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ADMINISTRATIVE AND LEGAL COMMITTEE ADVISORY GROUP

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EXPLANATORY NOTES ON ESSENTIALLY DERIVED VARIETIES UNDER THE 1991 ACT OF THE UPOV CONVENTION

Document prepared by the Office of the Union

1. The purpose of this document is to provide information to assist the Administrative and Legal Committee Advisory Group (CAJ-AG) in the consideration of the revision of the "Explanatory Notes on Essentially Derived Varieties Under the 1991 Act of the UPOV Convention" and of relevant matters concerning essentially derived varieties.

2. This document is structured as follows:

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I. REVISIONS TO THE EXISTING SECTIONS OF DOCUMENT UPOV/EXN/EDV/1 “EXPLANATORY NOTES ON ESSENTIALLY DERIVED VARIETIES UNDER THE 1991 ACT OF THE UPOV CONVENTION”

3. The CAJ-AG at its sixth session held in Geneva on October 18, 2011, considered documents CAJ-AG/11/6/3 and UPOV/EXN/EDV/2 Draft 1, the comments of the European Coordination Via Campesina (ECVC) and the International Community of Breeders of Asexually Reproduced Ornamental and Fruit Plants (CIOFORA) (available at the CAJ-AG/11/6 section of the UPOV website http://www.upov.int/meetings/en/details.jsp?meeting_id=24135).

(a) Revisions agreed by the CAJ-AG at its sixth session

4. The CAJ-AG, at its sixth session, agreed the following concerning document UPOV/EXN/EDV/2 Draft 1 (see document CAJ-AG/11/6/7 “Report”, paragraph 13):

paragraph 8 and Figures 2, 3 and 4	to redraft in order to clarify that varieties can be predominantly derived from variety A, either directly, or indirectly via varieties “B”, “C”, “D”, or “E” ... etc., and will still be considered essentially derived varieties from variety “A” if they fulfill the definition stated in Article 14(5)(b).
paragraph 14	first sentence to read as follows: “Members of the Union which amend their legislation in line with the 1991 Act of the UPOV Convention are able <u>may choose</u> to offer the benefits of the 1991 Act to varieties which were protected under an earlier law.”

5. The conclusions of the CAJ-AG, at its sixth session, have been incorporated in document UPOV/EXN/EDV/2 Draft 2.

(b) The possibility to use molecular marker data information of an initial variety to obtain essentially derived varieties

6. At the fifth session of the CAJ-AG, the representative of ISF requested the CAJ-AG to consider whether variety “D” would be “predominantly derived” from the initial variety if variety “D” was obtained by using only information on the initial variety, such as the DNA profile (see document CAJ-AG/10/5/7 “Report”, paragraph 17).

7. The CAJ-AG, at its sixth session, agreed that the explanation on “Predominant derivation – use of information” made by ISF during its Powerpoint presentation be provided to the Office of the Union for consideration by the CAJ-AG at its seventh session, in October 2012 (see document CAJ-AG/11/6/7 “Report”, paragraph 21).

8. The Powerpoint presentation made by ISF at the sixth session of the CAJ-AG is available at the CAJ-AG/11/6 section of the UPOV website http://www.upov.int/meetings/en/details.jsp?meeting_id=24135 . The contents of the slide on “Predominant derivation – use of information” is reproduced below:

Predominant derivation – Use of information

“The collection of molecular data from the initial variety and the subsequent application of the obtained DNA profiles with the explicit intention to select for similar genotypes in a particular population, which is mostly related to the initial variety, may also be regarded as predominant derivation from the initial variety. Therefore, for the purpose of EDV assessment, “predominant derivation” may result from: i) The use of – mainly- the plant material of an initial variety for selection or (back) crossing followed by selection in the breeding process, or ii) The use of molecular marker data, collected from an initial variety, for the purpose of selection of genotypes close or similar to the genotype of the initial variety, or in the case of hybrids, close or similar to the genotype of its parent lines.”

9. *The CAJ-AG is invited to consider:*

(a) *document UPOV/EXN/EDV/2 Draft 2; and*

(b) *the possibility to use molecular marker data information of an initial variety to obtain essentially derived varieties, as set out in paragraph 8 of this document.*

II. FURTHER MATTERS TO BE CONSIDERED

(a) The relationship between Article 14(5)(b)(i) and (iii) of the 1991 Act of the UPOV Convention

Article 14(5)(b) of the 1991 Act of the UPOV Convention

(b) For the purposes of subparagraph (a)(i), a variety shall be deemed to be essentially derived from another variety ("the initial variety") when

(i) it is predominantly derived from the initial variety, or from a variety that is itself predominantly derived from the initial variety, while retaining the expression of the essential characteristics that result from the genotype or combination of genotypes of the initial variety,

(ii) it is clearly distinguishable from the initial variety and

(iii) except for the differences which result from the act of derivation, it conforms to the initial variety in the expression of the essential characteristics that result from the genotype or combination of genotypes of the initial variety.

10. The following paragraphs provide information on discussions that took place: (a) during the preparatory work for the 1991 Diplomatic Conference for the Revision of the International Convention for the Protection of New Varieties of Plants; (b) during the Diplomatic Conference; (c) during the process for the development of guidance on essentially derived varieties after the Diplomatic Conference; and (d) during the fifth session of the CAJ-AG, that may be relevant for discussions with respect to Article 14(5)(b)(i) and (iii) of the 1991 Act of the UPOV Convention.

(i) *Discussions that took place during the preparatory work for the 1991 Diplomatic Conference for the Revision of the International Convention for the Protection of New Varieties of Plants*

11. At the Fourth Meeting with International Organizations, held in Geneva on October 9 and 10, 1989, document IOM/IV/2, "Revision of the Convention", included provisions for essentially derived varieties in paragraph 3 of the Proposed New Text to Article 5 "Effect of the Right Granted to the Breeder". The proposed text of Article 5 did not include a definition of essentially derived variety; however, alternatives were provided as follows:

[Extract from document IOM/IV/2]

"Proposed New Text

"Article 5

"Effects of the Right Granted to the Breeder

"[...]

"(3) If a variety is essentially derived from a [single] protected variety, the owner of the right in the protected variety

[Alternative 1] may prevent all persons not having his consent from performing the acts described in paragraph (1) above in relation to the new variety.

[Alternative 2] shall be entitled to equitable remuneration in respect of the commercial exploitation of the new variety.

[Alternative 3] may prevent all persons not having his consent from performing the acts described in paragraph (1) above in relation to the new variety. However, where the new variety shows a substantial improvement over the protected variety, the owner of the right shall only be entitled to equitable remuneration in respect of the commercial exploitation of the new variety.

"[...]"

[Extract of the explanatory notes on Article 5 "Effects of the Right Granted to the Breeder" presented in document IOM/IV/2, "Revision of the Convention"]

"5. Paragraph 3. – This paragraph introduces a new concept into the law of plant variety protection: the exploitation – but not the breeding – of a variety that is essentially derived from a protected variety would be subject to the right granted to the breeder of the latter variety ('dependence').

"6. The Committee has not yet taken a final position on the question whether the word 'single' would be inserted or omitted; at the present stage of the discussions, there seems to be general agreement on the fact that the following conditions should be met for there to be dependence:

"[...]"

"(ii) the derived variety must retain almost the totality of the genotype of the mother variety and be distinguishable from that variety by a very limited number of characteristics (typically by one)

"[...]"

(ii) *Discussions that took place during the Diplomatic Conference*

12. With respect to "while retaining the expression of the essential characteristics that result from the genotype or combination of genotypes of the initial variety"; the wording of the Basic Proposal presented at the 1991 Diplomatic Conference was as follows:

"(i) it is predominantly derived from the initial variety, or from a variety that is itself predominantly derived from the initial variety, particularly through methods which have the effect of conserving the essential characteristics that are the expression of the genotype or of the combination of genotypes of the initial variety, such as the selection of a natural or induced mutant of the somaclonal variant, the selection of a variant, backcrossings or transformation by genetic engineering."

