



TWO/47/27

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INTERNATIONAL UNION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS

Geneva

TECHNICAL WORKING PARTY FOR ORNAMENTAL PLANTS AND FOREST TREES**Forty-Seventh Session
Naivasha, Kenya, May 19 to 23, 2014****REPORTS ON DEVELOPMENT IN PLANT VARIETY PROTECTION
FROM MEMBERS AND OBSERVERS***Document prepared by the Office of the Union**Disclaimer: this document does not represent UPOV policies or guidance*

1. The Technical Committee (TC), at its forty-seventh session held in Geneva, from April 4 to 6, 2011, agreed to request the Office of the Union to invite experts to submit written reports to the Office of the Union in advance of the Technical Working Party (TWP) sessions in order that a document containing those reports could be prepared by the Office of the Union. The TC noted that TWP experts would be invited to make a brief oral summary of their written report at the session and would also be encouraged to make reports under the agenda item "Experiences with new types and species", as appropriate. The TC also noted that TWP experts would have an opportunity to raise questions concerning matters of interest (see document TC/47/26 "Report on the Conclusions", paragraphs 9 and 10).
2. Written reports were requested by the Office of the Union in Circular E14/087. The following reports were received (in alphabetical order):

Members of the Union: Annexes I to XII: Brazil, China, France, Germany, European Union, Japan, Mexico, Netherlands, New Zealand, Poland, Republic of Korea and South Africa.

Organizations: Annex XIII: International Community of Breeders of Asexually Reproduced Ornamental and Fruit Plants (CIOPORA).

[Annexes follow]

ANNEX I

BRAZIL

1. The National Plant Variety Protection Service – SNPC on the Ministry of Agriculture, Livestock and Food Supply (MAPA), is the national authority for the examination of applications and for granting Plant Breeder's Rights in Brazil.
2. In 2013, SNPC received 326 applications: agricultural crops (177), ornamentals (50), vegetables (35), fruit crops (28), forest trees (23) and forage crops (13).
3. Those 50 applications for ornamentals: *alstroemeria* (09), *anthurium* (07), *kalanchoe* (06), *oncidium* (05), *begonia* (04), *chrysanthemum* (04), *phalaenopsis* (03), *rosa* (03), *celosia* (02), *gypsophila* (02), *cymbidium* (01), *cynodon* (01), *hippeastrum* (01), *hydrangea* (01) and *zantedeschia* (01).
4. Applications from Netherlands (38), USA (6), Israel and Denmark (2 each) and United Kingdom and Thailand (1 each)
5. 68 titles granted: *chrysanthemum* (29), *alstroemeria* (13), *rosa* (07), *anthurium* (05), *euphorbia* (03), *gerbera* (03), *gypsophila* (03), *kalanchoe* (03) and *phalaenopsis* (01).
6. Titles granted to Netherlands (48), Switzerland (09), Australia (03), Brazil, Israel and Cyprus (02 each) and Denmark and Germany (01 each).
7. Up to April 30, 2014, SNPC received 90 applications: agricultural crops (48), ornamentals (16), fruit crops (09), vegetables (10) and forage crops (07).
8. Up to April 30, 2014, 12 titles granted: *alstroemeria* (03), *begonia* (03), *chrysanthemum* (02), *gypsophila* (02), *kalanchoe* (01) and *hypericum* (01).
9. Titles granted to Netherlands (09), Israel (02) and Denmark (01).

[Annex II follows]

CHINA

Report on the development of agricultural plant variety protection in China from the Development Center for Science and Technology, Ministry of Agriculture

Since last TWO meeting was held, the new development of agricultural plant variety protection of China is following:

Firstly, Mr. Arnd Jan van Wijk, who is expert from Naktuinbouw of the Netherlands was granted "Friendship award" by the People's Republic of China in 2013. China and Netherlands had developed a cooperation project on protection of plant breeder right during 2007 to 2011. This project trained more than 400 Chinese DUS test staffs and 60 staffs gained study opportunity going to Netherlands. Mr. Arnd Jan van Wijk was one of the projects in charge. He went to China for 16 times and gave lectures on protection of plant varieties. Therefore, he was granted "Friendship award" by Chinese government and attended to National Day reception in 2013.

Secondly, law enforcement is strengthened. The Ministry of Agriculture, the Ministry of public security and the State Administration for Industry and Commerce launched the special action against infringement of variety rights, manufacturing and selling counterfeit and inferior seed behavior in November, 2013. The aim of act is that protects the legitimate rights and interests of breeders, creates a market order of fair competition and promotes China's seed industry technology innovation.

Thirdly, DUS testing is first added into the "The Regulations of main crops variety examine and approve". This Regulations was published in December 27, 2013 and carries out from February 1, 2014. The article 15 specifies "The Distinctness, Uniformity and stability of plant variety must be tested in the variety VCU testing. The modifying procedure of variety VCU testing may have an important impact on breeding orientation.

Fourthly, the research testing technology and training of DUS was strengthened. The research project of the Ministry of agriculture on "DUS test and DNA test varieties information technology research" had completed in 2013. The project developed 80 genera or species national DUS test guidelines and 14 genera or species of DNA testing guidelines. This provides technical support for the protection of new varieties of plants list expansion. The Ministry of Agriculture held testing technical training courses for 15 days in November 2013. 26 trainees accepted training, who were from DUS test sub divisions of agricultural plant varieties DUS testing. It will improve the testing level.

Fifthly, the scope of protection of agricultural plants varieties is further expanded. The Ministry of Agriculture issued the ninth batch of agricultural plant variety protection list in April 11, 2013. The number of plant protection list has 13 genera or species, including ornamental plants *Tagetes* L. and *Tulipa* L. Up to now, total number of agricultural protection list has 93 genera or species.

Finally, the number of applications of PVP keeps on stability and the number of granted breeders' rights is increased. Up to March 31, 2014, the Ministry of agriculture had received applications 12111 cases, granted 4488 cases, which 282 cases were granted in 2013. The number granted breeder' rights is more than last year, but speed granted is some slowly. Otherwise, in these applications, foreign applications have 687 cases, involving Netherlands, the United States of America and the Republic of Korea and so on 18 countries. The top 3 countries are the Netherlands 294 cases, the United States of America 218 cases and the Republic of Korea 83 cases. Ornamental plant has 16 genera or species, and 844 cases, number granted 151 cases. The ornamental plant applications are those: Chrysanthemum 217 cases, Anthurium 126 cases, Gerbera 116 cases, Dianthus 101 cases, Phalaenopsis 68 cases, Lily 96 cases, orchid 43 cases, Guzmania 39 cases, New Guinea Impatiens 10 cases, Begonia 6 cases, lotus 5 cases, Limonium 4 cases, Tagetes 3 cases, Gladiolus 3 cases, Ranunculus 2 cases and impatiens 2 cases.

