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CAJ/46/8 Rev.*
ORIGINAL: English
DATE: April 10, 2003

UPOV

INTERNATIONAL UNION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS

GENEVA

ADMINISTRATIVE AND LEGAL COMMITTEE

Forty-Sixth Session
Geneva, October 21 and 22, 2002

REPORT

adopted by the Committee

Opening of the Session

1. The Administrative and Legal Committee (hereinafter referred to as "the Committee") held its forty-sixth session in Geneva, on October 21 and 22, 2002, under the chairmanship of Mrs. Nicole Bustin (France).

2. The list of participants is given in Annex I to this report.

3. The session was opened by the Chairperson, who welcomed the participants. She extended a special welcome to the Delegation of Latvia which had become a member of the Union since the preceding session of the Committee. The Delegation of Latvia expressed its gratitude to the Office of the Union and the member States for the assistance given to Latvia in the process of its accession to the 1991 Act of the UPOV Convention.

* The Committee decided at its forty-seventh session on April 10, 2003, to remove the information footnote concerning the word "hybrid" which appeared in document CAJ/46/8, on page 8 and on page 1 of Annex III.

Adoption of the Agenda

4. The Committee adopted the agenda as given in document CAJ/46/1.

Specific Issues Concerning the Interface Between Patents and Breeders' Rights

5. Discussions took place on document CAJ/46/2, which had been based on document CAJ/45/3 with the same title. The Vice Secretary-General introduced the document and informed the Committee about the WIPO-UPOV Symposium on the Co-existence of Patents and Plant Breeders' Rights in the Promotion of Biotechnological Developments, that was to be held in Geneva on October 25, 2002.

6. In relation to document CAJ/46/2, the Vice Secretary-General indicated that the basic purpose of the document was to illustrate the scope of protection and corresponding exceptions of the patent and plant breeders rights' systems; more precisely and, in particular, the comparison between the patent research exception and the breeder's exemption. It was important to raise awareness of the possible impact the presence of patented elements in plant material could have on the overall rate of progress in plant breeding.

7. Several delegations and organizations expressed their views on the issues that may arise if the patent right inhibits the breeder's exemption. Extensive discussions took place in relation to paragraph 25 which provided various cases to assist in the understanding of how certain uses might infringe a patent.

8. The Delegation of the United States of America suggested an amendment to the title and subtitle of Section I in order to provide a more accurate reflection of the issues. It wondered whether the cases to illustrate those problems were theoretical or supported by evidence. It added that infringement was a complicated area. The Delegation made different proposals suggesting the redrafting of paragraphs 3, 29 and 30, mainly in order to refer to the national laws and to avoid any interpretation of the TRIPS Agreement that could go beyond the scope of the UPOV Convention.

9. In relation to the proposal of the Delegation of the United States of America to reduce paragraph 30(a) by ending it after the word "breeders," the Delegation of Mexico considered it important to keep the last part of paragraph 30(a) "ensures that the development of new varieties is not inhibited;".

10. The Delegation of France further suggested some reorganization of the cases in paragraph 25.

11. The Chairperson summarized the discussions indicating that there was general agreement that some redrafting of the document by the Office of the Union, with the assistance of the Delegations concerned, was needed in order to reflect the views expressed by the Committee.

12. The changes, as proposed by the Vice Secretary-General and agreed by the Committee, are reproduced in Annex II, for ease of reference.

13. Conclusion: The Committee agreed with the contents of document CAJ/46/2 as amended by the Committee and:

(a) noted that the EDV provision in the UPOV Convention provided a mechanism for rewarding plant breeders and ensured that the development of new varieties was not inhibited;

(b) noted the potential difficulties in using cross-compulsory licensing as a means to address the lack of a breeder's exemption in the patent system;

(c) noted the consequences for breeding progress if the breeder's exemption was negated or inhibited through the presence of patented inventions in plant varieties; and

(d) recommended to members of the Union to consider, where appropriate, whether the nature of the research exemption in their patent laws concerning plants might inhibit the breeder's exemption.

