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INTERNATIONAL UNION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS

GENEVA

ADMINISTRATIVE AND LEGAL COMMITTEE

Twenty - fifth Session
Geneva, October 11 to 13, 1989

REPORT

adopted by the Committee

Opening of the Session

1. The Administrative and Legal Committee (hereinafter referred to as "the Committee") held its twenty-fifth session from October 11 to 13, 1989. The list of participants is given in Annex I to this report.
2. In the absence of the elected Chairman and Vice-Chairman, the session was opened by Mr. W.F.S. Duffhues (Netherlands), President of the Council, who welcomed the participants.

Election of a Chairman for the Session

3. Mr. J.-F. Prével (France) was unanimously elected Chairman of the session.

Adoption of the Agenda

4. The Committee adopted the agenda as appearing in document CAJ/XXV/1, subject to the addition of an item concerning the activities of GATT (inclusion of plant variety protection in negotiations on trade-related aspects of intellectual property rights--TRIPS).

New Developments in the Field of Plant Variety Protection

5. The Delegation of Denmark announced that consideration was being given to the extension of protection to Aster and possibly Anthurium as well. Apart from that, the services in charge of plant varieties were to be reorganized with effect from January 1, 1990. Lastly, the Government had decided that the examination of varieties for the purposes of their protection and entry in the national register of varieties admitted to the trade would have to be self-financed as from January 1, 1991. New sources of financing would have to be found, and fees could be expected to increase. That might affect the UPOV Recommendation on Fees in Relation to Cooperation in Examination (document C/XIV/17, Annex II), and the Delegation of Denmark suggested that it should be reviewed.

6. The Delegation of France announced that in July the Court of Cassation had handed down its decision concerning the question of the novelty of a line of maize that had never been marketed as such, but used as a component in hybrids which had been marketed. It confirmed the point of view of the Committee for the Protection of New Plant Varieties according to which such a line lost its novelty the first time it was used in the commercial production of a hybrid.

7. The Delegation of the United Kingdom announced that, following the study of examination systems in respect of varieties and seed, the Ministers for Agriculture had also requested that tests for distinctness, homogeneity and stability should be self-financed and that costs should no longer be transferable between species. Fees should be expected to increase by 28% on average. The authorities of the United Kingdom were endeavoring to reduce costs through cooperation and the simplification of examination procedures.

8. The Delegation of Argentina announced that Argentina had been operating a system for the protection of new varieties of plants since 1978. The relevant implementing decree had recently been amended to bring the procedures under the Law on Seed and Phytogenetic Creations up to date. The amended version had entered into force in January 1989.

9. The Law was administered by the National Seed Service, whose National Seed Commission, composed of representatives of the various branches of the variety and seed trade, was responsible for advising the Minister of Agriculture. The Service was also responsible for keeping the national register of varieties, which listed nearly 1,000 varieties. Two hundred and forty-two of them were protected and listed in the National Register of Varietal Property. The system was supplemented by a National Register of Trade in Seed and Fees, in which over 3,300 operators were registered.

10. The Central Seed Laboratory was affiliated to the National Seed Service. Through the Laboratory, Argentina was a member of the OECD international seed certification system and of ISTA.

11. The Delegation of Canada announced that the draft law on the protection of new varieties of plants had had its second reading in Parliament and was now being examined in committee.

12. The Vice Secretary-General announced that Poland's instrument of accession to the Convention had been received on October 11, and that Poland would become a full member of UPOV on November 11, 1989.

Revision of the Convention

13. Discussions were based on document IOM/IV/2.

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

14. Paragraph (1). The Delegation of the United Kingdom pointed out that the possibility of the European Communities becoming party to the revised Convention would have to be provided for here.

15. Paragraph (2). The discussion centered entirely on the second sentence, appearing in brackets, namely the prohibition of "double protection."

16. The Delegation of France recalled that no majority view had emerged at the fourth Meeting with International Organizations and that the Convention had proved effective in protecting varieties as such. It stated its readiness to support the proposed text, including the sentence in brackets, so as to help countries that might have difficulty in ensuring the exclusiveness of the plant variety protection system without that sentence; to that end, however, Articles 4 and 5 should not be prejudicial to the interests of breeders, and should provide for coverage of the entire plant kingdom on the one hand and for fully satisfactory protection on the other.

17. The Delegation of the United States of America hoped that the revision of the Convention would be characterized by a spirit of openness and that it would prove adaptable to future developments. It suggested that the sentence in brackets should be deleted. The aim of that suggestion was not to impose a system of double protection on member States, but to allow States to opt for such a system if they wished to do so. The Delegation pointed out that, in the United States of America, patent protection for vegetatively propagated plant varieties had been available for the past 60 years. Although the Convention offered a system of protection that had also functioned satisfactorily for more than 25 years, the patent system was increasingly used to protect plants. It would therefore be inadvisable to entrench the present position of some member States. Indeed, if the standard of protection were improved and the conditions of patentability were applied strictly, breeders could be generally satisfied with protection under the UPOV system and patent protection would be sought in fewer instances. In other words, the choice of a system of protection should be left to the breeder, who would more likely choose protection under an improved UPOV system even if there was no provision excluding plant varieties from patentability, such as Article 53(b) of the European Patent Convention.

18. Referring to a statement, made at the fourth Meeting with International Organizations, to the effect that the criteria determining the patentability of varieties should be the same as those applied under the UPOV system, the Delegation of the United States of America considered that those criteria might be useful to satisfy the requirement of an enabling disclosure regarding a variety, but that the claims should be examined with the novelty/non-obviousness criteria.

