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Subject: CIOPORA comments on the draft Plant Breeders Rights law of GHANA
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Hamburg, 16 October 2012

INTERNATIONAL UNION FOR THE PROTECTION OF NEW VARIETIES OF
PLANTS (UPOV)

Dr. Keun-Jin Choi, President of the Council
Ms. Kitisri Sukhapinda, Vice-President of the Council
Mr. Peter Button, Vice Secretary-General

34, chemin des Colombettes
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Dear Ms. Sukhapinda,
Dear Sirs,

For the preparation of the next meeting of the Consultative Committee and the Council please find attached our comments to the draft PBR legislation of GHANA.

We would kindly like to ask you to share our comments with the members of the Consultative Committee and the Council as well as with the government of GHANA.

With kind regards,

Dr. Edgar Krieger
Secretary General

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INTERNATIONAL UNION FOR THE PROTECTION OF
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Hamburg, 16 October 2012

CIOPORA comments on the draft Plant Breeders' Rights Bill of GHANA

Dear members of the Consultative Committee and the Council,

CIOPORA appreciates it that GHANA intends to adhere to the UPOV 1991 Act and has submitted a draft PBR law to UPOV.

After studying the draft law submitted to UPOV by letter dated 25 September 2012, CIOPORA considers the draft Law in general as being conform with the UPOV 1991 Convention. CIOPORA agrees to the general conclusions of the Office of UPOV in number 31 on page 6 of document C/46/14.

In addition to this, CIOPORA suggests to clarifying the following provisions:

1. PROVISIONAL PROTECTION (Article 15)

CIOPORA appreciates it that according to the draft law - between the application and the grant of the title - the applicant is deemed to be the holder of the PBR. CIOPORA suggests to deleting in Article 15 (2) the second half sentence:

(2) For the period of provisional protection, the applicant is deemed to be the holder of a plant breeder right. ~~in relation to any person who during the period has carried out an act which would require the breeder's authorisation under section 20, once the plant breeder right is conclusively granted.~~

The second half sentence refers to the past, i.e. to acts that have been carried out by a third person. As a consequence, the applicant could act only against "infringements", but could not actively grant licenses. However, Article 25 (1) permits the applicant to grant licenses.

2. EXCEPTIONS TO THE PLANT BREEDERS' RIGHT (Article 21)

CIOPORA assumes that vegetatively reproduced ornamental and fruit varieties are no agricultural plants as mentioned in Article 21 (2). A confirmation of this assumption would be appreciated.

3. OFFENSES (Article 58)

Article 58 (a) should be worded like follows:

A person who wilfully

(a) commits an infringement of a plant breeders' right

Additionally, the draft Law contains a few provisions which – although they are in compliance with the UPOV 1991 Convention – should be improved in order to provide effective protection for breeders or to take into consideration some practical given facts in the breeding business.

1. SCOPE OF THE BREEDER'S RIGHT (Article 20)

1.1 The main ambition of the breeders of ornamental and fruit varieties is to create new varieties of pot plants, cut flowers and fruits. Breeders of such varieties have to be able to exercise their right (and notably collect their royalties) at the stage where the added value of the variety is normally expressed – which is the end-product *per se* for most cut flowers and fruit varieties. Thus, the essence of protection for such categories of new products must bear on the **manufacture (reproduction/propagation), offering for sale, sale, exporting, importing and USE for commercial purposes** of the whole protected variety.

1.2 The acts as mentioned in Article 20 (1) refer to “propagating material”. The term “propagating material” is not defined in the UPOV 1991 Act so that Ghana is free to draft its own definition.

CIOPORA recommends to replacing the rather limited definition of propagating material in Article 61, which contains a subjective element (“intention”), by a sufficiently broad definition. The definition could be worded as follows:

- ***propagating material***, in relation to a plant of a particular plant variety, means any part or product from which, whether alone or in combination with other parts or products of that plant, another plant with the same essential characteristics can be produced (definition in the law of Australia) or
- ***propagating material***: entire plants or parts of plants as far as such parts are capable of producing entire plants (definition similar in the Community Plant Variety Right-Regulation 2100/94 of the European Union)

in order to provide for a sufficiently broad and balanced definition of “propagating material”.

1.3 CIOPORA suggests to including into Article 20 the protection of products made directly from harvested material, according to Article 14 (3) of the UPOV 1991 Act.

1.4 CIOPORA appreciates the adoption of the principle of dependency instituted by the 1991 UPOV Convention for “*essentially derived varieties*”.

However, CIOPORA recommends to deleting in the description of an essentially derived variety the last half-sentence of Article 20 (5) (a) of the draft Law

(a) is predominantly derived from the initial variety, or from a variety that is itself predominantly derived from the initial variety, ~~while retaining the expression of the essential characteristics that result from the genotype or combination of genotypes of the initial variety;~~

A comparison of the wording of the current sub-paragraphs (a) and (c) of the description shows that these two sub-paragraphs might be inconsistent in regard to the clause “*retaining the expression of the essential characteristics*”. While sub-paragraph (c) allows an unlimited number of differences (as long as they result from the act of derivation), sub-paragraph (a) seems to set a limit. Many member states of UPOV, inter alia the European Community, have avoided said inconsistency by leaving out the second half-sentence in sub-paragraph (a).

2. EXHAUSTION OF THE BREEDER’S RIGHT (Article 22)

The UPOV 1991 Convention, which has otherwise brought improvements to the 1978 Act, has introduced the principle of “exhaustion” of the breeder’s right. This principle has unfortunately been drafted in a too general way.

To provide the breeders of vegetatively propagated ornamental and fruit varieties parity with owners of patents as required under Art 27 (3) b of the TRIPS-Agreement it is necessary that the exhaustion exists only for the specific field of use for which the breeder has licensed his variety and only for the specific territory where the licensed title is valid.

CIOPORA would therefore like to propose the following wording for Article 27 of the Law:

The Plant Breeders’ Right shall not extend to acts that have been performed with the express authorization of the holder of the right and within such conditions and limitations as said holder may have made his authorization subject to.

3. DURATION OF THE PBR (Article 28)

CIOPORA suggests to expanding the duration of protection to 25 respectively 30 years.

4. OBLIGATION TO USE THE VARIETY DENOMINATION (Article 38)

For reasons of clarity and transparency in the market CIOPORA suggests that the sales and other marketing of the each and any material of the protected variety shall require the use of the variety denomination. To limit this obligation to propagating material (like in Article 38 (1)) is not sufficient.

5. PLANT BREEDERS TECHNICAL COMMITTEE (Article 43)

Against the background that 60 -80% of all applications for PBR are made by breeders of asexually reproduced ornamental and fruit varieties, a representative from this sector should form part of the Plant Breeders Technical Committee, too.

6. OFFENCES (Article 58)

Article 58 (b) should include each and any material, not only propagating material.

7. SPECIALIZED COURTS

Plant Breeders' Rights law is – due to the specialities of the material incurred – difficult and to judge about such cases it needs special knowledge in said matter. Thus, it is advisable to direct Plant Breeders' Rights court cases to selected courts, which are specialised in Plant Breeders' Rights law or at least to courts that already are established for patent infringement cases because of similar experience in industrial property. This guarantees a unitary and qualified case law.

CIOPORA kindly asks the Consultative Committee and the Council to take note of these comments and to notify the government of Ghana accordingly.

Respectfully yours,

CIOPORA

A handwritten signature in blue ink, appearing to read 'E. Krieger', with a stylized flourish at the end.

Dr. Edgar Krieger
Secretary General