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ADMINISTRATIVE AND LEGAL COMMITTEE**Seventy-First Session
Geneva, March 26, 2015**

DEVELOPMENT OF INFORMATION MATERIALS CONCERNING THE UPOV CONVENTION

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EXECUTIVE SUMMARY

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 seventy-first session, to report on a matter referred by the CAJ to the Consultative Committee and the Council and present a tentative program for the development of information materials.
2. In particular, the CAJ will be invited to:
 - (a) note that the CAJ-AG welcomed the presentation made by Australia by electronic means, via the internet, containing the additional information on the context of the examples provided by Australia at the EDV Seminar, and that a copy of the presentation has been posted on the CAJ-AG/14 section of the UPOV website;
 - (b) consider the development of guidance concerning the status of essentially derived varieties that are not granted protection in their own right, after the adoption of the revised document UPOV/EXN/EDV/2, as set out in paragraph 11;
 - (c) consider whether to invite the Delegations of Australia, Brazil and the European Union and other members of the Union to make presentations on their systems concerning essentially derived varieties at its seventy-second session;
 - (d) whether to request the Office of the Union to organize a meeting to exchange information with CIOPORA, ISF and WIPO in order to explore the possible role of UPOV in alternative dispute settlement mechanisms for matters concerning essentially derived varieties, including the provision of experts on EDV matters, and to provide a report at the seventy-second session of the CAJ; and
 - (e) consider a new draft of the "Explanatory Notes on Essentially Derived Varieties under the 1991 Act of the UPOV Convention" (Revision) (document UPOV/EXN/EDV/2 Draft 6) at its seventy-second session, as set out in paragraphs 15 and 16;
 - (f) consider document UPOV/EXN/PPM/1 Draft 4 as the basis for the adoption of the "Explanatory Notes on Propagating Material under the 1991 Act of the UPOV Convention", by the Council at its forty-ninth ordinary session, to be held on October 29, 2015;

(g) consider the conclusion of the CAJ-AG that it would not be appropriate to seek to develop a revision of the “Explanatory Notes on Acts in Respect of Harvested Material under the 1991 Act of the UPOV Convention” (document UPOV/EXN/HRV/1) for the time being;

(h) consider document UPOV/EXN/CAN/2 Draft 3 as the basis for the revision of the “Explanatory Notes on Cancellation of the Breeder’s Right under the UPOV Convention” (Revision) (document UPOV/EXN/CAN/1), by the Council at its forty-ninth ordinary session, to be held on October 29, 2015;

(i) note that the CAJ, at its sixty-ninth session, had agreed to invite the TC to consider the development of guidance on certain matters concerning variety descriptions, as set out in paragraph 26;

(j) consider document UPOV/EXN/NUL/2 Draft 3 as the basis for the revision of the “Explanatory Notes on the Nullity of the Breeder’s Right under the UPOV Convention” (Revision) (document UPOV/EXN/NUL/1), by the Council at its forty-ninth ordinary session, to be held on October 29, 2015;

(k) consider document UPOV/EXN/PRP/2 Draft 3 as the basis for the revision of the “Explanatory Notes on Provisional Protection under the UPOV Convention” (document UPOV/EXN/PRP/1), by the Council at its forty-ninth ordinary session, to be held on October 29, 2015;

(l) consider the conclusions of the CAJ-AG on:

(i) the purpose(s) of the variety description developed at the time of the grant of the breeder’s right (original variety description), as set out in paragraph 37; and

(ii) the status of the original variety description in relation to the verification of the conformity of plant material to a protected variety for enforcement of the breeder’s right, as set out in paragraphs 38 and 39;

(ll) note that a report on work concerning the possible development of a UPOV similarity search tool for variety denomination purposes and proposals concerning a possible revision of document UPOV/INF/12/4 “Explanatory Notes on Variety Denominations under the UPOV Convention” are provided in document CAJ/71/3 “Variety denominations”;

(m) consider matters concerning observers in the CAJ-AG in the event that a session of the CAJ-AG is convened by the CAJ;

(n) consider the merits of inviting written comments from members and observers on relevant CAJ documents before the CAJ sessions;

(o) note that the interest to discuss the relationship and effects of the implementation of the “Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity” for the breeder’s exemption was reported to the Consultative Committee and the Council, as set out in paragraph 48;

(p) subject to progress at the seventy-first session of the CAJ, consider the tentative program for the development of information materials at the seventy-second session of the CAJ, as set out in paragraph 51; and

(q) subject to the approval of the CAJ at its seventy-first session, the Council, at its forty-ninth ordinary session, will be invited to adopt the “Explanatory Notes on Propagating Material under the 1991 Act of the UPOV Convention” (document UPOV/EXN/PPM/1); the “Explanatory Notes on Cancellation of the Breeder’s Right under the UPOV Convention” (Revision) (document UPOV/EXN/CAN/2); Explanatory Notes on the Nullity of the Breeder’s Right under the UPOV Convention (Revision) (document UPOV/EXN/NUL/2); the “Explanatory Notes on Provisional Protection under the UPOV Convention” (Revision) (document UPOV/EXN/PRP/2); and in conjunction with the above explanatory notes, a revision of document UPOV/INF/6/3 “Guidance for the preparation of laws based on the 1991 Act of the UPOV Convention” (document UPOV/INF/6/4), in conjunction with the explanatory notes that the Council will be invited to adopt at its forty-ninth ordinary session..

