

**Administrative and Legal Committee****CAJ/78/13.****Seventy-Eighth Session  
Geneva, October 27, 2021****Original:** English  
**Date:** October 27, 2021**REPORT***adopted by the Administrative and Legal Committee**Disclaimer: this document does not represent UPOV policies or guidance*Opening of the session

1. The Administrative and Legal Committee (CAJ) held its seventy-eighth session via electronic means on October 27, 2021. The list of participants is reproduced in the Annex to this report.
2. The session was opened by Mr. Manuel Antonio Toro Ugalde (Chile), Vice-Chair of the CAJ, who joined the meeting by electronic means. The Vice-Chair welcomed the participants.
3. The CAJ noted that, due to unavoidable circumstances, Mr. Patrick Ngwediagi was not in a position to Chair the CAJ and had requested Mr. Manuel Antonio Toro Ugalde, Vice Chair of the CAJ, to preside over the CAJ.

Adoption of the agenda

4. The CAJ adopted the revised draft agenda, as presented in document CAJ/78/1 Rev.2, and agreed to move item 9 "PLUTO Plant Variety Database", after item 12 "Measures to enhance cooperation in examination (document CAJ/78/9)".

Outcome of the consideration of documents by correspondence (document CAJ/78/12)

5. The CAJ considered document CAJ/78/12.
6. The CAJ noted the approval of the CAJ by correspondence on September 21, 2021, of the decisions contained in the following documents (see document CAJ/78/12, paragraph 35):

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).

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

Report by the Vice Secretary-General on developments in UPOV (document CAJ/78/INF/2 and video)

8. The CAJ noted that a video presentation in English, with subtitles in English, French, German and Spanish, had been made available on the CAJ/78 webpage in advance of the CAJ session. A copy of the presentation was provided in document CAJ/78/INF/2.

9. The Vice Secretary-General reported that Ms. Nadia Gianoli had started working at UPOV under an agency contract, since September 1, 2021, to provide cover for the maternity leave of Ms. Urska Cerv.

Report on developments in the Technical Committee (document CAJ/78/2)

10. The CAJ noted the information in document CAJ/78/2 and in the oral report made by Mr. Nik Hulse, Chair of the Technical Committee (TC).

Development of information materials concerning the UPOV Convention (documents CAJ/78/3 Rev., CAJ/78/4, CAJ/78/4 Add. and CAJ/78/11)

11. The CAJ noted that documents CAJ/78/3 Rev. and CAJ/78/11 had been considered by correspondence.

12. The CAJ noted that the decisions in documents CAJ/78/3 Rev. and CAJ/78/11 had been taken and the following documents had been approved by the CAJ by correspondence, as provided in document CAJ/78/12, paragraph 35.

*Information Materials*

Document UPOV/INF/16:	Exchangeable Software (Revision) (document UPOV/INF/16/10 Draft 2)
Document UPOV/INF/17:	Guidelines for DNA Profiling: Molecular Marker Selection and Database Construction ("BMT Guidelines") (Revision) (document UPOV/INF/17/2 Draft 6)
Document UPOV/INF/22:	Software and Equipment Used by Members of the Union (Revision) (document UPOV/INF/22/8 Draft 2)
Document UPOV/INF/23:	UPOV Code System (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)
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13. The CAJ noted the report from the Office of the Union that the information materials and explanatory notes above had been adopted by the Council on September 21, 2021, in the procedure by correspondence (see document C/55/12 "Outcome of consideration of documents by correspondence", paragraphs 11 and 32).

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)

14. The CAJ considered documents CAJ/78/4, CAJ/78/4 Add. and document UPOV/EXN/EDV/3 Draft 2.

15. The CAJ noted the developments concerning the revision of document UPOV/EXN/EDV/2 "Explanatory Notes on Essentially Derived Varieties under the 1991 Act of the UPOV Convention" and the work of the WG-EDV, as reported in document CAJ/78/4.

