
 - (iii) offering for sale,
 - (iv) sale or other putting on the market,
 - (v) exporting,
 - (vi) importing,
 - (vii) stocking for any of the purposes mentioned in (i) to (vi), above,
 - (viii) use in any way other than those mentioned in (i) to (vii), above;

(b) in respect of the harvested material of the protected variety, any of the acts referred to in (a), above, provided that the harvested material was obtained through the use of reproductive or vegetative propagating material whose use, for the purposes of obtaining harvested material, was not authorized by the breeder;

(c) in respect of products directly obtained from harvested material of the protected variety, any of the acts referred to in (a), above, provided that such products were made using harvested material falling within the provisions of (b) above whose use, for the purposes of making such products, was not authorized by the breeder.

“(2) [Same, in respect of essentially derived and certain other varieties] (a) Subject to paragraphs (3) and (4), the acts mentioned in paragraph (1) shall also require the authorization of the breeder in relation to

- (i) varieties which are essentially derived from the protected variety, where the protected variety is not itself an essentially derived variety,
- (ii) varieties which are not clearly distinguishable in accordance with Article 7(3) from the protected variety and
- (iii) varieties whose production requires the repeated use of the protected variety.

(b) For the purposes of sub-paragraph (a)(i), a variety shall be considered to be essentially derived from another variety (‘the initial variety’) when

- (i) it is predominantly derived, whether directly or indirectly, from the initial variety, or from a variety that is itself predominantly derived from the initial variety, particularly through methods which have the effect of conserving the essential characteristics that are the result of [elements of] the genotype or of the combination of genotypes of the initial variety, such as the selection of a natural or induced mutant or of a somaclonal variant, the selection of a variant, back-crossings or transformation by genetic engineering,
- (ii) it is clearly distinguishable from the initial variety in accordance with Article 7(3) and
- (iii) it conforms to the genotype or the combination of genotypes of the initial variety, apart from the specific or incidental differences which result from the method of derivation.

“(3) [Acts not requiring the breeder’s authorization] The breeder’s right shall not extend to

- (i) acts done privately and for non-commercial purposes,
- (ii) acts done for experimental purposes and
- (iii) acts done for the purpose of breeding other varieties, and, except where the provisions of paragraph (2) apply, acts referred to in paragraph (1) in respect of such other varieties.

“(4) [Possible ‘farmer’s privilege’] Notwithstanding paragraphs (1) and (2), each Contracting Party may, within reasonable limits and provided that due consideration is given to the need for the breeder to obtain adequate remuneration, restrict the breeder’s right in relation to any variety in order to permit farmers⁶ to use for reproductive or propagating purposes, on their own holdings*, the product of the harvest which they have obtained by planting, on their own holdings, the protected variety or a variety covered by paragraph (2)(a)(i) or (ii) [, provided that such use is limited to a quantity equal to the quantity of reproductive or vegetative propagating material of the variety originally purchased].

“(5) [Exhaustion of right] (a) The breeder’s right shall not extend to acts concerning any material of the protected variety, or of a variety covered by the provisions of paragraph (2), which has been put on the

⁶ The words “farmer” and “holding” are translated into French as “agriculteur” and “exploitation” and into German as “Landwirt” and “Betrieb” in the French and German versions of this document.

market by the breeder or with his consent in the territory of the Contracting Party concerned, or any material derived from the said material, unless such acts

- (i) involve further reproduction or propagation of the variety in question,
 - (ii) fall outside the field of use for which the breeder put material on the market or gave his consent, or
 - (iii) involve an export of material of the variety which enables the reproduction of the variety into a country which does not protect varieties of the plant genus or species to which the variety belongs.
- (b) For the purposes of sub-paragraph (a), 'material' means, in relation to a variety,
- (i) reproductive or vegetative propagating material of any kind,
 - (ii) harvested material and
 - (iii) any product directly obtained from the harvested material."

24. From October 12 to 16, 1990, at the twenty-eighth session of the CAJ (CAJ/28), document IOM/5/2 was discussed (reproduced in paragraph 23). The CAJ approved the "Final Draft" of the new proposed text for the Convention, subject to the approval of the Council (see extract of document [CAJ/28/6](#) reproduced below):

"Article 12 - Effects of the Breeder's Right

"Paragraph (1) - Acts Requiring the Breeder's Authorization

"38. The Committee agreed that item (ii) should read: 'conditioning for the purpose of propagation.' The delegation of Sweden reserved its position on that item.

"39. The representative of the EPO and the delegation of Italy observed that item (viii) in paragraph (a) would cause problems because plant cells or cell lines could be used in industrial processes, for purposes other than propagation, and proposed the deletion of that item. The delegation of the Netherlands proposed to add the words 'as such' after the word 'use' in item (viii) to solve the problem. The delegation of Germany recalled that the definition of the scope of protection should be as broad as possible and that there was no conflict with patent protection. The proposal was not seconded.

"40. A number of delegations wondered whether item (viii) was necessary in view of the fact that items (i) to (vii) already covered all areas to be covered by the breeder's right. The delegation of Canada said that items (vii) and (viii) would cause some political difficulty, as the inclusion of these two items would reduce the difference between the patent and the plant breeder's right. After a long debate and following the statement of the Secretary-General that a reference to stocking was usual in intellectual property law and offered in effect a convenient point at which a right could be exercised in the case of infringement, and that item (viii) was a catch-all clause protecting the breeder against unforeseen forms of exploitation, the Committee agreed after a show of hands to maintain items (vii) and (viii) as proposed in the Draft.

"41. Concerning the harvested material and products directly obtained from harvested material, the delegations of Australia, Ireland, Japan, New Zealand, Spain, Sweden and the United Kingdom were in favor of the introduction of a notion of 'cascading application' of a breeder's right. The delegation of France expressly opposed the proposal on account of the fact that the purpose of the revision was to strengthen the breeder's right, that other intellectual property laws did not specify the point at which the obligation to pay royalty was incurred and that since the breeder's right was already subject to a limitation for political reasons, the breeder should be given the choice of the point of collection. The Secretary-General reminded the Committee that the formulation of the notion of a 'cascading application' was technically difficult and that this was the reason why the present text had been adopted. The Committee finally agreed to the inclusion of the notion of cascading as an option in the Final Draft by adding in square brackets at the end of subparagraph (b) the words 'and if, but only if, the breeder has had no legal possibility of exercising his right in relation to the propagating material' and at the end of subparagraph (c) the words 'and if, but only if, the breeder has had no legal possibility of exercising his right in relation to the harvested material.'

"42. On the proposal of the delegation of Sweden, the Committee agreed to include in the Final Draft the further alternative that there should appear no reference to the possible exercise of the plant breeder's right on products directly obtained from harvested material.

"Paragraph (2) - Acts Requiring the Breeder's Authorization in Respect of Essentially Derived and Certain Other Varieties.

"43. The Committee accepted the text proposed in the Draft after having deleted the words 'whether directly or indirectly', replaced the words 'result of [elements of]' by 'expression of' in subparagraph (b)(i), and deleted the words 'specific or incidental' in subparagraph (b)(iii).

"44. The representative of the European Communities (EC) said that the proposed provision relating to essentially derived varieties would cause difficulties for his organization because it went too far.

"Paragraph (4) - Possible 'Farmer's Privilege'

"45. For the title of the paragraph, the Committee agreed that the words 'farmer's privilege' should be replaced by 'farm-saved seed,' which was thought to be neutral and more appropriate.

"46. Concerning the systematic position of the provision, several delegations proposed that it should be combined with paragraph (3) (this was eventually done on the suggestion of the Working Group) or with Article 13.

"47. Concerning the text of the provision, the Committee decided to replace the phrase 'provided that due consideration is given to the need for the breeder to obtain adequate remuneration' by 'subject to the safeguarding of the legitimate interests of the breeder' and to delete the last proviso relating to the quantitative limitation of farm-saved seed.

"Paragraph (5) - Exhaustion of Right

"48. The delegation of Germany observed that subparagraph (a) (ii) was too vague and could give the breeder excessive power over materials of the variety put on the market. The delegation of the Netherlands raised the question of proof in relation to both the consent and the field of use for which the consent was given. Several delegations were in favor of deletion. The delegation of France opposed deletion, in particular on the ground that none of the organizations had objected to the provision in the fifth Meeting with International Organizations. The Committee finally agreed to maintain the item between square brackets for discussion at the Diplomatic Conference.

"49. On the proposal of the delegations of Sweden and Germany, the Committee agreed to add the words 'except where the export is for consumption purposes' at the end of subparagraph (a)(iii).

"50. The representative of the EC observed that the notion of 'territory of the Contracting Party concerned' would cause problems in the context of the EC. He suggested that there should be a specific provision for the EC."

1990 COUNCIL: ADOPTION OF THE BASIC PROPOSAL

25. On October 19, 1990, the Basic Proposal was adopted by the Council (see extract from document [UPOV/DC/91/3](#) reproduced below):

"Article 14

"Scope of the Breeder's Right

"(1) [Acts requiring the breeder's authorization] Subject to Articles 15 and 16, the following acts shall require the authorization of the breeder:

(a) in respect of the propagating material of the protected variety,

- (i) production or reproduction,
- (ii) conditioning for the purpose of propagation,
- (iii) offering for sale,
- (iv) sale or other putting on the market,
- (v) exporting,
- (vi) importing,
- (vii) stocking for any of the purposes mentioned in (i) to (vi), above,
- (viii) use in any way other than those mentioned in (i) to (vii), above;

(b) in respect of the harvested material of the protected variety, any of the acts referred to in (a), above, provided that the harvested material was obtained through the use of propagating material whose use, for the purpose of obtaining harvested material, was not authorized by the breeder [and if, but only if, the breeder has had no legal possibility of exercising his right in relation to the propagating material];

(c)

Alternative A

in respect of products made directly from harvested material of the protected variety, any of the acts referred to in (a), above, provided that such products were made using harvested material falling within the provisions of (b) above whose use, for the purposes of making such products, was not authorized by the breeder [and if, but only if, the breeder has had no legal possibility of exercising his right in relation to the harvested material].

Alternative B: no (c).

“(2) [Same, in respect of essentially derived and certain other varieties] (a) Subject to Articles 15 and 16, the acts mentioned in paragraph (1) shall also require the authorization of the breeder in relation to

- (i) varieties which are essentially derived from the protected variety, where the protected variety is not itself an essentially derived variety,
- (ii) varieties which are not clearly distinguishable in accordance with Article 7 from the protected variety and
- (iii) varieties whose production requires the repeated use of the protected variety.

(b) For the purposes of sub-paragraph (a) (i), a variety shall be considered to be essentially derived from another variety (‘the initial variety’) when

- (i) it is predominantly derived from the initial variety, or from a variety that is itself predominantly derived from the initial variety, particularly through methods which have the effect of conserving the essential characteristics that are the expression of the genotype or of the combination of genotypes of the initial variety, such as the selection of a natural or induced mutant or of a somaclonal variant, the selection of a variant, back-crossings or transformation by genetic engineering,
- (ii) it is clearly distinguishable from the initial variety and (iii) it conforms to the genotype or the combination of genotypes of the initial variety, apart from the differences which result from the method of derivation.

“Article 16

“Exhaustion of the Breeder’s Right

“(1) [Exhaustion of right] The breeder’s right shall not extend to acts concerning any material of the protected variety, or of a variety covered by the provisions of Article 14(2), which has been put on the market by the breeder or with his consent in the territory of the Contracting Party concerned, or any material derived from the said material, unless such acts

- (i) involve further propagation of the variety in question, [or]
- (ii) involve an export of material of the variety which enables the propagation of the variety into a country which does not protect varieties of the plant genus or species to which the variety belongs, except where the export is for consumption purposes [, or
- (iii) fall outside the field of use for which the breeder put material on the market or gave his consent].

“(2) [Meaning of ‘material’] For the purposes of paragraph (1), ‘material’ means, in relation to a variety,

- (i) propagating material of any kind,
- (ii) harvested material and
- (iii) any product made directly from the harvested material.”

1991 DIPLOMATIC CONFERENCE

26. From March 4 to 19, 1991, the Conference for the Revision of the International Convention for the Protection of New Varieties of Plants (UPOV/DC/91) was held in Geneva and adopted the 1991 Act of the UPOV Convention (see extracts from the Records of the Diplomatic Conference for the Revision of the International Convention for the Protection of New Varieties of Plants - Geneva 1991: [UPOV/PUB/346](#))

PROPOSALS FOR THE AMENDMENT OF THE BASIC TEXT

Proposal for the Amendment of Article 14(1), Introduction, and Article 14(2)(a) - submitted by the Delegation of the United States of America ([UPOV/DC/91/9](#))

"1. It is proposed that Article 14(1), introduction, be worded as follows:

'(1) [Acts requiring the breeder's authorization] Subject to Articles 15 and 16, the breeder's right shall confer on its owner the right to prevent others from exploiting the protected variety in the following manner [the following acts shall require the authorization of the breeder:]'

"2. It is further proposed that Article 14(2) (a), introduction, be worded as follows:

'(2) [Same, in respect of essentially derived and certain other varieties] (a) Subject to Articles 15 and 16, the breeder's right shall also confer on its owner the right to prevent others from performing any of the acts mentioned in paragraph (1) [shall also require the authorization of the breeder] in relation to."

Proposal for the Amendment of Article 14(1)(a)(iv) - submitted by the Delegation of the United States of America ([UPOV/DC/91/10](#))

"It is proposed that Article 14(1)(a)(iv) be worded as follows:

'(iv) selling or other marketing [sale or other putting on the market],"

Proposal for the Amendment of Article 14(1)(a)(viii) - submitted by the Delegation of the United States of America ([UPOV/DC/91/11](#))

"It is proposed that Article 14(1) (a) (viii) be deleted."

Proposal for the Amendment of Article 14(1)(b) - submitted by the Delegation of the United States of America ([UPOV/DC/91/12](#))

"It is proposed that Article 14(1)(b) be worded as follows:

'(b) in respect of the harvested material of the protected variety, any of the acts referred to in (a), above, provided that the harvested material was obtained through the unauthorized use of propagating material [whose use, for the purpose of obtaining harvested material, was not authorized by the breeder [and if, but only if, the breeder has had no legal possibility of exercising his right in relation to the propagating material]]:"

Proposal for the Amendment of Article 14(1)(c) - submitted by the Delegation of the United States of America ([UPOV/DC/91/13](#))

"It is proposed that Article 14(1)(c) be replaced by a new paragraph (2) as follows:

'(2) Subject to Articles 15 and 16, any Contracting Party may also provide that the breeder's right shall confer on its owner the right to prevent others from performing any of the acts mentioned in paragraph (1), above, in respect of products made directly from harvested material of the protected variety, provided that such products were made using harvested material falling within the provisions of paragraph (1)(b) above."

Proposal for the Amendment of Article 14(2)(b)(i) - submitted by the Delegation of the United States of America ([UPOV/DC/91/14](#))

"It is proposed that Article 14(2)(b)(i) be worded as follows:

'(i) it is predominantly derived from the initial variety, or from a variety that is itself predominantly derived from the initial variety, resulting in the conservation of the essential characteristics that are the expression of the genotype or of the combination of genotypes of the initial variety, particularly through methods [which have the effect of conserving the essential characteristics that are the expression of the genotype or of the combination of genotypes of the initial variety,] such as the

selection of a natural or induced mutant or of a somaclonal variant, the selection of a variant, backcrossings or transformation by genetic engineering.”

Proposal for the Amendment of Article 14(1)(a)(viii) - submitted by the Delegation of Italy (UPOV/DC/91/24)

“It is proposed that Article 14(1)(a)(viii) be worded as follows:

‘(viii) use for purposes of cultivation in the field in any way other than those mentioned in (i) to (vii), above;”

Proposal for the Amendment of Article 14 - submitted by the Delegation of the United Kingdom (UPOV/DC/91/50)

“It is proposed to add the following provision after Article 14(1)(b):

‘For the purposes of paragraphs (1)(a) and (b) ‘propagating material’ and ‘harvested material’ may comprise several plants, a single plant or one or several parts of a plant, including cells or cell-lines, provided that such part or parts can be used for the production of entire plants of the variety.’”

Proposal for the Amendment Article 14(1)(a) as provisionally adopted by the Conference - submitted by the Delegation of the United Kingdom (UPOV/DC/91/110)

“It is proposed that the following sub-paragraph be added to Article 14(1)(a):

‘(viii) use for the commercial production of cut flowers and fruit;”

Proposal for the Amendment of Article 14(1)(a)(viii) - submitted by the Delegation of Canada (UPOV/DC/91/60)

“It is proposed that Article 14(1)(a)(viii) be worded as follows:

‘(viii) commercial use of ornamental parts thereof, normally marketed for purposes other than propagation, as propagating material in the production of ornamental plants or cut flowers [use in any way other than those mentioned in (i) to (vii), above];”

Proposal for the Amendment of Article 14(1) - submitted by the Delegation of Japan (UPOV/DC/91/61)

“It is proposed that Article 14(1) be worded as follows:

‘(1) [Acts requiring the breeder’s authorization] Subject to Articles 15 and 16, at least the following acts shall require the authorization of the breeder:

(a) in respect of the propagating material of the protected variety,

- (i) production or reproduction,
- (ii) conditioning for the purpose of propagation,
- (iii) offering for sale,
- (iv) sale or other putting on the market,
- (v) exporting,
- (vi) importing,
- (vii) stocking for any of the purposes mentioned in (i) to (v) [(vi)], above,
- [(viii) use in any way other than those mentioned in (i) to (vii), above];

(b) in respect of the harvested material of the protected variety, [any of the acts referred to in (a), above, provided that the harvested material was obtained through the use of propagating material whose use, for the purpose of obtaining harvested material, was not authorized by the breeder [and if, but only if, the breeder has had no legal possibility of exercising his right in relation to the propagating material];]

- (i) use,
- (ii) offering for sale or for leasing,
- (iii) sale or other putting on the market,
- (iv) leasing,
- (v) exporting,
- (vi) importing,
- (vii) stocking for any of the purposes mentioned in (i) to (v), above, provided that, in spite of all due care required by the circumstances, the breeder could not exercise his right in relation to any of the acts concerning the propagating material of the protected variety referred to in (a), above;

(c) in respect of the products made directly from harvested material of the protected variety, any of the acts referred to in (b) [(a)], above, provided that, in spite of all due care required by the circumstances, the breeder could not exercise his right in relation to any of the acts concerning the harvested material of the protected variety referred to in (b) above [such products were made using harvested material falling within the provisions of (b) above whose use, for the purposes of making such products, was not authorized by the breeder [and if, but only if, the breeder has had no legal possibility of exercising his right in relation to the harvested material]].”

Proposal for the Amendment of Article 14(1)(c) - submitted by the Delegation of Poland (UPOV/DC/91/62)

“It is proposed that item (c) be deleted.”

Proposal for the Amendment of Article 14(2) - submitted by the Delegation of Poland (UPOV/DC/91/63)

“It is proposed that Article 14(2) be worded as follows:

‘(2) [Same, in respect of essentially derived and certain other varieties] (a) Subject to Articles 15 and 16, the acts mentioned in paragraph (1) shall also require the authorization of the breeder in relation to

(i) varieties which are essentially derived from the protected variety, where the protected variety is not itself an essentially derived variety,

(ii) varieties which are not significantly [clearly] distinguishable in accordance with Article 7 from the protected variety and

(iii) varieties whose production requires the repeated use of the protected variety.

(b) For the purposes of sub-paragraph (a)(i), a variety shall be considered to be essentially derived from another variety (‘the initial variety’) when

(i) it is predominantly derived from the initial variety, or from a variety that is itself predominantly derived from the initial variety, particularly through methods which have the effect of conserving the majority of the essential characteristics that are the expression of the genotype or of the combination of genotypes of the initial variety, such as the selection of a natural or induced mutant or of a somaclonal variant, the selection of a variant, back-crossings or transformation by genetic engineering,

(ii) it is significantly [clearly] distinguishable from the initial variety and

(iii) it conforms to the majority of the essential characteristics that are the expression of the genotype or the combination of genotypes of the initial variety, apart from the differences which result from the method of derivation.”

Proposal for the Amendment of Article 14(2) - submitted by the Delegation of Japan (UPOV/DC/91/65)

“1. It is proposed that the following provision be added to Article 14(2):

‘Each Contracting Party may implement this provision progressively to the various plant genera and species in the light of the special economic, ecological or technical conditions prevailing on its territory.’

“2. It is further proposed that the Conference adopt the following resolution:

‘To enable each Contracting Party to implement the provisions relating to essentially derived varieties without delay and on an internationally harmonized basis, the Diplomatic Conference for the Revision of the International Convention for the Protection of New Varieties of Plants held from March 4 to 19, 1991, requests the Secretary-General of UPOV to set in motion immediately after the closing of the Conference the establishment of draft standard guidelines, for adoption by the Council of UPOV, on essentially derived varieties.’”

Proposal for the Amendment of Article 14(2) - submitted by the Delegation of Japan (UPOV/DC/91/65 REV)

“1. It is proposed that the following provision be added to Article 14(2):

‘(c) Each Contracting Party may implement the provisions of sub-paragraph (a)(i) progressively to the various plant genera and species in the light of the special economic, ecological or technical conditions prevailing on its territory.’

“2. It is further proposed that the Conference adopt the following resolution:

‘To enable each Contracting Party to implement the provisions relating to essentially derived varieties without delay and on an internationally harmonized basis, the Diplomatic Conference for the Revision of the International Convention for the Protection of New Varieties of Plants held from March 4 to 19,

1991, requests the Secretary-General of UPOV to set in motion immediately after the closing of the Conference the establishment of draft standard guidelines, for adoption by the Council of UPOV, on essentially derived varieties.”

Proposal for the Amendment of Article 14(2)(b)(iii) - submitted by the Delegation of Japan (UPOV/DC/91/66)

“It is proposed that Article 14(2)(b)(iii) be worded as follows:

‘(iii) the characteristics that are the expression of its [it conforms to the] genotype or its [the] combination of genotypes conform to those of the initial variety, apart from the differences which result from the method of derivation.”

Proposal for the Amendment of Article 16(1) - submitted by the Delegation of Japan (UPOV/DC/91/69)

“It is proposed that Article 16(1) be worded as follows:

‘(1) [Exhaustion of right] The breeder’s right shall not extend to acts concerning any material of the protected variety, or of a variety covered by the provisions of Article 14(2), which has been sold or otherwise put on the market by the breeder or with his consent in the territory of the Contracting Party concerned, or any material derived from the said material, unless such acts

- (i) involve further propagation of the variety in question,
- (ii) involve an export of material of the variety which enables the propagation of the variety into a country which does not protect varieties of the plant genus or species to which the variety belongs, except where the export is for consumption purposes, or
- (iii) involves the use, as propagating material, of material which has not been sold or otherwise put on the market as propagating material.”