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INTRODUCTION

3. The CAJ, at its fifty-second session,¹ agreed an approach for the preparation of information materials concerning the UPOV Convention.² 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.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.

4. The CAJ, at its seventieth session⁴ agreed that all matters under consideration by the CAJ-AG at its ninth session⁵ should, following the ninth session of the CAJ-AG, be considered by the CAJ and that the CAJ-AG should only be convened, on an *ad hoc* basis, as considered appropriate by the CAJ.⁶

OVERVIEW OF THE DEVELOPMENT OF INFORMATION MATERIALS

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

¹ Held in Geneva on October 24, 2005.

² See document CAJ/52/4 "Approach for the development of information materials concerning the UPOV Convention", paragraphs 8 to 10.

³ See document CAJ/52/4, paragraphs 11 to 14 and document CAJ/52/5 "Report", paragraph 67.

⁴ Held in Geneva on October 13, 2014

⁵ Held in Geneva on October 14 and 17, 2014.

⁶ See document CAJ/70/10 "Report on the Conclusions", paragraphs 38 to 41.

INFORMATION MATERIALS

6. The CAJ, at its seventieth session, requested the CAJ-AG, at its ninth session, to advise the CAJ on documents to be considered at the seventy-first session of the CAJ, in March 2015.⁷

7. In that regard, the CAJ-AG advised as follows in relation to items “Development of information materials concerning the UPOV Convention” and “Variety denominations” of the seventy-first session of the CAJ:⁸

Development of information materials concerning the UPOV Convention (documents CAJ/71/2 and CAJ-AG/14/9/7 “Report”)

- (a) Explanatory Notes on Essentially Derived Varieties under the 1991 Act of the UPOV Convention (Revision) (document CAJ/71/2: proposed way forward, with a view to the discussion of a new draft of document UPOV/EXN/EDV/2 in the CAJ in October 2015)
- (b) Explanatory Notes on Propagating Material under the UPOV Convention (document UPOV/EXN/PPM/1 Draft 4)
- (c) Explanatory Notes on Acts in Respect of Harvested Material under the 1991 Act of the UPOV Convention (Revision) (document CAJ/71/2: CAJ-AG proposal to discontinue the development of a revision of UPOV/EXN/HRV/1)
- (d) Explanatory Notes on Cancellation of the Breeder's Right under the UPOV Convention (Revision) (document UPOV/EXN/CAN/2 Draft 3)
- (e) Explanatory Notes on Nullity of the Breeder's Right under the UPOV Convention (Revision) (document UPOV/EXN/NUL/2 Draft 3)
- (f) Matters concerning variety descriptions (document CAJ/71/2: to present the conclusion of the CAJ-AG)
- (g) Explanatory Notes on Provisional Protection under the UPOV Convention (Revision) (document UPOV/EXN/PRP/2 Draft 3)

Variety denominations (document CAJ/71/3)

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

8. The “Report on the Conclusions” of the CAJ-AG at its ninth session (document CAJ-AG/14/9/6) has been posted on the CAJ-AG and CAJ/71 sections of the UPOV website. The detailed report, which includes the discussions in the presence of observers, will be posted by March 25, 2015 (document CAJ-AG/14/9/7).

Explanatory Notes on Essentially Derived Varieties under the 1991 Act of the UPOV Convention (Revision) (document CAJ/71/2)

9. The CAJ-AG, at its ninth session,⁹ considered documents CAJ-AG/14/9/2 and UPOV/EXN/EDV/2 Draft 5 and the views expressed by the International Association of Horticultural Producers (AIPH), the Association for Plant Breeding for the Benefit of Society (APBRES), the International Community of Breeders of Asexually Reproduced Ornamental and Fruit Varieties (CIOPORA), the European Seed Association (ESA) and the International Seed Federation (ISF).¹⁰

⁷ See document CAJ/70/10 “Report on the Conclusions”, paragraph 39.

⁸ See document CAJ-AG/14/9/6 “Report on the Conclusions”, paragraphs 34 and 35.

⁹ At its ninth session.

¹⁰ See document CAJ-AG/14/9/6 “Report on the Conclusions”, paragraphs 26 and 31.

