



CAJ/48/7

ORIGINAL: English

DATE: February 25, 2004

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

**ADMINISTRATIVE AND LEGAL COMMITTEE**

**Forty-Eighth Session**  
**Geneva, October 20 and 21, 2003**

**REPORT**

*adopted by the Committee*

Opening of the Session

1. The Administrative and Legal Committee (CAJ) held its forty-eighth session in Geneva on October 20 and 21, 2003, under the Chairmanship of Ms. Nicole Bustin (France).
2. The list of participants is given in Annex I to this report.
3. The session was opened by the Chair, who welcomed the participants. She extended a particular welcome to the Delegation of Tunisia, a State which had become the fifty-third member of the Union on August 31, 2003. The Delegation of Tunisia expressed its gratitude to the Office of the Union and the members of the Union for the assistance given to Tunisia in the process of its accession to the UPOV Convention.
4. The Chair also informed the CAJ of the accession of Poland, on August 15, 2003, to the 1991 Act of the UPOV Convention.

### Adoption of the Agenda

5. The Chair noted that a new agenda item, entitled “Access to genetic resources and benefit-sharing” (document CAJ/48/6), had been added to the revised draft agenda (document CAJ/48/1 Rev.).

6. The CAJ adopted the revised agenda as presented in document CAJ/48/1 Rev.

### Specific Issues Concerning the Interface Between Patents and Breeders’ Rights

7. The Chair recalled that initial discussions on document CAJ/47/2 had already taken place during the forty-seventh session of the CAJ in April 2003, but due to time constraints, it was decided that further discussion on that item would take place at the present session of the CAJ.

8. The Vice Secretary-General referred to the first part of document CAJ/47/2 dealing with the recommendation concerning the adoption, by the Council of UPOV, of a position paper on “Specific Issues Concerning the Interface Between Patents and Breeders’ Rights,” based on document CAJ/46/2, as modified and approved by the CAJ on October 22, 2003, which appeared in the Annex to document CAJ/47/2.

9. The Vice Secretary-General explained that the second part of document CAJ/47/2 contained a report on the WIPO-UPOV Symposium on the Co-existence of Patents and Plant Breeders’ Rights in the Promotion of Biotechnological Developments of October 25, 2002. He clarified that the “Conclusions by the Chair of the Panel Discussion,” contained in paragraph 7 of document CAJ/47/2, constituted the personal views of the Chair and they should not be regarded as the conclusions of the Symposium. The CAJ was informed that the program, list of participants, presentations and discussions in English, French and Spanish of the WIPO-UPOV Symposium of 2002 were posted on the UPOV Website ([www.upov.int](http://www.upov.int)).

10. The representative of the World Intellectual Property Organization (WIPO) noted that neither WIPO nor UPOV had endorsed the conclusions by the Chair of the Panel Discussion as appearing in paragraph 7 of document CAJ/47/2 and made a proposal to delete paragraph 7. In reply, the Chair explained that only the Annex of document CAJ/47/2 was being considered and there would not be a revised version of document CAJ/47/2, but that her comments would be included in the Report of the present session.

11. In relation to the Annex to document CAJ/47/2, entitled “Specific Issues Concerning the Interface Between Patents and Breeders’ Rights,” the Chair indicated that the CAJ had two options: First, to consider the Annex as a working document approved by the CAJ and second, to consider the Annex as the basis for a position paper of UPOV to be adopted by the Council of UPOV.

12. The Delegation of the Russian Federation made proposals concerning the Annex to document CAJ/47/2 as follows:

(a) to create a footnote for the word “using” in the table in paragraph 5 explaining the different scope of this word in the patent system compared to the provisions in the plant breeders’ rights system;

(b) to delete the first sentence of paragraph 6 and to delete the word “therefore” in the second sentence of the same paragraph;

(c) to redraft the first sentence in paragraph 7 to reflect that there are important differences between the two systems in terms of rights conferred, in addition to differences in the scope of exceptions; and

(d) to insert an additional paragraph after paragraph 25 indicating that uncontrolled pollination could lead to varieties of common knowledge falling under patent protection.

13. The Delegation of the United States of America indicated that the issues raised in the Annex to document CAJ/47/2 were complex and certain areas of the document would require further development. The Delegation pointed out that the conclusion to recommend that members of the Union should consider whether the nature of the research exemption in the patent laws concerning plants might inhibit the breeder’s exemption was troublesome, in particular because the document did not provide any concrete or empirical evidence. Finally, while noting the value of bringing attention to those issues, the Delegation noted that the Symposium had not provided a consensus and, therefore, recommended not to adopt the Annex to document CAJ/47/2 as a UPOV position paper.

14. The representative of the European Community approved the option of using the Annex of document CAJ/47/2 as a working document. As a matter of consistency, the representative recommended that the term “regional,” which appeared in paragraph 12 of the Annex to document CAJ/47/2, should also be included in paragraph 14. The representative expressed some concern with paragraph 21 of the Annex to document CAJ/47/2 and proposed the deletion of that paragraph. The representative concluded that the Annex to document CAJ/47/2 required some modifications before being submitted to the Council.

15. The representative of the International Community of Breeders of Asexually Reproduced Ornamental and Fruit-Tree Varieties (CIOPORA) supported the view of the Delegation of the United States of America that the Annex to document CAJ/47/2 would require further revision before it should be considered by the Council. The representative further indicated that the term “use” would require an explanation of its different scopes in the patent and breeders’ rights systems in relation to the table provided in paragraph 5 of Annex to document CAJ/47/2.

16. The Delegation of the Netherlands noted that the document could be interpreted as a consideration of possible infringements to international obligations and, therefore, suggested not to develop the Annex to document CAJ/47/2 into a UPOV position paper.

17. The Delegation of the United States of America disagreed with the possible interpretation presented by the Delegation of the Netherlands, but indicated that it emphasized the difficulty to reach an agreement on a position paper for public distribution.

18. The Chair clarified that, although the document had not been adopted by the Council, the present Annex to document CAJ/47/2 was not confidential and had been used for the presentation of the Vice Secretary-General at the WIPO-UPOV Symposium of 2002. The Chair further recommended that the different points of view should be communicated to the Office of the Union in order to provide a basis to amend the Annex to document CAJ/47/2 and to provide the CAJ with a new version which would achieve a consensus.