Proposal for the Amendment of Article 16(1), Introduction - submitted by the Delegation of New Zealand (UPOV/DC/91/70)

“It is proposed that Article 16(1), introduction, be worded as follows:

‘(1) [Exhaustion of right] The breeder’s right shall not extend to acts concerning any material of the protected variety, or of a variety covered by the provisions of Article 14(2), in respect of which the breeder has done or authorized any of the acts referred to in Article 14(1)(a) [which has been put on the market by the breeder or with his consent] in the territory of the Contracting Party concerned, or any material derived from the said material, unless such acts”

Proposal for the Amendment of Article 14(1)(b) and (c) - submitted by the Delegation of Spain (UPOV/DC/91/82)

“It is proposed that Article 14(1)(b) and (c) be worded as follows:

‘(b) Each Contracting Party may provide that the above provision shall also apply in respect of the harvested material of the protected variety [, any of the acts referred to in (a), above], provided that the harvested material was obtained through the use of propagating material whose use, for the purpose of obtaining harvested material, was not authorized by the breeder and if, but only if, the breeder has had no legal possibility of exercising his right in relation to the propagating material. [.]

‘(c) Each Contracting Party may provide that the above provision shall also apply in respect of products made directly from harvested material of the protected variety [, any of the acts referred to in (a), above], provided that such products were made using harvested material falling within the provisions of (b) above whose use, for the purposes of making such products, was not authorized by the breeder and if, but only if, the breeder has had no legal possibility of exercising his right in relation to the harvested material.”

Proposal for the Amendment of Article 14(2) - submitted by the Delegation of Germany (UPOV/DC/91/89)

“It is proposed that Article 14(2)(a) be worded as follows:

‘(2) [Same, in respect of essentially derived and certain other varieties] (a) Subject to Articles 15 and 16, the acts mentioned in paragraph (1) shall also require the authorization of the breeder in relation to varieties

- (i) [varieties] which are essentially derived from the protected variety, where the protected variety is not itself an essentially derived variety,
- (ii) [varieties] which are not clearly distinguishable in accordance with Article 7 from the protected variety and
- (iii) [varieties] whose production requires the repeated use of the protected variety.”

Proposal for the Amendment of Article 14(2) - submitted by the Delegation of Germany (UPOV/DC/91/89 Rev.)

"1. It is proposed that Article 14(2)(a) be worded as follows:

'(2) [Same, in respect of essentially derived and certain other varieties] (a) Subject to Articles 15 and 16, the acts mentioned in paragraph (1) shall also require the authorization of the breeder in relation to varieties

- (i) [varieties] which are essentially derived from the protected variety, where the protected variety is not itself an essentially derived variety,
- (ii) [varieties] which are not clearly distinguishable in accordance with Article 7 from the protected variety and
- (iii) [varieties] whose production requires the repeated use of the protected variety."

Proposal for the Amendment of Article 14(1) - submitted by the Delegation of Germany (UPOV/DC/91/91)

"It is proposed that Article 14(1) be worded as follows:

'(1) [Acts requiring the breeder's authorization] Subject to Articles 15 and 16, the breeder's right shall confer on its owner the right to prevent others from exploiting the protected variety in the following manner [the following acts shall require the authorization of the breeder]:

(a) in respect of the propagating material of the protected variety, through

- (i) production or reproduction
- (ii) conditioning for the purpose of propagation,]
- (iii) offering for sale,
- (iv) sale or other putting on the market,
- (v) exporting,
- (vi) importing,
- (vii) stocking for any of the purposes mentioned in (i) to (vi), above,
- [(viii) use in any way other than those mentioned in (i) to (vii), above];

(b) in respect of the harvested material, including whole plants, of the protected variety, through any of the acts referred to in (a), above, provided that the harvested material was obtained through [the unauthorized use of propagating material [whose use, for the purpose of obtaining harvested material, was not authorized by the breeder [and if, but only if, the breeder has had no legal possibility of exercising his right in relation to the propagating material];].

'(2) [(c)] Each Contracting Party may provide that further specified acts shall be subject to the breeder's right of prohibition. It may also provide that the aforementioned acts in respect of products made directly from harvested material shall also require the authorization of the breeder [of the protected variety, any of the acts referred to in (a), above), provided that such products were made through unauthorized use of [using] harvested material [falling within the provisions of) referred to in (b) above [whose use, for the purposes of making such products, was not authorized by the breeder [and if, but only if, the breeder has had no legal possibility of exercising his right in relation to the harvested material]]."

Proposal for the Amendment of Article 14(1)(a)(vii) and (viii) - submitted by the Delegation of Denmark (UPOV/DC/91/96)

"It is proposed that Article 14(1)(a)(vii) and (viii) be worded as follows:

'(vii) production of any product coming under the protection of the breeder's right, [stocking for any of the purposes mentioned in (i) to (vi), above,]

'(viii) stocking for any of the purposes mentioned in (i) to (vii), above [use in any way other than those mentioned in (i) to (vii), above];

"Each Contracting Party may provide that further specific acts shall also require the authorization of the breeder."

Proposal for the Amendment of Article 14(1)(b) - submitted by the Delegation of Denmark (UPOV/DC/91/97)

"It is proposed that Article 14(1)(b) be worded as follows:

'(b) in respect of other parts of plants or the harvested material of the protected variety, any of the acts referred to in (a), above, provided that the harvested material was obtained through the use of propagating material whose use, for the purpose of obtaining harvested material, was not

authorized by the breeder and if, but only if, the breeder has had no legal possibility of exercising his right in relation to the propagating material;”

Proposal for the Amendment of Article 14(1)(c) - submitted by the Delegation of Denmark (UPOV/DC/91/98)

“It is proposed that Article 14(1)(c) be worded as follows:

‘(c) Each Contracting Party may provide that the above provisions shall also apply in respect of products made directly from harvested material of the protected variety, [any of the acts referred to in (a), above,] provided that such products were made using harvested material falling within the provisions of (b) above whose use, for the purposes of making such products, was not authorized by the breeder and if, but only if, the breeder has had no legal possibility of exercising his right in relation to the harvested material.”

Proposal for the Amendment of Article 16(1)(i) - submitted by the Delegation of Denmark (UPOV/DC/91/109)

“It is proposed that Article 16(1)(i) be worded as follows:

‘(1) [Exhaustion of right] The breeder’s right shall not extend to acts concerning any material of the protected variety, or of a variety covered by the provisions of Article 14 (2), which has been put on the market by the breeder or with his consent in the territory of the Contracting Party concerned, or any material derived from the said material, unless such acts

(i) involve [further] propagation of the variety in question for purposes other than consumption,”

Proposal for the Amendment of Article 14(2)(b)(i) - submitted by the Delegation of Japan (UPOV/DC/91/111)

“It is proposed that Article 14(2)(b)(i) be worded as follows:

‘(b) For the purposes of sub-paragraph (a)(i), a variety shall be considered to be essentially derived from another variety (‘the initial variety’) when

(i) it is predominantly derived from the initial variety, or from a variety that is itself predominantly derived from the initial variety, particularly through methods which have the effect of conserving the essential characteristics that are the expression of the genotype or of the combination of genotypes of the initial variety, [such as the selection of a natural or induced mutant or of a somaclonal variant, the selection of a variant, back-crossings or transformation by genetic engineering,]”

MEETING DISCUSSIONS ON THESE PROPOSALS

(extracts from the Records of the Diplomatic Conference for the Revision of the International Convention for the Protection of New Varieties of Plants - Geneva 1991 ([UPOV/PUB/346](#)))

“Article 14 - Scope of the Breeder’s Right

“Article 14(1), Introductory Part - Nature of the Breeder’s Right

“785. The PRESIDENT opened the meeting and the debate on Article 14. He invited the Delegation of the United States of America to introduce its proposal reproduced in document DC/91/9.

“786. Mr. HOINKES (United States of America) introduced the proposal of his Delegation and stated that its purpose was simply to return to a preferred formulation whereby the breeder was able to prevent others from doing certain acts. In the opinion of his Delegation that particular formulation was inadvertently abandoned at the 27th session of the Administrative and Legal Committee, in June 1990, when the Article was substantially reorganized. That formulation offered a more even-handed way of expressing what flowed from a breeder’s right.

“787. The PRESIDENT observed that the proposal of the Delegation of Germany reproduced in document DC/91/91 was exactly the same as that of the Delegation of the United States of America. He then invited the Delegation of Japan to introduce its proposal reproduced in document DC/91/61.

“788. Mr. HAYAKAWA (Japan) indicated that his Delegation proposed to insert the words ‘at least’ in the introductory part of Article 14(1) to compensate for the deletion of item (viii). His Delegation felt that the list of acts requiring the authorization of the breeder should not contain a vague element but should provide legal certainty. However, if the vaguely-defined act being the subject of item (viii) was deleted, it would not be adequate to exclude the possibility for Contracting Parties to specify additional acts to those mentioned in paragraph (1)(a). It was therefore proposed to have a precise list of seven kinds of acts as a minimum to be implemented by Contracting Parties.

"789. Mr. BOGSCH (Secretary-General of UPOV) stated that the proposal of the Delegation of Japan should be discussed in connection with item (viii). As far as the proposal of the Delegations of Germany and of the United States of America was concerned, it was not an accident that the text in the Basic Proposal had been adopted. There were two reasons for that text: some laws used the words 'to prevent' as proposed by the said Delegations, but their meaning was unclear. The breeder had not only a right to prevent, but also a right to remedies when he had been unable to exercise his right to prevent and was facing an infringement. A more important argument was perhaps that the present Convention used the term 'authorization,' and that was not an oversight or, if it was, a 30 years old oversight. 'Authorization' was a classical term in intellectual property and in the UPOV Convention; besides, it appeared in the proposals under consideration in the title of the paragraph.

"790. The PRESIDENT agreed with Mr. Bogsch (Secretary-General of UPOV) concerning the deferral of the further discussion of the proposal of the Delegation of Japan. He also observed that that proposal and the proposal of the Delegation of Denmark, reproduced in document DC/91/96, to add a sentence had the same aim. He would put them up for discussion together at a later stage.

"791. Mr. BURR (Germany) observed in that connection that the proposal made by his Delegation contained a similar passage.

"792. Mr. ARDLEY (United Kingdom) stressed that the proposal of the Delegations of Germany and of the United States of America was fundamental. Having attended all the sessions of the Administrative and Legal Committee which had the revision of the Convention on their agendas, his recollection was that there had been no intention, at least as far as the United Kingdom was concerned, to change the form of the basic right contained in the present Convention, i.e., to turn a positive into a negative right. It might well be that in other areas of intellectual property, one might be granted a right to exclude or prohibit others, but, as Mr. Bogsch (Secretary-General of UPOV) had stated, this was not the case with Article 5 of the present Convention, and certainly was not the common intention of the drafters of the Basic Proposal. For that reason the Delegation of the United Kingdom would oppose any change to the text in the Basic Proposal.

"793. Mr. ÖSTER (Sweden) stated that his Delegation supported the statement made by Mr. Ardley (United Kingdom).

"794. Mr. HEINEN (Germany) stated that his Delegation attached no fundamental significance to that matter. It could see no basic difference in the differing versions. His Delegation had proposed that the word 'right' be inserted to create a mental connection with the term 'breeder's right,' as determined with respect to its requirements in Article 5, and then be determined with regard to its content. It was solely that mental bridge that was the reason for the proposed formulation. His Delegation therefore assumed an open stance.

"795. Mr. KIEWIET (Netherlands) stated that his Delegation would prefer the text as proposed in the Basic Proposal. It supported the statement of Mr. Ardley (United Kingdom).

"796. Mr. WHITMORE (New Zealand) indicated that his Delegation also agreed with the views expressed by Mr. Ardley (United Kingdom).

"797. Mr. ESPENHAIN (Denmark) declared that his Delegation also shared the wish to maintain the text of the Basic Proposal, i.e., the positive statement that the breeder's authorization should be required before a third party entered into any of the activities concerned.

"798. Mr. O'DONOHUE (Ireland) stated that his Delegation also supported the point of view expressed by Mr. Ardley (United Kingdom).

"799. Mr. HOINKES (United States of America) stated that, like the Delegation of Germany, his Delegation could adopt a flexible approach on this matter, which was not really a matter of principle. The formulation suggested by his Delegation was not new and had appeared in successive drafts considered in the fall of 1989 and in the spring of 1990. His Delegation went along with its change in June 1990 for reasons of organization. On reflection, however, it had thought that a better way of expressing the effects of a breeder's right would be as suggested in its proposal. If other Delegations felt more comfortable with the text of the Basic Proposal, although it might be more complicated to administer, his Delegation would not stand in the way of a consensus.

"800. Mr. BRADNOCK (Canada) stated that his Delegation preferred the text in the Basic Proposal.

"801. The PRESIDENT noted that the first part of the proposal of the Delegation of Germany reproduced in document DC/91/91 and the proposal of the Delegation of the United States of America reproduced in document DC/91/9 were not supported and that the said Delegations were prepared to take a flexible approach in relation to the introductory part of Article 14(1). He concluded that the proposals were therefore not accepted.

"802. The conclusion of the President was noted by the Conference.

"803.1 Mr. ROYON (CIOPORA) wished to make a general statement on Article 14 (1). Despite the general trend revealed by the discussions, CIOPORA firmly believed that the rights of the breeder should be expressed as a right to exclude others from doing certain acts. It would appreciate an explanation of the fundamental difference between a positive and a negative right because this might shed some light on the basic reasons for the change mentioned by Mr. Hoinkes (United States of America).

"803.2 The wording of Article 14(1) was found to be very complicated. It should permit the breeder to control the commercial exploitation of his variety--for which a definition was still awaited--by means of a phrase such as: 'making'--that is propagating--, 'reproducing, using and selling.' There could perhaps be an addition concerning exporting and importing because of the specific reasons underlying this addendum. That phrase would cover all situations much better than the long and complicated list of acts and the distinction between 'propagating material' and 'harvested material.'

"804. Mr. ORDOÑEZ (Argentina) observed that Article 27 of the seed law of Argentina defined the scope of the breeder's right in a way similar to that in Article 14(1) of the Basic Proposal. His Delegation therefore fully supported the Basic Proposal.

"805. Mr. VON PECHMANN (AIPPI) wished to observe, on the matter of whether the breeder's right should be formulated as a right of prohibition, that a right of prohibition could possibly be of advantage since, in general, the courts would be required to deal with infringement of breeders' rights on very rare occasions only. Where there was a case, they could then rely on case law under parallel patent law, in which the right was already defined as a right of prohibition. Additionally, AIPPI also went along with the proposal of CIOPORA to define the right of prohibition in a single paragraph without making a distinction between propagating material and harvested material. The wording contained in the Basic Proposal could possibly lead to differing interpretations of the effects of protection.

"806. Mr. HARVEY (United Kingdom) observed that the preceding interventions were not directed against the substance of the text in the Basic Proposal but concerned the nature of the right granted to the breeder. The points that had been made were valid insofar as the Convention did not specify that the breeder was entitled to exercise an exclusive right in relation to the exploitation of the variety. His Delegation would not object to a positive formulation on those terms. Whether Article 14 was the right place for such a provision was, however, another matter.

"807. Mr. HEINEN (Germany) said that his Delegation shared the concern of Mr. Harvey (United Kingdom). If the wording in the Basic Proposal were to be maintained, the breeder would have to give himself consent to carry out certain acts. That was of course possible, but somewhat complicated.

"808. Mr. SCHUMACHER (GIFAP) said that GIFAP fully agreed with the statements made by Mr. von Pechmann (AIPPI).

"Article 14(1), Introductory Part - Exhaustive or Non-exhaustive Nature of the List of Acts Under Subparagraph (a) - And Possible Additional Provision on the Non-exhaustive Nature of the List [Article 14(4) of the Text as Adopted]

"Article 14(1)(a) - List of Acts Covered by the Breeder's Right

"809. The PRESIDENT opened the debate on the proposal of the Delegation of Japan reproduced in document DC/91/61 to add the words 'at least' in the introductory part of Article 14(1) and on the proposal of the Delegation of Denmark reproduced in document DC/91/96 to add a sentence to Article 14(1)(a). He recalled that the proposals had the same objective.

"810. Mr. HAYAKAWA (Japan) confirmed that the additional sentence proposed by the Delegation of Denmark had the same objective as the proposal of his Delegation.

"811. Mr. ESPENHAIN (Denmark) also confirmed that the effect of the two proposals was more or less the same. He added that the proposal of his Delegation was linked with the problem arising from the lack of clarity of paragraph (1)(a)(viii).

"812. Mr. BOGSCH (Secretary-General of UPOV) observed that it was difficult to discuss those proposals without knowing the fate of item (viii) of Article 14(1)(a). If item (viii) was maintained, the proposals should not be entertained because it would be difficult to imagine acts other than those already listed. He therefore suggested that consideration of those proposals be deferred. (Continued at 841)

"813. The PRESIDENT endorsed the suggestion of Mr. Bogsch (Secretary-General of UPOV) and opened the debate on the items of Article 14(1)(a).

"814. Mr. BOGSCH (Secretary-General of UPOV) stated that the proposal of the Delegation of the United States of America reproduced in document DC/91/10 concerned a point of drafting. It was to be supported in his opinion since it unified the definition of the acts enumerated in items (i) to (viii).

"815. Mr. SCHENNEN (Germany) said that his Delegation was of the opinion that the translation of the proposal into German, as contained in document DC/91/10, comprised a shift in the meaning. He proposed that the matter be clarified in the Drafting Committee since the proposal obviously concerned a drafting improvement only.

"816. Mr. ORDOÑEZ (Argentina) stated that his Delegation preferred the wording in the Basic Proposal.

"817. Mr. ESPENHAIN (Denmark) said that, personally, he would support the proposal. He did not know, however, whether it implied any amendment of substance.

"818. Mr. HOINKES (United States of America) confirmed the observation made at the opening of the debate on Article 14(1)(a)(iv) by Mr. Bogsch (Secretary General of UPOV). The proposal aimed at introducing a consistent formulation, with no effect on substance.

"819. Mr. DMOCHOWSKI (Poland) stated that his Delegation supported the proposal, but felt that it might be referred to the Drafting Committee.

"820. Mr. ORDOÑEZ (Argentina) stated that his preference for the text in the Basic Proposal was based on the meaning which the translation into Spanish would have. 'Putting on the market' would have a wider scope in Spanish than 'marketing,' which could be meant as applying to 'normal' commercial activities only. In Argentina, it was felt that some kinds of delivery of seeds should need the authorization of the breeder. Those kinds might not be embraced by 'marketing.'

"821. Mr. DAVIES (UPEPI) wondered whether, for the sake of consistency, item (i) should not be amended from 'production or reproduction' into 'producing or reproducing.'

"822. The proposal of the Delegation of the United States of America, reproduced in document DC/91/10, to amend Article 14(1)(a)(iv) to read: 'selling or other marketing' was adopted by consensus.

"823. The PRESIDENT opened the debate on the proposal of the Delegation of Denmark reproduced in document DC/91/96 and concerning a new item (vii) in Article 14(1)(a).

"824. Mr. ESPENHAIN (Denmark) introduced the proposal and stressed that it was linked, on the one hand, with the lengthy discussion which item (viii) had caused in the course of the preparatory work and with the proposal to delete it and, on the other hand, with the proposal to make the protection of products directly made from harvested material (Article 14(1)(c)) optional. The proposal aimed at establishing consistency insofar as only the production of the products coming under the protection of the breeder's right would be covered under Article 14(1)(a).

"825. Mr. KIEWIET (Netherlands) stated that his Delegation could not support the proposal of the Delegation of Denmark concerning a new item (vii).

"826. Mr. BRADNOCK (Canada) explained that it would be inappropriate to include a reference to products, as suggested by the Delegation of Denmark, in a part devoted to the propagating material of the protected variety. His Delegation could not support the proposal from the point of view of either drafting or substance.

"827. Mr. BURR (Germany) shared the view expressed by Mr. Bradnock (Canada) regarding the articulation of the provision. The reference to products did not belong under 'propagating material,' but in a new paragraph (2) in accordance with the proposal made by his Delegation in document DC/91/91.

"828. The PRESIDENT noted that there was no support for the proposal of the Delegation of Denmark. He therefore declared it rejected.

"829. The conclusion of the President was noted by the Conference.

"830. The PRESIDENT opened the debate on the proposal of the Delegation of Japan, reproduced in document DC/91/61, to amend the end of item (vii) to read: 'mentioned in (i) to (v), above'.

"831. Mr. HAYAKAWA (Japan) recalled that the reference to item (vi) had been explained as relating to the case where material was stocked in bonded warehouses for purposes of importation. His Delegation considered that that situation was outside the scope of the Convention and that the obligations to be met in relation to the breeder's right were to fall exclusively on the importer.

"832. Mr. KIEWIET (Netherlands) stated that his Delegation supported the proposal. Like the Delegation of Japan, it could not see the meaning of 'stocking' in relation to 'importing'.

"833. Mr. DMOCHOWSKI (Poland) indicated that his Delegation supported the proposal of the Delegation of Japan both as concerned the deletion of the reference to item (vi) in item (vii) and the deletion of item (viii).

834. Mr. HOINKES (United States of America) asked that it be clarified whether amending '(vi)' to '(v)', so as to exclude the act of stocking in relation to importation, meant that if the material was being stocked within a customs zone for the purpose of importation into the country, the breeder could not proceed against that material; whether he would have to wait until the material was released all over the country and to act against a multiplicity of users, whereas he could have stopped the infringement with one single procedure. Without having come to a position yet on this issue, he wondered whether it was desirable to take the proposed course of action.

"835. Mr. BRADNOCK (Canada) stated that his Delegation shared some of the concerns expressed by Mr. Hoinkes (United States of America). There were quite often differing legal concepts concerning when an import took place. In some cases, it was considered that the material was imported when it arrived in a country; in other cases when it was released from customs. The concern was that, once it was released from customs, it might indeed go in many different directions. It would be more convenient to be able to act at the first point, particularly when the material was stocked for the purpose of importation.

"836. Mr. ORDOÑEZ (Argentina) declared that his Delegation preferred the reference to item (vi) to stay for the reason explained by Mr. Hoinkes (United States of America).

"837. Mr. HAYAKAWA (Japan) observed that material released from the customs would indeed be distributed, but stocking for customs purposes was not facultative, but obligatory, in the case of importations. His Delegation therefore felt that it did not fall within the scope of the Convention.

"838. Mr. BOGSCH (Secretary-General of UPOV) observed that there was not much difference between stocking for one purpose or the other. The customs free territory being part of the territory of the Contracting State, it seemed difficult to imagine that the law did not apply on it. There was therefore no harm with maintaining the reference to item (vi). On the contrary, it would preserve the more effective possibility of intervening to stop infringement.

"839. Mr. TESCHEMACHER (EPO) concurred with Mr. Bogsch (Secretary-General of UPOV). Industrial property rights extended to the whole territory of the State. If the right extended to the importing of goods, then it necessarily extended to storage in a customs-free area since that was a result of import. Therefore, the reference to item (vi) in item (vii) did not add much.

