

REVIEW OF THE PROVISIONS OF ARTICLE 27.3(b)

Information from Members

Addendum

ESTONIA

The present document represents the information requested by the Council for Trade-Related Aspects of Intellectual Property Rights which the Secretariat has received from Estonia, by means of a communication from its Permanent Mission, dated 15 June 2001.¹

A. PATENT SYSTEM QUESTIONS

1. *In your territory, is there any basis for denying a patent on an invention consisting of an entire plant or animal that is novel and involves an inventive step?*

Section 7(2)6 of the Patents Act stipulates that "biotechnological inventions that can be used solely for one particular plant or animal variety" shall not be protected with patents.

2. *If the answer to question 1 is yes, please respond to the following questions:*

(a) *Does your patent system exclude entire plants or animals as inventions? If it does, please cite the legal basis for this;*

See the answer to question 1 above.

(b) *If your patent system does recognize entire plants and animals as inventions, does it exclude all such inventions from being patentable subject-matter, or does it only exclude certain types of plants or animals? If it excludes all, please cite the legal basis for their exclusion (e.g. lack of industrial applicability). If it excludes only certain types, please identify the categories or characteristics of inventions that are excluded and cite the legal basis for their exclusion;*

Section 6(2)8 of the Patents Act indicates that plant and animal varieties are not regarded as the subject of an invention.

¹ The questions to which answers are provided are those which can be found in document IP/C/W/126.

- (c) *Is there any other basis in your law that precludes the grant of a patent on any categories of plant or animal inventions that otherwise are novel, involve an inventive step and are capable of industrial application? If so, please cite the legal basis for that exclusion from patent eligibility.*

According to Sections 7(1)1 and 7(2)4 of the Patents Act, patent protection shall not apply to:

- inventions contrary to *ordre public* and morality; and
- processes for modifying the genetic identity of animals which are likely to cause them suffering without any substantial medical benefit to the health care of human beings or animals, and also animals resulting from the use of such processes.

3. *Other than with respect to subject-matter you defined as being ineligible to be patented under question 2, is it possible in your territory to obtain a patent claim defined in any of the following ways?*

- (a) *A patent claim that is not limited to a specific plant or animal variety.*

Yes.

- (b) *A patent claim that is expressly limited to a plant or animal variety.*

No.

- (c) *A patent claim that is expressly limited to a group of plants or animals, where the group is defined through reference to a shared characteristic such as incorporation of a particular gene.*

Yes.

- (d) *If the answers you provide to question 3(a) to (c) vary, please provide the definitions of a "plant variety" and an "animal variety" that are used by your examining authority.*

The concept of "plant variety" is defined by Section 2 of the Plant Varieties Act:

"§2. Variety and essentially derived variety.

- (1) "Variety" means a plant grouping within a single botanical taxon of the lowest known rank which is defined by the expression of the characteristics resulting from a given genotype or combination of genotypes, is distinguished from other plant groupings by the expression of at least one of the said characteristics and is considered as a unit with regard to its suitability for being propagated unchanged. Such plant grouping is deemed to be a variety irrespective of whether the conditions for the grant of a plant variety right are fulfilled or not.
- (2) A plant grouping consists of entire plants or parts of plants (hereinafter variety constituents) which are capable of producing entire plants with the same characteristics.

- (3) A variety is deemed to be essentially derived from another variety if it is predominantly derived from the initial variety or a variety that is itself predominantly derived from the initial variety, it is clearly distinguishable from the initial variety, and, except for the differences which result from the act of derivation, conforms to the initial variety in the expression of the essential characteristics that result from the genotype or combination of genotypes of the initial variety.
- (4) Essentially derived varieties may be obtained by the selection of a mutant or a variant individual of the initial variety, by back-crossing, transformation by genetic engineering, somatic cloning, or other such method."

The concept of an animal breed is defined in Section 2(9) of the Farm Animal Breed Act:

"Breed" means a group of animals of the same species, with similar parentage, conformation and economic utility, whose number is sufficient for breeding purposes."

