

Administrative and Legal Committee

CAJ/79/7

**Seventy-Ninth Session
Geneva, October 26, 2022**

Original: English
Date: July 22, 2022

MEASURES TO ENHANCE COOPERATION IN EXAMINATION

Document prepared by the Office of the Union

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EXECUTIVE SUMMARY

1. The purpose of this document is to invite the Administrative and Legal Committee (CAJ) to consider proposals concerning measures to address policy or legal barriers identified by the Technical Committee (TC) as preventing international cooperation in DUS examination.

2. The CAJ is invited to:

(a) consider the proposed questions for the survey of members of the Union for information on their policies or legal barriers that could prevent international cooperation in DUS examination;

(b) note the request for breeders' organizations to clarify the issues concerning the wish of breeders to use, or not to use, existing DUS reports, as set out in paragraph 20; and

(c) postpone the development of explanatory notes of Article 12 of the UPOV Convention ("Examination of the Application") until information from the survey of members of the Union and from breeders' organizations is available and considered by the CAJ.

3. The structure of this document is as follows:

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4. The following abbreviations are used in this document:

- CAJ: Administrative and Legal Committee
- TC: Technical Committee
- TC-EDC: Enlarged Editorial Committee
- TWA: Technical Working Party for Agricultural Crops
- TWC: Technical Working Party on Automation and Computer Programs
- TWM: Technical Working Party on Testing Methods and Techniques
- TWF: Technical Working Party for Fruit Crops
- TWO: Technical Working Party for Ornamental Plants and Forest Trees
- TWPs: Technical Working Parties
- TWV: Technical Working Party for Vegetables

BACKGROUND

Policy or legal barriers that the TC had identified as preventing international cooperation in DUS examination

5. The CAJ, at its seventy-seventh session¹, noted the information in document CAJ/77/2 and in the oral report by Mr. Nik Hulse, Chair of the TC (see document CAJ/77/10 “Report”, paragraphs 11 to 15).

6. The CAJ noted the measures agreed by the TC to overcome barriers that prevented international cooperation in DUS examination (see Annex to this document).

7. In response to the request of the TC, the CAJ requested the Office of the Union to prepare a document for consideration, at its seventy-eighth session, concerning the following policy or legal barriers that the TC had identified as preventing international cooperation in DUS examination and possible measures to address those barriers:

- (i) Requirement of formal agreement for cooperation;
- (ii) Obligation for DUS examination to be conducted by the authority granting the rights;
- (iii) Non-acceptance of breeder-based DUS test reports;
- (iv) Wish from breeders to use (or not) existing DUS reports.

8. The CAJ, at its seventy-eight session², agreed the following measures to address policy or legal barriers that the TC had identified as preventing international cooperation in DUS examination (see document CAJ/78/13 “Report”, paragraphs 40 to 43):

(a) survey members of the Union for information on their policies or legal barriers that could prevent international cooperation in DUS examination;

(b) develop explanatory notes to Article 12 of the UPOV Convention (“Examination of the Application”); and

(c) request breeders’ organizations to clarify the issues concerning the wish of breeders to use, or not to use, existing DUS reports.

9. The CAJ agreed that the survey should include the taking-over of test reports where the variety descriptions did not match the UPOV Test Guidelines characteristics.

10. In response to the comment from the European Union, the CAJ noted that the Explanatory Notes on “Examination of the Application” should explain all options for examination of varieties, as set out in the UPOV Convention.

Encouraging members to take-over DUS test reports when applicants could not submit plant material due to phytosanitary or other related issues

11. The TC, at its fifty-sixth session³ noted the comment provided by Japan in response to Circular E-20/119, of August 21, 2020, on difficulties to submit plant material to the authority receiving an application due to phytosanitary, quarantine or other related matters, as reported in document TC/56/22, paragraph 47, and reproduced as follows (see document TC/56/23 “Report”, paragraphs 61 to 63):

“Background

“When applying for PVP in another UPOV member, breeders may experience difficulties to submit plant material to the authority receiving an application due to phytosanitary, quarantine or other related matters.