"840. The proposal of the Delegation of Japan, reproduced in document DC/91/61, to amend the end of item (vii) to read: 'mentioned in (i) to (v), above', was rejected by three votes for, 13 votes against and two abstentions.

"841. (Continued from 812) The PRESIDENT opened the discussion on the proposals of the Delegations of Canada, Denmark, Germany, Japan and the United States of America, reproduced in documents DC/91/60, DC/91/96, DC/91/91, DC/91/61 and DC/91/11, to delete item (viii).

"842. Mr. HOINKES (United States of America) suggested that it might be appropriate to consider at the same time the proposal of the Delegation of Japan, reproduced in document DC/91/61, to add 'at least' in the introductory part of Article 14(1) and to make the list of acts non-limitative.

"843. Mr. BURR (Germany) observed that the number of identical proposals meant that there was support for deleting item (viii), and also that his Delegation had submitted a further proposal for deletion with regard to item (ii).

"844. Mr. KIEWIET (Netherlands) observed that since the list of acts was limitative in nature, it should end with an open clause of the kind appearing in item (viii). The Conference could not and should not pretend to be able to foresee all the acts that should be covered by the breeder's right. Item (viii) should therefore not be deleted. If that view were not to be shared by the majority, his Delegation would support the proposal made by the Delegation of Japan to add the words 'at least' in the introductory part of Article 14(1). That Delegation's proposal to delete item (viii) should be taken in combination with the proposal to add 'at least,' as a package. In that respect, Mr. Kiewiet supported the views expressed by Mr. Hoinkes (United States of America).

"845. Mr. HAYAKAWA (Japan) confirmed that what Mr. Kiewiet (Netherlands) had said in the latter part of his intervention reflected the intentions of the Delegation of Japan.

"846.1 Mr. BURR (Germany) remarked that both matters should be discussed together irrespective of how the voting would precede. It was not possible in the discussion to separate the deletion of item (viii) and the possibility of subjecting further acts to protection. In that respect, his Delegation was also altogether in agreement with the basic idea contained in the proposal of the Delegation of Japan. However, it did have a problem with its formulation. The proposal to insert in the introductory sentence only 'at least' did not answer the question of who was to effect the addition to the list of acts. That was why his Delegation proposed in document DC/91/91 a new, explicit paragraph (2) on the basis of which any Contracting Party could provide that certain further acts would be subject to the breeder's right of prohibition.

"846.2 To summarize, the Delegation of Germany supported all motions that aimed at deleting item (viii) and which would leave it to the member States, through a provision of a general nature, to subject certain other acts to the right of prohibition.

"847. Mr. BRADNOCK (Canada) stated that his Delegation supported the proposal of the Delegation of Japan. The addition of 'at least' in the introductory part of Article 14(1) meant that further rights could be given by the national lawmaker to the breeder. Item (viii) did not define who would decide on the other rights arising from acts that were not yet mentioned.

"848. Mr. HARVEY (United Kingdom) observed that there were very clear differences between the proposals under consideration. The deletion of item (viii), which was favored by his Delegation, would leave the Contracting Parties with no discretion to include other acts. The inclusion of the words 'at least' in the introductory part of Article 14(1) would partly resolve the problem; but it would give the discretion to the breeder, not to the Contracting Party. His Delegation would find it difficult to accept a text which contained an item (viii) or the words 'at least,' which both gave a blank check to the breeder. The necessary flexibility could be built into the Convention, following the deletion of item (viii), on the basis of the proposals of the Delegations of Denmark and Germany.

"849.1 Mr. ÖSTER (Sweden) stated that the item under consideration was one of the most important subjects to be discussed during the whole Conference. He recalled that he had already made some comments on it in his opening statement. Plant breeders' rights should not afford a more far-reaching scope of protection than patents. Demands for a more far-reaching scope than the one that was now offered seemed to be based on the assumption that the future scope of 'use' was hard to predict and that this should lead to a generous definition of the scope of protection. That view was not shared by Sweden, and was not an acceptable basis for the revision of the Convention. There were many reasons for that point of view.

"849.2 An aim of the revision of the Convention should be to harmonize legislation, Mr. Öster said, particularly in respect of the scope of the protection which was both the key to the protection that a breeder could obtain and the essence of the plant breeder's right. His Delegation therefore felt that it was not appropriate to leave to the Contracting Parties the possibility of defining a wider scope of protection at their discretion. The future consequences of allowing an option were very unclear. Therefore, his Delegation could not support the proposal to add the words 'at least' in the introductory part of Article 14(1), but supported the proposal to delete item (viii).

"850. Mr. BOGSCH (Secretary-General of UPOV) observed that it was very difficult to make decisions because the addition of 'at least' in the introductory part of Article 14(1) would indeed give a blank check to the member States to add any number of rights, however exaggerated. He agreed with Mr. Harvey (United Kingdom) that the intention of the proposal of the Delegation of Japan was better expressed in the proposals of the Delegations of Denmark and Germany. He was confident that that was the decision which the Conference wanted to make; it was certainly in favor of the private circles that member States had the latitude to grant stronger rights.

"851. Mr. FOGLIA (Italy) stated that his Delegation could not support for the moment the proposals to give freedom to Contracting Parties. The words 'at least' or the proposed permissive clause could raise problems in relation to the list of acts. It could support the deletion of item (viii) since it had proposed in document DC/91/24, which was still to be considered, a different provision for that item.

"852. Mr. VIRION (Poland) said that his Delegation was of the opinion that item (viii) would have to be deleted and the sentence proposed by the Delegation of Denmark added, rather than adding the words 'at least.'

"853.1 Mr. SCHENNEN (Germany) stated that an international Convention for the protection of intellectual property in the field of breeders' rights could indeed content itself with stipulating minimum rights as also done in other conventions. The problem of item (viii) was twofold. Item (viii) basically subjected all acts to plant variety protection and thereby made items (i) to (vii) superfluous. Secondly, it had been attempted to cover all conceivable acts of use in item (viii). The Delegation of Germany held that either the Convention or, better still, national law should determine precisely the individual acts of use that were prohibited. National law should give detailed account in order to ensure a clear balance with the limitations of protection provided for in Articles 15 and 16. For that reason, his Delegation held it to be most important that item (viii) be replaced by a ruling that would permit national law to extend protection to further acts of use.

"853.2 Finally, Mr. Schennen wished to refer again to the proposal of his Delegation to delete item (ii). That would produce a substantive difference. As a consequence of the overall proposal made by his Delegation, national law would have the choice of covering the act of use constituted by processing to produce propagating material. It was most important to his Delegation that no obligation be placed on the Contracting Parties with regard to processing to produce propagating material.

"854. Mr. HOINKES (United States of America) concurred with the views expressed by Mr. Schennen (Germany). Many national laws provided for a floor, but not necessarily for a ceiling. But the absence of a ceiling did not mean that there was no limit. And item (viii) was about as indefinite as anything could be; the

Convention should not be drafted in that fashion. If a new use was to be discovered later that should require the authorization of the breeder, the Convention should not prohibit Contracting Parties to extend protection to that use. Mr. Hoinkes fully understood the problem raised by Mr. Harvey (United Kingdom), but that was just a matter of drafting which could be resolved as follows: 'Subject to Articles 15 and 16, each Contracting Party shall provide that at least the following acts shall require the authorization of the breeder.'

"855. Mr. WHITMORE (New Zealand) stated that his Delegation agreed that item (viii) should be deleted and that each Contracting Party should be allowed to provide that further specific acts required the authorization of the breeder. How the latter could be written into the Convention was largely a matter of drafting for which several solutions were possible.

"856. Mrs. JENNI (Switzerland) said that it was also the view of her Delegation that the Convention should constitute a framework. The minimum rights were already well defined in items (i) to (vii) and the sentence proposed by the Delegation of Denmark would ensure a certain amount of elbow room for the member States. (Continued at 859)

"OPENING STATEMENTS (Continued from 244.7)

"857. The PRESIDENT reopened the meeting and gave an opportunity to the representative of the Food and Agriculture Organization of the United Nations (FAO) to make an opening statement.

"858.1 Mr. BOMBIN (FAO) welcomed the opportunity to make a general statement and said that it would be on Article 14 in relation to Article 15. Both Articles had a particular importance for FAO since they could affect the present situation as regards the 'research exemption' and the 'farmer's privilege.' The 'farmer's privilege' was widely used, especially in developing countries where many farmers could not afford to buy new seeds every year. In some countries, over 50% of the food supply depended on the use of seed harvested by the farmer and for which the farmer had paid some royalty in a previous year--when he had not received the initial seed stock from State seed certification agencies.

"858.2 Mr. Bombin recalled that it was in fact the existence of the 'research exemption' and of the 'farmer's privilege' that had allowed FAO member States to conclude that plant breeders' rights as provided for under the UPOV Convention were not incompatible with the FAO International Undertaking on Plant Genetic Resources. The scope of the protection envisaged in the Basic Proposal under Article 14(1)(a)(i) ('production or reproduction') was much wider than the scope provided in Article 5 of the present Convention ('production for purposes of commercial marketing'). Article 14 of the Basic Proposal eliminated the 'farmer's privilege' as a principle, although Article 15(2) reinstated it as an exception. FAO was not very happy about this downgrading of the 'farmer's privilege,' but understood that the UPOV member States wished to limit abuses or too wide interpretations of both the 'research exemption' and the 'farmer's privilege.'

"858.3 Mr. Bombin concluded his statement by saying that FAO considered it essential that both principles be kept in the new text of the Convention. This would surely favor acceptance by some developing countries of the UPOV Convention and would be in accordance with the principle of free availability of germplasm of the FAO International Undertaking on Plant Genetic Resources.

"CONSIDERATION OF THE DRAFT NEW ACT OF THE UPOV CONVENTION

"Article 14 - Scope of the Breeder's Right

"Article 14(1), Introductory Part - Exhaustive or Non-exhaustive Nature of the List of Acts Under Subparagraph (a) - And Possible Additional Provision on the Non-exhaustive Nature of the List [Article 14(4) of the Text as Adopted]

"Article 14(1)(a) - List of Acts Covered by the Breeder's Right

“(Continued from 856)

"859. Mr. ORDOÑEZ (Argentina) stated that item (viii) should be deleted and that the scope of protection should be defined with precision in the Convention, but as a minimum. His Delegation had some sympathy with the proposals of the Delegations of Denmark and Germany to let a Contracting Party decide whether further uses should be protected.

"860. Mr. TOURKMANI (Morocco) suggested adding 'for the purpose of marketing' to item (i) ('production or reproduction'). That would leave the 'farmer's privilege' intact. As for item (vi), relating to importing, it seemed to Mr. Tourkmani that it was not for the importer to request the breeder's authorization, but rather for the exporter. He therefore proposed deleting item (vi).

"861.1 Mr. TESCHEMACHER (EPO) said that he well understood those for whom item (viii) went too far and was unclear. The provision could, for instance, lead to a dispute whether protection had to be afforded not

only on import or export but also, for example, on the transit of seed. He also understood those who feared that forms of utilization would arise in future that would not be covered by items (i) to (vii). However, he wondered whether an explicit provision in Article 14 was necessary for that purpose.

"861.2 Mr. Teschemacher further wondered what the legal nature of the Convention was, that was to say whether it committed the member States, as did other treaties in the field of industrial property, to afford minimum protection whilst not depriving them of the right to afford more extensive protection. He asked himself that question also in connection with the possibility that item (viii) would be deleted without being compensated in part by an addition to the introductory sentence in Article 14(1) or by an additional paragraph. If a Contracting State did not infringe the Convention by extending protection at national level to a new form of utilization not covered by the Convention, then it would appear to be misleading to him, for instance, to insert the words 'at least' in the introductory sentence. If Article 14(1) was only to define a minimum scope of protection, then it would be altogether sufficient to describe that legal situation in the notes on the provision.

"862.1 Mr. Royon (CIOPORA) recalled that CIOPORA considered it as an essential principle of the definition of the scope of protection of an industrial property right covering a new product that not only the making and selling of the product, but also its use for commercial purposes should be under the control of the right owner. If item (viii) was deleted from Article 14(1) (a), CIOPORA could not see how the use of propagating material for the commercial production of cut flowers and fruit could ever be licensed by the breeder. Indeed, Article 14(1) (a) was strictly limited to propagating material and only provided an indirect possibility of control for the breeder in respect of produce.

"862.2 Mr. Royon further stated that it was essential for breeders of vegetatively propagated ornamental and fruit tree varieties that they should be able to license specific fields of use of their varieties; licensing for example a rose plant for the use by an amateur gardener or for the production of cut flowers were two completely different matters. Although CIOPORA had understanding for the various explanations given in support of the deletion of item (viii), it believed that there would be a dramatic loophole in the Convention for the varieties mentioned if breeders were not given the possibility of controlling the use of the propagating material and of licensing such use for the production of cut flowers or fruit.

"863. Mr. O'DONOHUE (Ireland) stated that his Delegation strongly supported the deletion of item (viii). It was sure that there would be developments in the future that would not be covered by the Convention and, like other Delegations, it could go along with the sentence as proposed for instance by the Delegation of Denmark to cover such eventuality.

"864. Mr. ELENA (Spain) associated his Delegation to the position stated by Mr. O'Donohoe (Ireland).

"865. Mr. WINTER (COMASSO) stated that COMASSO, as an organization of breeders, had been altogether happy with the Basic Proposal. It had seen it as a sign that a serious intention existed to afford to breeders a reinforced right, and one that was indeed necessary. The ongoing discussion, however, showed up tendencies not to go so far as was desirable and necessary. That was regretted by COMASSO. He wished to place great emphasis on the fact that item (viii) was essential for various reasons. Should it be decided, however, for political considerations and, possibly, due to fears that had nothing to do with propagating material, to delete item (viii), it would then be necessary in any event to provide the possibility of subjecting further acts to the breeder's right of prohibition at national level.

"866.1 Mr. SLOCOCK (AIPH) recalled that Article 14 was the most important provision of the Convention for the horticultural producers. One of the main objectives of the Conference was to define the scope of the breeder's right, and failure to define it made it pointless to discuss details in other provisions. AIPH had been somewhat surprised to see in the Basic Proposal a clause such as that in item (viii), the sort of thing one would put at the bottom of a shopping list. If one really believed in the value of item (viii), there would be no reason to bother with the preceding items.

"866.2 Moreover, Mr. Slocock said, it was hard to believe that, after many years of hard work, there would still be any act relating to the propagating material that was not already listed. And if one arose in the distant future, it would not be right that a particular breeder or the breeders in a particular country should alone benefit from an extended protection, with all the distortions in trade and industry to which this would lead. The revision of the Convention should, as Mr. Öster (Sweden) had pointed out, bring clarity and harmony. If at some future and distant point in time, other acts appeared which should require the breeder's authorization, the UPOV member States should collectively identify them in a revision of the Convention and should not leave individual States to take different and independent actions.

"867. Mr. VAN DE LINDE (ASSINSEL) stated that ASSINSEL was of the opinion that the Conference should agree on a Convention for the future, covering future developments. For that reason, ASSINSEL was in favor of maintaining item (viii) in the text. If, however, that could not be accepted, then ASSINSEL supported the proposal to insert an additional sentence.

"868. Mr. BANNERMAN (FICPI) voiced FICPI's concern at the proposal to delete item (viii). If Article 14(1)(a) was made into a closed list, it would simply encourage third parties to try to find ways of

exploiting protected varieties without recourse to acts covered by the breeder's right. The proposal of the Delegation of Japan was an improvement in that it enabled national authorities to cover further acts, but this detracted from the general trend towards harmonization. Any use made by a third party of the material referred to in Article 14 should be under the control of the owner of the breeder's right and the only exceptions to that should be those acts which were specifically excluded by the Convention under Articles 15 and 16.

"869. Mr. VON PECHMANN (AIPPI) said that AIPPI was of the opinion that item (viii) should remain in the Convention as safety net. It was breeder's 'last defense' in the event of an unperceivable utilization of his propagating material.

"870. Mr. SCHUMACHER (GIFAP) said that GIFAP held that breeders' rights should be strengthened as far as ever possible. They should gain attractiveness. Item (viii) should therefore remain. Should that not be possible, for political reasons, then GIFAP would favor the proposal made by the Delegation of Germany.

"871. Mr. SMOLDERS (ICC) said that ICC was also strongly in favor of maintaining item (viii), in particular for the reasons explained by Mr. Rayon (CIOPORA). ICC was very concerned about the protection of ornamental plants and fruit trees and wondered whether the new Convention as it was proposed was not drawing back from earlier texts.

"872. Mr. DAVIES (UPEPI) stated that UPEPI was also in favor of retaining item (viii), which gave stronger rights to breeders.

"873. Mr. KING (IFAP) stated that IFAP, as was predictable, strongly supported the view expressed by Mr. Slocock (AIPH) in favor of the deletion of item (viii).

"874. Mr. BESSON (FIS) said that FIS was in favor of maintaining item (viii) which would serve to interpret the elements covered by items (i) to (vi).

"875. The PRESIDENT wished to close the debate on the proposals under consideration.

"876. The proposal to delete item (viii) of Article 14(1)(a) was adopted 13 votes for, one vote against and two abstentions.

"877. The PRESIDENT observed that the adoption of the proposal to delete item (viii) of Article 14(1)(a) implied that the proposals of the Delegations of Canada and Italy, reproduced in documents DC/91/60 and DC/91/24, to amend that item were not longer relevant.

"878. The Conference noted that the proposals of the Delegations of Canada and Italy, reproduced in documents DC/91/60 and DC/91/24, to amend that item would not be considered. (Continued at 955)

"879. The PRESIDENT then wished to have a vote on the principle that Contracting Parties could make further acts subject to the authorization of the breeder.

"880. Mr. VON ARNOLD (Sweden) wished the Conference to revert to the question put by Mr. Teschemacher (EPO) concerning the character of the Convention before a vote was taken on the proposal to specify that further acts could be covered on a national basis. If the Convention was only a minimum standard and if the parties to the Convention could extend the scope of protection beyond what was prescribed in the Convention, the vote would not have much meaning.

"881. Mr. BOGSCH (Secretary-General of UPOV) stated that in his opinion the spirit of many industrial property conventions was indeed as described by Mr. Teschemacher (EPO). They provided for minimum rights. But the modern trend was to state that expressly, in particular since other provisions of such conventions were intended to be exhaustive. It would therefore be useful to state in the Convention that the list of acts could be supplemented if it was the wish of the Conference that it should be so.

"882. The proposal to add to the text of Article 14 (1) reference to the fact that the list of acts appearing in subparagraph (a) was only minimum list and could be supplemented on a national basis was adopted by consensus.

"883. The PRESIDENT opened the debate on the proposal of the Delegation of Germany, reproduced in document DC/91/91, to delete item (ii) in Article 14(1)(a), i.e., the reference to: 'conditioning for the purpose of propagation.'

"884. Mr. BURR (Germany) explained that deletion of the act of conditioning for the purpose of propagation from the list of acts subject to the breeder's right was based on the fact that it constituted a follow-up act to production. Furthermore, production was a circumstance that could indeed be controlled whereas conditioning on the farmer's own holding was very difficult to apprehend. His Delegation was aware that farmers in a number of member States increasingly made use of conditioning installations outside their own holdings and that those installations were able to serve as a bottleneck for the levying of fees. In view of that

situation, it had proposed an additional provision, the principle of which had just been accepted, under which the member States could subject further acts to the breeder's right in their own national law.

"885. Mr. BOGSCH (Secretary-General of UPOV) wished to recall the history of item (ii). 'Conditioning for the purpose of propagation' was a step in the manipulation of the propagating material which was particularly propitious for the establishment of infringement and for the lodging of a complaint.

"886. Mr. ORDOÑEZ (Argentina) fully supported the statement of Mr. Bogsch (Secretary-General of UPOV). Conditioning was a very important point in Argentina and had to be kept in the Convention. He wished the item to be further defined so that the farmer who was saving seed for his own use was protected and that the farmer who used the 'farmer's privilege' to trade in seeds would be caught.

"887. Mr. HARVEY (United Kingdom) also endorsed the remark made by Mr. Bogsch (Secretary-General of UPOV). Item (ii) was a very important provision: it was very important for the United Kingdom. It should not be optional, but all Contracting Parties should have a uniform provision entitling the breeder to authorize conditioning. His Delegation therefore opposed the proposal of the Delegation of Germany.

"888. Mr. KIEWIET (Netherlands) associated his Delegation with the statements of the previous speakers.

"889.1 Mr. KUNHARDT (Germany) wished to explain the proposal again in the light of previous statements. It was not a matter of obliging breeders, in principle, to accept or authorize conditioning--or to remove the conditioning of material to produce propagating material from protection. Conditioning did not lie on the same logical level as the other activities listed in Article 14(1)(a). A farmer who conditioned plant material to produce propagating material or who had such material conditioned as propagating material by a contractor was producing propagating material within the meaning of item (i) and was therefore subject to the breeder's right.

"889.2 Mr. Kunhardt further explained that all other acts listed under sub-paragraph (a) were those which someone undertook with material that was under his power of disposal. Conditioning could go beyond that. It could oblige a State to provide penalties for infringement not only with regard to a farmer who had propagating material conditioned without consent but also in respect of the contractor who had undertaken the conditioning. Germany did not wish to be obliged to use breeders' rights against contractors who conditioned material for farmers and in no way had ownership in the seed nor would be able to know whether the farmer had a license from the breeder or not. It was therefore not a matter of removing conditioning from the scope of protection, but simply of ensuring that the right of prohibition was addressed only to those parties who had such conditioning effected for their own seed.

"890.1 Miss BUSTIN (France) said that her Delegation had perfectly understood the various objections raised by the Delegation of Germany, but that France had great experience in the sector of application of the Convention in question. There had been problems of interpretation in France as to the place of the seed cleaning and conditioning stage in the production or reproduction sequence. The first instance courts, as also the appeal courts, had concluded that the act covered by item (ii), as presently proposed, was indeed an integral part of the acts referred to in item (i). That had nevertheless required a court interpretation that had been long to obtain.

"890.2 Miss Bustin added that it was essential for France that the breeder should have a means of acting directly with regard to the cleaning and conditioning activities and that such activities clearly constituted an infringing act when carried out other than for private purposes on seed obtained from harvested material. For that reason, the Delegation of France favored the maintaining of item (ii). It could indeed be useful to supplement that item by inserting the words 'cleaning and' before 'conditioning.'

"891. Mr. ÖSTER (Sweden) supported the proposal of the Delegation of Germany.

"892. The proposal of the Delegation of Germany, reproduced in document DC/91/91, to delete item (ii) of Article 14(1)(a) was rejected by three votes for, 14 votes against and one abstention.

"Article 14(1)(b) of the Basic Proposal [Article 14(2) of the Text as Adopted]- Scope of the Breeder's Right in Respect of Harvested Material

"893. The PRESIDENT opened the debate on the proposal of the Delegation of Spain reproduced in document DC/91/82.

