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MATTERS CONCERNING VARIETY DESCRIPTIONS

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1. The purpose of this document is to consider the purpose of the variety description developed at the time of the grant of the breeder's right (original variety description) and the status of the original variety description in relation to the verification of the conformity of plant material to a protected variety for the purposes of enforcement of the breeder's right.

2. The structure of this document is as follows:

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BACKGROUND

3. At its seventh session, held in Geneva on October 29 and 30, 2012, the Administrative and Legal Committee Advisory Group (CAJ-AG) considered matters arising after the grant of the breeder's right with regard to variety descriptions on the basis of Cases 3 and 4 presented in Appendix 1 of Annex I to document CAJ-AG/11/6/4 and paragraphs 9 and 10 of document CAJ/60/8, which state as follows:

"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 characteristics¹);
- "(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)."

4. At its seventh session, the CAJ-AG considered that it would be appropriate to develop further guidance on variety descriptions, in a separate document, on the basis of the relevant sections in document CAJ-AG/11/6/4 (see document CAJ-AG/12/7/7 "Report", paragraph 90):

5. At its eighth session, held in Geneva on October 21 and 25, 2013, the CAJ-AG considered document CAJ-AG/13/8/7 "Matters concerning variety descriptions" and the following matters for further guidance, on the basis of Cases 3 and 4 presented in Appendix 1 of Annex I to document CAJ-AG/11/6/4 and of paragraphs 9 and 10 of document CAJ/60/8, with particular reference to document TGP/5 "Experience and Cooperation in DUS Testing", Section 6: UPOV Report on Technical Examination and UPOV Variety Description:

(a) the purpose(s) of the variety description developed at the time of grant of the right (original variety description),

(b) the status of the original variety description in relation to the verification of the conformity of plant material to a protected variety for the purposes of:

- (i) verifying the maintenance of the variety (Article 22 of the 1991 Act, Article 10 of the 1978 Act);
- (ii) the examination of distinctness, uniformity and stability ("DUS") of candidate varieties; and
- (iii) the enforcement of the right.

(c) the status of a modified variety description in relation to (a) and (b) above produced, for example, as a result of:

- (i) a recalibration of the scale in the test guidelines (particularly for non-asterisked characteristics¹);

¹ "[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)

- (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; or
- (iv) the use of different versions of scales (e.g. different versions of the RHS Colour Chart).

(d) situations where an error is subsequently discovered in the initial variety description.

6. At its eighth session, the CAJ-AG agreed that the following matters in document CAJ-AG/13/8/7, paragraph 4, should be considered by the CAJ-AG in the first instance (see CAJ-AG/13/8/10 "Report", paragraph 72):

(a) the purpose(s) of the variety description developed at the time of grant of the right (original variety description);

(b) the status of the original variety description in relation to the verification of the conformity of plant material to a protected variety for the purposes of:

[...]

(iii) the enforcement of the right.

UPOV GUIDANCE ON VARIETY DESCRIPTION

Reference to "variety description" in the UPOV Convention

7. The 1991 Act of the UPOV Convention does not make reference to "variety description".

8. The 1978 Act of the UPOV Convention makes the following references to "description":

"Article 6: Conditions Required for Protection

"(1) The breeder shall benefit from the protection provided for in this Convention when the following conditions are satisfied:

"(a) Whatever may be the origin, artificial or natural, of the initial variation from which it has resulted, the variety must be clearly distinguishable by one or more important characteristics from any other variety whose existence is a matter of common knowledge at the time when protection is applied for. Common knowledge may be established by reference to various factors such as: cultivation or marketing already in progress, entry in an official register of varieties already made or in the course of being made, inclusion in a reference collection, or precise **description** in a publication. The characteristics which permit a variety to be defined and distinguished must be capable of precise recognition and **description**.

[...]

"(d) The variety must be stable in its essential characteristics, that is to say, it must remain true to its **description** after repeated reproduction or propagation or, where the breeder has defined a particular cycle of reproduction or multiplication, at the end of each cycle."

