



Disclaimer: unless otherwise agreed by the Council of UPOV, only documents that have been adopted by the Council of UPOV and that have not been superseded can represent UPOV policies or guidance.

This document has been scanned from a paper copy and may have some discrepancies from the original document.

---

Avertissement: sauf si le Conseil de l'UPOV en décide autrement, seuls les documents adoptés par le Conseil de l'UPOV n'ayant pas été remplacés peuvent représenter les principes ou les orientations de l'UPOV.

Ce document a été numérisé à partir d'une copie papier et peut contenir des différences avec le document original.

---

Allgemeiner Haftungsausschluß: Sofern nicht anders vom Rat der UPOV vereinbart, geben nur Dokumente, die vom Rat der UPOV angenommen und nicht ersetzt wurden, Grundsätze oder eine Anleitung der UPOV wieder.

Dieses Dokument wurde von einer Papierkopie gescannt und könnte Abweichungen vom Originaldokument aufweisen.

---

Descargo de responsabilidad: salvo que el Consejo de la UPOV decida de otro modo, solo se considerarán documentos de políticas u orientaciones de la UPOV los que hayan sido aprobados por el Consejo de la UPOV y no hayan sido reemplazados.

Este documento ha sido escaneado a partir de una copia en papel y puede que existan divergencias en relación con el documento original.

UPOV

CAJ/33/5

ORIGINAL : French

DATE : April 25, 1994

## INTERNATIONAL UNION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS

GENEVA

## ADMINISTRATIVE AND LEGAL COMMITTEE

## Thirty-third Session

Geneva, October 27, 1993

## REPORT

adopted by the CommitteeIntroduction

1. The Administrative and Legal Committee (hereinafter referred to as "the Committee") held its thirty-third session on October 27, 1993, under the chairmanship of Mr. H. Kunhardt (Germany). The list of participants is given at annex hereto.
2. The session was opened by the Chairman, who welcomed the participants.

Adoption of the Agenda

3. The agenda was adopted as given in document CAJ/33/1.

UPOV Model Administrative Agreement for International Cooperation in the Testing of Varieties

4. Discussions were based on document CAJ/33/2.
5. A short discussion took place on the fourth recital in the preamble. The Delegation of France pointed out that the new wording was better adapted to the present situation since it took into account the inadvisability of "centralization" for agroclimatical reasons, for example, and the possibility of "centralizing" examination at a number of authorities. The Committee finally adopted the wording proposed in document CAJ/33/2.

6. A discussion was also held on Article 4(3)(i) and on the matter of by whom a person was to be "duly authorized" (the Executing Authority or the Receiving Authority or both). The Committee decided to maintain the proposed wording since it had all the necessary flexibility, it being understood that where necessary and where possible and advisable, bilateral agreements could set out this item in greater detail.

7. The Committee adopted the amendment to Article 1(1) proposed by the Office of the Union. It was emphasized that where several bilateral agreements could apply, it would be for the Receiving Authority--and not the breeder--to decide on how the examination was to be carried out. The need for a degree of discipline was also mentioned: an authority that was willing to keep a reference collection suitable for international cooperation should be able to expect that the varieties would be examined by it.

8. The Committee also agreed to the proposed addition of a new paragraph (3).

9. The text as adopted by the Committee was submitted to the twenty-seventh ordinary session of the Council in document C/27/9 Add. [The Council also adopted the text.]

### Novelty

10. Discussions were based on document CAJ/33/3.

11. In his introduction, the Chairman drew attention to the conceptual analogy with the idea of novelty under patent law: basically, novelty was lost--in theory at least--when material that enabled a variety to be reproduced entered into the possession of another person. Referring to the extent of the powers afforded by possession following sale or disposal to others (i.e. to the question whether sale or disposal to others was "for purposes of exploitation of the variety") and to the concept of "others," he noted that case law already existed in Germany with respect to patents and that it was liable to be applied by analogy. In the case of a group, the nature of the organic links between the enterprises was decisive when determining whether the enterprise to which material had been made available was an "other" one or not. That point of view was supported by the Delegation of Japan.

12. The Delegation of the Netherlands was in full agreement with the analysis given by the Office of the Union in document CAJ/33/3. According to that Delegation, the matter should now be left to the national lawmaker and to the courts.

13. The Delegation of the Czech Republic raised the question of the novelty of a hybrid of which the formula was disclosed. The Delegation of France replied that novelty was assessed on the basis of transactions in seed or harvested material; in fact, a formula without access to the necessary plant material was of no use.