"894.1 Mr. LOPEZ DE HARO (Spain) explained that the proposal of his Delegation aimed at making it optional for Contracting Parties to include in their national laws and regulations provisions corresponding to those appearing in the Basic Proposal and relating to harvested material and products obtained from harvested material. It would permit the special circumstances of each country--social or political--to be taken into account. Spain could not accept today mandatory rules for the inclusion of acts in relation to harvested material and products obtained from harvested material in the acts that required the authorization of the breeder.

“894.2 In addition, in order to prevent the breeder from exercising his rights at his discretion at any of the steps defined in subparagraphs (a), (b) and (c), his Delegation proposed to add the phrase now appearing in square brackets in the Basic Proposal both in subparagraph (b) and in subparagraph (c). It had to be clear also in what cases these two options could be used. Mr. Lopez de Haro stressed that Spain’s future accession to the revised Convention would be difficult if Article 14(1)(b) and (c) were kept as appearing in the Basic Proposal.

“895. Mr. BRADNOCK (Canada) stated that his Delegation supported the position of Spain.

“896. Mr. LLOYD (Australia) stated that his Delegation also supported the amendment proposed by the Delegation of Spain.

“897. Mr. BROCK-NANNESTAD (UNICE) stated that UNICE expressed itself in favor of strengthening the rights to be available upon the grant of a breeder’s right. However, if such strengthening were obtained to the detriment of the possibilities of protecting new developments other than new varieties, the position would be different. In particular, if the definition of the subject matter that might only qualify for a breeder’s right became too broad, it would enable for instance Article 53(b) of the European Patent Convention to be invoked to deny protection even when the UPOV Convention could not provide protection; there would then be a large gap of unprotectable subject matter. There was thus a balance to be struck.

“898. Mr. KIEWIET (Netherlands) stated that the proposal of the Delegation of Spain concerned the very heart of the new Convention. Article 14(1)(b) and (c) was one of the main provisions designed to strengthen the position of the breeder. His Delegation was opposed to the proposal in all its aspects.

“899. Mr. HAYAKAWA (Japan) stated that, concerning the first part of the proposal of the Delegation of Spain, his Delegation was in favor of strengthening the breeder’s right and therefore opposed to the proposed amendment. Concerning the second part, his Delegation had proposed a similar amendment. He suggested that the two parts be discussed separately, the second in conjunction with similar amendments proposed by other Delegations.

“900. Mr. BURR (Germany) stated that his Delegation did not favor making subparagraph (b) optional. It shared the viewpoint of the Delegation of the Netherlands that breeders’ rights should compulsorily extend to harvested material. However, a question arose whether the words ‘harvested material’ were adequate in such case, for instance in order to cover pot plants. In that connection, Mr. Burr referred to the proposal of his Delegation reproduced in document DC/91/91 to supplement the words ‘harvested material’ with the words ‘including whole plants.’

“901. Miss BUSTIN (France) said that her Delegation was opposed to making the provision on the extension of breeders’ rights to the harvested material optional and therefore to the first part of the amendment proposed by the Delegation of Spain.

“902. Mr. HARVEY (United Kingdom) stated that his Delegation shared the position expressed by the previous speakers.

“903.1 Mr. DMOCHOWSKI (Poland) said that his Delegation supported the proposal of the Delegation of Spain concerning subparagraph (b). It was against the proposal concerning subparagraph (c) for it supported Alternative B in the Basic Proposal. The problem under consideration was also, in his opinion, connected with the contents of Article 15; some general comments were therefore appropriate.

“903.2 The Delegation of Poland expressed itself against an excessively increased breeder’s right, in particular against the increase of the material benefits through the sale of products made directly from harvested material of the protected variety. It also declared itself against the limitation of the ‘farmer’s privilege’ and shared the opinion of organizations such as FAO, AIPH, COGECA and COPA. A plant breeder’s right extended to industrial products--and consequently also to animal products obtained through use of the crop as fodder--would be very difficult or even impossible to exercise in practice. The identification of particular varieties in those products would mostly be impossible, even with the help of complex and costly examination procedures. Such a breeder’s right would then be a privilege for a small number of breeders, and that was contrary to the fundamental principle of equality before the law.

“903.3 The proposed extension of the breeder’s right to the products obtained from the harvested material of the protected variety and also the proposed restriction of the concept of ‘farmer’s privilege’ were insufficiently argued concessions to the claims of plant breeders. Plant breeders considered themselves as the exclusive creators of new varieties, on an equal footing with inventors in the technical or industrial field. However, the creation of a new plant variety was always, unlike a technical invention, the result of an interaction between the conscious and creative ideas and actions of a breeder, on the one hand, and the uncontrolled and random forces of nature, on the other. Therefore, it was not reasonable to reserve the material benefits from the creation of new varieties to the breeders. All human beings had an unquestionable right to a profit from the action of natural forces. In this particular case, those human beings were in the first place the agriculturists, horticulturists and sylviculturists, and also those who transformed the plant material.

It was thus necessary to retain in the Convention a proper balance between the rights and the interests of plant breeders and variety users.

"903.4 Mr. Dmochowski concluded his statement by saying that his Delegation advocated a limitation of the scope of the breeder's right to the propagation, storage and sale of propagating material of the protected variety and to the licensing of those activities. Only exceptionally should the harvested material derived from the use of propagating material of the protected variety also be covered, and then only with the reservation appearing in the square brackets in the Basic Proposal.

"904.1 Mr. HOINKES (United States of America) declared that his Delegation could not accept the proposal under discussion. It believed that the breeder's right should extend to the harvested material of the protected variety. In addition, the breeder should be able to proceed against the unauthorized harvested material directly; in other words, he should not be obliged to seek redress in respect of the propagating material first and invoke the extension of the right only if he were unsuccessful.

"904.2 The structure of the proposal was another point of concern: since the proposal opened up an option for Contracting Parties and added a condition, it was to be interpreted as permitting a particular Contracting Party not to adopt protection with respect to the harvested material and forcing all other Contracting Parties that wanted such protection to introduce the additional condition governing that protection. If the extension of the breeder's right was to become optional, then the additional condition would really not be necessary.

"905. Mrs. JENNI (Switzerland) stated that her Delegation was in favor of compulsory extension of protection to the harvested material and therefore opposed the proposal made by the Delegation of Spain.

"906. Mr. WHITMORE (New Zealand) said that his Delegation could not support the first part of the proposal of the Delegation of Spain.

"907. Mr. ÖSTER (Sweden) stated that his Delegation was basically against extending protection to the harvested material but, for the sake of harmonization, was prepared to vote for the text as presented in the Basic Proposal.

"908. Mr. ESPENHAIN (Denmark) stated that his Delegation was in favor of keeping the principle underlying the text appearing in the Basic Proposal.

"909. Mr. ORDOÑEZ (Argentina) supported in the name of his Delegation the text presented in the Basic Proposal.

"910. Mr. ROYON (CIOPORA) recalled that his impression from the past two years of work and cooperation with UPOV was that it was the intention of this Conference to improve the contents and scope of the breeder's right. If the proposal of the Delegation of Spain was to be accepted, the situation under Article 5(4) of the present Convention would be restored, which was not acceptable to CIOPORA. In addition, CIOPORA wished the second part of the proposal to be deleted.

"911. Mr. WINTER (COMASSO) expressed the opinion that it was essential in the interest of the intended reinforcement of breeders' rights that the mandatory extension of breeders' rights to the harvested material be laid down in the Convention. For the same reason, it appeared just as essential to delete the sentence given in square brackets in the Basic Proposal.

"912. Mr. O'DONOHUE (Ireland) stated that his Delegation supported the view that subparagraph (b) should be a mandatory provision.

"913. Mr. VAN DE LINDE (ASSINSEL) stated that ASSINSEL agreed with the Delegations which had stated that Article 14 was one of the core elements of the new Convention from the standpoint of strengthening the rights of the plant breeder. Article 14(1)(a) effectively covered only propagating material. There might be occasions, for instance in relation to farm-saved seed, when it would be politically or administratively more convenient to exercise the breeder's right on the harvested material. It was therefore important for the breeder to have flexibility. ASSINSEL supported the text in the Basic Proposal with the deletion of the words between square brackets.

"914. The proposal of the Delegation of Spain, reproduced in document DC/91/82, to make the provision in Article 14(1)(b) optional was rejected by four votes for, 13 votes against and one abstention.

"915. The PRESIDENT opened the debate on the second part of the proposal of the Delegation of Spain reproduced in document DC/91/82 and on the corresponding proposal of the Delegation of Japan reproduced in document DC/91/61. Both proposals aimed at making the exercise of the breeder's right in respect of the harvested material dependent upon the fact that it had been impossible to exercise it in respect of the propagating material.

"916. Mr. HAYAKAWA (Japan) observed that his Delegation was in favor of strengthening the breeder's right but felt that, if a mandatory provision were to be accepted to the effect that the breeder would be able

to exercise his right in relation to harvested material and other products, it would not lead to the establishment of a smooth relationship between the breeders and the users of varieties. The breeder should exercise his right at the earliest possible stage. If the breeder could freely choose the stage at which he exercised his right, there would be a very uncertain situation for the trade. Therefore, the Delegation of Japan proposed to introduce a so-called 'cascade principle.' It was only on that condition that Japan would be able to accept a broadening of the scope of the breeder's right.

"917. Mr. LOPEZ DE HARO (Spain) said that his Delegation fully endorsed the statement made by Mr. Hayakawa (Japan).

"918. Miss BUSTIN (France) observed that the second part of the amendment proposed by the Delegation of Spain appeared to introduce some confusion as between the scope of the breeder's rights and a theory taken from another field of intellectual property law, that was to say exhaustion, to be found in Article 16 of the Basic Proposal. To say that a right could only be exercised when it had not been exercised previously was tantamount to saying that it could only be exercised when it was not exhausted. That confusion raised certain problems. Moreover, the proposed amendment would oblige a breeder to furnish proof that he had not been able to exercise his right at an earlier stage. He would thus be afforded a right that was extensive, but extremely difficult to exercise due to the need to furnish negative proof. That was why the Delegation of France preferred the wording given in the Basic Proposal.

"919. Mr. BURR (Germany) said that his Delegation had some sympathy for the principle behind the proposals made by the Delegations of Japan and of Spain, even if one could argue, like the Delegation of France, that exhaustion resolved that question. One could nevertheless, in the provision discussed, once more set out the principle of exhaustion with clarity. However, the Delegation of Germany would by far prefer the formulation contained in the proposal of the Delegation of the United States of America in document DC/91/12. It wished therefore to request that a vote first be taken on the principle and that the question of formulation be postponed.

"920. Mr. KIEWIET (Netherlands) observed that the words: 'was not authorized by the breeder' appearing in the Basic Proposal were sufficient to establish the so-called 'cascade system.' To accept a stronger form of the 'cascade principle' as proposed by the Delegations of Japan and Spain would create all kinds of problems when the breeder would try to exercise his right in relation to harvested material; it would be very difficult for him to prove that he had not been in a position to exercise his right at an earlier stage. In fact, the breeder might just possess a worthless right.

"921. Mr. VON PECHMANN (AIPPI) stated that, if one was agreed that harvested material should be protected, then the breeder should not bear the burden of having to determine where and how given harvested material had been produced. The burden of proof could be difficult to such a degree that he would not be in a position at all to take action against the infringement of his right by that harvested material. The formulation 'no legal possibility' would put any good lawyer acting for the defendant in a position to cast doubt at any time on the justification for the action.

"922. Mr. ÖSTER (Sweden) recalled that during the preparatory work of the Administrative and Legal Committee, the representatives of Sweden were the ones who had introduced the proposal now appearing in square brackets in the Basic Proposal. To that extent, his Delegation supported the proposal of the Delegation of Spain. Its position was that the breeder should not have the possibility to choose the stage at which he would collect his royalties.

"923. Mr. WHITMORE (New Zealand) declared that the views of his Delegation were similar to those eloquently expressed by Miss Bustin (France) and Mr. Kiewiet (Netherlands).

"924. Mr. BRADNOCK (Canada) stated that his Delegation supported, like that of Sweden, the proposal of the Delegation of Spain. The focus of the plant breeder's right should be on propagating material, and only exceptionally should the right be exercised on harvested material.

"925. Mr. LLOYD (Australia) stated that his Delegation supported the views of the Delegations of Canada and Sweden. If the provisions of both Article 14(1)(b) and Article 14(1)(c) were made obligatory in the revised Convention, Australia would not be in a position to amend its legislation and to ratify the Convention because of the strength of certain national interest groups. This did not mean, however, that the Delegation of Australia was not sympathetic to the strengthening of the rights of the breeders or to the harmonization of those rights. Australia would endeavour to amend its Act, but the circumstances had to be borne in mind.

"926. Mr. ESPENHAIN (Denmark) recalled that, during the whole preparatory work on the proposed revised text, his Delegation had supported the objective to strengthen the breeder's right. At the same time, it had consistently taken the view that the royalties should be collected at the first possible stage. That also corresponded to a recommendation adopted at the 1978 Diplomatic Conference. His Delegation therefore supported the proposal of the Delegation of Spain.

"927. Mr. O'DONOHUE (Ireland) endorsed the position taken by Mr. Espenhain (Denmark).

“928. Mr. SLOCOCK (AIPH) stated that it might appear surprising that, as a representative of a producers’ organization, he should welcome the fact that Article 14(1)(b) should become obligatory; but this was realistic and marked a sensible progress in the development of plant variety protection legislation. However, in the market and in the horticultural world, it was an incorrect approach to suggest that the collection of the royalty or the exercise of the breeder’s right should take place anywhere but at the propagation stage. A choice for the breeder as to where he would exercise his right would be inappropriate in practice and doubtful in law.

“929. Mr. ORDÓÑEZ (Argentina) stated that his Delegation supported Article 14(1)(b) in all its aspects because if the breeder could not collect his royalty at the proper stage, he should be able to get it at the next stage in the economic chain.

“930. Mr. HRON (Austria) informed the Conference that debates in Austria were strongly oriented towards reinforcement of breeders’ rights, but they should be assertible as early as possible--that was to say, where possible, at the stage of propagating material. The rights should only be assertible at a later phase that is to say for harvested material, in exceptional cases.

“931. Mr. ROYON (CIOPORA) stated that CIOPORA was in favor of the strengthening of the breeder’s right because of the many loopholes that existed in many UPOV member States at the present time. The various interventions made so far only indirectly touched upon the contents of the right; they concerned essentially the commercial stage at which the breeder may collect his royalty. Provided that there was an exhaustion of the right, the question whether the breeder collected his royalty at one stage or another should be of no concern to the Conference in the opinion of CIOPORA. In France, for instance, under the currently applicable law, royalties were collected at different stages depending on the species and this had not raised any difficulty. The problem of control was also to be considered; the breeder should be able to collect his royalty where the control was the easiest.

“932. Mr. SMOLDERS (ICC) stated that his Delegation supported the statements made by the Delegation of France and the representative of CIOPORA. It was essential that the breeder was able to decide himself at which stage he could and would collect his royalties.

“933. The PRESIDENT proposed to close the debate and vote on the principle of the proposals of the Delegations of Japan and Spain, leaving it to the Drafting Committee to finalize the wording if the proposals were accepted.

“934. The principle of the proposals of the Delegations of Japan and Spain, reproduced in documents DC/91/61 and DC/91/82, to make the exercise of the breeder’s right in respect of the harvested material dependent upon the fact that it had been impossible to exercise it in respect of the propagating material was accepted by 10 votes for and eight votes against.

“935. The PRESIDENT opened the debate on the proposal of the Delegation of Japan, reproduced in document DC/91/61, to specify the acts covered by the breeder’s right in relation to the harvested material.

“936. Mr. HAYAKAWA (Japan) explained that, having examined the text in the Basic Proposal, his Delegation had tried to pick up the acts concerning the propagating material that were appropriate in the context of harvested material. The first was ‘use,’ namely to produce the product. Concerning: ‘offering for sale or for leasing,’ it was to be noted that, in Japan, the business of leasing ornamental plants or flowers had become quite significant, hence the need for a reference to it. Concerning item (vii), ‘stocking,’ the proposed text had to be amended according to the decision taken in respect of Article 14(1) (a)(vii) to read: ‘mentioned in (i) to (vi), above,’ rather than: ‘mentioned in (i) to (v), above.’

“937. Mr. WHITMORE (New Zealand) stated that his Delegation was very interested in the proposal. It seemed logical to have different lists in sub- paragraphs (a) and (b) since the acts carried out in respect of propagating material were not necessarily the same as the acts carried out in respect of harvested material. In principle, it supported the proposal, although it might be possible to make some minor improvements.

“938. Miss BUSTIN (France) said that her Delegation did not understand the sequence of the proposal made by the Delegation of Japan. In particular, it was unable to say what was added by item (iv) over and above item (ii); both referred to the ‘leasing’ of harvested material, which was moreover a concept that would need defining. The Delegation of France was therefore unable to support the proposal and opposed it.

“939. Mr. HAYAKAWA (Japan) explained that, in Japan, great quantities of ornamental plants and cut flowers were leased--and not sold--by special leasing traders, for example for receptions in hotels or offices. This practice was becoming a big business in Japan.

“940. Miss BUSTIN (France) said that, in view of the amendment the Conference had just adopted in order to introduce the ‘cascade’ principle, it was difficult to imagine how a breeder could exercise his right with regard to that type of activity. Her Delegation clearly preferred the broader wording in the Basic Proposal.

"941. Mr. FOGLIA (Italy) stated that his Delegation had the same problem as the Delegation of France. Additionally, the terms 'location' in French and 'leasing' in English might refer to two different contracts under Italian law. His Delegation was in favor of the text as appearing in the Basic Proposal.

"942. The proposal of the Delegation of Japan, reproduced in document DC/91/61, to list in Article 14(1)(b) the acts in respect of the harvested material covered by the breeder's right was rejected by five votes for, eight votes against and four abstentions.

"943. The PRESIDENT opened the debate on the proposals of the Delegations of Germany and of the United States of America, reproduced in documents DC/91/91 and DC/91/12, to substitute 'unauthorized [use]' for: 'whose use, for the purpose of obtaining harvested material, was not authorized by the breeder.'

"944. Mr. HOINKES (United States of America) stated that the thrust of the proposal of his Delegation was merely to clarify the provision.

"945.1 Miss BUSTIN (France) said that it seemed to her Delegation that the proposal appeared to meet the wishes expressed by certain Delegations to ensure that breeders could not levy a royalty on harvested material unless they had not been able to exercise their rights at an earlier stage. Indeed, if a breeder had not exercised his right at an earlier stage, one was faced with two types of situation: either he had refused authorization, and by that fact exercised a right in accordance with what the Convention authorized him; or his right had been violated as a result of the acts authorized under a license he had granted having been exceeded.

"945.2 The wording under discussion did not obligatorily say that the breeder had to levy a royalty at that stage; however, whether it concerned infringement by lack of authorization or violation of a contract, a breeder should be able to exercise his right in the manner proposed by the Delegation of the United States of America, whilst providing in Article 14 (1)(b) certain assurances to those States who wished to have a certainty that the rights would be exercised at the earliest possible stage. It was difficult to imagine a breeder voluntarily permitting reproduction or propagation to be undertaken in violation of his rights and reserving for a later time the possibility of acting by concluding a licensing contract only at a late stage. He would be putting himself in serious danger of insecurity. That, it would seem, was what had been highlighted by the Delegation of the United States of America in its proposal. The Delegation of France supported that proposal as a proposal to improve the wording of the amendment accepted beforehand.

"946. Mr. BOGSCH (Secretary-General of UPOV) wondered whether the proposal achieved its purpose. It seemed to him that if a person obtained the breeder's authorization for one act only, for example for conditioning for the purpose of propagation, the proposal implied that he could do anything with the propagating material because an authorization had been obtained. The text in the Basic Proposal was more precise: the authorization had to refer to the use which was to be made under subparagraph (b).

"947. Mr. ESPENHAIN (Denmark) observed that the Conference had already voted in favor of the last part of Article 14(1)(b). To accept the proposal under consideration would in fact be a step backwards, even if the proposal was considered a matter of drafting. His Delegation would not vote for it.

"948. Mr. HOINKES (United States of America) stated that he disagreed with Mr. Bogisch (Secretary-General of UPOV). If the use of the propagating material was authorized for conditioning purposes, and for conditioning purposes only, then there was no authorization for the use for any other purposes, in particular for obtaining harvested material.

"949. Mr. KIEWIET (Netherlands) felt that Mr. Hoinkes (United States of America) was right. If someone had the authorization to do something with propagating material other than to produce harvested material, and produced such material, then it could be said that he had obtained harvested material through unauthorized use of propagating material. However, the discussion had shown that it might be preferable to keep the text appearing in the Basic Proposal, which was very specific.

"950.1 Mr. ROYON (CIOPORA) stated that CIOPORA was not happy with the proposal because the right of the breeder should be exhausted only after a specifically qualified authorization had been given by him. If the wording and the interpretation of Article 14(1)(b) were to lead to the conclusion that the breeder could only collect his royalty at the stage of propagation, then a lot of the present commercial transactions in plant novelties would be disrupted.

"950.2 In the case of rose varieties used for the production of cut flowers, the breeder may grant a qualified authorization to a propagator to sell plants of the variety to cut-flower growers. The propagator would have his own customers to whom he would sell propagating material, but the latter may wish to be in direct contact with the breeder concerning the right to exploit the variety, for instance because they may find the immediate payment of a royalty too high after all the investments they had made to start production. Other producers would renew their plantations after three or four years only, instead of keeping them for seven or ten years, and prefer to pay to the breeder a yearly royalty. In many instances, the propagator was just an intermediate caring for the production of the material from which one would derive the basic product which made the interest of the variety, namely the cut flower or the fruit.

"950.3 Mr. Royon therefore wished to express his strong opposition to any exhaustion of the breeder's right after a non-qualified general authorization and to any obligation whatsoever to collect a royalty at any particular stage. That position was in keeping with the freedom of commerce and, provided there was no cascade of royalties, the marketing of varieties should be left to its own rules and competition should be allowed to play its role.

"951. Mr. SMOLDERS (ICC) stated that his Delegation felt that Mr. Bogsch (Secretary-General of UPOV) had a point and that it was a reason for rejecting the proposal. It also strongly supported the observations made by Mr. Royon (CIOPORA).

"952. Mr. HOINKES (United States of America) stated that he did not wish to insist on the proposal of his Delegation; but considering Article 14(1)(a) as amended by the Conference, there were only certain acts that required the breeder's authorization with respect to propagating material. One of them did not happen to be the use for the purpose of obtaining harvested material from propagating material. In other words, his authorization was not required under Article 14(1)(a) to obtain harvested material from propagating material. He wondered whether the present wording of Article 14(1)(b) was still consistent with that of Article 14(1)(a).

"953. Mr. BURR (Germany) wished once more to explain the purpose of the proposal made by his Delegation, that had the same content as that of the Delegation of the United States of America. In his view, there was agreement that authorization also implicitly covered the production of harvested material if the breeder had authorized the production and sale of propagating material. That was a case of harvested material that had been produced by authorized use of propagating material. However, where the breeder had not authorized sale and propagating material had nevertheless been sold and had been sown, for instance by the breaking of a licensing agreement, then that was a case of harvested material that had been produced by unauthorized use of propagating material. That was exactly the case that his Delegation wished to subject to intervention by the breeder.

