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INTERNATIONAL UNION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS

GENEVA

TECHNICAL COMMITTEE

Twentieth Session

Geneva, November 6 and 7, 1984

MINIMUM DISTANCES BETWEEN VARIETIES

Document prepared by the Office of the Union

1. During the meeting with international organizations held on November 9 and 10, 1983, the item Minimum Distances Between Varieties was discussed on the basis of a document (document IOM/I/3) containing a restatement of technical rules adopted in UPOV which are of importance when minimum distances between varieties are determined, and also on the basis of comments received from the professional organizations. The results of these discussions are reflected in the Record of the Meeting (document IOM/I/12).

2. In order to facilitate the evaluation of the results of that meeting, the Office of the Union had drafted a number of questions, listed in Part I of the Annex to document CAJ/XIII/2. These questions had in the meantime been discussed by the Administrative and Legal Committee and also by several Technical Working Parties. The outcome of these discussions--collected separately for each of the 13 questions--is reproduced in the Annex to this document. The same Annex refers to the different bodies according to the code used for the preparation of documents for them, namely:

CAJ - Administrative and Legal Committee
TWA - Technical Working Party for Agricultural Crops
TWO - Technical Working Party for Ornamental Plants and Forest Trees
TWV - Technical Working Party for Vegetables

3. The wording of the answers from the Administrative and Legal Committee is taken from the Annex to document CAJ/XIV/2, and the wording of the answers from the Technical Working Parties from drafts prepared inside the Office of the Union for the reports on the latest sessions of the various Technical Working Parties. These drafts have not yet been approved by the relevant chairmen or experts, as the case may be, and therefore may yet undergo changes.

4. As already mentioned in Circular U 925 of June 13, 1984, and as can also be seen from the Annex to this document, the Administrative and Legal Committee has agreed that most of the questions mentioned relate either to subjects that have to be discussed by the Technical Committee only or to subjects which have to be discussed first by the Technical Committee and thereafter by the Administrative and Legal Committee.

[Annex follows]

ANSWERS TO THE QUESTIONS ON MINIMUM DISTANCES
MENTIONED IN PART I OF DOCUMENT CAJ/XIII/2
GIVEN BY THE ADMINISTRATIVE AND LEGAL COMMITTEE,
THE TECHNICAL WORKING PARTY FOR AGRICULTURAL CROPS,
THE TECHNICAL WORKING PARTY FOR ORNAMENTAL PLANTS AND FOREST TREES
AND THE TECHNICAL WORKING PARTY FOR VEGETABLES

Extracts from Documents CAJ/XIV/2, TWA/XIII/11 Prov.,
TWO/XVII/13 Prov. and TWV/XVII/19 Prov.

Question 1: Is there a need to come to a different, or more precise interpretation of the notions used in the Convention to describe what has subsequently become known as "minimum distances," in particular of the rule that a 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?"

Answers:

CAJ: The Committee held that the concepts used in the Convention to describe minimum differences, particularly in the provision that "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," did not need interpreting in a way different from current acceptance nor did they need more precise interpretation.

TWO: The Working Party saw no need to work out a more precise interpretation of the notions "clearly distinguishable" and "important characteristics" in the Convention. It did however propose to consider the possibility of including the words "minimum distance" in the Text of the Convention in the course of a future revision. It noted that the two terms led to the two main criteria for establishing minimum distances, namely (i) the notion "important characteristic" to the criterion whether or not to admit a characteristic for the establishing of distinctness and (ii) the notion "clearly distinguishable" to the criterion whether the difference between two varieties inside one and the same characteristic was sufficient to establish distinctness. The criteria to assess the importance of a characteristic given during the discussions are mentioned under question 5, and the criteria to assess the minimum distance inside a characteristic, are mentioned under question 4(b).

TWV: In broad terms, the minimum distance between two varieties

- (i) must be something that can be proved;
- (ii) must be about the same as the difference between varieties already existing;
- (iii) must, for quantitative characteristics, be significantly larger than the variation in the characteristic concerned;
- (iv) must not be so small as to endanger the whole plant variety protection system.