19. The Delegation of the United States of America agreed that the CAJ approved the Annex to document CAJ/47/2 as a working document in order to prepare the presentation of the Vice Secretary-General and, as a consequence, it was a public document, but, nevertheless, the Delegation was of the opinion that the Annex to document CAJ/47/2 was not ready to be considered by the Council.

20. The Vice Secretary-General indicated that, for the Office of the Union, it was not essential to adopt a position paper. The key message of that document was the importance of the breeder's exemption and that discussion on that matter would continue. He further clarified that paragraph 29, containing the conclusions of the Annex to document CAJ/47/2, was not incorporated in the presentation given at the WIPO-UPOV Symposium of 2002. He welcomed the proposal to prepare a new version which could be accepted by all members of the CAJ, whilst keeping open the possibility of adoption by the Council.

21. The Chair observed that while it was not essential to adopt a UPOV position paper, the participation of the delegations was important to revise the document in order to avoid any contradictions or elements which might cause concern. The matters raised in the Annex to document CAJ/47/2 were the subject of important debate and it was essential that the CAJ was clear on the key elements. The Chair concluded that a new document, incorporating the comments made during that session and any further contributions received by the Office of the Union, would be prepared for the fiftieth session of the CAJ in October 2004. She also concluded that it was premature to submit the Annex to document CAJ/47/2 for consideration of the Consultative Committee and the Council in October 2003.

#### Access to Genetic Resources and Benefit-Sharing

22. Discussions were based on document CAJ/48/6. The Vice Secretary-General introduced the document and informed the CAJ that, on June 26, 2003, the Executive Secretary of the Convention on Biological Diversity (CBD) issued a Notification to relevant organizations inviting them to submit their views on the process, nature, scope, elements and modalities of an international regime on access to genetic resources and benefit-sharing. That information would be compiled by the Executive Secretary of the CBD and made available for the second meeting of the *Ad Hoc* Open-ended Working Group on Access and Benefit-sharing, to be held from December 1 to 5, 2003. He proposed that, on the basis of the recommendation to be made by the CAJ and the Consultative Committee, the Council of UPOV might adopt at its session on October 23, 2003, Annex II to document CAJ/48/6 as a suitable reply to the above Notification. In addition, it was also suggested that, on the same basis, Annex II could be adopted by the Council of UPOV as a UPOV position paper.

23. The Chair congratulated the Office of the Union for the quality of the draft reply prepared and invited comments on it.

24. The Delegation of Canada, referring to paragraph 5 of Annex II to document CAJ/48/6, proposed to replace the word "position" with "views."

25. In reply to the proposal made by the Delegation of Canada, the Chair recalled that paragraph 5 of document CAJ/48/6 already provided for the consideration of Annex II as a suitable reply of UPOV. It was agreed to replace the word "position" by the word "reply" in paragraph 5 of Annex II to document CAJ/48/6.

26. The Delegation of Sweden supported the proposal appearing in Annex II to document CAJ/48/6 and, in particular, the indication that providing the source of origin should not be considered as an additional condition for protection.

27. The representative of the European Community was in favor of the contents of the reply and considered it a well-balanced document. He expressed particular support to paragraphs 8 and 9 of Annex II to document CAJ/48/6.

28. The representative of the International Seed Federation (ISF) expressed support for the contents of the reply in Annex II to document CAJ/48/6. He noted that the country of origin of the genetic material used for breeding purposes was not always known and suggested that that should be stressed in the document.

29. The representative of CIOPORA expressed general agreement to the reply in Annex II to document CAJ/48/6. He stated that all existing plant varieties needed to be freely available unless access was forbidden or access had taken place illegally. He added that a breeder's right did not concern a process, but rather a product and, therefore, access was required to the variety and not the origin.

30. The Delegation of the United States of America expressed support and general agreement with the principles set out in the reply, which was reproduced in Annex II to document CAJ/48/6. It suggested that some redrafting of paragraphs 6, 12 and 17 of Annex II might be advisable in order to recognize situations in which the breeder's exemption might be subject to restrictions.

31. The Vice Secretary-General, in reply to the comments made by the Delegation of the United States of America, proposed to delete in paragraph 6 of Annex II to document CAJ/48/6 the following: "and is concerned about any potential restrictions on access to genetic resources for the purpose of plant breeding." In relation to the second sentence of paragraph 12 of Annex II, it was suggested to insert the words "under the UPOV Convention" before "subject to any restriction ...". As regards paragraph 17 of Annex II, the Vice Secretary-General suggested to delete the first and second sentence and to substitute its contents by the new first, second and third sentences of paragraph 6 of Annex II.

32. The Delegation of the United States of America agreed with the proposals made by the Vice Secretary-General.

33. The Delegation of Brazil expressed difficulties in agreeing to a position paper and to the use of the term "recommendation" in Annex II to document CAJ/48/6 in the context of issues going beyond plant variety protection. It suggested to amend the document accordingly.

34. The Chair noted that the Office of the Union had identified the importance of a reply and requested the CAJ to comment on the legal conformity of its contents in its field of competence, namely the protection of new varieties of plants under the UPOV Convention.

35. The Delegation of the Netherlands expressed support to the contents of the paper and underlined the importance of the subject. The reply reflected a positive attitude of UPOV to access and benefit-sharing. In that regard, the Delegation proposed, in relation to paragraph 8 of Annex II to document CAJ/48/6, to change "UPOV is not opposed to the disclosure" to "UPOV is in favor of the disclosure."

36. The Delegation of South Africa agreed with the importance of the paper and noted with interest the comments of the Delegation of Brazil concerning the status of the document and the fact that it should not be considered as a UPOV position.

37. The Delegation of Colombia agreed with the draft reply of UPOV since it was based on the UPOV Convention. It pointed to the terminology difference between the notion of genetic origin, which concerned the UPOV Convention, and the notion of geographical origin, which related to the CBD. The Delegation added that Decision 391 of the Andean Community did not permit additional conditions for the grant of a breeder's right to the ones contained in the UPOV Convention.