19. The Delegation of Australia considered that it was up to each State to decide for itself. It was therefore in favor of deleting the sentence in brackets. It expressed serious concern, moreover, at the fact that the sentence in question might make it very difficult for certain States to join UPOV: a State which set up a special system of protection after the system of patents had been extended to plants might have difficulty in subsequently closing the door to that system. At any rate, it could be assumed that not many varieties would be protected by industrial patents.

20. The Delegation of the Netherlands was of the opinion that there should be only one system of protection for varieties as such. The possibility of double protection, or a double system of protection, might give rise to confusion and should therefore be avoided. Accordingly, the Delegation was in favor of retaining the sentence in brackets.

21. The Delegation of New Zealand was not yet in a position to express a definite opinion, because of the misunderstandings that still persisted. In particular, it wondered whether the proposed text effectively conveyed the meaning that it was intended to convey. It was doubtful whether the authorities in charge of the system of patents would find the sentence in brackets acceptable.

22. The Delegation of Sweden recalled that Sweden was bound by the European Patent Convention and that its legislation could not be amended, whatever the final wording of Article 1. It wished to hear from the observer States whether the sentence in brackets would make it more difficult for them to accede to the Convention.

23. The Delegation of Canada announced that varieties were not patentable in Canada, in accordance with the "Pioneer" ruling of the Supreme Court. Should the patentability of plants be accepted in case law, then it would be inclined to share the point of view expressed by the Delegation of Australia.

24. The Delegation of the Federal Republic of Germany was in favor of retaining the sentence in brackets, but considered that it should be revised. Indeed, it referred to "any other form of protection," whereas no other had been defined as yet.

25. The Delegation of Denmark indicated that the Ministry of Agriculture and agricultural interest groups in its country were aware of the need to improve the patent system in order to satisfy the requirements of biotechnology. However, that did not necessarily imply that plant varieties had to be covered by patents. The two systems were necessary, but should not overlap. Accordingly, the Delegation was in favor of retaining the sentence in brackets. As for the fears expressed by the Delegation of Australia, it considered that great care would have to be taken in drafting the article that would correspond to the existing Article 37.

26. The Delegation of the United Kingdom announced that an agreement had been reached between the competent authorities whereby the protection of plant varieties was covered exclusively by the system of breeders' rights, partly on account of Article 53(b) of the European Patent Convention. It shared the view expressed by the Delegation of Denmark with regard to the article corresponding to the existing Article 37.

27. The Delegation of Argentina announced that the matter was currently under consideration in Argentina, and that varieties could not be patented there.

28. The Delegation of the European Patent Office (EPO) observed that the two important aims of the revision of the Convention were to strengthen the right of the breeder and adapt the system of protection to developments in the field of biotechnology. That was where the question of interdependence arose. The European Patent Convention offered scope for protection in a broad field. However, the EPO feared that, taken together, Articles 1(2), 2(ii) and 5(5) in particular, might have a restrictive effect on the scope of application of the latter Convention.

Article 2 (Definitions)

Paragraph (i) (definition of "species")

29. The Committee considered that it was not essential to define "species," since that term did not pose a problem. Furthermore, the approach adopted in respect of Article 4 made a definition redundant.

Paragraph (ii) (definition of "variety")

30. Importance and necessity of a definition. The Delegation of the United Kingdom stressed the importance of defining "variety." In that connection, the authorities responsible for plant variety protection were often told, in their discussions with those in charge of patents, that they did not understand the meaning of the word "variety."

31. The importance of defining the term was also stressed by the Vice Secretary-General, who referred to the claim that the definition of "variety" was given in Article 6. It should be made perfectly clear that Article 6 set forth only the conditions required for protection and that there were varieties which would not meet those conditions. That had to be done not only to ensure the proper functioning of the system of protection based on the Convention, but also to prevent the system of patents from encroaching on the scope of application of the Convention as a result of theoretical interpretations relying on the claim mentioned.

32. Possibility of reproducing an existing definition. The Delegation of Australia wondered whether it might not be possible to reproduce the definition given in the International Code of Nomenclature for Cultivated Plants,* which was convenient because it overcame the problem of discovered plants by using the expression "cultivated plants." The Vice Secretary-General replied that UPOV should work out a definition of its own, rather than rely on the work of other bodies, which might ignore its needs.

33. Reference to a grouping. The Delegation of the United States of America questioned the appropriateness of the reference to a "grouping," which could apply to a grouping of varieties. The Vice Secretary-General replied that the reference in question could not be dispensed with, because certain types of varieties could only be represented by a large number of plants or plant parts (typically seed).

34. Reference to parts of plants. The Delegation of France stated that it was in favor of simplifying the definition by means of a concomitant improvement of the definition of "material." However, that did not imply support for

* The first paragraph of Article 10 of that Code reads as follows:

"The international term cultivar denotes an assemblage of cultivated plants which is clearly distinguished by any characters (morphological, physiological, cytological, chemical, or others), and which, when reproduced (sexually or asexually), retains its distinguishing characters."

The Office of the Union considers that that formulation cannot be dissociated from Article 11, which defines a few specific categories of varieties.

the observations, made at the fourth Meeting with International Organizations, in favor of broadening the scope of patentability in respect of plants. A plant cell could very well be used either to regenerate a plant, hence a variety, or to produce a molecule in an industrial process, without there being any regeneration. It was important that the breeder of a protected variety should also enjoy a right in relation to that second form of use. That was why the Delegation of France supported the proposed paragraph (iv). However, there was also the possibility that plant breeding processes might be geared to that form of use alone. The Delegation of France saw no reason why the result of such work, namely a cell line, should be ineligible for protection under the UPOV system.

35. The Delegation of the United States of America, on the contrary, feared that the reference to "parts of plants" would extend the UPOV system into an area that would be more adequately covered by patents, and to which the Convention had not originally been intended to apply.

