PLANT VARIETY PROTECTION

Gazette and Newsletter
of the International Union
for the Protection of
New Varieties of Plants
(UPOV)

UPOV

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The International Union for the Protection of New Varieties of Plants (UPOV)—an international organization established by the International Convention for the Protection of New Varieties of Plants—is the international forum for States interested in plant variety protection. Its main objective is to promote the protection of the interests of plant breeders—for their benefit and for the benefit of agriculture and thus also of the community at large—in accordance with uniform and clearly defined principles.

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The picture on the front cover shows the species
Bolusanthus speciosus,
painted by Mrs. Elise Buitendag (South Africa)

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GAZETTE

RATIFICATION OF THE 1991 ACT OF THE UPOV CONVENTION

SWEDEN

On December 18, 1997, the Government of Sweden deposited its instrument of ratification of 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, with the Secretary-General of UPOV.

Sweden is the fourth State to ratify the 1991 Act of the Convention. From the point of view of international treaty law, the 1991 Act will not enter into force in respect of Sweden until one month after one additional State has deposited an instrument of ratification, acceptance or approval of the 1991 Act.

From the point of view of national law, Sweden has adapted its legislation to the 1991 Act.

NEWSLETTER

THE THIRTY-FIRST ORDINARY SESSION OF THE COUNCIL

The Council of the International Union for the Protection of New Varieties of Plants (UPOV) held its thirty-first ordinary session in Geneva on October 29, 1997, under the chairmanship of Mr. Bill Whitmore (New Zealand).

The Council

- decided unanimously to appoint Dr. Kamil Idris as Secretary-General of UPOV, effective December 1, 1997. (The acceptance speech of Dr. Kamil Idris is reproduced on page 4 of this Newsletter.)

- noted with appreciation that the new Secretary-General did not wish to receive an indemnity from UPOV.

- decided that the program and budget for the 1998-99 biennium should be so amended that the resulting saving be used for financing activities of interest particularly to developing countries.

- paid tribute to the contribution of Dr. Arpad Bogsch to the installation, working and development of the Union over the last twenty-four years. (The speech of Dr. Arpad Bogsch congratulating Dr. Idris on his appointment is also reproduced on page 6.)

- approved the report by the Secretary-General on the activities of the Union in 1996, given in document C/31/2, and noted the report on activities during the first nine months of 1997, given in document C/31/3.

- expressed appreciation to the Office of the Union for the work carried out, and also to WIPO for the assistance provided.

- adopted the program and budget, and the scale of contributions of member States as

proposed in document C/31/4, subject to the decision recorded in paragraph (c), above.

- decided that the contribution unit should remain at 53,641 Swiss francs for the years 1998 and 1999 even if additional contributions were received.

- took note, with satisfaction, of the plan for the medium-term from 2000 to 2003 set out in document C/31/11.

- renewed the designation of Switzerland as auditor of the accounts of UPOV for the years 1998 and 1999, and thanked the Swiss authorities for their contribution to the working of the Union.

- decided that a symposium should be held in 1998, at the earliest possible date compatible with a good preparation thereof, on the merits of the UPOV technical criteria for protection as the basis for an effective *sui generis* system of protection, and also for the development of agriculture. The calendar of meetings in 1998 is reproduced on the last section of this issue.

- elected Mr. Ryusuke Yoshimura (Japan) as President and Mr. Karl Olov Öster (Sweden) as Vice-President of the Council for a term of three years ending with the thirty-fourth ordinary session of the Council, in 2000:

- expressed its appreciation to the outgoing President, Mr. Bill Whitmore, for the work carried out during his term.

- decided to extend the chairmanship of the Working Group on Biochemical and Molecular Techniques, and DNA-Profiling in Particular, of Mr. Joël Guiard (France) for another year.

ACCEPTANCE SPEECH OF THE NEW SECRETARY-GENERAL, DR. KAMIL IDRIS

Geneva, October 29, 1997

Mr. President,
Distinguished Delegates,

May I first pay respect, Mr. President, to the excellent manner in which you have presided over the Council and the Consultative Committee of UPOV during the last three years.

I am greatly honored by your decision here today to appoint me as Secretary-General of the International Union for the Protection of New Varieties of Plants, which we all know by the familiar acronym UPOV. I pledge to honor, with all loyalty, discretion and conscience the trust placed in me.

I should like to pay tribute to the energy, foresight and vision of Dr. Arpad Bogsch who has played a unique and constructive role in the development of UPOV. He was on hand and influential when the UPOV Convention first came into force and under his wise counsels a completely new concept at the international level, the protection of new plant varieties, has become a dynamic form of intellectual property protection.

In approaching my duties as Secretary-General of UPOV, I will ensure that the principles of transparency, accountability, effective collaboration and a mutually responsive relationship between member States, market-sector interests and the Secretariat will guide the Office of UPOV in the years ahead. I have been particularly gratified to see the open and cooperative relationship between UPOV and the industry sectors interested in plant development and improvement.

Plants are, to a large extent, the basis for virtually the whole of the nutrition of animals and men. Plants are also a major source of materials for shelter, clothing, fuel and medi-

cines and, in the case of ornamentals, are the source of aesthetic pleasure and responsible for the enhancement of our environment and consequently of our planet.

The greatest challenge facing mankind is, and will continue to be, achieving food security in a sustainable manner. How can the population of the world be fed whilst using technology that does not damage the fertility of the world's soils, thus threatening the long-term survival of mankind?. The encouragement of plant improvement is the essential purpose of UPOV, and securing production increases through genetic improvement without recourse to excessive use of artificial fertilizers or chemicals is at the heart of all answers to this challenge.

The conservation of and access to genetic diversity and the deployment of biotechnology are major global issues with crucial implications for effective plant breeding. However, the relationship of intellectual property to genetic resources and biotechnology has become an acutely political question and has generated widespread misunderstanding and confusion. "Farmer's rights," "access," "equitable sharing of benefits"—these have become slogans frequently reiterated without an in-depth assessment of their practical significance. To the extent that the resulting confusion tends to obstruct or delay the implementation of measures which have the potential to contribute to food security, it is especially unfortunate. These are all issues on which UPOV has an important voice and must make itself heard.

Amidst the controversy, UPOV concentrates upon its essential task which is to explain the objectives and workings of the UPOV Convention and to demonstrate how it has contributed, and can contribute in the future, to the development of agriculture. The recent increase in the number of UPOV member States has been impressive, while the list of States which have introduced laws conforming to the UPOV Convention and which have commenced the process leading to accession to the Convention includes some of the world's most populous and agriculturally productive States. These States have recognized that the encouragement of private sector involvement in their seed and plant breeding industries is essential to the future development of their agriculture and thus to their economies.

These States will be joined in 1998 and 1999 by additional States which realize that they must provide plant variety protection in one form or another by the year 2000, in order to meet their obligations under the TRIPS Agreement. It is indispensable that UPOV provide information, guidance and assistance to all countries expressing interest in plant variety protection, and I am particularly concerned to examine how the resources available to UPOV for this vital task can be increased or optimized in the immediate future so as to ensure that all States are able to benefit from effective systems of plant variety protection. This is a critical challenge. Critical because it gives UPOV a more global reach, making it more attractive and of greater benefit, in particular to developing countries and countries in transition.

Mr. President,
Distinguished Delegates,

The Office of UPOV has a modest secretariat of dedicated staff carrying the responsibility for the future development of UPOV. The Union is fortunate that the staffing of the Office has been stable. The members of its staff are very experienced and set high standards. I should like to use this occasion to publicly pay tribute to that staff. I am confident that they are well-equipped to handle, together with the member States, the policy development of the Union.

Mr. President,
Distinguished Delegates,

I believe that the member States of UPOV, though having in many cases agricultural industries which are distinct, are both uniform and consistent in their approach to UPOV. All appreciate the primordial importance of plant breeding and the seed and plant industries to their economies, all appreciate the necessity to

secure the balanced participation of both public and private sectors in the field of plant improvement and all appreciate the transnational nature of plant improvement research and the need for close international cooperation. UPOV has a prominent place among international organizations and has a demanding mandate.

In accepting the appointment as Secretary-General of UPOV I measure with humility the responsibility that is before me and that is before all of us, but guided by confidence in the nobility of our goals, in the inspiration of our common spirit and in the determination of our common effort. Alone, I can do little. Together we can advance the mission of UPOV into the 21st century for the benefit of all mankind.

SPEECH OF DR. ARPAD BOGSCH

I wish to congratulate Dr. Kamil Idris the new Secretary-General of UPOV.

I do so both in the name of the staff of UPOV and in my own.

Your appointment, dear Kamil, was the result of the unanimous decision of all member States. So you can take over this important post with the assurance that you have the confidence of all the governments.

You are a lawyer and a specialist of international law and intellectual property law. You are an excellent organizer and leader. These are facts that you have demonstrated during the many years you served WIPO, the most recently during the years you were Deputy Director General of WIPO. And there is new evidence of these qualities in the way you started to direct WIPO. Because, honorable delegates, I inform you that even though my retirement has not yet taken place, I have *de facto* placed all the staff of WIPO under the direct orders of Dr. Idris from the moment WIPO has elected him. I am doing the same with the staff of the Office of UPOV as of today, the day on which Dr. Idris was appointed Secretary-General.

May I also, dear Kamil Idris, say here publicly—at the risk of hurting your well known modesty—that I and all the staff admire you not only for your professional but also for your human qualities: your brilliant intelligence, your uncompromising integrity, your kindness, your patience and your treating persons with the same courtesy whatever their professional rank.

We also know that you are an exemplary, loving husband of your wife, Mrs. Azza Idris, and an exemplary and loving father of your four young children, Mohamed, Dinas, Dalia and Dahd.

Mrs. Idris, our warmest congratulations go also to you. Your personality, your happy marriage, the patience with which you accept that your husband spends so much time in the office and on official travel are and will be indispensable to give him the family life whose happiness makes the performance of official duties so much more easy and successful.

