

Administrative and Legal Committee**CAJ/74/2****Seventy-Fourth Session
Geneva, October 23 and 24, 2017****Original:** English
Date: September 29, 2017**DEVELOPMENT OF INFORMATION MATERIALS CONCERNING THE UPOV CONVENTION***Document prepared by the Office of the Union**Disclaimer: this document does not represent UPOV policies or guidance***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-fourth session and present a tentative program for the development of information materials.
2. The CAJ is invited to:
 - (a) consider a possible revision of the “Explanatory Notes on Essentially Derived Varieties under the 1991 Act of the UPOV Convention” (Revision) (see document UPOV/EXN/EDV/2);
 - (b) note the request of CIOPORA and ISF to postpone the meeting of the Office of the Union 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, as set out in paragraph 18 of this document;
 - (c) consider a possible revision of the “Explanatory Notes on Conditions and Limitations Concerning the Breeder’s Authorization in Respect of Propagating Material under the UPOV Convention” (document UPOV/EXN/CAL/1);
 - (d) consider a possible revision of the “Explanatory Notes on Provisional Protection under the UPOV Convention” (document UPOV/EXN/PRP/2);
 - (e) consider requesting the Office of the Union the preparation of proposals, for consideration by the CAJ, at its seventy-fifth session, for the revision of document UPOV/INF/5 “UPOV Model Plant Breeders’ Rights Gazette (Revision)”, as set out in paragraph 36 of this document;
 - (f) note that a report on the 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 “Explanatory Notes on Variety Denominations under the UPOV Convention” are provided in document CAJ/74/3 “Variety denominations”; and
 - (g) consider the program for the development of information materials in conjunction with the discussions under the item “Program for the seventy-fifth 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.

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. 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 Annex I to this document.

INFORMATION MATERIALS

Possible revision of document UPOV/EXN/EDV/2 “Explanatory Notes on Essentially Derived Varieties under the 1991 Act of the UPOV Convention”

Adoption of document UPOV/EXN/EDV/2

6. The CAJ, at its seventy-third session, held in Geneva on October 25, 2016, agreed the following amendments to document “Explanatory Notes on Essentially Derived Varieties under the 1991 Act of the UPOV Convention” (Revision) (document UPOV/EXN/EDV/2 Draft 7).⁷

Paragraphs 20 and 21	Not to retain the following paragraphs that appear in strikethrough in document UPOV/EXN/EDV/2 Draft 7 720. 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. 21. 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 phenotypic expression of the essential characteristics may provide an indication of predominant derivation, if the variety fulfills the definition in Article 14(5)(b).
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7. The CAJ agreed that, subject to the changes in paragraph 6 above, a draft of the “Explanatory Notes on Essentially Derived Varieties under the 1991 Act of the UPOV Convention (Revision)” based on document UPOV/EXN/EDV/2 Draft 7 (document UPOV/EXN/EDV/2) be presented for adoption by the Council at its thirty-fourth extraordinary session in April 2017.⁸

8. The Council, at its thirty-fourth extraordinary session, adopted a revision of document UPOV/EXN/EDV/1 “Explanatory Notes on Essentially Derived Varieties under the 1991 Act of the UPOV Convention” (document UPOV/EXN/EDV/2), on the basis of document UPOV/EXN/EDV/2 Draft 8.⁹

9. The CAJ, at its seventy-third session, considered the matters in the following paragraphs in relation to future work of the CAJ on essentially derived varieties.

Comments of the Russian Federation

10. The CAJ, at its seventy-third session, noted the comments of the Russian Federation on document UPOV/EXN/EDV/2 Draft 7, which were circulated to the CAJ on October 24, 2016. The CAJ agreed to

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.

⁷ See document [CAJ/73/10](#) “Report on the Conclusions”, paragraph 8.

⁸ See document [CAJ/73/10](#) “Report on the Conclusions”, paragraph 9.

⁹ See document [C\(Extr.\)/34/6](#) “Report on the Decisions”, paragraph 8.

consider the relevant elements of those comments, at its seventy-fourth session, with a view to developing guidance in a future revision of document UPOV/EXN/EDV.¹⁰

11. By UPOV Circular E-17/113 of July 5, 2017, the CAJ was invited to send any comments and/or proposals in relation to the comments from the Russian Federation with a view to a possible revision of document UPOV/EXN/EDV/2 to the Office of the Union by August 4, 2017.

12. The Office of the Union received, on June 13, 2017, a submission from the Russian Federation with some modifications to the presentation of its comments and in order to refer to document UPOV/EXN/EDV/2. The updated comments from the Russian Federation were circulated with UPOV Circular E-17/113 and are reproduced in Annex II, Appendix 1. Document UPOV/EXN/EDV/2 can be consulted at the CAJ/74 page: http://www.upov.int/meetings/en/details.jsp?meeting_id=44404.

13. In reply to UPOV Circular E-17/113, the Office of the Union received comments from France, Switzerland and joint comments from ESA and ISF. Those comments are reproduced in Annex II, Appendixes 1 to 3, respectively.

14. The updated comments from the Russian Federation (Annex II, Appendix 1) are presented below after the relevant extract from document UPOV/EXN/EDV/2.

Extract from document UPOV/EXN/EDV/2 (paragraph 1)

1. 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 (Diplomatic Conference), adopted the following resolution:

“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.”

Proposal by the Russian Federation

1. Paragraph 1 with the relevance to the resolution of the Diplomatic Conference to be excluded from preamble, because it is being more than 25 years after the appeal to the Secretary General of UPOV to **immediately start** the development of guidance on Article 14(5).

Extract from document UPOV/EXN/EDV/2 (paragraph 2)

2. These Explanatory Notes provide guidance on “Essentially Derived Varieties” under the 1991 Act of the International Convention for the Protection of New Varieties of Plants (UPOV Convention). The purpose of this guidance is to assist members of the Union and relevant stakeholders in their considerations in matters concerning essentially derived varieties. The only binding obligations on members of the Union are those contained in the text of the UPOV Convention itself, and these Explanatory Notes must not be interpreted in a way that is inconsistent with the relevant Act for the member of the Union concerned.

Proposal by the Russian Federation

2. It would be more concise to discard the first sentence in the paragraph 2 and keep the second sentence with the following adjustment: “ *.in accordance with the 1991 Act of the UPOV Convention*”.

¹⁰ See document [CAJ/73/10](#) “Report on the Conclusions”, paragraph 13.

Extract from document UPOV/EXN/EDV/2 (Section I: Provisions of Essentially Derived Varieties)

SECTION I: PROVISIONS OF ESSENTIALLY DERIVED VARIETIES

- (a) Relevant provisions of the 1991 Act of the UPOV Convention

THE RIGHTS OF THE BREEDER
Article 14
Scope of the Breeder's Right
[...]

Proposal by the Russian Federation

3. The heading "THE RIGHTS OF THE BREEDER" before quoting the Article 14 is unnecessary. Subparagraphs 14(5)(ii) and (14)(5)(iii), as well as the footnotes are irrelevant to the EDV, but to "*certain other varieties*", thus creates unnecessary link in the document.

Extract from document UPOV/EXN/EDV/2 (paragraphs 4 and 5)

4. The requirement of predominant derivation from an initial variety means that a variety can only be essentially derived from one initial variety. The intention is that a variety should only be essentially derived from another variety when it retains virtually the whole genotype of the other variety. A derived variety could not, in practice, retain the expression of the essential characteristics of the variety from which it is derived unless it is almost entirely derived from that initial variety.

5. The phrase "while retaining the expression of the essential characteristics" requires that the expression of the essential characteristics conforms to and be derived from the initial variety.

Proposal by the Russian Federation

4. Paragraphs 4 and 5 are repeating the information provided in the Convention, however in a more complicated and confusing way.

Extract from document UPOV/EXN/EDV/2 (paragraph 6)

6. The following might be considered in relation to the notion of "essential characteristics":
- (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;
 - (ii) characteristics that are important from the perspective of the producer, seller, supplier, buyer, recipient, or user;
 - (iii) characteristics that are essential for the variety as a whole, including, for example, morphological, physiological, agronomic, industrial and biochemical characteristics;
 - (iv) essential characteristics may or may not be phenotypic characteristics used for the examination of distinctness, uniformity and stability (DUS);
 - (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);
 - (vi) essential characteristics may be different in different crops/species.

Proposal by the Russian Federation

5. Paragraph 6. It is impossible to make determination of a new variety based on the need of examination of additional characteristics that are absent in DUS Test Guidelines (such as "*performance*", "*value of the variety*", "*characteristics that are important from the perspective of the producer, seller, supplier, buyer, recipient or user*", "*characteristics that are essential for the variety as a whole*"). Such kind of characteristics should not be included in DUS Test Guidelines for different crops and species. Thus, it is the question of relevance of existence of the paragraph 6 in the document.

Extract from document UPOV/EXN/EDV/2 (paragraph 7)

7. 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".

Proposal by the Russian Federation

6. Paragraph 7. The first phrase states "...*it is clearly distinguishable from the initial variety*" ...*is concerned only with varieties that are clearly distinguishable, in accordance with Article 7...*" However, there is no additional explanation for understanding needed. The second sentence on the possibility of application of Article 14(5)(a)(ii) "*if the variety is "not clearly distinguishable in accordance with Article 7 from the protected variety"*" is wrong. Article 14(5)(a)(ii) has no reference to EDVs. Thus, it is the question of relevance of existence of the paragraph 7 in the document.

