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INTERNATIONAL UNION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS

GENEVA

ADMINISTRATIVE AND LEGAL COMMITTEE

**Ninth Session
Geneva, April 26 and 27, 1982**RECOMMENDATIONS FOR THE INTERPRETATION AND APPLICATION
OF ARTICLE 13 OF THE CONVENTIONDocument prepared by the Office of the UnionIntroduction

1. The Administrative and Legal Committee (hereinafter referred to as "the Committee") examined at its eighth session the draft of a revised version of the Guidelines for Variety Denomination (Annex II to document CAJ/VIII/7), drawn up by the Delegation of the Federal Republic of Germany, and took the following decision (see document CAJ/VIII/11, paragraph 21):

"(i) member States were asked to convey their observations on the principle governing the choice of variety denominations and on the draft to the Office of the Union by December 15, 1981;

(ii) the Office of the Union would revise the draft for the next session and, at the same time, change the title (as the question was no longer one of guidelines but of guidance for the interpretation of Article 13 of the Convention), simplify its provisions and add examples."

2. As far as the principle for the selection of variety denominations was concerned, the discussions held at the eighth session of the Committee led to the following results (see document CAJ/VIII/11, paragraph 22):

"(i) member States were prepared to accept combinations of letters and figures (in that order) in the case of species for which that type of denomination corresponded to an established international practice, in other words essentially for maize and sorghum; the same applied to series of denominations embodying one and the same alphabetical component, on the understanding that no breeder would have an exclusive right to such a component;

"(ii) the majority of the member States considered that denominations should not contain the name of the breeder, and that present practice should be maintained;

"(iii) where a family of denominations existed that were all made with one fanciful word, any new denomination should not constitute a simplification in relation to corresponding earlier denominations (for instance, if 'White Snapper' were approved, 'Snapper' could not be approved afterwards);

"(iv) it might be useful to exchange information, for instance annually, on decisions on proposed denominations that were on the borderline of acceptability and unacceptability, so that the attitudes of member States might be harmonized."

Contents of this document

3. Annex I to this document contains the draft of Recommendations which the Office of the Union has drawn up on the basis of the draft by the Delegation of the Federal Republic of Germany, of the instructions given by the Committee and of the observations made by the States.

4. The observations of the States on the principles for selection of variety denominations and on the draft prepared by the Delegation of the Federal Republic of Germany and submitted to the eighth session of the Committee are summarized in Annex II to this document. Annex II also contains observations made by ASSINSEL (International Association of Plant Breeders for the Protection of Plant Varieties) and by RHS (Royal Horticultural Society).

Brief comments on the draft Recommendations prepared by the Office of the Union

5. Heading.-- In order to rebuff the criticism expressed by the interested circles, the Office of the Union has endeavored to underline the recommendatory nature of the document under discussion, particularly in the heading and in the headings of the individual sections ("rules"). It also has tried to emphasise in the heading and the preamble the fact that the recommendations are primarily applicable for the selection of variety denominations by the breeders themselves and only secondarily for the decision on the suitability of submitted variety denominations for registration which has to be taken by the authorities. For the sake of completeness, the heading also explicitly mentions that the document also contains recommendations for the procedure to be adopted by the authorities.

6. Preamble.-- The Office of the Union has added a preamble before the Recommendations, drafted as is usual for preambles to treaties, thus following the example of the currently valid 1973 Guidelines for Variety Denominations. This, together with the explicit reference to Article 21(h) of the UPOV Convention, is intended to give the necessary weight to the Recommendations. This would seem necessary since the strong emphasis placed on flexibility in Rule 11, in particular, could easily give the impression of being completely non-committal. As far as the content of the Preamble is concerned, the Office of the Union has tried to place emphasis on the grounds for adopting such recommendations and, in particular, to point to the advantages which their adoption has for the breeders themselves.

7. The Preamble concludes with three main recommendations, the first of which is directed to the applicants while the second and third are addressed to the authorities of member States.

8. Prior rights.-- In the same way as the Delegation of the Federal Republic of Germany, the Office of the Union has not proposed any rules for the case of conflict with prior rights, but has simply mentioned as a principle that no variety denomination should be registered where prior rights of third parties could hamper its free use (which was necessary in order to have a "peg" for the list of classes). As already expressed in the Preamble, whether a proposed variety denomination conflicts with the prior right of a third party depends to a considerable extent not only on the national provisions of member States concerned but also of the actual situation in a given State--for instance, whether a certain trademark enjoys protection in that State. The approach adopted by the Office of the Union has also been influenced by the fact that the extent to which the authorities of member States should examine proposed variety denominations for possible conflict with prior rights--either ex officio in each and every case or only when an objection is filed--is still very much under discussion. In other words, the Office of the Union did not wish to prejudge considerations which a number of member States are examining in connection with the revision of their plant variety protection legislation and its adaptation to the 1978 text of the Convention. An additional difficulty when formulating recommendations on conflict with prior rights of third

parties is constituted by the fact that the owner of the prior right may permit or object to use by the applicant of an identical or similar designation in differing degrees from one country to another. Finally, the Office of the Union believes that examination for identity with prior rights and the degree of identity will be performed increasingly in future with the help of electronic data processing equipment and that this should be hampered as little as possible by administrative provisions.

