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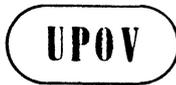
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TC/XXIII/3.

ORIGINAL: English

DATE: August 13, 1987

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

GENEVA

## TECHNICAL COMMITTEE

Twenty-Third Session  
Geneva, October 6 to 8, 1987

MATTERS ARISING FROM THE 1987 SESSIONS OF THE TECHNICAL WORKING PARTIES  
AND THE ADMINISTRATIVE AND LEGAL COMMITTEE  
TO BE DEALT WITH BY THE TECHNICAL COMMITTEE

Document prepared by the Office of the Union

This document summarizes, in its Annex I, matters arising from the 1987 sessions of the Technical Working Parties and the Administrative and Legal Committee which have to be dealt with by the Technical Committee (hereinafter referred to as "the Committee"). They comprise: (i) questions presented by the Technical Working Parties to the Committee; (ii) important decisions taken by the Technical Working Parties and communicated to the Committee for information; (iii) matters dealt with by the Technical Working Parties on the instructions of the Committee or in preparation for discussions planned in the Committee under separate agenda items; (iv) proposals for discussions of some items made by the Administrative and Legal Committee. The headings of the different items are listed on page 1 of Annex I.

To shorten references in this document to the various Technical Working Parties, use is made of the codes that designate their documents, namely:

- TWA - Technical Working Party for Agricultural Crops;
- TWC - Technical Working Party on Automation and Computer Programs;
- TWF - Technical Working Party for Fruit Crops;
- TWO - Technical Working Party for Ornamental Plants and Forest Trees;
- TWV - Technical Working Party for Vegetables.

[Annex I follows]

MATTERS ARISING FROM THE 1987 SESSIONS OF THE TECHNICAL WORKING PARTIES  
TO BE DEALT WITH BY THE TECHNICAL COMMITTEE

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Revision of the General Introduction to Test Guidelines

1. Some of the TWF experts proposed that the contents of subparagraphs 17(i) to 17(iii) of document TC/XXII/7 concerning the interpretation of a single combined Table of Characteristics for different groups of varieties should be included in the revised General Introduction to the Test Guidelines. Others, however, expressed concern that the revised General Introduction might become too long if all the subparagraphs were included.

(See TWF/XVIII/13 Prov., paragraph 7)

2. The Committee is invited to take the necessary decisions.

Continuous Characteristics of Which Only Three States Can Actually be Separated

3. During the discussion on Test Guidelines for Vegetable Marrow some of the TWV experts raised the question of how to deal with continuous characteristics with a 1-9 scale of which only three states were actually needed. The TWV agreed to pass the question on to the Technical Committee. (See TWV/XX/13 Prov., paragraph 26) Annex V to this document reproduces the respective part of the report on the discussions held on this subject during the twentieth session of the Technical Committee.

4. The Committee is invited to take the necessary decisions.

Test Guidelines for New Kinds of Plant

5. The TWV recognized that it might be necessary in the near future to discuss Test Guidelines for new kinds of plants such as medicinal plants and new oil crops for which none of the Technical Working Parties was working on as yet, and decided to ask the Technical Committee how to deal with such crops. The first species for which a decision has to be taken is Oenothera.

(See documents TWA/XVI/10 Prov., paragraph 32 and TWV/XX/13 Prov., paragraph 4)

6. The Committee is invited to take the necessary decisions.

Hilum Color in Broad Beans and Field Beans

7. The TWV noted that some breeders of field beans continued to express strong objections to the homogeneity requirement in hilum color and testa color in Faba beans, because those characteristics were agronomically of no importance. It was suggested that specific breeding methods should be taken into account not only in the case of synthetic varieties but also in the case of inbred varieties. The TWV noted that the TWA would, at its coming session, be discussing discontinuous characteristics of not truly self-pollinated varieties, and agreed to wait for the outcome of that discussion (see TWV/XX/13 Prov., paragraph 6). The TWA unfortunately had to postpone its main discussion on that subject to its session in 1988.

8. The Committee is invited to note the above information and to consider possible steps to be taken.

#### Use of the Term Resistance

9. The TWV noted that the Technical Committee had recommended that the term "resistance" be always used for characteristics concerning the reaction of varieties to diseases. Some experts mentioned that the term "tolerance" was an established pathological term, and that UPOV should use internationally standardized terms. However, the TWV agreed to the recommendation by the Technical Committee that the term "resistance" be used in Test Guidelines.

