



CAJ/69/2

ORIGINAL: English

DATE: February 20, 2014

# INTERNATIONAL UNION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS

Geneva

## ADMINISTRATIVE AND LEGAL COMMITTEE

### Sixty-Ninth Session Geneva, April 10, 2014

#### DEVELOPMENT OF INFORMATION MATERIALS CONCERNING THE UPOV CONVENTION

*Document prepared by the Office of the Union*

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1. The purpose of this document is to: provide background information to assist the Administrative and Legal Committee (CAJ) in its consideration of relevant matters at its sixty-ninth session; report on the work of the advisory group to the CAJ (CAJ-AG); and present a tentative program for the development of information materials.

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## I. BACKGROUND

2. The CAJ, at its fifty-second session, held in Geneva on October 24, 2005, agreed an approach for the preparation of information materials concerning the UPOV Convention, as explained in document CAJ/52/4, paragraphs 8 to 10. It also agreed to the establishment of an advisory group to the CAJ (CAJ-AG) to assist in the preparation of documents concerning such materials, as proposed in document CAJ/52/4, paragraphs 11 to 14 (see document CAJ/52/5 "Report", paragraph 67).

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

## II. OVERVIEW OF THE DEVELOPMENT OF INFORMATION MATERIALS

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

## III. MATTERS CONCERNING ESSENTIALLY DERIVED VARIETIES

### Seminar on Essentially Derived Varieties

5. The Seminar on Essentially Derived Varieties was held in Geneva, on October 22, 2013 (Seminar). The Seminar considered the following:

(a) technical and legal views on "predominantly derived", "essential characteristics" and "differences which result from the act of derivation", the relationship between Article 14(5)(b)(i) and (iii) of the 1991 Act of the UPOV Convention and the possible impact on breeding and agriculture;

(b) existing experience in relation to EDVs; and

(c) the possible role of future UPOV guidance on EDVs in cases before the courts.

6. The Seminar was open to the public and was attended by 177 participants. Copies of the presentations and a video of the Seminar are available on the UPOV website at: [http://www.upov.int/meetings/en/details.jsp?meeting\\_id=29782](http://www.upov.int/meetings/en/details.jsp?meeting_id=29782)

7. The English version of the Publication of the Seminar (Publication 358), which contains the speakers' written contributions and discussions, is available at [http://www.upov.int/meetings/en/details.jsp?meeting\\_id=29782](http://www.upov.int/meetings/en/details.jsp?meeting_id=29782). Paper versions of Publication 358(E) will be distributed to the CAJ at its sixty-ninth session.

8. Publication 358 in French, German and Spanish will be posted on the UPOV website, once they become available, and designated persons in UPOV bodies and participants at the Seminar will be notified accordingly.

#### Work of the CAJ-AG on Essentially Derived Varieties

9. The CAJ, at its sixty-eighth session, held in Geneva on October 21, 2013, requested the CAJ-AG to consider at its eighth session, the discussions at the Seminar on Essentially Derived Varieties (EDV Seminar), to be held on October 22, 2013, in relation to the CAJ-AG work on future guidance concerning essentially derived varieties, as set out in document CAJ/68/2, paragraphs 13 to 16 (see document CAJ/68/10 "Report on the Conclusions", paragraph 11).

10. The following paragraphs contain the conclusions of the CAJ-AG on essentially derived varieties, at its eighth session, held in Geneva on October 21 and 25, 2013 (see document CAJ-AG/13/8/10 "Report", paragraphs 38 to 49).

11. The CAJ-AG considered documents CAJ-AG/13/8/2 and UPOV/EXN/EDV/2 Draft 3, the views expressed by the representatives from the Association for Plant Breeding for the Benefit of Society (APBEBES) and the International Community of Breeders of Asexually Reproduced Ornamental and Fruit Varieties (CIOPORA), as set out in paragraphs 6 to 11 of document CAJ-AG/13/8/10 "Report", and, as requested by the CAJ at its sixty-eighth session, the discussions at the EDV Seminar.

#### *UPOV/EXN/EDV/2 Draft 3 "Explanatory Notes on Essentially Derived Varieties under the 1991 Act of the UPOV Convention"*

12. The CAJ-AG noted that the CAJ, at its sixty-seventh session, held in Geneva on March 21, 2013, had agreed that consideration of document UPOV/EXN/EDV/2 Draft 3 "Explanatory Notes on Essentially Derived Varieties under the 1991 Act of the UPOV Convention" should be postponed until after the Seminar on Essentially Derived Varieties (EDVs), and the consideration of that seminar by the CAJ-AG at its eighth session (see document CAJ/67/14 "Report on the Conclusions", paragraph 15).

13. The CAJ-AG also noted that the CAJ, at its sixty-seventh session, had agreed that consideration should be given to moving paragraph 8 of document UPOV/EXN/EDV/2 Draft 3 after paragraph 4. The CAJ-AG agreed that paragraph 8 of document UPOV/EXN/EDV/2 Draft 3 should be moved after paragraph 4 for the next draft of the document.

#### *The use of information of the initial variety to obtain essentially derived varieties*

14. The CAJ-AG recalled that it had agreed that consideration should be given to the following text as a starting point of a possible example on the use of information of the initial variety to obtain essentially derived varieties (see document CAJ-AG/13/8/2, paragraphs 6 and 7):

The use of molecular data from an initial variety, for the purpose of selection of genotypes from a population that is mostly related to the initial variety, to produce a variety with a similar genotype may provide evidence of predominant derivation.