9. Individual Rules.- The guidelines forming the substantive part of the Recommendations have been called "Rules." In drafting these Rules, the Office of the Union has largely followed the proposals made by the Delegation of the Federal Republic of Germany, although the layout has been changed. That Delegation had endeavored to make it clear in the structure of its draft that the individual rules were simply interpretations of Article 13 of the Convention and not, as claimed by some, extensions of those provisions. The Office of the Union feels that this approach was primarily adopted to facilitate discussion within the Committee itself on what was to be included in the Recommendations. In their final version, the Recommendations should be drafted in the usual form of statutory instructions. The fact that these are simply recommendations is stated clearly enough at the end of the Preamble.

10. Examples: Following the instructions received, the Office of the Union has added examples, where appropriate, to each of the rules. In doing so, it has tried to use imaginary denominations as examples rather than real denominations in order to avoid difficulties with the owners of varieties. This has provided the additional advantage of the use of imaginary names making it easier to underline the meaning of an individual Rule than would be the case with real examples. Where appropriate, different examples are used in the different language versions of this document in order to make the content of the rules more readily understandable.

11. The problem of the "families of variety denominations" (paragraph 2(iii) of this document) has not yet been dealt with in the draft since the discussion might be reopened and the problem is covered by another document submitted to the Committee (document CAJ/IX/9).

[Annexes follow]

RECOMMENDATIONS FOR THE SELECTION OF VARIETY DENOMINATIONS
BY APPLICANTS FOR PLANT BREEDERS' RIGHTS,
FOR THE DECISION BY THE AUTHORITIES ON THE SUITABILITY OF
VARIETY DENOMINATIONS AND FOR THE ADMINISTRATIVE PROCEDURE

THE COUNCIL,

HAVING REGARD to Article 13 of the International Convention for the Protection of New Varieties of Plants of December 2, 1961, as revised in Geneva on November 10, 1972, and on October 23, 1978;

HAVING REGARD to the requirement of the Convention that a variety shall be given a denomination destined to be its generic designation before protection can be granted;

CONSIDERING that the above-mentioned Article 13 requires the variety denomination to fulfill inter alia the following conditions:

- it must be suitable as a generic designation and permit the identification of the variety,
- it must not be liable to mislead or to cause confusion concerning the characteristics, value or identity of the variety or identity of the breeder,
- it must be different from every denomination which designates, in a member State of the Union, an existing variety of the same botanical species or of a closely related species;

CONSIDERING that paragraph 5 of the above-mentioned Article 13 requires a variety to be submitted in the various member States of the Union under the same denomination and requires the authorities of member States of the Union responsible for the granting of plant breeders' rights to protect such variety already protected in another member State of the Union exclusively under the variety denomination under which it is protected in the other member State of the Union unless they consider that denomination unsuitable in their State;

CONSIDERING that paragraph 7 of the above-mentioned Article 13 requires anyone offering for sale or marketing, in a member State of the Union, propagating material of a variety protected there to use the variety denomination, even after the expiration of the protection unless opposed by prior rights, and requires the member States of the Union to ensure that no rights in the designation, prior rights excepted, shall hamper the free use of the designation in connection with the variety, even after the expiration of the protection;

CONSIDERING that paragraph 4 of the above-mentioned Article 13 stipulate that prior rights of third parties shall not be affected and requires the authority responsible for granting plant breeders' rights to ask the applicant to submit another denomination for the variety if a person obliged to use the variety denomination is forbidden to do so because of a prior right of a third party;

RECOGNIZING that the main purpose of the rules enumerated in Article 13 is to ensure that, as far as possible, protected varieties be marketed under the same variety denomination on the territories of all member States, that the registered variety denomination is accepted as the generic designation and that even after the expiration of protection propagating material is not marketed without the variety denomination being used;

RECOGNIZING that such an aim can only be achieved if the very generally framed provisions on variety denominations in the above-mentioned Article 13 are uniformly interpreted and applied by the member States and that therefore it is appropriate to adopt corresponding recommendations;

CONVINCED that the adoption of such recommendations for uniform interpretation and application of the provisions of Article 13 would not only be a help for the authorities of the member States but also for the breeder having to select variety denominations and that, in particular, recommendations of this kind would also form a basis for the dialogue between the authorities and the applicants on the suitability of variety denominations;

RECOGNIZING that the assessment of whether a proposed variety denomination stands in conflict with a prior right of a third party is to a great degree dependent on statutory provisions that do not derive from plant breeders' rights--particularly national trademark law, the law on the use of names and company law--and that furthermore the factual situation very often differs from State to State, so that the adoption of recommendations that go beyond certain principles and aspects would not be appropriate;

HAVING REGARD TO Article 21(h), which sets out the task of the Council to take all necessary decisions to ensure the efficient functioning of the Union,

RECOMMENDS:

(i) that applicants take into account the following rules of principle when selecting variety denominations,

(ii) that the authorities of member States base their decisions on the suitability of proposed variety denominations on the following rules of principle,

(iii) that the authorities of member States take into account the following recommendations on the exchange of information and on the procedure for the examination of suitability.

