

## Position Paper

on the

**COMMUNICATION BY THE EUROPEAN COMMUNITIES AND  
THEIR MEMBER STATES TO THE TRIPs COUNCIL ON  
THE REVIEW OF ARTICLE 27.3 (B) OF THE TRIPs AGREEMENT  
AND THE CONVENTION OF BIOLOGICAL DIVERSITY (CBD) AND  
THE PROTECTION OF TRADITIONAL KNOWLEDGE AND  
FOLKLORE**

**“A CONCEPT PAPER”**

ESA\_02.0085.4

Brussels, 08.10.2002

1. ESA appreciates the European Communities and its Member States' willingness to commit to the process referred to in Clause 19 of the Doha Declaration instructing the TRIPs Council to continue the review of Art. 27.3 (b) of the TRIPs Trade Related Aspects of Intellectual Property Rights Agreement and to examine the relationship between TRIPs and CBD Conventional on Biological Diversity and the protection of Traditional Knowledge (TK), folklore and other relevant developments.

More specifically, ESA supports the view of the EC that there is no reason to amend Art. 27.3 (b) TRIPs as it now stands but to use the review to clarify the potential benefits and limitations of different national and international schemes for the protection of plant varieties.

Specific reference is made to the penultimate sentence stating that Members shall provide for the protection of plant varieties either by patents or by an effective *sui generis* system or by any combination thereof.

Furthermore, ESA is supportive to the EC's view that protection of Traditional Knowledge, strictly speaking, does not fall within the scope of Art. 27.3 (b) TRIPs but is relevant to other TRIPs provisions dealing with patents.

2. With respect to the issues of a *sui generis* protection of plant varieties and to farmers' rights, specifically referred to in chapters 5 and 6 of the Concept Paper as well as in the relevant boxes in the Executive Summary, ESA would like to make the following observations:

3. *sui generis* protection of plant varieties

ESA is in agreement with the EC that UPOV 1978 and UPOV 1991 meet the required standard of effectiveness under Art. 27.3 (b) TRIPs Agreement. However, ESA is of the opinion that UPOV 1991 is the most suitable existing intellectual property system tailored to protect plant varieties per se as it is a well balanced system allowing,

- a. the recognition and effective protection of plant varieties per se for all species, and
- b. access to genetic variability by the free use of protected commercialised plant varieties for further breeding work.

On the other hand, it is clear that under Art 27.3 (b) of TRIPs, no legally binding definition exists of what is understood to be an effective *sui generis* protection system. ESA therefore welcomes the approach of the EC to establish a list of criteria that any system of intellectual property rights protecting plant varieties must fulfil.

More specifically, this refers to the need for clearly defined limitations and exceptions related to the experimental use, the right to use a protected variety for further breeding and certain exceptions to the benefit of farmers.

4. Exceptions to the rights conferred

4.1. Breeder's exception

The UPOV system provides amongst other things for a compulsory exception from the scope of the Plant Breeder's Rights for acts done for the purpose of breeding other varieties, and for the commercialisation of such other varieties.

This breeder's exception makes breeding of new and improved plant varieties possible by ensuring that germplasm sources remain accessible. This in turn ensures that the

genetic basis for plant breeding is broadened and is actively conserved for the benefit of society.

The breeder's exception is a fundamental aspect of any *sui generis* system for the protection of plant varieties. It balances the strong and effective protection of the new varieties required by the breeders with the availability of a diverse variability of plant genetic material for their breeding work.

ESA recommends that in the case where a patent system is provided for the protection of plant varieties, as accepted under art. 27.3 (b) of TRIPs, a specific research exception, similar to that of the breeder's exception, shall be provided for, allowing for the use of patented varieties for breeding new varieties.

In the case where patented elements within plant varieties would unduly prevent third parties from the use of such material for breeding, the same type of research exception should apply. In this respect, we refer explicitly to Articles 7, 8 para II and 30 of the TRIPs Agreement.

#### 4.2. Farmers rights

ESA strongly objects to any approach attempting to create a link between farmers' rights in the broad and farmers' rights in the narrow meaning.

Farmers' rights in the broad meaning as a set of measures in recognition of the ancestral role of farmers in developing foodcrop varieties and preserving biodiversity are in accordance with the FAO International Treaty on Plant Genetic Resources for Food and Agriculture (IT) and are intended to reward farmers for their role as guardians of biodiversity in the past and in the future.

In this respect, ESA supports the EC's recognition that this should not be dealt with by the TRIPs Council as it is not an intellectual property matter.

The definition of farmers' rights in the narrow sense, i.e. the intellectual property related meaning as used in the concept paper, is used for an optional exception to the Breeder's Right as provided for in the UPOV Convention, in the Community Plant Variety Rights Regulation as well as in the EC Directive on the legal protection of biotechnological inventions and is commonly referred to as "farmers' privilege".

ESA strongly objects to the EC's stance to qualify this exception to an intellectual property right as a genuine right for the farmer.

It allows a farmer to carry out certain well-specified acts falling into the scope of the right without prior authorisation of the holder of the right, subject to the safeguarding of the legitimate interest of the breeder.

In no case is the particular act of selling seeds of protected varieties covered by this exception.

With respect to the least developed or developing countries, ESA is firmly of the view that the UPOV System caters completely for the needs of small farmers at subsistence levels, allowing them to use farm saved seed of protected varieties on their premises. In any event, breeders must remain the only ones entitled to derive commercial benefit from their protected varieties.

#### **Conclusion\*:**

**ESA concludes that UPOV 1991 is the best suited existing intellectual property right system tailored to protect plant varieties per se as it allows for:**

- **the recognition and effective protection of plant varieties per se; and**
- **the access to genetic variability by the free use of protected commercialised plant varieties of further breeding work; and**
- **the expansion of biological diversity by making available new and improved plant varieties and thus taking care of the needs of developing countries.**

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\* For ESA's general position on Plant Variety Protection ESA\_02.0009 please consult ESA's website <http://www.euroseeds.org/what3.htm>