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**INTERNATIONAL UNION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS**

Geneva

**ADMINISTRATIVE AND LEGAL COMMITTEE ADVISORY GROUP****Eighth Session  
Geneva, October 25, 2013**

## REPORT

*adopted by the Administrative and Legal Committee Advisory Group**Disclaimer: this document does not represent UPOV policies or guidance*Opening of the session

1. The Administrative and Legal Committee Advisory Group (CAJ-AG) held its eighth session in Geneva on October 21, 2013, starting at 3.00 p.m. and on October 25, 2013, under the Chairmanship of the Vice Secretary-General of UPOV.
2. The list of participants is reproduced in the Annex to this document.
3. The Chair recalled that the CAJ-AG had agreed, by correspondence, to issue *ad hoc* invitations to the organizations that the CAJ-AG had previously agreed to invite in order to enable them to continue to present their views on relevant matters (see document CAJ-AG/12/7/7 "Report", paragraph 2). On that basis, the following organizations had been invited to participate in the relevant part of the eighth session of the CAJ-AG: the Association for Plant Breeding for the Benefit of Society (APBREBES), the European Coordination Via Campesina (ECVC), the International Community of Breeders of Asexually Reproduced Ornamental and Fruit-Tree Varieties (CIOFORA) and the International Seed Federation (ISF).

Adoption of the agenda

4. The CAJ-AG adopted the draft agenda as presented in document CAJ-AG/13/8/1.

## DISCUSSIONS IN THE PRESENCE OF OBSERVERS

Explanatory Notes on Essentially Derived Varieties under the 1991 Act of the UPOV Convention (Revision)*Introduction by the Office of the Union*

5. The Office of the Union presented document CAJ-AG/13/8/2.

*Presentation of views by APBREBES*

6. The representative of APBREBES considered that the conclusions from the Seminar on Essentially Derived Varieties, held in Geneva on October 22, 2013, were the moderators' summaries and they did not reflect all the discussions that took place during the Seminar. In relation to the possible impact of EDV on breeding and agriculture, he noted that concern was expressed over the restriction on farmers in using protected varieties to adapt to local conditions, leading to increased farmers' vulnerability and threatening of

food security. He also highlighted that breeding material was derived to some extent from farmers' varieties with little or no restriction. The representative of APBREBES considered that the current approach to essentially derived varieties (EDV) gave breeders a market monopoly and reduced competition among breeders. He was of the opinion that the development of guidance based on dispute settlement cases within the breeding industry would not address those questions. The representative of APBREBES noted that on Session II of the EDV Seminar, the experiences from Netherlands, Japan, Australia and Israel were presented, but there were no experiences reflecting the challenges that developing countries would face with the EDV implementation, for instance, the challenge for a small-scale breeder in proving that their variety was not an EDV. He considered that every country could implement the EDV concept as it considered best and workable in the context of its country. The representative of APBREBES questioned whether private settlements should be used to influence public court decisions. He noted that the situations in the domain name dispute mechanism provided by the World Intellectual Property Organization (WIPO) were not comparable to the ones in crop-related disputes. He was of the view that courts dealing with cases in developing countries should not be influenced by such soft law, which was based on privately and anonymously settled disputes among mainly Northern breeding companies.

#### *Discussion*

7. In relation to the points raised by APBREBES, the Office of the Union clarified that, in respect of the CAJ-AG work on future guidance concerning essentially derived varieties, at its sixty-eighth session, held in Geneva on October 21, 2013, the CAJ had requested the CAJ-AG to consider the discussions at the EDV Seminar and had not referred specifically to the concluding remarks of the President of the UPOV Council (see document CAJ/68/10 "Report on the Conclusions", paragraph 11).

#### *Presentation of views by CIOPORA*

8. The representative of CIOPORA noted that the proposed language in document IOM/IV/2, presented in paragraph 11 of document CAJ-AG/13/8/2, provided a limited concept of EDV:

"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)."