Question 2: Can it be maintained that a characteristic is considered to be 'important' if it is--only--'important for distinguishing the variety', i.e., irrespective of whether it is a functional characteristic or not?

Answers:

CAJ: The Committee felt that the concept should be maintained of a characteristic being considered "important" once it was "important for distinguishing the variety" whether or not it was additionally a functional characteristic. However, it appeared to be a task for the Technical Committee to determine whether the considerations set out in paragraph 9 of document IOM/I/3 were to be confirmed or modified.

It was pointed out that the opinion that the drafters of the Convention had been thinking of "a characteristic important for the economic value of the variety" when they chose the term "important characteristic" (see paragraph 15 of document IOM/I/11) was not justified. However, the Records of the 1957-1961 Diplomatic Conference were not very explicit in that respect.

TWO: The Working Party agreed to maintain the principle that a characteristic was considered important even if it was only important for distinguishing the variety.

TWV: The Working Party agreed that a characteristic was to be considered important even if it was only important for distinguishing the variety.

Question 3: How can a difference be made between a characteristic suitable only for identification purposes and a characteristic also suitable for assessing distinctness?

Answers:

CAJ: The Committee considered that questions 3 to 8, 10 and 13 raised in document CAJ/XIII/2 were of a mainly technical nature and were therefore to be examined by the Technical Committee. However, questions 6 and 7 comprised an important legal element and would be examined by the Committee on the basis of the conclusions reached by the Technical Committee.

TWO: The Working Party agreed that there was a difference between characteristics suitable only for identification purposes and those suitable also for assessing distinctness. Most characteristics which were useful for distinctness purposes could be considered useful also for identification, but many characteristics useful for identification purposes would not be acceptable for establishing distinctness. As to further criteria see question 5.

TWV: The Working Party held the view that a distinction between a characteristic suitable only for identification purposes and a characteristic suitable also for assessing distinctness might be made in individual Test Guidelines by giving a negative list of characteristics suitable for identification purposes but not acceptable as distinguishing characteristics.

Question 4: Is it possible to establish additional rules for determining minimum distances:

(a) General rules:

- (i) common rules for all plant species;
- (ii) separate rules for different groups of plants according to their intended use (e.g., as a major agricultural crop, as an ornamental species, as a vegetable crop);

(iii) separate rules for different groups of plants according to their method of propagation (e.g., vegetatively propagated, sexually reproduced, self-pollinated, cross-pollinated); or

(iv) different rules for each species?

(b) Specific rules?

If general rules can only be established to a limited extent, should minimum distances be fixed individually for each characteristic in each Test Guidelines document?

Answers:

CAJ: See under question 3.

TWO: (a) The Working Party agreed that there should be common rules for all plant species, but no separate rules for different groups of plants according to their intended use, according to their method of propagation or according to each species. This meant that, after reexamination--at the request of the Technical Committee--of the possibility of having, within one species, different degrees of homogeneity depending on the method of propagation (see paragraph 39 of document TC/XIX/5), the Working Party could not abide by the decision taken by the Technical Committee during its nineteenth session. It reconfirmed its position that only one degree of homogeneity was acceptable within one species.

(b) The Working Party noted that from a theoretical point of view it might be advantageous to fix the minimum distances individually for each characteristic in each of the Test Guidelines. For practical reasons this was not possible, however, especially as the minimum distance in quantitative characteristics depended on several factors, some of which might change from year to year, making it impossible to establish minimum distances in advance. The Working Party noted that in France this possibility was checked at present with respect to certain species, and that in the Federal Republic of Germany a similar system which had been used for some years had had to be abandoned.

