



CAJ/45/8

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INTERNATIONAL UNION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS
GENEVA

ADMINISTRATIVE AND LEGAL COMMITTEE

Forty-Fifth Session
Geneva, April 18, 2002

REPORT

adopted by the Committee

Opening of the Session

1. The Administrative and Legal Committee (hereinafter referred to as "the Committee") held its forty-fifth session in Geneva on April 18, 2002, under the chairmanship of Ms. Nicole Bustin (France).
2. The list of participants is given in the Annex to this report.
3. The session was opened by the Chairperson, who welcomed the participants. She extended a special welcome to the Delegation of the Republic of Korea which had become a member of the Union since the preceding session of the Committee. The Delegation of the Republic of Korea expressed its gratitude to the Office of the Union and the member States for the assistance given in the process of accession to the 1991 Act of the UPOV Convention. The Chairperson also welcomed Mr. Vladimir Derbenskiy, Consultant at the Office of the Union, responsible for the Technical Working Party for Ornamental Plants and Forest Trees (TWO) and countries in transition to a market economy.

Adoption of the Agenda

4. The Committee adopted the agenda as given in document CAJ/45/1.

Specific Issues Concerning the Interface Between Patents and Breeders' Rights

5. Discussions were based on document CAJ/45/3, which was introduced by the Vice Secretary-General. He explained that it was divided into two parts: the first one dealt with the situation in which plant breeders' rights and a patent system existed in parallel and the breeder could choose one or the other; the second part dealt with the situation of overlapping protection between the two systems. The Vice Secretary-General informed the Committee about the WIPO-UPOV Symposium on the Co-existence of Patents and Plant Breeders' Rights in the Promotion of Biotechnological Developments, that will be held in Geneva on October 25, 2002, with the aim of raising awareness on the benefits of plant breeders' rights in those circles dealing with the patents system.

6. Following the proposal of the Chairperson, the Committee agreed to discuss the first part of the document and, once this had been discussed, to move on to the second part of it.

7. The Delegation of Denmark asked whether any progress had been made in relation to the problems caused due to the criteria used to assess novelty in applications for a plant patent for vegetatively propagated varieties in the United States of America. The Delegation of the United States of America clarified that it was aware of the situation, which had caused problems to foreign and domestic breeders, and that it would continue to work on resolving them. The Delegation of Germany considered that the document (CAJ/45/3) gave a good opportunity to have a paper on that issue. The Delegation of the Republic of Korea proposed that the different ways in which provisional protection was considered in the patent and the plant breeder's rights systems could be included.

8. The Representative of the Community Plant Variety Office (CPVO) did not agree to the proposal of paragraph 6 of the document. It considered that by harmonizing the patent and the plant breeder's right systems, the latter would lose the advantages it held, through its particular features as a *sui generis* system specifically developed for plant varieties. It added that strengthening the patents system was not a task for UPOV. The Delegation of the United States of America said that if a document were to be produced, three situations should be considered: a system with plant breeders' rights only; a system with both patent and plant breeders' rights and a third one with patents only. The Delegation said that the UPOV position for each one should be clarified, and proposed that the study show the situation for a breeder in each case. It also clarified that the utility patent system and the plant breeders' rights system had different requirements, that different rights are granted based upon these requirements and that they would not necessarily support a harmonization of both systems.

9. The Delegations of Argentina and France requested a rewording of paragraphs 4 and 6. The Representative of the International Community of Breeders of Asexually Reproduced Ornamental and Fruit-Tree Varieties (CIOPORA) expressed his opinion that breeders wanted a level of protection that allowed the exploitation of the variety whatever the system of protection was. He also considered that they were not in favor of comparing novelty between the patent and plant breeders' rights systems. Some delegations considered that Section I did not deal with the main issue and that it was not necessary to have it in the document.

Following this suggestion, the Vice Secretary-General proposed to delete paragraphs 3 to 6 and to leave it up to the Office to make further amendments accordingly.

