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

DEVELOPMENT OF INFORMATION MATERIALS CONCERNING THE UPOV CONVENTION

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EXECUTIVE SUMMARY

1. The purpose of this document is to provide background information to assist the Administrative and Legal Committee (CAJ) in its consideration of relevant matters at its seventy-second session and present a tentative program for the development of information materials.
2. The CAJ is invited to:
 - (a) welcome the presentation that the European Union has the intention to make on its system concerning essentially derived varieties, at the seventy-second session of the CAJ;
 - (b) consider the proposal for the Office of the Union to organize a meeting to exchange information with the International Community of Breeders of Asexually Reproduced Ornamental and Fruit Varieties (CIOPORA), the International Seed Federation (ISF) and the World Intellectual Property Organization (WIPO) in order to explore the possible role of UPOV in alternative dispute settlement mechanisms for matters concerning essentially derived varieties, including the provision of experts on EDV matters;
 - (c) consider a new draft of the "Explanatory Notes on Essentially Derived Varieties under the 1991 Act of the UPOV Convention" (Revision) (document UPOV/EXN/EDV/2 Draft 6), as set out in paragraph 13;
 - (d) note that a report on work concerning the possible development of a UPOV similarity search tool for variety denomination purposes and proposals concerning a possible revision of document UPOV/INF/12 "Explanatory Notes on Variety Denominations under the UPOV Convention" are provided in document CAJ/72/3 "Variety denominations";
 - (e) consider document UPOV/EXN/PPM/1 Draft 5, "Explanatory Notes on Propagating Material under the UPOV Convention", as set out in paragraph 17;
 - (f) consider the tentative program for the development of information materials in conjunction with the discussions on the scheduling of the CAJ sessions, under the item "Program for the seventy-third session" (see document CAJ/72/8), as set out in paragraphs 18 to 23.

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INTRODUCTION

3. The CAJ, at its fifty-second session,¹ agreed an approach for the preparation of information materials concerning the UPOV Convention.² It also agreed to the establishment of an advisory group to the CAJ (CAJ-AG) to assist in the preparation of documents concerning such materials.³ The agreed approach is summarized as follows: the Office of the Union will develop certain draft materials which it considers covers aspects of a straightforward nature and will circulate these to the CAJ for comments within a specified time. In other cases, where it is considered that there are difficult issues, where discussions at a CAJ session would be important for the development of suitable information materials, and also in cases where the drafts on seemingly straightforward materials provoke unexpected concerns when circulated for comments, it was agreed that the assistance of the CAJ-AG would be sought prior to the CAJ being invited to discuss those matters at its sessions.

4. The CAJ, at its seventieth session⁴ agreed that all matters under consideration by the CAJ-AG at its ninth session⁵ should, following the ninth session of the CAJ-AG, be considered by the CAJ and that the CAJ-AG should only be convened, on an *ad hoc* basis, as considered appropriate by the CAJ.⁶

OVERVIEW OF THE DEVELOPMENT OF INFORMATION MATERIALS

5. An overview of the development of the information materials is provided in the Annex to this document.

¹ Held in Geneva on October 24, 2005.

² See document CAJ/52/4 "Approach for the development of information materials concerning the UPOV Convention", paragraphs 8 to 10.

³ See document CAJ/52/4, paragraphs 11 to 14 and document CAJ/52/5 "Report", paragraph 67.

⁴ Held in Geneva on October 13, 2014

⁵ Held in Geneva on October 14 and 17, 2014.

⁶ See document CAJ/70/10 "Report on the Conclusions", paragraphs 38 to 41.

INFORMATION MATERIALS

6. The CAJ, at its seventy-first session,⁷ agreed to discuss the following information materials at the seventy-second session of the CAJ:

- Explanatory Notes on Essentially Derived Varieties under the 1991 Act of the UPOV Convention (Revision)
- Explanatory Notes on Variety Denominations under the UPOV Convention (Revision)
- Explanatory Notes on Propagating Material under the UPOV Convention.

