Disclaimer: unless otherwise agreed by the Council of UPOV, only documents that have been adopted by the Council of UPOV and that have not been superseded can represent UPOV policies or guidance.

This document has been scanned from a paper copy and may have some discrepancies from the original document.

———

Avertissement: sauf si le Conseil de l'UPOV en décide autrement, seuls les documents adoptés par le Conseil de l'UPOV n'ayant pas été remplacés peuvent représenter les principes ou les orientations de l'UPOV.

Ce document a été numérisé à partir d'une copie papier et peut contenir des différences avec le document original.

———

Allgemeiner Haftungsausschluß: Sofern nicht anders vom Rat der UPOV vereinbart, geben nur Dokumente, die vom Rat der UPOV angenommen und nicht ersetzt wurden, Grundsätze oder eine Anleitung der UPOV wieder.

Dieses Dokument wurde von einer Papierkopie gescannt und könnte Abweichungen vom Originaldokument aufweisen.

———

Descargo de responsabilidad: salvo que el Consejo de la UPOV decida de otro modo, solo se considerarán documentos de políticas u orientaciones de la UPOV los que hayan sido aprobados por el Consejo de la UPOV y no hayan sido reemplazados.

Este documento ha sido escaneado a partir de una copia en papel y puede que existan divergencias en relación con el documento original.

UPOV

TC/XVIII/7
ORIGINAL: German
DATE: September 30, 1982

INTERNATIONAL UNION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS

GENEVA

TECHNICAL COMMITTEE

Eighteenth Session
Geneva, November 18 and 19, 1982

MINIMUM DISTANCES BETWEEEN VARIETIES

Document prepared by the Office of the Union

Background

1. At its twenty-fifth session, the Consultative Committee of UPOV approved the envisaged procedure for the preparation of the hearing planned for 1983 of the international non-governmental organizations on the question of minimum distances between varieties and of variety denominations. The procedure (see document CC/XXV/8, paragraph 3) will therefore be as follows:

(i) The Office of the Union will prepare a draft paper, eventually intended as the basis of the hearing of international non-governmental organizations.

(ii) The draft paper will be submitted to the Administrative and Legal Committee and the Technical Committee when they meet in November 1982, and, if one or both of these Committees so recommend, also to the Consultative Committee, when it meets in the first half of 1983.

(iii) The hearing of the international non-governmental organizations will take place in the second half of 1983. Invitations will be extended to the four organizations in the field of plant breeding and the seed trade--AIPH (International Association of Horticultural Producers), ASSINSEL (International Association of Plant Breeders for the Protection of Plant Varieties), CIOPORA (International Community of Breeders of Asexually Reproduced Fruit Tree and Ornamental Varieties) and FIS (International Federation of the Seed Trade)--as well as to the AIPPI (International Association for the Protection of Industrial Property) and ICC (International Chamber of Commerce). The invitation will be accompanied by a document, consisting of the paper mentioned under (i), above, but taking into account the results of the discussions within the two Committees of UPOV and any discussion in the Consultative Committee.

(iv) The results on the hearing will be discussed in the first half of 1984 in the Technical Committee and in the Administrative and Legal Committee, and any necessary decisions in this matter, for instance on a resolution or recommendation, will be taken by the Consultative Committee and the Council in the second half of 1984" (see document CC/XXV/8 paragraph 3).

2. The above-mentioned paper is reproduced in the Annex to this document.

[Annex follows]

ANNEX

Draft

MINIMUM DISTANCES BETWEEN VARIETIES

Document prepared by the Office of the Union for the Hearing of the International Non-governmental Organizations

Introduction

1. The term "minimum distance between varieties" was coined in respect of the difference there should be between a new variety and any existing variety --especially another protected variety--to enable breeders rights (plant variety protection rights, plant patents) to be granted. Although this question has been of importance ever since UPOV has existed, especially in connection with the establishing of Test Guidelines and the determination of individual states of expression of the characteristics included in those Test Guidelines, it has gained importance in recent years as a result of various developments, namely

(i) the difficulties which have arisen in the case of varieties in which mutations appear frequently or can easily be provoked artificially;

(ii) the discussion on whether characteristics obtained with the help of electrophoresis or other sophisticated testing methods should be used in the testing of distinctness, homogeneity and stability and, finally,

(iii) the general question raised in the Technical Committee as to whether the range of characteristics included in the Test Guidelines should be enlarged.