10. The CAJ-AG welcomed the presentation made by Australia by electronic means, via the internet, containing the additional information on the context of the examples provided by Australia at the EDV Seminar. The presentation made by Australia has been posted on the CAJ-AG/14 section of the UPOV website.

11. The CAJ-AG recalled that, at its eighth session, it had agreed to consider the development of guidance on the matters raised in paragraphs 15 to 18 of document CAJ-AG/13/8/2 “Explanatory Notes on Essentially Derived Varieties under the 1991 Act of the UPOV Convention”, concerning the status of essentially derived varieties that were not granted protection in their own right, after the adoption of the revised document UPOV/EXN/EDV/2.

12. The CAJ-AG recalled its conclusion, at its eighth session, that at an appropriate future session of the CAJ-AG, the Delegations of Australia, Brazil and the European Union and other members of the Union be invited to make presentations on their systems concerning essentially derived varieties, would be considered by the CAJ.

13. The CAJ-AG noted that matters concerning the possible role of UPOV in alternative dispute settlement mechanisms and the proposal in document CAJ-AG/14/9/3 “Possible alternative dispute settlement mechanisms for essentially derived varieties” would be referred to the CAJ for consideration at its seventy-first session in March 2015. The proposal in document CAJ-AG/14/9/3 provides as follows:

“6. As a next step, the CAJ-AG may wish to consider requesting the Office of the Union:

(i) to organize a meeting to exchange information with CIOPORA, ISF and WIPO in order to explore the possible role of UPOV in alternative dispute settlement mechanisms for matters concerning essentially derived varieties, including the provision of experts on EDV matters; and

(ii) to provide a report for the CAJ-AG, at its tenth session in October 2015.”

14. It is proposed to consider the possible role of UPOV in alternative dispute settlement mechanisms and the proposal to organize a meeting to exchange information with CIOPORA, ISF and WIPO in order to explore the possible role of UPOV in alternative dispute settlement mechanisms for matters concerning essentially derived varieties, including the provision of experts on EDV matters, at the seventy-second session of the CAJ.

15. The CAJ-AG agreed to amend document UPOV/EXN/EDV/2 Draft 5 as follows:

Paragraph 2	<p>The second sentence to read:</p> <p>“The purpose of the<u>this</u> guidance [...]”</p> <p>To delete the third sentence:</p> <p>“The guidance is intended for: authorities granting breeders’ rights with competence in matters concerning essentially derived varieties; breeders, farmers, growers and other stakeholders; and relevant bodies responsible for solving disputes in litigation, mediation or arbitration cases”</p>
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Paragraph 6	<p>To read as follows:</p> <p>“6. The following might be considered in relation to the notion of “essential characteristics”:</p> <p>(i) essential characteristics, in relation to a plant variety, means heritable traits that are determined by the expression of one or more genes, or other heritable determinants, that contribute to the principal features, performance or value of the variety;</p> <p>(ii) characteristics that are important from the perspective of the producer, seller, supplier, buyer, recipient, or user;</p> <p>(iii) characteristics that are essential for the variety as a whole, including, for example, morphological, physiological, agronomic, industrial and biochemical characteristics;</p> <p>(iv) essential characteristics may or may not be phenotypic characteristics used for the examination of distinctness, uniformity and stability (DUS);</p> <p>(v) essential characteristics are not restricted to those characteristics that relate only to high performance or value (for instance, disease resistance may be considered as an essential characteristic when the variety has susceptibility to disease);</p> <p>(vi) essential characteristics may be different in different crops/species.”</p>
Paragraph 7	To be deleted
Paragraph 8	<p>To read as follows:</p> <p>“8. The phrase “it is clearly distinguishable from the initial variety” establishes that essential derivation is concerned only with varieties that are clearly distinguishable, in accordance with Article 7, from the initial variety and which are accordingly protectable. Article 14(5)(a)(ii) would apply if the variety is “not clearly distinguishable in accordance with Article 7 from the protected variety”.</p>
Paragraph 10	<p>To read as follows:</p> <p>“10. The words “except for the differences which result from the act of derivation” do not set a limit to the amount of difference which may exist where a variety is considered to be essentially derived. A limit is, however, set by Article 14(5)(b) (i) and (iii). The differences must not be such that the variety fails “to retain the expression of the essential characteristics that result from the genotype or combination of genotypes of the initial variety”.</p>
Paragraph 11	<p>To read as follows:</p> <p>“11. The examples given in Article 14(5) (c) make clear that the differences which result from the act of derivation should be one or very few. However, if there are only one or few differences that does not necessarily mean that a variety is essentially derived. The variety would also be required to fulfil the definition stated in Article 14(5)(b).”</p>
New paragraph after paragraph 11	<p>To insert the following quote in paragraph 11 in a new paragraph as follows:</p> <p>“12. The derived variety must retain almost the totality of the genotype of the mother variety and be distinguishable from that variety by a very limited number of characteristics (typically by one).”</p>
To re-insert title	Method of Breeding

