

CAJ-AG/14/9/6
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INTERNATIONAL UNION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS Geneva

ADMINISTRATIVE AND LEGAL COMMITTEE ADVISORY GROUP

Ninth Session Geneva, October 14 and 17, 2014

REPORT ON THE CONCLUSIONS

adopted by the Administrative and Legal Committee Advisory Group

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Opening of the session

- 1. The Administrative and Legal Committee Advisory Group (CAJ-AG) held its ninth session in Geneva on October 14 and 17, 2014, under the Chairmanship of the Vice Secretary-General of UPOV.
- 2. The list of participants is reproduced in the Annex to this document.
- 3. The CAJ-AG noted that the Administrative and Legal Committee (CAJ), at its seventieth session, held in Geneva on October 13, 2014, agreed as follows:
 - "38. The CAJ agreed that all matters under consideration by the CAJ-AG at its ninth session 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.
 - "39. On that basis, the CAJ requested the CAJ-AG, at its ninth session, to advise the CAJ those documents to be considered at the seventy-first session of the CAJ, in March 2015."

(see document CAJ/70/10 "Report on the Conclusions", paragraphs 38 and 39)

- 4. The Chair recalled that the CAJ-AG had agreed, by correspondence, to issue *ad hoc* invitations to the organizations that the CAJ-AG had previously agreed to invite in order to enable them to continue to present their views on relevant matters (see document CAJ-AG/13/8/10 "Report", paragraph 83). On that basis, the following organizations had been invited to participate in the relevant part of the ninth session of the CAJ-AG: the International Association of Horticultural Producers (AIPH), the Association for Plant Breeding for the Benefit of Society (APBREBES), the International Community of Breeders of Asexually Reproduced Ornamental and Fruit-Tree Varieties (CIOPORA), CropLife International, the European Seed Association (ESA) and the International Seed Federation (ISF).
- 5. The CAJ-AG noted that the discussions in the presence of observers would be provided in the detailed report.

Adoption of the agenda

6. The CAJ-AG adopted the draft agenda as presented in document CAJ-AG/14/9/1 Rev.

Explanatory Notes on Propagation and Propagating Material under the UPOV Convention

- 7. The CAJ-AG considered document UPOV/EXN/PPM/1 Draft 3 and the presentations of views by APBREBES, CIOPORA, and ESA.
- 8. The CAJ-AG agreed the following amendments to document UPOV/EXN/PPM/1 Draft 3:

General	To replace the term "propagation and propagating material" with "propagating material", in the title and elsewhere in the document.
1.	to read: "Propagating material encompasses reproductive and vegetative propagating material. The UPOV Convention does not provide a definition of 'propagating material'. The following section provides guidance on factors that might be considered in relation to whether material is propagating material."
2.	to read: "Whether material is propagating material is a matter of fact but may also include the intention on the part of those concerned (producer, seller, supplier, buyer, recipient, user) and depends on the definition of propagating material in the law of the member of the Union concerned. []"
4.	to read: "Taking into account the definition of propagating material in the law of the member of the Union concerned, if applicable, the following, non-exhaustive, list of factors, and/or combination of factors, might be considered in deciding whether material is propagating material:
	 (i) whether the material has been used to propagate the variety; (ii) whether the material is capable of producing entire plants of the variety; (iii) whether there has been a custom/practice of using the material for that purpose or, as a result of new developments, there is a new custom/practice of using the material for that purpose; (iv) the intention on the part of those concerned (producer, seller, supplier, buyer, recipient, user);
	(v) if, based on the nature and condition of the material and/or the form of its use, it can be determined that the material is "propagating material".

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

- 9. The CAJ-AG considered document UPOV/EXN/HRV/2 Draft 2 and the views expressed by AIPH, APBREBES, CIOPORA and ESA.
- 10. The CAJ-AG concluded that it would not be appropriate to seek to develop a revision of document UPOV/EXN/HRV/1 for the time being.

