

**UPOV/EXN/DEN/1 Draft 2****Original:** English**Date:** July 24, 2019**DRAFT  
(Revision)****EXPLANATORY NOTES ON VARIETY DENOMINATIONS UNDER THE UPOV CONVENTION***Document prepared by the Office of the Union**to be considered by**the Working Group on Variety Denominations at its sixth meeting,  
to be held in Geneva on October 29, 2019, and**the Administrative and Legal Committee at its seventy-sixth session,  
to be held in Geneva on October 30, 2019**Disclaimer: this document does not represent UPOV policies or guidance***Note for Draft version**

Footnotes will be retained in published document.

Endnotes and highlighted boxes are background information when considering this draft and will not appear in the final, published document.

~~Strikethrough~~ (highlighted in grey) indicates deletion from the text of document UPOV/INF/12/5 that has been agreed by the WG-DEN.

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New proposals in Circular E-19/041 issued on April 18, 2019 are presented in boxes.

~~Double strikethrough~~ indicates changes to document UPOV/INF/12/5, accepted by the WG-DEN by correspondence (see Circular E-19/041).

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Yellow highlighted ~~double strikethrough~~ indicates proposed changes to document UPOV/INF/12/5, to incorporate comments in response to Circular E-19/041.

Yellow highlighted double underlining indicates proposed changes to document UPOV/INF/12/5, to incorporate comments in response to Circular E-19/041.

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EXPLANATORY NOTES ON VARIETY DENOMINATIONS UNDER THE UPOV CONVENTION

PREAMBLE

1. The Council of the International Union for the Protection of New Varieties of Plants (UPOV) refers to the International Convention for the Protection of New Varieties of Plants (UPOV Convention), and in particular to Articles 5(2) and 20 of the 1991 Act, and Articles 6(1)(e) and 13 of the 1978 Act and the 1961 Convention, which provides that a variety must be given a suitable denomination which will be registered at the same time as the breeder's right is granted.

2. The Council recalls that, according to the relevant provisions of the UPOV Convention, a variety denomination must be suitable as a generic designation and must enable the variety to be identified; it must not be liable to mislead or to cause confusion concerning the characteristics, value or identity of the variety or the identity of the breeder.

3. The Council emphasizes that the main purpose of these Explanatory Notes is to ensure that, as far as possible, protected varieties are designated in all members of the Union<sup>1</sup> by the same variety denomination, that the approved variety denominations establish themselves as the generic designations and that they are used in the offering for sale or marketing of propagating material of the variety, even after the expiration of the breeder's right.

4. The Council recalls the definition of "variety" in Article 1 (~~1~~)<sup>a</sup> of the 1991 Act of the UPOV Convention:

"variety" means a plant grouping within a single botanical taxon of the lowest known rank, which grouping, irrespective of whether the conditions for the grant of a breeder's right are fully met, can be  
- defined by the expression of the characteristics resulting from a given genotype or combination of genotypes,  
- distinguished from any other plant grouping by the expression of at least one of the said characteristics and  
- considered as a unit with regard to its suitability for being propagated unchanged[.]

~~4-5.~~ Whilst noting that the only binding obligations for members of the Union are those contained in the UPOV Convention itself, the Council considers that the aim set out in paragraph 3 can only be achieved if the broadly worded provisions on variety denominations under the UPOV Convention are uniformly interpreted and applied by the members of the Union, and that the adoption of appropriate explanatory notes is therefore advisable. Those Explanatory Notes should not be interpreted in a way that is inconsistent with the UPOV Convention.

~~5-6.~~ The Council considers that the adoption of such Explanatory Notes for the uniform interpretation and application of the provisions on variety denominations will be of assistance not only to the authorities<sup>2</sup> of members of the Union but also to breeders in their selection of variety denominations.

~~6-7.~~ The Council, having regard to the UPOV Convention (Article 26(5)(x) of the 1991 Act and Article 21(h) of the 1978 Act and the 1961 Convention), under which it has the task of taking all necessary decisions to ensure the efficient functioning of the Union, and in the light of the experience acquired by members of the Union in connection with variety denominations, recommends that the authorities of the members of the Union,

(i) base their decisions on the suitability of proposed variety denominations on these Explanatory Notes;

(ii) take into account the guidance in these Explanatory Notes concerning the procedure for assessing the suitability of proposed variety denominations and the exchange of information;

(iii) provide comprehensive information concerning these Explanatory Notes, to assist breeders when selecting variety denominations.

