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

**ADMINISTRATIVE AND LEGAL COMMITTEE**

**Forty-Third Session**  
**Geneva, April 5, 2001**

REPORT

*adopted by the Committee*

Opening of the Session

1. The Administrative and Legal Committee (hereinafter referred to as "the Committee") held its forty-third session in Geneva on April 5, 2001, under the chairmanship of Mr. John Carvill (Ireland).
2. The list of participants is given in Annex I to this report. The Chairman welcomed the participants and especially the Delegation of Romania as a new member State of UPOV.
3. The Vice Secretary-General introduced the new staff of the Office of the Union: Mr. Paul Senghor, national of Senegal, and Ms. Yolanda Huerta, national of Spain. Mr. Senghor, who had pursued a career as a breeder at a national agricultural research institute and had represented his country in many international fora, would be the regional professional responsible for African and Arab countries, and Ms. Huerta, a lawyer with international experience and who has been working as Senior Legal Officer in the Office of Legal and Organization Affairs in the World Intellectual Property Organization, would be Senior Legal Officer.

Adoption of the Agenda

4. The Chairman proposed modifications to the agenda (document CAJ/43/1):

- to introduce the item “Brief report on the thirty -seventh session of the Technical Committee” as a new item 3 and,
- to discuss the item “ Terms of Reference of *Ad hoc* Subgroup of Technical and Legal Experts on Biochemical and Molecular Techniques (document CAJ/43/3)” after the item “New General Introduction to the Assessment of Distinctness, Uniformity and Stability in New Varieties of Plants (documents CAJ/43/4 and TC/37/5)”.

5. The Committee approved the above -mentioned modifications to the agenda as proposed by the Chairman.

#### Brief Report on the Thirty -Seventh Session of the Technical Committee

6. Mrs. Elise Buitendag, Chairperson of the Technical Committee, reported on the thirty-seventh session of the Technical Committee, which was held in Geneva from April 2 to 4, 2001. She summarized discussions on the main issues as follows:

General Introduction : The Technical Committee approved a document incorporating the suggestions made by the Committee during its forty -second session. Further amendments by the Technical Committee would be presented to the Committee for consideration later in the session.

UPOV databases : The Technical Committee decided to consider the revision of the UPOV information data bases, and decided to set up an *Ad hoc* working group to take this matter forward. The Technical Committee noted that this issue overlapped with the publication of plant variety descriptions, which would also be discussed by the Committee later in the session.

Reports on the work of the Technical Working Parties : The Technical Committee was informed about the progress in the work of the Technical Working Parties during year 2000 and also on the work of the *Ad hoc* subgroups in molecular techniques.

Reports on the discussions at the Committee, the Consultative Committee and the Council : The Technical Committee was informed by the Vice Secretary -General about the discussions at the last sessions of the Administrative and Legal Committee, the Consultative Committee and the Council of UPOV.

Approval of Test Guidelines : The Technical Committee adopted the following Test Guidelines:

TG/5/7:	Red Clover/Trèfle violet/Rotklee/Trébol rojo
TG/37/10:	Turnip/Navet/Herbst-, Mairübe/Nabo
TG/44/10:	Tomato/Tomate/Tomate/Tomate
TG/88/6:	Cotton, Cotonnier, Baumwolle, Algodón
TG/89/6:	Swede, Rutabaga/Chou -navet, Rutabaga/Kohlrübe/Colinabo
TG/94/6:	Ling, Scots Heather/Callune/Besenheide/Calluna
TG/98/6:	Actinidia/Actinidia/Actinidia/Actinidia
TG/162/4:	Garlic/Ail/Knoblauch/Ajo

TG/170/3:	Subterranean Clover/Trèfles souterrain/Bodenfrüchtiger Klee, Trébol subterráneo
TG/177/3:	Zantedeschia/Zantedesquie/Kalla, Zantedeschia/Cala
TG/178/3:	Fodder Radish/Radis oléifère, Radischinois/Ölrettich/ Rábano oleaginoso
TG/179/3:	White Mustard/Moutarde blanche/Weisser Senf/ Mostazablanca
TG/180/3:	Rescue Grass, Alaska Brome -grass/Brome cathartique, Brome sitchensis/Horn trespe, Alaska -Trespe/Cebadilla, Triguillo, Bromo
TG/181/3:	Amaryllis/Amaryllis/Amaryllis/Amarilis
TG/182/3:	Guzmania/Guzmania/Guzmania/Guzmania
TG/183/3:	Fennel/Fenouil/Fenchel/Hinojo
TG/184/3:	Globe Artichoke/Artichaut/Artischoke/ Alcachofa, A lcaucil
TG/191/2:	Horse Radish/Raifort Sauvage/Meerrettich/Rábano Salvaje.