Paragraph 14	Paragraph 14 to read as follows: “There is a need to consider the situation in different crops and species and the method of breeding in the determination of essentially derived varieties.”
Paragraph 20	To wait for joint proposal to be provided by ESA and ISF
Paragraph 21	To add a note that the current text was not acceptable but that new proposals should be considered. To show the existing text in strikethrough.
Paragraph 29	To read as follows: “29. Both predominant derivation (e.g. evidence of genetic conformity with the initial variety) and conformity on the essential characteristics (e.g. evidence on conformity in the expression of the essential characteristics of the initial variety) are possible starting points in providing an indication that a variety might be essentially derived from the initial variety.”
Paragraph 30	To read as follows: “30. In some situations, relevant information provided by the breeder of the initial variety on predominant derivation and/or on conformity on the essential characteristics might be used as the basis for the reversal of the burden of proof. In such situations, the other breeder might need to prove that the other variety is not essentially derived from the initial variety. For instance, the other breeder would need to provide information on the breeding history of the second variety to prove that the variety was not derived from the initial variety.”
Section II	To clarify the purpose of Section II in the relevant parts of the document and, in particular, that it relates to assessment of whether a variety is an EDV and not whether it is protectable.
New proposal	To develop guidance in the next draft to clarify the situation if the initial variety, or the EDV, is not protected or is protected in another territory.

16. In accordance with the proposal of the CAJ-AG (see paragraph 7(a), above), it is suggested that a new draft of the “Explanatory Notes on Essentially Derived Varieties under the 1991 Act of the UPOV Convention (Revision)” (document UPOV/EXN/EDV/2 Draft 6), incorporating the amendments agreed by the CAJ-AG at its ninth session (see paragraph 15, above), be prepared for consideration by the CAJ at its seventy-second session.¹¹

17. *The CAJ is invited to:*

(a) note that the CAJ-AG welcomed the presentation made by Australia by electronic means, via the internet, containing the additional information on the context of the examples provided by Australia at the EDV Seminar, and that a copy of the presentation has been posted on the CAJ-AG/14 section of the UPOV website;

(b) consider the development of guidance concerning the status of essentially derived varieties that are not granted protection in their own right, after the adoption of the revised document UPOV/EXN/EDV/2, as set out in paragraph 11;

(c) consider whether to invite the Delegations of Australia, Brazil and the European Union and other members of the Union to make

¹¹ To be held in Geneva on October 26 and 27, 2015.

presentations on their systems concerning essentially derived varieties at its seventy-second session;

(d) consider whether to request the Office of the Union to organize a meeting to exchange information with CIOFORA, ISF and WIPO in order to explore the possible role of UPOV in alternative dispute settlement mechanisms for matters concerning essentially derived varieties, including the provision of experts on EDV matters, and to provide a report at the seventy-second session of the CAJ; and

(e) consider a new draft of the “Explanatory Notes on Essentially Derived Varieties under the 1991 Act of the UPOV Convention” (Revision) (document UPOV/EXN/EDV/2 Draft 6) at its seventy-second session, as set out in paragraphs 15 and 16.

Explanatory Notes on Propagating Material under the 1991 Act of the UPOV Convention (document UPOV/EXN/PPM/1 Draft 4)

18. The CAJ-AG¹² considered document UPOV/EXN/PPM/1 Draft 3 and the presentations of views by APBRESBES, CIOFORA, and ESA.¹³

19. The CAJ-AG agreed the following amendments to document UPOV/EXN/PPM/1 Draft 3:

General	To replace the term “propagation and propagating material” with “propagating material”, in the title and elsewhere in the document.
1.	to read: “Propagating material encompasses reproductive and vegetative propagating material. The UPOV Convention does not provide a definition of ‘propagating material’. The following section provides guidance on factors that might be considered in relation to whether material is propagating material.”
2.	to read: “Whether material is propagating material is a matter of fact but may also include the intention on the part of those concerned (producer, seller, supplier, buyer, recipient, user) and depends on the definition of propagating material in the law of the member of the Union concerned. [...]”
4.	to read: “Taking into account the definition of propagating material in the law of the member of the Union concerned, if applicable, the following, non-exhaustive, list of factors, and/or combination of factors, might be considered in deciding whether material is propagating material: <ul style="list-style-type: none"> (i) whether the material has been used to propagate the variety; (ii) whether the material is capable of producing entire plants of the variety; (iii) whether there has been a custom/practice of using the material for that purpose or, as a result of new developments, there is a new custom/practice of using the material for that purpose; (iv) the intention on the part of those concerned (producer, seller, supplier, buyer, recipient, user); or (v) if, based on the nature and condition of the material and/or the form of its use, it can be determined that the material is “propagating material”.

