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INTERNATIONAL UNION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS
GENEVA

ADMINISTRATIVE AND LEGAL COMMITTEE

Fifty-Seventh Session
Geneva, April 10, 2008

**DEVELOPMENT OF INFORMATION MATERIALS
CONCERNING THE UPOV CONVENTION**

Document prepared by the Office of the Union

Introduction

1. The Administrative and Legal Committee (CAJ), at its fifty-second session, held in Geneva on October 24, 2005, agreed an approach for the preparation of information materials¹ concerning the UPOV Convention, as explained in paragraphs 8 to 10 of document CAJ/52/4. It also agreed to the establishment of an advisory group to the CAJ ("CAJ-AG") to assist in the preparation of documents concerning such materials, as proposed in paragraphs 11 to 14 of document CAJ/52/4 (see paragraph 67 of document CAJ/52/5, Report).

2. The agreed approach is summarized as follows: the Office of the Union will develop certain draft materials which it considers covers aspects of a straightforward nature and will circulate these to the CAJ for comments within a specified time. In other cases, where it is considered that there are difficult issues, where discussions at a CAJ session would be important for the development of suitable information materials, and also in cases where the drafts on seemingly straightforward materials provoke unexpected concerns when circulated for comments, it was agreed that the assistance of the CAJ-AG would be sought prior to the CAJ being invited to discuss those matters at its sessions.

¹ "Information materials" cover different forms of information, such as those used in relation to frequently asked questions, model forms, explanatory notes, distance-learning materials, guidance documents or position papers.

3. The purpose of this document is to:

(a) report on the progress and future work on the development of information materials under the UPOV Convention;

(b) provide background information on:

(i) the explanatory notes to be considered by the CAJ by correspondence;

(ii) the explanatory notes to be considered by the CAJ at its fifty-seventh session; and

(iii) the explanatory notes to be considered at the third session of the CAJ-AG, to be held in Geneva on October 31, 2008;

(c) present proposals concerning new requests for the development of explanatory notes; and

(d) present a proposal concerning the development of a drafting guidance document for developing a law using the provisions of the 1991 Act of the UPOV Convention and the guidance provided in information materials (e.g. explanatory notes). Such guidance would replace the “Model Law on the Protection of New Varieties of Plants” (UPOV Publication No. 842).

Explanatory notes to be considered by the CAJ by correspondence

4. The following explanatory notes are currently under preparation for consideration by correspondence:

(a) Explanatory Notes on the Right of Priority under the UPOV Convention;

(b) Explanatory Notes on the Nullity of the Breeder’s Right under the UPOV Convention; and

(c) Explanatory Notes on the Cancellation of the Breeder’s Right under the UPOV Convention.

5. The posting of the above explanatory notes, on the first restricted area of the UPOV website, will be notified to CAJ members and observers. In the absence of major concerns with those draft explanatory notes, revisions will be made on the basis of any comments received and the materials will be brought into use by the Office of the Union. If necessary, to address any major concerns, the advice of the CAJ-AG will be sought at its third session on October 31, 2008.

Explanatory notes to be considered by the CAJ at its fifty-seventh session

6. The following draft explanatory notes are to be considered by the CAJ at its fifty-seventh session:

- (a) Explanatory Notes on Essentially Derived Varieties under the UPOV Convention (document UPOV/EXN/EDV Draft 2);
- (b) Explanatory Notes on Exceptions to the Breeder's Right under the UPOV Convention (document UPOV/EXN/EXC Draft 2); and
- (c) Explanatory Notes on Novelty under the UPOV Convention (document UPOV/EXN/NOV Draft 2).

7. Comments received by CAJ members and observers after the posting of the first Drafts of the above explanatory notes were analyzed by the CAJ-AG at its second-session held in Geneva on October 26, 2007 (see document CAJ-AG/07/2/7).

8. The above explanatory notes incorporate the changes proposed by the CAJ-AG at its second session (see paragraphs 17 to 23 and 26 to 28 of document CAJ-AG/07/2/8).

Explanatory notes to be considered at the third session of the CAJ-AG on October 31, 2008

9. The explanatory notes to be considered at the third session of the CAJ-AG to be held in Geneva on October 31, 2008, are the following:

- (a) Explanatory Notes on Acts in Respect of Harvested Material under the UPOV Convention (document UPOV/EXN/HRV Draft 2);
- (b) Explanatory Notes on the Definition of Breeder under the 1991 Act of the UPOV Convention; and
- (c) Explanatory Notes on the Definition of Variety under the 1991 Act of the UPOV Convention.

10. The posting of the above explanatory notes, on the first restricted area of the UPOV website, will be notified to CAJ members and observers and comments received will be considered by the CAJ-AG at its third session.

Proposal for development of explanatory notes

Provisional protection

11. At the request of the Delegation of Colombia, at the second session of the CAJ-AG, held on October 26, 2007, the CAJ-AG agreed to propose that the CAJ consider the development of explanatory notes on provisional protection under the UPOV Convention (see paragraph 33 of document CAJ-AG/07/2/8).

Enforcement of breeders' rights

12. At its second session, the CAJ-AG agreed to propose to the CAJ that no further action be taken for the development of explanatory notes on Article 30(1)(i) of the 1991 Act of the UPOV Convention: Implementation of the Convention: (i) Provide for appropriate legal

remedies for the effective enforcement of breeders' rights (Article 30(1)(a) of the 1978 Act of the UPOV Convention) (see paragraphs 25 and 32 of document CAJ-AG/07/2/8).