Chairman and Vice -Chairman: The Technical Committee proposed that the Council elect Mr. Michael Camlin (United Kingdom) as Chairman and Ms. Julia Borys (Poland) as Vice-Chairperson for the forthcoming three -year term.

Items for the consideration of the Committee in the present session \_\_\_\_\_: The Technical Committee agreed to request the advice of the Committee on the following items: (a) the technical difficulties in considering all the varieties of common knowledge in the DUS examination; (b) the status of the information contained in the Technical Questionnaire of the applications for plant breeders' rights, and (c) the recommendation of methods which are covered by patent rights in the UPOV Test Guidelines.

7. The Chairperson of the Technical Committee thanked the Committee for its contribution to the revision of the General Introduction.

#### The Notion of Breeder and Common Knowledge \_\_\_\_\_

8. The Vice Secretary-General introduced document CAJ/43/2. He reminded the Committee that this subject had been discussed several times in past sessions and noted that the main changes to the document were in paragraph 22 of the Annex, which recommended UPOV member States to be prepared to take into account not only knowledge that exists in documented form but also the knowledge of relevant communities around the world, provided that this knowledge can be credibly substantiated to satisfy the standard of proof of the civil law courts. The Committee also agreed to two minor changes in the wording of paragraphs 15 and 21 proposed by the Vice Secretary -General.

9. At the invitation of the Chairman, several Delegations made comments on the document. The Delegation of Australia proposed to change the wording of the first sentence of paragraph 18 of the Annex to document CAJ/43/2 to "Protection is therefore potentially available..." He explained that the introduction of the word "potentially" was to remove the mandatory nature of the sentence, because the applicant may be shown not to be the breeder after the granting of the plant breeder's right. The Delegation of France observed that the French text of the document did not imply an obligation to grant protection. They added that the subject of the document was the definition of breeder and that protection should be granted regardless of the process of breeding the variety, provided that the requirements of the administrative process had been met. They concluded that the addition of the word "potentially" in the French text would be incorrect. The representative of ASSINSEL clarified that the wording used in the French text should be translated into English as "maybe

granted”, which would be according to the proposal from Australia. The Delegation of Australia agreed to the wording proposed by the representative of ASSINSEL.

10. The Committee agreed to the proposal of the Chairman to replace the wording “is therefore available” of paragraph 18 of the Annex to document CAJ/43/2 by “may be granted.”

11. The Delegation of the Community Plant Variety Office (CPVO) supported the development of the document, which it considered as confirming that the plant breeder’s rights created under the UPOV Convention were not contrary to those laid down in the Convention on Biological Diversity. However, the Delegation of the CPVO expressed concern that paragraphs 1 and 13 of the Annex to document CAJ/43/2 gave the idea that the development of agriculture was the only aim of the UPOV Convention. They observed that the development of agriculture, which included other types of plants such as ornamentals, was one of the aims of the Convention; the safeguarding of the interests of the breeders was also an important aspect of the Convention. Finally the Delegation of the CPVO considered that the wording of paragraph 23 of the Annex, when referring to varieties of common knowledge that are not clearly distinguishable, sufficient uniform and stable, was not in line with the definition of variety of the UPOV Convention. They proposed modifying these two sentences to “commonly known varieties, which are not protectable, are still varieties from which a candidate variety must be distinguished.” The representative of CIOPORA supported the remarks made by the Delegation of the CPVO.

12. The Committee agreed to the proposal of the Chairman to leave the Office of the Union to reword paragraphs 1, 13 and 23 of the Annex to document CAJ/43/2, taking into account the issues raised by the Delegation of the CPVO.

13. The Delegation of Belgium made comments on paragraphs 2, 20 and 24 of the Annex to document CAJ/43/2. In paragraph 2, an open list of examples is given within brackets when referring to a particular combination of genotypes, and they wondered whether grafts and rootstocks were included in this. The Delegation of Belgium considered that the wording “save error or omission” in paragraph 20 might be misinterpreted as a weakness of the UPOV system. They felt that the wording “the UPOV Convention seeks to ensure” already covered the possibility of error. In paragraph 24, they requested clarification on the reason for stating “acts of the exploitation can be effected with the material of the variety” instead of “reproductive material of the variety.”