Prior guidance on this matter, provided by the "Explanatory Notes on Variety Denominations under the UPOV Convention" (document UPOV/INF/12/35), is superseded by these Explanatory Notes (document UPOV/EXN/DEN/1).

<sup>1</sup> "Member of the Union" means a State party to the 1961 Convention/1972 Act, the 1978 Act or a State or intergovernmental organization party to the 1991 Act (Article 1(xi) of the 1991 Act).

<sup>2</sup> The "authority" means the authority entrusted with the task of granting breeders' rights (Article 30(1)(ii) of the 1991 Act and Article 30(1)(b) of the 1978 Act and 1961 Convention).

**EXPLANATORY NOTES ON VARIETY DENOMINATIONS  
UNDER THE UPOV CONVENTION**

*The Explanatory Notes below correspond to the paragraph numbers  
within Article 20 of the 1991 Act and Article 13 of the 1978 Act and 1961 Convention,  
unless indicated otherwise.*

Paragraph 1

(Paragraphs 1 and 3 of Article 13 of the 1961 Convention)

***[Designation of varieties by denominations; use of the denomination]***

**The variety shall be designated by a denomination which will be its generic designation. Each member of the Union shall ensure that, subject to paragraph (4), no rights in the designation registered as the denomination of the variety shall hamper the free use of the denomination in connection with the variety, even after the expiration of the breeder's right.**

Explanatory Notes – Paragraph (1)

1.1 Article 5(2) of the 1991 Act and Article 6(1)(e) of the 1978 Act and the 1961 Convention require that the variety is designated by a denomination. Paragraph (1) provides for the denomination to be the generic designation of the variety, and subject to prior rights, no rights in the designation shall hamper the free use of the denomination of the variety, even after the expiration of the breeder's right. The obligation under paragraph (1) should be considered together with the obligation to use the variety denomination in respect of the offering for sale or marketing of propagating material of the variety (see paragraph (7)).

1.2 The obligation under paragraph (1) to allow for the use of the denomination in connection with the variety, even after the expiration of the breeder's right, is of relevance if the breeder of the variety is also the holder of a trademark which is identical to the variety denomination. It should be noted that where a name is registered as a trademark by a trademark authority, the use of the name as a variety denomination may transform the trademark into a generic name. In such cases, the trademark may become liable for cancellation<sup>3</sup>. In order to provide clarity and certainty in relation to variety denominations, authorities should refuse a variety denomination which is the same as a trademark in which the breeder has a right. The breeder may choose to renounce the trademark right prior to the submission of a proposed denomination in order to avoid its refusal.

1.3 If an authority **is aware and** allows a denomination to be registered when the breeder of the variety is also the holder of a trademark that is identical to the variety denomination, the authority **as far as the authority is aware,** should inform the breeder of the obligation to allow the use of the denomination in connection with the variety, even after the expiration of the breeder's right.<sup>b</sup>

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<sup>3</sup> WIPO Publication No 489 "WIPO Intellectual Property Handbook

Proper Use of Trademarks

"2.397 Non-use can lead to the loss of trademark rights. Improper use can have the same result, however. A mark may become liable for removal from the Register if the registered owner has provoked or tolerated its transformation into a generic name for one or more of the goods or services in respect of which the mark is registered, so that, in trade circles and in the eyes of the appropriate consumers and of the public in general, its significance as a mark has been lost.

2.398 Basically, two things can cause genericness: namely, improper use by the owner, provoking transformation of the mark into a generic term, and improper use by third parties that is tolerated by the owner. [...]

2.400 The basic rule is that the trademark should not be used as, or instead of, the product designation. [...]

2.404 However, it is not enough just to follow these rules: the trademark owner must also ensure that third parties and the public do not misuse his mark. It is specifically important that the trademark should not be used as or instead of the product description in dictionaries, official publications, journals, etc."

## Paragraph 2

***[Characteristics of the denomination]***

**The denomination must enable the variety to be identified. It may not consist solely of figures except where this is an established practice for designating varieties. It must not be liable to mislead or to cause confusion concerning the characteristics, value or identity of the variety or the identity of the breeder. In particular, it must be different from every denomination which designates, in the territory of any member of the Union, an existing variety of the same plant species or of a closely related species.**

Explanatory Notes – Paragraph (2)*2.1 Identification*

Provisions under paragraph (2) emphasize the “identification” role of the denomination. Bearing in mind that the main objective of the denomination is to identify the variety, sufficient flexibility should be given to incorporate evolving practices in designating varieties.