38. In response to the comments from the Delegations of Brazil and South Africa, the Vice Secretary-General clarified that the reply contained in Annex II to document CAJ/48/6 related specifically to the UPOV Convention.

39. The Delegation of Uruguay stressed the importance to reach agreement among UPOV members and for a reply to be submitted to the meeting in December 2003 of the *Ad Hoc* Open-ended Working Group on Access and Benefit-sharing.

40. The Delegation of Colombia proposed a redraft of the second sentence of paragraph 8 of Annex II to document CAJ/48/6 to differentiate between geographical and genetic origin, or the source of origin, as suggested to it in the meantime by the Delegation of the United States of America, of the plant material used in the breeding of the variety, and indicating that UPOV was in favor that members requested that information in any way that would facilitate the examination. The Delegation, while proposing to change the order of the last two sentences, expressed its support for the wording in the remainder of the paragraph.

41. The representative of ISF indicated that knowing the geographical origin could be difficult or impossible, but knowing the source was always possible.

42. The following wording was agreed for the second sentence of paragraph 8: "UPOV encourages information on the origin of the plant material, used in the breeding of the variety, to be provided where this facilitates the examination mentioned above, but could not accept this as an additional condition for protection ..."

43. In reply to a question posed by the Delegation of South Africa concerning environmental issues, the Vice Secretary-General clarified that Article 18 of the 1991 Act of the UPOV Convention provided that "the breeder's right shall be independent of any measure taken to regulate the production, certification and marketing of material of varieties or the importing or exporting of such material." Thus, environmental concerns could be dealt with by measures regulating the commercialization of the variety.

44. In relation to paragraph 11 of Annex II to document CAJ/48/6, the representative of the European Community recalled that the legislation on access to genetic material should not be in conflict with the legislation dealing with the grant of the breeder's right.

45. The Delegation of Brazil expressed its agreement with the comment made by the representative of the European Community and emphasized the need to ensure that both legislations be mutually supportive. The Delegation recalled its concern with the word "recommendation" in paragraph 11 of Annex II to document CAJ/48/6.

46. As regards the contents of paragraph 11 of Annex II to document CAJ/48/6, the Delegation of Uruguay made a drafting proposal reflecting the concerns of the Delegation of Brazil and the comment made by the representative of the European Community. The Delegation proposed that since the legislation on access to genetic material and the legislation dealing with the grant of breeders' rights pursued different objectives, had different scopes of application and required a different administrative structure to monitor their implementation, UPOV consider that it was appropriate to include them in different legislation, although such legislation should be compatible.

47. The representative of CIOPORA also expressed his support for the new drafting proposal for paragraph 11 and the comment made by the representative of the European Community.

48. In relation to paragraph 13 of Annex II to document CAJ/48/6, the Delegation of the United States of America suggested to redraft the second sentence in order to refer directly to the contents of Article 13.2(d)(ii) of the International Treaty on Plant Genetic Resources for Food and Agriculture (International Treaty).

49. In response to concerns expressed by the Delegation of the United States of America that the International Treaty did not make reference to the breeder's exemption in the UPOV Convention, the representative of ISF clarified that the basis for the notion of non-monetary benefits in the context of the International Treaty was in fact the breeder's exemption.

50. The CAJ agreed to remove the words "as a fundamental form of benefit-sharing and, consequently" in paragraph 13 of Annex II to document CAJ/48/6.

51. The Delegation of the United States of America suggested the inclusion, in the second sentence of paragraph 14 of Annex II to document CAJ/48/6, of "where these constitute acts done privately and for non-commercial purposes" after "subsistence farmers."

52. The representative of the European Community suggested that conclusions in relation to the notion of subsistence farmers in paragraph 14 of Annex II to document CAJ/48/6 should be avoided pending discussions on document CAJ/48/3 "Acts done Privately and for Non-Commercial Purposes and Provisions on Farm-Saved Seed under the 1991 Act of the UPOV Convention."

53. Concerning discussions on Annex II to document CAJ/48/6, the Delegation of the Netherlands questioned if the exceptions to the breeder's right were relevant for the notion of "benefit-sharing." It expressed its support to the comments provided by the representative of the European Community concerning subsistence farmers.

54. The representative of ISF indicated that the question of subsistence farmers was an ongoing issue in the Food and Agriculture Organization of the United Nations (FAO) and the CBD. He was in favor of retaining the original wording, provided that "acts" could be defined.

55. On the basis of the discussions, it was agreed to modify paragraph 14 of Annex II to document CAJ/48/6 with the inclusion of the clarification provided by the Delegation of the United States of America.

56. The Delegation of Brazil requested that the reference to “recommendation” in paragraph 16 of Annex II to document CAJ/48/6 be removed and suggested to simplify the language for that paragraph.

57. There was agreement to use the term “summary” in place of “recommendation.”

58. The CAJ approved Annex II to document CAJ/48/6 with amendments to paragraphs 5, 6, 8, 11, 12, 13, 14, 16 and 17, as a suitable reply of UPOV to the Notification of June 26, 2003, from the Executive Secretary of the CBD and recommended its adoption by the Council of UPOV at its thirty-seventh ordinary session on October 23, 2003. The amended text of Annex II of document CAJ/48/6 is reproduced in Annex II to this document.

#### Publication of Variety Descriptions

59. Discussions were based on document CAJ/47/3. The Senior Legal Officer introduced the document which concerned the project to consider the publication of variety descriptions. The first part of the document contained a report on the results of a questionnaire designed to investigate the administrative, legal and financial framework in the field of publication and/or production of variety descriptions. The second part dealt with matters to be considered by the *Ad hoc* Working Group on the Publication of Variety Descriptions in relation to important administrative, legal and financial issues that resulted from the questionnaire which would need to be resolved before considering the possible introduction of an international system for the publication of variety descriptions.

60. The Delegation of France indicated that some modifications needed to be introduced to the French version of paragraph 7 of document CAJ/47/3. At the beginning of paragraph 7(a), the words “la responsabilité de” needed to be inserted and the word “destinées” should be changed to the word “fournies.” In relation to paragraph 7(b), the words “la responsabilité de” should be added at the beginning.

61. The Delegation of the Netherlands questioned whether a published description could replace an examination of distinctness, uniformity and stability.