14. The Delegation of France further pointed out that it maintained its position recorded in paragraph 47 of the Annex to document CAJ/33/3 with respect to novelty of lines. That view was supported by the Delegations of the Netherlands and of Spain.

15. Closing the exchange of views, the Chairman pointed out that it would be possible, in future sessions, to report on the options chosen by lawmakers when transferring Article 6(1) of the 1991 Act of the Convention to domestic law and also on any case law.

### Preservation of Existing Rights

16. Discussions were based on document CAJ/33/4.

17. In his introduction, the Chairman commented that the discussion would have to take the form of an exchange of views on transitional rules in respect of essentially derived varieties. He referred to the fact that the Office of the Union had made a distinction between three possible solutions\* in document CAJ/31/4 and that the Delegation of the Netherlands had already spoken, at a preceding session, in favor of the intermediate solution since it would cause the least friction.

18. The Delegation of New Zealand was unable to share the view that Article 40 would not apply in the case of essentially derived varieties on the grounds that the breeder's right was simply a right to prohibit. The matter had been examined at national level, and, on the contrary, it had been felt that the right afforded to the breeder of an essentially derived variety was limited and that the aforementioned reasoning concerning a right to prohibit was artificial. A law having retroactive effects would not generally be possible. The "broad solution" had been rejected. The "intermediate solution" had not seemed altogether satisfactory since it was not adequate to protect breeders' investments. The choice therefore fell on the solution referred to as "narrow", although "deferred" would be better. It was accepted that the new provisions would only assume their effects progressively.

19. The Delegation of Japan stated that the "intermediate solution" had been preferred in its country and that it had been deemed to comply with Article 40 of the 1991 Act of the Convention.

20. The Delegation of the United Kingdom announced that the "intermediate solution" had been preferred in its country also following consultations with breeders; it did not expect any insurmountable legal problems in view of the fact that the majority of breeders were in favor of that solution. It added that account had to be taken of the provisions on compulsory licenses. At a more general level, it pointed out that when the term of protection had been extended, the existing protected varieties had benefited from that extension in accordance with a general principle; it did not see why that principle should be changed in the case of essentially derived varieties.

21. The Delegation of the Netherlands observed that the "intermediate solution" had been preferred in its country. As to the situation described by the Delegation of New Zealand, it felt that there was no reason to be obliging to

---

\* Narrow solution: The provisions of Article 14(5)(i) of the 1991 Act would only be applied to initial varieties protected after the date of entry into force of the new Law and, consequently (at least in the vast majority of cases), in respect of essentially derived varieties created after that date.

Intermediate solution: The provisions would also apply to initial varieties protected prior to the date of entry into force of the new Law, but only in respect of essentially derived varieties that "appear" after that date. Essentially derived varieties "appearing" before that date would continue to be autonomous.

Broad solution: The provisions would apply to all varieties, including essentially derived varieties that have "appeared" before the date of entry into force of the new Law.

the producers of essentially derived varieties since, after all, they had long known that the conditions for exploiting those varieties were to change and would therefore have had plenty of time to adapt to the new situation.

22. The Delegation of Spain said that it had not yet had the opportunity to request a legal opinion on the matter; however, it did foresee difficulties if the provisions to be adopted were to have an effect on existing rights.

23. The Delegation of Australia stated that the situation in Australia was similar to that in New Zealand. Retroactive effect would be unconstitutional and the "intermediate solution" would be unacceptable if it were to cause prejudice to anyone.

24. The "intermediate solution" had been or was expected to be proposed in Denmark, Germany and Poland.

25. The Delegation of France returned to the concept of retroactivity. Retroactivity would exist if the breeder of an initial variety could demand royalties for the use of an essentially derived variety that had occurred prior to the amendment of the law. Such retroactivity would not be possible. However, the "intermediate solution" contained no retroactive element. It did nevertheless raise the question of investments made prior to amendment and which came to fruition after amendment. There was perhaps reason, in that respect, to take account of the purpose of the system of protection, which was to promote research and release of improved varieties. In the case of vegetatively propagated plants, particularly ornamental plants, the present system meant that the property of the breeder of an initial variety was misappropriated soon as a mutant occurred and replaced it on the market. However, in the case of sexually reproduced plants, the breeding processes were much longer and infinitely more expensive and they produced results of value to farmers. It was therefore possible that France would choose a variable "intermediate solution" that would contain some of the elements referred to in paragraph 10 of document CAJ/33/4 for sexually reproduced plants (but not a compulsory license since the confrontation of two private interests did not constitute a public interest).