Document TGP/5 "Experience and Cooperation in DUS Testing", Section 6 "UPOV Report on Technical Examination and UPOV Variety Description"

9. Components of a variety description are presented in the Annex "UPOV Variety Description" to document TGP/5 "Experience and Cooperation in DUS Testing", Section 6 "UPOV Report on Technical Examination and UPOV Variety Description", a copy of which is attached as an Annex to this document. The items forming the UPOV variety description are as follows:

1. Reference number of Reporting Authority
2. Reference number of Requesting Authority
3. Breeder's reference
4. Applicant (name and address)
5. (a) Botanical name of taxon
(b) UPOV code
6. Common name of taxon

7. Variety denomination
8. Date and document number of UPOV Test Guidelines
9. Date and/or document number of Reporting Authority's test guidelines
10. Reporting Authority
11. Testing station(s) and place(s)
12. Period of testing
13. Date and place of issue of document
14. Group: (Table: Characteristics; States of Expression; Note; Remarks)
15. Characteristics Included in the UPOV Test Guidelines or Reporting Authority's Test Guidelines (Table: Characteristics; States of Expression; Note; Remarks)
16. Similar Varieties and Differences from These Varieties
17. Additional Information
 - (a) Additional Data
 - (b) Photograph (if appropriate)
 - (c) RHS Colour Chart version used (if appropriate)
 - (d) Remarks

10. The "UPOV Variety Description" clarifies that the description is not composed of a description of the characteristics (item 15) in isolation. In particular, the key elements of a variety description at the time of grant of the breeder's right might be summarized as follows:

- (a) characteristics of the variety (Item 15); and
- (b) similar varieties and differences from these varieties (Item 16);
combined with
- (c) the information on the basis for (a) and (b), namely:
 - Date and document number of UPOV Test Guidelines (Item 8);
 - Date and/or document number of Reporting Authority's test guidelines (Item 9);
 - Reporting Authority (Item 10);
 - Testing station(s) and place(s) (Item 11);
 - Period of testing (Item 12);
 - Date and place of issue of document (Item 13);
 - Group: (Table: Characteristics; States of Expression; Note; Remarks) (Item 14);
 - Additional Information (Item 17);
 - (a) Additional Data
 - (b) Photograph (if appropriate)
 - (c) RHS Colour Chart version used (if appropriate)
 - (d) Remarks

11. The characteristics used in the growing trial for establishing distinctness and the differences in state of expression between candidate and the most similar variety(ies) should be provided in the variety description, as detailed in the addendum to item 16 "Similar Varieties and Differences from These Varieties" as follows:

"18. Explanatory Notes to the Annex: UPOV VARIETY DESCRIPTION

[...]

"(d) Ad Number 16 (Annex: UPOV Variety Description)

"Only those characteristics that show sufficient differences to establish distinctness should be given. Information on differences between two varieties should always contain the states of expression with their notes for both varieties; if possible, in columns if more varieties are mentioned."

Reference to variety description in other UPOV documents

12. Document TG/1/3 "General introduction to the examination of distinctness, uniformity and stability and the development of harmonized descriptions of new varieties of plants" and associated TGP documents make several mentions to variety descriptions with respect to the DUS examination. However, the purpose and status of the variety description generated at the time of the grant of the breeder's right is not discussed.

PURPOSE(S) OF THE VARIETY DESCRIPTION DEVELOPED AT THE TIME OF THE GRANT OF THE BREEDER'S RIGHT (ORIGINAL VARIETY DESCRIPTION)

13. On the basis of document TGP/5 "Experience and Cooperation in DUS Testing", Section 6 "UPOV Report on Technical Examination and UPOV Variety Description", the purpose of the variety description developed at the time of the grant of the breeder's right (original variety description) might be summarized as:

- (a) to describe the characteristics of the variety; and
- (b) to identify similar varieties and differences from these varieties; combined with the information on the basis for (a) and (b), namely:
 - Date and document number of UPOV Test Guidelines;
 - Date and/or document number of Reporting Authority's test guidelines;
 - Reporting Authority;
 - Testing station(s) and place(s);
 - Period of testing;
 - Date and place of issue of document;
 - Group: (Table: Characteristics; States of Expression; Note; Remarks);
 - Additional Information;
 - (a) Additional Data
 - (b) Photograph (if appropriate)
 - (c) RHS Colour Chart version used (if appropriate)
 - (d) Remarks

THE STATUS OF THE ORIGINAL VARIETY DESCRIPTION IN RELATION TO THE VERIFICATION OF THE CONFORMITY OF PLANT MATERIAL TO A PROTECTED VARIETY FOR ENFORCEMENT OF THE BREEDER'S RIGHT

14. UPOV guidance on the enforcement of breeders' rights contained in document UPOV/EXN/ENF/1 "Explanatory notes on the enforcement of breeders' rights under the UPOV Convention" explains as follows:

"SECTION II: Some possible measures for the enforcement of breeders' rights

"While the UPOV Convention requires members of the Union to provide for appropriate legal remedies for the effective enforcement of breeders' rights, it is a matter for breeders to enforce their rights."

[...]

