



CAJ-AG/10/5/7

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INTERNATIONAL UNION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS
GENEVA

**ADMINISTRATIVE AND LEGAL COMMITTEE
ADVISORY GROUP**

**Fifth Session
Geneva, October 18, 2010**

REPORT

adopted by the Administrative and Legal Committee Advisory Group

Opening of the session

1. The Administrative and Legal Committee Advisory Group (CAJ-AG) held its fifth session in Geneva on October 18, 2010 and on the afternoon of October 19, 2010, under the Chairmanship of the Vice Secretary-General of UPOV.
2. The list of participants is reproduced in the Annex to this document.

Adoption of the agenda

3. The CAJ-AG adopted the draft agenda, as proposed in document CAJ-AG/10/5/1 with the addition of document UPOV/EXN/HRV Draft 5 Corr. under agenda item 3 (b).
4. The Chair recalled that the CAJ-AG had agreed by correspondence to invite the International Community of Breeders of Asexually Reproduced Ornamental and Fruit Varieties (CIOPORA) and the International Seed Federation (ISF) to the relevant part of the fifth session of the CAJ-AG, in order to enable them to continue the presentation of their views on relevant matters. Items in which CIOPORA and ISF participated are noted in this report.

Explanatory Notes*Explanatory Notes on the Definition of Breeder under the 1991 Act of the UPOV Convention*

5. The CAJ-AG considered documents CAJ-AG/10/5/2 and UPOV/EXN/BRD Draft 3.
6. The CAJ-AG noted that paragraph 16 of document “The Notion of Breeder and Common Knowledge” (Document C(Extr.)/19/2 Rev.) provided guidance on the terms “discovery and development”. Document C(Extr.)/19/2 Rev., which was adopted by the Council at its nineteenth extraordinary session held in Geneva on April 19, 2002, was distributed to the CAJ-AG and posted in the CAJ-AG/10 section of the UPOV website.
7. The CAJ-AG agreed the following concerning document UPOV/EXN/BRD Draft 3:

Paragraph 8	to add, at the end of paragraph 8, the last sentence of paragraph 16 of document “The Notion of Breeder and Common Knowledge” (Document C(Extr.)/19/2 Rev.). Paragraph 8 would then read as follows: “With regard to ‘discovered and developed’, a discovery might be the initial step in the process of breeding a new variety. However, the term ‘discovered and developed’ means that a mere discovery, or find, would not entitle the person to obtain a breeder’s right. Development of a variety is necessary for a breeder to be entitled to obtain a breeder’s right. <u>In the 1991 Act, ‘discovery’ describes the activity of ‘selection within natural variation’ while ‘development’ describes the process of ‘propagation and evaluation.’</u> ”
Paragraph 9	examples to be revised, in consultation with interested experts
Paragraph 11	the last sentence of paragraph 11 to read as follows: “A person may, for example, become the ‘successor in title’ by law, will, gift, sale or exchange, <u>where the law of the relevant member of the Union so provides.</u> ”

8. The CAJ-AG agreed that the Office of the Union should prepare a revised version of the Explanatory Notes on the Definition of Breeder under the 1991 Act of the UPOV Convention (document UPOV/EXN/BRD Draft 4) for consideration by the CAJ-AG at its sixth session, to be held in October 2011.

Explanatory Notes on Acts in Respect of Harvested Material under the 1991 Act of the UPOV Convention

9. The CAJ-AG considered documents CAJ-AG/10/5/2 and UPOV/EXN/HRV Draft 5, the comments received from CIOPORA of October 4, 2010, which had been posted on the CAJ-AG section of the UPOV website and the comments received by the Delegation of the Russian Federation on October 18, 2010, which were distributed at the session and posted on the CAJ-AG section of the UPOV website.
10. The CAJ-AG considered the request made by CIOPORA for the development of explanatory notes on “propagation and propagating material” and agreed to report that request to the CAJ, at its sixty-third session, to be held on April 7, 2011. The CAJ-AG recalled that it was a matter for the CAJ to decide on the development of new explanatory notes.

