



CAJ-AG/12/7/6

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**INTERNATIONAL UNION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS**

Geneva

**ADMINISTRATIVE AND LEGAL COMMITTEE ADVISORY GROUP****Seventh Session  
Geneva, October 29 and 30, 2012**

## REPORT ON THE CONCLUSIONS

*adopted by the Administrative and Legal Committee Advisory Group*Opening of the session

1. The Administrative and Legal Committee Advisory Group (CAJ-AG) held its seventh session in Geneva on October 29, 2012, starting at 2.30 p.m. and October 30, 2012, under the Chairmanship of the Vice Secretary-General of UPOV.
2. The list of participants is reproduced in the Annex to this document. In addition to the *ad hoc* invitations for the International Community of Breeders of Asexually Reproduced Ornamental and Fruit Varieties (CIOPORA), European Coordination Via Campesina (ECVC), and International Seed Federation (ISF), agreed by the CAJ-AG at its sixth session which was held in Geneva on October 18, 2011, (see paragraph 14 of document CAJ/66/2), the CAJ-AG had agreed by correspondence to invite the Association for Plant Breeding for the Benefit of Society (APBEBES) to attend the relevant part of the CAJ-AG to present its views on the participation of observers in the CAJ-AG.

Adoption of the agenda and of the draft schedule

3. The CAJ-AG approved the draft schedule for the seventh session of the CAJ-AG as set out in document CAJ-AG/12/7/ INF. On the afternoon of October 29, 2012, at 3.00 p.m., the CAJ-AG discussed the agenda items in the presence of the above mentioned observers. The CAJ-AG continued discussions at 4.30 p.m. and on October 30, 2012, without the presence of the observers.
4. The CAJ-AG adopted the draft agenda, after moving agenda item 6 "Explanatory Notes on Propagation and Propagating Material" (document CAJ-AG/12/7/4) after agenda item 3(b).
5. The CAJ-AG noted that the comments on relevant explanatory notes from: the Russian Federation (comments of October 29), CIOPORA (comments of October 4 and of October 15, 2012), European Seed Association (ESA) (comments of October 8, 2012) and ISF (comments of October 15, 2012) had been notified to the CAJ and CAJ-AG and posted in the CAJ-AG website.

## DISCUSSIONS IN THE PRESENCE OF OBSERVERS

6. The CAJ-AG agreed that the report on discussions in the presence of observers would be presented in the draft full report and noted that the observers would be invited to comment on the draft of the relevant section of the report.

## DISCUSSIONS WITHOUT THE PRESENCE OF OBSERVERS

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

7. The CAJ-AG considered documents UPOV/EXN/BRD Draft 5 and CAJ-AG/12/7/2, the comments as set out in paragraph 5 and the views expressed by ECVC.

8. The CAJ-AG agreed the following concerning document UPOV/EXN/BRD Draft 5:

Paragraph 4	to read as follows: "The term 'person' in Article 1(iv) of the 1991 Act of the UPOV Convention should be understood to embrace both physical and legal persons. <u>The term person refers to one or more persons. For the purpose of this document, legal person refers to an entity with rights and obligations in accordance with the legislation of the member of the Union concerned.</u> "
Paragraph 9	to read as follows: "With regard to 'discovered and developed', a discovery might be the initial step in the process of breeding a new variety. However, the term 'discovered and developed' means that a mere discovery, or find, would not entitle the person to obtain a breeder's right. Development of plant material into a variety is necessary for a breeder to be entitled to obtain a breeder's right. <u>A person would not be entitled to protection of an existing variety that was discovered and propagated unchanged by that person.</u> "

9. The CAJ-AG agreed that, on the basis of the above amendments, the Office of the Union should prepare a revised version of document UPOV/EXN/BRD Draft 5, to be considered by the CAJ at its sixty-seventh session, to be held in Geneva on March 21, 2013.

10. In relation to the views expressed by ECVC, the CAJ-AG agreed that it would not be appropriate to include reference to "prior informed consent" and "access to genetic-resources and benefit-sharing" in Explanatory Notes under the UPOV Convention.

*Explanatory Notes on Acts in Respect of Harvested Material under the 1991 Act of the UPOV Convention*

11. The CAJ-AG considered documents UPOV/EXN/HRV Draft 8 and CAJ-AG/12/7/2, the comments as set out in paragraph 5 and the views expressed by CIOFORA, ECVC and ISF.

12. The CAJ-AG agreed the following concerning document UPOV/EXN/HRV Draft 8:

Paragraph 11	to read as follows: "Where a member of the Union decides to incorporate this optional exception into its legislation, 'unauthorized use' would not refer to acts that were covered by the optional exception. Subject to Articles 15 (1) and 16, 'unauthorized use' would refer to acts that were not covered by the optional exception in the legislation of the member of the Union concerned. <u>In particular, 'unauthorized use' would refer to acts that did not comply with the terms and conditions of the optional exception.</u> "
Paragraph 12	to read as follows: "The provisions under Article 14(2) of the 1991 Act mean that breeders can only exercise their rights in relation to the harvested material if they have not <del>been able</del> had a 'reasonable opportunity' to exercise their rights in relation to the propagating material."

