



CAJ/47/4

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INTERNATIONAL UNION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS

GENEVA

ADMINISTRATIVE AND LEGAL COMMITTEE**Forty-Seventh Session****Geneva, April 10, 2003****TRANSFER OF MATERIAL FOR THE PURPOSES OF EXAMINATION OF
DISTINCTNESS, UNIFORMITY AND STABILITY:
PROPOSED MODEL AGREEMENTS***Document prepared by the Office of the Union*

1. At its forty-sixth session on October 21 and 22, 2002, the Administrative and Legal Committee (hereinafter referred to as "the CAJ") discussed document CAJ/46/4 on the "Issues Concerning the Use of Material Submitted for Examination of Distinctness, Uniformity and Stability." The purpose of document CAJ/46/4 was to explore the importance of including plant material of candidate varieties submitted by the applicant in the collection of varieties used by authorities for the examination of distinctness, uniformity and stability (DUS). Furthermore, it identified the issues which can arise when this practice cannot be freely undertaken. In particular, it considered the situation where a breeder might wish to attach conditions to the use of plant material for such practices, or where the breeder did not permit such a practice at all.
2. The discussion of document CAJ/46/4 identified certain issues concerning the transfer of material for DUS examination which required further attention by the CAJ. In particular, the CAJ identified the following topics for its future work (see paragraph 38 of document CAJ/46/8 Prov.):

- (a) arrangements for the transfer of material
 - (i) from the breeder to the examination authority, and
 - (ii) between examination authorities.

In particular, it was suggested that the CAJ might consider the development of standard model agreements for such transfers;

(b) recommendations to ensure the independence of those DUS examination centers which have, or have links to, breeding activities.

3. This document will deal with certain elements of the work identified in paragraph 2(a). It is proposed that the draft recommendations identified in paragraph 2(b) will be considered by the CAJ in its forty-eighth session in October 2003.

4. At the forty-sixth session of the CAJ, two members of the Union (the Delegations of France and Spain), one intergovernmental organization (European Community) and one non-governmental organization (International Seed Federation (ISF)) indicated that they could make their experience available on matters and agreements concerning the transfer of material for DUS examination. The comments and proposals contained in the following sections have taken into consideration the experience of the above-mentioned delegations and organizations.

Transfer of Material from the Breeder to the Examination Authority

5. Whilst recognizing the importance of including plant material of candidate varieties submitted by the applicant, in the collection of varieties used by authorities for the DUS examination, some breeders are reluctant in some situations to submit material unconditionally because they fear that the material might be used for purposes other than DUS examination. At the forty-sixth session of the CAJ, the proposal to develop a model agreement that could serve as guidance for authorities and breeders concerning the transfer of material for DUS examination was welcomed.

6. The representative of ISF proposed its assistance to the Office of the Union by providing a model agreement concerning the use of the material submitted by the breeder (see paragraph 34 of document CAJ/46/8 Prov.).

7. On February 10, 2003, the Office of the Union received a communication from ISF, enclosing a document entitled "Minimum Elements to be Included in a Contract Between Breeders and PVP Offices Relating to Material Transfer for DUS Testing" (hereinafter "the ISF Proposal"). The ISF Proposal is reproduced in Annex I to this document. The ISF Proposal had been adopted by the Intellectual Property Committee of ISF in Washington, on February 7, 2003. ISF has requested that this document be in the form of guidelines rather than in the form of a contract.

8. In order to facilitate discussions by members and observers of the CAJ, the Office of the Union has prepared a preliminary draft 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." This Draft Model Agreement appears as Annex II to this document. The following section explains the essential points where the ISF Proposal has been modified.

9. The Draft Model Agreement in Annex II follows treaty language (UPOV Convention) whenever possible. Consequential terminology modifications to the ISF Proposal are that the term "Evaluation" has been changed to "Examination" (see Article 12 of the 1991 Act of the UPOV Convention) and the term "Institute", has been changed to "Authority" (see Article 1(ix) and Article 30(1)(ii) of the 1991 Act of the UPOV Convention).

10. Another modification in relation to the ISF Proposal relates to the importance to maintain the common practice for authorities to exchange plant material, which has been submitted for DUS examination, after breeders' rights have been granted to the variety concerned. This implies that any model agreement on this matter should, in the absence of a specific justified exclusion, allow authorities the transfer of material to facilitate the examination of other varieties. However, this would be subject to the corresponding agreements between authorities and limited to examination purposes.