(See TWV/XX/13 Prov., paragraph 10)

10. The Committee is invited to note the above information and to consider possible steps to be taken.

#### Color Pictures as a Supplement to Variety Descriptions

11. During discussions on Test Guidelines, some experts in the TWF suggested that variety descriptions, especially color descriptions, should be facilitated by the use of color pictures, as was the description of shapes, which at present were in some cases supplemented by shadowgraphs. The TWF noted the technical difficulty of including color pictures as part of the variety description, especially for countries that had to supply variety descriptions on request to everybody; however, it agreed to ask the Technical Committee to discuss the question at its next session.

(See document TWF/XVIII/13 Prov., paragraph 24)

12. The Committee is invited to note the above information and to consider possible steps to be taken.

#### Items for the Technical Working Party on Automation and Computer Programs (TWC)

13. The TWO noted that it had no items to propose to the TWC. It added that, in general, statistical analysis was not used on vegetatively propagated species in its field of competence unless specifically stated in the Test Guidelines. Therefore the relevant information in the General Introduction to the Test Guidelines would not apply to most of the Test Guidelines established by the TWO.

14. The TWO noted further that the envisaged exchange of information on variety descriptions via computer would raise certain additional problems with ornamental varieties, as descriptions of such varieties were often made up not only from states of expressions of the characteristics, but also from remarks in the additional column. Those remarks were very frequent, as it was often not possible to observe only one state of expression, and a main state together with several other states appearing to a lesser degree had to be considered.

(See TWO/XX/20 Prov., paragraphs 14 + 15)

15. The Committee is invited to note the above information and to consider possible steps to be taken.

16. The TWV noted that Mr. Brand (France) would prepare for the next session of the TWV a summary of the methodological study for DUS testing on Nantaise type carrot varieties used at his station.

(See TWV/XX/13 Prov., paragraph 14)

17. The Committee is invited to note the above information.

18. The TWV was of the opinion that in the case of vegetables it was impossible to make a general rule on the layout of tests and that it should be discussed species by species. It noted especially that for some vegetable species, such as onion, plant density could have a strong influence on the result of tests. Finally the TWV agreed to establish an inventory of the layout of tests on onion varieties used at present by individual countries, to be discussed at the next session.

(See document TWV/XX/13 Prov., paragraph 16)

19. Some experts of the TWV addressed to the TWC the question whether it was possible to make a program for converting descriptions of varieties when Test Guidelines documents were amended.

(See document TWV/XX/13 Prov., paragraph 17)

20. The Committee is invited to note the above information.

#### Revision of the UPOV Model for a Report on Technical Examination

21. The Working Parties noted the new Model for a Report on Technical Examination as reproduced in Annex IV to document TC/XXII/7, and also the recommendation that it be used at the national level as well as at the international level. Some experts reported that attempts to use the new model had come up against several difficulties, and that in certain cases it had not been possible at all to follow the new model, which might have been adopted too hastily, before being properly checked for practicability. The TWA mentioned especially the two columns in front of the table of characteristics, which caused problems with smaller word processors.

(See TWA/XVI/10 Prov., paragraph 8)

22. The Committee is invited to note the above information and to consider possible steps to be taken.

Logical Order of States of Expression in Test Guidelines

23. The TWC noted that a number of virtual quantitative characteristics that were presented in the Test Guidelines in a qualitative way, for example shapes, could sometimes have their order of states of expression improved, especially for countries that intended to use computers to screen varieties for those characteristics. The TWC was aware of the fact that especially shape was a mixture of different characteristics, and that in certain cases different logical orders were possible. It recommended that the Technical Working Parties consider breaking down those characteristics as far as possible into different characteristics or, if that were not possible, ensuring that the states of expression were always presented in a logical order. To that end the experts could contact their computer experts at the national level. In addition, Dr. Laidig (Federal Republic of Germany) offered to check first drafts of Test Guidelines, at the stage of their submission to the professional organizations for comments, to ascertain whether the order of states of certain characteristics could be improved. The Working Party also stressed that a characteristic with the states "absent (1)" and "present (9)" should only be used in cases where absence was absolute. Otherwise the 1 to 9 scale should be applied with the first state reading "absent or very weak."