15. The CAJ-AG noted that the above example would be circulated with the Draft Report (document CAJ-AG/13/8/10 Prov.), with three months to be provided for comments (see document CAJ-AG/13/8/10 Prov., paragraph 44(h)).

16. The CAJ-AG noted that the concept of indirect derivation was already introduced in document UPOV/EXN/EDV/1 as follows:

"5. Essentially derived varieties are obtained, either directly or indirectly, from a variety which is called the "initial variety". In the example in Figure 1, variety B is an essentially derived variety from variety A and is predominantly derived from variety A. Essentially derived varieties can also be indirectly obtained from an initial variety. In the example in Figure 2, Variety C is essentially derived from Initial Variety 'A', but is predominantly derived from variety B.

"6. Irrespective of whether variety C has been obtained directly from the initial variety A or not, it is an essentially derived variety from variety A if it fulfills the definition stated in Article 14 (5) (b).

"7. Another example of an indirect way in which it might be possible to obtain an essentially derived variety from an initial variety could be the use of a hybrid variety to obtain a variety which is essentially derived from one of the parent lines of the hybrid."

*The relationship between Article 14(5)(b)(i) and (iii) of the 1991 Act of the UPOV Convention*

17. The CAJ-AG requested the Office of the Union to prepare a text for inclusion in a new draft of document UPOV/EXN/EDV/2 on the following basis:

(a) to include a Preamble with a reference to the mandate of the 1991 Diplomatic Conference:

"The Diplomatic Conference for the Revision of the International Convention for the Protection of New Varieties of Plants, held in Geneva from March 4 to 19, 1991, adopted the following resolution (see document DC/91/140):

'Resolution on Article 14(5)

"The Diplomatic Conference for the Revision of the International Convention for the Protection of New Varieties of Plants held from March 4 to 19, 1991, requests the Secretary-General of UPOV to start work immediately after the Conference on the establishment of draft standard guidelines, for adoption by the Council of UPOV, on essentially derived varieties."

(b) to clarify in the Preamble the purpose of the guidance in relation to members of the Union and stakeholders;

(c) to include the text of document UPOV/EXN/EDV/1 "Explanatory Notes on Essentially Derived Varieties under the 1991 Act of the UPOV Convention", which was adopted by the Council, at its forty-third ordinary session, held in Geneva on October 22, 2009 (see document C/43/17 "Report", paragraph 23);

(d) to include the text of draft UPOV/EXN/EDV/2 "Explanatory Notes on Essentially Derived Varieties under the 1991 Act of the UPOV Convention" (revision) that had already been agreed by the CAJ-AG;

(e) to consider the inclusion of relevant part of the draft guidance presented in document IOM/6/2 "Essentially Derived Varieties" at the Sixth Meeting with International Organizations (IOM/6), taking into consideration the discussions at the IOM/6 on the above proposals contained in document IOM/6/5 "Report" (copies of documents IOM/6/2 "Essentially Derived Varieties" and IOM/6/5 "Report" in the four languages of the Office of the Union are posted, as reference documents, on the CAJ-AG/13/8 section of the UPOV website);

(f) to include the following elements from the EDV Seminar:

(i) the need to consider the situation in different crops/species and methods of breeding, e.g. mutants;

(ii) to explain the need to consider both predominant derivation (genetic conformity) and essential characteristics (phenotype) and for both those aspects to be considered as possible starting points, noting that the result would be the same;

(g) to include, as a possible starting point, the text of the explanatory note 6(ii) on Article 5 "Effects of the Right Granted to the Breeder" presented in document IOM/IV/2 (see document IOM/6/2 "Essentially Derived Varieties", paragraph 12, and document CAJ-AG/12/7/3, paragraph 11, reproduced below):

"[...]

"(ii) 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)

"[...]"

The CAJ-AG noted that the above text would be circulated with the Draft Report (document CAJ-AG/13/8/10 Prov.), with three months to be provided for comments (see document CAJ-AG/13/8/10 Prov., paragraph 44(h)); and

(h) the Office of the Union to provide possible EDV examples based on: the examples provided in document IOM/6/2 “Essentially Derived Varieties”; the examples provided by Australia and Japan in the EDV Seminar; the example provided on the use of information of the initial variety to obtain EDVs; and the explanatory note 6(ii) on Article 5 “Effects of the Right Granted to the Breeder” presented in document IOM/IV/2 (see paragraphs 41 and 44(g) of document CAJ/AG/13/8/10 Prov.); the CAJ-AG would have three months to provide comments on the EDV examples. The Delegation of Australia offered to provide additional information on the context of the examples provided by Australia at the ninth session of the CAJ-AG.

18. The CAJ-AG, at its eighth session, agreed the following approach in order to advance on relevant matters between the eighth and the ninth sessions of the CAJ-AG (see document CAJ-AG/13/8/10 “Report”, paragraph 81):

- Circulation of the “Draft Report” (document CAJ-AG/13/8/10 Prov.) by November 15, 2013, with EDV examples
- Comments on the “Draft Report” (document CAJ-AG/13/8/10 Prov.) by December 13, 2013
- Comments on EDV examples by February 21, 2014
- Circulation of new drafts of relevant explanatory notes by May 9, 2014
- Comments on new drafts of relevant explanatory notes by June 21, 2014
- Revised new drafts of relevant explanatory notes to be posted by August 29, 2014.

