

Administrative and Legal Committee
CAJ/78/12.
**Seventy-Eighth Session
Geneva, October 27, 2021**
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OUTCOME OF THE CONSIDERATION OF DOCUMENTS BY CORRESPONDENCE
Document prepared by the Office of the Union
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EXECUTIVE SUMMARY

1. The purpose of this document is to report on the outcome of the consideration by the Administrative and Legal Committee (CAJ) of the documents by correspondence, in accordance with the procedure adopted by the Council in 2021¹.
2. The CAJ is invited to note the approval of the CAJ by correspondence on September 21, 2021, of the decisions contained in the following documents:

Development of guidance and information materials (document CAJ/78/3 Rev.)

UPOV/INF/16: Exchangeable Software (Revision) (document UPOV/INF/16/10 Draft 2)

UPOV/INF/17: Guidelines for DNA-Profiling: Molecular Marker Selection and Database Construction ("BMT Guidelines") (Revision) (document UPOV/INF/17/2 Draft 6)

UPOV/INF/22: Software and Equipment Used by Members of the Union (Revision) (document UPOV/INF/22/8 Draft 2)

UPOV/INF/23: UPOV Code System (document UPOV/INF/23/1 Draft 3)

Explanatory Notes on Variety Denominations under the UPOV Convention (document CAJ/78/11)

UPOV/EXN/DEN: Explanatory Notes on Variety Denominations under the UPOV Convention (document UPOV/EXN/DEN/1 Draft 6)

Harvested material (document CAJ/78/5)

3. The CAJ is invited to note the comments on document CAJ/78/5 "Harvested material", received in response to Circular E-21/123 of August 23, 2021, that have not resulted in a revision of document CAJ/78/5 (see paragraph 33).

¹ The procedure for consideration of documents by correspondence is provided in Circular E-21/063 of May 14, 2021 (available at the TC/57, CAJ/78 and C/55 webpages).

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BACKGROUND

5. The Council adopted the procedure for the UPOV sessions in October 2021, in accordance with Circular E-21/063 of May 14, 2021 (available on the [CAJ/78](#) webpage). The seventy-eighth session of the Administrative and Legal Committee (CAJ/78) will be held on October 27, 2021, by electronic means (see invitation Circular E-21/071 of May 31, 2021), in combination with prior consideration of certain documents by correspondence.

6. In consultation with the Chair of the CAJ, the following documents in Circular E-21/087 of June 16, 2021 were identified in document CAJ/78/1 (Draft Agenda) with one asterisk (*) as documents for the procedure by correspondence with an opportunity for comments by July 15, 2021, prior to requests for approval of the proposed decisions in the documents:

Development of guidance and information materials (document CAJ/78/3)*

- UPOV/INF/16: Exchangeable Software (Revision) (document UPOV/INF/16/10 Draft 1)*
- UPOV/INF/17: Guidelines for DNA-Profiling: Molecular Marker Selection and Database Construction ("BMT Guidelines") (Revision) (document UPOV/INF/17/2 Draft 6)*
- UPOV/INF/22: Software and Equipment Used by Members of the Union (Revision) (document UPOV/INF/22/8 Draft 1)*
- UPOV/INF/23: UPOV Code System (document UPOV/INF/23/1 Draft 3)*

Harvested material (document CAJ/78/5)*

7. By July 15, 2021, comments of a straightforward nature were received on the following documents in Circular E-21/087 of June 16, 2021. The Office of the Union addressed the comments in a revised version of the following documents, with endnote explanations:

Development of guidance and information materials (document CAJ/78/3 Rev.)

- UPOV/INF/16: Exchangeable Software (Revision) (document UPOV/INF/16/10 Draft 2)

UPOV/INF/22: Software and Equipment Used by Members of the Union (Revision)
(document UPOV/INF/22/8 Draft 2)

8. Circular E-21/123 of August 23, 2021, invited the CAJ to approve the proposed decision(s) contained in the following documents within 30 days (i.e. September 21, 2021):

Development of guidance and information materials (document CAJ/78/3 Rev.)