14. The Delegation of France considered that it was important to recognize that errors or omissions could be made during the process of the granting of PBR and that it was, therefore, important to note that the system contained effective procedures for nullity or cancellation as remedies for these situations. They also highlighted that the administrative services in charge of the examination of applications for plant breeders’ rights would be unable to include some material in their reference collections used for the technical examination of the candidates. That could lead to the granting of a plant breeder’s right that should be declared null and void later on for lack of distinctness under the principles laid down in paragraphs 22 and 23 of the Annex to document CAJ/43/2. They added that that fact should be made known to the fora working in plant genetic resources. They concluded that the Delegation of France was in favor of keeping the wording of paragraph 20 unchanged.

15. The Delegation of Germany considered that document CAJ/43/2 was a position paper for UPOV without legal standing in the outside world. Under this assumption, this

Delegation wondered whether it would be more useful to get agreement on the general concepts laid down in the document rather than make a fine analysis of the possible interpretation of its text.

16. The Vice Secretary-General agreed with the German Delegation but he also considered that all the comments made to the document were useful ones and that the aim was to develop a document which could be published. He proposed that the Office of the Union contact those Delegations that had made comments in order to prepare a new document for the next session of the Committee in October 2001. He added that it would also be expected to have the final version of the General Introduction ready to be presented to the Council to which references could then be made in the document.

17. The Committee agreed to the above -mentioned proposal of the Vice Secretary -General. It was also agreed that in the meantime the principles could be used by UPOV in forthcoming meetings.

#### New General Introduction to the Assessment of Distinctness, Uniformity and Stability in New Varieties of Plants

18. The Chairman briefly summarized the history of the process of the revision to the General Introduction to the Assessment of Distinctness, Uniformity and Stability in New Varieties of Plants ( hereinafter referred to as “the General Introduction”) . He mentioned that the Technical Committee had discussed the General Introduction (document TC/37/5) during the previous days and that the outcome of these discussions was the revised version of Annex I of document CAJ/43/4, which had previously been provided to the delegates of the Committee.

19. The Technical Director introduced document CAJ/43/4 and explained the structure of the document. It contained three main parts. The first one dealt with those matters that the Committee had requested be discussed at its last session, the second part dealt with other legal and administrative aspects that had been changed in the General Introduction since the last time the Committee saw it; and the third part dealt with the associated documents called “TGP documents.” He proposed to go through document CAJ/43/4 first and afterwards to consider the General Introduction (i.e. the revised Annex I of document CAJ/43/4) in detail.

#### I. Matters Previously Considered by the Committee

20. Varieties of Common Knowledge: The Technical Director introduced paragraphs 3 and 4 of document CAJ/43/4. He explained that the Technical Committee had agreed to delete from the General Introduction the text in paragraph 3.(d) of document CAJ/43/4 because it was considered that this text might refer to varieties that are not of common knowledge and therefore should not be considered in the DUS examination. The representative of CIOPORA said that his Association needed to study this action before commenting. The Technical Director clarified that this was an inclusive list and what was mentioned in item d) could be included, with further clarification if needed, in the future TGP/3 Notion of Common Knowledge.

21. Some delegations noted the differences between the text of paragraph 3.(b) of document CAJ/43/4 and paragraph 56.(b) of document TC/37/5 and Article 7 of the 1991 Act of the

UPOV Convention. It was explained by the Office of the Union that the correct text is that of paragraph 56.(b) of document TC/37/5 and that the differences with Article 7 of the 1991 Act of the UPOV Convention were because the text of the Convention referred to differences of a candidate variety with respect to other varieties while in this case the objective was to define the Notion of Common Knowledge itself.

22. The Committee agreed to delete item (d) of paragraph 3 of document CAJ/43/4 and to have the following text in item (b) of the same paragraph:

“(b) the filing of an application for the grant of a breeder’s right or for the entering of the variety in an official register of varieties, in any country, which is deemed to render that variety a matter of common knowledge from the date of the application, provided that the application leads to the grant of a breeder’s right or to the entering of the variety in the official register of varieties, as the case may be;”

23. Supporting evidence: The Committee noted paragraph 5 of document CAJ/43/4 and in particular that, following the previous suggestion of the Committee, all references to the notion of “supporting evidence” had been removed from the General Introduction.

24. The Committee agreed to the proposal.

25. Requirement for Uniformity in Characteristics Used for Distinctness: The Committee noted paragraph 7 of document CAJ/43/4 which confirmed that the principle for uniformity in characteristics used for distinctness had been removed. It had been clarified that differences in the degree of uniformity should not be the basis for the assessment of distinctness (see paragraph 64 of Annex I of document CAJ/43/4).