13. The Basic Proposal was changed to the adopted text of Article 14(5)(b)(i) by the Drafting Committee when considering a particular proposal (document DC/91/14). The redrafting was not intended to change the substance of the content (see the Basic Proposal, document DC/91/14 and Summary Minutes of the Diplomatic Conference, paragraphs 1073, 1096 and 1097, also contained in the Annex to document CAJ-AG/09/4/3, pages 67, 72, 76, 78 and 79).

(iii) *Discussions that took place during the process for the development of guidance on essentially derived varieties after the Diplomatic Conference*

14. 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, adopted the following resolution (see document DC/91/140):

"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."

15. In relation to the above resolution, draft guidelines related to essentially derived varieties were elaborated and discussed by the CAJ at its twenty-ninth session held in Geneva on October 21 and 22, 1991; at its thirtieth session held in Geneva on April 8 and 9, 1992; at its thirty-second session held in

Geneva on April 22 and 23, 1993; and during the sixth meeting with international organizations (IOM/6) held in Geneva on October 30, 1992.

16. As part of the work on the development of draft standard guidelines on essentially derived varieties, on the basis of document CAJ/29/2, the relationship between Article 14(5)(b)(i) and (iii) was discussed at the twenty-ninth session of the CAJ held in Geneva on October 21 and 22, 1991, and at the thirtieth session of the CAJ, held in Geneva on April 8 and 9, 1992.

17. The records of the relevant discussions on document CAJ/29/2 at the twenty-ninth and thirtieth sessions of the CAJ, contained in documents CAJ/29/7 "Report", and CAJ/30/6 "Report", are reproduced in Annex I to this document.

18. The following proposals were presented in document IOM/6/2 "Essentially Derived Varieties" at the sixth Meeting with International Organizations (IOM/6) held in Geneva on October 30, 1992:

"8. 'predominantly derived from the initial variety' Article 14(5)(b)(i): The requirement of predominant derivation from an initial variety means that a variety can only be essentially derived from one variety. Discussions of the revision proposals in the sessions of the Administrative and Legal Committee which preceded the adoption by the Council in October 1990 of a draft Convention consistently showed that the intention was that a variety should only be essentially derived from another variety when it retained virtually the whole genotype of the other variety. This is confined by the words commented upon in paragraph 9 below. 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 variety.

"9. 'while retaining the expression of the essential characteristics': The essential characteristics are those which are indispensable or fundamental to the variety. 'Characteristics' would seem to embrace all features of a variety including, for example, morphological, physiological, agronomic, industrial and biochemical characteristics. It is suggested that the result of a biochemical test conducted on a variety, for instance, a screening test using a genetic probe, is a characteristic of the variety. 'while retaining' requires that the expression of the essential characteristics be derived from the initial variety.

"[...]

"12. '(iii) except for the differences which result from the act of derivation it conforms to the initial variety in the expression of the essential characteristics that result from the genotype or combination of genotypes of the original variety': 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 the words of paragraph (i). 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.' A comparison between subparagraphs (i) and (iii) of Article 14(5)(b) is somehow problematic in that (i) would seem to require the whole of the expression of the essential characteristics that result from the genotype of the initial variety while (iii) requires only that the derived variety conforms to the initial variety except for differences resulting from the act of derivation (however, see the discussions in paragraph 13 below). The examples of essential derivation given in Article 14(5) (c) make clear that the differences which result from the act of derivation should be one or very few.

"IV. Establishing the 'essential derivation' of a variety

"13. Article 14(5)(b) lays down those conditions that must be satisfied in order that a later variety shall be deemed to be essentially derived from another variety ('the initial variety'). The second of those conditions (established in Article 14(5)(b)(ii)) requires only that the later variety be clearly distinguishable from the initial variety and requires no further comment. The first such condition (established in Article 14(5)(b)(i)) requires that the later variety be derived from the initial variety which in turn requires that genetic materials of the initial variety have been used in the creation of the later variety. The first condition is accordingly concerned with the genetic origin of the later variety. The third such condition (established in Article 14(5)(b)(iii)) requires that the later variety conforms to ('is made similar to') the initial variety in the expression of the inherited essential characteristics of the initial variety apart from the differences which result from the act of derivation. The third condition is accordingly concerned with the degree of similarity of the later variety to the initial variety. Whilst the first condition also makes reference to the degree of similarity, the primary function of the first condition is to establish a requirement relating to the genetic origin of the variety.

"[...]

“VI. The question of the Degree of Similarity

“[...]

“21. To fulfill the conditions imposed by Article 14(5)(b)(iii) a later variety must conform to the initial variety in the expression of the essential heritable characteristics of the initial variety ‘except for the differences which result from the act of derivation’. Theoretically, if variety A is crossed with variety B and Variety X is selected from the resulting progeny, if variety X derives less than half of its essential heritable characteristics (i.e. from its genotype) from A and more than half from B, it will be essentially derived from B since apart from the characteristics derived from A, it conforms to the expression of the essential characteristics of B. This is clearly not the intended interpretation. A later variety cannot fulfill the conditions of Article 14(5)(b)(i) unless it is predominantly derived from the initial variety while retaining, without qualification in Article 14(5)(b)(i), the expression of the essential heritable characteristics of the initial variety.”

19. The records of the discussions at the IOM/6 on the above proposals are contained in document IOM/6/5 “Report” and are reproduced in Annex II to this document.

20. Copies of documents IOM/6/2 “Essentially Derived Varieties” and IOM/6/5 “Report” in the four languages of the Office of the Union will be posted, as reference documents, at the CAJ-AG/11/6 section of the UPOV website.

21. The CAJ, at its thirty-second session on April 22 and 23, 1993, and the Technical Committee, at its twenty-ninth session held on April 21 and 22, 1993, decided as follows: (document CAJ/32/10-TC/29/9 “Report”, see Annex to document CAJ-AG/09/4/3, page 100):

“Guidelines Relating to Essentially Derived Varieties

“28. The Chairman asked whether a list of sample cases in which a variety would be essentially derived should be drawn up at the present stage, or whether one should rather await the entry into force of the provisions concerned and the accumulation of some initial practical experience. In the first hypothesis the question that arose was how to incorporate the advice of breeders in the Guidelines, as the Guidelines were addressed to them; in that case the form of the document would also have to be specified.

“29. The Delegations of Germany, France and the Netherlands were of the opinion that one could not draw up a list in the abstract, which moreover would be liable to be taken as an exhaustive list, and that one should wait. It was also mentioned that the work of the Working Group on Biochemical and Molecular Techniques would greatly contribute to the definition of the essentially derived variety concept in practical cases.

“The Chairman concluded that this agenda item could be adjourned sine die.”

(iv) *Discussions that took place during the fifth session of the CAJ-AG*

22. At the fifth session of the CAJ-AG, held in Geneva on October 18, 2010 and on the afternoon of October 19, 2010, the representative of CIOPORA explained that for CIOPORA, to avoid legal uncertainty, it was necessary to clearly define the difference required for a variety to be considered not to be an essentially derived variety. He explained that the extension of the protection of an initial variety to its essentially derived varieties provided an effective means of protection for those essentially derived varieties that would have a short commercial life. CIOPORA considered that varieties obtained by mutation should be considered to be essentially derived varieties, irrespective of the number of differences. Therefore, he did not agree with the final sentence of paragraph 12 of document CAJ/29/2 “Guidelines to essentially derived varieties” and of paragraph 12 of document IOM/6/2 “Essentially Derived Varieties”, which stated that “[...] the differences which result from the act of derivation should be one or very few.” (see document CAJ-AG/10/5/7 “Report”, paragraph 14).

23. The CAJ-AG expressed concerns with regard to CIOPORA’s position that all mutations were essentially derived varieties (see document CAJ-AG/10/5/7 “Report”, paragraph 15).

(b) Matters concerning essentially derived varieties arising after the grant of a breeder’s right

24. At the sixty-first session of the CAJ, held in Geneva on March 25, 2010, the Delegation of Japan expressed an interest to learn more about the experience of other members of the Union on matters that might be raised after the grant of the breeder’s right concerning essentially derived varieties and provided the

following contribution in reply to Circular E-1168 (see Appendix 4 to the Annex to document CAJ/61/8 “Matters arising after the grant of the breeder’s right”).