Publication of Variety Descriptions

14. Discussions were based on document CAJ/46/3. The Vice Secretary-General introduced the document and noted that, at its forty-fifth session, in Geneva, on April 18, 2002, the Committee approved the schedule of activities for the project related to the publication of variety descriptions (see Section 6 of the Annex to document CAJ/45/4). He further noted that the project focused on two main aspects: firstly, the need for a model study to investigate and develop solutions to the technical issues concerning the possible development and publication of variety descriptions, at the international level, in an effective way; and secondly, that there were important legal, administrative and financial issues which would need to be resolved, by the Committee, before considering the possible introduction of an international system for the publication of variety descriptions. Document CAJ/46/3 dealt with the second aspect, namely the administrative, legal and financial matters and, in particular, the consideration by the Committee of a draft questionnaire to be sent to the authorities responsible for granting plant breeders' rights.

15. The Delegation of Germany made a request for the questionnaire to include information on whether authorities used photographs in the process of publication of variety descriptions and, if so, for which species. It considered that photographs could be very useful in the field of ornamental varieties.

16. The Vice Secretary-General confirmed that the appropriate modification to the questionnaire would be made in order to take up the suggestion made by the Delegation of Germany.

17. The Delegation of the Netherlands noted that the phenotype of varieties and, consequently, variety descriptions were closely related to the conditions under which varieties were grown. It wondered whether these aspects should also be included in the questionnaire.

18. The Technical Director clarified that this was a matter which would be dealt with by the Technical Committee in its work on this project.

19. The Delegation of Colombia suggested the inclusion of a question concerning varieties in commercial registers which are not protected by breeders' rights.

20. The Vice Secretary-General recalled that the project intended to deal with protected varieties as a first step. The inclusion of non-protected varieties would be considered at a later stage. It was agreed that it should be clarified that the question related to protected varieties.

21. The Delegation of the Republic of Korea expressed the wish that the questionnaire would take into consideration some technical questions in relation to reference varieties. The Vice Secretary-General suggested that those considerations be dealt with within the work of the Technical Committee on the proposals for species, or the *Ad hoc* Working Group on Publication of Variety Descriptions.

22. The Delegation of Belgium noted that some clarification might be needed for the second and the third box in question 22. Following a proposal by the Chairperson, it was agreed that an additional box requesting comments on the reply should be added at the end of question 22.

23. The Delegation of the Russian Federation suggested substitution of the slash in questions 18 and 19 by the word "and," and questioned whether "jointly" should be replaced by "combination" in question 18.

24. It was agreed that the footnote in question 15 should be reduced to a list of what might be considered "interested parties." The remainder of the footnote would be deleted. Following this decision, the Delegation of France underlined the importance to clearly indicate the objectives and the context of this questionnaire.

25. The Chairperson summarized the discussions and identified all the amendments to the draft questionnaire.

26. Conclusion: The Committee agreed with the proposed questionnaire as amended. This questionnaire would be sent to members of the Committee and one organization responsible for granting breeders' rights. A summary of the responses to the questionnaire, with a clear indication of the objectives and the context of this questionnaire, would be prepared by the Office of the Union and presented to the Committee for its consideration at its forty-seventh session in April 2003.

Issues Concerning the Use of Material Submitted for Examination of Distinctness, Uniformity and Stability

27. Discussions were based on document CAJ/46/4. The Vice Secretary-General introduced the document. Its purpose was to explore the importance of including plant material of candidate varieties, submitted by the applicant, in the collections of varieties used by authorities for the examination of distinctness, uniformity and stability (DUS). Furthermore, it identified the issues which can arise when this practice cannot be freely undertaken. In particular, it considered the situation where a breeder might wish to attach conditions to the use of plant material for such practices, or where the breeder did not permit such a practice at all.

28. The representative of the International Association of Breeders of Ornamental and Fruit Plants (CIOPORA) requested a change in paragraph 5, in particular, the deletion of the sentence "… or use of plant material by the original authority after the DUS examination is complete … candidate varieties." After the clarifications provided by the Chairperson, the Vice Secretary-General and the Delegation of France, paragraph 5 was retained unchanged, as it indicated the importance of this activity as the basis for the examination of other candidate varieties.