In addition, the fact that breeders are increasingly using similar or identic basic material for their breeding, which will inevitably lead to varieties that are closer and closer and thus more difficult to distinguish from each other, was important for the question of minimum distances between varieties. Finally, new techniques permit relatively easy and rapid a transfer of certain characteristics from one variety to another, which enables a protected variety to be slightly changed and a new variety to be created out of it with the sole purpose of avoiding payment of royalties for the use of the protected variety or even of applying for protection for the variety itself.

2. As will have to be explained in more detail, the question of minimum distances is also closely linked with that of the scope of protection of the granted rights.

3. The aim of the present document is to form a basis for discussing the whole question of minimum distances. It sets out how the provisions of the Convention rule the minimum distances between varieties and the scope of protection, refers to the resolutions adopted within UPOV for the application of these provisions and enumerates various questions which could arise when applying the provisions of the Convention and the national provisions based on it, in order to direct discussions towards the crucial questions of detail. Thereafter follows a short explanation of the significance for legal policy of the decision on minimum distances and on the scope of protection and finally mention is made of the way in which influence could be exerted on the minimum distances and the scope of protection.

4. Where the following paragraphs contain detailed observations on the individual provisions of the Convention and on the terms used in them, these are the personal opinions of the authors of the document. They should in no way be taken as a binding interpretation of the Convention.

MINIMUM DISTANCE AS A CONDITION FOR PROTECTION

5. The UPOV Convention already contains detailed provisions to ensure that variety protection is granted only for varieties which have a certain distance from other varieties. These provisions are mainly contained in Article 6(1)(a), which stipulates that distinctness shall be a condition for pro-

tection. In line with the patent law, the term "novelty" is also used of this condition for protection. Within UPOV, however, it has become customary to use the term "distinctness" when relating the variety for which protection is sought to other existing varieties and to keep the term "novelty" for the other condition stipulated in Article 6(1)(b), according to which protection can only be granted if the variety itself has not been offered for sale or marketed with the agreement of the breeder or his successor in title within given periods of time, whereby the cultivation of the variety itself for testing, its submission for entry or actual entry in an official register, or any other action resulting in the variety itself becoming generally known is not an obstacle to protection.

6. According to the above-mentioned Article 6(1)(a) a variety is distinguishable if the following conditions are fulfiled: It 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. These conditions are explained in more detail in the following paragraphs to facilitate discussion.

Distinctness with Respect to Any Other Variety

7. To establish distinctness, the testing authorities make a comparison with all other existing individual varieties. Contrary to patent law, which the plant variety protection system took as a model, the totality of the other varieties is not taken to create a fictive state of common knowledge (simply pieced together by the official tester) comparable to the state of the art under patent law. If a submitted variety comes very close to several other varieties it has to be compared with each of those varieties individually, and not with a combination of them, and protection is only be refused if the submitted variety fails to be clearly distinguishable from (at least) one of the existing varieties.

8. It should be noted that the variety itself ("the variety" within the meaning of Article 6)(1)(b)) is not included in the common knowledge. It may itself be commonly known. It is therefore of no disadvantage to the breeder if he already makes known the variety before the date of the application for protection, in a publication or in a lecture, if he publicly shows or exhibits his variety, if he cultivates it for tests or applies for protection in another State or for entry in a register; only marketing of the variety before certain deadlines (including offering for sale) by himself or his successor in title can be damaging to his claim for protection. It is therefore necessary to clarify whether "another variety" or "the variety" itself is concerned. Is "the variety" within the meaning of Article 6(1)(b) only the plant material constituting the variety, developed by the applicant, together with material derived therefrom, and not identical material developed independently by another breeder in a separate breeding process? What is the legal position if another breeder has already developed a variety and has made it commonly known before the deadline, that variety being identical or almost identical with the variety for which protection is subsequently sought (this could be the case, for example, where both breeders have used the same basic material, the same breeding processes and have obtained the same or almost the same results)? Would these varieties, despite their morphological, physiological and even genetic identity or quasi-identity, constitute "other" varieties in relation to each other or would that be plant material of the same variety, i.e. of the variety itself? When assessing protectibility of the submitted variety, therefore, should Article 6(1)(a) (distinctness) or (b) (novelty) of the UPOV Convention be applied? As regards the background to this ruling, the intention was doubtlessly to enable the breeder to do certain things with his own variety before applying for protection, for instance, application for registration of the variety in the national list, which would have prevented the granting of protection, had the strict novelty requirements of patent law been adopted. The plant breeder was to be given more freedom than the technical inventor.

