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INTERNATIONAL UNION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS  
GENEVA

**ADMINISTRATIVE AND LEGAL COMMITTEE**

**Thirty-Ninth Session  
Geneva, March 25, 1999**

THE NOTION OF TREES AND VINES FOR THE PURPOSES OF THE PROVISIONS ON  
NOVELTY AND THE DURATION OF PROTECTION

*Document prepared by the Office of the Union*

Introduction

1. At its thirty-eighth session, held on April 2, 1998, the Administrative and Legal Committee briefly examined the notion of trees and vines for the purposes of the provisions on novelty and the duration of protection, on the basis of document CAJ/38/5, and concluded that the question – given its acknowledged complexity – would be more appropriately considered within a working group.
2. The Office of the Union has sought views by electronic mail from representatives of nine member States and received four; they are summarized below. An enquiry has been made in 1998 by the Delegation of Australia; its summary of the replies is integrated into this document.

The Concept of Tree

*The general concept*

3. The background information provided by the Office of the Union is given in Annex I to this document. The general comment made by Mr. Bill Whitmore (New Zealand) is reproduced in Annex II.

4. The following answers were given to the question whether the UPOV Convention should be implemented on the basis of the ordinary meaning given to the word “tree” or on the basis of a botanical definition:

(a) The English Webster provides the preferred definition (reply from Canada).

(b) The ordinary meaning ascribed to the word “tree” is preferable (Ireland).

(c) One should not rely on a definition, particularly in view of the absence of a clear borderline between trees and shrubs. Two replies (Germany and New Zealand).

There seems to be agreement that the word “tree” should be given a broad or extensive meaning that would include at least the large shrubs. However, different views were expressed with respect to the precise scope beyond that category. Preferences were expressed for:

(a) an extension to smaller shrubs;

(b) an extension to plants which grow into a tree under particular circumstances (for instance roses);

(c) an extension to all woody plants.

5. The reply from Ireland was that a commonly agreed meaning is probably not attainable.

*The application of the notion to individual cases*

6. There seems to be agreement that one should not use a single reference book. One obvious reason is that there is no comprehensive one that would do the job. It may also be observed that reference books provide information on the growth habit of the various species, in particular in their natural habitat, but would not provide an automatic answer to the question whether a particular application for protection relates to a tree.

7. No clear answer emerged to the question of the taxonomic level at which decisions ought to be taken. The following were suggested:

(a) the species level;

(b) the genus or species level, it being understood that one would have to go down to the variety level in certain cases (for instance, Rhododendron varieties grown as pot plants would not be considered as trees; varieties grown in the open would);

(c) the variety level, which was considered to be the most appropriate and least confusing.

8. The summary provided by the Delegation from Australia referred to the possibility of compiling a list of genera and species that qualify as a tree or a vine (if no harmonized system can be achieved, the list would also have to be country-specific). It should be observed in this respect that, in the absence of precise information, it is up to the breeder to decide in the first

instance whether his variety is or is not a tree and that he incurs loss of his rights if he takes the wrong decision and makes use of the six-year period under the novelty rule.

*Special cases*

9. There seems to be no general answer. Two replies favor the treatment of woody plants as trees (this would apply to arborescent plants such as tree ferns and bamboos. No specific reply has been given for the banana “tree.”

10. It has also been suggested that the circulation of a document setting out the determinations made for the genera and species concerned for which applications for protection have already been made would best avoid confusion in this area.

The Concept of Vine

11. There is agreement that an interpretation of “vine” extending to herbaceous plants is erroneous.

12. There seems to be agreement that plants that are similar in appearance to the grapevine, e.g. wisteria and kiwi, should be treated like the grapevine.

13. As for the more slender woody climbers such as *Clematis* or *Lonicera*, the replies seem to be divergent: two refer to their woodiness, and two others suggest that they should be considered on a case by case basis.

[Two Annexes follow]

BACKGROUND INFORMATION

PART I

THE CONCEPT OF TREE

Chapter 1

General

Background\*

1.1 The French dictionary *Le Petit Robert* defines a tree (*arbre*) as follows:

"Large woody plant whose stem carries branches only above a certain level from the soil."

1.2 However, it defines the *arbrisseau* as follows:

"Small tree whose stem is branching as from its base."

1.3 The English *Webster* defines a tree as follows:

“(a) a woody perennial plant having a single main stem that may be short but is usually considerably elongated, has generally few or no branches on its lower part, and is crowned with a head of branches and foliage or (as in palms) of foliage only.

“(b) a shrub or herb that grows naturally in or is trained into an arborescent form <old rose ~s> <a sturdy banana ~> <some plants that are tall ~s under favorable conditions are mere shrubs at the extremes of their range>.”

