



CAJ/65/2

ORIGINAL: English

DATE: February 9, 2012

INTERNATIONAL UNION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS

Geneva

ADMINISTRATIVE AND LEGAL COMMITTEE**Sixty-Fifth Session
Geneva, March 29, 2012****DEVELOPMENT OF INFORMATION MATERIALS
CONCERNING THE UPOV CONVENTION***Document prepared by the Office of the Union*Introduction

1. The Administrative and Legal Committee (CAJ), at its fifty-second session, held in Geneva on October 24, 2005, agreed an approach for the preparation of information materials concerning the UPOV Convention, as explained in paragraphs 8 to 10 of document CAJ/52/4. It also agreed to the establishment of an advisory group to the CAJ ("CAJ-AG") to assist in the preparation of documents concerning such materials, as proposed in paragraphs 11 to 14 of document CAJ/52/4 (see paragraph 67 of document CAJ/52/5, Report).
2. The agreed approach is summarized as follows: the Office of the Union will develop certain draft materials which it considers covers aspects of a straightforward nature and will circulate these to the CAJ for comments within a specified time. In other cases, where it is considered that there are difficult issues, where discussions at a CAJ session would be important for the development of suitable information materials, and also in cases where the drafts on seemingly straightforward materials provoke unexpected concerns when circulated for comments, it was agreed that the assistance of the CAJ-AG would be sought prior to the CAJ being invited to discuss those matters at its sessions.
3. An overview of the development of the information materials is provided in the Annex to this document.

4. The structure of this document is as follows:

I. REPORT OF THE WORK OF THE CAJ-AG AT ITS SIXTH SESSION

- (a) Explanatory Notes on the Definition of Breeder under the 1991 Act of the UPOV Convention
- (b) Explanatory Notes on Acts in Respect of Harvested Material under the 1991 Act of the UPOV Convention
- (c) Explanatory Notes on Essentially Derived Varieties under the UPOV Convention (revision)
- (d) Matters arising after the grant of a breeder's right
- (e) Objectives of the possible development of a document on the exhaustion of the breeder's right under the 1991 Act of the UPOV Convention
- (f) Propagation and Propagating Material

II. REVISION OF DOCUMENT UPOV/INF/6 "GUIDANCE FOR THE PREPARATION OF LAWS BASED ON THE 1991 ACT OF THE UPOV CONVENTION" (DOCUMENT UPOV/INF/6/2)

III. DOCUMENT TO BE CONSIDERED BY THE ADMINISTRATIVE AND LEGAL COMMITTEE AT ITS SIXTY-FIFTH SESSION: ALTERNATIVE DISPUTE SETTLEMENT MECHANISMS (DOCUMENT UPOV/INF/ADS DRAFT 1)

IV. PROGRAM FOR THE DEVELOPMENT OF INFORMATION MATERIALS

- (a) Program to update the "UPOV Model Plant Breeders' Rights Gazette" (document UPOV/INF/5)
- (b) Work program for the development of information materials for the seventh session of the CAJ-AG, to be held in Geneva in October 2012, and for the sixty-sixth session of the CAJ, to be held in Geneva in October 2012

I. REPORT OF THE WORK OF THE CAJ-AG AT ITS SIXTH SESSION

5. The CAJ-AG held its sixth session in Geneva on October 18, 2011. The Report of the CAJ-AG at its sixth session (document CAJ-AG/11/6/7) has been posted in the CAJ-AG and CAJ/65 sections of the UPOV website. The following matters were considered by the CAJ-AG at its sixth session.

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

6. The CAJ-AG, at its sixth session, considered document UPOV/EXN/BRD Draft 4 “Explanatory Notes on the Definition of Breeder under the 1991 Act of the UPOV Convention” and the comments of the European Coordination Via Campesina (ECVC).

7. The CAJ-AG agreed that the Office of the Union should prepare a revised version of the “Explanatory Notes on the Definition of Breeder under the 1991 Act of the UPOV Convention” (document UPOV/EXN/BRD Draft 5) for consideration by the CAJ-AG at its seventh session, to be held in October 2012 (see document CAJ-AG/11/6/7 “Report”, paragraph 8).