(See document TWC/V/8 Prov., paragraph 18)

24. The Committee is invited to note the above information and to consider possible steps to be taken.

List of Reference Books and Documents

25. The Working Parties noted that the Technical Committee had adopted and published the list of reference books and documents reproduced in document TC/XXII/4, and that the same list would also be included in the UPOV Collection of Important Texts and Documents. They invited their members to inform the Office of UPOV of any additional information or corrections that might be necessary in that document.

26. The Committee is invited to note the above information.

Color Charts

27. The TWO noted that the planned empirical grouping of the RHS Colour Chart to facilitate the screening of varieties by computer had not progressed as expected. As other groups were working on a similar approach, for example the authority registering all varieties marketed in the Netherlands, the TWO indicated that it would appreciate some speeding up of that work. It invited all members to ascertain at the national level whether other bodies were working on similar programs, in order that parallel and divergent results might be avoided.

(See document TWO/XX/20 Prov., paragraph 16)

28. The Committee is invited to note the above information.

Participation of Technical Experts from Professional Organizations

29. The professional organizations had nominated six technical experts to the last session of the TWV, a significantly larger number than at the last meeting of the TWV, when only one technical expert had been present. The TWV noted the difficulty for the professional organizations of inviting technical experts for one particular species instead of several species. It recommended that draft Test Guidelines be sent to professional organizations as early as possible, and that the experiences of breeders be reflected when new Test Guidelines were drafted through contact with the breeders at the national level.

(See document TWV/XX/13 Prov., paragraph 19)

30. Several experts of the TWA preferred inviting technical experts to its subgroup meetings when working papers on Test Guidelines were prepared, stressing that the subgroup meeting on Triticale and Durum wheat held in March 1987, at which the professional experts had participated actively and the discussion had concentrated on Test Guidelines for those two species, had been very successful. Others thought that the technical experts should be also invited to the actual Working Party sessions, so that the Working Party could have the opportunity to hear the opinion of the breeders of the country in which the session was held. The TWA confirmed however that even in the latter case, the participation of technical experts should be restricted to specific subjects on the agenda, of which moreover they should be informed beforehand. The Working Party did not achieve general agreement on this problem, however, so it agreed to invite some technical experts to a part of its next session, for the discussions on electrophoresis and on Test Guidelines for Triticale and for Durum Wheat.

(See TWA/XVI/10 Prov., paragraph 37)

31. The Committee is invited to note the above information.

Workload of the Technical Working Parties

32. Several Technical Working Parties reported their experience of the items to be covered during sessions having increased so much in recent years that it was no longer possible to cover them in the three days normally allotted to sessions every year. It is therefore planned that in 1988, in addition to several subgroup meetings, the TWA and the TWV will meet for four days, and the TWO even for five days.

33. The Committee is invited to note the above information and to consider possible steps to be taken.

Study of the Use of Different Electrophoretic Methods

34. At the time of writing this document, no new information has become available to the Office of the Union on the above item. Should a written report from the United Kingdom reach the Office of UPOV before the session of the Technical Committee, the information will be distributed either before or during the next session of the Technical Committee.

(See TWA/XVI/10 Prov., paragraph 29)

35. The Committee is invited to note the above information and to consider possible steps to be taken.

Combined Over-Years (COY) Analysis

36. The TWC, having noted the decision of the Technical Committee to replace the previous distinctness criteria for varieties of grass species with combined over-years (COY) analysis, took stock of the state of implementation of that decision in the various member States. While in the United Kingdom COY analysis had been used for sets of two years (at a 0.1% level of significance) and three years (at a 1% level) of results ending in 1987, Denmark, the Federal Republic of Germany and the Netherlands would use COY analysis, parallel to the previous UPOV criteria, as from 1987 only. In France it might be used parallel to the previous UPOV criteria as from 1988. In the Netherlands COY analysis had already been used for some 1986 data on red fescue varieties. In Spain and Israel no tests of varieties of grass species were taking place. The experts from those countries would however study the possibility of applying COY analysis to other cross-fertilized species, for example, lucerne or chick pea. In Denmark a study on applying the analysis to beet varieties had already started.