Report on development of protection of woody plant varieties from the Chinese Academy of Forestry:

The annual number of applications for plant breeder's rights (PBR) has been increasing in recent years in China. The number of applications in 2013 was 177 and 158 of which were granted with PBR. By the end of 2013, the total number of applications for PBR was 1261 and 658 of them were granted in China (Forestry sector).

The scope of protection of PBR has been expanded. In order to encourage the breeding initiatives of plant breeders, the 5th list of plants for protection, including 120 genera/species was announced by the State Forestry Administration in 2013, taking into effect from April 1, 2013. Up to now, 198 genera/species are covered by the PVP system in China (Forestry sector).

Test guidelines development is ongoing. Till to the end of 2013, 71 test guidelines (TG) are in preparation and 27 of which have been completed by Chinese experts and published as national standard or forestry standard.

DUS testing stations are in normal operation. 3 DUS testing stations have been established to carry out the DUS testing of New Plant varieties. Up to now, 930 varieties in common knowledge have been collected at DUS testing station for Rose. DUS testing for 57 rose varieties have been carried out in the testing station in 2013. 83 varieties of poinsettia have been collected in DUS testing station for poinsettia and DUS testing of one candidate new variety of poinsettia has been done in DUS testing station for poinsettia. More than 700 varieties of tree peony have been collected at the DUS testing station for tree peony and they began to accept tasks of DUS testing from State Forestry Administration in 2013. DNA profiling of 152 rose varieties has been done in the Lab for molecular identification of plant varieties, State Forestry Administration in 2013.

[Annex III follows]

FRANCE

Since January 2014, DUS GEVES team has been reorganized.

-Clarisse Maton takes the general coordination of the DUS activities and the TLO CPVO representation,

-Virginie Bertoux and Richard Brand are the France representatives at UPOV,

-DUS ornamental activities are managed by Marie-Hélène Gandelin (CPVO ornamental contact) and Françoise Jourdan (UPOV TWO and CPVO ornamental contact),

-DUS fruit activities are managed by Richard Brand and Marie- Hélène Gandelin (UPOV TWF and CPVO fruit contact),

-DUS vegetables activities are managed by Pascal Coquin (national registration), Chrystelle Jouy and Stéphanie Christien (UPOV TWV and CPVO vegetable contact), all charged of DUS activities with Jean Michel Retailleau and Carole Dirwimmer.

In 2014, 23 ornamental species are DUS tested in France, which represents around 120 running applications. Shrubs, perennial, aromatic species are tested, mainly Hydrangea and Lavandula Genum.

The ornamental DUS examination is based on living reference collections, settled at GEVES or under the responsibility of GEVES. Some species, for which the material is difficult to maintain, have in addition, descriptive and numeric description collection and documentation.

[Annex IV follows]

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ANNEX IV

GERMANY

In Germany in 2013 in total 485 requests were received for carrying out DUS tests for ornamental and woody varieties from some 63 different species. 85% of the requests were received from the Community Plant Variety Office, 12 % from other UPOV countries and 3% were requests for domestic PBR. The most important species tested in Germany are Roses, Pelargonium, Petunia, Calibrachoa, Kalanchoe and Osteospermum. End of 2013 there were 634 titles in force for ornamental varieties and 85 for woody plants.

[Annex V follows]

EUROPEAN UNION

In 2013, Croatia joined the EU and hence the Community rights have become valid on the territory of 28 Member States.

In 2013, the Community Plant Variety Office of the European Union (CPVO) received 3 297 applications for Community plant variety protection which represents an all-time record and an increase of 15% as compared to the previous year. It is assumed that the strong increase observed in 2013 is partly due to a lowered application fee from EUR 900 to EUR 650 which was announced to become applicable as from the 1st January 2013. This most probably resulted in the decrease in application numbers observed at the end of 2012 and a consequent large increase in applications at the beginning of 2013.

In 2013, the CPVO granted 2 706 titles for Community protection which represents the highest number ever granted within a calendar year. By the end of 2013, there were 21 576 Community plant variety rights in force.

With 50.2% of the applications received in 2013, ornamentals continue to represent the largest group of applications filed for Community plant variety rights. While at the beginning of the Office in 1995 the share of ornamentals was well above the 60% mark it is now lingering around the 50% threshold.

Also in 2013, roses and chrysanthemums remained by far the most important species. Roses which had seen a drastic decline in application numbers in 2012 (-108 applications) returned almost to their "old numbers" of 2013.

In the first quarter of 2014 however, the CPVO saw a decline in global application numbers of almost 8% as compared to the same period of the previous year. The decline was particularly caused by a drop in the ornamental sector where nearly 25% less applications were received. It occurred for the first time in the nearly 20 years of existence of the CPVO that applications for agricultural varieties have outnumbered the ornamentals.

The CPVO continued to participate in two international fairs: in January the IPM in Essen, Germany, in co-operation with the German Bundessortenamt and in February at the Salon du Végétal in Angers, France in co-operation with the French GEVES. It is foreseen to expand the joint presence at the IPM to the Dutch Naktuinbouw and possibly other entrusted examination offices.

In 2013, an R&D project was launched with the aim to investigate the suitability of an alternative to the current cultivation scheme for Helleborus crops (namely to move to a cultivation in pots). The technical part of the project is carried out by Naktuinbouw, and the coordination is made by the CPVO. The final report is expected in the second half of 2014.

The CPVO is more and more moving to a paperless situation. Since 2010, applications for Community plant variety rights can be filed electronically: today the share of applications filed through this means has now reached some 80%. Since 2012, originals of e-certificates of protection are produced by the CPVO, with an e-signature. The CPVO stopped recently to send them on paper; title holders are now served using an exchange platform.

The CPVO has been requested by its Administrative Council to review its fee structure with the aim to cover examination costs to 100% by examination fees. It has been decided that in a first step in view of that goal, as from 2015 applicants will have to pay 85% of the costs incurred for the conduct of the technical examination. For certain crops, this change will result in a significant increase of the examination fee.

[Annex VI follows]

JAPAN

1. Number of application and granted in 2013

Number of application

year	No. of Applications	(2013/2012)	ornamentals	(2013/2012)
1978 to 2013	29,029	-	23,016	-
2012	1,110		914	
2013	1,054	(95%)	857	(94%)

Top 5 Applications of Ornamentals.

Chrysanthemum 204, Rosa 87, Dianthus 38, Petunia and Calibracoa 50(38;12)

Anthurium 23

Number of granted

Year	No. of PBR Granted	(2013/2012)	ornamentals	(2013/2012)
1978 to 2013	22,919	-	17,873	
2012	881		672	
2013	752	(85%)	576	(86%)

Top 5 PBR Granted of Ornamentals.