16. The CAJ noted that the WG-EDV, at its fourth meeting, had agreed the following changes to the text of document UPOV/EXN/EDV/3 Draft 2 “Explanatory Notes on Essentially Derived Varieties under the 1991 Act of the UPOV Convention (Revision)”:

Document UPOV/EXN/EDV/3 Draft 2	Changes agreed by the WG-EDV at its fourth meeting
Paragraph 7	“An essential characteristic is a characteristic that results from the expression of <del>one or more genes or other heritable determinants</del> <u>the genotype</u> and includes, but is not limited to, morphological, physiological, agronomic, industrial (e.g. oil characteristics) and/or biochemical characteristics.”
Paragraph 8	“An ‘essential characteristic’ is a characteristic that is <del>essential</del> <u>fundamental</u> for the variety as a whole. It should contribute to the principal features, performance or value for use of the variety and be relevant for one the following: the producer, seller, supplier, buyer, recipient, user of the propagating material and/or of the harvested material and/or of the directly obtained products and/or the value chain.”
Paragraph 11	“ <del>A predominantly</del> <u>An essentially</u> derived variety typically retains the expression of essential characteristics of the variety from which it is derived, except for those differences resulting from act(s) of derivation, which may also include differences in essential characteristics.”
Figures 2, 3, 4, 5, box 3:	“- predominantly derived from A <u>‘or B’</u> ”
Figures 2, 3, 4, 5, box 6:	“- predominantly derived from A <u>‘or Z-1’</u> ”

17. The CAJ noted that the WG-EDV had recommended that the CAJ, at its seventy-eighth session, consider document UPOV/EXN/EDV/3 Draft 2 “Explanatory Notes on Essentially Derived Varieties under the 1991 Act of the UPOV Convention (Revision)”, in conjunction with the changes agreed by the WG-EDV, as presented in the above paragraph and the following comments:

(a) the WG-EDV noted the comments made by the Delegation of Spain in relation to document UPOV/EXN/EDV/3 Draft 2 and agreed it would be important for members of the WG-EDV to take the opportunity to discuss those comments with the Delegation of Spain prior to the CAJ; and

(b) the representative of the Association for Plant Breeding for the Benefit of Society (APBREBES) did not agree with the text of Section II and the inclusion of Section III in document UPOV/EXN/EDV/3 Draft 2, as explained in the comments of APBREBES, in document UPOV/WG-EDV/4/2, Annex, Appendix IV (see at [https://www.upov.int/edocs/mdocs/upov/en/wg\\_edv\\_4/upov\\_wg\\_edv\\_4\\_2.pdf](https://www.upov.int/edocs/mdocs/upov/en/wg_edv_4/upov_wg_edv_4_2.pdf)).

18. The CAJ approved the text in document UPOV/EXN/EDV/3 Draft 2 with the changes that the WG-EDV had agreed, at its fourth meeting (see paragraph 16, above) and subject to the following additional changes:

Document UPOV/EXN/EDV/3 Draft 2	Changes agreed by the CAJ at its seventy-eighth session
Paragraph 2	“ <u>The purpose of these Explanatory Notes is to 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.</u> 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.

Paragraph 3	These Explanatory Notes are divided into the following four sections: Section I Provisions of essentially derived varieties; Section II Assessment of essentially derived varieties; <del>Section III Options for the enforcement of breeders' rights in relation to essentially derived varieties;</del> and Section <del>IV</del> <u>III</u> Facilitating EDV understanding and implementation.
Paragraph 29	An EDV is a variety and may require a variety denomination. Regardless of whether an EDV is protected in its own right or not, <u>the denomination that is used for the variety should be in accordance with the Explanatory Notes on Variety Denominations under the UPOV Convention UPOV/EXN/DEN and, in particular, shall not be identical, should be different</u> to the denomination of the initial variety.
Paragraph 35	deleted
Paragraph 36 (in English and Spanish)	<p>First two sentences to be merged in one sentence to read as follows:</p> <p>“In some situations, relevant information provided by the breeder of the initial variety on predominant derivation and/or on conformity of the essential characteristics might be used as the basis for the breeder of the putative EDV to be required to prove that their variety is not essentially derived from the initial variety.[...]”</p> <p>“En algunas situaciones, información pertinente proporcionada por el (la) obtentor(a) de la variedad inicial relativa a la derivación principal y/o la conformidad de los caracteres esenciales podría utilizarse como base para requerir al (a la) obtentor(a) de la presunta variedad esencialmente derivada que demuestre que su variedad no es esencialmente derivada de la variedad inicial. [...]”</p>
Paragraph 37	deleted
Sections II and III	Merge the contents of Sections II and III in one single section with the title of Section II and update the table of contents accordingly.

