



C/47/9

ORIGINAL: English

DATE: October 10, 2013

INTERNATIONAL UNION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS

Geneva

COUNCIL**Forty-Seventh Ordinary Session
Geneva, October 24, 2013**

PROGRESS REPORT OF THE WORK OF THE ADMINISTRATIVE AND LEGAL COMMITTEE

*prepared by the Office of the Union**Disclaimer: this document does not represent UPOV policies or guidance*

1. The Administrative and Legal Committee (CAJ) held its sixty-seventh session in Geneva, on March 21, 2013, under the chairmanship of Mr. Lü Bo (China). An oral report on the sixty-eighth session of the CAJ, to be held in Geneva on October 21, 2013, and on the program for its sixty-ninth session, will be made by the Chair of the CAJ at the forty-seventh ordinary session of the Council, to be held in Geneva on October 24, 2013.

2. At its sixty-seventh session, the CAJ considered the following matters:

(a) Report on Developments in the Technical Committee: The CAJ noted the report made by Mr. Joël Guiard (France), Chair of the Technical Committee (TC), on developments in the TC at its forty-ninth session, held in Geneva from March 18 to 20, 2013. The CAJ noted that the conclusions of the TC in relation to matters to be considered by the CAJ were reported in document CAJ/67/13 "Report on the Conclusions of the Technical Committee at its forty-ninth session on matters to be considered by the Administrative and Legal Committee". It further noted that the report on the conclusions of the TC was available in document TC/49/41 "Report on the Conclusions" (see document CAJ/67/14 "Report on the Conclusions", paragraph 9);

(b) Development of information materials concerning the UPOV Convention:

(i) The CAJ approved document UPOV/EXN/BRD Draft 6 as the basis for the adoption of the "Explanatory Notes on the Definition of Breeder under the 1991 Act of the UPOV Convention" by the Council at its forty-seventh ordinary session, to be held in Geneva on October 24, 2013, subject to one change in the Spanish translation of document UPOV/EXN/BRD Draft 6 (see document CAJ/67/14 "Report on the Conclusions", paragraph 11);

(ii) The CAJ decided to postpone the approval of the "Explanatory Notes on Acts in Respect of Harvested Material under the 1991 Act of the UPOV Convention" until its sixty-eighth session, to be held in Geneva on October 21, 2013, in order to verify the translations of the document and consider the following proposals:

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. However, subject to Articles 15(1) and 16, "unauthorized use" would refer to acts that were included in the scope of the breeder's right and were not covered by the optional exception in the legislation of the member of the Union concerned. In particular, 'unauthorized use' would refer to acts that did not comply with the terms and conditions of reasonable limits and the safeguarding of the legitimate interests of the breeder provided in the optional exception. "
Title section (d)	To read as follows: " <u>Reasonable opportunity</u> to exercise his right"

The CAJ agreed to invite the Administrative and Legal Committee Advisory Group (CAJ-AG) to immediately start work on a future possible revision of the "Explanatory Notes on Acts in Respect of Harvested Material under the 1991 Act of the UPOV Convention" in order to include illustrative examples of situations where breeders might be considered to be able to exercise their rights in relation to harvested material. The CAJ agreed to invite the CAJ-AG to consider the development of guidance on "reasonable opportunity" in relation to a possible revision of the "Explanatory Notes on Acts in Respect of Harvested Material under the 1991 Act of the UPOV Convention" (see document CAJ/67/14 "Report on the Conclusions", paragraphs 12 to 14);

(iii) The CAJ agreed that consideration of document UPOV/EXN/EDV/2 Draft 3 "Explanatory Notes on Essentially Derived Varieties under the 1991 Act of the UPOV Convention (Revision)" should be postponed until after the seminar on essentially derived varieties (EDVs), proposed to be held on October 22, 2013, and the consideration of that seminar by the CAJ-AG at its eighth session, to be held on October 25, 2013. The CAJ also agreed that consideration should be given to moving paragraph 8 of document UPOV/EXN/EDV/2 Draft 3 after paragraph 4. The CAJ noted that the Office of the Union would prepare a text on the possibility to use molecular marker data information of an initial variety to obtain essentially derived varieties for consideration by the CAJ-AG at its eighth session, to be held on October 25, 2013. The CAJ noted that the Office of the Union would prepare draft guidance on the relationship between Article 14(5)(b)(i) and (iii) of the 1991 Act of the UPOV Convention, 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, for consideration by the CAJ-AG at its eighth session, to be held on October 25, 2013. To further assist the CAJ-AG in preparing draft guidance, the CAJ agreed to propose to the Council that a seminar on essentially derived varieties (EDVs) be organized on October 22, 2013, in order to consider the following:

- technical and legal views on "predominantly derived", "essential characteristics" and "differences which result from the act of derivation" (see Article 14(5)(b) of the 1991 Act of the UPOV Convention), the relationship between Article 14(5)(b)(i) and (iii) of the 1991 Act of the UPOV Convention and the possible impact on breeding and agriculture;
- existing experience in relation to EDVs; and
- the possible role of future UPOV guidance on EDVs in cases before the courts;

With regard to the possible impact on breeding and agriculture, it agreed that the seminar should include the perspective of farmer-breeders. The CAJ agreed that the program for the seminar and the speakers should be agreed between the Office of the Union and the Chair and Vice-Chair of the CAJ, and the President of the Council. It also agreed that consideration should be given to making the seminar open to the public, with the presentations and discussions at the seminar being made available on the UPOV website after a suitable broadcast delay. The CAJ noted that, at an appropriate future session 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 (see document CAJ/67/14 "Report on the Conclusions", paragraphs 15 to 20);

(iv) The CAJ agreed to include an item on the program for the updating of document UPOV/INF/5 "UPOV Model Plant Breeders' Rights Gazette", as set out in paragraphs 9 and 10 of document CAJ/67/10 (see document CAJ/67/14 "Report on the Conclusions", paragraph 21);

(v) The CAJ agreed to invite the Consultative Committee and the Council to provide guidance on the proposals concerning participation of observers in the CAJ-AG, as set out in paragraphs 25 to 27 of document CAJ/67/2 "Development of information materials concerning the UPOV Convention" (see document CAJ/67/14 "Report on the Conclusions", paragraph 22);

(vi) The CAJ noted the plans of the CAJ-AG concerning matters arising after the grant of a breeder's right, as set out in paragraphs 32 to 36 of document CAJ/67/2 (see document CAJ/67/14 "Report on the Conclusions", paragraph 24);

(vii) The CAJ noted the plans of the CAJ-AG concerning the development of the "Explanatory Notes on Propagation and Propagating Material Under the 1991 Act of the UPOV Convention", as follows:

"39. 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.

(see document CAJ-AG/12/7/6 "Report on the conclusions", paragraph 16)

"40. 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 Notes by the Office of the Union, CIOPORA and ISF should be invited to provide additional factors (see document CAJ-AG/12/7/6 "Report on the conclusions", paragraph 17)."

The CAJ noted the report on the work of the CAJ-AG at its seventh session, as provided in document CAJ-AG/12/7/6 "Report on the Conclusions" (see document CAJ/67/14 "Report on the Conclusions", paragraphs 25 and 26);

(viii) The CAJ noted that the Council would be invited to adopt a revision of document UPOV/INF/6/2 "Guidance for the preparation of laws based on the 1991 Act of the UPOV Convention" (document UPOV/INF/6/3), in conjunction with the explanatory notes that the Council would be invited to adopt at its forty-seventh ordinary session, to be held in Geneva on October 24, 2013 (see document CAJ/67/14 "Report on the Conclusions", paragraph 27);

(ix) The CAJ approved the work program for the development of information materials for the eighth session of the CAJ-AG, to be held on October 25, 2013, as set out in document CAJ/67/14 "Report on the Conclusions", paragraph 28:

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 under the 1991 Act of the UPOV Convention
5. Explanatory Notes on Acts in Respect of Harvested Material under the 1991 Act of the UPOV Convention
6. Possible revision of the Explanatory Notes on the Cancellation of the Breeder's Right under the UPOV Convention
7. Possible revision of the Explanatory Notes on the Nullity of the Breeder's Right under the UPOV Convention
8. Possible revision of the Explanatory Notes on Variety Denominations under the UPOV Convention