*Matters concerning essentially derived varieties that are not granted protection in their own right*

19. The CAJ-AG agreed to consider the development of guidance on the matters raised in paragraphs 15 to 18 of document CAJ-AG/13/8/2, 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.

20. The CAJ-AG noted that the matters raised in paragraphs 15 to 18 of document CAJ-AG/13/8/2 would not arise if breeders protected EDVs in their own right.

*Presentations on systems in the members of the Union concerning essentially derived varieties*

21. The CAJ-AG noted 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 would be invited to make presentations on their systems concerning essentially derived varieties.

*Session III of the EDV Seminar “Possible role of future UPOV guidance on essentially derived varieties”*

22. The CAJ-AG noted the closing remarks of the President of the Council in Session III of the EDV Seminar “Possible role of future UPOV guidance on essentially derived varieties” in relation to the following topics:

(i) experiences on the role of “soft law”/guidance in different jurisdictions and in relation to other subject matters; and

(ii) the potential of alternative dispute settlement mechanisms as a tool for building guidance resulting from award/expert determination EDV cases.

23. The CAJ-AG agreed to consider the inclusion of information on alternative dispute settlement mechanisms for EDV matters in document UPOV/EXN/EDV/2, including a reference to document UPOV/INF/21 “Alternative Dispute Settlement Mechanisms”. As a first step, the CAJ-AG agreed that the Office of the Union should prepare an information document for the CAJ-AG on developments on alternative dispute settlement mechanisms at CIOPORA, the International Seed Federation (ISF) and the World Intellectual Property Organization (WIPO). In that regard, the CAJ-AG noted that one aspect for consideration would be the possible role of UPOV in the provision of experts on EDV matters.

24. *The CAJ is invited to note:*

*(a) the developments concerning the publication of the Seminar on Essentially Derived Varieties, which was held in Geneva, on October 22, 2013, as set out in paragraphs 6 to 8, above;*

*(b) the work of the CAJ-AG, at its eighth session, concerning a new draft of document UPOV/EXN/EDV/2 “Explanatory Notes on Essentially Derived Varieties under the 1991 Act of the UPOV Convention”, as set out in paragraphs 9 to 18, above;*

*(c) that the CAJ-AG, at its eighth session, agreed to consider the development of guidance concerning the status of essentially derived varieties that were not granted protection in their own right, after the adoption of the revised document UPOV/EXN/EDV/2, as set out in paragraphs 19 and 20, above;*

*(d) that the CAJ-AG, at its eighth session, noted 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 would be invited to make presentations on their systems concerning essentially derived varieties, as set out in paragraph 21, above; and*

*(e) that the CAJ-AG, at its eighth session, agreed that the Office of the Union should prepare an information document for the CAJ-AG on developments on alternative dispute settlement mechanisms at CIOPORA, the International Seed Federation (ISF) and the World Intellectual Property Organization (WIPO) and that the CAJ-AG noted that one aspect for consideration would be the possible role of UPOV in the provision of experts on EDV matters, as set out in paragraph 23, above.*

#### IV. MATTERS CONCERNING VARIETY DESCRIPTIONS

25. At its sixth session, held in Geneva on October 18, 2011, the CAJ-AG considered that it would be appropriate to develop further guidance on variety descriptions (see CAJ-AG/11/6/7 “Report”, paragraph 10).

26. The CAJ-AG, at its eighth session, held in Geneva on October 21 and 25, agreed that the following matters in document CAJ-AG/13/8/7 “Matters concerning Variety Descriptions”, paragraph 4, should be considered by the CAJ-AG in the first instance (see document CAJ-AG/13/8/10 “Report”, paragraph 72):

“(a) the purpose(s) of the variety description developed at the time of grant of the right (original variety description);

“(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:

“[...]”

“(iii) the enforcement of the right.”

27. The CAJ-AG, at its eighth session, 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").

28. The CAJ-AG, at its eighth session, agreed to propose to the CAJ that the following matters in document CAJ-AG/13/8/7, paragraph 4, should be considered by the TC in the first instance (see document CAJ-AG/13/8/10 "Report", paragraph 74):

"[...]"

"(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 characteristics<sup>1</sup>);

"(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."

29. The CAJ is invited to consider the proposal of the CAJ-AG, for the CAJ to invite the TC to consider the development of further guidance on certain matters concerning variety descriptions, as set out in paragraphs 27 and 28 of this document.

30. *The CAJ is invited to:*

*(a) note the matters concerning variety descriptions to be considered by the CAJ-AG in the first instance, as set out in paragraph 26 of this document; and*

*(b) consider the proposal by the CAJ-AG to invite the TC to consider the development of guidance on certain matters concerning variety descriptions, as set out in paragraphs 27 and 28 of this document.*

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<sup>1</sup> "[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)).  
"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)

V. MATTERS CONCERNING OBSERVERS IN THE CAJ-AG

Conclusions of the Consultative Committee concerning participation of observers in the CAJ-AG

31. The CAJ, at its sixty-seventh session, agreed to invite the Consultative Committee and the Council to provide guidance on the proposals concerning participation of observers in the CAJ-AG, as set out in document CAJ/67/2 "Development of information materials concerning the UPOV Convention", paragraphs 25 to 27 (see document CAJ/67/14 "Report on the Conclusions", paragraph 22). Paragraphs 25 to 27 of document CAJ/67/2 are reproduced below for ease of reference:

"25. The CAJ, at its sixty-fifth session, held in Geneva on October 29, 2012, noted the suggestion of the Association for Plant Breeding for the Benefit of Society (APBREBES) to include a limited number of permanent places for observers representing various stakeholder groups such as farmers, breeders and certain other observer non-governmental organizations (NGOs) (e.g. two per stakeholder group) in the CAJ-AG and to allow the stakeholder groups to coordinate on the persons to occupy those places at each session of the CAJ-AG, according to the matters under consideration. It also noted the suggestion by APBREBES that those permanent places could be supplemented on an *ad hoc* basis, as considered appropriate by the CAJ-AG. The CAJ agreed to invite the CAJ-AG to consider that approach at its seventh session, in October 2012 (see document CAJ/65/12 "Report on the Conclusions" paragraph 23).