19. The CAJ agreed that the WG-EDV had successfully concluded its work.

20. The CAJ approved the proposed revision of document UPOV/EXN/EDV/3 “Explanatory Notes on Essentially Derived Varieties under the 1991 Act of the UPOV Convention”, on the basis of document UPOV/EXN/EDV/3 Draft 2, as provided in paragraph 18.

21. The CAJ agreed, on the above basis, that a draft of document UPOV/EXN/EDV/3, as approved by the CAJ, be circulated for approval by the Consultative Committee and adoption by the Council by correspondence.

22. The CAJ noted that the procedure for adoption of document UPOV/EXN/EDV/3 by the Council by correspondence would be proposed to the Council, at its fifty-fifth ordinary session, on October 29, 2021, under agenda item 16.

Harvested Material (documents CAJ/78/5, CAJ/78/5 Add. and CAJ/78/12)

23. The CAJ noted that document CAJ/78/5 had been considered by correspondence.
24. The CAJ noted that the decisions in document CAJ/78/5 had been taken by the CAJ by correspondence on September 21, 2021, as provided in document CAJ/78/12, paragraph 31, as follows. The CAJ:
- (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 document CAJ/78/12;
  - (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.
25. The CAJ noted the comments on document CAJ/78/5 “Harvested material”, received in response to Circular E-21/123 of August 23, 2021, that had not resulted in a revision of document CAJ/78/5. Comments and the reply provided by the Office of the Union are presented in paragraphs 33 and 34 of document CAJ/78/12 (see paragraph 36 of document CAJ/78/12) and reproduced below:
- “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.”
26. The CAJ considered document CAJ/78/5 Add..
27. The CAJ approved the following composition of the WG-HRV:
- In reply to Circular E-21/157 of September 23, 2021, the following members of the Union and observers in the CAJ expressed an interest to be members of the WG-HRV: Argentina, Australia, Brazil, Chile, China, Czech Republic, European Union, France, Japan, Netherlands, New Zealand, Norway, Republic of Korea, Spain, United Kingdom, United Republic of Tanzania, United States of America, Association for Plant Breeding for the Benefit of Society (APBREBES), CropLife International, Euroseeds, International Association of Horticultural Producers (AIPH), International Community of Breeders of Asexually Reproduced Horticultural Plants (CIOPORA), International Seed Federation (ISF) and the Seed Association of the Americas (SAA).
28. The CAJ approved the date of March 15, 2022, for the first meeting of the WG-HRV, to be held by electronic means.

Novelty of parent lines with regard to the exploitation of the hybrid variety (document CAJ/78/6)

29. The CAJ considered document CAJ/78/6.

30. The CAJ invited members of the Union and observers to the CAJ to make presentations on the novelty of parent lines with regard to the exploitation of the hybrid variety at the seventy-ninth session of the CAJ, and after considering the presentations and discussions, the CAJ would consider next steps, as appropriate.

31. In reply to the comment of APBREBES, the Office of the Union expressed its commitment to ensuring that events were organized with a balance of perspectives. It recalled that the procedure for organizing seminars was determined by the UPOV body concerned with the aim of ensuring a balanced event. This procedure usually involved a circular inviting members and observers offers for topics and speakers and approval of the program.

PLUTO Plant Variety Database (document CAJ/78/7)

32. The CAJ considered document CAJ/78/7 and received a demonstration of the new version of the PLUTO database.

33. The CAJ noted the summary of contributions to the PLUTO database from 2016 to 2021, as set out in Annex II to document CAJ/78/7.

34. The CAJ noted the information concerning the development of the new version of the PLUTO database and the launch of the new version of the PLUTO database on October 11, 2021.