Extract from document UPOV/EXN/EDV/2 (paragraphs 8, 9, 10 and 11)

8. A judgment on the question on the degree of conformity must be reached on the basis of the essential characteristics which result from the genotype of the initial variety.

9. 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".

10. 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).

11. The derived variety must retain almost the totality of the genotype of the initial variety and be different from that variety by a very limited number of characteristics.

Proposal by the Russian Federation

7. There are unacceptable conditions for EDVs in paragraphs 8, 9, 10, 11 therefore, the paragraphs should be removed.

Extract from document UPOV/EXN/EDV/2 (paragraph 13)

13. The use of the word “may” in Article 14(5)(c) indicates that those ways may not necessarily result in an essentially derived variety. In addition, the Convention clarifies that those are examples and do not exclude the possibility of an essentially derived variety being obtained in other ways.

Proposal by the Russian Federation

8. Paragraph 13 makes the link of explanation to the word “may” in Convention. However, this is rather the explanation of the words “for example”.

Extract from document UPOV/EXN/EDV/2 (paragraph 14 and 15)

14. 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.

15. Whether a mutation is naturally or artificially induced is irrelevant. For instance, the genetic change may result in a mutant that no longer retains the expression of the essential characteristics that result from the genotype of the initial variety.

Proposal by the Russian Federation

9. Paragraphs 14 and 15 should be removed because it is inappropriate to continuously complicate the process of determination of EDVs, i.e. inclusion of additional testing.

Extract from document UPOV/EXN/EDV/2 (paragraph 17)

17. In the example in Figure 1, variety B is an essentially derived variety from variety A and is predominantly derived from variety A.

Proposal by the Russian Federation

10. Paragraph 17 mentions terms “essentially derived varieties” and “predominantly derived varieties” in one sentence that may bring the confusion of understanding that these terms are different, rather than synonyms in fact.

Extract from document UPOV/EXN/EDV/2 (paragraph 23)

23. Figures 3 and 4 provide a summary of the situation described above. It is important to note that the scope of the breeder’s right is only extended to essentially derived varieties in respect of a protected initial variety. In that regard, it should also be noted that a variety which is essentially derived from another variety cannot be an initial variety (see Article 14(5)(a)(i)). Thus, in figure 3, the rights of Breeder 1 extend to EDV “B”, EDV “C” and EDV “Z”. However, although EDV “C” is predominantly derived from EDV “B”, Breeder 2 has no rights as far as EDV “C” is concerned. In the same way, Breeders 2 and 3 have no rights as far as EDV “Z” is concerned. Another important aspect of the provision on essential derivation is that no rights extend to essentially derived varieties if the initial variety is not protected. Thus, in figure 4, if variety “A” was not protected or if variety “A” is no longer protected (e.g. because of expiration of the period of protection, or cancellation or nullification of the plant breeders’ rights), the authorization of Breeder 1 would no longer be required to be able to commercialize varieties “B”, “C” and “Z”.

Proposal by the Russian Federation

11. Elimination of the need to obtain authorization from the breeder of the initial variety for commercialization of a variety derived by third parties (each independently) simplifies the use of derived varieties in the protected territory. Thus, it would be reasonable to supplement the paragraph 23 with sub-paragraph 23.1 (place it after the Figure 4) as follows:

“23.1. The breeder of the protected derived variety may obtain an authorization for commercialization of the variety (issue of licenses to the third parties on behalf of the breeder) in the form of exclusive license agreement with the breeder of initial variety”.

Extract from document UPOV/EXN/EDV/2 (paragraph 24)

24. The scope of the breeder's right applies only to the territory of a member of the Union where the breeder's right has been granted and is in force. Therefore, the breeder of an initial variety only has rights in relation to an essentially derived variety if the initial variety is protected in the territory concerned. Furthermore, the breeder of an essentially derived variety only has rights in relation to that variety if it is protected in its own right in the territory concerned, or if the breeder of the essentially derived variety is also the breeder of the initial variety and the initial variety is protected in the territory concerned.

Proposal by the Russian Federation

12. According to the provision of Article 14(1)(a)(vi), it might be necessary to supplement paragraph 24 with the following text: *“In case of discrepancy between initial and the derived varieties' protection territories the breeder's right for the initial variety is extended to imported material of derived variety in the protection territory of the initial variety.”*

Extract from document UPOV/EXN/EDV/2 (paragraph 25)

25. Members of the Union which amend their legislation in line with the 1991 Act of the UPOV Convention may choose to offer the benefits of the 1991 Act to varieties which were protected under an earlier law. Thus, it is possible for members of the Union to offer the scope of protection provided by Article 14(5) to varieties which were granted protection under an earlier law. However, it should be noted that the conferring of the new scope of rights on a previously protected initial variety could impose new requirements concerning the commercialization of essentially derived varieties, for which the breeder's authorization was not previously required.

Proposal by the Russian Federation

13. Members of the Union acceding to the 1991 Act of the Convention under paragraph 25 of the current draft are encouraged to choose whether to extend the provisions of Article 14(5) to the generally known before the date of accession to the 1991 Act varieties. We believe there shouldn't be dual approaches used. All members of the Union acceding to the 1991 Act should follow the provisions of Article 14(5) of the 1991 Act concerning all protected varieties regardless of the date of registration. Thus it would be reasonable to adjust the first sentence in the paragraph 25 as follows: “Members of the Union which amend their legislation in line with the 1991 Act of the UPOV Convention should cover the extension of the provisions of Article 14(5) to the generally known varieties”.

* “Commercialization” encompasses the acts concerning a protected variety which require the authorization of the breeder according to Article 14(1) to (4) of the 1991 Act of the UPOV Convention.

Extract from document UPOV/EXN/EDV/2 (paragraph 26)

26. One means of dealing with such a situation is the following: for varieties for which protection was granted under the earlier law and for which there is a remaining period of protection which falls under the new law, to limit the scope of rights on a protected initial variety to essentially derived varieties whose existence was not a matter of common knowledge at the time that the new law came into effect. With respect to varieties whose existence is a matter of common knowledge, the General Introduction to the Examination of Distinctness, Uniformity and Stability and the Development of Harmonized Descriptions of New Varieties of Plants (Document [TG/1/3](#)) explains the following:

“5.2.2 Common Knowledge

“5.2.2.1 Specific aspects which should be considered to establish common knowledge include, among others:

“(a) commercialization of propagating or harvested material of the variety, or publishing a detailed description;

“(b) the filing of an application for the grant of a breeder’s right or for the entering of a variety in an official register of varieties, in any country, which is deemed to render that variety a matter of common knowledge from the date of the application, provided that the application leads to the grant of a breeder’s right or to the entering of the variety in the official register of varieties, as the case may be;

“(c) existence of living plant material in publicly accessible plant collections.

“5.2.2.2 Common knowledge is not restricted to national or geographical borders.”

Proposal by the Russian Federation

14. The content of the paragraph 26 does not refer to the content of the document thus its presence is unnecessary.

Extract from document UPOV/EXN/EDV/2 (Section II)

SECTION II: ASSESSMENT OF ESSENTIALLY DERIVED VARIETIES

27. A decision on whether to grant protection to a variety does not take into account whether the variety is essentially derived or not: the variety will be protected if the conditions for protection as set out in Article 5 of the UPOV Convention are fulfilled (novelty, distinctness, uniformity, stability, variety denomination, compliance with formalities and payment of fees). If it is concluded that the variety is an essentially derived variety, the breeder of that essentially derived variety still has all the rights conferred by the UPOV Convention. However, the breeder of the protected initial variety will *also* have rights in that variety irrespective of whether the essentially derived variety is protected or not.

28. The purpose of this Section is to provide guidance on assessing whether a variety is essentially derived and not whether the variety meets the requirements for the grant of a breeder’s right.

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.

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 other variety to prove that the variety was not essentially derived from the initial variety.

31. UPOV has established a section on its website (UPOV SYSTEM: Legal Resources: Jurisprudence: http://www.upov.int/about/en/legal_resources/case_laws/index.html) where case law relevant to plant breeders’ rights, including case law concerning essentially derived varieties, is published.

Proposal by the Russian Federation

15. *Section II* of the document leads to complication of the provision of determination of EDVs as there are responsible authorities and relevant examinations of the varieties for such purposes. Therefore we offer to consider the following version of the Section II instead:

“Section II “Registration of protected initial variety’s rights’ extension to essentially derived varieties”

27. *An applicant (breeder) shall indicate the history of breeding (creation) of the variety in the application materials (the application form) for granting the breeder’s right or application materials (the application form) for including the variety in the National List. At the stage of preliminary examination of the application the competent authority of the member of the Union examines the completeness of the information on the new variety and requests additional information if applicable.*

28. *A request to determine variety to the category “essentially derived varieties” and to denominate the initial variety is prepared by the authority based on the information containing the origin of the variety and DUS examination, and is published in the official Bulletin.*

29. *Comments on the application materials submitted within six months after the publication are to be agreed with stakeholders.*

30. *The decision of competent authority concerning the determination of variety to the category of essentially derived varieties and denomination of the initial variety may be appealed in accordance with national legislation.*

31. *In the case of the protection of the initial variety in the territory of the member of the Union, the competent authority requests to submit a license agreement with the breeder of the initial variety about the conditions commercialization of the propagating material of EDV when registering the breeder’s right for EDV.*

32. *Interrelation between essentially derived varieties (protected and unprotected by private right) and the protected initial variety is reflected by the competent authority by publishing the information about varieties used in own territory, including the UPOV website.*

33. *A provision similar to paragraph 34 should be developed in respect of varieties which production requires multiple usage of protected variety (Article 14(5)(a)(iii)).”*

[End of proposals by the Russian Federation on document UPOV/EXN/EDV/2]

Joint proposal from ISF/ESA

15. The CAJ, at its seventy-third session, considered the joint proposal from ISF/ESA for paragraphs 20 and 21 of document UPOV/EXN/EDV/2 Draft 7 and the comment received from the Delegation of the Russian Federation, as provided in document CAJ/73/2, paragraph 11.¹¹

16. The CAJ agreed that the joint proposal from ISF and ESA would benefit from clarification and agreed to consider that matter further with a view to developing guidance in a future revision of document UPOV/EXN/EDV, at its seventy-fourth session.¹² The updated proposal of ISF and ESA is reproduced below.

