



CAJ/73/11

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INTERNATIONAL UNION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS

Geneva

ADMINISTRATIVE AND LEGAL COMMITTEE**Seventy-Third Session
Geneva, October 25, 2016**

REPORT

*adopted by the Administrative and Legal Committee**Disclaimer: this document does not represent UPOV policies or guidance*Opening of the session

- *1. The Administrative and Legal Committee (CAJ) held its seventy-third session in Geneva on October 25, 2016, under the chairmanship of Mr. Martin Ekvad (European Union).
- *2. The session was opened by the Chair, who welcomed the participants. The list of participants is reproduced in Annex I to this report.
- *3. The Chair reported that Kenya, which had been a member of the Union since May 13, 1999, had deposited its instrument of accession to the 1991 Act of the UPOV Convention on April 11, 2016, and had become bound by the 1991 Act on May 11, 2016.
- *4. The Chair confirmed that the report of the seventy-second session of the CAJ, held in Geneva on October 26 and 27, 2015 (document CAJ/72/10), had been adopted by correspondence and made available on the UPOV website.

Adoption of the agenda

- *5. The CAJ adopted the draft agenda, as proposed in document CAJ/73/1 Rev.

Report on developments in the Technical Committee

- *6. The CAJ considered document CAJ/73/7 and noted the developments in the Technical Committee.

* An asterisk next to the paragraph number indicates that the text is reproduced from the Report on the Conclusions (document CAJ/73/10).

Development of information materials concerning the UPOV Convention

*7. The CAJ considered documents CAJ/73/2, UPOV/EXN/EDV/2 Draft 7 and UPOV/EXN/PPM/1 Draft 6.

Explanatory Notes on Essentially Derived Varieties under the 1991 Act of the UPOV Convention (Revision)

*8. The CAJ agreed the following amendments to document “Explanatory Notes on Essentially Derived Varieties under the 1991 Act of the UPOV Convention” (Revision) (document UPOV/EXN/EDV/2 Draft 7).

Paragraphs 20 and 21	<p>Not to retain the following paragraphs that appear in strikethrough in document UPOV/EXN/EDV/2 Draft 7</p> <p>720. Another example of an indirect way in which it might be possible to obtain an essentially derived variety from an initial variety could be the use of a hybrid variety to obtain a variety which is essentially derived from one of the parent lines of the hybrid.</p> <p>21. The use of molecular data from an initial variety, for the purpose of selection of genotypes from a population that is mostly related to the initial variety, to produce a variety with a similar phenotypic expression of the essential characteristics may provide an indication of predominant derivation, if the variety fulfills the definition in Article 14(5)(b).</p>
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*9. The CAJ agreed that, subject to the changes in paragraph 8 above, a draft of the “Explanatory Notes on Essentially Derived Varieties under the 1991 Act of the UPOV Convention (Revision)” based on document UPOV/EXN/EDV/2 Draft 7 (document UPOV/EXN/EDV/2) be presented for adoption by the Council at its thirty-fourth extraordinary session in April 2017.

*10. The CAJ considered the matters in the following paragraphs in relation to future work of the CAJ on essentially derived varieties.

*11. The CAJ considered the joint proposal from ISF/ESA for paragraphs 20 and 21 of document UPOV/EXN/EDV/2 Draft 7 and the comment received from the Delegation of the Russian Federation, as provided in document CAJ/73/2, paragraph 11.

*12. The CAJ agreed that the joint proposal from ISF and ESA would benefit from clarification and agreed to consider that matter further with a view to developing guidance in a future revision of document UPOV/EXN/EDV, at its seventy-fourth session.

*13. The CAJ noted the comments of the Russian Federation on document UPOV/EXN/EDV/2 Draft 7, which were circulated to the CAJ on October 24, 2016. The CAJ agreed to consider the relevant elements of those comments, at its seventy-fourth session, with a view to developing guidance in a future revision of document UPOV/EXN/EDV.