*2.2. Solely of figures*

2.2.1 Paragraph (2) states that the denomination may not consist “solely of figures” except where this is an “established practice” for designating varieties. The expression “solely of figures” refers to variety denominations consisting of numbers only (e.g. 91150). Thus, denominations containing both letters and figures are not subject to the “established practice” requirement (e.g. AX350).

2.2.2 In the case of denominations consisting “solely of figures,” the following non-exhaustive elements may assist the authorities to understand what might be considered to be “established practice”:

(a) for varieties used within a limited circle of specialists, the established practice should reflect that specialist circle (e.g. inbred lines);

(b) accepted market practices for particular variety types (e.g. hybrids) and particular genera/species (e.g. Medicago, Helianthus);

(c) “established practice” is determined to be when registration has been accepted for one species or group, so that it can be used in other species which have not yet registered any variety whose denomination consists solely of figures.

*2.3. Liable to mislead or to cause confusion*

Paragraph (2) states that the denomination must not be liable to “mislead or to cause confusion concerning the characteristics, value or identity of the variety or the identity of the breeder.” These aspects are considered below:

*2.3.1 Characteristics of the variety*

The denomination should not:

(a) convey the impression that the variety has particular characteristics which, in reality, it does not have;

*Example:* a variety denomination “dwarf” for a variety which is of normal height, when a dwarfness trait exists within the species, but is not possessed by the variety.

(b) refer to specific characteristics of the variety in such a way that the impression is created that only the variety possesses them, whereas in fact other varieties of the species in question also have or may have the same characteristics; for example where the denomination consists solely of descriptive words that describe attributes of the variety that other varieties in the species may also possess.

*Example 1:* "Sweet" for a fruit variety;

*Example 2:* "Large white" for a variety of chrysanthemum.

(c) convey the impression that the variety has particular characteristics, which in reality it does not have, by similarity or association with another variety denomination is derived from, or related to, another variety when that is not, in fact, the case;

*Examples of unsuitable denomination:* "Son of Russet Burbank", where "Russet Burbank" potato variety was not used in the breeding of "Son of Russet Burbank".

*Examples of suitable denominations:* "Koshihikari Niigata BL 1 go" and "Koshihikari Niigata BL 2 go", both of which introduced resistance against rice blight by Niigata prefectural government into "Koshihikari".

*Example:* a denomination which is similar to that of another variety of the same species or closely related species, e.g. "Southern cross 1"; "Southern cross 2"; etc., giving the impression that these varieties are a series of related varieties with similar characteristics, when, in fact, this is not the case.

(d) contain the botanical or common name of the genus to which that variety belongs.

*Examples of unsuitable denominations:*

*Carex* variety "Sedge" (*Carex* is the botanical name of the genus, for which the common name is sedge);

*Castanea* "Pale Chestnut" (*Castanea* is the botanical name of the genus, for which the common name is Chestnut);

*Gladiolus* "Pink Gladiolus";

*Narcissus* "Davis Daff" (*Narcissus* is the botanical name of the genus, for which the common name is Daffodil);

*Narcissus* "Granny's Daffodil";

*Paeonia* "Sussex Peony" (*Paeonia* is the botanical name of the genus, for which the common name is Peony);

*Phlox* "Phlox of Sheep";

*Rhododendron* "Rhododendron Mad".

*Examples of suitable denominations:*

*Dianthus* "Rupert's Pink" ("Pink" is not the common name for all plants in the genus *Dianthus*);

*Prunus* "Sato-zakura" ("Zakura" is the Japanese word for flowering cherries, rather than a name for the whole genus);

*Pyrus bretschneideri* "Ya Li". (While the word "li" is the Chinese common name for the genus *Pyrus*, "li" is inseparable from "ya" according to Chinese linguistic custom, and its inclusion in the variety denomination is therefore necessary and acceptable).

### 2.3.2 Value of the variety

The denomination should not consist of, or contain, comparative or superlative designations that are liable to mislead or to cause confusion concerning the characteristics or value of the variety.

*Example of unsuitable denominations:* a denomination which includes terms such as "Best performer", "Superior taste", "Sweeter than the rest".