¹² At its ninth session.

¹³ See document CAJ-AG/14/9/6 “Report on the Conclusions”, paragraphs 7 and 8.

20. *The CAJ is invited to consider document UPOV/EXN/PPM/1 Draft 4 as the basis for the adoption of the “Explanatory Notes on Propagating Material under the 1991 Act of the UPOV Convention”, by the Council at its forty-ninth ordinary session, to be held on October 29, 2015.*

Explanatory Notes on Acts in Respect of Harvested Material under the 1991 Act of the UPOV Convention (Revision) (document CAJ/71/2)

21. The CAJ-AG¹⁴ considered document UPOV/EXN/HRV/2 Draft 2 and the views expressed by AIPH, APBEBES, CIOFORA and ESA.¹⁵

22. The CAJ-AG concluded that it would not be appropriate to seek to develop a revision of document UPOV/EXN/HRV/1 for the time being.

23. *The CAJ is invited to consider the conclusion of the CAJ-AG that it would not be appropriate to seek to develop a revision of the “Explanatory Notes on Acts in Respect of Harvested Material under the 1991 Act of the UPOV Convention” (document UPOV/EXN/HRV/1) for the time being.*

Explanatory Notes on Cancellation of the Breeder’s Right under the UPOV Convention (Revision) (document UPOV/EXN/CAN/2 Draft 3)

24. The CAJ-AG¹⁶ considered document UPOV/EXN/CAN/2 Draft 2 and the views expressed by CropLife International.¹⁷

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

Title – cover page	To delete “the 1991 Act”
Paragraph 6	To replace by: 6. The cancellation of a breeder’s right is different from the surrender or renunciation of the breeder’s right. <u>Cancellation of a breeder’s right is a matter for the competent authority to decide in accordance with the UPOV Convention (see paragraph 3). By contrast, surrender or renunciation of the breeder’s right is a unilateral decision of the holder of the breeder’s right that is not linked to compliance with any obligation under the UPOV Convention. The holder of the breeder’s right decides can decide on an early termination by giving notice to the authority granting breeders’ rights. The competent authority publishes the termination of the breeder’s right.</u>

¹⁴ At its ninth session.

¹⁵ See document CAJ-AG/14/9/6 “Report on the Conclusions”, paragraphs 9 and 10.

¹⁶ At its ninth session

¹⁷ See document CAJ-AG/14/9/6 “Report on the Conclusions”, paragraphs 11 and 12.

<i>Verifying the maintenance of the variety</i>	<p>The CAJ-AG noted that the development of guidance on section “<i>Verifying the maintenance of the variety</i>” would need to wait for the consideration by the Technical Committee of relevant matters on variety descriptions, as explained in the Note in document UPOV/EXN/CAN/2 Draft 2 (reproduced below)</p> <p>Note: The CAJ-AG, at its eighth session, held in Geneva on October 21 and 25, 2013, agreed to the development of guidance on the following, which it proposed that the CAJ should invite the Technical Committee (TC) to consider in the first instance (see document CAJ-AG/13/8/10 “Report”, paragraph 73):</p> <p>(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</p> <p>(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”).</p> <p>The CAJ, at its sixty-ninth session, held in Geneva on April 10, 2014, in accordance with the proposal by the CAJ-AG, agreed to invite the TC to consider the development of guidance on certain matters concerning variety descriptions, as set out in document CAJ/69/2, paragraphs 27 and 28 (see document CAJ/69/13 “Report”, paragraph 19).</p>
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26. The CAJ, at its sixty-ninth session¹⁸, in accordance with the proposal by the CAJ-AG, at its eighth session, agreed to invite the TC to consider the development of guidance on certain matters concerning variety descriptions, as follows:¹⁹

“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:

¹⁸ held in Geneva on April 10, 2014.

¹⁹ see document CAJ/69/13 “Report”, paragraph 19.

- “(i) a recalibration of the scale in the Test Guidelines (particularly for non-asterisked characteristics²⁰);
 - “(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.”