(b) Explanatory Notes on Acts in Respect of Harvested Material under the 1991 Act of the UPOV Convention

8. The CAJ-AG, at its sixth session, considered document UPOV/EXN/HRV Draft 6 “Explanatory Notes on Acts in Respect of Harvested Material under the 1991 Act of the UPOV Convention” and the comments of the Russian Federation and ECVC.

9. The CAJ-AG agreed that the Office of the Union should prepare a revised version of the “Explanatory Notes on Acts in Respect of Harvested Material under the 1991 Act of the UPOV Convention” for consideration by the CAJ-AG, at its seventh session, to be held in October 2012. In order that the matter might be advanced in the meantime, it was agreed that the Office of the Union should consider the preparation of an interim draft, which might be circulated for comment by correspondence (see document CAJ-AG/11/6/7 “Report”, paragraph 11).

(c) Explanatory Notes on Essentially Derived Varieties under the UPOV Convention (revision)

(i) *Revision of the “Explanatory Notes on Essentially Derived Varieties Under the 1991 Act of the UPOV Convention”(document UPOV/EXN/EDV/2 Draft 1)*

10. The CAJ-AG considered document UPOV/EXN/EDV/2 Draft 1 “Explanatory Notes on Essentially Derived Varieties under the 1991 Act of the UPOV Convention (revision)”, and the comments of ECVC and International Community of Breeders of Asexually Reproduced Ornamental and Fruit Varieties (CIOPORA), and agreed that a revised version of the document be prepared for consideration by the CAJ-AG, at its seventh session (see document CAJ-AG/11/6/7 “Report”, paragraph 12 and 13).

(ii) *Relationship between Article 14(5)(b)(i) and (iii) of the 1991 Act of the UPOV Convention / Matters concerning essentially derived varieties*

11. The CAJ-AG concluded that it would be appropriate to continue to consider whether to develop further guidance on the concept of EDV in a future revision of document UPOV/EXN/EDV “Explanatory Notes on Essentially Derived Varieties Under the 1991 Act of the UPOV Convention”. It agreed that consideration should be given to including an explanation of the relationship between the provisions of Article 14(5)(b)(i) and (iii) of the 1991 Act of the UPOV Convention and the issues raised by the Delegation of Japan with regard to the exercise of plant breeders’ rights in relation to essentially derived varieties (see document CAJ-AG/11/6/3, paragraphs 30 and 31). It agreed that the documents CAJ/46/7 “The Notion of Essentially Derived Varieties in the Breeding of Ornamental Varieties” and Annex II to document CAJ/47/8 “Report” should be considered with regard to guidance on the concept of EDV (see document CAJ-AG/11/6/7 “Report”, paragraph 19).

12. As a first step, the CAJ-AG agreed that information on the systems in the European Union and Australia for essentially derived varieties and other relevant examples be provided to the Office of the Union for presentation to the CAJ-AG at its seventh session in October 2012 (see document CAJ-AG/11/6/7 “Report”, paragraph 20).

(iii) *The use of information of the initial variety to obtain essentially derived varieties*

13. The CAJ-AG agreed that the explanation on “Predominant derivation – use of information” made by the International Seed Federation (ISF) during its power point presentation be provided to the Office of the Union for consideration by the CAJ-AG at its seventh session (see document CAJ-AG/11/6/7 “Report”, paragraph 21).

(d) Matters arising after the grant of a breeder’s right

14. The CAJ-AG agreed that agenda item 5 “Matters arising after the grant of a breeder’s right (document CAJ-AG/11/6/4)” should be considered by the CAJ-AG at its seventh session (see document CAJ-AG/11/6/7 “Report”, paragraph 22).