26. The Delegation of Germany wondered about the need to have a restrictive interpretation. The Technical Director explained that a restrictive interpretation could prevent distinctness from some varieties of common knowledge, particularly those varieties (e.g. land races) that are less uniform and therefore the Technical Committee had agreed to delete paragraph 63 of Annex 1 of document CAJ/43/4. He also noted that to preserve the robustness of the system, paragraph 64 clearly stated that differences in the degree of uniformity would not provide in their own right the basis for distinctness.

27. The Committee agreed to the proposal.

28. Essentially derived varieties – Acts of the UPOV Convention: The Committee noted paragraphs 8 and 9 of document CAJ/43/4 where it was stated that the new version of the General Introduction would neither include references to the concept of essentially derived varieties nor special chapters referring to relevant Acts of the UPOV Convention. Certain references to specific Articles of the UPOV Convention were made where considered appropriate, but always ensuring that the document remained relevant to all Acts of the Convention.

29. The Committee agreed to the proposal.

II. Other Changes to Document TC/36/9 (previous version discussed at the Committee) Concerning Administrative and Legal Aspects

30. Contracting Parties: The Committee noted paragraph 10 of document CAJ/43/4 informing that the General Introduction now referred to “Contracting Parties” rather than “member States” in view of the possibility of an Intergovernmental Organization becoming a member of the Union, according to the provisions of the 1991 Act of the UPOV Convention.

31. Variety Description: The Committee noted paragraphs 11 and 12 of document CAJ/43/4 reporting on changes in the wording of the General Introduction in order to clarify the importance of the variety description, which had also led to a change in the title of the document.

32. The Committee agreed to these changes.

33. Chapter 1: Introduction/Document Title: The Committee noted paragraph 13 of document CAJ/43/4 in which it was explained that the new chapter provided an overview of the whole document for those who were not familiar with the UPOV system.

34. Chapter 2: The Examination of Distinctness, Uniformity and Stability (“DUS Testing”): The Committee noted paragraphs 14 to 16 of document CAJ/43/4 that made a clear reference to the requirement of examination laid down in the UPOV Convention and to the characteristics forming the basis of the examination. On further examination of this chapter, the Committee noted the principles laid down in the General Introduction where factors that might affect the expression of characteristics (e.g. growth retardants or pesticides) were considered.

35. The Committee noted these comments.

36. Chapter 3: Cooperation in DUS Testing: The Committee noted that there were no changes in that chapter.

37. Chapter 4: Characteristics Used in DUS Testing: The Committee noted paragraph 18 of document CAJ/43/4 which stated that the requirements for a characteristic to be suitable for DUS testing had been expanded, to include that the characteristic should result from the expression of the genotype and be sufficiently consistent and repeatable in a particular environment.

38. The Technical Director explained that replacement of the characteristic “pseudo qualitative” type by the so-called “dual type” mentioned in paragraph 19 should not be considered because the Technical Committee had decided to continue naming that type “pseudo qualitative.”

39. The Committee noted these comments.

40. Chapter 5: Examining Distinctness : The Committee noted paragraphs 21 and 22 of document CAJ/43/4. The Technical Director clarified that the key issues of these paragraphs would be discussed when considering document CAJ/43/5, Publication of Variety Descriptions, later in the session.

41. The Committee noted paragraph 20 of document CAJ/43/4 referring to the clarification in the categorization of characteristics in the General Introduction.

42. Chapter 6: Examining Uniformity : The Committee noted paragraphs 23 and 24 of document CAJ/43/4 which explained the introduction of a new item “Particular Features of Propagation.” This was linked to the UPOV Convention, to clarify why there were different standards of uniformity for different types of varieties. It also referred to the removal of references to specific standards in order to retain the timelessness of the document. These would be considered in detail in the associated document TGP/10 “Examining Uniformity.”

43. The Committee noted these comments.

44. Chapter 7: Examining Stability : The Committee noted paragraph 25 of document CAJ/43/4 referring to the relationship between uniformity and stability of plant varieties. Experience had shown that material which was found to be uniform was also found to be stable. This was the empirical basis for the assessment of stability considered in the General Introduction.

45. The Committee noted these comments.

46. Chapter 8: Composition of Test Guidelines : The Committee noted paragraph 26 of document CAJ/43/4 reporting on the changes in Chapter 8. The Technical Director explained that it had been shortened because the Technical Committee had considered it too detailed and many points would probably change in the near future. Consequently, most of the guidance for the drafting and composition of the UPOV Test Guidelines had been moved to TGP/7.