UPOV denomination similarity search tool (documents CAJ/78/8)

35. The CAJ considered document CAJ/78/8.

36. The CAJ noted the latest situation concerning the possible development of a UPOV denomination similarity search tool, as reported in paragraph 21 of document CAJ/78/8.

Possible guidance on take-over of DUS reports when the applicants cannot submit plant material (document CAJ/78/10)

37. The CAJ considered document CAJ/78/10.

38. The CAJ noted that proposals for enhancing cooperation and take-over of DUS test reports were provided in document CAJ/78/9 “Measures to enhance cooperation in examination”.

39. The CAJ agreed to include possible “guidance to encourage members of the Union, on a voluntary basis, to take over DUS test reports when the applicants could not submit plant material due to phytosanitary or other related issues where acceptable to the members of the Union concerned” as part of the work to be agreed by the CAJ under document CAJ/78/9.

Measures to enhance cooperation in examination (document CAJ/78/9)

40. The CAJ considered document CAJ/78/9.

41. The CAJ agreed that the survey should include the taking-over of test reports where the variety descriptions did not match the UPOV Test Guidelines characteristics.

42. In response to the comment from the European Union, the CAJ noted that the Explanatory Notes on “Examination of the Application” should explain all options for examination of varieties, as set out in the UPOV Convention.

43. The CAJ agreed the following measures to address policy or legal barriers that the TC had identified as preventing international cooperation in DUS examination:

(a) survey members of the Union for information on their policies or legal barriers that could prevent international cooperation in DUS examination;

(b) develop explanatory notes to Article 12 of the UPOV Convention (“Examination of the Application”); and

(c) request breeders’ organizations to clarify the issues concerning the wish of breeders to use, or not to use, existing DUS reports.

Matters for information:

44. The CAJ noted the following documents under item 13 “Matters for information”:

“(a) UPOV information databases (document CAJ/78/INF/3)

“(b) UPOV PRISMA (document CAJ/78/INF/4)

“(c) Molecular techniques (document CAJ/78/INF/5)”

Program for the seventy-ninth session

45. The CAJ agreed the following program for its seventy-ninth session to be held on October 26, 2022:

1. Opening of the session

2. Adoption of the agenda

3. Report by the Vice Secretary-General on developments in UPOV

4. Report on developments in the Technical Committee

5. Development of guidance and information materials

(a) Information documents

UPOV/INF/16 Exchangeable Software (Revision)

UPOV/INF/22 Software and Equipment Used by Members of the Union (Revision)

(b) Explanatory Notes

UPOV/EXN/HRV Explanatory Notes on Acts in Respect of Harvested Material under the 1991 Act of the UPOV Convention

UPOV/EXN/PPM Explanatory Notes on Propagating Material under the UPOV Convention

UPOV/EXN/PRP Explanatory Notes on Provisional Protection under the UPOV Convention

UPOV/EXN/DEN Explanatory Notes on Variety Denominations under the UPOV Convention

UPOV/EXN/[ ] Explanatory Notes on Examination of the Application under the UPOV Convention

(c) TGP documents

TGP/5 Experience and Cooperation in DUS Testing  
Section 6: UPOV Report on Technical Examination and UPOV Variety Description

6. Novelty of parent lines with regard to the exploitation of the hybrid variety
7. PLUTO Plant Variety Database
8. UPOV denomination similarity search tool
9. Measures to enhance cooperation in examination
10. Matters for information\*:
  - (a) UPOV information databases
  - (b) UPOV PRISMA
  - (c) Molecular techniques
11. Program for the eightieth session
12. Adoption of the report (if time permits)
13. Closing of the session

*46. This report was adopted at the close of its session, on October 27, 2021.*

[Annex follows]



## ANNEXE / ANNEX / ANLAGE / ANEXO

LISTE DES PARTICIPANTS / LIST OF PARTICIPANTS /  
TEILNEHMERLISTE / LISTA DE PARTICIPANTES

(dans l'ordre alphabétique des noms français des membres /  
in the alphabetical order of the French names of the Members /  
in alphabetischer Reihenfolge der französischen Namen der Mitglieder /  
por orden alfabético de los nombres en francés de los miembros)

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