‘The matters arising after the grant of a breeder’s rights in Japan

‘The matters concerning the EDV (the variety essentially derived from the initial variety)’

A breeder in Japan who used to get PBR (plant breeder’s rights) of EDV was informed by the partner company in Netherlands that the PBR of initial variety could protect the EDV without PBR of itself. Therefore, he intends to exercise his rights of the EDV only through the PBR of initial variety and to show the status of EDV not to make confusion.

At this situation if there are no appropriate criteria of the EDV, anyone can’t say whether the variety is EDV or not, and then its holder can’t exercise his rights of the EDV appropriately. And if there are no system to show in public that the EDV is under the PBR of the initial variety, many people may infringe the rights without notice of the rights.

So we think it is necessary for the authorities of PVP to create the criteria and the system.

Furthermore, we are concerned that it would cause chaos in the field to exercise the PBR by making use of the regulation of EDV. The reasons are as follows.

The EDV itself is not examined under the Plant Variety Protection and Seed Act of Japan and defined only by the way of breeding and distinctness from the initial variety. That means it is not necessary for the EDV to meet the conditions (distinctness, uniformity, stability, novelty etc) which are needed for the PBR registration. Moreover, the information (holder’s name, date of grant, duration, exhaustion etc) of the rights of the EDV are not published.

Therefore, we think it is necessary for the authorities to examine the EDV, grant the rights to it and administrate the registration list of the EDVs.

For that reason, we would like to know the experiences in other member countries (for example, Netherlands), such as some judgments of the court, some concrete laws and regulations concerning the rights of the EDV and how the holder of the EDV exercises his rights.

*The rights of the EDV mean the rights generated by the PBR of initial variety”

25. In response to the intervention of the Delegation of Japan concerning essentially derived varieties, the Vice Secretary-General made reference to document CAJ/46/7 “The Notion of Essentially Derived Varieties in the Breeding of Ornamental Varieties” and Annex III to document CAJ/47/8 “Report” and suggested that those documents be considered by the CAJ-AG at its fifth session (see paragraphs 73 of document CAJ/61/12 “Report”).

(c) Conclusions by the CAJ-AG at its sixth session

26. The CAJ-AG, at its sixth session, considered document CAJ-AG/11/6/3, the comments of ECVC, European Seed Association (ESA), International Community of Breeders of Asexually Reproduced Ornamental and Fruit Varieties (CIOPORA), and the presentations made by CIOPORA and the International Seed Federation (ISF) at the session (available at the CAJ-AG/11/6 section of the UPOV website http://www.upov.int/meetings/en/details.jsp?meeting_id=24135).

27. The Chair of the CAJ-AG, at its sixth session, recalled that the “Resolution on Article 14(5)”, adopted by the 1991 Diplomatic Conference, requested 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” (see document CAJ-AG/11/6/3, paragraph 19). He noted that the work on draft standard guidelines that was started by the Administrative and Legal Committee (CAJ) had been adjourned *sine die* (see document CAJ-AG/11/6/3, paragraph 26 and document CAJ-AG/11/6/7 “Report”, paragraph 15).

28. The CAJ-AG noted that CIOPORA was of the view that “determination of EDV is the task of the breeders”, whilst “defining clear rules on EDV opens the possibility for breeders to significant financial savings”. The CAJ-AG further noted that ISF was of the view that rules on EDV should be set by international bodies such as ISF, but decisions on specific cases should be made by the parties concerned. CIOPORA and ISF expressed their support for UPOV to continue the development of guidance on essentially derived varieties (see document CAJ-AG/11/6/7 “Report”, paragraph 16).

29. The CAJ-AG noted that, under certain conditions, it was possible to provide information concerning essentially derived varieties in the Register of the Community Plant Variety Office of the European Union.

30. The CAJ-AG noted that in a recent review on enforcement of plant breeders' rights, the Government of Australia had accepted the recommendations on essentially derived varieties and, in particular, that the Plant Breeder's Rights Office of Australia should retain responsibility for declarations on essentially derived varieties.

31. The CAJ-AG concluded that it would be appropriate to continue to consider whether to develop further guidance on the concept of EDV in a future revision of document UPOV/EXN/EDV "Explanatory Notes on Essentially Derived Varieties Under the 1991 Act of the UPOV Convention". It agreed that consideration should be given to including an explanation of the relationship between the provisions of Article 14(5)(b)(i) and (iii) of the 1991 Act of the UPOV Convention and the issues raised by the Delegation of Japan with regard to the exercise of plant breeders' rights in relation to essentially derived varieties (see document CAJ-AG/11/6/3, paragraphs 30 and 31). It agreed that the documents CAJ/46/7 "The Notion of Essentially Derived Varieties in the Breeding of Ornamental Varieties" and Annex II to document CAJ/47/8 "Report" should be considered with regard to guidance on the concept of EDV (see document CAJ-AG/11/6/7 "Report", paragraphs 17 to 19).

32. As a first step, the CAJ-AG agreed that information on the systems in the European Union and Australia for essentially derived varieties and other relevant examples be provided to the Office of the Union for presentation to the CAJ-AG at its seventh session in October 2012 (see document CAJ-AG/11/6/7 "Report", paragraph 20).

33. The information received from the European Union is reproduced in Annex III to this document. Any other relevant examples sent to the Office of the Union at least two weeks prior to the seventh session of the CAJ-AG will be published as an addendum to this document.

34. On the basis of information on the systems in the European Union and other relevant examples (see paragraphs 32 and 33), and with reference to document CAJ/46/7 "The Notion of Essentially Derived Varieties in the Breeding of Ornamental Varieties" and Annex II to document CAJ/47/8 "Report", the CAJ-AG is invited to consider whether to seek to develop guidance in the "Explanatory Notes on Essentially Derived Varieties Under the 1991 Act of the UPOV Convention", on the following:

(a) providing an explanation of the relationship between the provisions of Article 14(5)(b)(i) and (iii) of the 1991 Act of the UPOV Convention; and

(b) the exercise of breeders' rights in relation to essentially derived varieties (see paragraphs 24 and 25, above).

[Annexes follow]

ANNEX I

RELEVANT DISCUSSIONS ON DOCUMENT CAJ/29/2
AT THE TWENTY-NINTH AND THIRTIETH
SESSIONS OF THE CAJ

ADMINISTRATIVE AND LEGAL COMMITTEE

Twenty-ninth Session
Geneva, October 21 and 22, 1991

Document CAJ/29/7

REPORT

Relevant paragraph:

“11. Several delegations felt that it would be useful to hold a discussion with the breeder’s organizations – particularly ASSINSEL, which had already begun examining the matter – in view of the part the breeders would be required to play in managing the system of essentially derived varieties. A symposium could be held for that purpose on the occasion of the 1992 session of the Council and document CAJ/29/2 could be considered as an initial discussion paper, which in no way committed UPOV.”

ADMINISTRATIVE AND LEGAL COMMITTEE

Thirtieth Session
Geneva, April 8 and 9, 1992

Document CAJ/30/6

REPORT

Relevant paragraphs:

“Guidelines Relating to Essentially Derived Varieties

General

4. Discussions were based on documents CAJ/29/2, CAJ/29/7, paragraphs 4 to 14, and CAJ/30/5. The Committee also briefly discussed a letter from the Secretary General of the International Community of Breeders of Asexually Reproduced Ornamental and Fruit-Tree Varieties (CIOPORA), dated April 4, 1992, that had been received by the Office of the Union on the day preceding the session. The letter is reproduced at Annex II hereto.

Documents CAJ/29/2 and CAJ/29/7

5. Nature and Role of the Guidelines. – The Committee approached that question on the basis of paragraph 7 of document CAJ/29/7 (report on its twenty-ninth session).

6. The majority of delegations that spoke on that matter held the following views:

(i) It was not necessary to draw up guidelines for lawmakers, except possibly with regard to the burden of proof, since laws should remain sufficiently general to admit adjustment to future developments.

