



CAJ-AG/07/2/8

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INTERNATIONAL UNION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS
GENEVA

**ADMINISTRATIVE AND LEGAL COMMITTEE
ADVISORY GROUP**

**Second Session
Geneva, October 26, 2007**

REPORT

adopted by the Administrative and Legal Committee Advisory Group

Introduction

1. The Administrative and Legal Committee Advisory Group (hereinafter referred to as the "CAJ-AG") held its second session in Geneva on October 26, 2007.
2. The list of participants is reproduced in the Annex to this document.

Opening of the Session

3. The session was opened and chaired by the Vice Secretary-General, who welcomed the participants.

Adoption of the Agenda

4. The CAJ-AG adopted the agenda, as proposed in document CAJ-AG/07/2/1 Rev.2.

Article 5(2) of the 1991 Act: Conditions of Protection (Article 6(2) of the 1978 Act); and Article 18 of the 1991 Act: Measures Regulating Commerce (Article 14 of the 1978 Act)

5. The Vice Secretary-General introduced documents CAJ-AG/07/2/2 and UPOV/EXN/COND Draft 1.

UPOV/EXN/COND Draft 1, Section II

6. The CAJ-AG noted that any guidance on the definition of breeder would be considered in the Explanatory Notes on Article 1 under the UPOV Convention, which was planned for consideration by the CAJ-AG in October 2008.

UPOV/EXN/COND Draft 1, Section III

7. The CAJ-AG agreed that it would be helpful to harmonize the text in paragraphs 7 and 8.

8. Discussion took place regarding the inclusion of the final sentence of paragraph 11 which stated that “Furthermore, since the legislation on measures regulating commerce and the legislation dealing with the grant of breeders’ rights pursue different objectives, it is appropriate to include them in different legislation, although such legislation should be compatible and mutually supportive.” It was noted that some members of the Union included measures regulating commerce (e.g. National List and seed certification) in the same law as that dealing with the grant of breeders’ rights. However, it was observed that, in such cases, it was clear that the measures regulating commerce and the measures dealing with the grant of breeders’ rights were independent of each other.

9. The CAJ-AG discussed the possibility of adding a summary of the matters covered in Section III (c) “No other conditions”, but concluded that it would not be appropriate.

Article 14(2) of the 1991 Act: Acts in Respect of Harvested Material (Article 5(4) of the 1978 Act); and Article 16 of the 1991 Act: Exhaustion of the Breeder’s Right

10. The Technical Director introduced documents CAJ-AG/07/2/3, CAJ-AG/07/2/3 Add., CAJ-AG/07/2/7, UPOV/EXN/HRV Draft 1 and recent contributions received on October 25, 2007, from the International Association of Horticultural Producers (AIPH) and Mr. Huib Ghijzen (document CAJ-AG/07/2/7 Add.).

11. In document UPOV/EXN/HRV Draft 1, paragraph 4, the CAJ-AG agreed to replace “propagation” by “production or reproduction”. With regard to the comments made by CIOFORA (see document CAJ-AG/07/2/7), the CAJ-AG agreed with the explanation as it was presented in paragraph 4, but concluded that the text should be simplified to avoid confusion.

12. In document UPOV/EXN/HRV Draft 1, Section II (b) “Unauthorized use”, the CAJ-AG considered the comments received from the International Seed Federation (ISF) and AIPH on whether the notion of “unauthorized use” was limited to the acts under the scope of the breeders’ rights as established on Article 14(1) of the UPOV Convention, or whether it should be understood in a broader sense. The CAJ-AG agreed that the Office of the Union should review the history of the development of Article 14(2) of the UPOV Convention for guidance

on the intended meaning of “unauthorized use”. In the next draft it was agreed that it would be more appropriate to provide guidance in the form of illustrative examples. The CAJ-AG noted that the remaining sections of the document were linked to the explanation in Section II(b) and agreed that no further discussion would be worthwhile until a new draft of that section had been produced.

13. In document UPOV/EXN/HRV Draft 1, Section II (c) “Reasonable opportunity”, the CAJ-AG agreed to reverse the order of paragraphs 10 and 11 and to extend the examples in Section II (d) in order to provide further guidance.