“20. Another example of a way in which it might be possible to obtain EDV from an initial variety could be the physical use of a hybrid variety to obtain a variety which is essentially derived from one of the parent lines of the hybrid. In such a case the parent line is the initial variety. The hybrid is obtained by using the initial variety and the EDV is obtained by using the hybrid. It might be that the breeder of the EDV did not use the initial variety himself, but by using the hybrid he is using a variety that is derived from the initial variety. This means the initial variety has been used in the derivation process.”

¹¹ See document [CAJ/73/10](#) “Report on the Conclusions”, paragraph 11.

¹² See document [CAJ/73/10](#) “Report on the Conclusions”, paragraph 12.

Alternative dispute settlement mechanisms for matters concerning essentially derived varieties

17. The CAJ, at its seventy-third session, noted that a meeting of the Office of the Union with the International Community of Breeders of Asexually Reproduced Ornamental and Fruit Varieties (CIOPORA), ISF and the World Intellectual Property Organization (WIPO) had been tentatively scheduled to take place during the first quarter of 2017 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, as set out in paragraphs 14 and 15 of document CAJ/73/2.¹³

18. On January 10, 2017, CIOPORA and ISF requested the Office of the Union to postpone the meeting on alternative dispute settlement mechanisms between the Office of the Union with WIPO, ISF and CIOPORA to allow more time for internal discussions and further coordination between CIOPORA and ISF, before the meeting takes place. Any developments with regard to a meeting will be reported at future sessions of the CAJ.

19. *The CAJ is invited to:*

(a) consider a possible revision of the “*Explanatory Notes on Essentially Derived Varieties under the 1991 Act of the UPOV Convention*” (Revision) (see document UPOV/EXN/EDV/2); and

(b) note the request of CIOPORA and ISF to postpone the meeting of the Office of the Union 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, as set out in paragraph 18 of this document.

Possible revision of the Explanatory Notes on Conditions and Limitations Concerning the Breeder's Authorization in Respect of Propagating Material under the UPOV Convention (document UPOV/EXN/CAL/1)

20. The CAJ, at its seventy-third session, considered the request of the Russian Federation of a possible revision of the Explanatory Notes on Conditions and Limitations Concerning the Breeder's Authorization in Respect of Propagating Material under the UPOV Convention (document UPOV/EXN/CAL/1) and requested the Office of the Union to send a circular to the CAJ circulating the proposals by the Russian Federation and requesting any additional proposals for revision of document UPOV/EXN/CAL/1. The replies to the Circular would be considered by the CAJ, at its seventy-fourth session. The CAJ would then decide whether to start the revision of document UPOV/EXN/CAL/1.¹⁴ Document UPOV/EXN/CAL/1 can be consulted at the CAJ/74 page: http://www.upov.int/meetings/en/details.jsp?meeting_id=44404.

21. By UPOV Circular E-17/111 of July 5, 2017, the CAJ was invited to send any comments and/or proposals in relation to the comments from the Russian Federation with a view to a possible revision of document UPOV/EXN/CAL/1 to the Office of the Union by August 4, 2017. The comments of the Russian Federation circulated with UPOV Circular E-17/111 are reproduced below and in Annex III.

22. In reply to UPOV Circular E-17/111, the Office of the Union received comments from France, Switzerland and joint comments from ESA and ISF. Those comments are reproduced in Annex III, Appendixes 1 to 3 respectively.

¹³ See document [CAJ/73/10](#) “Report on the Conclusions”, paragraph 14.

¹⁴ See document [CAJ/73/10](#) “Report on the Conclusions”, paragraph 19.

Extract from document UPOV/EXN/CAL/1 (Preamble)

PREAMBLE

1. The purpose of these Explanatory Notes is to provide guidance concerning the conditions and limitations to which the breeder's authorization may be subject, for acts in respect of propagating material (Article 14(1) of the 1991 Act and Article 5(2) of the 1978 Act), under the International Convention for the Protection of New Varieties of Plants (UPOV Convention). The only binding obligations on members of the Union are those contained in the text of the UPOV Convention itself, and these Explanatory Notes must not be interpreted in a way that is inconsistent with the relevant Act for the member of the Union concerned.

Proposal by the Russian Federation

1. The conceptual statement of the preamble of all Explanatory Notes "...Explanatory Notes must not be interpreted in a way that is inconsistent with the relevant Act for the member of the Union concerned" means that:

- Developers / drafters of Explanatory Notes are imposed to a responsibility not to distort relevant legal provisions of the concerned Act of the UPOV Convention, and
- Explanatory Notes should not include any legal regulations except those contained in the text of the UPOV Convention itself.

Extract from document UPOV/EXN/CAL/2 (paragraph 3)

3. For illustrative purposes, examples of conditions and limitations which a breeder might include are:

- (i) remuneration – level of remuneration (e.g. linked to quantity of propagating material, area sown with the propagating material, amount or value of material produced from the propagating material etc.), timing and method of payment, etc.;
- (ii) period of authorization;
- (iii) method by which the authorized acts may be undertaken (e.g. method of production or reproduction, export routes etc.);
- (iv) quality and quantity of material to be produced;
- (v) territory(ies) covered by the authorization for export;
- (vi) conditions under which the person authorized may license/sub-license other parties to conduct the authorized acts on their behalf;

Proposal by the Russian Federation

2. Considering the above mentioned we suppose that phrases: "amount of... material produced from the propagating material", "method of payment" in subparagraph (i), as well as phrase "quantity of material" in subparagraph (iv) of paragraph 3 of the document considered, should be deleted (see explanation below).

Explanation:

Breeder's right does not extend on acts in respect of material of a protected variety which had been marketed by breeder or with his consent in the territory of Contracting Party (Article 16 of 1991 Act of the UPOV Convention). Therefore, breeder's remuneration cannot be dependent on amount of material, grown from propagating material.

Licensee and the third parties are not burdened with liability to the breeder when producing plant / harvested material from propagating material. We believe that there are no options for payment methods (cash or by transfer) of remuneration to the breeder.

Payment of remuneration to the breeder shall be in the respective currency of the country of protection of a variety without any options ("methods"). For example, payment in-kind (product, service, etc.) without proper cash registration is illegitimate.

We also believe that it is illegal (monopoly) for the breeder to regulate the quantity of propagating material to be produced by licensee.

3. We suggest considering amendments of the subparagraphs of paragraph 3 considered as follows:

"(i) remuneration - level of remuneration (e.g. linked to quantity (value) of propagating material grown or realized (for the varieties covered by a national law related to exceptions to the breeder's right under Article 15(2)), or area sown with the propagating material, ~~amount or value of material produced from the propagating material etc.~~), timing and ~~method of payment, etc.~~ the size of penalties for violation of payment timing";

"(iv) quality ~~and quantity~~ of material to be produced,"

We also think it would be applicable to supplement paragraph 3 with the following subparagraph:

"() right of the licensor or their authorized representative for familiarize with appropriate documents of the licensee in respect of propagating material".

23. The CAJ is invited to consider a possible revision of the "Explanatory Notes on Conditions and Limitations Concerning the Breeder's Authorization in Respect of Propagating Material under the UPOV Convention" (document UPOV/EXN/CAL/1).

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

24. The Council, at its forty-ninth ordinary session,¹⁵ adopted a revision of document UPOV/EXN/PRP/1 "Explanatory Notes on Provisional Protection under the UPOV Convention" (document UPOV/EXN/PRP/2), on the basis of document UPOV/EXN/PRP/2 Draft 4.¹⁶ Document UPOV/EXN/PRP/2 can be consulted at the CAJ/74 page: http://www.upov.int/meetings/en/details.jsp?meeting_id=44404

25. The Council, at its forty-ninth ordinary session, noted the request by the Delegation of the Russian Federation to discuss a possible future revision of the "Explanatory Notes on Provisional Protection under the UPOV Convention" at the seventy-third session of the CAJ.¹⁷

26. The Chair of the CAJ, at the forty-ninth ordinary session of the Council, noted the request by the Delegation of the Russian Federation to discuss a possible future revision of the "Explanatory Notes on Provisional Protection under the UPOV Convention" at the seventy-third session of the CAJ.¹⁸

27. The CAJ, at its seventy-third session, considered the request of the Russian Federation for a revision of the "Explanatory Notes on Provisional Protection under the UPOV Convention" (document UPOV/EXN/PRP/2) and requested the Office of the Union to send a circular to the CAJ circulating the proposals by the Russian Federation and requesting any additional proposals for revision of document UPOV/EXN/PRP/2. The replies to the Circular would be considered by the CAJ, at its seventy-fourth session. The CAJ would then decide whether to start the revision of document UPOV/EXN/PRP/2.¹⁹

28. By UPOV Circular E-17/112 of July 5, 2017, the CAJ was invited to send any comments and/or proposals in relation to the comments from the Russian Federation with a view to a possible revision of document UPOV/EXN/PRP/2 to the Office of the Union by August 4, 2017. The comments of the Russian Federation circulated with UPOV Circular E-17/112 are reproduced below.