Harvested Material (document CAJ/78/5)

9. Circular E-21/123 of August 23, 2021, also included documents identified in document CAJ/78/1 (Draft Agenda) with two asterisks (**) to be considered by correspondence in accordance with the specific procedure agreed by the relevant UPOV body. The CAJ was invited to approve the proposed decision(s) contained in the following documents within 30 days (i.e. September 21, 2021):

Explanatory Notes on Variety Denominations under the UPOV Convention (document CAJ/78/11)**

Explanatory Notes on Variety Denominations under the UPOV Convention
(document UPOV/EXN/DEN/1 Draft 6)**

10. As no objections were received by September 21, 2021, relevant decisions in the documents in paragraphs 8 and 9 above, are considered to have been taken by correspondence. The decisions taken by the CAJ by correspondence on September 21, 2021 are reproduced in the following paragraphs 12 to 31 according to the items in document CAJ/78/1 Rev. (Revised Draft Agenda).

AGENDA ITEM 6: DEVELOPMENT OF GUIDANCE AND INFORMATION MATERIALS
(DOCUMENT CAJ/78/3 REV.)

11. The CAJ considered document CAJ/78/3 Rev..

Information Materials

UPOV/INF/16: Exchangeable Software (Revision) (document UPOV/INF/16/10 Draft 2)

12. The CAJ approved the proposed revision of document UPOV/INF/16/9 "Exchangeable Software", on the basis of document UPOV/INF/16/10 Draft 2.

13. The CAJ agreed that the Council be invited to adopt in 2021 the revisions to document UPOV/INF/16/10 "Exchangeable Software", as presented in document UPOV/INF/16/10 Draft 2.

UPOV/INF/17: Guidelines for DNA-Profiling: Molecular Marker Selection and Database Construction ("BMT Guidelines") (Revision) (document UPOV/INF/17/2 Draft 6)

14. The CAJ approved the revision of document UPOV/INF/17/1 "Guidelines for DNA-Profiling: Molecular Marker Selection and Database Construction ("BMT Guidelines")", on the basis of document UPOV/INF/17/2 Draft 6.

15. The CAJ agreed that the Council be invited to adopt in 2021 the revisions to document UPOV/INF/17/2 "Guidelines for DNA-Profiling: Molecular Marker Selection and Database Construction ("BMT Guidelines")", as presented in document UPOV/INF/17/2 Draft 6.

*UPOV/INF/22: Software and Equipment Used by Members of the Union (Revision)
(document UPOV/INF/22/8 Draft 2)*

16. The CAJ approved the revision of document UPOV/INF/22/7 "Software and Equipment Used by Members of the Union", on the basis of document UPOV/INF/22/8 Draft 2.

17. The CAJ agreed that the Council be invited to adopt in 2021 the revision to document UPOV/INF/22/8 "Software and Equipment Used by Members of the Union", as presented in document UPOV/INF/22/8 Draft 2.

UPOV/INF/23: UPOV Code System (document UPOV/INF/23/1 Draft 3)

18. The CAJ approved the revision of document UPOV/INF/23 “UPOV Code System”, on the basis of document UPOV/INF/23/1 Draft 3.

19. The CAJ agreed that the Council be invited to adopt in 2021 the revision to document UPOV/INF/23 “UPOV Code System”, as presented in document UPOV/INF/23/1 Draft 3.

Explanatory Notes

UPOV/EXN/DEN: Explanatory Notes on Variety Denominations under the UPOV Convention (document UPOV/EXN/DEN/1 Draft 6)

20. The CAJ noted that matters concerning variety denominations were considered in document CAJ/78/11.

Explanatory Notes on Variety Denominations under the UPOV Convention (document CAJ/78/11)

21. The CAJ considered document CAJ/78/11.

22. The CAJ noted the developments concerning the revision of document UPOV/INF/12/5 “Explanatory Notes on Variety Denominations under the UPOV Convention”, as reported in document CAJ/78/11.

23. The CAJ noted the comments received in response to Circular E-21/106 of July 9, 2021, concerning document UPOV/EXN/DEN/1 Draft 5, reproduced in Annex II to document CAJ/78/11 and the changes made in document UPOV/EXN/DEN/1 Draft 6 in response to those comments.

