

Administrative and Legal Committee

CAJ/76/3

**Seventy-Sixth Session
Geneva, October 30, 2019**

Original: English
Date: July 23, 2019

ESSENTIALLY DERIVED VARIETIES

Document prepared by the Office of the Union

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EXECUTIVE SUMMARY

1. The purpose of this document is to provide background information and report on developments concerning essentially derived varieties, including relevant matters on the “Seminar on the impact of policy on essentially derived varieties (EDVs) on breeding strategy” in order to assist the Administrative and Legal Committee (CAJ) in its consideration of the review of the guidance on EDV provided in document UPOV/EXN/EDV/2 “Explanatory Notes on Variety Denominations under the UPOV Convention”.

2. The CAJ is invited to:

(a) note the background information and developments concerning EDVs, including relevant matters on the “Seminar on the impact of policy on essentially derived varieties (EDVs) on breeding strategy”, as set out in paragraphs 4 to 15 of this document;

(b) consider the outcome of the EDV Seminar to be presented to the CAJ, at its seventy-sixth session, in an oral report by the Chair of the CAJ; as set out in paragraphs 16 to 18 of this document;

(c) note that there have been no developments concerning a possible 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 EDVs, including the provision of experts on EDV matters.

3. The structure of this document is as follows:

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BACKGROUND

4. The CAJ, at its seventy-fifth session¹, considered document CAJ/75/3 “Presentations on essentially derived varieties” and the presentations made by the United States of America, the International Community of Breeders of Asexually Reproduced Ornamental and Fruit Varieties (CIOPORA), the European Seed Association (ESA) and the International Seed Federation (ISF) on essentially derived varieties (EDVs).

5. The CAJ agreed:

- “to propose to the Council to organize a ‘Seminar on the impact of policy on essentially derived varieties (EDVs) on breeding strategy’, to be held on the morning of October 30, 2019;
- “that the seminar should include presentations by breeders, judges, academics and UPOV member authorities to provide a range of perspectives on the subject. The Office of the Union would invite members and observers to submit questions and issues which they would wish to be addressed in the seminar. The Office of the Union, in consultation with the Chair of the CAJ, would then prepare a draft program for comment by the CAJ by correspondence. On the basis of comments received, the Chair of the CAJ in conjunction with the Office of the Union would finalize the program;
- “that the seminar should be open to the public, with the recording of the seminar being made available on the UPOV website after a suitable broadcast delay” (see document CAJ/75/14 “Report”, paragraphs 15 and 16).

6. The CAJ agreed that the consideration of the revision of the Explanatory Notes on EDVs should be included in the agenda for the seventy-sixth session of the CAJ, and the outcome of the seminar should be a basis for that consideration (see document CAJ/75/14 “Report”, paragraph 17).

7. The Council, at its fifty-second ordinary session², approved “the organization of a ‘Seminar on the impact of policy on essentially derived varieties (EDVs) on breeding strategy’, to be held in Geneva on the morning of October 30, 2019” (see document C/52/20 “Report”, paragraph 12(b)).

Replies to UPOV Circular E-19/032 with proposed questions and issues to be addressed in the EDV Seminar

8. In accordance with the above approach, the following members and observers submitted questions and/or issues which they would wish to be addressed in the EDV seminar in reply to UPOV Circular E- 19/032 of March 8, 2019: China, European Union, Russian Federation, Sweden, CIOPORA, ESA and ISF.

9. The questions and issues received in reply to UPOV Circular E-19/032 are summarized as follows:

- (a) origin and experiences in the implementation of the EDV concept (e.g. mutants and modern techniques);
- (b) relationship between breeding methods and determination of EDV;
- (c) challenges of the increasing flow of new varieties developed using modern breeding techniques;
- (d) how can the EDV concept ensure that breeders of initial varieties have an additional source of remuneration?
- (e) what is the balance between the EDV concept and the breeder’s exemption?
- (f) possible guidance on the “conformity” requirement under Article 14(5)(b)(iii) of the 1991 Act, in relation to the notion of “essential characteristics”;
- (g) how is the EDV concept interpreted by judges?
- (h) what is the perception of the evolution of the number of EDV cases?

¹ Held in Geneva on October 31, 2018.

² Held in Geneva on November 2, 2018.

- (i) what is the evidence on genetic conformity with the initial variety and on conformity in the expression of the essential characteristics of the initial variety?
- (j) what should determine the reversal of the burden of proof in EDV cases?
- (k) what are the strategies for breeding programs using different breeding methods and different crops and species (e.g. agricultural, fruits, vegetables, and ornamentals)?
- (l) experiences of differences in the essential characteristics of varieties with specific examples depending on the species and breeding methods;
- (m) impact on the EDV concept of developments in plant breeding (e.g. directed mutagenesis; genome of mutant almost identical to the initial variety while the phenotype can be significantly different; repeated backcrossing; genome editing); and
- (n) is the current guidance in document UPOV/EXN/EDV/2 addressing the needs of all types of breeding programs?

Preparation of the Draft Program for the EDV Seminar for approval by the CAJ by correspondence

10. In discussions with the Chair of the CAJ in the preparation of the draft program for the EDV Seminar, it was recalled that the “Seminar on essentially derived varieties (EDVs)” held in 2013 had included presentations by UPOV member authorities and presentations concerning court decisions on EDVs (see https://www.upov.int/meetings/en/details.jsp?meeting_id=29782).

11. Therefore, Session I in the draft program is intended to provide an overview of the developments that have arisen since the Seminar on EDVs of 2013 concerning academic perspectives and experiences from judges and authorities.