11. The CAJ-AG agreed the following concerning document UPOV/EXN/HRV Draft 5:

General	to verify the translations in French, German and Spanish to reflect the specific wording of the Convention in those languages.
Section I (b), paragraph 5	Paragraph 5 to read as follows: “The explanation that harvested material includes entire plants and parts of plants, which is material that can potentially be used for propagating purposes, means that <u>at least some forms of</u> harvested material has <u>have</u> the potential to be used as propagating material (see ‘Illustrative examples’).”
Section I (d) Title	to change the title from “Reasonable opportunity” to “Exercise his right”
Section I (d), paragraph 8	Paragraph 8 to read as follows: “The term ‘his right’, in Article 14(2) of the 1991 Act, relates to the breeder’s right in the territory concerned (see paragraph 6 above): a breeder can only exercise his right in that territory. Thus, ‘reasonable opportunity to exercise his right’ in relation to the propagating material means a reasonable opportunity to exercise his right in relation to the propagating material in the territory concerned. Furthermore, in particular, ‘reasonable opportunity to exercise his right’ does not mean a reasonable opportunity to obtain a right, for example in another territory. It is a matter for each member of the Union to determine what constitutes a ‘reasonable opportunity’ to exercise his right. ”
Section I (e), General	the CAJ-AG agreed that the Office of the Union should continue consultations with the Delegation of the Russian Federation concerning examples 2, 3, 4, 5 and 6, in order to make the necessary amendments in the next version of the document subject to a review of examples 2, 3, 4, 5 and 6, as set out above, to amend the titles of the “Illustrative examples” in order to reflect, if appropriate, the changes below to delete “grant and” from the relevant places of the “Illustrative examples”
Section I (e), paragraph 9	to move paragraph 18 after paragraph 9 and to amend the reference to Section II
Section I (e), Example 1	Example 1 to read as follows: “ <i>Variety 1 is protected in Country A. Propagating material of variety 1 is exported without the breeder’s authorization to Country B BT and the breeder did not have a reasonable opportunity to exercise his right on the propagating material exported from Country A. Country B does not grant and protect breeders’ rights. Variety 1 is then propagated in Country B and harvested material imported into Country A.</i> ”

Section I (e), Example 2	<p>Example 2 to read as follows:</p> <p><i>“Variety 2 is protected in Country C. Harvested material (e.g. grain, plants, flowers etc.) of variety 2 is exported to Country D and the breeder’s authorization is not obtained for the export of that material as propagating material. However, the material is subsequently used as propagating material (e.g. as seed, cuttings etc.) in Country D (Country D does not grant and protect breeders’ rights). Harvested material of variety 2 is then imported into Country C. T and the breeder did not have a reasonable opportunity to exercise his right on the propagating material exported from Country C.”</i></p> <p>the first sentence of paragraph 11 (i) of the Spanish version to read as follows: <i>“el producto de la cosecha se obtuvo por <u>hubo</u> utilización no autorizada (exportación) de material de reproducción o de multiplicación.”</i></p> <p>to delete the last sentence of paragraph 11 (i) as follows: <i>“Thus, there was unauthorized export of propagating material to Country D”</i></p>
Section I (e), Example 4	<p>Example 4 to read as follows:</p> <p><i>“Variety 4 is protected in Country G. Harvested material (e.g. grain, plants, flowers etc.) of variety 4 is exported to Country H and the breeder’s authorization is not obtained for the export of that material as propagating material. However, the material is subsequently used as propagating material in Country H. In Country H, protection according to the UPOV Convention is available for the genus or species to which the variety 4 belongs, but there is no plant breeder’s right for variety 4. Harvested material of variety 4 is then imported into Country G. T and the breeder did not have a reasonable opportunity to exercise his right on the propagating material exported from Country G.”</i></p> <p>to delete the last sentence of paragraph 13(i) as follows: <i>“Thus, there was unauthorized export of propagating material to Country H”</i></p>
Section I (e), Example 5	<p>The first three sentences of Example 5 to read as follows:</p> <p><i>“Variety 5 is protected in Country I. Propagating material of variety 5 is exported without the breeder’s authorization to Country J and the breeder did not have a reasonable opportunity to exercise his right on the propagating material exported from Country I.[...]”</i></p> <p>to delete the last sentence of paragraph 14(i) as follows: <i>“Thus, there was unauthorized export of propagating material to Country J”</i></p>
Section I (e), Example 6	<p>The last two sentences of Example 6 to read as follows:</p> <p><i>“[...] However, the grower in Country M uses the 25,000 plants to propagate further plants of variety 6 and harvested material (cut-flowers) from those propagated plants is then imported into Country L T and the breeder did not have a reasonable opportunity to exercise his right on the propagating material exported from Country L.”</i></p>

	<p>to delete the last sentence of paragraph 15(i) as follows: “Thus, there was unauthorized export of propagating material to Country M”</p> <p>Paragraph 15(ii) to read as follows: “the breeder did not have a reasonable opportunity to exercise his right in Country L in relation to the propagating material exported to Country M.”</p>
Section I (e), Example 7	<p>the last two sentences of Example 7 to read as follows:</p> <p><i>“[...] A farmer uses some of the harvested material of variety 7 for propagating purposes on his own holdings and the breeder did not have a reasonable opportunity to exercise his right on the propagating material.”</i></p>
Section I (e), Example 8	<p>the last two sentences of Example 8 to read as follows:</p> <p><i>“[...] The farmer uses more than the permitted amount for propagating purposes on his own holdings and the breeder did not have a reasonable opportunity to exercise his right on the propagating material.”</i></p>
Section II	<p>to delete Section II from document UPOV/EXN/HRV Draft 5, without prejudice to future considerations under agenda item 5(a) “objectives of the possible development of a document on the exhaustion of the breeder’s right under the 1991 Act of the UPOV Convention (document CAJ-AG/10/5/4)”</p>

12. The CAJ agreed that the Office of the Union should prepare a revised version of the Explanatory Notes on Acts in Respect of Harvested Material under the 1991 Act of the UPOV Convention (UPOV/EXN/HRV Draft 6) for consideration by the CAJ-AG at its sixth session, to be held in October 2011.