(See TWC/V/8 Prov., paragraph 6)

37. The TWC noted that the information necessary for applying the COY analysis was at present given in documents TC/XX/5, in Annex IV of document TWC/IV/13 and also in the documentation on the COY program and its users' guide, which also included magnetic tapes that had been distributed by Dr. Weatherup (United Kingdom) to certain interested States. As UPOV had now adopted those criteria for varieties of grasses, the information would be combined in one document, which could be updated at the same time and distributed to all member States. Dr. Weatherup would only circulate magnetic tapes by special request, however.

(See TWC/V/8 Prov., paragraph 9)

38. The TWC noted further results from the United Kingdom which confirmed the United Kingdom experts' decision to use for the conditions prevailing in their country the significance level of 0.1% for results of two years and 1% for results of three years. The other member States would have to obtain more evidence to find out whether they could reach at the same level of reliability, or whether a level of 5% for results of three years would be more realistic for their conditions. Several experts warned however that it might be difficult to explain to applicants and breeders that in various member States different yardsticks would be used for the testing of distinctness of one and the same variety.

(See TWC/V/8 Prov., paragraph 10)

39. The majority of the experts of the TWF were of the opinion that visual assessments were more efficient than statistical assessments for fruit crops, and they saw little possibility of introducing over-years-analysis for the testing of fruit varieties. The Working Party noted however that the experts from South Africa would study the applicability of over-years-analysis to fruit crops.

(See TWF/XVIII/13 Prov., paragraph 8)

40. Most of the experts of the TWV expressed their misgivings about introducing COY analysis for the distinctness testing of vegetable varieties. Some experts mentioned that the layout of tests of vegetables was quite different from that of grasses. Others expressed their concern that the differences between varieties might become progressively narrower if COY analysis were introduced for the testing of vegetable varieties.

(See TWV/XX/13 Prov., paragraph 15)

41. In order to promote the use of COY analysis for vegetables, the TWC asked several experts to try to apply COY analysis--if possible--to data on vegetable varieties such as onion, carrot or leek. It was hoped that in this way, together with direct contacts at the national level between the experts of the TWC and the TWV, the vegetable experts could be encouraged or persuaded to study or apply COY analysis also to species in their area of competence. The TWC noted at the same time however that, for most species handled by the TWO and TWF, there were fewer opportunities of applying that method, as only few characteristics were measured.

(See TWC/V/8 Prov., paragraph 14)

42. The TWC agreed to include modified joint regression analysis as an option in the COY program to be distributed. It could then be used by member States that had some difficulty in achieving the 1% level of significance to reduce the variation in certain characteristics.

(See TWC/V/8 Prov., paragraph 12)

43. The TWC noted a report from the United Kingdom on an investigation to reduce the broad range of variation in a given characteristic by comparing only varieties close to the candidate variety. The investigation was based on data of spring height and date of ear emergence of red fescue varieties, with all varieties being brought into ranked order in those characteristics. The study would be continued further to find out whether the method could be used as a supplement to COY analysis, to refine the possibilities of distinction where varieties could not be distinguished otherwise. The question of whether a differently ranked order of varieties would be necessary for each characteristic, or whether one order in one characteristic (e.g. ear emergence) could be fixed for the testing of all characteristics, would also be studied.

(See TWC/V/8 Prov., paragraph 11)

44. Having noted the reluctance of experts in some Technical Working Parties to study COY analysis, the TWC agreed to discuss during its next session the use of statistical methods and the reasons and need for applying statistical methods.

(See TWC/V/8 Prov., paragraph 13)

45. The TWA noted that the Technical Committee had agreed to introduce COY analysis for testing the distinctness of grass species at a significance level of at least 5%. It recognized however that only the United Kingdom was actually using COY analysis for testing grasses, and that the other member States were having difficulty in introducing COY analysis exactly as adopted by the Technical Committee. During the discussion the TWA noted the following proposals or comments to be transmitted to the TWC and to the Technical Committee (see TWA/XVI/10 Prov., paragraph 10):

- (i) Several experts of the TWA expressed the fear that the request for at least 5% significance level might be dangerous, as some member States might then be inclined to lower their levels, and it might be difficult at a later stage to raise them again.
- (ii) The TWC should take into account the testing methods used at present by the member States' testing authorities when it developed new statistical methods, in order to avoid any unnecessary complication of testing methods.
- (iii) The TWC should give the other Technical Working Parties enough time to catch up with the new improvement proposed by it. It should not therefore prepare further options for COY analysis for the time being.
- (iv) In future the Technical Committee should not adopt new statistical methods proposed by the TWC without the agreement of the other Technical Working Parties that would be affected by the changes, and without allowing them time to study the methods.
- (v) The TWA proposed that more experts working in non-statistical fields should participate in the work of the TWC.