10. Conclusion: The Committee agreed to delete paragraphs 3 to 6 (all Section I) from the document.

Report on the Thirty -Eighth Session of the Technical Committee

11. The Technical Director reported on the thirty -eighth session of the Technical Committee, held in Geneva from April 15 to 17, 2002 (see document TC/38/15). He informed the Committee that, under the chairmanship of Mr. Michael Camlin (United Kingdom), the Technical Committee had proposed that, at its nineteenth extraordinary session on April 19, 2002, the Council adopt document TC/38/5, Annex I, as the “General Introduction to the Examination of Distinctness, Uniformity and Stability and the Development of Harmonized Descriptions of New Varieties of Plants,” subject to the amendments presented in document TC/38/15. The Technical Committee also proposed to the Council that it elect, at its session in October 2002, the following as Chairpersons for the period 2003 -2005:

Technical Working Party for Agricultural Crops (TWA) :

Mr. Carlos Gómez-Etchebarne, Uruguay

Technical Working Party on Automation and Computer Programs (TWC) :

Mr. Uwe Meyer, Germany

Technical Working Party for Fruit Crops (TWF) :

Mr. Erik Schulte, Germany

Technical Working Party for Ornamental Plants and Forest Trees (TWO):

Mr. Chris Barnaby, New Zealand

Technical Working Party for Vegetables (TWV) :

Mr. Kees van Ettehoven, Netherlands

Working Group on Biochemical and Molecular Techniques, and DNA -Profiling in Particular (BMT) :

Mr. Gerhard Deneken, Denmark.

12. The Committee also noted that the Technical Committee had discussed the protection of seed-propagated ornamental varieties and progress in the drafting of TGP documents. It had also discussed document TC/38/8, and had agreed that this document should form the basis for Section 2 of document TGP/7 (“TG Template”) and, accordingly, should be used as the basis for all future Test Guidelines. Other items discussed had included the procedure for the development of TGP and other important documents for consideration by the Technical Committee, the publication of variety descriptions, and the outcome of the BMT Review Group discussion. It had agreed the schedule for reporting the outcome of the BMT Review Group meeting and for future meetings of the Crop Subgroups. It had further discussed the review of UPOV information databases and services, had agreed to a proposal for preparatory workshops for the Technical Working Parties, and had taken note of the document on

arrangements for DUS testing. The Technical Committee had adopted the following Test Guidelines:

TG/8/6	FieldBean/Féverole/Ackerbohne/Haba,Haboncillo
TG/31/8	Cocksfoot/Dactyle/Knaulgras/Dactilo
TG/36/6Corr.	RapeSeed/Colza/Raps/Colza(revisionofparagraph4ofChapter IV)
TG/39/8	Meadow Fescue, Tall Fescue/Fétuque des prés, Fétuque élevée/ Wiesen-,Rohrschwengel/Festucadelosprados,Festucaalta
TG/41/5	EuropeanPlum/Pruniereuropéen/Pflaume/Cirueloeuropeo
TG/65/4	Kohlrabi/Chou-rave/Kohlrabi/Colinabo
TG/74/4	Celeriac/Célieri-rave/Knollensellerie/Apionabo
TG/82/4	Celery/Célieri-branche/Bleich-,Stielsellerie/Apio
TG/90/6	VegetableKale/Choufrisé/Grünkohl/Colrizada
TG/117/4	EggPlant/Aubergine/Aubergine,Eierfrucht/Berenjena
TG/119/4	VegetableMarrow,Squash/Courgette/Gartenkürbis,Zucchini/ Calabaza,Zapallo
TG/185/3	TurnipRape/Navette/Rübsen/Nabina
TG/186/2	Sugarcane/Canneàsucre/Zuckerrohr/Cañadeazúcar
TG/187/1	PrunusRootstock/Porte -greffesdePrunus/Prunus -Unterlagen/ PrunusPortainjerto
TG/188/1	Celosia/Célosie/Celosia/Crestadegal lo
TG/189/1	Pentas/Pentas/Pentas/Pentas
TG/190/1	Thyme/Thym/Thymian/Tomillo
TG/194/1	Lavandula,Lavender/Lavandevraie,Lavandins/ EchterLavendel,Lavendel/Lavándula,Lavanda
TG/195/1	Tobacco/Tabac/Tabak/Tabaco
TG/196/1	NewGuineaImpatiens/Impatientede Nouvelle-Guinée/ Neu-Guinea-Impatiens/ImpatiensdeNuevaGuinea
TG/197/1	Eustoma/Eustoma/Eustoma/Eustoma

Revised General Introduction to the Examination of Distinctness, Uniformity and Stability and the Development of Harmonized Descriptions of New Varieties of Plants

13. The Technical Director introduced document CAJ/45/2 and noted the amendments introduced by the Technical Committee, which were included in document CAJ/45/2 Add.

