



CAJ-AG/08/3/2

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**INTERNATIONAL UNION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS**  
GENEVA

**ADMINISTRATIVE AND LEGAL COMMITTEE  
ADVISORY GROUP**

**Third Session  
Geneva, November 1, 2008**

DOCUMENTS TO BE CONSIDERED BY THE CAJ-AG

*Document prepared by the Office of the Union*

I. INTRODUCTION

1. The purpose of this document is to provide an overview of the documents to be considered by the Administrative and Legal Committee Advisory Group (CAJ-AG) at its third session to be held in Geneva, on November 1, 2008:

- (a) Documents referred directly to the CAJ-AG

Drafting Guidance for Laws based on the 1991 Act of the UPOV Convention  
(document CAJ-AG/08/3/3)

Explanatory Notes on Acts in Respect of Harvested Material under the  
UPOV Convention (document UPOV/EXN/HRV Draft 2)

Explanatory Notes on the Definition of Breeder under the 1991 Act of the  
UPOV Convention (document UPOV/EXN/BRD Draft 1)

Explanatory Notes on the Definition of Variety under the 1991 Act of the  
UPOV Convention (document UPOV/EXN/VAR Draft 1)

Enforcement of Plant Breeders' Rights (document UPOV/EXN/ENF Draft 1)

- (b) The following documents to be considered by the Administrative and Legal Committee (CAJ) by correspondence will be considered by the CAJ-AG only if substantive comments are received:

Explanatory Notes on the Right of Priority under the UPOV Convention (document UPOV/EXN/PRI Draft 1)

Explanatory Notes on Provisional Protection under the UPOV Convention (document UPOV/EXN/PRP Draft 1)

Explanatory Notes on the Nullity of the Breeder's Right under the UPOV Convention (document UPOV/EXN/NUL Draft 1)

Explanatory Notes on the Cancellation of the Breeder's Right under the UPOV Convention (document UPOV/EXN/CAN Draft 1)

2. If substantive comments are received on the documents considered by the CAJ by correspondence (see paragraph 1(b) above), an addendum to this document containing those comments will be prepared for the consideration of the CAJ-AG at its third session.

- (c) Essentially Derived Varieties

3. Consideration of this item is subject to the outcome of the discussions in the CAJ, at its fifty–eighth session to be held in Geneva on October 27 and 28, 2008, on the development of the Explanatory Notes on Essentially Derived Varieties under the UPOV Convention (see paragraphs 4 to 8 of document CAJ/58/4).

## II DOCUMENTS REFERRED DIRECTLY TO THE CAJ-AG

### Drafting Guidance for Laws based on the 1991 Act of the UPOV Convention (document CAJ-AG/08/3/3)

4. In order to provide guidance in the preparation of laws, the CAJ at its fifty-seventh session held in Geneva on April 10, 2008, agreed that the Office of the Union should prepare a document which would, where possible, use the text of the relevant provisions of the 1991 Act of the UPOV Convention and make reference to the relevant information materials (e.g. explanatory notes) (see paragraph 60 of document CAJ/57/7 “Report”).

5. At that session, the CAJ also agreed that a draft of that guidance document should be considered by the CAJ-AG at its third session to be held in Geneva on November 1, 2008 and subsequently by the CAJ in 2009. The Annex to document CAJ-AG/08/3/3 contains a draft of that guidance document entitled “Guidance for the Preparation of Laws Based on the 1991 Act of the UPOV Convention”.

Explanatory Notes on Acts in Respect of Harvested Material under the UPOV Convention  
(document UPOV/EXN/HRV Draft 2)

6. At its second session held in Geneva on October 26, 2007, the CAJ-AG considered document UPOV/EXN/HRV Draft 1. The following comments were made by the CAJ-AG at that session (paragraphs 11 to 15 of document CAJ-AG/07/2/8 “Report”):

“11. In document UPOV/EXN/HRV Draft 1, paragraph 4, the CAJ-AG agreed to replace ‘propagation’ by ‘production or reproduction’. With regard to the comments made by CIOPORA (see document CAJ-AG/07/2/7), the CAJ-AG agreed with the explanation as it was presented in paragraph 4, but concluded that the text should be simplified to avoid confusion.

“12. In document UPOV/EXN/HRV Draft 1, Section II (b) ‘Unauthorized use’, the CAJ-AG considered the comments received from the International Seed Federation (ISF) and AIPH on whether the notion of ‘unauthorized use’ was limited to the acts under the scope of the breeders’ rights as established on Article 14(1) of the UPOV Convention, or whether it should be understood in a broader sense. The CAJ-AG agreed that the Office of the Union should review the history of the development of Article 14(2) of the UPOV Convention for guidance on the intended meaning of ‘unauthorized use’. In the next draft it was agreed that it would be more appropriate to provide guidance in the form of illustrative examples. The CAJ-AG noted that the remaining sections of the document were linked to the explanation in Section II(b) and agreed that no further discussion would be worthwhile until a new draft of that section had been produced.

“13. In document UPOV/EXN/HRV Draft 1, Section II (c) ‘Reasonable opportunity’, the CAJ-AG agreed to reverse the order of paragraphs 10 and 11 and to extend the examples in Section II (d) in order to provide further guidance.

“14. In document UPOV/EXN/HRV Draft 1, Section II (d) ‘Illustrative examples’, the CAJ-AG agreed that consideration should be given to adding an additional example to cover farm-saved seed in Australia, where the government allows the saving of seed by farmers, but which does not constitute authorized use unless an authorization is given by the breeder in the form of a contract.”