36. The Vice Secretary-General indicated that the aim was to include in the definition any plant material that could be used to produce a complete plant and therefore one that comprised all the genetic resources of the variety. Such material consisted of parts of plants such as seed or cuttings, but also of cells or, in its most basic form, protoplasts. It would be absurd to revise the Convention so as to exclude from its area of application such parts, or processes such as propagation in vitro or the production of artificial seed.

37. The Delegation of the EPO also questioned the reference to "parts of plants" in relation to the reference to "other forms of use." It feared that that combination might broaden the scope of the Convention to accommodate innovations that previously had nothing to do with plant breeding (such as cell lines used as a diagnostic tool). It suggested that the definition of the term "variety" should be restricted to whole plants, and that the extent of the right granted to the breeder should be specified, in terms of the material it covered, in Articles 2(iv) and 5.

38. The Delegation of the Federal Republic of Germany was willing to agree to a simplified definition of "variety," but felt that the reference to other forms of use was necessary, because the meaning of the word "cultivation" was too narrow. It proposed a definition along the following lines:

"'Variety' shall mean a grouping of botanical individuals definable in terms of common expressions of genetically determined characteristics and distinguishable, by means of such expressions, from the other groupings of botanical individuals belonging to the same species."

39. The Delegations of the Netherlands and of Sweden were not convinced that the definition proposed by the Office of the Union was in need of radical modification; they considered that the omission of the reference to "parts of plants" was the only point that should perhaps be examined. The Delegation of New Zealand expressed satisfaction with the proposal of the Office of the Union and with the definition given in the International Code of Nomenclature for Cultivated Plants. The Delegation of Denmark felt that the above proposal deserved consideration and that there would be advantages in using a reference to "botanical individuals."

40. Definition of "variety" and relation to other systems for the protection of intellectual property. The Delegation of Switzerland considered that the definition of "variety" had to be sufficiently precise to ensure that the

demarcation from the patent system was also clear. It added that, according to what had been said at the previous sessions of the Committee, the definition proposed by the Office of the Union was entirely conventional.

41. The Delegation of the EPO indicated that a definition of "variety" that included cells and cell lines would not provide a suitable basis for the demarcation between the patent system and the plant variety protection system. If such a definition were adopted, the prohibition on double protection written into Article 53(b) of the European Patent Convention could be lifted and the choice of a form of protection left to innovators in the field of plants; the prohibition could alternatively be maintained, in which case the EPO would have to base its practice on the conventional conception of the variety, namely, the one that had guided the drafting of Article 53(b), and consequently disregard the new conception set forth in the Convention.

42. The Delegation of France pointed out that the definition given in Article 2 was "for the purposes of this Convention," and was meant to define the purpose of the Convention. It recalled that a "variety" was an abstraction materialized by elements such as the plants representing it and the material enabling it to reproduce or multiply. It was for that reason that the Delegation of France could accept a looser definition than the one proposed in Article 2. Yet that was also the reason why it might indeed be feared that breeders' rights would be granted for plant cells according to the provisions of the Convention, for, although a plant cell was not a variety, it was nonetheless a typical example of the material needed to propagate a variety.

43. Discussions on the definition of "variety" were resumed on October 13. The Delegation of the Federal Republic of Germany submitted the following proposal and stressed that it was merely a suggestion for consideration in connection with future work:

"'Variety' shall mean a grouping of plants distinguished by common expressions of genetically determined and inheritable characteristics."

44. The Vice Secretary-General stressed the importance of the definition of "variety" in determining the scope of application of the Convention. The reference to plants and parts of plants had been intended to ensure that the Convention applied to all the plant forms that the genotype representing a variety could take. The Office of the Union wished to support the text, which had been presented in a succession of documents, because, although it raised fundamental issues from the point of view of the interface between plant variety protection and patents, it was nonetheless essential to the future of the Convention.

45. Indeed, the mere fact of a genotype occurring only in the form of an isolated cell did not necessarily imply that it was to be excluded from the scope of application of the Convention. The aim was not at all to extend the scope of application of the Convention to industrial processes that it had never covered before. While one could quite well imagine the Convention making inroads into the field of patents, one could equally well imagine the reverse. Yet that situation was a consequence of technological development and therefore quite independent of the present or future text of the Convention. The point was best illustrated by the case of artificial seed: the definition of "variety" could not possibly exclude from the scope of application of the Convention those varieties that were represented by cells contained in artificial seed or, in more general terms, produced by new technology.

46. The Office of the Union recalled that the purpose of the proposed definition of "variety" was to spell out in the Convention that, for the purposes of defining the general scope and applicability of the Convention, the word "variety" should be understood to refer to any material that could reasonably be considered by its users to represent a variety. The aim had been to make up for a shortcoming in the literature available on the subject, which offered no really satisfactory definition, partly on account of the complexity of biological and technical constraints. Another aim had been to preclude an interpretation according to which only what fulfilled the technical conditions set out in Article 6 of the Convention would qualify as a variety and anything failing to meet those conditions would not be subject to the exclusion of plant varieties from patentability. The aim was not to restrict or expand the scope of application of either of the systems of protection under consideration. In that connection, the reference to "parts of plants" stemmed from an inescapable biological constraint, namely, that a part of plant--not smaller than a cell or a protoplast comprising all the genetic material of a complete plant--was representative of a clone-type variety if it was capable of vegetative propagation. Relations between the two systems of protection would primarily be determined by that biological constraint, as a result of which cell cultures--cell lines--posed a problem.

47. Reference to forms of use other than cultivation. The Delegation of the EPO requested that an example be given of a variety consisting of a part of plant and defined on the basis of a form of use other than cultivation. It pointed out that, in the opinion of the EPO, a process using cell cultures in a fermenter to produce proteins, for example, which were useful in pharmacy, fell within the scope of patentable inventions. However, that did not imply that, where the cells were the result of work that had led to the granting of a breeder's right, there would be no dependency between the owner of the patent and the owner of the breeder's right.

