



CAJ/72/9

ORIGINAL: English

DATE: October 27, 2015

INTERNATIONAL UNION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS

Geneva

ADMINISTRATIVE AND LEGAL COMMITTEE**Seventy-Second Session
Geneva, October 26 and 27, 2015**

REPORT ON THE CONCLUSIONS

*adopted by the Administrative and Legal Committee**Disclaimer: this document does not represent UPOV policies or guidance*Opening of the session

1. The Administrative and Legal Committee (CAJ) held its seventy-second session in Geneva on October 26 and 27, 2015, under the chairmanship of Mr. Martin Ekvad (European Union).
2. The session was opened by the Chair, who welcomed the participants. The list of participants is reproduced in the Annex to this report.
3. The Chair reported that Montenegro had deposited its instrument of accession to the 1991 Act of the UPOV Convention on August 24, 2015, and had become the seventy-third member of the Union on September 24, 2015.
4. The Chair reported that the United Republic of Tanzania had deposited its instrument of accession to the 1991 Act of the UPOV Convention on October 22, 2015, and would become the seventy-fourth member of the Union on November 22, 2015.
5. The Chair reported that Canada, which had been a member of the Union since March 4, 1991, had deposited its instrument of ratification of the 1991 Act of the UPOV Convention on June 19, 2015, and had become bound by the 1991 Act on July 19, 2015.
6. The Chair confirmed that the report of the seventy-first session of the CAJ, held in Geneva on March 26, 2015 (document CAJ/71/11), had been adopted by correspondence and made available on the UPOV website.

Adoption of the agenda

7. The CAJ adopted the draft agenda, as proposed in document CAJ/72/1 Rev. with the addition of document CAJ/72/4 Add. under item 5.

Development of information materials concerning the UPOV Convention

8. The CAJ considered documents CAJ/72/2, UPOV/EXN/EDV/2 Draft 6 and UPOV/EXN/PPM/1 Draft 5.
9. The CAJ noted the presentation of the European Union on its system concerning essentially derived varieties. A copy of the presentation will be provided in an addendum to document CAJ/72/2.

10. The CAJ endorsed the proposal for the Office of the Union to organize a meeting to exchange information with the International Community of Breeders of Asexually Reproduced Ornamental and Fruit Varieties (CIOPORA), the International Seed Federation (ISF) and the World Intellectual Property Organization (WIPO), in order to explore the possible role of UPOV in alternative dispute settlement mechanisms for matters concerning essentially derived varieties, including the provision of experts on EDV matters.

11. The CAJ agreed the following amendments to document “Explanatory Notes on Essentially Derived Varieties under the 1991 Act of the UPOV Convention” (Revision) (document UPOV/EXN/EDV/2 Draft 6):

Paragraph 4	To read as follows: “The requirement of predominant derivation from an initial variety means that a variety can only be essentially derived from one <u>initial</u> variety. The intention is that a variety should only be essentially derived from another variety when it retains virtually the whole genotype of the other variety. A derived variety could not, in practice, retain the expression of the essential characteristics of the variety from which it is derived unless it is almost entirely derived from that <u>initial</u> variety.”
Paragraph 4	Spanish version to read as follows: “El requisito de derivación principal de una variedad inicial implica que una variedad solo puede ser esencialmente derivada de una <u>sol</u> a variedad <u>inicial</u> . La intención es que una variedad solo sea esencialmente derivada de otra variedad cuando conserve prácticamente todo el genotipo de la otra variedad. En la práctica, una variedad derivada no puede conservar la expresión de los caracteres esenciales de la variedad de la que deriva excepto si deriva casi exclusivamente de esa variedad <u>inicial</u> .”
Paragraph 5	To read as follows: “The phrase “while retaining the expression of the essential characteristics” requires that the expression of the essential characteristics <u>conforms to and</u> be derived from the initial variety.”
Paragraph 11	To read as follows: “The derived variety must retain almost the totality of the genotype of the initial variety and be <u>distinguishable different</u> from that variety by a very limited number of characteristics (<u>typically by one</u>).”
Paragraphs 20 and 21	20. Another example of an indirect way in which it might be possible to obtain an essentially derived variety from an initial variety could be the use of a hybrid variety to obtain a variety which is essentially derived from one of the parent lines of the hybrid. 21. The use of molecular data from an initial variety, for the purpose of selection of genotypes from a population that is mostly related to the initial variety, to produce a variety with a similar phenotypic expression of the essential characteristics may provide an indication of predominant derivation, if the variety fulfills the definition in Article 14(5)(b). A joint proposal on paragraphs 20 and 21 to be provided by ESA and ISF for consideration by the CAJ at its seventy-third session. ESA and ISF would be invited to present to the CAJ the background issues to paragraphs 20 and 21 and the proposed text.
Paragraph 31	Spanish version to read as follows: “Tanto la derivación <u>predominante principal</u> (por ejemplo, datos sobre la conformidad genética con la variedad inicial) como la conformidad respecto de los caracteres esenciales (por ejemplo, datos sobre la conformidad en la expresión de los caracteres esenciales de la variedad inicial) son posibles puntos de partida para ofrecer indicios de que una variedad podría ser esencialmente derivada de la variedad inicial.”
Paragraph 32	To read as follows: “In some situations, relevant information provided by the breeder of the initial variety on predominant derivation and/or on conformity on the essential characteristics might be used as the basis for the reversal of the burden of proof. In such situations, the other breeder might need to prove that the other variety is not essentially derived from the initial variety. For instance, the other breeder would need to provide information on the breeding history of the <u>second other</u> variety to prove that the variety was not <u>essentially</u> derived from the initial variety.”

