

FORM FOR TABLING PARLIAMENTARY QUESTIONS

To the: COUNCIL
COMMISSION

ORAL QUESTIONS	WRITTEN QUESTIONS
Oral Question with debate (Rule 42) <input type="checkbox"/> Question Time (Rule 43) <input type="checkbox"/>	Written Question (Rule 44) <input type="checkbox"/> Priority Written Question (Rule 44 (4)) <input checked="" type="checkbox"/>
AUTHOR(S): LUCAS, Caroline	
SUBJECT: TRIPs, UPOV and Farmers' Rights (please specify)	
TEXT: <p>The EU in its bilateral trade agreements almost invariably seeks to impose obligations on its partners to accede to international treaties on intellectual property which go beyond their existing commitments. One example is the use of what has been termed "TRIPs Plus" to require trading partners to accede to the International Convention for the Protection of New Varieties of Plants (UPOV 1991) which carries specific rules on plant variety rights not contained in TRIPs. The EU-Lebanon agreement is the latest example; although Lebanon is not yet a member of the WTO it is required to accede both to UPOV 1991 and to the TRIPs Agreement within 5 years</p> <p>The Commission in its Concept Paper of September 2002 on the review of TRIPs Article 27.3b and the TRIPs/CBD relationship notes that Art. 27.3b requires effective sui generis protection of plant variety rights but agrees that, although the UPOV 1991 Convention meets the standard of effectiveness in Article 27.3(b), <u>other protection models may be equally effective.</u></p> <p>In addition, the Concept Paper says that Farmers' exemptions (i.e. exceptions to plant variety rights or patents allowing farmers to save, use, exchange or sell seeds of protected varieties or seeds) can, under certain circumstances, be justified under Article 27.3(b) of the TRIPs Agreement, or under Article 30 of the TRIPs Agreement. These rights are either not available or are severely restricted under UPOV 1991</p> <p>Will the Commission please explain why it pursues a set of objectives in its bilateral trade negotiations which clearly and effectively prevent the application of the more flexible intellectual property rules in respect of plant varieties, as provided by the multilateral TRIPs agreement?</p>	
Signature(s):	Date: 25.03.03

P-1266/03EN

Answer given by Mr Lamy
on behalf of the Commission
(30 April 2003)

Through its Communication (Concept Paper) of 17 October 2002¹ the Union was the first developed country Member of the World Trade Organisation (WTO) to address the review of Article 27.3(b) of the Trade Related Intellectual Property Rights (TRIPs) Agreement and related issues in a substantial, constructive and systematic manner.

In particular, the Union acknowledged that the UPOV Convention was not the only possible *sui generis* protection model for plant varieties and advocated an interpretation of the TRIPs Agreement that would allow for farmers' exemptions. This approach was welcomed by developing country Members, both in the TRIPs Council and in the Committee on Trade and Environment.

Bilateral trade agreements concluded by the Union do contain a reference to the UPOV Convention, either through a commitment to adhere to the UPOVC or by a best-efforts clause (which, however, does not constitute a firm obligation in itself). These commitments are part of a balanced package of mutual commitments and concessions, which have not been "imposed" but have been freely accepted by the trading partner.

Since 2002, the Union approach has been adjusted to further accommodate development concerns: in ongoing bilateral negotiations, the Commission is proposing that the trade partner, as an alternative to the UPOV Convention, could equally implement some other adequate and effective *sui generis* system of protection of plant varieties, in compliance with Article 27.3(b) of the TRIPs Agreement.

In the Commission's assessment the UPOV Convention (in both its 1978 and 1991 versions) offers a protection regime much more flexible than patent protection and therefore better suited to the specificities of plant varieties (as a matter of fact, the Convention serves as a model for Community and national legislation in several Member States). Therefore, certain developing countries, e.g. Mexico, Brazil and Argentina, have adhered to the UPOV Convention, without having previously taken any such commitment in a bilateral agreement with the Union.

As regards farmers' exceptions, the UPOV Convention provides for a "farmers' privilege", which permits farmers to use for propagating purposes, on their own holdings, the product of the harvest which they have obtained by planting, on their own holdings, the protected variety.

Moreover, the Convention states that breeders' rights do not extend to acts done privately and for non-commercial purposes : this exception does, in the view of the Commission, cover any act done by subsistence farmers (whose activities are, by

¹ IP/C/W/383

definition, "non-commercial") with regard to protected varieties, including the exchange of seed. So, as far as subsistence farmers are concerned, the possibility to provide for exceptions goes well beyond the "farmers' privilege".

Also, the Convention in many cases allows for the free breeding of new varieties on the basis of existing varieties (be it by agro-business or by farmers).

Finally, adherence to the UPOV Convention does not prevent the establishment of additional protection regimes for traditional farming practices, traditional knowledge or varieties which do not meet the criteria set out in the UPOV Convention, as well as the protection of farmers' rights as set out in the International Treaty on Plant Genetic Resources for Food and Agriculture.

Exemptions beyond those available under the 1991 Act of the UPOV Convention could be conceived and defended as being allowed under Article 27.3(b) of the TRIPs Agreement. It would, however, be wrong to state that the UPOV Convention does not provide for a flexible system and for farmers' exemptions.

As such, the 1991 UPOV Convention does provide for an effective and flexible sui generis system for the protection of plant varieties though alternative models could be put in place, and would be consistent with the TRIPs Agreement provided they offer effective protection.