13. On January 30, 2008, at a meeting between the Office of the Union and the International Community of Breeders of Asexually Reproduced Ornamental and Fruit-Tree Varieties (CIOPORA), CIOPORA proposed to send a presentation on elements of effective intellectual property protection which it considered appropriate. The presentation of CIOPORA is reproduced in the Annex to this document in English only. The Office of the Union clarified to CIOPORA that the availability of certain enforcement measures will depend on the particular legal system in the territory concerned. However, the Office of the Union agreed to propose that the CAJ invite the CAJ-AG to consider the development of information materials, possibly in the form of a list of enforcement measures which might be considered by members, and future members, of the Union.

Drafting guidance for laws based on the 1991 Act of the UPOV Convention

14. In order to provide guidance in the preparation of laws, it is proposed to prepare a text which incorporates, as far as possible, treaty language of the relevant provisions of the 1991 Act of the UPOV Convention. Where appropriate, reference would be made to the relevant information materials (e.g. explanatory notes) to provide assistance in preparing the additional text needed in a law or in its implementation.

15. It is suggested that the advice of the CAJ-AG be sought at its third session on October 31, 2008, prior to the consideration of the guidance document by the CAJ in 2009.

16. *The CAJ is invited to:*

(a) note the development of draft information materials concerning the UPOV Convention, as set out in this document;

(b) approve the proposed program for the development of explanatory notes, as set out in paragraphs 5 to 10;

(c) consider and approve the draft explanatory notes referred to in paragraph 6; and

(d) consider the proposals, presented in paragraphs 11 to 15.

[Annex follows]

The elements of effective IP protection

- **It is not only the protection title and the basic law that counts**
- **Without effective enforcement of the rights the protection title is worthless**

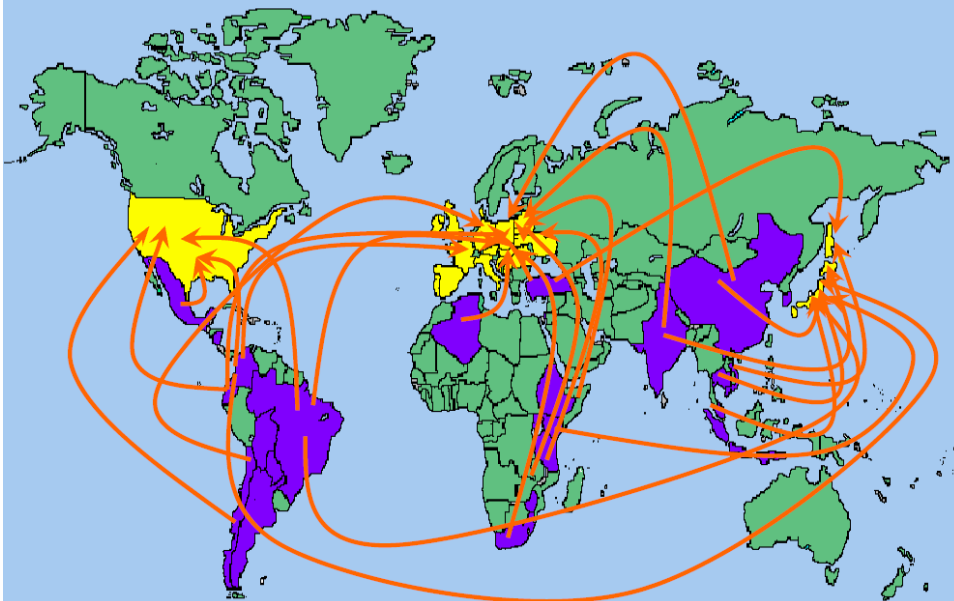
The elements of effective IP protection

- **Do right holders have access to premises of the supposed infringer and can they take samples?**
- **Do they have the right to information?**
- **What about the barriers to get a preliminary injunction?**
- **What about damages and punitive damages?**
- **Who pays the cost for the court procedures?**
- **Which courts are competent for our cases? Do the judges know what PBR are?**
- **What about customs procedures?**

Access to greenhouses and samples

- **Right holders must be granted access to greenhouses to count and inspect plants and collect samples**
- **There is only a short period between an infringement of a PBR (e.g. illegal propagation) and the sales of the infringing plants, thus fast provisional measures to preserve evidence are necessary.**

International trade with ornamentals and fruits



Right to information

- **The trade with ornamental and fruit plants is very international and so there are widespread sources of propagating material**
- **Right holders must be able to get access to information on the illegal sources of propagating material and about the recipients of illegal material**



Provisional measures

- **The trade with ornamental and fruit plants is a very fast business**
- **Often huge intermediaries, providing services and market space to the sellers, are involved in the chain**
- **Right holders must be able to stop alleged infringements quickly on the spot of the sellers or the intermediaries**
- **Landlords of such spots must be liable**

Damages

- **Infringers weigh their profit against their risk**
- **The risk to be caught and the damages payable must outweigh the potential profits**
- **Damages must be deterrent to the infringer and must make up for the losses of the right holder**

Criminal law

- **Infringement of Plant Breeders' Rights should be treated as a criminal act as it is comparable with theft, misappropriation and fraud.**

Customs law

- **The trade with ornamental and fruit plants is very international.**
- **Effective instruments to control the import and export of illegal plant material is required.**
- **The national customs authorities need to have sufficient knowledge on plants and Plant Breeders' Rights to be able to support the breeders effectively**

Specialised Courts

- **Plant Breeders' Rights law is a special and rather complex legal field. It requires not only expertise on the legal side, but also knowledge about plant breeding and growing.**
- **The effective enforcement of Plant Breeders' Rights requires specialized courts.**
- **Without specialized courts judges cannot build up experience and expertise in PBR matters.**

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