Rule 1

(1) Designations which may be taken for indications of another kind by which propagating material or harvested material is commonly designated are not suitable as generic designations and may therefore not be registered as variety denominations. This is applicable whether the indication for which the designation may be taken is correct or not.

(2) Paragraph 1 is also applicable where the designation is not used alone but as part of a more comprehensive designation. It is also applicable for translations of such designations into another language unless that language is not used in any of the countries in which the variety might be marketed.

(3) Paragraph 1 excludes, in particular, designations that are identical or which may be confused with designations of the following kind:

(i) Latin or common names for botanical genera, species or other taxonomical units or parts of such names unless it is obvious that these designations are used solely to signify the color or form, or used in some other figurative sense, for varieties which belong to a category of plants that is botanically different or differs in respect of its cultivation.

Examples: Designations such as "Cherry," "Cerasus," "Cerise," "Kirsche" or a designation comprising the word Cherry, such as "Scarlet Cherry," would not be registrable for a fruit variety, but would be suitable for varieties of a completely different category of plant, for instance for a tomato variety with small fruits or for a rose variety. The designation "Early Snowball" would not be registrable for a variety of the genus Viburnum, that is known by the

common name "Snowball" or by corresponding names in various other languages ("boule de neige," "Schneeball"), but would be suitable, on the other hand, for a cauliflower variety. The designation "Trifolium," even if used with an addition, would not be registrable for a clover or grass variety, but would be suitable for registration, however, for an ornamental shrub whose leaves were arranged in a way similar to clover.

(ii) Terms used in breeding or in the production and marketing of seed, except designations that are identical or identical in part with such terms if alone or in conjunction with other terms they have another pre-existing meaning and will be understood by the general public to have this other meaning if used in connection with the variety.

Examples: "Genus," "Species," "Variety," "Cultivar," "Population," "Hybrid," "Cross," "Line," "Rootstock," "Mutant," "Ecotype," "Threeway," "Inbred," "Top-cross," "F 5," "Elite," "Standard," "Improved." Suitable for registration would be "Crossbow" which, although it contains the breeding term "cross," is obviously used in the sense of "bow." Likewise, the designation "Variety Night" would not be related to the technical term "variety" and would therefore be suitable for registration.

(iii) Indications usually referring to quantity, weight, price, date or quality unless it is obvious that they cannot have such meaning in connection with propagating material or harvested material of the variety. Not suitable for registration are abbreviations which could be understood as such indications. This subparagraph is also applicable where the indication is used as an addition to, or as part of, a designation.

Examples: The designation "DM 10" would not be registrable since it could be taken for an indication of the price in Deutschmarks. Likewise, the designation "Cheaper by the Dozen" could be misunderstood as an indication of the price. "Feb 10" could be mistaken for an indication of date and "Meterlong" as an indication of length. Designations such as "Seven League Boots," "Silver Dollar" or "Upper Ten" would be registrable however.

(iv) Official control signs, names or abbreviations of examining stations or of other authorities which might be brought into connection with a variety. This is not applicable where it would be manifestly unreasonable to establish such relation.

Examples: "British Standards Institution" or the abbreviations "BSI" and "BS" (prefix denoting a British standard) would not be registrable, nor would "OECD Scheme," "Seed Scheme" or simply "Scheme." Not registrable would also be designations comprising the three capital letters "ISO," "SOC," or "BSA," which could be understood as referring to the International Organization for Standardization, the official French testing station for seed or the Federal Plant Varieties Office in Hanover. "AOC" or "VDQS" would not be suitable for registration for vine varieties, but would be registrable for vegetable varieties.

(v) Geographical indications, unless it is manifestly excluded that they could be meant as indications or appellations of origin.

Examples: A designation such as "Evesham" for a strawberry variety or "Cavaillon" for a melon variety would not be registrable, not even as part of a broader designation nor for other varieties.* Designations referring to historical regions or countries existing only in literature ("Arcadia," "Utopia") or to places or regions that are remote or of manifestly no importance for plant growing ("Manhattan," "Montmartre," "Soho," "North Pole," "Copacabana") would be suitable for registration since they hardly can be taken for an indication or appellation of origin or for a similar indication.

* Different opinion held by the US Patent and Trademark Office, see Annex II.

Rule 2

(1) Designations which are difficult to remember or to pronounce for the average user are unsuitable as generic designations and may therefore not be registered as variety denominations. This is not applicable for varieties which are exclusively marketed within a limited circle of knowledgeable persons as in the case of parent varieties for the production of hybrids.