Explanatory Notes on Essentially Derived Varieties under the 1991 Act of the UPOV Convention (Revision) (document UPOV/EXN/EDV/2 Draft 6)

7. The CAJ, at its seventy-first session, noted that the CAJ-AG, at its ninth session⁸, had welcomed the presentation made by Australia by electronic means, via the internet, containing the additional information on the context of the examples provided by Australia at the EDV Seminar, and that a copy of the presentation had been posted on the CAJ-AG/14 section of the UPOV website.⁹

8. The CAJ agreed to consider the development of guidance concerning the status of essentially derived varieties that were not granted protection in their own right, after the adoption of the revised document UPOV/EXN/EDV/2.¹⁰

9. The CAJ agreed to invite members of the Union to make presentations on their systems concerning essentially derived varieties at its seventy-second session.¹¹

10. On June 26, 2015, 2015, UPOV Circular E-15/149 was sent to the members of the CAJ, inviting presentations on their systems concerning essentially derived varieties at the seventy-second session of the CAJ. At the date of this document, the European Union had confirmed its intention to make a presentation.

11. The CAJ agreed to consider, at its seventy-second session, the proposal for the Office of the Union to organize a meeting to exchange information with the International Community of Breeders of Asexually Reproduced Ornamental and Fruit Varieties (CIOPORA), the International Seed Federation (ISF) and the World Intellectual Property Organization (WIPO) in order to explore the possible role of UPOV in alternative dispute settlement mechanisms for matters concerning essentially derived varieties, including the provision of experts on EDV matters. The CAJ noted that the Council had adopted document UPOV/INF/21/1 "Alternative Dispute Settlement Mechanisms".¹²

12. The CAJ agreed to consider a new draft of the "Explanatory Notes on Essentially Derived Varieties under the 1991 Act of the UPOV Convention" (Revision) (document UPOV/EXN/EDV/2 Draft 6) at its seventy-second session, incorporating the following amendments agreed by the CAJ-AG at its ninth session, (see document CAJ/71/2, paragraph 15).¹³

⁷ Held in Geneva on March 26, 2015.

⁸ Held in Geneva, on October 14 and 17, 2014.

⁹ See document CAJ/71/10 "Report on the Conclusions", paragraph 10.

¹⁰ See document CAJ/71/10 "Report on the Conclusions", paragraph 11.

¹¹ See document CAJ/71/10 "Report on the Conclusions", paragraph 12.

¹² See document CAJ/71/10 "Report on the Conclusions", paragraph 13.

¹³ See document CAJ/71/10 "Report on the Conclusions", paragraph 14.

Paragraph 2	<p>The second sentence to read:</p> <p>“The purpose of the <u>this</u> guidance [...]”</p> <p>To delete the third sentence:</p> <p>“The guidance is intended for: authorities granting breeders’ rights with competence in matters concerning essentially derived varieties; breeders, farmers, growers and other stakeholders; and relevant bodies responsible for solving disputes in litigation, mediation or arbitration cases”</p>
Paragraph 6	<p>To read as follows:</p> <p>“6. The following might be considered in relation to the notion of “essential characteristics”:</p> <p>(i) essential characteristics, in relation to a plant variety, means heritable traits that are determined by the expression of one or more genes, or other heritable determinants, that contribute to the principal features, performance or value of the variety;</p> <p>(ii) characteristics that are important from the perspective of the producer, seller, supplier, buyer, recipient, or user;</p> <p>(iii) characteristics that are essential for the variety as a whole, including, for example, morphological, physiological, agronomic, industrial and biochemical characteristics;</p> <p>(iv) essential characteristics may or may not be phenotypic characteristics used for the examination of distinctness, uniformity and stability (DUS);</p> <p>(v) essential characteristics are not restricted to those characteristics that relate only to high performance or value (for instance, disease resistance may be considered as an essential characteristic when the variety has susceptibility to disease);</p> <p>(vi) essential characteristics may be different in different crops/species.”</p>
Paragraph 7	To be deleted
Paragraph 8	<p>To read as follows:</p> <p>“8. The phrase “it is clearly distinguishable from the initial variety” establishes that essential derivation is concerned only with varieties that are clearly distinguishable, in accordance with Article 7, from the initial variety and which are accordingly protectable. Article 14(5)(a)(ii) would apply if the variety is “not clearly distinguishable in accordance with Article 7 from the protected variety”.</p>
Paragraph 10	<p>To read as follows:</p> <p>“10. The words “except for the differences which result from the act of derivation” do not set a limit to the amount of difference which may exist where a variety is considered to be essentially derived. A limit is, however, set by Article 14(5)(b) (i) and (iii). The differences must not be such that the variety fails “to retain the expression of the essential characteristics that result from the genotype or combination of genotypes of the initial variety”.</p>
Paragraph 11	<p>To read as follows:</p> <p>“11. The examples given in Article 14(5) (c) make clear that the differences which result from the act of derivation should be one or very few. However, if there are only one or few differences that does not necessarily mean that a variety is essentially derived. The variety would also be required to fulfil the definition stated in Article 14(5)(b).”</p>