¹⁵ Held in Geneva, October 29, 2015.

¹⁶ See document [C/49/18](#) "Report on the Decisions", paragraph 27.

¹⁷ See document [C/49/18](#) "Report on the Decisions", paragraph 26.

¹⁸ See document [C/49/18](#) "Report on the Decisions", paragraph 48.

¹⁹ See document [CAJ/73/10](#) "Report on the Conclusions", paragraph 20.

29. In reply to UPOV Circular E-17/112, the Office of the Union received comments from France, Switzerland and joint comments from ESA and ISF. Those comments are reproduced in Annex IV, Appendixes 1 to 3 respectively.

Extract from document UPOV/EXN/PRP/2 (Preamble)

PREAMBLE

1. The purpose of these Explanatory Notes is to provide guidance on “Provisional Protection” under the International Convention for the Protection of New Varieties of Plants (UPOV Convention). The only binding obligations on members of the Union are those contained in the text of the UPOV Convention itself, and these Explanatory Notes must not be interpreted in a way that is inconsistent with the relevant Act for the member of the Union concerned.

Proposal by the Russian Federation

1. Taking into consideration the statement of the Explanatory Notes: “The only binding obligations on members of the Union are those contained in the text of the UPOV Convention itself, and these Explanatory Notes must not be interpreted in a way that is inconsistent with the relevant Act for the member of the Union concerned” the Russian Federation experts are of the opinion that provisional protection under the UPOV Convention is applicable only in respect of acts which would require the authorization of the breeder after the right is granted. Provisional protection is not valid if the breeder’s right shall not be granted.

Extract from document UPOV/EXN/PRP/2 (Section II, paragraphs 9 and 13 “Example Provision”)

9. Provisional protection is valid only in relation to acts that would require the breeder’s authorization “once the right is granted”. The UPOV Convention requires (see Article 30(1)(iii) of the 1991 Act and Article 30(1)(c) of the 1978 Act) that the public is informed through the regular publication of information concerning applications for and grants of breeders’ rights, which includes withdrawals and rejections of applications.

[...]

Example provision

13. The following example provision is intended to provide assistance to States/ intergovernmental organizations wishing to draft a provision on provisional protection in their laws in accordance with the 1991 Act of the UPOV Convention:

**Article [13]²⁰
Provisional Protection**

[1] Provisional protection is provided to safeguard the interests of the breeder during the period between [the filing] / [the publication] of the application for the grant of a breeder’s right and the grant of that right.

Example A

[2] The holder of a breeder’s right [shall at least be entitled to equitable remuneration] from any person who, during the period provided in paragraph [(1)], has carried out acts which, once the right is granted, require the breeder’s authorization as provided in Article [14].

Example B

[2] The applicant is considered to be the holder of a breeder’s right in relation to any person who, during the period provided in paragraph [(1)], has carried out acts which, once the right is granted, require the breeder’s authorization as provided in Article [14]. The applicant shall have the same rights to enter into license agreements and to initiate legal proceedings as if on the [filing] /

²⁰ The highlighted text in square brackets is intended for drafters involved in the preparation of laws and identifies, as appropriate, text to be completed, numbering of provisions that might need to be modified, or provisions of the 1991 Act of the UPOV Convention providing for a choice.

[publication] date the breeder's right had been granted to the applicant in respect of the variety concerned. The rights conferred under this paragraph shall be deemed never to have been conferred if the right is not granted.

Proposal by the Russian Federation

2. Cases where some UPOV members provide breeder's rights to the applicants before the date of the rights granting should not be recommended in the UPOV materials including Explanatory Notes.

3. On the basis of above mentioned, we think the wording of paragraph 9 and Example B should be as follows:

"9. Provisional protection is valid only in relation to acts that would require the breeder's authorization "once the right is granted", i.e., ~~Therefore~~ if the right is not granted, provisional protection is not applicable. The UPOV Convention requires (see Article 30(1)(iii) of the 1991 Act and Article 30(1)(c) of the 1978 Act) that the public is informed through the regular publication of information concerning applications for and grants of breeders' rights, which includes withdrawals and rejections of applications."

"Example B

[(2)] The applicant is considered to be the holder of a breeder's right in relation to any person who, during the period provided in paragraph provided in paragraph [(1)], has carried out acts which, once the right is granted, require the breeder's authorization as provided in Article [14]. Legal action in respect of provisional protection can only be initiated after the right is granted. ~~The applicant shall have the same rights to enter into license agreements and to initiate legal proceedings as if on the [filing] / [publication date the breeder's right had been granted to the applicant in respect of the variety concerned. The rights conferred under this paragraph shall be deemed never to have been conferred if the right is not granted.]"~~

Extract from document UPOV/EXN/PRP/2 (Section II, paragraphs 10, 11 and 12)

10. The possibility to enter into license agreements on the basis of applications for breeders' rights and/or to initiate legal proceedings before the grants of breeders' rights will be determined by the relevant legislation of the member of the Union concerned. The relevant legislation might, in addition to the legislation governing breeders' rights, include other legislation on substantive and procedural matters (e.g. civil legislation, criminal legislation).

11. In cases where it is possible to enter into a license agreement before the grant of a breeder's right, the effects on royalties paid if the right is not granted (e.g. whether or not the licensor has to reimburse past royalties) may be provided in the relevant legislation and/or may be agreed by the parties in accordance with the legislative system.

12. In some members of the Union, legal action in respect of provisional protection can only be initiated after the right is granted. In some other members of the Union, it is possible to initiate legal proceedings before the grant of a breeder's right. In those cases, the competent judicial authority may decide that any damages during the period of provisional protection would only be enforceable once the right has been granted. In such cases, the judicial authority could, for example, request the third party to transfer the amount of the damages to a depository account for payment to the breeder if and when the right is granted.

Proposal by the Russian Federation

3. Paragraphs 10, 11 and 12 should be deleted.

30. *The CAJ is invited to consider a possible revision of the "Explanatory Notes on Provisional Protection under the UPOV Convention" (document UPOV/EXN/PRP/2).*

UPOV Model Plant Breeders' Rights Gazette (Revision)

31. The "UPOV Model Plant Breeders' Rights Gazette" (document UPOV/INF/5) was adopted by the Council on October 18, 1979 (see document C/XIII/17, paragraphs 12 and 12a). A copy of document UPOV/INF/5 is available in the UPOV Collection (see http://www.upov.int/upov_collection/en/).

32. The CAJ at its sixty-fourth session,²¹ agreed that document UPOV/INF/5 should be updated in order to:

(a) reflect the wording of the 1991 Act of the UPOV Convention and of documents recently adopted by the Council (e.g. UPOV Model Form for the Application of Plant Breeders' Rights (document TGP/5 Section 2/3));

(b) address relevant developments in the formats of national/regional Gazettes of members of the Union; and

(c) simplify the structure of the document (see document CAJ/64/11 "Report on the Conclusions", paragraph 8).

33. The CAJ, at its seventy-third session, agreed to continue to defer the preparation of a draft revision of document UPOV/INF/5 "UPOV Model Plant Breeders' Rights Gazette (Revision)" (document UPOV/INF/5/1 Draft 1), pending developments in relation to the development of a prototype electronic form (see document CAJ/73/4 "Electronic application form").²²

34. The Council, at its fiftieth ordinary session, held in Geneva on October 28, 2016, approved the launch of the Electronic Application Form (EAF) in January 2017.²³ Developments concerning the electronic application form (EAF) are presented in document CAJ/74/4.

35. The CAJ, at its sixty-eighth session,²⁴ approved the amendments to the program for improvements to the PLUTO database ("Program") (see document CAJ/69/6 "UPOV Information Databases", Annex I.²⁵ Developments concerning the program for the PLUTO Database are presented in document CAJ/74/4.

36. The CAJ may wish to consider requesting the Office of the Union to prepare proposals for consideration by the CAJ at its seventy-fifth session, for the revision of document UPOV/INF/5 "UPOV Model Plant Breeders' Rights Gazette (Revision)", taking into consideration matters for updating identified by the CAJ at its sixty-fourth session and reflecting developments concerning the EAF, and relevant fields of the PLUTO Database, as follows (emphasis added for new text):

(a) reflect the wording of the 1991 Act of the UPOV Convention and of documents recently adopted by the Council (e.g. UPOV Model Form for the Application of Plant Breeders' Rights (document TGP/5 Section 2/3) *and developments concerning the Electronic Application Form (EAF)*);

(b) address relevant developments in the formats of national/regional Gazettes of members of the Union *and relevant fields of the PLUTO Database as an additional tool to inform the public of information concerning applications for and grants of breeders' rights, and proposed and approved denominations*;

(c) simplify the structure of the document.

37. The CAJ is invited to consider requesting the Office of the Union to prepare proposals, for consideration by the CAJ, at its seventy-fifth session, for the revision of document UPOV/INF/5 "UPOV Model Plant Breeders' Rights Gazette (Revision)", as set out in paragraph 36 above.

²¹ held in Geneva on October 17, 2011.

²² See document [CAJ/73/10](#) "Report on the Conclusions", paragraph 21.

²³ See document [C/50/20](#) "Report", paragraph 10(d).

²⁴ Held in Geneva, held on October 21, 2013.

²⁵ See document [CAJ/68/10](#) "Report on the Conclusions", paragraphs 23 to 26.

