



CAJ-AG/08/3/4

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INTERNATIONAL UNION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS
GENEVA

**ADMINISTRATIVE AND LEGAL COMMITTEE
ADVISORY GROUP**

**Third Session
Geneva, October 28, 2008**

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 third session in Geneva on October 28, 2008.
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/08/3/INF/1 Prov., with the addition of document CAJ-AG/08/3/2 Add., under agenda item 3, document UPOV/INF/6/1 Draft 1, under agenda item 3(a) and a new item "Matters referred by the CAJ, at its fifty-eighth session, to the CAJ-AG".

5. The Chair explained to the CAJ-AG that the International Community of Breeders of Asexually Reproduced Ornamental and Fruit-Tree Varieties (CIOPORA) and the International Seed Federation (ISF) would be invited to participate in the CAJ-AG session under the relevant agenda items.

MATTERS REFERRED BY THE CAJ, AT ITS FIFTY-EIGHTH SESSION, TO THE CAJ-AG

Essentially Derived Varieties

6. The Chair recalled that, subject to a linguistic change to paragraph 8 of the Spanish version, the CAJ had approved, at its fifty-eighth session, document UPOV/EXN/EDV Draft 2.

7. The Chair explained that the CAJ had requested the CAJ-AG to consider the comments received from CIOPORA and ISF on document UPOV/EXN/EDV Draft 2, as set out in document CAJ/58/4, Annexes I and II, respectively, with a view to proposing a future revision of the explanatory notes on essentially derived varieties, as considered appropriate. As a first step, the CAJ had agreed that CIOPORA and ISF should be invited to participate at the third session of the CAJ-AG, in order to discuss how to proceed with that process in a timely and effective way (see paragraphs 24 and 25 of document CAJ/58/6 “Report on the Conclusions”).

8. The Chair reported that the CAJ had noted that the following aspects, in particular, would be considered by the CAJ-AG (see paragraph 26 of document CAJ/58/6 “Report on the Conclusions”):

(a) the proposal of CIOPORA to use the term “breeder” or “holder of a breeder’s right” in a consistent way;

(b) the proposal of CIOPORA to explain that all of the varieties belonging to one of the examples in Article 14(5)(c) of the 1991 Act (e.g. mutants) might be essentially derived varieties;

(c) the request of CIOPORA to clarify the relationship between Article 14(5)(b)(i) and (iii) of the 1991 Act;

(d) the proposal of CIOPORA to divide paragraph 9 of document UPOV/EXN/EDV Draft 2 into three paragraphs;

(e) the request of ISF to amend paragraph 11 (third sentence) of document UPOV/EXN/EDV Draft 2 and to include a variety “D” in figures 3 and 4 of document UPOV/EXN/EDV Draft 2.

(discussions in the presence of ISF and CIOPORA)

(a) *Proposal of CIOPORA to use the term “breeder” or “holder of a breeder’s right” in a consistent way*

9. The CAJ-AG noted that the terms used in document UPOV/EXN/EDV Draft 2 reflected the terms used in the 1991 Act of the UPOV Convention and in relevant reference documents (e.g. document IOM/6/2). No recommendation was made to amend document UPOV/EXN/EDV.

(b) *Proposal of CIOPORA to explain that all of the varieties belonging to one of the examples in Article 14(5)(c) of the 1991 Act (e.g. mutants) might be essentially derived varieties*

10. The representative of CIOPORA was of the view that the first sentence of the explanatory note in paragraph 4 of document UPOV/EXN/EDV Draft 2, “The use of the word ‘may’ in Article 14(5)(c) indicates that those ways may not necessarily result in an essentially derived variety”, was too restrictive.

11. The CAJ-AG concluded that, on the basis of the wording in the Convention, it would not be appropriate to accept the proposal of CIOPORA “to explain that all of the varieties belonging to one of the examples in Article 14(5)(c) of the 1991 Act (e.g. mutants) might be essentially derived varieties”.

(c) *Request of CIOPORA to clarify the relationship between Article 14(5)(b)(i) and (iii) of the 1991 Act*

12. The CAJ-AG concluded that it would be useful, as a first step, to gather information on the preparatory work concerning the provisions in Article 14(5)(b) prior to the Diplomatic Conference of 1991. Particular reference was made to explanatory note 6(ii) of document IOM/IV/2 (the relevant extract of document IOM/IV/2 has been posted in the CAJ-AG/08/3 and CAJ/59 sections of the UPOV website).

