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Sent: October 14, 2011 16:08
To: mail, Upov
Cc: Button, Peter; lvbo@agri.gov.cn; Andrea Mansuino; Dominique Thevenon (t.dominique4@aliceadsl.fr)
Subject: CIOPORA comments to the UPOV documents CAJ-AG/11/6/3 and UPOV/EXN/EDV/2/Draft 1
Attachments: Letter to UPOV CAJ-AG on Essentially Derived Varieties_14-10-2011 (1).pdf

Attn.

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

Administrative and Legal Committee Advisory Group (CAJ-AG)

34, chemin des Colombettes
CH-1211 Genève 20

Switzerland

Dear members of the UPOV CAJ-AG,

Please find attached the CIOPORA comments to the UPOV documents

CAJ-AG/11/6/3 and UPOV/EXN/EDV/2/Draft 1.

As far as the comments of the European Seed Association are concerned CIOPORA is confident that the European Seed Association sticks to its mandate to speak on behalf of the European seed industry, representing the interests of those active in research, breeding, production and marketing of seeds of agricultural, horticultural and ornamental plant species (in most of which - as far as the undersigned knows - the mutation rate is negligible).

With kind regards,

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Secretary General

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Hamburg, 14 October 2011

**Explanatory notes on Essentially Derived Varieties under the UPOV Convention
CAJ-AG/11/6/3 and UPOV/EXN/EDV/2/Draft 1**

Dear members of the CAJ-AG,

CIOPORA is pleased to submit the following comments in regard to the documents CAJ-AG/11/6/3 and UPOV/EXN/EDV/2/Draft 1.

Introduction

1. The main aspect for CIOPORA in the documents relates to the relationship between Article 14 (5) (b) (i) and (iii) of the UPOV 1991 Act, as this relationship significantly influences the scope of the EDV provision, namely the question whether there is a limit in the number of phenotypic differences between the Initial Variety and the EDV.
2. CIOPORA is of the opinion that there is no limit in the phenotypic differences between an Initial Variety and an EDV, as long as the differences result from the act of derivation. Nothing in the UPOV 1991 Act can be interpreted in the meaning that an EDV should differ from its Initial Variety only by one or very few phenotypic characteristics. The explicit attempt of the delegation of Germany in the Diplomatic Conference to limit the differences to a "very small number of modifications" (see DC/91/92 on page 132 of the Records) was rejected by the vast majority of votes (see No. 1092 of the Records).

The purpose of the EDV concept

3. To clarify the purpose of the EDV concept it is worth-wile to quote the two following statements:

The basic purpose of the EDV concept is to strengthen the right of the breeder (IOM/IV/2, page 2, no. B. 5. (i)).

The very objective of dependence is to give to the breeder of an original genotype an additional source of remuneration ((IOM/IV/2, page 12, no. 6. (iv)).

4. CIOPORA concludes from this that the purpose of EDV is to give to the breeder the control over mutations (which are solely based on original genotypes), to prevent plagiarism and to provide the traditional breeders with a counterbalance to biotech inventors.

No limitation to one or a few phenotypic differences

5. The argument, that an EDV shall have only one or a few phenotypic differences to the Initial Variety, lacks a solid basis. It is only based on a contradictory half-sentence in Article 14 (5) (b) (i), which – by the way - has not taken over in the PBR legislations of several UPOV member states.
6. Undoubtedly the wording of Article 14 (5) (b) (i) and (iii) contains a contradiction in regard to the relevant question of the number of differences between EDV and Initial Variety. This contradiction has been discussed and reconciled in the Sixth Meeting with the International Organisations. In IOM/6/2, No. 13 it reads:

*Article 14(5)(b) lays down those conditions that must be satisfied in order that a later variety shall be deemed to be essentially derived from another variety ('the initial variety'). The second of those conditions (established in Article 14(5)(b)(ii)) requires only that the later variety be clearly distinguishable from the initial variety and requires no further comment. The **first such condition (established in Article 14(5)(b)(i))** requires that the later variety be derived from the initial variety which in turn requires that genetic materials of the initial variety have been used in the creation of the later variety. The first condition is accordingly concerned with the genetic origin of the later variety. **The third such condition (established in Article 14(5)(b)(iii))** requires that the later variety conforms to ('is made similar to') the initial variety in the expression of the inherited essential characteristics of the initial variety apart from the differences which result from the act of derivation. The third condition is accordingly concerned with the degree of similarity of the later variety to the initial variety. Whilst the first condition also makes reference to the degree of similarity, the primary function of the first condition is to establish a requirement relating to the genetic origin of the variety.*