For all these reasons, there is not the slightest doubt, I should rather say, there is absolute certainty, that under your leadership, Dr. Kamil Idris, UPOV will further flourish and grow. It will do so to the full satisfaction of the member States of UPOV and of the staff of UPOV.

I wish you much success and full satisfaction.

Insh Allah.

SPEECHES GIVEN ON THE OCCASION OF THE FAREWELL DINNER IN HONOR OF DR. ARPAD BOGSCH ON OCTOBER 28, 1997 AT THE *HÔTEL DES BERGUES*, GENEVA

SPEECH OF DR. DIRK BÖRINGER*

Madame,

Secretary-General Dr. Bogsch, dear Arpad,

President of the Council,

Ladies and Gentlemen,

One of the old prophets in the Bible says: "Everything has its time and everything has its place." This evening is the time to express our thanks to a person who has worked for UPOV a long time and with great success.

For me as an old-timer, it is a great honor to be invited to take part at this farewell dinner and to be allowed to say a few words.

When, in 1968, the UPOV Convention came into force and the Union was founded, Professor Bodenhausen (Netherlands) was Director of BIRPI, the previous organization for intellectual property. According to the Procedures for Technical and Administrative Cooperation between UPOV and BIRPI, he became automatically the first Secretary-General of UPOV. But behind him, there was a Deputy Director named Dr. Arpad Bogsch. Already at that time it was obvious to everybody that he would become the successor of Professor Bodenhausen in WIPO and in UPOV. And actually this was the case in 1973 after BIRPI had changed into WIPO.

From that time on, UPOV delegates and UPOV staff members in the Secretariat had no other choice than to cooperate with this strong but capable man. And looking back 25 years, I must say: It was a good, a very good time, to which we would give a "9" in the UPOV observation scale for plant characteristics!

For the first years of Dr. Bogsch's period, I see three matters on which he pressed his fingers:

- With the yearly budgets, he gave UPOV a sound financial basis.

- He pushed very much for new members of the Union-worldwide-and he had great success.

- Under his overall responsibility and under the active guidance of competent Vice Secretaries-General, the technical work of the Union was structured and developed. I think of the Rules for Variety Denominations, the Technical Guidelines with their famous General Introduction and, last but not least, the bilateral cooperation between member States.

In the 80s and the beginning of 90s, the great achievement was the new definition of the variety and the extended scope of protection, as laid down in the 1991 text of the Convention.

In addition to all this, he has established a wonderful building for WIPO and thus for UPOV, too.

During all his official years, Dr. Bogsch was the great *spiritus rector*. In the meetings, he argued strongly for that which should, in his opinion, be done. Often he talked in the

* Former President of the *Bundessortenamt*, Hanover, Germany

background with Council members and delegates of the professional organizations. When there was a standstill in the negotiations, selected persons were invited to have dinner with him around the large table on the 11th floor.

We all remember very well how the Secretary-General argued in the meetings. For example, when he called me "the honorable delegate of Germany," I knew that he was against my proposal. When he called me merely "the delegate of Germany," then he was willing to discuss the proposal. And when he said "Mr. Böringer" or even "Dr. Böringer has made a proposal which should be discussed," then it was clear: He supported my idea.

During all these years, you had mostly the better arguments, Dr. Bogsch. We all admired your knowledge and your competence and we followed you with great respect, but frankly speaking, not everyone loved you all the time. I know that you can accept what I say, because that is the normal situation for all of us in professional life.

It was a great experience to cooperate with you, but we seldom had a chance to learn a bit of the private side of your life. Once my wife and I had the pleasure to meet you in our country, in Bayreuth, during the *Wagner* festival. *Tristan und Isolde* were on the program. We could see and learn from you how you enjoyed music and how much you needed classical music for your recreation.

Today, we have to thank you for all that you have done for UPOV and for many of us. In our thanks, we have to include the former Vice Secretaries-General and the present one. Furthermore we have to express our thanks to all staff members who have worked under your responsibility.

You were the captain of the ship and now you have to go ashore. Thus, a great era has come to a good end.

Dr. Bogsch, we all thank you so much and we wish your wife and you all the best for the future.

Herzlichen Dank, Arpad, und 'Auf Wiedersehen'!

Ladies and Gentlemen, may I ask you to raise your glasses and to thank Dr. Bogsch with all what we have in our glasses.

SPEECH OF MR. BILL WHITMORE*

Dr. Bogsch, Mrs. Bogsch, other distinguished guests, members and alternate members of the UPOV Council.

First, it is my great pleasure as the President of the UPOV Council to welcome all of you this evening at this dinner to honour and farewell Dr. Bogsch. I thank you for coming. I hope that you enjoy the company, the food and the wine.

Now I propose to add to what Dr. Böringer told us earlier by recounting some highlights from the impressive curriculum vitae of Arpad Bogsch. I shall not make a long speech. However it would be difficult to be overly brief. The curriculum vitae of Arpad Bogsch is long and his achievements many.

– Arpad Bogsch trained in law in Budapest, in the country of his birth. He commenced practicing law in Budapest.

* President of the UPOV Council

– In 1948 he became the legal officer for the Copyright Division of UNESCO in Paris.

– Six years later he joined the US Copyright Office in Washington.

– In 1963 he became the First Deputy Director of BIRPI (the United International Bureaux for the Protection of Intellectual Property). In 1970 BIRPI became WIPO.

– Then in 1973 he became Director General of WIPO and Secretary General of UPOV.

What of his academic achievements? Arpad Bogsch earned the degree of Doctor of Laws in both Budapest and Paris. In 1956 he qualified with the degree Master of Comparative Law from the George Washington University in the USA.

Subsequently he has been granted numerous honorary doctorates; in India, United States of America, Sri Lanka, Republic of Korea, Hungary, Romania, China, India again, the Russian Federation, Czech Republic, Ukraine, Slovakia, Georgia, Latvia and Ulaanbataar. If my information is correct that comes to a total of 15 honorary doctorates.

Dr. Bogsch has been honored with many decorations. I shall not identify each one but I can tell you that the following have conferred decorations: Sweden, Austria, Spain, Senegal, Republic of Korea, International Olympic Committee, Bulgaria, Japan, Thailand, France, Argentina, Hungary, Senegal again, Colombia, France again, Germany, Tanzania, Hungary again, Cuba, Peru, Sweden again and Indonesia.

These honorary degrees and decorations give us some indication of the regard in which Arpad Bogsch is held, and for many years has been held, around the world.

UPOV is 36 years old this year. Arpad Bogsch has held the position of UPOV Secretary General for 24 of those 36 years. When he became Secretary General in 1973 UPOV was a small organization, with only 6 member States. Today UPOV has 34 member States. However the 24 years have not just been years of growth in a numerical sense. There has been technological development; for example we have today in the final stages of development the excellent UPOV CD-ROM database. The UPOV Convention has been adapted in response to economic changes and developments in biotechnology; during Arpad Bogsch's tenure the UPOV Convention was rewritten in 1978, and again in 1991. Arpad Bogsch surely leaves a clear mark upon the UPOV of today.

For me the abiding memory will be of Arpad Bogsch at the 1991 UPOV Diplomatic Conference. Many a time when a discussion was getting nowhere Dr. Bogsch brought into play his wisdom, his formidable intelligence and his common sense. With unerring ability he put his finger on the heart of the problem and pointed to a solution.

It was an American who once said: "Anyone who isn't confused doesn't understand the problem." Arpad Bogsch is the rare mortal who isn't confused and does understand the problem.

Dr. Bogsch's years of service as Secretary-General of UPOV are to be marked at a ceremony on 28th November. A tree is to be donated to the city of Geneva and planted on that day near the *Musée Ariana* in the grounds of the United Nations.

Dr. Bogsch, to mark your coming retirement as Secretary-General of UPOV at the end of November, and as a small recognition of your very great contribution to UPOV over 24 years, I wish on behalf of the UPOV Council to present to you a UPOV gold medal.

SPEECH OF DR. ARPAD BOGSCH

Mr. President Bill Whitmore,

Dear Delegates from governments, from the European Commission, the Community Plant Variety Office, OECD, AIPPI, ASSINSEL and CIOPORA,

Dear colleagues in UPOV and WIPO and Mrs. Judy Greengrass and Mrs. Deborah Keefer,

Ladies and gentlemen,

During the last 24 years, that is, the period during which I was the Secretary General of UPOV, many good things happened in UPOV. Not because of me but during that period.

I shall recall only three of those good things.

First and foremost, the membership of UPOV increased so much-from six in 1973 to 34 now-that UPOV is now truly international. It includes not only developed but also developing countries. Having more members in UPOV is in the obvious interest of everyone who, like us, believes that a *sui generis*, UPOV-type protection is the best system for plant breeders and everyone for whom the development of agriculture, forestry, etc. and food security are important. I thank the delegates for having encouraged the Secretariat of UPOV to demonstrate to governments the usefulness of their accession to UPOV. Our Vice Secretary-General, Barry Greengrass was the motor, and much of the success is due to his wisdom and energy.

The second important event of those 24 years was the diplomatic conference which modernized the UPOV Convention in 1991. The revision was carefully prepared and thoroughly discussed. The positive outcome is, here too, the merit of the representatives of the Member States who knew when to insist and when to make compromises. Among my colleagues, Director André Heitz, who, in addition to being an agronomist, is a very fine lawyer indeed, has particular merits in connection with the negotiations in that diplomatic conference.

The third important event I shall mention is the creation of a UPOV database on CD ROMs, of denominations and other particulars of plant varieties. It is an outstanding example of how to put modern technology to work for satisfying needs of international information. In this field, my colleague, Max-Heinrich Thiele-Wittig excelled with his dedication and know-how.