Paragraph 32	Spanish version to read as follows: “En algunas situaciones, podría utilizarse como base de la inversión de la carga de la prueba información pertinente proporcionada por el obtentor de la variedad inicial relativa a la derivación <u>predominante principal</u> o la conformidad respecto de los caracteres esenciales. En tales situaciones, el otro obtentor podría estar obligado a demostrar que su variedad no es esencialmente derivada de la variedad inicial. Por ejemplo, el otro obtentor debería aportar información sobre el método de obtención de la segunda variedad para demostrar que la variedad no se derivó de la variedad inicial.”
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12. The CAJ agreed that a new draft of the “Explanatory Notes on Essentially Derived Varieties under the 1991 Act of the UPOV Convention (Revision)” (document UPOV/EXN/EDV/2 Draft 7), incorporating the changes and reflecting the approach agreed by the CAJ at its seventy-second session, be posted as soon as possible for consideration by the CAJ at its seventy-third session.

Explanatory Notes on Variety Denominations under the UPOV Convention (Revision)

13. The CAJ noted that a report on work concerning the possible development of a UPOV similarity search tool for variety denomination purposes and proposals concerning a possible revision of document UPOV/INF/12 “Explanatory Notes on Variety Denominations under the UPOV Convention” were provided in document CAJ/72/3 “Variety denominations”.

Explanatory Notes on Propagating Material under the UPOV Convention

14. The CAJ agreed the following amendments to document “Explanatory Notes on Propagating Material under the UPOV Convention” (document UPOV/EXN/PPM/1 Draft 5):

Section (a)	To delete Section (a) and incorporate in the Annex to the document the provisions of the UPOV Convention where reference is made to the notion of propagating material.
Paragraph 1	To read as follows: “The UPOV Convention does not provide a definition of ‘propagating material’. Propagating material encompasses reproductive and vegetative propagating material. The following are non-exhaustive examples of factors that have been considered by members of the Union in relation to whether material is propagating material: “(i) plant or part of plants used for the variety reproduction; “(ii) whether the material has been used to propagate the variety; “(iii) whether the material is capable of producing entire plants of the variety and is factually used for propagating purposes; “(iv) whether there has been a custom/practice of using the material for propagating purposes or, as a result of new developments, there is a new custom/practice of using the material for that purpose; “(v) the intention on the part of those concerned (producer, seller, supplier, buyer, recipient, user); “(vi) if, based on the nature and condition of the material and/or the form of its use, it can be determined that the material is “propagating material”; or “(vii) the variety material where conditions and mode of its production meet the purpose of reproduction of new plants of the variety but not of final consumption.”

15. The CAJ agreed that a draft of document “Explanatory Notes on Propagating Material under the UPOV Convention” incorporating the changes agreed by the CAJ at its seventy-second session, be presented for adoption by the Council at its extraordinary session in March 2016.