(ii) The guidelines were mainly aimed at breeders, who were required to manage between themselves the economic relationships resulting from extension of the protection of one variety to the essentially derived varieties.

(iii) The guidelines were therefore also aimed, for example in the form of an expert opinion, at those authorities that would be responsible for settling disputes between breeders on the essentially derived nature or not of a variety.

The delegation of Japan would have preferred guidelines aimed at the lawmakers.

7. The importance of closely concerted action with the breeders' organizations was stressed by several delegations in view of the part to be played by the breeders.

8. Several delegations pointed to the limitations suffered by the guidelines: examination of examples showed that they could go no further than generalities and, moreover, detail was likely to impede the capacity for adapting to circumstances. The Delegations of Germany and of Denmark proposed that there should be a simple collection of examples that reflected the outcome of discussions. The Delegation of France held that to pursue examples would rapidly lead to a dead end.

[...]

12. Paragraph 8 of Document CAJ/29/2. – All the delegations that spoke with regard to that paragraph were opposed to the description given for the “percentage of derivation.” The 50% boundary was not particularly telling and was likely to lead to serious technical error on the part of a non-specialist. To lay down a figure was also extremely hazardous where its basis was not known (all genetic material or the coding parts only) and where there was a genetic heritage common to all the varieties.

13. Paragraph 9 of Document CAJ/29/2. – The Delegation of the United Kingdom pointed out the danger of analyzing every phrase, since that would raise more problems than it solved. Such was the case for the explanations as to the concept of “characteristics.”

14. Paragraph 12 of Document CAJ/29/2. – The Delegation of Japan said that not only did account have to be taken of the number of differences, but also of their significance. That point was not considered further.

“[...]

22. Paragraph 21 of Document CAJ/29/2. – The Committee wanted that paragraph to be redrafted in order to avoid the problem of percentages.

“[...]

“27. Document to be Submitted to the Sixth Meeting with International Organizations.- The Committee agreed that document CAJ/9/2, without part VII, should be the basis for the document to be submitted to the sixth meeting with international organizations, it being understood that such document would not be a draft for the guidelines referred in the Resolution on Article 14(5) adopted by the Diplomatic Conference. It was emphasized, in particular, that the guidelines should not enter into detail given in paragraphs 6 et seq of document CAJ/29/2.”

[Annex II follows]

ANNEX II

RELEVANT DISCUSSIONS ON DOCUMENT CAJ/29/2
AT THE TWENTY-NINTH AND THIRTIETH
SESSIONS OF THE CAJ

SIXTH MEETING WITH INTERNATIONAL ORGANIZATIONS

Geneva, October 30, 1992

Document IOM/6/5

RECORD OF THE MEETING

Relevant paragraphs:

Paragraph 8

19. Mr. LANGE (ASSINSEL) said that ASSINSEL was basically in agreement with the statements in paragraph 8. It also went along with the interpretation that the words "predominantly derived from the initial variety" meant that derivation could only exist from one variety. However, it had discussed a case, in relation to that paragraph, in which a variety A was crossed with a variety B and the progeny was selected in such a way that the new variety came very close to the genome of variety B. It was ASSINSEL's view that such a case was to be dealt with rather like the case of backcrossing and could indeed be covered by the phrase in question. ASSINSEL felt, however, that such cases should be examined with great prudence and that the question of the threshold value had to play a decisive part.

20. Mr. WINTER (COMASSO) informed the meeting of COMASSO's view that the interpretation of the Act reproduced in paragraph 8 was correct and that indeed only one variety could be the initial variety.

21. Mr. Dirk BÖRINGER (Germany) observed that the case set out by Mr. Lange (ASSINSEL) presented no problems for him. The decisive fact was whether the new variety essentially contained the genome of one of the parent varieties. The method of breeding was not laid down at any point.

Paragraph 9

22. Mr. LANGE (ASSINSEL) said that ASSINSEL was of the opinion that the word "essential" should not contain any connotation of the value of the corresponding characteristics. Nor should it in any way constitute a limitation to certain properties. ASSINSEL had already made observations on that question in its written comments; for it, the words "essential characteristics" referred as it were to the essence of the genotype of the initial variety and meant that the whole genome of the initial variety had to be used as a basis for assessing genetic conformity.

23.1 Mr. ROYON (CIOPORA) recalled that CIOPORA had already underlined in the discussions on the draft revised UPOV Convention that it was of the view that the expression of the essential characteristics was really the overwhelming matter to be considered in dependency. However, it again felt that the wording of the 1991 Act was very confusing indeed. Despite the explanations given in paragraph 12 of document IOM/6/2, it felt that there was an unnecessary repetition and even a discrepancy in Article 14(5)(b) between: "while retaining the expression of the essential characteristics ... of the initial variety" in item (i) and "it conforms" in item (iii), the latter being laxer than the former. CIOPORA had already made many comments in the past on the word "conform."

23.2 It was therefore important for this meeting to define what was really necessary for an essentially derived variety to reproduce the essential characteristics of the initial one. As to the word "essential" itself, CIOPORA did not fully agree with the explanations or interpretations given by Mr. Lange (ASSINSEL), because it considered it premature, at this stage, to say that elements of value--"value" being a very broad term--should be excluded from the scope of the word "essential." That scope should evolve only through judicial interpretation.

Paragraph 12

33. Mr. LANGE (ASSINSEL) stated that ASSINSEL was generally in agreement with the statements in paragraph 12, although their formulation appeared somewhat complicated. However, it did have a question, particularly with regard to the final sentence: what was the meaning of the phrase "the differences which result from the act of derivation should be one or very few"? ASSINSEL felt that that statement should not impair the question of threshold values in any event. Furthermore, the term "threshold value" was nowhere to be found. The question therefore arose why that term had not been used.

34.1 Mr. GREENGRASS (Vice Secretary-General of UPOV) observed that in discussions that had taken place within UPOV thus far, there had been a certain reluctance to resort to mathematical formulations, and the notion of a threshold value would just require that. It should be recognized that not every implication of a new concept of this kind could be anticipated; for that reason, the tendency had been to refrain from putting forward a figure or elements leading to a figure. One had to be conscious of the fact that a significant portion of the genotype was "sleeping," i.e. was not expressed. Percentages and thresholds would only be meaningful if they related to an appropriate, well-defined basis. Most member States would like to keep the concept very general, at least at this stage, so that it remained flexible in its application.

34.2 As far as the last sentence was concerned, Mr. Greengrass stated that its purpose was merely to emphasize the fact that varieties would not be essentially derived unless they were extremely close to the initial variety.

35.1 Mr. LE BUANEC (ASSINSEL) observed that discussions on paragraphs 10 to 12 had shown the importance of the interplay between the concepts of distinctness and of derivation. ASSINSEL, for its part, felt that there was no reason to change the work that was currently being done on distinctness under the 1978 Act. As far as derivation was concerned, it felt that it had to be judged after distinctness had been determined, and probably on the basis of criteria that were not necessarily the same.

35.2 To follow up the comments made by Mr. Greengrass (Vice Secretary-General of UPOV), Mr. Le Buanec pointed out that the aim and the wish of ASSINSEL were not to have quantified values already shown in a document. That would be far too premature and, in any event, progress had to be species by species and genetic structure by genetic structure in order to arrive at reliable data. What it would like, on the other hand, was for the concept of threshold to be discussed at some point or other, but without greater detail. To members of ASSINSEL, the members of the profession to whom the Convention was addressed by priority, obviously within the general framework of law, it appeared that the concept of threshold was altogether fundamental.

36.1 Mr. ROYON (CIOPORA) stated that CIOPORA felt very uneasy about the wording of Article 14(5)(b). It had opposed this wording during the discussions before the Diplomatic Conference; it needed to know what the UPOV experts really meant by saying in item (i): "while retaining the expression of the essential characteristics" and then in item (iii): "it conforms to the initial variety." Did they mean that virtually all the characteristics--or only most of them--had to be retained? Was "conform" less stringent? Clarifications should be given on this point to the users of the Convention, and at least to the Governments which would have to give effect to the Convention domestically, to avoid great insecurity in the implementation of the 1991 Act.