"26. The CAJ-AG, at its seventh session, considered document CAJ-AG/12/7/5 and the views of APBREBES (see document CAJ-AG/12/7/6 "Report on the conclusions", paragraph 30).

"27. With regard to the request of the CAJ, at its sixty-fifth session, for the CAJ-AG to consider the suggestion to include a limited number of permanent places for observers representing various stakeholder groups such as farmers, breeders and certain other observer non-governmental organizations (NGOs) in the CAJ-AG and to allow the stakeholder groups to coordinate on the persons to occupy those places at each session of the CAJ-AG, according to the matters under consideration, the CAJ-AG noted that document UPOV/INF/7 "Rules of Procedure of the Council", Rules 36 and 20, states as follows:

'Rule 36: Establishment of Committees

'(1) The Council may set up permanent or temporary committees to prepare its work or to examine technical, legal or any other questions of interest to UPOV.

'(2) When setting up any committees, the Council shall establish the terms of reference of that committee and shall determine whether and to what extent observers will be invited to the meetings of the committee; the Council may, at any time, decide changes in the initial terms of reference and in the decision concerning observers."

'Rule 20: Observers and Experts

'(1) Observers and experts may take part in debates at the invitation of the chairman.

'(2) They may not submit proposals, amendments or motions, and have no right to vote."

"(see document CAJ-AG/12/7/6 "Report on the conclusions", paragraph 31)."

32. The CAJ, at its sixty-eighth session, held in Geneva on October 31, 2014, noted that the Consultative Committee, at its eighty-sixth session to be held in Geneva on October 23, 2013, would consider relevant matters concerning the participation of observers in the CAJ-AG. The CAJ noted that the conclusions of the Consultative Committee would be reported to the CAJ.

33. The Consultative Committee, at its eighty-sixth session, endorsed the current approach whereby the CAJ-AG invites, on an *ad hoc* basis, organizations that have observer status in the CAJ to present their views at the relevant part of the CAJ-AG, as it considers appropriate. The Council, at its forty-seventh ordinary session, held in Geneva on October 24, 2013, noted the conclusions of the Consultative Committee concerning the participation of observers in the CAJ-AG (see documents C/47/15 Rev. "Report by the President on the work of the eighty-sixth session of the Consultative Committee; adoption of recommendations, if any, prepared by that Committee", paragraph 41 and C/47/19 "Report on the Decisions", paragraph 19).

*34. The CAJ is invited to note that the Consultative Committee, at its eighty-sixth session, endorsed the current approach whereby the CAJ-AG invites, on an ad hoc basis, organizations that have observer status in the CAJ to present their views at the relevant part of the CAJ-AG, as it considers appropriate.*



Ad hoc invitations to the relevant part of the ninth session of the CAJ-AG

35. The CAJ-AG, at its eighth session, recalled that observers to the CAJ could send comments on relevant matters of the program of the CAJ-AG. The CAJ-AG agreed that, in cases where written comments were received from observers to the CAJ, the CAJ-AG would invite those observers to the relevant part of the ninth session of the CAJ-AG and the Office of the Union would issue the corresponding *ad hoc* invitations (see document CAJ-AG/13/8/10 "Report", paragraph 83).

36. *The CAJ is invited to:*

(a) *note that the CAJ-AG, at its eighth session, had recalled that observers to the CAJ could send comments on relevant matters of the program of the CAJ-AG and that, in cases where written comments were received from observers to the CAJ, the CAJ-AG had agreed to invite those observers to the relevant part of the ninth session of the CAJ-AG and the Office of the Union would issue the corresponding ad hoc invitations;*

(b) *endorse the approach for ad hoc invitations for the ninth session of CAJ-AG, presented in paragraph (a), above, for future sessions of the CAJ-AG.*

VI. REPORT OF THE WORK OF THE CAJ-AG AT ITS EIGHTH SESSION

37. The CAJ-AG held its eighth session in Geneva on October 21 and 25, 2013. The report of the CAJ-AG at its eighth session (document CAJ-AG/13/8/10 "Report") has been posted on the CAJ-AG and CAJ/69 sections of the UPOV website.

38. In addition to matters reported in Part III "Matters concerning essentially derived varieties", Part IV "Matters concerning variety descriptions" and Part V "Matters concerning observers in the CAJ-AG" of this document, the following matters were considered by the CAJ-AG at its eighth session.

Explanatory Notes on Propagation and Propagating Material

39. The CAJ-AG, at its eighth session, considered document UPOV/EXN/PPM Draft 1 "Explanatory Notes on Propagation and Propagating Material" and the views expressed by APBREBES, CIOFORA and ISF, as set out in paragraphs 13 to 29 of document CAJ-AG/13/8/10 "Report" (see document CAJ-AG/13/8/10 "Report", paragraphs 50 to 54).