*Examples of suitable denominations:* "Lake Superior", "Best wishes".

### 2.3.3 Identity of the variety

(a) For denominations consisting solely of letters, as a general recommendation, a difference of only one letter or one number may be considered to be liable to mislead or cause confusion concerning the identity of the variety, except where the:

~~(i)~~—difference of one letter provides for a clear visual or phonetic difference, e.g. if it concerns a letter at the beginning of a word:

~~Examples of suitable denominations:~~ in the English language, 'Harry' and 'Larry', 'Meagan' and 'Reagan', 'Kinky' and 'Binky', 'Hagar' and 'Magar', and 'Manuela' and 'Emanuele' would not cause confusion; ~~However, 'Bough' and 'Bow' might cause confusion (in phonetic terms);~~

~~Example 2:~~ in the Japanese and Korean languages there is no difference between "L" and "R" sounds, thus "Lion" and "Raion" are exactly the same although these are distinguishable for English mother tongue speakers;

~~Examples of unsuitable denominations:~~ 'Helena' and 'Elena', 'Jozephine' and 'Josefin', 'Manuela' and 'Mannuelle', 'Paqou', 'Pacou' and 'Pakou', 'Philip' and 'Filip', and 'Poge' and 'Poje', and 'Zophia' and 'Sophia' could cause confusion phonetically but not visually;

~~(ii)(b)~~ For denominations consisting of a combination of letters and figures; ~~and~~

~~(iii)~~—denominations consisting "solely of figures", as a general recommendation, a difference of only one letter or one number may be considered not to be liable to mislead or cause confusion concerning the identity of the variety.

New draft of the Section 2.3.3 (a) of document UPOV/EXN/DEN considered by members of the WG-DEN for comments by correspondence in the Circular E-19/041 issued on April 18, 2019

### 2.3.3 Identity of the variety

(a) ~~As a general recommendation, a~~ difference of only one letter or one number may be considered to be liable to mislead or cause confusion concerning the identity of the variety, ~~except where the~~ However, the following cases of only one letter or one number difference may be considered not to be liable to mislead or cause confusion:<sup>c</sup>

(i) difference of one letter provides for a clear visual ~~or~~ and phonetic difference, e.g. if it concerns a letter at the beginning of a word:

~~Example 4s of suitable denominations:~~ in the English language, 'Harry' and 'Larry'; 'Meagan' and 'Reagan'; 'Kinky' and 'Binky'; and 'Hagar' and 'Magar' would not cause confusion; ~~However, 'Bough' and 'Bow' might cause confusion (in phonetic terms);<sup>d</sup>~~

~~Example 2s of unsuitable denominations:~~ in the Japanese and Korean languages there is no difference between "L" and "R" sounds, thus "Lion" and "Raion" are exactly the same although these are distinguishable for English mother tongue speakers. ~~'Helena' and 'Elena'; 'Paqou', 'Pacou' and 'Pakou'; 'Poge' and 'Poje', and 'Zophia' and 'Sophia' could cause confusion phonetically, although not visually;<sup>e</sup>~~

~~(ii)<sup>f</sup>~~ difference of one letter provides a widely-recognizable difference in meaning

~~Examples of suitable denominations:~~ 'Power' and 'Poker'; 'Angle' and 'Ankle';

~~(ii)(iii)~~ denominations consisting solely of letters not in the form of words

~~Examples of suitable denominations:~~ 'ABCD' and 'ABCE';

~~(iii)(iv)~~ denominations consisting of a combination of letters and figures

~~Examples of suitable denominations:~~ 'ABC678' and 'ABC688'; and 'PremP009' and 'PremP109';<sup>g</sup>

~~(iii)(iv)(v)~~ denominations consisting "solely of figures"

~~Examples of suitable denominations:~~ '411' and '412'.

[...]

~~(b)(c)~~ The use of a denomination which is similar to that used for a variety of another species or genera in the same denomination class (see section 2.5) may cause confusion.

(e)(d) In order to provide clarity and certainty in relation to variety denominations, the re-use of denominations is, in general, discouraged, since the re-use of a denomination, even where that relates to a variety which no longer exists (see section 2.4.2) may, nevertheless, cause confusion. In some limited cases an exception may be acceptable, for example a variety which was never commercialized, or was only commercialized in a limited way for a very short time. In those cases, a suitable period of time after discontinued commercialization of the variety would be required before the re-use of the denomination in order to avoid causing confusion in relation to the identity and/or the characteristics of the variety.