Chrysanthemum 116, Rosa 76, Dianthus 43, Petunia 30, Phalaenopsis 16, Cymbidium 14

2. Average duration of the examination procedure (from application to registration)

2012	2013	2014 (target)
2.34 year	2.48 year	2.3 year

3. Japanese national test guidelines have been harmonized with UPOV TGs in 2013.

genera and species
TWO: Berberis, Buddleja, Echinacea, Gladiolus, Heuchera, Oncidium, Phalaenopsis

Web-site: http://www.hinsyu.maff.go.jp/en/en_top.html

[Annex VII follows]

MEXICO

In Mexico plant varieties can be officially registered by two modalities, one is through applying for registration in the National Catalogue of Plant Varieties (CNVV), which does not confer exclusivity of use. The other is by the application of breeder's title, which confers the right to exclusive use for a specified time. The regulatory framework for this record types is included in the Federal Law of Plant Varieties and the Federal Law of Production, Certification and Trade of seeds.

During the first quarter of 2014, 11 breeders of 7 nationalities filed 32 applications for 12 plant species; 12 were for agricultural crops, 6 for fruit crops, 4 for ornamentals, and 10 for vegetables. Out of which 38% were filed by residents of Mexico, 32% Netherlands, 9% Japan, 9% United Kingdom, 6% United States of America, 3% Israel and 3% Australia.

Currently, there are 203 registered breeders, of which the National Research Institute, Forestry, Agriculture and Livestock (INIFAP) tops the list with 275 applications, followed by Pioneer Hi-Bred International, Inc. with 130, Seeds and Monsanto Agricultural Products, SA de CV with 128, Driscoll Strawberry Associates, Inc. with 101, Seminis Vegetable Seeds, Inc. with 81, Meiland International, SA with 67 and 957 requests from 197 additional breeders.

By March 31, 2014, residents of 31 countries had applied, Mexico tops the list with 604, followed by the United States of America with 585, Netherlands 283, France 79, Germany 46 and others (26 countries) with 142 requests.

During the period 1996 to March 2014 have entered 740 applications for agricultural crops, 434 for ornamental and forestry, 365 for fruit, 197 for vegetables, 2 mushrooms and 1 seaweed.

In order of importance, in terms of number of the applications filed for species, there have been 373 filed for maize, 237 for rose, 115 for strawberry, 65 for cotton, 70 sorghum and 879 for other 106 species.

From the year 2002 up to date, 1181 breeder titles have been granted, distributed among the following species: 248 of corn, 137 of rose, 79 of strawberry, 51 of cotton, 70 of sorghum, 36 of cranberry, 33 of vines, 32 of potato, 32 of wheat, 30 of gerbera, 30 of raspberry and 428 between other 78 species.

During the first quarter of 2014, 72 breeders' titles were distributed in the following crops: 12 of corn, 7 of rose, 6 of cotton, 6 of vine, 6 of Carnation, 6 of chrysanthemum, 4 of sorghum and 25 in other 14 species. From the total of 1181 titles given to crops breeder, to March 31, 2014, remain in effect 1059.

Ornamental Crops

Applications:

During the first quarter of 2014 an Israeli and a Japanese, filed four applications corresponding to ornamental species. With these new applications for ornamental crops, the cumulative is 434 applications covering 30 species.

By March 31, 2014, residents of 11 countries requested protection for ornamental crops, Netherlands tops the list with 204, followed by France with 79, Germany with 43, the United States of America with 36, Italy with 23, Israel with 12, Japan 4, New Zealand 2, United Kingdom 2, Spain 1 and 28 residents.

The number of applications for crops are: rose (237), gerbera (46), chrysanthemum (31), anthurium (25), alstroemeria (23), carnation (16) and others (56).

Breeders' titles granted

Since 2002 up to date 275 breeders' titles of ornamental varieties have been granted, distributed among the following species: 137 rose, 30 gerbera, chrysanthemum 25, anthurium 25, alstroemeria 19, 14 carnation, and 25 other 10 species.

During the first quarter of 2014, 26 breeder titles for ornamentals were granted: Rose 7, carnation 6, chrysanthemum 6, orchid 3, anthurium 2 and dahlia 2.

[Annex VIII follows]

NETHERLANDS

Number of applications received

In 2013 1904 applications were received for testing for the first year for national listing and national and European Plant breeders rights. (In brackets the difference with 2012):

Ornamentals	972	(+11%)
Agriculture	144	(+10%)
Vegetables	788	(+20%)
Total	1904	(+15%)

This is an important increase and an all-time record high number of applications. The number of applications received in 2014 up till now, still shows a further increase, except for Ornamentals.

Registration

- The online version of the Netherlands Register of plant varieties (NRR) was included in the thoroughly revised website of the Dutch Board for Plant Varieties RvP (www.raadvoorplantenrassen.nl).
- The use of the i-portal for DUS-applications at Naktuinbouw has increased. Also the electronic exchange of application forms and reports with CPVO vice versa has been started in the beginning of 2014.
- Variety Denominations
In 2013 the CPVO published a new version of the explanatory notes for the checking of the suitability of variety denominations. The CPVO has explained the contents of these notes in a meeting with the Dutch breeding companies. The contacts between CPVO and Dutch Board for Plant Varieties/Naktuinbouw are strengthened in the field of exchanging visions on the suitability of variety denominations.
- Registration of fruit varieties
In the framework of the new Fruit species directive of the European Union, Naktuinbouw made an inventory of those fruit varieties that are being marketed in the Netherlands. As foreseen in the directive a distinction has been made in those varieties that were tested on the DUS principles for Plant Breeders' Rights, and can thus be certified, and other varieties. In 2014 descriptions of more than 1200 fruit varieties will have to be finished. We try to cooperate with other European (fruit) partners to exchange information.
For membership of the TWF, Gerard Bolscher (who will retire in May 2014) has been replaced by his successor Marco Hoffman.
- Developments in VCU
VCU testing of agricultural crops has been collectively financed by breeders and farmers in the Netherlands for a long time already. Due to reorganization of some public institutions there is no collective farmer's contribution anymore. From 2014 onwards VCU will be 100% financed by the breeders only.

Quality System

- The second CPVO-audit according to the standards for CPVO entrustment of all ca. 950 species was carried out in 2013. The renewed entrustment was formalized by the decision of the CPVO Administrative Council in March 2014.
- Updating common knowledge Vegetables. In 2013 Naktuinbouw started a project to update information of disease resistance characteristics from varieties of common knowledge. Another project is ongoing in cooperation with GEVES. In tomato, pea and lettuce GEVES and Naktuinbouw developed combined databases.

Training in DUS related activities

The sharing of knowledge is important in order to work on a global, harmonized and strong Plant Breeders Right system for the benefit of society. Naktuinbouw contributes to this principle on different levels.