1.4 There seem to be very few "botanical" definition of tree. The following, by E.L.J. Little (Atlas of United States trees), has been found on the Internet at:

<http://quercus.ca.uky.edu/treeweb/taxonomy.html#tree:>

“A tree is a perennial woody plant which at maturity is 13 ft [4m] or more in height, with a single trunk at least 3 inches [7,6cm] in diameter, unbranched for at least several feet above the ground, and having a more or less definite crown.”

It is further commented that

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\* The Delegation from Argentina submitted extracts from the Microsoft Encarta Encyclopaedia. The following definitions – taken from *The European Garden Flora. Dicotyledons (Part III). Volume 5:601*, Cambridge University Press – were also quoted by the Delegation from Ireland:

“**Tree:** A long lived perennial woody plant, usually with a single stem.”

“**Shrub:** A woody plant with several stems or branches from near the base and of a smaller stature than a tree.”

“Shrubs are woody plants that are usually smaller than trees at maturity and have multiple stems with no clear main trunk.”

1.5 The (United States) Federal Geographic Data Committee Vegetation Subcommittee (<http://biology.usgs.gov/fgde.veg/>) has the following definition:

“Trees – Woody plants that generally have a single main stem and have more or less definite crowns. In instances where life form cannot be determined, woody plants equal to or greater than 5m in height will be considered trees.”

1.6 The Australian Centre for Plant Biodiversity Research provides at <http://www.anbg.gov.au/glossary/fl-aust.html> the following definitions from the Flora Section of the Australian Biological Resources Study:

“Tree: a woody plant at least 5 meters high, with a main axis the lower part of which is usually unbranched.”

“Shrub: a woody plant less than 5 metros high, either without a distinct main axis, or with branches persisting on the main axis almost to its base.”

It also provides at <http://www.anbg.gov.au/glossary/fl-nsw.html> the following definitions from the National Herbarium of New South Wales:

“Tree: a woody plant usually with a single distinct trunk and generally more than 5m high.”

“Shrub: a much-branched woody plant less than 8m high and usually with many stems. Tall shrubs are mostly 28m high; small shrubs 12m high; subshrubs less than 1m high.”

### Question 1

Should the UPOV Convention be implemented on the basis of the ordinary meaning given to the word "tree"? (If it is felt that the basis should be a "botanical" definition, please state the definition and give bibliographic details.)

### Question 2 (see also subsequent questions)

Which meaning should be taken as a general basis (or guiding principle):

- (a) The restricted ordinary meaning (the *Petit Robert* definition under 1.1 above)?
- (b) A more extensive meaning that includes large shrubs (the first *Webster* definition under 1.3)?
- (c) An even more extensive meaning that includes smaller shrubs (the *arbrisseaux* mentioned in the *Petit Robert* definition under 1.2)?
- (d) A very extensive definition that includes plants which grow into a tree under particular circumstances (for instance roses as indicated in the second *Webster* definition under 1.3)?

### Question 3

Should we attempt to specify criteria (for instance, to be a tree, the plants of the species concerned must ordinarily grow higher than, say, four meters)?

## Chapter 2

### Handling of True Trees

#### Background

2.1 Botanical descriptions usually categorize the various species. For instance, with regard to *Corylus* (hazelnut):

(a) The *RHS Dictionary of Gardening* says that *Corylus* is a genus of about 15 species of deciduous trees and shrubs. *C. avellana* (the common hazelnut) is described as a shrub 8 to 10 ft. (2 to 2.5m) high, *C. colurna* (the Turkish hazelnut) as a tree 70 to 80 ft. (21 to 24m) high and *C. heterophylla* (the Japanese hazel) as a shrub or small tree up to 20 ft. (6m) high.

(b) The *Diccionario de Plantas Agrícolas* uses the terms árbol (a tree), arbusto (a small tree or large shrub) and arbolito (a small shrub). *C. avellana* is described as an arbusto or arbolito up to 6m, and *C. colurna* as an arbolito or árbol up to 25m.

(c) The *Zander* uses signs for, in particular, Baum (tree), Strauch (shrub), Halbstrauch ("half-shrub"). *C. avellana* is a shrub, and *C. colurna* a tree. In some instances, it uses two signs for a particular species (for instance, *Camellia sinensis* and *Prunus lusitanica* are shown as being both tree and a shrub).

2.2 Hazelnuts illustrate the possibility to use a certain species generally regarded as a bush in the same way as a species generally regarded as a tree, such as apples.

2.3 Certain kinds of plants have been the subject of intense interspecific breeding, so that it is not very meaningful to attempt to classify a plant down to the species level. In the case of Rhododendrons, for instance, the range of varieties includes true trees and small shrubs.

### Question 4

Should we use (attempt to use) a reference book, and if yes, which one?

