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1015

INTERNATIONAL UNION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS

GENEVA

**FOURTH MEETING
WITH INTERNATIONAL ORGANIZATIONS**

Geneva, October 9 and 10, 1989

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 Economic Community (COMASSO) on the revision of the Convention. They were transmitted to the Office of the Union by telefax on September 8, 1989.

[Annex follows]

ANNEX

Revision of the Convention

- UPOV Document IOM/VI/2 -

1. General Comment

COMASSO welcomes the opportunity to contribute to the initiative undertaken by the Council of UPOV in view of a revision of the UPOV Convention.

Our comments are based on our strong support of the same objectives, as the aims of the revision formulated in the document IOM/VI/2 - English version - under introduction, B, Para (5).

2. Special CommentsArticle 1 Constitution, Purpose

para (1): no comment

para.(2):

- COMASSO is in favour of binding the member states to undertake all measures in order to recognize and to ensure a right.
- COMASSO proposes to use the expression 'plant variety right' as the convention governs the subject of a right on plant varieties.
- In this context we strongly support the intended use throughout the convention of the word "right" instead of "protection", protection being the consequence of a right.
- 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 national patent 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,

By reasons of avoiding legal uncertainty, therefore COMASSU is of the opinion that the provision in par 2 (new) 2nd sentence in brackets needs to become an element of the convention.

Article 2 Definitions

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

(I): We propose deletion, as when we come to consider Article 4 we opt for the application to "all varieties".

(II): no comment

(III): no comment

(IV): COMASSU strongly recommends to maintain the complete definition of material as proposed, being one of the core definitions of the strengthened convention. Material has to be defined without any restriction proposed by the deletion of the parts in brackets. Only such a broad definition assures that the intention to strengthen the right will be met. If there will be any restriction as proposed then it would be better to have no definition of material at all.

Article 3 National treatment

para (1): COMASSU proposes deletion of the last 4 words: "imposed on such nationals". This provision might create distortion in the application of the right in the European Community as the unique Europe.

para (2): Deletion is proposed of the latter part of this provision after the word "rights" - where the condition for national treatment is required to check the multiplication of the variety. A check of multiplication forms no part of a grant of right.

para (3): COMASSO welcomes the deletion of the provision for reciprocity.

Article 4 Application

para (1): COMASSO welcomes the mandatory application of the convention to all varieties (Alternative 3).

The other alternatives are not convincing or offering possibilities for ambiguity, e.g. interspecific hybrids would not be covered by "all botanical species".

para (2): As the intentions of breeders are directed towards breeding and protecting on possibilities everywhere, we cannot accept any exclusion rule from the mandatory application to all varieties.

As to the definition of 'exceptional difficulties', in our understanding such case shall not be accepted, when in at least one member state examination facilities are existing, offered or can be created.

Article 5 Effects of the Right

COMASSO is in favour of the conception to set out fundamental rights with clearly defined limitations.

para (1): COMASSO agrees with the strengthening of right as formulated in para (1) I, II, III.

- (III): We propose the deletion of the last half sentence: "for any of the aforementioned purposes", we understand that whenever imports or stocking occur the purposes mentioned in (I) (II) are automatically covered.

para (2):

- (I): We agree with the principle of exhaustion of right as defined in this provision.
- (II) We accept the content of this provision as laid down in

the french and german version: "acts done privately for non-commercial purposes", i. e. delete the word "and" in the English ver

- (III): We agree with the principle, but would add after "purposes" the words "with no commercial intent".
- (IV): We acknowledge the principle of the Breeder's Exemption under condition that the new wording does not change the meaning of the contents of article 5, para 3. in the existing convention.

We understand that due to the new system in according an absolute right with clearly defined exemptions, the burden of proof now rests with the undertaker of acts for breeding purposes.

para (3:) COMASSO is positive as to the principle of dependence being introduced in the convention.