#### 2.3.4 Identity of the breeder

The variety denomination should not mislead or cause confusion concerning the identity of the breeder.

New draft of Section 2.3.4 of document UPOV/EXN/DEN considered by members of the WG-DEN for comments by correspondence in Circular E-19/041 of April 18, 2019

#### 2.3.4 Identity of the breeder

(a) The variety denomination should not mislead or cause confusion concerning the identity of the breeder.

[Alternative 1:] (b) A theme may become associated with a breeder by custom and practice. However, for such themes to become associated with a breeder, it would be necessary for the themes to be accompanied by a common word, prefix or suffix. In such cases, the authority may consider that the use of that theme for denominations of varieties by another breeder may mislead or cause confusion concerning the identity of the breeder;

Examples of unsuitable denominations: 'ABC red' proposed by a breeder (Breeder 2) when 'ABC white', 'ABC blue' and 'ABC yellow' are registered by another breeder (Breeder 1).

[Alternative 2:] (b) A theme word format, pattern or combination may become associated with a breeder by custom and practice. However, to become associated with a breeder, it would be necessary for the themes to be accompanied by to include a common word, prefix or suffix. In such cases, the authority may consider that the use of that theme word format, pattern or combination for denominations of varieties by another breeder may mislead or cause confusion concerning the identity of the breeder;

Examples of unsuitable denominations: 'ABC red' proposed by a breeder (Breeder 2) when 'ABC white', 'ABC blue' and 'ABC yellow' are registered by another breeder (Breeder 1).

[Alternative 3 (delete (b):] ~~(b) A theme may become associated with a breeder by custom and practice. However, for such "themes" to become associated with a breeder, it would be necessary for the themes to be accompanied by a common word, prefix or suffix. In such cases, the authority may consider that the use of that theme for denominations of varieties by another breeder may mislead or cause confusion concerning the identity of the breeder;~~

~~Examples of unsuitable denominations: 'ABC red' proposed by a breeder (Breeder 2) when 'ABC white', 'ABC blue' and 'ABC yellow' are registered by another breeder (Breeder 1).~~

#### 2.4. Different from an existing variety of the same plant species or of a closely related species

2.4.1 Paragraph (2) states that the denomination must be "different" from an existing variety of the same plant species or a closely related species<sup>4</sup>.

2.4.2 The following explanation is for the purposes of variety denominations and without prejudice to the meaning of a "variety whose existence is a matter of common knowledge" in Article 7 of the 1991 Act and in Article 6(1)(a) of the 1978 Act and the 1961 Convention. In general, the re-use of denominations is

<sup>4</sup> Article 20(2) of the 1991 Act refers to "plant species" and Article 13(2) of the 1978 Act and 1961 Convention refers to "botanical species"; the divergence in terminology does not contain any difference in substance.



discouraged but, under exceptional circumstances (see section 2.3.3(c)), the denomination of an old variety could, in principle, be registered for a new variety.

*2.5. Variety denomination classes: a variety denomination should not be used more than once in the same class*

2.5.1 For the purposes of providing guidance on the third (see section 2.3.3(b)) and fourth sentences of paragraph 2 of Article 20 of the 1991 Act and of Article 13 of the 1978 Act and the 1961 Convention, variety denomination classes have been developed. A variety denomination should not be used more than once in the same class. The classes have been developed such that the botanical taxa within the same class are considered to be closely related and/or liable to mislead or to cause confusion concerning the identity of the variety.

2.5.2 The variety denomination classes are as follows:

(a) General Rule (one genus / one class): for genera and species not covered by the List of Classes in Annex I, a genus is considered to be a class;

(b) Exceptions to the General Rule (list of classes):

(i) classes within a genus: List of classes in Annex I: Part I;

(ii) classes encompassing more than one genus: List of classes in Annex I: Part II.

2.5.3 It is recommended that the UPOV Plant Variety Database ("~~UPOV-ROM~~ PLUTO database") is used in the process to check if, in the territory of any member of the Union, the proposed denomination is different from denominations of existing varieties of the same genus or, if appropriate, variety denomination class (see Annex I). Attention is drawn to the "General Notice and Disclaimer" of the ~~UPOV-ROM~~ PLUTO database to ensure that the information contained in the ~~UPOV-ROM~~ PLUTO database is considered in an appropriate way.