- Naktuinbouw is involved in bilateral projects to exchange knowledge and to train staff of countries that are working in or on Plant Breeders Rights systems. Besides ongoing projects in China and India in 2013 the following projects started :
- In Ghana, where the Ghanaean authorities asked assistance in the setting up of a system now the PBR law was accepted by UPOV,
- in Rwanda, where advise was given on the agricultural policy including the necessity to provide for a good system of variety protection to promote in influx of better varieties,
- in Ukraine where despite the very uncertain political situation the authorities continue to strive for the improvement of the Ukrainian Plant Breeders' Right system and:

- in the United Republic of Tanzania where an adjusted form of the Wageningen PVP course will be given on location in the framework of capacity building in this new UPOV member.
- Annually, Naktuinbouw, with the help of UPOV and CPVO, is organising the PVP course in Wageningen, under coordination and supervision of Mrs. Laura Pinan Gonzales. In 2013 31 participants from 19 countries participated in this two week training.
- Four colleagues will follow in 2014 the tutor-education of the new UPOV distance learning course DL-305 "Examination of Applications for Plant Breeders' Rights" (a joint effort of UPOV, Naktuinbouw and experts of other UPOV members).
- In 2013 Naktuinbouw, in the framework of the internship programme received again 4 colleagues from the UPOV office (1), Zimbabwe (1) and the Republic of Korea (2). The colleagues work together with Naktuinbouw colleagues and thus learn the details of the DUS test work as it is performed in the Netherlands. The use of the Naktuinbouw helpdesk stabilised. Colleagues from all over the world find this opportunity to ask DUS related questions.
- Recently Naktuinbouw published a book; "framework for the Introduction of Plant Breeders' Rights". This book, written by Arnold van Wijk and Niels Louwaars is a guidance for practical implementation of a Plant Breeders' Rights system in a country. We hope with this book, that contains lots of explanations and examples, to offer support to those colleagues who work in countries that recently started, or will start a (UPOV based) Plant Breeders' Rights system.

Research projects (highlights).

- Handhelds-project: The description for the DUS tests made in field conditions was made on paper for ornamental and vegetable crops in the past. In 2013 Naktuinbouw changed this procedure and now uses handhelds for this purpose. In 2014 the project continues in order to be able to also use handhelds for the comparison between applications and comparing varieties in the field trials.
 - Harmonization of disease resistance tests within the EU. In 2013 several tests were carried on within this CPVO project. Results are expected in 2014.
 - Ongoing projects: 1-project on change of crop management (from outdoor to indoor) for DUS in Helleborus, together with CPVO; 2-origin of chimera-like structures in Lily and a number of projects to study the possible effect on the DUS work of a change in growing media from soil to artificial media.
- Other:
- CIOPORA has contacted CPVO and Naktuinbouw about the setup of a new DNA-project in Rose together with BSA and NIAB. Discussion about a draft will be continued in 2014.

International Cooperation

With GEVES:

The on-going cooperation with GEVES was evaluated in the beginning of 2014. Activities will be intensified in joint data bases of vegetable varieties, joint resistance tests, dbases for photographs and descriptions of ornamental varieties (GEMMA), standardized color description techniques (AIM).

Projects in the CPVO R&D system

Naktuinbouw participates in a number of CPVO co-funded projects:

- The Harmores project; harmonization of disease resistance testing between a number of Examination Offices
- The potato Ring test project to harmonize the testing of potato between the European Examination Offices
- Development of a European Potato database (containing molecular and morphological data) as a centralized collection of varieties of common knowledge.
- A project to study the possible effect of seed treatment on the DUS test in vegetables

Infringement cases

The use of the DUS sample and DNA data of the DUS samples for infringement purposes is under discussion in the Netherlands between the authorities and the industry. Also the question on ownership of the DUS sample itself plays a role in this discussion.

Miscellaneous

- The oldest part of our greenhouses was renewed and enlarged are ready for use since March 2014.

NEW ZEALAND

The Plant Variety Rights Office (PVRO) information technology system has now been in operation for over twelve months. User's familiarity with the system is steadily increasing with almost 100% on line applications and the on line searching, variety descriptions and photos are being accessed more frequently.

Applications for ornamental varieties in 2013/14 have nearly doubled in comparison with the same period in 2012/13, returning to the levels consistently seen prior to 2011 of 70-80 per year. The increase in application number is made up of relatively few genera, mainly rose, petunia and Australian and New Zealand natives. A new ornamentals examiner started in September 2013 following the departure of the previous ornamental examiner. The new examiner has completed the UPOV Distance Learning Course and has managed DUS trails himself over the 2013/14 growing season.

The PVRO has provided information and guidance to an ornamental nursery industry Rights holders group established in 2012. The group aims to increase intellectual property awareness within the nursery industry and consult with PVRO as needed. Current discussion topics are variety names, labelling, trademarks and on line plant sales that may be considered infringements.

A review of the testing arrangements and some collections of varieties will continue for 2014. It is probable that centralized official testing for *Clematis* and *Zantedeschia* will be discontinued due to an absence of applications. Part of the existing variety collection for *Zantedeschia* may be retained *in vitro*, using a commercial tissue culture laboratory. Consideration is being given to re-introducing centralized official testing for *Petunia*, due to an increase in applications and applications for New Zealand bred varieties.

The Plant Variety Rights Office has entered into an agreement for the use of a private variety collection for *Cordyline*. The collection will be used for DUS testing and PVRO will assist in expanding the number of varieties held. The collection holder is not involved in any DUS evaluation and examination activity with all work carried out by the authority.

[Annex X follows]

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ANNEX X

POLAND

Number of protected varieties had slightly dropped to 1237 as of April 2014; 640 of which were agricultural crop varieties, 126 fruit and berry plant varieties, 217 vegetable varieties and 254 of which were ornamental varieties. In 2013, 51 candidate varieties for ornamentals had been tested: 63% for national protection, 23% for other UPOV member States and 14% for the CPVO. Currently, 65 ornamental varieties are in DUS trials in 2014, mainly trees and shrubs (68%) such as *Salix*, *Clematis*, *Berberis*, *Cornus*.

[Annex XI follows]

REPUBLIC OF KOREA

1. Plant Breeder's Right

Total number of application as of 31 March, 2014 has been reached 7,080 and among them, 4,920 varieties were registered since implementation of PVP system in 1998.

Last year we received 606 applications, 47 percent of which were for ornamental crops such as chrysanthemum (68 varieties), rose (52), moth orchid (22), gerbera (21), and lily(19).

2. Variety Characteristic Search System

- For selecting similar variety by comparison of variety characteristics
- Protected variety, reference variety and so on (since 1998)
- Input data numbers: 13,318 varieties for 216 crops

(as of March. 31. 2014)

Total	Rose	Red pepper	Chrysanthemum	Rice	Others
13,318	961	1,250	710	584	9,813

3. Plant Variety Protection Law

In the Republic of Korea, Plant variety protection had been enforced by Seed Industry Law since 1997. Last year, new Plant Variety Protection Law was enacted for reinforcing its effectiveness.