47. The Committee noted these comments.

### III. Associated TGP Documents

48. The Committee noted that the Technical Committee had decided not to consider the adoption of the TGP documents at that time but to provide a list of relevant existing UPOV documents associated with each TGP document (see paragraphs 48 to 50 of document TC/37/8 Prov.). Consequently, Annex II would not be considered at the forty-third session of the Administrative and Legal Committee.

49. The Committee noted these comments.

### Working Document for a New Revised General Introduction to the Examination of Distinctness, Uniformity and Stability and to the Development of Harmonized Description of New Varieties of Plants (Annex I of document CAJ/43/4)

50. The Technical Director introduced a revised version of Annex I to the document CAJ/43/4 which had resulted from modifications agreed upon during the thirty-seventh



session of the Technical Committee. He explained that the main general change was the deletion of all the explanations that had appeared in italic font in the previous version of the General Introduction.

51. The Committee then went through the revised Annex I noting the changes made by the Technical Committee (see paragraphs 9 to 45 of document TC/37/8 *Provision*). The Delegation of France noted the hard work of the Technical Committee and the Office of the Union for presenting the most up-to-date version of the General Introduction to the Committee. Nevertheless they asked about the possibility of having the document translated into the four UPOV languages and having an additional period of time for comments before it was presented to the Council of UPOV. The Delegations of Argentina and Japan supported the proposal from France and asked about the exact procedure that would be followed for the adoption of the General Introduction. Although these Delegations recognized the need to complete the document, they wanted to know the nature of the comments that could be made, whether they should be on the form only or also on the substance of the document. The Vice Secretary-General clarified that the present version of the revised General Introduction had already been extensively discussed within UPOV and there was no reason to be pessimistic about its readiness for being considered by the Council of UPOV. Nevertheless, he added, if comments on the substance were made, another round of discussions might be necessary, which could delay its final approval one year more.

52. On the proposal by the Vice Secretary-General, the Committee agreed to circulate the final version of the General Introduction translated into the four UPOV languages and to wait for comments before sending it to the Council. If no comments on the substance of the document were made, it could be presented to the Council.

#### Terms of Reference of Ad Hoc Subgroup of Technical and Legal Experts on Biochemical and Molecular Techniques

53. The Committee noted document CAJ/43/3 proposing the terms of reference for an *Ad hoc* subgroup of technical and legal experts established to consider matters arising from the Working Group on Biochemical and Molecular Techniques, and DNA Profiling in Particular (BMT) (see paragraph 2 of document CAJ/43/3). The Committee also noted document CAJ/43/3 *Add.* which reported on the crops subgroups on biomolecular techniques. These subgroups had met during February and March 2001 and had discussed the possible use of molecular techniques in DUS testing for Maize, Oilseed Rape, Rose, Tomato and Wheat. The subgroups had considered the need for the use of molecular characteristics and considered three possible approaches for their use in the examination of distinctness, uniformity and stability.

54. The CPVO supported the proposal of creating a subgroup but considered that the terms of reference should be broader, including the possible use of molecular techniques for identification purposes. The CPVO expressed its willingness to join the proposed *Ad hoc* subgroup if observer organizations were admitted. The Delegations of Argentina, France, Germany and the representative of CIOPORA supported the proposal from the CPVO and also volunteered to join the *Ad hoc* subgroup. The Delegation of Argentina also mentioned the existence of jurisprudence in that country with respect to the use of molecular markers and plant variety identity claims.

55. The Vice Secretary-General clarified that such an extension of the terms of reference of the *Ad hoc* subgroup would go beyond the responsibility of UPOV. He considered that any technique useful for DUS examination was useful for plant variety identification but the above-mentioned *Ad hoc* subgroup had no clear guidance on plant variety identification. Nevertheless, the Vice Secretary-General considered that the proposals in document CAJ/43/3 gave room for consideration of the issue proposed by the CPVO. He concluded that the participation of observers would be most welcome.

56. The Delegations of Denmark, Netherlands, Russian Federation, Sweden and the representative of ASSINSEL agreed with the comments made by the Vice Secretary-General and proposed to keep the terms of reference as proposed in document CAJ/43/3. Some of these Delegations noted that the granting and enforcement of plant breeders' rights were not the same thing, and that UPOV should consider with caution the possibility of broadening the terms of reference of the *Ad hoc* subgroup. The Delegation of the CPVO informed the Council that a request for the inclusion of DNA profiles in the plant variety description had been received at their office. They also considered that, on the one hand, the use of that information for the enforcement of the plant breeder's rights was a matter that concerned the breeder but, on the other hand, the inclusion of it in the plant variety description was a matter for the office granting the plant breeder's right. The Delegations of France and New Zealand considered that plant variety identification could be a matter of interest for the office granting plant breeders' rights.

