

The history of the protection of harvested material in UPOV 1991.

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Summary and Conclusion

In the first Convention of the Union for the Protection of new varieties of Plants in (UPOV) in 1961, the scope of protection was limited to the production, marketing and sale of propagation material.

This limitation offered a loophole for producers of fruits and flowers. They could reproduce the variety in a neighboring country, where the variety could not or was not protected, harvest the fruits or the flowers from the reproduced material and import those products into the country where the variety was only protected by its reproductive material.

So, the owner of the protected variety could not prevent the commercial sales of the fruits and flowers of his protected variety. This so-called U-turn construction was often possible because each UPOV61-78-member state could and did protect different genera and species.

For agricultural seed crops this limited scope of protection was sufficient as the seed production in European countries fell, and still falls, under a seed certification system that provides already for a good control for the breeder on the seed production of his variety.

In the course of the years the need for extension of the protection to the marketed product grew under the pressure of the ornamental and fruit breeders, who were not satisfied with the limited scope of the UPOV Conventions.

In 1986, 25 years after the first Convention, the UPOV Council started a procedure to extend the breeder's right to all material of the protected variety. In the following years the Administrative and Juridical Committee (CAJ) organized meetings with representatives of the member states and with representatives of the international organizations (IOM). The results of the discussions were reported in the CAJ and IOM papers.

The first proposal in April 1988 extends the scope of protection to include the offering for sale, placing on the market, use of any kind, importation or holding for the above-mentioned purposes of (*all*) plant material of the variety. Combined with an exhaustion paragraph for products sold on the market, except for the reproduction of the variety.

In October 1989 Germany proposed an amendment¹ in order to oblige the breeder to exercise his right at first on the propagating material before exercising it on the harvested material. The main part of the text is formulated as follows:

(2) Where the owner of the breeder's right is unable to exercise his rights in accordance with paragraph (1)(ii), his right shall extend to the harvested material of the variety. where the owner of the breeder's right is unable to exercise his right in accordance with paragraph (1) (ii), or in respect of harvested material, his right shall extend to the products directly obtained from harvested material of the variety.

This proposal was discussed in October 1989, where the Vice Secretary-General stressed that, "regarding its scope, it constituted a step backwards as compared with the proposal submitted at the fourth Meeting with International Organizations, and that that step backwards. might

¹ Annex 2 of the report CAJ/ XXV/ 2, October 1989

prove prejudicial to UPOV's image. He invited the delegations to consider carefully whether it was really necessary”.

In the June 1990 meeting of the CAJ a key discussion took place concerning the position of the harvested material.²

“Some delegations did not agree, that the draft text did not clearly show, that the breeder had to ‘exercise his rights and royalty at the first stage of exploitation. They therefore would like a ‘hierarchy’ of rights. Germany and 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:

“(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.”

In the discussions that followed it was observed that the wording proposed by the Office 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.

Some delegations 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.

From these paragraphs it is clear that the term “authorization” was not intended to be used solely as an exclusive permission based on a formal Right like an IPR. In line with the former German proposal, it was only the intention to force the breeder to exercise his rights first on the propagating material and, only if he could not do so, then to exercise his rights on the harvested material.

The sentence in article 14(2) UPOV 1991“the use of a propagating material whose use, for the purposes of obtaining harvested material, was not authorized by the breeder.” is now interpreted as that there must be an existing right to base the owner’s authorization on. However, the misuse of propagating material occurs often in countries where there is no protection or where the variety is not protected. It has never been the intention to exclude the harvested material from protection just for the reason that the propagating material was not or could not be protected. On the contrary, as shown in the preparatory papers, all material of the variety has the same level of protection as according to the intention of the new Convention to repair the U-turn loophole in the scope of the breeder’s right. But the hierarchy of rights (called the "cascade" provision), as it has been imposed by misusing the term “authorization”, weakens - unintentional - the protection of the harvested material. “Authorization” in the cascade context should therefore also be read as “with consent”.

³In October 1990 the discussion on “cascading” continued.

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.

² CAJ 27/8 June 25-29 1990 Report

³ CAJ 28/6 12-16 October 1990

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*" (...).

