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

GENEVA

**ADMINISTRATIVE AND LEGAL COMMITTEE****Forty-Third Session  
Geneva, April 5, 2001****NEW REVISED "GENERAL INTRODUCTION TO THE EXAMINATION OF  
DISTINCTNESS, UNIFORMITY AND STABILITY AND THE DEVELOPMENT OF  
HARMONIZED DESCRIPTIONS OF NEW VARIETIES OF PLANTS"  
(DOCUMENT TG/1/3)**

*Document prepared by the Office of the Union*

1. The Administrative and Legal Committee (hereinafter referred to as "the Committee") is invited to consider document TC/37/5 containing the proposal to replace document TG/1/2 with document TG/1/3 a new "Revised General Introduction to the Examination of Distinctness, Uniformity and Stability and the Development of Harmonized Descriptions of New Varieties of Plants" and a proposal for the adoption of the associated TGP documents.
2. The Committee considered and commented on the previous draft of document TG/1/3 (document TC/36/9) at its forty-second session held in Geneva on October 23 and 24, 2000. The document has since been redrafted to take account of the opinion of the Technical Committee but has also been subject to other revisions, as explained in full in document TC/37/5. Many of the changes are of a technical nature and may not require detailed review by this Committee. With this in mind, the Office of the Union has prepared this paper to highlight the following changes in response to comments made by this Committee and those which, in addition, are considered to be of a legal or administrative nature. It also provides an explanation of the need for the associated TGP documents to be adopted in parallel with document TG/1/3.

## I. MATTERS PREVIOUSLY CONSIDERED BY THE COMMITTEE

- (a) Varieties of Common Knowledge (document CAJ/42/7 Prov., paragraphs 17 to 34)

3. The text of Chapter 5.2 is in accordance with the position of the Committee, except that one particular aspect, considered to establish common knowledge (see (d) below), has been omitted following discussions in the Enlarged Editorial Committee. The Committee's position is as follows:

Specific aspects which shall be considered to establish common knowledge include, among others:

- (a) commercialization of propagating or harvested material of the variety or publishing a detailed description;
- (b) the filing of an application for the granting of a breeder's right or for the entering of another variety in an official register of varieties, in any country, shall be deemed to render that other variety a matter of common knowledge from the date of the application, provided that the application leads to the granting of a breeder's right or to the entering of the said other variety in the official register of varieties, as the case may be;
- (c) existence of living plant material in publicly accessible plant collections;
- [(d) varieties included in a collection officially used for examination of applications for plant breeders' rights] *omitted from the General Introduction.*

4. Aspect 3.(d) has been proposed for deletion because the collection should only be made up of candidates or plant material which is publicly accessible. Candidates are dealt with under (b) and plant material which is publicly accessible is dealt with under (c). There is a danger if (d) extends further than (b) and (c). This would allow a breeder to arrange for a variety, which has not been entered for protection, to be included in a collection envisaged in (d) and block distinctness for other varieties – thereby achieving a degree of protection without the variety becoming a matter of common knowledge in the real sense and without the cost of seeking plant breeders' rights. Furthermore, this option may only exist for member States using an official system of examination and not for those operating a breeder based testing system. It appears that there have been cases where the inclusion of varieties in the DUS collection has been requested for this purpose. There are also practical difficulties because the "variety" would have to be characterized at significant cost – potentially at the cost of plant breeders' rights' applicants. In the light of these complications, it is suggested that 3.(d) be removed from the General Introduction and may be considered further under TGP/3, if appropriate.

- (b) Supporting Evidence (document CAJ/42/7 Prov., paragraphs 52 to 64)

5. All reference to "supporting evidence" has been removed. Chapter 4.7 "Functional Categorization of Characteristics" has introduced the status of additional characteristics and clarifies their function and selection criteria.

(c) Requirement for Uniformity in Characteristics Used for Distinctness (document CAJ/42/7 Prov., paragraphs 69 to 73)

6. The Committee considered the following extract from document TC/36/9:

“For the assessment of distinctness no candidate variety 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.”

7. The Committee could not accept this principle, noting that it would cause particular difficulty for establishing distinctness from certain types of non-uniform varieties, e.g. landraces. The Committee is advised that this requirement has now been removed and that the only reference to uniformity in relation to distinctness is the following:

“5.3.2 Clearly Distinguishing Varieties by their Characteristics

“65. A difference only in the level of uniformity of a characteristic, without any resultant change in the overall expression of the characteristic in the variety, is not a basis for establishing distinctness.”