What about the future of the Secretariat? In the hands of Dr. Kamil Idris it will be in excellent hands because he is an eminent lawyer and diplomat and it can be safely predicted that he will use his talents and influence to promote new accessions, the further improvement of TRIPS-required legislations, the enhancement of worldwide information, to mention only the three topics I spoke about a minute ago. My warm best wishes to him for much success at the head of the UPOV Office.

And now a few words about this evening, about this dinner to which we were invited by the president of the Council of UPOV-that is, the president of the supreme governing body of UPOV-Mr. Bill Whitmore.

I speak also in the name of my wife when I say that we were deeply touched when we learned from Barry Greengrass of the idea of a farewell banquet. And we are even more touched today, and feel much honored by the fact that so many delegates, you, are here today.

The idea of planting a tree in my memory is also touching and original. It is also mos appropriate for an organization which deals with

trees, kings of the world of plants. I am very grateful to you for this special attention.

The speeches of Dirk Böringer and of Bill Whitmore went straight to my heart. I thank them for their words which, together with the presente of everyone of you with your good wishes, made this banquet a sheer pleasure both for my wife and me. We shall remember it as long as we live.

COLOMBIA

Decree No. 533 of March 8, 1994[1, 2]

Introducing Regulations to the Common Provisions on the Protection of the Rights of Breeders of New Plant Varieties as Amended by Decree No. 2468 of November 4, 1994

CHAPTER I

SCOPE

Article 1

The scope of this Decree shall extend to all cultivated varieties of botanical genera and species, provided that the cultivation, possession or use thereof is not prohibited on grounds of human, animal or plant health.

This Decree shall not apply to wild species, that is, those individual plant species that have not been planted or improved by man. Such species shall be subject to the provisions of paragraph 21 of Article 5 of Law No. 99 of 1993.

CHAPTER II

COMPETENT NATIONAL AUTHORITY

Article 2

The Colombian Institute for Agriculture and Livestock (ICA) shall be the competent national authority for the application of the provisions on plant variety protection.

Article 3

For the purposes of this Decree, the functions of the ICA shall be the following:

(a) Conduct of tests to determine novelty, distinctness, uniformity and stability.

Such tests may be carried out by public or private entities or both, according to guidelines issued by the Subregional Committee for the Protection of Plant Varieties, established pursuant to Article 37 of Decision 345. The said entities shall have been previously authorized by the Ministry of Agriculture.

(b) Grant of breeders' certificates.

(c) Creation and upkeep of the National Register of Protected Plant Varieties.

(d) Setting and collection, in accordance with the Law, of fees for services rendered by it, subject to the administrative procedure for the grant of breeders' certificates, the deposit of live samples, field and laboratory trials and other fees arising from the protection of varieties.

(e) Organization and maintenance of deposits of live material or, failing that, recognition of the maintenance and deposit of such material in another member country or in a country that grants reciprocal treatment and has internationally recognized legislation on the protection of the rights of breeders of new plant varieties.

(f) Participation in national and international gatherings and events, without prejudice to powers conferred on other public bodies, but without contracting international obligations except with express authorization.

(g) Publication of the Protected Plant Varieties Gazette, which shall give information on the filing of applications, including the identification of applicants, the varieties filed for protection, the denominations given them, the acceptance or rejection of applications, the grant of breeders' certificates, declarations of lapse or invalidation of breeders' certificates and all legal acts subject to registration.

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1 Spanish title: *Decreto No. 533 de 1994 (marzo 8) por el cual se reglamenta el régimen común de protección de derechos de los obtentores de variedades vegetales.*

2 Translated by the Office of the Union.

(h) Notification of the grant of breeders' certificates to the Board of the Cartagena Agreement within a period not exceeding forty-eight (48) hours following the date of publication, in the Protected Plant Varieties Gazette, of the decision granting the breeders' certificate.

(i) Revocation of the breeder's certificate where any of the events provided for in Article 35 of Decision 345 of 1993 occurs.

(j) Introduction of such tests and field and laboratory trials as it considers appropriate for the verification of compliance with the conditions laid down in Article 7 of Decision 345 of 1993.

(k) Introduction of procedures for the approval of technical examinations conducted abroad to test the requirements of distinctness, uniformity and stability.

(l) Such other powers as are conferred on it by Decision 345 of 1993.

CHAPTER III

RECOGNITION AND REGISTRATION OF BREEDER'S RIGHT

Article 4

A breeder's certificate shall be granted to the person, whether natural person or legal entity, who has created a plant variety, provided that the variety meets the conditions laid down in Article 4 of Decision 345 of 1993.

Article 5

The ICA shall issue a technical report on novelty, distinctness, uniformity and stability. If the report is favorable and the application complies with the other requirements, the breeder's certificate shall be granted and registration with the corresponding denomination shall be ordered.

Article 6

The National Register of Protected Plant Varieties is hereby established.

The Register shall contain a phenotypical description of the protected variety, the number of the breeder's certificate, the denomination of the variety, the particulars of the breeder and of his representative if any, the identity of the owner of the protection right where not the same person as the breeder, and any other legal act affecting the breeder's rights.

Article 7

The term of protection shall be 20 years in the case of vines, forest trees and fruit trees, including the rootstocks thereof, and 15 years for all other species, both terms being counted from the date of grant.

CHAPTER IV

RIGHTS AND OBLIGATIONS OF THE BREEDER

Article 8

The breeder of a variety entered in the National Register of Protected Plant Varieties shall have the right to prohibit third parties from engaging without his consent in the acts specified in Article 24 of Decision 345 of 1993 in relation to protected varieties and varieties essentially derived from the protected variety, except where the said variety is itself an essentially derived variety.

Article 9

The owner of a variety entered in the National Register of Protected Plant Varieties shall have the obligation, in addition to those contained in Decision 345 of 1993, to maintain and replace, at the request of the ICA, the live sample of the variety throughout the term of the breeder's certificate.

CHAPTER V

FILING OF THE APPLICATION AND ACCEPTANCE OR REJECTION THEREOF

Article 10

The application for the grant of a breeder's certificate shall be filed with the ICA and shall contain the following:

(a) Name, address and nationality of the applicant and of the breeder when the latter is acting through an agent.

(b) Common and scientific names of the species.

(c) Proposed generic denomination.

(d) Identification of the breeder and place in which the variety was bred, specifying the country of origin.

(e) Most noteworthy morphological, physiological, health, phenological and physico-chemical aspects and industrial or technological properties such as will permit description of the variety.

(f) Genetic origin of the variety.

(g) The mention, where appropriate, of the exercise of the right of priority provided for in Article 18 of Decision 345.

(h) Geographical origin of the plant material constituting the raw material of the new variety to be protected.

(i) The application for a breeder's certificate for a variety protected abroad shall specify all the countries in which the said certificate is registered, including the date of such registration.

In order to comply with the requirement specified in subparagraph (c) of this Article, the denomination shall possess all the following characteristics:

1. It shall allow the variety to be identified.

2. It may not be composed solely of figures.

3. It may not mislead or confuse as to the characteristics, value or identity of the variety or as to the identity of the breeder.

Article 11

The ICA shall accept or reject an application within the period specified in Article 6 of the Code of Legal Administration. The acceptance or rejection of the application shall be determined by its compliance with the requirements of form specified in the foregoing Article.

Article 12

The ICA shall pronounce on the conditions specified in Article 7 of Decision 345 within a period of three (3) years for short-cycle varieties and ten (10) years for medium and long-cycle varieties, both periods being calculated from the filing date of the application for protection.

Article 13

The period of protection of breeders' rights shall begin to run on the date on which the decision granting the breeder's certificate comes into effect. That date shall be understood to be the date of grant of the certificate.

In the case of breeders' certificates or titles granted abroad, the ICA shall have a period of 30 calendar days, following the filing date of the application for protection, within which to pronounce thereon.

RESEARCH INCENTIVES

Article 14

The National Government shall specify the manner in which entities under public law may distribute among their breeder employees and assign to research plans, programs and projects such funds as are derived from the exploitation of plant varieties in respect of which they hold breeders' certificates.

The participation of breeder employees in the funds referred to in this Article shall not be wage components and shall in no way be taken into account for the settlement of social benefits or entitlements of any kind deriving from their employment relations.

CHAPTER VI

INFRINGEMENTS

Article 15

In the event of infringement of the rights conferred by a breeder's certificate, those provisions and procedures shall be applied, subject to compatibility with this Decree, that are laid down by the Code of Commerce for infringements of industrial property rights, without prejudice to such criminal actions as may be available.

TRANSITIONAL PROVISION

A variety that is not new on the opening date of the National Register of Protected Plant Varieties, but has been registered prior to the said date in the register of the ICA or a register of cultivars in any of the Member Countries, or again in a register of protected varieties in any country having special legislation on plant variety protection and granting reciprocal treatment to Colombia, shall enjoy protection as provided in this Decree if the application for protection is filed within the year following the opening date of the said Register.

The term of protection may not exceed that which has yet to run before the lapse of the periods specified in Article 7 of this Decree, counted from the date of registration of the variety at the ICA or in the register of another country.

Article 16

This Decree shall enter into force on the publication date thereof.

PARAGUAY

Law No. 385 on Seeds and Cultivar Protection of August 11, 1994[1, 2, 3,4]

CHAPTER I

GENERAL PROVISIONS

Purpose of the Law

Article 1

The purpose of this Law is to promote an efficient plant breeding activity [...] and to protect the right of breeders of new cultivars in accordance with regional agreements which have been signed or are to be signed and with all international norms concerning seed.

Article 2

(a) Farmer or user: natural or legal person who buys or produces seed for sowing or planting.

(b) [...]

(c) Cultivar of foreign origin: a variety which has been entered in a register of any kind in its country of origin.

(d) Phytogenetic creation: a cultivar or variety, whatever its genetic nature, obtained by discovery or by the incorporation or transfer and/or the application of scientific knowledge to the inheritable improvement of plants.

(e) Cultivar or variety: a group of cultivated plants which are clearly distinguishable from others of their species by any characteristic (morphological, physiological, cytological, chemical or otherwise), which when they are reproduced (sexually or asexually), maintains their distinctive characteristics.