Explanatory Notes on Essentially Derived Varieties under the 1991 Act of the UPOV Convention (Revision)

13. The CAJ-AG considered document CAJ-AG/10/5/3.

Relationship between Article 14(5)(b)(i) and (iii) of the 1991 Act of the UPOV Convention

14. The representative of CIOPORA explained that for CIOPORA, to avoid legal uncertainty, it was necessary to clearly define the difference required for a variety to be considered not to be an essentially derived variety. He explained that the extension of the protection of an initial variety to its essentially derived varieties provided an effective means of protection for those essentially derived varieties that would have a short commercial life. CIOPORA considered that varieties obtained by mutation should be considered to be essentially derived varieties, irrespective of the number of differences. Therefore, he did not agree with the final sentence of paragraph 12 of document CAJ/29/2 “Guidelines relating to essentially derived varieties” and of paragraph 12 of document IOM/6/2 “Essentially Derived Varieties”, which stated that “[...] the differences which result from the act of derivation should be one or very few.”

15. The CAJ-AG expressed concerns with regard to CIOPORA's position that all mutations were essentially derived varieties.

Inclusion of a variety "D" in figures 3 and 4 of document UPOV/EXN/EDV

16. The representative of ISF endorsed the inclusion of a variety "D" in document UPOV/EXN/EDV as presented in Annex II of document CAJ-AG/10/5/3.

17. The representative of ISF requested the CAJ-AG to consider whether variety "D" would be "predominantly derived" from the initial variety if variety "D" was obtained by using only information on the initial variety, such as the DNA profile.

18. The CAJ-AG agreed to request its members, CIOPORA and ISF to send comments on document CAJ-AG/10/5/3 to the Office of the Union. Based on the comments made at its fifth session and those submitted to the Office of the Union, a new version of document "Explanatory Notes on Essentially Derived Varieties under the 1991 Act of the UPOV Convention (Revision)" would be prepared for the sixth session of the CAJ-AG in October 2011.

Objectives of the possible development of a document on the exhaustion of the breeder's right under the 1991 Act of the UPOV Convention

19. The CAJ-AG agreed that agenda item 5(a) "Objectives of the possible development of a document on the exhaustion of the breeder's right under the 1991 Act of the UPOV Convention (document CAJ-AG/10/5/4)" should be considered by the CAJ-AG at its sixth session in October 2011.

Objectives of the possible development of a document on the notion of "own holdings" under Article 15(2) of the 1991 Act of the UPOV Convention

20. The CAJ-AG considered document CAJ-AG/10/5/5.

21. In recognition of the difficulty in developing a common definition of "own holdings", the CAJ-AG agreed to propose to the CAJ that, for the time being, it should not seek to develop guidance on the notion of "own holdings".

Matters arising after the grant of a breeder's right

22. The CAJ-AG considered document CAJ-AG/10/5/6.

23. The CAJ-AG invited members of the Union, in particular those which had made contributions on matters arising after the grant of a breeder's right (see Annex to document CAJ-AG/10/5/6), to provide the Office of the Union with comments on whether the contributions had been identified under appropriate headings of document CAJ-AG/10/5/6 and whether further guidance should be developed. Based on those comments, the Office of the Union would prepare a document for consideration by the CAJ-AG at its sixth session in October 2011.

Date and program for the sixth session

24. Subject to the CAJ approval, at its sixty-third session, to be held on April 7, 2011, the CAJ-AG agreed the following program for its sixth session, to be held in October 2011, and anticipated that a full day would be necessary to cover the program:

1. Opening of the session
2. Adoption of the agenda
3. Explanatory Notes
 - (a) UPOV/EXN/BRD: Explanatory Notes on the Definition of Breeder under the 1991 Act of the UPOV Convention
 - (b) UPOV/EXN/HRV: Explanatory Notes on Acts in Respect of Harvested Material under the 1991 Act of the UPOV Convention
4. Explanatory Notes on Essentially Derived Varieties under the 1991 Act of the UPOV Convention (revision)
5. Matters arising after the grant of a breeder's right
6. Objectives of the possible development of a document on the exhaustion of the breeder's right under the 1991 Act of the UPOV Convention
7. Matters referred by the CAJ to the CAJ-AG consideration since the fifth session of the CAJ-AG
8. Date and program for the seventh session

25. The CAJ-AG agreed that CIOPORA and ISF be invited to the relevant part of the sixth session of the CAJ-AG, in order to enable their views to be presented on relevant matters.

26. The CAJ-AG noted that the tentative date of October 22, 2011, for the sixth session of the CAJ-AG might change to October 17, 2011, if the CAJ decided, at its sixty-third session, on April 7, 2011, that a full day would be necessary to cover the program for the sixty-fourth session of the CAJ in October 2011.

27. The present 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 membres/
in the alphabetical order of the names in French of the members/
in alphabetischer Reihenfolge der französischen Namen der Mitglieder/
por orden alfabético de los nombres en francés de los miembros)

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