(e) Objectives of the possible development of a document on the exhaustion of the breeder’s right under the 1991 Act of the UPOV Convention

15. The CAJ-AG considered documents CAJ-AG/10/5/4 and CAJ-AG/11/6/5.

16. In recognition of the complexity of the legislation and jurisprudence concerning the exhaustion of intellectual property rights, the CAJ-AG agreed to propose to the CAJ that it should not seek to develop guidance on exhaustion of the breeder’s right under the 1991 Act of the UPOV Convention beyond the guidance provided in document UPOV/INF/6 “Guidance for the preparation of laws based on the 1991 Act of the UPOV Convention” (see document CAJ-AG/11/6/7 “Report”, paragraph 24).

(f) Propagation and Propagating Material

17. The CAJ-AG considered document CAJ-AG/11/6/6, the comments of the Russian Federation and the European Seed Association (ESA), and the presentations made by CIOPORA and ISF at the session.

18. The CAJ-AG noted that many plant cells have the potential to regenerate a whole plant (“totipotency”) and agreed that there was a risk that the use of certain terms to define propagating material could be interpreted in a way that would cover virtually any harvested material. In that regard, the CAJ-AG agreed that any guidance on propagating material would need to be consistent with the provisions for harvested material in the 1991 Act of the UPOV Convention (see document CAJ-AG/11/6/7 “Report”, paragraph 27).

19. The CAJ-AG agreed that the Office of the Union should invite proposals for the development of guidance on the notion of “Propagation and propagating material”, with due regard to the comments of the CAJ-AG in paragraph 18, for consideration by the CAJ-AG at its seventh session (see document CAJ-AG/11/6/7 “Report”, paragraph 28).

20. The CAJ is invited to note the report on the work of the CAJ-AG at its sixth session, as provided in document CAJ-AG/11/6/7 “Report” and summarized in paragraphs 5 to 19, above.

II. REVISION OF DOCUMENT UPOV/INF/6 “GUIDANCE FOR THE PREPARATION OF LAWS BASED ON THE 1991 ACT OF THE UPOV CONVENTION” (DOCUMENT UPOV/INF/6/2)

21. At its forty-fifth ordinary session, held in Geneva on October 20, 2011, the Council adopted the revision of document UPOV/INF/6 “Guidance for the preparation of laws based on the 1991 Act of the UPOV Convention” (document UPOV/INF/6/2), on the basis of the amendments to document UPOV/INF/6/1, as presented in Annex II to document C/45/13 (see document C/45/17 “Report on the Decisions”, paragraph 17). Document UPOV/INF/6/2 can be found at http://www.upov.int/information_documents/en/list.jsp

22. The CAJ is invited to note the adoption of the revision of document UPOV/INF/6 “Guidance for the preparation of laws based on the 1991 Act of the UPOV Convention” (document UPOV/INF/6/2).

III. DOCUMENT TO BE CONSIDERED BY THE ADMINISTRATIVE AND LEGAL COMMITTEE AT ITS SIXTY-FIFTH SESSION: ALTERNATIVE DISPUTE SETTLEMENT MECHANISMS (DOCUMENT UPOV/INF/ADS DRAFT 1)

23. The CAJ at its sixty-fourth session, held in Geneva on October 17, 2011, noted the information provided in document CAJ/64/3 "Alternative Dispute Settlement Mechanisms" and its Annexes.

24. The CAJ, at its sixty-fourth session, agreed to the development of a document, for its sixty-fifth session in March 2012, to provide information on alternative dispute settlement mechanisms for breeders' rights. The CAJ agreed that a clarification should be included in the document to explain the nature of the document and, in particular, to specify that the purpose of the document was the provision of information and not to provide UPOV dispute settlement mechanisms (see document CAJ/64/11 "Report on the Conclusions", paragraph 10 and 11).

25. The CAJ is invited to consider document "Alternative Dispute Settlement Mechanisms" (document UPOV/INF/ADS Draft 1).

IV. PROGRAM FOR THE DEVELOPMENT OF INFORMATION MATERIALS

(a) Revision of the "UPOV Model Plant Breeders' Rights Gazette" (document UPOV/INF/5)

26. The "UPOV Model Plant Breeders' Rights Gazette" (document UPOV/INF/5) was adopted by the Council on October 18, 1979 (see document C/XIII/17, paragraphs 12 and 12a). A copy of document UPOV/INF/5 has been posted on the CAJ/65 section of the UPOV website for information.

