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ADMINISTRATIVE AND LEGAL COMMITTEE

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**GUIDANCE CONCERNING INFORMATION, DOCUMENTS OR MATERIAL
FURNISHED BY THE BREEDER FOR EXAMINATION PURPOSES AND FOR
VERIFYING THE MAINTENANCE OF VARIETIES**

Document prepared by the Office of the Union

1. At its fiftieth session, on October 18 and 19, 2004, the Administrative and Legal Committee (CAJ) discussed document CAJ/50/2 “Draft recommendations concerning information, documents or material furnished for examination purposes” (draft recommendations). See paragraphs 1 to 7 of document CAJ/50/2 to obtain information on the historical background of the draft recommendations.
2. The CAJ agreed that a new version of document CAJ/50/2 should be prepared for the April session of the CAJ in 2005, taking into account the comments made at its October session in 2004 (see paragraphs 65 to 160 of document CAJ/50/7 Prov.).
3. The new version of document CAJ/50/2, which is presented as the Annex to this document, makes direct reference to the relevant provisions of the 1991 Act of the UPOV Convention where the authority may require the breeder to furnish necessary information, documents or material. This requirement is contained in Article 12, as regards examination purposes, and also in Article 22(1)(b)(i) for verification of the maintenance of the variety. As a consequence, the title of the new version of the draft document in the Annex has been changed to: “Guidance concerning information, documents or material furnished by the breeder for examination purposes and for verifying the maintenance of varieties”.

4. During the consideration of document CAJ/50/2, a discussion took place on the nature of the document. It was agreed that the document should provide clear guidance for existing and future members of the Union by means of a checklist or control list with the required degree of flexibility and without prejudice to the applicable law.

5. The Annex to this document includes guidance, mainly in a table form, on matters concerning the handling by authorities of information, documents and material furnished by breeders for examination purposes and for verifying the maintenance of varieties in the context of a plant breeder's right scheme in accordance with the UPOV Convention.

6. The CAJ is invited to consider and comment on the proposed "Guidance concerning information, documents or material furnished by the breeder for examination purposes and for verifying the maintenance of varieties" in the Annex to this document.

[Annex follows]

DRAFT

GUIDANCE CONCERNING INFORMATION, DOCUMENTS
OR MATERIAL FURNISHED BY THE BREEDER FOR EXAMINATION PURPOSES
AND FOR VERIFYING THE MAINTENANCE OF VARIETIES

Introduction

1. Without prejudice to applicable law and international treaties, the guidance in this document relates to the handling of information, documents and material furnished by breeders¹ to authorities¹ for examination purposes or for verifying the maintenance of varieties in the context of a plant breeder's right scheme in accordance with the UPOV Convention (see Article 12 and Article 22(1)(b)(i) of the 1991 Act of the UPOV Convention).

Obligations of Authorities

2. In drafting guidance concerning information, documents or material furnished by the breeder for examination purposes or for verifying the maintenance of varieties, it is recognized that the authority is required to act in accordance with its public service status. That status carries obligations with regard to its handling of information, documents and material and the safeguarding of the legitimate interests of the breeder. In particular, authorities are required to take the necessary measures to avoid the unauthorized removal and/or the misuse of information, documents and material.

3. In general, unless otherwise agreed with the breeder, the authority should only use information, documents and material of varieties, furnished by the breeder, for its activities concerning the examination of plant breeders' rights applications and verification of the maintenance of varieties, as appropriate.

4. The authority should follow the "UPOV Recommendations to ensure the independence of those DUS examination centers which have, or have links to, breeding activities" (draft document in CAJ/49/3).

Court Proceedings

5. Information, documents and material furnished by the breeder or generated by the authority concerning applications for and grants of breeders' rights might be requested in the context of court proceedings.

¹ Reference in this document to the terms "breeder" and "authority" should be understood as defined in Article 1(iv) and (ix), respectively, of the 1991 Act of the UPOV Convention.

Guidance

6. It is for each authority to decide which information, documents or material furnished by the breeder it publishes (e.g. in its official gazette), makes available to the public on request or to other authorities. The following table is intended to provide some guidance where sought by authorities.

7. The Table should be read as follows: grey boxes should be understood as “not appropriate”; columns referring to “available to DUS examiners in other territories” cover situations where the DUS examination is not conducted by the authority itself; footnotes in the Table relate to UPOV documents used as a reference (e.g. ^{a, b, c}...); additional information indicated by a corresponding note (e.g. ^{see note 1, 2, 3...}) has been incorporated in the Appendix at the end of the Table (notes in the Appendix should be read in conjunction with the following Table).