13. The CAJ-AG requested the Office of the Union to prepare, for its fourth session, a document containing available information that might help to explain the relationship between Article 14(5)(b)(i) and (iii) of the 1991 Act.

(d) *Proposal of CIOPORA to divide paragraph 9 of document UPOV/EXN/EDV Draft 2 into three paragraphs*

14. No recommendation was made at the CAJ-AG session.

(e) *Request of ISF to amend paragraph 11 (third sentence) of document UPOV/EXN/EDV Draft 2 and to include a variety “D” in figures 3 and 4 of document UPOV/EXN/EDV Draft 2*

15. The CAJ-AG agreed that the Office of the Union should prepare a draft guidance document on the situation with regard to variety “D”, for consideration by the CAJ-AG at its fourth session.

Exceptions to the Breeder's Right

16. The Chair recalled that the CAJ had approved document UPOV/EXN/EXC Draft 3, subject to the amendments agreed by the CAJ at its fifty-eighth session (see paragraph 27 of document CAJ/58/6 "Report on the Conclusions").

17. The Chair explained that the CAJ had requested the CAJ-AG to consider the comments received from ISF on document UPOV/EXN/EXC Draft 2, as set out in Annex II of document CAJ/58/4, and the comments of CIOPORA on document UPOV/EXN/EXC Draft 3, with a view to proposing a future revision of the explanatory notes on exceptions to the breeder's right, as considered appropriate.

18. The Chair reported that the CAJ had noted that the following aspects, in particular, would be considered by the CAJ-AG (see paragraph 28 of document CAJ/58/6 "Report on the Conclusions"):

(a) the request of ISF to provide an explanation on "holding" (document CAJ/58/4, Annex II, page 1 of the English version); and

(b) the request of CIOPORA to provide an explanation of "safeguarding of the legitimate interests of the breeder" in paragraph 17 of document UPOV/EXN/EXC Draft 3 which would not allow the application of Article 15(2) of the 1991 Act to asexually reproduced ornamental and fruit varieties.

(discussions in the presence of ISF and CIOPORA)

(a) *Request of ISF to provide an explanation on "holding" (document CAJ/58/4, Annex II, page 1 of the English version)*

19. The Chair referred to the explanation provided by the Chair of the CAJ at the fifty-eighth session of the CAJ that the intention of the UPOV Convention was to refer to individual farmers rather than groups of farmers, but had recalled the previous discussions in the CAJ and, in particular, the difficulty in developing a common definition that would be suitable for all members of the Union (paragraph 69 of document CAJ/58/7 Prov. "Draft Report").

(b) *Request of CIOPORA to provide an explanation of "safeguarding of the legitimate interests of the breeder" in paragraph 17 of document UPOV/EXN/EXC Draft 3 which would not allow the application of Article 15(2) of the 1991 Act to asexually reproduced ornamental and fruit varieties"*

20. The Chair recalled the explanation provided at the fifty-eighth session of the CAJ that paragraphs 13 to 16 of document UPOV/EXN/EXC Draft 3 provided an explanation of "common practice" in relation to the recommendation of the Diplomatic Conference of 1991 on Article 15(2) of the 1991 of the UPOV Convention and had noted that the explanatory notes could not be more restrictive than the UPOV Convention. (paragraph 67 of document CAJ/58/7 Prov. "Draft Report"). It was noted that the text in paragraph 14 of document UPOV/EXN/EXC Draft 3 reflected the policy of UPOV during discussions in the relevant UPOV bodies when examining laws.

21. The CAJ-AG concluded that it would not be appropriate to consider a revision of UPOV/EXN/EXC for the time being.

Novelty

22. The Chair recalled that the CAJ had approved document UPOV/EXN/NOV Draft 2, subject to the amendments agreed by the CAJ (see paragraph 30 of document CAJ/58/6 “Report on the Conclusions”).

23. The Chair explained that the CAJ had requested the CAJ-AG to consider the comments received from ISF on document UPOV/EXN/NOV Draft 2, as set out in document CAJ/58/4, Annex II, with a view to proposing a future revision of the explanatory notes on novelty, as considered appropriate.