4. Molecular Techniques

Recently, the Republic of Korea is actively applying DNA analysis to seed circulation management of several crops. The representative example is analyzing about comparison of DNA profiles between registered seed and marketing seed. In addition, we are utilizing molecular markers in genetic purity assessment of national list of varieties of rice, barley and soybean.

5. International Cooperation

Korea Seed & Variety Service (KSVS) provides PVP training course for the 16 experts from Asian and African countries for 3 weeks in June 2014, financially supported by KOICA.

KSVS is scheduled to host the UPOV Biochemical and Molecular Technical meeting. This session will be held on 9-13 November 2014, in Seoul.

6. Korea Forest Seed & Variety (KFSV)

Since KFSV center established in 2008, the number of new varieties for Forest PVP application has reached 206 by the end of 2013. 48 varieties are granted for protection and 5 varieties are rejected. 103 varieties are under DUS test.

Among 206 varieties, 84 varieties were ornamental crops, 62 varieties were vegetable crops and 60 varieties were fruits crops.

In ornamental crop, 84 varieties consisted of 42 species have been applied. And the major species were pine tree (*Pinus densiflora*), korean lawn grass (*Zoysia japonica*), siberian chrysanthemum (*Chrysanthemum zawadskii*), etc.

Until now, 147 national test guideline were established for forest plant such as Tricuspid Cudrania (*Cudrania tricuspidata*), *Persicaria tinctoria*, *Aralia elata*.

[Annex XII follows]

SOUTH AFRICA

With regards to applications and valid Plant Breeders' Rights for 2013 the following is reported:

- An additional 29 taxa have been declared in terms of the Plant Breeders' Rights Act during 2013.
- 309 PBR applications were received of which 30% were for Agricultural crops, 39% for Ornamental crops, 27% for Fruit crops and 4% for Vegetable crops.
- As of December 2013, a total of 2607 varieties had valid plant breeder's rights in South Africa, of which 34% were for Ornamental crops, 34% for Agricultural crops, 23% for Fruit crops and 9% for Vegetable crops. The top three crops for each crop are:

FRUIT CROPS
1. <i>Prunus persica</i> (L.) Batsch var. <i>nucipersica</i> Schneid. (105)
2. <i>Vitis</i> L. (71)
3. <i>Prunus persica</i> (L.) Batsch (105)

ORNAMENTAL CROPS
1. <i>Aloe</i> L. (46)
2. <i>Chrysanthemum</i> L. (65)
3. <i>Rosa</i> L. (341)

AGRIC CROPS
1. <i>Solanum tuberosum</i> L. (93)
2. <i>Triticum</i> L. (83)
3. <i>Zea mays</i> L. (352)

VEGETABLE CROPS
1. <i>Allium cepa</i> (34)
2. <i>Phaseolus vulgaris</i> L. (36)
3. <i>Solanum lycopersicum</i> L. (49)

PBR's granted in 2013 only are as follows:

Agricultural crops:	101
Vegetable crops:	16
Fruit crops:	66
Ornamental crops:	71

White CONV 86
 White open pollinated 6
 White GMO 73
 Yellow CONV 69
 Yellow GMO 118

[Annex XIII follows]

CIOPORA

1. CIOPORA Position Papers on IP

After more than 18 months of intensive discussions the CIOPORA members in the last Annual General Meeting of CIOPORA in The Hague, NL, on 1 and 2 April 2014, have approved four Position Papers on IP, namely on Minimum Distance (“Distinctness”), Scope of the Right, Breeders’ Exemption and Exhaustion.

The Position papers are attached as Appendix, and CIOPORA heartily invites the TWO and TWF to take note of the Positions.

The TWO and TWF may consider to including the discussion of the Positions, particularly the one on Minimum Distance, on the agenda of their next meetings.

2. DNA data bases

The CIOPORA Crop Sections Cut-Rose (IRBA), Gypsophila and Fruit are considering the set-up of comprehensive DNA databases, for the use in DUS examinations (selection of reference varieties), in the determination of EDV and in enforcement.

3. Next CIOPORA AGM

The next CIOPORA Annual General Meeting shall take place on 23 – 26 March 2015 in Tel Aviv, Israel.

The venue of the AGM 2016 shall be Istanbul, Turkey.

[Appendix follows]

TWO/47/27

ANNEX XIII

APPENDIX

CIOPORA

POSITION PAPERS ON IP

Minimum Distance
The Scope of the
Right Breeders'
Exemption
Exhaustion

2014

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CIOPORA position
on
Minimum Distance / Distinctness

as approved by its Annual General Meeting on 02 April 2014 in The Hague, NL

Key statements:

- CIOPORA demands a sufficient minimum distance between varieties for an effective Plant Variety Right.
- Since new varieties are bred, selected and introduced mainly for commercial targets, the requirement “clearly” should be seen as a judgmental and evaluative requirement, and should not end in a simple search of a botanical difference.
- The requirement “clearly distinguishable” should be assessed on characteristics important for the crop concerned; in this regard new important characteristics may be taken into consideration. Accordingly, a new type of characteristics (“relevant for the determination of clearly distinguishable”) should be included into chapter 4.8 of TGP/3 and the test-guidelines should determine for each characteristic whether it is considered relevant for the determination of “clearly distinguishable”.
- The relevant authorities should have the continuing obligation to take into consideration additional characteristics proposed by applicants, if such additional characteristics are important for the determination of “clearly distinguishable”.
- Differences in unimportant characteristics only should not lead to a clearly distinguishable variety.
- In order to be clearly distinguishable, the distance between two varieties in regard to their important characteristics must be sufficiently broad. Particularly in regard to pseudo-qualitative characteristics and quantitative characteristics a difference of only one note in general should not be considered as a sufficiently broad distance. The decision should be made on a crop by crop basis.
- Varieties with the same note in the UPOV test-guideline for a given characteristic should not be considered to be clearly distinguishable with respect to that characteristic. The possibility to search for a difference in a subsequent growing trial if such difference was not clear in the first properly performed examination should be eliminated.
- The possibility of randomized “blind” testing in case of doubts over the distinctness of a candidate variety should also be eliminated. In case of a doubt over distinctness, the candidate variety cannot be considered to be clearly distinguishable from the reference variety.
- The decision on which characteristics are relevant for the determination of “clearly distinguishable”, on how many of such characteristics must differ from each other and on the distance between such characteristics should be made on a crop-by-crop basis by a panel of experts, including representatives of the breeders of the crop concerned.

Full text:

Minimum distance

CIOPORA demands a sufficient minimum distance between varieties for an effective Plant Variety Right.

