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MATTERS CONCERNING ESSENTIALLY DERIVED VARIETIES

Document prepared by the Office of the Union

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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 relevant matters concerning essentially derived varieties.

2. This document is structured as follows:

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I. BACKGROUND

3. The background information concerning the development of the provisions and guidance on essentially derived varieties is provided in document CAJ-AG/13/8/2 "Explanatory Notes on Essentially Derived Varieties under the 1991 Act of the UPOV Convention" and document CAJ-AG/13/8/10 "Report", paragraphs 38 to 48.

II. EXPLANATORY NOTES ON ESSENTIALLY DERIVED VARIETIES UNDER THE 1991 ACT OF THE UPOV CONVENTION (REVISION)

4. The CAJ-AG, at its eighth session, held in Geneva on October 21 and 25, 2013, considered documents CAJ-AG/13/8/2 and UPOV/EXN/EDV/2 Draft 3, and the views expressed by the representatives from Association for Plant Breeding for the Benefit of Society (APBREBES) and the International Community of Breeders of Asexually Reproduced Ornamental and Fruit Varieties (CIOPORA), as set out in paragraphs 6 to 11 of document CAJ-AG/13/8/10 "Report". As requested by the CAJ, at its sixty-eighth session, held in Geneva on October 21, 2013, the CAJ-AG, at its eighth session, also considered the discussions at the

Seminar on Essentially Derived Varieties (EDVs), held in Geneva on October 23, 2013 (see documents CAJ/68/11 "Report, paragraph 11, and CAJ-AG/13/8/10 "Report", paragraph 38).

5. The CAJ-AG, at its eighth session, 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 (see document CAJ-AG/13/8/10 "Report", paragraph 44):

"(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), [of document CAJ-AG/13/8/10 "Report"]); 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), [of document CAJ-AG/13/8/10 "Report"]); 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."

6. The CAJ, at its sixty-ninth session, held in Geneva on April 10, 2014, noted that the Delegation of the European Union was of the view that the EDV Seminar provided a good starting point to develop further guidance on EDV matters. While recognizing that detailed discussions on EDV would take place at the CAJ-AG in October, the Delegation explained that the European Union was currently working on EDV matters and therefore would welcome the development of guidance that could be endorsed by all the members of the Union (document CAJ/69/13 "Report", paragraph 15).
7. The Delegation of Argentina, at the sixty-ninth session of the CAJ, proposed to discuss the potential role of authorities granting breeders' rights in determining whether a variety was an EDV or not at the CAJ-AG in October. It noted that the Explanatory Notes on Essentially Derived Varieties under the 1991 Act of the UPOV Convention (document UPOV/EXN/EDV/1) adopted by the Council contained a recommendation in that regard. The Delegation believed that it might be useful to explore if it would be possible to broaden and further develop the existing recommendation on matters concerning EDV determination. The Delegation offered to send comments to the Office of the Union that might assist in the development of the document (document CAJ/69/13 "Report", paragraph 16).
8. The CAJ, at its sixty-ninth session, agreed that the Office of the Union should prepare a document, for consideration by the CAJ-AG at its ninth session, to explore a possible role of authorities granting breeders' rights in matters concerning essentially derived varieties and agreed that the document would be included under item 3 of the program for the ninth session of the CAJ-AG. The CAJ welcomed the offer of the Delegation of Argentina to assist the Office of the Union in the development of the document (document CAJ/69/13 "Report", paragraph 17).
9. The CAJ, at its sixty-ninth session, approved the work program for the development of information materials for the ninth session of the CAJ-AG, to be held on October 14 and 17, 2014 (see document CAJ/69/2 "Development of information materials concerning the UPOV Convention", paragraphs 65 and 66, and document CAJ/69/13 "Report", paragraph 29).
10. The CAJ, at its sixty-ninth session, agreed that the new drafts of relevant explanatory notes be provided to the CAJ-AG by May 9, 2014, and that CAJ members and observers also be given the opportunity to provide comments (see document CAJ/69/13 "Report", paragraph 30).
11. On the above basis, the "Explanatory Notes on Essentially Derived Varieties under the 1991 Act of the UPOV Convention" (document UPOV/EXN/EDV/2 Draft 4) were posted on the UPOV website on May 20, 2014 (see UPOV Circular E-14/136). Comments were received from Argentina, Norway, APBREBES, CIOPORA, CropLife International and the European Seed Association (ESA) (see CAJ-AG/13 section under "Consideration by Correspondence": http://www.upov.int/meetings/en/details.jsp?meeting_id=29783).
12. On the basis of the comments received, the "Explanatory Notes on Essentially Derived Varieties under the 1991 Act of the UPOV Convention (Revision)" (document UPOV/EXN/EDV/2 Draft 5) were prepared and posted on September 10, 2014, for consideration by the CAJ-AG at its ninth session (see UPOV Circular E-14/214).
13. On October 4, 2014, comments were received from the International Seed Federation (ISF) on document UPOV/EXN/EDV/2 Draft 5 and have been published on the CAJ-AG section of the UPOV website.
14. The contribution of Argentina for the exploration of a possible role of authorities granting breeders' rights in matters concerning essentially derived varieties is available at http://www.upov.int/edocs/mdocs/upov/en/caj_ag_13_8/caj_ag_13_8_www_285383.pdf (see paragraph 7, above) and has been included in document UPOV/EXN/EDV/2 Draft 5, Section II "Assessment of essentially derived varieties", Proposal by Argentina.
15. In relation to the offer from the Delegation of Australia to provide, at the ninth session of the CAJ-AG, additional information on the context of the examples provided by Australia in the EDV Seminar, the Office of the Union is exploring the possibility for Australia to make a presentation by electronic means, via the internet (see document CAJ-AG/13/8/10 "Report", paragraph 44 (h) and paragraph 5(h) above).