11. The additional administrative burden, as proposed by the ISF Proposal, to obtain a written authorization from the breeder prior to exchange of material with other authorities, may only be necessary in certain cases (e.g. parental lines). For example, it may not be necessary in those cases where plant material of the variety is likely to become freely available in the market place. Therefore, the Draft Model Agreement in Annex II allows the exchange of material between examination authorities, but provides for a specific exclusion clause only if required (see draft Clauses 4 and 9 in Annex II to this document).

12. Reference in the ISF Proposal to bilateral agreements has been modified in order to take into consideration a proposed Draft Model Agreement for the Transfer of Material between Examination Authorities that will be presented in the section below.

13. The Clause concerning acknowledgment of receipt of samples of material has been retained, but only if required. Each authority may have its own procedures, and a balance will need to be reached between cases where such an acknowledgment may be appropriate and other cases where it would create an unnecessary administrative burden (see draft Clause 3 in Annex II).

14. The Draft Model Agreement in Annex II also establishes that the parties involved in the examination should treat the material and related data as confidential and should take reasonable steps to avoid any unauthorized use by other parties (see draft Clause 10 in Annex II).

15. An additional safeguard to ensure the independence of the DUS examination has been introduced into the Draft Model Agreement in Annex II when the examining authority, or any party to which it contracts examination work, may be involved in a breeding activity related to the same or similar crop (see draft Clause 6 in Annex II).

16. Other modifications to the ISF Proposal have been introduced in order to clarify certain concepts (see draft Clause 8 in Annex II) or to provide for a balanced approach of the rights and obligations between the Parties (see draft Clauses 12 and 13 in Annex II). Certain elements of the ISF Proposal have been retained in square brackets, for information purposes. Their content does not seem suitable in agreements between breeders and authorities or may be subject to existing practices of authorities, or the subject matter is already covered by other Clauses in Annex II (e.g. concerns indicated in Clause 16 are dealt with in Clauses 7, 12 and 13).

Transfer of Material Between Examination Authorities

17. The CAJ agreed that, for its next session, the Office of the Union would prepare a Model Agreement for Transfer of Material Between Authorities for Examination Purposes. In Annex III of this document appears the “Draft Model Agreement on the Transfer of Material Between Examination Authorities.” In the elaboration of this Draft Model Agreement, the Office of the Union has taken into account experience of members of the Union and observers and also UPOV Publication No. 644 (Section 19) “Model Administrative Agreement for International Cooperation in the Testing of Varieties.”

18. The above-mentioned Model Administrative Agreement was adopted by the Council of UPOV, on October 29, 1993 (document C/27/15, Annex III), in order to provide some guidance for a cooperation framework between members of the Union in DUS examination as a means of optimizing the functioning of their plant variety protection systems. Of particular relevance is Article 4 of this Model Administrative Agreement which highlights that authorities should take all necessary steps to safeguard the rights of the applicant, with a particular reference to the transfer of material. Article 6 refers to particular arrangements that may be decided between the authorities on matters like the exchange of samples and maintenance of reference collections.

19. It has been considered necessary to identify the status of authorities that may enter into this type of arrangement. The term “Initial Authority” identifies the authority that has received the material from the applicant. The term Executing Authority is the authority that has been entrusted by the Initial Authority to undertake partial or all activities concerning DUS examination of a candidate variety or the authority that uses the requested material of a particular variety for comparison, for examination purposes, with another variety (see draft Clauses 3 and 4 in Annex III).

20. The essential Clause of the Draft Model Agreement in Annex III is that the Executing Authority should observe the conditions established in a final UPOV Model Agreement on the Transfer of Material from the Breeder to the Examination Authority, as if it were the authority referred to therein (see draft Clause 5 in Annex III). The content of a final UPOV Model Agreement is still unknown as it would depend on the results of the deliberations of the CAJ in relation to the Draft Model Agreement Based on the ISF Proposal which appears in Annex II to this document.

21. The Executing Authority should therefore be responsible for the application of obligations under the final UPOV Draft Model Agreement on the Transfer of Material from the Breeder to the Examination Authority in relation to any party that has or may have access to the transferred material and information related to that material (see draft Clause 5 in Annex III).

22. The CAJ is invited to consider and comment on the content of this document and more precisely to propose any further modification to the Draft Model Agreement in Annex II.