[...]

(h) Plant breeder: a natural person, specialized in genetic improvement, working to discover, create, develop and maintain varieties of cultivated plants.

[...]

(j) Breeder: a natural or legal person who registers a variety in the National Register of Protected Cultivars for which he is granted the title of breeder.

[...]

(ß) Seed or plant material: all plant parts or structures including nursery plants [*o mudas*] intended or used for sowing, planting or propagation;

[...]

Subjects of the Present Law

Article 3

Any natural or legal person may carry out work to breed cultivars or lines, to produce, process, conduct laboratory analysis of, distribute or commercialize seed without any limitation other than to adjust his or its activities to the legal provisions and regulations that are in force.

[...]

CHAPTER III

NATIONAL REGISTER OF COMMERCIAL CULTIVARS

Article 11

[...]

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1 Published in the Official Gazette of August 12, 1994.
2 Spanish title: *Ley No. 385 de Semillas y Protección de Cultivares de 11 de agosto de 1994.*
3 Provisions not related to plant variety protection have not been included. The full text will be published in a future issue.
4 Translated by the Office of the Union.

Article 12

Cultivars which meet the following requirements can be entered in [the National Register of Commercial Cultivars]:

(a) Distinctness: the cultivar must be clearly distinguishable by one or more phenotypic or genotypic characteristics from any other variety whose existence is a matter of common knowledge at the date of the application.

(b) Homogeneity: the cultivar must be sufficiently uniform in its relevant characteristics subject to the variation that may be expected from the particular feature of its propagation.

(c) Stability: the relevant characteristics of the cultivar must remain unchanged through successive generations or in the case of a particular cycle of propagation at the end of each such cycle.

The Seed Directorate can verify by means of trials that the aforementioned requirements are fulfilled.

[...]

CHAPTER IV

NATIONAL REGISTER OF PROTECTED CULTIVARS

Article 22

The National Register of Protected Cultivars is set up within the Seeds Directorate for the purpose of safeguarding breeders' rights.

Article 23

Except as provided in Article 37, the breeder's right requires that the production and marketing of seed of the protected variety be subject to the prior authorization of the breeder. The authorization given by the breeder shall be communicated by him to the Seeds Directorate.

Article 24

Varieties and lines of the following species are protected by this Law: Cotton (*Gossypium* spp.), Rice (*Oryza sativa* L.), Rapeseed (*Brassica napus*), Sunflower (*Helianthus annuus* L.), Maize (*Zea Mays* L.), Soyabean (*Glycine max* (L.) Merrill), Sorghum (*Sorghum* spp.), Wheat (*Triticum* spp.). Species not specified in this Article may be entered in the Register by decision of the Ministry of Agriculture and Livestock on a proposal from the Seeds Directorate, subject to a report from the Technical Committee for the Certification of Cultivars, where the needs of national agriculture so dictate.

Article 25

Those cultivars that meet all the requirements laid down in Article 12 and in addition fulfill the requirement of novelty may be entered in the National Register of Protected Cultivars.

A variety shall not be considered new for the purposes of this Law where, prior to the filing of the application for registration it has been sold or disposed of to others by the breeder or with his consent on the national territory, or has been sold or disposed of to others by the breeder or with his consent on the territory of another State, for more than six years prior to the filing of the application for registration in the case of vines, forest trees, fruit trees and ornamental trees, or more than four years in the case of other species.

Material disposed of to others for the testing of the variety shall not diminish the breeder's right to protection.

Article 26

For the purposes of registration at the National Register of Protected Cultivars the cultivar shall be identified by a single denomination that serves to distinguish it from any other. The denomination may not consist solely of figures or mislead or confuse as to the characteristics of the cultivar or the identity of the breeder. Other conditions governing the denomination shall be laid down by regulation.

The approved denomination of the variety shall be registered at the National Register of Protected Cultivars at the same time as the relevant breeder's certificate is granted.

Article 27

Any person who places on sale, markets or for whatever purpose supplies seed of a protected variety shall be obliged to use the denomination of the said variety, even after the breeder's certificate has lapsed.

Article 28

The denomination of a protected variety may not be made into a trademark. This provision shall not prevent the breeder of a variety from adding a trademark to the denomination thereof for marketing purposes.

The names of varieties that become public property shall remain names of varieties, even where they are registered as trademarks.

Article 29

The application for registration in the National Register of Protected Cultivars shall have the character of a sworn statement, and shall be sponsored by an agricultural or forestry engineer who holds a national or nationally recognized title and is registered in the National Register of Agricultural and Forestry Engineers. It shall give the particulars required under Articles 12 and 25 and shall mention the parent material of the new cultivar. Other requirements to be met by the application shall be laid down by regulation.

Article 30

The Technical Committees referred to in Article 16 shall examine cultivars submitted for registration to verify or note, as the case may be, compliance with the requirements of Articles 12 and 25.

If the examination finding is favorable, the Ministry of Agriculture and Livestock shall, on a proposal from the Seeds Directorate, grant the breeder's certificate, the term of which shall be from 15 to 20 years according to the species or group of species, as laid down by regulation. The certificate shall specify the dates of grant and lapse.

The Seeds Directorate may, if considered appropriate, grow the variety or carry out other necessary tests, or alternatively take into account the results of growing trials or other tests already carried out for the purpose of confirming compliance with Articles 12 and 25. The breeder may likewise be asked for any information, document or material that may be necessary, and which must be available to the application body for as long as the breeder's certificate remains valid.

Article 31

The breeder shall deliver a sample of seed of the cultivar to be protected to the Seeds Directorate. The breeder shall be responsible for the maintenance of live samples, and the Seeds Directorate shall request the delivery of the material whenever it sees fit. The Directorate may likewise request the breeder to deliver samples for preservation in a national germplasm bank.

Article 32

The breeder's certificate for a variety or line may be granted jointly to more than one natural person and/or legal entity. It shall be marketable, transferable and inheritable, and the transferee may use it, derive benefit from it and dispose of it during the period remaining to its owner and in the same manner and on the same conditions as the said owner.

Article 33

The filing of the application for registration of a variety in any country with which the Republic of Paraguay has a bilateral or multilateral agreement on the subject shall give the applicant priority for a period of 12 months during which time he may have it registered in the National Register of Protected Cultivars.

This period shall be calculated from the filing date of the first application. The actual day of filing shall not be included in the period.

The requirements to be met for the exercise of these rights shall be laid down by regulation.

Article 34

The protection of a cultivar shall not prevent other persons from using it for experimental purposes or for the creation of a new cultivar, which may be registered in the name of its creator without the consent of the breeder of the original cultivar used to produce it, provided that the original cultivar is not used permanently for the production of the new one.

Article 35

The rights of the breeder shall not be violated by a farmer who sows and stores seed of the protected cultivar for his own use, or uses or sells the product of the said cultivar as a raw material or food.

Article 36

The Ministry of Agriculture and Livestock, on a proposal by the Seeds Directorate and after the opinion of the National Seeds Council has been obtained, shall declare the protected cultivar to be "for restricted public use" where it is decided that such a resolution is necessary to ensure an adequate supply of seed and that the breeder is not supplying the needs of the public satisfactorily. The proposal shall specify the term of the declaration of restricted public use. Where necessary the extension of the term shall be provided for in a new resolution, issued according to the procedure specified in this Article.

Article 37

Throughout the period during which the declaration of restricted public use is in effect, the Seeds Directorate may grant authorization to produce seed of the corresponding cultivar to natural persons or legal entities registered in the National Register of Seed Producers referred to in Article 44. In that case the breeder of the cultivar in question shall collect compensation from the seed producer, and the Seeds Directorate may act as intermediary for that purpose.

Article 38

The breeder's right shall be canceled under the following circumstances:

(a) termination of the legal period of protection;

(b) renunciation of rights on the part of the breeder;

(c) third-party fraud, in which case the right shall be transferred to the lawful breeder, if he can be identified;

(d) failure by the breeder to provide, at the request of the Seeds Directorate, a seed sample of the protected cultivar with characteristics identical to the original seed;

(e) failure to pay fees to the National Registry of Protected Cultivars;

(f) any other ground for cancellation that is considered appropriate on a proposal from the Seeds Directorate and subject to the opinion of the Technical Committee for Cultivar Inspection.

Article 39

The breeder's right shall be declared null and void if it is proved that, the time of the grant of the said right:

(a) the conditions laid down in Articles 12(a) and 25 of this Law were not properly complied with;

(b) the conditions laid down in Article 12(b) and (c) were not properly complied with where the grant of breeder's right was based solely on information and documents supplied by the person concerned.

Breeders' rights may not be invalidated on any grounds different from those specified in this Article.

Article 40

Cultivars of foreign origin with breeders' certificates in force in their countries of origin may be registered in the National Register of Protected Cultivars. To that end the foreign breeders shall be given the same rights as nationals with respect to the recognition and protection of breeders' rights, subject to compliance with the requirements and standards provided for in this Chapter.

Article 41

The application for the registration of cultivars from other countries shall be filed by the legal representative, permanently resident in the country, of the person concerned and shall be sponsored by an agricultural or forestry engineer who holds a national or nationally-recognized title and is registered in the National Register of Agricultural and Forestry Engineers.

Article 42

Cultivars which, on the date of adoption of this Law, have been grown commercially for a maximum period of three or more years are declared public property, and may not be granted protection by the National Registry of Protected Cultivars, being therefore freely available for use. The growing period for the aforementioned declaration may be determined using as a reference such statistical information from official or other sources as will assist in proving the duration of commercial use of the cultivar concerned.

The cancelling or invalidation of breeders' rights on any of the grounds provided for in Articles 38 and 39 shall likewise cause the protected variety to become public property with the aforementioned consequences.

[...]