INFORMATION, DOCUMENTS AND MATERIAL FURNISHED BY THE BREEDER FOR EXAMINATION PURPOSES
(ARTICLE 12 OF THE 1991 ACT OF THE UPOV CONVENTION)

1. APPLICATION / TECHNICAL QUESTIONNAIRE (TQ) INFORMATION

Ref. ^a		publication (e.g. in the official gazette) (see note 1)	UPOV publications (see note 2)	available to public on request	make available to: other authorities/DUS examiners in other territories
	Filing date and number	encouraged	UPOV-ROM		
1.	(a) Applicant's name and address(es)	encouraged	UPOV-ROM		
	(b) Nationality	discretionary	summary (C/38/7)	encouraged	encouraged
4.	(a) Proposed denomination	encouraged	UPOV-ROM		
	(b) Breeder's reference	encouraged	UPOV-ROM		
5.	(a) Breeder (if different from applicant)	encouraged	UPOV-ROM		
	(c) State(s) in which the variety was bred	discretionary		encouraged	encouraged
6.	(a) Further applications for protection	discretionary	UPOV-ROM	encouraged	encouraged
	(b) Further applications for official variety listing	discretionary	UPOV-ROM	encouraged	encouraged
7.	Priority claim	discretionary	UPOV-ROM	encouraged	encouraged
8.	Previous sales / marketing and denomination used			encouraged	encouraged
9.	(a) Status of technical examination			discretionary	encouraged
	(c) Authorization to exchange information and material with authorities of other members of the Union				encouraged
TQ	Sections 5 (characteristics of the variety), 6 (similar varieties and differences), 8 (authorization for release), 9 (information on plant material)			encouraged	encouraged
TQ	Section 4: information on the breeding scheme and propagation of the variety Section 7: additional information which may help in the examination of the variety (including e.g. photographs)			discretionary: authorities may allow certain of this information to be provided in a confidential section of the TQ (e.g. information on parent lines of hybrid candidate varieties)	encouraged: authorities may choose not to provide certain information (e.g. information on parent lines of hybrid candidate varieties)

^a Numbers in the column of this Section relate to the item of the UPOV Model Form Application for Plant Breeders' Right (TGP/5: Section 2 (Annexes II and IV, Part I of document C/XVIII/9 Add.) (UPOV Publication No. 644(E), Section 10)) and TQ refers to Technical Questionnaire (TGP/7/1: Development of Test Guidelines: Annex 1 TG Template).

2. VARIETY DENOMINATION INFORMATION (see note 3)

	publication (e.g. in the official gazette)	UPOV publications	available to public on request	make available to other authorities
Denominations: Applications	encouraged	UPOV-ROM		
Denominations: Approval	encouraged	UPOV-ROM		
Denominations: Cancellations	encouraged	UPOV-ROM		
Denominations: Applications for a new denomination	encouraged	UPOV-ROM		
Denominations: Approval of new denomination	encouraged	UPOV-ROM		

3. PROCESSING

	publication (e.g. in the official gazette)	UPOV publications	available to public on request	make available to other authorities
Withdrawal of applications	encouraged	UPOV-ROM		
Proposed rejection of application	discretionary			
Rejection of application	encouraged	UPOV-ROM		
Proposed grant of protection	discretionary			
Provisional description (proposed grant of protection)	discretionary			
Grant of protection	encouraged	UPOV-ROM		
Surrender	encouraged	UPOV-ROM		
Cancellation	encouraged	UPOV-ROM		
Nullity	encouraged	UPOV-ROM		
Basis for decisions taken by the authority (e.g. lack of novelty)	discretionary		discretionary	encouraged
Explanation on decisions taken by the authority (e.g. details concerning lack of novelty)			discretionary	discretionary
Compulsory licenses	encouraged			
Expiration	encouraged	UPOV-ROM		
Changes of applicant	encouraged	UPOV-ROM		
Changes of holder	encouraged	UPOV-ROM		
Changes of agent	encouraged	UPOV-ROM		
Licenses	discretionary		discretionary	

