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INTERNATIONAL UNION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS

GENEVA

**FIFTH MEETING
WITH INTERNATIONAL ORGANIZATIONS**

Geneva, October 10 and 11, 1990

REVISION OF THE CONVENTION:

COMMENTS FROM COMASSO

Document prepared by the Office of the Union

The annex to this document contains the comments from the Association of Plant Breeders of the European Community (COMASSO) on the revision of the Convention. They were received by the Office of the Union on October 4, 1990.

[Annex follows]

COMASSO

Association of Plant Breeders
of the European Economic Community

Association des Obtenteurs
de Variétés Végétales de la
Communauté Economique Européenne

Vereinigung der Pflanzzüchter der
Europäischen Wirtschaftsgemeinschaft

Revision of the UPOV-CONVENTION

- UPOV Document IOM/5/2 Rev. -

1. General comments

1.1. COMASSO presents the following comments in order to contribute to the initiatives undertaken in view of the revision of the UPOV-Convention.

Our comments are based on our strong support of the objectives, as to

- strengthen the right of the breeder
- extend the practical scope of application
- clarify provisions
- adapt provisions to recent and prospective developments.

1.2. In the Introduction of document IOM/5/2 Rev. reference is made in numbers 1 and 2, to document IOM/5/3 instead of doc. IOM/5/2 (rev.) and in number 1 reference is made to the contents of the administrative and final clauses instead of the substantive law provisions.

1.3. Number 3 of the Introduction provides for the insertion of titles for the different paragraphs of the articles.

COMASSO is strongly opposed to this, because by this in fact definitions are created for a number of exceptional and extreme situations, even if these titles are not intended to constitute part of the provisions of the Convention.

2. Special comments

Article 1 Definitions

COMASSO welcomes the principle to ensure harmonized interpretation of key provisions by means of clear definitions in the Convention.

- (IV) We welcome the introduction of the reference to the relevant Contracting Parties' laws as to the employer/employee situation.
- (V) COMASSO proposes use of the expression "plant variety right" throughout the Convention instead of "breeders' right" because the Convention governs the subject of a right on plant varieties.
- (VI)
- We agree with the wider definition of the variety covering also those not fulfilling the DUS requirements.
 - We propose to insert after the words in the 3rd line "the result of" the words "the expression of".
 - We see a contradiction between the distinctness in respect of the definition of the variety being based on "at least one of the said characteristics" and that defined in the relevant Article 7 (3) without this provision.
 - It must be ensured, that the definition of the hybrid being represented by its components and the formula which associates them, will be covered by the definition of the variety. COMASSO is of the conviction, that the present text does not cover this situation.
- (VII) proposed COMASSO proposes the inclusion of the definition of "derived variety", Article 12 (2) b due to consideration to be given to our comments under Article 12.

(VIII) proposed COMASSO proposes to include in the definitions of Article 1 that of "material" as defined in the present text in Article 12 (5) (b) with the proposed deletion of the word "directly" in the last line.

This definition governs the whole Convention, not only Article 12, and assures the intention to strengthen the right.

Article 2 Obligation of Contracting Parties

(1) We are of the opinion that the reservation expressed in Article 36 (2) relates now more to the obligation of applying the Convention to all genera and species.

Therefore we propose to make Article 4 (2) the relevant place for the qualification of the "subject to the provisions of Article 36 (2)".

Note Ban of double protection

In view of the specific European legal situation as to the existence of clear exemption clauses for the patentability of plant varieties in patent conventions and in national laws, and

in view of the EEC proposal for a Council Directive on the legal protection of biotechnological inventions confirming clearly existing exclusion rules on the protection of plant varieties in international conventions,

COMASSO understands that there is no obligation expressed for the Contracting Parties to change existing exemption clauses in the relevant conventions and national laws.

It is the legitimate interest of any inventor to look for the best protection for his invention.

COMASSO is of the conviction that a protection offered by a right under a strengthened UPOV Convention still meets best the interests of breeders. This is especially because of the requirements for DUS to be met under UPOV and because of the breeders' exemption, neither of which are prerequisites covered by the existing patent systems.

In the light of these comments we see a real need for a "collision norm" to cover interactions with other industrial property rights.

In no case such collision norms should be unbalanced, i. e. they should not lead to a situation that a holder of a right, be it plant variety right or patent, be expropriated by only having a right without contents.

Article 3 Measures regulating Commerce

COMASSO agrees with the provision as proposed. We understand that by this no obligation for the Contracting Parties is created to provide for certification or marketing regulating systems.

Article 4 Genera und Species to be protected

- (1) We are concerned about the possibility that the reference to "genera and species" could not cover the case of interspecific hybrids.

We agree with the mandatory application as the principle and can accept the need to have some transitional rules.

- (1)(i) In this respect we propose to amend this article by the insertion of the words "of the major crops grown in the territory of that Contracting Party" after the word "species".

At least the difference should be made between agricultural and vegetable genera and species.

- (2) see our comments to Article 2 (1) as to the reservation of Article 36 (2).

Article 5 National treatment

COMASSO agrees with this provision and especially welcomes the deletion of the provision for reciprocity.

Article 6 First application

No comment.