CHAPTER X

INFRINGEMENTS AND SANCTIONS

Article 88

The following shall be liable to sanctions:

(a) any person who produces seed for marketing that does not conform to the production systems provided for in this Law;

(b) persons, whether natural persons or legal entities, who produce seed for marketing without being registered in the National Register of Seed Producers;

(c) persons, whether natural persons or legal entities, who sell seed or offer seed for sale without being registered in the National Register of Seed Traders;

(d) persons, whether natural persons or legal entities, who conduct analyses or issue analysis certificates for commercial purposes without being registered in the National Register of Seed Laboratories, or those who alter or falsify analysis certificates or the information contained therein;

(e) any person who displays for sale, or for whatever purpose delivers to third parties, seed that is not labelled in accordance with the provisions of Article 58;

(f) any person who displays for sale, or for whatever purpose delivers to third parties, seed that either partly or entirely fails to correspond to the information given on the packaging, tag or label;

(g) any person who prevents or in any way obstructs supervisory tasks connected with the implementation of this Law;

(h) any person who changes the nature of seed obtained under certification and/or inspection or other systems, whether of national origin or imported;

(i) any person who supplies information on or publicizes, in advertisements or circulars or by any other means of dissemination, seed that does not meet legal requirements or is liable to mislead or confuse as to the cultivar to which the seed belongs or its origin, nature and quality, or who fails to supply or falsifies information that he is obliged to supply under this Law;

(j) any person who produces and/or markets seed of cultivars not registered in the National Register of Commercial Cultivars that belong to the species covered by this Law, and those that are in the process of being entered in the Register in accordance with the provisions of the last paragraph of Article 13;

(k) any person who produces for marketing or markets seed of protected cultivars without the consent of the breeder;

(l) any person who imports and/or markets seed that does not conform to the provisions of this Law;

(ll) any person who fails to comply with any other provision of this Law.

Article 89

The Ministry of Agriculture and Livestock shall impose the following sanctions on those who contravene the provisions of this Law:

(a) a warning in the case of a simple error or oversight;

(b) a fine;

(c) confiscation;

(d) partial or total, temporary or permanent closure of premises.

The sanctions listed above may be imposed separately or together, due account being taken of the provisions of Article 92.

Article 90

Without prejudice to the sanctions mentioned in the foregoing Article, the subsidiary sanction of removal of the entry in the Register of Seed Producers or Traders, or of other registrations granted by the Seeds Directorate, for a limited period or indefinitely shall be ordered.

In the event of a second or subsequent offense, the offender shall be punished with up to three times the fine imposed earlier and/or final cancellation of his registration in the relevant Register shall be ordered.

Article 91

The farmer who acquires seed that does not correspond to the information given on the packaging, tag or label shall be entitled to demand repayment by the seller of the sum paid for the seed and for the cost of sowing or plantation and management of the crop up to the time at which the first signs were observed of the falsity of the information given on the packaging or label, without prejudice to any other legal action that may be available to the affected acquirer as indemnification for damages.

Where the cause of the action is not attributable to the seller, the latter may make a claim against the producer or importer on the same grounds and with the same effects as are specified in the first paragraph of this Article.

Article 92

Fines shall be equivalent to the amount of 50 to 10,000 times the minimum daily wage at the current rate, the graduation of which shall be calculated according to the seriousness of the offense, the prejudice caused to a third party and the record of the person responsible.

Article 93

The confiscation of infringing products shall be carried out by the Seeds Directorate according to the procedure laid down by regulation. The Ministry of Agriculture and Livestock may authorize the owner of the confiscated product to sell it for consumption or to order its destruction in a manner and under conditions specified by regulation.

Article 94

Infringements shall be statute-barred six years after they have been committed.

Article 95

The person affected by a resolution of the Ministry of Agriculture and Livestock imposing a sanction may file a request for reconsideration with the same Ministry within a mandatory period of ten working days counted from the day following the date on which the resolution objected to was notified to him. The Ministry of Agriculture and Livestock shall decide the question within a period of ten working days. Where the Ministry calls for evidence or inquiries for the purpose of decision, the said period shall be counted from the time at which it has been provided or taken.

If no resolution is issued in the period specified, it shall be understood that the request for reconsideration has been tacitly dismissed.

Article 96

The person affected by a ruling dismissing his request for reconsideration may file a legal-administrative appeal within a mandatory period of ten working days.

The said period shall be counted from the day following the notification of the ruling or from the expiry of the period allowed for the handing down of such a ruling.

Article 97

Proceedings instituted before the Ministry of Agriculture and Livestock shall be summary, and the time limits specified shall be mandatory.

CHAPTER XI

SPECIAL PROVISIONS

Article 98

Decree No. 24.251 of December 7, 1972, is repealed.

Article 99

The foregoing is to be communicated to the Executive.

PORTUGAL

Decree-Law No. 213/90 of June 28, 1990[1, 2, 3]

Article 1

Object

(1) This Decree-Law establishes the legal regime governing breeders' rights in new plant varieties.

(2) Those botanical species the plant varieties of which may be the subject of breeders' rights shall be specified by order of the Minister of Agriculture, Fisheries and Food.

Article 2

Plant Varieties Eligible for Protection

Breeders' rights may be accorded solely in respect of those plant varieties which, according to the definition to be laid down by order of the Minister of Agriculture, Fisheries and Food, are deemed to be distinct, homogeneous, stable and new.

Article 3

Content of Plant Breeder's Rights

(1) The breeders' rights in a plant variety confer on their owner exclusive entitlement to produce and market plants of that variety or the corresponding reproductive or vegetative propagating material.

(2) Plant breeders' rights shall not prevent the use of the protected plant variety as initial or basic material for the production of other varieties, except where its repeated or systematic use is necessary.

Article 4

Term of Plant Breeders' Rights

(1) Plant breeders' rights shall have a limited term which shall be a minimum of 15 or 20 years, depending on whether they relate to herbaceous plants or to woody plants.

(2) Terms may differ according to species or group of species.

Article 5

Lapse of Plant Breeders' Rights

Plant breeders' rights shall lapse, *inter alia*:

(a) when their term has expired;

(b) when fees due have not been paid;

(c) when the new plant variety no longer displays the characteristics required by this Decree-Law and the Regulations under it;

(d) when the breeder or the actual owner so requests;

(e) when it is demonstrated that the holder of the rights is not the lawful owner thereof.

Article 6

National Registry of Protected Varieties

(1) The National Registry of Protected Varieties (*Centro Nacional de Registo de Variedades Protegidas*-CENARVE) is hereby created, to operate within the framework of the National Institute of Agricultural Research (*Instituto Nacional de Investigaçao Agrária*--INIA), the current President of which shall direct it.

(2) CENARVE shall be responsible for taking the necessary action for the implementation of this Decree-Law.

(3) The President of INIA, in his capacity as Director of CENARVE, shall be assisted, in the exercise of the

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1 Portuguese title: *Decreto-Lei No. 213/90 de 28 de Junho.*

2 Published in the *Diário da República - 1 Série*, No. 147 of June 28, 1990, on pages 2727 and 2728.

3 Translation by the Office of the Union.

functions conferred on him by this Decree-Law, by a Technical Board, the membership of which shall be laid down by order of the Minister of Agriculture, Fisheries and Food.

(4) The members of the Technical Board shall carry out their functions without remuneration.

Article 7

Offenses

(1) The production, marketing and use of plant varieties in breach of the provisions of Article 3 of this Decree-Law and the Regulations for which it provides shall constitute an offense punishable with a fine of 20,000 to 500,000 escudos.

(2) Negligence shall be punishable.

(3) Where liability for the offense lies with a legal entity, the maximum amounts of the fines shall be 6,000,000 escudos in the case of a fraudulent act or 3,000,000 escudos in the case of an act committed by negligence.

(4) Forty per cent of the proceeds from fines imposed shall be paid to INIA, and the balance to the State Treasury.

Article 8

Fees

For the purposes of registration with CENARVE and the keeping of its Register, the persons and entities concerned shall pay fees, the amount of which shall be set in accordance with paragraph (2) of Article 38 of Decree-Law No. 5-A/88 (of January 14, 1988).

Article 9

Regulations

The technical provisions for the implementation of this Decree-Law shall be approved by order of the Minister of Agriculture, Fisheries and Food.

ARTICLES OF INTEREST

THE NON-PATENTABILITY OF PLANT VARIETIES

The Decision of Technical Board of Appeal 3.3.4 of February 21, 1995-T 356/93*

by Peter Lange**

The prohibition contained in Article 53(b) of the European Patent Convention on the patenting of plant varieties and essentially biological processes for the production of plants has long been a focus of interest for legal writers[1] but is now also increasingly an issue in the decisions of the Patent Offices.[2] This is hardly surprising since this legal norm represents the basic rule for delimitation[3] between patentable inventions and the national breeders' rights[4] for new plant varieties instituted under the UPOV Convention.

After a brief introduction to the background history of Article 53(b) EPC, I shall attempt to define the reason of law behind Article 53(b) EPC and the resultant interpretation criteria and then make a critical assessment of this decision, particularly from the point of view plant breeding.

A. Background History of Article 53(B) EPC

Legal writers have quite rightly pointed out that the International Convention for the Protection of New Varieties of Plants (UPOV Convention) that had been concluded already in 1961 in Paris was one of the main reasons why the Contracting States were not committed to the patenting of plant varieties when the attempt was made in Strasbourg in the early sixties to achieve uniformity in substantive patent law.[5] Article 2(b) of the Strasbourg Convention thus exempted the Contracting States from making patents available for plant and animal varieties and for essentially biological processes for the production of plants and animals. On the other hand, the Contracting States were explicitly required to open up patent protection to microbiological processes and products manufactured with the help of such processes.[6] An important part was played in that decision, as already mentioned, by the fact that the UPOV Convention already provided specific protection for new plant varie-

* Official Journal EPO 8/1995, pp. 545-585 = GRUR Int. 1995, 978, with annotations by Schrell.