40. The CAJ-AG agreed to amend paragraph 1 of document UPOV/EXN/PPM Draft 1 to read:

"1. Whether material is propagating material is a matter of fact but ~~also of~~ [may also] include the intention on the part of those concerned (producer, seller, supplier, buyer, recipient, user). For example, the intention of the producer, seller or supplier is not the only relevant aspect, but also the intention of the buyer, recipient or user of material. Thus, even though one party might have not anticipated that material would be used for propagation, another concerned party might have the intention to use the material for propagation. In particular, the explanation in Article 14(2) and in Article 16(2)(ii) of the 1991 Act of the UPOV Convention means that harvested material includes entire plants and parts of plants, ~~which is material that can potentially be used for propagating purposes, means that at least some forms of harvested material have the potential to be used as propagating material."~~

41. The CAJ-AG agreed to amend paragraph 3 of document UPOV/EXN/PPM Draft 1 to read:

"3. The following, non-exhaustive, list of factors, 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;
- (iv) the intention on the part of those concerned (producer, seller, supplier, buyer, recipient, user); ~~and or~~
- (v) whether the plant material is suitable for reproducing the variety unchanged."

42. The CAJ-AG noted that the Delegation of Argentina would make a proposal in relation to paragraph 3 and, if appropriate, any corresponding adjustment to paragraph 1 of document UPOV/EXN/PPM Draft 1.

43. The CAJ-AG requested the Office of the Union to prepare a new draft of document UPOV/EXN/PPM on the above basis.

*44. The CAJ is invited to note the plans of the CAJ-AG concerning the development of the "Explanatory Notes on Propagation and Propagating Material under the UPOV Convention", as set out in paragraphs 39 to 43, above.*

#### Explanatory Notes on Acts in Respect of Harvested Material

45. The CAJ-AG, at its eighth session, considered document CAJ-AG/13/8/3 "Explanatory Notes on Acts in Respect of Harvested Material", the comments of the Russian Federation of October 21, and of October 25, 2013, which had been circulated to the participants and posted on the CAJ-AG website, the comments in document CAJ-AG/13/8/10 "Report", paragraphs 31 to 37, and the views expressed by APBRES, CIOFORA and ISF (see document CAJ-AG/13/8/10 "Report", paragraphs 55 to 58).

46. With regard to Examples 1 to 11, the CAJ-AG, at its eighth session, agreed:

General	To provide an indication of the unauthorized use and lack of reasonable opportunity to exercise the right in the illustrations
	To clarify whether the explanations in Alternative (a) and Alternative (b) were, or were not, mutually exclusive in each of the examples.
Example 2	To clarify if the material is grain or seed
Example 7	Alternative (b) To read "The breeder of Variety 2 can exercise the right on the imported harvested material if there was unauthorized export (use) of propagating material and the breeder did not have a reasonable opportunity in Country <del>A E</del> to exercise the right in relation to the export of propagating material."
Example 9	Alternative (b) To read "The breeder of Variety <del>3 1</del> cannot exercise the right on the imported harvested material because there was no unauthorized use of propagating material."

47. The CAJ-AG noted that the Delegation of the Russian Federation would provide additional comments on "reasonable opportunity". The Russian Federation provided additional comments on December 17, 2013, which will be reflected in the next draft of the document.

48. The CAJ-AG, at its eighth session, requested the Office of the Union to prepare a new draft of document CAJ-AG/13/8/3 (document UPOV/EXN/HRV/2 Draft 1) on the above basis.

*49. The CAJ is invited to note the plans of the CAJ-AG concerning the revision of the "Explanatory Notes on Harvested Material under the 1991 Act of the UPOV Convention", as set out in paragraphs 45 to 48, above.*

#### Matters concerning cancellation of the breeder's right

50. The CAJ-AG, at its eighth session, considered document CAJ-AG/13/8/4 "Matters concerning cancellation of the breeder's right" (see document CAJ-AG/13/8/10 "Report", paragraphs 59 to 63).

51. The CAJ-AG agreed to:

- (a) the development of guidance on reasons for possibly not cancelling a breeder's right, on the basis of document CAJ-AG/13/8/4, paragraph 9;
- (b) the development of guidance to explain that it was a matter for the member of the Union concerned to decide which authority was competent to decide on cancellation;
- (c) the development of guidance to explain that cancellation proceedings might result from a request from a third party or *ex officio* by the competent authority of the member of the Union concerned; and
- (d) provide an explanation that the surrender or the renunciation of the breeder's rights was different from the cancellation of the breeder's right.

*52. The CAJ is invited to note the plans of the CAJ-AG concerning the possible revision of the "Explanatory Notes on Cancellation of the Breeder's Right under the UPOV Convention", as set out in paragraph 51, above.*

#### Matters concerning nullity of the breeder's right

53. The CAJ-AG, at its eighth session, considered document CAJ-AG/13/8/5 "Matters concerning nullity of the breeder's right" (see document CAJ-AG/13/8/10 "Report", paragraphs 65 to 68).

54. The CAJ-AG agreed to the development of guidance to explain:

- (a) that it was a matter for the member of the Union concerned to decide which authority was competent to decide on nullity of breeders' rights;
- (b) that nullity proceedings might result from a request from a third party or *ex officio* by the competent authority of the member of the Union concerned; and
- (c) measures that might result from a decision on nullity, as set out in paragraph 15 of document CAJ-AG/13/8/5.

