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INTERNATIONAL UNION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS

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ADMINISTRATIVE AND LEGAL COMMITTEE**Forty-Seventh Session****Geneva, April 10, 2003**

PUBLICATION OF VARIETY DESCRIPTIONS

Document prepared by the Office of the Union

1. The purpose of this document is to report on the results of a questionnaire designed to investigate the administrative, legal and financial framework in the field of publication and/or production of variety descriptions.

Background

2. At its forty-fourth session, on October 22, 2001, the Administrative and Legal Committee (hereinafter referred to as "the CAJ") considered documents CAJ/44/4 and CAJ/44/4 Add. and agreed on the Project to consider the publication of variety descriptions (hereinafter referred to as "the Project"). The discussions in the CAJ identified the need for a model study to investigate and develop solutions to technical issues concerning the possible development and publication of variety descriptions, at the international level, in an effective way. At the same time, it was noted that there were important administrative, legal and financial issues which would need to be resolved before considering the possible introduction of an international system for the publication of variety descriptions.

3. A draft questionnaire, seeking information on the current administrative, legal and financial framework in the field of publication and/or production of variety descriptions, was prepared by the Office of the Union in consultation with the *Ad hoc* Working Group on the Publication of Variety Descriptions (hereinafter referred to as "the Working Group"). At its forty-sixth session, on October 21 and 22, 2002, the CAJ approved the Questionnaire, the results of which form the basis of this document.

Results of the Questionnaire

4. The Questionnaire was sent on January 16, 2003, as an Annex to Circular 3399. As of March 31, 2003, the questionnaire had drawn responses from 27 authorities with experience in the publication and/or production of variety descriptions. Of those authorities, 26 were members of the Union and one was an intergovernmental organization. A list of the authorities which responded is reproduced in Annex I to this document.

5. A summary of the responses to the individual questions is provided in Annex II to this document. However, the following key aspects were identified from the responses:

- A significant number of authorities have experience in routinely publishing variety descriptions with variation in the exact information provided and financing of the publication.
- Nearly all authorities make variety descriptions available on request. In the same way as for those authorities with experience in routinely publishing variety descriptions, there is variation in the exact information provided and financing of the issuing and production of variety descriptions.
- The majority of authorities do not require authorization before issuing a variety description. However, some authorities require authorization and some restrict access to certain interested parties. Thus, some authorities would need to take legal measures to enable them to publish variety descriptions via a centralized international database, with access for all interested parties.
- If the publication of variety descriptions via a centralized international database proved to be possible, most authorities indicated their ability, in principle, to contribute with the submission of variety descriptions in an agreed electronic format. A small number of authorities indicated that they would be willing to provide technical and/or other resources to establish and maintain the database. However, it was noted that, in some cases, the necessary tools would need to be developed and funding for this work would also need to be addressed.
- With regard to the funding of any database, there were different opinions as to whether this should be self-financing, income-generating or free to all users. It was also noted that a study should be made on the possible financial effects for authorities of such a database.
- With only one exception, all respondents indicated that responsibility for submitted data and use of data should lie with the contributor and user, respectively.

Matters to be considered by the Working Group

6. Resulting from the analysis of the replies to the Questionnaire, the following have been identified as matters that appear to require further attention by the Working Group and the CAJ in the development of the Project.

Legal and Administrative Considerations

7. As a reflection of the general agreement (see replies to questions 24 and 25 in Annex II to this document), it is recommended to include the following principles in the Project:

(a) the accuracy of the data submitted to a centralized international database should be the sole responsibility of the contributor;

(b) the use of the data should be the sole responsibility of the user, regardless of any model systems which UPOV might develop to facilitate the use of data.