27. The CAJ at its sixty-fourth session, held in Geneva on October 17, 2011, agreed that document UPOV/INF/5 should be updated in order to:

(a) reflect the wording of the 1991 Act of the UPOV Convention and of documents recently adopted by the Council (e.g. UPOV Model Form for the Application of Plant Breeders' Rights (document TGP/5 Section 2/3));

(b) address relevant developments in the formats of national/regional Gazettes of members of the Union; and

(c) simplify the structure of the document (see document CAJ/64/11 "Report on the Conclusions", paragraph 8).

28. Based on the above approach, the CAJ agreed that a program for the updating of document UPOV/INF/5 would be presented for consideration by the CAJ at its sixty-fifth session (see document CAJ/64/11 "Report on the Conclusions", paragraph 9).

29. It is proposed that a document providing background information on the proposed changes and a first draft of the revision of document UPOV/INF/5 be presented to the CAJ at its sixty-seventh session, to be held in March 2013.

30. The CAJ is invited to consider the program for the updating of document UPOV/INF/5 "UPOV Model Plant Breeders' Rights Gazette" (document UPOV/INF/5), as set out in paragraph 29 of this document.

(b) Work program for the development of information materials for the sixth session of the CAJ-AG, to be held in Geneva in October 2011, and for the sixty-fourth session of the CAJ, to be held in Geneva in October 2011

31. The CAJ-AG, at its sixth session, agreed the following program for its seventh session, to be held in October 2012, subject to approval by the CAJ at its sixty-fifth session (see document CAJ-AG/11/6/7 "Report", paragraph 29):

1. Opening of the session
2. Adoption of the agenda
3. Explanatory Notes
 - (a) UPOV/EXN/BRD: Explanatory Notes on the Definition of Breeder under the 1991 Act of the UPOV Convention
 - (b) UPOV/EXN/HRV: Explanatory Notes on Acts in Respect of Harvested Material under the 1991 Act of the UPOV Convention
4. Explanatory Notes on Essentially Derived Varieties under the 1991 Act of the UPOV Convention (revision)
5. Matters Arising after the Grant of a Breeder's Right
6. Propagation and Propagating Material
7. Matters referred by the CAJ to the CAJ-AG for consideration since the sixth session of the CAJ-AG
8. Date and program for the eighth session

32. Subject to the endorsement of the CAJ at its sixty-fifth session, to be held in Geneva on March 29, 2012, the CAJ-AG proposed that the sixty-sixth session of the CAJ be held on the morning of October 29, 2012, and that the seventh session of the CAJ-AG be held on the afternoon of October 29 and on October 30, 2012.

33. The CAJ-AG recalled that the terms of reference of the CAJ-AG provided that “[t]he CAJ members and observers would be able to send comments directly to the advisory group. [...] Observer organizations, in particular those representing the interests of breeders, might be invited by the advisory group to present their views on a particular provision of the 1991 Act to assist in [its] work” (see document CAJ/52/4, paragraphs 13 and 14, and document CAJ/52/5 “Report”, paragraph 67).

34. The CAJ-AG noted that, as was the case for other UPOV bodies, documents of the CAJ-AG should be posted six weeks prior to the relevant CAJ-AG session. In order to ensure that the CAJ-AG had sufficient time to consider written comments, the CAJ-AG agreed that comments should be sent, in English, to the Office of the Union at least two weeks prior to the relevant session of the CAJ- AG.

35. The CAJ-AG agreed that, in cases where written comments were received from an observer organization, the CAJ-AG would invite the observer organization to the relevant part of the next CAJ-AG session if the presence of the organization was considered necessary to present its views or to provide further explanations concerning its written comments. In that regard, the CAJ-AG agreed that the CAJ-AG would, if necessary, decide by correspondence whether to invite the observer organization to the relevant part of the CAJ-AG session.