[Annex I follows]

ANNEX I / ANNEXE I / ANLAGE I / ANEXO I

[In English only / En anglais seulement
Nur auf Englisch / En Inglés solamente]

Proposal by the International Seed Federation

MINIMUM ELEMENTS TO BE INCLUDED IN A CONTRACT BETWEEN BREEDERS AND PVP OFFICES RELATING TO MATERIAL TRANSFER FOR D.U.S. TESTING

1. "SAMPLES" mean the seed or other propagating material transferred to INSTITUTE as specified in Attachment 1 as well as any progeny derived therefrom, and any plant, plant part or component of SAMPLES.
2. "EVALUATION" means official testing for Distinctness, Uniformity and Stability (D.U.S.).
3. INSTITUTE shall confirm to BREEDER the delivery of the SAMPLES, by returning or having returned to BREEDER a signed copy of ATTACHMENT 1 received with the shipment of the SAMPLES.
4. INSTITUTE shall be entitled to grow plants from SAMPLES **solely for INSTITUTE's official PVP-related DUS testing purposes** ("EVALUATION"), taking into account possible bilateral agreements, at (location).
5. INSTITUTE shall be entitled to grow plants from SAMPLES, or make selfing's or crossings solely for INSTITUTE's official EVALUATION. INSTITUTE may not use SAMPLES for self- or cross-pollination to produce progenies for breeding, research or commercial purposes.
6. BREEDER retains full title and interest and commercial rights in SAMPLES, and will become the owner of any plant material in which SAMPLES would be incorporated.
7. INSTITUTE shall not isolate or have isolated, sequence or have sequenced, or analyze or have analyzed proteins or genetic material (genes, RNA or DNA) from SAMPLES and shall not use or have used any biotechnology processes including, but not limited to, tissue culturing, mutagenesis, or transformation, to manipulate SAMPLES. Notwithstanding the above, isozyme and fingerprinting data collection is permitted under the present Article but such data shall only be used by INSTITUTE for EVALUATION purposes.
8. It is understood by both parties hereto that the SAMPLES are the proprietary and confidential information of the BREEDER, and that the INSTITUTE shall not give, transfer and /or distribute SAMPLES or EVALUATION data to any third party in any manner whatsoever, except on request or consent of the BREEDER. Only INSTITUTE personnel directly involved in performing EVALUATION shall have access to SAMPLES and EVALUATION data. INSTITUTE shall undertake EVALUATION only in INSTITUTE's home country location(s) mentioned in Clause 4, and shall not give, transfer and/or distribute SAMPLES to similar INSTITUTES located in other countries elsewhere without first obtaining BREEDER's prior written informed consent and obtaining from the recipient the signature of on, and written consent to, the same obligations as those subscribed herewith by INSTITUTE. BREEDER may request from time to time that INSTITUTE reports its use of the SAMPLES and the amount still available in INSTITUTE's inventory.
9. INSTITUTE assumes any and all responsibility to comply with all applicable laws, regulations, and guidelines relating to the growing of a crop from SAMPLES and the disposition of grain produced from said crop.
10. BREEDER makes no warranty, express or implied, with respect to the seed, including any warranty of merchantability and/or fitness for a particular purpose, which are hereby expressly disclaimed.

11. INSTITUTE is solely responsible for all claims or liabilities that may arise as a result of its EVALUATION of SAMPLES and the grain produced from SAMPLES. INSTITUTE agrees to indemnify and hold harmless BREEDER against any and all liabilities resulting from or arising out of INSTITUTE's use of SAMPLES.
12. No license or right in SAMPLES is conveyed or granted hereunder by BREEDER to INSTITUTE under any proprietary rights owned or controlled by BREEDER except as otherwise stated herein. Additionally, SAMPLES may contain licensed third party technology to which no rights are conveyed or granted hereunder by BREEDER, except for the limited right to conduct the EVALUATION. INSTITUTE will not use BREEDER's name for any advertising or product labeling notice without prior written authorization from BREEDER.
13. This Agreement shall end on the earlier of a) withdrawal or rejection of the application, b) INSTITUTE no longer retains SAMPLES, c) upon thirty (30) days written notice by either Party at any time with or without cause, or d) upon material breach of this Agreement, ("Termination"). Upon Termination, INSTITUTE shall cease all use of SAMPLES and return its remaining inventory of SAMPLES to BREEDER or destroy SAMPLES if so instructed by BREEDER.
14. This Agreement is made in two originals. It shall be governed by the laws of (to be agreed by the parties). In case of dispute between the Parties regarding the interpretation or implementation of this Agreement that the Parties have not been able to resolve within 30 days from the date the aggrieved Party notified the other Party of the issue, the matter shall be submitted for relevant arbitration. If any provision of this Agreement is found to be invalid, in whole or in part, the other provisions or the remaining portion of such provisions shall not be affected and shall remain in full force and effect.