Common Knowledge

9. The other variety with which the submitted variety is to be compared must already be generally known at the time of application for protection, that is to say its existence must be a matter of "common knowledge." The Convention gives a number of examples for establishing such common knowledge (cultiva-

tion, marketing already in progress, entry in an official register of varieties already made or in the course of being made, inclusion in the reference collection, precise description in a publication). This enumeration is not, however, meant to be exhaustive. It already indicates that the notion of "common knowledge" is to be interpreted as extensively as possible. As soon as any event enables it to be established that the variety already exists, the wish of the authors of the Convention would seem to be that "common knowledge" be assumed, even where, in individual cases, it was not possible for a competitor to know of the existence of the variety. A competitor will not have had this possibility, for example, during the period in which the variety--for which protection is granted afterwards--has been filed for protection but not yet been made public by the Office, a case which in a number of member States at least is considered to establish common knowledge. Whether the mere publication of breeders' variety descriptions, e.g. of mutations, which come very close to a variety that is a candidate for protection would be sufficient to establish common knowledge has not yet been unanimously clarified within UPOV.

Characteristics

10. The wording of the Convention requires that the characteristics for assessing distinctness should be such that they are capable of precise recognition and description. In addition, the range of characteristics has been further limited by the adjective "important", which will be dealt with in more detail in the following chapter. By definition therefore, all kinds of characteristics may be considered (on the sole condition of being important) if they can be recognized and described. However, the question arises here as to how the terms "recognition" and "description" are to be interpreted. Can a characteristic be described when it exists only as a reaction to a given treatment? Can a characteristic be recognized if it is only possible to do so with complicated technical aids which are not available to every breeder or competitor? Or must it be possible to recognize it with the human sense organs or at least with simple commonly available technical aids?

11. Characteristics established by means of electrophoresis constitute an example of characteristics which can only be recognized and described after technical methods have been used. By electrophoretic methods we mean a series of methods having in common the fact that a given solution of plant material of a given variety is placed in an electric field with the result that the individual types of component matter in the solution separate from the other types and collect at predetermined time in each case at a given point and can thus be identified. Diagrams of material of different varieties can then be compared for congruence or lack of congruence and the view had been put forward that material of the same plant variety always gives the same diagram if standardized electrophoretic methods are used. If this is the case, a comparison of such diagrams could establish whether two samples stem from one and the same variety or from two different varieties.

12. It has been repeatedly proposed that these methods, which save time and money and appear to give very clear results, be put to good use in the testing of distinctness by the national authorities who would accept the result of electrophoretic methods as a characteristic. The discussions in various committees of UPOV have shown that, on the other hand, concern exists that this could lead to too fine a differention being made. Differences could arise between the electrophoretic diagrams of plants grown in different fields which have so far rightly been considered to belong to the same variety. Particular objections to the use of electrophoresis could also be forthcoming in view of the homogeneity requirements. Indeed, many of the varieties so far held to be homogeneous could no longer be considered so if this characteristic were to be included. It has been argued that such small differentiations would lead to economically absurd results. Furthermore, it has been asked whether variety testing methods should be used which are not readily available in general or in any event not to the medium and small-sized applicants.

13. To sum up, in all UPOV bodies at least, great reserve has been exercised and it has been said that electrophoresis should not be generally used for the time being. An exception, however, could be its use for a variety where the value test in comparison with comparable varieties had given a higher commercial value but for which distinctness could not be established or at least not clearly proved by conventional means. In such cases, where the Office was convinced of the existence of a new variety and there was a danger that a valuable variety could be withheld from society, an exception should be made

and the use of a characteristic allowed for distinguishing purposes which could only be represented by means of electrophoresis. In general, however, each UPOV member State should consult with the other member States before accepting electrophoretic methods for distinguishing purposes.