*55. The CAJ is invited to note the plans of the CAJ-AG concerning the possible revision of the "Explanatory Notes on Nullity of the Breeder's Right under the UPOV Convention", as set out in paragraphs 54, above.*

#### Matters concerning variety denominations

56. The CAJ-AG, at its eighth session, considered document CAJ-AG/13/8/6 "Matters concerning variety denominations" (see document CAJ-AG/13/8/10 "Report", paragraphs 69 to 71).

57. The CAJ-AG agreed to the development of guidance in relation to a request from a breeder to change a registered variety denomination in cases other than where the denomination of the variety was cancelled after the grant of the right, on the basis that such a request should be refused. However, the CAJ-AG agreed that changes would be appropriate in the following situations:

- (a) if it was discovered that there was a prior right concerning the denomination which would have resulted in the rejection of the denomination (see Article 20(4) and (7) of the 1991 Act, Article 13(4) and (7) of the 1978 Act and document UPOV/INF/12/4, Note 7);
- (b) if the denomination was unsuitable because it was contrary to the provisions of Article 20(2) of the 1991 Act and Article 13(2) of the 1978 Act; and

(c) if the denomination was subsequently refused in another member of the Union and, at the request of the breeder, the authority agreed to change the denomination to the one registered in the said other member of the Union.

58. It was agreed that the additional guidance should be considered as part of a possible revision of the “Explanatory Notes on Variety Denominations under the UPOV Convention” (document UPOV/INF/12/4).

59. Other developments on variety denominations that might be relevant in the context of a possible revision of the “Explanatory Notes on Variety Denominations under the UPOV Convention” (document UPOV/INF/12/4) are considered in document CAJ/69/5 “Variety Denominations” and document CAJ/69/9 “Possible development of a UPOV similarity search tool for variety denomination purposes”.

60. *The CAJ is invited to:*

(a) *note the plans of the CAJ-AG concerning the possible revision of the “Explanatory Notes on Variety Denominations under the UPOV Convention”, as set out in paragraphs 57 and 58, above; and*

(b) *note that other developments on variety denominations that might be relevant in the context of a possible revision of the “Explanatory Notes on Variety Denominations under the UPOV Convention” (document UPOV/INF/12/4) are considered in document CAJ/69/5 “Variety Denominations” and document CAJ/69/9 “Possible development of a UPOV similarity search tool for variety denomination purposes”.*

Matters arising after the grant of a breeder's right on: provisional protection, filing of applications and enforcement of breeders' rights

61. The CAJ-AG, at its eighth session, considered document CAJ-AG/13/8/8 “Matters arising after the grant of a breeder's right on: provisional protection, filing of applications and enforcement of breeders' rights”. (see document CAJ-AG/13/8/10 “Report”, paragraphs 76 to 78)

62. The CAJ-AG agreed not to consider the development of guidance on matters arising after the grant of a breeder's right in relation to the filing of applications, nor enforcement of breeders' rights.

63. The CAJ-AG agreed to consider the possible development of guidance on provisional protection in relation to the possibility to initiate legal proceedings before the grant of a breeder's right and to enter into license agreements before the grant.

64. *The CAJ is invited to note:*

(a) *that the CAJ-AG agreed not to consider the development of guidance on matters arising after the grant of a breeder's right in relation to the filing of applications, nor enforcement of breeders' rights;*

(b) *that the CAJ-AG agreed to consider the possible revision of the “Explanatory Notes on Provisional Protection under the UPOV Convention”, as set out in paragraph 63, above; and*

(c) *the report on the work of the CAJ-AG, at its eighth session, as provided in document CAJ-AG/13/8/10 “Report”.*

## VII. PROGRAM FOR THE DEVELOPMENT OF INFORMATION MATERIALS

### Work program for the development of information materials for the ninth session of the CAJ-AG, to be held in Geneva in October 2014

65. The CAJ-AG, at its eighth session, agreed the following program for its ninth session, to be held in October 2014, subject to approval by the CAJ (see document CAJ-AG/13/8/10 "Report", paragraph 80):

1. Opening of the session
2. Adoption of the agenda
3. Explanatory Notes on Essentially Derived Varieties under the 1991 Act of the UPOV Convention
4. Explanatory Notes on Propagation and Propagating Material
5. Explanatory Notes on Acts in Respect of Harvested Material under the 1991 Act of the UPOV Convention
6. Matters concerning cancellation of the breeder's right
7. Matters concerning nullity of the breeder's right
8. Matters concerning variety denominations
9. Matters concerning variety descriptions
10. Matters concerning provisional protection
11. Matters concerning observers in the CAJ-AG
12. Possible alternative dispute settlement mechanisms for EDVs
13. Matters referred by the CAJ to the CAJ-AG for consideration since the eighth session of the CAJ-AG
14. Date and program for the tenth session

66. The CAJ-AG, at its eighth session, agreed the following approach in order to advance on relevant matters between the eighth and the ninth sessions of the CAJ-AG (see document CAJ-AG/13/8/10 "Report", paragraph 81):

- Circulation of the "Draft Report" (document CAJ-AG/13/8/10 Prov.) by November 15, 2013, with EDV examples
- Comments on the "Draft Report" (document CAJ-AG/13/8/10 Prov.) by December 13, 2013
- Comments on EDV examples by February 21, 2014
- Circulation of new drafts of relevant explanatory notes by May 9, 2014
- Comments on new drafts of relevant explanatory notes by June 21, 2014
- Revised new drafts of relevant explanatory notes to be posted by August 29, 2014