62. In reply to the concern expressed by the Delegation of the Netherlands, the Chair indicated that questions of a technical nature concerning that project would be dealt with by the Technical Committee. The Technical Director recalled that the UPOV Convention provided that a decision to grant a breeder’s right required an examination.

63. The Chair further indicated that the principle in the project, incorporated in paragraph 7(b) of document CAJ/47/3, concerning the responsibility on the use of data should clearly specify the uses and the conditions for the user, in order to address the concern expressed by the Delegation of the Netherlands.

64. The representative of ISF noted that when a title was granted, the description was normally attached to it. Therefore, it would be possible for ISF to coordinate the publication of variety descriptions in a database.

65. The CAJ noted the results of the questionnaire and agreed on the matters to be considered by the Working Group on the Publication of Variety Descriptions as provided in paragraphs 7, 8 and 11 of document CAJ/47/3. It was also agreed that an oral report on



progress in the matters to be considered by the Working Group would be made, as appropriate, to the CAJ.

Transfer of Material for the Purposes of Examination of Distinctness, Uniformity and Stability: Proposed Model Agreements

66. Discussions were based on document CAJ/47/4. The Vice Secretary-General introduced the document which identified certain issues concerning the transfer of material for DUS examination which the CAJ has agreed to consider further. In particular, in 2002 the CAJ had proposed to consider the development of standard model agreements for the transfer of material from the breeder to the examination authority, and between examination authorities. In that respect, the representative of ISF had proposed its assistance by providing a model agreement concerning the use of the material submitted by the breeder to the authority (see Annex I to document CAJ/47/4).

67. In order to facilitate discussions, the Office of the Union had prepared a preliminary draft model agreement, building on the ISF proposal entitled “Draft Model Agreement Based on the ISF Proposal on the Transfer of Material from the Breeder to the Examination Authority” (see Annex II to document CAJ/47/4). That contained certain modifications to the ISF proposal, in order to clarify concepts, and retained in square brackets certain clauses because their content did not seem suitable in agreements between breeders and authorities or might be subject to existing practices of authorities.

68. The Delegation of Germany was not in favor of the adoption of model agreements as contained in Annexes II and III to document CAJ/47/4. The Delegation had major concerns in relation to the contents of such model agreements and, in particular, in relation to the issues of responsibility. It considered that such model agreements would be in conflict with provisions of domestic legislation.

69. The Delegation of Argentina agreed with the comments made by the Delegation of Germany and, in particular, the fact that the contents of such a draft model agreement would depend on the legislative framework and agreements applicable in each country. The Delegation noted that paragraph 16 of Annex II to document CAJ/47/4 contained commercial considerations that were not justified in a relationship between the breeder and the authority, particularly when the material was publicly available. It finally noted that matters concerning responsibility would be subject to national legislation and should be limited to legal or unlawful use of the plant sample.

70. The Delegation of France agreed with the comments made by the Delegations of Argentina and Germany and indicated that the draft model agreement contained in Annex II to document CAJ/47/4 could be relevant between private parties, but was not applicable for authorities. Authorities were already obliged to comply with confidentiality obligations, and it would not be necessary to have a model agreement to cover that matter.

71. The Delegation of the Netherlands supported comments made by the Delegations of Argentina, France and Germany and expressed concern with the statement in paragraph 7 of Annex II to document CAJ/47/4 that the sample would remain the property of the breeder. It noted that the sample played an important role in establishing the identity of the variety and also in the development of reference collections, as well as for authenticity purposes. Finally, it stated that it had difficulties to accept a model agreement along those lines.

72. The representative of the European Community was in favor of comments made by the Delegations of France, Germany and the Netherlands, but could understand that there might be a need for a special agreement in relation to inbred lines. He further noted that the introduction of a model agreement of general application in the daily routine would imply financial and administrative burdens.

73. The Delegation of Australia indicated that paragraph 9 of Annex II to document CAJ/47/4 was contrary to the obligation under its national law to publish the results of the examination.

74. The Delegation of Spain referred to the background of document CAJ/47/4 and to the fact that certain problems might exist and that there was a need to understand the concerns of the breeders while avoiding the development of restrictive practices. It further indicated that there were certain problems in Annex II to document CAJ/47/4, in particular, the reference in paragraph 8 to “the authorities shall not use or have used any biotechnology processes including, but not limited to, tissue culturing ...” The Delegation noted that tissue-culturing might be essential in order to keep varieties of certain species in reference collections. As regards matters raised in paragraph 15 of Annex II to document CAJ/47/4, it should be noted that, if appropriate, authorizations of the National Committee on Biosecurity were necessary. Finally, the Delegation expressed concern with regard to the consequences of paragraph 17 of Annex II to document CAJ/47/4 for reference collections.

75. In reply to the question posed by the Chair on whether the Delegation of Spain was in favor of a model agreement between the breeder and the authority, the Delegation clarified that for the transfer of material of inbred/parent lines, a particular agreement might be justified, but the Delegation would not agree to restrictive clauses or agreements applicable to varieties which were already available in the market.

76. The Delegation of South Africa understood the concerns and the need to ensure that the right of the breeder was not infringed. It proposed the development of a short material transfer agreement within the scope of the UPOV Convention.

77. The representative of ISF indicated that it should, firstly, be determined whether there was agreement in principle on a need to find a solution to the problems that existed and, secondly, if this was the case, the contents of such an agreement should be explored. In relation to questions concerning responsibility, a model agreement would provide model clauses, which would be beneficial for breeders in the context of UPOV's growing membership. If the CAJ was in favor of the principle of having a model agreement, further improvements, as regards the contents, could be made to Annex II to document CAJ/47/4.

78. The Delegation of the United States of America indicated that it had certain problems with the contents of the model agreements in Annexes II and III to document CAJ/47/4, but it expressed its agreement with the statement made by the representative of ISF that the breeder had the right to know how the material would be handled. It proposed the development of guidelines or recommendations instead of model agreements.

79. The Delegation of Mexico was in favor of a model agreement or guidelines that could be applicable to particular cases, for example, parent lines, and which provided the required flexibility to ensure the application of the relevant national legislation.