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1 *Inter alia*, Beier, Crespi, Straus, Biotechnology and Patents, an international enquiry by OECD, VCH Verlagsgesellschaft, Weinheim, 1986. pp. 27 *et seq.*; Heribert Mast, Sortenschutz/Patentschutz und Biotechnologie, Carl Heymanns Verlag KG 1986 S. 27ff.; J. Straus, Biotechnologische Erfindungen - ihr Schutz und ihre Grenzen, GRUR 1992, 252 ff.; R. Moufang, Genetische Erfindungen im gewerbl. Rechtsschutz, Carl Heymanns Verlag KG 1988, 186 ff.; H. Heumeier, Sortenschutz und/oder Patentschutz für Pflanzenzüchtungen, Carl Heymanns Verlag KG, 181 ff.; P. Lange, Die Natur des Züchterrechts (Sortenschutzrecht) in Abgrenzung zur patentfähigen Erfindung, GRUR Int. 85, 88-94(92 ff.).

2 Technical Board of Appeal: : Propagating material/Ciba-Geigy" - T 49/83 of 26.7.83, GRUR Int. 84, pp. 301 *et seq.*; Technical Board of Appeal: "Hybrid plants/Lubrizol" - T 320/87 of 10.11.88, GRUR Int. 1990. 629; Technical Board of Appeal: "Oncomouse/Harvard II - T 19/20 of 3.10.90, GRUR Int. 90, 978.

3 Lange, *op. cit.*, p. 92; Moufang *op. cit.*, pp. 186 *et seq.*; Bauer, Carsten: Patente für Pflanzen - Motor des Fortschritts? S. 216 ff., Werner Verlag GmbH, Düsseldorf, 93.

4 Compare Neumeier, *op. cit.*, pp. 33 *et seq.*

5 Straus, *op. cit.* p. 259.

6 Moufang, *op. cit.* pp. 199 et seq.

ties[7] under which the requirements of novelty, distinctness, sufficient homogeneity, stability and a variety denomination had established special criteria for grant which were, in my opinion, particularly well suited and perfectly adapted to biological material[8] and, of particular importance, had set up a quite specific configuration for the scope of protection. Here I should make special mention of breeder's privilege, that constitutes the "core" of the UPOV Convention,[9] and to which I shall return later in more detail.

However, it is also important to mention in this connection that the criteria for protection under patent law—particularly invention, reproducibility and inventive step, as also industrial application—were extremely disputed in the doctrine at that time for the patenting of new plant varieties and were difficult, to say the least, to justify (as they may still be today).[10]

The result was that, in 1973, a further step was taken in the European Patent Convention, as also in numerous domestic patent laws in Europe (and also in non-European patent laws), and Article 53(b) EPC therefore explicitly excludes plant varieties and essentially biological processes for the production of plants from patenting.[11]

This also quite logically corresponds to a purposeful conflict provision[12] between a *sui generis* law for the protection of new results of plant breeding work (protection for new plant varieties) and the general possibility of obtaining patent protection for inventions, which is still unreservedly valid today.

It should additionally be mentioned that the German Bundestag, after a hearing in the Legal Committee and after receiving the results of the Enquiry Committee on the Opportunities and Risks of Genetic Engineering, that it had set up on June 29, 1984, explicitly decided to maintain the exclusion of plant varieties and animal varieties from patent protection[13]!

B. The Reason of Law of Article 53(B) EPC

From what I have said above, it transpires that the exclusion of plant varieties and essentially biological processes for producing plants from patenting contained in Article 53(b) EPC has its grounds in the special protection for the results of plant breeding that already existed under the UPOV Convention, that is to say plant variety protection, whereby, as also already mentioned, the special criteria for protection and also, in particular, the scope of protection that is well suited to the special requirements of plant breeders, are to be emphasized.[14] In this context, we should make special reference to what is known as breeder's privilege: Article 5(3) of the 1978 UPOV Convention (now Article 15(1)(iii) of the 1991 revised UPOV Convention) lays down an essential principle of plant variety protection to the effect that protected varieties may be freely used as an initial source of variation for the creation of other varieties without the consent of the (original) breeder

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7 Straus, *op. cit.*, p. 259, "... the aim was that inventions in the field of plant breeding should primarily be protected under the UPOV Convention ..."; R. Teschemacher, "Die Patentfähigkeit von Mikroorganismen nach deutschem und europäischem Recht," GRUR Int. 357-363 (360; "It was the view that plant breeders' rights were to be preferred for the protection of new plant varieties that had been patented in various countries up until then"; Beier, Crespi, Straus, *op. cit.*, p. 25; Lange, *op. cit.* p. 91.

8 Lange, *op. cit.* p. 91; Beier, Crespi, Straus, *op. cit.* p. 25; Straus, Das Verhältnis von Sortenschutz und Patentschutz für biotechnologische Erfindungen in internationaler Sicht, GRUR Int. 333-339 (337).

9 Lange, *op. cit.*, p. 91.

10 Thus also, Straus, *op. cit.* (note 1) p. 259.

11 Straus, *op. cit.* (note 1) p. 259, Beier; Crespi, Straus, *op. cit.*, p. 27.

12 Bauer, *op. cit.*, p. 214.

13 BT Drucks. 11/8520 p. 46. Also Schennen, Die diplomatische Konferenz zur Revision des UPOV-Übereinkommens im März 1991, Mitt. 1991, 129 *et seq.* (132) explicitly points out that the Federal Government had not considered lifting the exclusion of patenting. See also Teschemacher, Festschrift für Nirk, C.H. Becksche Verlagsbuchhandlung München, 1992, Die Schnittstelle zwischen Patent- und Sortenschutz nach der Revision des UPOV-Übereinkommens von 1991, S. 1005 ff. (1007).

14 Thus also, in particular, Moufang, *op. cit.* p. 192; for the specific differences between variety protection and patents, see in particular Lange, *op. cit.* pp. 89-92.

and that the new breeding result may be freely used (produced, reproduced, marketed, etc.—and also protected) without the consent of the (original) breeder. It is therefore intentional that no dependency exists. This principle is still indispensable for plant breeders today despite the use of biotechnological methods in breeding (including genetic engineering) since breeding is always based on what already exists, requires a broad range of variability and demands the free use of material.[15]

Since the purpose of plant variety protection is not to protect an invention, for instance a specific property in plant material, but the creation (including the discovery) of a new plant variety (that is to say a unique new "shuffled" genotype with a corresponding phenotypical expression—see the definition of variety below), there must be the continuing possibility of using the protected material of competitors to develop new varieties with a new and unique genotype (for example, by crossing—that is to say a new "reshuffle"), without there being dependency.

The fact that many breeders now themselves apply genetic engineering or use its results makes no difference whatsoever:

Genetic engineering simply helps, *inter alia*, to insert new specific characteristics into plant material (therefore it increases the initial variability), but cannot alone create new plant varieties since it must then be completed by further breeding work (in particular crossing, selection, etc.) before achieving a new plant variety.[16]

Again the Revised UPOV Convention has left intact the core of plant variety protection constituted by this breeder's privilege. The newly introduced dependency in plant variety protection for "essentially-derived varieties" applies only to the special case of very close genotypical identity with the "initial variety"—for instance, in the case of plagiaristic breeding or the genetically engineered alteration of an extremely small genetic component of the overall genome.[17] If plant varieties were to be patented (even if it were possible in the doctrine in the light of what has been said above) then this lack of dependency deriving from breeder's privilege would no longer be guaranteed and the application of the experimental exception under patent law would in no way replace it!

We must therefore acknowledge that the essential nucleus of the reason of law of Article 53(b) EPC is to be found in the *sui generis* nature of plant variety protection.

C. Interpretation Criteria

However, there result herefrom also the following criteria of interpretation that are very important in relation to the necessary delimitation, explained above, between the very specific breeder's right for new plant varieties and a patent for new inventions.[18] To interpret a law means to investigate its purpose. The essential element in so doing is the will of the lawmaker that is objectivized in the wording of the law, although we must not remain bound to its literal expression.[19]

The point of departure is the meaning of the words (the linguistic and grammatical interpretation), followed by an interpretation in accordance with the context of the meaning (the systematic interpretation), the background

[15] Lange, *op. cit.* p. 21; cf. also Bauer, *op. cit.* p. 61 as also Lessmann in Festschrift für Rudolf Lukes, Carl Heymanns Verlag 1991, S. 431 "... these differing factual findings may not be overlooked and may not lead to a hasty parallel assessment under patent law ..."

[16] H. Becker, Pflanzenzüchtung, Verlag Eugen Ulmer, Stuttgart, 1993, S. 282 ff. (290).

[17] Lange, Abgeleitete Pflanzensorten und Abhängigkeit nach der revidierten UPOV-Konvention, GRUR Int. 93, 137 ff. (139).

[18] See also the statement made by the Federal Minister for Food, Agriculture and Forestry, Jochen Borchert, on the occasion of the fiftieth anniversary of the Federal Association of German Plant Breeders in the Festschrift for the jubilee on 9.5.95 in Bonn, p. 57 ("... it is closely linked to the issue of a reasonable delimination between patents and plant variety protection ..."), published by BDP, Kaufmannstr. 71-73, 53115 Bonn.

[19] Heinrichs, Palandt BGB, 52. Auflage 93 Einleitung vor § 1, Rdn. 34.

history and, finally, the teleological interpretation which is of basic importance for the result of the interpretation and which must take its guidance from the reason of law.[20]

According to the meaning of the words, "plant varieties" and "essentially biological processes for the production of plants" are first to be excluded from patent protection. In so doing we may consider correctly with Moufang that the concept of variety is not only expressed immaterially, but that it also contains a "structural" side[21] since a variety protection certificate is not only granted for a plant variety, but its effect also extends to physical and structural objects, for instance to propagating material (and according to the revised 1991 UPOV Convention also to harvested material—Article 14(2)—or in certain cases even to products made directly from harvested material).