14. Characteristics obtained with the help of electrophoresis are mentioned only as an example of characteristics obtained by sophisticated testing methods. Other methods, for example, are color measurement and color analysis, the use of high-power microscopy or electron microscopy, high-pressure liquid chromatography or gas chromatography and chemical analysis. Further characteristics of this kind can also be created by setting up special situations and observing the behavior of the variety in such situations, e.g. their reaction to chemicals (as, for example, DDT), immune reactions or resistance to pests and diseases. Furthermore, possibilities can be found in the field of technological characteristics or other properties, or again in the characteristics which are easily and rapidly transferred from one variety to another (which are often used with the sole purpose of getting round protection). Very few of the characteristics obtained by these methods have so far been accepted for distinctness purposes although many of them have proved without any doubt highly useful for identification purposes (for the difference between distinctness and identification, see paragraph 17 below).

"Important" Characteristics

15. A submitted variety must be distinguishable by at least one "important" characteristic from any other variety whose existence is a matter of common knowledge. The UPOV Convention does not explicitly stipulate what has to be considered an important characteristic. In the early years of UPOV there was disagreement as to the points of view with respect to which the characteristic has to be important and the Council of UPOV decided in the General Introduction to the Test Guidelines that important had to be interpreted as "important for distinguishing one variety from another" (see document TG/1/2, paragraph 7).

16. The UPOV Test Guidelines for the individual species list a number of characteristics which all member States consider to be "important" for distinctness purposes and which are therefore also important for the examination of homogeneity and stability. They are not necessarily qualities which give an idea of a certain value that the variety may possess. The Tables of Characteristics are not exhaustive but may be enlarged by further characteristics if this proves to be useful. The member States can therefore draw up national lists of characteristics which contain additional characteristics and they are not prevented by the Convention from taking into account further characteristics in individual cases in actual testing. Whether these additional characteristics have to be mentioned in the national lists of characteristics before they can be taken into account in the testing of an individual variety or whether the national office is free to include any additional characteristic on the spot is a question of national legislation and the present answer differs in the various member States. The UPOV Convention and the UPOV Test Guidelines give the States a completely free hand in this case.

17. The interpretation of the word important as "important for distinguishing one variety from another" has recently been supplemented. The statement that all characteristics that are important for distinguishing purposes are also important characteristics within the meaning of the UPOV Convention could lead to the false conclusion that all characteristics that enable a variety to be identified can also be used as important characteristics for distinguishing purposes. The Technical Committee therefore prepared the following clarification which was noted with approval by the Council (see document C/XV/9, paragraphs 6 to 8):

> "6. The [Technical] Committee concluded that several sophisticated methods might be very well adapted for checking the identity of a sample but not for distinguishing varieties for the granting of variety protection. It therefore stressed the need to make a clear distinction between these two purposes.
>
> "7. To be used for identification purposes a method has to fulfill several technical requirements. It must be capable of standardization and should lead to the establishment of significant differences which are consistent and repeatable.

"8. To be acceptable as a method which would lead to characteristics which can be used for the establishing of distinctness for the granting of variety protection, the fulfilment of all these technical requirements alone may not be enough. The notion of an important characteristic may be open to other than purely technical interpretation. Decisions on the acceptance of a certain characteristic observed by a certain method will have to be taken species by species depending on the stage of development of breeding as well as on several further considerations which go beyond the competence of the Technical Committee."

18. This shows clearly that characteristics can exist that are very well suited for identification purposes or for confirming that a given sample belongs to a specific variety, but that cannot be considered important for distinguishing purposes. This type of characteristic is met with particularly when the sophisticated testing methods mentioned in paragraph 14 are used.

Reasons for the Rejection of Characteristics Obtained with the Help of Sophisticated Methods

19. The main reasons for the rejection of certain characteristics which have been obtained with sophisticated methods are:

(a) Lack of standardization or problems with the interpretation of the results

(b) Lack of a clear difference

(c) Disturbance of the whole plant variety protection system.