9. The representative of CIOPORA recalled that Article 14(5)(b)(i) of the 1991 Act read "retaining the expression of the essential characteristics". He was of the view that the word "essential" was disregarded due to the reference to a limited number of characteristics, making the EDV concept smaller. The representative of CIOPORA noted that an EDV must be clearly distinguishable from the initial variety; therefore, it must have at least one difference in one characteristic. He was of the view that one difference was the minimum for a variety to be considered to be an EDV, but could not be the maximum. According to the representative, the proposal was silent on how to evaluate the differences which result from the act of derivation. The representative of CIOPORA was of the opinion that the UPOV system was an open access system, allowing the use of protected material for further breeding and the commercialization of the breeding results. In his view, that unique feature of the UPOV system, in relation to other IP protection systems, limited the exclusive right of the title holder significantly, and the balance was inclined to the side of the open access rather than to the side of the exclusive right. In his opinion, it was the purpose of the 1991 Act to repair that situation, by introducing in the scope of the right the "varieties which are not clearly distinguishable" and the "essentially derived varieties". The representative of CIOPORA reported that CIOPORA was opposed to any attempt to limit the EDV concept beyond the language of the 1991 Act, but supported a balanced interpretation of the concept, which took into consideration the exclusive right of the breeder of the initial variety. He asked for information on the conclusions of the CAJ-AG with regard to the development of guidance on matters concerning EDV which were not granted protection in their own right.

#### *Discussion*

10. In relation to the comments of CIOPORA on the proposal contained in paragraph 11 of document CAJ-AG/13/8/2, the Office of the Union recalled that the proposal had been introduced at the request of the CAJ-AG as a starting point for discussion and that the views of stakeholders on that approach were sought.

11. The Office of the Union explained that the conclusions of the CAJ-AG with regard to matters concerning EDV which were not granted protection in their own right would be available in the "Report" of the CAJ-AG (document CAJ-AG/13/8/10) and would be reported to the CAJ.

## Explanatory Notes on Propagation and Propagating Material

### *Introduction by the Office of the Union*

12. The Office of the Union presented document UPOV/EXN/PPM Draft 1.

### *Presentation of views by APBREBES*

13. The representative of APBREBES was of the view that there was no need for the development of explanatory notes on propagation and propagating material. He said that an explanatory note was not a standard definition and referred to the Preamble of the UPOV Explanatory Notes: "The only binding obligations on members of the Union are those contained in the text of the UPOV Convention itself, and these Explanatory Notes must not be interpreted in a way that is inconsistent with the relevant Act for the member of the Union concerned." The representative of APBREBES considered that, as members of the Union had different definitions of propagating material, the development of a definition of propagation and propagating material was problematic. He considered that not even a non-exhaustive list of factors should be developed as such a list already provided factors which might be considered as a basis for a decision. In order to obtain a complete basis of information for the discussion, the representative of APBREBES suggested conducting a survey in order to obtain the current definitions used by members of the Union.

### *Discussion*

14. In relation to the point raised by APBREBES, the Office of the Union recalled that document CAJ-AG/11/6/6 contained a review of the references to propagation and propagating material in the laws notified by the members of the Union which contained the definition of those terms.

15. The representative of APBREBES explained that he was aware of this first review but noted that only half of the laws of the members of the Union were included.

### *Presentation of views by CIOPORA*

16. The representative of CIOPORA noted that the first draft of the explanatory notes on propagation and propagating material perpetuated a situation where the use of entirely different definitions would result in lack of harmonization and in an ineffective protection for plant varieties in the territories of some members of the Union. The representative of CIOPORA proposed that the draft explanatory notes should aim at clarifying the minimum requirements for an effective protection of plant varieties and at requesting members of the Union to fulfill those minimum requirements. He noted that, in the first instance, the protection of the UPOV Convention applied in respect of propagating material. The representative of CIOPORA was of the opinion that a PBR law, which covered as propagating material only very few parts of plant material or which deprived the title-holder from making full use of his rights, was not effective. The representative of CIOPORA was of the view that the factor "whether the material has been used to propagate the variety", which was an activity in the past, and the factor "intention on the part of those concerned" took away from the title-holder the possibility to give an authorization and to make his "prior" authorization subject to conditions and limitations as provided in Article 14(1)(a) and (b) of the 1991 Act.

### *Discussion*

17. The Office of the Union clarified that the list of factors in paragraph 3 of document UPOV/EXN/PPM Draft 1 related to "propagating material" and not to "authorization".

18. The Delegation of the European Union requested the views of the representative of CIOPORA on the factor concerning the intention in paragraph 3(iv) of document UPOV/EXN/PPM Draft 1. The Delegation was of the view that the subject matter of protection had to be defined in the legislation and the intention came in at a later stage.