80. The Delegation of Argentina noted that submission of samples was necessary for examination purposes, but that those samples could also be necessary when considering legal challenges after the right had been granted. It further clarified that, if the authorities did not comply with the norms concerning confidentiality, they would be held responsible. The Delegation further indicated its preference for guidelines or recommendations.

81. The representative of CIOPORA expressed his support for the comments made by the representative of ISF concerning the existence of problems and the need to find means to resolve them. He indicated that any future guidelines should clearly forbid any use of plant materials for further breeding and should address the issue of mutations arising during testing. It was also proposed that such guidelines should consider the cost of resubmitting material where trial failure resulted from the fault of the authority and should address the issue of access to examination sites.

82. In reply to the questions raised by the representative of CIOPORA, the Chair explained that certain observations were addressed in document CAJ/48/2 dealing with "Recommendations to ensure the independence of those DUS examination centers which have, or have links to, breeding activities."

83. The Delegation of the Russian Federation noted that such model agreements might create an additional burden and suggested that clauses concerning confidentiality should be included within the documentation required for the application.

84. The Chair summarized the discussions and identified the need to draft recommendations in order to clarify which guarantees were provided by authorities to the breeders. She noted that the CAJ did not wish to proceed with discussions on a model agreement which could be contrary to national laws. The Chair proposed to invite comments in order to identify different problems that could be addressed within proposed draft recommendations which could be elaborated by the Office of the Union for discussion at the forty-ninth session of the CAJ in April 2004.

85. The Delegation of Sweden proposed to draft a questionnaire in order to identify the matters that needed to be addressed by those recommendations.

86. In relation to the proposal by the Delegation of Sweden to proceed with a questionnaire, the Vice Secretary-General explained that the procedure needed for a questionnaire would require additional time making it difficult to finalize a document for the April session of the CAJ in 2004. He proposed, instead, a written procedure in order to allow the CAJ to submit written contributions or suggestions on the contents of the first draft of those recommendations by November 15, 2003.

87. The CAJ noted the contents of document CAJ/47/4 and decided to request the Office of the Union to draft recommendations, based on the discussions and written contributions to be provided by November 15, 2003, on the transfer of material for the purposes of examination of distinctness, uniformity and stability for the April session of the CAJ in 2004.

Recommendations to Ensure the Independence of those DUS Examination Centers which have, or have Links to, Breeding Activities

88. Discussions were based on document CAJ/48/2. The Vice Secretary-General introduced the document and referred to the decision of the CAJ on October 22, 2002, to develop recommendations to ensure the independence of those DUS examination centers which have, or have links to, breeding activities. Draft recommendations had been prepared in order to ensure that any center entrusted by an authority to undertake a particular examination activity would follow the requirements for independence, as appropriate for a public service. The CAJ was invited to consider the draft recommendations contained in the Annex to document CAJ/48/2.

89. The Delegation of the United States of America requested clarification that the draft recommendations did not apply to a breeder-based testing system.

90. The Delegation of the Republic of Korea expressed its support of the draft recommendations and indicated that an authority might also have links to breeding activities.

91. The Delegation of the Netherlands did not consider it appropriate to cover examination activities of breeders in relation to their own varieties.

92. The Chair clarified that the purpose of the document was to ensure that a particular examination activity was undertaken in a neutral manner in order to avoid confusion between a center's examination activities and its breeding activities.

93. The representative of ISF proposed to change the word "may" to "should" in draft recommendation 3 in the Annex to document CAJ/48/2, in the first sentence of draft recommendation 4, in draft recommendation 4(b) and in draft recommendation 5. He also considered that it would be appropriate to clarify what is to be understood by "what was considered to be a related area" in draft recommendation 1. He proposed to refer to the denomination classes as a criteria to identify what was a related area.

94. The representative of CIOPORA preferred to retain the wording "what was considered to be a related area."

95. The Chair suggested that it might be better to leave the decision of what was considered to be a related area to the authority, depending on the circumstances applicable to each particular case. She further clarified in relation to draft recommendation 2 in the Annex to document CAJ/48/2 that reference to conditions and to "UPOV Model Agreement on the Transfer of Material from the Breeder to the Authority" would need some redrafting in order to refer to the decision during the discussions on document CAJ/47/4 to prepare draft recommendations rather than a model agreement (see paragraph 87 of this document).

96. In relation to draft recommendation 4 in the Annex to document CAJ/48/2, the Delegation of France proposed a change in the structure in order to identify general conditions, as they appeared in draft recommendation 4(a), paragraph 2, and draft recommendation 4(b), paragraph 2, and specific conditions such as in draft recommendation 4(a), paragraph 1.

97. The representative of ISF also recommended some clarification in draft recommendation 4 in the Annex to document CAJ/48/2 in order to indicate that the contents

of that recommendation refer to the situation when the authority decided to confirm the work and to add additional conditions. He also proposed that the conditions in draft recommendation 4(a) should be applicable in all cases where a conflict of interest existed and that conditions in draft recommendation 4(b) and (c) might be optional.

98. The Delegation of Argentina pointed out that it would be advisable to find a mechanism to give the breeder the opportunity to express his opinions in relation to a particular conflict of interest between the authority and the center that had been entrusted with a particular examination activity.

99. In reply to the proposal made by the Delegation of Argentina, the Senior Legal Officer suggested that a mechanism of consultation between the authority and the breeder concerned could be envisaged prior to the confirmation of the work to the center by the authority.

100. It was agreed that a new version of the draft recommendations, incorporating the suggestions and modifications made during the meeting, would be prepared for the forty-ninth session of the CAJ in April 2004.

#### Acts done Privately and for Non-Commercial Purposes and the Farmer's Privilege under the 1991 Act of the UPOV Convention

101. Discussions were based on document CAJ/48/3. The Vice Secretary-General explained that the objective of the document was to seek guidance from the CAJ in order to assess the need to develop a paper to explain the scope and implementation of the compulsory exception under Article 15(1)(i) and the optional exception under Article 15(2) of the 1991 Act. The CAJ was also invited to comment, if appropriate, on the proposed table of contents for such a paper contained in the Annex to document CAJ/48/3.