14. Conclusion: The Committee agreed to propose, jointly with the Technical Committee, documents CAJ/45/2 and CAJ/45/2 Add. for adoption by the Council, at its nineteenth extraordinary session to be held on April 19, 2002, as document TG/1/3 the General Introduction to the Examination of Distinctness, Uniformity and Stability and the Development of Harmonized Descriptions of New Varieties of Plants.

Publication of Variety Descriptions

15. The Vice Secretary-General introduced document CAJ/45/4. He recalled that the Committee had discussed the issue during its last two sessions. He also noted that the Office of the Union, following the advice of the Committee and the *Ad hoc* Working Group on the Publication of Variety Descriptions, had prepared an amended version of the project. He further explained that the project focused on two main aspects: firstly, the need for a model

study to investigate and develop solutions to the technical issues concerning the possible development and publication of variety descriptions, at the international level, in an effective way; and secondly, that there were important legal, administrative and financial issues which would need to be resolved, by the Committee, before considering the possible introduction of an international system for the publication of variety descriptions. Finally, he reported that the Technical Committee had agreed to the proposed schedule in Section 6.1 of the Annex to the document.

16. Conclusion: Following the proposal of the Chairperson, the Committee approved the schedule of activities as proposed under Section 6 of the Annex to document CAJ/45/4.

Ad Hoc Subgroup of Technical and Legal Experts on Biochemical and Molecular Techniques (“BMT Review Group”)

17. The Vice Secretary-General reported on the meeting of the BMT Review Group, which had taken place on the evening of April 16, 2002, to discuss document TC/38/14-CAJ/45/5. He reported that the BMT Review Group had considered the proposals set out in document TC/38/14-CAJ/45/5 and had concluded as follows:

Proposal 1 (Option 1(a) for a gene specific marker of a phenotypic characteristic) was, on the basis of the assumptions in the proposal, acceptable within the terms of the UPOV Convention and would not undermine the effectiveness of protection offered under the UPOV system.

Proposals 2, 3 and 4 (Option 2: Calibration of threshold levels for molecular characteristics against the minimum distance in traditional characteristics for oilseed rape, maize and rose, respectively), where used for the management of reference collections, were, on the basis of the assumptions in the proposals, acceptable within the terms of the UPOV Convention and would not undermine the effectiveness of protection offered under the UPOV system.

Regarding Proposal 5 (Option 3 for rose) and Proposal 6 (Option 3 for wheat), the BMT Review Group noted there was no consensus on the acceptability of these proposals within the terms of the UPOV Convention and no consensus on whether they would undermine the effectiveness of protection offered under the UPOV system. Concerns were raised that, in these proposals, using this approach it might be possible to use a limitless number of markers to find differences between varieties. The concern was also raised that differences would be found at the genetic level which were not reflected in morphological characteristics.

The Vice Secretary-General also reported on some general remarks. Firstly, concern had been raised regarding the accessibility of techniques covered by patents. Secondly, the group had emphasized the importance of considering if there were cost benefits arising from any new approaches. Thirdly, the importance of the relationship between phenotypic characteristics and molecular techniques had also been discussed. Finally, the importance of examining uniformity and stability on the same characteristics as used for distinctness had been emphasized.

18. The Delegation of the Netherlands required further clarification on whether the phenotype was still to be considered when assessing distinctness. The Chairperson clarified

that the BMT Review Group and the Technical Committee had agreed that, when there was a strong linkage between the molecular technique and the expression of the characteristic or when there was a correlation between them, there was no conflict with the UPOV Convention nor diminishing of the protection provided. She added that where this was not the case, no consensus had been achieved. The Representative of the International Association of Plant Breeders for the Protection of Plant Varieties (ASSINSEL) considered that, for the assessment of uniformity and stability, the same characteristics used for the assessment of distinctness should be used.

19. Conclusion: The Committee agreed with the conclusions of the BMT Review Group, reported by the Vice Secretary -General, that Proposals 1, 2, 3 and 4 could be pursued on the basis of the assumptions, whilst recognizing the need for further work to examine these assumptions and, in the case of Option 2, to improve the relationship between morphological and molecular distances. It also noted the divergence of views which had been expressed regarding Proposals 5 and 6. The Committee, in conjunction with the decision taken at the Technical Committee, also agreed to the following schedule for reporting the outcome of the BMT Review Group meeting and for future meetings of the Crop Subgroups:

(a) The Office to produce a document, containing the recommendations of the BMT Review Group and the considerations of the Technical Committee and CAJ, for circulation to the TWPs.

