



CAJ/40/6

ORIGINAL : French

DATE : March 10, 2000

**UNION INTERNATIONALE POUR LA PROTECTION DES OBTENTIONS VÉGÉTALES**  
GENÈVE

**ADMINISTRATIVE AND LEGAL COMMITTEE**

**Fortieth Session**  
**Geneva, October 18, 1999**

REPORT

*adopted by the Committee*

Opening of the Session

1. The Administrative and Legal Committee (hereinafter referred to as “the Committee”) held its fortieth session in Geneva on October 18, 1999, under the chairmanship of Mr. John Carvill (Ireland).
2. The list of participants is given in the annex to this report.
3. The session was opened by the Chairman, who welcomed the participants. He extended a special welcome to the delegations of the States that had become members of UPOV since the preceding session of the Committee, i.e. Bolivia, Brazil, China, Kenya, Panama and Slovenia.

Adoption of the Agenda

4. The Committee adopted the agenda as given in document CAJ/40/1 after having agreed to add an item on the links between a hybrid variety and its components from the point of view of novelty and an item on the marking of protected varieties.

The Notion of Breeder

5. Discussions were based on document CAJ/40/2.

*The document itself*

6. The Delegation of the United States of America found the document useful and convincing. It also wished that the first sentence of paragraph 12 be clarified, since it ought to refer to patents for invention.

7. The Delegation of France was worried about the possible impact of the document. Certainly, it was intellectually rigorous, legally correct and economically pertinent, but it was perhaps psychologically inadvisable to set out the system of protection with total transparency which, for the critics of the system, would confirm their worst fears about the appropriation of genetic resources for mercantile purposes.

8. The Delegation of the United Kingdom observed that the issue of activities pursued with natural resources was becoming ever more sensitive at a political level, but felt that one should be frank and transparent. UPOV should present the complete situation and place emphasis on the benefits of plant variety protection for agriculture.

9. The Delegation of Germany stressed the need for genetic progress and in order to promote that progress it was necessary to have a system of protection for new plant varieties. It would be useful in that respect to lay more emphasis on the advantages derived from the system of protection.

10. The Delegation of the Netherlands was satisfied with the document, but understood that some delegations could be concerned at its impact. It felt that if the document was to be revised, then emphasis should be laid on the fact that UPOV was perfectly aware of the problems raised in other forums.

11. The Delegation of Mexico pointed out that Mexico was an important center of origin and diversity of cultivated plants and that it hosted CIMMYT, the International Maize and Wheat Improvement Center. It understood the aims of the document, but felt that it did not take into sufficient account the importance of conserving genetic resources. It also stressed that the issue of access to genetic resources was a matter for the laws taken to implement the International Undertaking on Plant Genetic Resources and the Convention on Biological Diversity and that it was for breeders to comply with those laws.

12. The Delegation of Sweden observed that the discussion bore more on the basic principles of protection of new plant varieties than on the notion of breeder.

13. The representative of ASSINSEL noted that the document concerned an important issue and that it dealt with debatable items. He expressed the wish that it should be subjected to a new examination.

14. The Vice Secretary-General pointed out that it was wrong to think that there was an enormous problem of "bio-piracy" and, in fact, none of the allegations made in various circles had been substantiated; moreover, the matter of the conservation of genetic resources did not

fall within the ambit of UPOV, but of other organizations working in parallel with UPOV. He suggested that the next session of the Committee should examine a draft position paper.

15. The Committee went along with that suggestion.

*Genetic origin of varieties*

16. The Delegation of France also referred, in its statement reported in part in paragraph 7 above, to the issue of the genetic origin of a variety, which was of capital importance. Information was requested under the procedure for granting a plant variety protection certificate under the heading of useful information (errors made in good faith could not be held against the grant of a title). However, the authorities were hearing contradictory demands, some parties advocating the maintaining of confidentiality and the others asking for publication.

17. The Delegation of the United Kingdom observed that there was no pressing demand in the United Kingdom for publication of the genetic origin of a variety. Moreover, the forms were currently being revised in order to separate the public information from that which was to remain confidential.

18. The Delegation of the Netherlands considered that the question of genetic origin did not concern UPOV and that it was administratively impossible, as things stood, to require information on origin.

19. The Delegation of Mexico felt, on the contrary, that it was necessary for the applicant to declare the genetic origin of the variety to enable the official service to check that it complied with the provisions governing access to genetic resources.

20. The Vice Secretary-General pointed out that all the member States requested information on the genetic origin of a variety. However, one should avoid going beyond what was necessary for examination and thereby adding, *de facto*, a new requirement for protection.

Notion of Trees and Vines for the Purposes of the Provisions on Novelty and the Duration of Protection

21. Discussions were based on document CAJ/40/3.

22. Following a brief discussion, the Committee decided:

(a) that the Office of the Union should draw up for the next session a revised document containing more precise information with the aim of making a recommendation to the member States (taking into account the fact that certain States administer the protection system on the basis of a distinction between herbaceous plants and woody plants);

(b) that it would consider at its next session possible provisions for adoption, at the appropriate time, when the special treatment for trees and vines would be eliminated.