Explanatory Notes on Variety Denominations under the UPOV Convention (Revision)

38. The CAJ is invited to note that a report on the progress of the work of the Working Group on Variety Denominations (WG-DEN) 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 “Explanatory Notes on Variety Denominations under the UPOV Convention” are provided in document CAJ/74/3 “Variety denominations”.

39. The CAJ is invited to note that a report on the 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 “Explanatory Notes on Variety Denominations under the UPOV Convention” are provided in document CAJ/74/3 “Variety denominations”.

TENTATIVE PROGRAM FOR THE DEVELOPMENT OF INFORMATION MATERIALS

40. The CAJ is invited to consider the program for the development of information materials, as proposed in Annex I to this document, on the basis of the conclusions at its seventy-fourth session on the matters raised above, and in conjunction with the discussions under the item “Program for the seventy-fifth session”.

41. The CAJ is invited to consider the program for the development of information materials in conjunction with the discussions under the item “Program for the seventy-fifth session”.

[Annexes follow]

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 A possible revision will be considered by the CAJ in October 2017
UPOV/EXN/CAN	Cancellation of the Breeder's Right under the UPOV Convention	UPOV/EXN/CAN/2 adopted in October 2015
UPOV/EXN/EDV	Essentially Derived Varieties under the 1991 Act of the UPOV Convention	UPOV/EXN/EDV/2 adopted in April 2017 A possible revision will be considered by the CAJ in October 2017
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/2 adopted in October 2015
UPOV/EXN/PPM	Propagating Material under the 1991 Act of the UPOV Convention	UPOV/EXN/PPM/1 adopted in April 2017
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/2 adopted in October 2015 A possible revision will be considered by the CAJ in October 2017
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/10 adopted in April 2017 UPOV/INF-EXN/11 Draft 1 to be considered by the Council in October 2017
UPOV/INF/4	Financial Regulations and Rules of UPOV	UPOV/INF/4/4 adopted in March 2015
UPOV/INF/5	UPOV model plant breeders' rights gazette	UPOV/INF/5 adopted in October 1979 A possible revision will be considered by the CAJ in October 2017
UPOV/INF/6	Guidance for the preparation of laws based on the 1991 Act of the UPOV Convention	UPOV/INF/6/5 adopted in April 2017
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/12/5 adopted in October 2015 UPOV/INF/12/6 Draft 4 to be considered by the WG-DEN in October 2017
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/15/3 adopted in March 2015
UPOV/INF/16	Exchangeable Software	UPOV/INF/16/6 adopted in October 2016 UPOV/INF/16/7 Draft 1 to be considered by the CAJ and the Council in October 2017
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/22/3 adopted in October 2016 UPOV/INF/22/4 Draft 1 to be considered by the CAJ and the Council in October 2017

[Annex II follows]

PROPOSAL OF THE RUSSIAN FEDERATION IN VIEW OF A POSSIBLE REVISION
OF DOCUMENT UPOV/EXN/EDV/2**RUSSIAN FEDERATION: Revised comments on UPOV/EXN/EDV/2****Part 1. Comments relevant to edition of the document**

1. Paragraph 1 with the relevance to the resolution of the Diplomatic Conference to be excluded from preamble, because it is being more than 25 years after the appeal to the Secretary General of UPOV to **immediately start** the development of guidance on Article 14(5).
2. It would be more concise to discard the first sentence in the paragraph 2 and keep the second sentence with the following adjustment: "...in accordance with the 1991 Act of the UPOV Convention".
3. The heading "THE RIGHTS OF THE BREEDER" before quoting the Article 14 is unnecessary. Subparagraphs 14(5)(ii) and (14)(5)(iii), as well as the footnotes are irrelevant to the EDV, but to "*certain other varieties*", thus creates unnecessary link in the document.
4. Paragraphs 4 and 5 are repeating the information provided in the Convention, however in a more complicated and confusing way.
5. Paragraph 13 makes the link of explanation to the word "**may**" in Convention. However, this is rather the explanation of the words "**for example**".
6. Paragraph 17 mentions terms "**essentially derived varieties**" and "**predominantly derived varieties**" in one sentence that may bring the confusion of understanding that these terms are different, rather than *synonyms* in fact.

Part 2. Comments relevant to the content of the document

1. Paragraph 6. It is impossible to make determination of a new variety based on the need of examination of additional characteristics that are absent in DUS Test Guidelines (such as "performance", "value of the variety", "characteristics that are important from the perspective of the producer, seller, supplier, buyer, recipient or user", "characteristics that are essential for the variety as a whole"). Such kind of characteristics should not be included in DUS Test Guidelines for different crops and species. Thus, it is the question of relevance of existence of the paragraph 6 in the document.
2. Paragraph 7. The first phrase states "...**it is clearly distinguishable from the initial variety**"...*is concerned only with varieties that are clearly distinguishable, in accordance with Article 7...*" However, there is no additional explanation for understanding needed. The second sentence on the possibility of application of Article 14(5)(a)(ii) "*if the variety is "not clearly distinguishable in accordance with Article 7 from the protected variety"*" is wrong. Article 14(5)(a)(ii) has no reference to EDVs. Thus, it is the question of relevance of existence of the paragraph 7 in the document.
3. There are unacceptable conditions for EDVs in paragraphs 8, 9, 10, 11 therefore, the paragraphs should be removed.
4. Paragraphs 14 and 15 should be removed because it is inappropriate to continuously complicate the process of determination of EDVs, i.e. inclusion of additional testing.
5. Elimination of the need to obtain authorization from the breeder of the initial variety for commercialization of a variety derived by third parties (each independently) simplifies the use of

Proposal of the Russian Federation in view of a possible revision of document UPOV/EXN/EDV/2

derived varieties in the protected territory. Thus, it would be reasonable to supplement the paragraph 23 with sub-paragraph 23.1 (place it after the Figure 4) as follows:

"23.1. The breeder of the protected derived variety may obtain an authorization for commercialization of the variety (issue of licenses to the third parties on behalf of the breeder) in the form of exclusive license agreement with the breeder of initial variety".

6. According to the provision of Article 14(1)(a)(vi), it might be necessary to supplement paragraph 24 with the following text: *"In case of discrepancy between initial and the derived varieties' protection territories the breeder's right for the initial variety is extended to imported material of derived variety in the protection territory of the initial variety."*

7. Members of the Union acceding to the 1991 Act of the Convention under paragraph 25 of the current draft are encouraged to choose whether to extend the provisions of Article 14(5) to the generally known before the date of accession to the 1991 Act varieties. We believe there shouldn't be dual approaches used. All members of the Union acceding to the 1991 Act should follow the provisions of Article 14(5) of the 1991 Act concerning all protected varieties regardless of the date of registration. Thus it would be reasonable to adjust the first sentence in the paragraph 25 as follows: *"Members of the Union which amend their legislation in line with the 1991 Act of the UPOV Convention should cover the extension of the provisions of Article 14(5) to the generally known varieties"*.

8. The content of the paragraph 26 does not refer to the content of the document thus its presence is unnecessary.

9. Section II of the document leads to complication of the provision of determination of EDVs as there are responsible authorities and relevant examinations of the varieties for such purposes. Therefore we offer to consider the following version of the Section II instead:

"Section II "Registration of protected initial variety's rights' extension to essentially derived varieties"

27. An applicant (breeder) shall indicate the history of breeding (creation) of the variety in the application materials (the application form) for granting the breeder's right or application materials (the application form) for including the variety in the National List. At the stage of preliminary examination of the application the competent authority of the member of the Union examines the completeness of the information on the new variety and requests additional information if applicable.

28. A request to determine variety to the category "essentially derived varieties" and to denominate the initial variety is prepared by the authority based on the information containing the origin of the variety and DUS examination, and is published in the official Bulletin.

29. Comments on the application materials submitted within six months after the publication are to be agreed with stakeholders.

30. The decision of competent authority concerning the determination of variety to the category of essentially derived varieties and denomination of the initial variety may be appealed in accordance with national legislation.

31. In the case of the protection of the initial variety in the territory of the member of the Union, the competent authority requests to submit a license agreement with the breeder of the

Proposal of the Russian Federation in view of a possible revision of document UPOV/EXN/EDV/2

initial variety about the conditions commercialization of the propagating material of EDV when registering the breeder's right for EDV.

32. Interrelation between essentially derived varieties (protected and unprotected by private right) and the protected initial variety is reflected by the competent authority by publishing the information about varieties used in own territory, including the UPOV website.

33. A provision similar to paragraph 34 should be developed in respect of varieties which production requires multiple usage of protected variety (Article 14(5)(a)(iii)).”

[Appendix 1 of Annex II follows]

APPENDIX 1 OF ANNEX II

COMMENTS FROM FRANCE
ON THE PROPOSAL OF THE RUSSIAN FEDERATION IN VIEW OF A POSSIBLE REVISION
OF DOCUMENT UPOV/EXN/EDV/2

[IN ENGLISH ONLY – Original: French]

UPOV/EXN/EDV : explanatory note on essentially derived varieties

Dear All,

In view of the fact EDVs are such a highly specific topic, **we do not believe that substantial revision of document UPOV/EXN/EDV** (as proposed by the Russian Federation) **can be carried out within the framework of the CAJ**. Would it not be better, if need be, to set up an ad hoc working group, consisting of lawyers and experts, to deal with this issue?

That said, nothing prevents the Russian Federation, from rigorously presenting its proposed amendments to the CAJ and the working group (if it were to be set up) at a later stage (i.e. after its mail).

The **formal observations** made by the Russian Federation are not an issue.

However, the same cannot be said of its **substantive comments**. This is why it is not a good idea to address this issue in the CAJ.