*14. The CAJ noted that a meeting of the Office of the Union with the International Community of Breeders of Asexually Reproduced Ornamental and Fruit Varieties (CIOPORA), ISF and the World Intellectual Property Organization (WIPO) had been tentatively scheduled to take place during the first quarter of 2017 in order to explore the possible role of UPOV in alternative dispute settlement mechanisms for matters concerning essentially derived varieties, including the provision of experts on EDV matters, as set out in paragraphs 14 and 15 of document CAJ/73/2.

Explanatory Notes on Propagating Material under the UPOV Convention

*15. The CAJ noted the developments concerning document UPOV/EXN/PPM/1 Draft 6 “Explanatory Notes on Propagating Material under the UPOV Convention” at the ninety-first session of the Consultative Committee and the thirty-third extraordinary session of the Council, both held in Geneva on March 17, 2016, as set out in paragraphs 20 and 21 of document CAJ/73/2.

*16. The CAJ noted that the “Seminar on Propagating and Harvested Material in the context of the UPOV Convention” had been held in Geneva on October 24, 2016, and noted the report of the closing remarks at the Seminar by Mr. Martin Ekvad, Chair of the CAJ (reproduced in Annex II of this document). The CAJ

noted that the Proceedings of the Seminar would include a Foreword by the Chair of the CAJ, which would include his closing remarks.

*17. The CAJ agreed the following amendments to document “Explanatory Notes on Propagating Material under the UPOV Convention” (document UPOV/EXN/PPM/1 Draft 6):

“FACTORS THAT ~~MIGHT BE~~ HAVE BEEN CONSIDERED IN RELATION TO PROPAGATING MATERIAL

“The UPOV Convention does not provide a definition of ‘propagating material’. Propagating material encompasses reproductive and vegetative propagating material. The following are non-exhaustive examples of factors that have been considered by members of the Union in relation to whether material is propagating material. Those factors should be considered in the context of each member of the Union and the particular circumstances.

[...]

(ii) whether the material has been or may be used to propagate the variety;

(iii) whether the material is capable of producing entire plants of the variety ~~and is factually used for propagating purposes;~~

[...]”

UPOV organized a “Seminar on Propagating and Harvested Material in the context of the UPOV Convention.” in Geneva on October 24, 2016. The proceedings of the Seminar can be found at http://www.upov.int/meetings/en/topic.jsp?group_id=73

*18. The CAJ agreed that, subject to the changes in paragraph 17 above, a draft of the “Explanatory Notes on Propagating Material under the UPOV Convention” based on document UPOV/EXN/PPM/1 Draft 6 (document UPOV/EXN/PPM/1) be presented for adoption by the Council at its thirty-fourth extraordinary session in April 2017.

Possible revision of document UPOV/EXN/CAL/1 “Explanatory Notes on Conditions and Limitations Concerning the Breeder’s Authorization in Respect of Propagating Material under the UPOV Convention”

*19. The CAJ considered the request of the Russian Federation of a possible revision of the Explanatory Notes on Conditions and Limitations Concerning the Breeder’s Authorization in Respect of Propagating Material under the UPOV Convention (document UPOV/EXN/CAL/1) and requested the Office of the Union to send a circular to the CAJ circulating the proposals by the Russian Federation and requesting any additional proposals for revision of document UPOV/EXN/CAL/1. The replies to the Circular would be considered by the CAJ, at its seventy-fourth session. The CAJ would then decide whether to start the revision of document UPOV/EXN/CAL/1.

Possible revision of document UPOV/EXN/PRP/2 “Explanatory Notes on Provisional Protection under the UPOV Convention”

*20. The CAJ considered the request of the Russian Federation for a revision of the Explanatory Notes on Provisional Protection under the UPOV Convention” (document UPOV/EXN/PRP/2) and requested the Office of the Union to send a circular to the CAJ circulating the proposals by the Russian Federation and requesting any additional proposals for revision of document UPOV/EXN/PRP/2. The replies to the Circular would be considered by the CAJ, at its seventy-fourth session. The CAJ would then decide whether to start the revision of document UPOV/EXN/PRP/2.

