



CAJ-AG/11/6/7

ORIGINAL: English

DATE: February 7, 2012

INTERNATIONAL UNION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS
GENEVA

**ADMINISTRATIVE AND LEGAL COMMITTEE
ADVISORY GROUP**

**Sixth Session
Geneva, October 18, 2011**

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 sixth session in Geneva on October 18, 2011, 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/11/6/1 Rev.
4. The CAJ-AG noted that the comments on documents and explanatory notes received from the Russian Federation, European Coordination Via Campesina (ECVC), European Seed Association (ESA), International Community of Breeders of Asexually Reproduced Ornamental and Fruit Varieties (CIOPORA) had been posted in the CAJ-AG section of the UPOV website and the CAJ had been notified accordingly. Those comments were considered by the CAJ- AG under the relevant agenda item.

5. The Chair recalled that the CAJ-AG had agreed at its fifth session, held in Geneva on October 18, 2010 and on the afternoon of October 19, 2010, to invite CIOPORA and the International Seed Federation (ISF) to the relevant part of the sixth session of the CAJ-AG, in order to enable them to present their views on relevant matters. The CAJ-AG agreed to invite CIOPORA and ISF to provide an overview of their views in the form of a Powerpoint presentation, copies of which are provided in the CAJ-AG section of the UPOV website.

Explanatory Notes

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

6. The CAJ-AG considered document UPOV/EXN/BRD Draft 4 and the comments of ECVC.

7. The CAJ-AG agreed the following changes to document UPOV/EXN/BRD Draft 4:

Paragraph 4	to clarify the meaning of legal person. The Office of the Union would consult the legislation of members of the Union for that clarification.
Paragraph 6	to explain that anyone could be a breeder, by reference to a non-exhaustive list of examples of breeders, and to refer to document C(Extr.)/19/2 Rev. "The Notion of Breeder and Common Knowledge".
Paragraph 8	to replace the highlighted section with a reference to document C(Extr.)/19/2 Rev. "The Notion of Breeder and Common Knowledge" and to clarify that a person would not be entitled to protection of an existing <i>variety</i> that was discovered and propagated unchanged by that person.

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 5) for consideration by the CAJ-AG at its seventh session, to be held in October 2012.

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

9. The CAJ-AG considered document UPOV/EXN/HRV Draft 6 and the comments of the Russian Federation and ECVC.

10. The CAJ-AG agreed the following concerning document UPOV/EXN/HRV Draft 6:

(e) Illustrative examples	The CAJ-AG noted that the illustrative examples could cause some confusion with regard to matters concerning unauthorized use of propagating material and matters concerning exhaustion. It agreed that the illustrative examples should be replaced by a general explanation of "unauthorized use of propagating material", on the basis of the cases provided in the illustrative Examples 1 to 8. The CAJ-AG noted that Example 9 did not make reference to unauthorized use of propagating material.
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11. 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 for consideration by the CAJ-AG at its seventh session, to be held in October 2012. In order that the matter might be advanced in the meantime, it was agreed that the Office of the Union should consider the preparation of an interim draft, which might be circulated for comment by correspondence.

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

Revision of the “Explanatory Notes on Essentially Derived Varieties Under the 1991 Act of the UPOV Convention”(document UPOV/EXN/EDV/2 Draft 1)

12. The CAJ-AG considered documents CAJ-AG/11/6/3 and UPOV/EXN/EDV/2 Draft 1 and the comments of ECVC and CIOPORA.

13. The CAJ-AG agreed the following concerning document UPOV/EXN/EDV/2 Draft 1:

paragraph 8 and Figures 2, 3 and 4	to redraft in order to clarify that varieties can be predominantly derived from variety A, either directly, or indirectly via varieties “B”, “C”, “D”, or “E” ... etc., and will still be considered essentially derived varieties from variety “A” if they fulfill the definition stated in Article 14(5)(b).
paragraph 14	first sentence to read as follows: “Members of the Union which amend their legislation in line with the 1991 Act of the UPOV Convention are able <u>may choose</u> to offer the benefits of the 1991 Act to varieties which were protected under an earlier law.”

Relationship between Article 14(5)(b)(i) and (iii) of the 1991 Act of the UPOV Convention / Matters concerning essentially derived varieties

14. The CAJ-AG considered document CAJ-AG/11/6/3, the comments of ECVC, ESA and CIOPORA, and the presentations made by CIOPORA and ISF at the session.

15. The Chair recalled that the “Resolution on Article 14(5)”, adopted by the 1991 Diplomatic Conference, requested the “Secretary-General of UPOV to start work immediately after the Conference on the establishment of draft standard guidelines, for adoption by the Council of UPOV, on essentially derived varieties” (see document CAJ-AG/11/6/3, paragraph 19). He noted that the work on draft standard guidelines that was started by the CAJ had been adjourned *sine die* (see document CAJ-AG/11/6/3, paragraph 26).

16. The CAJ-AG noted that CIOPORA was of the view that “determination of EDV is the task of the breeders”, whilst “defining clear rules on EDV opens the possibility for breeders to significant financial savings”. The CAJ-AG further noted that ISF was of the view that rules on EDV should be set by international bodies such as ISF, but decisions on specific cases should be made by the parties concerned. CIOPORA and ISF expressed their support for UPOV to continue the development of guidance on essentially derived varieties.

17. The CAJ-AG noted that, under certain conditions, it was possible to provide information concerning essentially derived varieties in the Register of the Community Plant Variety Office of the European Union.

18. The CAJ-AG noted that in a recent review on enforcement of plant breeders' rights, the Government of Australia had accepted the recommendations on essentially derived varieties and, in particular, that the Plant Breeder's Rights Office of Australia should retain responsibility for declarations on essentially derived varieties.