36.2 Mr. Royon then again repeated that the discussion on the problem of distinctness could not be separated from that on the problem of dependency because there were examples under the 1978 Act of cases where very minute differences had been accepted in some countries to grant protection and where, from the point of view of infringement, no one was able, either in the trade or in the public at large, to distinguish the two varieties concerned.

37. Mr. Gérard URSELMANN (ASSINSEL) wondered whether the statement of Mr. Greengrass (Vice Secretary-General of UPOV) in reply to the question from ASSINSEL had made the position clear for the audience. He had understood the statement in the sense that, to be essentially derived, a variety had to be very close to the initial variety and had in fact to differ only in one or a very small number of expressions of characteristics, i.e., in ASSINSEL's understanding, two or three. If that were to be the position, then the principle of dependency would apply in a very small number of cases in practice and would

be void of any significance. ASSINSEL was in the process of establishing thresholds for the various species and groups within species, and if the statement made in document IOM/6/2 were to be the principle underlying UPOV's work, then there would hardly be any need for discussions on thresholds. ASSINSEL would propose to delete the reference to "should be one or very few" and to pave the way for discussions on thresholds and a formulation thereof.

Paragraphs 13 and 14

38. Mr. KIEWIET (Netherlands) wished to raise a question with the international organizations in relation to the nature of the guidelines which the UPOV Council would have to establish. In general, UPOV guidelines were meant to give guidance to the national authorities responsible for the granting of breeders' rights. The general opinion was that the determination whether a variety was an essentially derived one or not had to be made in the first place by the private parties concerned, the breeders. The guidelines were therefore, in that case, primarily of relevance to those parties; they should also give guidance to the Courts which would have to deal with the matter if the parties did not reach an agreement. The question was therefore: would the breeders--and the Courts--take the guidelines seriously? Mr. Kiewiet recognized that nobody could give a definite answer to that question at this meeting. He therefore asked the international organizations whether the breeders' organizations considered the possibility of establishing guidelines on their own to give guidance to their members, or whether they were prepared to support the guidelines established by UPOV in a declaration directed to their members.

39. Mr. LE BUANEC (ASSINSEL) replied that the position of ASSINSEL was altogether clear. It was obvious that the guidelines to be set up would be essentially aimed at breeders and possibly the courts. However, between the breeders and the courts, there would probably be an intermediary instance constituted by the arbitration boards. ASSINSEL was highly favorable to the establishment of arbitration rules, which would obviously be closely related to the guidelines. If close collaboration between ASSINSEL and UPOV could lead to UPOV guidelines, ASSINSEL would of course be ready to support them with respect to the arbitration boards and the courts. It had the intention of drawing up a number of such rules in the coming two years.

40.1 Mr. ROYON (CIOPORA) stated that CIOPORA was indeed always ready to collaborate closely with the Office of the Union to put together guidelines, where necessary. However, it would find it a little awkward to have to finalize the guidelines on the basis of a text which, from the very onset, did not altogether satisfy it. It therefore appeared that the first guidelines on which agreement could be reached ought to concern the minimum distances; those indeed appeared necessary both for the use of the granting authorities and for the use of the courts that would have to decide in infringement proceedings involving varieties that were not clearly distinguishable.

40.2 As far as the subject matter of the meeting was concerned, it appeared somewhat premature to CIOPORA to consider guidelines. It would, on the other hand, welcome a discussion being opened on the issues of burden of proof and the problems that would arise due to the coexistence of differing versions of the Convention. Despite that, CIOPORA was open to all suggestions and its cooperation with UPOV was assured. However, it had the impression that it would be difficult to set up guidelines limited to the matter of essentially derived varieties on the basis of a text that did not as yet appear satisfactory.

40.3 Mr. Royon added that, although he was aware that discussions could only take place on the basis of an existing text, it was indeed because he had repeatedly spoken up over the years on the matter of dependency that CIOPORA had finally obtained that dependency in the 1991 Act. It was therefore not premature to go into the wishes for amendment to the present text in the light of the forthcoming revision of the Convention.

41. Mr. WINTER (COMASSO) put forward the view that it was technically correct to take the presently available text--whether it be satisfactory or not--as a basis to carry out constructive work and to at last convert the new principle into a practical reality. That principle had been introduced in order to protect the initial breeder and COMASSO supported that basic intention. It would be essential for UPOV to draw up the guidelines, of any type, together with the professional organizations concerned since they could serve as a help in reaching decisions on how to determine derivation, whether for the benefit of the breeders themselves or for the courts.

42. Mr. LANGE (ASSINSEL) expressed the wish of ASSINSEL that the word "value" be deleted from "value judgment" in paragraph 14 of document IOM/6/2.

43. Mr. GREENGRASS (Vice Secretary-General of UPOV) explained that the word "value" bore no relationship in the particular context with value for cultivation and use. It was used as an element of legal terminology to distinguish the case concerned from an issue of fact and to indicate that, at some point, somebody, for instance a judge, would have to weigh up all the evidence and decide on the basis of an evaluation of the evidence. If an alternative word could be found, the word "value" would be replaced.

44. Mr. LANGE (ASSINSEL) replied that English was not his mother tongue and he could therefore not propose any replacement for the word "value" in English. He wished, however, to ensure that the statement should not allow of any interpretation to the effect that it referred to the economic properties of the varieties concerned.

45. Mr. ROYON (CIOPORA) stated that the concept of derivation required a genetic test, and accepted that there were various scientific tests that could be used by the plaintiff to provide evidence. However, there were cases, in view of the present state of technology, where derivation could not be established. One might therefore wonder whether the protection holder should not be able to establish a prima facie case of infringement based upon phenotypic similarities and then shift onto the alleged infringer the burden of showing that the alleged infringing variety was not derived from the protected variety. CIOPORA could not contribute much more at this stage.

46. Mr. LANGE (ASSINSEL) suggested, on the matter of the burden of proof, that had been mentioned by Mr. Royon (CIOPORA), that it be dealt with as a whole following discussion of document IOM/6/2.

Paragraph 21

58.1 Mr. Timothy ROBERTS (ASSINSEL) wished to take up the suggestion, made previously by the Delegation of ASSINSEL, that there might be a problem where varieties A and B were crossed and where breeding was conducted on the hybrid that resulted from the progeny, and eventually led to a variety that conformed to B but was distinct from it. That case raised an important theoretical question, namely whether it satisfied the legal requirements for there being dependency from B. A clear opinion had been expressed on this by Mr. Böringer (Germany). Mr. Roberts suggested, however, that the question might require more consideration. It had been his experience that smaller breeders were very concerned about the concept of dependence coming to play when they crossed A with B and ended up with progeny fairly similar to B.

58.2 There was always a need for a proper balance, Mr. Roberts observed, in intellectual property matters between a fair degree of protection for the owner of the right and clarity for third parties, so that the latter knew what they could do and what they could not. It was clear that until the Convention had been amended, the situation was out of balance and that the protection afforded to the breeder was not sufficient. But that did not mean that one should go too far the other way. Most of the examples given in the Annex to document

IOM/6/2 referred to rather special situations. For instance, somebody who undertook to insert a new gene by genetic technology into an existing variety, was clearly on notice that his work was likely to lead to a situation of dependency. But it would be very good if a breeder who crossed A and B could be reasonably confident that he would not have to face the prospect of being dependent on either variety.

58.3 Mr. Roberts wished to go a step further and to suggest that the 1991 Act could be read to say that there was no dependency in the case at issue, because the initial cross resulted in a hybrid which was clearly dependent on neither A nor B, being 50% of A and 50% of B. He suggested that the hybrid was a variety, an independent one, and hence anything derived from it could not be dependent on either A or B.