48. The Vice Secretary-General replied that work aimed at improving plants could, for example, be specifically geared to the development of a plant or variety with improved pharmaceutical properties, which would be easier to use in the pharmaceutical industry. He considered the example given by the Delegation of the EPO to be significant, for a variety could quite well be used for the cultivation of plants, followed by industrial extraction, and at the same time for cell culture in a fermenter. Yet a much more important case, from UPOV's point of view, would be one in which the fermenter culture yielded somatic embryos, which were then encapsulated to produce artificial seed.

49. Insertion of a reference to genetic structure. The Vice Secretary-General added that it would be appropriate to consider a reference to the genotype in the definition of "variety." The current approach, which consisted in examining characteristics, amounted to analyzing a genotype on the basis of its expression (phenotype). Modern methods would make it possible to examine the genetic makeup of varieties in greater depth. The Delegation of Australia supported that view.

50. Conclusion. The Committee eventually decided to request the Office of the Union to draw up a document on the concept of "variety" for consideration at its next session.

Paragraph (iii) (definition of "breeder")

51. A number of delegations declared themselves satisfied with the proposed wording of paragraph (iii). None of them supported the limitation, proposed at the fourth Meeting with International Organizations, with regard to discoveries.

Paragraph (iv) (definition of "material")

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

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

54. With the exception of the Delegation of France, all delegations were in favor of deleting the reference to products obtained from harvested material (fourth subparagraph). The Delegation of the EC then asked whether the member States could individually extend protection to such products. The Vice Secretary-General pointed out that the proposed new text contained no provision on the lines of the present Article 5(4).

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

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

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

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

Article 3 (National Treatment)

59. This Article did not give rise to any comments.

Article 4 (Scope of Application of the Convention)

60. Proposed alternatives for paragraphs (1) and (2). No delegation was in favor of Alternative 1 ("all botanical species"). The Delegation of the United Kingdom, however, proposed the formula "the varieties of all botanical species," as a combination of Alternatives 3 and 1. Its proposal was supported by the Delegations of Australia and Denmark, but the Delegation of France insisted on the need for simple, manageable definitions. Moreover, the Delegation of the Federal Republic of Germany drew attention to the problems posed by the concept of species in terms of its general definition and the status of interspecific hybrids. Its observations were supported by several other delegations.

61. Only the Delegations of the Federal Republic of Germany and the Netherlands initially expressed preference for Alternative 2 ("the whole plant kingdom"). In that connection, the Delegation of Canada observed that in its country no provision had been made for the protection of algae, fungi, etc. The Delegation of Australia asked whether the UPOV system was to be extended to such organisms. The Delegation of the EPO stated that it had difficulties with that alternative because of the uncertainties surrounding the classification of microorganisms and consequent problems of overlaps between patents and plant variety protection.

62. The majority of the delegations spoke in favor of a text based on Alternative 3, referring to varieties. A number of delegations suggested the formula "all plant varieties." However, that formula was eventually discarded. The Delegation of the European Communities (EC) announced that the new draft proposal for an EC Council Regulation on Community Plant Variety Rights provided for the Regulation to be applicable to "varieties from the entire plant kingdom," a formula combining Alternatives 3 and 2. That formula was finally adopted.

63. Paragraph (2). The majority of the delegations was in favor of retaining that paragraph. Only the Delegations of France and the Netherlands would prefer it to be deleted, the former being willing to retain it only if it were established that its deletion would impede the accession of new States to the Union. In that connection, the Delegation of Argentina indicated that all species were already protected in its country; that of Canada pointed out that its country intended to extend protection species by species and would have to avail itself of paragraph (2) in order to do so.

64. The question was then raised whether paragraph (2) should be made applicable only in respect of new member States. A number of delegations referred to the necessity of that paragraph for present member States as well, as ratifications should not be delayed. The Delegation of the United Kingdom questioned the appropriateness of the last sentence.

65. The Committee eventually endorsed the proposal of the Federal Republic of Germany, which consisted in shifting that paragraph to the final provisions, in the form of an exception or a transitional provision, and considering the possibility of introducing restrictions, including a time limit, and a principle whereby there would be no exceptional difficulties from the point of view of examination provided that such examination could be carried out in another State.

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

Special provisions governing the protection of hybrids and lines

66. The Committee decided to look into the matter after specific proposals had been submitted by ASSINSEL.

Paragraph (1) (fundamental right granted to the breeder)

67. The Committee took note of the various amendment proposals made at the fourth Meeting with International Organizations.

68. The Delegation of the EPO pointed out that paragraph (1) seemed to suggest that the scope of the protection afforded under the Convention was meant to extend to acts of propagation involving parts of plants, including microscopic parts of plants; that would effectively extend the scope of plant variety protection to industrial activities hitherto unquestionably subject to patent law. The Delegation suggested that, if such were the case, Article 2 or Article 5 would have to be amended so as to rule out that extension.

Paragraph (2) (exceptions to the right granted to the breeder)

69. The Delegations of Australia and New Zealand indicated that they had difficulties with the wording of subparagraph (i), because its meaning and effects were difficult to understand. They requested that it be reworded to state more specifically that the breeder's right was to be exercised primarily on the basis of the acts mentioned in paragraph (1), subparagraph (i), or, failing that, on the basis of those enumerated in the following subparagraphs of that paragraph.

70. The Delegation of the Federal Republic of Germany suggested the adoption of the same structure as that used in patent legislation, specifically, by defining the general effects of protection, then its limitations and, lastly, the principle of exhaustion of rights. It announced that it might submit proposals to that effect at a later stage.