4. DUS EXAMINATION

Ref.		publication (e.g. in the official gazette)	available to public on request	make available to DUS examiners in other territories	make available to other authorities
	Growing trials and other necessary tests (see note 4)		access: discretionary	access: discretionary	access: encouraged
	DUS raw data				discretionary: e.g. in relation to purchased DUS report
^b	DUS Report: interim			discretionary	encouraged
^c	DUS Report (Sections 12 – 17): final		discretionary	encouraged	encouraged
^d	Variety description: Section 14: Group Section 15: Characteristics included in UPOV TG or National TG Section 16: Similar Varieties and Differences from these Varieties Section 17: Additional Information (e.g. photograph)	discretionary	discretionary	encouraged	encouraged
	Other information in the file				discretionary: e.g. in relation to purchased DUS report

^b UPOV Interim Report on Technical Examination (TGP/5: Section 7 (TC/XXV/12, Annex) (UPOV Pub. 644(E), Section 24))

^c UPOV Report on Technical Examination (TGP/5: Section 6 (TC/XXV/12, Annex) (UPOV Pub. 644(E), Section 23))

^d UPOV Variety Description (TGP/5: Section 6 (TC/26/6, Annex I) (UPOV Pub. 644(E), Section 23))

5(a) MATERIAL of the CANDIDATE VARIETY furnished by the BREEDER (see note 5)

Status	make available to DUS examiners in other territories	available to other authorities	available for specific non PBR purposes (see note 8)	destroy or return to breeder
PBR pending		discretionary, on the basis that the material is destroyed or returned to the breeder if the variety is not granted PBR (see note 6)		
PBR withdrawn				encouraged
PBR rejected				encouraged
PBR granted	encouraged, subject to safeguarding the legitimate interests of the breeder (e.g. parent lines) (see note 7)	encouraged, subject to safeguarding the legitimate interests of the breeder (e.g. parent lines) (see note 7)		
PBR cancelled	encouraged, subject to safeguarding the legitimate interests of the breeder (e.g. parent lines) (see note 7)	encouraged, subject to safeguarding the legitimate interests of the breeder (e.g. parent lines) (see note 7)	discretionary (e.g. gene bank) (see note 9)	
PBR surrendered				
PBR expired				
PBR nullified				encouraged

5(b) RESIDUE of the TRIAL using MATERIAL of the CANDIDATE VARIETY furnished by the BREEDER (see note 5)

Once the examination is complete, authorities are encouraged to destroy [or return to the breeder] the residue of the trial using material of the candidate variety furnished by the breeder, unless otherwise agreed with the breeder.

5(c) MATERIAL NOT of the CANDIDATE VARIETY furnished by the BREEDER (see note 5)

Authorities are encouraged to destroy or return to the breeder all material not of the candidate variety furnished by the breeder, unless otherwise agreed with the breeder.

INFORMATION, DOCUMENTS AND MATERIAL FURNISHED BY THE BREEDER FOR VERIFYING THE MAINTENANCE OF THE VARIETY (ARTICLE 22(1)(b)(i) OF THE 1991 ACT OF THE UPOV CONVENTION)

6. INFORMATION and DOCUMENTS concerning the PROTECTED VARIETY

	publication	available to public on request	make available to other authorities
Information and documents		discretionary	encouraged

7(a) MATERIAL of the PROTECTED VARIETY furnished by the BREEDER for VERIFYING the MAINTENANCE of the PROTECTED VARIETY (see note 10)

	available to DUS examiners in other territories	available to other authorities	available for specific non PBR purposes (see note 8)
Material of the protected variety	encouraged, subject to safeguarding the legitimate interests of the breeder (e.g. parent lines) (see note 7)	encouraged, subject to safeguarding the legitimate interests of the breeder (e.g. parent lines) (see note 7)	discretionary (e.g. gene bank)

7(b) RESIDUE of the TRIAL using MATERIAL of the PROTECTED VARIETY furnished by the BREEDER for VERIFYING the MAINTENANCE of the PROTECTED VARIETY (see note 10)

Once the verification is complete, authorities are encouraged to destroy [or return to the breeder] the residue of the trial using material of the protected variety furnished by the breeder, unless otherwise agreed with the breeder.

7(c) MATERIAL NOT of the PROTECTED VARIETY furnished by the BREEDER for VERIFYING the MAINTENANCE of the PROTECTED VARIETY (see note 10)

Authorities are encouraged to destroy or return to the breeder all material not of the protected variety furnished by the breeder for verifying the maintenance of the protected variety, unless otherwise agreed with the breeder.