59. Mr. ROYON (CIOPORA) went along with Mr. Roberts (ASSINSEL) in stating that paragraph 21 provided a necessary and obvious clarification. However, one could not simply deduce that a variety obtained by crossing A and B would never infringe either one of the parents. Indeed, the breeder of the parent concerned could always invoke, where appropriate, application of Article 14(5)(a)(ii).

[...]

[Annex III follows]



EUROPEAN COMMISSION
HEALTH AND CONSUMERS DIRECTORATE-GENERAL
Deputy Director General for the Food Chain

19. 07. 2012

Brussels,
SANCO E2/ICN/sd (2012) 1025745
AM (2012) 884387

Dear Mr Button,

I refer to your letter of 9 July 2012 regarding the next meeting of the Administrative and Legal Committee Advisory Group (CAJ-AG) and the revision of the 'explanatory note on essentially Derived Varieties (EDV) Under the 1991 Act of the UPOV Convention".

In the EU, the Regulation (EC) N°2100/94 on Community Plant Variety Rights offers the possibility to register an EDV of an initial protected variety and to introduce information in the Official Gazette of the Community Plant Variety Office (CPVO). The rules provide that where the holder of an initial variety and the breeder of a variety essentially derived from the initial variety both so request, the identification of the varieties as initial and essentially derived including the variety denominations and the names of the parties concerned shall be registered. A request from one of the parties concerned only shall suffice if he has obtained either a non-contentious acknowledgement by the other party or following a final decision or a final judgment of a court which contain an identification of the varieties concerned as initial and essentially derived. In the documents attached, you will find the relevant articles of the basic Regulation and the proceedings Regulation addressing the EDV issue.

The information is registered in the register for granted rights under the protected initial variety in question. The registration is published in the Official Gazette of the CPVO. The table attached listed all the requests received by CPVO for EDV registration. In addition there is an extract of the Official Gazette published in March 2010 and the listing of EDV varieties.

Mr Peter Button
Vice Secretary - General
UPOV
34 Chemin des Colombettes
CH-1211 Genève 20
Suisse

I would like to draw the attention of the UPOV members that the registration is done following a declaration made by the party(ies) concerned. The CPVO does not establish that the “alleged” EDV satisfies the technical and legal conditions found under the definition of an EDV.

Finally, the CPVO is considering adopting a policy specifying more in detail the conditions to be satisfied before an EDV is registered.

I hope that this information will be helpful for the discussion and the revision of the explanatory note. CPVO is prepared to make an oral presentation during the next CAJ-AG meeting.

Yours sincerely



Ladislav Miko

Enc: 4

C.c.: DG Sanco: Mr Poudelet, Mr Gumbel, Mrs Simion, Mrs Mannerkorpi,
Mrs Clément-Nissou,
CPVO: Mr Ekvad, Mr Godinho, Mrs Lightbourne, Mr Theobald
Council: Mr Ataz
EEAS-Geneve: Mrs Lida

Relevant provisions from the Council Regulation (EC) n°2100/94 on Community Plant Variety Rights

Article 13.5

5. The provisions of paragraphs 1 to 4 shall also apply in relation to:

- (a) varieties which are essentially derived from the variety in respect of which the Community plant variety right has been granted, where this variety is not itself an essentially derived variety;
- (b) varieties which are not distinct in accordance with the provisions of Article 7 from the protected variety; and
- (c) varieties whose production requires the repeated use of the protected variety.

6. For the purposes of paragraph 5 (a), a variety shall be deemed to be essentially derived from another variety, referred to hereinafter as 'the initial variety' when:

- (a) it is predominantly derived from the initial variety, or from a variety that is itself predominantly derived from the initial variety;
- (b) it is distinct in accordance with the provisions of Article 7 from the initial variety; and
- (c) except for the differences which result from the act of derivation, it conforms essentially to the initial variety in the expression of the characteristics that results from the genotype or combination of genotypes of the initial variety.

Article 17: Use of variety denominations

1. Any person who, within the territory of the Community, offers or disposes of to others for commercial purposes variety constituents of a protected variety, or a variety covered by the provisions of Article 13 (5), must use the variety denomination designated pursuant to Article 63; where it is used in writing, the variety denomination shall be readily distinguishable and clearly legible. If a trade mark, trade name or similar indication is associated with the designated denomination, this denomination must be easily recognizable as such.

2. Any person effecting such acts in respect of any other material of the variety, must inform of that denomination in accordance with other provisions in law or if a request is made by an authority, by the purchaser or by any other person having a legitimate interest.

3. Paragraphs 1 and 2 shall apply even after the termination of the Community plant variety right.

Article 63: Variety denomination

1. Where a Community plant variety right is granted, the Office shall approve, for the variety in question, the variety denomination proposed by the applicant pursuant to Article 50 (3), if it considers, on the basis of the examination made pursuant to the second sentence of Article 54 (1), that this denomination is suitable.

2. A variety denomination is suitable, if there is no impediment pursuant to paragraphs 3 or 4 of this Article.

3. There is an impediment for the designation of a variety denomination where:

- (a) its use in the territory of the Community is precluded by the prior right of a third party;
- (b) it may commonly cause its users difficulties as regards recognition or reproduction;
- (c) it is identical or may be confused with a variety denomination under which another variety of the same or of a closely related species is entered in an official register of plant varieties or under which material of another variety has been marketed in a Member State or in a Member of the International Unit for the Protection of New Varieties of Plants, unless the other variety no longer remains in existence and its denomination has acquired no special significance;
- (d) it is identical or may be confused with other designations which are commonly used for the marketing of goods or which have to be kept free under other legislation;
- (e) it is liable to give offence in one of the Member States or is contrary to public policy;
- (f) it is liable to mislead or to cause confusion concerning the characteristics, the value or the identity of the variety, or the identity of the breeder or any other party to proceedings.

4. There is another impediment where, in the case of a variety which has already been entered:
- (a) in one of the Member States; or
 - (b) in a Member of the International Union for the Protection of New Varieties of Plants; or
 - (c) in another State for which it has been established in a Community act that varieties are evaluated there under rules which are equivalent to those laid down in the Directives on common catalogues; in an official register of plant varieties or material thereof and has been marketed there for commercial purposes, and the proposed variety denomination differs from that which has been registered or used there, unless the latter one is the object of an impediment pursuant to paragraph 3.
5. The Office shall publish the species which it considers 'closely related' within the meaning of paragraph 3 (c).

Article 67: Decisions subject to appeal

1. An appeal shall lie from decisions of the Office which have been taken pursuant to Articles 20, 21, 59, 61, 62, 63 and 66, as well as on decisions related to fees pursuant to Article 83, to costs pursuant to Article 85, to the entering or deletion of information in the Register pursuant to Article 87 and to the public inspection pursuant to Article 88.
2. An appeal lodged pursuant to paragraph 1 shall have suspensory effect. The Office may, however, if it considers that circumstances so require, order that the contested decision not be suspended.
3. An appeal may lie from decisions of the Office pursuant to Articles 29 and 100 (2), unless a direct appeal is lodged pursuant to Article 74. The appeal shall not have suspensory effect.
4. An appeal against a decision which does not terminate proceedings as regards one of the parties may only be made in conjunction with an appeal against the final decision, unless the decision provides for separate appeal.

Article 87: Establishment of the Registers

1. The Office shall keep a Register of Applications for Community Plant Variety Rights which shall contain the following particulars:
 - (a) applications for a Community plant variety right together with a statement of the taxon and the provisional designation of the variety, the date of application and the name and address of the applicant, of the breeder and of any procedural representative concerned;
 - (b) any cases of termination of proceedings concerning applications for a Community plant variety right together with the information set out in subparagraph (a);
 - (c) proposals for variety denominations;
 - (d) changes in the identity of the applicant or his procedural representative;
 - (e) on request, any levy of execution as referred to in Articles 24 and 26.
2. The Office shall keep a Register of Community Plant Variety Rights wherein, after grant of a Community plant variety right, the following particulars shall be entered:
 - (a) the species and variety denomination of the variety;
 - (b) the official description of the variety or a reference to documents in the Office's possession in which the official description of the variety is contained as integrating part of the Register;
 - (c) in the case of varieties for which material with specific components has to be used repeatedly for the production of material, a reference to such components;
 - (d) the name and address of the holder, of the breeder and of any procedural representative concerned;
 - (e) the date on which the Community plant variety right begins and ends, together with the reasons for the termination of right;
 - (f) on request, any contractual exclusive exploitation right or compulsory exploitation right, including the name and address of the person enjoying the right of exploitation;
 - (g) on request, any levy of execution as referred to in Article 24;
 - (h) where the holder of an initial variety and the breeder of a variety essentially derived from the initial variety both so request, the identification of the varieties as initial and essentially derived including the variety denominations and the names of the parties concerned. A request from one of the parties concerned only shall suffice if he has obtained either a non-contentious

acknowledgement by the other party pursuant to Article 99 or a final decision or a final judgment pursuant to the provisions of this Regulation which contain an identification of the varieties concerned as initial and essentially derived.