The words "*but only if, the breeder has had no legal possibility of exercising his right*" include the option that there might be no right to exercise, while the words "*the use of the propagating material was not authorized by the breeder*" is interpreted as that there must be an existing right to base this authorization on.

In the discussions about paragraph 14(2) during the Diplomatic Conference in March 1991, some countries wished this paragraph optional, unless the cascade provision was introduced. This cascade provision was eventually accepted with 10 to 8 votes.

None of the examples used by the conference delegates to explain the cascade, referred to the U-turn situation, which was initially an important drive for extending the breeder's right. The final adopted text containing the phrase: "unauthorized use of the propagating material shall require the authorization for the harvested material" is not in line with the initial intention of the original German text proposal for the cascade provision:

(2) Where the owner of the breeder's right is unable to exercise his rights in accordance with paragraph (1)(ii), his right shall extend to the harvested material of the variety.

This formulation applies to all cases where the breeder cannot exercise his rights on the propagating material, including the case where the breeder has no such right in the circumstances of the case. For instance, in the case of illegal production in a country where there is no protection and as a result the variety cannot be protected.

If, in such a case, harvested material is produced from propagating material without knowledge and/or consent of the breeder, he cannot act according to the present text and interpretation of paragraph 14(2), just for the legal requirement of unauthorized use of the propagating material, that only applies if the propagating material is protected by breeder's rights.

Conclusion:

The history and the development of the 1991 UPOV Convention, shows the strong wish to strengthen and improve the Breeder's Right by extending the protection to all commercial material of plant varieties and at the same time, to formulate the scope of protection such that the breeder is obliged to exercise his right first on the propagating material and in the case he is not able to do so, e.g. if he has no Right in a given territory, he may exercise his right on the harvested material.

As a result, paragraph 2 of article 14 must be interpreted such that the 'unauthorized' use of propagating material includes also this use 'without the consent' of the owner of the variety.

ANNEX

Overview of the relevant articles and papers for the preparation of the 1991 Convention

Article 14 UPOV 1991

(1) (.....)

(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.

Article 5 of the UPOV Conventions 1961, 1972 and 1978, provides for the scope of protection of the plant variety as follows:

(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.

Paragraph 4 contains an optional provision to extend the scope of protection, in connection with article 29 that relates to special agreements. This option has never been used.

(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.

In November 1986, 25 years after the release of the first 1961 Convention, the UPOV Council published a draft recommendation for the extension of the breeder's right⁴, in which it recommended to base the rights granted to the breeder in such a way that:

(1) Subject to the following provisions, the effect of the rights granted to the breeder shall be that his prior authorization shall be required for the production, offering for sale, placing on the market, use of any kind, importation or holding for the above mentioned purposes of plant material of the variety;

(4) The rights granted to the breeder shall not extend to acts, carried out on the territory of the State, in respect of material placed on the market by the owner of the rights or his successor in title, or with their express consent, on condition that they do not concern production for commercial purposes of reproductive or vegetative propagating material of the variety or the offering for sale or placing on the market of such material.

⁴ See document CAJ/XVIII/6, November 1986

The breeder's right is herewith extended to all material: for the purpose of reproduction as well as for the purpose of marketing and consumption. As a consequence, also the exhaustion of the right is provided for, except for the further reproduction of the variety.

In December 1986 the Council of UPOV decided to put in hand the discussion of proposals for possible amendments to the UPOV Convention and to discuss the matter at the following meetings in 1987.

In January 1987 the UPOV Vice Secretary-general sent a letter to all interested parties with a request to submit by 1 March 1987 to the Office proposals for amendments of the individual articles as well as for the whole Convention.

In October 1987 the UPOV Council entrusted the preparation of the revision of the Convention to the CAJ. One of the main purposes was to strengthen the breeder's right by revision of article 5 of the 1978 Convention⁵ concerning the scope of protection.

Document CAJ/XXII/2 of April 1988 shows for the revision of the Convention the following redraft of 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 this early stage of the revision of the Convention, the right is extended to all material of the variety and the products derived therefrom. The exhaustion paragraph prevents the owner to exercise his rights both on reproductive/propagating material and the products harvested therefrom.