IN WITNESS WHEREOF, the Parties have executed this Agreement as of the Effective Date.

INSTITUTE

BREEDER

Company authorized signature:

Company authorized signature:

(Authorized signature)

(Authorized signature)

(print or type name)

(print or type name)

(title)

(title)

(Effective date)

(Effective date)

ATTACHMENT 1

This Attachment aims at acknowledging the delivery of the SAMPLES listed below.

Samples Provided For Evaluation

N°	PVP application number	Denomination/Denomination Proposal	Amount of seeds
1			
2			
3			
4			
5			
6			
7			
8			
9			
10			
11			
12			
13			
14			
15			

Delivery address if different
from legal address

Name of the person who
will receive the seeds

I, herewith confirm the reception of the SAMPLES
listed above on

Signature : _____

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

ANNEX II

DRAFT MODEL AGREEMENT BASED ON THE ISF PROPOSAL
ON THE TRANSFER OF MATERIAL FROM THE BREEDER
TO THE EXAMINATION AUTHORITY

1. “Sample” means the seed or other propagating material transferred to the Authority as specified in the Attachment as well as any progeny derived therefrom, and any material in the form of plant, plant part or component of a sample.
2. “Examination” means examination for Distinctness, Uniformity and Stability (D.U.S.).
- [3. The Authority, where requested, shall confirm to the Breeder the delivery of samples, by returning to the Breeder a copy of the Attachment received with the shipment of the samples.]
4. The Authority shall be entitled to grow or propagate plants from samples solely for the examination by the Authority or for examination by Authorities under bilateral agreements including, in particular, those agreements as detailed in the applicable document of the Council of UPOV “Cooperation in Examination.”¹ The Breeder may require that, only for particular samples, the Authority obtain the prior authorization of the Breeder before transmitting the samples to other Authorities.
5. The Authority shall be entitled to use samples for self- or cross-pollination for the examination. The Authority may not use samples for self- or cross-pollination to produce progenies for breeding, research or commercial purposes.
6. In cases where the Authority, or any party to which it contracts examination work, are involved in breeding activities, the Authority shall follow the “UPOV Recommendations for ensuring independence in DUS Examination.”²
7. The Breeder retains full title and interest and commercial rights in samples, and will become the owner of any plant material in which samples would be incorporated. Notwithstanding the above, after the necessary samples have been selected from the material, in the context of the examination, the resulting product of the harvest (e.g. grain), may be disposed of for other uses than production and reproduction (multiplication) and in a way that variety identification could not be possible and subject to the applicable laws and regulations.
8. The Authority shall only isolate or have isolated, sequence or have sequenced, or analyze or have analyzed proteins or genetic material (genes, RNA or DNA) from samples for the examination. The Authority shall not use or have used any biotechnology processes including, but not limited to, tissue culturing, mutagenesis, or transformation, to manipulate samples without the permission of the Breeder.

¹ The latest version is document C/36/5 (October 2002).

² A first draft of these recommendations will be subject to discussion by the CAJ in its forty-eighth session in October 2003.

9. It is understood by both Parties hereto that the samples of the material are the proprietary and confidential information of the Breeder, and that, subject to clause 4, the Authority shall not give, transfer and /or distribute samples or examination data to any third party in any manner whatsoever, except on request or consent of the Breeder.

10. The Authority may contract examination work. Access to samples and examination data by parties other than those involved in the examination shall be subject to the prior authorization of the Breeder. Any party involved in the examination should treat the material as confidential and should take reasonable steps to avoid any unauthorized use of the material by other parties.

[11. The Breeder may make a reasonable request that, from time to time, the Authority report its use of the samples and the amounts still available in the Authority's inventory.]

12. The Authority assumes its responsibility to comply with all applicable laws, regulations, and guidelines relating to the growing of a crop from samples and the disposition of any resultant crop.

13. The Breeder has the responsibility to notify the Authority of all necessary information to enable the Authority to comply with all applicable laws and regulations and guidelines relating to the above mentioned matter.

[14. The Breeder makes no warranty, express or implied, with respect to the seed, including any warranty of merchantability and/or fitness for a particular purpose, which are hereby expressly disclaimed.]

