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ADMINISTRATIVE AND LEGAL COMMITTEE

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**NEW GENERAL INTRODUCTION TO THE ASSESSMENT OF DISTINCTNESS,
UNIFORMITY AND STABILITY IN NEW VARIETIES OF PLANTS**

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1. BACKGROUND AND DEVELOPMENT

1.1 Origin and initiation

1. Following a proposal made during a meeting of the Editorial Committee, the Chairs of various Technical Working Parties and the Chair and Vice-Chair of the Technical Committee, during the thirty-fourth session of the Technical Committee, March 30 to April 1, 1998, decided to revise document TG/1/2, "Revised General Introduction to the Guidelines for the Conduct of Tests for Distinctness, Homogeneity and Stability of New Varieties of Plants". Comments from experts were requested and the revision of the Revised General Introduction was discussed in all Technical Working Party meetings held during 1998 (see document TC/34/10, paragraphs 57 to 60, TWA/27/27, paragraphs 26 to 28, TWC/29/14, paragraphs 40 to 45, TWF/29/14, paragraphs 40 to 45, TWO/31/19, paragraphs 59 to 60)

2. First draft and discussion process: In December 1998, the first draft New Revised General Introduction (document TC/35/5) was sent for comments (Circular U 2763). The comments received resulted in a draft New Revised General Introduction (document TC/35/9) which was sent for discussion at the thirty-fifth session of the Technical Committee on March 22 to 24, 1999 (Circular U 2791). During its session, the Technical Committee agreed to ask the Editorial Committee, enlarged by the Chairs of the Technical Working Parties, to hold a meeting after its thirty-fifth session. The Technical Committee also agreed to have the New

Revised General Introduction split into two documents, the first one to contain the general principles for DUS testing, which should remain unchanged for a long time, and the second one to contain explanations, which could be updated regularly (a set of so-called TGP documents) (see document TC/35/12, paragraph 28).

3. The Enlarged Editorial Committee met after the Technical Committee session and again on May 10 and 11, 1999. As a result of those meetings, another draft New Revised General Introduction was prepared (document TC/35/13) and sent to the Working Parties (Circular 2828) who discussed it during their meetings held between June and September 1999 (see documents TWA/28/22, paragraphs 24 to 36; TWC/17/13, paragraphs 42 to 53; TWF/30/14, paragraphs 20 to 32; TWO/32/9, paragraphs 23 to 25 and TWV/33/15, paragraphs 48 to 52). The comments made by the Technical Working Parties during their meetings in 1999 were considered in a new meeting of the Enlarged Editorial Committee in October 1999. As a result of that meeting another draft New Revised General Introduction was prepared (document TC/36/6).

4. During the thirty-sixth session of the Technical Committee, April 3 to 5, 2000, the following schedule was decided:

1. In the middle of April send documents TC/36/5 and 7 to all Technical Working Parties asking for comments before the middle of May 2000.
2. Send Circular to the Technical Committee asking for comments on open points before end of April.
3. Prepare, by May 15, 2000, updated document TC/36/6 (TC/36/8), send together with comments from the Technical Committee on open points and summary of changes to TC/36/6 to the Technical Committee and all Technical Working Parties for information. Comments should reach UPOV before the end of May 2000 (if needed, a further Editorial Committee meeting would be held).
4. Send comments received on TC/36/5 and 7 to all Technical Working Parties by May 20, 2000.
5. Have the new updated version of the draft New Revised General Introduction ready by September 15, 2000, for presentation at the CAJ session in October 2000.
6. By February 1, 2001, have the updated version of the draft New Revised General Introduction containing comments or proposals for rewording of some paragraphs made by the CAJ ready for presentation to the TC session in April 2001 and to the Council session either in April (if the Council meets in April) or October 2001.

5. After the session of the Technical Committee, Circular 2953 was sent asking for comments on the complementary documents to the draft New Revised General Introduction. Circular 2954 was sent attaching a draft of the New Revised General Introduction (document TC/36/8), and asking for comments. Circular 2976 was then sent containing the comments on the draft New Revised General Introduction and its complementary documents for discussion at all the Technical Working Parties during their meetings in year 2000.

6. During June and July 2000, meetings of the TWA, TWC, TWF and TWO took place. Comments on the draft New Revised General Introduction (TC/36/8) were made and some discussions on the complementary documents were held as far as time allowed. The outcome of those meetings was an updated revision of the draft New Revised General Introduction (TC/36/9) in August 2000, which will be submitted to the forty-second session of the CAJ for discussion. In September 2000, the TWV is planning to discuss the General Introduction.