With respect to the concept of "variety," following the 1991 revision, it is the legal definition of variety included in Article 1(vi) of the UPOV Convention that applies today. I shall deal with this in more detail in connection with decision T 356/93.

With respect to "essentially biological processes for the production of plants" we shall have to include not only what are known as the conventional biological breeding processes (such as crossing, selection, hybrid breeding, etc.), but also all those "technical" processes that are today used in plant breeding, such as, for instance, the use of tissue culture, and the like, but not chemical or physical processes (including genetic engineering!) since from a terminological point of view we cannot continue to distinguish between "biological" and "technical" and also no new plant varieties can be bred by chemical or physical processes, but, at best, biological material treated or altered with respect to individual properties.[22] Altogether, however, an overall assessment of the procedural steps will be decisive and, in the individual case, they indeed may lead to the predominance of the biological character and thus to exclusion from patentability.

Surprisingly, not only in the literature, but also particularly in the decisions of the Patent Office, the above-mentioned generally applicable criteria of interpretation are hardly applied to Article 53(b) EPC, but on the contrary, a terse comment is made that Article 53(b) EPC, as a "provision of exception or of exclusion," is to be restrictively interpreted.[23]

Even Moufang, who begins by carefully assessing all the possible interpretations and even emphasizes that it is nevertheless clear that the exclusion of varieties was (also) made because the special breeders' rights under the UPOV Convention and the national plant breeders' rights were to be considered a form of protection that was more appropriate and better adapted to the needs of breeders,[24] finally refers uncritically to the general methodological principle that provisions of exception are to be restrictively interpreted, but nevertheless sees at the end a certain contradiction with the general principle of patent law that narrow claims are more likely to be accepted than broadly formulated claims.

The claim that provisions of exception are to be restrictively interpreted is in itself already untenable from a legal point of view and in this general situation is indeed inapplicable.[25] For instance, within the limits of the corresponding legislative purpose, an extensive interpretation or analogy is altogether acceptable even in the case of provisions of exception.[26]

Moreover, in the specific case of Article 53(b) EPC, which concerns, as referred to

[20] Heinrichs, *op. cit.*, Rdn. 35/38.
[21] Moufang, *op. cit.*, p. 190.
[22] Thus also Moufang, *op. cit.*, pp. 197 and 198.
[23] The only possible justification I feel could be used might be found in the documentation to the EPC: document IV 1/61-D, p. 5, Nr. 2, paragraph 1 according to which patentability is to be defined as broadly as possible under European patent law.
[24] Moufang, *op. cit.*, p. 192.
[25] Heinrichs, *op. cit.*, Einleitung vor § 1 BGB Anm. 45.
[26] BGHZ 26, 83; BAG NJW 69, 75; Ffm BB 82, 515; Hamm OLGZ 86, 17.

above, a typical provision of delimitation between patent protection and plant variety protection that has its specific justification in the *sui generis* nature of variety protection, this alleged "methodological principle" can in no way be applied.

More properly, we shall go along with Bruchhausen[27] and look for the delimitation between the two systems, preserving their guarantees, at the point where one only of the systems offers a possibility of protection.

This means, finally, that patents cannot be granted for plant varieties, including their variety material (propagating material, harvested material and directly obtained products) and can also not be granted via the second part of Article 53(b) EPC which opens up patentability to microbiological processes and the products thereof for variety material produced in that way.[28]

This latter "counter-exception" would be quite clearly strained, in view of its background, if an attempt were made to use it to justify patent protection for plant varieties.[29]

Moreover, if such were not the case, the breeder's privilege under the UPOV Convention would be undermined by the provisions of patent protection.

Since that fact is obviously quite clear to various patent law specialists, they therefore hold that Article 53(b) EPC should be revised[30] or they can no longer see any legal necessity for it (particularly, they allege, after the revision of the UPOV Convention)[31] or, again, they counterattack and regard breeder's privilege as a questionable attribute of plant variety protection law.[32] Although I must admit that in their past discussions the patent law specialists and the breeders' rights specialists have come increasingly closer in their positions[33], it is to be regretted from the point of view of plant breeding that the importance of breeder's privilege still frequently fails to be recognized as the indispensable core of the very specific protection of plant varieties. The International Association of Plant Breeders ASSINSEL, on the other hand, has unanimously emphasized in several resolutions the fact that breeder's privilege is an indispensable central provision of plant variety protection law.[34]

Finally, it is the interpretation proposed here for Article 53(b) EPC that would lead to acceptable solutions not only for the owners of plant variety protection certificates but also for the owners of patents. Indeed, in no way does it deny the necessary patent protection for biotechnological inventions.[35]

As an example, patent protection, as described below—for a genetically engineered construction or process—must extend right up to the plant material, including propagating material, and should also be effective for the variety material—without, however, including the variety itself or its propagating material, harvested material or products obtained therefrom in their overall "genotypical expression." Only such variety material is eligible for variety protection and thus excluded from patent protection! Therefore, if such variety material

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27 Bruchhausen in Benkard, Patentgesetz, 9th edition, Becksche Verlagsbuchhandlung München 93 Note. 12a (*in fine*) to § 2 PatG.

28 Thus also, in effect, Moufang, *op. cit.*, p. 200; Neumeister, *op. cit.*, p. 199, describes this view as probably the predominant opinion in legal writings.

29 Thus Bauer, *op. cit.*, pp. 224, 225.

30 See bibliography in Straus, *op. cit.*, p. 226, Note 140.

31 Straus, *op. cit.*, p. 266 *in fine*.

32 Moufang, *op. cit.*, p. 396.

33 Straus, Pflanzenpatente und Sortenschutz - Friedliche Koexistenz - GRUR 1993, 794; "This discussion has also probably meant that, in the meantime, patent law specialists understand more of plant variety protection and plant variety protection specialists more of patent law and in both forms of protection it is unlikely that we should see mutually exclusive alternatives for the protection of innovations in the field of plant breeding."

34 See the ASSINSEL declaration on the application of the new principle in the UPOV Convention on essentially derived varieties of 5.6.92 (Toronto), Introduction, paragraph 2, published in GRUR, in 1993, 142 (annexed to Lange, *op. cit.*, note 19).

35 Numerous plant breeders already work with biotechnological and genetic engineering methods or cooperate with genetic engineering firms and are therefore themselves concerned for effective patent protection for the corresponding inventions, in their own interest!

is not claimed as such in a patent claim, nothing opposes patent protection, for instance, for the invention of a specific property (resistance, etc.) in plants or also in variety material; on the contrary, such patent protection must also be effective for the variety material, since it would otherwise be without effect.

In that same case, the variety material (whether protected or not under breeders' rights) must be freely useable, under the principle of breeders' privilege, for further breeding work. This again is a matter of using for breeding purposes "the whole genotypical expression" as such. Thus, if a breeder succeeds in "mendeling" out the resistance characteristic, that is anchored in the variety by genetic engineering and patented, he must be allowed to use that variety material freely in his further breeding work (for instance, by crossing, etc.). If he does not succeed, then he continues to be dependent on the patent (not to speak of plant variety dependency in the case of an "essentially derived variety," which is mostly the case if variety material of a protected variety is used and the genotype is simply changed to a slight degree, for instance by inserting a characteristic by means of genetic engineering).

D. Critical Assessment of the Decision of the Technical Board of Appeal T 356/93

After having set out the principles above, we may now make a critical assessment of the recent decision by the Technical Board of Appeal of the EPO:

1. Definition of "Plant Variety"

To begin with the decision properly bases itself, as did the preceding decisions of the Technical Boards of Appeal[36], on the definition of "plant variety" given in the UPOV Convention as valid at that time. It then correctly appears to use the variety definition according to Article 1(vi) of the revised 1991 UPOV Convention—although not literally and not in full.

In particular, there is lacking the phrase used in the first indent of the UPOV definition according to Article 1(vi): (a plant grouping)

"defined by the expression of the characteristics resulting from a given genotype or combination of genotypes,"

However, it is exactly this part of the definition that is important since it makes clear the "dimension" of a plant variety, already referred to above under B, as a plant grouping excluded from patent protection.

It is, namely, always a question of a plant population that results from a unique genotype (or a given combination of genotypes) which expresses a specific phenotype (that can be defined on the basis of the expression of the characteristics resulting from the genotype).[37] This variety definition is based essentially on the phenotype (the expression of the characteristics), but also relates to the genotype. Indeed, this genotype reference perhaps makes my explanations above (under B) clearer where I spoke there of a "unique new shuffled genotype with a corresponding phenotypical expression."

This is the purpose of protection under UPOV and that type of plant varieties is excluded from patent protection.

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[36] It should, however, be critically noted in respect of decision 320/87 "hybrid plants/lubrizol" that it may in no way be assumed that hybrid seed and plants cannot be considered a "variety," because they are allegedly not stable, since the appropriate characteristics of the hybrids themselves may be repeatedly reproduced without change by use of the parent lines for each propagation cycle (see in this respect also van der Graaf, GRUR Int. 1990, 632). Accordingly, they may also be independently protected as a variety. Additionally, the UPOV Convention contains specifically for hybrid varieties a number of special provisions, such as Article 14(5)(a)(iii) of the revised version (varieties whose production requires the repeated use of the protected variety need the consent of the breeder).

[37] See in particular Teschemacher, note 15, p. 1010: "... if the variety is not already defined by one or individual properties, but by the characteristics of the plant, i.e. by the overall phenotype. Finally, the variety is a single marketable product."

Due to the "structural" side of the variety definition mentioned above (footnote 23) all plant parts, propagating material and, in particular, plant cells must be included within the definition of plant or plant variety, contrary to the decision (paragraph 23), if whole plants of the variety can be regenerated from them.

