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UPOV

CAJ/I/8
ORIGINAL: English
DATE: April 5, 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
Danish representative to the Council

In a letter dated March 29, 1978, addressed to the Secretary-General of UPOV, the Danish 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.

[Annex follows]

CAJ/I/8 [Original]

ANNEX

Remarks from Denmark
on the proposals for modification
of Article 13 of the Convention
contained in document CAJ/I/2

General remarks It is generally acknowledged in Denmark that changes of a legal text should be avoided unless there are strong reasons for such changes. Two considerations lie behind this idea. First, that a change of a text only as to form may be understood as involving changes as to substance and so give rise to unnecessary discussions; secondly, that all contribution to the understanding of the text derived from administrative and juridical practice (and other sources as well) will become more or less valueless.

Both considerations are of importance in respect of Article 13. There is probably no other Article of the Convention which has caused so many discussions as Article 13. Radical changes of this Article may give rise to new prolonged discussions and the very valuable material for interpretation of the Article accumulated during the last decade, that is even from before the entry into force of the Convention, will be of little value for the future.

That is why we need to be strongly convinced that there are good reasons for the necessity of the changes to be made.

Furthermore we believe that the legal construction of the denomination which was created by the Convention and later elaborated during numerous discussions is so valuable that we would be reluctant to give it up. We refer here in particular to the fact the denomination is "part" of the variety, that it is not subject to private property, and that it can (and must) be used by everybody in connection with the variety.

Old paragraph 1. In our opinion, the English translation ("shall be given") of the authentic French text ("doit etre designée par") is wrong. It repeats only Article 6 (1) (e) and does not add anything new to Article 13. We understand the idea of this paragraph as a program or principle to the effect that the variety shall be known under a denomination, that is more or less the same idea as expressed in the EEC Council Directives of 29th September 1970 on the common catalogue of varieties of agricultural plant species and on the marketing of varieties of vegetable species: "is known by the same name" (Fr.: "porte .... la même denomination", G.: "dieselbe Bezeichnung trägt"). We feel that this understanding gives the paragraph an independent meaning, and would be reluctant to give it up.

In paragraph 1o of document CAJ/I/2 it is pointed out that Article 13 (1) does not say when and by whom the variety name shall be given (better: be designated by). As to "by whom" the answer is given in the beginning of Article 13 (7) and the first sentence of (8, b): any person, it is generic. The question "when" may be answered differently. Due to some bad experience in the past we are considering to introduce on a national basis a provision saying that new varieties may not be marketed before they have a name. Already for this reason we could not support paragraph (1) of the proposal made by the Secretariat.

Old paragraph 2. We see no strong need for amending this paragraph - on the contrary we consider it vary valuable-, and for the reasons set out at the beginning of this paper, we advise against any change.

Old paragraph 3. We agree with paragraph 14 and the last sentence of paragraph 4 of document CAJ/I/2 about the difficulties arisen from the mentioning of trademarks in a plant breeders' rights Convention, and wonder if the solution to these difficulties would not be to say in general that the denomination must not be subject to rights which may hamper or prevent the free use of the denomination. On the one side this would allow - if so desired - a new construction of trademarks, whereby the trademark owner could not prevent the use of his trademark as a variety denomination. On the other side such wording would give everybody the possibility to use the denomination in connection with the variety.

We could not support, however, that the question be solved merely by means of the words "unsuitable" and "unlawful" (as proposed in the Secretariate's draft), which is not enough to describe the legal construction of the denomination as set forth in the beginning of this paper.

In this connection we would draw the attention to the fact that many plant products other than propagating material are sold under the variety name.

In recent regulations concerning the marketing of potatoes for human consumption our Ministry of Agriculture has provided that the variety name shall be indicated on the prescribed label.

Under EEC Rules fruits and vegetables of certain species shall bear a label containing among other indications the variety name.

For cut flowers, especially roses, the auctions normally indicate the variety.

For wheat and rape the EEC has different prices according to the quality (fodder wheat versus baking wheat - chemical composition of rape) which depends on the variety. Hence the necessity to indicate the variety.

From the above said it follows that it is absolutely necessary for the producer to be able to use the variety name.

Old paragraphs 4-6. No comments at present.

Old paragraph 7. We disagree with the statements of paragraph 18 of document CAJ/I/2 that the obligation for any person (etc.) to use the variety denomination and that the obligatory use of the denomination also after the expiry of the protection has nothing to do with plant breeders' rights. - As to the first provision we sould like to point out that it helps the breeder to control illegal sales of the variety, which could else be done under other names. Furthermore, the rights of the breeders are not unlimited; there are also duties and conditions, and one is for the breeders to accept that the name follows the variety.

Old paragraph 8, a. We are somewhat uncertain in respect of the need to maintain this provision in the text. We may not disagree with the statement in paragraph 19 of document CAJ/I/2 that the UPOV Convention may not be the ideal place for this provision. On the other hand we ask ourselves how a deletion would work in the light of the considerations contained in the beginning of this paper.

Old paragraph 8, b. The concept of the denomination as a "free" name which is nobody's property is so important to us that we could not support a deletion of the first sentence. We agree to delete the reference to trademarks but would like to include provision saying in general that no private rights can be given to the denomination.

Old paragraph 9. Following the idea not to mention trademarks in the Convention, we could envisage a deletion of this paragraph We have however no strong feelings in this respect

Old paragraph 1o. The reference in paragraph 22 of document CAJ/I/2 to the word "unlawful" seems to us to be unsufficient. We also think that the provision in the second sentence should be maintained.

Final remarks From the above said can be understood that we could not support the proposal contained in paragraph 3 of document CAJ/I/2. We are well aware of the fact that - as pointed out in paragraph 23 of the said document - the proposal would not prevent the member States from maintaining this present legislation, but we foresee that the proposal - if adopted - would cause, first of all, endles.discussions, which should be avoided, and secondly might result in a destruction of the harmonization of the national legislations so far achieved.

[End of Annex and of document]