Explanatory Notes on Cancellation of the Breeder's Right under the UPOV Convention (Revision)

11. The CAJ-AG considered document UPOV/EXN/CAN/2 Draft 2 and the views expressed by CropLife International.

12. The CAJ-AG agreed the following amendments to document UPOV/EXN/CAN/2 Draft 2:

Title – cover page	To delete "the 1991 Act"
Paragraph 6	To replace by:
	6. The cancellation of a breeder's right is different from the surrender or renunciation of the breeder's right. Cancellation of a breeder's right is a matter for the competent authority to decide in accordance with the UPOV Convention (see paragraph 3). By contrast, surrender or renunciation of the breeder's right is a unilateral decision of the holder of the breeder's right that is not linked to compliance with any obligation under the UPOV Convention. The holder of the breeder's right decides can decide on an early termination by giving notice to the authority granting breeders' rights. The competent authority publishes the termination of the breeder's right.
Verifying the maintenance of the variety	The CAJ-AG noted that the development of guidance on section "Verifying the maintenance of the variety" would need to wait for the consideration by the Technical Committee of relevant matters on variety descriptions, as explained in the Note in document UPOV/EXN/CAN/2 Draft 2 (reproduced below)
	Note: The CAJ-AG, at its eighth session, held in Geneva on October 21 and 25, 2013, agreed to the development of guidance on the following, which it proposed that the CAJ should invite the Technical Committee (TC) to consider in the first instance (see document CAJ-AG/13/8/10 "Report", paragraph 73):
	(a) use of information, documents or material provided by the breeder for verifying the maintenance of the variety, as set out in paragraph 15 of document CAJ-AG/13/8/4 "Matters concerning cancellation of the breeder's right", with an explanation that the information, documents or material could be maintained in a different country; and
	(b) use of Test Guidelines for verifying the maintenance of the variety that were different from the Test Guidelines used for the examination of Distinctness, Uniformity and Stability ("DUS").
	The CAJ, at its sixty-ninth session, held in Geneva on April 10, 2014, in accordance with the proposal by the CAJ-AG, agreed to invite the TC to consider the development of guidance on certain matters concerning variety descriptions, as set out in document CAJ/69/2, paragraphs 27 and 28 (see document CAJ/69/13 "Report", paragraph19).

Explanatory Notes on Nullity of the Breeder's Right under the UPOV Convention (Revision)

13. The CAJ-AG considered document UPOV/EXN/NUL/2 Draft 2 and the views expressed by ESA.

14. The CAJ-AG agreed the following changes to document UPOV/EXN/NUL/2 Draft 2:

Paragraph 9	9. The decision to declare a breeder's right null and void invalidates the right
	from the date of grant, although the decision of nullity by the competent
	authority will occur at a later date. Therefore, nullity has, in principle,
	retroactive effects. The retroactive effects of nullity may vary in practice [and
	will depend on the relevant legislation of the member of the Union concerned].
	The remedies concerning the retroactive effects of nullity may also will depend
	on the relevant legislation of the member of the Union concerned and may also
	depend on contractual arrangements. In some cases, such as in cases of
	fraud or wilful abusive acts by the holder of the breeder's right, reimbursement
	of royalties paid and/or other remedies may apply. In some other cases,
	reimbursement of royalties received by the holder of the breeder's right may
	not be applicable.

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

- 15. The CAJ-AG considered document UPOV/INF/12/5 Draft 2 and the views expressed by APBREBES and ESA.
- 16. The CAJ-AG, at its eighth session, held in Geneva on October 21 and 25, 2013, agreed to the development of guidance in relation to a request from a breeder to change a registered variety denomination (see document CAJ-AG/13/8/10 "Report on the Conclusions", paragraph 70). In that regard, the following guidance was agreed by the CAJ-AG:
 - "7.2 The following items provide guidance in relation to changes of registered variety denominations:
 - (a) The UPOV Convention requires a change of the registered denomination where the denomination of the variety is cancelled after the grant of the right. The competent authority should cancel a variety denomination if:
 - (i) by reason of a prior right, the use of the denomination of a variety is forbidden to a person who, in accordance with the provisions of paragraph (7), is obliged to use it (see paragraph (4) "Prior rights of third persons");
 - (ii) the denomination is unsuitable because it is contrary to the provisions in paragraph (2) "Characteristics of the denomination";
 - (b) In cases where the registered denomination is subsequently refused in another member of the Union because it is unsuitable in that territory (e,g, prior right), at the request of the breeder, the authority may consider it appropriate to change the denomination to the denomination registered in the said other member of the Union (see provisions in paragraph (5) "Same denomination in all Contracting Parties"); and
 - (c) In general, subject to (a) and (b) above, it would not be appropriate for the authority to change a registered denomination following a request by the breeder."
- 17. Proposals concerning other aspects in the explanatory notes were received when document UPOV/INF/12/5 Draft 1 was circulated by correspondence, and the CAJ-AG agreed to make an initial consideration of those other proposals, in order to assist the CAJ.