"954. The PRESIDENT suggested that the discussion be suspended on this proposal until the next meeting. (Continued at 1529.4)

"Article 14(1)(a) - List of Acts in Respect of Propagating Material Covered by the Breeder's Right (Continued from 878)

"955. The PRESIDENT opened the debate on the proposal of the Delegation of the United Kingdom reproduced in document DC/91/110.

"956. Mr. HARVEY (United Kingdom) recalled that his Delegation made this proposal because of the point raised by the representative of CIOPORA before lunch and of the impression that something was lacking in the text of Article 14(1)(a) to cover what was a valid point. Article 14(1)(a), being devoted to propagating material, the act of 'production or reproduction' concerned propagating material, and not harvested material. Article 14(1)(b) gave the breeder a right only when unauthorized use of propagating material was made for producing harvested material, but there was actually no requirement for anyone to obtain the authorization of the breeder for the use of propagating material for the purposes of producing harvested material. An amendment was therefore needed to Article 14(1)(a).

"957. Mr. BOGSCH (Secretary-General of UPOV) said that, in his opinion, the proposal was very useful and in fact necessary.

"958. Mr. BURR (Germany) wished to put a question to the Delegation of the United Kingdom. Was the agreement of the breeder to use for the purpose referred to to be required in addition to his agreement to the sale of the propagating material? In his preceding statement he had assumed it to be obvious that one could sow the propagating material where the breeder had given his agreement to its sale. Why should one otherwise have sold it? The question could be answered in both directions. Nevertheless, there had to be clarity.

"959. Mr. HIJMANS (Netherlands) stated that the proposal of the Delegation of the United Kingdom seemed to be very useful. On the other hand, it raised questions. The first concerned exhaustion of the right. When someone sold propagating material, for instance fruit trees, and collected his royalty at that stage, his right became exhausted; that was a principle of the intellectual property systems, including plant breeders' rights. The second question was whether the limitation to cut flowers and fruit was useful or whether the proposed provision should apply to all plants. The third was whether, if there really was a problem, it was not covered by Article 14(1)(b) .

"960. Mr. ARDLEY (United Kingdom) replied that the question concerning exhaustion was a good point. However, as illustrated by an example given earlier in the discussion, the breeder would have to charge such an enormous royalty on the sale of rose bushes to cover the fact that they would be used for seven or eight years for the production of cut flowers that it would be unworkable. There was a question of exhaustion involved, which might need a specific provision. As far as the scope of Article 14(1) (b) was concerned, his

Delegation's expectation had been that the Article would in fact cover this situation, but it did not provide for an express authorization by the breeder for the use of propagating material for the purpose of producing harvested material. That Article, as worded, made it much more difficult for the breeder to enforce his rights in the case of such use. Finally, the limitation to cut flowers and fruit was being proposed in response to CIOPORA's concern. The question did not arise in the case of most agricultural crops, but the Delegation had an open mind on this issue.

"961. Mr. FOGLIA (Italy) wondered whether the proposal of the Delegation of the United Kingdom was really necessary. The use of propagating material might be covered implicitly by Article 14(1)(a). Another question was the reason for using the expression 'commercial production' when Article 14(1)(a)(i) referred to 'production,' unspecified.

"962. Mr. DMOCHOWSKI (Poland) stated his opinion that the remarks of the representative of CIOPORA aimed at covering in the new text of the Convention the matter dealt with in the present Convention in Article 5(1), third sentence, namely the extension of the right of the breeder to ornamental plants and parts thereof normally marketed for purposes other than propagation when they were used as propagating material in the production of ornamental plants or cut flowers. The proposal of the Delegation of the United Kingdom had a different purpose, however. Mr. Dmochowski therefore proposed to address the problem raised by CIOPORA, which was also that of retaining the scope of the present Convention.

"963.1 Mr. ESPENHAIN (Denmark) wished to speak on the proposal of his Delegation reproduced in document DC/91/97, although it was not yet under discussion, in view of the links with the question under consideration. He thought that the proposal covered the point raised by the representative of CIOPORA through its reference to: 'other parts of plants or the harvested material.' The wish was to cover the cases where a producer multiplied propagating material, not for marketing, but for use of the propagating material so multiplied on his own holding on a commercial scale. For example, a producer could buy ten strawberry plants, multiply them by tissue culture and lay out a very large plantation. He would use the ten plants commercially, but would never sell propagating material, and the breeder would receive a royalty for ten plants only in relation to what eventually became a commercial production on a very large scale.

"963.2 The amendment of Article 14(1)(b) proposed by the Delegation of Denmark would cover this situation; in addition, it was restricted to ornamental plants and fruit crops. The Delegation realized that those two categories of products were the most important ones in terms of the problem to be solved. However, it did not wish other products to be excluded. In view of this, the Delegation supported the intention behind the proposal of the Delegation of the United Kingdom, but wondered whether it fully covered the problem.

"964.1 Mr. KUNHARDT (Germany) explained that the proposal of the Delegation of the United Kingdom did not directly concern propagating material and that it had the following effect: if someone bought a rose bush from a breeder, the latter received compensation for that rose bush. If the purchaser used the rose bush in order to cut flowers off it and sell them, then the proposal would mean that a new authorization and a new license would be required. The Delegation of the United Kingdom felt that to be appropriate since flowers would be able to be cut from such a rose bush for over ten years. However, that contravened a principle of industrial property.

"964.2 Someone who bought a machine, the making of which had been subject to payment of a license, could subsequently use the machine for dozens of years, for as long as the machine lasted, to produce goods and to sell them without the inventor having any claim whatsoever to a further share in the proceeds of those products. There was indeed nothing to stop the breeder laying down a license fee to be paid on sale of the rose bush that would fully cover his breeding work. The principle of levying royalties continuously for one and the same object was alien to the thinking of the Delegation of Germany. The proposal under discussion no longer involved a particular problem in the plant area, but went far beyond what was usual in the field of patents.

"964.3 The other case that had been mentioned, that was to say the case of someone buying individual plants, propagating them and obtaining cut flowers or fruit from the propagated plants, corresponded to the third sentence of the present Article 5(1) of the Convention. That case was covered by the provisions in the Basic Proposal. However, the Delegation of Germany shared the view of the Delegation of Denmark that an addition would perhaps be warranted in respect of parts of plants and, perhaps, whole plants also. It would be able to agree to an amendment as proposed by that Delegation. The proposal made by the Delegation of the United Kingdom, however, contained more possibilities than the Delegation of Germany could admit.

"965.1 Mr. ROYON (CIOPORA) stressed that the Delegation of the United Kingdom had altogether understood the spirit of the statement made on behalf of CIOPORA at the preceding meeting. It had precisely defined the circumstances under which there could be abuse with regard to a breeder who would not obtain his just remuneration for use of his variety. It was not at all a question, as said by Mr. Dmochowski (Poland), of repeating the provision in the third sentence of Article 5(1) of the present text of the Convention. That provision concerned problems of utilization of final products for propagation and was included in a different manner in the new draft Convention.

"965.2 Mr. Rayon added that the proposal made by the Delegation of Denmark was in itself interesting, but did not solve the specific problem he had raised and which was satisfactorily solved in the proposal made by the Delegation of the United Kingdom. As to the comments made by Mr. Kunhardt (Germany), with respect to the patented machine, it had not to be forgotten that, under patent law, that machine could be licensed for a restricted field of use and that the inventor's remuneration could be calculated, not only on the price of the machine, but also on the price and quantity of articles that were sold.

"965.3 The problem to be solved was the following: rose bushes could be sold either for the retail trade or for the production of cut flowers. Garden rose bushes obviously bore a much lower royalty. There had already been cases of florists buying rose bushes intended for the general public and using them for the production of cut flowers. That was therefore a case of propagating material being used beyond what the breeder had potentially authorized when granting a propagating license. It appeared only equitable to CIOPORA that such case be covered in the new Convention.

"966. Mr. ÖSTER (Sweden) stated that his Delegation was not sure whether the amendment proposed by the Delegation of the United Kingdom was needed and whether the problem could not be covered by Article 14(1)(a)(i) in one way or another. It was, however, conscious of the problem which had been raised. Another question concerned the reference to the 'commercial production' and had to be seen in relation to Article 15, under which the breeder's right did not extend to non-commercial activities.

"967.1 Mr. SCHENNEN (Germany) wished to make an addition, in the light of the statements made by Mr. Rayon (CIOPORA), to the position already taken by his Delegation. The proposal made by the Delegation of the United Kingdom created a non-exhaustible right since each subsequent use for the production of flowers generated not only an obligation to payment, but also an obligation to obtain authorization. The question was whether that was intended. Where acts in respect of propagating material were concerned for which no authorization had been given by the breeder, those fell under Article 14(1)(b).

"967.2 With regard to the example quoted by Mr. Rayon (CIOPORA) in respect of rose bushes that were bought at a lower price and then used to produce cut flowers, that appeared to Mr. Schennen to be a matter for Article 16(1)(iii) of the Basic Proposal, namely a matter of the scope of exhaustion. It was therefore his opinion that the proposal concerned solely a matter of exhaustion and would therefore be better dealt with in the context of Article 16, although his Delegation would still be unable to accept the content of the proposal. Moreover, there arose the question whether a breeder in practice could define or restrict the area of utilization.

"968. The PRESIDENT observed that the provision of Article 16 referred to by Mr. Schennen (Germany) was in square brackets; it was not to be considered as part of the Basic Proposal for the moment, in the absence of any proposal for amendment. He suggested to postpone the issue until the next meeting. He had not heard any support for the proposal, but only questions and suggestions for alternative solutions. (Continued at 1005)

[...]

"Article 14 - Scope of the Breeder's Right

"Article 14(1)(a) - List of Acts in Respect of Propagating Material Covered by the Breeder's Right (Continued from 968)

"1005. The PRESIDENT reopened the debate on the proposal of the Delegation of the United Kingdom, reproduced in document DC/91/110, to add the 'use for the commercial production of cut flowers and fruit' to the list of acts in respect of propagating material covered by the breeder's right.

"1006. Mr. DMOCHOWSKI (Poland) stated that, after reconsideration of the problem, his Delegation now supported the proposal.

"1007.1 Mr. ROYON (CIOPORA) wished to make a very firm statement concerning the wrong that would be done to breeders of asexually reproduced plants, particularly the creators of cut flower varieties and fruit tree varieties, by deleting item (viii) without any replacement. The solution proposed by CIOPORA, and obligingly taken up by the Delegation of the United Kingdom, seemed to CIOPORA to constitute a compromise that would make it possible to obtain for asexually reproduced ornamentals and fruit tree varieties the equivalent of patent protection, that was to say protection covering fabrication, sale and use for commercial purposes, a protection which CIOPORA had been demanding since 1961 and in respect of which it had continuously pointed out that there existed no legal, commercial or economic reason for refusal.

"1007.2 As he had explained at the preceding meeting, it was essential that a breeder should be able, under his licensing contract, to gain direct access to the person exploiting his variety industrially for the production of flowers or of fruit. He could not rely on simple controls by the propagator since, at the propagation level, the final purpose of propagated plants, which could differ greatly depending on the variety, was not known.

"1007.3 Mr. Royon repeated the example he had given of the florist who bought rose bushes normally sold on the gardening market and then exploited them for commercial purposes for the production of cut flowers. It did not seem proper for that type of industrial or commercial user to be able to appropriate the added value inherent in the creation of a variety; where a breeder had spent between ten and fifteen years in creating a variety for the production of cut flowers or fruit, then it was indeed the cut flower or the fruit that was the significant element in that creation. The second reason for the request was that, when a license was granted for such products, it was important to be able to monitor the industrial exploitation of the product. It was important to be able to assist or control production, for example in the form of technical assistance or quality control.

"1007.4 Finally, Mr. Rayon concluded that, if the proposal of the Delegation of the United Kingdom was not accepted, then once more, as in 1961, the Conference would have deliberately accepted a reduction in the rights of breeders of ornamental plants and fruit trees for reasons which could no longer be understood after thirty years of the existence of protection.

"1008. Mr. ROBERTS (ICC) stated that the ICC supported the proposal for amendment submitted by the Delegation of the United Kingdom for the reasons forcefully stated by Mr. Rayon (CIOPORA). It was a matter of injustice to breeders of varieties used for the production of cut flowers and fruit that they should have no method of control over the commercial products, which were the fundamental expression of the variety. It was difficult to see that breeders' rights would be of much help if the breeder was not able to control this type of exploitation. Mr. Roberts hoped that those countries which did not support the proposal would give their reasons and perhaps propose alternative amendments to deal with this important problem.

"1009. Mr. HARVEY (United Kingdom) wished to point out that the concern on which the proposal of his Delegation was based arose from Article 14(1)(b) and its reference to: 'provided that the harvested material was obtained through the use of propagated material whose use ... was not authorized by the breeder.' There was nothing in Article 14(1)(a), or anywhere else in the Convention, which specified that the authorization of the breeder was required to produce harvested material from propagating material. If the proposed amendment or a similar amendment was rejected, Article 14(1)(b) would make no sense, Mr. Harvey suggested.

"1010.1 Mr. KUNHARDT (Germany) stated that his Delegation had already taken a position on that proposal and had expressed its objections to the wording. The proposal would add a further act of utilization under subparagraph (a), that was to say in relation to propagating material of the protected variety, which would not however directly concern propagating material, meaning that one could gain the impression that a breeder's right could be asserted twice, in a cumulative manner, with respect to one and the same object. That would mean that the breeder's right with respect to ornamentals and fruit trees would never be exhausted.

"1010.2 However, his Delegation assumed from the discussions that the proposal was possibly not quite clear. It had been interpreted in differing manners. His Delegation agreed that a ruling would have to be found in the area of cut flowers and fruit to avoid the present abusive situation. In order to do so, it would be necessary, in particular, to forbid any acquirer of plants from carrying out propagation on his own holding. The Delegation had assumed that the Basic Proposal had covered that matter. Should such not be the case, then it was willing to reflect again on the wording of subparagraph (b) and to consider an addition such as that proposed in document DC/91/97 by the Delegation of Denmark. Indeed, the term 'parts of plants' in respect of ornamentals and fruit trees was perhaps a better expression than 'harvested material.'

"1011.1 Miss BUSTIN (France) observed that French law already contained a provision such as that proposed by the Delegation of the United Kingdom. However, that provision applied within the framework of the law established by the 1978 Convention. It had the drawback of applying only to certain categories of plants, whereas others would warrant the same treatment. However, it seemed to the Delegation of France that the Delegation of the United Kingdom had above all accepted to present a proposal for amendment in view of the development of discussions on Article 14(1)(b); it could but regret finally having to support a suppletive provision that would, in fact, be less than the provision put forward in the Basic Proposal.

"1011.2 Miss Bustin added that the Delegation of Germany had wished to refer the Conference to the amendment proposed in document DC/91/97 by the Delegation of Denmark. That proposed amendment, however, also had a drawback, which was to make the extension of rights to the harvested material a suppletive provision due to the inclusion of the phrase given between square brackets in the Basic Proposal. The Delegation of France might therefore be obliged to support the proposal of the Delegation of the United Kingdom as a suppletive however, it would have preferred the broader provision--applicable to all plant species and compulsory--that was given in Article 14(1)(b) of the Basic Proposal.

"1012. Mr. HAYAKAWA (Japan) stated that his Delegation supported the opinion of the Delegation of Germany.

"1013. Mr. KIEWIET (Netherlands) stated that his Delegation was in the same position as the Delegations of Germany and Japan. One of the questions raised by Mr. Harvey (United Kingdom) was about the sense of Article 14(1)(b) if Article 14(1)(a) would not cover the use for the purpose specified in the proposal. In the

opinion of his Delegation, it made a sense because, if propagating material was put on the market, the putting on the market implied an authorization by the seller to the buyer to produce harvested material from that propagating material, otherwise the selling of the propagating material would make no sense.

"1014. Mr. PERCY (UPEPI) stated that UPEPI would support the proposed amendment, but was extremely puzzled why item (viii) had been deleted in the first place and why an amendment had been proposed as a substitute that was much narrower. It did not cover, for example, use for the purpose of producing leaves which in turn were used to produce chemicals.

"1015. Mr. ORDOÑEZ (Argentina) stated that his Delegation shared the opinion of the Delegation of Germany.

"1016. Mr. ROYON (CIOPORA) held that the Delegation of Germany was mixing two completely different concepts: that of propagation beyond what was permitted --which appeared to be well covered by the draft Convention as it stood—and the problem of the extension asked for by CIOPORA. Mr. Rayon did not see how the addition of that use in Article 14(1)(a) would limit application of exhaustion of the right. In patent law, where manufacture, sale and use were covered by the basic right, there also existed a principle of exhaustion of the right and that principle was applied without problems. He could not see why exhaustion of the right could not be applied in the same way to new plant varieties. And if it were not to apply under the same conditions, would one accept separate protection for production and reproduction, offering for sale, exporting, and the like?

"1017. Mr. KIEWIET (Netherlands) wished to clarify his earlier statement. The opinion of his Delegation was that when propagating material was put on the market or sold without any conditions accompanying that selling, then the buyer of that propagating material was free to do what he wanted with that material. The problem raised by CIOPORA could of course be solved by the seller of propagating material making it a condition of contract that the buyer pay him a royalty in respect of each crop.

"1018. Mr. BOGSCH (Secretary-General of UPOV) observed that one had to be realistic. The law on intellectual property was a substitute for contracts because one could not regulate all situations by contract.

"1019.1 Mr. ESPENHAIN (Denmark) recalled that his Delegation had fully supported at the previous meetings the wish of the representative of CIOPORA that the particular situation should be covered. But it also fully shared the concern of the Delegation of Germany that the breeder's right should be exhausted somewhere and that the proposal of the Delegation of the United Kingdom might provide an open-ended right. It was for that particular reason that it had made its proposal reproduced in document DC/91/97.

"1019.2 His Delegation fully shared the view that if propagating material, for example an apple tree, had been put on the market by the breeder and the licence fee had been paid, the owner of the orchard in which the tree was then planted had a full right to harvest the apples and to do with them what he liked. What should not be possible and what his Delegation would like to cover in Article 14(1)(b) was the situation where somebody bought one apple tree and planted a whole orchard therefrom. Mr. Percy (UPEPI) had mentioned the production of parts of plants to extract oil or chemicals; the proposal of the Delegation of Denmark to introduce a reference to parts of plants in Article 14(1)(b) would cover such production whatever its purpose was.

"1020.1 Mr. BURR (Germany) wished also to set out once more the position of his Delegation. Article 14(1)(a) basically covered two types of acts, the production of propagating material, including conditioning, and the putting on the market of propagating material, including offering for sale, importing, exporting, and so on. In the case of the second type of act, the question of the purpose of the putting on the market arose. That was doubtlessly the production of harvested material. That would be viewed by the Delegation of Germany as the normal use of propagating material. It had to be possible to exploit all plant products that arose from such use, except for the purpose of propagation. For instance, in the case of fruit trees, that meant that the production of fruit, but also the cutting of twigs in blossom or the use of the trunk as wood for veneers. The cutting of scions for grafting, on the other hand, should be excluded. Indeed grafting was a further act of propagation.

"1020.2 As for the wording of Article 14(1)(b), Mr. Burr further observed that, in German at least, the term 'harvested material' had a very narrow meaning. It would imply that, when buying a fruit tree, one would also need authorization, even after years, if protection was still valid, to use the trunk for the veneer wood. That was the reason for the proposal of the Delegation of Germany that subparagraph (b) should practically only concern harvested material obtained from propagating material that had been produced and used unlawfully.

"1021. Mr. ÖSTER (Sweden) wondered whether the examples given by Mr. Espenhain (Denmark) were not already covered by Article 14(1)(a) since they constituted a propagation and therefore whether the proposal of the Delegation of Denmark was necessary for the purpose indicated by it.

"1022. Mr. KIEWIET (Netherlands) agreed with Mr. Öster (Sweden): the propagation of a fruit tree was indeed covered by Article 14(1)(a)(i). In addition, the selling of the fruit obtained from the propagated trees

was covered by Article 14(1)(b). He added that his Delegation felt that the purchase of the fruit tree implied the authorization to produce and sell fruit from that tree, unless otherwise provided in a contract.

“1023. Mr. ESPENHAIN (Denmark) conceded that it might be a question of interpretation of Article 14(1), but the case to be covered concerned the production of propagating material that would never be commercialized, but used on the premises of the person who produced it.

“1024. Mr. HOINKES (United States of America) observed that the discussion concerned a fundamental question, and that that question had already been raised by Mr. Harvey (United Kingdom). Article 14(1)(b) made reference to harvested material obtained through the use of propagating material, which use had not been authorized by the breeder. There was thus a requirement for an authorization from the breeder to obtain harvested material from propagating material. And yet Article 14(1)(a) made no reference to that authorization. Article 14(1)(a) clearly implied that an authorization to obtain harvested material from propagating material was not necessary. But, all of a sudden, Article 14(1)(b) specified that the control by the breeder was extended to harvested material if an authorization had not been obtained from him to use the propagating material for the purpose of producing the harvested material; it added another authorization because, if it did not, it would be totally inoperative. The crucial question was thus: what does Article 14(1)(b) mean?

“1025. Mr. GREENGRASS (Vice Secretary-General of UPOV) observed that the difficulty highlighted by Mr. Hoinkes (United States of America) arose from the deletion of the item (viii) from Article 14(1) (a) which referred to the use of propagating material. It might indeed be necessary to reinstate an item on the use for the purpose of obtaining harvested material if the drafting was to follow through consistently from subparagraph (a) to subparagraph (b).

“1026. Mr. ROYON (CIOPORA) said that his Delegation very strongly supported the statements by Mr. Hoinkes (United States of America) and Mr. Greengrass (Vice Secretary-General of UPOV) who had explained the undesirable consequences of the proposed deletion of item (viii) in Article 14(1)(a). Furthermore, he wished to emphasize, with regard to the concern expressed by Mr. Espenhain (Denmark), that the request made by CIOPORA did not affect reproduction, but utilization. A breeder possessing a large propagation installation had the possibility of granting licenses for the production of cut flowers or fruit and therefore of recovering his part in the added value of his variety. Therefore, why should a small breeder, who needed to use a propagator, have his possibility of intervening suppressed at the propagation stage?

“1027. The PRESIDENT reopened the meeting and noted that, at this point of the debate, several interlinked questions were being considered at the same time and that several courses of action could be envisaged: make a proposal for a new Article 14(1)(a)(viii) and then come back to Article 14(1)(b); decide on the latter and then reconsider the former; set up a working group.

“1028. Mr. DMOCHOWSKI (Poland) supported the setting-up of a working group and observed that the working group should also discuss the second sentence of the definition of a variety appearing in the Basic Proposal, that is, the definition of ‘propagating material,’ and perhaps also of ‘harvested material.’