24. The CAJ approved the revision of document UPOV/EXN/DEN “Explanatory Notes on Variety Denominations under the UPOV Convention”, on the basis of document UPOV/EXN/DEN/1 Draft 6.

25. The CAJ agreed that the Council be invited to adopt in 2021 the revision to document UPOV/EXN/DEN/1 “Explanatory Notes on Variety Denominations under the UPOV Convention”, as presented in document UPOV/EXN/DEN/1 Draft 6.

UPOV/EXN/EDV: Explanatory Notes on Essentially Derived Varieties under the 1991 Act of the UPOV Convention (documents CAJ/78/4, CAJ/78/4 Add. and UPOV/EXN/EDV/3 Draft 2)

26. The CAJ noted that matters concerning essentially derived varieties would be considered by the CAJ at its seventy-eighth session.

Harvested Material

27. The CAJ noted that matters concerning harvested material were considered in document CAJ/78/5.

Tentative program for the development of guidance and information materials

28. The CAJ approved the program for the development of information materials, as proposed in the Annex to document CAJ/78/3 Rev.

AGENDA ITEM 8: HARVESTED MATERIAL (DOCUMENT CAJ/78/5)

29. The CAJ considered document CAJ/78/5.

30. The CAJ noted the developments concerning harvested material and unauthorized use of propagating material, including relevant matters on the “Seminar on the breeder’s right in relation to harvested material”, as set out in paragraphs 4 to 16 of document CAJ/78/5.

31. The CAJ approved the proposals for a procedure for the revision of relevant guidance, as follows:

(i) agreed to initiate a revision of the “Explanatory Notes on Acts in Respect of Harvested Material under the 1991 Act of the UPOV Convention” (document UPOV/EXN/HRV/1), “Explanatory Notes on Propagating Material under the UPOV Convention” (UPOV/EXN/PPM/1), and “Explanatory Notes on Provisional Protection under the UPOV Convention” (UPOV/EXN/PRP/2);

(ii) agreed to establish a working group on harvested material and unauthorized use of propagating material (WG-HRV);

(iii) approved the terms of reference (ToRs) for the WG-HRV, as presented in the Annex to this document;

(iv) requested the Office of the Union to issue a Circular to invite members of the Union and observers to the CAJ to express their interest to be a member of the WG-HRV; and

(v) noted that, at its seventy-eighth session, the CAJ would receive a report of the replies to the Circular with the expressions of interest to be part of the WG-HRV, with a request for the CAJ to agree its composition and the date for its first meeting.

32. In accordance with the above request of the CAJ, UPOV Circular E-21/157 of September 23, 2021, was issued with an invitation to the members of the Union and observers to the CAJ to express their interest to be a member of WG-HRV by October 22, 2021. The CAJ at its seventy-eighth session will be invited to consider the report of the replies to the Circular with the expressions of interest to be part of the WG-HRV, with a request for the CAJ to agree its composition and the date for its first meeting as presented in document CAJ/78/5 Add..

Comments from the European Union

33. In reply to Circular E-21/123 of August 23, 2021, the following comments on document CAJ/78/5 were received from the European Union:

“The EU and its Member States wish to thank for the very informative seminar on harvested material, in particular in relation to the EU Court of Justice case on fruit trees (“Nadorcott”). It seems that in the first place the provisional protection and unauthorised use of propagating material should be looked at and assessed in their current form. We wish to highlight that if propagating material is stolen effective national criminal law should be primarily applicable.”

