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INTERNATIONAL UNION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS

GENEVA

SIXTH MEETING
WITH INTERNATIONAL ORGANIZATIONS

Geneva, October 30, 1992

ESSENTIALLY DERIVED VARIETIES

OBSERVATIONS FROM COMASSO

Document prepared by the Office of the Union

1. The annex to this document contains a set of recommendations submitted, by letter of September 22, 1992, by the Association of Plant Breeders of the European Economic Community (COMASSO).
2. It was underlined in the letter that the set was not exhaustive and did not cover, in particular, the question of the burden of proof, for which two aspects were to be considered: the principles for alleviating the burden, for instance through acceptance of prima facie evidence, and the reversal of the burden of proof.

[Annex follows]

ANNEX

RECOMMENDATIONS

Fundamental principles of the legal instrument
"Dependent Protection in respect of essentially derived varieties"1991 UPOV Convention

In view of fact that the Secretary-General of UPOV has been entrusted with the task of establishing guidelines relating to essentially derived varieties, COMASSO submits the following recommendations with a view to their being taken into account:

1. The guidelines should highlight the main fundamental principles and thereby provide guidance to the lawmaker for the drafting of plant variety protection legislation and, at the same time, leave room for the settlement of the details arising from the practical implementation of the provisions.
2. The initiative for claiming and exercising the dependant right belongs exclusively to the holder of the breeder's right in the initial variety.
3. The provisions of the 1991 UPOV Convention on derived varieties exclude any legal possibility of restricting the scope or exercise of the dependent right on the basis of its economic consequences, as provided in the proposal for a regulation of the Council (of the European Communities) on community plant variety rights.
4. The dependent right is the legal consequence of a proven "essential derivation."
5. Only a protected variety may constitute an initial variety that gives rise to a dependent right.
6. There can only be one initial variety for an essentially derived variety.
7. A variety remains an essentially derived one and may not become an initial variety upon termination of the protection of the relevant initial variety. Given that an essentially derived variety may not be the basis for dependence, the varieties down the chain of derivation can only depend from the first, initial variety. This results from the underlying intention to protect the initial breeder.
8. "Essential derivation" is subject to three conditions:
 - clear distinctness;
 - "predominant derivation";
 - genetic conformity.

"Genetic conformity" means that, in the main, the basic contents of the genome of the other variety has been retained; specific thresholds must be defined in this respect (see under 12, below). COMASSO proposes that phenotypic similarity (concerning essential characteristics) be taken as an indication where adequate methods (tools) to prove genetic conformity are not (yet) in existence.

9. Derivation may be presumed on the basis of the derivation methods used; the list of examples in Article 15(5)(c) is not exhaustive.

10. "Essential derivation" may be proven by means of recognized scientific methods such as RFLP, RAPD or PCR.
11. The proof must be produced by recognized specialists of the species concerned, for instance breeders or molecular geneticists; access to official data collected in the course of the acceptance procedure should be given, but the offices competent for plant variety matters should assume no responsibility in relation to such proof.
12. Different thresholds governing genetic conformity should be set for the various main species, and even for subdivisions of such species, depending on their genetic constitution and the plant breeding technology. In cases of doubt, the threshold should be set by Courts.

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