8. In relation to other legal and administrative considerations raised by the replies to the Questionnaire (see replies to questions 15, 16, and 17 in Annex II to this document), it is recommended that the Working Group further consider the following matters:

(a) while the replies to the Questionnaire have indicated that the majority of authorities have not identified legal difficulties associated with the publication of variety descriptions via a centralized international database, with access for all interested parties, some authorities require authorization and may restrict access to certain interested parties (see replies to questions 8, 11 and 14 in Annex II to this document). The Working Group may wish to consider, in coordination with the authorities concerned, the possibility of harmonizing and simplifying authorization procedures and to study possible solutions concerning the restricted access to variety descriptions by interested parties. This access to published variety descriptions would be considered in relation to:

(i) prior to the granting of protection;

(ii) after the protection has been granted;

(b) in coordination with the Technical Committee, further harmonization of the information provided in, and the format used for, variety descriptions for the international database (see replies to questions 3, 10, 17(i), 24(ii), (iii) and (iv) in Annex II to this document);

(c) clarification of legal issues concerning the results of the examination and of the variety description, in coordination with the relevant authorities (e.g. one authority indicated that prior to the contribution of data to the international database, it may need to waive, for this purpose, its copyright on published material, another authority pointed out some ownership considerations);

(d) the legal aspects of a delegation mechanism to deal with the publication aspects for the international database;

(e) the level of centralized error checking system which might be necessary before publishing in the international database; and

(f) the legal and administrative aspects of working with different languages and/or alphabets.

Financial Considerations

9. In the replies to the Questionnaire (see replies to questions 20, 21, 22 and 23 in Annex II to this document), there were different views on whether this database should be self-financed through income from non-contributing users (15 in favor), free to all users (9 in favor) or income-generating (1).

10. Several authorities would, in principle, contribute data to a centralized database freely if there was free access to all data in the database for all contributing authorities. The same number of authorities would contribute freely on the basis that non-contributing users paid a fee to UPOV. Other authorities preferred different combinations of the options proposed in question 22.

11. Bearing in mind the preferences expressed by the authorities in the Questionnaire, in relation to the financial considerations in the development, maintenance and access to a centralized international database, further analysis on the following is recommended:

(a) cost analysis for UPOV (budget) of each of the different financial scenarios (e.g. self-financed, free to all users or income-generating database);

(b) study of the financial implications, for authorities, of the creation of an international database for each of the different financial scenarios (e.g. self-financing, free to all users or income-generating).

12. It is proposed that the CAJ invite the Working Group to consider the matters raised in the responses to the Questionnaire and, in particular, paragraphs 7, 8 and 11 of this document and report to the CAJ on the proposals of the Working Group for taking up these matters alongside the technical matters of the Project.

13. The CAJ is invited to note the results of the Questionnaire and comment on the matters to be considered by the Working Group as provided in paragraph 12 of this document.

[Annex I follows]

ANNEX I

LIST OF AUTHORITIES
WHICH RESPONDED TO THE QUESTIONNAIRE

Members of the Union:	Australia
	Argentina
	Belgium
	Canada
	China
	Croatia
	Czech Republic
	Denmark
	Estonia
	Finland
	France
	Germany
	Hungary
	Ireland
	Israel
	Japan
	Latvia
	Mexico
	New Zealand
	Poland
	Republic of Korea
	Romania
	Russian Federation
	Spain
	Sweden
	United States of America
Intergovernmental Organization:	Community Plant Variety Office (CPVO)

[Annex II follows]

SUMMARY OF RESPONSES

I. AUTHORITIES WITH EXPERIENCE IN PUBLISHING VARIETY DESCRIPTIONS

QUESTION 1. Does your authority have experience in publishing variety descriptions?Summary of responses

Yes	9
No	18
Total	27

QUESTION 2. Does your authority currently publish variety descriptions?Summary of responses

Yes	9
No	0
Total	9

Comments:

- (i) One authority had experience in certain species only.
- (ii) Another authority had experience in the annual publication of variety descriptions registered in the national catalogue.

QUESTION 3. What information is provided in the variety description?Summary of responses

3.1	“Full” description according to all characteristics in the UPOV Test Guidelines	1(+2)
3.2	UPOV asterisked characteristics	2(+2)
3.3	“Full” description according to all characteristics in the test guidelines used for DUS examination in your territory	1(+3)
3.4	Other (i.e. photographs)	6

Comments:

- (i) Three authorities have provided for different replies depending on the species (see figures in brackets in the table above).
- (ii) One authority may use a specific characteristic to “ascertain” distinction (e.g. diagram).
- (iii) Five authorities publish photographs.

QUESTION 4. What means does your authority use for publication (e.g. printed gazette, Website, CD-ROM, etc.)?