24. The Chair reported that the CAJ had noted that the following aspects, in particular, would be considered by the CAJ-AG:

(a) varieties of recent creation under Article 6(2) of the 1991 Act in relation to the time at which the plant breeders’ rights system becomes operational (see document CAJ/58/4, Annex II, page 3 of the English version); and

(b) the request for further explanations of “for purposes of exploitation” and “or otherwise disposed of” of Article 6(1) of the 1991 Act (document CAJ/58/4, Annex II, page 2 of the English version).

(discussions in the presence of ISF and CIOPORA)

(a) *Request of ISF concerning varieties of recent creation under Article 6(2) of the 1991 Act in relation to the time at which the plant breeders’ rights system becomes operational (see document CAJ/58/4, Annex II, page 3 of the English version)*

25. The CAJ-AG noted that that matter went beyond novelty and should be covered in a guidance document under preparation, concerning the procedure on how to become a member of UPOV and accede to the 1991 Act of the UPOV Convention (see paragraph 37(b) of document CAJ/58/6 “Report on the Conclusions”). In that regard, the CAJ-AG made reference to the obligations under Article 30(2) of the 1991 Act of the UPOV Convention: “It shall be understood that, on depositing its instrument of ratification, acceptance, approval or accession, as the case may be, each State or intergovernmental organization must be in a position, under its laws, to give effect to the provisions of this Convention”.

(b) *Request of ISF for further explanations of “for purposes of exploitation” and “or otherwise disposed of” of Article 6(1) of the 1991 Act (document CAJ/58/4, Annex II, page 2 of the English version)*

26. The CAJ-AG noted that the list of acts that might be considered not to result in the loss of novelty, in paragraph 6 of document UPOV/EXN/NOV Draft 2, as amended by the CAJ (see paragraph 30 of document CAJ/58/6 “Report on the Conclusions”) already provided useful guidance. However, it agreed that ISF would be able to make proposals of possible additional acts, which could be considered in due course.

27. The CAJ-AG concluded that it would not be appropriate, for the time being, to consider a revision of UPOV/EXN/NOV to address the requests made by ISF.

28. The CAJ-AG recalled that the CAJ, at its fifty-eighth session, had agreed to the development of example provision(s) for the implementation of Article 6(2) of the 1991 Act “Varieties of recent creation”, based on the available explanatory notes in document UPOV/EXN/NOV Draft 2, as amended by the CAJ (see paragraphs 30 and 37 of document CAJ/58/6 “Report on the Conclusions”).

DOCUMENTS CONSIDERED BY THE CAJ-AG

29. The CAJ-AG considered documents CAJ-AG/08/3/2 and CAJ-AG/08/3/2 Add.

Guidance for the Preparation of Laws Based on the 1991 Act of the UPOV Convention

30. The CAJ-AG considered documents CAJ-AG/08/3/3 and UPOV/INF/6/1 Draft 1.

31. The Chair recalled that the CAJ had noted, at its fifty-eighth session, that the Office of the Union had the intention to use a document, similar to UPOV/INF/6/1 Draft 1, to the extent that the text of the Convention and the agreed text of the explanatory notes allowed. In that regard, he recalled that the CAJ had noted that the explanatory notes approved at its fifty-eighth session, and those approved by correspondence, would be brought into use by the Office of the Union for that purpose. It was also explained that the Office of the Union would arrange for that guidance document to be translated into Arabic, Chinese, French, German, Russian and Spanish (see paragraphs 34 and 36 of document CAJ/58/6 “Report on the Conclusions”).

32. The CAJ-AG agreed that a guidance document containing the text of the Convention and approved text from the explanatory notes would provide useful assistance to States/ intergovernmental organizations wishing to draft a law in accordance with the 1991 Act of the UPOV Convention. The CAJ-AG encouraged the distribution of the guidance document to potential members of UPOV and encouraged the Office of the Union to make it available, as soon as possible, on the UPOV website.

33. The CAJ-AG requested the Office of the Union to prepare a new draft of document UPOV/INF/6/1 Draft 1 for consideration by the CAJ at its fifty-ninth session, to be held in Geneva on April 2, 2009, with the following changes:

- “Part I: Example text for Articles for consideration in the preparation of laws based on the 1991 Act of the UPOV Convention”: the CAJ-AG agreed that in the next draft of the document the underlining would be removed and the text in strikethrough would be deleted.