19. The representative of CIOPORA confirmed that, in his view, the law should have a clear definition of the subject matter and propagating material was the subject matter for a PBR system. He said that the subject matter of protection should not be linked to any subjective factors and only objective factors should be taken into consideration. In his view, the intention was not enough to make a clear definition of propagating material.

20. The Delegation of the United States of America asked the representative of CIOPORA whether it would be enough if the definition included the term “used” in order to have objective evidence that material had been used as propagating material.

21. The representative of CIOPORA explained that, in his opinion, the notion of “used” or “has been used” was not sufficient, as the action had already taken place. He considered that such a definition did not cover the right of the title holder to give “prior” authorization and covered only one part of the scope of the breeder’s right.

#### *Presentation of views by ISF*

22. The representative of ISF stated that it was important for policy-makers to set up a legislative framework which could encourage and protect innovators. He was of the opinion that the list in paragraph 3 of document UPOV/EXN/PPM Draft 1 should be reconsidered in light of the techniques currently used for propagation. In paragraph 3(ii) of document UPOV/EXN/PPM Draft 1, the representative of ISF proposed to replace “capable of” by “can be used for”.

#### *Discussion*

23. The Delegation of the United States of America requested the representative of ISF to provide clarification on the parts of plants that could be used as propagating material.

24. The representative of ISF explained that already in the 1980’s it was possible to generate new plants through tissue culture. He explained that the current generation of new plants through tissue culture was still not interesting from a commercial point of view, but it could become the case in the future.

25. The Delegation of Argentina noted that the intention was an important factor in order to identify whether a particular act was authorized or not by the breeder.

26. The representative of ISF explained that in some cases material of varieties was misused. He was of the view that it was necessary to create a stronger legal framework to deal with those situations.

27. The representative of CIOPORA was of the view that the definition of propagating material should not be limited to the intention of the users to use the material as propagating material.

28. The representative of CIOPORA asked if the legislation of a possible future member containing a definition of propagating material as “material that has been used to propagate the variety”, which was based on the factor in paragraph 3(i) of document UPOV/EXN/PPM Draft 1, would be in line with the 1991 Act of the UPOV Convention.

29. The Office of the Union recalled that it was a matter for the Council to decide whether a law was in conformity with the 1991 Act of the UPOV Convention.

#### Explanatory Notes on Acts in Respect of Harvested Material

##### *Introduction by the Office of the Union*

30. The Office of the Union presented document CAJ-AG/13/8/3.

##### *Presentation of views by APBREBES*

31. The representative of APBREBES commented that it was not clear if the examples 1 to 8 in document CAJ-AG/13/8/3 and their alternatives referred only to cases of unauthorized exports. The representative of APBREBES reported that new forms of direct contracts with farmers, not with propagators, were proliferating. He reported that those contracts included “licenses for producers or traders for harvested material” under which royalties were established on harvested material. He shared the opinion of Via Campesina, which questioned the legal basis on those contracts in relation to the principle of the exhaustion of the breeder’s right. He was of the view that once the material was marketed by the breeder, or with their consent, no further remuneration should be required. He noted that contracts allowing for globalized vertical integration into the supply chain, for example “Closed loop marketing”, contained various

commitments with regard to breeders' rights licenses. The representative argued that those types of contracts were not in line with the UPOV Convention and prevented the exercise of the optional exception in Article 15(2) of the 1991 Act of the Convention. He reported that Article 8 of the Swiss Federal Plant Variety Protection Law provided as follows: "Any agreement which restricts or annuls the exceptions to the right to protection for the varieties referred to in art. 6 and 7 shall be deemed to be null and void". With regard to the guidance on the term "reasonable opportunity", the representative of APBREBES considered that the text presented at a previous session of the CAJ-AG was still valid: "It is a matter for each member of the Union to determine what constitutes 'reasonable opportunity' to exercise his right." The representative was not in favor of developing guidance on the term "reasonable opportunity".

#### *Discussion*

32. The Office of the Union recalled that the contents of document CAJ-AG/13/8/3 provided a starting point for discussion on further guidance concerning harvested material.

33. In relation to the comments made by APBREBES on contracts, the Office of the Union referred to the information provided at the Symposium on Contracts in relation to Plant Breeder's Rights, held in 2008, the proceedings of which were published on the UPOV website ([http://www.upov.int/meetings/en/topic.jsp?group\\_id=73](http://www.upov.int/meetings/en/topic.jsp?group_id=73)).