1.2 Present situation

7. The process for the revision of the Revised General Introduction has created two kinds of document:

a- The draft New Revised General Introduction contained in document TC/36/9 which is the one submitted to the Administrative and Legal Committee for discussion. It is important to highlight that document TC/36/9 (as its previous versions) is in fact the TGP/1, the first complementary document, that is the draft New Revised General Introduction with explanations. The explanations will be removed in the final version of the New Revised General Introduction, but will be kept for TGP/1.

b- The complementary documents. As mentioned before it was decided to have a set of complementary documents (the so-called TGP documents) to the draft New Revised General Introduction, which could be updated from time to time. The whole list of planned TGP documents is included in an Annex to the draft New Revised General Introduction. The first draft set of TGP documents is contained in documents TC/36/5 and TC/36/7. This set of documents is at an early stage of development and discussion on them is necessary before their final adoption. At present they mostly represent the point of view of the expert who volunteered for their preparation. It is not intended to have the TGP set of documents ready jointly with the New Revised General Introduction. Nevertheless the draft New Revised General Introduction must be worded and agreed upon in order to avoid inconsistencies between it and the TGP documents.

8. The notion of Common Knowledge is the subject of one of the TGP documents (TGP/3). The text of TGP/3 was already introduced to the CAJ at its forty-first session (see document CAJ/41/2) and its relation with the notion of breeder is also discussed in document CAJ/42/2.

2. OPEN POINTS IN THE GENERAL INTRODUCTION

9. In spite of the procedure already carried out and the several draft revisions of the draft New Revised General Introduction, there are still some subjects that require further discussion and clarification. These subjects have been called “open points” and can be briefly summarized as follows:

a - Interpretation of the definition of “variety”. The definition of “variety” in Article 1(vi) of the 1991 Act of the UPOV Convention is broader than that of protectable variety. There are therefore questions such as whether plant groupings other than registered varieties, like ecotypes, land races and breeding material, could be considered as varieties as well. Another point is whether the wording “characteristics resulting from a given genotype or combination

of genotypes” refers to morphological or physiological characteristics only or whether another type of characteristic could be considered as well (see TC/36/9, paragraphs 12 to 14 and 77).

b - Multivariate analysis. Up to the present, assessment of Distinctness, Uniformity and Stability has been made following a characteristic-by-characteristic approach. Nevertheless while some experts think that this approach should be kept, other experts propose exploring the possibilities of using an overall difference of a set of characteristics (multivariate approach) at least for the selection of the closest varieties to which a candidate should be compared.

The draft New Revised General Introduction clearly differentiates between the biologically meaningful combination of characteristics (combined characteristic, e.g. ratio length/width) and multivariate analysis. Although the draft does not exclude the use of multivariate analysis, criteria and extent of its use are to be defined in TGP/12 (see TC/36/9, paragraphs 71, 92 and 111.)

c - Hybrid parentage. Some experts considered that it was possible to use the hybrid formula both for making a pre-selection of the closest varieties to which a candidate variety should be compared and for DUS assessment, while other experts considered that DUS assessment should be done on the hybrid itself. Another related subject is whether the National Authorities could ask for the submission of the parent formula and parent lines, which would allow the DUS requirements to be checked in the correct way. This concept is already included in some UPOV Test Guidelines for the pre-selecting of varieties (see TG/2/6 Corr.; TG/36/6 and TG/81/6).

The draft New Revised General Introduction states that the Convention may allow for the use of methods other than those based on individual characteristics for DUS assessment. The use of hybrid formula is mentioned as one option. The draft New Revised General Introduction refers to TGP/4 for the possible uses of hybrid formula in the DUS assessment (see document TC/36/9, paragraphs 60, 92, 132 to 138, 142 and 168).

d - Supporting evidence. A special situation exists where there is no clear Distinctness in any of the characteristics used during the DUS test but nevertheless the crop expert responsible for the test is convinced that the variety is clearly distinct. In this case it is possible to use further information as supporting evidence of the Distinctness of the variety. There are different points of view on this matter. On the one hand some experts consider that there is no difference between the supporting evidence and another DUS characteristic, on the other hand other experts say that the conviction of the expert is necessary but not sufficient, in the same way as supporting evidence itself is not enough without the expert’s conviction. It is necessary to set up clear rules on how to use supporting evidence.

10. Concerning the setting-up of categories of characteristics, it is mentioned in the draft New Revised General Introduction that supporting evidence characteristics are not considered sufficient on their own to establish Distinctness. It is also mentioned that some which have met certain requirements have been included in an Annex to the Test Guidelines. Finally it states that the Convention may allow the use of methods other than those based on individual characteristics for DUS assessment. Supporting evidence is mentioned among others (see TC/36/9, paragraphs 59, 76, 92, 211 and 212).

e - Different degrees of Uniformity. It may happen that two varieties are different in their resistance to a specific disease. This may be the consequence of the introduction of new

characteristics, for which earlier varieties were not tested and not uniform. There is some concern as to how to assess DUS in that situation, mainly if one variety is not uniform for that characteristic. The role played by the definition of Uniformity in the UPOV Convention, where it calls for a variety “sufficiently uniform in its relevant characteristics” also causes concern.