The Working Party mentioned the following criteria that it would consider when deciding on the minimum distance within one characteristic:

- (i) The minimum difference will depend on the level of homogeneity of the varieties within that species. A low homogeneity level will therefore require a larger minimum distance.
- (ii) The minimum distance must be about the same as the difference between existing varieties that are close to each other.
- (iii) The minimum distance for quantitative characteristics must be sufficiently larger than the variation in the characteristic concerned.
- (iv) The minimum distance for quantitative characteristics that are measured should be checked by statistical means.
- (v) When the minimum distance is decided upon, it has to be considered not only that it is necessary to establish distinctness in a well-controlled test, but also that it has to be possible to prove the same distinctness later on in commerce.

- (vi) One possibility mentioned of deciding whether a certain difference was acceptable entails mixing a certain number of plants of an existing variety and a candidate variety which are rather close to each other, and asking the candidate variety's applicant to identify the plants belonging to his variety. If he is able to identify the plants belonging to his variety, some member States will consider that sufficient evidence of the difference being great enough to justify a separate right.

TWV: (a) The Working Party saw no possibility of establishing further general rules common to all plant species or to different groups of plants according to their intended use or their method of propagation, or for establishing common rules for each species. It did however stress that, despite the practical differences in the testing methods used in various member States, the results of the tests did not differ much.

(b) The majority of the members of the Working Party did not recommend fixing individual minimum distances for each characteristic in each of the Test Guidelines. Minimum distances would fluctuate according to the possibility of making observations. Normally, routine observations would be made, but where an observation was decisive for the granting of plant variety protection, a more careful observation would be carried out which might result in changes in the Notes attributed to the variety in a previous observation.

Question 5: Which are the criteria for the admission of further characteristics for the examination of distinctness, homogeneity and stability?

Answers:

CAJ: See under question 3.

TWA: (i) Some experts were of the opinion that all characteristics considered useful for the testing of distinctness should be included in the UPOV Test Guidelines, in order to make more States aware of the fact that those characteristics were already used and therefore deserved study with a view to inclusion in their own national test guidelines. Others considered it unnecessary, for a characteristic to be included in the UPOV Test Guidelines, to require that it be already used as a routine characteristic in several member States. Others expressed the opinion that all characteristics used in any of the UPOV member States should be listed to avoid situations such as the present one, where there were too many national differences in the establishing of lists of characteristics. Others wondered why, for example, 50 characteristics should be tested if the testing of only 20 characteristics was sufficient to distinguish the majority of the varieties. Another present situation to be avoided was that in which, in some member States, different lists of characteristics were used depending on whether the variety was tested for distinctness purposes for national listing or for plant variety protection.

(ii) During these discussions it became apparent that different approaches were taken in the individual member States with respect to the inclusion of further characteristics in national Test Guidelines. Some member States had long lists of characteristics while others contented themselves with a smaller number. This would lead to the situation where, in the countries with long lists of characteristics, there would be greater possibilities for distinguishing varieties, whereas for more characteristics homogeneity would be required and more varieties would be rejected for lack of it. In member States where a smaller number of characteristics was used, the varieties would need to be homogeneous for a smaller number of characteristics only, and therefore the number of varieties rejected for lack of homogeneity

would be smaller, whereas more candidate varieties would be rejected for lack of distinctness with the smaller number of characteristics. As long as the varieties were protected and commercialized in one member State only, there was no problem, but if breeders were to apply for protection of varieties in more than one member State, more cases would arise where in one member State a variety would be rejected for lack of distinctness or homogeneity while the same variety would be accepted in others.

(iii) Those placing more emphasis on the testing of homogeneity justified their approach by the fact that, if the breeder had made a genuine breeding effort, it was the duty of the competent authority to ensure that the variety was not kept from the market only because the characteristics used at present would not allow its distinctness to be established. The breeder would be able to make efforts to improve the homogeneity of his variety, whereas he would have little choice for improving the possibilities of distinctness if certain characteristics were not considered acceptable to the national authorities. The countries placing more emphasis upon the question of distinctness pointed out that, when looking for characteristics for distinctness, one would have to start with the most reliable characteristics, which were easily accessible and would not fluctuate. With regard to characteristics that had a certain fluctuation, the authority would have to stop at the point where the fluctuation increased, affording fewer possibilities for distinction. There was little use in including in the UPOV Test Guidelines purely descriptive characteristics which could not be used for establishing distinctness.