14. In document UPOV/EXN/HRV Draft 1, Section II (d) “Illustrative examples”, the CAJ-AG agreed that consideration should be given to adding an additional example to cover farm-saved seed in Australia, where the government allows the saving of seed by farmers, but which does not constitute authorized use unless an authorization is given by the breeder in the form of a contract.

15. The CAJ-AG agreed that a new draft of document UPOV/EXN/HRV should be prepared for its third session in October 2008.

16. With regard to document CAJ-AG/07/2/3, the CAJ-AG agreed that it would not be appropriate to seek to develop guidance on: the definition of material under Article 16(2)(iii); the optional provision of the scope of the breeder’s right in Article 14(3) (“Acts in respect of certain products”) of the 1991 Act of the UPOV Convention; and the consideration of the interaction between contract law/practices and provisions of the UPOV Convention, such as the exceptions to the breeder’s right.

Article 14(5) of the 1991 Act: Essentially Derived and Certain Other Varieties

17. The Senior Counsellor introduced documents CAJ-AG/07/2/4, CAJ-AG/07/2/7 and UPOV/EXN/EDV Draft 1.

18. The CAJ-AG agreed with the explanation in paragraph 12 (indicated as paragraph 15), but considered that the wording should be modified for the sake of clarity. It also agreed to the deletion of “It is important to recall that”, at the beginning of paragraph 13 (indicated as paragraph 12). On that basis, it agreed that a revised draft should be presented to the Administrative and Legal Committee (CAJ).

19. With regard to document CAJ-AG/07/2/4, paragraph 5(c), the CAJ-AG agreed that it would not be appropriate to seek to develop guidance for licensing agreements with respect to essentially derived varieties nor for the concepts of “derived from”, “predominantly derived” or “essential characteristics”.

Article 15 of the 1991 Act: Exceptions to the Breeder’s Right (Article 5(3) of the 1978 Act)

20. The Senior Counsellor introduced documents CAJ-AG/07/2/5, CAJ-AG/07/2/7 and UPOV/EXN/EXC Draft 1.

21. With regard to document UPOV/EXN/EXC Draft 1, the CAJ-AG agreed:
- to modify the illustration on page 7 to avoid an interpretation that variety C is necessarily a hybrid;
 - to reiterate in Section II (c) that, for some crops/species, it would previously have been decided that there would be no farmer’s privilege;
 - to indicate in paragraph 18 that the factors might be considered in combination;
 - to add the amount/value of the crop harvested by the farmer as another factor which might be considered, in order to take into account the productivity of the land;
 - first sentence of paragraph 21 to read “An example of another factor which might be considered in relation to reasonable limits and safeguarding the legitimate interests of the breeder is the proportion, or amount, of the crop concerned which would be the subject of the farmer’s privilege.”
 - to incorporate remuneration to the breeder as a way of safeguarding the legitimate interest of the breeders;
 - text in paragraph 23 shown in strikethrough to be deleted;
 - paragraph 24 to refer to “harvested material” instead of “own seed”; and
 - to consider whether to delete paragraph 25 or to replace it with a reference to Article 35(2) of the 1991 Act of the UPOV Convention to explain the circumstances in the United States of America.
22. The CAJ-AG agreed that a revised draft, incorporating the comments above, should be presented to the CAJ.
23. With regard to document CAJ-AG/07/2/5, paragraph 6(b), the CAJ-AG agreed that it would not be appropriate to seek to develop explanatory notes to cover subjects beyond the ones already contained in document UPOV/EXN/EXC Draft 1. In particular, concerning the possibility of adding a clause in a contract to modify the exceptions to breeders’ rights, the CAJ-AG considered that that was a matter for each UPOV member to consider with respect to its own legislation.
- Article 30(1)(i) of the 1991 Act of the UPOV Convention: Implementation of the Convention: Provide for Appropriate Legal Remedies for the Effective Enforcement of Breeders’ Rights (Article 30(1)(a) of the 1978 Act of the UPOV Convention)
24. The Vice Secretary-General introduced document CAJ-AG/07/2/6.
25. The CAJ-AG took note of the information and made no recommendation for the development of guidance with respect to appropriate legal remedies for the effective enforcement of breeders’ rights.