34. The Office of the Union suggested that the European Union raise the above comments in the WG-HRV.

35. The CAJ is invited to note the approval of the CAJ by correspondence on September 21, 2021, of the decisions contained in the following documents:

Development of guidance and information materials (document CAJ/78/3 Rev.);

UPOV/INF/16: Exchangeable Software (Revision) (document UPOV/INF/16/10 Draft 2)

UPOV/INF/17: Guidelines for DNA-Profiling: Molecular Marker Selection and Database Construction (“BMT Guidelines”) (Revision) (document UPOV/INF/17/2 Draft 6)

UPOV/INF/22: Software and Equipment Used by Members of the Union (Revision) (document UPOV/INF/22/8 Draft 2)

UPOV/INF/23: UPOV Code System (document UPOV/INF/23/1 Draft 3)

*Explanatory Notes on Variety Denominations
under the UPOV Convention (document CAJ/78/11)*

*UPOV/EXN/DEN: Explanatory Notes
on Variety Denominations under the
UPOV Convention
(document UPOV/EXN/DEN/1 Draft 6)*

Harvested material (document CAJ/78/5).

36. *The CAJ is invited to note the comments on document CAJ/78/5 "Harvested material", received in response to Circular E-21/123 of August 23, 2021, that have not resulted in a revision of document CAJ/78/5 (see paragraph 33).*

[Annex follows]

TERMS OF REFERENCE OF THE WORKING GROUP ON
HARVESTED MATERIAL AND UNAUTHORIZED USE OF PROPAGATING MATERIAL
(WG-HRV)

approved by the Administrative and Legal Committee on September 21, 2021

PURPOSE:

The purpose of the WG-HRV is to draft a revision of the “Explanatory Notes on Acts in Respect of Harvested Material under the 1991 Act of the UPOV Convention” (document UPOV/EXN/HRV/1), “Explanatory Notes on Propagating Material under the UPOV Convention” (UPOV/EXN/PPM/1), and “Explanatory Notes on Provisional Protection under the UPOV Convention” (UPOV/EXN/PRP/2), for consideration by the Administrative and Legal Committee (CAJ).

COMPOSITION:

- (a) to be composed of the members of the Union and the observers agreed by the CAJ;
- (b) other members of the Union would be free to participate at any meeting of the WG-HRV and make comments, where so desired;
- (c) the WG-HRV would revert back to the CAJ if the WG-HRV recommended to invite other observers or experts to any of its meetings; and
- (d) meetings to be chaired by the Vice Secretary-General.

MODUS OPERANDI:

(a) in drafting the revision of documents UPOV/EXN/HRV/1, UPOV/EXN/PPM/1, and UPOV/EXN/PRP/2, the WG-HRV to consider the matters identified in the replies to UPOV Circular E-19/232 and, in particular, the concluding remarks at the 2021 Seminar on the breeder’s right in relation to harvested material:

- *“How does the lack of effective protection on harvested material impact on growers and consumers?”*

“Evidence was presented at the Seminar that the lack of effective protection for new varieties of fruit trees, prior to the grant of breeders’ rights, could inhibit the early introduction of new and improved varieties, thus reducing the benefits of those varieties for growers and consumers and, therefore, society as a whole. Furthermore, if breeders do not have effective protection to recover the investment in breeding, improved varieties might not be developed at all.

- *“What are the main challenges in the exercise of the breeder’s right in relation to the harvested material?”*

“A common area of concern is lack of predictability concerning the breeder’s right in relation to the harvested material.

“For certain species, trees, once planted, can produce fruits for many years. Therefore, a minimum scope of provisional protection and/or a narrow interpretation of “unauthorized use of propagating material” may not provide the means for the breeder to exercise and enforce their right in relation to the growing of the plants and producing and selling of the fruit.

- *“At the level of UPOV: what solutions do you see for those challenges in the exercise of the breeder’s right in relation to the harvested material?”*

“Clear indication from presentations and discussions that guidance in the explanatory notes on harvested material would benefit from further clarification.

“To help to encourage the development of new varieties of plants, further guidance would be helpful on:

- “propagating material
- “harvested material
- “effective provisional protection
- “notion of ‘unauthorized use of propagating material’
- “the doctrine of exhaustion of rights in relation to the reversal of the burden of proof”.

(b) the WG-HRV to meet at a time and frequency to address its mandate, by physical and/or virtual means, as agreed by the WG-HRV;

(c) the WG-HRV to report to the CAJ on progress of its work and to seek further guidance from the CAJ, as appropriate;

(d) WG-HRV documents to be made available to the CAJ.

[End of Annex and of document]