Program for the development of information materials

16. The CAJ considered the program for the development of information materials in conjunction with the discussions on the scheduling of the CAJ sessions, under the item “Program for the seventy-third session” (see document CAJ/72/8), and agreed as follows

Explanatory Notes on Essentially Derived Varieties under the 1991 Act of the UPOV Convention (Revision) (UPOV/EXN/EDV/2 Draft 7)

Explanatory Notes on Variety Denominations under the UPOV Convention (Revision)

Possible revision of the Explanatory Notes on Conditions and Limitations Concerning the Breeder's Authorization in Respect of Propagating Material under the UPOV Convention (document UPOV/EXN/CAL/1)

UPOV Model Plant Breeders' Rights Gazette (Revision)

17. The CAJ noted that, at its seventy-first session, the CAJ had agreed to defer the preparation of a draft revision of document UPOV/INF/5 "UPOV Model Plant Breeders' Rights Gazette (Revision)" (document UPOV/INF/5/1 Draft 1), pending developments in relation to the development of a prototype electronic form (see documents CAJ/71/4 "Electronic Application Systems" and CAJ/71/10 "Report on the Conclusions", paragraph 30).

Variety descriptions and role of plant material

18. The CAJ recalled that, at its seventy-first session, it had noted that the TC had agreed to include discussion on variety descriptions and the role of plant material, including minimum number of growing cycles for DUS examination, during its fifty-second session of the TC, to be held in Geneva in 2016.¹ The CAJ noted that any matter concerning variety descriptions and the role of plant material for consideration by the CAJ would be reported by the TC to the CAJ (See document CAJ/71/10 "Report on the Conclusions", paragraph 24).

Variety denominations

19. The CAJ considered document CAJ/72/3.

20. The CAJ noted the presentation of Argentina on variety denominations, a copy of which would be provided in an addendum to document CAJ/72/3.

21. The CAJ noted the work by the Working Group for the Development of a UPOV Denomination Similarity Search Tool (WG-DST) concerning the possible development of a UPOV similarity search tool for variety denomination purposes.

22. The CAJ noted the following elements from the oral report by the Vice Secretary-General on the third meeting of the WG-DST, held in Geneva on October 2, 2015:

(a) Members of the Union had been invited, by means of a circular E-15/156 of August 19, 2015, to participate in the second step of the Test Study for the development of an effective denomination similarity search tool. The objective of the second step was to refine the algorithm that had been identified as the best algorithm in the first step of the Test Study. On the basis of the results of the second step, the Office of the Union would refine the algorithm during November/December 2015 and would customize the algorithm by December 2015. The revised algorithm would be reviewed by the WG-DST at its fourth meeting, to be held on February 4, 2016;

(b) With regard to non-acceptable terms, the WG-DST had proposed to consider botanical and common names as non-acceptable terms. In the case of common names, it had agreed that it would be necessary to restrict the common names, perhaps to those in the GENIE database and for selected crops/species only;

(c) With regard to comparatives/superlatives, the WG-DST had agreed to investigate the feasibility of including a list of comparatives/superlatives as non-acceptable terms. That possibility would be reviewed by the WG-DST at its fourth meeting;

¹ See document CAJ/71/10 "Report on the Conclusions", paragraph 24.

(d) The WG-DST had concluded that it would not be feasible to address “established practice” with regard to the use of denominations consisting solely of figures and had noted that this was not a difficult matter for members of the Union to implement.

23. The CAJ agreed the following next steps for the revision of the “Explanatory Notes on Variety Denominations under the UPOV Convention”:

(a) to expand the mandate and the composition of the Working Group for the Development of a UPOV Denomination Similarity Search Tool (WG-DST) to prepare recommendations for the CAJ concerning the revision of document UPOV/INF/12 “Explanatory Notes on Variety Denominations under the UPOV Convention” (Working Group on Variety Denominations (WG-DEN));

(b) the Office of the Union to issue a circular with a request to CAJ members and observers to participate in the WG-DEN and, if appropriate, to present proposals for revisions of document UPOV/INF/12, by January 20, 2016;

(c) the WG-DEN to meet during the week of the UPOV sessions in March 2016;

(d) the WG-DEN to take the proposals received in response to the circular in paragraph (b) above and the proposals in paragraphs 28 to 37 and 41 of document CAJ/72/3 in conjunction with the work on the development of an effective UPOV similarity search tool;

(e) the WG-DEN to consider proposals for the expansion of the content of PLUTO database to include all recognized varieties, including those that had not been, or were no longer, registered/protected (see document CAJ/72/6 “UPOV Information Databases”, paragraph 38).