Article 7 Conditions

- (1) No comment
- (2) We propose to change the title into "Novelty".
- (2) (a) We propose to delete the contents of and the brackets.
- (2) (a) (i) (ii)
We understand that the reference to "make available for the purposes of exploitation" will in no case cover the situation of passing on varietal material for the seed production on contractual basis.
- (2) (b)
We agree with the principle laid down in this provision but would propose to alter the word "may" in the 3rd line into "shall" in order to make it a binding provision.
- (3) No comment
- (4) No comment
- (5) No comment

Article 8 Right of Priority

- (1) COMASSO maintains the proposal to provide for a 24 months' period of priority in order to have adequate information on distinctness upon which to decide that it is appropriate to enter the said variety into another territory.
- (2) No comment
- (3) We suggest to maintain the actual period of four years as there are situations which justify this legal possibility.

Article 9 Examination, Provisional Protection

- (1) We propose to include the following into this provision:

(c) proposed

"The grant of protection for a variety in the territory of a given Contracting Party shall be independent from the grant of protection or the refusal of the protection for the same variety outside that territory."

- (2) We welcome the introduction of a provisional protection as a binding provision.

Instead of entitlement to at least equitable remuneration the full compensation for all damages incurred should be offered.

We ask for deletion of the last sentence of the paragraph because legal uncertainty will occur.

Article 10 Duration

COMASSO welcomes the increasing minimum periods of protection.

Article 11 Nullity, Forfeiture

- (1) No comment
- (2) (a)
No comment

(b) (III)

COMASSO asks for the deletion of this provision being too severe a penalty for having missed to propose a denomination.

Article 12 Effects

(1) (a)

- COMASSO is in favour of the conception of strengthening the right.
- We agree with the wording of "reproductive" when the meaning is "sexual". Otherwise there is an unclear situation.

This comment applies to other situations in which the word "reproductive" is contrasted with the word "vegetative".

(1) (b) (c)

- We understand these provisions as offering the possibility to the breeder to choose the stage where he will collect his royalty.
- We propose deletion of the word "directly" in the first line of Article 12 (1) (c) for those cases where the specific characteristics of the variety can be identified in the said product.

(2) (a) (I)

COMASSO cannot accept a situation that the initial variety in the sense of the Convention can be a derived variety.

Therefore we propose to put the word "a" instead of "the protected variety" in the first line of this provision.

(2) (a) (II)

COMASSO accepts this provision as it stands. There might be an implication, however, that no genuine innovation is encouraged but plagiarism. If this interpretation is right,

we ask for deletion of Article 12 (2) (a) (II).

(2) (a) (III)

COMASSO proposes to add the following sentence:

"Using components for seed production purposes or giving them to third parties on the basis of licencing agreements does not constitute an offer for sale"

- see our comments under Article 7 (2) (i) - .

(2) (b)

We agree with the contents, but strongly recommend simplification.

(2) (b) (I)

We propose to delete contents and brackets in the 5th line.

(2) (b) I, II, III to be included as definition into Article 1 as proposed Art (1) (VII)

(3) We accept the provision as laid down in its contents. We underline that we acknowledge the principles of the breeders' exemption assuring the free flow of germplasm.

(4) COMASSO points out that it is contrary to all principles in existing intellectual property rights to establish a right and then provide for a specific exemption which relates to a particular profession. This would establish a dangerous precedent which could extend into other areas of intellectual property right.

If, for political reasons, this precedent has to be accepted, then clear conditions have to be established. The provision as proposed does not satisfy this requirement in as much as it is too vague, especially in relation to the definition of "reasonable limits" and in terms of the mechanism required to ensure "adequate remuneration" to the breeder.

While each Contracting Party may provide for specific exemptions, at least the following conditions should apply in each case:

- restriction of a plant variety right shall only apply to a minimum of species of agricultural crops and should be limited to cases where the harvested material may be used directly for propagation;
- the restriction of the right must exclusively relate to the use by farmers for reproductive or propagative purposes, on their own holdings the product of the harvest which they have obtained by planting on their own holdings the protected variety or a variety covered by Art. 12 (2) (I) or (II);
- such use should be limited to a quantity equal to the quantity of reproductive or vegetative material originally used;
- it will be left within the breeders' responsibility to establish the level of royalty.

There should be not special provision with a sub-paragraph title as is proposed in Article 12 (4) but the provision should be included in Article 12 (3) without a specific heading.

(5)(a) COMASSO agrees with the principle of exhaustion of right as defined in this provision.

(5)(b) We propose to insert the definition of "material" into Article 1 after deletion of the word "directly" in 5(b)(iii).

Article 13 Restrictions

- (1) COMASSO underlines that the exploitation of components of a hybrid is effected through the hybrid and therefore legislation should in no case impose an obligation to sell components which have been protected.

We maintain our proposal to add the following:

"The Contracting Party shall notify to the Secretary General of the restrictions and the reasons thereof. The Council shall state its position."

Article 14 Denomination

COMASSO is positive as to the efforts undertaken to make the provision more understandable and clear.

We are concerned that some national authorities impose more detailed provisions than those which are required in the Convention.

- (1) We strongly propose to delete the qualification of the denomination as being generic designation.
- (9) We welcome that the proposal maintains the existing possibility to associate a trademark or similar indication to the denomination.

Bonn, 1st October 1990

[End of document]