New paragraph after paragraph 11	To insert the following quote in paragraph 11 in a new paragraph as follows: "12. The derived variety must retain almost the totality of the genotype of the mother variety and be distinguishable from that variety by a very limited number of characteristics (typically by one)."
To re-insert title	Method of Breeding
Paragraph 14	Paragraph 14 to read as follows: "There is a need to consider the situation in different crops and species and the method of breeding in the determination of essentially derived varieties."
Paragraph 20	To wait for joint proposal to be provided by ESA and ISF
Paragraph 21	To add a note that the current text was not acceptable but that new proposals should be considered. To show the existing text in strikethrough.
Paragraph 29	To read as follows: "29. Both predominant derivation (e.g. evidence of genetic conformity with the initial variety) and conformity on the essential characteristics (e.g. evidence on conformity in the expression of the essential characteristics of the initial variety) are possible starting points in providing an indication that a variety might be essentially derived from the initial variety."
Paragraph 30	To read as follows: "30. In some situations, relevant information provided by the breeder of the initial variety on predominant derivation and/or on conformity on the essential characteristics might be used as the basis for the reversal of the burden of proof. In such situations, the other breeder might need to prove that the other variety is not essentially derived from the initial variety. For instance, the other breeder would need to provide information on the breeding history of the second variety to prove that the variety was not derived from the initial variety."
Section II	To clarify the purpose of Section II in the relevant parts of the document and, in particular, that it relates to assessment of whether a variety is an EDV and not whether it is protectable.
New proposal	To develop guidance in the next draft to clarify the situation if the initial variety, or the EDV, is not protected or is protected in another territory.

13. Document UPOV/EXN/EDV/2 Draft 6 has been prepared in accordance with the amendments agreed by the CAJ-AG at its ninth session.

14. *The CAJ is invited to:*

(a) *note that the European Union has the intention to make a presentation on its system concerning essentially derived varieties, at the seventy-second session of the CAJ;*

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

(c) *consider a new draft of the “Explanatory Notes on Essentially Derived Varieties under the 1991 Act of the UPOV Convention” (Revision) (document UPOV/EXN/EDV/2 Draft 6), as set out in paragraph 13.*

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

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

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

Explanatory Notes on Propagating Material under the UPOV Convention (document UPOV/EXN/PPM/1 Draft 5)

17. The CAJ, at its seventy-first session, agreed to consider a new draft of the “Explanatory Notes on Propagating Material under the 1991 Act of the UPOV Convention” (document UPOV/EXN/PPM/1 Draft 5) at its seventy-second session, on the basis of the following amendments to document UPOV/EXN/PPM/1 Draft 4¹⁴

- (i) to change the title of the document and the preamble to refer to the UPOV Convention;
- (ii) to update Section (a) to include relevant articles of the 1978 Act;
- (iii) to delete paragraphs 2 and 3; and
- (iv) to replace the word “decide” with “determine” in paragraph 4.

18. The CAJ is invited to consider document UPOV/EXN/PPM/1 Draft 5, “Explanatory Notes on Propagating Material under the UPOV Convention”, as set out in paragraph 17.

TENTATIVE PROGRAM FOR THE DEVELOPMENT OF INFORMATION MATERIALS

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

18. The CAJ is invited to consider the next steps of the development of the “Explanatory Notes on Essentially Derived Varieties under the 1991 Act of the UPOV Convention (Revision)”, on the basis of the discussions at the seventy-second session of the CAJ.

