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INTERNATIONAL UNION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS

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DRAFT

ALTERNATIVE DISPUTE SETTLEMENT MECHANISMS

Document prepared by the Office of the Union

*to be considered
by the Administrative and Legal Committee
at its sixty-fifth session to be held in Geneva on March 29, 2012*

Note for Draft version

Endnotes provide background information when considering the draft version, not to be retained in the adopted version of the document.

Footnotes to be retained in the published version of the document.

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ALTERNATIVE DISPUTE SETTLEMENT MECHANISMS

PREAMBLE

1. Alternative dispute settlement mechanisms, such as arbitration and mediation, are an “alternative” to litigation. Arbitration is a “method of dispute resolution involving one or more neutral third parties who are usually agreed by the disputing parties and whose decision is binding.”¹ Mediation is a “method of non-binding dispute resolution involving a neutral third party who tries to help the disputing parties reach a mutually agreeable solution”.² It is possible to agree to arbitrate or mediate before a dispute has arisen or after a dispute arises.
2. The purpose of this document is to provide information on alternative dispute settlement mechanisms for breeders’ rights. In that regard, it should be noted that UPOV does not provide alternative dispute settlement mechanisms.ⁱ
3. The only binding obligations on members of the Union are those contained in the text of the UPOV Convention itself, and this information document must not be interpreted in a way that is inconsistent with the relevant Act for the member of the Union concerned.
4. Section I reproduces relevant provisions of the 1991 Act and the 1978 Act of the UPOV Convention. Section II provides information on certain dispute settlement mechanisms for breeders’ rights.

¹ Garner, Bryan A. *Black’s Law Dictionary*, Eight Edition, Thomson West, 2007, page 112.

² Garner, Bryan A. see *supra*, page 1003.

SECTION I:

RELEVANT PROVISIONS FOR ALTERNATIVE DISPUTE SETTLEMENT MECHANISMS

Conditions and limitations concerning the breeder's authorization

5. Article 14(1)(a) of the 1991 Act of and Article 5(2) of the 1978 Act of the UPOV Convention provide as follows:

<p>1991 Act of the UPOV Convention</p> <p style="text-align: center;">Article 14</p> <p style="text-align: center;">Scope of the Breeder's Right</p> <p>(1) [Acts in respect of the propagating material] (a) Subject to Articles 15 and 16, the following acts in respect of the propagating material of the protected variety shall require the authorization of the breeder:</p> <ul style="list-style-type: none">(i) production or reproduction (multiplication),(ii) conditioning for the purpose of propagation,(iii) offering for sale,(iv) selling or other marketing,(v) exporting,(vi) importing,(vii) stocking for any of the purposes mentioned in (i) to (vi), above. <p>(b) The breeder may make his authorization subject to conditions and limitations. [...]</p>
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<p>1978 Act of the UPOV Convention</p> <p style="text-align: center;">Article 5</p> <p style="text-align: center;">Rights protected; Scope of Protection</p> <p>(1) The effect of the right granted to the breeder is that his prior authorisation shall be required for</p> <ul style="list-style-type: none">- the production for purposes of commercial marketing- the offering for sale- the marketing <p>of the reproductive or vegetative propagating material, as such, of the variety.</p> <p>Vegetative propagating material shall be deemed to include whole plants. The right of the breeder shall extend to ornamental plants or parts thereof normally marketed for purposes other than propagation when they are used commercially as propagating material in the production of ornamental plants or cut flowers.</p> <p>(2) The authorisation given by the breeder may be made subject to such conditions as he may specify. [...]</p>

6. Document UPOV/EXN/CAL "Explanatory Notes on Conditions and Limitations Concerning the Breeder's Authorization in respect of Propagating Material under the UPOV Convention", paragraph 2, provides as follows (see http://www.upov.int/explanatory_notes/en/list.jsp):

"The UPOV Convention establishes the right of the breeder to make his authorization, for acts in respect of propagating material, subject to conditions and limitations. The conditions and limitations according to which a breeder may authorize the acts in respect of the propagating material are a matter for the breeder to decide."

7. For illustrative purposes, document UPOV/EXN/CAL, provides examples of conditions and limitations that a breeder might include in his authorization. With regard to conditions and limitations, the breeder may decide, if appropriate, to make his authorization subject to the acceptance that, in case of a dispute, the dispute will be submitted to alternative dispute settlement mechanisms (e.g. arbitration).

Enforcement of breeders' rights

8. Article 30(1)(i) of the 1991 Act of and Article 30(1)(a) of the 1978 Act of the UPOV Convention provide as follows:

1991 Act of the UPOV Convention

Article 30

Implementation of the Convention

(1) *[Measures of implementation]* Each Contracting Party shall adopt all measures necessary for the implementation of this Convention; in particular, it shall:

(i) provide for appropriate legal remedies for the effective enforcement of breeders' rights;

[...]

1978 Act of the UPOV Convention

Article 30

**Implementation of the Convention on the Domestic Level;
Contracts on the Joint Utilisation of Examination Services**

(1) Each member State of the Union shall adopt all measures necessary for the application of this Convention; in particular, it shall:

(a) provide for appropriate legal remedies for the effective defence of the rights provided for in this Convention;

[...]

9. Document UPOV/EXN/ENF "Explanatory Notes on the Enforcement of Breeders' Rights under the UPOV Convention", Section II, provides as follows (see http://www.upov.int/explanatory_notes/en/list.jsp):

"While the UPOV Convention requires members of the Union to provide for appropriate legal remedies for the effective enforcement of breeders' rights, it is a matter for breeders to enforce their rights.

