WIPO-UPOV SYMPOSIUM ON THE CO-EXISTENCE OF PATENTS AND PLANT BREEDERS' RIGHTS IN THE PROMOTION OF BIOTECHNOLOGICAL DEVELOPMENTS

PANEL DISCUSSION

Introduction by the Chair
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"It is an honor and pleasure for me to chair this final Panel Discussion being surrounded by all these excellent speakers of the WIPO-UPOV-Symposium of today.

It will be a great challenge for me to open a hopefully fruitful discussion between the speakers and the audience and I will try my very best to organize this by structuring the debate and focussing the discussion on some main issues which already stood out during today's meeting.

But first, please allow me the following remarks:

The title of this Symposium is devoted to the "Co-existence of Patents and Plant Breeders' Rights in the Promotion of Biotech Developments." The notion "Co-existence" to my mind is too negative, and thus at least for the following reasons:

- It has a smack of hostility between two totally incompatible systems of protection (comparable with the political endeavors during the Cold War to establish co-existence between two incompatible political systems);

- We should be totally aware of the fact that there is nothing new within the intellectual property regime in having different choices of protection titles which may complement each other, overlap or even compete with each other!

- It has to be clarified that under plant breeders' rights, specific plant varieties are protected, whereas an invention is the subject matter of a biotech patent which normally contains generic claims since such an invention may be realized in an undefined number of plant varieties;

- Last, but not least, and here I would like to underline the statement of Prof. Straus: In view of the fact that in the plant area actually - at least in Europe - we have only an infinitely small number of field trials with patented plant material and virtual no cultivation of such plants: Do we carry on a practical or a theoretical discussion?

Of course, we have to identify the main differences (strengths and weaknesses) between the systems, especially so far as they protect the same subject matter or if they interfere unduly with each other and have to work for necessary improvements in both. The ongoing review of the TRIPS Agreement under the auspices of World Trade Organization (WTO) requests not only minimum standards for the protection of plant

varieties and biotech inventions or just a co-existence of different systems, but demands better harmonization of the systems. To achieve this goal we have to look at the needs of world-wide markets, incentives for the development of least developed or developing countries, and have to consider public interest!

It is my understanding that the "public" should comprise a wide range of groups of persons, e.g. direct customers, the farmers, the processing industry, consumers and, of course, the research community. They all should benefit from new knowledge, developments and the promising innovations in biotechnology and plant breeding within research institutions, the breeding and biotech industry. This will only take place if efficient and adequate protection systems are available, thus being the main condition for effective technology transfer.

In this sense, I would like to divide the discussions into the following three main domains which have already been anticipated by the organizers of this Symposium:

1. Accessibility of protected inventions and plant varieties for further innovation:

In this respect, the following aspects should be considered:

- Scope of the research exemption / experimental use defense within the patent regimes (harmonization needed?);
- Scope of the Breeders' Exemption within the plant breeders rights system;
- Consequences / validity of contractual restrictions e.g. by bag tags.

2. What are the experiences with IP strategies and licensing in the area of patents for biotech inventions and PBR systems?

- Are the protection criteria, the scope of protection and the enforcement and prosecution measures well suited for the different objects of protection and for the needs mentioned?
- Are deficiencies in this respect due to the system *per se* or due to its implementation or administration?
- Management of the Essentially Derived Varieties concept?

3. Which measures are necessary for a "balanced co-existence" (a better harmonisation) of the systems?

- A well defined and broader research exemption or
- A compulsory license system,
- A cross license system,
- Or just confidence in the negotiation powers of the markets?