[15. Subject to Clause 13, the Authority is responsible for all claims or liabilities that may arise as a result of its examination of samples and the grain produced from samples. Subject to Clause 13, the Authority agrees to indemnify and hold harmless the Breeder against any and all liabilities resulting from or arising out of the Authority's use of samples. If the above claims and liabilities are the result of the Breeder's omission to inform the Authority, as provided in Clause 13, the Breeder agrees to indemnify the Authority.]

[16. No license or right in samples is conveyed or granted hereunder by the Breeder to the Authority under any proprietary rights owned or controlled by the Breeder except as otherwise stated herein. Additionally, samples may contain licensed third party technology to which no rights are conveyed or granted hereunder by the Breeder, except for the limited right to conduct the examination. In those cases, transfer of material to other authorities may require the prior consent of the Breeder. The Authority will not use the Breeder's name for any advertising or product labeling notice without prior written authorization from the Breeder.]

17. This Agreement shall end on the earlier of (a) withdrawal or rejection of the application, (b) the Authority no longer retains samples, (c) upon thirty (30) days written notice by either Party at any time with or without cause, or (d) upon material breach of this Agreement, (Termination). Upon Termination, the Authority shall cease all use of samples and return its remaining inventory of samples to the Breeder or destroy samples if so instructed by the Breeder.

18. This Agreement is made in two originals. It shall be governed by the laws of (to be agreed by the Parties). In case of dispute between the Parties regarding the interpretation or

implementation of this Agreement that the Parties have not been able to resolve within 30 days from the date the aggrieved Party notified the other Party of the issue, the matter shall be submitted for relevant arbitration. If any provision of this Agreement is found to be invalid, in whole or in part, the other provisions or the remaining portion of such provisions shall not be affected and shall remain in full force and effect.

IN WITNESS WHEREOF, the Parties have executed this Agreement as of the Effective Date.

THE AUTHORITY

BREEDER

Company authorized signature:

(Authorized signature)

(Authorized signature)

(print or type name)

(print or type name)

(title)

(title)

(Effective date)

(Effective date)

ATTACHMENT

**Material covered by the Agreement
Samples of the Material Provided for Examination**

Nº	PVP application number	Denomination/Denomination Proposal	Samples provided
1			
2			
3			
4			
5			
6			

Delivery address

Name of the official who
will receive the samples

Confirmation of delivery required:	<input type="checkbox"/> Yes	<input type="checkbox"/> No
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[Annex III follows]

ANNEX III

DRAFT MODEL AGREEMENT ON THE TRANSFER OF MATERIAL
BETWEEN EXAMINATION AUTHORITIES

1. “Sample” means the seed or other propagating material transferred to the Authority as specified in the Attachment as well as any progeny derived therefrom, and any material in the form of plant, plant part or component of a sample.
2. “Examination” means examination for Distinctness, Uniformity and Stability (D.U.S.).
3. “Initial Authority” means the Authority that has received the samples from the applicant.
4. “Executing Authority” is the Authority that has been entrusted by the Initial Authority to undertake partial or all activities concerning the examination of a candidate variety or the Authority that uses the requested material of a particular variety for comparison, for examination purposes, with another variety.
5. The Executing Authority shall observe the conditions established in the “UPOV Model Agreement on the Transfer of Material from the Breeder to the Examination Authority,”* as if it were the Authority referred to therein.
6. This Agreement shall be governed by (to be agreed by the Authorities concerned). In case of dispute between the parties regarding the interpretation or implementation of this Agreement the matter shall be submitted for relevant arbitration. This Agreement shall be amended by mutual agreement.
7. Authorities may end this Agreement by given [reasonable] notice to the other party or by mutual agreement or by material breach of this Agreement. In particular, unless the parties agree otherwise, completion of pending examinations and transmittal of the relevant reports shall be respected.
8. This Agreement shall enter into force on ... and is made in two originals.

* This Model Agreement has not yet been adopted; its content will depend on the results of the deliberations of the CAJ on the Draft Model Agreement in Annex II.

ATTACHMENT

Material covered by the Agreement

Samples of the Material Provided for Examination

Nº	PVP application number	Denomination/Denomination Proposal	Samples provided
1			
2			
3			
4			
5			
6			

Delivery address

Name of the official who
will receive the samples

Name of the Breeder and contact
details

Confirmation of delivery required:	<input type="checkbox"/> Yes	<input type="checkbox"/> No
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[End of Annex III and of document]