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INTERNATIONAL UNION FOR THE PROTECTION OF INDUSTRIAL PROPERTY
(PARIS UNION)

ASSEMBLY

Nineteenth Session (9th Extraordinary)

Geneva, September 21 to 29, 1992

PATENT APPLICATIONS CLAIMING THE PRIORITY
OF APPLICATIONS FOR PLANT BREEDERS' RIGHTS

Memorandum prepared by the Director General

Background

1. At the Diplomatic Conference for the Revision of the International Convention for the Protection of New Varieties of Plants, held in Geneva from March 4 to 19, 1991 (hereinafter referred to as the "UPOV Diplomatic Conference"), Article 11(1) of that Convention (hereinafter referred to as the "UPOV Convention"), regarding the right of priority, was revised, in order to permit applicants for breeders' rights to invoke the priority of an application for a patent.

2. Article 11(1) of the UPOV Convention, as revised in 1991, reads as follows:

"(1) [The right; its period] Any breeder who has duly filed an application for the protection of a variety in one of the Contracting Parties (the "first application") shall, for the purpose of filing an application for the grant of a breeder's right for the same variety with the authority of any other Contracting Party (the "subsequent application"), enjoy a right of priority for a period of 12 months. This period shall be computed from the date of filing of the first application. The day of filing shall not be included in the latter period."

3. The discussions that took place during the UPOV Diplomatic Conference, in connection with Article 11(1), made it clear that, while the Conference adopted a text that would allow a right of priority to be claimed (for obtaining a breeder's right) on the basis of a patent application claiming the same variety, a number of delegations were concerned about the lack of express provisions, on the international level, to the effect that a right of priority may be claimed in a patent application on the basis of an application for a breeder's right relating to the same plant variety. Several delegations pointed out that--in a spirit of reciprocity--it would be desirable to have, within the framework of the patent system, a right of priority that would correspond to Article 11(1) of the UPOV Convention.

4. While under Article 11(1) of the UPOV Convention, as revised in 1991, a breeder may rely on an application for a patent claiming a plant variety for the purpose of applying, with the benefit of the right of priority recognized by the UPOV Convention, for breeders' rights in other Contracting Parties of the UPOV Convention, the UPOV Convention does not, and cannot, regulate the converse case, namely, the possibility of claiming a right of priority in a patent application on the basis of an application for a breeder's right. This matter can only be regulated in the framework of the Paris Convention for the Protection of Industrial Property (hereinafter referred to as "the Paris Convention").

Resolution of the Assembly

5. In order to oblige the members of the Paris Union to recognize the said priority right, the Paris Convention would have to be revised on this point. However, revision is very slow and, in the meantime, voluntary recognition of the said right could be effected by any State that wishes to do so. There is nothing in the Paris Convention that would prevent such a voluntary recognition. Some States may already recognize this right.

6. Consequently, it is proposed that the Assembly of the Paris Union adopt a resolution recommending to its Member States to recognize the said right. The resolution could read as follows:

"The Assembly of the Paris Union for the Protection of Industrial Property recommends to each country of the Union which does not do so already to recognize that, where an invention is the subject of an application for a breeder's right in a country of the Union, such application shall give rise to a right of priority under the same conditions and with the same effects as an application for a patent as provided in Article 4 of the Paris Convention."

7. The Assembly of the Paris Union is invited to adopt the resolution proposed in paragraph 6, above.

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