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In English only

UPOV

IOM/5/9
ORIGINAL : English
DATE : October 8, 1990

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 ICC

Document prepared by the Office of the Union

The annex to this document contains the comments from the International Chamber of Commerce (ICC) on the revision of the Convention. They were received by the Office of the Union on October 8, 1990.

[Annex follows]

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1990-10-08 DC

COMMENTS ON THE REVISION OF THE UPOV CONVENTION

Submitted by the International Chamber of Commerce Working Party on Legal Protection of Biotechnological Inventions

UPOV Documents IOM/5/2 Rev. (22 August 1990) and IOM/ 5/3 (August 2, 1990)
Fifth Meeting with International Organizations
Geneva, October 10 and 11, 1990

General

UPOV is to be congratulated for its continued effort to promote the dialogue between interested circles.

We feel that important progress has been made towards our ultimate goal of substantially strengthening the Plant Variety Rights system without impairing the rights provided by the patent system.

Special Comments on the Text

Introduction

We have certain reservations with respect to the introduction of titles placed between square brackets and which do not form part of the provisions of the Convention. In particular, the reference to a "farmer's privilege" (Art. 12 (4) on page 45) is undesirable.

Article 1(iv)

It would appear that the 2nd provision ("where the laws...") can be deleted since it is fully covered by the 3rd provision ("the successor in title...").

Article 1 (v)

We propose replacement of this definition by:

> "variety right" means the right defined in Article 12 attached to a Title of protection granted by a Contracting Party under this Convention for the variety.

Article 1(vi)

We feel that the proposed definition of "variety" is unnecessary. It should suffice to define a variety by reference to Article 7. The proposed definition for "variety" also covers plants not satisfying the DUS requirements. Accordingly, depending on the context, the term "variety" encompasses differing scopes of plants. This is undesirable and confusing. Moreover, we are strongly opposed to an expansion of the definition as this may result in a de facto restriction of patent rights in countries which exclude plant varieties from patent protection.

Article 1, Further Comments

It is proposed to add a definition for derived variety and for material of a variety.

Article 2 - Obligations of Contracting States

In our opinion, Article 36(2) should be deleted thus rendering Art. 2(1) obsolete. The deletion of the so-called double protection ban is noted with satisfaction.

Article 4 - Genera and Species to Be Protected

We are strongly in favour of shortening the 10 year period suggested in subsection (1)(ii) to 3 years.

If this is not feasible then the wording of Art. 4(1)(i) should be amended such that a balanced introduction is secured, e.g. by the following amendments:

> "(i) at the date on which it becomes bound by this Convention, to a balanced selection of at least 25 plant genera or species out of the major agricultural, horticultural and ornamental crops grown in the territory of that Contracting Party, or of hybrids thereof and,"

Article 5 - National Treatment

ICC welcomes the deletion of the provision for reciprocity.

Article 6 - First Application

We assume that the principle of the provision of Art.11(3) of the 1978 Convention still applies, but would like this to be confirmed.

Article 7 - Conditions for the Grant of a Breeder's Right

(2)	We propose to refer to Novelty rather than to Newness.
(2)(a)	We propose to delete the brackets with its content.
(2)(a)(i)	We propose inserting "express" before "consent of the breeder".

We feel the principle of the period of grace should be made obligatory and the period extended from one to two years.

(2)(a)(iii) We propose amendment to " the <u>express</u> consent of the breeder".

(2)(b) This non-binding provision leaves the decision with the Contracting Party. In our opinion it should either be made a binding provision or be deleted. We tend to support deletion.

(3) This provision combined with the novelty provision of paragraph (2) and the expanded scope of protection conferred to a variety raises the question whether the rights are conferred to the first to file or to the first to invent.

We feel protection should be conferred according to the first to file principle.

<u>Article 8</u> - Right of Priority

(1) Since, in general, more than 1 year is required to determine distinctness, we propose extending the priority period to 24 months.

(3) We propose to maintain the actual period of four years.

<u>Article 12</u> - Effects of the Breeder's Rights

(1) No distinction should be made between reproductive (we prefer employing the word "sexual") or vegetative material and harvested material. We propose combining paragraphs (a) and (b) to

"(a) The title of protection granted in accordance with the provisions of this Convention shall confer to its owner the right to exclude others from exploiting the variety and in particular:

(i) from producing or reproducing the variety;

(ii) from using for commercial purposes, conditioning, offering for sale or selling the variety or material thereof;

(iii) from importing or stocking the variety or plant material thereof;"

The term "material of the variety" should preferably be defined, e.g. as follows:

"The term "material of the variety" shall mean any plant or part of plant, whatever its botanical or commercial function may be."

Such definition should conveniently be incorporated into Article 1.

The listing of (a)(i) to (vii) does not seem necessary, since (a)(viii) covers everything.

(1)(c) If paragraphs (a) and (b) are combined, then this paragraph should be adapted accordingly. We also propose deletion of the word "directly" to secure adequate protection for products typical of the protected variety.

The amended paragraph could for example read as follows:

"(b) in respect of products obtained from plant material of the protected variety, the right of the breeder shall extend to any of the acts referred to in (a) above, provided that such products were obtained through the use of plant material and that such use was not authorised by the breeder;"

(2)(a)(i) We propose replacement by "varieties which are essentially derived from a protected variety", i.e. deletion of the 2nd line of this paragraph.

(2)(a)(ii) We propose replacing the term "not clearly distinguishable" by "not distinct". It is assumed that the paragraph intends to refer to varieties which are only distinguishable from the protected variety by secondary features (i.e. features being essentially introduced to become distinct from the protected variety without however adding value to said variety) and/or to a variety not distinct from another variety but obtained from parental lines which are distinguishable from those of the other variety.

(2)(a)(iv) We propose to add the following sentence:

"Using components for seed production purposes or giving them to a third party for seed production on behalf of the variety right holder under a production licence agreement does not constitute an offer for sale".

(2)(b) We agree with the introduction of the dependency principle at least with respect to essentially derived varieties. If at all possible, the wording should be made more clear and concise.

(2)(b)(i) We propose to delete the square brackets and its content in line 4.

(2)(b)(iii) Clarification of the words "it conforms" seems necessary.

(4) We are strongly opposed to the introduction of this provision and propose its deletion.

If this is for political reasons not acceptable then we should at least secure that the "privilege" is not expanded beyond the uses presently tolerated.

The proposed provision does not meet this requirement.

The Contracting parties should not provide for specific exemptions unless at least the following requirements are met:

- restriction of a plant variety right shall only apply to a minimum of species selected from agricultural crops from the group consisting of cereals, potatoes and oilseed rape and should be limited to cases where the harvested material may be used directly for multiplication;

- the restriction of the right must exclusively relate to the use by farmers for reproductive 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 material originally used;

- it will be left within the breeders' responsibility to establish the level of royalty.

There should be no 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.

Article 13 - Restriction on the Exercise of the Breeder's Right

(1) We can agree with this provision assuming it is accepted that the the Breeder's Right is a right to exclude others from exploiting the variety.

Article 36 - Reservations

In view of proposed Article 1, this Article becomes redundant, resp. should be replaced by the statement:

"No reservations to this Convention are permitted".

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