TWO:

The Working Party mentioned the following criteria which it kept in mind when deciding on the admission of further characteristics for the examination of distinctness, homogeneity and stability:

- (i) it must be possible for a variety to be homogeneous in that characteristic;
- (ii) it must be possible for a variety to be stable in that characteristic;
- (iii) it must be possible for a variety to be genetically stable in that characteristic;
- (iv) it must be possible for the expression of the characteristic to be proved;
- (v) the characteristic must show a certain fixed expression;
- (vi) the characteristic must be reproducible;
- (vii) the characteristic must be important for the recognition of the variety;
- (viii) it must be possible for the breeder to keep his variety true to type in commerce with respect to that characteristic;
- (ix) the characteristic must not demand unreasonable efforts on the part of the maintainer to keep his variety stable in that characteristic;
- (x) the characteristic must be used by the breeder during the selection of his variety;
- (xi) it must be possible to observe that characteristic practically on a large scale;
- (xii) it must be possible to note that characteristic during normal cultivation of the variety; if it is only possible to identify the differences with a magnifying class, this could not be done on a large scale;
- (xiii) it must be possible to notice where a change has occurred in the variety; if this is not possible the characteristic is not practicable;
- (xiv) it must be possible for a grower producing the variety to be aware of his infringement of rights if he uses a protected variety;
- (xv) it must be worth while to use that characteristic in testing; if all varieties show the same expression in that characteristic, the requirement is not fulfilled;
- (xvi) the characteristic must not demand unreasonable efforts on the part of the testing authority;

- (xvii) it must be possible to prove distinctness with the normal number of replicates; if too large a number of replicates is necessary to establish distinctness, the characteristic will not be admissible;
- (xviii) a standardized method must exist for the examination of the characteristic;
- (xix) the characteristic must enable a competent authority to prove distinctness even after several years; thus a characteristic on resistance to diseases for which it is not possible to store a certain strain of disease, or a characteristic for the testing of which a certain chemical is needed whose production cannot be ensured for the duration of protection, will not be acceptable;
- (xx) acceptance of the characteristic must not endanger the whole system of plant variety protection.

TWV: The Working Party cited the following possible criteria for the admission of further characteristics for the examination of distinctness, homogeneity and stability:

- (i) they had to be reliable, repeatable, homogeneous, stable and easy to assess;
- (ii) they had already been accepted in another member State;
- (iii) facilities to execute the test had to be available;
- (iv) they had to be needed to distinguish between two varieties;
- (v) the breeder claimed it to be the only distinguishing characteristic (if it was a special characteristic and only claimed for a given candidate variety, other varieties--except the one from which the candidate variety could otherwise not be distinguished--need not be tested with respect to that characteristic);
- (vi) [See also (i) to (iv) of the answer of the Technical Working Party for Vegetables to question 1].

Question 6: Should not only phenotypical but also genetic differences be taken into account in the examination of distinctness? How can the latter differences, which are not apparent, be assessed and described?

Answers:

CAJ: See under question 3.

TWO: The Working Party agreed that pure genetic differences for which no different phenotypical expressions could be noted should not constitute sufficient evidence for the establishing of distinctness.

TWV: The Working Party agreed that genetic differences which did not result in phenotypical or physiological differences should not be taken into account in the examination of distinctness.

Question 7: How far should the search for new characteristics for distinguishing purposes be pursued? Should an authority look for new characteristics if it is convinced of the 'originality' of the variety (e.g., a difference in yield) or only if the applicant claims genetic differences? In such cases, should sophisticated testing methods be used or should they be used only if the applicant so requests?

Answers:

CAJ: See under question 3.