29. Discussion also took place in relation to paragraph 8. The representative of CIOPORA was concerned by the effect of the publishing of detailed descriptions on the novelty of varieties. The Delegation of the Netherlands stated that the UPOV Convention clearly established that novelty was not affected by the publication of a variety description. The Chairperson further clarified that a publication would be enough to establish common knowledge, but would not be enough to establish novelty.

30. In relation to paragraph 12, the Delegation of France and the representative of the European Community were concerned about the importance given to a published variety description in the examination of distinctness in cases where varieties were unavailable for comparison in growing tests or other trials. In reply to this concern, the Vice Secretary-General proposed to add the term "subject to technical reliability" after the words in the third sentence "importance of the publication of variety descriptions." In this regard, the Vice Secretary-General further added that this wording was in line with the wording used in paragraph 13(ii) in the conclusion of this document "a system of publishing variety descriptions may, if based on technical information considered to be reliable by the Technical Committee, …"

31. The representative of CIOPORA expressed certain concerns regarding the use of material supplied by plant breeders to technical examination centers if the examination centers were themselves involved in breeding activities.

32. The representative of the European Community indicated that, in those cases, the Community Plant Variety Office (CPVO) requested specific protocols to guarantee that the persons involved in the testing were not involved in breeding activities.

33. The Chairperson proposed to include on the agenda for future work, a specific item to determine how UPOV should explore this matter, if appropriate with the assistance of a questionnaire, and also whether to recommend draft model agreements concerning the use of material which might assist to clarify, provide guidance and offer reassurance to plant breeders.

34. The representative of the International Seed Federation (ISF) proposed its assistance to the Office of the Union by providing a model agreement concerning the use of the material submitted by the breeder.

35. The Delegation of Spain agreed with the proposal from ISF and encouraged the Office of the Union to work on the preparation of model agreements. It explained that, recently, when requesting material from breeders, the Office of Spain had received contracts that restricted the supply of material to other authorities. This was not confined to material concerning parental lines, but also in relation to varieties which could be found in the market. The Delegation also emphasized the need for the breeders' community to facilitate the examination of varieties, for the benefit of the whole protection system.

36. The Delegation of France also indicated that they could make their experience available on similar types of matters and agreements, concerning testing and related obligations.

37. Conclusion: The Committee agreed with the conclusions in paragraph 13 of document CAJ/46/4. In particular, it noted that:

(a) some authorities have established collections of plant material of varieties of common knowledge for the purposes of examination but need to consider how to manage plant

material of candidate varieties provided by the breeder, as a part of the application, if conditions are attached to its use for such a purpose;

(b) a system of publishing variety descriptions may, if based on technical information considered to be reliable by the Technical Committee, offer an effective means of examining distinctness to address situations where plant material of varieties was unavailable for comparison in growing tests or other trials.

38. Furthermore, the following topics were identified for future discussion by the Committee:

(a) arrangements for the transfer of material

(i) from the breeder to the examination authority, and
(ii) between examination authorities.

In particular, it was suggested that UPOV might consider the development of standard model agreements for such transfers;

(b) recommendations to ensure the independence of those DUS examination centers which have, or have links to, breeding activities.

39. The Committee agreed with the future work as proposed in paragraph 38.

Variety Denominations

40. Discussions were based on document CAJ/46/5. The Vice Secretary-General introduced the document and reported on the third meeting of the *Ad hoc* Working Group on Variety Denominations (the Working Group), held in Geneva on October 21, 2002. In relation to the document, it was highlighted that, in parallel to the activities of the Working Group within UPOV, the CPVO and the International Union of Biological Sciences (IUBS) Commission were also working on matters related to variety denominations. The Working Group had coordinated its efforts on this issue with those two Organizations.

41. The Vice Secretary-General further indicated that the two main items of the agenda of the Working Group, during its third meeting, were a first round of discussions on the draft explanatory notes on Article 20 of the 1991 Act of the UPOV Convention concerning variety denominations (document WG-VD/3/2), and a second item providing information on the replies to the questionnaire seeking information on how the effectiveness of the UPOV-ROM might be improved (document WG-VD/3/3). The Vice Secretary-General gave the floor to the Senior Legal Officer to inform on the advancement of the discussions of the draft explanatory notes.