Breeders' Exemption

23. Discussions were based on document CAJ/40/4.
24. Several delegations stressed that the question raised in that document was a private law issue and therefore beyond the competence of plant variety protection services. However, there were other authorities that could be required to pronounce on the validity of the clauses concerned.
25. The Delegation of France pointed out that the problem arose more particularly in the case of varieties that would not be marketed as such. It considered that that case would have to be examined in depth since a basic principle of the Convention — which, in the opinion of the Plant Variety Protection Committee of France, constituted a public provision — was not applied when a line was protected; thinking could perhaps be based on the Budapest Treaty on the International Recognition of the Deposit of Microorganisms for the Purposes of Patent Procedure in order to achieve a logical functioning of the system of protection.
26. The Delegation of the United Kingdom remarked that, due to lack of time, no firm conclusions had been so far reached, but that the preliminary view of the experts was that the clauses concerned could indeed be declared contrary to competition law as the result of an abuse of a dominant position.
27. The Delegation of Argentina observed that, in its country, protected lines were subject to the same rules concerning publication and availability as the other varieties.
28. The Delegation of the Russian Federation explained that licensing contracts had to be registered in its country and that a contract containing a clause that waived the “breeder’s exemption” would not be registered.
29. The Delegation of the Netherlands noted that the clause concerned could only be examined in its country by a court to which a party that considered itself prejudiced had applied. However, it was to be feared that such party would not take the risk of attacking the breeder where the latter was in a dominant position, even if that party had a good likelihood of winning.
30. The representative of ASSINSEL stated that breeders supported the principle of “breeder’s exemption”, but felt that it had to be exercised in accordance with strict rules and conditions. The UPOV Convention did not contain an obligation to make plant material available to third parties so that they may use it for breeding purposes, nor did it provide a mechanism to that effect. Subject to the effects of other intellectual property rights that could co-exist with a breeder’s right, two principles ought to be applied. Firstly, only the propagating material of protected varieties that were marketed as such and the material that was remitted by the breeder or his successor in title under a contract specifically dealing with variety creation should be available for plant breeding. Secondly, certain types of material should be excluded from the exemption, i.e. material handed to third parties for the purposes of experimentation or integrated production; material that had been fraudulently obtained or inadvertently disclosed. The access to the genetic heritage of an inbred line could perfectly be obtained through the seeds of the commercial hybrids derived from it.
31. The representative of CIOPORA also observed that the breeders were in favor of “breeder’s exemption”, which was very similar to the exception for experimental use under

patent law. However, the breeders represented by CIOPORA were opposed to an extension of the exemption to the marketing of derived varieties. As far as the 1991 Act was concerned, they were relatively satisfied, but would have preferred a system of dependence applying to all varieties that reproduced the essential characteristics of the protected initial variety. As to the waiver clauses under examination, CIOPORA considered that they would not stand examination by a court (except in connection with acts such as the supplying of a variety to a third party for experimentation). Moreover, they would be governed in future, within the European Community, by the Regulation on block exemptions, which also applied to plant varieties.

32. The Delegation of the United States of America considered the matter difficult and one calling for a solution. When a breeder sold his seed under a contract that was explicitly or implicitly binding for the purchaser, the latter would be prosecuted for any violation of a clause in the contract in accordance with the law of contracts. That meant that legal protection would only be of use against infringing third parties if the clauses of the contract were lawful.

33. The Vice Secretary-General explained that legal proceedings were ongoing in the United States of America and that the courts would probably be required to pronounce on the clause under examination in the meeting.

34. The Chairman concluded the discussions by requesting delegations to provide additional information and suggesting that the Committee could consider at its next session the question of principle raised by the Delegation of France (see paragraph 25 above).

35. The Committee went along with that suggestion. The representative of ASSINSEL stated that a system of deposit for the seeds of inbred lines, similar to the system under the Budapest Treaty, would be a source of major concern for breeders.

#### New Procedures for the Revision of Treaties

36. The Committee took note of document CAJ/40/5.

#### Links between a Hybrid Variety and its Components from the Point of View of Novelty

37. The Delegation of France pointed out that one of the aims of the 1991 revision had been to settle the issue of the novelty of lines contained in the formula of a hybrid, but that certain States at the Diplomatic Conference had wished for a provision that would enable the variety to be used prior to the filing of an application for protection under a system that implied neither sale nor furnishing to third parties of propagating material or harvested material. It would seem that the wording of Article 6(1) of the 1991 Act did not permit the conclusion — perhaps not in all cases — that a line lost its novelty through the marketing of a hybrid derived from it. In the view of the Delegation of France, it had become essential to have a clear interpretation of Article 6(1).

### Marking of Protected Varieties

38. The Delegation of France explained that various breeders wished to use a sign similar to the “®” used for registered trademarks to denote that a variety was protected. Although it was not a matter that concerned the authorities, it would be useful if the Committee could consider that matter and, if appropriate, give its advice.

### Program for the Forty-First Session

39. The Vice Secretary-General pointed out that work was currently ongoing within the European Community with regard to signs capable of constituting a variety denomination. He suggested that the issue should also be dealt with by the Committee to the extent that the work concerned could have an effect on all the member States in view of the principle of using a single variety denomination.

40. The program for the forty-first session would include the following items:

- a) The notion of breeder (position paper);
- b) The notion of trees and vines for the purposes of the provisions on novelty and the duration of protection (list of genera and species that could be concerned by a recommendation and future solutions from a legal point of view);
- c) Links between a hybrid variety and its components from the point of view of novelty;
- d) Breeder’s exemption;
- e) Signs which may constitute a variety denomination;
- e) Marking of protected varieties.

*41. This 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 États/in the alphabetical order of the names  
in French of the States/in alphabetischer Reihenfolge der französischen Namen der Staaten/  
por orden alfabético de los nombres en francés de los Estados)

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