TWO: The Working Party agreed that where it was convinced of the "originality" of the variety it would make more efforts to find a new characteristic enabling it to prove distinctness. Where the applicant claims distinctness in a special characteristic which can only be tested with considerable increase in expenditure, the applicant will be asked to pay the additional costs, and if he should agree to pay these costs the characteristic may be used for distinguishing purposes. If a difference is visually obvious in the plot but not according to the test results, the authorities would make a check on why this difference was not reflected in the observed characteristics. The Working Party agreed that sophisticated methods, for example electrophoresis, should not, even in these cases, be acceptable for establishing distinctness.

TWV: The Working Party was of the opinion that, where an authority was convinced of the originality of a candidate variety, it should look more carefully for new characteristics, not only when the breeder requested it but also on its own initiative. Even in such cases, however, sophisticated methods such as electrophoresis or biochemical methods should not be used to obtain distinguishing characteristics.

Question 8: Should the parent lines be examined in each and every case as well as the formula in the examination of a hybrid variety?

Answers:

CAJ: See under question 3.

TWO: The Working Party noted that this question was not applicable to the species in its field of competence.

TWV: The Working Party was not of the opinion that the parent lines should be examined in each and every case for a hybrid variety.

Question 9: In future, should only lines of hybrids be eligible for protection, and not the hybrids themselves?

Answers:

CAJ: It was pointed out that, although the exclusion of hybrids from protection could represent a technical solution, it would meet with legal obstacles in various States, particularly as a result of Article 2(2) of the 1961 Convention, which included hybrids in the definition of the word "variety" for the purposes of the Convention.

TWO: The Working Party noted that this question was not applicable to the species in its field of competence.

TWV: The Working Party thought it desirable that hybrids be eligible for protection and not the lines alone.

Question 10: Should it be more clearly stated that the UPOV Test Guidelines are primarily established for describing varieties and only secondarily for assessing distinctness, homogeneity and stability, or should that principle be changed?

Answers:

CAJ: See under question 3.

TWA: While some experts were of the opinion that the Test Guidelines were primarily established for distinguishing varieties, the majority confirmed that they were primarily established for describing varieties. One argument brought forward in support of the latter opinion was that under the present system it might very well happen that, according to the results of the testing

for all characteristics mentioned in the UPOV Test Guidelines, two varieties had a completely identical description but nevertheless, inside a given state of a characteristic, were so distinct as to justify the grant of two separate rights. Conversely, two varieties with different descriptions might not be sufficiently distinct from each other if the differences were in characteristics where a difference of more than one state of expression was considered necessary for distinction. The Working Party requested the Technical Committee to clarify that situation and also asked whether the title of the Test Guidelines needed amendment to make the aim clearer. The main advantage of the Test Guidelines for establishing distinctness--although their primary aim was for description purposes only--was that they served as a means of preselecting, screening the existing varieties and finding out those which most closely resembled the candidate variety under test. The real test of distinctness would take place then, however, by pairwise comparisons of the candidate variety with all those varieties most closely resembling it.

TWO: The Working Party had a long discussion on whether the UPOV Test Guidelines were primarily established for describing varieties and only secondarily for assessing distinctness, homogeneity and stability or vice versa. Finally the majority of the member States agreed that the Test Guidelines were established primarily for describing varieties. The discussions had therefore shown that this fact should be more clearly stated to avoid such confusion as had arisen even between the members of the Working Party. The Working Party considered it useful, however, to develop the Test Guidelines in such a way as to make them more useful also for the testing of distinctness. So far the Test Guidelines contained only information on the characteristics that were considered important for the testing of distinctness. They were silent on the difference within each characteristic which was considered sufficient to establish distinctness. Thus the Test Guidelines, and with them the description of the varieties, could only be used as a preselection to ascertain which of the varieties would have to be used for pairwise comparisons with a candidate variety. It was noted moreover that two varieties could have identical descriptions according to the UPOV Test Guidelines but could nevertheless be distinct because they showed a clear difference within the same state of expression of at least one characteristic. On the other hand, two varieties could have different descriptions, but the differences might not be enough to establish distinctness. Therefore, except where a minimum distance had been fixed for each characteristic, the Test Guidelines continued to be primarily intended for describing varieties.