3. Any other particular or any condition for the entering in both Registers may be specified in the implementing rules pursuant to Article 114.

4. The Office may of its own motion and upon consultation with the holder adapt the official variety description in respect of the number and type of characteristics or of the specified expressions of those characteristics, when necessary, in the light of the current principles governing the description of varieties of the taxon concerned, in order to render the description of the variety comparable with the descriptions of other varieties of the taxon concerned.

Article 99: Obtaining identification of a variety

The holder of an initial variety and the breeder of a variety essentially derived from the initial variety shall be entitled to obtain an acknowledgement of the identification of the varieties concerned as initial and essentially derived.

Other general provisions on information to the public from Commission Regulation (EC) n°874/2009 establishing implementing rules for the application of Council Regulation (EC) n°2100/94 as regards proceedings before the Community Plant Variety Office

TITLE V - INFORMATION GIVEN TO THE PUBLIC

CHAPTER I - Registers, public inspection and publications

Section 1 - The Registers

Article 78: Entries related to proceedings and to Community plant variety rights, to be entered in the Registers

1. The following "other particulars" referred to in Article 87(3) of the basic Regulation shall be entered in the Register of Applications for Community Plant Variety Rights:

- (a) date of publication where such publication is a relevant event for the computation of time limits;
- (b) any objection, together with its date, the name and address of the objector and those of his procedural representative;
- (c) priority data (date and State of the earlier application);
- (d) any institution of actions in respect of claims referred to in Article 98(4) and Article 99 of the basic Regulation as to entitlement to the Community plant variety right, and the final decision in, or of any other termination of, any such action.

2. The following "other particulars" referred to in Article 87(3) of the basic Regulation shall be entered in the Register of Community Plant Variety Rights, upon request:

- (a) the giving of a Community plant variety right as a security or as the object of any other rights in rem; or
- (b) any institution of actions in respect of claims referred to in Article 98(1) and (2) and Article 99 of the basic Regulation and relating to the Community plant variety right, and the final decision in, or of any other termination of, any such action.

3. The President of the Office shall decide upon the details of the entries to be made and may decide upon further particulars to be entered in the Registers for the purpose of the management of the Office.

The President of the Office shall determine the form of Registers. The Registers may be maintained in the form of an electronic database.

Article 79: Entry of transfer of a Community plant variety right

1. Any transfer of Community plant variety rights shall be entered in the Register of Community Plant Variety Rights on production of documentary evidence of the transfer, or of official

documents confirming the transfer, or of such extracts from those documents as suffice to establish the transfer. The Office shall retain a copy of those pieces of documentary evidence in its files.

The President of the Office shall determine the form in and the conditions under which those pieces of documentary evidence are to be retained in the files of the Office.

2. The entry of a transfer may be refused only in the event of failure to comply with the conditions laid down in paragraph 1 and in Article 23 of the basic Regulation.

3. Paragraphs 1 and 2 shall apply to any transfer of an entitlement to a Community plant variety right for which an application has been entered in the Register of Applications for Community Plant Variety Rights. The reference to the Register of Community Plant Variety Rights shall be understood as a reference to the Register of Applications for Community Plant Variety Rights.

Article 80: Conditions for entries in the Registers

Without prejudice to other provisions of the basic Regulation or of this Regulation, a request for an entry or a deletion of an entry in the Registers may be made by any interested person. The request shall be made in writing, accompanied by supporting documents.

Article 81: Conditions for specific entries in the Registers

1. Where a Community plant variety right applied for or granted is concerned by bankruptcy or like proceedings, an entry to this effect shall be made, free of charge, in the Register for Community Plant Variety Rights at the request of the competent national authority. This entry shall also be deleted at the request of the competent national authority, free of charge.

2. Paragraph 1 shall apply mutatis mutandis to the institution of actions in respect of claims referred to in Articles 98 and 99 of the basic Regulation and the final decision in, or of any other termination of, any such action.

3. Where varieties are identified respectively as initial and essentially derived, a request for entry by all the parties to proceedings may be made jointly or separately. In the event of a request from only one party to proceedings, the request shall be accompanied by sufficient documentary evidence of the actions referred to in Article 87(2)(h) of the basic Regulation to replace the request of the other party.

4. Where the entry of a contractual exclusive exploitation right or of a Community plant variety right given as security or as the subject of rights in rem is requested, such request shall be accompanied by sufficient documentary evidence.

Article 82: Public inspection of the Registers

1. The Registers shall be open for public inspection on the premises of the Office. Access to the Registers and the documents held therein shall be granted under the same terms and conditions as apply to the access to documents held by the Office within the meaning of Article 84.

2. On-the-spot inspection of the Registers shall be free of charge. The production and delivery of extracts from the Registers in any form that requires the processing or manipulating of data other than the mere reproduction of a document or parts thereof shall be subject to the payment of a fee.

3. The President of the Office may provide for public inspection of the Registers on the premises of national agencies, or sub-offices designated, pursuant to Article 30(4) of the basic Regulation.

Section 2 - Keeping of documents, public inspection of documents and varieties grown

Article 83: Keeping of the files

1. Documents, either in the form of originals or copies relating to proceedings shall be kept in files, a file number being attached to such proceedings, except for those documents relating to the exclusion of, or objection to, members of the Board of Appeal, or to the staff of the Office or the Examination Office concerned, which shall be kept separately.
2. The Office shall keep one copy of the file referred to in paragraph 1 (file copy) which shall be considered the true and complete copy of the file. The Examination Office may keep a copy of the documents relating to such proceedings (examination copy), but shall ensure delivery of those originals which the Office does not hold.
3. The original documents filed by parties to the proceedings which form the basis of any electronic files may be disposed of after a period following their reception by the Office.
4. The President of the Office shall determine the details as to the form in which the files are to be kept, the period during which files are to be kept and the period referred to in paragraph 3.

Article 84 - Access to documents held by the Office

1. The Administrative Council shall adopt the practical arrangements for access to the documents held by the Office, including the Registers.
2. The Administrative Council shall adopt the categories of documents of the Office that are to be made directly accessible to the public by way of publication, including publication by electronic means.

Article 85: Inspection of the growing of the varieties

1. A request for inspection of the growing of the varieties shall be addressed in writing to the Office. With the consent of the Office, access to the test plots shall be arranged by the Examination Office.
2. Without prejudice to Article 88(3) of the basic Regulation, general access to the test plots by visitors shall not be affected by the provisions of this Regulation, provided that all grown varieties are coded, that appropriate measures against any removal of material are taken by the Examination Office entrusted and are approved by the Office, and that all necessary steps are taken to safeguard the rights of the applicant for, or holder of, a Community plant variety right.
3. The President of the Office may lay down the details of the procedure for the inspection of the growing of the varieties, and may review the safeguards to be provided under paragraph 2.

Article 86: Confidential information

For the purpose of keeping information confidential, the Office shall make available, free of charge, forms to be used by the applicant for a Community plant variety right in order to request the withholding of all data relating to components as referred to in Article 88(3) of the basic Regulation.