57. The Chairman proposed to keep the terms of reference of the *Ad hoc* subgroup without changes but to include the item of plant variety identification on the agenda of the Committee for future consideration.

58. The Committee agreed to the proposal made by the Chairman.

#### Publication of Variety Descriptions

59. The Technical Director introduced document CAJ/43/5. He explained to the Committee that the document referred to the background of the issue, which had been discussed in the previous session of the Committee when it had been agreed to set up a working group to study the publication of plant variety descriptions, and identified the issues to be considered by that working group. He added that the document also considered different situations with respect to the availability of varieties of common knowledge and the testing of distinctness of variety groupings. He highlighted the following issues to be considered by the subgroup in relation to the publication of variety descriptions: (a) legal impediments; (b) method of publication; (c) nature of variety description; (d) other relevant information; (e) model study – aspects for prioritization and (f) access charge.

60. The Delegation of France recalled that this issue had been discussed at the Technical Committee. This Delegation understood the general interest in having available plant variety descriptions, but nevertheless expressed its concern about the workload that this task might require, and about some technical aspects, such as the environmental effect on the descriptions of plant varieties, which should be taken into account in order to reap the benefits proposed by the document. This Delegation mentioned the example of the European Union, where national offices exchanged descriptions, and it frequently happened that different descriptions for the same variety, in a characteristic considered important for the assessment of distinctness, were due to environmental effect. The Delegation of Romania also considered

that plant variety descriptions from different places could not be used for the granting of plant breeders' rights due to differences caused by the environment.

61. The CPVO Delegation considered that the document presented a good proposal and agreed that plant variety descriptions could be very useful in the management of reference collections. Nevertheless, the CPVO Delegation supported the concern of the Delegation of France and added that, if the document suggested replacing plant varieties by descriptions, they could not support it because, in their point of view, it was not acceptable to reject an application on the basis of descriptions only. This Delegation explained that in their system plant variety descriptions were free, but the DUS Test Report was quoted at the agreed price within UPOV members States of 350 Swiss francs.

62. The Delegation of the Netherlands considered that the issue was more related to who would be authorized to make use of that description for official purposes and also expressed concerns about paying to use it, as it was an accepted practice at the moment for the exchange of technical reports. This Delegation proposed that the above-mentioned subgroup could consider how to deal with the possible misuse of the published descriptions. The Delegation of Belgium considered that there should be an agreement on who were expected to use the plant variety descriptions.

63. The representative of CIOPORA said that the overall effect of the filing and publication of plant variety descriptions on the cost of the systems should be considered and that breeders would probably not be in favor of increases. The representative of ASSINSEL recognized that some technical problems might arise during the development of the project but he was of the opinion that it was worthwhile to solve them. He added that the management of reference collection was a real problem and that the availability of plant variety descriptions could be a way to deal with it. He proposed to start working on a species-by-species basis and he also supported the creation of the working group to study the publication of plant variety descriptions.

64. The Delegation of Australia supported the introduction of a model study on a small group of species. They added that, in Australia, plant variety descriptions were published and that breeders and the general public used them. The Delegation of the Russian Federation supported the publication of plant variety descriptions and there was no legal impediment in their country for that. They proposed to start doing it at national level and to exchange information afterwards.

65. The Delegation of France supported the creation of a subgroup to discuss the creation of a plant variety description database. This Delegation also asked the Committee to note two legal problems that the aforementioned subgroup and the Office of the Union should take into account: one was the inclusion of already published plant variety descriptions, on which some rights might exist, and the second concerned the ownership of the descriptions of protected plant varieties.

66. The Delegation of Belgium asked whether the legal problems concerned the national offices or the Office of the Union, and which would actually publish the descriptions. The Delegation of Argentina considered that the legal impediments referred to the national law of every member State setting up principles of confidentiality that might hamper their handling of the plant variety descriptions with the Office of the Union. The Vice Secretary-General stated that variety descriptions provided by the Contracting Parties would be published and

that legal impediments noted during the discussion should be considered by the working group.

67. The Committee agreed that the working group should study the publication of plant variety descriptions under the terms proposed in document CAJ/43/5, taking into account the present discussion.