36. On the basis of comments received for the sixth session of the CAJ-AG, the CAJ-AG agreed at its sixth session to invite CIOPORA, ECVV, and ISF to the relevant part of the seventh session of the CAJ-AG.

37. *The CAJ is invited to:*

(a) approve the work program for the development of information materials for the seventh session of the CAJ-AG, as set out in paragraph 31, above;

(b) consider the date for the seventh session of the CAJ-AG under item “Program for the sixty-sixth session” of the CAJ, as set out in paragraph 32, above; and

(c) note the arrangements concerning the posting of CAJ-AG documents and comments, and the ad hoc invitations to observer organizations, as set out in paragraphs 33 to 36, above.

OVERVIEW OF THE DEVELOPMENT OF INFORMATION MATERIALS

| Latest reference | Explanatory Notes on: | Status |
|------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------|----------------------------------------|
| UPOV/EXN/GEN/1 | Genera and Species to be Protected under the 1991 Act of the UPOV Convention | Adopted by the Council in October 2009 |
| UPOV/EXN/NAT/1 | National Treatment under the 1991 Act of the UPOV Convention | Adopted by the Council in October 2009 |
| UPOV/EXN/NOV/1 | Novelty under the UPOV Convention | Adopted by the Council in October 2009 |
| UPOV/EXN/PRI/1 | Right of Priority under the UPOV Convention | Adopted by the Council in October 2009 |
| UPOV/EXN/PRP/1 | Provisional Protection under the UPOV Convention | Adopted by the Council in October 2009 |
| UPOV/EXN/EDV/1 | Essentially Derived Varieties under the 1991 Act of the UPOV Convention | Adopted by the Council in October 2009 |
| UPOV/EXN/EXC/1 | Exceptions to the Breeder's Right under the 1991 Act of the UPOV Convention | Adopted by the Council in October 2009 |
| UPOV/EXN/NUL/1 | Nullity of the Breeder's Right under the UPOV Convention | Adopted by the Council in October 2009 |
| UPOV/EXN/CAN/1 | Cancellation of the Breeder's Right under the UPOV Convention | Adopted by the Council in October 2009 |
| UPOV/EXN/ENF/1 | Enforcement of Breeders' Rights under the UPOV Convention | Adopted by the Council in October 2009 |
| UPOV/EXN/VAR/1 | Definition of Variety under the 1991 Act of the UPOV Convention | Adopted by the Council in October 2010 |
| UPOV/EXN/CAL/1 | Conditions and Limitations Concerning the Breeder's Authorization in Respect of Propagating Material under the UPOV Convention | Adopted by the Council in October 2010 |
| UPOV/EXN/HRV Drafts 7 and 8 | Acts in Respect of Harvested Material under the 1991 Act of the UPOV Convention | For the CAJ-AG session in October 2012 |
| UPOV/EXN/BRD Draft 5 | Definition of Breeder under the 1991 Act of the UPOV Convention | For the CAJ-AG session in October 2012 |
| CAJ-AG/12/7/3 and UPOV/EXN/EDV/2 Draft 2 | Essentially Derived Varieties under the 1991 Act of the UPOV Convention (revision) | For the CAJ-AG session in October 2012 |
| CAJ-AG/12/7/4 | Propagation and Propagating Material | For the CAJ-AG session in October 2012 |
| Latest reference | INF documents | Status |
| UPOV/INF/6/2 | Guidance for the Preparation of Laws Based on the 1991 Act of the UPOV Convention | Adopted by the Council in October 2011 |
| UPOV/INF/13/1 | Guidance on How to Become a Member of UPOV | Adopted by the Council in October 2009 |
| UPOV/INF/14/1 | Guidance for Members of UPOV on How to Ratify, or Accede to, the 1991 Act of the UPOV Convention | Adopted by the Council in October 2009 |
| UPOV/INF/15/1 | Guidance for Members of UPOV on Ongoing Obligations and Related Notifications | Adopted by the Council in October 2010 |