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agreed by the Council of UPOV, only documents that have been adopted by the Council of UPOV and that have not been superseded can represent UPOV policies or guidance.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

UPOV/C/VII/18
Original : English
Date: October 12, 1973

INTERNATIONALER VERBAND ZUM SCHUTZ VON PFLANZENZÜCHTUNGEN | UNION INTERNATIONALE POUR LA PROTECTION DES OBTENTIONS VÉGÉTALES | INTERNATIONAL UNION FOR THE PROTECTION OF NEW PLANT VARIETIES

COUNCIL

Seventh Ordinary Session

Geneva, October 10 to 12, 1973

Draft Report

Part II, Second Day

67. The Council agreed to send a telegram to Professor Pielen, Chairman of the Council, wishing him a quick recovery from his illness.

68. The Vice Secretary General read out a letter received that morning from the Ministry of Agriculture of Kenya in which they expressed their delight at having been invited to the Council meeting but regretted that they were unable to attend the meeting due to the short notice. They thanked for the invitation and expressed the hope for good working relations with UPOV. They announced the mailing under separate cover of a copy of the Kenyan Seeds and Plant Varieties Act and would appreciate having a copy of the proceedings of the Council sent to them.

Revision of the Provisional Guidelines for Variety Denominations (Item 14(i) of the Agenda)

69. The Vice Secretary General introduced document UPOV/C/VII/2 and explained that, during the preparation of this document within the Working Group, a discussion had taken place on the possibility of providing for an exception to the rules for rootstocks in the same way as for maize. Moreover, the paper so far did not contain comments on the problems arising in connection with Article 4. He added that the Annex contained several letters received from different organizations complaining about restrictions envisaged in the Guidelines for Variety Denominations.

70. Mr. Doughty (United Kingdom) expressed the very great concern of his country regarding the contents of Article 4, in particular: although there was no specific mention in the Article, it seemed to outlaw the custom of using a house name as a prefix in the variety denomination to denote the origin of a variety. If the real intention was to outlaw the prefix system, this should be clearly stated. He added that there were several different systems used to denote origin and the prefix system was only one of these. The existence of so many systems raised the question of why the breeder wanted to know the origin. He went on to say that the representatives of the different States were present at the Council meeting mainly to serve the wishes of the seed industry and the consumer, and as the industry was so firmly opposed to the Guidelines for Variety Denominations, an attempt should be made to

627

ascertain their wishes, and he raised the question why there should be opposition to the breeder associating himself with the final product. He asked the members present if it was the intention to outlaw not only the separate prefix but also other indications of origin such as the syllable bar-, the ending -mo or the like. He also asked whether the main obstacle of the house name was that, at the end of the protection period the suffix would not become public property. As the prefix denoted only where breeding took place, it would not lead to confusion. The Council of UPOV should seek to avoid making too many very detailed rules and thus putting additional obstacles in the way of an increase in the number of member States. He therefore asked the Council to reject Article 4 of document UPOV/C/VII/2 and to study the different indications of origin more carefully.

71. Mr. Mejegaard (Sweden) pointed out that very often a house name was protected as a trademark or, if not actually protected as a trademark, could presumably be regarded as a trademark. If this trademark was made part of the denomination, the trademark holder would automatically lose his right to the trademark. As the denomination was a generic name, there should from the outset be no barrier to its future use by the public. He agreed that in some countries the trademark holder would not lose his right even if the trademark was incorporated in a denomination. He said therefore that Article 4 was very important as a means of putting an end to this custom. He added that a second point in support of Article 4 was that very often the house name was the dominant element in a variety denomination and the consumer was tempted to use only the dominant element and to omit the remainder of the denomination. This happened mainly with foreign varieties. Thus the situation in Sweden occurred where the house mark ARAN, for example, was used as the only name for three different varieties: all of the three variety denominations had started with ARAN, and the consumer had simply adopted the first word in the denomination. This very real likelihood of confusion made it impossible to accept any variety denomination embodying a house name.

72. Mr. Laclavière (France) pointed out that the consideration of Guidelines for Variety Denominations had to take into account not only the interests of the professional organizations but also those of the consumer.