#### Review of Information Databases and Services

68. The Technical Director introduced document TC/37/6 reporting to the Committee that the Technical Committee had decided to set up a working group to investigate the effectiveness of UPOV databases, which have several data fields in common but, nevertheless, some problems in the handling of the data due to the lack of standardization (e.g. name of species). Considering the overlapping between the task of that subgroup and the one dealing with the publication of plant variety descriptions, the Technical Director proposed to the Committee that the participants in the working group on plant variety description might also participate in the working group on databases.

69. The Committee agreed to the above-mentioned proposal of linking the working group on databases and the working group on publication of plant variety descriptions.

#### Novelty of Parental Lines

70. The Committee noted document CAJ/43/6 dealing with the issue of novelty of parental lines of hybrid varieties. The Technical Director explained that this issue had been introduced in response to a request from ASSINSEL. He recalled that the Committee had discussed this issue during its forty-first session held in Geneva on April 6, 2000, and had concluded that the novelty of inbred lines could be considered to be lost by the exploitation of the hybrid variety and that ASSINSEL had not agreed to this, for the reasons set out in paragraphs 4 and 6 of document CAJ/43/6.

71. The representative of ASSINSEL thanked the Committee for considering the issue once more. He explained that breeders wanted to base their arguments upon the legal interpretation of the text of the Convention. He highlighted that there was no specific clause for parental lines in the UPOV Convention, that Article 6 of the Convention (Novelty) referred to the “exploitation of the variety” and that breeders considered that the commercialization of the hybrid is not the commercialization of harvested material of the parental line and that, even in the case that it could be considered as harvested material of the parental line, it did not apply to the parental lines. 1

72. The Delegation of Japan considered that the previous conclusion of the Committee gave the possibility for different interpretations and added that in Japan the novelty of the parental lines was not lost by the exploitation of the hybrid variety. The Delegation of CIOPORA supported the arguments raised by ASSINSEL, even though the members of that Association did not work with hybrid varieties.

73. Different points of view were expressed. Whilst the Delegation of the Russian Federation considered that the novelty of parental lines was lost by the exploitation of the hybrid, the Delegation of the CPVO agreed with the position of ASSINSEL. The Delegation

of France considered that the wording of the novelty condition had been modified during the Diplomatic Conference of 1991 to state that the novelty of the parental lines was lost by the exploitation of the hybrid and added that the debates in the European Union showed that the 1991 Act failed in that aim. They explained that in French law, the commercialization of the hybrid variety was considered as exploitation of the parental line. Some delegates mentioned that the UPOV Model Law considered that possibility.

74. The Vice Secretary-General explained that even though the UPOV Model Law had no legal status, its text had been approved by the CAJ.

75. The Delegation of the United States of America agreed with the position of the Delegation of France. It considered that, if the novelty of the parental lines was not lost by the commercialization of the hybrid, then it was possible to protect the hybrid in the first instance, to protect the parental lines once the hybrid protection had expired and by that procedure to obtain protection for a very long period. Such longer protection was against public interest and therefore it could not agree with the interpretation of ASSINSEL.

76. The Delegate of ASSINSEL clarified that the objective of the breeders was not to obtain longer protection but to find a solution to the special situation that had developed in sugar beet. While the representative of CIOPORA considered that, after the expiration of the period of protection a variety should become a public one, the Delegation of the CPVO considered that if the fathers of the Convention wanted the novelty of the parental lines to be lost by the commercialization of the hybrid, they should have stated it more clearly in the text. The existing text allowed for different interpretations and the Committee should admit that situation.

77. The Vice Secretary-General concluded that the text of the Convention allowed for both interpretations and therefore it was not possible to reach a common conclusion.

78. The Chairman summed up that after the discussions it was not necessary to change the previous interpretation on that matter.

79. The Committee agreed with the conclusion of the Chairman.

#### Recent Changes in the Practice of the U.S. Patent and Trademark Office Relevant to Plant Varieties

80. The Vice Secretary-General introduced document CAJ/43/7 which provided information about a recent change in the United States Patent and Trademark Office in the interpretation and application of the United States Patent Law. This new interpretation concerned a prior foreign grant of plant variety protection being equivalent to a grant of a patent for purposes of determining whether a plant variety, for which a plant patent has been applied, met the statutory novelty requirements (Section 102(d) of Title 35, United States Code). The Vice Secretary-General clarified that, even though this new interpretation was in line with Article 35(2) of the 1991 Act of the UPOV Convention, some problems might arise. On the one hand, the sudden change in a long standing practice of the U.S. Patent and Trademark Office caused uncertainty among applicants holding a plant breeder's right granted in another UPOV Contracting Party, on the other hand, this practice might lead to the presence of a large number of unprotected, asexually reproduced, varieties in the U.S. market. He also referred to a more recent communication informing that, in order to maintain