“1029. Mr. HEINEN (Germany) likewise advocated the setting up of a working group.

“1030. The setting-up of a working group was decided by the Conference by consensus.

“1031. Mr. ESPENHAIN (Denmark) asked whether the working group should consider only Article 14(1)(b) in relation to a new Article 14(1)(a)(viii) or discuss all the proposals made so far, including on Article 14(1)(c).

“1032. Mr. ÖSTER (Sweden) stated that the working group should not reopen the debate on the issues decided upon in the previous meeting, and that it should receive a clear mandate in that respect.

“1033. Mr. ELENA (Spain) supported the view expressed by Mr. Öster (Sweden).

“1034. Mr. BRADNOCK (Canada) felt that the working group should not be given the task to discuss Article 14(1)(c), but rather to sort out the issues that had already been discussed in Plenary. In particular, the group might look at the rights granted under Article 5 of the present Convention and consider why it had been specified in Article 5(2) that: ‘The authorization given by the breeder may be made subject to such conditions as he may specify’ and whether the deletion of that provision was one of the reasons for the present difficulties.

“1035. The PRESIDENT concluded that the main element of the mandate of the working group would be to reconcile Article 14(1)(b) with Article 14(1)(a), possibly through the addition of a new item (viii) to the latter, so that the objective of strengthening the Convention would be achieved in a manner that was satisfactory both technically and legally.

“1036. The conclusion of the President was noted by the Conference.

"1037. The PRESIDENT then proposed that the working group be composed of seven member Delegations and one observer Delegation.

"1038. The Delegations of Denmark, Germany, Japan, the Netherlands, Sweden, the United Kingdom, the United States of America and Morocco indicated their readiness to participate in the working group.

"1039. The Conference decided that the working group would comprise the mentioned in the Delegations by consensus.

"1040. The PRESIDENT then suggested that the chairmanship of the working group be assumed by the Delegation of the United Kingdom.

"1041. The Conference decided, with the agreement of the Delegation of the United Kingdom, that the latter would assume the chairmanship of the working group.

"1042. Mr. KIEWIET (Netherlands) observed that the discussion arose from the remarks of one of the professional organizations. He suggested that it would be wise to add a representative of the professional interests as expert to the working group.

"1043. Mr. LANGE (ASSINSEL) suggested that, should the Conference wish to take up that suggestion, a representative of CIOPORA be designated as expert.

"1044. The PRESIDENT suggested that the Delegation of CIOPORA should nominate an expert.

"1045. Mr. ROYON (CIOPORA) said that, as the sole representative of CIOPORA, he would have difficulty in following both the meetings of the Plenary and the work of the group. He asked whether, in view of that, the working group could not call upon him as representative of CIOPORA once the matter had been whittled down. He could then give his view on specific points and his presence would, perhaps, not be necessary for the whole duration of the work.

"1046. Mr. HOINKES (United States of America) suggested that, in view of the far-reaching scope of the task of the working group, the Conference might invite a representative of the EPO to participate in his personal capacity in the sessions of the working group to give technical advice.

"1047. Mr. TESCHEMACHER (EPO) stated that he would be pleased to take part as an expert in the deliberations of the working group.

"1048. The PRESIDENT then suggested that two experts be invited to join the working group, it being understood that it would be their responsibility to make the necessary arrangements so that they would participate in the whole work of the group.

"1049. The Conference decided by consensus to invite Mr. Rayon (CIOPORA) and Mr. Teschemacher (EPO) to participate as experts in the deliberations of the working group. (Continued at 1527).

[...]

"Article 14 – Scope of the Breeder's

"Article 14(1)(a)(viii) and (b) Report of the Working Group (Continued from 1049)

"1527. The PRESIDENT opened the debate on Article 14(1)(a)(viii) and (b). He proposed to suspend the meeting for 10 minutes to enable the participants to read the report of the Working Group on Article 14(1)(a) and (b) reproduced in document DC/91/118.

"1528. The PRESIDENT invited Mr. John Harvey (Chairman of the Working Group) to introduce the report.

"1529.1 Mr. HARVEY (Chairman of the Working Group) stated that he could be brief in view of the comprehensiveness of the report and limit himself to explaining some points.

"1529.2 Following the suggestion, made by the Delegation of the United Kingdom in Plenary, to insert in Article 14(1)(a) a provision on the use of propagating material for the purpose of producing harvested material, many Delegations had pointed out that such a provision would extend the scope of Article 14(1)(a) beyond that which was needed to address the problem, and would therefore require a subsequent limitation. To give a suitable wording to that limitation had been found to be very difficult and the Working Group therefore decided unanimously that it was better to tackle the problem in Article 14(1)(b).

"1529.3 The discussion on this issue had raised the question of whether or not the provision of Article 5(2) of the 1978 Act of the Convention should be included in the revised Convention. That provision made it clear that the breeder, in giving his authorization, may put conditions and limitations on the licences granted. The Working Group thought that it was useful to include that provision in Article 14(1)(a), particularly as the

Conference had decided to delete Article 14(1)(a)(viii) and had therefore restricted the list of acts subject to authorization under Article 14(1)(a).

"1529.4 (Continued from 954) Concerning Article 14(1)(b), the Working Group had been conscious of the fact that the decision had been taken to remove the square brackets from the last clause appearing in the Basic Proposal. It therefore proposed a system in which the harvested material of the protected variety could be the basis of a royalty collection where two conditions were met: (i) that the breeder had not authorized the use of propagating material for the purpose of producing that harvested material: and (ii) that the breeder had had no reasonable opportunities to exercise his right in relation to the propagating material.

"1529.5 Mr. Harvey added that, quite understandably, the report had been drafted quite hurriedly and that a number of Delegations which had participated in the Working Group had proposed some very slight changes in the text which did not alter its meaning. The changes concerned the end of Article 14(1)(b), which should read as follows: 'provided that such harvested material was obtained through the unauthorized use of propagating material, and that (unless) the breeder has not had reasonable opportunity [opportunities] to exercise his right in relation to the propagating material.' Those changes would make it clearer that the second provision ('and that ... ') referred to the whole provision rather than to the clause immediately preceding it and beginning with: 'provided that.'

"1530. Miss BUSTIN (France) did not wish to speak on the substance of the proposal, which satisfied her Delegation, but on the editorial modifications that had just been read out. The Delegation of France was strongly attached to the wording of subparagraph (b) as it had been proposed by the Working Group, since the modifications alleged to be purely editorial did in fact have considerable effect on the onus of proof.

"1531. Mr. PERCY (UPEPI) observed that Article 14(1)(b) talked about 'any of the acts referred to in paragraph (a) above.' Were it not for other portions of that provision, one might think that the acts referred to were the acts in respect of propagating material contemplated in subparagraph (a). To avoid any misunderstanding, he suggested that the reference should be supplemented by a mention of the items (i) to (vii).

"1532. Mr. HAYAKAWA (Japan) stated that he did not wish to speak on the substance of the proposal but to seek clarification as to whether 'propagating material' included undifferentiated plant cells, such as calluses, which had the ability to be regenerated into whole plants but were cultivated in tanks without being regenerated.

"1533. Mr. ORDOÑEZ (Argentina) stated that his Delegation was quite satisfied with the result of the deliberations of the Working Group. It further agreed to the amendments presented orally by Mr. Harvey (Chairman of the Working Group).

"1534.1 Mr. ROYON (CIOPORA) observed that he had been seconded to the Working Group as an expert. He pointed out that, although paragraph 18 of the report stated that the Working Group had taken a unanimous decision, he was not part of the group since CIOPORA had not approved that text.

"1534.2 Mr. Royon then wished to make a general statement on Article 14 which constituted the very foundation of the Convention. CIOPORA had always demanded that the protection afforded under the UPOV Convention should extend to new products created and marketed by the breeder. However, in the case of ornamental varieties intended for the production of cut flowers and of fruit tree varieties, the new product was not the propagating material, but the cut flower or the fruit. That was why, in the same way as a patent for a product protected the manufacture, placing on the market and use of the product covered by the patent, the breeder's right should enable a breeder to exercise his right with respect to those who, as industrial horticulturists, exploited for commercial purposes the new product constituted by such cut flower or fruit. The reason for which CIOPORA held Article 14(1)(a) to be necessarily incomplete was that it did not cover use of propagating material for the commercial or industrial production of cut flowers or of fruit.

"1534.3 As for Article 14(1)(b), despite the praiseworthy efforts of the Working Group, it did no more than to give the breeder an indirect means—through the cut flower or fruit—of controlling after the act any propagating material that had escaped his control under Article 14(1)(a). It did not afford protection to cut flowers or to fruit as was demanded by the breeders concerned.

"1534.4 The present Convention, in Article 5(4), opened the possibility to member States to afford protection to the marketed product. CIOPORA had understood that the aim of the present Conference was to reinforce the rights of the breeder and to give him protection equivalent to that under a product patent. CIOPORA had welcomed that aim during the two years of collaboration with UPOV and had continually repeated that the important matter for it was the content of protection and not the means for the protection. CIOPORA noted with regret and bitterness that the statements of intent had not been followed by an effect and that the Conference, if it did not improve the content of the right in the last instance, would not have fully accomplished its mission.

"1535. The PRESIDENT gave the floor to the Delegation of Poland and stated that he would then proceed to the vote.

"1536. Mr. DMOCHOSWKI (Poland) stated that his Delegation supported the new formulation of Article 14(1)(a) and (b) as appearing in the report of the Working Group. To the question of the Delegation of Japan, he observed that cells and also parts of cells such as protoplasts were parts of plants.

"1537. The PRESIDENT put the proposal reproduced in paragraph 18 of document DC/91/118 to the vote on the understanding that the question of the drafting of the end of Article 14(1)(b) would be submitted to the Drafting Committee.

"1538. Mr. HAYAKAWA (Japan) insisted that his Delegation needed an answer to its question raised earlier. He invited the member Delegations which had an idea about the question to share it.

"1539. Mr. HARVEY (United Kingdom) replied that his Delegation did not fully understand the point made by the Delegation of Japan. If the question was whether cells and cell lines were parts of plants, the answer was yes; if they were harvested material, the answer would probably be no, though they could be.

"1540. Mr. HAYAKAWA (Japan) recalled that the question was about calluses which had the ability to be regenerated but were used in fermentation vats without being regenerated. Could they be considered as propagating material or not?

"1541. Mr. HEINEN (Germany) noted that the President had already repeatedly called for a vote. His Delegation wished to support the President in that endeavor. He proposed that questions be raised once the Conference had dealt finally with Articles 1 to 42.

"1542. Mr. HARVEY (Chairman of the Working Group) stated that he believed that the question of the Delegation of Japan related to what was meant by 'propagating material,' and not what was meant by 'harvested material.' The question was therefore appropriate to paragraph (1)(a) which had already been adopted by the Plenary. In addition, it related to a matter which had not been discussed in the Working Group, except that it had considered whether it should suggest the definition of 'propagating material' and had decided not to do so.

"1543. The PRESIDENT noted that there was no real opposition to the proposal. He concluded that it was therefore accepted. He thanked the Working Group and its Chairman, Mr. Harvey (United Kingdom).

"1544. The conclusion of the President was noted by the Conference.

"1545. Mr. BOGSCH (Secretary-General of UPOV) wished to ask for the benefit of the Drafting Committee whether the phrase: 'the breeder may make his authorization of acts under subparagraphs (1)(a)(i) to (vii) subject to conditions and limitations,' appearing in paragraph (1)(a), was intended to apply to that paragraph only or also to paragraph (1)(b). In the latter case, it should be made into a separate sentence referring to both.

"1546. Mr. HARVEY (Chairman of the Working Group) replied that the intention had been to include the phrase in paragraph (1)(a) because paragraph (1)(b) referred to 'the acts referred to in paragraph (a).' It followed that those acts could also be subject to conditions and limitations. To that extent, the phrase applied to both without this being explicit in paragraph (1)(b).

"1547. Mr. BOGSCH (Secretary-General of UPOV) stated that this was now clear, but that the Drafting Committee would have to take out the words 'subparagraphs (1)(a)(i) to (vii)' because they constituted a reference to the same provision. He added that his question had been motivated by the fact that, when this phrase had been proposed, reference had been made to the 1978 Act and the fact that the 1978 Act did not limit in any way the principle that the authorization given by the breeder could be made subject to such conditions as he might specify. On the basis of the answer received, the Drafting Committee would have to maintain the phrase inside paragraph (1)(a).

"1548. Mr. HOINKES (United States of America) observed that the text proposed by the Working Group for the introductory part of Article 14(1) was the same as the original wording ('Subject to Articles 15 and 16, the following acts shall require the authorization of the breeder'). He wondered whether the Conference had not adopted a different introductory phrase and wished to make sure that earlier decisions were not lost sight of.

"1549. The PRESIDENT replied that the Conference had indeed accepted the principle of the proposals of the Delegations of Denmark, Germany and Japan reproduced in document DC/91/96, DC/91/91 and DC/91/61. Those proposals had been referred to the Drafting Committee which had the task of finding a suitable formulation for the principle that the list of acts in paragraph (1)(a) was not exhaustive. (Continued at 1852.4)

"Article 14(1)(c) of the Basic Proposal [Article 14(3) of the Text as Adopted] - Scope of the Breeder's Right in Relation to Certain Products

"1550. The PRESIDENT opened the debate on Article 14(1)(c). He noted that the Conference had five proposals before it, namely from the Delegations of the United States of America (document DC/91/13), Poland (document DC/91/62), Spain (document DC/91/82), Germany (document DC/91/91) and Denmark (document DC/91/98). He gave the floor to the Delegation of Poland to introduce its proposal, which was the most far-reaching and whose adoption would close the consideration of Article 14(1)(c).

"1551. Mr. VIRION (Poland) said that his Delegation was opposed to an excessive broadening of breeders' rights and to the extension of those rights to the products made directly from harvested material. The exercise of breeders' rights in an industrial or animal product obtained by using the harvested material of the protected variety was impossible or at least extremely difficult in practice. Identification of the variety in those products would rarely be possible and would demand a control process that was likely to be costly and complicated. In fact, only a small number of breeders would be able to enjoy it and that was not a good thing in international law. Furthermore, Mr. Virion feared that the Lower House of his country would oppose such a right and that Poland would have great difficulty in acceding to the new text of the Convention.

"1552. Mr. DMOCHOWSKI (Poland) added that in 99.9% of the cases, the varietal differences would disappear in the industrial products and that a provision such as that in Article 14(1)(c) was therefore not opportune. The remuneration of special achievements which would be reflected in industrial products should be obtained through higher prices of propagating material or through special licensing agreements.

"1553.1 Mr. KIEWIET (Netherlands) stated that his Delegation was in favor of including a provision in the Convention concerning products directly obtained from harvested material as proposed in alternative A. Such a provision was the necessary complement to the protection to which the breeder was entitled in relation to a variety. It was only meaningful in the cases where it could be proven that a protected variety formed the basis of the product concerned. For those cases, even if they were limited in number, there should be a provision in the Convention.

"1553.2 Mr. Kiewiet added that the text of Alternative A should be brought in line with the text of paragraph (1)(b) as worded in the proposal of the Working Group which had just been adopted. That could be a matter for the Drafting Committee. Mr. Kiewiet concluded by saying that in reacting to the proposal of the Delegation of Poland, he had also reacted to the other proposals made in relation to Article 14(1)(c).

"1554. Mr. IANNANTUONO (Italy) said that his Delegation supported the proposal made by the Delegation of Poland.

"1555. Mr. ÖSTER (Sweden) emphasized that his Government was vigorously opposed to including products made directly from harvested material in the scope of the breeder's right. The reasons for this were as follows:

(i) Firstly, the notion of products made directly from harvested material was very unclear and could be interpreted to embrace a wide range of products which had only a limited connection with the plant breeder's right in the traditional meaning. The introduction of that concept would lead to litigation on the meaning of 'products made directly...'

(ii) Secondly, the possibility for the breeder to exercise his rights in respect of such products would depend very much on the species to which the variety belonged and the product in question. Thus, such a protection would be of a different value for different types of breeders in a quite arbitrary way.

(iii) Thirdly, the Delegation of Sweden was concerned about the interface between patent protection and plant variety protection. The proposed provision in Alternative A would give far-reaching protection in respect of products coming from the plant kingdom, even in respect of products which were not available to the breeder when he applied for a plant breeder's right. In the patent field, only those products would be covered by a patent that were included in the patent claim or were very similar to those. It was not reasonable to give a protection almost as broad as patent protection for plant varieties protected by a plant breeder's right.

(iv) Finally, such a provision could only be harmful to developing countries. For example, there should be no royalty on canned fruit or fruit derived from a protected variety and produced in a non-member State. The Delegation of Sweden was therefore supporting Alternative B in the Basic Proposal, which was similar to the proposal of the Delegation of Poland.

"1556.1 Miss BUSTIN (France) said that, just as the Delegation of the Netherlands, her Delegation was in favor of the Basic Proposal and, consequently, opposed to the proposed amendment submitted by the Delegation of Poland. It seemed to her that the claimed inequalities--linked to the provision of proof in order to exercise the supplementary right that would be afforded by paragraph (1)(c)--were not sufficient reason to refuse that right to breeders working on species for which proof of infringement could be provided under that provision. It had not to be forgotten that the text to be adopted in 1991 would have to apply for a

sufficiently large number of years and that technical and scientific progress would enable that new right to be applied to an ever growing number of species.

“1556.2 The Delegation of France was further not unaware that certain industrial uses of plant varieties fell—as was traditional under patent law. That likewise did not appear a valid reason to terminate the right afforded to breeders at the point where their varieties were used for industrial purposes. It held that, in such case, the advantages attaching to the two rights should be shared, if necessary, between the patentee and the breeder of the variety which served as a basis for a new industrial utilization since it was only in that case that the right under the patent would apply.

“1556.3 Miss Bustin concluded by saying that her Delegation remained concerned at certain situations, particularly the impossibility for breeders in certain sectors, such as aromatic or perfume plants, to exercise their rights at either of the earlier stages laid down in paragraphs (1)(a) and (b). It could possibly envisage amendments that would make the provision optional, but would in no event accept its omission from the Convention.

“1557.1 Mr. HAYAKAWA (Japan) stated that his Delegation was in favor of Alternative A in the Basic Proposal. The reason was that plant breeders' rights should also be exercisable when propagating material had been exported without the authorization of the breeder to a country where it was reproduced and used to produce products which were then imported into the country of origin, or when propagating material was reproduced and used to produce products and when those products were the only ones to be put on the market.

“1557.2 However, Mr. Hayakawa felt that Alternative A should not be interpreted too widely: in particular, the word ‘directly’ was very important. His Delegation interpreted it as meaning that this provision should only apply when certain characteristics of the variety were conserved to some extent in those products and when the variety could be identified through those characteristics and through the processing method leading to the product concerned. Otherwise the scope of the breeder's right would become unjustifiedly too wide and the interests of a bona fide third party who had engaged in the distribution of the product concerned would be affected.

“1558. Mr. HARVEY (United Kingdom) stated that his Delegation would have to support the amendment proposed by the Delegation of Poland because it believed that Alternative A would go too far in a Convention which dealt with plants. Alternative A concerned industrial products, manufactured products: only in very rare cases would there be a justification for allowing the breeder to collect a royalty on the manufactured or industrial products. Most of the royalties would be collected at the two previous stages, either on propagating material or on harvested material. Mr. Harvey finally asked the President to clarify his statement that, if the amendment was accepted, the other amendments would automatically fall.

“1559. The PRESIDENT stated that if a majority was in favor of the proposal of the Delegation of Poland, i.e., of omitting any reference to products directly made from harvested material in Article 14, there would be no point in discussing the other proposed amendments.

“1560. Mr. HARVEY (United Kingdom) replied that if that was the case—and that the other proposals designed to make this an option for the Contracting Parties would not be discussed and would not be considered for inclusion in the Convention—his Delegation might take the view that, although it would wish to support the proposal of the Delegation of Poland, it would have to oppose it to be able to consider the possibility of an optional provision for Contracting Parties.

“1561. Mr. BOGSCH (Secretary-General of UPOV) observed that the Rules of Procedure provided that the proposal which was the furthest removed from the Basic Proposal should be put to the vote first. This was difficult to apply in the present case because there were two alternatives in the Basic Proposal; there was thus room to discuss whether one should not vote on both of them. If Alternative B was carried, then there would still be room for checking whether an amended Alternative A could be acceptable. Mr. Bogsch concluded that this was tortuous and that the position expressed by the President was just as good. However, it had to be noted that some countries might wish to make a step in the direction of a compromise.

“1562. Mr. LOPEZ DE HARO (Spain) recalled that his Delegation had submitted a proposal for this provision. For the time being, however, it would like to support strongly the proposal made by the Delegation of Poland for the reasons given by Mr. Harvey (United Kingdom).

“1563. Mr. BURR (Germany) stated that it had already been ascertained in the preparatory meetings that certain member States would experience difficulties with certain products derived from harvested material where it was evidently possible to attribute the product to the variety. So far, it had been good practice, where it was discovered that one or the other member State would have difficulties, to help them, wherever possible, to overcome those problems. His Delegation was therefore in favor of not making the provisions binding, meaning that the legal system of the member State concerned could provide for extension of protection.

"1564.1 Mr. ESPENHAIN (Denmark) stated that his Delegation wished to follow the advice of Mr. Bogsch (Secretary-General of UPOV) because it was important that at least the arguments be put on the table before a vote was taken. It could associate itself to the position expressed by Mr. Burr (Germany). Alternative A in the Basic Proposal had indeed caused many difficulties in some member States, and even his Delegation had had some doubts whether a provision should be included.

"1564.2 On the other hand, during discussions at the national level, it was realized that there might be cases where it would be justified to have the possibility to include products made directly from harvested material in the scope of the breeder's right. The Delegation of France had already pointed out such cases. The Delegation of Denmark therefore proposed that the provision be made optional so that an extension of the breeder's right could be made under national law in specific situations, should it be realized at a later stage that such an extension was relevant and possible. The proposal reproduced in document DC/91/98 was already partly adjusted to the decisions on Article 14(1)(b), but would have to be revised in the light of the latest decisions.

"1565.1 Mr. GUIARD (France) wished to underline, following the statements by Mr. Burr (Germany) and Mr. Espenhain (Denmark), the opening made by his Delegation in its first statement with regard to possible acceptance of an optional provision.

"1565.2 He further pointed out that, although one could today consider such cases to be relatively rare, the situation was likely to develop. Indeed, it had to be admitted that production on an integrated scale was growing with varieties that increasingly satisfied the very specific needs of that form of production. Failing a provision within the Convention providing for protection applied to the product, breeders of such varieties could find themselves in an extremely delicate situation if they wished to assert their rights. It therefore appeared essential to maintain such a provision. Moreover, identification of varieties at the stage of the industrial product was altogether possible, without difficulty and without having recourse to expensive techniques.