71. With regard to the proposals submitted at the fourth Meeting with International Organizations for the deletion of the word "and" and the substitution of "domestically" for "privately" in the English version of subparagraph (ii), it was stressed that the basic text was derived from the text of the Luxembourg Community Patent Convention and that the word "domestically" might be construed as meaning "at the national level."

**Proposal by the Delegation of the Federal Republic of Germany
(Annex II to this report)**

72. A number of delegations expressed satisfaction with the conciseness of the proposal, which clearly specified the stage in the exploitation of the variety at which the royalty was to be collected. As regards its scope, the Vice Secretary-General stressed that it constituted a step backwards as compared with the proposal submitted at the fourth Meeting with International Organizations, and that that step backwards might prove prejudicial to UPOV's image. He invited the delegations to consider carefully whether it was really necessary. A few delegations indicated that the proposal should be examined in greater depth at the national level and that it remained to be established whether or not it accurately reflected the intentions and wishes.

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

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

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

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

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

Paragraph (3) (essentially derived varieties)

78. Number of parent varieties. Opinions were divided as to whether the word "single" should be retained or deleted. The Delegation of the Netherlands stated that, according to the specialists, a variety could be essentially derived from several varieties and therefore proposed that the introductory part of paragraph (3) read "if a variety is essentially derived from one or more protected varieties." The Delegation of France recalled that the expression "essentially derived" meant "genetically related," and the Vice Secretary-General that the derived variety had to retain most of the genotype of the parent variety, so that a variety could not possibly "depend" on two varieties simultaneously.

79. The Delegation of the United Kingdom recalled that the purpose of the word "single" was to provide information on the plant breeding methods capable of producing essentially derived varieties; in its opinion, the deletion of that word would create uncertainty. The Delegation of the Federal Republic of Germany asked whether it might not be preferable to spell out those methods in the provision itself. Its point of view was supported by the Delegation of the United States of America, which considered that explanations in a commentary were not sufficient.

80. The Vice Secretary-General announced that the Technical Committee had, in the course of its discussions on the workshops on the examination of varieties, concluded that the provision proposed in Article 5(3) would have to be taken into account in the assessment of minimum distances between varieties. That Committee had proposed that a joint meeting should be held with the Administrative and Legal Committee to consider those matters jointly.

81. The principle of a contribution by the Technical Committee won general support.

82. Effects of the subsidiary right in an essentially derived variety. Alternative 1 was supported by the Delegations of the Federal Republic of Germany (provided that the plant breeding methods were enumerated), the United States of America, France (first option) and Sweden. No delegation was against it.

83. The Delegation of the Netherlands proposed that the words "unless equitable remuneration is offered" should be added to Alternative 1. Alternative 1, thus amended, was supported by the Delegations of the Federal Republic of Germany (if the plant breeding methods were not enumerated), Denmark, France (as a second option, in so far as it was a satisfactory compromise) and the United Kingdom (together with Alternative 2). The Delegation of the United States of America considered that it merely amounted to a variation of Alternative 2.

84. Alternative 2 was supported by the Delegation of the United Kingdom (together with Alternative 1 as amended), but rejected by that of France (because it was not balanced).

85. No delegation supported Alternative 3. It was rejected by the Delegations of France and the Netherlands. The former considered that its interpretation gave rise to many difficulties, the latter that the concept of "a substantial improvement" was foreign to the protection of new varieties of plants. It was further observed that that alternative was analogous to Article 14 of the proposal for an EC Council Directive on the Legal Protection of Biotechnological Inventions.

86. The Delegation of the EC indicated that the EC Commission might not be in a position to endorse the proposed effects of the subsidiary right in an essentially derived variety.

87. Status of essentially derived varieties in terms of protection. It was pointed out that the effects of the subsidiary right in an essentially derived variety were the same, whether it was protected or not (on the understanding that the right existed only if the variety from which it derived was protected). However, the facility of exercising that right would depend on the alternative adopted.

Paragraph (4) (possibility of States limiting the right granted to the breeder)

88. Retention or removal of the possibility. The Delegation of France, supported by that of the Netherlands, stated that it would strongly oppose any provision allowing a right granted under the revised Convention to be limited, and proposed that paragraph (4) should be left out.

89. The vast majority of the other delegations spoke in favor of maintaining a provision whereby the right could be restricted. Opinions were divided as to whether the provision should be left as proposed--in other words permitting various types of restrictions--or whether one needed only provide for the introduction of a "farmer's privilege."

90. Reference to the public interest. The Delegation of Denmark, considering that a "farmer's privilege" was not a measure in the public interest, proposed that the reference to public interest should be deleted. The Delegation of the United Kingdom also favored its deletion.

91. The Delegation of France appreciated the political advantage, for a large number of States, of introducing the concept of a "farmer's privilege" in the Convention. The issue had in fact been brought up in France, but recognition of that privilege would immediately raise the question of its limits. Furthermore, it had to be borne in mind that such recognition would entail a significant departure from other intellectual property rights. If Article 5(4) were maintained either as it stood, or especially without the reference to the public interest, the Delegation of France might have to request a return to the present form of Article 5. Indeed, efforts to strengthen the rights of the breeder would no longer be credible in the eyes of professional associations if each member State were allowed to restrict the right on the sole, and not easily assessed, condition that it was not to cause excessive prejudice. For the sake of legal security, each member State should be expected to offer at least basic protection.

92. Effects of the position adopted by the Council. The Delegation of Sweden proposed that the effects of the position adopted by the Council should be reviewed.