“Phytosanitary, quarantine or other related matters should be discussed and resolved at bilateral consultations. Such consultations may take considerable amount of time to be completed. During such period, applications for PVP may be rejected due to the impossibility for applicants to submit plant material for testing in such other UPOV members.

¹ Held via electronic means on October 28, 2020.

² Held via electronic means on October 27, 2021.

³ Held via electronic means on October 26 and 27, 2020

"In certain cases, propagating material of a variety might enter the territory of another UPOV member without the consent of the breeder, even when quarantine or non-importability would apply. This situation could cause severe problems in case the breeder's rights are not granted in that UPOV member due to phytosanitary, quarantine or other related issues.

"Proposal:

"Japan would like to propose developing guidance to encourage UPOV members to take-over DUS test reports when the applicants cannot submit plant material due to phytosanitary or other related issues. In case the Technical Committee agrees to developing such guidance, the proposal could be submitted for consideration by the CAJ."

12. The TC, at its fifty-sixth session, noted that plant material was required for granting breeders' rights in some members of the Union.

13. The TC agreed to propose to the CAJ the development of guidance to encourage UPOV members, on a voluntary basis, to take-over DUS test reports when the applicants could not submit plant material due to phytosanitary or other related issues where acceptable to the UPOV members concerned. The TC agreed that this proposal should be presented for consideration by the CAJ in document CAJ/77/2 "Report on developments in the Technical Committee."

14. In response to the request of the TC, the CAJ, at its seventy-seventh session⁴, further requested the Office of the Union to prepare a document for consideration, at its seventy-eighth session, with proposals for developing guidance to encourage members of the Union, on a voluntary basis, to take-over DUS test reports when the applicants could not submit plant material due to phytosanitary or other related issues where acceptable to the members of the Union concerned (see document CAJ/77/10 "Report", paragraph 15).

15. The CAJ, at its seventy-eighth session,⁵ considered document CAJ/78/10 "Possible guidance on take-over of DUS reports when the applicants cannot submit plant material".

16. The CAJ noted that proposals for enhancing cooperation and take-over of DUS test reports were provided in document CAJ/78/9 "Measures to enhance cooperation in examination".

17. The CAJ agreed to include possible "guidance to encourage members of the Union, on a voluntary basis, to take over DUS test reports when the applicants could not submit plant material due to phytosanitary or other related issues where acceptable to the members of the Union concerned" as part of the work to be agreed by the CAJ under document CAJ/78/9 (see document CAJ/78/13 "Report", paragraphs 37 to 39).

MEASURES TO ADDRESS POLICY OR LEGAL BARRIERS PREVENTING INTERNATIONAL COOPERATION IN DUS EXAMINATION

Survey members of the Union for information on their policies or legal barriers that could prevent international cooperation in DUS examination

18. The following questions are proposed for the survey of members of the Union:

- (i) Is the authority entrusted with the task of granting breeders rights in your country/organization obliged to conduct the DUS examination for all applications? [yes/no]
- (ii) If you responded yes to the previous question, please indicate if it is a requirement that is specified in the
 - a. law
 - b. regulations
 - c. administrative procedures
 - d. other[Comments]