Comments:

- (i) The majority of authorities use printed gazettes as the means of publication.
- (ii) One authority uses the Website for publication purposes and makes printed copies available for specific uses and upon request.
- (iii) In addition to the printed gazette, two authorities also use the Website and another authority is currently publishing only bibliographic data on the Website and CD-ROM; the latter is, however, planning to include full descriptions in the near future.
- (iv) One authority uses the Official Journal, Website and, for certain cases, also a CD-ROM as means for publication.

QUESTION 5. Who receives copies of the publication?

Comments:

- (i) All the authorities provide for accessibility of the publication or the Website to interested parties, in certain cases, subject to subscription or payment of a fee.
- (ii) Some examples of parties receiving the gazette or consulting the Website are the following: administrations and universities, public libraries, interested breeders, field inspectors, authorities for agriculture and agro-research, plant genetic resource centers, agro-library, intellectual property offices who participate in document exchange agreements and interested individuals.

QUESTION 6. Does your authority charge the recipients?

Summary of responses

Yes	3+3 (paper only)
No	3 (Website only)+ 2 (Website and paper)+ 1(paper only)

Comments:

- (i) The majority of the authorities charge the recipients of paper publications unless they are official authorities.
- (ii) Access for Website publication is free of charge in five countries.
- (iii) Access to publication of variety descriptions is provided completely free of charge by three authorities and an additional authority is in the process of taking that decision.

QUESTION 7. Is the cost of publication borne:

Summary of responses

7.1	Entirely by the fees to applicants	3
7.2	Entirely by the authority	4
7.3	Entirely by the recipients	0
7.4	Other	2
	Total	9

QUESTION 8. Do you require authorization for the publication (e.g. by the applicant)?

Summary of responses

Yes	0
No	9
Total	9

Comments:

(i) In general, the authorities replying do not require authorization for the publication. However, there are two particular exceptions:

- In the case of one authority, the applicant reviews and approves the description, but authorization is not required for the publication;

- In the case of another authority, authorization is required by the applicant for pending plant breeder's rights applications, but not after the right has been granted.

(ii) One authority indicated that no authorization was required for publications (with a minor exception).

II. AUTHORITIES WHO MAKE VARIETY DESCRIPTIONS AVAILABLE ON REQUEST

QUESTION 9. Does your authority make variety descriptions available on request?

Summary of responses

Yes	23
No	4
Total	27

Comments:

The explanation given by one authority is that it makes the descriptions available via publication and another authority because, while not confidential, access to the descriptions is restricted.

QUESTION 10. What information is provided in the variety description?

Summary of responses

10.1	"Full" description according to all characteristics in the UPOV Test Guidelines	7(+3)
10.2	UPOV asterisked characteristics	3(+2)
10.3	"Full" description according to all characteristics in the Test Guidelines used for DUS examination in your territory	12(+3)
10.4	Other (i.e. photographs)	8

Comments:

(i) Three authorities have provided for different replies depending on the species (see figures in brackets in the table above).

(ii) One authority has indicated the use of shadowgraphs.

(iii) Six authorities incorporate photographs in the variety descriptions, however, for certain authorities, this applies only for fruit and ornamental varieties.

(iv) One authority may publish a specific characteristic used to “ascertain” distinctness (e.g. diagram).

QUESTION 11. To whom do you make variety descriptions available?

Comments:

(i) The majority of authorities that make variety descriptions available upon request do not provide restrictions if the title has already been granted.

(ii) Some examples of parties requesting variety descriptions are the following: applicants, breeders, farmers, national institutes, related associations, authorities and official services, field inspectors, seed control authorities and other interested individuals.

(iii) During the period before the granting of the breeder’s right, several authorities make variety descriptions available only to other authorities and, in certain cases, to the applicant concerned or their representative.

(iv) One authority makes variety descriptions available only to authorities with whom it has bilateral cooperation agreements.

QUESTION 12. Does your authority charge a fee to recipients of variety descriptions?

Summary of responses

Yes	10
No	12
Total	22

Comments:

(i) Of those authorities requesting a fee, some make an exception for public institutions or authorities.

(ii) In the case of one authority, a fee is charged only if the country test report is included.

QUESTION 13. Is the cost of issuing a variety description on request borne:

Summary of responses

13.1	Entirely by the fees to applicants	4
13.2	Entirely by the authority	10
13.3	Entirely by the recipients	10
13.4	Other	
	Total	24

Comments:

(i) For certain authorities which have indicated that the cost of issuing a variety description on request is borne entirely by the recipients, public entities are exempted of fee payment in certain members.