(2) Paragraph 1 excludes, in particular, the following designations:

(i) Designations consisting of a combination of more than three letters if the combination is not pronounceable as a syllable and does not obviously form a sequence of letters commonly known to the public. The syllables do not need to have a meaning.

Examples: "ZKXV" would not be registrable but "STM" would since it consists of three letters only. "Jeuvensam" is registrable since it is pronounceable as syllables and the combinations "ABCD" or "AEIOU" are easily recognizable as sequences of letters.

(ii) A number (where numbers are admitted as such or as additions) consisting of more than four digits unless, exceptionally, the number has a special significance that makes it easy to remember.

Examples: "11537" would not be suitable for registration, but "10,000 Dollars" would.

(iii) A designation consisting of more than three independent words unless special circumstances make it easy to remember.

Examples: "What is it to be?" would be suitable for registration since the shortness of the words and its special originality makes the designation more easy to remember than would otherwise be the case with more than three words.

(iv) Excessively long words, particularly those composed of more than three syllables without pre-existing meaning or of more than three different terms, unless such composed words have a meaning which is very easily understandable for the public.

Examples: "Dimlunmarmer" would not be suitable for registration but "Doremifa" would. "Diplomgartenbauinspektor," a common German title for a horticultural officer, "Oldfarmersjoy," easy to remember because of a certain originality, should be considered suitable for registration.

(v) Combinations of letters and digits are only suitable for registration in that sequence and only for species where that type of denomination is established international practice, in particular for maize and sorghum.

Examples: "TC 15" would be suitable for registration for a maize variety, but not "15 TC."

(vi) Designations containing the same alphabetical component as other designations for a series of varieties, for example, varieties belonging to the same applicant, are suitable for registration, but third parties cannot be excluded from using that component.

Examples: A breeder could use the component "KIT" at the beginning of all varieties filed by him, for example, "KITE," "KITTYCAT," "KITBAG."

Rule 3

Designations containing elements which would cause difficulties when expressed in speech or transmitted by telex, for instance special signs like hyphens, subscripted or superscripted numbers, alternation of upper and lower case, are not suitable as generic designations and may therefore not be registered as variety denominations.

Examples: "A.Z.B.-35," "Medici-A-M²," "AvTM 512," "Goldmorgen⁷⁷" would not be registrable.

Rule 4

Designations which consist exclusively or predominantly of terms of everyday language which, if registered as variety denominations, would prevent others from using them when marketing propagating material, in other words, terms whose use should be kept free, are not suitable as generic designations and may therefore not be registered as variety denominations.

Examples: The designations "Latest Development," "Success of the Enterprise," "Sales Hit" would not be suitable for registration. See also the examples for designations excluded under Rule 1.

Rule 5

(1) Designations whose use may be forbidden in the marketing of propagating material of the variety are not suitable as generic designations and may therefore not be registered as variety denominations.

(2) Paragraph 1 excludes, in particular, the following designations:

(i) Those in which the applicant himself has some other right (for instance a right in a name or trademark) which he could assert under the law of the State to oppose use of the variety denomination by others, either at all times or, at least, after the expiration of the period of protection.

Examples: Designations containing the name or trade name of the breeder or of the owner of the variety are not suitable for registration.

(ii) Designations in which prior rights of third parties exist which can be asserted to oppose the use of the variety denomination. The personal names of other persons are registrable as variety denominations or parts of denominations only if they consist of:

(a) Dedications to public figures which cannot be mistaken for the name of well-known breeders or owners of varieties, on condition that the applicant can prove that these persons or, if recently deceased, their survivors, have agreed to such use;

(b) Historical figures or characters in literature.

Examples: "Peter the Great" would be suitable for registration, unless Rule 6 is applicable, i.e. not suitable for variety of a particularly small growth. "Felix Krull," a figure in a novel by Thomas Mann, or "Return of Ulysses" would be suitable for registration. However, "Felix Krull" would not be suitable if there were a well-known breeder of that name. Names of politicians, actors, musicians or sportsmen, for instance "Henri Dunant," "Nelly Melba", unless identical with the name of a well-known breeder or owner of a variety, are suitable for registration, with the agreement of the bearer of the name or his survivors if the bearer of the name is recently deceased.

(iii) Designations which would be contrary to public policy in the member State.

Rule 6

(1) A variety denomination is misleading and therefore not registrable if it is danger of creating the wrong impression as to the characteristics and value of the variety.

(2) Paragraph 1 excludes, in particular, the following designations:

(i) Designations which create the impression that the variety has particular features which in reality it does not have.

Examples: "Big Head" or "Grosse-tête" for a lettuce variety with relatively small heads, "Daddy Longlegs" for a short-stemmed tulip variety.

(ii) Designations which refer to special features of a variety in such a way that the impression is created that only this variety possesses those features, while in reality other varieties of the species in question have or may have the same features.

Examples: "Winter hardy", "Silo maize", "Truly resistant."

