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

**ADMINISTRATIVE AND LEGAL COMMITTEE**

**Sixtieth Session**  
**Geneva, October 19 and 20, 2009**

**MATTERS ARISING AFTER THE GRANT OF THE BREEDER'S RIGHT**

*Document prepared by the Office of the Union*

1. The Administrative and Legal Committee (CAJ), at its fifty-ninth session, held in Geneva on April 2, 2009, agreed to include in the draft agenda of its sixtieth session the item "Matters arising after the grant of the breeder's right", in order to consider the development of a document to provide guidance on matters concerning distinctness, uniformity, stability and novelty that are brought to the attention of an authority after the grant of a breeder's right. The purpose of this document is to provide background information, including illustrative examples, to assist the CAJ in its consideration of those matters.

2. In the consideration of matters concerning distinctness, uniformity, stability and novelty that are brought to the attention of an authority after the grant of a breeder's right, it should be noted that authorities with responsibility on those matters may, or may not, be the authority entrusted with the task of granting breeders' rights.

Background

3. During its discussions on document TGP/11 "Examining Stability" at its forty-first session, held in Nairobi, from June 11 to 15, 2007, the Technical Working Party for Vegetables (TWV) agreed that, in addition to continuing the development of document TGP/11 "Examining Stability", it would be of practical assistance to seek to develop a document on how to address problems concerning stability which were brought to the attention of an authority after the grant of a plant breeder's right. It noted that such a document could also be extended to address problems concerning distinctness, uniformity and novelty which were brought to the attention of an authority after the grant of a plant breeder's right and also to consider the status and use of the "official" variety description. The TWV

noted that the development of such a document would be outside the framework of the DUS examination and, therefore, outside the scope of the General Introduction and TGP documents. It also noted the need for such a document to be endorsed by the Technical Committee (TC) and the CAJ and agreed to await the views of those committees before starting work on such a document (see document TWV/41/13 “Report”, paragraph 33).

4. At its forty-fourth session, held in Geneva from April 7 to 9, 2008, the TC noted the TWV proposal for the possible development of a document to provide guidance on matters concerning distinctness, uniformity, stability and novelty which are brought to the attention of an authority after the grant of a breeder’s right and the status and use of the “official” variety description. The TC agreed that the view of the CAJ should be sought with regard to whether it would be appropriate to pursue those proposals (see document TC/44/13 “Report”, paragraph 118).

5. At its fifty-eighth session, held in Geneva on October 27 and 28, 2008, the CAJ considered document TGP/11/1 Draft 5 “Examining Stability”, in conjunction with document CAJ/58/2 “TGP documents”. Document CAJ/58/2, paragraphs 7 and 8 explained the following:

“7. At its forty-fourth session, the TC noted the TWV proposal for the possible development of a document to provide guidance on matters concerning distinctness, uniformity, stability and novelty which are brought to the attention of an authority after the grant of a breeder’s right and the status and use of the “official” variety description (see document TC/44/3, paragraph 17). The TC also noted the comments of the TC-EDC that there would be practical advantages in dealing with all aspects of stability in a single document and the proposal of the TC-EDC that the TC, in conjunction with the CAJ, might consider an amendment to the title of TGP/11, with the document being clearly separated into two parts:

Part I: Examining Stability (Article 12 “Examination of the Application”, of the 1991 Act of the UPOV Convention)

Part II: Stability after the grant of a breeder’s right (Article 22(1) “Cancellation of the Breeder’s Right”, of the 1991 Act of the UPOV Convention)

8. The TC agreed that the view of the CAJ should be sought with regard to whether it would be appropriate to pursue those proposals.”

6. The CAJ agreed that document TGP/11 should consider only the examination of stability in the context of the DUS examination and that a separate document should be developed to provide guidance on matters concerning distinctness, uniformity, stability and novelty that are brought to the attention of an authority after the grant of a breeder’s right (see document CAJ/58/6 “Report on the Conclusions”, paragraph 11).

7. At its forty-fifth session, held in Geneva from March 30 to April 1, 2009, the TC took note of the discussions at the CAJ at its fifty-eighth session and agreed to propose to the CAJ that, within its approach for the preparation of information materials concerning the UPOV Convention, a document be developed to provide guidance on matters concerning distinctness, uniformity, stability and novelty that are brought to the attention of an authority after the grant of a breeder’s right (see document CAJ/58/7, Report, paragraphs 11 to 22).

### Illustrative Examples

8. The Office of the Union has sought information on examples of possible matters arising after the grant of the breeder's right. The following examples were identified:

a) Matters concerning distinctness

*Example:*

- After the grant of the breeder's right, a claim is made that the protected variety was not distinct from a variety whose existence was a matter of common knowledge at the time of the filing of the application.

b) Matters concerning stability

*Example:*

- Due to stability or maintenance problems, the material of a "protected variety" is no longer clearly distinguishable from another variety whose existence was a matter of common knowledge at the time of the filing of the application.
- A claim from a grower that the propagating material provided by the breeder is not of the protected variety.

c) Variety description

9. Amongst the issues that might arise is the practical matter of determining whether propagating material is of a protected variety by the use of living plant material and/or plant variety descriptions in variety collections, according to the nature of the variety collection, (see document TGP/4 "Constitution and Maintenance of Variety Collections").

10. With regard to variety descriptions, the determination of whether propagating material is of the protected variety can be less straightforward than when living plant material is held in the variety collection. For example, the propagating material may be of the protected variety, but might not correspond to the variety description in the variety collection because 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;
- (iv) the use of different versions of scales (e.g. different versions of the RHS Colour Chart).

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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)

11. As explained in paragraph 8, the above examples have been presented by the Office of the Union for illustration purposes; however, there may be other matters that would be relevant, in particular in relation to matters arising after the grant of the breeder's right with respect to uniformity and novelty.

Relevant provisions of the UPOV Convention

12. In the consideration of matters concerning distinctness, uniformity, stability and novelty arising after the grant of a breeder's right, Article 21 "Nullity of the Breeder's Right", paragraph (1)(i) and (ii) and Article 22 "Cancellation of the Breeder's Right", paragraph (1)(a) and (b)(i), of the 1991 Act of the UPOV Convention, might be particularly relevant:

"Article 21

Nullity of the Breeder's Right

(1) [*Reasons of nullity*] Each Contracting Party shall declare a breeder's right granted by it null and void when it is established

(i) that the conditions laid down in Articles 6 [Novelty] or 7 [Distinctness] were not complied with at the time of the grant of the breeder's right,

(ii) that, where the grant of the breeder's right has been essentially based upon information and documents furnished by the breeder, the conditions laid down in Articles 8 [Uniformity] or 9 [Stability] were not complied with at the time of the grant of the breeder's right, or

[...]"

"Article 22

Cancellation of the Breeder's Right

(1) [*Reasons for cancellation*] (a) Each Contracting Party may cancel a breeder's right granted by it if it is established that the conditions laid down in Articles 8 [Uniformity] or 9 [Stability] are no longer fulfilled.

(b) Furthermore, each Contracting Party may cancel a breeder's right granted by it if, after being requested to do so and within a prescribed period,

(i) the breeder does not provide the authority with the information, documents or material deemed necessary for verifying the maintenance of the variety,

[...]"

13. *The CAJ is invited to consider whether it would be appropriate to develop a document to provide guidance on matters concerning distinctness, uniformity, stability and novelty arising after the grant of a breeder's right.*

[End of document]