" The following non-exhaustive list of enforcement measures might be considered, as appropriate:

" [...]

" (e) Measures resulting from alternative dispute settlement mechanisms

Civil measures (see above (a)³) obtained as a result of alternative dispute settlement mechanisms (e.g. arbitration). [...]"

³ Extract from document UPOV/EXN/ENF "Explanatory Notes on the Enforcement of Breeders' Rights under the UPOV Convention", Section II:

- (a) Civil measures
- (i) provisional measures, pending the outcome of a civil action, to prevent or stop an infringement of the breeder's right, and/or to preserve evidence (e.g. collect samples of infringing material from greenhouses);
 - (ii) measures to allow a civil action to prohibit the committing, or continuation of the committing, of an infringement of the breeder's right;
 - (iii) measures to provide adequate damages to compensate the loss suffered by the holder of the breeder's right and to constitute a deterrent to further infringements;
 - (iv) measures to allow destruction or disposal of infringing material;
 - (v) measures to provide payment by the infringer of the expenses of the holder of the breeder's right (e.g. attorney's fees);
 - (vi) measures to require an infringer to provide information to the holder of the breeder's right on third persons involved in the production and distribution of infringing material.

SECTION II:

INFORMATION ON ALTERNATIVE DISPUTE SETTLEMENT MECHANISMS FOR BREEDERS' RIGHTS

10. This section provides information on certain international alternative dispute settlement mechanisms.^{4,5} Information on domestic dispute settlements mechanisms should be obtained from the relevant institutions of the members of the Union concerned.

11. The following institutions provide services for alternative dispute settlement mechanisms relevant for breeders' rights:

International Seed Federation (ISF)ⁱⁱ

7, chemin du Reposoir, 1260 Nyon, Switzerland
Tel.: +41 22 365 4420; fax: +41 22 365 4421; e-mail: isf@worldseed.org
http://www.worldseed.org/isf/dispute_settlement.html

World Intellectual Property Organization (WIPO)ⁱⁱⁱ

WIPO Arbitration and Mediation Center
34, chemin des Colombettes, 1211 Geneva 20, Switzerland
Tel.: +41 22 338 8247; fax: +41 22 740 3700; e-mail: arbiter.mail@wipo.int
<http://www.wipo.int/amc/en/>

12. In addition to the above, the contact details of certain institutions that provide services and training relevant to arbitration of intellectual property disputes are reproduced below.⁶

International Chamber of Commerce (ICC)

ICC International Court of Arbitration
Secretariat of the ICC International Court of Arbitration Headquarters
38, Cours Albert 1^{er}, 75008 Paris, France
Tel: +33 1 49 53 29 05; Fax: +33 1 49 53 29 29
<http://www.iccwbo.org/policy/arbitration/id2882/index.html>

Chartered Institute of Arbitrators (CI Arb)

12 Bloomsbury Square, London WC1A 2LP, United Kingdom
Tel: +44 (0) 20 7421 7444; Fax: +44 (0) 20 7404 4023
<http://www.ciarb.org/about/>

⁴ One particular feature of international arbitration is that an international arbitral award is enforceable in the Contracting Parties to the "Convention on the Recognition and Enforcement of Foreign Arbitral Awards" (1958 New York Convention) (see http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsq_no=XXII-1&chapter=22&lang=en).

⁵ The United Nations Commission on International Trade and Law (UNCITRAL) adopted on April 28, 1976, the UNCITRAL Arbitration Rules. "The UNCITRAL Arbitration Rules provide a comprehensive set of procedural rules upon which parties may agree for the conduct of arbitral proceedings arising out of their commercial relationship and are widely used in *ad hoc* arbitrations as well as administered arbitrations. The Rules cover all aspects of the arbitral process, providing a model arbitration clause, setting out procedural rules regarding the appointment of arbitrators and the conduct of arbitral proceedings and establishing rules in relation to the form, effect and interpretation of the award" (extract from UNCITRAL's website see http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1976Arbitration_rules.html).

⁶ Plant, David, *Resolving International Intellectual Property Disputes*, ICC Publishing SA, 1999, page 71.

American Arbitration Association (AAA)

1633 Broadway, 10th Floor, New York, NY 10019, United States of America
Toll Free: 1-800-778-7879; e-mail: websitemail@adr.org
<http://www.adr.org/>

International Institute for Conflict Prevention and Resolution (CPR)

575 Lexington Avenue, 21st Floor, New York, NY 10022, United States of America
Tel: +1.212.949.6490; fax: +1.212.949.8859; e-mail for General Inquiries: info@cpradr.org
<http://www.cpradr.org/>

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- ⁱ The CAJ, at its sixty-fourth session, held in Geneva on October 17, 2011, “agreed to the development of a document, for its sixty-fifth session in March 2012, to provide information on alternative dispute settlement mechanisms for breeders’ rights. The CAJ agreed that a clarification should be included in the document to explain the nature of the document and, in particular, to specify that the purpose of the document was the provision of information and not to provide UPOV dispute settlement mechanisms.”(see document CAJ/64/11 “Report on the Conclusions”, paragraph 11).
- ⁱⁱ See document CAJ/63/10 “Report” , paragraph 37, document CAJ/64/3 “Alternative Dispute Settlement Mechanisms”, Annex II, and document CAJ/64/11 “Report on the Conclusions”, paragraphs 10 and 11.
- ⁱⁱⁱ See document CAJ/63/10, “ Report” , paragraph 39, document CAJ/64/3 “Alternative Dispute Settlement Mechanisms”, Annex III, and document CAJ/64/11, “Report on the Conclusions” , paragraphs 10 and 11.

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