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ADMINISTRATIVE AND LEGAL COMMITTEE

Fiftieth Session
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**DRAFT RECOMMENDATIONS CONCERNING INFORMATION, DOCUMENTS OR
MATERIAL FURNISHED FOR EXAMINATION PURPOSES**

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 (CAJ) discussed document CAJ/46/4 on the "Issues Concerning the Use of Material Submitted for Examination of Distinctness, Uniformity and Stability". Document CAJ/46/4, while pointing out the importance of including and exchanging 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), identified 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 practices, other than the examination of the candidate variety itself, or where the breeder did not permit such practices 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 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 (see paragraph 38 of document CAJ/46/8). In that respect, the representative of the International Seed Federation (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).

3. In order to facilitate discussions, the Office of the Union (Office) had prepared preliminary draft model agreements, 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) and “Draft Model Agreement on the Transfer of Material Between Examination Authorities” (see Annex III to document CAJ/47/4).

4. The CAJ, at its forty-eighth session, on October 20 and 21, 2003, after a preliminary consideration of document CAJ/47/4, decided to develop guidelines or recommendations instead of considering model agreements as contained in Annexes II and III to document CAJ/47/4. Several delegations had concerns in relation to the contents of model agreements and, in particular, in relation to the issue of responsibility. The CAJ considered that model agreements might be in conflict with provisions of domestic legislation.

5. The CAJ requested the Office to draft recommendations, based on the discussions during the meeting (see paragraphs 66 to 87 of document CAJ/48/7) and written contributions to be provided by November 15, 2003, for the forty-ninth session of the CAJ in 2004. The Office received two written contributions on November 11 and 26, 2003, from the Delegations of the Netherlands and of Hungary, respectively.

6. It was also noted during the discussions on document CAJ/47/4 that there was a need to clarify the measures taken by authorities in order to reassure breeders. Those measures apply not only to the material required for examination purposes, but also to information or documents provided by the breeder in conformity with Article 12 of the 1991 Act of the UPOV Convention.

7. At its forty-ninth session, held in Geneva on April 1, 2004, the CAJ discussed the “Draft Recommendations Concerning Information, Documents or Material Furnished for Examination Purposes”, based upon document CAJ/49/2. The CAJ agreed that the reference to measures to ensure the removal or inappropriate use of the information, documents or material, be moved from Draft Recommendation 1 and placed in a new paragraph as an introduction to the whole document. It considered it necessary to include the definition of “breeder” as a footnote. The CAJ agreed that Draft Recommendation 2 should be reworded to clarify that the information, documents and material furnished with a particular application might be used for the examination of other applications. With respect to Draft Recommendation 3, the CAJ recognized that, in spite of the need to exchange information, documents and material between the authorities to provide for an efficient examination, the legitimate interests of the breeders should be safeguarded, and there was support for the exchange of material if the variety was officially registered or protected. It further agreed to clarify in a revised version of Draft Recommendation 3 that the exchange of information, documents and material concerned varieties whose existence was a matter of common knowledge. In relation to Draft Recommendation 4, the CAJ agreed to delete the first part of it, and to include “without the authorization of the breeder” at the end of the first paragraph. Finally it noted the need to clarify if the word “material” referred to varieties before the granting of the breeder’s right, during the period of protection or after the breeder’s right had expired, and suggested that this point should be considered in the revision of all draft recommendations.

8. The CAJ agreed that a new version of the draft recommendations would be prepared for the October 2004 session of the CAJ, taking into account the comments made. The new draft recommendations concerning information, documents or material required by the authority for examination purposes are reproduced in the Annex to this document.

9. The CAJ is invited to consider and comment on the content of this document and the proposed draft recommendations in its Annex.

[Annex follows]

DRAFT RECOMMENDATIONS CONCERNING INFORMATION, DOCUMENTS
OR MATERIAL FURNISHED FOR EXAMINATION PURPOSES

Introduction

1. The recommendations in this document are intended to provide guidance concerning the handling of information, documents and material furnished to authorities for examination purposes in the context of a plant breeder's right scheme in accordance with the UPOV Convention and in recognition of the public service status of authorities operating such schemes.