TWV: The Working Party agreed that the Test Guidelines were primarily intended for describing varieties. However, it would prefer to change that principle if such a possibility could be found.

Question 11: Is it possible to accede to the wish of breeders to participate in meetings at which drafts for Test Guidelines are discussed or can discussions be envisaged with experts and representatives from the professional circles on the fixing of minimum distances for certain plant groups? How should the results of such discussions be given effect if only the second type of discussions is agreed to?

Answers:

CAJ: That question had to be answered by the technical bodies of UPOV. Nevertheless, the Committee held that meetings with breeders working with a given species, organized by the examining authorities at the place of examination, similar to that held in the Federal Republic of Germany in respect of Begonia Elatior, were to be preferred to participation of breeders in sessions of the Technical Working Parties.

TWO: The Working Party did not agree to invite breeders to its ordinary sessions, but agreed to give more opportunities to breeders and also growers to discuss present problems on a national level. The national authorities should thus keep contact with those of their breeders and growers who were interested in plant variety protection activities. The Working Party regretted on this occasion that for the species in its field of competence --with a few exceptions--it never received comments when UPOV draft Test Guidelines were sent to the professional organizations for that purpose.

TWV: The Working Party noted that in some member States breeders participated in meetings at the national level at which drafts for Test Guidelines were discussed or discussions on minimum distances took place. It recommended that such contacts be intensified at the national level.

Question 12: Should minimum distances be enlarged for species in which mutations occur frequently or can be easily induced, or, if minimum distances are maintained or even reduced, would it be desirable to introduce a "droit de suite" for the breeder of a variety for mutations of that variety? Would the latter be possible without amending the Convention?

Answers:

CAJ: It was emphasized that the wording of the Convention did not permit the breeder to be given a "droit de suite" in mutations derived from his variety: any mutant could be protected in the name of the person who had bred it or discovered it, irrespective of the amount of breeding work that had been done, if it was clearly distinct from the other varieties--particularly the mother variety--in one or more important characteristics. In fact, the problem under discussion was not so much that of mutations as that of minimum distances and, consequently, solutions, at least partial ones, could be found in a consensus on the question of those distances. It was also pointed out that although it was sometimes attempted to resolve the problem contractually, that procedure met with legal obstacles in some States. Furthermore, the producers were opposed to that solution as had been shown in recent discussions held between representatives of AIPH and representatives of CIOPORA.

TWO: The Working Party agreed that in principle the minimum distance should not be enlarged for species in which mutations occurred frequently or could easily be induced. In special cases, however, one might consider deciding that certain characteristics in which mutations were known to occur frequently or to be easily induced would no longer be accepted for establishing distinctness. The Working Party did not consider it desirable to introduce a "droit de suite" for the breeder of a variety for mutations of that variety. So far it was not possible to prove that a mutation was really a mutation.

TWV: The Working Party abstained from commenting on mutations as the question played a very limited role in its field.

Question 13. In looking for new distinctness criteria, should the distances within a characteristic be reduced or would it be preferable to look for new characteristics?

Answers:

CAJ: See under question 3.

TWO: The Working Party agreed that the question whether, in looking for new distinctness criteria, the distance within a characteristic should be reduced or whether it was preferable to look for new characteristics would have to be decided case by case. If

possible, first preference would have to be given to the search for new characteristics. In certain cases, depending on the homogeneity of a characteristic, it might be possible to reduce the distance within that characteristic. In other cases, where it was not possible to reduce the minimum distance inside a characteristic or to find a new characteristic, the variety would have to be rejected for lack of distinctness.

TWV:

The Working Party was of the opinion that the question whether in future, in searching for new distinctness criteria, the distance within a characteristic should be reduced or whether it would be preferable to look for new characteristics, depended on the development of the species concerned. If varieties of a species became more homogeneous in certain characteristics, the distances between varieties could be reduced for those characteristics.

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