102. The Chair clarified that there were two questions before the CAJ: First, whether there was a need to develop such a document and, second, whether the proposed table of contents was appropriate. She further requested comments on whether new elements should be added, or the present ones modified, and clarified that it was not expected to have substantive discussions at that stage on the different elements addressed in the table of contents.

103. The Delegation of South Africa welcomed the proposal and suggested that it should focus on the UPOV Convention whilst bearing in mind what was contained in the International Treaty on Plant Genetic Resources for Food and Agriculture because several countries were bound by both international instruments. The Delegation further suggested consultations in order to gather the experience of members concerning those exceptions and, in particular, information on compliance mechanisms in order to ensure good compliance with the exceptions provided in the UPOV Convention.

104. The Delegation of the Netherlands was in favor of the development of the document and offered its assistance to the Office of the Union.

105. The Delegation of Chile emphasized that there were different ways to implement the exceptions provided in the UPOV Convention depending on the particular circumstances of each country. It supported the development of a document that would facilitate the implementation of the system in an efficient manner.

106. The Delegation of Argentina indicated that its country was in the process of preparing the accession to the 1991 Act. In that context, it considered that it would be very useful to receive indications of which acts were included within the scope of Article 15(1)(i) of the 1991 Act and, in particular, whether certain acts concerning farmers' cooperative societies might be included.

107. The Delegation of France expressed its support for the development of a document noting that the contents of Article 15 were relatively brief and that detailed explanations would be useful.

108. The Delegation of the United States of America considered that it was an important task and emphasized the need to proceed cautiously. It recalled that the terms of the UPOV Convention had been carefully considered with the inclusion of the appropriate flexibility and expressed reservations on a position paper that could reduce that flexibility. It discouraged any attempt to define terms that were not defined at the Diplomatic Conference of 1991 and suggested that, instead of proceeding with an exhaustive examination of laws, it would prefer that examples of certain legislation were provided to serve as guidance.

109. The Delegation of Sweden was in favor of the elaboration of a document on the basis that it was undertaken with due caution.

110. The Delegation of Australia recommended that the flexibility in the way members might implement those exceptions should be maintained.

111. The Vice Secretary-General clarified that the document would provide certain legislative examples for illustrative purposes with the agreement of the members concerned.

112. The Delegation of the Republic of Korea was in favor of the development of guidelines which would be useful for countries implementing those exceptions.

113. The Delegation of Argentina considered it important to provide a clear explanation of what was included or excluded under the exceptions of Article 15(2) of the 1991 Act, for example, selling or exchanging seed with third parties was not acceptable. In relation to Article 15(1)(i) of the 1991 Act, it would be important to define what was a subsistence farmer and what was private and non-commercial. While those notions were known in the field of patents, it was not the case in the field of breeders' rights.

114. The Delegation of Colombia referred to the inclusion of the exception under Article 15(2) of the 1991 Act in the Decision 345 of the Andean Community. It would welcome a report that might serve as guidance for interpreting what was considered private and non-commercial.

115. In reply to the explanation requested by the Delegation of South Africa concerning the reference to "guiding principles" in the introduction of Annex to document CAJ/48/3, the Chair clarified that it was better not to refer to "guiding principles" for the time being and to wait for the drafting of the document and the discussions within the CAJ in order to decide what should be the future of such a document.

116. The representative of ISF referred to the contents of the Annex to document CAJ/48/3 and, in relation to the exception to the breeder's right under Article 15(1)(i) of the 1991 Act, suggested avoiding a definition of "subsistence farmers," as that was a matter left to national

law, and recommended instead to concentrate on which acts were considered to be “private and non-commercial.” He further proposed to provide the Office of the Union with the results of a recent survey by ISF on the exception under Article 15(2) of the 1991 Act.

117. The Chair noted the agreement of the CAJ to elaborate a document on the basis of the table of contents in the Annex to document CAJ/48/3 incorporating the comments and suggestions received from members and observers. As suggested by the Vice Secretary-General, the Chair proposed to draft a document in the form of draft explanatory notes on the exceptions under Article 15(1)(i) and Article 15(2) of the 1991 Act that could serve as guidance in the drafting of national laws concerning those exceptions. It was agreed that a first draft of that document would be presented for consideration by the CAJ at its session in October 2004.

#### Review of the UPOV-ROM Plant Variety Database

118. Discussions were based on document TC/39/14-CAJ/47/5, which contained the results of a questionnaire designed to investigate how the effectiveness of the UPOV-ROM might be improved and also presented proposals on how the results of the questionnaire might be developed into a program of activity.

119. The CAJ noted the results of the questionnaire and approved the proposed program of activity for improving the effectiveness of the UPOV-ROM.

#### UPOV Information Databases

120. The CAJ considered document CAJ/48/4, which presented the database of taxa with their proposed UPOV codes and explained a project for the development of a new database (“GENIE” Database) to provide information on: the status of protection; experience in distinctness, uniformity and stability (DUS) testing; cooperation in examination; and the existence of UPOV Test Guidelines.

121. The Delegation of the United States of America was in favor of the proposals contained in document CAJ/48/4 and expressed its gratitude to the Technical Committee and to the Office of the Union, in particular concerning the “GENIE” database, which it considered to be an excellent idea.

122. The CAJ noted that the Technical Committee had agreed the approach and the work program for the development and introduction of the proposed UPOV code and the proposal for the development of the “GENIE” database. The CAJ also agreed to the approach for the development of a UPOV code and the work program for the development and introduction of the proposed UPOV code, as set out in paragraph 16 of document CAJ/48/4, and the proposal for the development of the “GENIE” database.

#### Variety Denominations

123. The Senior Legal Officer introduced documents CAJ/47/6 and CAJ/48/5 concerning the developments in the work plan of the *Ad hoc* Working Group on Variety Denominations (Working Group). She gave an oral report on the fifth meeting of the Working Group which

was made up of 23 participants from 10 members, one observer state and four observer organizations. Mr. Piers Trehane, Rapporteur, International Code of Nomenclature for Cultivated Plants (ICNCP), had been also present.