73. The Secretary General pointed out that most of the difficulties discussed were due merely to lack of information and the stress on having a house mark as part of a denomination was mainly due to the fact that it had not been clearly understood that a breeder might always use an indication of origin next to the variety denomination, but that it must not form part of the denomination. Article 13(7) of the Convention said that the use of a variety denomination was compulsory even after expiration of the protection period. A house name, however, could not become free for use by third parties and, even if it was used, the public would think that the variety still had the same origin although this might not be the case after the expiration of the protection period. This was where the question of confusion arose. In this connection the fact of the house name being a trademark or not was irrelevant.

74. Dr. Böringer (Germany (Federal Republic of)) pointed out that there was a misunderstanding of the problem. Even without Article 4, the exclusion of a house name from a variety denomination was already in the laws of many countries. The article had therefore been intended more to make the situation clear than to introduce new restrictions. As long as the breeder was free to add a house mark to a variety denomination this sufficed to meet breedrs' needs. This last possibility was used often, and in Germany it had also been found, to the consternation of the authorities, that house names placed beside the variety denomination frequently overshadowed the actual variety denomination. Therefore, if the Council considered the draft paper too narrow, it would first have to discuss, and try to change, Article 13 of the Convention.

75. Mr. Butler (Netherlands) pointed out that there were other means of indicating the origin of a variety apart from the use of a house name. Beside the use of short syllables like bar- or -mo breeders had established different series of names, for example using series of names from the Bible, names of rivers or other series. There was a difference however, between the use of a separate house name and short syllables added to a word or series of names, as for these series the breeder was never assured of acquiring a monopoly, any other breeder being free to use the same short syllable or a denomination of the same series.

76. To make the difference between a separate house name and the other series even clearer, Mr. Kunhardt (Germany (Federal Republic of)), asked the United Kingdom whether it would accept an application from a foreign breeder with a variety denomination containing for example the word MARIS in the denomination. The Representative of the United Kingdom answered that this application would be refused in the United Kingdom, on the grounds of its leading to confusion. This answer showed that one of the differences between a house mark and other possibilities of indication of origin was that the other possibilities were open to every breeder. Mr. Butler (Netherlands) also said that in his country they were always glad to receive a variety denomination which fitted into a certain series, but which came from a different breeder, as the series would thus lose its value for the first breeder and would be discontinued.

77. It was further pointed out during the discussion that the use of house marks in the United Kingdom was mainly limited to Government institutes and, although it was thought that this should promote discontinuation, the United Kingdom pointed out that the Government had no influence on the breeder, whether private or government institutes, and could not interfere with their matters.

78. Mr. Rollin (United States) pointed out that this problem did not exist in his country as the Plant Protection Act did not lay down any rules for the denomination of a variety: only the Seed Act did this. In the United States a trademark was allowed to be placed next to a name. The United States treated breeders differently depending on whether they were public institutes or private breeders. While public institutes could have a series of names, for example for oats, CLINTON, plus a different number, the private breeder would not be allowed to use the same word CLINTON. Even though the word CLINTON was not a trademark and was not intended to confer a monopoly, the possibility of confusion would not permit this name to be used elsewhere. From the foregoing it could be seen that the main thing to be considered when an application was filed was whether or not the denomination was misleading.

79. Mr. van Wyk (South Africa) pointed out that his country had only a few private breeders. For the naming of varieties the International Code of Nomenclature for Cultivated Plants had been used. Experience had shown that the Code was easy to apply.

80. Miss Thornton (United Kingdom) said that during the discussion on the International Code of Nomenclature for Cultivated Plants an attempt had been made once to outlaw the use of prefixes, but very soon it had been shown that this was not possible. Thus it was that the International Code of Nomenclature for Cultivated Plants still allowed the use of prefixes.

81. Miss Thornton (United Kingdom) pointed out that her country had very reluctantly agreed at the last meeting of the Working Group on Variety Denominations not to mention rootstocks as another exception under paragraph 4 of Article 3, but in the meantime they had received the letter from the East Malling Research Station which is annexed to this document. Now they wished to ask the Council whether it could not agree to exclude rootstocks also, since on the one hand the group was only a very small one and they could not see that this exclusion would cause any real difficulties. On the other hand, if the system of fancy names had also to be applied to rootstocks in the future, it would be very difficult to distinguish by means of the name alone between varieties for the use of rootstocks and others to be used as scion.

82. Mr. Søndergaard (Denmark) pointed out that it would not be possible for his country to accept different rules for the two possibilities mentioned.