20. Lack of Standardization. Many of the sophisticated methods still require standardization or lack a detailed description, and problems arising in the interpretation of the results need resolving. For example, there are numerous methods which, although similar, differ from each other and give different results, thus making it difficult to compare or standardize. In addition, the results can be interpreted in different ways and thus lead to different conclusions. In the case of electrophoresis, for example, not only are different methods used but also results can be interpreted differently, e.g. the presence or not of certain bands, their position and their intensity can be interpreted differently. Some of these problems could, nevertheless, be solved within UPOV. Keeping to the example of electrophoresis, agreement could be reached within UPOV on one single method and on one single interpretation, e.g. it could be agreed to take into account only the absence or presence of certain bands.

21. Lack of a Clear Difference due to Lack of Homogeneity. For many characteristics obtained with sophisticated methods there is a problem of lack of homogeneity. Not only do these characteristics lack homogeneity in many of the presently protected varieties, but also it often seems difficult to improve this situation in new varieties, thus making it impossible to observe a clear difference which could establish distinctness. Before introducing any new characteristic therefore, it is first necessary to clarify the question of homogeneity and also that of the effect of the admission of this characteristic on varieties that are already protected.

22. Disturbance of the Whole Plant Variety Protection System. UPOV and the offices of the individual member States bear responsibility for the whole plant variety protection system and its usefulness for the general public. As already mentioned in the preamble to the Convention, they must pay attention to both the importance of the protection of new plant varieties for the development of agriculture in their territories and the safeguarding of the interests of the breeders. When accepting a characteristic as an important characteristic or a difference as a clear difference, they must keep in mind the question whether in so doing they are not making it possible to grant additional plant variety protection rights which would unjustifiably interfere with existing protection rights which the Convention requires them to "ensure" (see Article 1(1) of the Convention). A balance must be struck between the "ensuring" of granted rights and the need to enable new rights to be granted where something really new and worthy of protection has been created. The decision on whether a characteristic is important cannot therefore be taken safely on the basis of whether the characteristic enables two varieties to be identified but must also take into account whether acceptance of the characteristic would not unjustifiably undermine existing rights or even jeopardize the whole system of plant variety protection.

"Clearly" Distinguishable

23. The variety has to be "clearly" distinguishable and testing must give clear results. The Convention provides no more detailed definition of this requirement. Right from the beginning, therefore, UPOV has discussed this question in several of its organs. The result of those discussions is recorded in the General Introduction to the UPOV Test Guidelines (document TG/1/2) which states, for given cases, when a variety is clearly distinguishable from another commonly known variety.

24. For all groups of characteristics, the common criterion laid down for distinctness is that the difference between two varieties,

- has been determined at at least one testing place,
- is clear, and
- is consistent.

25. In the case of true qualitative characteristics the difference between two varieties has to be considered clear if the respective characteristics show expressions which fall into two different states. In the case of other qualitatively handled characteristics, an eventual fluctuation has to be taken into account in establishing distinctness.

26. When distinctness depends on measured [quantitative] characteristics the difference has to be considered clear if it occurs with one per cent probability of error, for example, on the basis of the method of the Least Significant Difference. The differences are consistent, if they occur with the same sign in two consecutive, or in two out of three, growing seasons.

27. If a normally visually observed quantitative characteristic is the only distinguishing characteristic in relation to another variety, it should be measured, in the case of doubt, if this is possible with reasonable effort. In any case, it is recommended to make a direct comparison between two similar varieties since direct pair-wise comparisons show the least bias. In each comparison it is acceptable to note a difference between two varieties as soon as this difference can be seen with the eye and could be measured though this measurement might require unreasonable effort. The simplest criterion for establishing distinctness is that of consistent differences (significant differences with the same sign) in pair-wise comparisons, provided that they can be expected to recur in the following trials. The number of comparisons has to be sufficient to allow a comparable reliability as for measured characteristics.

28. Cases can arise in which for two varieties differences may be observed in several separately assessed characteristics, and if a combination of such data is used to establish distinctness, it should be ensured that the degree of reliability is comparable with that required [for measured quantitative characteristics or normally visually observed quantatitive characteristics].