Paragraph (5) (Collision Norm)

93. A number of delegations considered that the uncertainties surrounding Articles 2 and 5, coupled with the discussions under way at the national level and those to be held by the joint UPOV/WIPO Committee, would make a decision on Article 5(5) premature. Accordingly, they proposed that it should be maintained for the sake of discussion. The Delegation of the United States of America, supported by that of Australia, recalled that the provision in question had been maintained in the text for the sake of discussion at the fourth Meeting with International Organizations. Now that it had served its purpose, it should be deleted, because it was inappropriate and basically unacceptable. The Delegation of the Netherlands also considered that it went too far, but preferred to await the outcome of the session of the joint UPOV/WIPO Committee. The Delegation of New Zealand advocated a positive approach to the issue.

94. The Delegation of the EPO considered that paragraph (5) amounted to a collision norm that was to the detriment of patentees. Although the primary objective of many inventions was to develop and disseminate varieties, patentees would be denied the right to intervene in the former activity by virtue of subparagraph (ii), and in the latter by virtue of subparagraph (i). Their right would therefore be reduced to an empty shell. In fact, that provision went farther than the subsidiary right in an essentially derived variety provided for in paragraph (3).

95. The Delegation of the Federal Republic of Germany referred to the fact that the text it had proposed was not appropriate for a provision in the Convention, but was designed as food for thought in relation to the discussion of the issue. The Delegation recalled that the principle of the exhaustion of rights applicable under patent law was ill-adapted to living matter; proposals had accordingly been put forward to overcome that problem, although some of them actually resulted in eliminating the principle altogether. The objective was therefore to ensure that the patentee received remuneration, and that the breeder could use the variety freely. At present, in the case of a patent for a gene, for example, the patentee could exercise his right of prohibition and receive remuneration in relation to the use of the gene, that is to say the development of the variety; his right was then exhausted, once the variety reached the stage of exploitation. That would no longer be the case in future if the above-mentioned proposals concerning the principle of exhaustion were adopted. The provision proposed in paragraph (5) was intended not to deprive the patentee of his rights, but, by reinstating the principle of exhaustion for protected varieties--and for them only--to oblige him to exercise his rights solely in relation to the breeder of a protected variety; the users of the variety would then be responsible only to the breeder, who, in turn, would have to ensure that he received from the users both his own remuneration and that which he had paid to the patentee.

96. The Delegation of the EPO considered that one could only hypothesize, for the time being, on how that problem would be dealt with under patent law; there was as yet no case law on the infringement of patents for genes that might help determine the latest stage at which a patentee could still exercise his right. If in some cases the patentee were forced to apply to the breeder alone, difficulties might arise with regard to the division of powers between the parties concerned.

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

Paragraph (1)(a) (novelty)

97. Reference to the agreement of the breeder. A number of Delegations were unable to agree to the proposal, made at the fourth Meeting with International Organizations, for the insertion of the word "express" before the word "agreement." It was observed that it was often difficult to assess the legal relations between the applicant and the person who had marketed the variety or exploited it commercially. Besides, the proposed text, without the word "express," conformed to other statutory instruments on intellectual property.

98. The Delegation of the Federal Republic of Germany proposed that the text should be brought into even closer conformity with the other statutory instruments on intellectual property by deleting the reference to the agreement of the breeder in the second sentence and providing for an exception that would operate in favor of the breeder in the event of a flagrant abuse. That proposal was supported by the Delegations of France, New Zealand and the Netherlands; the latter, however, wished to examine it in greater depth.

99. The Delegation of Denmark sought assurance that the proposal put forward by the Delegation of the Federal Republic of Germany properly covered the importation of cut flowers. It observed, that there was no unlawful act and therefore no abusive conduct, yet the breeder had neither expressed his agreement nor exported products of the variety himself, and therefore should not be denied his rights. The Delegation of the Federal Republic of Germany was inclined to consider that such a case destroyed novelty and that the breeder could then sue for damages. The Delegation of France, however, felt that such

proceedings would be difficult to institute in France, and its point of view was shared, in more general terms, by the Vice Secretary-General, who failed to see on what grounds such an action could be brought.

100. In that connection, the Delegation of the Federal Republic of Germany stressed that consideration must be given not only to the problems confronting the breeder, but also to those that would confront users who had acquired material believing, in good faith, that it was freely usable.

101. Reference to vines. The Delegation of Australia suggested that the word "vines" should be replaced by "woody vines."

102. Time limit of two years. The Delegation of the United Kingdom recalled that it had been proposed that the time limit provided for in subparagraph (i) should be extended to two years and made binding. It was against the proposed extension and recalled that the United Kingdom had not introduced the one-year time limit permitted under the present text. Furthermore, it suggested that the sentence on the effect that common knowledge of the existence of the variety had on its novelty should be transferred to subparagraph (b).

Paragraph (1)(b) (distinctness)

103. Type of characteristics taken into consideration. It was emphasized that the proposal, made at the fourth Meeting with International Organizations, for distinctness to be based on economic considerations (i.e. functional characteristics) could not be adopted and that, at any rate, the proposed text was neutral in that respect. Furthermore, it was asked whether, in view of the wording of paragraphs (1)(c) and (1)(d), it might not be advisable either to reinsert a reference to characteristics in paragraph (1)(b) or to delete the reference from the latter two paragraphs; technological developments in the field of genomic analysis might well tip the balance in favor of the latter alternative.

104. Common knowledge. It was pointed out that the list of cases in which the existence of a variety was a matter of common knowledge was not exhaustive, and that the word "protected" could also, if necessary, be understood to mean "patented." Indeed, if a variety was patented, it should be possible for anyone to verify that another variety was distinguishable from it. It was also pointed out that the reference to a variety known to be exploited (and not "commercially exploited") was intended to avoid, in accordance with a basic principle of intellectual property law, the situation where a variety exploited as a trade secret might be invoked against an application for protection filed by a competitor.