The exclusive right on reproduction is not exhausted. In this stage there is not (yet) any discussion concerning the obligation of the holder to exercise his right first on the propagating material and in the case such exercise is or was not possible, to exercise his right on the product harvested from that propagating material.

In CAJ XXIII/2, October 1988, the text of article 5 has been adapted according to various remarks during the CAJ meeting in April 1988:

Article 5

Effects of the Right Granted to the Breeder

(1) The breeder of a variety protected in accordance 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, putting on the market or using, or importing or for any of the afore-mentioned purposes:

(i) material of the variety and

⁵ See document CAJ/XXII/2, April 1988

(ii) material of another variety produced by means of the repeated use of the variety, subject to any right which may be granted to another breeder in respect of that other variety.

(b) This right shall not extend, however, to any such aforementioned acts concerning any material which has been put on the market in the 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.

In the CAJ/24/6 Report of its session in April 1989 the following important conclusions with regard to the further drafting of article 5 in relation to the purpose of use of plant material were taken:

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 material that 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.

Paragraph 75 underlines the purpose of use of the material concerned "for the purpose intended", whether for further propagating or as a final product for consumption. The term "harvested material" as eventually used in the 1991 Convention is confusing as all material, including 'propagating material', has in fact been harvested from a preceding crop.

Moreover, in a number of crops - cereals, potatoes -, propagating and harvested material are genetically and physically identical, only distinguished by its intended purpose.

Paragraph 76 clearly explains the principle of exhaustion.

The paper IOM IV/2, dated October 1989, reporting the meeting with International Organizations - representatives of breeders, patent office, chamber of commerce etc. - contains the following proposals:

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.

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)).

Proposed New Text

Article 2

Definitions

For the purposes of this Convention:

[(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

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).

Annex 2 of the report CAJ/ XXV/ 2, October 1989 contains an amendment of Germany on article 5 with the aim to oblige the breeder to exercise his right at first on the propagating material before to exercise it on the harvested material. And to make sure that the breeder can exercise his right only once and not both on the propagating and the harvested material. The latter however has already been ruled in the exhaustion paragraph 2 (i).

CAJ/ XXV/2 - Annex 2

ARTICLE 2 and ARTICLE 5

(Definition of "Material" and Rights of the Breeder)

Proposal by the Delegation of the Federal Republic of Germany

"(1) The breeder's 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, importing, using or stocking reproductive or vegetative propagating material of the variety, including such plant parts as may be regenerated into whole plants.

(2) Where the owner of the breeder's right is unable to exercise his rights in accordance with paragraph (1)(ii), his right shall extend to the harvested material of the variety. where the owner of the breeder's right is unable to exercise his right in accordance with paragraph (1) (ii), or in respect of harvested material, his right shall extend to the products directly obtained from harvested material of the variety.

(3) [Limitations set out in paragraphs (2)(ii) to (iv) of Article 5, as proposed in document IOM/IV/2]."

The discussion on this proposal is reflected in the paragraphs 73-77 of CAJ /XXV/2

Proposal by the Delegation of the Federal Republic of Gerii&Jly
(Annex II to this report)

72. A number of delegations expressed satisfaction with the conciseness of the proposal, which clearly specified the stage in the exploitation of the variety at which the royalty was to be collected. As regards its scope, the Vice Secretary-General stressed that it constituted a step backwards as compared with the proposal submitted at the fourth Meeting with International Organizations, and that that step backwards might prove prejudicial to UPOV's image. He invited the delegations to consider carefully whether it was really necessary.

A few delegations indicated that the proposal should be examined in greater depth at the national level and that it remained to be established whether or not it accurately reflected the intentions and wishes.

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73. The Delegation of Spain expressed a reservation with regard to paragraph (2), while the Delegations of the Netherlands and Sweden expressed doubts as to the second sentence of that paragraph, particularly in the light of earlier discussions on the scope of the word "material." The Delegation of the United States of America, on the other hand, questioned the appropriateness of the words "reproductive or vegetative propagating" in paragraph (1)(ii). Moreover, it wondered whether it might not be preferable to state in paragraph (2) the reason for which the breeder had been unable to exercise his right, for if provision were made for a "farmer's privilege," that paragraph would presumably empower the breeder to exercise his right downstream from the farmer.