UPOV Model Plant Breeders’ Rights Gazette (Revision)

*21. The CAJ agreed to continue to defer the preparation of a draft revision of document UPOV/INF/5 “UPOV Model Plant Breeders’ Rights Gazette (Revision)” (document UPOV/INF/5/1 Draft 1), pending developments in relation to the development of a prototype electronic form (see document CAJ/73/4 “Electronic application form”).

*22. The CAJ noted the report of the discussions, at the fifty-second session of the TC, on variety descriptions and the role of plant material, as set out in paragraph 37 of document CAJ/73/2.

*23. The CAJ agreed to consider the program for the development of information materials in conjunction with the discussions on the scheduling of the CAJ sessions, under the item "Program for the seventy-fourth session", as set out in paragraph 39 of document CAJ/73/2.

Variety denominations

*24. The CAJ considered document CAJ/73/3.

*25. The CAJ noted the work by the Working Group on Variety Denominations (WG-DEN) concerning the Revision of Document UPOV/INF/12 "Explanatory Notes on Variety Denominations under the UPOV Convention".

*26. The CAJ noted that France, the Netherlands and New Zealand had provided comments on document UPOV/INF/12/6 Draft 1 and that those comments would be considered by the WG-DEN at its second meeting.

*27. The CAJ noted the work by the WG-DEN concerning the possible development of a UPOV similarity search tool for variety denomination purposes.

*28. The CAJ noted the work by the WG-DEN concerning the expansion of the content of the PLUTO database.

*29. The CAJ noted that the next meeting of the WG-DEN would take place in Geneva on October 25, 2016.

Information and databases

Electronic application form

*30. The CAJ considered document CAJ/73/4 and received an oral report by the Vice Secretary-General on the Eighth Meeting on the Development of a Prototype Electronic Form (EAF/8 Meeting), held in Geneva on October 24, 2016, as summarized below.

*31. The CAJ noted that the EAF/8 Meeting had agreed that the prototype electronic application form Version 2 (PV2) had demonstrated the feasibility of the project. The CAJ agreed with the following proposals made by the EAF/8 Meeting:

Validation of the prototype

- (a) Prototype Version 2 (PV2) had demonstrated the feasibility of the project;
- (b) PV2 meets the expectations of a functioning system for users to send and receive application data, and reuse submitted data;
- (c) PV2 should be used as the basis for the launch of an operational system;

Languages

Questions

- (d) The EAF would present all items (questions) in English, French, German and Spanish. Translations for all items (questions) in other languages would be made available if provided by the participating members of the Union, with a suitable disclaimer;

Answers

- (e) Users would be required to provide information (answers) in a language accepted by the PVP Office concerned, which would be indicated in the form;

Payment

- (f) The EAF would not affect the fees that PVP Offices receive per application;
- (g) Payment of the application fee would be made directly by the applicant to the relevant PVP Office unless otherwise agreed with the Office of the Union. However, the EAF system would allow, if

requested, for application fees to be collected via the EAF and distributed to the PVP Offices in a form and currency agreed by the PVP Office concerned;

- (h) The EAF charge per application would be as follows:
- CHF 150 / submitted application in 2017/2018
 - CHF 250 / submitted application from 2019;

Addition of new crops

- (i) To launch the EAF on January 9, 2017 with rose, soya bean, lettuce, apple fruit varieties and potato;
- (j) To present to the next EAF meeting more details about the different approaches to add more crop/species to the system:
- Customized technical questionnaire
 - Technical questionnaire based on the UPOV Test Guidelines
 - Generic technical questionnaire;
- (k) At the EAF/9 meeting in April 2017, to establish a list of priority for addition of new crops/ species;