4. *Is it possible to obtain a patent in your territory on a micro-organism that is novel, involves an inventive step and is capable of industrial application? If not, please identify the legal basis under which these inventions are deemed ineligible to be patented.*

Yes, as far as biological material can be the subject of an invention (Section 6(1) of the Patents Act).

5. *Is it possible to obtain a patent in your territory on an essentially biological process for the production of a plant or animal (i.e. a process limited to those acts that are necessary for sexual or asexual reproduction of a plant or animal)? If not, please identify the legal basis under which a patent on such a process would be denied.*

It is not possible to obtain a patent on an essentially biological process for the production of a plant or animal. Under Section 7(2)5 of the Patents Act, processes are unpatentable which are biological in essence and are used for deriving biological materials, producing plant or animal varieties, except microbiological processes for deriving micro-organisms. An essentially biological process for the derivation of a biological material or production of plant or animal varieties is defined in Section 7(3) as a process which consists entirely of natural phenomena, including crossing and selection.

6. *Is it possible to obtain a patent in your territory covering subject-matter that is identical to that found in nature (e.g. a plant or animal in its natural state)?*

Yes (artificial re-creation and clones are permitted).

B. PLANT VARIETY PROTECTION SYSTEMS

7. *Do the laws applicable to your territory provide for a sui generis form of protection for a new plant variety?*

Yes. The Plant Varieties Act provides for a *sui generis* form of protection for new plant varieties.

8. *If the answer to question 7 is yes, does that protection conform to the standards defined in one of the Acts of the International Convention for the Protection of New Varieties of Plants (UPOV).*

Yes.

9. *If the answer to question 8 is yes, please specify the Act of the UPOV Convention upon which your legislation is based (i.e. the 1991 Act, the 1978 Act or the 1961/1972 Act).*

Estonian legislation is based on the 1991 Act of the UPOV Convention.

10. *If sui generis protection for plant varieties is provided in your territory, would any of the following acts require the prior authorization of the right holder:*

(a) *acts performed for research or experimental purposes, or to develop new varieties of plants;*

No. Section 40 of the Plant Variety Rights Act stipulates: "A protected variety may be used without a licence issued by the holder of the plant variety right:

- 1) in scientific research and in official trials conducted for the purposes of comparison;
- 2) as parental material for the purpose of breeding new varieties;
- 3) privately, and for non-profit purposes."

(b) *acts performed to commercially exploit a variety distinct from the protected variety but sharing its essential characteristics;*

Yes, if the exploited variety is essentially derived from the protected initial variety or from a variety that is itself predominantly derived from that initial variety.

(c) *acts performed by a farmer of harvesting seed from his planting of a protected variety legitimately obtained, storage of that seed, and replanting of that seed on the farmers' land.*

No, but at the request of the right holder or his representative the farmer must provide information about the quantities of the seed harvested.

A licence fee has to be paid if the protected variety is grown for personal purposes on a territory bigger than 10 ha.

If prior authorization is not required for any of the above examples of activities, is there any requirement that the party undertaking the specified actions provide the right holder with remuneration in any form?

Yes (see the response to question 10(c)).

11. *Can protection be obtained for a plant variety that was known to the public, or was publicly available, prior to the application for sui generis protection for that plant variety, and if so, under what conditions (i.e. what are the time-limits during which public disclosure or availability will not preclude the grant of protection)?*

Yes, protection can be obtained for a plant variety that was known to the public or was publicly available prior to the application for *sui generis* protection for that plant variety.

In the case of availability of a plant variety in Estonia, the time-limit is one year. In the case of availability in the territory of another state, the time-limit is four years and in the case of trees and grapevines, the time-period is not longer than six years.

12. *Can protection be predicated on identification of an unexpressed gene, on an unexpressed set of genes present in the genome of the plant variety, or on the characteristics of germplasm, rather than the expressed characteristics of plant varieties derived from such genes or germplasm?*

The issue is currently under consultation with the UPOV.