¹⁴ See document CAJ/71/10 “Report on the Conclusions”, paragraph 15.

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

19. The CAJ is invited to consider the next steps of the development of the “Explanatory Notes on Variety Denominations under the UPOV Convention (Revision)”, on the basis of the discussions at the seventy-second session of the CAJ.

Explanatory Notes on Propagating Material under the UPOV Convention

20. The CAJ is invited to consider the next steps of the development of the “Explanatory Notes on Propagating Material under the UPOV Convention”, on the basis of the discussions at the seventy-second session of the CAJ.

UPOV Model Plant Breeders’ Rights Gazette (Revision)

21. The CAJ, at its seventy-first session, agreed to defer the preparation of a draft revision of document UPOV/INF/5 “UPOV Model Plant Breeders’ Rights Gazette (Revision)” (document UPOV/INF/5/1 Draft 1), pending developments in relation to the development of a prototype electronic form (see document CAJ/71/4).¹⁵

Variety descriptions and role of plant material

22. The CAJ, at its seventy-first session, noted that the TC had agreed to include discussion on variety descriptions and the role of plant material, including minimum number of growing cycles for DUS examination, during its fifty-second session, to be held in Geneva in 2016.¹⁶ Any matter concerning variety descriptions and the role of plant material for consideration by the CAJ will be reported by the TC to the CAJ.

23. It is proposed to consider the program for the development of information materials in conjunction with the discussions on the scheduling of the CAJ sessions, under the item “Program for the seventy-third session” (see document CAJ/72/8).

24. The CAJ is invited to consider the program for the development of information materials in conjunction with the discussions on the scheduling of the CAJ sessions, under the item “Program for the seventy-third session” (see document CAJ/72/8), as set out in paragraphs 18 to 23.

[Annex follows]

¹⁵ See document CAJ/71/10 “Report on the Conclusions”, paragraph 30.

¹⁶ See document CAJ/71/10 “Report on the Conclusions”, paragraph 24.

OVERVIEW OF THE DEVELOPMENT OF INFORMATION MATERIALS

EXPLANATORY NOTES

Reference	Explanatory Notes on:	Status
UPOV/EXN/BRD	Definition of Breeder under the 1991 Act of the UPOV Convention	UPOV/EXN/BRD/1 adopted in October 2013
UPOV/EXN/CAL	Conditions and Limitations Concerning the Breeder's Authorization in Respect of Propagating Material under the UPOV Convention	UPOV/EXN/CAL/1 adopted in October 2010
UPOV/EXN/CAN	Cancellation of the Breeder's Right under the UPOV Convention	UPOV/EXN/CAN/1 adopted in October 2009 UPOV/EXN/CAN/2 Draft 4 to be considered by the Council in October 2015
UPOV/EXN/EDV	Essentially Derived Varieties under the 1991 Act of the UPOV Convention	UPOV/EXN/EDV/1 adopted in October 2009 UPOV/EXN/EDV/2 Draft 6 to be considered by the CAJ in October 2015
UPOV/EXN/ENF	Enforcement of Breeders' Rights under the UPOV Convention	UPOV/EXN/ENF/1 adopted in October 2009
UPOV/EXN/EXC	Exceptions to the Breeder's Right under the 1991 Act of the UPOV Convention	UPOV/EXN/EXC/1 adopted in October 2009
UPOV/EXN/GEN	Genera and Species to be Protected under the 1991 Act of the UPOV Convention	UPOV/EXN/GEN/1 adopted in October 2009
UPOV/EXN/HRV	Acts in Respect of Harvested Material under the 1991 Act of the UPOV Convention	UPOV/EXN/HRV/1 adopted in October 2013
UPOV/EXN/NAT	National Treatment under the 1991 Act of the UPOV Convention	UPOV/EXN/NAT/1 adopted in October 2009
UPOV/EXN/NOV	Novelty under the UPOV Convention	UPOV/EXN/NOV/1 adopted in October 2009
UPOV/EXN/NUL	Nullity of the Breeder's Right under the UPOV Convention	UPOV/EXN/NUL/1 adopted in October 2009 UPOV/EXN/NUL/2 Draft 4 to be considered by the Council in October 2015
UPOV/EXN/PPM	Propagating Material under the 1991 Act of the UPOV Convention	UPOV/EXN/PPM/1 Draft 5 to be considered by the CAJ in October 2015
UPOV/EXN/PRI	Right of Priority under the UPOV Convention	UPOV/EXN/PRI/1 adopted in October 2009
UPOV/EXN/PRP	Provisional Protection under the UPOV Convention	UPOV/EXN/PRP/1 adopted in October 2009 UPOV/EXN/PRP/2 Draft 4 to be considered by the Council in October 2015
UPOV/EXN/VAR	Definition of Variety under the 1991 Act of the UPOV Convention	UPOV/EXN/VAR/1 adopted in October 2010