124. The Working Group had studied a third draft of document “Draft Explanatory Notes on Article 20 of the 1991 Act of the UPOV Convention Concerning Variety Denominations (document WG-VD/5/2).” In particular, discussions had taken place on a possible solution to permit the traceability of a variety when different denominations were necessary. That was of particular relevance for authorities with non-roman script alphabets. Discussions on that matter would continue at the next meeting of the Working Group in April 2004.

125. The Working Group had started discussions on a document containing a proposal to revise UPOV Recommendation 9 and the List of Classes for Variety Denomination purposes (document WG-VD/5/3). The contents of document WG-VD/5/3 were based on the replies to a questionnaire concerning that matter addressed to members and observers of the CAJ. Replies had been received from 29 members of the Union, one observer state, one intergovernmental organization and one non-governmental organization. The Working Group had, in principle, agreed some redrafting of Recommendation 9 in order to address not only what was considered to be closely related from a taxonomic point of view, but also to address matters concerning use and, in particular, confusion in relation to the identity of the variety. In relation to the proposed changes to the existing classes contained in the replies to the questionnaire, the Working Group had requested the Office of the Union to contact again the authorities and organizations which provided those proposals in order to ask them for the reasoning behind those proposed changes. The additional information to be gathered by the Office of the Union would be used to assist in the deliberations on that matter at the sixth meeting of the Working Group in April 2004.

126. The CAJ noted the contents of documents CAJ/47/6 and CAJ/48/5 and the oral report by the Senior Legal Officer.

#### Program for the Forty-Ninth Session

127. It was agreed that the program for the forty-ninth session would include the following items:

1. Transfer of material for the purposes of examination of distinctness, uniformity and stability: proposed recommendations
2. Recommendations to ensure the independence of those DUS examination centers which have, or have links to, breeding activities
3. UPOV information databases
4. Publication of variety descriptions
5. Variety denominations



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

[Annex I follows]

ANNEXE I / ANNEX I / ANLAGE I / ANEXO I

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[L'annexe II suit/  
Annex II follows/  
Anlage II folgt/  
Sigue el Anexo II]



ANNEX II

**UPOV**

INTERNATIONALER  
VERBAND  
ZUM SCHUTZ VON  
PFLANZENZÜCHTUNGEN  
  
GENÈVE, SCHWEIZ

UNION INTERNATIONALE  
POUR LA PROTECTION  
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VÉGÉTALES  
  
GENÈVE, SUISSE

UNIÓN INTERNACIONAL  
PARA LA PROTECCIÓN  
DE LAS OBTENCIONES  
VEGETALES  
  
GINEBRA, SUIZA

INTERNATIONAL UNION  
FOR THE PROTECTION  
OF NEW VARIETIES  
OF PLANTS  
  
GENEVA, SWITZERLAND

**ACCESS TO GENETIC RESOURCES  
AND BENEFIT-SHARING**

*Reply of UPOV to the Notification of June 26, 2003, from the  
Executive Secretary of the Convention on Biological Diversity (CBD)*

approved by the Administrative and Legal Committee  
at its forty-eighth session on October 21, 2003,  
with the recommendation that the Council of UPOV adopt it  
at its thirty-seventh ordinary session on October 23, 2003.

## Introduction

1. The International Union for the Protection of New Varieties of Plants (UPOV) is an intergovernmental organization, established by the International Convention for the Protection of New Varieties of Plants (the “UPOV Convention”). The UPOV Convention was adopted on December 2, 1961, and revised in 1972, 1978 and 1991. The Mission of UPOV, based on the UPOV Convention, is: *“To provide and promote an effective system of plant variety protection, with the aim of encouraging the development of new varieties of plants, for the benefit of society.”*

2. As of July 31, 2003, UPOV has 53 members<sup>1</sup>. Furthermore, 18 States and two intergovernmental organizations have initiated, with the Council of UPOV, the procedure for becoming members of the Union and 53 other States have been in contact with the Office of the Union for assistance in the development of legislation on plant variety protection. It is therefore anticipated that more than 100 States or intergovernmental organizations may be members of UPOV in the future.

3. UPOV supports the view that the Convention on Biological Diversity (CBD) and relevant international instruments dealing with intellectual property rights, including the UPOV Convention, should be mutually supportive.

4. It should be recalled that the Conference of the Parties to the CBD, in its Decision IV-24, taken at its sixth Meeting (COP-6) held in The Hague, Netherlands, from April 7 to 19, 2002, acknowledged relevant work being carried out by other intergovernmental organizations, such as the World Intellectual Property Organization (WIPO), the World Trade Organization (WTO), the United Nations Conference on Trade and Development (UNCTAD), the Food and Agriculture Organization of the United Nations (FAO) and UPOV, on issues related to access to genetic resources and benefit-sharing.

5. UPOV has developed a reply based on the principles of the UPOV Convention in order to provide some guidance on UPOV’s views on the “process, nature, scope, elements and modalities of an international regime on access to genetic resources and benefit-sharing.”

## Access to Genetic Resources

6. UPOV considers that plant breeding is a fundamental aspect of the sustainable use and development of genetic resources. It is of the opinion that access to genetic resources is a key requirement for sustainable and substantial progress in plant breeding. The concept of the “breeder’s exemption” in the UPOV Convention, whereby acts done for the purpose of breeding other varieties are not subject to any restriction, reflects the view of UPOV that the worldwide community of breeders needs access to all forms of breeding material to sustain greatest progress in plant breeding and, thereby, to maximize the use of genetic resources for the benefit of society.

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<sup>1</sup> More detailed information concerning UPOV’s membership can be found at:  
<http://www.upov.int/en/about/members/index.html>.

### *Disclosure of Origin*

7. The requirement for “distinctness” in the UPOV Convention<sup>2</sup> means that protection shall only be granted after an examination to determine if the variety is clearly distinguishable from all other varieties, whose existence is a matter of common knowledge<sup>3</sup> at the date of filing of the application, regardless of the geographical origin. Furthermore, the UPOV Convention provides that, if it is discovered that a breeder’s right has been granted for a variety that was not distinct, that right shall be declared null and void.