27. *The CAJ is invited to:*

(a) *consider document UPOV/EXN/CAN/2 Draft 3 as the basis for the revision of the “Explanatory Notes on Cancellation of the Breeder’s Right under the UPOV Convention” (Revision) (document UPOV/EXN/CAN/1), by the Council at its forty-ninth ordinary session, to be held on October 29, 2015; and*

(b) *note that the CAJ, at its sixty-ninth session, had agreed to invite the TC to consider the development of guidance on certain matters concerning variety descriptions, as set out in paragraph 26.*

Explanatory Notes on the Nullity of the Breeder’s Right under the UPOV Convention (Revision) (document UPOV/EXN/NUL/2 Draft 3)

28. The CAJ-AG²¹ considered document UPOV/EXN/NUL/2 Draft 2 and the views expressed by ESA.²²
29. The CAJ-AG agreed the following changes to document UPOV/EXN/NUL/2 Draft 2:

Paragraph 9	<p><u>9. The decision to declare a breeder’s right null and void invalidates the right from the date of grant, although the decision of nullity by the competent authority will occur at a later date. Therefore, nullity has, in principle, retroactive effects. The retroactive effects of nullity may vary in practice [and will depend on the relevant legislation of the member of the Union concerned]. [The remedies concerning the retroactive effects of nullity may also will depend on the relevant legislation of the member of the Union concerned and may also depend on contractual arrangements].</u> In some cases, such as in cases of fraud or wilful abusive acts by the holder of the breeder’s right, reimbursement of royalties paid and/or other remedies may apply. In some other cases, reimbursement of royalties received by the holder of the breeder’s right may not be applicable.</p>
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30. *The CAJ is invited to consider document UPOV/EXN/NUL/2 Draft 3 as the basis for the revision of the “Explanatory Notes on the Nullity of the Breeder’s Right under the UPOV Convention” (Revision) (document UPOV/EXN/NUL/1), by the Council at its forty-ninth ordinary session, to be held on October 29, 2015.*

²⁰ “[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)

²¹ At its ninth session

²² See document CAJ-AG/14/9/6 “Report on the Conclusions”, paragraphs 13 and 14.

Explanatory Notes on Provisional Protection under the UPOV Convention (Revision)
(document UPOV/EXN/PRP/2 Draft 3)

31. The CAJ-AG²³ considered document UPOV/EXN/PRP/2 Draft 2 and the views expressed by CropLife International.²⁴

32. The CAJ-AG agreed to propose to the CAJ a revision of document UPOV/EXN/PRP, as set out in document UPOV/EXN/PRP/2 Draft 2.

33. The CAJ is invited to consider document UPOV/EXN/PRP/2 Draft 3 as the basis for the revision of the “Explanatory Notes on Provisional Protection under the UPOV Convention” (document UPOV/EXN/PRP/1), by the Council at its forty-ninth ordinary session, to be held on October 29, 2015.

Matters concerning variety descriptions considered by the CAJ-AG (document CAJ/71/2)

34. At its eighth session, the CAJ-AG²⁵ considered document CAJ-AG/13/8/7 “Matters concerning variety descriptions” and the following matters for further guidance²⁶, with particular reference to document TGP/5 “Experience and Cooperation in DUS Testing”, Section 6: “UPOV Report on Technical Examination and UPOV Variety Description”:

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

²³ At its ninth session.

²⁴ See document CAJ-AG/14/9/6 “Report on the Conclusions”, paragraphs 24 and 25.

²⁵ Held in Geneva on October 21 and 25, 2013.

²⁶ On the basis of Cases 3 and 4 presented in Appendix 1 of Annex I to document CAJ-AG/11/6/4 and of paragraphs 9 and 10 of document CAJ/60/8.

Purpose(s) of the variety description developed at the time of the grant of the breeder's right (original variety description)

35. At its sixty-ninth session,²⁷ the CAJ noted the matters concerning variety descriptions to be considered by the CAJ-AG in the first instance, as follows²⁸:

“(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.”

36. The CAJ-AG²⁹ considered document CAJ-AG/14/9/4 “Matters concerning variety descriptions”.³⁰

37. The CAJ-AG agreed that, on the basis of document TGP/5 “Experience and Cooperation in DUS Testing”, Section 6 “UPOV Report on Technical Examination and UPOV Variety Description”, the purpose of the variety description developed at the time of the grant of the breeder's right (original variety description) might be summarized as follows:

- (a) to describe the characteristics of the variety; and
- (b) to identify and list similar varieties and differences from these varieties;
combined with the information on the basis for (a) and (b), namely:
 - Date and document number of UPOV Test Guidelines;
 - Date and/or document number of Reporting Authority's test guidelines;
 - Reporting Authority;
 - Testing station(s) and place(s);
 - Period of testing;
 - Date and place of issue of document;
 - Group: (Table: Characteristics; States of Expression; Note; Remarks);
 - Additional Information;
 - (a) Additional Data
 - (b) Photograph (if appropriate)
 - (c) RHS Colour Chart version used (if appropriate)
 - (d) Remarks

Status of the original variety description in relation to the verification of the conformity of plant material to a protected variety for enforcement of the breeder's right

38. The CAJ-AG³¹ considered the status of the original variety description in relation to the verification of plant material of a protected variety for the purposes of enforcement of the breeder's right and noted that UPOV guidance on the enforcement of breeders' rights contained in document UPOV/EXN/ENF/1 “Explanatory notes on the enforcement of breeders' rights under the UPOV Convention” explains as follows³²:

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

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

[...]