105. Finally, it was proposed that "in particular" be substituted for "specifically" in the English text.

Paragraph (1)(c) (homogeneity)

106. The Delegation of Australia pointed out that the proposed text might convey the impression that a variety was required to be homogeneous and stable only in respect of the characteristics that made it distinct, and not in respect of the other characteristics taken into consideration. It suggested that that point should be borne in mind in the revision of the paragraph.

107. The Delegation of the EPO stated that the EPO was under the impression that the definition of the concept of homogeneity was drifting towards a broader concept peculiar to patent law. The Delegation of France replied that a title of protection could never cover anything but a single variety. Besides, in the light of the explanations provided at the previous session of the Committee, it considered that the reference to characteristics could be dispensed with.

Paragraph (1)(d) (stability)

108. The Committee noted that the breeder had to be allowed to specify a particular cycle of reproduction or propagation, and that the proposed text left that option open. Although it was primarily up to the breeder to define the cycle, the service responsible for plant variety protection should not be expected to take account of unreasonable specifications. The proposal to maintain the text as proposed did not give rise to any objection.

Paragraph (2) (denomination)

109. It was proposed that the word "have" be substituted for "be given."

Paragraph (3) (limitation of conditions)

110. It was proposed that "other conditions than those mentioned in paragraphs (1) and (2) above" be substituted for "other conditions than those mentioned above."

Article 7 (Examination of the Application; Provisional Protection)

111. The Committee took note of the proposals submitted at the fourth Meeting with International Organizations. It rejected the proposal for the substitution of "should" for "may" in paragraph (3).

Article 8 (Duration of the Right)

112. The Committee saw no need to depart from the text proposed for Article 8.

Article 9 (Restrictions on the Exercise of the Right)

113. With regard to the expression "free exercise," it was noted that that was a standard formula in the field of intellectual property law.

114. It was proposed that the phrase "results in the authorization of" be substituted for "[when any such restriction] is made in order to authorize," as the authorization of a third person to exploit the variety was the consequence, rather than the cause, of the restriction for reasons of public interest.

Article 10 (Nullity and Forfeiture of the Right)

115. Grounds for, and consequences of, annulment and forfeiture (paragraphs (1) and (2)). The Committee began by examining the grounds for, and consequences of, annulment (paragraph (1)) and forfeiture (paragraph (2)).

116. With regard to consequences, it was pointed out that the effects of annulment were, in principle, retroactive to the date of granting of the right, whereas forfeiture took effect only from the date of the decision declaring forfeiture. In practice, however, the effects of annulment could vary according to circumstances and legislation; in particular, royalties received may or may not have to be returned to licensees; according to one of the principles that may be applicable, the latter, although they would have paid royalties unduly, would have enjoyed the benefits of the right licensed to them, for example in the form of a limitation of competition or on account of the technological advantage afforded by the license.

117. With regard to grounds, annulment could be declared only on account of a flaw whose existence, on the date of the granting of the rights could be proved after the fact; for example, that would apply to a lack of novelty or distinctness. However, it might be deemed inappropriate to annul a right for lack of homogeneity, for example, if the defect was subsequently remedied.

118. The Delegations of Australia and New Zealand considered that opinions on that matter could vary depending on whether the right had been granted on the basis of a growing trial conducted by the official service or by the applicant. A number of proposals were put forward in that connection, including one for the addition of lack of homogeneity to the grounds for annulment.

119. Paragraph (2). The Committee took note of the proposal, submitted at the fourth Meeting with International Organizations, to omit the reference to characteristics. The Delegations of the Federal Republic of Germany and Australia proposed the insertion of a reference to homogeneity and stability. Those of Denmark, the United Kingdom and Sweden did not oppose it, but felt that the proposed text was satisfactory as it stood.

120. Paragraph (3). A number of delegations spoke in favor of omitting the phrase in brackets. The Delegation of the Federal Republic of Germany further suggested that the need for a formal request should be added to subparagraph (b) in order to complete the parallelism between the two subparagraphs.

121. Forfeiture attributable to variety denomination. The Delegation of the Federal Republic of Germany observed that, in the present circumstances, the competent authorities would be without recourse against the owner of a breeder's right who, following the cancellation of the denomination of his variety subsequent to the granting of the right, failed to propose a new denomination or proposed denominations that were unsuitable. It therefore proposed that provision be made for that circumstance to constitute grounds for forfeiture under paragraph (3), and proposed the addition of a new subparagraph (c) with the following wording:

"(3) The right may become forfeit if:

...

(c) in the event of the cancellation of the denomination of the variety subsequent to the granting of the right, the breeder, after being requested to do so and within a prescribed period, fails to propose another suitable denomination."

122. The Delegation of France pointed out that the denomination was the only subjective element in a substantive right and gave rise to an obligation that

the breeder had to fulfill. It hesitated over the severity of the penalty and suggested that consideration be given to the possibility of suspending the right. Several other delegations failed to see the need for such a provision.

123. That proposed provision was also considered in the course of discussions on Article 13.

124. The Delegations of the Netherlands and the United Kingdom considered that, in the absence of a denomination, Article 13(7) would prevent the variety from being exploited. The Delegation of the Federal Republic of Germany did not share that view; in its opinion, the obligation in question would not operate. Moreover, the owner of the right could turn the situation to his advantage and market the variety under a trademark. The Delegation of France considered that such a policy would merely lead to the invalidation of the trademark, so that it would obviously be in the interest of the owner of the right to propose an acceptable new denomination. In the circumstances, the proposed subparagraph (c) was unnecessary. Quite apart from that, such a provision would be difficult to introduce in France. Commenting on that last point, the Delegation of the Federal Republic of Germany replied that its introduction would not be compulsory.

125. The provision in question was then reexamined on the basis of the text reproduced above, after it had been submitted to the Committee in writing.