46. The Committee is invited to note the above information and to consider possible steps to be taken, especially with respect to paragraphs 40, 42 and 45.

#### Testing of Homogeneity

47. The TWC discussed again the proposal for a new over-years uniformity criterion for cross-fertilized plants presented to the TWC during its previous session. The TWC followed the proposals for a change in the program and agreed to incorporate the method with the amendments in the COY analysis program as a subroutine within the whole package for further study. In that way combined-over-years analysis of distinctness and the over-years uniformity criterion could be studied further and applied to the same data.

48. Some experts said that standards should be studied to ensure that the application of that method did not open the way to more and more heterogeneous varieties. Others stressed that a further study was necessary to ensure continuity of results compared with the application of the present homogeneity criteria.

(See TWC/V/8 Prov., paragraph 15 and 16)

49. The Committee is invited to note the above information.

50. The TWC wondered a little about the background to the drawing up of the table with the number of off-types tolerated for various sample sizes in paragraph 28 of the General Introduction to Test Guidelines. Dr. Weatherup (United Kingdom) will try to calculate the maximum number of off-types for several

sample sizes not covered by the table but used by the member State concerned (e.g. 1,000, 2,000, 3,000, 4,000 and 5,000) which will give the same nominal standard.

(See TWC/V/8 Prov., paragraph 17)

51. The TWA noted that the TWC was studying the application of a nominal standard for testing homogeneity in self-pollinated plant species. The TWA recommended harmonizing the sample size and keeping the size mentioned in the Test Guidelines concerned. It proposed including the background explanation in the table of the number of acceptable off-types with respect to the sample size when the General Introduction to the Guidelines (document TG/1/2) was revised.

(See TWA/XVI/10 Prov., paragraph 11)

52. The Committee is invited to note the above information and to consider possible steps to be taken.

Priorities for the Extension of the List of Species of Which Varieties are Eligible for Protection in the Member States

53. At its nineteenth session the Administrative and Legal Committee asked the Technical Committee to define groups of species that should, as a minimum, be included in all member States' lists of species of which varieties were eligible for protection. Annex II to this document reproduces the part of the report that covers the discussions held on this subject at the nineteenth session of the Administrative and Legal Committee. Document CAJ/XVIII/2 reproduces the proposals made by the professional organizations for the harmonization of those lists of species within the member States.

54. The Committee is invited to note the above information and to consider possible steps to be taken.

Definition and Examination of Hybrid Varieties

55. At its twentieth session the Administrative and Legal Committee discussed again the motion of ASSINSEL on maize hybrids as reproduced in document CAJ/XIX/5, and also document CAJ/XX/7 prepared by an expert from France. The Administrative and Legal Committee finally invited the Technical Committee to look into the question and to have a joint discussion with the Administrative and Legal Committee on it on the morning of October 15, 1987. Annex III to this document reproduces a relevant extract from the report of the nineteenth session of the Administrative and Legal Committee. The last paragraph of Annex IV reproduces paragraph 50 of document TC/XX/12, which gives the position taken by the Technical Committee at its twentieth session.

56. The TWA noted documents CAJ/XVIII/3 on minimum distances and CAJ/XX/7, which contained the procedure used in France for distinctness decisions in the case of hybrid maize varieties and the list of classified characteristics of parent line varieties. It agreed to study document CAJ/XVIII/3 at the national level. With respect to document CAJ/XX/7, Mr. J. Guiard (France) mentioned

that this procedure had been used in France for two years already without problems, and that the list of classified characteristics had proven adequate for a decision on distinctness. He summarized the whole testing procedure as follows:

- (i) the testing authority compares the parent lines according to the list of classified characteristics;
- (ii) if sufficient difference in the parent lines is established according to that list, the hybrid variety in question is regarded as distinct;
- (iii) if sufficient difference in the parent lines is not established, the hybrid variety in question should itself be tested;
- (iv) in any case, all hybrid varieties submitted to the testing authorities are themselves described individually.