42. The Senior Legal Officer indicated that, at this stage, it was too early to provide any results on the discussions concerning the draft explanatory notes. She indicated that the draft explanatory notes were clearly linked to the relevant provisions of Article 20 of the 1991 Act of the UPOV Convention and, whenever possible, they also referred to the existing recommendations. The current draft had the objective to provide clarity and the required flexibility to allow for a harmonized approach in decisions concerning variety denominations. In particular, the intention was to follow, as far as possible, the principle provided in

Article 20(5) of the 1991 Act that, unless the proposed denomination was unsuitable in the particular territory, the same denomination should be proposed and registered in all members of the Union. The different drafts of the explanatory notes would be made available for consultation by the Committee members in the restricted area of the UPOV Website, where the documents of the Working Group were posted.

43. The Technical Director informed the Committee on the decision of the Working Group, made at its second meeting, to prepare a questionnaire to investigate how the effectiveness of the UPOV-ROM might be improved. A powerpoint presentation was made to the Committee in order to illustrate the summary of the responses to the questionnaire. The analysis of those replies led to a proposal, by the Office of the Union, for a program to improve the effectiveness of the UPOV-ROM. This proposal was made in relation to existing projects already underway, matters specifically concerning variety denominations and general improvements. Regarding variety denominations, the results of the questionnaire suggested that further consideration should be given by the Working Group to allow, under certain circumstances, different variety denominations in different territories. Furthermore, it suggested that the Working Group might examine the feasibility of the UPOV-ROM becoming one means by which authorities could comply with the requirement of Article 20(6) of the 1991 Act of the UPOV Convention, to inform other members of the Union of matters concerning variety denominations. A document containing an analysis of the responses to the questionnaire will be presented to the Committee in a separate agenda item with a corresponding document for consideration by the Committee at its next session.

44. Conclusion: The Committee noted the contents of document CAJ/46/5 and the oral reports made by the Vice Secretary-General, the Technical Director and the Senior Legal Officer.

Protection of Hybrid Varieties Through Protection of Parent Lines

45. Discussions were based on document CAJ/46/6. The Vice Secretary-General introduced the document and indicated that its purpose was, in response to a request from the Technical Committee, to consider the protection of hybrid varieties through protection of parent lines. He recalled that this request had arisen, in particular, because of the development of hybrid varieties in the ornamental sector. In some cases, the same parent line was used in many different hybrid varieties and breeders, conscious of the cost of protecting all the individual hybrid varieties, noted that, in such cases, protection of a series of hybrid varieties could be achieved by protection of the single parent line common to all the hybrids in the series, provided that the parent line fulfilled all the conditions for, and protection is granted. The Vice Secretary-General highlighted the difference between the protection provided by Article 14(5)(a)(iii) of the 1991 Act and that provided by Article 5(3) of the 1978 Act.

46. With regard to paragraph 5 of the document, it was noted that it was a matter for each State party to the 1978 Act to interpret Article 5(3) of that Act and to decide whether, in the example given, a hybrid would be covered by the protection of one or more of the parent lines.

47. It was agreed that the document should emphasize that the 1991 Act of the UPOV Convention only allowed extension of protection to a hybrid variety, by protection of one or more of the parent lines, if there is “repeated use” of such parent lines for the production of the hybrid varieties. Thus, it should be clarified that repeated use of parent lines might not be required if a “hybrid” variety can be produced by vegetative propagation or apomixis.

48. The Delegation of the Netherlands proposed that, in paragraph 6, the phrase "… obtain protection for his hybrid varieties …" should be replaced by "extend protection to his hybrid varieties." The Delegation of Switzerland noted that that proposed change would need to be reflected throughout the document and, in particular, in the title of the document. Thus, it was agreed that the title should read "Extension of protection to hybrid varieties through protection of parent lines."

49. Conclusion: The Chairperson concluded that the situation with regard to hybrid varieties under the 1991 Act was clear, but that the situation under the 1978 Act was a matter to be interpreted by each State party. Furthermore, with regard to the 1991 Act, it had been agreed that the protection provided by a breeder's certificate for a parent line would extend to hybrid varieties, provided there was repeated use of such a parent line for the production of the hybrid varieties. She further noted that it was for each plant breeder to determine whether it would be appropriate to make use of the extended protection of parent lines or to seek to obtain protection of the hybrid variety itself. Annex III presents document CAJ/46/6 as amended by the agreed changes.