(d) Essentially Derived Varieties (document CAJ/42/7 Prov., paragraphs 76 to 77)

8. The Committee expressed concern at references to Essentially Derived Varieties in the General Introduction and wished these to be withdrawn to make it clear that the General Introduction would not address this issue. The Committee is advised that there are no longer any such references in the draft TG/1/3.

(e) Acts of the Convention (document CAJ/42/7 Prov., paragraphs 79 to 80)

9. At the request of the Committee, the General Introduction has been amended to ensure that it is applicable to all Acts of the UPOV Convention and, in particular, does not refer exclusively to the 1991 Act.

## II. OTHER CHANGES TO DOCUMENT TC/36/9 CONCERNING ADMINISTRATIVE AND LEGAL ASPECTS

### General

(a) Contracting Parties

10. The term “member State” has been replaced with “Contracting Party” to provide consistency with the UPOV Convention but also to reflect the fact that not all parties to the Convention are “States.”

(b) Variety Description

11. Greater clarity has been sought for the relationship between the DUS examination and variety description. This has been provided in the following text:

*“Chapter 1: Introduction*

“1. According to Article 7 of the 1961/72 and 1978 Acts and Article 12 of the 1991 Act of the UPOV Convention, protection can only be granted in respect of a new plant variety after examination of the variety has shown that it complies with the requirements for protection laid down in these Acts and, in particular, that the variety is distinct (D) from any other commonly known variety and that it is sufficiently uniform (U) and stable (S), or “DUS” in short. The examination, or “DUS test,” is based mainly on growing tests, carried out by the authority competent for granting plant breeders’ rights or by separate institutions, such as public research institutes, acting on behalf of that authority or in some cases on the basis of growing tests carried out by the breeder. The examination generates a description of the variety, using its relevant characteristics (e.g. plant height, leaf shape, time of flowering), by which it can be defined as a variety in terms of Article 1(vi) of the 1991 Act of the Convention.”

*“Chapter 2.4: Characteristics as the Basis for Examination of DUS*

“16. For any variety to be capable of protection it must first be clearly defined. Only after a variety has been defined can it be finally examined to consider if it fulfills the DUS criteria required for protection. Throughout all Acts of the UPOV Convention it has been established that a variety is defined by its characteristics and that these characteristics are therefore the basis by which a variety can be examined for DUS.

“17. The 1991 Act of the UPOV Convention makes this clear by stating in Article 1(vi) that a variety is a plant grouping which can be “defined by the expression of the characteristics resulting from a given genotype or combination of genotypes” and which can be “distinguished from any other plant grouping by the expression of at least one of the said characteristics.”

“18. Further to their use in defining a variety, characteristics are the basis for examining distinctness, uniformity and stability.”

12. This clarification of the importance of the variety description has also resulted in a change of title to “Revised General Introduction to the Examination of Distinctness, Uniformity and Stability and the Development of Harmonized Descriptions of New Varieties of Plants.”

*Chapter 1: Introduction / Document Title*

13. The Office of UPOV considered that readers unfamiliar with the UPOV system may have found it difficult to go straight from the UPOV Convention to the General Introduction without a broader overview of the document in the introduction. This document has attempted to address this.

Chapter 2: The Examination of Distinctness, Uniformity and Stability (“DUS Testing”)

(a) Requirement for Examination (Chapter 2.1)

14. The UPOV Convention (Article 12, 1991 Act; Article 7, 1978 Act) requires an examination of the application. This is the basis for the DUS test, but in previous versions of the General Introduction, there was no clear reference to the appropriate Article in the UPOV Convention, unlike the specific references for Distinctness, Uniformity and Stability. This basis for the DUS test is now made explicit in the Chapter title and text.

(b) Characteristics as the Basis for Examination of DUS (Chapter 2.4)

15. Chapter 2.4 now explains the basis in the UPOV Convention for the use of characteristics in the examination of DUS and also allows the possible consideration of aspects other than characteristics:

“19. In the 1961/72 and 1978 Acts of the UPOV Convention, Article 6(1)(a) specifies that distinctness is established by a variety being “clearly distinguishable by one or more important characteristics” and Article 6(1)(d) requires stability in its “essential characteristics.” Although the term characteristic is not specified in the criteria for uniformity it is clearly implied that the uniformity requirement relates to the characteristics of the variety given that these are the basis for distinctness and stability.