INOV's comments to UPOV: please correct me if I have misunderstood the comments of the Russian Federation on Paragraph 23!

I have the impression that, despite the Russian Federation's claim,

(« Elimination of the need to obtain authorization from the breeder of the initial variety for commercialization of a variety derived by third parties (each individually) simplifies the use of derived varieties in the protected territory. Thus it would be reasonable to supplement paragraph 23 with sub-paragraph 23.1(place it after figure 4) as follows:

*“23.1. The breeder of the protected derived variety **may** obtain an authorization for commercialization of the variety (issue of licenses to the third parties on behalf of the breeder) in the form of an exclusive license agreement with the breeder of the initial variety”).*

the authorization of holder of the initial variety is mandatory. Should not “may” be replaced by “must”?

Best regards,
Yvane MERESSE

INOV

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DES OBTENTIONS VEGETALES

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[Appendix 2 of Annex II follows]

APPENDIX 2 OF ANNEX II

COMMENTS FROM SWITZERLAND
ON THE PROPOSAL OF THE RUSSIAN FEDERATION IN VIEW OF A POSSIBLE REVISION
OF DOCUMENT UPOV/EXN/EDV/2

[IN ENGLISH ONLY – Original: German]

Swiss Confederation

Federal Department of Economy, Education
and Research WBF
Federal Office of Agriculture BLW
Department of Plant Health and Varieties

CH-3003 Bern. BLW.

International Union for the Protection of New Varieties of Plants
34, Chemin des Colombettes,
1211 Geneva 20

Reference/File Number:
Your reference:
Our reference:
Person responsible: tsh/sag
Berne, 6.08.2017

Circular E-17/111-113; Comments

Madam,
Sir

Thank you for providing us with the opportunity to provide you with comments on the proposals made by the Russian Federation with regard to documents UPOV/EXN/CAL/1 (Circular E-17/111), UPOV/PRP/2 Draft 4 (Circular E-17/112) and UPOV/EXN/EDV/2 (Circular E-17/113).

Our comments on the individual proposals are as follows:

UPOV/EXN/CAL/1: [...] [see Appendix 2 of Annex IV]

UPOV/EXN/PRP/2 Draft 4: [...] [see Appendix 2 of Annex V]

UPOV/EXN/EDV/2: We have directly incorporated our comments into the document containing the Russian proposals (cf. Annex). Furthermore, please note the choice of letter (b) in the reference of the heading above item 8 (*Conformity with the initial variety in the expression of the essential characteristics (Article 14 (5) (b) (iii))*).

Yours sincerely,

Federal Office of Agriculture BLW.

Gabriele Schachermayr, Dr. Sc. Nat.
Departmental Manager

Encl.: Circular E-17/113 with comments

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Comments from Switzerland on the proposal of the Russian Federation in view of a possible revision of document UPOV/EXN/EDV/2

RUSSIAN FEDERATION: Revised comments on UPOV/EXN/EDV/2

Part 1. Comments relevant to edition of the document

1. Paragraph 1 with the relevance to the resolution of the Diplomatic Conference to be excluded from preamble, because it is being more than 25 years after the appeal to the Secretary General of UPOV to **immediately start** the development of guidance on Article 14(5).

Comment [THS1]: The appeal was made a long time ago but it illustrates the fact that a need for explanatory notes was already identified when the EDV concept was first elaborated.

2. It would be more concise to discard the first sentence in the paragraph 2 and keep the second sentence with the following adjustment: "...in accordance with the 1991 Act of the UPOV Convention".

3. The heading "THE RIGHTS OF THE BREEDER" before quoting the Article 14 is unnecessary.

Comment [THS2]: We agree. The heading refers to the entire Chapter.

Subparagraphs 14(5)(a) (ii) and (14)(5)(iii), as well as the footnotes are irrelevant to the EDV, but to "certain other varieties", thus creates unnecessary link in the document.

Comment [THS3]: Basically, we agree. However, reference is made to these provisions later on. It is therefore useful to list this information here.

4. Paragraphs 4 and 5 are repeating the information provided in the Convention, however in a more complicated and confusing way.

Comment [THS4]: In our opinion, only the final sentence of Paragraph 4 should be deleted.

5. Paragraph 13 makes the link of explanation to the word "may" in Convention. However, this is rather the explanation of the words "for example".

6. Paragraph 17 mentions terms "essentially derived varieties" and "predominantly derived varieties" in one sentence that may bring the confusion of understanding that these terms are different, rather than synonyms in fact.

Comment [THS5]: According to Article 14(5)(b) (i), one of the conditions for essentially derived varieties is that they are varieties which are predominantly derived from the initial variety. Consequently, there must be a difference between "essentially derived" and "predominantly derived".

Part 2. Comments relevant to the content of the document

1. Paragraph 6. It is impossible to make determination of a new variety based on the need of examination of additional characteristics that are absent in DUS Test Guidelines (such as "performance", "value of the variety", "characteristics that are important from the perspective of the producer, seller, supplier, buyer, recipient or user", "characteristics that are essential for the variety as a whole"). Such kind of characteristics should not be included in DUS Test Guidelines for different crops and species. Thus, it is the question of relevance of existence of the paragraph 6 in the document.

2. Paragraph 7. The first phrase states "...it is clearly distinguishable from the initial variety" ...is concerned only with varieties that are clearly distinguishable, in accordance with Article 7..." However, there is no additional explanation for understanding needed. The second sentence on the possibility of application of Article 14(5)(a)(ii) "if the variety is "not clearly distinguishable in accordance with Article 7 from the protected variety" is wrong. Article 14(5)(a)(ii) has no reference to EDVs. Thus, it is the question of relevance of existence of the paragraph 7 in the document.

Comments from Switzerland on the proposal of the Russian Federation in view of a possible revision of document UPOV/EXN/EDV/2

Comment [THS6]: Why? If the variety is not clearly distinguishable from the initial variety, it is not an EDV. However, the question arises as to whether it can be considered as another variety in the first place.

3. There are unacceptable conditions for EDVs in paragraphs 8, 9, 10, 11 therefore, the paragraphs should be removed.

Comment [THS7]: In our opinion, these articles are used to determine whether or not we are referring to an EDV and should therefore be maintained.

4. Paragraphs 14 and 15 should be removed because it is inappropriate to continuously complicate the process of determination of EDVs, i.e. inclusion of additional testing.

Comment [THS8]: We see no reason why these paragraphs should be removed.

5. Elimination of the need to obtain authorization from the breeder of the initial variety for commercialization of a variety derived by third parties (each independently) simplifies the use of derived varieties in the protected territory. Thus, it would be reasonable to supplement the paragraph 23 with sub-paragraph 23.1 (place it after the Figure 4) as follows:

"23.1. The breeder of the protected derived variety may obtain an authorization for commercialization of the variety (issue of licenses to the third parties on behalf of the breeder) in the form of exclusive license agreement with the breeder of initial variety".

Comment [THS9]: We do not understand this proposal.

6. According to the provision of Article 14(1)(a)(vi), it might be necessary to supplement paragraph 24 with the following text: *"In case of discrepancy between initial and the derived varieties' protection territories the breeder's right for the initial variety is extended to imported material of derived variety in the protection territory of the initial variety."*

Comment [THS10]: This is, however, the idea of an EDV.

7. Members of the Union acceding to the 1991 Act of the Convention under paragraph 25 of the current draft are encouraged to choose whether to extend the provisions of Article 14(5) to the generally known before the date of accession to the 1991 Act varieties. We believe there shouldn't be dual approaches used. All members of the Union acceding to the 1991 Act should follow the provisions of Article 14(5) of the 1991 Act concerning all protected varieties regardless of the date of registration. Thus it would be reasonable to adjust the first sentence in the paragraph 25 as follows: "Members of the Union which amend their legislation in line with the 1991 Act of the UPOV Convention should cover the extension of the provisions of Article 14(5) to the generally known varieties".

Comment [THS11]: The members of the Union must continue to be able to ensure the protection of EDVs retroactively. The retroactivity of law is subject to stringent conditions.

8. The content of the paragraph 26 does not refer to the content of the document thus its presence is unnecessary.

Comment [THS12]: The first sentence of this paragraph relates to EDVs and should remain.

9. Section II of the document leads to complication of the provision of determination of EDVs as there are responsible authorities and relevant examinations of the varieties for such purposes. Therefore we offer to consider the following version of the Section II instead:

Comment [THS13]: In practical terms, determination of whether a variety is an EDV mainly occurs in the courts. We think that this cannot be carried out within the DUS framework.

"Section II "Registration of protected initial variety's rights' extension to essentially derived varieties"

27. An applicant (breeder) shall indicate the history of breeding (creation) of the variety in the application materials (the application form) for granting the breeder's right or application materials (the application form)

Comments from Switzerland on the proposal of the Russian Federation in view of a possible revision of document UPOV/EXN/EDV/2

for including the variety in the National List. At the stage of preliminary examination of the application the competent authority of the member of the Union examines the completeness of the information on the new variety and requests additional information if applicable.

28. A request to determine variety to the category "essentially derived varieties" and to denominate the initial variety is prepared by the authority based on the information containing the origin of the variety and DUS examination, and is published in the official Bulletin.

29. Comments on the application materials submitted within six months after the publication are to be agreed with stakeholders.

30. The decision of competent authority concerning the determination of variety to the category of essentially derived varieties and denomination of the initial variety may be appealed in accordance with national legislation.

31. In the case of the protection of the initial variety in the territory of the member of the Union, the competent authority requests to submit a license agreement with the breeder of the initial variety about the conditions commercialization of the propagating material of EDV when registering the breeder's right for EDV.