The Notion of "Essentially Derived Variety" in the Breeding of Ornamental Varieties

50. The Chairperson informed the Committee that due to time constraints it was not possible to deal with the last item of the agenda concerning "The notion of 'essentially derived variety' in the breeding of ornamental varieties" (document CAJ/46/7). Following the proposal by the Chairperson, the Committee decided to defer discussions on this item to its April 2003 session.

Program for the Forty-Seventh Session

51. It was agreed that the program for the forty-seventh session would include the following items:

1. The notion of "essentially derived variety" in the breeding of ornamental varieties

2. Specific issues concerning the interface between patents and breeders' rights

3. Publication of variety descriptions

4. Transfer of material for the purposes of examination of distinctness, uniformity and stability

5. Review of the UPOV-ROM Plant Variety Database

6. Variety denominations.

52. Before closing the session, the Chairperson gave the floor to the Delegation of the United States of America at the request of some delegations that wanted to receive information of the current situation on how the novelty provision was applied under the Plant Patent Act.

53. The Delegation of the United States of America explained the situation in that country and the three forms of protection available for plant varieties. One form of protection was the standard patent, also known as the utility patent. It clarified that the issues to be discussed did not concern applicants filing for utility patents and, in particular, the novelty provision remained the same. The second form of protection was the Plant Variety Protection Act, which was consistent with the UPOV Convention and on which no concerns had been raised. What had raised concern and uncertainty amongst breeders was a situation concerning the third form of protection, the Plant Patent Act which was applied to asexually reproduced plants. The novelty provisions applicable to utility patents were also applied to the Plant Patent Act. In that regard, there had been a case law which applied the novelty provisions under utility patents to a plant variety and had an impact on the way the Plant Patent Act was implemented. The Delegation indicated that examiners in the United States Patent and Trademark Office (USPTO) were making rejections based on the evidence of a breeder's certificate in combination with the evidence of "on-sale in a foreign country" commercial availability of the plant variety in a foreign country. A regulation in United States law provides examiners with the ability to request further information from applicants. Thus, if examiners find a breeder's certificate that was evidence of prior art," they would then ask whether there was evidence of "on-sale in a foreign country." If this were the case, then examiners might retain a rejection of novelty, indicating that the plant variety was not novel. That was a change because previous to that case law, a breeder's certificate was not considered to be an "enabling publication." Based on that case law, evidence of "on-sale in a foreign country," in combination with a "breeder's certificate," was now considered to be an enabling publication, therefore defeated novelty. This had raised uncertainty amongst breeders in the plant variety circles, and breeders who had previously received a breeder's certificate in a foreign country and had started marketing that plant variety in foreign countries, could not file in the United States of America without fear that they would receive a rejection as the plant variety would not be considered novel. Indeed, rejections were now being made if there was evidence of a breeder's certificate and evidence of "on-sale in a foreign country."

54. The Delegation further added that there was a hearing in the United States Congress under one of the Sub-committees where constituent Congressman Issa introduced a Bill that presented a 10-year grace period indicating that "Prior Art" would not defeat novelty for a 10-year period. However, the Bill did not receive sufficient support with other constituents. The Bill was being reexamined, but it was unclear whether it was dead in the Sub-committee or not. Noting that the Director of USPTO was the Under Secretary for Intellectual Property and, as such, responsible for handling the legislative issues that went before the Congress, the Delegation requested that breeders who had any evidence of the negative impact of this change on their businesses send such evidence to the USPTO to support their cause. This would make it easier to convince Congress that the situation was having an impact on industry rather than just creating an uncertainty about the legislation. The Delegation expressed its wish to clarify the situation and indicated its willingness to discuss the matter further after the meeting of the Committee.

55. The present report has been adopted by correspondence.

[Annex I follows]

ANNEXE I / ANNEX I / ANLAGE I / ANEXO I

LISTE DES PARTICIPANTS / LIST OF PARTICIPANTS/ TEILNEHMERLISTE / LISTA DE PARTICIPANTES

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

ANNEX II

SPECIFIC ISSUES CONCERNING THE INTERFACE BETWEEN PATENTS AND PLANT BREEDERS' RIGHTS

Amendments to document CAJ/46/2 as agreed on October 21 and 22, 2002, by the Administrative and Legal Committee at its forty-sixth session

…..