### Question 5

How should we classify the plants:

(a) Work at genus level (despite the fact that there is variation as between species) and take an extensive approach (i.e. all species and varieties would be considered to be trees as soon as one species is a tree, or a restrictive approach?

- (b) Work at species level?
- (c) Work, where relevant, at the variety level, that is decide for each variety whether it is a tree or not?

### Chapter 3

#### Handling of Special Cases

##### Question 6

How should we treat arborescent plants (such as tree ferns), or plants whose common name includes or implies the notion of tree (such as banana treed), or bamboos?

## PART II

### THE CONCEPT OF VINE

#### Background

1.1 The original French and German texts of the Convention refer to the plant of the genus *Vitis* that produces grapes, and more particularly to *V. vinifera*. The English "vine" is more ambiguous and may also cover – woody or herbaceous – climbing and creeping plants, or even herbaceous plants of spreading growth such as tomato or potato.

##### Question 7

Is it agreed that an interpretation of "vine" extending to herbaceous plants is erroneous?

##### Question 8

How should we treat plants which are similar in appearance to the grapevine, e.g. wisteria and kiwi?

##### Question 9

How should we treat other woody, more slender, climbers such as *Clematis* or *Lonicera*?

[Annex II follows]

ANNEX II

COMMENT FROM MR. BILL WHITMORE (NEW ZEALAND)

The concept of tree.

I think it is important to go back if possible to first principles and ask what the writers of the UPOV Conventions intended. While there is little indication of this in the records of the 1991 Diplomatic Conference, the records of the 1978 Diplomatic Conference are more helpful. It was in the 1978 Convention that the six-year period of grace for trees and vines, was introduced. It is explained in the record of the 1978 Conference that the period of grace was to be extended to six years “in the case of certain groups of plants which are usually slow-growing”.\*

With this in mind how should the word “tree” be interpreted? If the intention is to differentiate between those plants which are slow growing and those which are not, it is confusing and not particularly logical to distinguish plants which are trees from plants which are not trees, such as shrubs. Certain trees and certain shrubs may be equally slow growing, or equally fast growing; the fact that one happens to have a single trunk whereas the other has more than one trunk is irrelevant. [Annex I] identifies other illogicalities.

The New Zealand Plant Variety Rights Act attempts to reflect the intentions of the writers of the UPOV Conventions while avoiding endless debate by drawing the line between woody plants and non-woody plants. This may not be a perfect solution but it has worked well in practice. There are far fewer problems differentiating between woody and non-woody plants than between plants which are trees and those which are not trees. While lawyers may think the terms “woody” and “non-woody” rather strange and imprecise they are terms used with a clear meaning by plants people. One would expect that in general woody plants would be slower growing than non-woody plants.

I would not suggest that this group resolve the problem under discussion as in the New Zealand law. I mention it merely as a useful pointer to a possible solution.

I hope that it might be possible to avoid getting into the enormous and contentious activity of distinguishing plants on a taxon by taxon basis, or on the basis of whether they have one or more trunks, etc.

As a tentative suggestion could we agree to interpret the word “tree” in the 1991 Convention to mean trees in the sense understood in everyday usage but including also other woody plants.

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\* The decision to provide for two minimum periods of protection was taken at the first session of the Committee of Experts (Paris, April 22 to 25, 1958) which elaborated the Convention between 1958 and 1961. The Records of the Diplomatic Conferences of 1957–1961 and 1972 (pages 32 and 38) show that the following distinctions were suggested: annual plants and perennial plants; possibly food and industrial plants and ornamental plants; plants that are rapidly distributed on a large scale and others. In conclusion, the experts agreed on a minimum period of 18 years “for certain categories of plants such as grapevine, fruit trees and their rootstocks, forest trees, ornamental trees” (*Note from the Office of the Union*).



### The concept of vine

In New Zealand we interpret 'vine' to include all woody vines. We believe it to be illogical and arbitrary, for the purpose of Article 6 and 19 of the 1991 Act, to distinguish grapevine from other vines, such as wisteria or kiwifruit, of a similar woody nature and with a similar rate of growth.

We suggest taking a similar approach with vines as suggested with respect to trees. In other words define the word "vine" in the 1991 Convention to mean grape but including also other woody vines.

### A more fundamental solution

The problems under discussion arise because of the nature of the wording in the 1991 Convention. Perhaps the group should consider making a recommendation to the CAJ to take the opportunity at the next Diplomatic Conference on the UPOV Convention to amend the wording in Article 6 and 19.

One possibility would be to remove the distinction between the types of plant. For example one might envisage:

- Article 6 allowing sales for a fixed period prior to application irrespective of the type of plant.
- Article 19 providing for a right for a specified minimum number of years irrespective of the type of plant.

[End of document]