(iii) Designations creating the impression that the variety originates from another variety or is related to it, when in fact it is not the case.

Examples: "Bintje's grandchild" for a potato variety for which the well-known variety "Bintje" did not serve as the initial source of variation or "Of King Dagobert's Stable" for a variety having no relationship with another variety bearing the denomination "King Dagobert," are not suitable for registration.

Rule 7

A variety denomination is misleading and therefore not suitable for registration if there is a danger of it creating the wrong impression as to the identity of the breeder.

Examples: The examples given to Rule 5(2)(ii) where the names of historical figures or characters in literature or of public figures are identical with the names of well-known breeders or owners of a plant variety.

Rule 8

(1) Designations under which a past variety of the same botanical or related species was officially registered or propagating material was marketed are not suitable for registration in view of possible confusion and of their possibly misleading nature.

(2) Paragraph 1 is not applicable where the old variety is no longer cultivated and its variety denomination has not attained major importance, unless special circumstances could mean that it was potentially misleading.

Examples: The designation "Bintje" is not suitable for registration for any other potato variety since that particular variety is still cultivated. It would not even be suitable for registration, if Bintje were not cultivated any more, since the denomination has attained great importance. "Brown Marga" would be suitable for registration if "Marga" had been the denomination of a variety cultivated in the past and which is not stored in a gene bank nor has attained great importance. This would not be the case, however, for "Resurrection of Marga" since it could create the impression that the variety originated from "Brown Marga."

(3) For the same reasons, designations which create the impression that the variety has its origin in a certain country or region, when in fact this is not the case, are not registrable.

Examples: "True North" (poetic designation for Canada) would not be suitable for registration for a wheat variety developed in Europe of European material, nor would "Beauty of Rembrandt's Garden" for a tulip variety bred neither in the Netherlands nor with Dutch material.

(4) A designation which, by using botanical or breeding terms, may mislead as to the species to which a variety belongs or as to its manner of breeding or its breeding stage, even if the denomination is so chosen that it would be acceptable as a generic designation.

Examples: "Three-Way Victor" for a simple hybrid, "Twelfth generation" for a F6-hybrid.

Rule 9

Designations which are excluded by international conventions from being used as trademarks or parts of trademarks are not suitable for registration as variety denominations.

Examples: Article 6ter of the Paris Convention for the Protection of Industrial Property excludes, inter alia, names and abbreviations of names of intergovernmental organizations from registration as trademarks.

Rule 10

A variety denomination which is identical with a designation under which in a member State a variety of the same botanical or of a closely related species is officially registered or filed for registration or under which propagating material of the variety has been marketed is not registrable. The same applies where the proposed variety denomination and the other denomination are so similar to each other that for a purchaser of average attentiveness the danger of confusion would exist. All taxonomical units belonging to the same botanical genus and those taxonomical units contained in the same class in the list in Annex II to this Recommendation are considered closely related species.

Rule 11

Rules 1 to 9 are to be applied in a flexible manner and taking into account the actual circumstances and the purpose mentioned in the individual provisions. In addition, the following elements, in favor of the applicant, should be taken into account in each individual case:

- type of the variety as well as of the species and of the whole group to which the variety belongs,
- the envisaged and potential distribution of the variety,
- the circle of users of the variety,
- whether the variety denomination is used for the final product or not, and
- whether the breeder or the user of the variety has the possibility and the intention of using the variety denomination together with another indication such as a trademark or a trade name.

PART II

PROCEDURE

Rule 12

(1) The decision on the suitability of a variety denomination in accordance with the preceding Rules is taken by the authority referred to in Article 30(1)(b) (hereinafter referred to as "the authority") of the member State in which the variety denomination is first approved. However, that authority takes into account when rendering its decision all observations made by authorities of other member States.

(2) The authorities of member States accept the variety denomination approved in another member State even if they have objections unless it is impossible for them to accept that variety denomination because

- (i) prior rights of third parties prevent such acceptance,
- (ii) the variety denomination is not pronounceable in the relevant language or there are reasons which make the designation unacceptable in the member State in question,
- (iii) mandatory national provisions prevent its acceptance,
- (iv) the designation would conflict with public policy in the member State.

Rule 13

(1) The mutual information between the authorities of the member States on variety denominations and the communication of observations on proposed variety denominations, as provided for under Article 13(6) of the UPOV Convention, is achieved by an exchange of the official gazettes published by the member States according to Article 30(1)(c) of the UPOV Convention. These official gazettes are to be composed according to the UPOV model gazette for plant variety protection (Document UPOV/INF/5) and according to any further recommendations which may be adopted by UPOV; in particular, the chapters containing information on variety denominations shall be appropriately identified in the table of contents.

(2) Each authority of a member State sends to the competent authorities of the other member States a mutually agreed number of copies of each issue of the official gazette immediately after its publication.