Harvested material

24. The CAJ considered documents CAJ/72/4 and CAJ/72/4 Add.

25. The CAJ noted the presentations concerning harvested material made by Argentina, the European Union and the Russian Federation.

26. The CAJ noted that the presentations made by Argentina, the European Union and the Russian Federation on harvested material were reproduced in the Annexes to document CAJ/72/4 Add.

27. The CAJ agreed to propose to the Council to organize a one-day seminar on propagating and harvested material to be held in conjunction with the UPOV sessions in October 2016. The seminar should include speakers to report on cases in which the notions of harvested material and/or propagating material have been considered, and speakers from relevant academic institutions and judicial authorities to provide perspectives on the subject. CAJ members and observers would be invited to propose speakers. The Office of the Union, Chair of the CAJ and President of the Council would prepare a draft program for consideration by the Consultative Committee and approval by the Council in March 2016.

Information and databases

(a) Electronic application systems

28. The CAJ considered document CAJ/72/5 and received an oral report by the Vice Secretary-General on the Sixth Meeting on the Development of a Prototype Electronic Form (Sixth EAF Meeting), held in Geneva on October 26, 2015, as summarized below.

29. The CAJ noted that the Sixth EAF Meeting had agreed that the prototype electronic application form Version 1 (PV1) had demonstrated the feasibility of the project, including the validation on the data transfer from breeders to the participating PVP Offices, in terms of data completeness and in conformity with the agreed data model. The CAJ agreed with the following proposals made by the EAF/6 Meeting:

Prototype Version 2 (PV2)

- (a) The aim of the Prototype Version 2 (PV2) will be to demonstrate the scalability of the system, i.e. addition of further crops, languages and PVP Offices, and also to demonstrate the feasibility of implementation by PVP Offices.
- (b) The following items to be addressed in PV2:
 - (i) Different languages;
 - (ii) Addition of other crops:
 - to add 3 or 4 of: apple; potato; rose; soybean, in an order of priority to be established according to the interest of participating PVP Offices and breeders and the ability of the participating PVP Offices to provide relevant Technical Questionnaire information;
- (c) Addition of other PVP Offices;
- (d) Payment modalities and user authentication;
- (e) Possibility for participating UPOV members to introduce or modify their questions in the form using an online interface;
- (f) Legal aspects;
- (g) Compliance with Web Content Accessibility Guidelines (WCAG);
- (h) Security requirements such as:
 - (i) Data confidentiality;
 - (ii) Access rights management;
- (i) High availability (HA) of the system;
- (j) Communication with existing and external systems such as the GENIE Database, WIPO Users Account and existing systems in PVP Offices;
- (k) Architecture of the system.

30. The CAJ noted that the participating members in the EAF would be invited to test the system in stages, through different interim test releases, in order to obtain regular feedback. Comments would be taken into consideration for the development of subsequent test releases in order to have a fully functioning prototype (PV2) by August 2016 for a final test campaign in September 2016, before presentation at the sessions of the CAJ, the Consultative Committee and the Council in October 2016, as appropriate.

31. The CAJ agreed that all members of the Union should have the opportunity to participate in the development of PV2, whilst noting that in order to be able to participate the following information would need to be provided to the Office of the Union by November 30, 2015:

- (a) Applications forms and other application information requirements for PVP Offices that did not provide their forms for PV1;
- (b) Technical Questionnaire information for apple, potato, rose and soybean;
- (c) Payment procedures;
- (d) Application authorization procedures;
- (e) Security requirements for data transfer and receipt;
- (f) Communication protocols for those PVP Offices that wish:
 - (i) to receive application data from the EAF system;
 - (ii) to enable breeders to retrieve data from their PVP Offices via the EAF system.

32. The CAJ noted that, in the case of PVP Offices using forms in languages other than English, French, German or Spanish, the PVP Offices would need to arrange for translation of the forms of all participating members of the Union in the language concerned.

33. In parallel with the development of PV2, the CAJ agreed that the following items would be addressed prior to launch of the EAF:

- (a) Operations such as:
 - (i) users support;
 - (ii) routine maintenance provisions;
- (b) Integration with PVP Offices systems;
- (c) Training for PVP Offices and applicants; and
- (d) Publicity of the availability of the system for breeders.

34. The Delegation of the African Intellectual Property Organization (OAPI) expressed its support for the project and expressed its wish to take part into the development of PV2.