It is therefore wrong to generally include plant cells within the definition of "microorganisms"

2. Essentially Biological Processes for the Production of Plants and Microbiolgical Processes

Apart from the fact that the distinction made in the decision between processes that are not essentially biological for the production of plants and microbiological processes cannot be accepted (paragraph 38) and, moreover, would seem superfluous, we can finally agree with the statement that products of microbiological processes cannot represent plant varieties (paragraph 39) since otherwise this would lead to avoidance of the above described prohibition on the patenting of plant varieties.

However, it is not clear in the specific case how the product of a microbiological process (according to Claims 7 and 21) can be regarded as a plant belonging to a plant variety as detailed above. The simple reference to working examples (paragraph 40.4) in the form of known plant varieties cannot replace a precise examination of whether the subject matter of the invention is truly a plant variety as such. The fact that, in individual cases, exploitation of the invention may indeed lead to "essentially-derived varieties" within the meaning of the revised UPOV Convention, is obvious, but is purely an issue for plant breeders' rights and irrelevant to the question of patentability and thus of the subject matter of the invention (see paragraph 40.4).

3. Negation of Claims to Plants or Seed

From my point of view, the decision definitely takes the wrong path in paragraph 40.3 where it is stated in respect of claim 21 that "this claim is in general directed to a plant which possesses, integrated in its genome in a stable manner, a heterologous DNA containing ..."

Consequently, it is stated that the subject matter of claim 21 differs decisively from the subject matter dealt with in decisions T49/83 and T320/87 in that it relates to genetically modified plants which remain stable in their modified characteristic(s) and that these characteristics are transmitted in a stable manner in the plants and seeds throughout succeeding generations (what else are we to expect of a genetically introduced property except that it no longer changes from generation to generation—that is to say it follows the normal genetic rules?). Then, using the argument of the working examples, it is deduced that they are "genetically transformed plant varieties" and that therefore the subject matter of claim 21 covers genetically transformed plant varieties despite the fact that the claim is not formulated as a variety description.

The decisive point of departure for the decision is therefore, in my view, the incorrect assumption of a plant variety based on a generalized genotype.

However, the above explanations shows that this is not the case. A plant variety is always precisely characterized by a highly individual (unique) combination of properties which again are based on an individual (unique) genome.

Since the claims—even including the working examples—do not make claim (not even indirectly) to individual plant varieties as such, but on the contrary the quite general subject matter of the invention in claim 21 represents plants transformed in a stable manner by genetic engineering having an enzymatic effect not specific to the variety (generic plant claim), this claim (and claim 18 for seed with the same characteristics) ought not be disallowed on the grounds of contravention of Article 53(b) EPC.

Should this decision be upheld and the principles set out therein continue to be applied, I can foresee the following risks for plant breeding:

1. Breeder A, who licenses a patent of that kind from a genetic engineering firm (possibly an exclusive license for the plant species with which he works), would first have to go to considerable expense (for the licensing and for development of the variety). However, any other breeder using plants (or seed) of the variety developed by breeder A, and possibly protected by a plant breeder's right, could introduce the specific property, which it is in fact intended to protect by patent, into his own plant material without being subject to a patent license.

The principle of dependency under variety protection is of no utility here since the variety developed by the second breeder can be completely "remixed"—but contain that one interesting property that for him is free of patent rights.

2. As in the first case, the patent owner has granted the plant breeder a license in return for payment.

However, the patented invention may concern a property which, when producing plants (whether they be varieties or not) in the field, leads to a substance in the harvested material that is industrially exploitable.

However, since the patent owner has already received his license fees, the patent will already be exhausted. Claims to a corresponding utilization of the seed (also in the case of reproduced seed) or to the harvested material come to naught due to the lack of patent claims to the seed. Again this result would seem unfair since the above mentioned license in no way covers further utilization.

For the reasons that have been stated, decision T 356/93 of the Technical Board of Appeal should not constitute the final word and should be revised on account of the deviations from preceding decisions of the Technical Boards of Appeal, particularly where it concerns, as in the present case, generic plant claims without specific plant varieties being claimed in their individual nature.

However, whether or not a patent application can claim directly or indirectly plant varieties in their individuality should be assessed in accordance with the above-mentioned generally valid criteria of interpretation.

Post Scriptum by the Author

After completing this commentary, I gained knowledge of the decision by the Enlarged Board of Appeal of the EPO of November 27, 1995 (G 3/95). This latter decision was taken subsequent to decision T 356/93 and referral of the following point of law by the President of the EPO under Article 112(1)(b) of the EPC:

"Does a claim which relates to plants or animals but wherein specific plant or animal varieties are not individually claimed contravene the prohibition on patenting in Article 53(b) EPC if it embraces plant or animal varieties?"

The Enlarged Board of Appeal refused the referral of this point of law as being inadmissible. Its main grounds lie in the fact that decision T356/93 does not conflict with any previous decisions of the EPO. Thereby, the Enlarged Board of Appeal held the question of law referred to it by the President of the EPO to be a matter that was not relevant for decision T 356/93 of the Technical Board of Appeal and not a decisive point in that decision. The statement—although it is not possible to go along with its justification—is to be welcomed, at best, in that it leaves room for further decisions concerning the referred matter—and which, it is to be hoped, will go in the direction I have advocated.

However, it remains highly unsatisfactory that decision T 356/93 should continue to be valid for the time being with the negative consequences described above. The incorrect

conclusion that I would criticize consists particularly in a wrong definition of plant variety and therefore in an unbalanced interpretation of the prohibition on patenting of plant varieties under Article 53(b) of EPC.

The statement contained in paragraph 40.3 to the effect that claim 21 "... is in general directed to a plant which possesses, integrated in its genome in a stable manner, a heterologous DNA containing ...," in no way suffices to make such a plant a plant variety within the meaning of the UPOV Convention, unless:

1. As explained above under D1, the variety definition under Article 1(vi) of the revised UPOV Convention is referred to in full; that means that it must concern a "plant grouping (...) which (...) can be

- distinguished from any other plant grouping by the expression of at least one of the said characteristics ..."

It is quite obvious that the decision of the Technical Board of Appeal just assumes that the simple concept of introducing a genetically stable integrated additional heterologous piece of DNA into the genome of a plant is accompanied by the distinctness of that plant—that is to say is equated with it. This in itself is already wrong, since the UPOV Convention makes a clear difference between "clearly distinguishable" (by the expression of a characteristic—that is to say in the area of the phenotype) and an essentially derived variety (very close genetic conformity—see Article 14(5)(b)(ii) and (iii)). There must first be clear distinctness in the area of the phenotype and only then can the question become relevant whether the genotype contains an (intolerable) genetic concordance that would lead to an essentially derived variety.

This is again wrong since the expression of the distinctive characteristic that is to be examined from a phenotypical point of view (see above definition of variety) can in no way be assumed from the existence of a stably fixed modification of the genome or lead to clear distinctness in the phenotype.

2. Even if phenotypical expression of a distinctness characteristic is assumed in the individual case due to a stably anchored modification of the genotype in a plant, it is still not certain whether—either before or after the insertion of the genetic modification—the corresponding plants really constitute a plant variety within the meaning of the UPOV Convention. It is incorrectly assumed that the process started from a distinct, homogeneous and stable plant variety (apparently due to gross over-estimation of the working examples), despite the fact that the case may well concern a heterogeneous, non-distinguishable plant population, and also that subsequently it has become a plant population within the meaning of a plant variety under the UPOV Convention. Here again it is incorrectly assumed that individual plant varieties that are truly new within the meaning of the UPOV Convention can be claimed as such and that the prohibition of patentability thus comes into operation.

In view of the limited accuracy, described above, of the decision by the Enlarged Board of Appeal, it is further to be hoped that the substance of Decision T 356/93 of the Technical Board of Appeal will not remain the final word.

OBITUARY

Georg Hendrick Christiaan Bodenhausen

Georg Hendrick Christian Bodenhausen, the first Director General of the World Intellectual Property Organization (WIPO) and the first Secretary General of UPOV, died in Lausanne (Switzerland) on October 1, 1997.

Bodenhausen was born in Utrecht (Holland) on July 11, 1905. He was a national of the Netherlands.

Bodenhausen studied law in the Netherlands and practiced there as an independent attorney-at-law, specialized in intellectual property from 1930 to 1962. He was also professor at the University of Utrecht, teaching intellectual property. His specialization in the field of intellectual property and his keen interest also in the international aspects resulted in the Netherlands Government's choosing him to be a delegate at the conferences for the revision of intellectual property treaties.

He was appointed Director of BIRPI (*Bureau internationaux réunis pour la protection de la propriété intellectuelle)*, predecessor organization of WIPO in January, 1963, and elected Director General-the first Director General-of WIPO in 1970. As a consequence of holding these positions he became the first Secretary-General of UPOV in 1969. He retired as Director General of WIPO and Secretary General of UPOV in 1973.

CALENDAR

UPOV MEETINGS IN 1998

March 30 to April 1, 1998 (Geneva, Switzerland)	Technical Committee
April 2, 1998 (Geneva, Switzerland)	Administrative and Legal Committee
April 3, 1998 (Geneva, Switzerland)	Consultative Committee
June 16 to 19, 1998 (Merelbeke (or Melle), Belgium)	Technical Working Party for Computer Programs
June 23 to 26, 1998 (Angers, France)	Technical Working Party for Agricultural Crops
June 29 to July 3, 1998 (Slupia, Wielka, Poland)	Technical Working Party for Vegetables
September 28 to 30, 1998 (Washington D.C., United States of America)	Working Group on Biochemical and Molecular Techniques, and DNA-Profiling in Particular
October 26, 1998 (Geneva, Switzerland)	Administrative and Legal Committee
October 27, 1998 (Geneva, Switzerland)	Consultative Committee
October 28, 1998 (Geneva, Switzerland)	Council
November 9 to 14, 1998 (Coolangatta, Queensland, Australia)	Technical Working Party for Fruit Crops and Ornamentals

OTHER MEETINGS

September 6 to 8, 1999 (Cambridge, United Kingdom)	World Seed Conference