83. Dr. Böringer (Germany (Federal Republic of)) stated that the Working Group on Variety Denominations, after long discussions, had agreed not to allow an exception for rootstocks, as rootstocks were widely commercialized in the same way as other varieties, and the situation would be quite different from that for maize, for example, where inbred lines had only a very limited distribution. Germany could therefore not agree to an exception for rootstocks. In Germany rootstocks for vines had enjoyed protection since 1953 and up to now the use of actual names for rootstocks had worked very well. He repeated an earlier statement by the Secretary General that the Convention had set new standards and, although old customs might have worked very well, breeders had to comply with the new Convention if they wished to receive protection under it.

629

84. Mr. Laclavière (France) supported the statement of the German delegate and told the Council that in France the system used for vines was a thing of the past; since UPOV had entered a new era, it would also be useful to apply new systems and to avoid exceptions as far as possible.

85. Dr. Böringer (Germany (Federal Republic of)) added that it would be difficult to agree always on exceptions for special botanical species. If, for example, an exception were allowed for rootstocks there might be certain situations where, as with for roses or vines, one variety could be used as both a rootstock and a scion. The same might also be true of apples.

86. A vote was taken on whether to keep paragraph 4 of Article 3 in the Guidelines. Denmark, France, Germany (Federal Republic of), the Netherlands and Sweden voted in favor of its retention, the United Kingdom against it.

87. In the following discussion the question arose whether paragraph (3) of Article 3 should also apply to paragraph (4) of the same Article. Several different means of changing the rules were tried in order to provide free naming possibilities for hybrids, for example, one variety name differing from another only by a different number--for example ABC 100 and ABC 101--. One proposal was to start paragraph (4) of Article 3 with the phrase: "Notwithstanding paragraphs (2) and (3), etc.," another was to start the same paragraph: "Articles 2 and 3 are not applicable to paragraph (4) of Article 3 ..."; another solution seemed to be to have a different article starting with: "Paragraphs (1) and (3) of Article 3 shall not apply to this Article." It was finally pointed out that last-minute changes were very dangerous and it might be better to leave paragraph (4) of Article 3 as it stood.

88. The Council agreed to leave paragraph (4) of Article 3 as it stood in the draft UPOV/C/VII/2.

89. Continuing the discussion on Article 4, Mr. Doughty (United Kingdom) asked the Council what was to be understood by the words "any element". Did this include also other systems of indication of origin as bar-, -mo or series of names from the Bible, names of rivers or other series.

90. The Secretary General replied that two letters at the beginning of a word could be accepted as it would not be possible to monopolize this use, but a separate word or a series containing syllables of several letters would be refused. However, it would be very difficult to decide where the exact limit lay between acceptance and refusal since this depended on the individual case. It was therefore not possible to give a clear guide on how to work; only the two opposite possibilities for acceptance and refusal could be clearly defined.

91. A vote was taken on Article 4. Denmark, France, Germany (Federal Republic of), the Netherlands and Sweden voted in favor of its inclusion, the United Kingdom against. The inclusion was thus adopted.

92. The Council unanimously agreed on the last line of Annex 1, mentioning that Articles 5 to 10 remained unchanged as in the former document (UPOV/C/IV/18 Rev.), and that Article 11 should be deleted. By this last decision the whole draft of the Guidelines for Variety Denominations had been adopted as laid down in Annex 1 to document UPOV/C/VII/2 without any change.

Examination of the possibilities of cooperation between the Working Group on Variety Denominations and the Commission of the International Code of Nomenclature for Cultivated Plants (Item 14(ii) of the Agenda)

93. Dr. Böringer (Germany (Federal Republic of)) introduced document UPOV/C/VII/15 and gave a short introduction to its background. The main differences between the International Code of Nomenclature for Cultivated Plants and the UPOV Guidelines for Variety Denominations of UPOV were that the Code of Nomenclature looked at the problem more from the botanical angle, while UPOV looked at it more from the angle of legal and formal conformity with the UPOV Convention. While parts of the UPOV Guidelines were also contained in the International Code, other parts did not agree fully. It seemed that the time had now come to bring about a harmonization of the two different possibilities. He proposed that the Chairman and a few other members of the Commission of the International Code of Nomenclature for Cultivated Plants should be invited to participate in the meetings of the Commission of the International Code of Nomenclature. Also, the newly-adopted Guidelines should be sent to the other party. This procedure could create a good basis for international cooperation and it could no longer be said that the two groups worked independently of one another without considering the other party.