#### Program of Future Work

26. Following a discussion in which several Delegations participated, the Committee agreed that a new model law on plant variety protection should be drawn up initially by the Office of the Union in collaboration with a limited group of experts and also that the Committee should only meet in April 1994 if a draft had been supplied to the delegations long enough in advance. [The Council decided at its twenty-seventh ordinary session not to schedule a session of the Committee in April 1994.]

27. This report has been adopted by correspondence.

[Annex follows]

CAJ/33/5

## ANNEXE/ANNEX/ANLAGE

**LISTE DES PARTICIPANTS/  
LIST OF PARTICIPANTS/  
TEILNEHMERLISTE**

(dans l'ordre alphabétique des noms français des Etats/  
in the alphabetical order of the names in French of the States/  
in alphabetischer Reihenfolge der französischen Namen der Staaten)

I. ETATS MEMBRES/MEMBER STATES/VERBANDSSTAATENAFRIQUE DU SUD/SOUTH AFRICA/SUEDAFRIKA

David P. KEETCH, Director, Plant and Quality Control, Department of Agriculture, Private Bag X258, Pretoria 0001

Elise BUITENDAG (Mrs.), Principal Plant and Quality Control Officer, Plant and Quality Control, Private Bag X11208, Nelspruit 1200

ALLEMAGNE/GERMANY/DEUTSCHLAND

Rudolf ELSNER, Präsident, Bundessortenamt, Osterfelddamm 80, 30627 Hannover

Henning KUNHARDT, Leitender Regierungsdirektor, Bundessortenamt, Osterfelddamm 80, 30627 Hannover

Walter DÄSCHNER, Regierungsdirektor, Bundesministerium für Ernährung, Landwirtschaft und Forsten, Rochusstrasse 1, 53123 Bonn

Hans-Walter RUTZ, Referatsleiter, Bundessortenamt, Osterfelddamm 80, 30627 Hannover

Michael KÖLLER, Referent, Bundessortenamt, Osterfelddamm 80, 30627 Hannover

AUSTRALIE/AUSTRALIA/AUSTRALIEN

Henry (Mick) LLOYD, Director, Plant Variety Rights Office, Department of Primary Industries and Energy, P.O. Box 858, Canberra, A.C.T. 2601

BELGIQUE/BELGIUM/BELGIEN

Walter J.G. VAN ORMELINGEN, Ingénieur principal, Service de la protection des obtentions végétales, Ministère de l'agriculture, Manhattan Center, Office Tower, 21, avenue du Boulevard, 1210 Bruxelles

CANADA/KANADA

Glenn HANSEN, Director, Commissioner of Plant Breeders' Rights, Plant Products Division, Agriculture Canada, K.W. Neatby Building, 960 Carling Avenue, Ottawa, Ontario, K1A 0C6

DANEMARK/DENMARK/DAENEMARK

Flemming ESPENHAIN, Chairman, Plant Novelty Board, Plant Directorate, Ministry of Agriculture, Skovbrynet 20, 2800 Lyngby

Svend PEDERSEN, Scientist, Plant Directorate, Ministry of Agriculture, Skovbrynet 20, 2800 Lyngby

ESPAGNE/SPAIN/SPANIEN

Ricardo LOPEZ DE HARO, Director Técnico de Registro de Variedades y Certificación, Instituto Nacional de Semillas y Plantas de Vivero, José Abascal, 56, 28003 Madrid

José M. ELENA, Jefe de Area, Registro de Variedades, Instituto Nacional de Semillas y Plantas de Vivero, José Abascal, 56, 28003 Madrid

ETATS-UNIS D'AMERIQUE/UNITED STATES OF AMERICA/VEREINIGTE STAATEN VON AMERIKA

Lee J. SCHROEDER, Senior Counsellor, Office of Legislation and International Affairs, Patent and Trademark Office, Box 4, U.S. Department of Commerce, Washington, D.C. 20231

Alan A. ATCHLEY, Plant Variety Examiner, Plant Variety Protection Office, Room 500, Department of Agriculture, NAL Building, 10301 Baltimore Blvd., Beltsville, MD 20705

Michael J. ROTH, Patent Counsel, Pioneer Hi-Bred International Inc., 700 Capital Square, 400 Locust Street, Des Moines, Iowa 50309

FINLANDE/FINLAND/FINNLAND

Arto VUORI, Director, Plant Variety Rights Office, Plant Variety Board, Ministry of Agriculture and Forestry, Liisankatu 8, 00170 Helsinki