8. The breeder is usually required, in a technical questionnaire that accompanies his application for protection, to provide information concerning the breeding history and genetic origin of the variety. UPOV encourages information on the origin of the plant material, used in the breeding of the variety, to be provided where this facilitates the examination mentioned above, but could not accept this as an additional condition of protection since the UPOV Convention provides that protection should be granted to plant varieties fulfilling the conditions of novelty, distinctness, uniformity, stability and a suitable denomination and does not allow any further or different conditions for protection. Indeed, in certain cases, for technical reasons, applicants may find it difficult, or impossible, to identify the exact geographic origin of all the material used for breeding purposes.

9. Thus, if a country decides, in the frame of its overall policy, to introduce a mechanism for the disclosure of countries of origin or geographical origin of genetic resources, such a mechanism should not be introduced in a narrow sense, as a condition for plant variety protection. A separate mechanism from the plant variety protection legislation, such as that used for phytosanitary requirements, could be applied uniformly to all activities concerning the commercialization of varieties, including, for example, seed quality or other marketing-related regulations.

### *Prior Informed Consent*

10. With regard to any requirement for a declaration that the genetic material has been lawfully acquired or proof that prior informed consent concerning the access of the genetic material has been obtained, UPOV encourages the principles of transparency and ethical behavior in the course of conducting breeding activities and, in this regard, the access to the genetic material used for the development of a new variety should be done respecting the legal framework of the country of origin of the genetic material. However, the UPOV Convention requires that the breeder’s right should not be subject to any further or different conditions than the ones required to obtain protection. UPOV notes that this is consistent with Article 15 of the CBD, which provides that the determination of the access to genetic resources rests with the national governments and is subject to national legislation. Furthermore, UPOV considers that the competent authority for the grant of the breeder’s rights is not in a position to verify whether the access to genetic material has taken place in accordance with the applicable law in this field.

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<sup>2</sup> Reference to the UPOV Convention in this document should be understood as a reference to the latest Act of the UPOV Convention (the 1991 Act). The full text of the UPOV Convention can be found at: <http://www.upov.int/en/publications/conventions/1991/content.html>

<sup>3</sup> The matter of common knowledge is considered further in UPOV document “[The Notion of Breeder and Common Knowledge](#)” (C(Extr.)/19/2 Rev.). This document can be found at: [http://www.upov.int/en/about/key\\_issues.html](http://www.upov.int/en/about/key_issues.html)

### *Summary*

11. Since the legislation on access to genetic material and the legislation dealing with the grant of breeders' rights pursue different objectives, have different scopes of application and require a different administrative structure to monitor their implementation, UPOV considers that it is appropriate to include them in different legislation, although such legislation should be compatible and mutually supportive.

### Benefit-Sharing

#### *Breeder's Exemption*

12. UPOV would be concerned if any mechanism to claim the sharing of revenues were to impose an additional administrative burden on the authority entrusted with the grant of breeders' rights and an additional financial obligation on the breeder when varieties are used for further breeding. Indeed, such an obligation for benefit-sharing would be incompatible with the principle of the breeder's exemption established in the UPOV Convention whereby acts done for the purpose of breeding other varieties are not, under the UPOV Convention, subject to any restriction and the breeders of protected varieties (initial varieties) are not entitled to financial benefit-sharing with breeders of varieties developed from the initial varieties, except in the case of essentially derived varieties (EDV). Furthermore, a benefit-sharing mechanism within the legislation to grant breeder's rights, would seem to tax only "protected" varieties and, instead of creating incentive mechanisms to develop new varieties, may provoke the opposite effect, whereby breeders would not develop new varieties or would not seek protection (favoring a legally insecure environment).

13. The Food and Agriculture Organization of the United Nations (FAO), at its 31<sup>st</sup> Conference, on November 3, 2001, adopted the International Treaty on Plant Genetic Resources for Food and Agriculture. This Treaty (Article 13.2. (d)(ii)) recognizes the concept of the breeder's exemption, in that breeders are excepted from financial benefit-sharing whenever their products are "available without restriction to others for further research and breeding ...".

#### *Subsistence Farmers*

14. In addition to the breeder's exemption and the research exemption, the UPOV Convention contains another compulsory exception to the breeder's right whereby the breeder's right does not extend to acts done privately and for non-commercial purposes. Therefore, activities of subsistence farmers, where these constitute acts done privately and for non-commercial purposes, are excluded from the scope of the breeder's right and such farmers freely benefit from the availability of protected new varieties.

#### *Farm-Saved Seed*

15. The provision on "farm-saved seed" (also known as the "farmer's privilege") is an optional benefit-sharing mechanism provided by the UPOV Convention, under which UPOV members may permit farmers, on their own farms, to use part of their harvest of a protected variety for the planting of a further crop. Under this provision, members of UPOV are able to adopt solutions, which are specifically adapted to their agricultural circumstances. However, this provision is subject to reasonable limits and requires that the legitimate interests of the breeder are

safeguarded, to ensure there is a continued incentive for the development of new varieties of plants, for the benefit of society. For example, certain members of UPOV apply the provision on farm-saved seed only to certain species or limit its application using criteria such as the size of the farmer's holding or the level of production.

### *Summary*

16. Mechanisms of benefit-sharing should take into account the need for a relationship of mutual supportiveness in respect of the essential principles of the UPOV system of plant variety protection and, in particular, of the breeder's exemption provision.

### Conclusion

17. UPOV considers that plant breeding is a fundamental aspect of the sustainable use and development of genetic resources. It is of the opinion that access to genetic resources is a key requirement for sustainable and substantial progress in plant breeding. The concept of the "breeder's exemption" in the UPOV Convention, whereby acts done for the purpose of breeding other varieties are not subject to any restriction, reflects the view of UPOV that the worldwide community of breeders needs access to all forms of breeding material to sustain greatest progress in plant breeding and, thereby, to maximize the use of genetic resources for the benefit of society. In addition, the UPOV Convention has inherent benefit-sharing principles in the form of the breeder's exemption and other exceptions to the breeder's right and UPOV is concerned about any other measures for benefit-sharing which could introduce unnecessary barriers to progress in breeding and the utilization of genetic resources. UPOV urges the *Ad Hoc* Open-ended Working Group on Access and Benefit-sharing to recognize these principles in its work and to ensure that any measures it develops are supportive of these principles and, therefore, of the UPOV Convention.

[End of Annex II and of document]