11. After discussions at the thirty-sixth session of the Technical Committee and the TWA, TWC, TWO and TWF meetings, some amendments to the draft New Revised General Introduction were made. In the Revised General Introduction it is clarified that different levels of resistance can be accepted as a characteristic for the assessment of Distinctness if the results are technically reliable. The improvement of already existing varieties is not forbidden under the UPOV Convention. With the introduction of new characteristics it may be possible to select different forms within an existing variety. Nevertheless, the requirement of clear Distinctness calls for the recognition of limits to the reselection of existing varieties. For the assessment of Distinctness no candidate can be distinguished from an existing variety solely by a characteristic that is part of the other variety but is not uniform in that variety. This principle will prevent the use of new DUS characteristics from eroding the protection of existing varieties while encouraging the improvement of existing varieties and enabling the protection of clearly distinct selections. This approach requires reasonable levels of Uniformity in the varieties of plant species, which have not previously been the subject of protection to ensure that variety development of other varieties is not inhibited. It is also stated that for the decision on Distinctness both the candidate and similar varieties should be uniform. Finally in the draft New Revised General Introduction it is considered that the relevant characteristics of a variety should include at least all characteristics used as a basis for Distinctness or in the variety description established at the date of grant the protection (see document TC/36/9 paragraphs 21, 56, 58, 77, 80, 84, 93, 99, 113 and 120).

f - Example varieties. To clarify the states of expression of a characteristic in the UPOV Test Guidelines, example varieties are given. With an increasing number of new member States from different regions of the world joining the Union, example varieties included in the Test Guidelines are becoming less relevant. The Technical Committee and the Technical Working Parties have discussed the possibility of improving the situation by, for example, including a second set of example varieties. This solution causes some problems of concordance between more than one list of example varieties, while keeping the standardization level in the assessment of DUS and also of the checking and quality of a second list. At its thirty-sixth session held from April 3 to 5, 2000, the Technical Committee decided to circulate among the Technical Working Parties a paper prepared by the expert from France during the session (see document TWA/29/20). Most experts agreed to the basic principles set down in the paper and comments will be sent to the expert from France for the development of a more comprehensive paper.

12. The draft New Revised General Introduction makes several references to this situation. Firstly it is stated that the objective of example varieties is to clarify the states of expressions of a characteristic and that example varieties from different regions should not be combined for a characteristic unless they have been tested in the same place. Example varieties are those that were available to the expert who drafted the Test Guidelines. Where the set of example varieties given for characteristics in the Test Guidelines is not applicable (or useful) for two or more member States from a different region, a second set of example varieties from that region may be given in the Test Guidelines. In this case, concordance of the example varieties in the different sets should be aimed at, especially with respect to quantitative characteristics in the course of the preparation of the Test Guidelines through the exchange of

information and data between the different regions. The draft New Revised General Introduction also makes clear that it is not possible to use the same example varieties worldwide and that each State has to prepare its own set of example varieties (see document TC/36/9, paragraphs 66, 100, 194 to 198).

g - Common Knowledge. Article 7 of the UPOV Convention provides that a variety “shall be deemed to be distinct if it is clearly distinguishable from any other variety whose existence is a matter of Common Knowledge at the time of the filing of the applications”. The Technical Committee has decided to include a complementary document, TGP/3, dealing with the notion of Common Knowledge. Some discussions on this subject raised concerns about the criteria to be followed in its definition and also awareness that it is a politically sensitive issue and this should also be considered in order to avoid future criticism of the UPOV system. There is no agreed position at the moment on the criteria establishing Common Knowledge (availability or existence of living material, compliance with the definition of variety, no necessity of being designated by a name, existence and to be known, etc., see document TGP/3). The TGP/3 is an initial draft document at an early stage of development and the Technical Committee decided to forward the discussion on Common Knowledge to the Administrative and Legal Committee (see document CAJ/41/2). At one Technical Working Party some experts considered that they should rather focus discussions on the management of reference collections and leave the Technical Committee, the Administrative and Legal Committee and even the Council to decide on the notion and policy in respect of Common Knowledge.

13. The draft New Revised General Introduction, when dealing with the notion of Common Knowledge, refers to document TGP/3. Nevertheless the General Introduction also states that the varieties to be taken into account for comparison should not be limited to national borders and that reference collections should contain seed or vegetative plant material of any other varieties of Common Knowledge. It also clarifies that a description of an old variety, a test report or the knowledge of an expert panel, however detailed it may be, even with herbarium material, is not enough on its own for the decision on Distinctness if no more living material exists (see document TC/36/9, paragraphs 32, 33, 36, 37, 78, 79 and 144).

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