"3. The purpose of this document is to consider the situation where, notwithstanding the fact that the subject matter of protection is different, the grant of a patent might inhibit the "breeder's exemption" provided by the UPOV system of plant variety protection. ~~an overlap in the protection provided~~. It then considers the issues which may arise and addresses how a State may be able to preserve the breeder's exemption within national legislation implementing the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement). ~~measures which might be taken to ensure that the patent and plant breeders' rights systems continue to be mutually supportive in future.~~

"5. It is necessary to start by examining ~~the circumstances where~~ the scope of protection offered under the patent system and UPOV system ~~overlap, despite the fact that the subject matter of protection is different~~. In particular, this is explored in relation to ~~this concerns~~ the situation where, for example, the development of genetic engineering can result in a plant variety which will be protected as a plant variety, by a plant breeder's right, but will also contain an invention protected by patent (e.g. patented genetic element). The issues which arise from such ~~overlapping~~ protection are a result of differences in the scope and exceptions for the two systems. These differences and the issues which arise are explored in the following section.

"I. ISSUES ARISING FROM ~~OVERLAPPING~~ THE GRANTING OF PROTECTION

"Issues Which May Arise from Inhibition of the Breeder's Exemption by the Granting of a Patent ~~Arising from the Lack of a Breeder's Exemption in Patents~~

"16. Two main issues may arise if a patent inhibits ~~from the lack of a~~ the breeder's exemption ~~in the patent system~~. Firstly, there ~~is~~ might be an imbalance between the UPOV system and patent system concerning the obligation to reward the right holder of the initial protected subject matter (i.e. patented invention or protected variety) as far as countries that are still bound by the 1961/72 and 1978 Acts of the UPOV Convention are concerned. This has been addressed by the provision for essentially derived varieties (EDV) in the 1991 Act of the UPOV Convention. Secondly, there is a need to consider how to maintain the ability to exercise the breeder's exemption in the case of varieties which contain patented inventions. These issues are explained below.

Balancing the reward to the respective rights holders (essentially derived varieties)

"17. The potential imbalance between the exceptions under the patent system and the UPOV system was known at the time of the development of the 1991 Act of the Convention…

"20. As explained in paragraphs 12 to 15, the patent system may require that the permission of the Gen-elem 1 patent holder is obtained *before any breeding work can begin*. In such circumstances, it might be ~~is much~~ more difficult for agreement to be reached between the variety owner and patent holder because the value of the end variety cannot be reliably estimated.

"21. The nature of the difference which exists between the two systems is not always fully understood. Thus, certain mechanisms, such as cross-compulsory licensing ~~arrangements~~ between patent holders and plant breeders' rights holders, which have been introduced by some members of the Union to address an imbalance might ~~will~~ fail to resolve the problem unless they ensure that the patent system allows the breeding of new varieties in the same way as provided by the UPOV Convention.

"22. Furthermore, with regard to the possible development of such mechanisms, it might be noted that the UPOV Convention makes it unnecessary to obtain a compulsory license for anything other than that strictly justified by public interest, as provided in Article 17(1) of the 1991 Act. Bearing in mind the breeder's exemption in the UPOV Convention, the need to introduce a mechanism for a compulsory license on the basis of important technical advance of considerable economic significance, such as that provided in the TRIPS Agreement (Article 31(l)(i)) may not be justified, because if the new variety satisfied such a test, there would be a very strong incentive for the patent holder and variety owner to find a mutually beneficial arrangement.

"23. In conclusion, it is important to recognize that a basic principle of the breeder's exemption, which allows the breeding of new varieties of plants using protected varieties, is not affected by the EDV concept and that the introduction of the EDV concept maintains the access of all varieties for breeding. However, it does provide a mechanism to ensure a suitable reward for plant breeders. ~~The patent system does not make specific provision for free access to plant material for breeding new varieties.~~

The ability to exercise the breeder's exemption in the case of varieties containing patented inventions

"25. If a variety (variety X) contains a patented genetic element, it will be necessary for a breeder to assess if the process of breeding a new variety, using variety X as a parent, would infringe the patent covering the genetic element. The following hypothetical situations are intended to illustrate real outcomes ~~Various cases may occur~~:

Case 1: The act of using variety X, containing the patented genetic element, to cross with another variety *infringes* the patent ~~Furthermore,~~ and:

(a) the permission of the patent holder *is* required to remove the patented genetic element from variety X.