12. It was further recalled that the aim of the Seminar was to consider the impact of EDVs on breeding strategy, which would require input from breeders, in particular. Therefore, and in recognition of the limited duration of the Seminar, the presentations in Session II focus on breeders’ perspectives. The speakers will be invited to address the issues and questions raised in response to Circular E-19/032 (see paragraph 9), as appropriate.

13. The Draft Program for the EDV Seminar, prepared in consultation with the Chair of the CAJ, was circulated to the CAJ for approval by correspondence with UPOV Circular E-19/090 of June 20, 2019. No comments were received on the draft program as reproduced in the Annex to this document.

14. The CAJ agreed that the EDV Seminar should be open to the public, with the recording of the Seminar being made available on the UPOV website after a suitable broadcast delay. The online registration and the Draft Program of the EDV Seminar approved by the CAJ are available at https://www.upov.int/meetings/en/details.jsp?meeting_id=50787.

15. It is planned to publish the proceedings of the EDV Seminar in the four UPOV languages (English, French, German and Spanish), including the presentations and discussions, as soon as possible after the Seminar.

OUTCOME OF THE EDV SEMINAR AND REVIEW OF THE GUIDANCE ON EDV PROVIDED IN DOCUMENT UPOV/EXN/EDV/2 “EXPLANATORY NOTES ON ESSENTIALLY DERIVED VARIETIES UNDER THE 1991 ACT OF THE UPOV CONVENTION”

16. The CAJ, at its seventy-fifth session¹, agreed that the consideration of the revision of the Explanatory Notes on EDVs should be included in the agenda for the seventy-sixth session of the CAJ, and that the outcome of the seminar should be a basis to that consideration (see document CAJ/75/14 “Report”, paragraph 17).

17. A summary of the outcome of the EDV Seminar will be presented to the CAJ, at its seventy-sixth session³, in an oral report by the Chair of the CAJ.

³ To be held in Geneva on October 30, 2019.

18. On the above basis, the CAJ will be invited to consider whether to initiate a revision of the guidance on EDVs provided in document UPOV/EXN/EDV/2 "Explanatory Notes on Essentially Derived Varieties under the 1991 Act of the UPOV Convention".

ALTERNATIVE DISPUTE SETTLEMENT MECHANISMS FOR MATTERS CONCERNING ESSENTIALLY DERIVED VARIETIES

19. There have been no developments concerning a possible meeting of the Office of the Union with CIOPORA, ISF and the World Intellectual Property Organization (WIPO) in order to explore the possible role of UPOV in alternative dispute settlement mechanisms for matters concerning EDVs, including the provision of experts on EDV matters, and the Office of the Union has no plans to pursue this matter further unless there is a change of circumstances.

20. *The CAJ is invited to:*

(a) note the background information and developments concerning EDVs, including relevant matters on the "Seminar on the impact of policy on essentially derived varieties (EDVs) on breeding strategy", as set out in paragraphs 4 to 15 of this document;

(b) consider the outcome of the EDV Seminar to be presented to the CAJ, at its seventy-sixth session³, in an oral report by the Chair of the CAJ; as set out in paragraphs 16 to 18 of this document;

(c) note that there have been no developments concerning a possible 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 EDVs, including the provision of experts on EDV matters.

[Annex follows]

Seminar on the impact of policy on essentially derived varieties (EDVs) on breeding strategy

UPOV/SEM/GE/19/1 Prov. 1

Geneva, October 30, 2019

Original: English

Date: July 25, 2019

DRAFT PROGRAM

approved by the Administrative and Legal Committee

Disclaimer: this document does not represent UPOV policies or guidance

Abstract

The concept of Essentially Derived Varieties (EDVs) was introduced in the 1991 Act of the UPOV Convention with the aim of providing an effective incentive for plant breeding that would maximize progress in the development of new, improved varieties for the benefit of society.

The purpose of the Seminar is to consider the impact of EDV policy on breeding strategies and the consequences for the development of new, improved varieties of plants. The Seminar will provide perspectives covering various breeding methods and different types of plants. The Seminar is expected to assist the Administrative and Legal Committee (CAJ) in its review of the guidance on EDV provided in document [UPOV/EXN/EDV/2](#).

8.30 Registration
9.30 Welcome address and opening

Mr. Peter Button, Vice Secretary-General, UPOV

SESSION I: TO AN EDV CONCEPT FOR THE PRESENT AND THE FUTURE

Moderator: Mr. Peter Button

9.40 Plant breeding and the EDV concept: challenges of the past, opportunities for the future?

Key note Speaker: Mr. Sven J.R. Bostyn, University of Copenhagen, Faculty of Law, Centre for Advanced studies in Biomedical Innovation Law (CeBIL), Denmark

10.10 UPOV guidance on EDV

Ms. Yolanda Huerta, Legal Counsel and Director of Training and Assistance, UPOV

SESSION II: IMPACT OF EDV CONCEPT ON PLANT BREEDING

Moderator: Mr. Anthony Parker, Chair, Administrative and Legal Committee (CAJ), UPOV

10.20 Outlook for agricultural crops

Ms. Magali Pla, Deputy Manager of Industrial Property, Limagrain, France

10.40 Outlook for ornamental plants

Mr. Micha Danziger, Danziger "Dan" Flower Farm, Israel

11.00 Coffee break

11.20 Outlook for vegetables

Mr. Laurens Kroon, Head of Research, Bejo, Netherlands

11.40 Outlook for fruit

Ms. Emma Brown, Business Development Manager, Plant & Food Research, New Zealand

12.00 Panel discussion and questions

12.25 Closing remarks

Mr. Anthony Parker

[End of Annex and of document]