15. In relation to the use of the original variety description, it should be recalled that the description of the variety characteristics and the basis for distinctness from the most similar variety are linked to the circumstances of the DUS examination, as set out in paragraph 10 (c) of this document, namely:

- Date and document number of UPOV Test Guidelines;
- Date and/or document number of Reporting Authority's test guidelines;
- Reporting Authority;
- Testing station(s) and place(s);
- Period of testing;
- Date and place of issue of document;
- Group: (Table: Characteristics; States of Expression; Note; Remarks);
- Additional Information;
 - (a) Additional Data
 - (b) Photograph (if appropriate)
 - (c) RHS Colour Chart version used (if appropriate)
 - (d) Remarks

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

(a) consider whether paragraph 13 provides a suitable summary of the purpose of the variety description developed at the time of the grant of the breeder's right (original variety description); and

(b) consider whether paragraphs 14 and 15 provide a suitable summary of the status of the original variety description in relation to the verification of plant material to a protected variety for the purposes of enforcement of the breeder's right.

[Annex follows]

ANNEX

EXTRACT FROM DOCUMENT TGP/5: "EXPERIENCE AND COOPERATION IN DUS TESTING"
SECTION 6: UPOV REPORT ON TECHNICAL EXAMINATION AND UPOV VARIETY DESCRIPTION

ANNEX

UPOV VARIETY DESCRIPTION

1. Reference number of Reporting Authority
2. Reference number of Requesting Authority
3. Breeder's reference
4. Applicant (name and address)
5. (a) Botanical name of taxon
- (b) UPOV code
6. Common name of taxon
7. Variety denomination
8. Date and document number of UPOV
Test Guidelines
9. Date and/or document number of
Reporting Authority's test guidelines
10. Reporting Authority
11. Testing station(s) and place(s)
12. Period of testing
13. Date and place of issue of document
14. Group: (if characteristics of number 15 are used for grouping, they are marked with a G in that number)

| UPOV No. | Reporting Authority No. | Characteristics | States of Expression | Note | Remarks |
|-------------|----------------------------|-----------------|----------------------|------|---------|
|-------------|----------------------------|-----------------|----------------------|------|---------|

Reference number of Reporting Authority

15. Characteristics Included in the UPOV Test Guidelines or Reporting Authority's Test Guidelines

| UPOV No. | Reporting Authority No. | Characteristics | States of Expression | Note | Remarks |
|----------|-------------------------|-----------------|----------------------|------|---------|
| | | | | | |

16. Similar Varieties and Differences from These Varieties

| Denomination(s) of variety(ies) similar to the candidate variety | Characteristic(s) in which the candidate variety differs from the similar variety(ies) ⁹⁾ | State of expression of the characteristic(s) for the similar variety(ies) | State of expression of the characteristic(s) for the candidate variety |
|--|--|---|--|
|--|--|---|--|

⁹⁾ In the case of identical states of expression of both varieties, please indicate the size of the difference.

17. Additional Information

- (a) Additional Data
 - (b) Photograph (if appropriate)
 - (c) RHS Colour Chart version used (if appropriate)
 - (d) Remarks
-

18. Explanatory Notes to the Annex: UPOV VARIETY DESCRIPTION

(a) General (Annex: UPOV Variety Description)

The reference number of the Reporting Authority should be repeated on each page of the report.

(b) Ad Number 14 (Annex: UPOV Variety Description)

Only information on the group to which the variety belonged should be given or information on groupings other than by characteristics listed in Number 15. Grouping by characteristics mentioned in Number 15 should be indicated simply by marking the respective characteristic in Number 15 with the letter "G" before the number of the characteristic.

(c) Ad Number 15 (Annex: UPOV Variety Description)

(i) All characteristics of the UPOV Test Guidelines should be reproduced, including those which are not applicable and those which have not been recorded. Those not applicable should be marked "not applicable," those not recorded, "not recorded."

(ii) The asterisks from the UPOV Test Guidelines should be repeated on the form.

(iii) Additional characteristics from the Reporting Authority's test guidelines should not be placed after the UPOV Test Guidelines characteristics, but in their sequence according to the UPOV principles, as the main purpose of the form is still for the authority's use. They do not need to be specially marked as they are sufficiently identified by the Reporting Authority's number.

(iv) The list contains only a small column for brief remarks or for a reference to lengthier remarks which should be reproduced in a footnote.

(d) Ad Number 16 (Annex: UPOV Variety Description)

Only those characteristics that show sufficient differences to establish distinctness should be given. Information on differences between two varieties should always contain the states of expression with their notes for both varieties; if possible, in columns if more varieties are mentioned.

[End of Annex and of document]