29. The interpretation contained in paragraphs 25 to 28, which has been taken from paragraphs 21 to 26 of document TG/1/2, clearly indicates that it is not possible to give a general interpretation of the word "clearly," but that the interpretation depends on the type of characteristic. Under the above-mentioned interpretation, there are no problems at all with respect to true qualitative characteristics as the minimum distances between two varieties are clearly fixed. For measured quantitative characteristics, the distances are also fairly clearly defined. The use of statistical methods demands, however, that the sample size be fixed if it is wished to obtain results with the same degree of probability. UPOV has therefore decided that the individual Test Guidelines will no longer state minimum sizes for samples but fixed sizes instead to ensure that the same difference is considered clear or not clear in all member States and to avoid the increase in sample size in some States meaning that smaller differences are still considered to be clear.

30. As can already be seen from paragraph 27 and the detailled provisions reproduced there, the interpretation for normally visually observed quantitative characteristics raised the biggest difficulties and still now gives the greatest tolerance for different possibilities of interpretation. A normally visually observed characteristic should be measured if it is the only distinguishing characteristic in relation to another variety. Only when this is not possible or the effort would be unreasonable, should other steps be taken.

31. Unfortunately, most of the characteristics for distinguishing purposes are either normally visually observed quantitative characteristics or characteristics which, although expressed qualitatively, are not true qualitative characteristics. In this last-mentioned case, paragraph 25 above also requires an eventual fluctuation to be taken into account, thereby leaving great scope for different interpretations, meaning that these two groups of characteristics will either require still further discussion within UPOV in order to restrict again the possible range of differences in interpretation or the fixing by the Technical Working Parties of the clear difference for each characteristic in the Test Guidelines. A similar situation applies also for the characteristics mentioned in paragraph 28 above, which however, have not occured very often as yet.

MINIMUM DISTANCE AND SCOPE OF PROTECTION

32. The breeder's interest in reconsidering the question of minimum distances would not seem, or at least, not alone, to stem from concern that another person could also obtain protection for a variety that is very close to his own variety. It is important to the owner of a protection right--often this is the most important aspect--to be able to prevent a competitor putting on the market propagating material that is almost identical with the material of the protected variety. In other words, for the breeders the scope of protection for their own variety is often of greater importance than the distance that has to be complied with for granting plant variety protection for other varieties.

33. Under the UPOV Convention there is a certain interaction between the minimum distance and the scope of protection as a result of Article 5(3) of the Convention since it is not necessary to have the authorization of the owner of the protected variety for creating a new variety on the basis of such already protected variety and for its marketing (with the exception of the repeated use of the variety, e.g. as a parent variety for the commercial production of a hybrid variety). This is an important departure from patent law where no comparable interaction exists and where it is quite possible for a patent to be granted for an invention which falls within the scope of protection of a more comprehensive invention. For example, one inventor may own a patent for a chemical substance and another inventor a patent for a new and inventive use of the substance for a specific purpose. In such a case, the owner of the process patent needs the consent of the owner of the product patent in order to exploit his patent and a third person wishing to use the substance for the above-mentioned purpose would need the consent of both patent owners, meaning he would have to pay royalties to both patent owners. Because of these differences between the two systems, the extensive patent case law and literature cannot be used for questions of plant variety protection, or at most in a very limited way.

34. Article 5(3) should therefore mean that the scope of protection of a protected variety cannot in any event extend to plant material of a new variety, i.e. it can go no further than the point at which protection can be granted for a new variety created from that material. It is another question, however, whether the scope of protection always extends to this boundary or whether between the protection given to one variety and the area in which another protection right can be granted there remains an intermediate space, meaning that material could be sold freely in this intermediate space without the permission of the owner of the protection right, although it would not be eligible for plant variety protection even if fulfilling the other requirements for recognition as a variety.

35. The Convention contains only a short ruling on the scope of protection. Article 5(1) simply says that effect of the plant variety protection right is that the prior authorization of the breeder (that is to say the owner of the protection right) shall be required for the production, for purposes of commercial marketing or offering for sale or marketing, of reproductive or vegetative propagating material, as such, of the new variety. What is therefore to be understood by "reproductive or vegetative propagating material, as such, of the new variety" as used in Article 5(1) of the UPOV Convention and in the national laws based on the Convention. These words most probably also cover propagating material produced from material of the new variety originating from the breeder. It is an open question, however, whether cover also extends to propagating material of a variety which is identical with the protected variety, but has been developed from other material, i.e. material of a vari-

ety from a "parallel breeder." It may also be asked whether propagating material of varieties which differ only slightly from the protected variety would also be covered. It will have to be discussed whether the owner of the right should not receive protection which also covers material of identical or almost identical varieties. It would seem quite logical to go up to the boundary of the area where protection could be granted for other varieties. On this assumption, the scope of protection would cover: material of the variety itself, material of an identical variety, material of any other variety that differs so little from a protected variety that plant variety protection cannot be granted. In general, it may be observed that in actual fact the scope of protection will be decided by the national courts.