#### *Presentation of views by CIOPORA*

34. The representative of CIOPORA suggested the deletion of example 8 of document CAJ-AG/13/8/3, because it could be misleading and did not appear to correspond to the legislation of some members of the Union.

#### *Discussion*

35. In relation to the point raised by CIOPORA, the Office of the Union noted the request for clarification and mentioned that the basis for example 8 had been provided by CIOPORA.

#### *Presentation of views by ISF*

36. The representative of ISF was of the opinion that the examples in document CAJ-AG/13/8/3 provided clarifications on situations in the real life. He suggested clarifying the two alternatives proposed for each example. He asked if the explanations provided in each of the two alternatives could be used separately or both explanations needed to be fulfilled. The representative suggested that Alternative (a) of Example 9 could benefit from clarification.

#### *Discussion*

37. In relation to the point raised by the representative of ISF, the Office of the Union recalled that the two alternatives were provided in order to have a clearer understanding of members' and observers' views.

## DISCUSSIONS WITHOUT THE PRESENCE OF OBSERVERS

### *Explanatory Notes on Essentially Derived Varieties under the 1991 Act of the UPOV Convention (Revision)*

38. The CAJ-AG considered documents CAJ-AG/13/8/2 and UPOV/EXN/EDV/2 Draft 3, and the views expressed by the representatives from APBREBES and CIOPORA, as set out in paragraphs 6 to 11 of this report and, as requested by the CAJ at its sixty-eighth session, the discussions at the EDV Seminar.

### *UPOV/EXN/EDV/2 Draft 3 "Explanatory Notes on Essentially Derived Varieties under the 1991 Act of the UPOV Convention"*

39. The CAJ-AG noted that the CAJ, at its sixty-seventh session, held in Geneva on March 21, 2013, had agreed that consideration of document UPOV/EXN/EDV/2 Draft 3 "Explanatory Notes on Essentially Derived Varieties under the 1991 Act of the UPOV Convention" should be postponed until after the Seminar on

Essentially Derived Varieties (EDVs), and the consideration of that seminar by the CAJ-AG at its eighth session (see document CAJ/67/14 "Report on the Conclusions", paragraph 15).

40. The CAJ-AG also noted that the CAJ, at its sixty-seventh session, had agreed that consideration should be given to moving paragraph 8 of document UPOV/EXN/EDV/2 Draft 3 after paragraph 4. The CAJ-AG agreed that paragraph 8 of document UPOV/EXN/EDV/2 Draft 3 should be moved after paragraph 4 for the next draft of the document.

*The use of information of the initial variety to obtain essentially derived varieties*

41. The CAJ-AG recalled that it had agreed that consideration should be given to the following text as a starting point of a possible example on the use of information of the initial variety to obtain essentially derived varieties (see document CAJ-AG/13/8/2, paragraphs 6 and 7):

The use of molecular data from an initial variety, for the purpose of selection of genotypes from a population that is mostly related to the initial variety, to produce a variety with a similar genotype may provide evidence of predominant derivation.

42. The CAJ-AG noted that the above example would be circulated with the Draft Report (document CAJ-AG/13/8/10 Prov.), with three months to be provided for comments (see paragraph 44(h), below).

43. The CAJ-AG noted that the concept of indirect derivation was already introduced in document UPOV/EXN/EDV/1 as follows:

"5. Essentially derived varieties are obtained, either directly or indirectly, from a variety which is called the "initial variety". In the example in Figure 1, variety B is an essentially derived variety from variety A and is predominantly derived from variety A. Essentially derived varieties can also be indirectly obtained from an initial variety. In the example in Figure 2, Variety C is essentially derived from Initial Variety 'A', but is predominantly derived from variety B.

"6. Irrespective of whether variety C has been obtained directly from the initial variety A or not, it is an essentially derived variety from variety A if it fulfills the definition stated in Article 14 (5) (b).

"7. Another example of an indirect way in which it might be possible to obtain an essentially derived variety from an initial variety could be the use of a hybrid variety to obtain a variety which is essentially derived from one of the parent lines of the hybrid."

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

44. The CAJ-AG requested the Office of the Union to prepare a text for inclusion in a new draft of document UPOV/EXN/EDV/2 on the following basis:

(a) to include a Preamble with a reference to the mandate of the 1991 Diplomatic Conference:

"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.'"