FRANCE/FRANKREICH

Nicole BUSTIN (Mlle), Secrétaire général, Comité de la protection des obtentions végétales (CPOV), Ministère de l'agriculture, 11, rue Jean Nicot, 75007 Paris

Joël GUIARD, Directeur adjoint, GEVES, La Minière, 78285 Guyancourt Cedex

Philippe DELACROIX, Premier secrétaire, Mission permanente, 36, route de Pregny, 1292 Chambésy, Suisse

HONGRIE/HUNGARY/UNGARN

László DUHAY, Oberrat, National Office of Inventions, Garibaldi u. 2, 1054 Budapest

Tivadarné LÁNG, Senior Examiner, National Office of Inventions, Garibaldi u. 2, 1054 Budapest

IRLANDE/IRELAND/IRLAND

John V. CARVILL, Controller, Plant Breeders' Rights, Department of Agriculture, Food and Forestry, National Variety Testing Centre, Backweston, Leixlip, Co. Kildare

ISRAEL

Shalom BERLAND, Legal Adviser, Registrar of Plant Breeders' Rights, Ministry of Agriculture, Arania St. 8, Hakiria, Tel Aviv 61070

ITALIE/ITALY/ITALIEN

Pasquale IANNANTUONO, Conseiller juridique, Service des accords de propriété intellectuelle, Ministère des affaires étrangères, Palazzo Farnesina, 00100 Rome

Giovanna MORELLI GRADI (Mme), Chef de Division, Office italien des brevets et des marques, Ministère de l'industrie, du commerce et de l'artisanat, Via Molise 19, 00187 Rome

JAPON/JAPAN

Hidenori MURAKAMI, Director, Seeds and Seedlings Division, Agricultural Production Bureau, Ministry of Agriculture, Forestry and Fisheries, 1-2-1 Kasumigaseki, Chiyoda-ku, Tokyo

Hiroki TANAKA, Deputy Director, Seeds and Seedlings Division, Agricultural Production Bureau, Ministry of Agriculture, Forestry and Fisheries, 1-2-1 Kasumigaseki, Chiyoda-ku, Tokyo

Kôji HIRAYAMA, Director, Examination Standard Office, Patent Office, 3-4-3 Kasumigaseki, Chiyoda-Ku, Tokyo

Yoshiyuki TAKAGI, First Secretary, Permanent Mission, 3, chemin des Fins, 1211 Geneva 19, Switzerland

NORVEGE/NORWAY/NORWEGEN

Nordahl ROALDSØY, Adviser, Royal Ministry of Agriculture, P.O. Box 8007 Dep., 0030 Oslo

Kåre SELVIK, Director General, Royal Ministry of Agriculture, P.O. Box 8007 Dep., 0030 Oslo

Haakon SØNJU, Senior Executive Officer, The National Agricultural Inspection Service, STIL, P.O. Box 3, 1430 As

NOUVELLE-ZELANDE/NEW ZEALAND/NEUSEELAND

Bill WHITMORE, Commissioner of Plant Variety Rights, Plant Variety Rights Office, P.O. Box 24, Lincoln



PAYS-BAS/NETHERLANDS/NIEDERLANDE

Bart P. KIEWIET, Chairman, Board for Plant Breeders' Rights, P.O. Box 104, 6700 AC Wageningen

Elisabeth HUYZER (Mrs.), Legal Adviser, Ministry of Agriculture, Bezuidenhoutseweg 73, The Hague

Johan P. PLUIM MENTZ, Secretary, Board for Plant Breeders' Rights, P.O. Box 104, 6700 AC Wageningen

POLOGNE/POLAND/POLEN

Eugeniusz BILSKI, Director, Research Centre of Cultivars Testing (COBORU), 63-022 Slupia Wielka

Jan VIRION, Chef-expert, Ministère de l'agriculture et de l'économie alimentaire, 30, rue Wspolna, 00-930 Varsovie

Kazimierz DMOCHOWSKI, Scientific Worker, Research Centre of Cultivars Testing (COBORU), 63-022 Slupia Wielka

REPUBLIQUE TCHEQUE/CZECH REPUBLIC/TSCHECHISCHE REPUBLIK

Erik SCHWARZBACH, Director, Plant Variety Testing Branch, UKZUZ (State Institute for Control and Testing in Agriculture), Hroznova 2, 65 606 Brno

ROYAUME-UNI/UNITED KINGDOM/VEREINIGTES KOENIGREICH

John ARDLEY, Deputy Controller, Plant Variety Rights Office, White House Lane, Huntingdon Road, Cambridge CB3 0LF