- We agree that a dependent variety must meet the requiremont of distinctness.
- We agree that a dependent variety must retain almost the totality of the original genotype and that distinctness must be shown by a limited number of characteristics.
We disagree that this is typically one characteristic.
- The derived variety must have been obtained using a method whose objective regardless of the technique is to maintain the essential characteristics of the mother variety.
- Dependence should occur at least in respect of derived varieties bred by techniques as the given examples in Explanatory notes, 6 (III).
- The problem of a 'dependence pyramid' is seen, but no solution can be put forward yet. We are of the opinion that the solution proposed in Explanatory notes 6 (IV) is not workable.
A possible approach for a solution could be that dependence should be claimed by the original breeder and not be subject of administrative decisions.

- In the proposed text of this paragraph the word 'single' should be deleted.
We cannot exclude situations where dependency relates to more than one parent.
- COMASSO is of the opinion that as to the nature of the right to be granted, that of Alternative 1 is the most adequate for the original breeder.

para (4): COMASSO cannot accept a provision as proposed in para (4). Exemptions of acts from the effects of the Right shall be exclusively dealt with and listed in the convention as done in para (2). Uniformity throughout Member States is essential.

Abuse of right and possibilities to encounter this are sufficiently dealt with in Article 9.

We propose to delete para 4 as a whole.

para (5): We see a real need for a 'collision norm' to cover interactions with other industrial property rights. In no case should such a collision norm 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. In any case there should be balanced norms in the UPOV convention as well as in the patent system. The proposed wording does not meet these requirements.

Article 6 Conditions

para (1):

- (a) Add before 'agreement' in 5th. line the word 'express'.
 - (I) We propose an obligatory period of grace of two years in order to harmonize the legal situation, therefore delete "if the legislation of that State so provides".
- (b) no comment
- (c) no comment
- (d) no comment

para (2): This provision is only acceptable if Article 13 is simplified following our proposals.

para (3): no comment

Article 7 Examination- Provisional Protection

para (1): no comment

para (2): no comment

para (3): The provision to conclude contracts must become binding. Therefore we propose to insert "whenever possible" before "Contracts" in line 1. Also to delete "may" and insert "should" also in line 1.

para (4): We welcome the introduction of a binding provision on a provisional protection. We are of the opinion, however, that a minimum remuneration should not be offered here but at least compensation for all damages incurred.

Article 8 Duration

COMASSO welcomes the proposed increasing of the periods of protection.

The periods proposed should be 25 years and 30 years. Potatoes should be included in the group of 30 years.

Article 9 Restrictions on the Exercise

para (1): Add as new second sentence:

'The member state of the Union shall notify to the Secretary General of this restriction and the reasons thereof. The Council shall state its position'.

para (2): no comment

Article 10 Nullity - Forfeiture

para (1): no comment

para (2): no comment

para (3): Delete the reference to the inspection of measures in view of maintenance breeding. Those fall in the confidential sphere of the breeder.

Article 11 Member States

no comment

Article 12 Priority

para (1): COMASSO is of the opinion, that a 24 month' period of priority will constitute a justified improvement.

para (2): no comment

para (3): We suggest to maintain the actual period of 4 years as there are situations which justify this legal possibility.

Article 13 Denomination

para (1): We propose to alter the word 'denomination' into 'designation'. This should apply to the whole convention and would help avoiding misunderstanding as to the necessary requirement to be fulfilled.
COMASSO welcomes the deletion of the qualification as being generic designation.

para (2): We propose to add to the first sentence at the end: 'which shall register it at the same time as the Right is granted'.
The second sentence to be deleted.

para (3): to be deleted

para (4): to be deleted

para (5): We propose a new wording:

'par 3 (new):

A designation shall not be suitable if a third party proves that this designation infringes his prior rights.'

para (6): to be deleted

para (7): Para (7) to become para (4) (new)

COMASSO is of the opinion that most of the importance of a 'designation' lies in its use to trade.

Therefore proposed alternative 1 seems to fit best the interests of the breeders.

COMASSO is of the opinion that a positive statement as to the continued possibility of adding a trademark etc to the variety designation should be made by UPOV. Therefore it is proposed to maintain the present Art. 13 (para 8).

Article 14 Independent Measures Regulating Marketing,
Certification

In view of possible assistance to new members we would propose that this provision be maintained.

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