Paragraph 13	to read as follows: "The term 'his right', in Article 14(2) of the 1991 Act, relates to the breeder's right in the territory concerned (see paragraph 6 above): a breeder can only exercise his right in that territory. Thus, 'exercise his right' in relation to the propagating material means to exercise his right in relation to the propagating material <i>in the territory concerned</i> . <del>It is a matter for each member of the Union to determine what constitutes "reasonable opportunity" to exercise his right."</del>
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13. The CAJ-AG agreed that the comments made by ECVC would not be relevant for inclusion in the Explanatory Notes on Acts in Respect of Harvested Material.

14. The CAJ-AG agreed that on the basis of the above amendments, the Office of the Union should prepare a revised version of document UPOV/EXN/HRV Draft 8, to be considered by the CAJ at its sixty-seventh session, to be held in Geneva on March 21, 2013. The CAJ-AG further agreed to propose to the CAJ that the CAJ-AG be invited to immediately start work on illustrative examples for a future possible revision. The CAJ-AG also agreed to propose to the CAJ that the CAJ-AG be invited to consider the development of guidance on "reasonable opportunity".

#### Explanatory Notes on Propagation and Propagating Material

15. The CAJ-AG considered document CAJ-AG/12/7/4, the comments as set out in paragraph 5 and the presentations and views expressed by CIOPORA and ISF.

16. The CAJ-AG agreed that the Office of the Union should prepare a draft "Explanatory Note on Propagation and Propagating Material Under the 1991 Act of the UPOV Convention" for consideration at its eighth session. The basis of the Explanatory Note would be:

(a) to explain forms of material that could be propagating material, including an explanation on the basis of document UPOV/EXN/HRV Draft 8 that "some forms of harvested material have the potential to be used as propagating material", in a similar way to that explained in the "Model Law on the Protection of New Varieties of Plants" ("Model Law" - UPOV Publication No. 842), Section 1.19;

(b) to provide a non-exhaustive list of factors that might be considered in deciding whether material is propagating material, such as:

- (i) whether the material has been used to propagate the variety;
- (ii) whether the material is capable of producing entire plants of the variety;
- (iii) whether there has been a custom/practice of using the material for that purpose;
- (iv) the intention on the part of those concerned (producer, seller, buyer, user); and
- (v) whether the plant material is suitable for reproducing the variety unchanged.

17. It was noted that the list above was a tentative, initial list that would require further consideration. It was also agreed that, in the preparation of the draft Explanatory Note by the Office of the Union, CIOPORA and ISF should be invited to provide additional factors.

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

18. The CAJ-AG considered documents CAJ-AG/12/7/3 and UPOV/EXN/EDV/2 Draft 2, the comments as set out in paragraph 5 and the views expressed by CIOPORA, ECVC and ISF.

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

19. The CAJ-AG agreed the following concerning document UPOV/EXN/EDV/2 Draft 2:

Figure 4	First box to read as follows: Initial Variety "A" (NOT PROTECTED) bred <del>and protected</del> by Breeder 1
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20. The CAJ-AG agreed that, on the basis of the text provided by ISF (document CAJ-AG/12/7/3, paragraph 8, reproduced below) with suitable amendments, the Office of the Union should prepare a text on the possibility to use molecular marker data information of an initial variety to obtain essentially derived varieties to be considered for by the CAJ-AG at its eighth session, to be held in October 2013.

“The collection of molecular data from the initial variety and the subsequent application of the obtained DNA profiles with the explicit intention to select for similar genotypes in a particular population, which is mostly related to the initial variety, may also be regarded as predominant derivation from the initial variety. Therefore, for the purpose of EDV assessment, “predominant derivation” may result from: i) The use of – mainly- the plant material of an initial variety for selection or (back) crossing followed by selection in the breeding process, or ii) The use of molecular marker data, collected from an initial variety, for the purpose of selection of genotypes close or similar to the genotype of the initial variety, or in the case of hybrids, close or similar to the genotype of its parent lines.”

21. The CAJ-AG agreed that on the basis of the above amendments, the Office of the Union should prepare a revised version of document UPOV/EXN/EDV/2 Draft 2, to be considered by the CAJ at its sixty-seventh session, to be held in Geneva on March 21, 2013.

*The relationship between Article 14(5)(b)(i) and (iii) of the 1991 Act of the UPOV Convention*

22. CAJ-AG agreed that, on the basis of the explanatory note 6(ii) on Article 5 “Effects of the Right Granted to the Breeder” presented in document IOM/IV/2 (document CAJ-AG/12/7/3, paragraph 11, reproduced below), the Office of the Union should prepare draft guidance on the relationship between Article 14(5)(b)(i) and (iii) of the 1991 Act of the UPOV Convention for consideration by the CAJ-AG at its eighth session, to be held in October 2013.