(ii) One authority provided for a combination of responses, the cost of issuing the description is borne by the recipients and, if it is not enough, by the applicant.

QUESTION 14. Do you require authorization before issuing a variety description (e.g. by the applicant)?

Summary of responses

Yes	2
No	20
Total	22

Comments:

(i) Two authorities require authorization. In the case of one of these authorities, the description is only issued if the applicant makes such a request.

(ii) During the period before the granting of the breeder's right, one authority makes available variety descriptions only to the other authorities and, in certain cases, to the applicant concerned or their representative.

III. LEGAL AND ADMINISTRATIVE CONSIDERATIONS

QUESTION 15. Please explain any legal difficulties, for your authority, associated with the publication of variety descriptions via a centralized international database, with access for all interested parties* .

Comments:

(i) The majority of authorities have not identified legal difficulties associated with the publication of variety descriptions via a centralized international database, with access for all interested parties.

(ii) One authority indicated the need to clarify how the authority concerned may waive its copyright on published material.

(iii) Another authority noted that a possible exception for parental lines of hybrid varieties could be explored.

(iv) Two authorities indicated that the legal difficulties are unknown, one of them due to the lack of experience in publication of variety descriptions.

(v) One authority indicated that the confidentiality obligation under its law only applies to variety descriptions of pending applications.

(vi) One authority noted that the legal problem concerning the ownership of the results of the examination and of the variety description should be considered.

QUESTION 16. Would your authority need to take any legal measures to enable it to publish variety descriptions via a centralized international database, with access for all interested parties?

Summary of responses

Yes	2
No	23
Total	25

Comments:

Two authorities identified the need to take legal measures, one of them indicated that a delegation mechanism should be established to deal with the publication aspects of a centralized international database.

* Interested parties could include plant breeders' rights authorities, other authorities (i.e. those not conducting the DUS examination on the candidate variety), breeders, genetic resource centers and the maintainers of 'land race' varieties.

QUESTION 17. If your authority is willing, in principle, to contribute data, would it be able to submit variety descriptions in an agreed electronic format for inclusion in a database (as for the UPOV-ROM)?

Summary of responses

Yes	21
No	5
Total	26

Comments:

(i) Two of the authorities willing to contribute data in an agreed electronic format specified that the above is subject to the format required for the submission; one of them clarified that it could only provide the data in the format prepared for its publication.

(ii) Two authorities willing to contribute indicated that this is subject to time and financial resources available.

(iii) Three authorities are currently developing a database for variety descriptions, once finalized they will be in a position to contribute.

IV. FINANCIAL CONSIDERATIONS

QUESTION 18. How is the cost of producing the description for a variety, protected by your authority, currently borne?

Summary of responses

18.1	Entirely by the application fees (including other types of fees such as annual fees and examination fees)	13
18.2	Entirely by the authority	1
18.3	Jointly by the authority and application fees	8
18.4	Other	2
	Total	24

Comments:

Two authorities indicated that the costs are borne by the applicant, due to the fact that the official description is based on the description submitted by the applicant.

QUESTION 19. How is the cost of producing descriptions of varieties “whose existence is a matter of common knowledge” currently borne?

Summary of responses

19.1	Entirely by the application fees (including other types of fees such as annual fees and examination fees)	8
19.2	Entirely by the authority	13
19.3	Jointly by the authority and application fees	3
19.4	Other	2
	Total	26

Comments:

For one authority, in the majority of cases, the cost is borne by the application fees, but in rare cases it is the authority who covers the costs.

QUESTION 20. Should the database be:

Summary of responses

20.1	Self-financing through income from non-contributing users	14(+1)
20.2	Income generating	1
20.3	Free to all users	8(+1)

Comments:

(i) One authority has proposed a combination of self-financing through income from non-contributing users and, if possible, revenue-generating if it does not create an obstacle for the sources of national income.

(ii) One authority has indicated that the database should be self-financed through income from non-contributing users and free to all [contributing] users (see figures in brackets in the table above).

QUESTION 21. Please indicate other possible financial considerations in the development, maintenance and access to a centralized international database.