74. Consideration of the proposal was resumed at the end of the discussion on document IOM/IV/2. The Chairman invited the delegations to submit their observations to the Office of the Union by the end of November 1989.

75. The Vice Secretary-General considered that if the Committee departed from the structure set out in document IOM/IV/2, it might fail to achieve its objective, which was to strengthen the right of the breeder, notably by adapting it to recent and foreseeable developments in the technical and economic field· under consideration.

76. The Delegations of Denmark and the Federal Republic of Germany emphasized that the proposal was intended merely to set forth the same rights in a different form. The Delegation of the Federal Republic of Germany pointed out that the aim was to spell out clearly that the owner of the right could exercise it once only and receive a royalty once only, and that he should do so at the earliest possible stage. In its opinion, there had never been any question of leaving the choice of the stage to the owner. If the text proposed in document IOM/IV/2 conveyed that impression it was in imperative need of amendment.

77. The Delegation of France feared that the owner of a right might be unable to exercise it in respect of imported harvested material, such as cut flowers, as the right to prohibit such imports was not provided for. The Delegation of the Federal Republic of Germany replied that that right should be provided for and that the wording of the proposed text should be reconsidered and improved, for example, by specifying the grounds on which the exercise of the right had been prevented.

wherein the Vice Secretary-General "considered that if the Committee departed from the structure set out in document IOM/IV/2, it might fail to achieve its objective, which was to strengthen the right of the breeder, notably by adapting it to recent and foreseeable developments in the technical and economic field· under consideration".

It has to be noted here that the German proposal uses the formulation "unable to exercise his right" that later will be replaced by "was not authorized by the breeder". If there is no Right it cannot be exercised, as is concluded in the Melanie case by the Bundes Gerichts Hof⁶.

⁶ Abrufnummer: 061207 Vorschriften: SortG § 10 Abs. 1, SortG § 37 Abs. 2, GemSortV Art. 94 Abs. 2, BGB § 242
Gericht: BGH Urteil vom: 14.02.2006 Aktenzeichen: X ZR 93/04 Rechtsgebiete: SortG, GemSortV, BGB Eingestellt am: 25.04.2006

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(Article 1, continued)

Proposed New Text

(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];*

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Proposed New Text

Article 14

Effects of the Breeder's Right

(1) [A]* The breeder's right shall confer on its owner the right to prevent all persons not having his consent
[from exploiting the variety and, in particular,]*

(i) from reproducing or propagating the variety, or from conditioning reproductive or propagating material of the variety;

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

(iii) from exporting material of the variety;

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

(The new text does not contain a provision that would correspond to paragraph (2) of the present text.)

[(b) Each Contracting Party may extend the scope of protection of the plant breeder's right in respect of any variety to the product directly obtained from harvested material.]**

Material = any material including harvested material

(4) The breeder's right shall not extend to acts concerning any material of his variety, or of a variety covered by the provisions of paragraph (2), which has been put on the market by the breeder or with his express consent, or any material derived from the said material, unless such acts

(i) involve further reproduction or multiplication of the variety in question,

(ii) fall outside the field of use for which the breeder put material on the market or gave his express consent,

(iii) involve an export of material of the variety which enables the reproduction of the variety into a country which does not protect plant varieties.

CAJ 27/8 June 25-29 1990 Report

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.

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 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:

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]

(i i) 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)

(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:

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.

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.

From these paragraphs it is clear that the term "authorization" was intended as providing informal consent and not a permission based on a formal Right like an IPR.

CAJ 28/6 12-16 October 1990

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."

The words "legal possibility of exercising his right" include the option that there may be no right to exercise, while the words "the use of the propagating material was not authorized by the breeder" is interpreted as that there must be an existing right to base this authorization on.