35. The CAJ noted that the Council would need to approve the launch of an EAF system and charges to be paid by applicants.

(b) UPOV information databases

36. The CAJ considered document CAJ/72/6.

37. The CAJ noted the updates concerning the GENIE and PLUTO databases, as provided in document CAJ/72/6, paragraphs 6 to 16.

38. The CAJ received an oral report by the Vice Secretary-General on the third meeting of the WG-DST, held on October 2, 2015, in Geneva.

39. The CAJ noted the proposal to accept accents and special characters in denominations provided in the PLUTO database, while noting that the denomination search tool on the PLUTO database would only use the character set ASCII [American Standard Code for Information Interchange] representation, as defined in ISO [International Standards Organization] Standard 646 (see document CAJ/72/6, paragraph 20). It agreed that the matter should be referred to the WG-DEN.

40. The CAJ agreed that matters concerning the possible expansion of the content of the PLUTO database to include all recognized varieties, including these that have not been, or were no longer, registered/protected as set out in document CAJ/72/6, paragraph 24, be referred to the WG-DEN.

41. The CAJ noted that developments concerning non-acceptable terms for variety denominations were considered in document CAJ/72/3 "Variety Denominations".

42. The CAJ noted that the second training course on "Contributing data to the PLUTO database" had been held in Geneva, from September 7 to 9, 2015, in English, and that Oman, South Africa, and the former Yugoslav Republic of Macedonia had participated in the training. The CAJ also noted that South Africa had reported that it would provide data to the PLUTO database from December 2015, and that Oman and the former Yugoslav Republic of Macedonia had expressed their intention to submit data to the PLUTO database once applications were received.

43. The CAJ noted that the third training course on "Contributing data to the PLUTO database" had been held in Geneva, from October 12 to 14, 2015, in Spanish, and that Argentina, Bolivia (Plurinational State of), Chile, Colombia, Costa Rica, Ecuador, Mexico, Nicaragua, Panama, Paraguay and Uruguay had participated in the training. The CAJ also noted that commitments to start submitting data had been made by Argentina: from the middle of December 2015; Bolivia (Plurinational State of): from the end of 2015; Colombia: from the end of February 2016; Ecuador: from the first week of December 2015; Mexico: from the end of 2015; Nicaragua: from the end of November 2015; Panama: from the end of 2015; Paraguay: middle of December 2015; and Uruguay: from the end of 2015; and noted that Chile and Costa Rica had submitted the data just before the training course.

(c) *Exchange and use of software and equipment*

44. The CAJ considered document CAJ/72/7.

45. The CAJ noted that the TC, at its fifty-second session, to be held in Geneva from March 14 to 16, 2016, would be informed that the discussion on the inclusion of the SISNAVA software in document UPOV/INF/16 would be continued at the Technical Working Party on Automation and Computer Programs (TWC), at its thirty-fourth session, to be held in 2016.

Program for the seventy-third session

46. The CAJ considered document CAJ/72/8.

47. The following program was agreed for the seventy-third session of the CAJ:

1. Opening of the session
2. Adoption of the agenda
3. Report on developments in the Technical Committee
4. Development of information materials concerning the UPOV Convention
 - (a) Explanatory Notes on Essentially Derived Varieties under the 1991 Act of the UPOV Convention (Revision) (document UPOV/EXN/EDV/2 Draft 7) and presentations by the European Seed Association (ESA) and the International Seed Federation (ISF)
 - (b) Possible revision of the Explanatory Notes on Conditions and Limitations Concerning the Breeder's Authorization in Respect of Propagating Material under the UPOV Convention (document UPOV/EXN/CAL/1)
5. Variety denominations
6. Information and databases
 - (a) Electronic application form
 - (b) UPOV information databases
 - (c) Exchange and use of software and equipment
7. TGP documents
8. Molecular techniques
9. Program for the seventy-fourth session
10. Adoption of the report on the conclusions (if time permits)
11. Closing of the session

48. The CAJ considered the work program for the seventy-third session of the CAJ and proposed not to hold a CAJ session in March 2016 and to hold a two-day CAJ session in October 2016.

49. The CAJ noted that a report on the conclusion of the CAJ, on the schedule of the CAJ sessions for 2016, would be made to the Consultative Committee, at its ninetieth session, to be held on October 28, 2015.

50. The CAJ adopted this report at the close of its session on October 27, 2015.

[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 French names 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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