19. The CAJ-AG concluded that it would be appropriate to continue to consider whether to develop further guidance on the concept of EDV in a future revision of document UPOV/EXN/EDV "Explanatory Notes on Essentially Derived Varieties Under the 1991 Act of the UPOV Convention". It agreed that consideration should be given to including an explanation of the relationship between the provisions of Article 14(5)(b)(i) and (iii) of the 1991 Act of the UPOV Convention and the issues raised by the Delegation of Japan with regard to the exercise of plant breeders' rights in relation to essentially derived varieties (see document CAJ-AG/11/6/3, paragraphs 30 and 31). It agreed that the documents CAJ/46/7 "The Notion of Essentially Derived Varieties in the Breeding of Ornamental Varieties" and Annex II to document CAJ/47/8 "Report" should be considered with regard to guidance on the concept of EDV.

20. As a first step, the CAJ-AG agreed that information on the systems in the European Union and Australia for essentially derived varieties and other relevant examples be provided to the Office of the Union for presentation to the CAJ-AG at its seventh session in October 2012.

The use of information of the initial variety to obtain essentially derived varieties

21. The CAJ-AG agreed that the explanation on "Predominant derivation – use of information" made by ISF during its power point presentation be provided to the Office of the Union for consideration by the CAJ-AG at its seventh session, in October 2012.

Matters arising after the grant of a breeder's right

22. The CAJ-AG agreed that agenda item 5 "Matters arising after the grant of a breeder's right (document CAJ-AG/11/6/4)" should be considered by the CAJ-AG at its seventh session in October 2012.

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

23. The CAJ-AG considered documents CAJ AG/10/5/4 and CAJ AG/11/6/5.

24. In recognition of the complexity of the legislation and jurisprudence concerning the exhaustion of intellectual property rights, the CAJ-AG agreed to propose to the CAJ that it should not seek to develop guidance on exhaustion of the breeder's right under the 1991 Act of the UPOV Convention beyond the guidance provided in document UPOV/INF/6 "Guidance for the preparation of laws based on the 1991 Act of the UPOV Convention".

Propagation and Propagating Material

25. The CAJ-AG considered document CAJ-AG/11/6/6, the comments of the Russian Federation and ESA, and the presentations made by CIOPORA and ISF at the session. In addition to the information provided in the Annex to document CAJ-AG/11/6/6, the CAJ-AG noted that the legislation of the European Union provided that “[a] plant grouping consists of entire plants or parts of plants as far as such parts are capable of producing entire plants, both referred to hereinafter as ‘variety constituents.’”

26. The CAJ-AG noted that CIOPORA was of the view that propagating material should “cover entire plants or parts of plants as far as such parts are capable of producing entire plants” and that ISF preferred an explanation of propagating material in terms such as “capable of” or “can”, and not “intended for” or “used for”.

27. The CAJ-AG noted that many plant cells have the potential to regenerate a whole plant (“totipotency”) and agreed that there was a risk that the use of certain terms to define propagating material could be interpreted in a way that would cover virtually any harvested material. In that regard, the CAJ-AG agreed that any guidance on propagating material would need to be consistent with the provisions for harvested material in the 1991 Act of the UPOV Convention.

28. The CAJ-AG agreed that the Office of the Union should invite proposals for the development of guidance on the notion of “Propagation and propagating material”, with due regard to the comments of the CAJ-AG in paragraph 27, for consideration by the CAJ-AG at its seventh session in October 2012.

Date and program for the seventh session

29. Subject to approval by the Administrative and Legal Committee (CAJ) at its sixty-fifth session, to be held on March 29, 2012, the CAJ-AG agreed the following program for its seventh session, to be held in October 2012:

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. Propagation and Propagating Material

7. Matters referred by the CAJ to the CAJ-AG for consideration since the sixth session of the CAJ-AG

8. Date and program for the eighth session

30. Subject to the endorsement of the CAJ at its sixty-fifth session, to be held in Geneva on March 29, 2012, it was proposed that the sixty-sixth session of the CAJ be held on the morning of October 29, 2012, and that the seventh session of the CAJ-AG be held on the afternoon of October 29 and on October 30, 2012.

31. The CAJ-AG recalled that the terms of reference of CAJ-AG provided that “[t]he CAJ members and observers would be able to send comments directly to the advisory group. [...]. Observer organizations, in particular those representing the interests of breeders, might be invited by the advisory group to present their views on a particular provision of the 1991 Act to assist in [its] work” (see document CAJ/52/4, paragraphs 13 and 14, and document CAJ/52/5 “Report”, paragraph 67).

32. The CAJ-AG noted that documents of the CAJ-AG should be posted, as it was the case for other UPOV bodies, six weeks prior to the relevant CAJ-AG session. In order to ensure that the CAJ-AG had sufficient time to consider written comments, the CAJ-AG agreed that comments should be sent, in English, to the Office of the Union at least two weeks prior to the relevant session of the CAJ- AG.

33. The CAJ-AG agreed that, in cases where written comments were received from an observer organization, the CAJ-AG would invite the observer organization to the relevant part of the next CAJ-AG session if the presence of the organization was considered necessary to present its views or to provide further explanations concerning its written comments. In that regard, the CAJ-AG agreed that the CAJ-AG would, if necessary, decide by correspondence whether to invite the observer organization to the relevant part of the CAJ-AG session.

34. On the basis of comments received for the sixth session of the CAJ-AG, the CAJ-AG already agreed to invite CIOPORA, ECVC, and ISF to the relevant part of the seventh session of the CAJ-AG.

35. *The present report has been adopted by correspondence.*

[Annex follows]

ANNEXE / ANNEX / ANLAGE / ANEXO

LISTE DES PARTICIPANTS / LIST OF PARTICIPANTS /
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(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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