18. The following suggestions were agreed by the CAJ-AG:

2.2.2 (b)	To clarify the terminology in 2.2.2 (b). In particular, to consider changing the examples or replacing "species" by "genera" or "taxa" in the following sentence:
	"(b) accepted market practices for particular variety types (e.g. hybrids) and particular species (e.g. Medicago, Helianthus).
2.2.2 (c)	To add 2.2.2 (c) as follows:
	"(c) 'established practice' is determined to be when registration has been accepted for one species or group, so that it can be used in other species which have not yet registered any variety whose denomination consists solely of figures."
2.3.1 (c)	To develop further guidance on 2.3.1 (c) and to provide other, more appropriate examples
	"(c) convey the impression that the variety is derived from, or related to, another variety when that is not, in fact, the case;
	<i>Example:</i> a denomination which is similar to that of another variety of the same species or closely related species, e.g. "Southern cross 1"; "Southern cross 2"; etc., giving the impression that these varieties are a series of related varieties with similar characteristics, when, in fact, this is not the case."
2.3.1.(d)	To add 2.3.1.(d) as follows:
	"(d) contain the botanical or common name of the genus to which that variety belongs. The identity of the denomination and that of the genus to which it belongs could become unclear and confusing."
	To clarify the following example:
	Example: Carex variety 'Sedge'. This could possibly be referred to as 'Sedge' Carex and without the use of italics or single quotes the identity of the denomination and the genus may not be clear.
	To develop guidance on possible confusion of the use of the botanical or common name of a genus to which that variety does <u>not</u> belong – case by case
2.3.3.	To consider proposals in 2.3.3 of document UPOV/INF/12/5 Draft 2 as an initial step to develop further guidance and appropriate examples in conjunction with the development of an effective UPOV similarity search tool
4(a)	To modify 4(a) as follows:
	"(a) An authority should not accept a variety denomination if a there is an existing prior right, the exercise of which may prevent the use of the proposed denomination, has already been granted to a third party under plant breeder's right law, trademark law or any other intellectual property legislation. It is the responsibility of the title holder of a prior right to assert his rights through the available objection or court procedures. However, authorities are encouraged to make prior searches in relevant publications (e.g. official gazettes) and databases (e.g. UPOV Plant Variety Database (PLUTO) http://www.upov.int/pluto/en/) to identify prior rights for variety denominations. They may also make searches in other registers, such as trademark registers, before accepting a variety denomination."
4(e)(i)	To modify last sentence of 4(e)(i) as follows: "In cases of mere similarity or small likelihood of association confusion by users, waivers granted to breeders by prior trademark right holders could be a suitable
	solution."

Matters concerning variety descriptions

- The CAJ-AG considered document CAJ-AG/14/9/4 "Matters concerning variety descriptions".
- 20. The CAJ-AG agreed that on the basis of document TGP/5 "Experience and Cooperation in DUS Testing", Section 6 "UPOV Report on Technical Examination and UPOV Variety Description", the purpose of the variety description developed at the time of the grant of the breeder's right (original variety description) might be summarized as:
 - (a) to describe the characteristics of the variety; and
 - (b) to identify and list similar varieties and differences from these varieties; combined with the information on the basis for (a) and (b), namely:
 - Date and document number of UPOV Test Guidelines;
 - Date and/or document number of Reporting Authority's test guidelines;
 - Reporting Authority;
 - Testing station(s) and place(s);
 - Period of testing;
 - Date and place of issue of document;
 - Group: (Table: Characteristics; States of Expression; Note; Remarks);
 - Additional Information;
 - (a) Additional Data
 - (b) Photograph (if appropriate)
 - (c) RHS Colour Chart version used (if appropriate)
 - (d) Remarks
- 21. The CAJ-AG considered the status of the original variety description in relation to the verification of plant material of a protected variety for the purposes of enforcement of the breeder's right and noted that UPOV guidance on the enforcement of breeders' rights contained in document UPOV/EXN/ENF/1 "Explanatory notes on the enforcement of breeders' rights under the UPOV Convention" explains as follows:

"SECTION II: Some possible measures for the enforcement of breeders' rights

"While the UPOV Convention requires members of the Union to provide for appropriate legal remedies for the effective enforcement of breeders' rights, it is a matter for breeders to enforce their rights."
[...]