Rule 14

(1) After the receipt of each issue of the official gazette of another member State, each authority examines the filed variety denominations published in that issue. If the authority finds a variety denomination to be unsuitable, it proceeds as follows:

(i) It communicates its observations, together with its reasons, to the authority which has published the variety denomination, on a form as reproduced in Annex II to these Rules, as soon as possible, but not later than three months after the publication of the issue concerned.

(ii) A copy of the above mentioned communication is sent at the same time to the competent authorities of the other member States.

(2) The authority which has published the filed denomination examines immediately the observations communicated by the authorities of the other member States of the Union and proceeds as follows:

(i) If the observations refer to an obstacle to registration which, according to the Convention, applies for all member States, the competent authority accepts the observations and rejects the filed denomination. If the competent authority does not share the misgivings of the other authority, it informs the other authority thereof and gives its reasons. As far as possible the offices concerned will endeavor to reach agreement.

(ii) If the observation refers to a fact which is an obstacle to registration only in the State of the authority which has made the observation but not in the State of the authority which has published the filed denomination (i.e. identity of the denomination with another's trademark in the former State only), the latter authority informs the applicant accordingly and requests him to file another variety denomination if he also intends to request the granting of protection in the member State of the authority which has transmitted the observation or if he intends to market propagating material of the variety in that State. If this procedure does not lead to the filing of another variety denomination, there is no need for a communication by the competent authority to the authority which has transmitted the observation.

[The following annexes will be attached to the final version of these Rules:

Annex I: List of Classes for Denomination Purposes.

Annex II: Form for the Communication of Observations on a Proposed Variety Denomination.]

[Annex II follows]

SUMMARY OF OBSERVATIONS

to the principles for the Selection of Variety Denominations
and
to the draft for a revised version of the Guidelines for
Variety Denominations, submitted to the eighth session of the Committee
by the Delegation of the Federal Republic of Germany
(Annex I of Document CAJ/VIII/7) *

1. South Africa (Extract from a letter dated February 9, 1982, from Mr. J.F. Van Wyk, Director of the Division of Plant and Seed Control, to the Vice Secretary-General):

The principles governing the choice of variety denominations as contained in Article 13 in the Convention appears to be adequate at this stage. I have no objection against the amplification by way of recommendations of the principles as contained in Article 13 and would in this connection support the contents of Annex I to document CAJ/VIII/7.

2. United States of America (Letter dated January 21, 1982, from Mr. R.D. Tegtmeyer, Assistant Commissioner for Patents, to the Vice Secretary-General):

I am writing to provide the views of the United States on the proposals now under consideration for amending the UPOV variety denomination guidelines (UPOV document CAJ/VIII/7). We recognize the great amount of thought and effort behind this UPOV document, and compliment those who prepared it.

While our variety naming system will be based primarily on the International Code of Nomenclature for Cultivated Plants (1980), the proposals under consideration are also well-suited for this objective. A number of the variety naming principles incorporated in the document might be clearer, however, if illustrative examples of their application could be provided. For example, we do not understand the general principles referred to in the bottom part of item 4.1.1.1. We also have a few comments on particular provisions of the guidelines.

We are not sure that item 1.1 (at least in translation) accurately states the relationship between variety names and proprietary rights. Perhaps it could read along these lines, "The variety name is the generic designation of the variety and cannot become the basis of a proprietary right in respect to the variety or to any variety with which it might be confused. In cases of conflict between a variety name and the prior proprietary right of a third party, the third party's right must predominate."

Item 4.1.1.2 precludes certain geographical indications. In some cases, however, such indications could be proper. A plant variety having as part of its variety name the State or region where it originated would be such a case.

Item 4.1.1.5 seemingly precludes indications referring to the characteristics of the variety. We agree with this principle in general, but believe certain variety names might properly indicate or imply characteristics or value. For example, we see nothing wrong with a variety name that includes some indication of flower color, the ever-bearing properties of a fruit or berry, or plant size.

* Only relevant observations are reproduced in the present annex.

Item 4.12.3.1 precludes a variety name containing the name of the breeder or the owner of the breeders' right. We understand the reasons advanced for this principle, but wonder if they are always applicable. As examples, we point out that a number of plant varieties, e.g., Bradford pear, Starkcrimson apple and Stowell's Evergreen corn, are well-known by these precluded names.

The proposals conclude with an observation that the list of classes is still being prepared. For the United States, we have decided to consider only the species within the same genus as closely-related. Species within another genus, except perhaps in rare circumstances, will not be regarded as closely-related. In the case of a genus containing a great number of species, we may regard only certain of these species as closely-related. We believe this philosophy about defining classes will avoid the need for complex and scientifically incorrect definitions, and suggest its adoption in other member States.

We hope these comments will be helpful, and welcome the opportunity to answer any questions about them or explain them further. My Office has asked certain interested private sector representatives to review the proposed guidelines. I will forward any comments they provide

3. France: With a letter, dated December 3, 1981, Mr. M. Simon, Secretary of the Committee for the Protection of Plant Varieties, transmitted, as the French contribution to the revision of the Guidelines for Variety Denominations, the following text which has the form of a ministerial decree intended to replace the one published in the French official Journal of March 26, 1974. The text combines the new provisions forwarded recently, such as those resulting from the new wording of Article 13 of the Convention and the discussions held in the Committee.