INFORMATION DOCUMENTS

Latest reference	INF documents	Status
UPOV/INF-EXN	List of UPOV/INF-EXN Documents and Latest Issue Dates	UPOV/INF-EXN/7 adopted by the Council in March 2015 UPOV/INF-EXN/8 Draft 1 to be considered by the Council in October 2015
UPOV/INF/4	Financial Regulations and Rules of UPOV	UPOV/INF/4/4 adopted by the Council in March 2015
UPOV/INF/5	UPOV model plant breeders' rights gazette	UPOV/INF/5 adopted in October 1979
UPOV/INF/6	Guidance for the preparation of laws based on the 1991 Act of the UPOV Convention	UPOV/INF/6/3 adopted in October 2013 Document C/49/14, Annex IV, to be considered by the Council in October 2015
UPOV/INF/7	Rules of Procedure of the Council	UPOV/INF/7 adopted in October 1982
UPOV/INF/8	Agreement between the World Intellectual Property Organization and the International Union for the Protection of New Varieties of Plants	UPOV/INF/8 signed in November 1982
UPOV/INF/9	Agreement between the International Union for the Protection of New Varieties of Plants and the Swiss Federal Council to Determine the Legal Status in Switzerland of that Union (Headquarters Agreement)	UPOV/INF/9 signed in November 1983
UPOV/INF/10	Internal Audit	UPOV/INF/10/1 adopted in October 2010
UPOV/INF/12	Explanatory Notes on Variety Denominations under the UPOV Convention	UPOV/INF/12/4 adopted in November 2012 Document C/49/14, Annex III, to be considered by the Council in October 2015
UPOV/INF/13	Guidance on how to become a member of UPOV	UPOV/INF/13/1 adopted in October 2009
UPOV/INF/14	Guidance for members of UPOV on how to ratify, or accede to, the 1991 Act of the UPOV Convention	UPOV/INF/14/1 adopted in October 2009
UPOV/INF/15	Guidance for Members of UPOV on Ongoing Obligations and Related Notifications	UPOV/INF/15/3 adopted by the Council in March 2015
UPOV/INF/16	Exchangeable Software	UPOV/INF/16/4 adopted in October 2014 Document UPOV/INF/16/5 Draft 1 to be considered by the Council in October 2015
UPOV/INF/17	Guidelines for DNA-Profiling: Molecular Marker Selection and Database Construction ("BMT Guidelines")	UPOV/INF/17/1 adopted in October 2010
UPOV/INF/18	Possible use of Molecular Markers in the Examination of Distinctness, Uniformity and Stability (DUS)	UPOV/INF/18/1 adopted in October 2011
UPOV/INF/19	Rules governing the granting of observer status to States, intergovernmental organizations and international non-governmental organizations in UPOV bodies	UPOV/INF/19/1 adopted in November 2012
UPOV/INF/20	Rules governing access to UPOV documents	UPOV/INF/20/1 adopted in November 2012
UPOV/INF/21	Alternative Dispute Settlement Mechanisms	UPOV/INF/21/1 adopted in November 2012
UPOV/INF/22	Software and Equipment Used by Members of the Union	UPOV/INF/22/1 adopted in October 2014 Document UPOV/INF/22/2 Draft 1 to be considered by the Council in October 2015

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