Article 6 of the 1991 Act of the UPOV Convention: Explanatory Notes on Novelty Under the UPOV Convention (Article 6(1)(b) of the 1978 Act of the UPOV Convention)

26. The Technical Director introduced documents CAJ-AG/07/2/7 and UPOV/EXN/NOV Draft 1.

27. With regard to paragraph 5 of document UPOV/EXN/NOV Draft 1, the CAJ-AG noted that there were different views in respect of the assessment of novelty in the case of varieties which were inbred (parent) lines of hybrid varieties and concluded that it would be difficult to agree a recommendation on this subject.

28. The CAJ-AG agreed the following changes to document UPOV/EXN/NOV Draft 1:

- to delete paragraph 5;
- paragraph 6: second sentence to begin a new paragraph to read “The following acts may be considered not to result in the loss of novelty [...]”; to delete subparagraph iii); to refer to the successor in title in subparagraph iv); to clarify subparagraph v); and to include the case of officially recognized exhibitions;
- paragraph 7: to clarify that “longer evaluation” refers to the period for multiplication; and
- section (f) (paragraph 11 and Table) to be deleted.

Date and Program

29. The CAJ-AG agreed to hold its third session in Geneva, on October 31, 2008. In relation to the consideration of explanatory notes, the CAJ-AG noted that the proposed program for the CAJ and CAJ-AG would be as follows:

(a) *Explanatory Notes to be considered by the CAJ by correspondence*

Explanatory Notes on the Right of Priority under the UPOV Convention

Explanatory Notes on the Nullity of the Breeder’s Right under the UPOV Convention

Explanatory Notes on the Cancellation of the Breeder’s Right under the UPOV Convention

30. The above draft explanatory notes will be circulated to the CAJ. In the absence of major concerns with those draft explanatory notes, revisions will be made on the basis of any comments received and the materials will be brought into use by the Office of the Union. If necessary, to address any major concerns, the advice of the CAJ-AG will be sought at its third session on October 31, 2008.

(b) Explanatory Notes to be considered by the CAJ

31. Draft explanatory notes to be considered by the CAJ at its fifty-seventh session, to be held in Geneva on April 10, 2008, would be as follows:

Explanatory Notes on Essentially Derived Varieties under the UPOV Convention
(document UPOV/EXN/EDV Draft 2)

Explanatory Notes on Exceptions to the Breeder's Right under the UPOV Convention
(document UPOV/EXN/EXC Draft 2)

Explanatory Notes on Novelty under the UPOV Convention
(document UPOV/EXN/NOV Draft 2)

32. The CAJ-AG agreed to propose to the CAJ that no further action be taken for the development of explanatory notes on Article 30(1)(i) of the 1991 Act of the UPOV Convention: Implementation of the Convention: (i) Provide for appropriate legal remedies for the effective enforcement of breeders' rights (Article 30(1)(a) of the 1978 Act of the UPOV Convention).

(c) Proposal for development of explanatory notes

33. The CAJ-AG agreed to propose that the CAJ consider the development of explanatory notes on Provisional Protection under the UPOV Convention.

(d) Explanatory Notes to be considered at the third session of the CAJ-AG

34. Draft explanatory notes to be considered at the third session of the CAJ-AG to be held in Geneva on October 31, 2008, would be as follows:

Explanatory Notes on Acts in Respect of Harvested Material under the UPOV Convention (document UPOV/EXN/HRV Draft 2)

Explanatory Notes on the Definition of Breeder under the 1991 Act of the UPOV Convention

Explanatory Notes on the Definition of Variety under the 1991 Act of the UPOV Convention

Closing of the Session

35. The CAJ-AG agreed that a draft report should be prepared by the Office of the Union and distributed to its participants for adoption by correspondence.

36. The present report has been adopted by correspondence.

[Annex follows]

ANNEX

LIST OF PARTICIPANTS

(dans l'ordre alphabétique des noms français des membres/
in the alphabetical order of the names in French of the members/
in alphabetischer Reihenfolge der französischen Namen der Mitglieder/
por orden alfabético de los nombres en francés de los miembros)

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