(b) The TWPs to consider this document and to consider detailed reports of the work of Crop Subgroups.

20. The Committee also noted the proposed schedule of the meetings of Crop Subgroups agreed by the Technical Committee as follows:

- (a) Maize: no future meeting to be planned at this stage, subject to consideration by the TWA;
- (b) Oilseed Rape: to meet sometime after (not in conjunction with) the next TWA meeting, but before the next session of the BMT;
- (c) Rose: to meet before the next TWA meeting;
- (d) Tomato: no future meeting to be planned at this stage, subject to consideration by the TWA;
- (e) Wheat: to meet sometime after (not in conjunction with) the next TWA meeting, but before the next session of the BMT.

21. The Committee noted the establishment of new Crop Subgroups as follows:

- (a) Sugarcane: to hold its first meeting immediately after, and in association with, the next TWA meeting;
- (b) Potato: to hold its first meeting immediately after, and in association with, the next TWA meeting;

- (c) Mushroom: to hold its first meeting immediately after, and in association with, the next TWV meeting;
- (d) Soybean: to hold its first meeting immediately after, and in association with, the next TWA meeting, if there is sufficient interest among experts.

Review of UPOV Information Databases and Services

22. The Technical Director introduced document CAJ/45/6. He noted that the Office planned to develop and maintain a single database of information based on species/taxonomic groups, which will be used to generate different reports. He also noted that, in order to construct a single database, it would be necessary to use a "unique identifier" which would be the code developed in document TC/35/16 "Revised Working Paper for a UPOV Taxon Code for Use in the UPOV -ROM Plant Variety Database." However, he highlighted that the construction of this code could be changed relatively easily and quickly before the code is put into use, to meet the demands for the work on publication of variety descriptions and variety denominations. The Committee noted the proposal to present a copy of the consolidated database of taxa to the Technical Committee in Spring 2003 and noted that the Technical Committee had agreed that the Office should proceed on this basis and maintain the database and code until the requirements of a UPOV code for the publication of variety descriptions and/or variety denominations become clear.

23. Conclusion: The Committee endorsed the proposal of the Technical Committee.

Issues Concerning the Use of Material Submitted for Examination of Distinctness, Uniformity and Stability

24. The Vice Secretary-General introduced document CAJ/45 /7. He explained that the objective was to clarify the situation regarding materials submitted for examination, a question which had been raised in previous sessions of the Committee when discussing the issue of accessibility to material of inbred lines.

25. The Delegation of Spain stressed that the collections of varieties used for the technical examination of candidate varieties were not only formed by material of candidate varieties as mentioned in paragraph 2 of the document. He clarified that they were broader than that. The Delegation of Germany said that it had reservations about the interpretation of Article 12 of the Convention, that the breeder could be required to submit plant material of all varieties of common knowledge necessary for the examination of his candidate variety. The Delegation of the Netherlands supported the viewpoint of the Delegation of Germany and wondered if the breeder could furnish material from his competitors. The Delegation of France also supported this position but it further considered that a National Authority may request material of the candidate variety from the breeder and may also request material of reference varieties, but if the breeder did not provide material of these reference varieties, it should not be an obstacle for the continuation of the official examination of the variety. The Representatives of ASSINSEL and CIOPORA also supported the position expressed by Germany and the Netherlands. ASSINSEL further clarified that it considered that the obligation for a breeder was to submit everything necessary for the candidate variety and that breeders did not think that they had to provide material of reference varieties.

26. The Delegation of Australia considered that the arguments mentioned did not suit all the testing systems. He explained that in a breeder -based testing system, in many cases, the applicant is requested to furnish all the necessary material and to carry out the DUS test. Therefore, it was a requirement of the breeder to collect this material which would be only for the purpose of the DUS examination. He also clarified that if, after the granting of the plant breeder's right, it was found that the variety was not distinct, the breeder knew what the legal consequences would be. The Representative of ASSINSEL considered that to furnish material of reference varieties to a National Authority and to carry out DUS tests by the breeder were two different things. The Vice Secretary -General recalled that the purpose was to show that there was some responsibility of the breeder in the examination.

27. The Delegation of Belgium drew attention to Article 11(3) of the 1991 Act of the UPOV Convention. In that paragraph, allusion was made to the information, documents or material mentioned in Article 12. This same information, documents or material were, under the terms of Article 11(3), required by national laws. Hence the Delegation of Belgium questioned whether the current meeting was the appropriate forum for discussing the information, documents or materials and whether it would not be more appropriate to refer to the national laws.