The TRIPS agreement requires that a ‘sui generis’ system for the protection of plant varieties is effective. One of the most important requirements for effective PBR protection is a sufficiently broad minimum distance between varieties. An insufficient distance between varieties results in multiple weaknesses of the protection:

- The exclusive right of the breeder of the first variety is weakened. The exclusive right is mainly determined by the scope of protection. If PBR protection is granted for other very similar varieties, these other varieties are considered to be clearly distinguishable from the first variety, and thus fall out of the scope of the right of the first variety.
- The purpose of IP protection to support the commercial interest of the innovators is disregarded by not differentiating between important and unimportant characteristics.
- The obligation of the breeder to maintain his protected variety true-to-type is at risk if no tolerance is allowed. The breeder will potentially not be able to fulfill his obligation to maintain the variety true to type, if already very minor differences lead to a new variety.
- A fair examination of candidate varieties is not given anymore, because the environmental variation of the phenotypic appearance of the reference varieties compared to the previous years and to the year of their initial examination makes it extremely difficult for the examination offices to judge if the reference variety is still the one which has been granted protection – particularly in species where no living reference collection exist.
- The enforcement of PBR is very difficult, because very soon a plant runs out of the scope of protection if the plant differs from the variety description in only one or two minor characteristics.
- The phenotypic variation within a variety, caused by environmental influences or by cultivation methods, is larger than the variation tolerated between two separate varieties. This makes it very difficult to identify a plant in the production and trade chain.

In today's reality, based on the UPOV 1991 Act, even a very small difference between two varieties makes the varieties clearly distinguishable in the eyes of the examination offices. Based on a pure botanical approach, all characteristics of a species are considered to be equally essential. In contrast to the UPOV 1978 Act, no differentiation is made anymore between characteristics important or unimportant for a variety. As a consequence, even a difference in one unimportant characteristic can make a variety clearly distinguishable from another variety in the eyes of the examination offices.

This systematical and inbuilt narrowing of the distances between varieties is supported by UPOV even more, by allowing for example randomized blind tests if doubts exist over the distinctness of two varieties.

This pure botanical approach runs contrary to the legal character of intellectual property protection and devaluates the requirement of "clearly distinguishable" in Article 7 of the UPOV 1991 Act to a sole measurement of a difference in at least one characteristic in the meaning of Article 1 (vi) of the UPOV 1991 Act (definition of variety).

As a result, the initial improvement of the UPOV 1991 Act compared to the UPOV 1961 and 1978 Act, aiming at a better control of "varieties, which are not clearly distinguishable from the protected variety" (Article 14 (5) (a) (ii) of the 1991 Act) has been impeded by this botanical approach.

Taking into consideration the weaknesses resulting from too small minimum distance and from the undifferentiated evaluation of important and unimportant characteristics, CIOFORA requires the following changes in the DUS examination:

- Since new varieties are bred, selected and introduced mainly for commercial targets, the requirement "clearly" should be seen as a judgmental and evaluative requirement, and should not end in a simple search of one botanical difference.
- The requirement "clearly distinguishable" should be assessed on characteristics important for the crop concerned; in this regard new important characteristics may be taken into consideration. Accordingly, a new type of characteristics ("relevant for the determination of clearly distinguishable") should be included into chapter 4.8 of TGP/3¹, and the test-guidelines should determine for each characteristic whether it is considered relevant for the determination of "clearly distinguishable".

¹ TGP/3: "GENERAL INTRODUCTION TO THE EXAMINATION OF DISTINCTNESS, UNIFORMITY AND STABILITY AND THE DEVELOPMENT OF HARMONIZED DESCRIPTIONS OF NEW VARIETIES OF PLANTS"

- The relevant authorities should have the continuing obligation to take into consideration additional characteristics proposed by applicants, if such additional characteristics are relevant for the determination of “clearly distinguishable”.
- Differences in unimportant characteristics only should not lead to a clearly distinguishable variety.
- In order to be clearly distinguishable, the distance between two varieties in regard to their important characteristics must be sufficiently broad. Particularly in regard to pseudo-qualitative characteristics and quantitative characteristics a difference of only one note in general should not be considered as a sufficiently broad distance. The decision should be made on a crop by crop basis.
- Varieties with the same note in the UPOV test-guideline for a given characteristic should not be considered to be clearly distinguishable with respect to that characteristic. If a difference was not clear in the first properly performed examination, the possibility to search for a difference in a subsequent growing trial, according to chapter 5.2.3.2.4 of TGP/9, should be eliminated.
- The possibility of randomized “blind” testing according to chapter 6.4 of TGP/9 in case of doubts over the distinctness of a candidate variety should also be eliminated. In case of a doubt over distinctness, the candidate variety cannot be considered to be clearly distinguishable from the reference variety.
- The decision on which characteristics are relevant for the determination of “clearly distinguishable”, on how many of such characteristics must differ from each other and on the distance between such characteristics should be made by a panel of experts, including representatives of the breeders of the crop concerned.

CIOPORA suggests that these changes, which first have to be included into the general UPOV TGP documents, should afterwards be included into the single UPOV test guidelines gradually, species by species, by the Technical Working Parties and the Technical Committee, taking into consideration the input of the breeders.

The changes should not have retroactive effects for varieties which are already on the market or for which protection has been granted.

CIOPORA position
on
The Scope of the Right

as approved by its Annual General Meeting on 02 April 2014 in The Hague, NL

Key statements:

- CIOPORA requests UPOV and its member countries to harmonize the definition of propagating material world-wide.
- Propagating material should include any material of a plant from which, whether alone or in combination with other parts or products of that or another plant, another plant with the same characteristics can be produced.
- CIOPORA requests the clarification that propagating material that (in a technical sense), has been harvested is considered exclusively as propagating material. Only material of a variety which is not capable, by any means, of producing another plant with the same characteristics should be considered to be harvested material in the legal sense.
- CIOPORA requests that harvested material should be protected directly and per se.
- CIOPORA requests that products that are obtained directly from material of a protected variety should be protected directly and per se.
- CIOPORA requests to include into the scope of rights the use of propagating material for the production of harvested material.
- CIOPORA requests that the EDV concept is clarified and implemented in a sufficiently broad way. CIOPORA is in the process of developing a comprehensive position on this matter.
- CIOPORA requests that the concept of varieties, which are not clearly distinguishable from the protected variety, will be restored and its meaning be sufficiently broadened, by establishing a sufficiently broad minimum distance between varieties.

Full text:

The scope of the Right

1. The protected material

According to Article 14 (1) of the UPOV 1991 Act the following acts in respect of the propagating material of the protected variety shall require the authorization of the breeder: (i) production or reproduction (multiplication), (ii) conditioning for the purpose of propagation, (iii) offering for sale, (iv) selling or other marketing, (v) exporting, (vi) importing and (vii) stocking for any of the purposes mentioned in (i) to (vi), above.

According to Article 14 (2) of the UPOV 1991 Act the acts as listed above shall apply also to harvested material, including entire plants and parts of plants, that has been obtained through the unauthorized use of propagating material of the protected variety, unless the breeder has had reasonable opportunity to exercise his right in relation to the said propagating material.