²⁷ Held in Geneva on April 10, 2014.

²⁸ See document CAJ/69/13 “Report”, paragraph 18.

²⁹ At its ninth session.

³⁰ See document CAJ-AG/14/9/6 “Report on the Conclusions”, paragraphs 19 and 20.

³¹ At its ninth session.

³² See document CAJ-AG/14/9/6 “Report on the Conclusions”, paragraph 21.

39. The CAJ-AG agreed that, in relation to the use of the original variety description, it should be recalled that the description of the variety characteristics and the basis for distinctness from the most similar variety are linked to the circumstances of the DUS examination, as set out in paragraph 10 (c) of this document, namely³³:

- Date and document number of UPOV Test Guidelines;
- Date and/or document number of Reporting Authority's test guidelines;
- Reporting Authority;
- Testing station(s) and place(s);
- Period of testing;
- Date and place of issue of document;
- Group: (Table: Characteristics; States of Expression; Note; Remarks);
- Additional Information;
 - (a) Additional Data
 - (b) Photograph (if appropriate)
 - (c) RHS Colour Chart version used (if appropriate)
 - (d) Remarks

40. *The CAJ is invited to consider the conclusions of the CAJ-AG on:*

(a) the purpose(s) of the variety description developed at the time of the grant of the breeder's right (original variety description), as set out in paragraph 37; and

(b) the status of the original variety description in relation to the verification of the conformity of plant material to a protected variety for enforcement of the breeder's right, as set out in paragraphs 38 and 39.

Variety denominations (document CAJ/71/3)

41. A report on the work concerning the development of a UPOV similarity search tool for variety denomination purposes and proposals concerning a possible revision of the "Explanatory Notes on Variety Denominations under the UPOV Convention" (document UPOV/INF/12/4) is provided in document CAJ/71/3 "Variety denominations".

42. *The CAJ is invited to note that a report on work concerning the possible development of a UPOV similarity search tool for variety denomination purposes and proposals concerning a possible revision of document UPOV/INF/12/4 "Explanatory Notes on Variety Denominations under the UPOV Convention" are provided in document CAJ/71/3 "Variety denominations".*

³³ See document CAJ-AG/14/9/6 "Report on the Conclusions", paragraph 22.

MATTERS CONCERNING OBSERVERS IN THE CAJ-AG

43. The CAJ-AG³⁴ considered document CAJ-AG/14/9/5 “Matters concerning observers in the CAJ-AG” and agreed that the matter should be considered by the CAJ at the appropriate time.³⁵

44. On the above basis, it is proposed to consider matters concerning observers in the CAJ-AG in the event that a session of the CAJ-AG is convened by the CAJ.³⁶

45. The CAJ-AG suggested to the CAJ to consider the merits of inviting written comments from members and observers on relevant CAJ documents before the CAJ sessions.³⁷

46. *The CAJ is invited to:*

(a) *consider matters concerning observers in the CAJ-AG in the event that a session of the CAJ-AG is convened by the CAJ; and*

(b) *consider the merits of inviting written comments from members and observers on relevant CAJ documents before the CAJ sessions.*

MATTER REFERRED BY THE CAJ TO THE CONSULTATIVE COMMITTEE AND THE COUNCIL

47. The CAJ, at its seventieth session³⁸ noted the interest to discuss the relationship and effects of the implementation of the “Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity” for the breeder’s exemption. The CAJ noted that this interest would be reported to the Consultative Committee and the Council.

48. The Council, at its forty-eighth ordinary session,³⁹ noted the work of the Consultative Committee at its eighty-eighth session,⁴⁰ as reported in document C/48/19 “Report by the President on the work of the eighty-eighth session of the Consultative Committee; adoption of recommendations, if any, prepared by that Committee”, which provided as follows:⁴¹

“61. The Consultative Committee noted that, at the seventieth session of the Administrative and Legal Committee (CAJ), held in Geneva on October 13, 2014, the CAJ had noted the interest to discuss the relationship and effects of the implementation of the “Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity” for the breeder’s exemption (see document CAJ/70/10 “Report on the Conclusions”, paragraph 40).”

49. *The CAJ is invited to note that the interest to discuss the relationship and effects of the implementation of the “Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity” for the breeder’s exemption was reported to the Consultative Committee and the Council, as set out in paragraph 48.*

³⁴ At its ninth session.

³⁵ See document CAJ-AG/14/9/6 “Report on the Conclusions”, paragraph 32.

³⁶ See document CAJ/70/10 “Report on the Conclusions”, paragraphs 38 to 41.

³⁷ See document CAJ-AG/14/9/6 “Report on the Conclusions”, paragraph 33.

³⁸ Held in Geneva on October 13, 2014.

³⁹ Held in Geneva on October 16, 2014.