(b) to clarify in the Preamble the purpose of the guidance in relation to members of the Union and stakeholders;

(c) to include the text of document UPOV/EXN/EDV/1 "Explanatory Notes on Essentially Derived Varieties under the 1991 Act of the UPOV Convention", which was adopted by the Council, at its forty-third ordinary session, held in Geneva on October 22, 2009 (see document C/43/17 "Report", paragraph 23);

(d) to include the text of draft UPOV/EXN/EDV/2 “Explanatory Notes on Essentially Derived Varieties under the 1991 Act of the UPOV Convention” (revision) that had already been agreed by the CAJ-AG;

(e) to consider the inclusion of relevant part of the draft guidance presented in document IOM/6/2 “Essentially Derived Varieties” at the Sixth Meeting with International Organizations (IOM/6), taking into consideration the discussions at the IOM/6 on the above proposals contained in document IOM/6/5 “Report” (copies of documents IOM/6/2 “Essentially Derived Varieties” and IOM/6/5 “Report” in the four languages of the Office of the Union are posted, as reference documents, on the CAJ-AG/13/8 section of the UPOV website);

(f) to include the following elements from the EDV Seminar:

(i) the need to consider the situation in different crops/species and methods of breeding, e.g. mutants;

(ii) to explain the need to consider both predominant derivation (genetic conformity) and essential characteristics (phenotype) and for both those aspects to be considered as possible starting points, noting that the result would be the same;

(g) to include, as a possible starting point, the text of the explanatory note 6(ii) on Article 5 “Effects of the Right Granted to the Breeder” presented in document IOM/IV/2 (see document IOM/6/2 “Essentially Derived Varieties”, paragraph 12, and document CAJ-AG/12/7/3, paragraph 11, reproduced below):

“[...]”

“(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)

“[...]”;

The CAJ-AG noted that the above text would be circulated with the Draft Report (document CAJ-AG/13/8/10 Prov.), with three months to be provided for comments (see paragraph 44(h), below); and

(h) the Office of the Union to provide possible EDV examples based on: the examples provided in document IOM/6/2 “Essentially Derived Varieties”; the examples provided by Australia and Japan in the EDV Seminar; the example provided on the use of information of the initial variety to obtain EDVs; and the explanatory note 6(ii) on Article 5 “Effects of the Right Granted to the Breeder” presented in document IOM/IV/2 (see paragraphs 41, 44(g), above); the CAJ-AG would have three months to provide comments on the EDV examples. The Delegation of Australia offered to provide additional information on the context of the examples provided by Australia at the ninth session of the CAJ-AG.

*Matters concerning essentially derived varieties that are not granted protection in their own right*

45. The CAJ-AG agreed to consider the development of guidance on the matters raised in paragraphs 15 to 18 of document CAJ-AG/13/8/2, concerning the status of essentially derived varieties that were not granted protection in their own right, after the adoption of the revised document UPOV/EXN/EDV/2.

46. The CAJ-AG noted that the matters raised in paragraphs 15 to 18 of document CAJ-AG/13/8/2 would not arise if breeders protected EDVs in their own right.

*Presentations on systems in the members of the Union concerning essentially derived varieties*

47. The CAJ-AG noted that, at an appropriate future session of the CAJ-AG, the Delegations of Australia, Brazil and the European Union and other members of the Union would be invited to make presentations on their systems concerning essentially derived varieties.

*Session III of the EDV Seminar “Possible role of future UPOV guidance on essentially derived varieties”*

48. The CAJ-AG noted the closing remarks of the President of the Council in Session III of the EDV Seminar “Possible role of future UPOV guidance on essentially derived varieties” in relation to the following topics:

(i) experiences on the role of “soft law”/guidance in different jurisdictions and in relation to other subject matters; and

(ii) the potential of alternative dispute settlement mechanisms as a tool for building guidance resulting from award/expert determination EDV cases.

49. The CAJ-AG agreed to consider the inclusion of information on alternative dispute settlement mechanisms for EDV matters in document UPOV/EXN/EDV/2, including a reference to document UPOV/INF/21 “Alternative Dispute Settlement Mechanisms”. As a first step, the CAJ-AG agreed that the Office of the Union should prepare an information document for the CAJ-AG on developments on alternative dispute settlement mechanisms at CIOPORA, ISF and WIPO. In that regard, the CAJ-AG noted that one aspect for consideration would be the possible role of UPOV in the provision of experts on EDV matters.