[Extract of the explanatory notes on Article 5 “Effects of the Right Granted to the Breeder” presented in document IOM/IV/2, “Revision of the Convention”]

“5. Paragraph 3. – This paragraph introduces a new concept into the law of plant variety protection: the exploitation – but not the breeding – of a variety that is essentially derived from a protected variety would be subject to the right granted to the breeder of the latter variety (‘dependence’).

“6. The Committee has not yet taken a final position on the question whether the word ‘single’ would be inserted or omitted; at the present stage of the discussions, there seems to be general agreement on the fact that the following conditions should be met for there to be dependence:

“[...]

“(ii) the derived variety must retain almost the totality of the genotype of the mother variety and be distinguishable from that variety by a very limited number of characteristics (typically by one)

“[...]

*Matters concerning essentially derived varieties arising after the grant of a breeder’s right*

23. The CAJ-AG noted the presentation by the Delegation of the European Union made to the CAJ-AG at its seventh session.

24. The CAJ-AG agreed that, at an appropriate future meeting of the CAJ-AG, the Delegations of Australia, Brazil and the European Union and other members of the Union would be invited to make presentations on their systems concerning essentially derived varieties.

Matters arising after the grant of a breeder's right

25. The CAJ-AG considered document CAJ-AG/11/6/4.

26. The CAJ-AG considered that it would be appropriate to develop further guidance in separate documents for the following matters, on the basis of the relevant sections in document CAJ-AG/11/6/4:

- (a) Cancellation of the breeder's right;
- (b) Nullity of the breeder's right;
- (c) Variety denominations; and
- (d) Variety descriptions.

27. The CAJ-AG agreed that the Office of the Union should seek clarification on the issues that the European Union and the Russian Federation intended to be covered in relation to possible further guidance on provisional protection.

28. The CAJ-AG agreed that the Office of the Union should seek clarification on the issues that the Russian Federation intended to be covered in relation to possible further guidance on filing of applications and enforcement of breeders' rights.

29. In the light of other developments and matters considered by relevant guidance under consideration the CAJ-AG agreed not to continue discussions on:

- (e) Material covered by the breeder's right;
- (f) Essentially derived varieties;
- (g) Exhaustion of the breeder's right;
- (k) Providing information on varieties covered by the breeder's right.

Matters referred by the CAJ to the CAJ-AG for consideration since the sixth session of the CAJ-AG

30. The CAJ-AG considered document CAJ-AG/12/7/5.

31. With regard to the request of the CAJ to consider the suggestion to include a limited number of permanent places for observers representing various stakeholder groups such as farmers, breeders and certain other observer non-governmental organizations (NGOs) in the CAJ-AG and to allow the stakeholder groups to coordinate on the persons to occupy those places at each session of the CAJ-AG, according to the matters under consideration, the CAJ-AG noted that document UPOV/INF/7 "Rules of Procedure of the Council", Rules 36 and 20, states as follows:

"Rule 36: Establishment of Committees

"(1) The Council may set up permanent or temporary committees to prepare its work or to examine technical, legal or any other questions of interest to UPOV.

"(2) When setting up any committees, the Council shall establish the terms of reference of that committee and shall determine whether and to what extent observers will be invited to the meetings of the committee; the Council may, at any time, decide changes in the initial terms of reference and in the decision concerning observers."

"Rule 20: Observers and Experts

"(1) Observers and experts may take part in debates at the invitation of the chairman.

"(2) They may not submit proposals, amendments or motions, and have no right to vote."

32. The CAJ-AG agreed that it, in that context, the CAJ-AG should seek further guidance from the CAJ before making a proposal.

Date and program for the eighth session

33. Subject to approval by the Administrative and Legal Committee (CAJ) at its sixty-seventh session, to be held on March 21, 2013, the CAJ-AG agreed the following program for its eighth session, to be held in October 2013:

1. Opening of the session
2. Adoption of the agenda
3. Explanatory Notes on Essentially Derived Varieties under the 1991 Act of the UPOV Convention (revision)
4. Explanatory Notes on Propagation and Propagating Material
5. Possible revision on cancellation of the breeder's right
6. Possible revision on Nullity of the breeder's right
7. Possible revision on Variety denominations
8. Possible revision on Variety descriptions
9. Matters arising after the grant of a breeder's right on: provisional protection, filing of applications and enforcement of breeders' rights.
10. Matters referred by the CAJ to the CAJ-AG for consideration since the seventh session of the CAJ-AG
11. Date and program for the ninth session

34. The CAJ-AG noted that subject to any changes that the CAJ might agree at its sixty-seventh session, to be held on March 21, 2013, the sixty-eighth session of the CAJ would be held on October 21 and 22, 2013, and that the eighth session of the CAJ-AG would be held on October 25, 2013.

[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/  
por orden alfabético de los nombres en francés de los miembros)

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