7. On February 5, 2008, the Office of the Union received a written contribution from the Russian Federation with comments on document UPOV/EXN/HRV Draft 1, a copy of which has been posted in the CAJ-AG section of the UPOV website.

8. Background information to explain the changes in the new draft of document UPOV/EXN/HRV Draft 1, will be presented to the CAJ-AG at its third session.

*9. The CAJ-AG is invited to consider document UPOV/EXN/HRV Draft 2.*

Explanatory Notes on the Definition of Breeder under the 1991 Act of the UPOV Convention  
(document UPOV/EXN/BRD Draft 1)

10. Following the program of work agreed by the CAJ-AG at its first session held in Geneva on October 20, 2006, the CAJ-AG agreed that at its third session it would consider draft explanatory notes on the definition of breeder. The following issues to be addressed in the explanatory notes were identified by the CAJ-AG (paragraph 10 of document CAJ-AG /06/1/3 “Report on the Conclusions”):

“10. With regard to the definition of ‘breeder’ (Article 1(iv) of the 1991 Act), it was agreed that the Office of the Union would prepare a document which would, in particular, consider ‘development’ in relation to ‘discovery and development’. It was agreed that the document should be prepared on the basis of existing documents, including document C(Extr.)/19/2 Rev., and materials to be provided by members of the Union, including Argentina and Australia. The document would include clarification that only the breeder of a variety is entitled to file an application for that variety (subject matter of protection) and to obtain the grant of the right, if the variety complies with the conditions of protection (relationship between Article 1(iv), (v) and Article 21(1)(iii) of the 1991 Act). It was agreed that the document should be presented to the CAJ-AG at its session of 2008.”

*11. The CAJ-AG is invited to consider document UPOV/EXN/BRD Draft 1.*

Explanatory Notes on the Definition of Variety under the 1991 Act of the UPOV Convention  
(document UPOV/EXN/VAR Draft 1)

12. Following the program of work agreed by the CAJ-AG at its first session held in Geneva on October 20, 2006, the CAJ-AG agreed that at its third session it would consider draft explanatory notes on the definition of variety. The following issues concerning the definition of variety were identified in the discussion paper prepared for the first session of the CAJ-AG (paragraphs 13 to 15 of document CAJ AG/06/1/2):

“13. Clarification of the difference between a ‘variety’ and, for example a gene/trait, a single plant, etc. (the Distance Learning course has identified a need to make this basic clarification).

“14. Clarification that a ‘variety’ is not restricted to varieties which fulfill the requirements for plant variety protection. To include the clarification in document TG/1/3 ‘General Introduction to the Examination of Distinctness, Uniformity and Stability and the Development of Harmonized Descriptions of New Varieties of Plants’ (hereinafter ‘General Introduction’):

“5.2 Varieties of Common Knowledge

‘Key aspects for determining whether a potential variety is, in fact, a variety and moreover whether its existence is a matter of common knowledge are set out below. These considerations apply equally to all types of variety, whether protected or not, and include plant material, such as ecotypes and landraces. Further developments and a more detailed explanation of the issues related to varieties of common knowledge are to be found in document TGP/3, ‘Varieties of Common Knowledge.’

“5.2.1 Criteria for a Variety

‘A variety whose existence is a matter of common knowledge must satisfy the definition of a variety set out in Article 1(vi) of the 1991 Act of the UPOV Convention, but this does not necessarily require fulfillment of the DUS criteria required for grant of a breeder’s right under the UPOV Convention.’

“15. Consideration of synthetic varieties, varietal associations (e.g. oilseed rape) and ‘composite varieties’ / ‘multi-lines’ (physical combination of unrelated lines?) in relation to the definition of a variety and, therefore, the possibility of protection.”

13. At its first session, the CAJ-AG agreed the following in relation to the preparation of the draft explanatory notes on the definition of variety (paragraph 9 of document CAJ-AG /06/1/3 “Report on the Conclusions”):

“9. With regard to the consideration of synthetic varieties, varietal associations and ‘composite varieties’ / ‘multi-lines’ in relation to the definition of variety (Article 1(vi) of the 1991 Act) and, therefore, the possibility of protection, it was agreed to await the initial consideration of an agenda item ‘Applications for breeders’ rights covering a combination of lines’ by the Technical Committee (TC) at its forty-third session in March 2007 and to incorporate that guidance in a document to be considered by the CAJ-AG at its session of 2008.”

14. The Technical Committee (TC), at its forty-fourth session held in Geneva from April 7 to 9, 2008, concluded as follows (paragraph 21 of document TC/44/12 “Report on the Conclusions”):

“21. With regard to applications covering a combination of lines, as considered in document TC/44/11, the TC noted the discussions in the TWPs and noted that the conclusions of the TWPs were reflected in the proposals concerning document TGP/10/1 Draft 9[“Examining Uniformity”], Section 1.2 (Introduction) and Section 2.4 “Segregating characteristics”. It agreed that further specific examples might be put forward by for consideration by the TWPs at their sessions in 2008, and subsequently by the TC at its forty-fifth session. However, it agreed that the title of any future agenda item and document should be “Combination of lines or varieties”.

*15. The CAJ-AG is invited to consider document UPOV/EXN/VAR Draft 1.*

Enforcement of Plant Breeders’ Rights (document UPOV/EXN/ENF Draft 1)

16. 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).

17. 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 would provide useful guidance for members and

future members. The presentation of CIOPORA was reproduced in the Annex to document CAJ/57/5 in English only.

18. At its fifty-seventh session, the CAJ agreed to invite the CAJ-AG, at its third session, 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 (see paragraph 59 of document CAJ/57/7 “Report”).

*19. The CAJ-AG is invited to consider document UPOV/EXN/ENF Draft 1.*

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