⁴ Held via electronic means on October 28, 2020

⁵ Held via electronic means on October 27, 2021

- (iii) Does your country/organization require a formal agreement to utilize DUS test reports from another UPOV member? [yes/no]
- (iv) If you responded yes to the previous question, please indicate if it is a requirement that is specified in the
 - a. law
 - b. regulations
 - c. administrative procedures
 - d. other[Comments]
- (v) Are there requirements in your country/organization to utilize DUS test reports from another UPOV member? [yes/no] [if yes, please list the requirements]
- (vi) If you responded yes to the previous question, please indicate if the requirements are specified in the
 - a. law
 - b. regulations
 - c. administrative procedures
 - d. other[Comments]
- (vii) Does your country/organization accept DUS test reports based on testing within the territory of your country/organization conducted at the breeders' premises?
 - a. Yes, always
 - b. Yes, on certain conditions [please list conditions]
 - c. No [please provide information on reasons for non-acceptance]
- (viii) If you responded yes, on certain conditions, or no to the previous question, please indicate if the conditions or the non-acceptance are specified in the
 - a. law
 - b. regulations
 - c. administrative procedures
 - d. other[Comments]
- (ix) Does your country/organization accept DUS test reports based on testing outside the territory of your country/organization conducted at the breeders' premises?
 - a. Yes, always
 - b. Yes, on certain conditions [please list conditions]
 - c. No [please provide information on reasons for non-acceptance]
- (x) If you responded yes, on certain conditions, or no to the previous question, please indicate if the conditions or the non-acceptance are specified in the
 - a. law
 - b. regulations
 - c. administrative procedures
 - d. other[Comments]
- (xi) Does your country/organization take-over DUS test reports where the variety descriptions do not match the UPOV Test Guidelines characteristics? [yes/no] [Comments]
- (xii) Does your country/organization take-over DUS test reports where the variety descriptions do not match the characteristics of your country/organization authority test guidelines? [yes/no] [Comments]

- (xiii) Does your country/organization accept to take over DUS test reports when the applicants could not submit plant material due to phytosanitary or other related issues?
- Yes, always
 - Yes, on certain conditions [please list conditions]
 - No [please provide information on reasons for non-acceptance]
- (xiv) If you responded yes, on certain conditions, or no to the previous question, please indicate if the conditions or the non-acceptance are specified in the
- law
 - regulations
 - administrative procedures
 - other
- [Comments]
[Please provide information on other related issues, if applicable]

Request breeders' organizations to clarify the issues concerning the wish of breeders to use, or not to use, existing DUS reports

19. Before proposing measures to address the policy or legal barrier (iv) "wish from breeders to use (or not) existing DUS reports", it would be important to clarify the issues concerned with the breeders' organizations.

20. On July 26, 2022, the Office of the Union issued Circular E-22/104 inviting breeders' organizations to provide information on situations when breeders would choose to repeat DUS examination instead of taking-over existing test reports; and situations when they would favor taking-over existing reports (instead of repeating examination). Responses to Circular E-22/104 will be presented to the CAJ, at its seventy-ninth session.

Explanatory Notes to Article 12 of the UPOV Convention ("Examination of the Application")

21. The purpose of the Explanatory Notes on "Examination of the Application" would be to develop a coherent set of guidance and models to address cooperation in DUS examination for different situations. The Explanatory Notes on "Examination of the Application" should explain all options for examination of varieties, as set out in the UPOV Convention.

22. Information to be collected from members of the Union and breeders' organizations could provide a better understanding of the policies and legal barriers that prevent international cooperation in DUS examination (see paragraphs 18 and 20, above). It is therefore proposed to postpone the development of the Explanatory Notes on "Examination of the Application" until this information is available and considered by the CAJ.

23. *The CAJ is invited to:*

(a) consider the proposed questions for the survey of members of the Union for information on their policies or legal barriers that could prevent international cooperation in DUS examination;

(b) note the request for breeders' organizations to clarify the issues concerning the wish of breeders to use, or not to use, existing DUS reports, as set out in paragraph 20; and

(c) postpone the development of explanatory notes of Article 12 of the UPOV Convention ("Examination of the Application") until information from the survey of members of the Union and from breeders' organizations is available and considered by the CAJ.

[Annex follows]

MEASURES AGREED BY TC TO OVERCOME BARRIERS THAT PREVENTED INTERNATIONAL COOPERATION IN DUS EXAMINATION⁶

The TC, at its fifty-fifth⁷ session, noted that the TWPs, at their sessions in 2019, had formed discussion groups to discuss the technical concerns that prevent cooperation in DUS examination and to propose how to overcome the technical concerns raised.