7. In the said meeting both CIOFORA and ASSINSEL refused to limit the differences between an EDV and its Initial Variety to one or a few. In the report of the meeting (IOM/6/5) it reads e.g. under No. 37 (Mr. Gerard Urselmann (ASSINSEL) ... "If that were to be the position, then the principle of dependency would apply in a very small number of cases in practise and be void of any significance. ... ASSINSEL would propose to delete the reference to "should be one or very few".
8. Narrowing of the EDV concept by allowing only one or a few differences between an EDV and its Initial Variety would in fact deprive the EDV concept of its significance, particularly in the area of vegetatively reproduced ornamental and fruit varieties. It would limit the notion of EDV to "plagiarism" only and would not take into account the new tendencies in the development of new varieties, e.g. certain methods of developing new varieties, applying chemicals and other mutagens, which allow the development of plants which phenotypically differ significantly from the mother plant without altering the genome and its structure significantly.
9. The drafters of the UPOV 1991 Convention were not able to foresee in all details the scientific development and the future breeding methods. In fact, the methods have been improved rapidly and significantly, and it is expected that the rate of development will be even faster in the future. Therefore, the statement in IOM/6/2, No. 12: "The examples of essential derivation given in Article 14 (5) (c) make clear that the differences which result from the act of derivation should be one or very few" is not valid anymore in the year 2011. Inducing mutations is not limited to seeking one or very few phenotypic differences.

The primary aim of UPOV must be to protect innovation

10. Innovation is the motor of any business. In the area of plant breeding the "original genotypes" provide the level of innovation which is the motor for the entire business. Therefore, the promotion of innovation necessitates the primary protection of these "original genotypes".

Depending on the development stage of species it is extremely difficult and cost- and labour intensive to create real innovations in these species. These investments must be protected by granting a solid protection.

11. In order to enable innovators to sustainably continue their business, they deserve a true and effective "exclusive right" for their innovation. Granting such an exclusive right is the key task of any Intellectual Property regime, also of the UPOV PBR regime. The breeders' exemption poses a unique limitation to such exclusive right, as it allows third parties to immediately take advantage of the innovation. CIOPORA is in favour of granting unlimited access to the germplasm for further breeding and research. However, it requires a corrective as regards the commercialisation of the breeding result. The EDV concept is designed as such corrective, and its significance must not be diminished by a limitation of its scope.
12. Not granting an effective exclusive right for innovations means a disadvantage for all innovative breeders, but particularly for innovative small and medium breeders. These breeders do have only their IP protection to protect against competitors, as they often lack size and market(ing) power.

Determination of EDV is task of the breeders

13. It is a common understanding among the UPOV members that it is up to the breeders to determine when there is essential derivation between varieties.
14. In the area of vegetatively reproduced ornamental and fruit varieties CIOPORA has developed a solution, that is both balanced and simple and avoids lengthy disputes on whether a variety is an EDV or not. Such solution is urgently required, as some recent court cases show. CIOPORA is opposed to the approach to give the jurisprudence the lead in solving the EDV problem. Enforcement of Plant Breeders' Rights by way of court proceedings is not affordable for small and medium breeders in many cases. Maintaining an uncertain situation in an important area such as EDV would deprive many innovative breeders from the possibility to enforce their rights on EDV.
15. Finally, one aspect shall be highlighted, which is not in the focus yet: defining clear rules on EDV opens the possibility for breeders to significant financial savings. Because EDV fall under the scope of protection of the Initial Variety, in many cases a separate protection for the EDV would not be necessary. This could be of particular importance for species with a high mutation rate. However, this requires clear and certain rules, in order to avoid the challenging of a variety as not being an EDV. If the rules are clear, it does not need an examination and registration of an EDV, as suggested by the delegation of Japan in its response to Circular E-1168.
16. CIOPORA kindly requests to include into document UPOV/EXN/EDV/2/Draft 1 explanations on the relationship between Article 14 (5) (b) (i) and (iii) of the UPOV 1991 Act as proposed in No. 29 of CAJ-AG/11/6/3, before it is presented to the CAJ.

With kind regards,

CIOPORA



Dr. Edgar Krieger
Secretary General