28. The Chairperson concluded that there were different interpretations of Article 12 of the 1991 Act of the UPOV Convention and that material of reference varieties could be required, but she pointed out that, if that material was not submitted, the application could not be rejected.

29. Following a proposal from the Office of the Union, the Committee agreed to delete paragraphs 1 to 3 and 16(i) of the document and to refer in the document only to material of the candidate variety. The Committee also agreed to explore further the various possibilities under Article 12 of the 1991 Act of the UPOV Convention in the future.

30. The Committee then discussed paragraphs 5 to 8. The Delegation of Germany noted that a variety could become a matter of common knowledge independent from the protection, e.g. if it was marketed before the application. The Chairperson clarified that a variety could become a matter of common knowledge from the date of application but it could also become a matter of common knowledge in other ways. She added that, in general, it was a matter of legal protection that National Authorities usually do not exchange material of varieties before the plant breeder's right was granted.

31. The Committee agreed to delete the last part of the second sentence of paragraph 7. The new sentence should read as follows: "The exchange does not generally take place until after the grant of rights or official registration of a variety."

32. No comments were made on paragraphs 9 to 12.

33. Conclusion: The Committee agreed to continue the discussion on the rest of the document during its forty -sixth session in October 2002 and requested the Office of the Union to prepare a new document incorporating the conclusions in paragraphs 28 and 30 of this document.

Variety Denominations

34. The Vice Secretary-General reported on the meeting of the *Adhoc* Working Group on Variety Denominations, held in Geneva on April 18, 2002. The Committee noted the following conclusions:

(a) draft an updated version of UPOV/INF/12 Rev., in the form of “explanatory notes” clearly linked to the Convention. This will utilize the existing recommendations as far as possible, but will eliminate any inconsistencies with the Convention and, as appropriate, will be elaborated and clarified to take into account responses received from the questionnaire. In particular, it will address the matters raised in paragraphs 3 to 13 of document WG -VD/02/01. This draft will be presented to the Working Group four weeks in advance of its next meeting which, it is anticipated, will be held during the week commencing October 21, 2002. g

(b) draft a questionnaire for all members of the Union and other interested organizations, seeking information on how the effectiveness of the UPOV *-ROM* (or similar web-based database) might be improved. It will also seek advice from members on how important and relevant they consider this mechanism to be for complying with Article 20(6) of the 1991 Act of the Convention. This draft questionnaire will be sent to the members of the Working Group for comment, with the aim of issuing a questionnaire by August 2002 in order that the responses can be analyzed by the Working Group and its recommendations reported to the CAJ during its session in October 2002.

(c) draft a questionnaire for all members of the Union and other interested organizations, to seek advice on whether there is a need for a review of the classes of closely related species contained in Annex I of document UPOV/INF/12 Rev. and, if so, aspects which need to be considered. This draft questionnaire will be sent to the members of the Working Group for comment, with the aim of issuing a questionnaire by December 2002.

35. The Committee also noted that, on the question of whether to consider establishing a “standing” group for an ongoing review of matters concerning variety denominations, it was agreed that these meetings should be held at the same time as the UPOV sessions; however, it was thought that once the revised draft of the document UPOV/INF/12 Rev. was approved, the group would only need to meet on an *ad hoc* basis.

Program for the Forty -Sixth Session

36. It was agreed that the program for the forty -sixth session would include the following items:

1. Specific issues concerning the interface between patents and breeders' rights
2. Publication of variety descriptions
3. Issues concerning the use of material submitted for examination of distinctness, uniformity and stability

4. Varietydenominations
5. Issuesconcerningtheprotectionofseed -propagatedornamentalvarieties.

SpecialAwards

37. TheViceSecretary -GeneralawardedUPOVsilvermedalstoMr. John Carvill(Ireland) in recognition of his chairmanship of the Committee for the period of 1999 to 2001, and to Mr. H. Dieter Hoinkes (United States of America) in recognition of his chairmanship of the Committee for the period of 1996 to 1998. The Delegation of the United States of America was requested to present the medal to Mr. Hoinkes on behalf of UPOV.

38. The present report has been adopted by correspondence including, in paragraph 27, the observation made by the Delegation of Belgium.

[Annex follows]

ANNEXE/ANNEX/ANLAGE/ANEXO

LISTEDES PARTICIPANTS/ LISTOF PARTICIPANTS/
TEILNEHMERLISTE/ LISTADE PARTICIPANTES

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