Official variety list

- (l) To consider whether to include information for official variety list purposes in the EAF, at the next EAF meeting (EAF/9 in April 2017);

Terms of use

- (m) To finalize a detailed document explaining the “Terms of Use” with participating members and WIPO, on the following basis:
- (i) Application data to be transferred to the selected authority after submission and without waiting for the payment confirmation of the EAF charge and the application fee (if appropriate),
 - (ii) If the payment using bank transfer is not received within 45 days after the submission of the application, a reminder to be sent by the the UPOV/WIPO Finance Department.
 - (iii) Charges for payment of application fees by credit card to be considered with PVP Offices on a bilateral basis,
 - (iv) Individual Authority Fees to be redistributed to PVP offices, based on the requested payments (if appropriate),
 - (v) Payment transfers might have a delay according to the payment method chosen (credit card or bank transfer).

Participation in the launch of EAF

*32. The CAJ noted that, each authority, participating in PV2, should inform the Office of the Union if it wished to participate in the EAF from the launch, by November 11, 2016, and should provide the necessary information, including:

- Crops to be supported in EAF (from the 5 crops deployed in PV2)
- Accepted currencies
- Payment method (direct or via UPOV)
- To provide bank account information (if appropriate)
- Any other missing information requested (see Wiki)
- To test the system during the Pre-Launch Test (November-December 2016).

*33. The CAJ also noted that User guides for breeders and PVP Offices would be made available online in English, French, Spanish, German and other relevant languages. The Office of the Union would develop, for PVP Offices and users, in consultation with participating members:

- a program of training (including Online sessions & Webinars)
- a program of users' support and routine maintenance provisions
- a program of publicity of the availability of the system.

*34. The CAJ noted that the EAF would consider “On Line Application Form” (OLAF) as a possible name at the EAF/9 meeting.

*35. The CAJ agreed to propose, subject to approval by the Consultative Committee, for the Council at its fiftieth ordinary session, to be held in Geneva on October 28, 2016, to approve the launch of the EAF on January 9, 2017.

*36. The next meeting of the EAF (EAF/9) was agreed by the EAF to be held in Geneva on Wednesday April 5, 2017.

UPOV information databases

*37. The CAJ considered document CAJ/73/5.

UPOV code developments

*38. The CAJ noted the developments concerning UPOV codes, as set out in paragraph 8 of document CAJ/73/5.

*39. The CAJ noted that the TC, at its fifty-second session, had agreed to invite the European Union to make a proposal to the TWP, at their sessions in 2016, to revise the Guide to the UPOV Code System with regard to UPOV codes for hybrid genera and species, as set out in paragraph 10 of document CAJ/73/5.

PLUTO database

*40. The CAJ noted:

(a) the summary of contributions to the PLUTO database from 2013 to 2015 and the current situation of members of the Union on data contribution, as presented in the Annex to document CAJ/73/5;

(b) that the WG-DEN, at its first meeting, had agreed to defer the consideration of the matters concerning the possible expansion of the content of the PLUTO database to include all recognized varieties, including those that have not been, or were no longer, registered/protected in document UPOV/WG-DEN/1/4 “Expansion of the Content of the PLUTO database” until its second, or a subsequent, meeting;

(c) that the WG-DEN, at its first meeting, had agreed to defer the consideration of the proposal to accept accents and special characters in denominations provided in the PLUTO database in document UPOV/WG-DEN/1/4 “Expansion of the Content of the PLUTO database” until its second, or a subsequent, meeting; and

(d) that matters concerning a UPOV denomination similarity search tool, non-acceptable terms for variety denominations, and the revision of document UPOV/INF/12 “Explanatory notes on variety denominations under the UPOV Convention” are reported in document CAJ/72/3 “Variety Denominations”.