SLOVAQUIE/SLOVAKIA/SLOWAKEI

Roman SUCHÝ, Senior Officer, Ministry of Agriculture, Dobrovicova 12, 812 66 Bratislava

SUEDE/SWEDEN/SCHWEDEN

Karl Olov ÖSTER, Permanent Under-Secretary, Ministry of Agriculture; President, National Plant Variety Board, Drottninggatan 21, 103 33 Stockholm

Evan WESTERLIND, Head of Office, National Plant Variety Board, Box 1247, 171 24 Solna

SUISSE/SWITZERLAND/SCHWEIZ

Hans SPILLMANN, Wissenschaftlicher Adjunkt, Bundesamt für Landwirtschaft, 3003 Bern

II. ETATS OBSERVATEURS/OBSERVER STATES/BEOBACHTERSTAATEN

COLOMBIE/COLOMBIA/KOLUMBIEN

Juan C. ESPINOSA, Premier secrétaire, Mission permanente, 17-19, chemin du Champ-d'Anier, 1209 Genève, Suisse

CROATIE/CROATIA/KROATIEN

Petar JAVOR, Deputy Head, Department for Cereals Breeding, Institute for Breeding and Production of Field Crops, Marulicev trg 5/I, 41000 Zagreb

MAROC/MOROCCO/MAROKKO

Amar TAHIRI, Chef de Bureau du Catalogue officiel, D.P.V.C.T.R.F., Service de contrôle des semences et plants, B.P. 1308, Rabat

PORTUGAL

Carlos M.C. PEREIRA GODINHO, Expert, Office de la protection des obtentions végétales, CENARVE, Edificio II, C.N.P.P.A., Tapada da Ajuda, 1300 Lisboa

REPUBLIQUE DE COREE/REPUBLIC OF KOREA/REPUBLIK KOREA

Yang Sup CHUNG, Intellectual Property Attaché, Permanent Mission, 20, route de Pré-Bois, 1215 Geneva 15, Switzerland

Seongwan KIM, Patent Examiner, Korean Industrial Property Office (KIPO), 823, Yeoksam-dong, Kangnam-ku, Seoul 135-784

ROUMANIE/ROMANIA/RUMAENIEN

Adriana PARASCHIV (Mrs.), Head, Examination Department, State Office for Inventions and Trademarks, 5, Ion Ghica, Sector 3, Bucharest

SLOVENIE/SLOVENIA/SLOWENIEN

Marina PEČNIK (Mrs.), Adviser, Ministry of Agriculture and Forestry, Parmova 33, 61000 Ljubljana

Joze SPANRING, Member of the Executive Committee for the Release of Cultivars, P.O. Box 486, Jamnikarjena 101, 61001 Ljubljana

TURQUIE/TURKEY/TUERKEI

Bayram KAGAR, Deputy Counsellor for Economic and Commercial Affairs, Permanent Mission, 28, chemin du Petit-Saconnex, 1211 Geneva 19, Switzerland

III. ORGANISATIONS INTERGOUVERNEMENTALES/INTERGOVERNMENTAL ORGANIZATIONS/  
ZWISCHENSTAATLICHE ORGANISATIONEN

ORGANISATION MONDIALE DE LA PROPRIETE INTELLECTUELLE (OMPI)/  
WORLD INTELLECTUAL PROPERTY ORGANIZATION (WIPO)/  
WELTORGANISATION FUER GEISTIGES EIGENTUM (WIPO)

Octavio ESPINOSA, Head, Patent Law Section, Industrial Property Division,  
34, chemin des Colombettes, 1211 Geneva 20, Switzerland

COMMUNAUTE EUROPEENNE (CE)/  
EUROPEAN COMMUNITY (EC)/  
EUROPAEISCHE GEMEINSCHAFT (EG)

Jürgen A. TIEDJE, Administrateur adjoint, Commission des Communautés euro-  
péennes, Direction générale de l'agriculture, 200, rue de la Loi (Loi 84-1/3),  
1049 Bruxelles, Belgique

IV. BUREAU/OFFICER/VORSITZ

Henning KUNHARDT, Vorsitzender

V. BUREAU DE L'UPOV/OFFICE OF UPOV/BUERO DER UPOV

Arpad BOGSCH, Secretary-General  
Barry GREENGRASS, Vice Secretary-General  
André HEITZ, Director-Counsellor  
Max-Heinrich THIELE-WITTIG, Senior Counsellor  
Makoto TABATA, Senior Program Officer

[Fin du document/  
End of document/  
Ende des Dokuments]