Explanatory Notes on Propagation and Propagating Material (document UPOV/EXN/PPM Draft 1) (CAJ-AG agenda item 4)

50. The CAJ-AG considered document UPOV/EXN/PPM Draft 1 and the views expressed by APBREBES, CIOPORA and ISF, as set out in paragraphs 13 to 29 of this report.

51. The CAJ-AG agreed to amend paragraph 1 of document UPOV/EXN/PPM Draft 1 to read:

“1. Whether material is propagating material is a matter of fact but ~~also of~~ [may also] include the intention on the part of those concerned (producer, seller, supplier, buyer, recipient, user). For example, the intention of the producer, seller or supplier is not the only relevant aspect, but also the intention of the buyer, recipient or user of material. Thus, even though one party might have not anticipated that material would be used for propagation, another concerned party might have the intention to use the material for propagation. In particular, the explanation in Article 14(2) and in Article 16(2)(ii) of the 1991 Act of the UPOV Convention means that harvested material includes entire plants and parts of plants, ~~which is material that can potentially be used for propagating purposes, means that at least some forms of harvested material have the potential to be used as propagating material.~~”

52. The CAJ-AG agreed to amend paragraph 3 of document UPOV/EXN/PPM Draft 1 to read:

“3. The following, non-exhaustive, list of factors, or combination of factors, might be considered in deciding whether material is propagating material:

- (i) whether the material has been used to propagate the variety;
- (ii) whether the material is capable of producing entire plants of the variety;
- (iii) whether there has been a custom/practice of using the material for that purpose;
- (iv) the intention on the part of those concerned (producer, seller, supplier, buyer, recipient, user); ~~and or~~
- (v) whether the plant material is suitable for reproducing the variety unchanged.”

53. The CAJ-AG noted that the Delegation of Argentina would make a proposal in relation to paragraph 3 and, if appropriate, any corresponding adjustment to paragraph 1 of document UPOV/EXN/PPM Draft 1.

54. The CAJ-AG requested the Office of the Union to prepare a new draft of document UPOV/EXN/PPM on the above basis.

Explanatory Notes on Acts in Respect of Harvested Material

55. The CAJ-AG considered document CAJ-AG/13/8/3, the comments of the Russian Federation of October 21, and of October 25, 2013, which were circulated to the participants and posted on the CAJ-AG website, and the comments as set out in paragraphs 31 to 37 of this document and the views expressed by APBREBES, CIOPORA and ISF.

56. The CAJ-AG noted that the Delegation of the Russian Federation would provide additional comments on “reasonable opportunity”.



57. With regard to Examples 1 to 11, the CAJ-AG agreed:

General	To provide an indication of the unauthorized use and lack of reasonable opportunity to exercise the right in the illustrations
	To clarify whether the explanations in Alternative (a) and Alternative (b) were, or were not, mutually exclusive in each of the examples.
Example 2	To clarify if the material is grain or seed
Example 7	Alternative (b) To read “The breeder of Variety 2 can exercise the right on the imported harvested material if there was unauthorized export (use) of propagating material and the breeder did not have a reasonable opportunity in Country <u>A E</u> to exercise the right in relation to the export of propagating material.”
Example 9	Alternative (b) To read “The breeder of Variety <u>3 1</u> cannot exercise the right on the imported harvested material because there was no unauthorized use of propagating material.”

58. The CAJ-AG requested the Office of the Union to prepare a new draft of document CAJ-AG/13/8/3 (document UPOV/EXN/HRV/2 Draft 1) on the above basis.

#### Matters concerning cancellation of the breeder's right

59. The CAJ-AG considered document CAJ-AG/13/8/4.

60. The CAJ-AG agreed to the development of guidance on reasons for possibly not cancelling a breeder's right, on the basis of document CAJ-AG/13/8/4, paragraph 9.

61. The CAJ-AG agreed to the development of guidance to explain that it was a matter for the member of the Union concerned to decide which authority was competent to decide on cancellation.

62. The CAJ-AG agreed to the development of guidance to explain that cancellation proceedings might result from a request from a third party or *ex officio* by the competent authority of the member of the Union concerned.

63. The CAJ-AG agreed to provide an explanation that the surrender or the renunciation of the breeder's rights was different from the cancellation of the breeder's right.

64. The CAJ-AG agreed to consider the development of guidance on the use of information, documents or material provided by the breeder for verifying the maintenance of the variety, as set out in paragraph 15 of document CAJ-AG/13/8/4, and guidance on the use of Test Guidelines for verifying the maintenance of the variety that were different from the Test Guidelines used for the examination of Distinctness, Uniformity and Stability (“DUS”), in conjunction with document CAJ-AG/13/8/7 “Matters concerning Variety Descriptions”.