[Appendix follows]

APPENDIX

NOTES OF THE TABLE ON INFORMATION, DOCUMENTS
OR MATERIAL FURNISHED BY THE BREEDER FOR EXAMINATION PURPOSES AND FOR
VERIFYING THE MAINTENANCE OF VARIETIES

Publication

Note 1: Sections 1 to 4 of the Table refers to information published by the authority (e.g. in its Official Gazette), including:

(a) information concerning applications for, and grants of, breeders' rights and proposed and approved denominations (Article 30(1)(iii) of the 1991 Act, Article 30(1)(c) of the 1978 Act of the UPOV Convention). See also the UPOV Model Plant Breeders' Rights Gazette (UPOV/INF/5 (UPOV Pub. 644(E) Section 9)) and UPOV Model Form for the Application for Plant Breeders' Right (TGP/5: Section 2 (Annexes II and IV, Part I of document C/XVIII/9 Add.) (UPOV Publication No. 644(E), Section 10));

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

UPOV Publications

Note 2: The column "UPOV Publications" in Sections 1 to 3 of the Table refers to information submitted by authorities as a contribution to UPOV documents and publications including, in particular, the Plant Variety Database (UPOV-ROM) which contains data on applications for plant breeders' rights, proposed and approved denominations, relevant parties and information regarding equivalent applications in the territories of other authorities.

Variety Denominations

Note 3: Authorities are required to inform other members of the Union on matters concerning variety denominations, in particular 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) (see Section 2 "Variety denomination information" of the Table).

Growing Trials

Note 4: In Section 4 "DUS Examination" of the Table, reference is made to growing trials. Consideration should be given to whether the opportunity to visit growing trials would be given to all or only to some aspects of the growing trials. In particular, the authority may avoid any access to the part of a growing trial which contains material of parent lines submitted in relation to an application for a hybrid variety. Furthermore, for example, the opportunity to visit 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.) and the varieties in the trial might be coded. Particular measures should be taken to avoid the removal of material during such visits.

Material of Parent Lines Furnished by the Breeder in Relation to an Application for a Hybrid Variety

Note 5: Guidance in the Table, in particular in Section 5, refers only to material of the candidate variety. In the case of material of parent lines submitted as a part of the examination of a candidate hybrid variety, material should only be made available to other authorities and other DUS examiners in such a way that the legitimate interests of the breeder would be safeguarded. Unless agreed otherwise by the breeder, arrangements for such exchange should only concern parent lines of hybrid varieties which have been granted plant breeders' rights (PBR) or for which PBR have expired and the breeder should be notified accordingly.

Candidate Varieties

Note 6: In the case of varieties for which an application is under examination, particular consideration should be given with respect to providing material to other authorities in relation to safeguarding the legitimate interests of the breeder. Authorities may, for example, decide not to provide material of candidate varieties or may decide to provide material of a candidate variety on the basis that the material is destroyed or returned to the breeder if the application does not lead to the granting of a breeder's right (see Section 5(a) of the Table "Material of the Candidate Variety Furnished by the Breeder"). Arrangements for such exchange concerning candidate varieties should be subject to formal agreements between authorities and the breeders should be notified accordingly (see Model Administrative Agreement for International Cooperation in the Testing of Varieties (TGP 5: Section 1 (Annex III of document C/27/15) (UPOV Pub. 644(E) Section 19)).

Protected Varieties

Note 7: In respect of protected varieties, authorities are encouraged to exchange information, documents and material furnished by the breeder for examination purposes or for verifying the maintenance of varieties, in ways which will ensure the effective grant of breeders' rights and which safeguard the legitimate interests of the breeders.

Material Available for Purposes other than Examination Purposes and the Verification of the Maintenance of Varieties

Note 8: The authority should take appropriate measures to ensure that material furnished to it for examination purposes or for verifying the maintenance of varieties is not used for breeding purposes without the authorization of the breeder.

Note 9: Notwithstanding Note 8, in a case where an authority makes material furnished to it available for other purposes (e.g. for inclusion in a gene bank) after the termination of the breeder's right, the authority should differentiate between material of the variety which is the subject of the plant breeder's right and other material, for example material of parent lines submitted in connection with an application for a hybrid variety, which it is encouraged to destroy or return to the breeder.

Material of Parent Lines Furnished by a Breeder for Verifying the Maintenance of a Protected Hybrid Variety

Note 10: The principle explained in Note 5 also applies to material of parent lines furnished by a breeder for verifying the maintenance of a protected hybrid variety.

[End of Appendix and of document]