94. The Chairman told the Council that he was a member of the Committee of the International Code of Nomenclature for Cultivated Plants, but for three years no meeting had taken place, and the last addition to this Code had been made in 1969. The next meeting would probably take place during 1974.

95. The Secretary General proposed that the Secretariat write a letter to the Chairman of the Commission of the International Code of Nomenclature for Cultivated Plants proposing an exchange of delegates when meetings of one of the two parties took place. The Council unanimously endorsed this proposal.

96. Miss Thornton (United Kingdom) asked the member States if they could help her country to face the new sitation created by the approval of Article 4 of the Guidelines for Variety Denominations. She asked if the member States could consider the possibility of accepting denominations with prefixes that had already been approved in the United Kingdom, on the understanding that in the future they would no longer be accepted.

97. Mr. Søndergaard (Denmark) and Mr. Laclavière (France) pointed out that they would try to discuss this possibility in their countries; it would be very difficult, however, and, at the moment, they could not give any assurance.

98. Dr. Böringer (Germany (Federal Republic of)) and Mr. Butler (Netherlands) pointed out that in the past they had accepted variety denominations embodying house names, but this had been discontinued a few years previously. They now had in their countries accepted variety denominations with prefixes and others where they had convinced the breeder to use only a name without a house mark. If for the latter they were now to ask for retroactive inclusion or, for varieties currently under examination, to allow a house mark retroactively this would delay the whole operation. For varieties under examination it would delay the final decision by about six months. Therefore they were afraid that the possibilities in their countries were very limited. They agreed to consider the possibility however, especially as the United Kingdom had promised to provide a list of all denominations with prefixes approved to date in the United Kingdom.

99. Dr. Böringer (Germany (Federal Republic of)) pointed out that now that the Guidelines for Variety Denominations had been finally adopted, the anxiety felt by professional organizations might well increase. He proposed, therefore, to mention in the letter to the professional organizations accompanying the adopted Guidelines that it was not the intention of the Council to reduce their naming possibilities but that the Guidelines for Variety Denominations contained only what had been laid down in the Convention and served only to clarify this item and actual practical use.

100. The Council agreed to this letter, although the professional organizations were already aware of the fact and all arguments. The Secretariat was also requested to provide the member States with a copy of the letter.

Harmonization of Fees (Item 17 of the Agenda)

101. Mr. Laclavière (France) introduced document UPOV/C/VII/6. He pointed out that the document mainly contained the following three ideas: first, a recommendation to the States that they harmonize their administration fees at a level of 500 Swiss francs; second, the different member States had difficulty in balancing their accounts, as the fees charged did not cover the costs, and as they had further agreed that a total cost coverage was not desirable as a large part of the work was done in the public interest; third, cooperation on testing should be achieved between the member States and efforts should be made to avoid repetitive testing, using instead the test results of other member States and thereby reducing the expenditure of the testing stations as well as the fees charged to the breeder.

102. Dr. Böringer (Germany (Federal Republic of) pointed out that, at the last meeting of the Working Group, agreement in principle had been reached on the Guidelines but that afterwards the public interest had been found to be too strongly stated, with the result that his country now had some reservations. For this reason they had prepared a different draft for consideration by the Council.

This draft, a copy of which had been distributed, actually contained no new substantive elements. It had been drafted only to give a better presentation, mainly to lessen the emphasis on the public interest. He added that it would be unwise to state the public interest so strongly as breeders would in future have a weapon and would always use this document as a basis when fee questions arose, mentioning that the authority itself had agreed on the question of the public interest.

103. Miss Thornton (United Kingdom) mentioned that the administration of the protection system for plant breeders' rights was very expensive. The German draft had now watered down the original conclusion, which had more strongly stressed the public interest of the system.

104. Mr. Mejegaard (Sweden) stated that his country was very interested in the joint use of trials, for example for ornamentals, but that Swedish law did not allow the charging of testing fees to be waived, even if the results of another testing station were used. He further asked whether the testing fee was considered to represent one, two or three years of testing. He mentioned that a further difficulty for his country was that it had two different authorities, one undertaking trials and the other granting rights.