- In this case, in practice, there is no longer any breeder's exemption available on variety X because it cannot be used for breeding other varieties without the permission of the patent holder.

or

~~Case 2: The act of using variety X, containing the patented genetic element, to cross with another variety infringes the patent.~~ However,

(b) the permission of the patent holder *is not* required to remove the patented genetic element from variety X and the breeder removes the patented genetic

element before using variety X (minus the patented genetic element) for breeding.

- The breeder's exemption has not been completely lost in this case because a new variety could be bred without the permission of the patent holder. However, in practice, the breeder's exemption has been inhibited because of the need to remove the patented genetic element before starting the breeding work.

~~Case 3: The act of using variety X, containing the patented genetic element, to cross with another variety does not infringe the patent, but evaluation of the progeny infringes the patent, regardless of whether the progeny contains the patented genetic element. In this case, in practice, there is no longer any breeder's exemption available on variety X because it cannot be used for breeding other varieties without the permission of the patent holder.~~

Case 2~~3~~: The act of using variety X, containing the patented genetic element, to cross with another variety *does not infringe* the patent. Evaluation of the progeny infringes the patent, but only where the progeny contains the patented genetic element.

(a) If the breeder *is unable* to screen all the progeny resulting from the cross, the evaluation of the progeny might be feared by the breeder to infringe the patent, regardless of whether the progeny contains the patented genetic element.

- In this case, in practice, there is no longer any breeder's exemption available on variety X because it would not be used for breeding other varieties without the permission of the patent holder.

~~Case 4:~~ (b) If the breeder *is able* to screen all the progeny,

- the breeder's exemption has not been completely lost ~~in this case~~ because a new variety could be bred without the permission of the patent holder, providing it did not contain the patented genetic element. However, in practice, the breeder's exemption has been inhibited because of the need to identify the progeny which contain the patented genetic element and remove these from the program.

"26. It is clear that patent protection of the~~, although the purpose of the patent in variety X is only to protect the~~ genetic element~~, it~~ can, in effect, confer the protection onto variety X and as a result negate or inhibit the breeder's exemption.

"27. The rapid progress in the development of genetic engineering raises the prospect that, in the foreseeable future, an ever increasing number of plant varieties will contain patented inventions. Furthermore, the varieties may contain several patented genetic elements, which would make the removal of the patented genetic elements, envisaged in cases 1(b) and 2(b) ~~2 and 4~~, difficult or impossible in practice. The practical consequence of this development may be that the breeder's exemption, which is an essential principle in the UPOV system of plant variety protection, would be lost or greatly weakened.

"II. PROVISIONS WITHIN THE TRIPS AGREEMENT WHICH MIGHT ALLOW THE PRESERVATION OF THE BREEDER'S EXEMPTION ~~MEASURES WHICH MIGHT BE TAKEN TO ENSURE THAT THE PATENT AND PLANT BREEDERS' RIGHTS SYSTEMS CONTINUE TO BE MUTUALLY SUPPORTIVE IN FUTURE~~

"28. Article 7 of the TRIPS Agreement states that "The protection and enforcement of intellectual property rights should contribute to the *promotion of technological innovation* and to the *transfer and dissemination of technology*, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a *balance of rights* and obligations" (emphasis added). Furthermore, the TRIPS Agreement provides (Article 8(2)) that "Appropriate measures, provided that they are consistent with the provisions of this Agreement, may be needed to prevent the abuse of intellectual property rights by right holders or the resort to practices which unreasonably restrain trade or *adversely affect the international transfer of technology*" (emphasis added).

"29. As explained in paragraph 12, the exceptions to the rights conferred by a patent under Article 30 of the TRIPS Agreement are not specific. This means that a State may be able to implement Article 30~~there may be scope for these to be interpreted~~ in a way that protects ~~which will not undermine the UPOV system of plant variety protection and, in particular,~~ the breeder's exemption.