- 22. The CAJ-AG agreed that, in relation to the use of the original variety description, it should be recalled that the description of the variety characteristics and the basis for distinctness from the most similar variety are linked to the circumstances of the DUS examination, as set out in paragraph 10 (c) of this document, namely:
 - Date and document number of UPOV Test Guidelines:
 - Date and/or document number of Reporting Authority's test guidelines:
 - Reporting Authority;
 - Testing station(s) and place(s);
 - Period of testing;
 - Date and place of issue of document;
 - Group: (Table: Characteristics; States of Expression; Note; Remarks);
 - Additional Information:
 - (a) Additional Data
 - (b) Photograph (if appropriate)
 - (c) RHS Colour Chart version used (if appropriate)
 - (d) Remarks

23. The CAJ-AG agreed to recommend to the CAJ that the purpose of the original variety description and the status of the original variety description in relation to the verification of the conformity of plant material to a protected variety for the purposes of the enforcement of the right, as set out above, should be conveyed to the Technical Committee to assist in its consideration of:

"[…]

- "(b) the status of the original variety description in relation to the verification of the conformity of plant material to a protected variety for the purposes of:
 - "(i) verifying the maintenance of the variety (Article 22 of the 1991 Act, Article 10 of the 1978 Act);
 - "(ii) the examination of distinctness, uniformity and stability ("DUS") of candidate varieties; and

"[…]

- "(c) the status of a modified variety description in relation to (a) and (b) above produced, for example, as a result of:
 - "(i) a recalibration of the scale in the Test Guidelines (particularly for non-asterisked characteristics¹);
 - "(ii) variation due to the environmental conditions of the years of testing for characteristics that are influenced by the environment;
 - "(iii) variation due to observation by different experts; or
 - "(iv) the use of different versions of scales (e.g. different versions of the RHS Color Chart).
- "(d) situations where an error is subsequently discovered in the initial variety description."

Explanatory Notes on Provisional Protection under the UPOV Convention (Revision)

- 24. The CAJ-AG considered document UPOV/EXN/PRP/2 Draft 2 and the views expressed by CropLife International.
- 25. The CAJ-AG agreed to propose to the CAJ a revision of document UPOV/EXN/PRP, as set out in document UPOV/EXN/PRP/2 Draft 2.

Essentially Derived Varieties

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

- 26. The CAJ-AG considered documents CAJ-AG/14/9/2 and UPOV/EXN/EDV/2 Draft 5 and the views expressed by AIPH, APBREBES, CIOPORA, ESA and ISF.
- 27. The CAJ-AG 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.
- 28. The CAJ-AG noted that the CAJ-AG, at its eighth session, had agreed to consider the development of guidance on the matters raised in paragraphs 15 to 18 of document CAJ AG/13/8/2 "Explanatory Notes on Essentially Derived Varieties under the 1991 Act of the UPOV Convention", 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.

[&]quot;[I]f a characteristic is important for the international harmonization of variety descriptions (asterisked characteristics) and is influenced by the environment (most quantitative and pseudo-qualitative characteristics) [.....] it is necessary to provide example varieties" in the Test Guidelines (see document TGP/7, Annex 3, Guidance Note GN 28 "Example varieties", section 3.3 (iii)).