"DRAFT

(France)

amending the Decree of March 14, 1974,
concerning the denominations of plant varieties in respect of which
either an entry has been made in the Catalogue of Species and Varieties of
Cultivated Plants or a plant variety certificate has been issued.

Article one:

The denomination is the generic designation of the variety.

Article 2:

The denominations of plant varieties, provided for in the above texts with a view to the recording of the varieties in the Catalogue of Species and Varieties of Cultivated Plants or to the issue of new plant variety certificates, must permit those varieties to be identified without risk of error or confusion, particularly with respect to the origin, source, characteristics or value of the variety, or the identity of the breeder.

To this end, the denomination proposed by the breeder on his own responsibility must comply with the provisions set forth in Articles 4 et seq. of this Decree.

Article 3:

Where a denomination has already been used to designate a variety at the time of its entry in a national catalogue or in the common catalogue or at the time of the grant of a title of protection in a member State of the International Union for the Protection of New Varieties of Plants, it must also be used in France for the entry in the Catalogue of Species and Varieties of Cultivated Plants, or to identify the variety in a new plant variety certificate.

However, the breeder may be authorized to propose another denomination if reasons of language or public policy prevent the use of the pre-existing denomination in France.

In such cases, the synonymy shall be mentioned in the Catalogue of Species and Varieties of Cultivated Plants or in the new plant variety certificate.

Article 4:

A denomination may not consist of more than three easily pronounceable and memorable words which may or may not have an existing meaning. Where a denomination is composed of a single word, such word may be followed by digits up to a maximum of four subject to such digits not being misleading as regards the origin and characteristics of the variety.

A series of denominations may comprise:

(a) the same alphabetical part, whereby no one breeder may have exclusive use thereof;

(b) the same word followed by further words, whether descriptive or not, subject to such words not being misleading as to the origin or botanical characteristics of the variety. Any word liable to express a notion of superiority in relation to an existing denomination shall be prohibited.

Where such is an established international practice for designating varieties within a genus or species, a denomination may also be constituted by a combination of letters followed by digits, whereby the respective number of letters and digits may not exceed four.

Article 5:

A denomination may not be formed by deleting one or two words from a denomination already in use. The denomination of an old variety that is still well known may not be used to designate a new variety. A denomination may further not comprise any element liable to hinder the free use of the denomination or the free marketing of the variety.

Article 6:

The provisions of Article 10 of Decree No. 71-765 referred to above concerning the use of a trademark in conjunction with a variety denomination shall apply to the marketing of all the varieties entered in the Official Catalogue of cultivated plants or in the Common Catalogue.

Article 7:

Notwithstanding the foregoing articles, where a variety serves exclusively for the production of propagating material for other varieties, its denomination may consist of a combination of letters or of digits or of letters and digits without limitation subject to such type of denomination corresponding to an established international practice for the species in question.

Article 8:

The variety denominations contained in the Catalogue of Species and Varieties of Cultivated Plants as at the date of this Decree shall be maintained.

4. Israel (Letter, dated December 16, 1981, from Dr. H. Gelmond, Chairman of the Plant Breeders' Rights Council to the Vice Secretary-General):

Please be informed that due to the relatively limited number of applications for the registration of breeders' rights annually filed in Israel and the fact that most proposed denominations are in Hebrew, we are not so perplexed by the complexity of the subject.

In matters of daily practice, we are guided by Article 31 of our Plant Breeders' Rights Law, which is in harmony with Article 13 of the UPOV Conventions.

We accept the guidelines, as proposed in document CAJ/VIII/7 of September 17, 1981 and shall attempt to adhere to the rules as much as feasible. However, we shall still attempt to avoid accepting, in varieties of local breeding, variety denominations consisting of a combination of letters and figures, for all species.

5. New Zealand (Letter dated January 26, 1982 of Mr. F.W. Whitmore, Registrar of Plant Varieties, to the Vice Secretary-General):

With regard to the draft revised version of the Guidelines for Variety Denominations (Annex I to document CAJ/VIII/7), we fully appreciate the work and thought that went into its preparation and feel that it has provided a very useful basis for discussion in detail, but we believe that the new Guidelines should be a simpler document based on more general recommendations rather than being very detailed and attempting to provide for every possibility.

6. Switzerland (Letter dated January 15, 1982, from Dr. W. Gfeller, Chief of the Federal Bureau for Plant Variety Protection, to the Vice Secretary-General):

Document CAJ/VIII/11, paragraph 21(i), records that the member States were invited to convey their observations on the principles governing the choice of variety denominations and on the relevant draft to the Office of the Union by December 15, 1981.