57. Some experts of the TWA expressed concern that the distinctness of the resulting hybrid varieties could not necessarily be guaranteed by the difference of the parent varieties in classified characteristics, especially in the case of hybrid varieties produced by using isogenic lines, and that the interpretation of that list might be too optimistic. Others mentioned that the procedure had been introduced as a means of facilitating the testing method, and that its application should be restricted to those hybrid varieties for which a great number of applications for plant breeders' rights were expected. Several experts reminded the TWA that the possibility of granting plant breeders' rights for hybrid maize varieties merely on the basis of the difference of their parent lines or their formula had been rejected several years before, when the Test Guidelines for maize were revised. While some experts recognized that, if the French procedure were accepted as an option for the present UPOV distinctness criteria for hybrid maize varieties, it would be necessary to change the general philosophy of hybrid variety testing, the experts from France insisted that the procedure as a whole did not change the UPOV rule, being only a practical approach to simplify testing and to cope with the numerous applications for maize hybrids. The TWA did not take any decision on the subject at the present session, and agreed to study it further in each country.

58. Some experts of the TWA proposed that if, in the future, a list of classified characteristics were to be established, it should be submitted first to the Technical Working Party concerned before being presented to the other UPOV bodies.

(See TWA/XVI/10 Prov., paragraphs 20 to 22)

59. The Committee is invited to note the above information and to consider possible steps to be taken.

#### Minimum Distances Between Varieties

60. The Office of the Union had submitted to the Administrative and Legal Committee at its eighteenth session, document CAJ/XVIII/3 dealing with minimum distances between varieties. The Administrative and Legal Committee did not

however enter into detailed discussions, and only agreed to take up discussions after the document had been discussed in the Technical Committee (see document CAJ/XVIII/7, paragraph 30). The Administrative and Legal Committee touched the same subject at its twentieth session, in connection with the question of the testing of maize hybrids, and agreed to have a joint discussion on minimum distances with the Technical Committee on October 15, 1987 [now on October 8, 1987]. Annex IV reproduces the position held by the Technical Committee on the subject at its twentieth session.

61. The Committee is invited to note the above information and to consider possible steps to be taken.

Proposals for New Chairmen for the Technical Working Parties

62. At the end of the forthcoming ordinary session of the Council in October 1987, the terms of office of the chairmen of the five Technical Working Parties will themselves come to an end. The various Technical Working Parties therefore proposed to the Technical Committee that it propose to the Council the election of the following experts as chairmen for the next three years:

- TWA - Technical Working Party for Agricultural Crops: Mr. D.P. Feeley, Ireland;
- TWC - Technical Working Party on Automation and Computer Programs: Dr. F. Laidig, Federal Republic of Germany;
- TWF - Technical Working Party for Fruit Crops: Mr. B. Bar-Tel, Israel;
- TWO - Technical Working Party for Ornamental Plants and Forest Trees: Mr. C.J. Barendrecht, Netherlands;
- TWV - Technical Working Party for Vegetables: Mr. R. Brand, France.

(See documents TWA/XVI/10 Prov., paragraph 38, TWC/V/8 Prov., paragraph 31, TWF/XVIII/13 Prov., paragraph 30, TWO/XX/20 Prov., paragraph 28 and TWV/XX/13 Prov., paragraph 40)

63. The Committee is invited to take the necessary decisions.

[Annex II follows]

Extract from Document CAJ/XIX/11

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List of Priorities in Relation to Extension of Protection

22. Discussions were based on documents CAJ/XVIII/2 and CAJ/XIX/2.
23. Several delegations referred to the link between the list of protected species and examination of varieties. The latter included an important economic aspect (the cost of the examination itself and the cost of maintaining the necessary infrastructure, especially reference collections), as well as a political aspect as shown in the Annex to document CAJ/XIX/2.
24. The representative of the Netherlands proposed that a subgroup composed of two or three persons should be set up to formulate a document on the different possibilities available in the field of examination.
25. The representative of France emphasized that France's policy consisted of extending protection where it was of economic interest and there was a reliable means of examination, thus permitting the granting of reliable titles of protection. He considered that users should be asked whether or not they agreed to less reliable titles being granted.
26. The representative of the Federal Republic of Germany said that in his country varieties of all species were protectable under the Plant Variety Protection Law or, if the latter was not yet extended to a particular species, under the Patent Law. Until recently, the existence of two forms of protection had not led to any problems because the second form was more theoretical than practical. Patentability of plant varieties, while allowed in theory, was denied in practice because plant varieties could not fulfill the conditions for patentability. Moreover, the practice of the Federal Office of Plant Varieties had always been to extend plant variety protection to a particular species whenever it became necessary or desirable. In those rare cases where a patent application was filed before plant variety protection was extended, the applicant subsequently transformed it into an application for breeders' rights, once the extension had been achieved. Finally, patents were only very rarely granted for breeding processes.
27. The situation had, however, changed. In the first place, views in patent circles were changing with regard to patentability, in practice, of plant varieties. Secondly, at present a number of patent applications were being examined and patents had even been issued either for groups of plants assimilated to products (for example, varieties or intergeneric hybrids such as the pomato), or for breeding processes. In that connection, the representative of the Federal Republic of Germany cited the case of a process for creating the pomato through fusion of protoplasts, a process for producing camomile plants (having a certain content of useful substances) which used in particular alternately micropropagation and sexual reproduction, and a process for producing beer by using brewer's barley with a low proanthocyanidine content.