[&]quot;1.2.3 Example varieties are important to adjust the description of the characteristics for the year and location effects, as far as possible. [...] " (see document TGP/7, Annex 3, Guidance Note GN 28 "Example varieties", section 1.2.3)

- 29. The CAJ-AG noted that the conclusion of the CAJ-AG, at its eighth session, that at an appropriate future session of the CAJ-AG, the Delegations of Australia, Brazil and the European Union and other members of the Union be invited to make presentations on their systems concerning essentially derived varieties, would be considered by the CAJ.
- 30. The CAJ-AG noted that matters concerning the possible role of UPOV in alternative dispute settlement mechanisms and the proposal in document CAJ-AG/14/9/3 "Possible alternative dispute settlement mechanisms for essentially derived varieties" would be referred to the CAJ for consideration at its seventy-first session in March 2015.
- 31. The CAJ-AG agreed to amend document UPOV/EXN/EDV/2 Draft 5 as follows:

Paragraph 2	The second sentence to read:
	"The purpose of the this guidance []"
	To delete the third sentence: "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"
Paragraph 6	To read as follows:
	"6. The following might be considered in relation to the notion of "essential characteristics":
	 (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;
	(ii) characteristics that are important from the perspective of the producer, seller, supplier, buyer, recipient, or user;
	(iii) characteristics that are essential for the variety as a whole, including, for example, morphological, physiological, agronomic, industrial and biochemical characteristics;
	(iv) essential characteristics may or may not be phenotypic characteristics used for the examination of distinctness, uniformity and stability (DUS);
	 (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);
	(vi) essential characteristics may be different in different crops/species."
Paragraph 7	To be deleted
Paragraph 8	To read as follows:
	"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".

Paragraph 10	To read as follows:
	"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"."
Paragraph 11	To read as follows:
	"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)."
New paragraph	To insert the following quote in paragraph 11 in a new paragraph as follows:
after paragraph 11	"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.

Matters concerning observers in the CAJ-AG

- 32. The CAJ-AG considered document CAJ-AG/14/9/5 and agreed that the matter should be considered by the CAJ at the appropriate time.
- 33. The CAJ-AG suggested to the CAJ to consider the merits of inviting written comments from members and observers on relevant CAJ documents before the CAJ sessions.

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Matters referred by the CAJ to the CAJ-AG for consideration since the eighth session of the CAJ-AG

- 34. The CAJ, at its seventieth session, held in Geneva on October 13, 2014, requested the CAJ-AG, at its ninth session, to advise the CAJ on documents to be considered at the seventy-first session of the CAJ, in March 2015.
- 35. In that regard, the CAJ-AG advised as follows in relation to items 4 "Development of information materials concerning the UPOV Convention" and 7 "Variety denominations" of the seventy-first session of the CAJ:
 - 4. Development of information materials concerning the UPOV Convention (documents CAJ/71/2 and CAJ-AG/14/9/7 "Report")
 - (a) Explanatory Notes on Essentially Derived Varieties under the 1991 Act of the UPOV Convention (Revision) (document CAJ/71/2: proposed way forward, with a view to the discussion of a new draft of document UPOV/EXN/EDV/2 in the CAJ in October 2015)
 - (b) Explanatory Notes on Propagating Material under the UPOV Convention (document UPOV/EXN/PPM/1 Draft 4)
 - (c) Explanatory Notes on Acts in Respect of Harvested Material under the 1991 Act of the UPOV Convention (Revision) (document CAJ/71/2: CAJ-AG proposal to discontinue the development of a revision of UPOV/EXN/HRV/1)
 - (d) Explanatory Notes on Cancellation of the Breeder's Right under the UPOV Convention (Revision) (document UPOV/EXN/CAN/2 Draft 3)
 - (e) Explanatory Notes on Nullity of the Breeder's Right under the UPOV Convention (Revision) (document UPOV/EXN/NUL/2 Draft 3)
 - (f) Matters concerning variety descriptions (document CAJ/71/2: to present the conclusion of the CAJ-AG)
 - (g) Explanatory Notes on Provisional Protection under the UPOV Convention (Revision) (document UPOV/EXN/PRP/2 Draft 3)
 - 7. Variety denominations (document CAJ/71/3)

Explanatory Notes on Variety Denominations under the UPOV Convention (Revision) (CAJ to be invited to consider a plan for the revision of document UPOV/INF/12/5)

36. The CAJ-AG adopted this report at the close of its session on October 17, 2014.

[Annex follows]

CAJ-AG/14/9/6

ANNEXE / ANNEX / ANLAGE / ANEXO

LISTE DES PARTICIPANTS / LIST OF PARTICIPANTS / TEILNEHMERLISTE / LISTA DE PARTICIPANTES

(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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