#### Matters concerning nullity of the breeder's right

65. The CAJ-AG considered document CAJ-AG/13/8/5.

66. The CAJ-AG agreed to the development of guidance to explain that it was a matter for the member of the Union concerned to decide which authority was competent to decide on nullity of breeders' rights.

67. The CAJ-AG agreed to the development of guidance to explain that nullity proceedings might result from a request from a third party or *ex officio* by the competent authority of the member of the Union concerned.

68. The CAJ-AG agreed to the development of guidance to explain measures that might result from a decision on nullity, as set out in paragraph 15 of document CAJ-AG/13/8/5.

Matters concerning variety denominations

69. The CAJ-AG considered document CAJ-AG/13/8/6.

70. The CAJ-AG agreed to the development of guidance in relation to a request from a breeder to change a registered variety denomination in cases other than where the denomination of the variety was cancelled after the grant of the right, on the basis that such a request should be refused. However, the CAJ-AG agreed that changes would be appropriate in the following situations:

(a) if it was discovered that there was a prior right concerning the denomination which would have resulted in the rejection of the denomination (see Article 20(4) and (7) of the 1991 Act, Article 13(4) and (7) of the 1978 Act and document UPOV/INF/12/4, Note 7);

(b) if the denomination was unsuitable because it was contrary to the provisions of Article 20(2) of the 1991 Act and Article 13(2) of the 1978 Act; and

(c) if the denomination was subsequently refused in another member of the Union and, at the request of the breeder, the authority agreed to change the denomination to the one registered in the said other member of the Union.

71. It was agreed that the additional guidance should be considered as part of a possible revision of the "Explanatory Notes on Variety Denominations under the UPOV Convention" (document UPOV/INF/12/4).

Matters concerning variety descriptions

72. The CAJ-AG agreed that the following matters in document CAJ-AG/13/8/7, paragraph 4, should be considered by the CAJ-AG in the first instance:

(a) the purpose(s) of the variety description developed at the time of grant of the right (original variety description);

(b) the status of the original variety description in relation to the verification of the conformity of plant material to a protected variety for the purposes of:

[...]

(iii) the enforcement of the right.

73. The CAJ-AG agreed to the development of guidance on the following, which it proposed that the CAJ should invite the Technical Committee (TC) to consider in the first instance:

(a) use of information, documents or material provided by the breeder for verifying the maintenance of the variety, as set out in paragraph 15 of document CAJ-AG/13/8/4, with an explanation that the information, documents or material could be maintained in a different country; and

(b) use of Test Guidelines for verifying the maintenance of the variety that were different from the Test Guidelines used for the examination of Distinctness, Uniformity and Stability ("DUS").

74. The CAJ-AG agreed to propose to the CAJ that the following matters in document CAJ-AG/13/8/7, paragraph 4, should be considered by the TC in the first instance:

[...]

(b) the status of the original variety description in relation to the verification of the conformity of plant material to a protected variety for the purposes of:

(i) verifying the maintenance of the variety (Article 22 of the 1991 Act, Article 10 of the 1978 Act);

(ii) the examination of distinctness, uniformity and stability ("DUS") of candidate varieties; and

[...]

(c) the status of a modified variety description in relation to (a) and (b) above produced, for example, as a result of:

- (i) a recalibration of the scale in the Test Guidelines (particularly for non-asterisked characteristics<sup>1</sup>);
- (ii) variation due to the environmental conditions of the years of testing for characteristics that are influenced by the environment;
- (iii) variation due to observation by different experts; or
- (iv) the use of different versions of scales (e.g. different versions of the RHS Colour Chart).

(d) situations where an error is subsequently discovered in the initial variety description.

75. In relation to matters concerning nullity of the breeder's right (see document CAJ-AG/13/8/5), the CAJ-AG agreed to the development of guidance to explain the importance of the authority maintaining information on all varieties considered in the examination of distinctness of a candidate variety and proposed to the CAJ to invite the TC to pursue that matter in the first instance.

#### Matters arising after the grant of a breeder's right on: provisional protection, filing of applications and enforcement of breeders' rights

76. The CAJ-AG considered document CAJ-AG/13/8/8.

77. The CAJ-AG agreed not to consider the development of guidance on matters arising after the grant of a breeder's right in relation to the filing of applications, nor enforcement of breeders' rights.