28. That new trend would give rise to long and difficult discussions on the dividing line between patents and plant variety protection. But above all, it created a political problem. It would be contrary to the rationality of the legal order to allow varieties protected under the plant variety protection law--for which examination had allowed verification of their material existence and characteristics--to coexist with varieties or non-variety material protected under the patent law--where a straightforward documentary examination did not offer the above-mentioned guarantees. That was why authorities in the Federal Republic of Germany were studying the possibility of extending protection to all botanical species, as was mentioned in paragraph 6 above. Such an extension would solve part of the problem.

29. However, the problem also had an international dimension. In that connection, the representative of the Federal Republic of Germany appealed to other member States to protect at least the economically important species. He considered that work on the subject should commence as soon as possible and proposed that a start should be made by regulating the technical aspects in the Committee itself, in a subgroup or in the Technical Committee.

30. The Chairman proposed that the Technical Committee should be asked to define the groups of species that should be protected and to report to the Committee. The Committee endorsed the proposal.

[Annex III follows]

Extract from Document CAJ/XIX/11

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ASSINSEL Motion on the Definition of Maize Hybrids

45. Discussions were based on document CAJ/XIX/5.

46. The Committee shared the point of view expressed by the Office of the Union that the request contained in the motion was not in conformity with Article 6(1)(a) of the Convention.

47. The representatives of France and the Federal Republic of Germany noted that the motion was in fact related to the examination of hybrid varieties. The problem was particularly critical in the case of maize because of the very large number of applications for protection and registration in the national lists of varieties. In theory, two methods could be envisaged: either to examine each hybrid variety, which would be long and costly, or to decide upon the distinctness solely on the basis of a study of the formula and lines, the hybrid only being examined in the last resort in case of doubt.

48. Up to the present, authorities in member States had used the first method and the representatives of the Federal Republic of Germany and France hoped that it could be maintained. In any case, growing of the hybrid and its examination were necessary in order to verify the conformity of the hybrid material with the formula and to establish its description. Nevertheless, a revision of examination procedures could perhaps be envisaged in the case of species such as maize and sunflower (but not, for example, in the case of synthetic varieties, particularly in respect of grasses). It was therefore necessary to undertake a more detailed examination, in particular, on the basis of the Technical Committee's eventual contribution.

49. The Committee shared that point of view and decided to postpone examination of the question until the Technical Committee had made its report. [At its thirty-fifth session, the Consultative Committee decided to include the question in the agenda of the third (next) meeting with international organizations, as well as in the agenda of the next session of the Administrative and Legal Committee, which would study it on the basis of a document to be drawn up by the delegation of France.]

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[Annex IV follows]

## ANNEX IV

Extract from Document TC/XX/12

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Minimum Distances Between Varieties

49. The Committee based its discussion on documents TC/XX/6, TC/XX/7 and paragraph 22 of document TC/XX/3 Add. It examined the 13 questions listed in Part I of the Annex to document CAJ/XIII/2 on the basis of the answers given so far by the Administrative and Legal Committee and the Technical Working Parties and came to the following conclusions:

Question 1: There was no need to modify the interpretation of the notion ".... clearly distinguishable by one or more important characteristics ...." used in the Convention. It would, however, have to be kept in mind that the requirement had been included by the member States in their national laws with slightly different wording, as for example by ".... at least one important characteristic."

