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UPOV

CAJ/I/6
ORIGINAL: French
DATE: March 13, 1978

INTERNATIONAL UNION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS

GENEVA

ADMINISTRATIVE AND LEGAL COMMITTEE

First Session
Geneva, April 17 to 19, 1978

ARTICLE 13 OF THE UPOV CONVENTION

Observations transmitted by the
French representative to the Council

1. In a letter of March 2, 1978, addressed to the Secretary-General of UPOV, the French representative to the UPOV Council transmitted observations on the proposals of the Secretary-General of UPOV for the amendment of Article 13 of the Convention, which were contained in document CAJ/I/2. The observations are attached to this document.

2. In the letter accompanying these observations, it was indicated that they contained no opinion with respect to the proposal on Article 13 originating from the Federal Republic of Germany (Annex III to document CAJ/I/2), since the experts from the trademarks service had to be consulted beforehand.

[Annex follows]

ANNEX

OBSERVATIONS OF FRANCE CONCERNING THE PROPOSALS FOR AMENDMENT OF ARTICLE 13 OF THE CONVENTION CONTAINED IN PAGES 1 TO 5 OF DOCUMENT CAJ/I/2

General Remark. The 1961 Convention was drafted in a given style under the direction of one and the same person (the Chairman of the Committee of Experts), and in accordance with a single guiding concept, thus ensuring its consistency.

If one article or another is modified for the sole purpose of improving its wording or of individually coping with certain specific situations, there is a danger of losing this consistency of thought and style and ending up with a heterogeneous text (as is the case of very frequently modified conventions) which would no longer render the same services.

Article 13(1) of the present text. To understand the 1961 Convention, it must be remembered that it was conceived as an Act by which the signatory States agreed on a certain number of principles which had not been a matter of course before and which they decided to set up as rules of law applicable to all concerned. The Convention is a code containing provisions intentionally drafted in a general way to act as the basis on which national legislation can be drafted and the particularities of each State can be accommodated. The comment made in paragraph 10, at the bottom of page 3 of document CAJ/I/2, on the lack of precision of Article 13(1) is therefore a misconstruction. Prior to the advent of the Convention, it was not self-evident that a variety had to be designated by a denomination or that there should be one denomination only. The Convention therefore established the general rule that a variety could only be considered to be such if it had a denomination, just as it had already been stated that it was required to be distinct, homogeneous and stable. The wording of the paragraph (1) proposed on page 2 would be in its right place in a model law or national legislation.

Article 13(2) of the present text. The explanations given on page 3, in paragraph 6, and on page 4, in paragraph 11, of document CAJ/I/2 leave out of account the discussions and decisions of the Working Group on Variety Denominations. The denomination has a "registrar" role to play. The word "identifier" (to identify) has the meaning of "reconnaître" (to recognize). The only problem is that of suitably translating this term in the English and German texts. Any other interpretation would be contrary to the spirit of the Convention.

As regards the proposal to use figures alone for designating varieties, it should be remembered that a conceptual distinction was made between registration and denomination, which fulfill different functions. Even professional organizations have agreed with this.

As to the argument put forward that deleting the prohibition on using figures would facilitate the accession of certain States, it calls for the following declaration, which constitutes a declaration of principle valid for the other Articles:

The Convention has been, and continues to be, a source of progress. Numerous States preparing their accession are endeavoring to satisfy its provisions. It would be a step backwards to lower the level of its requirement without precise reason, on the sole grounds of facilitating the accession of one or another State. In the case in point, it may be observed that the designation of maize varieties in the United States of America by figures is no longer the general rule and that the proposed deletion would bring this trend to a halt. No more should be done than to provide for exceptions, as was very sensibly done, which are theoretically of a temporary nature even if their duration is not specified, in order to facilitate the accession of States which have to cope with established situations or real and justified material obstacles.

The deletion of the second subparagraph could be envisaged, but would lead to a regrettable gap in the Convention. In any case, the new wording proposed on page 2 is much too heavy and contains repetitions.

To conclude, there is no reason whatsoever for modifying paragraphs (1) and (2) of Article 13 which, incidentally, have been taken over more or less word for word by national legislations.

Article 13(3) of the present text. Observations reserved.

Article 13(4) and (5) of the present text. Document CAJ/I/2 states that the essential elements of these paragraphs are covered by paragraphs (1) and (3) of the proposal appearing on page 2 of the document. The advantage of modifying the present wording is not clearly explained. On the other hand, the change in style introduced by the proposal would severely adulterate the consistency of the Convention.

Article 13(6) of the present text. Observations reserved. This paragraph would warrant separate study.

Article 13(7) of the present text. Here again, the present text of the Convention established a principle and it had appeared necessary to the drafters of the Convention to establish that principle in general terms.

The basic philosophy of this paragraph is that once a denomination has been given to a variety, it shall be final, whether or not the variety is protected and whether or not it is put on the market.

The proposed wording adversely affects the present scope of the Convention for a number of reasons. The only question which needs asking is whether this alteration is desirable or, on the contrary, inopportune. France leans towards this second alternative.

Article 13(8)(a) of the present text. The conclusion of the observations made on page 4, paragraph 19, of document CAJ/I/2 is not unfounded. It suggests that a parallel international convention on seed is lacking. However, for as long as such a convention does not exist, it seems necessary to maintain in the Convention for the Protection of New Varieties of Plants a provision that may seem marginal but would nevertheless be missed if it were not included, even in an unlikely place.

Article 13(8)(b) of the present text. Paragraph 20, on page 5 of the document, states that declaring signs or words generic by legislative *fiat* on the sole basis that they are used in connection with plant varieties is, to say the least, "unusual."

This remark may be pertinent but it ignores the spirit of the Convention. On the recommendation of their experts, the States declared it desirable that the denomination should have a generic nature. They affixed their signature to this declaration. This may seem arbitrary but it is also arbitrary to declare that a variety is constituted by an assemblage of plants which is distinct from any other assemblage, homogeneous, stable and designated by a denomination, to the exclusion of any other consideration. (It may be added that the French *Cour de Cassation* [supreme court] did not wait for the Convention to state in a famous decision that a variety denomination was of a generic nature. This seemed obvious to it.)

Article 13(9) of the present text. It should be recalled that this paragraph, which, effectively, was not indispensable, was added at the insistence of plant breeding and industrial property circles. Its deletion would probably lead to unfortunate reactions which it seems needless to provoke.

* * *

France reserves its position on the problems relating to trademarks raised in the German proposal.

[End of document]