"1566. Mr. KIEWIET (Netherlands) wished to add that there were also other ways of finding out whether a protected variety had been used to make a certain product. The products had a paper trail, so to speak, which could also lead to a protected variety without there being a need to identify that variety on a scientific basis.

"1567. Mr. ORDOÑEZ (Argentina) stated that, on the basis of its law and its administrative and technical procedures, and with the political support of farmers, traders and breeders, it was quite easy for Argentina to grant breeders' rights under the provisions of Article 14(1)(a) and (b). However, it would be quite difficult to grant such rights if they were to cover products made directly from harvested material. His Delegation therefore shared the view of the Delegations of Sweden and of the United Kingdom that the provision was perhaps going a bit too far and should not be included in the Convention.

"1568. Mr. ROYON (CIOPORA) stated that, in the opinion of CIOPORA, discussions were difficult because the wording of the whole of Article 14 was inadequate and because paragraph (1)(c) gave the impression that the right under the Convention might extend to any industrial product downstream. But that provision was just another illustration of the necessity already underlined by him for the breeder to be fully compensated for his creative work and for the added value which benefited those who used plant material of his variety commercially. The wording of paragraph (1)(c) being what it was, CIOPORA was of the opinion that it had to be maintained, but without the text between the square brackets.

"1569. Mr. STRAUS (AIPPI) stated that AIPPI supported the views expressed by Mr. Royon (CIOPORA) and especially by the Delegations of France and of the Netherlands. He added that the most likely case in which Article 14(1)(c) would apply was that of the importation of products from countries where there were no plant breeders' rights.

"1570. Mr. DOS SANTOS TARRAGO (Brazil) stated that the extension of the rights envisaged in Article 14 already presented a considerable amount of difficulties for non-member States. Those difficulties would be even greater if paragraph (1)(c) were included.

"1571. Mr. BRADNOCK (Canada) stated that his Delegation supported the proposal of the Delegation of Poland, largely for the reasons explained by Mr. Ölster (Sweden). The proposed Article 14(1)(c) seemed to be a very broad and sweeping proposal that was intended to regulate a few specific cases. The Delegation felt that it was inappropriate in the Convention.

"1572. Mr. WINTER (COMASSO) said that COMASSO advocated the Basic Proposal and proposed deletion of the part in square brackets. As far as the technical justification was concerned, he referred to the statements made by the Delegations of France and of the Netherlands.

"1573. Mr. LANGE (ASSINSEL) stated that ASSINSEL, as an international organization of breeders, was probably affected more than anyone else by the proposed provision and supported Alternative A most emphatically. Plant varieties would increasingly become of interest, as Mr. Guiard (France) had quite rightfully mentioned, for the technical processing and extraction of spices, raw materials for pharmaceutical

products, oils, lubricants and olfactants. His Delegation did not attach decisive importance to the difficulties cited by a number of Delegations since they were simply questions of the burden of proof which concerned breeders alone. Furthermore, the breeders were now obliged by the fundamental structure of Article 14 to initially exercise their rights at the stage of propagating material. That was already a considerable obstacle. Nevertheless, current developments in plant breeding had to incite general support for Alternative A. Those contemporary developments should not be hampered.

“1574. Mr. CHRETIEN (GIFAP) said that GIFAP favored Alternative A for the reasons set forth by the Delegation of France and the representative of ASSINSEL. It also shared the viewpoints presented by the representatives of AIPPI and of CIOPORA.

“1575. Mr. GUTIERREZ DE LA ROCHE (Colombia) stated that his Delegation wished to support the proposal of the Delegation of Poland, mainly for the reasons given by the Delegation of Brazil.

“1576. Mr. REKOLA (Finland) stated that the proposal to extend plant breeders' rights to material obtained directly from harvested material of the protected variety had aroused concern in Finland. It seemed to be impossible to evaluate its consequences on the trade and economy. Therefore, there was a large body of opinion in Finland that believed that plant breeders' rights should not be extended in the way proposed.

“1577. Mr. PERCY (UPEPI) stated that his Delegation wished to be associated with Alternative A and strongly supported the remarks made by Mr. Lange (ASSINSEL) and Mr. Straus (AIPPI).

“1578. Mr. BOBROVSZKY (Hungary) stated that his Delegation supported the proposal of the Delegation of Poland for the reasons given mainly by the Delegations of Sweden and Finland.

“1579. The PRESIDENT suggested that the Conference vote on the proposal of the Delegation of Poland reproduced in document DC/91/62.

“1580. Mr. VAN ORMELINGEN (Belgium) would have liked to have the subject of the vote and its implications explained to him. He wished to know in particular whether acceptance of the amendment proposed by the Delegation of Poland would still permit a debate to be held on the inclusion in the Convention of a provision of an optional nature.

“1581. The PRESIDENT replied that, to his understanding, voting in favor of the proposal of the Delegation of Poland would mean a deletion of Article 14(1)(c) and the closure of the debate on this Article. Since there would then be no opportunity for a new discussion on an optional provision, those who were in favor of such a provision would have to oppose the proposal.

“1582. Mr. HOINKES (United States of America) stated that he did not want to confuse the discussion further but felt that there was another way of tackling the problem in view of the fact that the Basic Proposal contained two alternatives. One might take up Alternative A first, since it appeared first, and consider whether or not it ought to be amended in accordance with the proposals made by several Delegations. The question would then be whether it was acceptable in its amended form. If it was not acceptable either in its original or in its amended form, then Alternative B would be accepted. The procedure now proposed might just be tantamount to putting the cart before the horse.

“1583. The PRESIDENT suggested that, on this basis, the vote should be postponed to give way to a discussion on the possibility of adopting a facultative provision. He observed that there were four proposals aiming at making Article 14(1)(c) optional, namely from the Delegations of the United States of America (document DC/91/13), Spain (document DC/91/82), Germany (document DC/91/91) and Denmark (document DC/91/98). The proposals of the Delegations of Spain and Denmark were exactly the same. The proposal of the Delegation of Germany went somewhat further in covering also the possible extension to further acts--which had already been discussed and accepted in principle. Finally, the Delegation of the United States of America proposed to have a new paragraph 14(2). The proposal being different from the others, he asked the Delegation of the United States of America to introduce it.

“1584.1 Mr. HOINKES (United States of America) stated that the proposal of his Delegation was to a large degree parallel to that of the Delegation of Germany. The reason for proposing a new paragraph (2) was simply that one could not leave the proposed optional provision in paragraph (1) because the latter introductory phrase provided that 'the following acts shall require the authorization of the breeder.' In other words, paragraph (1) was mandatory and a non-mandatory provision had to be in a free-standing paragraph.

“1584.2 As for the reason for which his Delegation made that proposal, Mr. Hoinkes stated that it was quite similar to that indicated by the Delegation of Germany: it had basically tried to bridge the gap between fundamentally opposed positions, the position of those who wanted to have products. It thought that it might be helpful to leave it to the Contracting Parties which felt very strongly about extending the breeder's right to products directly obtained from harvested material to so provide in their implementing legislation on the basis of the proposed provision. As for the actual wording of the proposal, the Delegation was now in the hands of the Conference. Obviously, the phrase: 'the acts ... shall require the authorization of the breeder' would have to be reinstated since the Conference had not accepted the concept of a 'right to prevent.'

"1584.3 Mr. Hoinkes then elaborated on the proposed deletion of: 'whose use, for the purpose of making such products, was not authorized by the breeder' after: 'provided that such products were made using harvested material falling within the provisions of paragraph (1)(b) above.' Since the harvested material was to fall under paragraph (1)(b) for the provision to be applicable, its obtaining was already something that the breeder had not authorized. If one were to leave the language as appearing in Alternative A, one would have to raise the rather amazing question of when and under what circumstances a breeder would ever authorize the making of products from harvested material whose production he had not authorized in the first place.

"1584.4 Finally, Mr. Hoinkes stated that the reference to 'the acts mentioned in paragraph (1), above,' should be completed to read: 'paragraph (1)(a)(i) to (vii), above.'

"1585. The PRESIDENT stated that the discussion should be limited at this stage to the possibility of having an optional provision. He invited the Delegations of Denmark, Spain and Germany to introduce their proposals.

"1586. Mr. ESPENHAIN (Denmark) recalled that he had already spoken on the proposal of his Delegation, and in fact introduced it, when he took the floor to show the spirit of cooperation which guided that Delegation. To make discussions easier, it would withdraw its proposal since the principle was in fact covered by the proposal that was already on the table and support the principles outlined by Mr. Hoinkes (United States of America). He commended him on his enlightening description of complicated matters and said that he was sure that Mr. Hoinkes was right on the point of the successive authorizations.

"1587. The withdrawal of the proposal of the Delegation of Denmark reproduced in document DC/91/98 was noted by the Conference.

"1588. Mr. LOPEZ DE HARD (Spain) stated that the proposal of his Delegation was to make the provision optional for each Contracting Party and to delete the brackets surrounding the last phrase. Since the Working Group on Article 14(1)(a) and (b) had drafted a new phrase, the Delegation would study the possibility of having the same phrase in this provision.

"1589. Mr. BURR (Germany) said that his Delegation wished to act in exactly the same way as the Delegation of Denmark. It also withdrew its proposal in favor of the proposal made by the Delegation of the United States of America, but, just as the Delegation of Spain, it requested that the Drafting Committee should adapt the provision to the formulation drafted by the Working Group on Article 14(1)(a) and (b).

"1590. The withdrawal of the proposal of the Delegation of Germany, reproduced in document DC/91/91, concerning the subject under discussion was noted by the Conference.

"1591. The PRESIDENT noted that there were two proposals left. He asked the Delegation of Spain whether it could go along with the proposal of the Delegation of the United States of America and withdraw its own proposal.

"1592. Mr. LOPEZ DE HARO (Spain) replied in the affirmative

"1593. The withdrawal of the proposal of the Delegation of Spain reproduced in document DC/91/82 was noted by the Conference.

"1594. Mr. VON ARNOLD (Sweden) stated that his Delegation was not fully clear whether the proposal of the Delegation of the United States of America was intended to include what had been called the 'cascade principle,' namely the following phrase that had been proposed by the Working Group on Article 14(1)(a) and (b): 'unless the breeder has had reasonable opportunities to exercise his right in relation to the propagating material.'

"1595. The PRESIDENT replied that this phrase was to be included.

"1596. Mrs. JENNI (Switzerland) stated that her Delegation would have in fact preferred Alternative A in the Basic Proposal, that was to say a provision binding on all Contracting Parties. However, if it created so much difficulty for certain countries, then her Delegation could also support its formulation as an optional provision.

"1597. Mr. KIEWIET (Netherlands) stated that, quite understandably, his Delegation was not in favor of the proposal of the Delegation of the United States of America because it wanted a mandatory provision on this subject in the Convention. But if a mandatory provision did not find a majority, it would, of course, prefer that proposal to the proposal of the Delegation of Poland to keep the Convention silent on the matter. Mr. Kiewiet asked the President whether it was possible to vote on the inclusion of a mandatory provision for his Delegation would, in the absence of that vote, be in a dilemma in relation to the proposal of the Delegation of the United States of America, which was its fallback position.

"1598. Mr. HARVEY (United Kingdom) declared that his Delegation could support the amendment proposed by the Delegation of the United States of America. He added that he was not sure that he could agree with the argument that the 'cascade clause' was not necessary. The fact that the provision referred to paragraph (1)(b) did not automatically mean that it referred to non-authorized harvested material. Paragraph (1)(b) actually referred to harvested material of any kind, with a clause that it would only apply if the harvested material was not authorized as a result of an authorization given in respect of propagating material. And where that paragraph was invoked, the harvested material would become authorized, and the provision now under consideration would not be applicable.

"1599. Mr. BRADNOCK (Canada) stated that his Delegation would support the comments of Mr. Kiewiet (Netherlands) with regard to the sequence of events in voting, but for the exact opposite reasons. It would prefer that there be no provision at all, and only as a fallback position would it consider an optional provision.

"1600. Mr. HAYAKAWA (Japan) wished to state the position of his Delegation. He recalled that it had made a proposal concerning paragraph (1)(c) (document DC/91/61). The proposal was to have a mandatory provision with the 'cascade principle,' which would have to be formulated in accordance with the proposal of the Working Group on Article 14(1)(a) and (b). His Delegation would not insist on the proposal in view of the direction taken by the Conference.

"1601. Mr. ORDOÑEZ (Argentina) stated that his Delegation supported the Comments of Mr. Bradnock (Canada).

"1602. Mr. STRAUS (AIPPI) stated that AIPPI supported the comments of the Delegations of Switzerland and of the Netherlands. He added that AIPPI had always found it extremely unfortunate when an international Convention prevented its parties from offering a higher level of protection. The proposal of the Delegation of the United States of America was therefore the minimum that should be done for breeders.

"1603. Mr. ROYON (CIOPORA) said that he supported the statement by Mr. Straus (AIPPI) as also the approach suggested by Mr. Kiewiet (Netherlands). Indeed, it seemed to him that if a vote was taken on accepting or rejecting Alternative A, the possibility of having that alternative accepted with a different wording would perhaps be lost.

"1604. The PRESIDENT invited the Delegation of the United States of America to comment on the question raised by the Delegation of the United Kingdom.

"1605. Mr. HOINKES (United States of America) replied that, in his opinion, the question raised by the Delegation of the United Kingdom referred to paragraph (1)(b) which indeed started with a reference to harvested material of whatever kind; but it then continued with a statement that the breeder could only exercise his rights with respect to harvested material that had been obtained through the unauthorized use of propagating material. In the opinion of his Delegation, a cross-reference to the provisions of paragraph (1)(b) did not permit a selective approach limited to the words 'harvested material.' Those provisions were to be considered altogether and therefore the only valid reference would be to harvested material that was obtained through the unauthorized use of propagating material. But if that seemed unclear, then it would just be a matter of drafting to bring clarity.

"1606. The PRESIDENT stated that he now wished to take a vote on the proposal of the Delegation of the United States of America.

"1607. Mr. DMOCHOWSKI (Poland), referring to Rule 38(2) of the Rules of Procedure, stated that the vote should first pertain to the proposal of his Delegation.

"1608. Mr. HARVEY (United Kingdom) wondered whether the provision under consideration was not one for which the President might wish to exercise his prerogative to ask for a show of hands to establish whether the feeling of the meeting was in favor of an optional provision or not and how the formal vote should be taken under the Rules of Procedure.

"1609. Mr. ESPENHAIN (Denmark) stated that his Delegation supported the proposal of Mr. Harvey (United Kingdom).

"1610. The PRESIDENT decided to follow the proposal of Mr. Harvey (United Kingdom). Having asked the Delegations which were in favor of an optional provision to raise their plates, he noted that there were nine such Delegations against six Delegations which opposed it.

"1611. Mr. KIEWIET (Netherlands) invited the President to also sound the opinion of the Conference on a mandatory provision.

"1612. The PRESIDENT decided to follow the proposal of Mr. Kiewiet (Netherlands). He counted five Delegations in favor of a mandatory provision and 13 Delegations which were opposed. He then proceeded to the vote on the proposal of the Delegation of Poland reproduced in document DC/91/62.

"1613. The proposal of the Delegation of Poland reproduced in document DC/91/62 was rejected by five votes for, 12 votes against and three abstentions.

"1614. The PRESIDENT then proceeded to the vote on the proposal of the Delegation of the United States of America reproduced in document DC/91/13, on the understanding that it would be referred to the Drafting Committee for the necessary adaptation, in particular in relation to the 'cascade principle.'

"1615. The proposal of the Delegation of the United States of America reproduced in document DC/91/13 was accepted by 10 votes for, four vote against and six abstentions. (Continued at 1852.4)

[...]

"Article 16 - Exhaustion of the Breeder's Right

"1637. The PRESIDENT opened the debate on Article 16 and on the proposal of the Delegation of New Zealand reproduced in document DC/91/70.

"1638. Mr. WHITMORE (New Zealand) stated that, as a result of the discussions on Article 14, his Delegation had decided to withdraw its proposal and to support the proposal of the Delegation of Japan.

"1639. The Conference noted the withdrawal of the proposal of the Delegation of New Zealand reproduced in document DC/91/70.

"1640. The PRESIDENT then opened the discussion on the proposal of the Delegation of Japan, reproduced in document DC/91/69, which concerned the introductory phrase of Article 16(1).

"1641. Mr. HAYAKAWA (Japan) stated that, in order to align that provision with Article 14(1)(a), his Delegation proposed to use the words: 'sold or otherwise put on the market.' The proposal only concerned a drafting matter.

"1642. Mr. BOGSCH (Secretary-General of UPOV) stated that the proposal represented a clarification and, without involving a change in substance, certainly reflected better the intentions.

"1644. It was so decided.

"1645. The PRESIDENT then opened the debate on the proposal of the Delegation of Denmark reproduced in document DC/91/109.

"1646.1 Mr. ESPENHAIN (Denmark) stated that his Delegation did not intend to change the substance of the Article, but to clarify it. Paragraph (1)(i) could be understood in the sense that the breeder's right would not be exhausted if anyone was using the material purchased from the breeder for normal propagation. If somebody bought seed, it was for propagation to produce a harvest; in that case, of course, the breeder's right should be exhausted. His Delegation felt that the text in the Basic Proposal might create some doubts about this. It therefore proposed that the words: 'for purposes other than consumption' be included. This would mean that if anyone was to use the material put on the market by the breeder for purposes other than consumption--for propagating purposes--then, of course, the breeder would have an opportunity of exercising his right.

"1646.2 Mr. Espenhain added that his Delegation also believed that this proposed amendment would cover the situation, discussed under Article 14, of material bought for use on a person's own property--not with the intention to sell or put on the market new propagating material--but for the purpose of having propagating material for the production of, for example, fruit. It believed that this would not be a consumption purpose.

"1647. Miss BUSTIN (France) confessed that she had perhaps not altogether followed the explanations given by Mr. Espenhain (Denmark), particularly towards the end of his statement. She would like him to explain what was achieved by adding the words: 'for purposes other than consumption' by comparison with the exemption from the right of the breeder for acts done privately and for non-commercial purposes as presently proposed in Article 15(1)(i). From the explanations given, she had understood that, in fact, Article 16(1) would repeat the provision already included in the Article on exceptions to the right.

"1648. Mr. ESPENHAIN (Denmark) replied that he did not know whether he could really add anything. In the preceding meeting, the Conference had adopted a revised version of Article 14(1) on the basis of the report of the Working Group on Article 14(1)(a) and (b). The proposal in fact had been drafted before that revision had taken place. On the other hand, his Delegation still felt that Article 16 left some doubt because the breeder's right would not exhaust when somebody bought propagating material, because he propagated it thereafter. A farmer who bought 100 kg of cereal seed would produce harvest of, say, one tonne, and this was propagating. The provision might therefore lead to misunderstandings and that was the reason for seeking a clarification.

"1649. Miss BUSTIN (France) said that, following the statement by Mr. Espenhain (Denmark), she could but oppose that proposed amendment. In- deed, it appeared extremely dangerous to her to provide for exhaustion of a right that did not exist since, in fact, consumption for private purposes was exempted from the breeder's right. The proposed amendment would be likely to cause confusion in a case where, for the moment, there was none, unless the 'consumption' that was to be referred to in Article 16 was something else. However, the Delegation of Denmark had just assured her that it presumed that it added nothing to the existing text. The provision was therefore pointless and the Delegation of France was opposed to it.

"1650. Mr. ESPENHAIN (Denmark) apologized for having created a possible misunderstanding. He stated that he had not used the words: 'consumption for private use.' His Delegation fully shared the view that that use was covered by Article 15(1); when somebody bought seeds or fruit trees for commercial use, he would of course have to propagate it in the case of cereals, and his Delegation wanted to make sure that that case was covered as well as regards the exhaustion of the right. This was the example which was given in the report of the Working Group on Article 14(1)(a) and (b), namely the commercial use of propagating material for the production of fruit.

"1651. Miss BUSTIN (France) said that she was becoming more and more lost. Was the Conference in the process of inserting Article 15(2) into Article 16(1) or did it wish to introduce an exception that was currently neither in Article 15(1) nor in Article 15(2)? Are we saying that the breeder's right had to be exhausted although there was a new reproduction or propagation of the variety for the purpose of selling the harvested material? Miss Bustin admitted that she failed to understand. For her, the amendment was linked either to Article 15(1), particularly the provision on acts done privately and for non-commercial purposes, or to Article 15(2).

"1652. Mr. HARVEY (Chairman of the Working Group on Article 14(1)(a) and (b)) drew the attention of the Conference to the wording of Article 14 proposed by the Working Group. That wording explained the issue raised by the Delegation of Denmark. He understood that its position was to say that if reproductive material was sold to a purchaser, whereby of course a royalty was collected, and if the purchaser multiplied one rose bush up into one thousand for the purpose of producing cut flowers, it could be argued that the exhaustion of the right took place on the one rose bush in the first instance. The explanation of the position of the Delegation of Denmark, as given to the Working Group, was that this was unfair: had the breeder known when he sold the rose bush that it was to be used to produce a thousand rose bushes to produce cut flowers, he would not have agreed to the sale in that form. The Delegation of Denmark was seeking to redress that injustice if it were to occur. Whether it had chosen the right words was for it to say.

"1653. Miss BUSTIN (France) said that she had at last obtained the explanation she wanted. The Delegation of France could give very broad support to the intentions behind that proposed amendment.

"1654. Mr. KIEWIET (Netherlands) stated that his Delegation could also, of course, support the idea behind the proposal. However, it was of the opinion that this idea was already covered by the present text of Article 16(1)(i) for the propagation at issue--buying one rose bush and multiplying it into one thousand--was 'further propagation of the variety.' The additional words proposed by the Delegation of Denmark gave--at least--the impression that they were a restriction to the restriction. Therefore, although it supported fully the idea behind the proposal, the Delegation of the Netherlands considered that the proposal was not up to its purpose.

"1655. Mr. GUIARD (France) said that the explanations given by Mr. Harvey (Chairman of the Working Group on Article 14(1)(a) and (b)) had clarified the proposal but that, on reading the text, it would seem that the breeder's right did not extend to acts of utilization unless those acts implied reproduction or propagation. The breeder's rights did not therefore apply to acts of consumption. The fact of referring solely to 'consumption' caused great concern to the Delegation of France since it did not know what that term implied. The expression was much too vague.

"1656. Mr. ESPENHAIN (Denmark) stated that this was an example of the problems arising when one had to use a language that was not his mother tongue. His Delegation might have used the wrong term, but the reason for which it used it was that it was also used in the next subparagraph. The same interpretation would have to be given in relation to both subparagraphs (i) and (ii), and therefore the term 'consumption' might perhaps be misunderstood. Mr. Espenhain at least understood from the Delegation of France that this could be the case because of the link between the two provisions. His Delegation had no intention to link those provisions. Those who had one of the official languages as mother tongue could perhaps say whether the wrong term was used in both of them. His Delegation was concerned at the use of 'further propagation' because it believed that if a breeder put seed on the market for the production of for example fodder, that seed would be put on the market for that purpose, and it understood that this was consumption.