105. To clear up a misunderstanding, and also to inform the other non-member States on how the exchange of test results was intended to take place according to this document, it was pointed out that, in the Netherlands for example, the cost of the tests amounted to about 85% while the administrative costs amounted only to 15%. On the other hand, the income from testing fees amounted to only 25%, while the income from administrative fees amounted to about 75%. This meant that the actual fees charged for the tests covered only a very small part of their actual cost. If, therefore, a country making use of testing facilities in another country was requested to pay the testing fees charged in the country undertaking the test, it would in fact only be paying a very small part of the costs that would be incurred if the country provided testing facilities and undertook the tests itself. The country making use of the testing facilities of another country would thus make a very substantial profit, and it was therefore more than justified that this country should refrain from charging the breeder testing fees. The costs which the country would have to pay for making use of test results would be more than covered by the administrative fees which it would still be receiving from the breeder. They were normally intended to cover the greater part of the testing costs, but now only needed to cover the small amount of the testing fees. If the country making use of testing facilities of another country made a profit, the breeder should also share in that profit and pay a testing fee only once, since the test itself would have been undertaken only once.

106. As it was not possible to reach agreement on either of the two drafts presented on the subject, it was finally decided that a meeting of the Fee Harmonization Working Party should take place after the present meeting of the Council, for the preparation of a new draft to be considered by the Council on the following day.

Protection Period in Member States and Priority Questions (Item 18 of the Agenda)

107. The Vice Secretary General introduced document UPOV/C/VII/8. He pointed out that this document was mainly intended as an incentive to member States to note the problems mentioned and to think them over. Its chief purpose was to allow for afterthoughts.

108. The Council agreed to postpone the discussion of this item.

Amendment of the Convention (Item 19 of the Agenda)

109. The Vice Secretary General pointed out that this item was also intended merely for afterthought. He reminded the Council of the decisions of the Consultative Working Committee and the Council's discussion of the previous day. The Consultative Working Committee would discuss this problem during its next meeting at the beginning of 1974. In the autumn of 1974 a meeting at governmental level with non-member States was also planned in order to deal with the same item.

110. Although it was pointed out that it would be good to start a discussion and to collect ideas, or to set up a study group to discuss this problem, it was finally agreed that it would be better if first each country were to consider the question separately and provide the Secretariat with its ideas before December 1, as agreed the previous day.

Date of Next Meeting (Item 20 of the Agenda)

111. It was pointed out that for several participants in the Council meeting who came to Geneva from far away, it would be an advantage and a saving in costs if the Council meeting could be held close to the meeting of the OECD, in order that these countries might send one person to both meetings on one single trip. It was agreed that the Secretariat would telephone Mr. Juckes the following day to find out if a date had already been considered for the 1974 meeting of the OECD.

112. It was also mentioned that there were plans to hold an information meeting at governmental level in conjunction with the next meeting of the Council, for the discussion of problems relating to the Convention. As this would require a great deal of work on the part of the Secretariat, and as it was not yet known when the new Vice Secretary General would be available, the next meeting of the Council should take place late in the year, not before November.

Any Other Business (Item 21 of the Agenda)

113. The Secretary General pointed out that the Council had requested of the Secretariat that all WIPO proposals involving financial matters which might also affect UPOV should be made known to the Council. At the moment, the United Nations Common System was applied to WIPO salaries, which made a distinction between professional staff and general service staff. The salaries of general service staff were in Swiss francs, whereas those of professional staff were based on dollars which in the past had caused a marked reduction in professional salaries, owing to the devaluation of the dollar, leading sometimes to higher salaries in the general service category than in the professional category. During the forthcoming WIPO meeting in November, it was proposed to change the basis of professional salaries from dollars to Swiss francs. Although nearly all the specialized agencies of the United Nations base the salaries of their professional staff on dollars, there are some which do not. Therefore there is a definite possibility of the proposal being accepted. The Council would be informed by letter immediately after a decision had been taken.

114. Dr. Knobloch (Germany (Federal Republic of)) pointed out that sometimes they received a revised version of a document from the Secretariat. He asked if it would not be possible for the Secretariat to mark in future any changes made to the former document to facilitate the work of the member States--this being a system which is widely used in similar cases.

115. The Vice Secretary General answered that he would take note of this and study the different possibilities of marking changes.

116. The Council suspended its meeting to enable the Secretariat to prepare the draft report of the meeting and also to allow the Working Group for Variety Denominations to prepare a new combined draft for discussion the following day.

[End of document]