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Subject: CIOPORA comments to the UPOV documents CAJ-AG/12/7/4 and UPOV/EXN/HRV Draft 8
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Attachments: [CIOPORA letter to UPOV CAJ-AG on CAJ-AG 12 7 4 and UPOV EXN HRV Draft 8 15-10-2012.pdf](#)

Attn.

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OF PLANTS (UPOV)
Administrative and Legal Committee Advisory Group (CAJ-AG)
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Dear members of the UPOV CAJ-AG,

Please find attached the CIOPORA comments to the UPOV documents
CAJ-AG/12/7/4 and UPOV/EXN/HRV Draft 8.

With kind regards,

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Secretary General

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Hamburg, 15 October 2012

**Explanatory notes on Acts in respect of harvested material under the UPOV
Convention, UPOV/EXN/HRV Draft 8
Explanatory notes on propagation and propagating material, CAJ-AG/12/7/4**

Dear members of the CAJ-AG,

CIOPORA is pleased to share with you its comments on UPOV documents UPOV/EXN/HRV
Draft 8 and CAJ-AG/12/7/4.

1. General considerations about the importance of definitions

- 1 The Plant Breeders' Rights system under UPOV is an Intellectual Property system. It, therefore, is a legal system, and not a botanical, agricultural or otherwise natural scientific system.
- 2 Legal systems heavily depend on legal definitions of terms. It, therefore, should be noted that the classification of plant material as "propagating material" or "harvested material" in the first instance depends on the legal definitions of the terms "propagating material" and "harvested material", and not on common sense.
- 3 The UPOV Acts do neither contain a legal definition of "propagating material" nor of "harvested material".
- 4 Therefore, the explanation in chapter 3 of document UPOV/EXN/HRV Draft 8 (3. *The explanation that harvested material includes entire plants and parts of plants, which is material that can potentially be used for propagating purposes, means that at least some forms of harvested material have the potential to be used as propagating material*) is not necessarily true; it depends on the definition of "harvested material" and "propagating material" in the PBR law concerned¹.
- 5 The same applies for the explanation in chapter 14 of document CAJ-AG/12/7/4, referring to Nr. 1.19 of the UPOV the Model Law: "1.19 'Propagating material' undoubtedly means parts of plants used to produce new plants (for example seeds, cuttings and grafts), as well as whole plants used for planting (for example, rooted cuttings, runners and young plants grown from seed): whether such material is

¹ See e.g. the definition of "variety constituents" in Article 5 (3) of the Community PVR regulation 2100/94, which leaves no room for harvested material having the potential to be used as propagating material.

propagating material, depends on the definition of “propagating material” in the PBR law concerned².

- 6 Based on the aforementioned, UPOV/EXN/HRV Draft 8 should state that in the first instance it is definitions which determine whether plant material is propagating or harvested material.
- 7 In this regard the recommendation in Nr. 1.16 of the UPOV Model Law: “... Drafting definitions capable of covering all possible situations satisfactorily is probably a risky endeavor; it is preferable to rely on common sense and case law.” cannot be supported by CIOPORA.

2. The relationship between propagating material and harvested material

- 8 Taking into consideration that under the current UPOV Acts only propagating material enjoys unconditioned protection, and that therefore propagating material is the most important part of the protected plant material, the definition of propagating material should be discussed first and only afterwards it should be made sure that the definition of harvested material does not conflict with the definition of propagating material (and not vice versa).
- 9 For that reason CIOPORA does not agree with the approach in Nr. 12 of document CAJ-AG/12/7/4 (In order to facilitate the consideration of the CAJ-AG on the possible development of guidance on the notion of “Propagation and propagating material” that would be consistent with the provisions for harvested material in the 1991 Act of the UPOV Convention, ...).
- 10 Additionally, because there exists no definition of “harvested material” in the UPOV 1991 Act, there exists no limitation for the development of a definition of “propagating material”.
- 11 As regards the relationship between propagating material and harvested material, from a legal perspective and a definition-based approach, one and the same plant material cannot be considered to be both propagating material and harvested material – it is one **or** the other³. If material is - according to its definition - classified as propagating material, it cannot be also classified as harvested material, even if it is “harvested material” in the common sense.
- 12 This should be clarified in document UPOV/EXN/HRV Draft 8, too.

3. The content of document UPOV/EXN/HRV Draft 8

- 13 In the opinion of CIOPORA the document UPOV/EXN/HRV Draft 8 does not become clearer by removing the examples 1 – 8 of Draft 6. Obviously in the absence of the observers the CAJ-AG decided to remove the examples, because they *could cause some confusion with regard to matters concerning unauthorized use of propagating material and matters concerning exhaustion*. CIOPORA would be pleased to receive additional information about why the examples can cause confusion.

4. No effective protection for harvested material

- 14 The explanatory note on harvested material once more underlines the fact that harvested material is not effectively protected by the UPOV 1991 Act. Not only there is missing a clear definition of what is propagating material and – as a consequence – what is harvested material. Additionally, the limited and conditioned protection of harvested material leaves a wide protection-gap for vegetatively reproduced ornamental and fruit varieties.

² See e.g. the PBR laws which define propagating material as material being intended for multiplication. Neither unrooted nor rooted cutting are in general intended for multiplication.

³ See also the Australian Government Response to the Advisory Council on Intellectual Property report *A review of enforcement of Plant Breeders Rights*, page 4 No. 2., http://www.acip.gov.au/library/pbr_enforcement_response.pdf

- 15 Even in countries where propagating material *per definitionem* includes plants or parts of plants which are capable of producing new plants true-to-type, the majority of fruits fall into the category of harvested material. Breeders of such fruit varieties are not even able to control the commercialisation of harvested material in the territory where they have PBR protection, if the harvested material is imported from a country which offers no or no effective PBR protection⁴.
- 16 There are numerous cases imaginable where propagating material with the authorization of the title-holder enters a country which offers no or no effective protection for plant varieties. The sometimes heard recommendation or warning, in order to avoid protection-gaps breeders should not commercialize their varieties in countries without protection, disregards the reality in business and lacks understanding of the minimum contents of effective IP protection⁵. In times of globalization economic necessities and business opportunities urge breeders to exploit their varieties not only in countries, where PBR exists, but also in other countries, where the varieties are grown.
- 17 Breeders of vegetatively reproduced ornamental and fruit varieties are concerned about the lack of protection resulting from such behaviour, especially when taking into consideration the high number of non-UPOV countries and countries which are bound by the UPOV 1978 Act.

CIOPORA will be pleased to further-on contribute to the discussions.

With kind regards,

CIOPORA



Dr. Edgar Krieger
Secretary General

⁴ unless there was prior unauthorized use of propagating material in the protected territory.

⁵ Patent-owners can – except in the case of exhaustion - control the import of patent-protected products into a protected territory, even if these products are produced with the consent of the Patent-owner in the country.