OBJECTIVES OF LEGAL POLICY

36. The assessment of the minimum distances and of the extent of protection is of considerable importance for the individual protection right and consequently also for the system as a whole. Little importance was attached to this aspect in the early years since the number of protected varieties was small and distances between the individual varieties were larger. With the increase in the number of protected varieties and applications for protection rights, however, this question will play a more important role. The question of principle poses itself in a similar way for other protection rights of a comparable kind. The consequences of the size of the minimum distances are briefly outlined below.

Effect of Small Minimum Distances

37. A tendency to maintain small minimum distances will mean that a larger number of protection rights can be granted. This will favor the applicant for protection rights and will result in a large number of protected varieties and to intense competition and, obligatorily in a high degree of homogeneity of the individual varieties, which can be extremely difficult for the breeder to obtain. The workload of the offices will increase considerably, first, because more varieties will have to be tested and secondly because each variety will have to be tested more carefully and more exactly, e.g. to gain more statistical evidence of the smaller differences.

38. This also raises the question whether the additional effort on the part of the national offices is desirable from the point of view of national economy. Will the large number of almost identical varieties, bringing a considerable additional variety testing and maintaining workload make such a contribution to the development of agriculture that these efforts are justified? On the other hand, the commercial value of protection will be seriously eroded by the granting of further protection rights that are very close and by the corresponding narrowing of the scope of protection, particularly since modern techniques enable characteristics to be rapidly transferred to a protected variety (a special danger for very successful varieties). Consumers and trade would often not be able to tell the difference between numerous varieties, particularly where the distinction could only be made by very sophisticated and complicated methods.

39. This development would lead to the protection right becoming worthless and breeders not bothering in the long term to obtain protection rights. The system of protection could cease to be an incentive for the creation of new varieties and the possible result would be a decline in breeding work in general.

Effect of Large Minimum Distances

40. The adoption of large minimum distances and a broad scope of protection has the opposite effect of increasing the value of a protection right once it has been granted, although it makes variety protection rights harder to obtain. It will result in to strong protection rights representing a just return on the amounts invested. The efforts to produce distinguishable varieties will be strengthened and as a result varieties with truely distinguishable new characteristics will appear on the market instead of a large number of related varieties which often crowd around a successful variety without really bringing additional benefits. The requirements for homogeneity will not have to be set at an extremely high level. This will have a positive

effect on the commercial value of the variety. It will be more worthwhile obtaining protection and it is to be expected that the incentive for continued breeding activity will be strengthened. The identification of varieties during production, trade or at the consumers will be made easier and will be possible in many cases without the use of highly complicated equipment or sophisticated methods.

The Special Problem of Mutations

41. The question of minimum distances becomes highly critical where mutations are a frequent occurrence or can be readily generated. If the requirements for minimum distances are too low, a situation can very rapidly arise in this case where it is no longer worthwhile obtaining protection rights since the protection for commercially profitable varieties can easily be by-passed or the protected varieties are already superseded by other varieties after a short time.

POSSIBILITIES OF INFLUENCE

42. It is doubtful whether UPOV has any possibility at all of influencing developments. As regards the assessment of the scope of protection, this would in any event be most difficult since the decision always lies in the first instance with the relevant courts of the member States. At most, influence could be exerted by UPOV agreeing with the professional organizations on certain opinions to be expressed in the form of expert opinions or even recommendations, in the hope that the national courts will take these views into consideration.

43. As regards minimum distances as conditions for granting protection rights, the decisions are first taken by the variety protection offices that have to apply the UPOV Convention and the national laws based on it. The authorities of the member States have already made efforts within UPOV to achieve harmonized solutions and have established rules, principally in the General Introduction to the Test Guidelines, which are applied to a varying degree by the individual offices. If one or other aspect of the present situation appear unsatisfactory, the various organs of UPOV could take the following steps.