- “Part II: Notes based on information materials concerning certain Articles of the 1991 Act of the UPOV Convention”: to be updated in accordance with the agreed text of the explanatory notes (see paragraphs 21 to 34 of document CAJ/58/6 “Report on the Conclusions”).

Explanatory Notes on Conditions and Limitations Concerning the Breeder's Authorization in Respect of Propagating Material; and on Acts in Respect of Harvested Material under the UPOV Convention

34. The CAJ-AG considered document UPOV/EXN/HRV Draft 2 and a presentation made by the Office of the Union.

(discussions in the presence of ISF and CIOPORA)

35. The CAJ-AG explained to CIOPORA that it was not possible to provide a "legal" definition of "harvested material" in document UPOV/EXN/HRV Draft 2.

36. The CAJ-AG requested the Office of the Union to prepare a new draft of document UPOV/EXN/HRV (draft 3), to be circulated to the CAJ for comments. On the basis of the comments received, the Office of the Union was requested to prepare a further draft (draft 4) for consideration by the CAJ-AG at its fourth session.

General	to move the explanatory notes on conditions and limitations concerning the breeder's authorization in respect of propagating material to a separate document
Section I(a) and paragraphs 1, 2, 5 and 6	to delete the boxes with the provisions of Article 5(4) of the 1978 Act and the references to Article 5(4) of the 1978 Act
paragraph 4(iv)	to delete reference to "price"
paragraph 8	to be deleted
paragraph 9	to read as follows: "Unauthorized use refers to the acts in respect of the propagating material that require the authorization of the <u>holder of the breeder's right</u> breeder <u>in the territory concerned</u> (Article 14(1) of the 1991 Act and Article 5(1) of the 1978 Act), but where such authorization has not been obtained. <u>Thus, unauthorized acts can only occur in the territory of the member of the Union where a breeder's right has been granted and is in force</u> "
paragraph 10	to be deleted
All examples	to revise the title to avoid confusion
Examples 1(a) and (b)	to amend "exported to Country A" to "imported into Country A"
paragraphs 15, 16 and 17	to add an explanation concerning the consequence of exhaustion of the right

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

37. The CAJ-AG considered document UPOV/EXN/BRD Draft 1.

38. The CAJ-AG requested the preparation of a new draft of document UPOV/EXN/BRD, on the basis of reflections by the Office of the Union, for consideration by the CAJ-AG at its fourth session.

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

39. The CAJ-AG considered document UPOV/EXN/VAR Draft 1.

40. The CAJ-AG requested the preparation of a new draft of document UPOV/EXN/VAR, on the basis of reflections by the Office of the Union, for consideration by the CAJ-AG at its fourth session.

Enforcement of Breeders' Rights

41. The CAJ-AG considered document UPOV/EXN/ENF Draft 1.

(discussions in the presence of ISF and CIOPORA)

42. The Delegation of the Republic of Korea requested that measures to compensate for damage to the reputation of the breeder caused by an infringement, be covered in Section II of document UPOV/EXN/ENF Draft 1.

43. The representative of CIOPORA requested that measures against an intermediary whose services are being used by a third party to infringe a breeder's right, be covered in Section II of document UPOV/EXN/ENF Draft 1.

44. The CAJ-AG agreed that consideration should be given to those requests and the amendments that would be required in Section II of document UPOV/EXN/ENF Draft 1.

45. The CAJ-AG requested the Office of the Union to prepare a new draft of document UPOV/EXN/ENF Draft 1 for consideration by the CAJ, at its fifty-ninth session, to be held in Geneva on April 2, 2009.

Date and program for the fourth session

46. The CAJ-AG proposed the following program for its fourth session, to be held in Geneva on October 23, 2009:

1. Opening of the session
2. Adoption of the agenda
3. Matters to be considered by the CAJ-AG
 - (a) Documents referred directly to the CAJ-AG

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

Explanatory Notes on Conditions and Limitations Concerning the Breeder's Authorization

Explanatory Notes on Acts in Respect of Harvested Material under the UPOV Convention

Possible revision of the Explanatory Notes on Essentially Derived Varieties under the UPOV Convention

(b) Matters referred to the CAJ-AG by the CAJ (if appropriate)

4. Date and program for the fifth session
5. Closing of the session

47. The present report has been adopted by correspondence.

[Annex follows]

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 names in French of the members/
in alphabetischer Reihenfolge der französischen Namen der Mitglieder/
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