9. Possible guidance on variety descriptions
10. Matters arising after the grant of a breeder's right on: provisional protection, filing of applications and enforcement of breeders' rights.
11. Matters referred by the CAJ to the CAJ-AG for consideration since the seventh session of the CAJ-AG
12. Date and program for the ninth session

(c) TGP documents:

(i) In agreement with the conclusions of the TC at its forty-ninth session (see the Annex to document CAJ/67/13, paragraphs 1 to 3), the CAJ approved document TGP/15/1 Draft 4 "~~New Types of Characteristics~~ [Guidance on the Use of Biochemical and Molecular Markers in the Examination of Distinctness, Uniformity and Stability (DUS)]" as the basis for the adoption of document TGP/15/1 by the Council at its forty-seventh ordinary session to be held in Geneva on October 24, 2013. The CAJ noted that document TGP/15/1 could be revised in the future, for instance to incorporate additional examples for the models (see document CAJ/67/14 "Report on the Conclusions", paragraphs 30 and 32);

(ii) Subject to changes agreed by the TC and the CAJ, the CAJ approved documents CAJ/67/11 "Revision of existing sections of document TGP/14: Section 2: Botanical Terms, Subsection 2: Shapes and Structures" and CAJ/67/12 "Revision of document TGP/14: Section 2: Botanical Terms, Subsection 3: Color" as the basis for the adoption of document TGP/14/2 by the Council at its forty-seventh ordinary session to be held in Geneva on October 24, 2013 (see document CAJ/67/14 "Report on the Conclusions", paragraph 36);

(iii) The CAJ approved the program for the development of TGP documents, as amended in accordance with the conclusions of the TC at its forty-ninth session (see the Annex to document CAJ/67/13, paragraph 8) (see document CAJ/67/14 "Report on the Conclusions", paragraph 39);

(d) Molecular techniques:

The CAJ noted that the TC had agreed to the possibility of holding a coordinated meeting of the fourteenth session of the Working Group on Biochemical and Molecular Techniques, and DNA-Profiling in Particular (BMT) with meetings of other relevant international organizations, as set out in paragraphs 8 and 9 of document CAJ/67/4 "Molecular techniques". The TC had also agreed that, if it was not possible to organize a joint meeting with other organizations in 2014, a meeting of the BMT should be organized in the meantime (see the Annex to document CAJ/67/13, paragraph 10) (see document CAJ/67/14 "Report on the Conclusions", paragraph 42);

(e) Variety denominations:

The CAJ noted the developments concerning potential areas for cooperation between UPOV and the International Commission for the Nomenclature of Cultivated Plants of the International Union for Biological Sciences (IUBS Commission) and the International Society for Horticultural Science Commission for Nomenclature and Cultivar Registration (ISHS Commission), as set out in paragraphs 4 and 5 of document CAJ/67/5 "Variety denominations" (see document CAJ/67/14 "Report on the Conclusions", paragraph 44);

(f) UPOV information databases:

(i) The CAJ noted the amendments to UPOV codes for certain hybrid genera and species, as set out in Annex II of document CAJ/67/6 "UPOV information databases" (see document CAJ/67/14 "Report on the Conclusions", paragraph 46);

(ii) The CAJ noted the developments concerning the program for improvements to the Plant Variety Database, as reported in document CAJ/67/6. The CAJ noted the presentation of the new page of the PLUTO Plant Variety Database for searching variety denominations. The CAJ noted the presentation made by the Delegation of the European Union on the Community Plant Variety Office (CPVO) experience in the use of its denomination similarity search tool in the examination of proposed denominations. The CAJ welcomed the proposal made during the presentation by the CPVO to explore the possibility to develop a UPOV similarity search tool for variety denomination purposes, based on the CPVO search tool, and agreed to include an item to consider that proposal at its sixty-eighth session, to be held in Geneva on October 21, 2013. The CAJ noted the information on the contribution of data and the provision of assistance to

contributors, as set out in Annex IV to document CAJ/67/6. The CAJ noted the plans of the Office of the Union to conduct a survey of members of the Union on their use of databases for plant variety protection purposes and on their use of electronic application systems (see document CAJ/67/14 "Report on the Conclusions", paragraphs 47 to 52);

(g) Exchangeable software:

The CAJ noted the conclusions of the TC, at its forty-ninth session, held in Geneva from March 18 to 20, 2013, on a proposed revision of document UPOV/INF/16 for inclusion of new software and for the inclusion of information on software use by members of the Union, as set out in the Annex to document CAJ/67/13, paragraphs 25 to 28. The CAJ noted, in particular, that the TC had reviewed the title of document UPOV/INF/16 "Exchangeable Software" and Section "1. Requirements for exchangeable software" and had agreed that those texts should remain unchanged on the basis that the document concerned software that had been developed or customized by a member of the Union for UPOV purposes. However, the TC had agreed that it would be useful to develop a separate information document that would allow members of the Union to provide information on the use of non-customized software and equipment (e.g. data loggers) that was used by members of the Union (see Annex to document CAJ/67/13, paragraph 24). The CAJ noted that it would be invited, at its sixty-eighth session, to be held in Geneva in October 2013, to consider a proposed revision of document UPOV/INF/16 "Exchangeable Software" (see document CAJ/67/14 "Report on the Conclusions", paragraphs 54 to 56);

(h) Electronic application systems:

The CAJ noted the oral report by the Office of the Union of the meeting on the development of a prototype electronic form, held in Geneva on the evening of March 20, 2013. In particular, it was informed that the prototype electronic form would be initially developed for lettuce, potato, rose and apple. It was also informed that it had been agreed, in the first instance, to prepare all questions in the form in English and in the languages of the members of the Union concerned for their own questions. The CAJ noted that the next meeting on the development of a prototype electronic form was planned to take place in Geneva in the evening of October 24, 2013 (see document CAJ/67/14 "Report on the Conclusions", paragraph 58);

(i) Use of electronic communication for meetings:

The CAJ noted that the Consultative Committee, at its eighty-fourth session, held in Geneva on October 31, 2012, had approved the use of web conferencing by UPOV bodies, as considered appropriate by the UPOV body concerned, to facilitate participation by members of the Union and observers in accordance with the existing procedures. The Consultative Committee had recalled that the procedures concerning the invitations to the sessions of the UPOV bodies were contained in the UPOV Convention, rules of procedure, guidance for members of UPOV on ongoing obligations and related notifications, rules governing the granting of observer status to States, intergovernmental organizations and international non-governmental organizations in UPOV bodies and the rules governing access to UPOV documents. In accordance with those procedures, web conferencing participation would be by means of a password issued to the designated persons in the relevant UPOV body and participation would be monitored by the Office of the Union. The CAJ noted that the Consultative Committee, at its eighty-fourth session, had also approved the use of webcasting of sessions of UPOV bodies for viewing by members of the Union and observers in accordance with the existing procedures, as considered appropriate by the UPOV body concerned. The Consultative Committee had noted that the procedures concerning the invitations to the sessions of the UPOV bodies were contained in the UPOV Convention, rules of procedure, guidance for members of UPOV on ongoing obligations and related notifications, rules governing the granting of observer status to States, intergovernmental organizations and international non-governmental organizations in UPOV bodies and the rules governing access to UPOV documents. In accordance with those procedures, webcasting viewing would be by means of a password issued to the designated persons in the relevant UPOV body and participation would be monitored by the Office of the Union. The CAJ also noted that the Consultative Committee, at its eighty-fourth session, had agreed that, in all other cases of webcasting, the Consultative Committee would be invited to approve any arrangements for a possible webcast (see document CAJ/67/14 "Report on the Conclusions", paragraph 60 and 61).

Program for the sixty-eighth session

3. The following program was agreed for the sixty-eighth session of the CAJ, to be held in Geneva on October 21, 2013: Opening of the session; Adoption of the agenda; Development of information materials concerning the UPOV Convention; Molecular techniques; Variety denominations; UPOV information databases; Exchangeable software; Electronic application systems; Possible development of a UPOV similarity search tool for variety denomination purposes; Program for the sixty-ninth session; Adoption of the report on the conclusions (if time permits); and Closing of the session (see document CAJ/67/14 "Report on the Conclusions", paragraph 62).

4. *The Council is invited to:*

(a) *note the work of the CAJ, as reported in this document and in the oral report to be made by the Chair of the CAJ; and*

(b) *approve the work program for the sixty-ninth session of the CAJ, as presented in the oral report of the Chair of the CAJ.*

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