44. Technical Working Parties

(i) To provide the Technical Committee and the Administrative and Legal Committee with the necessary illustrative material and to avoid getting lost in purely theoretical discussions, the various Technical Working Parties could each be asked to select one of the adopted Test Guidelines for study, e.g. the Technical Working Party for Agricultural Crops could select the Test Guidelines for Wheat, the Technical Working Party for Fruit Crops the Test Guidelines for Apple, the Technical Working Party for Ornamental Plants and Forest Trees the Test Guidelines for Rose and the Technical Working Party for Vegetables the Test Guidelines for Tomato. The experts from the individual member States participating in the work of the respective Technical Working Parties could be asked to establish a list of all characteristics of the respective species considered important characteristics in their countries and to state in addition for each characteristic what was currently considered in their country to be a clear difference within the characteristic. The Office of the Union could compile this information from the individual member States in one document for the respective Technical Working Party and for the Technical Committee. The document could also be communicated to the professional organizations for their comments.

(ii) After conclusion of all, or only a part, of the work mentioned in paragraphs 45 and 46, the Technical Working Parties could be asked to check the suitability of the characteristics in all Test Guidelines when they were revised on the basis of the principles established by the Technical Committee. A further step that could be envisaged would be to add mimimum distances for each characteristic in all the Test Guidelines.

45. Technical Committee

(i) The Technical Committee could continue its discussions on minimum distances and, taking the example of characteristics obtained with the help of electrophoresis, could endeavor to reach decisions on the technical aspects of the acceptance of a characteristic. All decisions should clearly state whether they are of general applicability or are valid in certain areas only (a given type of characteristic, a given group of plants or species).

(ii) Various provisions of the General Introduction to the Test Guidelines could be reviewed as to their suitability and, if need be, revised or supplemented.

(iii) Additional elements could be included in the General Introduction to the Test Guidelines, e.g. the difference between characteristics that are sufficient for identification purposes, but are not considered important characteristics for distinctness purposes, could be clearly shown. General criteria for the acceptance of characteristics could be established--if need be, together with the Administrative and Legal Committee. The following criteria may be envisaged:

(a) The existence of a standardized method for the observation of the characteristics, producing reliable results.

(b) The degree to which the characteristic is dependant on environmental factors.

(c) The degree to which requirements for homogeneity and stability can be met.

(d) The degree of risk for existing variety protection rights.

(e) The effect on the variety protection system.

(f) Simple possibility of variety characteristic testing available to small and medium-sized breeders.

46. Administrative and Legal Committee

(i) The Administrative and Legal Committee--and if need be, also the Consultative Committee--could endeavor to reach a common interpretation of certain Articles of the Convention. A study could be made as to how the offices and courts of the member States have so far interpreted the provisions of the Convention and the national laws based on them and whether the Committee feels they have interpreted them in the right way. The national offices could be asked to put either in these bodies or their subgroups their views and ideas on this point at the next session or the one following that.

(ii) Although the scope of protection of a protected variety has to be decided in the end by the national courts, a common approach could be developed within UPOV that would help the courts in taking their decisions. The following questions would seem to need clarification:

(a) The interpretation of the term "other variety" in Article 6(1)(a) and its demarcation from the term "the variety" in Article 6(1)(b);

(b) The interpretation of the term "common knowledge" in Article 6(1)(a), particularly as regards the publication of variety descriptions prepared by the breeder;

(c) The interpretation of the term "reproductive or vegetative propagating material" in Article 5(1);

(d) The interpretation of the terms "recognition" and "description".

(iii) The points (d), (e) and (f) in the above paragraph 45(iii) could also be discussed jointly, if need be, with the Technical Committee.

Continuing Harmonization of the Lists of Characteristics and Clear Differences Within the Characteristics

47. The member States could be asked to inform the Office of the Union periodically on all additional new characteristics they include in their national lists of characteristics, and to state at the same time which differences they consider to be "clear differences." This would enable the Office of the Union to keep the other member States informed on new developments and thereby prompt them to consider whether these additional characteristics could also be included in their own national lists of characteristics. The Technical Working Parties could then also check whether the new characteristics should be included in the UPOV Test Guidelines.

[End of Annex]