“20. In the 1991 Act of the UPOV Convention, Article 8 states that uniformity is assessed on the basis of a variety being “sufficiently uniform in its relevant characteristics” and Article 9 states that a variety is “deemed to be stable if its relevant characteristics remain unchanged after repeated propagation or, in the case of a particular cycle of propagation, at the end of each such cycle.” Although the criteria for distinctness (Article 7) do not require a variety to be *clearly* distinguishable using exclusively characteristics, the requirement in Article 1(vi) that a variety “can be distinguished from any other plant grouping by the expression of at least one of the said characteristics ...” means that a variety must, at least, be distinguishable by characteristics. Any possible use of aspects other than characteristics, in examining distinctness under the 1991 Act of the UPOV Convention, will be considered in TGP/12 “Non-traditional Characteristics and Methods for DUS Testing.”

(c) Factors Which May Affect the Expression of the Characteristics of a Variety (Chapter 2.5.3)

16. The text in this section has been expanded to ensure adequate coverage of aspects such as the occurrence of phytoplasmas in varieties submitted for examination:

“24. The expression of a characteristic or several characteristics of a variety may be affected by factors such as pests and disease, chemical treatment (e.g. growth retardants or pesticides), past effects of tissue culture, different rootstocks, scions

taken from different growth phases of a tree, etc. Depending on the circumstances, the testing authority should ensure either that:

- “ • the varieties under test are all free of such factors or,
- “ • that all varieties included in the DUS test, including varieties of common knowledge, are subject to the same factor and that this factor has an equal effect on all varieties or,
- “ • in cases where a satisfactory examination could still be undertaken, the affected characteristics are excluded from the DUS examination unless the true expression of the characteristic of the plant genotype can be determined, notwithstanding the presence of the factor.”

### Chapter 3: Cooperation in DUS Testing

17. No substantial changes.

### Chapter 4: Characteristics Used in DUS Testing

#### (a) Selection of Characteristics (Chapter 4.2)

18. The requirements of a characteristic have been expanded to include the requirements that it must (a) result from expression of the genotype and (b) be sufficiently consistent and repeatable in a particular environment. Specific references have been made to the Convention, where appropriate.

#### (b) Review of “Pseudo-Qualitative” Characteristics (Chapter 4.4.3)

19. At certain points in Annexes I and II, there are two alternative versions of the text marked as <sup>1</sup>[ ] and <sup>2</sup>[ ]. This provision has been introduced because of a recent proposal, made at the Enlarged Editorial Committee meeting in January 2001, for a fundamental change to the classification of types of characteristics. The proposal is to replace “pseudo-qualitative” characteristics by a new type called “dual type” characteristics. This change has not been considered within the Technical Working Parties but in the view of some of the Chairpersons of the Technical Working Parties, it may offer the potential for an improved means of classification. It was considered appropriate for this option to be discussed at the Technical Committee. The Committee is advised that the position of the Technical Committee, to be developed at its thirty-seventh session, will be reported to the Committee at its forty-third session.

#### (c) Functional Categorization of Characteristics (Chapter 4.7)

20. Discussions in the Technical Working Parties highlighted the need for this further clarification regarding the function of the different categories of characteristic (e.g. asterisk, grouping, Technical Questionnaire, etc. ...) and criteria for these functions.

Chapter 5: Examining Distinctness(a) Measures in Addition to the Technical Examination of Distinctness (Chapter 5.3.1)

21. The Committee is asked to note that this particular matter is also under discussion by the Committee under agenda item 6 (see document CAJ/43/5).

22. The following new text has been introduced to reflect the actual situation in some Contracting Parties and, in particular, the use of the publication of variety descriptions to reinforce the technical examination:

“59. It is necessary to examine distinctness against all varieties of common knowledge. However, a systematic individual comparison may not be required against those varieties of common knowledge which are within a group known to have specific expressions of characteristics reliably ensuring that such varieties will be distinct from the candidate variety. In addition, certain procedures (e.g. publication of variety descriptions) may be developed to allow such an approach in some circumstances where there cannot be absolute certainty that all the varieties within such a group will be distinct from the candidate variety but where these supplementary procedures provide an effective examination of Distinctness overall. Such procedures may also be developed to address the lack of availability or accessibility of some varieties of common knowledge. Any such procedures will be set out in TGP/9 “Examining Distinctness.”