Additionally, according to Article 14 (3) of the UPOV 1991 Act, the UPOV members may – optionally - provide that the acts as listed above apply also to products made directly from harvested material of the protected variety falling within the provisions of paragraph (2) through the unauthorized use of the said harvested material, unless the breeder has had reasonable opportunity to exercise his right in relation to the said harvested material.

Although the terms are key terms in the UPOV system, the UPOV Acts do not include a definition of “propagating material” and “harvested material”.

As a consequence of the absent definition of propagating material in the UPOV Acts, many of the UPOV member states have a – to some extent significant - different definition for propagating material. As a consequence, one and the same material of a variety is considered in one country to be propagating material, while in another country it is considered to be harvested material. This causes confusion in the international trade and runs contrary to the aim of UPOV to harmonize the IP protection for plant varieties.

CIOPORA requests from UPOV and its member countries to harmonize the definition of propagating material world-wide. Propagating material should include any reproductive or vegetative material of a plant from which, whether alone or in combination with other parts or products of that or another plant, another plant with the same characteristics can be produced.

Additionally, CIOPORA requests the clarification that propagating material that (in a technical sense) has been harvested is considered exclusively as propagating material. Only material of a variety which is not capable, by any means, of producing another plant with the same characteristics should be considered to be harvested material in the legal sense.

Harvested material and products directly obtained from propagating or harvested material should be covered directly and without limitations.

Harvested material of protected vegetatively reproduced ornamental and fruit varieties needs to be protected directly and per se, without the restrictions and conditions as given in the current UPOV 1991 Act. Given the large number of countries with an increasing production and export of horticultural products, but without effective IP protection for plant varieties, the restricted protection of harvested material causes a lot of confusion, uncertainties and the severe risk of wide loopholes, which can make the protection for vegetatively reproduced ornamental and fruit varieties ineffective.

Protecting directly and per se harvested material is to the benefit of the honest growers and producers, too. They pay royalties anyway and suffer from unlicensed propagation and production of harvested material. Particularly imports of fruits from countries with limited or no protection can be controlled more effectively if the harvested material is protected directly.

Taking into consideration the fast growing amount of processed products, such as fruit juice, being processed in many parts of the world and being imported into other countries, products that are obtained directly from material of a protected variety must be protected directly and per se, too, as far as vegetatively reproduced ornamental and fruit varieties are concerned.

CIOPORA, therefore, requests that harvested material and products that are obtained directly from material of a protected variety should be protected directly and per se.

2. The acts which require the authorization of the title holder

According to Article 14 of the UPOV 1991 Act the following acts in respect of the propagating material of the protected variety shall require the authorization of the breeder: (i) production or reproduction (multiplication), (ii) conditioning for the purpose of propagation, (iii) offering for sale, (iv) selling or other marketing, (v) exporting, (vi) importing and (vii) stocking for any of the purposes mentioned in (i) to (vi), above.

In the horticultural industry the cut-flowers, fruits and plants are the main added-value products. The use of propagating material for the production of such products is one of the most important acts in the production chain. Therefore, it needs to be included within the scope of rights in order to allow the title-holders to license said acts.

Even under a broad concept of “propagating material”, as it is described above, the use of propagating material for the production of harvested material needs to be covered by the scope of the right.

CIOPORA strongly requests to include into the scope of rights the use of propagating material for the production of harvested material.

3. Varieties which fall under the scope of the protected variety

According to Article 14 (5) of the UPOV 1991 Act the authorization of the title holder is also required for acts listed in paragraphs (1) to (4) of this Article in regard to:

- (i) varieties which are essentially derived from the protected variety,
- (ii) varieties which are not clearly distinguishable from the protected variety and
- (iii) varieties whose production requires the repeated use of the protected variety.

In its 'Green Paper', CIOPORA articulated its appreciation about the extension of protection manifested in Article 14 (5) and expressed its hope that this Article corrects the existing loophole in regard to "cosmetic breeding". As a precondition to the closing of this loophole, CIOPORA mentioned: "These new provisions oblige the authorities in charge of the examination of distinctness to be more rigorous when evaluating the minimum distances between varieties for the grant of a title of protection."

However, in practice it turns out that the inclusion of Article 14 (5) does not keep its promises to better protect existing protected varieties. The EDV-concept is still heavily disputed and some circles try to limit this concept as far as even possible. Regarding varieties which are not clearly distinguishable from the protected variety it turns out that in today's reality the provision of Article 14 (5) (ii) of the UPOV 1991 Act is devoid of meaning, as even a very small difference between two varieties makes the varieties clearly distinguishable in the eyes of the examination offices (see also the CIOPORA Position Paper on Minimum Distance of 2 April 2014). Only the extension to "repeated use" seems to work, but this is not of importance for vegetatively reproduced ornamental and fruit varieties.

CIOPORA, therefore, requests that the EDV concept is clarified and implemented in a sufficiently broad way. CIOPORA is in the process of developing a comprehensive position on this matter.

Additionally, CIOPORA requests that the concept of varieties, which are not clearly distinguishable from the protected variety (Article 14 (5) (ii)) will be restored and its meaning be sufficiently broadened, by establishing a sufficiently broad minimum distance between varieties (see also the CIOPORA Position Paper on Minimum Distance of 2 April 2014)).

CIOPORA position
on
Breeders' exemption

as approved by its Annual General Meeting on 02 April 2014 in The Hague

Key statements:

- CIOPORA supports a breeders' exemption that contains the use of commercialized plant material of protected varieties for further breeding.
- CIOPORA requests that the commercialization of any variety, which falls under the scope of a protected variety, shall require the authorization of the title holder of the protected variety.
- The breeders' exemption should read: The breeder's right shall not extend to acts done for the purpose of breeding other varieties.

Full Text:

Breeders' exemption

According to Article 15 (1) (iii) of the UPOV 1991 Act the breeder's right shall not extend to acts done for the purpose of breeding other varieties, and, except where the provisions of Article 14 (5) apply, acts referred to in Article 14 (1) to (4) in respect of such other varieties.

The breeders' exemption is imbedded in the UPOV PBR system since its beginning. It is a unique feature in IP protection systems. The underlying rationale for the breeders' exemption was that without unrestricted access to existing genetic variation advances in breeding would be hampered.

The current breeders' exemption consists of two components:

- The free use of protected plant material for further breeding
- The - limited - commercialization of the new breeding result.

The free use of protected plant material for further breeding is the component of the breeders' exemption which has not changed since the beginning of the UPOV system.

What has changed in the course of time is the limitation of the commercialization of the breeding result: while in the UPOV 1961 Act and 1978 Act (Article 5.3) the breeders' exemption was limited only when the repeated use of the protected variety is necessary for the commercial production of another variety, in the UPOV 1991 Act, Article 15 (1) (iii) in combination with Article 14 (5) was meant to limit the breeders' exemption to a greater extent - at least on paper - by prohibiting the free commercialization of three groups of varieties:

- (i) varieties which are essentially derived from the protected variety (where the protected variety is not itself an essentially derived variety),
- (ii) varieties which are not clearly distinguishable from the protected variety and
- (iii) varieties whose production requires the repeated use of the protected variety.