"1657. Mr. BOGSCH (Secretary-General of UPOV) stated that he was of the same view as the Delegation of France and did not understand the word 'consumption' in the context described. He asked whether it meant eating or using in any other way.

"1658.1 Mr. KUNHARDT (Germany) said that his Delegation had understood the aim of the proposal, on the basis of the explanations given, but that it shared the concern as to the term 'consumption.' It had

understood that the Delegation of Denmark wished to ensure that material put on the market as propagating material, could also be used as such, that was to say could be grown. Although normal cultivation in the biological sense was or could be propagation, it should not fall under the provision under discussion.

"1658.2 In order to ensure that the provision had to be inverted and it had to be stated that the item concerned only use of material as propagating material in those cases where the material was not intended as propagating material. Such a provision was contained, under item (iii), in the proposal made by the Delegation of Japan in document DC/91/69. It would be conceivable to merge items (i) and (iii), for instance as follows: '... unless material had been used as propagating material although it was not intended as such when put on the market.'

"1658.3 To summarize: the suggestion made by the Delegation of Denmark was covered by the proposal of the Delegation of Japan on paragraph (1)(iii). That latter provision could be merged with paragraph (1)(i). The Delegation of Germany supported the principle behind it, but had doubts as to whether it was well expressed in the proposal made by the Delegation of Denmark.

"1659. Mr. ROYON (CIOPORA) said that CIOPORA shared the views expressed by the Delegation of France and considered that the proposal of the Delegation of Denmark, as it was worded at present, might represent a further limitation of the already restricted right granted to the breeder. The proposal mentioned: 'further propagation of the variety in question,' but Article 14(1)(a)(ii) mentioned not only 'propagation' but also 'reproduction.' And it might well be that a cut-flower grower, for instance, bought material only once and reproduced it to the same amount every year in order to escape royalty payment. The proposal would add another loophole in the Convention.

"1660. Mr. LLOYD (Australia) stated that the proposal could be more specific if it were drafted along the following lines: 'propagation of the variety in question for multiplying propagating material.'

"1661.1 Mr. WANSCHER (Denmark) recalled that he had been a member of the Working Group and wished to repeat the example he had given to that Group, although its Chairman, Mr. Harvey, had made a very good reference to it. His Delegation thought that there was a loophole in the draft Convention. If the Conference could assure it that there was none, then it would be prepared to accept that, but the loophole which it saw was to the detriment of the breeder, and it wanted to be of help to the breeder.

"1661.2 The example he had given was that of a breeder who put apple trees on the market on the assumption that they would be planted in a garden and grown to produce apples. The shopkeeper would of course never ask a customer whether he bought the trees to plant them directly in his private garden or to use them as the basis for establishing a commercial orchard. If the latter happened, it would be reasonable to say that it was infringement and that the breeder's right to some kind of royalty had not been exhausted. One might face the difficulty that the royalty could not be claimed by counting the apple trees in the orchard because nobody could prove the origin of the trees. The breeder might only be able to say that they were from his variety and had been propagated without his authorization. It would then be reasonable for him to have some kind of remuneration based on an agreement with the illegal grower, based, for instance, on the turnover of apples, because the purpose of all this was to harvest apples, not just once as with grain or other annual crops, but as long as the apple trees would produce apples. The same thing could happen with rose bushes.

"1661.3 This was what the Delegation of Denmark tried to solve and meant with 'consumption.' The apples and the cut flowers were the products for consumption, but the multiplication had been carried out without authorization. If one followed the text as the Delegation read it, the breeder's right would be exhausted at the time when the plants were sold to the flower shop, and there was no natural link between the breeder and the grower. The grower might be in good faith as to the breeder's right, but this was not fair to the breeder.

"1662. Mr. GREENGRASS (Vice Secretary-General of UPOV) stated that he wished to try to elucidate this question because he had been present in the Working Group, where Mr. Wanscher (Denmark) had referred to that example on more than one occasion. When somebody bought some apple trees from a retailer and reproduced them, then the reproduction was an act under Article 14(1)(a) which was an infringement of the breeder's right. Pursuant to the text under consideration on the exhaustion of the breeder's right, there was indeed a sale of apple trees; but, notwithstanding the fact that the original sale involved an act that exhausted the right, there was a further propagation of the variety and the breeder's right in relation to that further propagation was not exhausted. The text in the Basic Proposal was thus perfectly satisfactory and enabled the breeder to assert his rights without the addition that was proposed.

"1663. Miss BUSTIN (France) said that her Delegation could but share the analysis made by Mr. Greengrass (Vice Secretary-General of UPOV).

"1664. Mr. ESPENHAIN (Denmark) stated that the discussion showed that there was a difficulty with the language. For example, the word 'consumption' was used in paragraph (1)(ii), and he wondered whether that 'consumption' was really meant to be as narrow as it had been suggested in relation to the proposal of

his Delegation. Could material put on the market by the breeder be exported for the production of fodder? Was that production not meant to be 'consumption'?

"1665. The PRESIDENT stated that there was no need to elaborate on the meaning of 'consumption.' The proposal had now been debated at length and its purpose was now understood. He therefore proceeded to the vote on the understanding that the proposal would be submitted, if adopted, to the Drafting Committee which would have to find a better wording.

"1666. The proposal of the Delegation of Denmark reproduced in document DC/91/109 was rejected by two votes for, 12 votes against and five abstentions. (Continued at 1852.5)

"1667. The PRESIDENT then opened the debate on the proposal of the Delegation of Japan reproduced in document DC/91/69 and relating to paragraph (1)(iii).

"1668. Mr. HAYAKAWA (Japan) stated that the text of paragraph (1)(iii) in the Basic Proposal was too broad and too imprecise. For example, if seeds were sold as propagating material and somebody bought those seeds to use them as animal feed, the right would not be exhausted under this paragraph. His Delegation therefore proposed to limit it to the case where material was used as propagating material which had not been sold or otherwise put on the market as propagating material.

"1669. Mr. VON ARNOLD (Sweden) stated that, after having heard the debate on the proposal of the Delegation of Denmark, his Delegation wondered whether it was really necessary to have a subparagraph (iii) as proposed by the Delegation of Japan, that is, whether its concern was not covered by other Articles and paragraphs. It felt that Article 16(1)(iii) should be deleted altogether. In such an important field as the exhaustion of rights it was particularly important to have rules that were practical to apply. There had been talks during the preparation work of potatoes put on the market for the production of pommes frites and then used to produce chips. Although this was perhaps not a very serious interpretation of the provision, it showed that it was not practical and could lead to litigation. In the view of his Delegation it should be deleted.

"1670. Mr. BURR (Germany) observed that those parts of the Basic Proposal in square brackets were not a part of the proposal, but simply reproduced a minority opinion for further consideration. His Delegation could therefore go along with the Basic Proposal, i.e., with deletion of that part that corresponded to item (iii). On the other hand, the Delegation had some sympathy for the proposal made by the Delegation of Japan which made what could have been meant in that subparagraph somewhat clearer. However, it was of the same opinion as the Delegation of Sweden. Nevertheless, as already mentioned, the proposal should perhaps be linked with item (i) in order to make the legal situation clear.

"1671. Mr. WHITMORE (New Zealand) stated that the proposal was very easy to follow but, like the Delegation of Sweden, his Delegation wondered whether it was really necessary. He asked Mr. Greengrass (Vice Secretary-General of UPOV) to give his opinion on the proposal.

"1672.1 Mr. GREENGRASS (Vice Secretary-General of UPOV) stated that he could give an example that might be relevant to the proposal and that would differ slightly from the example that had been used by the Delegation of Denmark. Rose bushes could be placed on the market through two very different channels of trade: the sale to the consumer and the sale to cut-flower producers. A rose breeder might well choose to distinguish between those two outlets because, plainly, the commercial importance of an outstanding cut-flower producer and his potential commercial return would be very different. What could happen in that case was that somebody who wished to use the variety for producing cut flowers bought bushes at the retail outlet. That example would be covered only by the proposal of the Delegation of Japan, and not by the reference to 'production or reproduction' in Article 14(1)(a). In that sense the proposal would be useful.

"1672.2 Another example would be the consumption potato--that is, potatoes that were destined to be consumed and to disappear--that were diverted into the channels of seed. Then, once again, the normal commercial arrangements would be disrupted and that example would also be covered by the proposal. The proposal had some merit. It was more specific than the original paragraph (1)(iii) which had disturbed some people because it was too general.

"1673. Mr. KIEWIET (Netherlands) stated that his Delegation could not support the provision laid down in paragraph (1)(iii) for the following reasons: if the use of a variety or of material thereof fell outside the field of use for which the breeder put it originally on the market, it was in the opinion of his Delegation a matter to be solved between the breeder and the parties concerned on the basis of private law. Third parties who acted in good faith in obtaining material of a protected variety from others than the breeder without knowing under what conditions this material was originally put on the market should not be the victim of abuses in relation to that material committed by others. His Delegation could not accept that provision either in the form in which it appeared in the Basic Proposal or in the more restricted form that was proposed by the Delegation of Japan.

"1674. Mr. PALESTINI (Italy) stated that his Delegation would go along with the comments of the Delegations of Sweden and Germany and would favor the deletion of Article 16(1)(iii), without substitution of another text.

"1675.1 Mr. HOINKES (United States of America) observed that Article 16(1)(iii) was within square brackets in the Basic Proposal and was therefore not part of the Basic Proposal. There was thus no question of deletion. So the Conference could safely dispose of the ghost of Article 16(1)(iii).

"1675.2 Turning to the proposal of the Delegation of Japan, Mr. Hoinkes observed that it did have some utility in that it could serve as a matter of clarification; but the question remained whether it was necessary in the light of the drafting of the introductory phrase of Article 16(1) and of subpara-graph (i). It was provided that: 'The breeder's right shall not extend to acts concerning any material . . . which has been . . . put on the market unless such acts involve further propagation of the variety'; according to paragraph (2), 'material' could be propagating material of any kind, harvested material, etc. The result was that when any material, whether it was put on the market as propagating material or not, was used in such a manner as to involve further propagation of the variety, the breeder's right did not exhaust.

"1675.3 Mr. Hoinkes wished to quote in this respect the example of the use as seed--and not as a spice--of celery seed sold in jars in groceries. The act of using that celery seed that was put on the market as a spice to grow celery was covered by the right. The proposal of the Delegation of Japan might therefore be considered as unnecessary.

"1676. Miss BUSTIN (France) said that the text of the Basic Proposal appeared to her Delegation to comprise only two subparagraphs in Article 16(1). The additional subparagraph proposed by the Delegation of Japan would represent, according to its interpretation, a restriction in the existing contractual freedom that had in fact been confirmed by the sentence that corresponded to Article 5(2) of the 1978 Act which the Working Group on Article 14(1)(a) and (b) had added to Article 14(1). Consequently, it was unable to support the proposition and had to oppose it.

"1677. Mr. HAYAKAWA (Japan) recalled that the concern of his Delegation which led to the proposal was simple. It related to the case of somebody who bought grain or soya beans sold for consumption and used them for growing a harvest for sale. In that case, there was no propagation, the process of producing a plant from a seed not being propagation. That case was not covered by Article 16(1)(i).

"1678. Mr. ORDOÑEZ (Argentina) stated that his Delegation supported the proposal of the Delegation of Japan for the same reason as it had supported the proposal of the Delegation of Denmark.

"1679. Mr. STRAUS (AIPPI), having heard a number of examples of practical cases, wished to draw the attention of the Conference to a substantial difference between the texts of Article 16(1)(ii), where the words 'consumption' and 'Ernahrung' had a different meaning. He wondered whether this was only a drafting matter or a substantial difference.

"1680.1 Mr. ROYON (CIOPORA) observed that when Article 16(1)(iii), which was not part of the Basic Proposal, had been proposed for inclusion between square brackets, the Basic Proposal contained an item (viii) in Article 14(1)(a). As stated by the Delegation of the Netherlands, the matter could be left to contractual law. However, since Article 14(1)(a)(viii) had been deleted, CIOPORA considered that there were good reasons for introducing paragraph (1)(iii) in Article 16. It supported the text now appearing between square brackets.

"1680.2 Mr. Rayon then turned to the proposal of the Delegation of Japan and the example given by Mr. Greengrass (Vice Secretary-General of UPOV) of a professional florist who would buy rose bushes from a wholesaler selling plants for amateur gardening, to exploit them for the sale of cut flowers. He stated that this was clearly a form of exploitation of the variety which the breeder had not permitted when he had granted a license to propagate his variety as garden plants. In that case the breeder had not received an adequate remuneration, and his right should not be exhausted.

"1680.3 However, he could not draw the same conclusion as the Vice Secretary- General on that example because, Mr. Rayon stated, the proposal of the Delegation of Japan did not cover that case. Indeed the proposal was nothing but a remake of the third sentence of Article 5 (1) of the 1978 Act, except that it was no longer limited to ornamental plants. In the particular example concerned, the rose bushes bought by the professional florist were not used as propagating material; they were not at all propagated, but simply used for the commercial production of cut flowers. Therefore, for the proposal to be acceptable as some form of response to the needs of breeders of ornamental plants, the words 'as propagating material' should be deleted after the word 'use.'

"1681.1 Mr. ESPENHAIN (Denmark) stated that his Delegation supported the proposal of the Delegation of Japan. The examples given by Mr. Greengrass (Vice Secretary-General of UPOV) in fact showed that there was a similarity between that proposal and the proposal of his Delegation. Mr. Espenhain further observed that the amendment proposed by Mr. Rayon (CIOPORA) was very interesting, but would have to be considered further.

"1681.2 Mr. Espenhain then elaborated on the meaning of words such as 'propagation' and 'consumption.' Mr. Straus (AIPPI) had correctly stated that there was a difference between the texts. For his Delegation,

'further propagation' appearing in Article 16(1)(i) might convey a false impression. An explanation should be given at a later stage as to whether it would cover the case where one just planted a seed and obtained a crop for the production of fodder, for example--a case which his Delegation would consider to be consumption in the broad sense, as opposed to the meaning that underlayed this discussion, which was: 'consumption by human beings in accordance with Article 16(1)(ii).' There had to be 'consumption' in a broad sense when somebody put on the market seeds which were used for production of animal feed, for example, and the breeder's right should be exhausted in that case because the seeds had been put on the market for that purpose.

"1681.3 But then, the word 'propagation' might create difficulties because, if one considered propagation to be a whole cycle, then one could say that somebody who bought seed of a barley variety, for example, would buy it for the purpose of producing seed. There would be a full cycle of seed production. If the new seed was intended for malt and beer production, and if the beer had been drunk, there would, in the opinion of his Delegation, be 'consumption' and the breeder's right would be exhausted. But if the seed was reused commercially, there would be two possibilities: either it was used on a farmer's own premises, and the act of use would be covered by Article 15(2) (the so-called 'farmer's privilege'), or it would fall under Article 14(1)(a), 'production or reproduction' of new seed.

"1681.4 His Delegation therefore believed that the Conference ought to be very careful about the word 'propagation,' which the Delegation understood to refer to the case where one obtained a crop, or a crop of seed, i.e., a full cycle. It also ought to be careful about the word 'consumption.' His Delegation certainly understood Article 16(1)(ii) to mean that the breeder's right was also exhausted when, for example, grass seed was exported for the production of a fodder crop. In its view, that would also be 'consumption.'

"1682. Mr. ROBERTS (ICC) stated that ICC endorsed the remarks made by Mr. Rayon (CIOPORA). It shared CIOPORA's disappointment at this Conference turning out so disappointing for breeders of ornamental plants and fruit crops. More specifically on the proposal of the Delegation of Japan, ICC commended the solution suggested by the Delegation of Germany to incorporate the proposed subparagraph (iii) into subparagraph (i). This would have the great advantage that it would be clearly legal for the farmer who bought seed from the breeder to sow it.

"1683. The proposal of the Delegation of Japan, reproduced in document DC/91/69, to add a subparagraph (iii) to Article 16(1) was rejected by six votes for, 10 votes against and four abstentions.

[...]

"1852.4 (Continued from 1549, 1615 and 1636) In Article 14, the Committee had made the following amendments:

(i) In paragraph (1)(a)(i), it had added the word 'multiplication' in brackets after 'reproduction' in the English text to ensure that the meaning was clear and to overcome what was identified as a possible difference of interpretation between the three languages.

(ii) The Committee had also been asked to look at the best way of framing Article 14(1), in a way that would best separate out the various acts and their subject matter whilst making it clear, firstly, that the protection relating to propagating material was mandatory but could be added to by Contracting Parties, secondly, that the protection relating to harvested material was mandatory and, thirdly, that the extension to directly made products was optional. The Committee had therefore restructured the former paragraph (1) into paragraphs (1) to (4) and provided in paragraph (4) that Contracting Parties may add to the acts mentioned in items (i) to (vii) of the former paragraph (1)(a) (new paragraph (1)).

(iii) The former Article 14(2) relating to essentially derived and certain other varieties thus became Article 14(5). The Committee had also been asked to consider its structure. The main problem involved the need to express the meaning of 'essentially derived variety' in such a way that it was the expression of the essential characteristics of the initial variety and the retention of that expression that was important. It had also been felt important to ensure that the examples, such as the selection of a natural or induced mutant, were not definitive but were just examples. In view of the need for technical precision and internal consistency in this paragraph, the Committee had asked three of its members, Mr. Bould (United Kingdom), Mr. Guiard (France) and Mr. Roth (United States of America) to form a subcommittee to produce a revised wording together with the Secretary of the Committee. The text of paragraph (5)(b) was based largely upon their work.

"1852.5 (Continued from 1666) In Article 16 (exhaustion of the breeder's right), paragraph (1)(ii) now referred to the export for food consumption purposes. The Committee believed that this term would include feed for animal production purposes. In paragraph (2), the term 'harvested material' had been expanded to include entire plants and parts of plants, to be consistent with Article 14(2). (Continued at 1941).

[...]

"1941. (Continued from 1825.5) Mr. ESPENHAIN (Denmark) asked whether it was appropriate to ask now for consideration of Article 16.

"1942. The PRESIDENT indicated that the wording 'for food consumption purposes' appearing in Article 16(1)(ii) had been the subject of a discussion in the Drafting Committee and that the Delegation of Denmark had proposed to substitute 'final' for 'food.' The Drafting Committee had been of the opinion that this was a point to be decided in Plenary. He therefore asked whether this little change was agreeable.

"1943. Mr. DMOCHOWSKI (Poland) stated that his Delegation supported the proposal of the Delegation of Denmark.

"1944. The PRESIDENT asked whether the proposal was opposed. In the absence of any opposition, he declared it accepted.

"1945 The conclusion of the President was noted by the Conference.

ADOPTION OF THE NEW ACT OF THE UPOV CONVENTION

[...]

"1971. The PRESIDENT then put the text reproduced in the reassembled document DC/91/138 to the vote. He noted that no member Delegation wished to vote against this text and that no member Delegation wished to abstain. He therefore declared the text unanimously adopted as the International Convention for the Protection of New Varieties of Plants of December 2, 1961, as Revised at Geneva on November 10, 1972, on October 23, 1978, and on March 19, 1991.

FINAL DRAFT (Extract of document [DC/91/138](#))

"Text of Article 14 and Article 16 adopted by the 1991 Act Diplomatic Conference:

"Article 14

"Scope of the Breeder's Right

"(1) [Acts in respect of the propagating material] (a) Subject to Articles 15 and 16, the following acts in respect of the propagating material of the protected variety shall require the authorization of the breeder:

- (i) production or reproduction (multiplication),
- (ii) conditioning for the purpose of propagation,
- (iii) offering for sale,
- (iv) selling or other marketing,
- (v) exporting,
- (vi) importing,
- (vii) stocking for any of the purposes mentioned in (i) to (vi), above.

(b) The breeder may make his authorization subject to conditions and limitations.

"(2) [Acts in respect of the harvested material] Subject to Articles 15 and 16, the acts referred to in items (i) to (vii) of paragraph (1)(a) in respect of harvested material, including entire plants and parts of plants, obtained through the unauthorized use of propagating material of the protected variety shall require the authorization of the breeder, unless the breeder has had reasonable opportunity to exercise his right in relation to the said propagating material.

"(3) [Acts in respect of certain products] Each Contracting Party may provide that, subject to Articles 15 and 16, the acts referred to in items (i) to (vii) of paragraph (1)(a) in respect of products made directly from harvested material of the protected variety falling within the provisions of paragraph (2) through the unauthorized use of the said harvested material shall require the authorization of the breeder, unless the breeder has had reasonable opportunity to exercise his right in relation to the said harvested material.

"(4) [Possible additional acts] Each Contracting Party may provide that, subject to Articles 15 and 16, acts other than those referred to in items (i) to (vii) of paragraph (1)(a) shall also require the authorization of the breeder.

"(5) [Essentially derived and certain other varieties] (a) The provisions of paragraphs (1) to (4) shall also apply in relation to

- (i) varieties which are essentially derived from the protected variety, where the protected variety is not itself an essentially derived variety,

- (ii) varieties which are not clearly distinguishable in accordance with Article 7 from the protected variety and
 - (iii) varieties whose production requires the repeated use of the protected variety.
- (b) For the purposes of subparagraph (a)(i), a variety shall be deemed to be essentially derived from another variety ('the initial variety') when
- (i) it is predominantly derived from the initial variety, or from a variety that is itself predominantly derived from the initial variety, while retaining the expression of the essential characteristics that result from the genotype or combination of genotypes of the initial variety,
 - (ii) it is clearly distinguishable from the initial variety and
 - (iii) except for the differences which result from the act of derivation, it conforms to the initial variety in the expression of the essential characteristics that result from the genotype or combination of genotypes of the initial variety.
- (c) Essentially derived varieties may be obtained for example by the selection of a natural or induced mutant, or of a somaclonal variant, the selection of a variant individual from plants of the initial variety, backcrossing, or transformation by genetic engineering.

"Article 16

"Exhaustion of the Breeder's Right

"(1) [Exhaustion of right] The breeder's right shall not extend to acts concerning any material of the protected variety, or of a variety covered by the provisions of Article 14(5), which has been sold or otherwise marketed by the breeder or with his consent in the territory of the Contracting Party concerned, or any material derived from the said material, unless such acts

- (i) involve further propagation of the variety in question or
- (ii) involve an export of material of the variety, which enables the propagation of the variety, into a country which does not protect varieties of the plant genus or species to which the variety belongs, except where the exported material is for final consumption purposes.

"(2) [Meaning of 'material'] For the purposes of paragraph (1), 'material' means, in relation to a variety,

- (i) propagating material of any kind,
- (ii) harvested material, including entire plants and parts of plants, and
- (iii) any product made directly from the harvested material.

"(3) ['Territory' in certain cases] For the purposes of paragraph (1), all the Contracting Parties which are member States of one and the same intergovernmental organization may act jointly, where the regulations of that organization so require, to assimilate acts done on the territories of the States members of that organization to acts done on their own territories and, should they do so, shall notify the Secretary-General accordingly.'

[End of Annex and of document]