Exchange and use of software and equipment

*41. The CAJ considered documents CAJ/73/6, UPOV/INF/16/6 Draft 1 and UPOV/INF/22/3 Draft 1.

UPOV/INF/16: Exchangeable Software (Revision)

*42. The CAJ noted that the Council, at its forty-ninth ordinary session adopted the revision of document UPOV/INF/16 “Exchangeable Software” (document UPOV/INF/16/5), on the basis of document UPOV/INF/16/5 Draft 1.

*43. The CAJ noted that:

(a) the Republic of Moldova can, if appropriate, offer to explain the software at the thirty-fifth session of the TWC on the software for inclusion in a draft of document UPOV/INF/16; and

(b) subject to a positive recommendation by the TWC and agreements by the TC and CAJ in 2017, a draft of document UPOV/INF/16 “Exchangeable Software” containing the software proposed for inclusion by the Republic of Moldova would be presented for adoption by the Council.

*44. The CAJ agreed the proposed revision of document UPOV/INF/16/5 concerning the inclusion of information on the use of software by members of the Union, as set out in Annex I to document CAJ/73/6 (see document UPOV/INF/16/6 Draft 1).

*45. The CAJ agreed that a draft of document UPOV/INF/16/6 “Exchangeable Software” be presented for adoption by the Council at its fiftieth ordinary session, to be held on October 28, 2016.

UPOV/INF/22: Software and Equipment Used by Members of the Union

*46. The CAJ noted that the Council, at its forty-ninth ordinary session, adopted document UPOV/INF/22/2 “Software and equipment used by members of the Union”, on the basis of document UPOV/INF/22/2 Draft 1.

*47. The CAJ considered the information in Annex II to document CAJ/73/6 for inclusion in document UPOV/INF/22 (see document UPOV/INF/22/3 Draft 1).

*48. The CAJ agreed that a draft of document UPOV/INF/22 concerning software and equipment used by members of the Union be presented for adoption by the Council at its fiftieth ordinary session, to be held on October 28, 2016.

TGP documents

*49. The CAJ considered documents CAJ/73/8, TGP/7/5 Draft 1 and TGP/8/3 Draft 1.

Documents to be considered by the CAJ

*50. The CAJ agreed the proposed revisions to document TGP/7 “Development of Test Guidelines”, as presented in document TGP/7/5 Draft 1, and document TGP/8 “Trial Design and Techniques Used in the Examination of Distinctness, Uniformity and Stability”, as presented in document TGP/8/3 Draft 1.

*51. The CAJ noted that the Council would be invited to consider the proposed revisions to documents TGP/7 and TGP/8, as presented in documents TGP/7/5 Draft 1 and TGP/8/3 Draft 1, respectively, for adoption at its fiftieth ordinary session and that the comments made by the CAJ on those documents, at its seventy-third session, would be reported to the Council at its fiftieth ordinary session.

*52. The CAJ noted that in conjunction with the adoption of the revised TGP documents at the fiftieth ordinary session of the Council, the Council would be invited to adopt a revision of document TGP/0 “List of TGP documents and latest issue dates” (document TGP/0/9) on the basis of document TGP/0/9 Draft 1.

Program for the development of TGP documents

*53. The CAJ agreed the program for the development of TGP documents, as set out in the Annex to document CAJ/73/8.

Molecular techniques

*54. The CAJ considered document CAJ/73/9.

*55. The CAJ noted the report on developments in the BMT, as set out in paragraphs 6 to 9 of document CAJ/73/9.

*56. The CAJ noted that the developments concerning the OECD/UPOV/ISTA Joint Workshop on Molecular Techniques would be considered by the TC, at its fifty-third session, as set out in paragraphs 11 to 19 of document CAJ/73/9.

*57. The CAJ agreed the draft question and answer concerning the information on the situation in UPOV with regard to the use of molecular techniques for a wider audience, including the public in general, as set out in paragraph 22 of document CAJ/73/9.