(b) The Criteria for Distinctness Using Characteristics (Chapter 5.3.3)

(i) Number of testing locations: The new text removes the need for establishing distinctness “in at least one testing place” because this would automatically preclude the possibility of establishing distinctness using two different locations, which is to be considered in document TGP/9 “Examining Distinctness.”

(ii) Consistent differences: Chapter 5.3.3.1, paragraph 68, has been elaborated to clarify why two independent growing cycles are not required for some varieties:

“68. However, in some circumstances the influence of the environment is not such that a second growing cycle is required to provide assurance that the differences observed between varieties are consistent. For example, in the case of many vegetatively propagated crops the level of uniformity within a variety, or in other words the consistency between individual plants of the same variety, is sufficient to observe that differences between varieties are significantly greater than the variation within a variety and therefore ensure that these are not due to environmental variation. Furthermore, if the growing environment of the crop is consistent, for example in a greenhouse with fixed temperature and light, it may not be necessary to observe two growing cycles to be confident that any differences observed could be considered to be consistent in that environment, although this will also be dependent on the features of propagation allowing confidence in the consistency of the observation.”

Chapter 6: Examining Uniformity

(a) Particular Features of Propagation (Chapter 6.3)

23. The new Chapter 6.3 “Particular Features of Propagation,” covering the different methods of examining uniformity, has been introduced to clarify the basis in the UPOV Convention for considering different uniformity requirements for self-pollinated, cross-pollinated and hybrid varieties.

(b) Self-Pollinated and Vegetatively Propagated Varieties (Chapter 6.3.1)

24. The references to specific standards (e.g. population standard of 1% on an acceptance probability of at least 95%) have been removed because they were considered too specific for a document intended not to need revision for several years. However, these specific standards have been transferred to TGP/10 “Examining Uniformity,” which is proposed for adoption in parallel with the General Introduction.

Chapter 7: Examining Stability

Relationship between Stability and Uniformity (Chapter 7.3.1)

25. The text has been revised as follows to clarify that the basis on which stability is inferred from uniformity is empirical, i.e. based on experience.

“115. It is not usually possible to perform tests on stability which produce results as certain as those for the testing of distinctness and uniformity. However, experience has demonstrated that, in general, when a submitted sample has been shown to be uniform the material can also be considered stable. Furthermore, if the variety is not stable, material produced will not conform to the characteristics of the variety and where the breeder is unable to provide material conforming to the characteristics of the variety the breeder’s right may be cancelled.”

Chapter 8: Composition of Test Guidelines

Scope of TGP/7 “Development of Test Guidelines”

26. The various discussions in the Technical Working Parties have resulted in the identification of several important matters to be considered for Test Guidelines. These include the procedure for introducing and for updating Test Guidelines and the development of a model Test Guidelines document. In response, it is suggested that the scope of document TGP/7 should be broadened to encompass all practical aspects relating to the development of UPOV Test Guidelines, i.e. the practical implementation of the General Introduction. It has also been observed that most of the contents of the chapter on Test Guidelines in the previous draft was very detailed and were perhaps too restrictive for the General Introduction which is intended to be in place for many years. Consequently, all detailed aspects previously contained in this chapter have been removed. However, they have been transferred, largely unchanged, into draft TGP/7 “Development of Test Guidelines,” which is proposed for adoption in parallel with the General Introduction.



Chapter 9: Conduct of DUS Testing in the Absence of Test Guidelines

27. No substantial changes.

III. ASSOCIATED TGP DOCUMENTS

28. It will be necessary to adopt the associated TGP documents to ensure that certain current UPOV technical recommendations are not lost in the transition from TG/1/2. In particular, certain detailed statistical criteria have been transferred from Chapter 6 “Examining Uniformity” to TGP/10 “Examining Uniformity” and most of the detailed aspects of the Test Guidelines have now been transferred to TGP/7 “Development of Test Guidelines.” However, it is also important that the TGP documents are introduced to make direct reference to many existing important UPOV guidelines of which inexperienced DUS examiners may, otherwise, be unaware (e.g. TGP/5 “Experience and Cooperation in DUS Testing” makes reference to various UPOV model forms and agreements).

*29. The Committee is invited to recommend submission of document TC/37/5, Annexes I and II, as TG/1/3 and associated TGP documents, for approval by the Council at its next session on October 25, 2001.*

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