Comments:

(i) One authority indicated that the creation of the database would require the adjustment of the existing systems, and/or establishment of the international database, and to maintain and continue to evolve the international database in order to fulfill the evolving operational and user requirements.

(ii) One authority made a proposal consisting of a financial share by non-contributing users, a contribution of data by the competent authorities and a complementary financial contribution to the UPOV budget.

(iii) One authority indicated that the time and financial considerations to extract the data for the international database should be further analyzed.

(iv) Another authority suggested that a cost-benefit analysis should be undertaken.

(v) Two authorities indicated that certain financial considerations would depend on who the users would be.

(vi) One authority noted that translation costs should also be included in the financial considerations.

(vii) One authority indicated that, for those authorities with systems based to a great extent on the information provided by the breeder, the access to the database should not be financially prohibitive.

(viii) One authority indicated that the related costs concerning the creation of the international database should be reflected in the UPOV Program and Budget.

(ix) One authority proposed a study of the financial implications of the creation of the international database for national and/or regional authorities.

QUESTION 22. Would you, in principle, contribute data to a centralized database:

Summary of responses

22.1	Freely with no conditions	0
22.2	Freely if there was free access to all data on the database for all contributing authorities	9
22.3	Freely on the basis that non-contributing users paid a fee to UPOV	9
22.4	On the basis that a fee would be paid by all users and an appropriate share paid to the contributing authorities and UPOV	2
22.5	Other	6
	Total	26

Comments:

(i) The reply of three authorities corresponds to the combination of the proposals in question 22.2 and 22.3. They would contribute data to a centralized database freely if there was free access to all data on the database for all contributing authorities and on the basis that non-contributing users paid a fee to UPOV.

(ii) One authority had indicated that their willingness to contribute is subject to availability of funds to extract the data and that appropriate contribution is received by all or most UPOV members.

(iii) One authority can contribute freely only in relation to the collection of abstracts, but not as regards the full descriptions.

(iv) The reply of one authority corresponds to the combination of the proposals in question 22.2 and 22.4. It would contribute data to a centralized database freely if there was free access to all data on the database for all contributing authorities and on the basis that a fee would be paid by all users and an appropriate share paid to the contributing authorities and UPOV.

QUESTION 23. Would your authority be prepared to provide technical and/or other resources for:

Summary of responses

23.1	Establishing the database	4
23.2	Maintaining the database	1
23.3	Contributing data	19

Comments:

(i) In addition to the contribution of data, one authority, subject to approval and funding, is prepared to provide technical and/or other resources also for establishing and maintaining the database.

(ii) Another authority would be willing to provide technical and other resources if funds are available and the database remains a valuable asset to all authorities including that authority.

(iii) One authority is prepared to contribute with expertise for the definition of the system for the database.

(iv) One authority finds it difficult to reply without analysis of the financial aspects.

V. RESPONSIBILITY FOR SUBMITTED DATA

QUESTION 24. Should the accuracy of the data submitted to a centralized international database be the sole responsibility of the contributor (as with the UPOV-ROM)?

Summary of responses

Yes	25
No	1
Total	26

Comments:

(i) One authority indicated that a centralized error checking system is also necessary before publishing.

(ii) One authority noted that language considerations should be taken into account. In particular the difficulty in translating full descriptions from non roman-script-based languages.

(iii) One authority indicated that full variety descriptions are currently available only in paper; in the future full variety descriptions may be available as scanned and/or converted pdf files.

(iv) One authority agreed with the principle that the accuracy of the data should be the sole responsibility of the contributor subject to the condition that further reformatting should not affect the data as submitted by the contributor.

VI. RESPONSIBILITY FOR USE OF DATA

QUESTION 25. If a database is established, should it be on the clear basis that the use of the data would be the sole responsibility of the user (as with the UPOV-ROM), regardless of any model systems which UPOV might develop to facilitate the use of data?

Summary of responses

Yes	26
No	0
Total	26

Comments:

- (i) One authority indicated that a system that UPOV could develop would serve as guidance, but each authority would need to interpret data for local conditions.
- (ii) One authority indicated the need to take into account the place of testing and the place where data was collected.
- (iii) Two authorities considered it very important to clearly indicate in the Project concerning the database that the use of the data is the sole responsibility of the user.

[End of Annex II and of document]