consistency in statutory interpretation of the 35 U.S.C. § 119(f) as amended by the American Inventor's Protection Act of 1999 (AIPA) (Title IV of the Intellectual Property and Communications Omnibus Reform Act of 1999) (S. 1948), which provided for applicants from a WTO member country or from a UPOV Contracting Party to be technically precluded from basing a priority claim on a foreign application for a plant breeder's right when seeking plant patent or utility patent protection for a plant variety, the U.S. Patent and Trademark Office had changed this interpretation and would not make rejections under 35 U.S.C. § 102(d) based on a PBR certificate. Furthermore, the communication also informed that the USPTO might consider seeking legislation that would further clarify the status of certificates of plant variety protection as prior art.

81. The Vice Secretary-General noted that another risk existed under the provisions of 35 U.S.C. § 102(b) which stated that a person should be entitled to a patent unless the invention had been patented or described in a printed publication in that country (U.S.) or a foreign country, or in public use, or in sale in that country (U.S.) more than one year prior to the date of the application for a patent in the United States of America.

82. The representative of CIOPORA advised that its members had been informed of this situation and had taken action. Nevertheless he added that, at the moment, there were rejections of applications based on 35 U.S.C. § 102(b) and that the Association here represented was very concerned about the new development and legal action had been taken against the decision.

83. The Delegation of the United States of America informed the Committee that the USPTO was aware of the problems created by the interpretation of 35 U.S.C. § 102(d) and that the rejections were going to be reviewed. They added that the problem of the application of 35 U.S.C. § 102(b) was compounded by a decision of the Board of Appeal of 1992 that combined the publication, which was not itself enabling, with the commercial availability of the product, cotton in that case, and in that decision the publication was essentially used as a road map where somebody skilled in the art could go in order to find the subject matter for which protection was sought and whether or not it could be duplicated more than one year before the application was filed but that decision had never been appealed. They added that there were older cases, which held that a publication, by itself, if it did not do anything more than, for instance, show a picture of a rose, was not regarded as enabling disclosure by itself. They advised that the USPTO encouraged applicants who had been rejected under 35 U.S.C. § 102(b) to seek review and to let the judiciary process go forward but, of course, this would take time. They clarified that the provisions of the Plant Patent Act were intertwined with those for Utility Patents and section 35 U.S.C. § 102(b), which decided the novelty aspect of a particular invention, made no difference between plant patents and utility patents. They noted that the decision of the Board of Appeals had been published in 1992 but the USPTO had not applied it until recently. In their opinion it had not been a change in the interpretation of the Patent Law but an application of it in line with a valid Board Decision. To change that interpretation, by letting the judicial process of an appeal run its course, would take too much time. It was for that reason that the USPTO would try to see what could be done legislatively to remedy the situation to ensure that the industry, which should be helped by intellectual property protection, would not actually be damaged. Legislative review would have to be undertaken and he hoped that it would happen in short order to investigate what could be done to ensure that the way 35 U.S.C. § 102(b) was being applied could be altered to protect the needs of the industry. They concluded that the whole situation affected both domestic and foreign breeders in the same way.

84. The Chairman thanked the Delegation of the United States of America for the clear explanation given to the Committee.

Program for the Forty -Fourth Session

85. The Delegation of the CPVO suggested that these several *ad hoc* working groups that had been created during the last sessions of the UPOV Committees could meet in Geneva during the week when the next session of the Administrative and Legal Committee would be held, to save travelling costs for those who would participate in them. The Office of the Union noted the proposal.

86. The Committee agreed to include the following items in the program of the forty -fourth session:

1. Opening of the session
2. Adoption of the agenda
3. The notion of breeder and common knowledge (revised version of document CAJ/43/2)
4. Inclusion of patented methods in UPOV Test Guidelines
5. Publication of variety descriptions
6. Status of information included in the Technical Questionnaire of Test Guidelines
7. Breeder's exemption in relation to parent lines
8. Plant variety identification
9. Program for the forty -fifth session
10. Closing of the session.

87. *The present report has been adopted by correspondence.*

[Annex follows]

ANNEXE/ANNEX/ANLAGE/ANEXO

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