32. Interrelation between essentially derived varieties (protected and unprotected by private right) and the protected initial variety is reflected by the competent authority by publishing the information about varieties used in own territory, including the UPOV website.

33. A provision similar to paragraph 34 should be developed in respect of varieties which production requires multiple usage of protected variety (Article 14(5)(a)(iii))."

Comment [THS14]: Where?

[Appendix 3 of Annex II follows]

COMMENTS FROM ISF AND ESA
ON THE PROPOSAL OF THE RUSSIAN FEDERATION IN VIEW OF A POSSIBLE REVISION
OF DOCUMENT UPOV/EXN/EDV/2

[IN ENGLISH ONLY]



Mr. Peter Button
UPOV
34 chemin des Colombettes
CH-1211 Geneva 20

Nyon, 4 August 2017

Ref: UPOV Circulars E-17/111, E-17/112, E-17/113

Dear Mr. Button,

ISF and ESA would like to thank you for your circulars of the 7th of July, inviting observers to submit their comments on the comments and proposals received from the Russian Federation. You can find below our comments on the following explanatory notes:

Circular E-17/111: request of the Russian Federation for a possible revision of the Explanatory Notes on Conditions and Limitations Concerning the Breeder's Authorization in Respect of Propagating Material under the UPOV Convention (document UPOV/EXN/CAL/1)

[...] [see Appendix 3 of Annex IV]

Circular E-17/112: request of the Russian Federation for a possible revision of the Explanatory Notes on Provisional Protection under the UPOV Convention (document UPOV/EXN/PRP/2)

[...] [see Appendix 3 of Annex V]

Comments from ISF and ESA on the proposal of the Russian Federation in view of a possible revision of document UPOV/EXN/EDV/2

Circular E-17/113: comments of the Russian Federation on document UPOV/EXN/EDV/2 Draft 7 "Explanatory Notes on Essentially Derived Varieties (EDV) under the 1991 Act of the UPOV Convention (Revision)"

In the Part 1 of the comments provided by the Russian federation, ISF and ESA are of the opinion that the proposals are not bringing any relevant inputs. Thus the explanatory note should not be modified in that sense.

Point 6 is even wrongly introducing the notion that the terms "essentially derived varieties" and "predominantly derived" are similar concepts. This is a misconception as predominant derivation is a practical act while essential derivation is a legal concept created by the 1991 Act of the UPOV Convention.

According to ISF and ESA, the Part 2 of the comments are also not providing any relevant inputs. The text of the explanatory note is already clear enough to address the concerns of the Russian Federation expressed in points 1, 2, 5, 6 and 8.

Points 3 and 4 question long time agreed concepts. ISF and ESA are not in favor to reopen a discussion on the foundations of the 1991 Act of the UPOV Convention regarding these aspects of determination of EDVs.

Point 7 proposes to impose to Members of the Union, who amend their legislation in line with 1991 Act of the UPOV Convention, to cover the extension of the provisions of Article 14(5) to the generally known varieties. ISF and ESA would not recommend to adopt this obligation as national legal situations being so different from one country to another, imposing a general regime regarding EDV when upgrading to UPOV 1991 may not encourage countries to do so.

ESA and ISF are strongly against the proposal made in point 9. It would be contrary to the spirit of the EDV concept to provide the PVP offices the right to determine whether a variety is essentially derived. Granting a protection according to DUS criteria and determining whether there is essential derivation of a variety are two different responsibilities which should not be automatically left in the hands of the PVP offices.

In conclusion, ESA and ISF are not supporting the proposals made by the Russian Federation in this circular with regard to the newly adopted EDV explanatory note.

However, **we would like to submit a proposal to clarify the situation where an EDV of a parental line is produced via a hybrid. Paragraphs 20 and 21 would read as follow:**

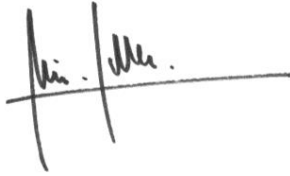
"20. Another example of a way in which it might be possible to obtain EDV from an initial variety could be the physical use of a hybrid variety to obtain a variety which is essentially derived from one of the parent lines of the hybrid. In such a case the parent line is the initial variety. The hybrid is obtained by using the initial variety and the EDV is obtained by using the hybrid. It might be that the breeder of the EDV did not use the initial variety himself, but by using the hybrid he is using a variety that is derived from the initial variety. This means the initial variety has been used in the derivation process.

In case you are of the view that further explanation of the above proposal is necessary, we are available to provide a brief overview of the background issues which led to this text proposal at the 74th session of the CAJ.

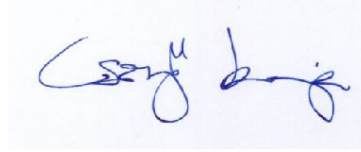
We are staying at your disposal may you have further questions,"

Comments from ISF and ESA on the proposal of the Russian Federation in view of a possible revision
of document UPOV/EXN/EDV/2

Sincerely Yours,

A handwritten signature in black ink, appearing to read 'Michael Keller', written over a horizontal line.

Michael Keller
ISF Secretary General

A handwritten signature in blue ink, appearing to read 'Szonja Csörgő', written over a horizontal line.

Szonja Csörgő
ESA Director IP and Legal Affairs

[Annex III follows]

PROPOSAL OF THE RUSSIAN FEDERATION IN VIEW OF A POSSIBLE REVISION
OF DOCUMENT UPOV/EXN/CAL/1

MINISTRY OF AGRICULTURE OF THE RUSSIAN FEDERATION

STATE COMMISSION OF THE RUSSIAN FEDERATION
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To: UPOV Office

e-mail: upov.mail@upov.int

Attention: Mr. P. Button, Vice Secretary-General

January 18, 2016.

Subj: Proposals of the Russian Federation on documents:

UPOV/EXN/CAL/1 "EXPLANATORY NOTES ON CONDITIONS AND LIMITATIONS CONCERNING
THE BREEDER'S AUTHORIZATION IN RESPECT OF PROPAGATING MATERIAL UNDER THE UPOV
CONVENTION"

Dear Mr. Button,

Following the consideration at the Seventy Third Session of the Administrative and
Legal Committee mentioned in paragraphs 19 of document CAJ/73/10 "Report on the
Conclusions", we herewith forward you our comments and proposals in respect of document
UPOV/EXN/CAL/1 "EXPLANATORY NOTES ON CONDITIONS AND LIMITATIONS CONCERNING
THE BREEDER'S AUTHORIZATION IN RESPECT OF PROPAGATING MATERIAL UNDER THE UPOV
CONVENTION"

The changes proposed are highlighted in yellow or crossed out.

1. The conceptual statement of the preamble of all Explanatory Notes "... *Explanatory Notes must not be interpreted in a way that is inconsistent with the relevant Act for the member of the Union concerned*" means that:

- Developers / drafters of Explanatory Notes are imposed to a responsibility not to distort relevant legal provisions of the concerned Acts of the UPOV Convention, and
- Explanatory Notes should not include any legal regulations except those contained in the text of the UPOV Convention itself.

2. Considering the above mentioned we suppose that phrases: "*amount of ... material produced from the propagating material*", "*method of payment*" in subparagraph (i), as well as phrase "*quantity of material*" in subparagraph (iv) of paragraph 3 of the document considered, should be deleted (see explanation below).

Explanation:

Breeder's right does not extend on acts in respect of material of a protected variety which had been marketed by breeder or with his consent in the territory of Contracting Party (Article 16 of 1991 Act of the UPOV Convention). Therefore, breeder's remuneration cannot be dependent on amount of material, grown from propagating material.

Licensee and the third parties are not burdened with the liability to the breeder when producing plant / harvested material from propagating material. We believe that there are no

Proposal of the Russian Federation in view of a possible revision of document UPOV/EXN/CAL/1

options for payment methods (cash or by transfer) of remuneration to the breeder.

Payment of remuneration to the breeder shall be in the respective currency of the country of protection of a variety without any options (“methods”). For example, payment-in-kind (product, service, etc.) without proper cash registration is illegitimate.

We also believe that it is illegal (monopoly) for the breeder to regulate the quantity of propagating material to be produced by licensee.

3. We suggest considering amendments of the subparagraphs of paragraph 3 considered as follows:

“(i) remuneration - level of remuneration (e.g. linked to quantity (value) of propagating material grown or realized (for the varieties covered by a national law related to exceptions to the breeder’s right under Article 15(2), or area sown with the propagating material, ~~amount or value of material produced from the propagating material etc.~~), timing and ~~method of payment, etc.~~ the size of penalties for violation of payment timing”;

“(iv) ~~quality and quantity~~ quality of material to be produced;

We also think it would be applicable to supplement paragraph 3 with the following subparagraph:

“() right of the licensor or their authorized representative for familiarize with appropriate documents of the licensee in respect of propagating material”.