III. MATTERS CONCERNING ESSENTIALLY DERIVED VARIETIES THAT ARE NOT GRANTED PROTECTION IN THEIR OWN RIGHT

16. The CAJ-AG, at its eighth session, agreed to consider the development of guidance on the matters raised in paragraphs 15 to 18 of document CAJ-AG/13/8/2 "Explanatory Notes on Essentially Derived Varieties under the 1991 Act of the UPOV Convention", 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 (see document CAJ-AG/13/8/10 "Report", paragraph 45).

17. 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 (see document CAJ-AG/13/8/10 "Report", paragraph 46).

IV. PRESENTATIONS ON SYSTEMS IN THE MEMBERS OF THE UNION CONCERNING ESSENTIALLY DERIVED VARIETIES

18. The CAJ-AG, at its eighth session, 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 (see document CAJ-AG/13/8/10 "Report", paragraph 47).

V. POSSIBLE ALTERNATIVE DISPUTE SETTLEMENT MECHANISMS FOR ESSENTIALLY DERIVED VARIETIES

19. Matters concerning the possible role of UPOV in alternative dispute settlement mechanisms are contained in document CAJ-AG/14/9/3 "Possible alternative dispute settlement mechanisms for essentially derived varieties".

20. *The CAJ-AG is invited to:*

(a) *note that the Office of the Union is exploring the possibility for Australia to make a presentation by electronic means, via the internet, containing the additional information on the context of the examples provided by Australia in the EDV Seminar;*

(b) *consider the "Explanatory Notes on Essentially Derived Varieties under the 1991 Act of the UPOV Convention (Revision)" (document UPOV/EXN/EDV/2 Draft 5);*

(c) *note that the CAJ-AG, at its eighth session, agreed to consider the development of guidance on the matters raised in paragraphs 15 to 18 of document CAJ-AG/13/8/2 "Explanatory Notes on Essentially Derived Varieties under the 1991 Act of the UPOV Convention", 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;*

(d) *consider the conclusion of the CAJ-AG, at its eighth session, 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 be invited to make presentations on their systems concerning essentially derived varieties; and*

(e) *note that matters concerning the possible role of UPOV in alternative dispute settlement mechanisms are contained in document CAJ-AG/14/9/3 "Possible alternative dispute settlement mechanisms for essentially derived varieties".*

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