67. In accordance with the approach agreed by the CAJ-AG at its eighth session, the following new drafts of explanatory notes will be circulated to the CAJ-AG by May 9, 2014 (see above and document CAJ-AG/13/8/10 "Report", paragraph 81):

Explanatory Notes on Essentially Derived Varieties under the 1991 Act of the UPOV Convention (document UPOV/EXN/EDV/2 Draft 4)

Explanatory Notes on Propagation and Propagating Material under the UPOV Convention (document UPOV/EXN/PPM Draft 2)

Explanatory Notes on Acts in Respect of Harvested Material under the 1991 Act of the UPOV Convention (document UPOV/EXN/HRV/2 Draft 1)

Explanatory Notes on Cancellation of the Breeder's Right under the UPOV Convention (document UPOV/EXN/CAN/2 Draft 1)

Explanatory Notes on Nullity of the Breeder's Right under the UPOV Convention (document UPOV/EXN/NUL/2 Draft 1)

Explanatory Notes on Variety Denominations under the UPOV Convention (document UPOV/INF/12/5 Draft 1)

Explanatory Notes on Provisional Protection under the UPOV Convention (document UPOV/EXN/PRP/2 Draft 1)

68. On the basis of comments received from the CAJ-AG, new drafts of the above explanatory notes will be posted by August 29, 2014 and CAJ members and observers will be notified accordingly. The CAJ-AG will consider those new drafts at its ninth session.

69. The CAJ-AG noted that, subject to any changes that the CAJ might agree at its sixty-ninth session, to be held on April 10, 2014, the seventieth session of the CAJ would be held on October 13, 2014, and that the ninth session of the CAJ-AG would be held on October 14 and 17, 2014 (see document CAJ-AG/13/8/10 "Report", paragraph 83).

70. *The CAJ is invited to:*

(a) *approve the work program for the development of information materials for the ninth session of the CAJ-AG, to be held in October 2014, as set out in paragraphs 65 to 68, above; and*

(b) *agree that the ninth session of the CAJ-AG be held on October 14 and 17, 2014.*

#### Updating of document UPOV/INF/5 "UPOV Model Plant Breeders' Rights Gazette"

71. The CAJ, at its sixty-eighth session, held in Geneva on October 21, 2013, agreed to include an item for the updating of document UPOV/INF/5 "UPOV Model Plant Breeders' Rights Gazette" in the program for the seventieth session of the CAJ, to be held in October 2014 (see document CAJ/68/10 "Report on the Conclusions", paragraph 17).

72. *The CAJ is invited to note that the CAJ agreed to include an item for the updating of document UPOV/INF/5 "UPOV Model Plant Breeders' Rights Gazette" in the program for the seventieth session of the CAJ, to be held in October 2014.*

#### Revision of document UPOV/INF/15 "Guidance for Members of UPOV on Ongoing Obligations and Related Notifications and on the Provision of Information to Facilitate Cooperation"

73. The Consultative Committee, at its eighty-sixth session, held in Geneva on October 23 and 24, 2013, considered the letter of ISF of January 21, 2013, on the subject "Application, examination and granting aspects of PBR applications".

74. The Consultative Committee agreed to the development of document UPOV/INF/15 "Guidance for Members of UPOV on Ongoing Obligations and Related Notifications and on the Provision of Information to Facilitate Cooperation" into an umbrella document that would identify key issues for the operation of a plant variety protection system and which would provide links to detailed information materials.

75. The Consultative Committee agreed to invite the CAJ and TC to consider the ISF recommendations in relation to existing and possible future information materials, in parallel with the development of document UPOV/INF/15 into an umbrella document (see document C/47/15 Rev. "Report by the President on the work of the eighty-sixth session of the Consultative Committee; adoption of recommendations, if any, prepared by that Committee", paragraphs 62 to 66).

76. The matters raised by ISF that the Consultative Committee agreed to invite the CAJ to consider are presented in document CAJ/69/10 "Matters raised by the International Seed Federation (ISF)".

*77. The CAJ is invited to note that the revision of document UPOV/INF/15, to include matters raised by ISF that the Consultative Committee agreed to invite the CAJ to consider is presented in document CAJ/69/10 "Matters raised by the International Seed Federation (ISF)".*

[Annex follows]