General Obligations

2. In drafting recommendations concerning information, documents or material furnished for examination purposes, it is recognized that the authority is required to act in accordance with its public service status. This status carries obligations with regard to its handling of information, documents and material and the safeguarding of the interests of the breeder¹. For example, authorities are required to take the necessary measures to avoid the unauthorized removal and/or the misuse of information, documents and material. In general, unless otherwise agreed with the breeder, the authority may use information, documents and material of varieties, furnished with a particular application for plant breeders' rights, for examination purposes only for its activities concerning examinations of plant breeders' rights.

Public Accessibility

3. The authority should consider which information, documents or material furnished for examination purposes are subject to:

Publication

4. Information published in the Official Gazette or by other means may include:

(a) applications for, and grants of, breeders' rights and proposed and approved denominations (see Article 30(1)(iii) of the 1991 Act, Article 30(1)(c) of the 1978 Act of the UPOV Convention and UPOV Model Plant Breeders' Rights Gazette);

(b) other information which may be mandatory under the applicable law: for example, changes in persons (applicants, holders and procedural representatives), descriptions and photographs of the variety.

¹ Reference in this document to the term "breeder" should be understood as defined in Article 1(iv) of the 1991 Act of the UPOV Convention, i.e.

“ – the person who bred, or discovered and developed, a variety,
– the person who is the employer of the aforementioned person or who has commissioned the latter's work, where the laws of the relevant Contracting Party so provide, or
– the successor in title of the first or second aforementioned person, as the case may be”

Public inspection

5. The authority should consider if, and under what circumstances, upon request, information, documents and material furnished for examination purposes may be subject to public inspection and what form the public inspection may take. It shall specify whether this request might include, for example, consultation of:

(a) the register(s) of applications and breeders' rights;

(b) information, documents and material relating to applications. For example with regard to the:

(i) *Application form*: Consideration should be given to whether all or some of the information which has not been published might be consulted: for example applications with other authorities, dates of first commercialization abroad or the status of the technical examination with other authorities (see UPOV Model Form for the Application for Plant Breeders' Rights, items 6 to 9).

(ii) *Technical Questionnaire*: Consideration should be given to whether some or all of the information in the Technical Questionnaire might be consulted. For example, document TGP/7.1 "Development of Test Guidelines" indicates that authorities may allow certain of the information in Section 4 "Information on the breeding scheme" and Section 7 "Additional information which may help in the examination of the variety" to be provided in a confidential section of the Technical Questionnaire.

(iii) *Growing trials*: Consideration should be given to whether the opportunity to visit growing trials would be given to all or some aspects of the growing trials. For example, the possibility might be limited to some part of the trial, to a particular pair of varieties in the trial or to general information about the trial (trial design, location, etc.).

(iv) *DUS report*: Consideration should be given to whether some or all information contained in the DUS report might be consulted. For example, public inspection might or might not be restricted to the results of the technical examination and conclusions and information on similar varieties and differences to these varieties (see UPOV Report on Technical Examination and UPOV Variety Description). Consideration should also be given to the possibility for public inspection of the interim DUS report (see UPOV Interim Report on Technical Examination).

(v) *Official description of the variety*

(vi) *Plant material in the variety collection*: Consideration should be given to if, and in what form, plant material might be subject to public inspection. Particular care should be taken with regard to any measures which would allow material to be removed for public inspection and the need to safeguard the interests of the breeder should be taken into account. In relation to the viewing of material, this should be considered in conjunction with public inspection of the growing trials (see paragraph (iii)).

Providing Information, Documents and Material to Other Authorities

6. Authorities are required to inform other members of the Union on the submission, registration and cancellation of denominations (see Article 20(6) of the 1991 Act, Article 13(6) of the 1978 Act of the UPOV Convention and UPOV Model Plant Breeders' Rights Gazette).

7. Authorities are encouraged to exchange information, documents and material furnished for examination in respect of varieties whose existence is a matter of common knowledge, in ways which will ensure the effective grant of breeders' rights and which safeguard the interests of the breeders. Arrangements for such exchange may be subject to formal agreements between authorities (see Model Administrative Agreement for International Cooperation in the Testing of Varieties).

8. In the case of varieties for which an application is under examination, authorities should consider the extent to which information, documents and material furnished for examination should be provided to other authorities. Particular consideration should be given with respect to providing material to other authorities in relation to safeguarding the interests of the breeder. Authorities may, for example, decide only to provide material if and when the application leads to the granting of a breeder's right or to the entering of the variety in the official register of varieties, as the case may be.