We are happy to have the opportunity to set out a few general principles governing our activities:

1. The variety denomination must make it possible to identify the variety. According to our law, alone variety denominations that consist solely of digits are unsuitable to adequately identify a variety. We would not like to go into further detail here as to the problems of requirements as to suitability and risk of confusion of variety denominations, but would simply remind you of the excellent paper by Henning Kunhardt "Requirements as to the Constitution of Variety Denominations" in GRUR 1975, Volume 9, pages 463/467.

2. In addition to the principle that a variety denomination should be distinctive and not confusing, there is a requirement that the variety denomination may not offend the national, moral or religious feelings of sectors of the population. There is no need to give examples since every obviously offensive variety denomination can be recognized as such and agreement will hardly be reached on borderline cases since they would not otherwise be borderline cases.

3. We would like to call into question the principle that a variety denomination may be not be misleading or liable to give a false impression as to the origin, characteristics or value of the variety, as to the breeder or owner of the variety, in view of its difficult application. For instance, can a variety denomination "golden winner" be accepted even if the variety has never won a first prize in a show? Should we, for example, refuse the denomination "Meise" (titmouse) for a variety of rose merely because one might have to ask whether this was connected with the breeder Meilland?

Would we have to agree with Meilland if he contested such a proposal? If a rose breeder had the idea of calling his new variety "Haubenmeise" (crested titmouse) then two firms, i.e. Hauser in Vaumarcus (Switzerland) and Meilland could submit objections since the firm Hauser has already been promised the prefix "hau" and "mei" is known to be reserved for Meilland. In so far as colors are included in a variety denomination, the only question that may be put is whether the variety really corresponds to the color that is stated in

the denomination. In such a case we would not be in a position to refuse a color as a component of a variety denomination for reasons of possible misleading or deception.

Although we cannot exhaustively cover the wide area of principles for variety denominations, we hope nevertheless that these few thoughts on this complex problem will suffice to sketch out our point of view.

7. ASSINSEL (letter, dated January 15, 1982, from Mr. H.H. Leenders, Secretary General, to the Vice Secretary-General):

Although the Chairman of your Council and you yourself attended our Congress in Acapulco, we are confirming in writing, that our General Assembly has decided to invite you to revise the Guidelines for Variety Denominations in such a way, that breeders whatever their nationality, would have the possibility of using variety denominations combining letters and figures and symbols or a name indicating the identity of the breeder of the variety concerned.

Our members have after several years of experience with the practical application of this guideline, come to the conclusion that the provisions of Article 13 of the Convention which stipulates

- a) that the denomination must not be liable to mislead or lead to confusion concerning the characteristics, value or identity of the new variety or the identity of the breeder,
- b) the variety denomination must be different from every denomination which designates in any member State of the Union existing varieties of the same or closely related botanical species

should be the leading principles in variety naming and that all further regulations are rather confusing than clarifying this issue.

Please bring this opinion to the attention of your competent Committee and your Council.

8. Royal Horticultural Society (extract from a letter dated February 19, 1982, from Mr. A.C. Leslie, Registration Officer, The Royal Horticultural Society's Garden, Wisley, Woking, Surrey (United Kingdom), to the Vice Secretary-General):*

* The Office of the Union has also received a copy of the correspondence exchanged between Mr. A.C. Leslie and Mr. A.W.A.M. Van der Meeren, Secretary of the Netherlands Board of the Plant Variety Right, from which follows two extracts:

(i) Letter dated January 5, 1982, from Mr. Leslie to Mr. Van der Meeren:
"... Could I point out that it is my understanding that organizations concerned with granting Breeders Rights should contact the Registration Authority concerned (where there is one in existence) concerning the eligibility of all names submitted to them. The R.H.S. has been appointed the International Registration Authority for Rhododendron, Narcissus, Lily, Dianthus, Conifer, Orchid, Dahlia and Delphinium cultivar names and has published Registers for all but conifers. Our Registers are of course kept up to date and I would be very happy to check any names you may require."

(ii) Answer from Mr. Van der Meeren to Mr. Leslie: "As to your suggestion in the last alinea of your letter of 5 January I can inform you that I discussed it with the Chairman of the Raad. He agrees that it could be useful to come to a closer cooperation with the International Registration Authorities. However this is a matter which regard the official authorities in all UPOV member States. Therefore it is desirable that this item will be discussed in one of the next sessions of the Administrative and Legal Committee of UPOV."

... The easiest way for cooperation seems to me that the different International Registration Authorities make certain that they come in possession of the various Gazettes and make their objections with all necessary data within said period of three months. Of course the decisions have to stay in the end with the national registration authorities which are appointed in the diverse national laws as the legal authority to do so."

As an International Registration Authority for 8 major cultivar groups we are concerned that there appears to be a lack of liaison between most UPOV States and the Registration Authorities, with the result, for instance, that names are being registered by rights organizations which duplicate those already on our Registers. I would hope to send you some formal proposals to improve this situation in the near future, together with some suggestions regarding the current practice of applying more than one name to the same plant. However, before doing so I would like to be clear on the initial guidelines you provide for your member States.

[End of Document]