30. The Committee is invited ~~to note~~:

(a) to note that the EDV provision in the UPOV Convention provides a mechanism for rewarding plant breeders and *~~but, unlike the patent system,~~ ensures that the development of new varieties is not inhibited;*

(b) to note the potential difficulties in using cross-compulsory licensing as a means to address the lack of a breeder's exemption in the patent system;

(c) to note the consequences for breeding progress if the breeder's exemption is negated or inhibited through the presence of patented inventions in plant varieties and;

(d) to recommend to members of the Union to consider, where appropriate, whether the nature of the research exemption in their patent laws concerning plants might inhibit the breeder's exemption ~~to consider what measures might be appropriate to address the threat to the breeder's exemption.~~"

[Annex III follows]

ANNEX III

EXTENSION OF PROTECTION TO HYBRID VARIETIES THROUGH PROTECTION OF PARENT LINES

Document agreed on October 21 and 22, 2002,
by the Administrative and Legal Committee at its forty-sixth session

1. The purpose of this document is, in response to a request from the Technical Committee (hereinafter referred to as "the TC"), to consider the protection of hybrid varieties through protection of parent lines.

2. At its thirty-eighth session, held in Geneva from April 15 to 17, 2002, the TC heard from the International Seed Federation (ISF) that breeders of seed-propagated ornamental plants are considering how to utilize the UPOV system of plant variety protection in a way that would serve the breeding activities and economics in their sector. This discussion has, at least in part, been triggered because the development of seed-propagated varieties by breeders of ornamental plants is a relatively new development, compared to the more traditional approach of breeding vegetatively propagated varieties.

3. One particular development in seed-propagated ornamental plant varieties has been the introduction of hybrid varieties. In some cases, the same parent line is used in many different hybrid varieties and breeders, conscious of the cost of protecting all the individual hybrid varieties noted that, in such cases, protection of a series of hybrid varieties could be achieved by protection of the single parent line common to all the hybrids in the series, provided that the parent line fulfilled all the conditions for, and is granted, protection.

4. The UPOV Convention does indeed provide protection with regard to the use of the protected variety as a parent for the production and exploitation of a hybrid variety. Thus, Article 14(5)(a)(iii) of the 1991 Act states that the provisions for protected varieties extend to varieties (i.e. hybrid varieties in this case) "whose production requires the repeated use of the protected variety"—the protected variety being the parent line. This wording establishes that, regardless of whether the seed of the hybrid is produced in another country—even one without plant variety protection—seed of the hybrid must not be imported, marketed or sold in a country where a parent line is protected, without the authorization of the breeder. This is because the seed of the hybrid is the propagating material of the variety whose production requires the repeated use of the protected variety and the acts covered in Article 14(1)(a), such as selling, marketing and importing, require the authorization of the breeder. However, it should be noted that, for example, the use of parent lines might not be required if a "hybrid" variety can be produced by vegetative propagation or apomixis.

5. Similarly, the 1978 Act provides protection for the hybrid through protection of a parent line in Article 5(3), which provides that authorization of the breeder is required with respect to a protected variety for the "utilization of the variety as an initial source of variation for the purpose of creating other varieties or for the marketing of such varieties … when the repeated use of the variety is necessary for the commercial production of another variety." However, in this case the protection of a parent line in country A might not provide effective protection of the hybrid in country A if the seed of the hybrid is produced in country B, where country B

does not apply the UPOV Convention. This is because, in country B, there is no restriction on the use of the parent lines and it might be considered that there is no repeated use of the parent line in country A. Thus, it will be a matter for each State party to the 1978 Act to interpret Article 5(3) of that Act and to decide whether, in this situation, a hybrid would be covered by the protection of one or more of the parent lines.

6. ~~Thus~~ In conclusion, on the basis described in this document, the UPOV Convention allows a breeder and not just breeders of ornamental plants, to ~~obtain~~ extend protection ~~for~~ to ~~his~~ their hybrid varieties by protection of one or more of the parent lines, if there is repeated use of such parent lines for the production of the hybrid varieties. It will be for each breeder to decide whether this is the most appropriate route to protection according to their particular circumstances.

[End of Annex III and of document]