9. In cases where an application is rejected or withdrawn and the existence of the variety does not otherwise become a matter of common knowledge, authorities should consider the extent to which information, documents and material furnished for examination should be provided to other authorities. Particular consideration should be given with respect to providing material to other authorities in relation to safeguarding the interests of the breeder.

Material in Relation to Breeding Purposes

10. The authority shall, in particular, take appropriate measures to ensure that material furnished to it for examination is not used for breeding purposes without the authorization of the breeder. The authority may consider whether to make material furnished to it for the examination, available for further breeding after the expiration of the breeder's right. In such cases, the authority should differentiate between material of the variety which is subject of the plant breeder's right and other material, for example in relation to parent lines submitted in connection with an application for a hybrid variety.

11. The authority should follow the "UPOV Recommendations to ensure the independence of those DUS examination centers which have, or have links to, breeding activities".

Specific Aspects

12. The authority should consider its approach with regard to publication, public inspection, the provision of information to other authorities and material in relation to breeding purposes with respect to each of the following aspects:

(a) Status of the application:

- (i) *Applications still under examination;*
- (ii) *Withdrawn applications;*
- (iii) *Rejected applications;*
- (iv) *Varieties for which plant breeder's right has been granted.*

(b) Type of variety material: The authority may, for example, take a specific approach with regard to material of parent lines submitted in relation to an application for a hybrid variety, or with regard to information concerning the parentage of hybrid varieties.

(c) Cooperation in examination: The authority should consider its specific approach with regard to whether the DUS examination is:

- (i) *conducted by the authority itself;*
- (ii) *conducted by another authority on its behalf:* In such cases, the authority should consider establishing an agreement which addresses the handling of information, documents and material provided by the breeder to the other authority, or produced by the other authority (see Model Administrative Agreement for International Cooperation in the Testing of Varieties and UPOV Model Form for the Designation of the Sample of the Variety);
- (iii) *conducted on behalf of another authority:* In such cases (the reciprocal of (ii) above), the authority should consider establishing an agreement which addresses the handling of information, documents and material provided to it by the breeder, or which it produces, in respect of an application made with the other authority (see Model Administrative Agreement for International Cooperation in the Testing of Varieties and UPOV Model Form for the Designation of the Sample of the Variety);
- (iv) *based on trials carried out by, or on behalf of, the breeder:* In such cases the authority should consider which information, documents and material it requires the breeder to furnish (see Declaration on the Conditions for the Examination of a Variety Based Upon Trials Carried out by or on Behalf of the Breeder).

Transparency

13. The applicable law, rules and practices concerning information, documents and material furnished for examination purposes including, in particular, those aspects identified in these recommendations, shall be available to the breeder.

REFERENCES

Title	Document	Date
Development of Test Guidelines	TGP/7.1	March 31, 2004
Draft UPOV Recommendations to Ensure the Independence of Those DUS Examination Centers which have, or have links to, Breeding Activities	CAJ/49/3	Aug. 24, 2004
UPOV Model Plant Breeders' Rights Gazette	UPOV/INF/5 (UPOV Pub. 644(E) Sect.9)	May 9, 1979
UPOV Model Form for the Application for Plant Breeders' Rights	C/XVIII/9 Add., Annexes II and IV, Part I (UPOV Pub. 644(E) Sect.10)	Oct. 14, 1984
UPOV Model Form for the Designation of the Sample of the Variety	C/XIII/8, Annex II (UPOV Pub. 644(E) Sect.13)	April 25, 1979
Declaration on the Conditions for the Examination of a Variety Based Upon Trials Carried out by or on Behalf of the Breeder	C/27/15, Annex II (UPOV Pub. 644(E) Sect.16)	Oct. 29, 1993
Model Administrative Agreement for International Cooperation in the Testing of Varieties	C/27/15, Annex III (UPOV Pub. 644(E) Sect.19)	Oct. 29, 1993
UPOV Report on Technical Examination and UPOV Variety Description	TC/XXV/12, Annex, and TC/26/6, Annex I (UPOV Pub. 644(E) Sect.23)	Oct. 6, 1989 Oct. 12, 1990
UPOV Interim Report on Technical Examination	TC/XXV/12, Annex (UPOV Pub. 644(E) Sect.24)	Oct. 6, 1989

[End of Annex and of document]