Question 2: There was no need for further interpretation of the notion "important characteristics."

Question 3: From the technical point of view, there was no difference between characteristics suitable only for identification and those also suitable for assessing distinctness. Other aspects, however, as for example juridical ones, or the uncertainty of the consequences of the acceptance of a characteristic for distinctness, did not at present allow certain characteristics to be admitted for distinctness purposes, although they were accepted for identification purposes.

Question 4: UPOV had at present rules in the General Introduction to the Test Guidelines and the individual Test Guidelines. UPOV would collect experience, species by species, which would then be reflected in these Test Guidelines. It was not meaningful to indicate minimum distances in the Test Guidelines for each characteristic.

Question 5: It was difficult to cover all situations in detail in advance. Therefore only the three main criteria agreed upon during the eighteenth session of the Technical Committee and reproduced in document TC/XVIII/13, paragraph 39, were reconfirmed:

(i) whether the characteristic could be considered an important characteristic and whether varieties that could be identified by that characteristic could be expected to have a sufficient minimum distance from other varieties to justify the grant of plant variety protection.

(ii) whether varieties could be expected to be homogeneous in the characteristic concerned or to segregate according to a certain formula, and

(iii) whether harmonized and standardized methods existed to observe that characteristic.

- Question 6: Phenotypical differences which cannot be verified according to the basic testing principles as laid down in the General Introduction or the individual Test Guidelines should not be taken into account. Sophisticated methods, as for example electrophoresis, are so far not considered to fulfil the basic testing principles.
- Question 7: Additional efforts to distinguish a variety should be undertaken if the authority was convinced of the originality of the variety or if the breeder furnished further proof of it. Even in these cases, however, no sophisticated method should be accepted.
- Question 8: Parent lines should not automatically be examined in each and every case. It would depend on the species concerned whether the breeding formula had to be examined and/or the lines tested.
- Question 9: The eligibility for protection should not be limited to lines alone.
- Question 10: It was confirmed that the Test Guidelines were established for describing varieties and for the testing of distinctness, homogeneity and stability, as already mentioned in the General Introduction to the Test Guidelines.
- Question 11: It was recommended that, in order to improve contacts with breeders, more meetings with them at the national level and not at the level of the Technical Working Parties should be foreseen.
- Question 12: Minimum distances should not be enlarged for species where mutants frequently occur since it was not possible as yet to prove that a mutant really was a mutant. Without a change in the UPOV Convention a droit de suite could not be admitted. It was noted that difficulties existed at present and as so far no solutions had been found they had to be kept in mind for the future.
- Question 13: In looking for new distinct characteristics, in the first instance new characteristics should be searched for if the existing characteristics did not enable a variety to be distinguished. The reduction of the minimum distances in characteristics would be rather difficult.

50. Having noted the difficulty in dealing with minimum distances without specific cases, the Committee decided not to continue discussing this item unless new developments changed the present situation.

51. During the discussions on minimum distances between varieties, the Committee noted document TC/XX/7 containing a motion on maize hybrids from ASSINSEL. In answer to the motion, it was noted that within UPOV it had so far not been possible to agree upon a common approach as to what defined a maize hybrid.

## ANNEX V

Extract from Document TC/XX/12

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27. Quantitative Characteristics in which only three groups can be separated. Dr. Thiele-Wittig reported on the results of the discussion held by the Editorial Committee with respect to the problems of quantitative characteristics in which only three groups could be separated. The Committee noted that the problem had been raised mainly by the Subgroup on Potato during the establishing of a working paper on Test Guidelines for Potato (revision). The Committee agreed on the recommendation made by the Editorial Committee to refer the working paper on Test Guidelines for Potato back to the Subgroup on Potato of the Technical Working Party for Agricultural Crops and to ask it:

(i) to check whether all the characteristics listed in the working paper were really needed. For this purpose, it asked that the expert from the Netherlands should indicate for each characteristic how often that characteristic had so far been the only characteristic enabling varieties to be distinguished;

(ii) to try to treat the quantitative characteristics, in principle, according to the 1 to 9 scale;

(iii) to use the handling of quantitative characteristics in a qualitative way in the light of paragraph 10 of the General Introduction to the Test Guidelines only in very exceptional cases, and

(iv) to indicate for these last-mentioned cases what rules would be applied for distinctness.

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[End of Annex V and of document]