Yours sincerely,

Y. Goncharov,
Acting Chairman



[Appendix 1 of Annex III follows]

APPENDIX 1 OF ANNEX III

COMMENTS FROM FRANCE
ON THE PROPOSAL OF THE RUSSIAN FEDERATION IN VIEW OF A POSSIBLE REVISION
OF DOCUMENT UPOV/EXN/CAL/1

[IN ENGLISH ONLY – Original: French]

UPOV/EXN/CAL : note on technology transfer on PVPs

Dear All,

We do not think that it is necessary to review **Paragraph 3** of this note. Regarding Paragraph 3,

- The list of items (*roman numerals*) is not exhaustive and does not claim to be exhaustive, as the final reference to “etc.” indicates.
- To address the concern of the Russian Federation relating to the means of payment: this item, like all others, does not define in any way these conditions; the conditions for each item need to be written down and negotiated by the parties in the licensing contract.
- There is no obligation to follow the provisions of paragraph 3 (since they are for illustrative purposes),
- The addition of terms such as “value” and “sanctions” (as proposed by the Russian Federation), which are more or less developed, is included in the final “etc.” of Paragraph 3. Other items such as “means of control of the license holder/ or the sub-licensees” or “arrangements for the protection of the PVP”, “arrangements for bearing the costs of protection” could just as easily be added.
- In our opinion, **Paragraph 3 is therefore appropriate in its current form**. It has the advantage of indicating useful directions in which to proceed. The actual contents of the licensing contract must be established by the parties concerned.

However, it may be useful to review the wording of Paragraph 2:

“2. The UPOV Convention establishes the right of the breeder to make its authorization, for acts in respect of propagating material, subject to conditions and limitations. The conditions and limitations according to which a breeder may authorize the acts in respect of the propagating material are a matter for the breeder to decide”.

This may become:

*“2. The UPOV Convention establishes the right of the breeder to make its authorization, for acts in respect of propagating material, subject to conditions and limitations. The conditions and limitations according to which a breeder may authorize the acts in respect of the propagating material **fall within the negotiation between the breeder and the licensee.**”*

Best regards,
Yvane MERESSE

INOV

INSTANCE NATIONALE
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[Appendix 2 of Annex III follows]

APPENDIX 2 OF ANNEX III

COMMENTS FROM SWITZERLAND
ON THE PROPOSAL OF THE RUSSIAN FEDERATION IN VIEW OF A POSSIBLE REVISION
OF DOCUMENT UPOV/EXN/CAL/1

[IN ENGLISH ONLY – Original: German]

[...]

UPOV/EXN/CAL/1: We see no need to revise these explanatory comments. In our opinion, the document indicates, by way of individual examples, various opportunities that are available for holders of plant variety rights in the formulation of their licensing agreements. The document does not contain any new legal provisions.

[...]

[Appendix 3 of Annex III follows]

APPENDIX 3 OF ANNEX III

COMMENTS FROM ISF AND ESA
ON THE PROPOSAL OF THE RUSSIAN FEDERATION IN VIEW OF A POSSIBLE REVISION
OF DOCUMENT UPOV/EXN/CAL/1

[IN ENGLISH ONLY]

[...]

Circular E-17/111: request of the Russian Federation for a possible revision of the Explanatory Notes on Conditions and Limitations Concerning the Breeder's Authorization in Respect of Propagating Material under the UPOV Convention (document UPOV/EXN/CAL/1)

ISF and ESA are acknowledging the proposals made by the Russian Federation however we are not agreeing with any of them.

Points 2 and 3 are especially contradicting common practices which are taking place in the seed business. Breeders, as owner of their varieties, should remain free to apply any conditions, related to the calculation of their remuneration, quantity of material, currency etc. National contract laws may put restrictions on the conditions and limitations on the use of licensing agreements however, this is already well explained in the explanatory note which states in the introductory sentence to point 3 that these are "*examples of conditions and limitations which a breeder might include*".

In conclusion, ESA and ISF are not supporting the proposals made by the Russian Federation in this circular.

[...]

[Annex IV follows]

PROPOSAL OF THE RUSSIAN FEDERATION IN VIEW OF A POSSIBLE REVISION
OF DOCUMENT UPOV/EXN/PRP/2

MINISTRY OF AGRICULTURE OF THE RUSSIAN FEDERATION

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To: UPOV Office
e-mail: upov.mail@upov.int
Attention: Mr. P. Button, Vice Secretary-General

January 20, 2017.

Subj: Proposals of the Russian Federation on document UPOV/EXN/PRP/2 Draft 4
“EXPLANATORY NOTES ON PROVISIONAL PROTECTION UNDER THE UPOV CONVENTION”

Dear Mr. Button,

Following the consideration at the Seventy Third Session of the Administrative and Legal Committee mentioned in paragraphs 20 of document CAJ/73/10 “Report on the conclusions”, we herewith forward you our suggestions in respect of document UPOV/EXN/PRP/2 Draft 4 “EXPLANATORY NOTES ON PROVISIONAL PROTECTION UNDER THE UPOV CONVENTION”

The changes proposed are highlighted in yellow or crossed out.

1. Taking into consideration the statement of the Explanatory Notes: “The only binding obligations on members of the Union are those contained in the text of the UPOV Convention itself, and these Explanatory Notes must not be interpreted in a way that is inconsistent with the relevant Act for the member of the Union concerned” the Russian Federation experts are of the opinion that provisional protection under the UPOV Convention is applicable only in respect of acts which would require the authorization of the breeder after the right is granted. Provisional protection is not valid if the breeder's right shall not be granted.

2. Cases where some UPOV members provide breeders rights to the applicants before the date of the rights granting should not be recommended in the UPOV materials including Explanatory Notes.

3. On the basis of above mentioned, we think the wording of paragraph 9 and Example B should be as follows:

“9. Provisional protection is valid only in relation to acts that would require the breeder's authorization “once the right is granted”, i.e., ~~Therefore~~ if the right is not granted, provisional protection is not applicable. The UPOV Convention requires (see Article 30(1)(iii) of the 1991 Act and Article 30(1)(c) of the 1978 Act) that the public is informed through the regular publication of information concerning applications for and grants of breeders' rights, which includes withdrawals and rejections of applications.”

Proposal of the Russian Federation in view of a possible revision of document UPOV/EXN/PRP/2

“Example B

[(2)] The applicant is considered to be the holder of a breeder’s right in relation to any person who, during the period provided in paragraph provided in paragraph [(1)], has carried out acts which, once the right is granted, require the breeder’s authorization as provided in Article [14]. Legal action in respect of provisional protection can only be initiated after the right is granted. The applicant shall have the same rights to enter into license agreements and to untiute legal proceedings as if on the [filing] / [publication date the breeder’s right had been granted to the applicant in respect of the variety concerned. The rights conferred under this paragraph shall be deemed never to have been conferred if the right is not granted.]”

Paragraphs 10, 11 and 12 should be deleted.

Yours sincerely,

Y. Goncharov,
Acting Chairman



[Appendix 1 of Annex IV follows]

APPENDIX 1 OF ANNEX IV

COMMENTS FROM FRANCE
ON THE PROPOSAL OF THE RUSSIAN FEDERATION IN VIEW OF A POSSIBLE REVISION
OF DOCUMENT UPOV/EXN/PRP/2

[IN ENGLISH ONLY – Original: French]

UPOV/EXN/PRP: explanatory note on provisional protection

Dear All

Further to the proposal of the Russian Federation relating to explanatory note UPOV/EXN/PRP/ Draft 4, consisting of the following:

- Delete paragraphs 10, 11 and 12: we do not agree. These paragraphs should be kept in their current form. They deal with licensing contracts relating to PVP requests. There is nothing shocking about this. This model is totally viable (as is the case for technology transfers relating to patent applications).
- Paragraph 9: RAS. We are perfectly happy with the wording of Draft 2: *“Provisional protection is valid only in relation to acts that would require the breeder’s authorization “once the right is granted”, i.e. if the right is not granted, provisional protection is not applicable”*.
- We are happy with the original wording of example B. There is no reason to change it.

Best regards,
Yvane MERESSE

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[Appendix 2 of Annex IV follows]

APPENDIX 2 OF ANNEX IV

COMMENTS FROM SWITZERLAND
ON THE PROPOSAL OF THE RUSSIAN FEDERATION IN VIEW OF A POSSIBLE REVISION
OF DOCUMENT UPOV/EXN/PRP/2

[IN ENGLISH ONLY – Original: German]

[...]

UPOV/EXN/PRP/2 Draft 4: Here too we see no need for revision. It is obvious from the document that the provisional measures will not be implemented or need to be annulled if the corresponding plant variety right is not granted. It is incumbent upon the Parties of the Union to decide how they will guarantee indemnification of third parties in such a case.

[...]

[Appendix 3 of Annex IV follows]

APPENDIX 3 OF ANNEX IV

COMMENTS FROM ISF AND ESA
ON THE PROPOSAL OF THE RUSSIAN FEDERATION IN VIEW OF A POSSIBLE REVISION
OF DOCUMENT UPOV/EXN/PRP/2

[IN ENGLISH ONLY]

[...]

Circular E-17/112: request of the Russian Federation for a possible revision of the Explanatory Notes on Provisional Protection under the UPOV Convention (document UPOV/EXN/PRP/2)

ISF and ESA are acknowledging the proposals made by the Russian Federation however we are of the opinion that points 1 and 2 are not providing any new information, the explanatory note is already clear about when breeders' rights are not granted.

We are not supporting the proposal made in point 3 to come back to the original text of the explanatory note. The text of the UPOV/EXN/PRP/2 Draft 4, proposing the deletion of "*if the right is not granted provisional protection is not applicable*" makes the text clearer. ISF and ESA supports the current writing of Draft 4.

Moreover, we are not supporting the proposals made in Example B. The current text of Draft 4 reflects perfectly the suitable situation for breeders getting provisional protection. It is perfectly relevant that the provisional protection provides the same level of protection than the definitive protection. It is to be noted that in many countries, national laws provide that a financial deposit is made to the Court, to compensate damages the defendant may have suffered if the protection is not granted.

In conclusion, ESA and ISF are not supporting the proposals made by the Russian Federation in this circular.

[...]

[End of Annex IV and of document]