The TC considered the outcomes of discussions held at the TWO, TWV, TWF, TWA and TWC, at their sessions in 2019, as set out in document TC/55/10, paragraphs 19 to 26, reproduced as follows:

“Technical and related administrative issues:

- “Sufficient experience for conducting DUS examination of a particular crop / quality of examination performed
- “Suitable variety collection
- “Information on varieties included in DUS examination
- “Different descriptions due to environmental influence on expression of characteristics
- “Lack of assessment of or divergent protocols and nomenclature for disease resistance characteristics
- “Requirement for a specific comparison variety to be described along with candidate
- “Lack of information on quality controls for DUS at breeders’ premises
- “DUS test reports that do not conform to UPOV Test Guidelines (missing or different characteristics)
- “Difficulty to complete variety collections (e.g. import / phytosanitary issues)
- “Lack of global DNA database for selection of similar varieties
- “Language barriers
- “Difficulty to identify contact persons
- “Lack of information on available DUS test reports

“Policy or legal issues:

- “Requirement of formal agreement for cooperation
- “Obligation for DUS examination to be conducted by the authority granting the rights
- “Non-acceptance of breeder-based DUS test reports
- “Wish from breeders to use (or not) existing DUS reports”

The TC, at its fifty-fifth session, agreed to report to the CAJ the related policy or legal issues presented in document TC/55/10, paragraphs 27 and 28, reproduced below:

- “Requirement of formal agreement for cooperation
- “Obligation for DUS examination to be conducted by the authority granting the rights
- “Non-acceptance of breeder-based DUS test reports
- “Wish from breeders to use (or not) existing DUS reports”

⁶ Extract from document CAJ/77/2 “Report on developments at the Technical Committee”.

⁷ Held in Geneva on October 28 and 29, 2019.

The TC, at its fifty-sixth session⁸, noted that it had considered document TC/56/11 by correspondence. The TC noted that decisions on document TC/56/11 had been taken by the TC by correspondence as provided in document TC/56/22, paragraphs 39 to 44, and reproduced below:

“39. The TC considered document TC/56/11.

“40. The TC noted that members of the Union have the possibility to update information on a person(s) to be contacted for matters concerning international cooperation in DUS examination by:

“(i) updating information when invited to provide information for document TC/[xx]/4 ‘List of genera and species for which authorities have practical experience in the examination of distinctness, uniformity and stability’; and/or

“(ii) notifying the Office of the Union by sending an e-mail to upov.mail@upov.int;

“41. The TC agreed to propose the development of a package of compatible IT tools with the following elements:

“(a) Platform for:

“(i) exchange of existing DUS reports for:

“(1) UPOV members to post and receive existing DUS reports and arrange payment, as appropriate;

“(2) PVP applicants to request use of existing DUS reports and make payments, as appropriate.

“(ii) UPOV members to make their documented DUS procedures and information on their quality management systems available to other members of the Union.

“(b) Tool to provide information on cooperation in DUS examination between UPOV members to PVP applicants in a user-friendly form, using information contained in the GENIE database;

“(c) Module for UPOV members to use the web-based TG Template and database of characteristics to develop individual authorities’ test guidelines (IATG) in their language;

“(d) Platform for UPOV member databases containing variety description information.

“42. The TC noted the potential for machine translation technology to reduce translation costs for UPOV documents in UPOV languages and to make UPOV materials in a wider range of languages.

“43. The TC agreed to revise document TGP/5, Section 6: “UPOV Report on Technical Examination and UPOV Variety Description”, to include additional information in DUS test reports, to:

- provide information on varieties included in the variety collection
- report the varieties considered in the examination (not only similar varieties)
- provide data from field observations with the DUS test report for each variety
- provide information on environment in which the DUS examination was conducted

“44. The TC agreed to assess the impact of the proposed plan on the basis of the number of cooperation agreements reported by members of the Union, as presented in document C/[xx]/INF/5 ‘Cooperation in examination’”.

[End of Annex and of document]

⁸ Held via electronic means on October 26 and 27, 2020.