126. A number of delegations indicated that they were not opposed to its insertion. The Delegation of Denmark, however, observed that the suitability of the proposed new denomination was partly a matter of subjective appreciation, which might give rise to difficulties in the application of the proposed provision.

127. The proposed subparagraph (c) was eventually approved.

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

128. The Delegation of the EC asked whether it might not be advisable, considering the EC's legislative powers, to delete the expression "by a special agreement under Article 29" from paragraph (3)(b). It was agreed that the matter would be taken up in connection with the treaty-law provisions.

Article 12 (Right of Priority)

129. A consensus emerged in favor of Alternative 1 (retention of the twelve-month period of priority) and the proposed wording of paragraph (3) (reduction to two years of the additional period in which additional documents and material should be furnished). That reduction was dictated by considerations such as the need to provide competing breeders also with legal security, the shorter periods needed for the propagation of varieties as a result of new methods and the intensification of international cooperation in examination.

Article 13 (Variety Denomination)

130. No delegation spoke in favor of the proposals for rewording Article 13 submitted at the fourth Meeting with International Organizations. On the whole, the text proposed in document IOM/IV/2 was considered to be satisfactory.

131. With regard to paragraph (5)(a), the Delegation of Denmark suggested that "generic" should be inserted before "denomination." The Delegation of the Federal Republic of Germany replied that that qualification would destroy the entire benefit of the simplification of paragraph (1).

132. With regard to paragraph (5)(c), it was observed that it failed to address the issue of designations liable to cause confusion. The latter were partly covered by paragraph (5)(e) (notably in respect of confusion with other denominations).

133. With regard to paragraph (7), neither of the proposed alternatives won a majority.

134. Finally, certain delegations wished to maintain at least the first sentence of the present paragraph (8), especially since its omission might be interpreted as the withdrawal of an option that in fact was still available.

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

135. The Delegations of Australia and New Zealand pointed out that Article 14 had been and indeed might still be useful, for example in making breeders aware that seed certification services were not required to cooperate in the enforcement of breeders' rights, or in demonstrating the inanity of certain arguments against the protection of new varieties of plants. Furthermore, in States organized on a federal basis, the two fields in question could be covered by different legislative bodies. Other delegations considered the Article to be superfluous. However, none of them was opposed to its maintenance.

136. The usefulness of paragraph (2), however, was disputed. The Delegation of France could agree to its maintenance only if "shall, as far as possible, avoid hindering" were replaced with "shall not hinder." The Delegations of the Federal Republic of Germany and Spain supported that proposal.

Report on Preparations for the Joint UPOV/WIPO Meeting on the Relationship Between Patent Protection and Plant Variety Protection

137. The Vice Secretary-General gave a brief progress report on preparations for the joint UPOV/WIPO meeting on the relationship between patent protection and plant variety protection. He explained that the document which was to serve as a basis for discussions would set out the specific issues to be considered.

Activities of GATT

138. The Committee was informed that the question had been raised as to whether plant variety protection should be included in GATT's current negotiations on trade-related aspects of intellectual property rights. The Delegation of Japan inquired about the position of the other member States in that respect. The Delegations of the Federal Republic of Germany and Denmark indicated that the European Communities would have to hold consultations on the matter.

Program of the Twenty-Sixth Session of the Committee

139. With regard to preparations for the Diplomatic Conference on the Revision of the Convention, the Consultative Committee had taken decisions at its

fortieth session, on October 16, 1989, which the Council had endorsed at its twenty-third ordinary session, on October 17 and 18, 1989. Those decisions had been reflected in the report on the fortieth session of the Consultative Committee in the following terms:

"22. The discussion concerned essentially the preparation of the Diplomatic Conference, which was scheduled to be held in March 1991. It was decided that there should be preparatory meetings to that effect. This would call for adjustments to be made to the draft program and budget for the 1990-1991 biennium, the costs of the preparatory meetings being covered from the budget item 'Administrative and Legal Committee.'

"23. The Committee further decided that the Office of the Union should submit to the first Preparatory Meeting for the Revision of the Convention (April 23 to 27, 1990) a new proposed text based on the structure which had been proposed by the Delegation of the Netherlands at the 1978 Diplomatic Conference but had not been retained in view of its belatedness. The Office should further submit draft treaty-law and final provisions to the second meeting (June 25 to 29), which should finalize the draft revised text of the Convention subject to a last consideration at the third meeting (October 15 and 16). After final approval by the Council at its session scheduled to be held on October 18 and 19, the documents should be sent out by the Office in the course of November."

140. A number of delegations stressed the need for the experts of the Technical Committee to participate in discussions on some of the proposals for the revision of the Convention and proposed that a joint meeting should be held with that Committee.

141. The following matters were also mentioned as requiring or deserving consideration by the Committee:

(i) Results of the Joint UPOV/WIPO meeting;

(ii) Legal implications of user access to information held by member States, in the event of the establishment of a data base open to the general public, with special reference to the question of the confidentiality of information and implications for the system of cooperation in examination;

(iii) Fees paid or payable to plant variety protection offices subject to the rule of self-financing.

142. This report was adopted by the Committee at its twenty-sixth session, on April 23, 1990.

[Annexes follow]

ANNEX I/ANNEXE I/ANLAGE I

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

ANNEX II

ARTICLE 2 and ARTICLE 5

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

Proposal by the Delegation of the Federal Republic of Germany

Article 2: Delete subparagraph (iv).

Article 5: Reword the first part as follows:

"(1) The breeder's right granted in accordance with the provisions of this Convention shall confer on its owner the right to prevent all persons not having his consent:

(i) from reproducing or propagating the variety;

(ii) from offering for sale, putting on the market, exporting, importing, using or stocking reproductive or vegetative propagating material of the variety, including such plant parts as may be re-generated into whole plants.

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

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

[End of document]