From a systematical point of view, the reference in Article 15 (1) (iii) to the varieties listed in Article 14 (5) (ii) and (iii) is incorrect: only varieties which are essentially derived from the protected variety are necessarily the result of breeding with the protected variety. Varieties which are not clearly distinguishable from the protected variety can be developed by using other material than the protected variety (e.g. the same parents of the protected variety), and varieties whose production requires the repeated use of the protected variety are usually the result of sexual reproduction of plants, but not of breeding work. The main reason for this systematical error is obviously that UPOV on the one hand wanted to maintain the "traditional" possibility

to commercialize varieties resulting from breeding with a protected variety, while on the other hand it wanted to further limit the breeders' exemption by prohibiting the commercialization of two more types of varieties.

In order to have a systematically correct structure, the breeders' exemption should be re-structured. Additionally, in order to adapt the PBR system to the current environment in modern breeding and to make it suitable for the challenges in the future, the breeders' exemption should be fine-tuned.

Additionally, it should be clarified that the free use covers only material, which has been put on the market by the breeder or with his consent. Plant material, which for example has been handed over to an examination office for purposes of DUS examination, should not be freely available for further breeding. The same applies to material which has for example been propagated illegally or has been stolen from the breeder or obtained by another unlawful activity.

In conclusion, CIOFORA is in favor of the free use of commercialized plant material of protected varieties for further breeding, provided that the commercialization of the breeding results does not weaken the exclusive right in the protected innovation.

CIOFORA, therefore, supports a breeders' exemption that contains the use of commercialized plant material of protected varieties for further breeding.

CIOFORA requests that the commercialization of any variety, which falls under the scope of a protected variety, shall require the authorization of the title holder of the protected variety².

Such varieties shall be:

- varieties which are not clearly distinguishable from the protected variety
- varieties which are essentially derived from the protected variety
- varieties whose production requires the repeated use of the protected variety. Therefore, for the sake of clarification and convenience, the second part of the current breeders' exemption (... and, except where the provisions of Article 14 (5) apply, acts referred to in Article 14 (1) to (4) in respect of such other varieties) should be deleted and the breeders' exemption should read:

The breeder's right shall not extend to acts done for the purpose of breeding other varieties.

Such change of the wording of the breeders' exemption will correct its current structure and will, in combination with a clarification of the EDV concept and a broadening of the Minimum Distance strengthen the breeders' right.

² This solution is comparable with the "limited" breeders' exemption in some Patent laws, such as the Unitary Patent in the EU and the Patent laws in Germany, France and Switzerland

CIOPORA position
on
Exhaustion

as approved by its Annual General Meeting on 02 April 2014 in The Hague

The 1991 Act of the UPOV Convention has introduced in its Article 16 the principle of “Exhaustion” of the PBR; a principle, which is known in all Intellectual Property Protection systems. The UPOV 1991 Act establishes exhaustion in form of national exhaustion³. National exhaustion has the effect that products, which have been marketed by the title- holder or with his consent in the protected territory, fall in the public domain in this territory, so that the title-holder can exert his right to said products only once in this territory.

The exhaustion provision in the UPOV 1991 Act reads:

Article 16 Exhaustion of the Breeder’s Right

- (1) [Exhaustion of right] The breeder’s right shall not extend to acts concerning any material of the protected variety, or of a variety covered by the provisions of Article 14(5), which has been sold or otherwise marketed by the breeder or with his consent in the territory of the Contracting Party concerned, or any material derived from the said material, unless such acts
 - (i) involve further propagation of the variety in question or
 - (ii) involve an export of material of the variety, which enables the propagation of the variety, into a country which does not protect varieties of the plant genus or species to which the variety belongs, except where the exported material is for final consumption purposes.
- (2) [Meaning of “material”] For the purposes of paragraph (1), “material” means, in relation to a variety:
 - (i) propagating material of any kind,
 - (ii) harvested material, including entire plants and parts of plants, and
 - (iii) any product made directly from the harvested material.
- (3) [“Territory” in certain cases] For the purposes of paragraph (1), all the Contracting Parties which are member States of one and the same intergovernmental organization may act jointly, where the regulations of that organization so require, to assimilate acts done on the territories of the States members of that organization to acts done on their own territories and, should they do so, shall notify the Secretary-General accordingly⁴.

On one side the exhaustion provision in the UPOV 1991 Act is very broad. It covers not only acts concerning the plant material marketed by the title-holder or with his consent, but also acts concerning any material derived from said material. On the other side it explicitly excludes specific acts from the exhaustion, namely the further propagation of the variety in question and the export of specified material into countries which do not provide for protection for the genus or species concerned.

CIOPORA is of the opinion that the exhaustion provision in the UPOV Act should be modernized and adapted to the current circumstances.

³ In contrast to this the concept of international exhaustion includes that a product, which has been marketed somewhere in the world by the title-holder or with his consent, falls into the public domain in the protected territory.

⁴ Here the principle of regional exhaustion, as practiced e.g. in the EU, is allowed, too.

It is obvious and correlates to the exhaustion rules in other IP systems that the PBR in a territory in principle shall be exhausted for material, which has been marketed by the title holder or with his consent in the territory where the PBR is effective.

Taking into consideration the heterogeneous protection of plant varieties in the world and the capacity of propagation material to reproduce itself true-to-type, it is reasonable to limit the exhaustion of the PBR for the export of the propagating material⁵ into a country, which does not protect varieties of the plant genus or species to which the variety belongs.

As far as material is concerned, which is produced from the material marketed by the title-holder or with his consent (in the following "produced material"), the PBR should be exhausted only for produced material, if and to such extent its production has been licensed, and provided that the produced material is not subsequently used for other propagation or multiplication.

In the first instance it is a matter of the parties concerned (title-holder and licensee) to draft the scope of the license and to precisely describe the acts covered by the license.

However, in that regard it can be assumed that, if for example the title-holder or his licensee sells apple trees to an apple grower without any specific agreement, the apple grower has been granted an unlimited implied license to produce and sell apples from these trees in the territory, where the PBR is valid. A cut-rose grower buying rose plants without a specific agreement has the implied right to produce cut-roses for the purpose of selling them – directly or via the trade chain - to end-consumers in the territory, where the PBR is valid.

Once more it shall be clarified that exhaustion of any PBR shall be strictly limited to the very territory where the PBR is in effect. The marketing of material in a protected territory shall trigger the exhaustion only for this very territory. Any import of said material or material produced from it into another territory, where a (parallel) PBR exists, requires a separate authorization (license) of the respective title-holder. CIOPORA is opposed to any form of international exhaustion.

[End of Annex XIII, Appendix, and of document]

⁵ Propagating material as described in the position paper "Scope of the Right".