78. The CAJ-AG agreed to consider the possible development of guidance on provisional protection in relation to the possibility to initiate legal proceedings before the grant of a breeder's right and to enter into license agreements before the grant.

#### Matters concerning observers in the CAJ-AG

79. The CAJ-AG noted that the conclusions of the Consultative Committee, at its eighty-sixth session held in Geneva on October 23 and on the morning of October 24, 2013, concerning the participation of observers in the CAJ-AG, would be reported to the CAJ.

#### Date and program for the ninth session

80. Subject to approval by the Administrative and Legal Committee (CAJ) at its sixty-ninth session, to be held on April 10, 2014, the CAJ-AG agreed the following program for its ninth session, to be held in October 2014:

1. Opening of the session
2. Adoption of the agenda
3. Explanatory Notes on Essentially Derived Varieties under the 1991 Act of the UPOV Convention
4. Explanatory Notes on Propagation and Propagating Material
5. Explanatory Notes on Acts in Respect of Harvested Material under the 1991 Act of the UPOV Convention

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<sup>1</sup> "[I]f a characteristic is important for the international harmonization of variety descriptions (asterisked characteristics) and is influenced by the environment (most quantitative and pseudo-qualitative characteristics) [...] it is necessary to provide example varieties" in the Test Guidelines (see document TGP/7, Annex 3, Guidance Note GN 28 "Example varieties", section 3.3 (iii)).  
"1.2.3 Example varieties are important to adjust the description of the characteristics for the year and location effects, as far as possible. [...]" (see document TGP/7, Annex 3, Guidance Note GN 28 "Example varieties", section 1.2.3)

6. Matters concerning cancellation of the breeder's right
7. Matters concerning nullity of the breeder's right
8. Matters concerning variety denominations
9. Matters concerning variety descriptions
10. Matters concerning provisional protection
11. Matters concerning observers in the CAJ-AG
12. Possible alternative dispute settlement mechanisms for EDVs
13. Matters referred by the CAJ to the CAJ-AG for consideration since the eighth session of the CAJ-AG
14. Date and program for the tenth session

81. The CAJ-AG agreed the following approach in order to advance on relevant matters between the eighth and the ninth sessions of the CAJ-AG:

- Circulation of the "Draft Report" (document CAJ-AG/13/8/10 Prov.) by November 15, 2013, with EDV examples
- Comments on the "Draft Report" (document CAJ-AG/13/8/10 Prov.) by December 13, 2013
- Comments on EDV examples by February 21, 2014
- Circulation of new drafts of relevant explanatory notes by May 9, 2014
- Comments on new drafts of relevant explanatory notes by June 21, 2014
- Revised new drafts of relevant explanatory notes to be posted by August 29, 2014

82. The CAJ-AG noted that, subject to any changes that the CAJ might agree at its sixty-ninth session, to be held on April 10, 2014, the seventieth session of the CAJ would be held on October 13 ~~and 14~~, 2014, and that the ninth session of the CAJ-AG would be held on October ~~[14 and]~~ 17, 2014.

*Ad hoc invitations to the relevant part of the ninth session of the CAJ-AG*

83. The CAJ-AG recalled that observers to the CAJ could send comments on relevant matters of the program of the CAJ-AG. The CAJ-AG agreed that, in cases where written comments were received from observers to the CAJ, the CAJ-AG would invite those observers to the relevant part of the ninth session of the CAJ-AG and the Office of the Union would issue the corresponding *ad hoc* invitations.

84. *This report was adopted by correspondence.*

[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 names in French 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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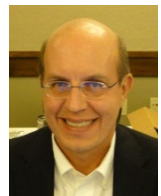


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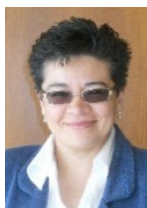
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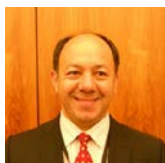
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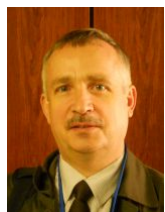


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Peter BUTTON, Vice Secretary-General



Yolanda HUERTA (Mrs.), Legal Counsel



Fuminori AIHARA, Counsellor



Ben RIVOIRE, Technical/Regional Officer (Africa, Arab countries)



Leontino TAVEIRA, Technical/Regional Officer (Latin America, Caribbean countries)

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