⁴⁰ Held in Geneva on October 15 and 16, 2014.

⁴¹ See document C/48/19, paragraph 61.

TENTATIVE PROGRAM FOR THE DEVELOPMENT OF INFORMATION MATERIALS

50. Subject to progress at the seventy-first session of the CAJ, it is proposed to discuss the following information materials at the seventy-second session of the CAJ:

Explanatory Notes on Essentially Derived Varieties under the 1991 Act of the UPOV Convention (Revision) (document CAJ/72/2 "Development of information materials concerning the UPOV Convention" and document UPOV/EXN/EDV/2 Draft 6)

Explanatory Notes on Variety Denominations under the UPOV Convention (Revision) (document CAJ/72/3 "Variety denominations")

UPOV Model Plant Breeders' Rights Gazette" (Revision) (document CAJ/72/2 "Development of information materials concerning the UPOV Convention")

51. The CAJ, at its seventieth session,⁴² agreed that the Office of the Union should prepare a draft revision of document UPOV/INF/5 "UPOV Model Plant Breeders' Rights Gazette" (document UPOV/INF/5/1 Draft 1) for consideration by the CAJ at its seventy-second session, to be held in October 2015, subject to its consideration of the program for the development of information materials.⁴³ It is suggested to defer the preparation of a draft revision of document UPOV/INF/5/1 Draft 1, pending developments in relation to the development of a prototype electronic form (see document CAJ/71/4).

52. Subject to the approval of the CAJ at its seventy-first session, the Council, at its forty-ninth ordinary session, to be held on October 29, 2015, will be invited to adopt the following explanatory notes:

Explanatory Notes on Propagating Material under the 1991 Act of the UPOV Convention (document UPOV/EXN/PPM/1)

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

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

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

In conjunction with the explanatory notes that the Council will be invited to adopt at its forty-ninth ordinary session, it is proposed to adopt a revision of document UPOV/INF/6/3 "Guidance for the preparation of laws based on the 1991 Act of the UPOV Convention" (document UPOV/INF/6/4).

53. *The CAJ is invited to:*

(a) subject to progress at the seventy-first session of the CAJ, consider the tentative program for the development of information materials, as set out in paragraphs 50 to 52; and

(b) note that, subject to the approval of the CAJ at its seventy-first session, the Council, at its forty-ninth ordinary session, will be invited to adopt:

(i) the "Explanatory Notes on Propagating Material under the 1991 Act of the UPOV Convention" (document UPOV/EXN/PPM/1);

⁴² Held on October 13, 2014.

⁴³ See document CAJ/70/10 "Report on the Conclusions", paragraph 19.

(ii) the “Explanatory Notes on Cancellation of the Breeder’s Right under the UPOV Convention” (Revision) (document UPOV/EXN/CAN/2);

(iii) the Explanatory Notes on the Nullity of the Breeder’s Right under the UPOV Convention (Revision) (document UPOV/EXN/NUL/2);

(iv) the “Explanatory Notes on Provisional Protection under the UPOV Convention” (Revision) (document UPOV/EXN/PRP/2); and

(v) in conjunction with the above explanatory notes, a revision of document UPOV/INF/6/3 “Guidance for the preparation of laws based on the 1991 Act of the UPOV Convention” (document UPOV/INF/6/4).

[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 3 to be considered by the CAJ in March 2015
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 6 to be considered by the CAJ in October 2015
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/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 3 to be considered by the CAJ in March 2015
UPOV/EXN/PPM	Propagating Material under the 1991 Act of the UPOV Convention	UPOV/EXN/PPM/1 Draft 4 to be considered by the CAJ in March 2015
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 3 to be considered by the CAJ in March 2015
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/6 adopted in October 2014 UPOV/INF-EXN/7 Draft 1 to be considered by the Council in March 2015
UPOV/INF/4	Financial Regulations and Rules of UPOV	UPOV/INF/4/3 adopted in March 2013 Proposed revision of UPOV/INF/4 to be considered by the Council in March 2015
UPOV/INF/5	UPOV model plant breeders' rights gazette	UPOV/INF/5 adopted in October 1979 Proposed revision of UPOV/INF/5 to be considered by the CAJ in October 2015
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 Proposed revision of UPOV/INF/12 to be considered by the CAJ in March 2015
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 UPOV/INF/15/3 Draft 2 to be considered by the Council in March 2015
UPOV/INF/16	Exchangeable Software	UPOV/INF/16/4 adopted in October 2014 Proposed revision of UPOV/INF/16 to be considered by the CAJ in March 2015
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
UPOV/INF/22	Software and Equipment Used by Members of the Union	UPOV/INF/22/1 adopted in October 2014 Proposed revision of UPOV/INF/22 to be considered by the CAJ in March 2015

[End of the Annex and of the document]