Section 3 - Publications

Article 87: Official Gazette

1. The publication to be issued at least every two months pursuant to Article 89 of the basic Regulation shall be called the Official Gazette of the Community Plant Variety Office (hereinafter the Official Gazette).
2. The Official Gazette shall also contain the information entered in the Registers pursuant to Article 78(1)(c) and (d), Article 78(2) and Article 79.

3. The President of the Office shall determine the manner in which the Official Gazette is published.

Article 88: Publication of applications for exploitation rights to be granted by the Office and decisions thereon

The date of receipt of an application for an exploitation right to be granted by the Office and of delivery of the decision on such application, the names and addresses of the parties to proceedings and the form of order sought, or decided upon, shall be published in the Official Gazette. In the case of a decision to grant a compulsory licence, the contents of such decision shall likewise be published.

Article 89: Publication of appeals and decisions thereon

The date of receipt of a notice of appeal and of delivery of the decision on such appeal, the names and addresses of the parties to the appeal proceedings and the form of order sought, or decided upon, shall be published in the Official Gazette.

EDV registration requests

G granted
A active
T terminated
R rejected

No	date	edv breeder	procedural representative if any	denomination of the Initial variety	Holder of the initial variety	CPVO File No	CPVO status	denomination of the EDV	CPVO File No	CPVO status	species	Botanical taxon	Remarks	publication
1	17/11/2006	Kurt Kramer		FRITZ KIRCHER	Kurt Kramer	1995/0531	G	MINNA KIRCHER			CALLU	Calluna vulgaris (L.) Hull	registered & published	gazette 06.2006
2				FRITZ KIRCHER				MARTHA			CALLU	Calluna vulgaris (L.) Hull	registered & published	
3				AMETHYST	Kurt Kramer	1995/0534	G	AMANDA			CALLU	Calluna vulgaris (L.) Hull	registered & published	
4	27/11/2007	Kurt Kramer		ALICIA	Kurt Kramer	1995/0299	G	DARK ALICIA	1999/0039	T	CALLU	Calluna vulgaris (L.) Hull	registered & published	gazette 06.2007
5				ALICIA				HELENA			CALLU	Calluna vulgaris (L.) Hull	registered & published	
6				SPRING SURPRISE	Kurt Kramer	1995/0526	G	WINTER SURPRISE			CALLU	Calluna vulgaris (L.) Hull	registered & published	
7				KLAUDINE	Kurt Kramer	1997/1048	G	ROSANN			CALLU	Calluna vulgaris (L.) Hull	registered & published	
8	10/06/2008	Terra Nova Nurseries Inc.	Deutsche Saatgutgesellschaft m.b.H. Berlin	SNOWBERRY	Terra Nova Nurseries Inc.	2007/0128	R	GOLD NUGGET	2008/0235	G	COREO	Coreopsis L.	registered & published	gazette 06.2008
9				AUTUMN BLUSH		2006/1122	R	MOONLIGHT	2009/0770	G	COREO	Coreopsis L.	registered & published	
10				GOLD NUGGET		2008/0235	G	CRANBERRY ICE			HEU01	Heuchera L.	registered & published	

No	date	edv breeder	procedural representative if any	denomination of the Initial variety	Holder of the initial variety	CPVO File No	CPVO status	denomination of the EDV	CPVO File No	CPVO status	species	Botanical taxon	Remarks	publication
11				GOLD NUGGET				TAHITIAN SUN			HEU01	Heuchera L.	registered & published	
12				TNHEUCB		2005/1913	G	CREME LIMON			HEU01	Heuchera L.	registered & published	
13				OBSIDIAN		2003/1918	G	MIDNIGHT ROSE			HEU01	Heuchera L.	registered & published	
14				MIDNIGHT ROSE				RASPBERRY RIPPLE			HEU01	Heuchera L.	registered & published	
15	30/09/2008	Marco van Noort Vaste Planten V.O.F.		SOLAR FLARE	Marco van Noort Vaste Planten V.O.F.	2008/0219	A	LUNAR GLOW			BERG1	Bergenia Moench	registered & published	
16		Marco van Noort Vaste Planten V.O.F.		MARMALADE	Terra Nova Nurseries Inc.	2004/1997	G	LIME MARMALADE			HEU01	Heuchera L.	registered & published	
17	05/11/2009	California Florida Plant Compnay L.P.	Deutsche Saatgutgesellschaft m.b.H. Berlin	CFPC ANNETTE	California Florida Plant Compnay L.P.	2004/2023	G	CFPC ADELE			DIA03	Dianthus caryophyllus L.	registered & published	gazette 01.2010
18				TESS		2004/1584	G	CFPC PINK TESS			DIA03	Dianthus caryophyllus L.	registered & published	
19				CFPC EVERMORE				CFPC CHANTILLY	2010/0143	A	DIA03	Dianthus caryophyllus L.	not registered nor published	
20	11/02/2010	Terra Nova Nurseries, Inc	Deutsche Saatgutgesellschaft m.b.H. Berlin	AMBER WAVES	Terra Nova Nurseries, Inc	2001/0524	G	MIDAS TOUCH			HEU01	Heuchera L.	registered & published	

No	date	edv breeder	procedural representative if any	denomination of the Initial variety	Holder of the initial variety	CPVO File No	CPVO status	denomination of the EDV	CPVO File No	CPVO status	species	Botanical taxon	Remarks	publication
21				PINK LEMONADE		2006/2564	G	CHERRY LEMONADE	2006/2563	T	CORE4	Coreopsis rosea Nutt. x C. tinctoria Nutt.	registered & published	
22				PINK LEMONADE				STRAWBERRY LEMONADE	2006/2565	T	CORE4	Coreopsis rosea Nutt. x C. tinctoria Nutt.	registered & published	
23	16/04/2010	RICHARD DAVIS	Deutsche Saatgutgesellschaft m.b.H. Berlin	RUM PUNCH	RICHARD DAVIS	2007/1123	G	RP1	2007/1124	T	CORE0	Coreopsis L.	registered & published	gazette 03.1010
24				RUM PUNCH				RP4	2007/1125	T	CORE0	Coreopsis L.	registered & published	
25				RUM PUNCH				RP5	2007/1126	T	CORE0	Coreopsis L.	registered & published	
26	24/09/2010	California Florida Plant Compnay L.P.	Deutsche Saatgutgesellschaft m.b.H. Berlin	CFPC ANNETTE	California Florida Plant Compnay L.P.	2004/2023	G	CFPC MELE			DIA03	Dianthus caryophyllus L.	not registered nor published	PENDING
27	03/01/2011	Danzinger "DAN" Flower Farm	Royalty administration International C.V.	DANLISADABLUE	Danzinger "DAN" Flower Farm	2004/0991	G	LILAC DANLISADABLUE			LIM06	Limonium altaica	not registered nor published	PENDING

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EN PART A / Chapter XII: Other particulars entered in the registers / Table XII.3: Essential Varieties (EDV) (Page 145)

Pursuant to Article 89 of Council Regulation (EC) No 2100/94 of 27 July 1994 on Community plant variety right of 01.09.94 p.1), the Community Plant Variety Office, hereby publishes the information entered into its Registers pursuant to Article 87(2) request from the breeder to register varieties essentially derived from initial varieties.

The following particulars were entered in the Register of Rights:

Identifiers of the initial variety registered with the CPVO

- 1: File number
- 2: Holder
- 3: Approved denomination
- 4: Grant number, date

Data linked to the Essentially Derived Variety

- 5: Denomination of EDV
- 6: EDV holder
- 7: Arrival date at the Office of a valid EDV application

1	2	3	4	5	6
Coreopsis L.					
2007/1123	05881	RUM PUNCH	25411	RP1	05881
2007/1123	05881	RUM PUNCH	25411	RP5	05881
2007/1123	05881	RUM PUNCH	25411	RP4	05881
Coreopsis rosea Nutt. x C. tinctoria Nutt.					
2006/2564	02133	PINK LEMONADE	25409	STRAWBERRY LEMONADE	02133
2006/2564	02133	PINK LEMONADE	25409	CHERRY LEMONADE	02133
Heuchera L.					
2001/0524	02135	AMBER WAVES	11455	MIDAS TOUCH	02133

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