*58. The CAJ noted that the draft question and answer concerning the information on the situation in UPOV would be presented for adoption by the Council at its fiftieth ordinary session, to be held on October 28, 2016.

Program for the seventy-fourth session

*59. The following program was agreed for the seventy-fourth session of the CAJ and considered that its work program could be covered by a session to be held on October 23 and 24, 2017:

1. Opening of the session
2. Adoption of the agenda
3. Development of information materials concerning the UPOV Convention
 - (a) Possible revision of document UPOV/EXN/EDV/2 Explanatory Notes on Essentially Derived Varieties under the 1991 Act of the UPOV Convention (Revision)
 - (b) Possible revision of document UPOV/EXN/CAL/1 "Explanatory Notes on Conditions and Limitations Concerning the Breeder's Authorization in Respect of Propagating Material under the UPOV Convention"
 - (c) Possible revision of document UPOV/EXN/PRP/2 "Explanatory Notes on Provisional Protection under the UPOV Convention"
 - (d) UPOV Model Plant Breeders' Rights Gazette (Revision)
4. Variety denominations
5. Information and databases
 - (a) Electronic application form
 - (b) UPOV information databases
 - (c) Exchange and use of software and equipment
6. TGP documents
7. Molecular techniques
8. Program for the seventy-fifth session
9. Adoption of the report on the conclusions (if time permits)
10. Closing of the session

60. *This report was adopted by correspondence.*

[Annexes follow]

ANNEXE / ANNEX / ANLAGE / ANEXO

LISTE DES PARTICIPANTS / LIST OF PARTICIPANTS /
TEILNEHMERLISTE / LISTA DE PARTICIPANTES

(dans l'ordre alphabétique des noms français des membres /
in the alphabetical order of the French names 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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[Annex II follows /
L'annexe II suit /
Anlage II folgt /
Sigue el Anexo II]

ANNEX II

Closing Remarks by Mr. Martin Ekvad,
Chair of the Administrative and Legal Committee (CAJ)
at the Seminar on Propagating and Harvested Material in the context of the UPOV Convention,”
held in Geneva on October 24, 2016

- Propagating material and harvested material are two core concepts of the UPOV Convention
- No definitions on propagating material and harvested material in the UPOV Convention
- UPOV members have implemented the notions of propagating material and harvested material in their own context
- One complicating factor is that the same plant material can be propagating material and harvested material
- Harmonisation or consistency helps all stakeholders to understand the scope of the breeders' rights
- It is important to communicate with farmers, producers and other stakeholders involved in the value chain about the benefits of new plant varieties and therefore plant breeders' rights
- All types of farmers are necessary and complementary and the UPOV Convention has particular exceptions to cover activities of, for example, subsistence farmers
- Judges have given judgments in relation to propagating and harvested material in some UPOV members
- Judgments have taken into account consideration
 - Intention
 - Cascade principle for propagating and harvested material
 - Safeguarding of the interests of the breeders and producers/farmers
- Relevant cases seem to provide satisfactory interpretations in the seed sector and the ornamental sector
- It would be helpful for breeders to report on concrete issues they face

Messages for UPOV

- To work on achieving a common understanding on propagating material and harvested material
- A non-exhaustive list of possible factors in the Draft Explanatory Notes is useful, even if UPOV members have their own definitions
- Better understanding of “reasonable opportunity” would be beneficial
- The Proceedings of this Seminar can serve as a valuable source of information for UPOV members
- Cases reported to UPOV will be published on the UPOV website

Messages for breeders

- Breeders may want to use the legal systems to clarify the situation
 - Breeders may want to cooperate on bringing cases before courts (examples Anti-Infringement Bureau for Intellectual Property Rights on Plant Material (AIB)/Breeders Trust)
- Depending on the outcome of cases legislator may decide whether to react
- Breeders should ensure that effective contracts are used to be able to exercise their breeders' rights in relation to harvested material