The misuse of propagating material occurs often in countries where there is no protection or where the variety is not protected. It has never been the intention to exclude the harvested material from protection for the reason that the propagating material was and could not be protected. On the contrary, as shown in the preparatory papers, all material of the variety has the same level of protection. But the cascade provision, as it has been imposed by misusing the term “authorization”, weakens - unintentional - the protection of the harvested material. “Authorization” in the cascade context should therefore be read as “consent “or to be left out:

(...) 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.

should be read as:

(...) in respect of harvested material, including entire plants and parts of plants, where the breeder had no reasonable opportunity to exercise his rights in relation to the propagating material, shall require the authorization of the breeder.

IOM/5/2 10-11 October 1990

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Proposed New Text

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;

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(5) [Exhaustion of right]

(a) The breeder's right shall not extend to acts concerning any material of his variety, or of a variety covered by the provisions of paragraph (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 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,

(iii) any product directly obtained from the harvested material.

CAJ 28/6 12-16 October 1990

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."

The words "legal possibility of exercising his right" include the option that there may be no right to exercise, while the words "the use of the propagating material was not authorized by the breeder" is interpreted as that there must be an existing right to base the authorization on. The misuse of propagating material occurs often in countries where there is no protection or where the variety is not protected. It has never been the intention to exclude the harvested material from protection for the reason that the propagating material was and could not be protected. On the contrary, as shown in the preparatory papers, all material of the variety has the same level of protection. But the cascade provision, as it has been imposed by misusing the term "authorization", weakens - unintentional - the protection of the harvested material. "Authorization" in the cascade context should therefore be read as "consent "or be left out:

(...) 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.

should be read as:

(...) in respect of harvested material, including entire plants and parts of plants, where the breeder had no reasonable opportunity to exercise his rights in relation to the propagating material, shall require the authorization of the breeder.

PM 1/2 April 1990

FIRST PREPARATORY MEETING FOR THE REVISION OF THE UPOV CONVENTION
Geneva, April 23 to 26, 1990

Proposed New Text

Article 17

Effects of the Breeder's Right

(1) [Alternative 1: ---] [Alternative

2: Subject to the provisions of paragraph (4)] the breeder's right shall confer on its owner the right to prevent all persons not having his consent from exploiting the variety commercially and in particular:

(i) from reproducing or propagating the variety;

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

(iii) from exporting material of the variety;

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

PM 1/4

REPORT OF GROUP 9: "DEFINITION OF MATERIAL OF THE VARIETY" (Rapporteur: Girard J. Urselmann)

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

It was expressed that all products obtained from the variety fall under a potential definition. As these products on one hand consist of reproductive material, enabling regeneration into the whole plants, and otherwise could be extracted from the variety (like e.g., oil, perfume, protein, etc.), it was felt appropriate to keep them separate in a definition. So, in conclusion the group felt it appropriate to define "material of the variety" as follows:

"Reproductive products of the variety plus other products obtained directly or indirectly from the variety". Many valuable remarks were made during the discussions for which both NGO and GO members are thanked for.

Diplomatic Conference March 1991

Basic proposal:

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) 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];

adopted Text

(1) as above

(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.

In the discussions during the Diplomatic Conference about paragraph 14(2) some countries would make this paragraph optional unless cascade provision was introduced. Eventually the cascade was accepted with 10 to 8 votes.

None of the examples, as used by the delegates to explain the cascade, referred to the U-turn situation, which was initially an important drive for strengthening the breeder's right. This has resulted in the final adopted text where "unauthorized" use of the propagating material shall require the authorization for the harvested material". In this way the original intention to require just the consent for using the propagating material in any case was narrowed to the formal authorization based on an existing Right.

The text of the original German proposal for the cascade provision reads:

(2) Where the owner of the breeder's right is unable to exercise his rights in accordance with paragraph (1)(ii), his right shall extend to the harvested material of the variety.

This formulation applies to all occurrences where the breeder cannot exercise his rights on the propagating material, because he has not such right in the particular case.

For instance, illegal production in a country where there is no protection, or if the variety is not protected or is under provisional protection.

If, in such a case, harvested material is produced from his propagating material without his knowledge and/or consent, he cannot act according to the present text and interpretation of paragraph 14(2), just for the legal requirement of unauthorized use of the propagating material, that only applies if the propagating material is protected by a breeder's right.