## OVERVIEW OF THE DEVELOPMENT OF INFORMATION MATERIALS

## EXPLANATORY NOTES

Reference	Explanatory Notes on:	Status
UPOV/EXN/BRD	Definition of Breeder under the 1991 Act of the UPOV Convention	UPOV/EXN/BRD/1 adopted in October 2013
UPOV/EXN/CAL	Conditions and Limitations Concerning the Breeder's Authorization in Respect of Propagating Material under the UPOV Convention	UPOV/EXN/CAL/1 adopted in October 2010
UPOV/EXN/CAN	Cancellation of the Breeder's Right under the UPOV Convention	UPOV/EXN/CAN/1 adopted in October 2009 UPOV/EXN/CAN/2 Draft 1 to be considered by the CAJ-AG by correspondence UPOV/EXN/CAN/2 Draft 2 to be considered by the CAJ-AG in October 2014
UPOV/EXN/EDV	Essentially Derived Varieties under the 1991 Act of the UPOV Convention	UPOV/EXN/EDV/1 adopted in October 2009 UPOV/EXN/EDV/2 Draft 4 to be considered by the CAJ-AG by correspondence UPOV/EXN/EDV/2 Draft 5 to be considered by the CAJ-AG in October 2014
UPOV/EXN/ENF	Enforcement of Breeders' Rights under the UPOV Convention	UPOV/EXN/ENF/1 adopted in October 2009
UPOV/EXN/EXC	Exceptions to the Breeder's Right under the 1991 Act of the UPOV Convention	UPOV/EXN/EXC/1 adopted in October 2009
UPOV/EXN/GEN	Genera and Species to be Protected under the 1991 Act of the UPOV Convention	UPOV/EXN/GEN/1 adopted in October 2009
UPOV/EXN/HRV	Acts in Respect of Harvested Material under the 1991 Act of the UPOV Convention	UPOV/EXN/HRV/1 adopted in October 2013 UPOV/EXN/HRV/2 Draft 1 to be considered by the CAJ-AG by correspondence UPOV/EXN/HRV/2 Draft 2 to be considered by the CAJ-AG in October 2014
UPOV/EXN/NAT	National Treatment under the 1991 Act of the UPOV Convention	UPOV/EXN/NAT/1 adopted in October 2009
UPOV/EXN/NOV	Novelty under the UPOV Convention	UPOV/EXN/NOV/1 adopted in October 2009
UPOV/EXN/NUL	Nullity of the Breeder's Right under the UPOV Convention	UPOV/EXN/NUL/1 adopted in October 2009 UPOV/EXN/NUL/2 Draft 1 to be considered by the CAJ-AG by correspondence UPOV/EXN/NUL/2 Draft 2 to be considered by the CAJ-AG in October 2014
UPOV/EXN/PPM	Propagation and Propagating Material under the UPOV Convention	UPOV/EXN/PPM Draft 2 to be considered by the CAJ-AG by correspondence UPOV/EXN/PPM Draft 3 to be considered by the CAJ-AG in October 2014
UPOV/EXN/PRI	Right of Priority under the UPOV Convention	UPOV/EXN/PRI/1 adopted in October 2009
UPOV/EXN/PRP	Provisional Protection under the UPOV Convention	UPOV/EXN/PRP/1 adopted in October 2009 UPOV/EXN/PRP/2 Draft 1 to be considered by the CAJ-AG by correspondence UPOV/EXN/PRP/2 Draft 2 to be considered by the CAJ-AG in October 2014
UPOV/EXN/VAR	Definition of Variety under the 1991 Act of the UPOV Convention	UPOV/EXN/VAR/1 adopted in October 2010



INFORMATION DOCUMENTS

Latest reference	INF documents	Status
UPOV/INF-EXN	List of UPOV/INF-EXN Documents and Latest Issue Dates	UPOV/INF-EXN/5 adopted in October 2013
UPOV/INF/4	Financial Regulations and Rules of UPOV	UPOV/INF/4/3 adopted in March 2013
UPOV/INF/5	UPOV model plant breeders' rights gazette	UPOV/INF/5 adopted in October 1979 (updating of document UPOV/INF/5 to be considered by the CAJ in October 2014)
UPOV/INF/6	Guidance for the preparation of laws based on the 1991 Act of the UPOV Convention	UPOV/INF/6/3 adopted in October 2013
UPOV/INF/7	Rules of Procedure of the Council	UPOV/INF/7 adopted in October 1982
UPOV/INF/8	Agreement between the World Intellectual Property Organization and the International Union for the Protection of New Varieties of Plants	UPOV/INF/8 signed in November 1982
UPOV/INF/9	Agreement between the International Union for the Protection of New Varieties of Plants and the Swiss Federal Council to Determine the Legal Status in Switzerland of that Union (Headquarters Agreement)	UPOV/INF/9 signed in November 1983
UPOV/INF/10	Internal Audit	UPOV/INF/10/1 adopted in October 2010
UPOV/INF/12	Explanatory Notes on Variety Denominations under the UPOV Convention	UPOV/INF/12/4 adopted in November 2012 UPOV/INF/12/5 Draft 1 to be considered by the CAJ-AG by correspondence UPOV/INF/12/5 Draft 2 to be considered by the CAJ-AG in October 2014
UPOV/INF/13	Guidance on how to become a member of UPOV	UPOV/INF/13/1 adopted in October 2009
UPOV/INF/14	Guidance for members of UPOV on how to ratify, or accede to, the 1991 Act of the UPOV Convention	UPOV/INF/14/1 adopted in October 2009
UPOV/INF/15	Guidance for Members of UPOV on Ongoing Obligations and Related Notifications	UPOV/INF/15/2 adopted in March 2013 (revision of document UPOV/INF/15: see document CAJ/69/10)
UPOV/INF/16	Exchangeable Software	UPOV/INF/16/3 adopted in October 2013
UPOV/INF/17	Guidelines for DNA-Profiling: Molecular Marker Selection and Database Construction ("BMT Guidelines")	UPOV/INF/17/1 adopted in October 2010
UPOV/INF/18	Possible use of Molecular Markers in the Examination of Distinctness, Uniformity and Stability (DUS)	UPOV/INF/18/1 adopted in October 2011
UPOV/INF/19	Rules governing the granting of observer status to States, intergovernmental organizations and international non-governmental organizations in UPOV bodies	UPOV/INF/19/1 adopted in November 2012
UPOV/INF/20	Rules governing access to UPOV documents	UPOV/INF/20/1 adopted in November 2012
UPOV/INF/21	Alternative Dispute Settlement Mechanisms	UPOV/INF/21/1 adopted in November 2012

[End of Annex and of document]