New draft of the Section 2.6 of document UPOV/EXN/DEN considered by members of the WG-DEN for comments by correspondence in the Circular E-19/041 issued on April 18, 2019

2.6 UPOV denomination similarity search tool

Members of the Union are encouraged to use the UPOV denomination similarity search tool to make a preliminary check if the proposed denomination is different from denominations of existing varieties of the same variety denomination class (see Annex I). It is emphasized that the use of the UPOV denomination similarity search tool would constitute a preliminary step in the process of examination of suitability of variety denominations, with other checks being conducted by the authorities, as appropriate.

Paragraph 3

(Paragraph 4 of Article 13 of the 1961 Convention)

***[Registration of the denomination]***

**The denomination of the variety shall be submitted by the breeder to the authority. If it is found that the denomination does not satisfy the requirements of paragraph (2), the authority shall refuse to register it and shall require the breeder to propose another denomination within a prescribed period. The denomination shall be registered by the authority at the same time as the breeder's right is granted.**

Explanatory Notes – Paragraph (3)

3.1 If the authority has found no grounds for refusal under paragraph (2), and knows of no grounds for refusal under paragraph (4), the proposed denomination shall be registered, published and communicated to the authorities of the other members of the Union.

3.2 In the event of prior rights (paragraph (4)) or other grounds for refusal, any interested person may file an objection to the registration. The authorities of the other members of the Union may submit observations (see Explanatory Notes of paragraph (6)).

3.3 Relevant objections and observations should be communicated to the applicant. The applicant should be given the opportunity to reply to the observations. If the authority considers the denomination unsuitable within its territory, it will require the breeder to submit another denomination. Failure to submit a proposal within the prescribed period should entail the rejection of the application.

3.4 The examination of the proposed denomination and of the other conditions for the protection of the variety are procedures which should be undertaken in parallel in order to ensure that the denomination can be registered at the time the breeder's right is granted.

Paragraph 4

(Paragraph 10 of Article 13 of the 1961 Convention)

***[Prior rights of third persons]***

**Prior rights of third persons shall not be affected. If, by reason of a prior right, the use of the denomination of a variety is forbidden to a person who, in accordance with the provisions of paragraph (7), is obliged to use it, the authority shall require the breeder to submit another denomination for the variety.**

Explanatory Notes – Paragraph (4)

4. In deciding on the suitability of the proposed denomination and examining objections and observations in relation to prior rights of third persons, the following are intended to assist authorities.

(a) An authority should not accept a variety denomination if **there is an existing prior right, the exercise of which may prevent the use of the proposed denomination, has already been granted to a third party under plant breeder's right law, trademark law or any other intellectual property legislation.** It is the responsibility of the title holder of a prior right to assert his rights through the available objection or court procedures. However, authorities are encouraged to make prior searches in relevant publications (e.g. official gazettes) and databases (e.g. UPOV Plant Variety Database (PLUTO) <http://www.upov.int/pluto/en/>) to identify prior rights for variety denominations. They may also make searches in other registers, such as trademark registers, before accepting a variety denomination.

(b) The notion of prior rights should include those rights which are in force, in the territory concerned, at the time of publication of the proposed denomination. For rights whose duration starts at the filing date of the application, the filing dates are those relevant for prior right considerations, provided those applications lead to the granting of rights.

(c) In the case of two conflicting proposed variety denominations (see paragraph (2)) in the same or different territories, the one with an earlier publication date should be retained and the relevant authority should request the breeder, whose proposed denomination was or might have been published at a later date, to submit another denomination.

(d) If, after the granting of a breeder's right, it is discovered that there was a prior right concerning the denomination which would have resulted in the rejection of the denomination, the denomination should be cancelled and the breeder should propose another suitable denomination for the variety. Article 22(1)(b)(iii) of the 1991 Act states that, if the breeder does not propose another suitable denomination, the authority may cancel the breeder's right.

(e) The following items provide some guidance on what might constitute a "prior right", the exercise of which may prevent the use of the proposed denomination:

(i) A trademark may be considered as a prior right when the proposed denomination is identical to a trademark registered for an identical good. For all practical purposes, such identity of goods is most likely to occur in respect of trademarks registered for goods under Class 31 of the Nice Classification<sup>5</sup>, although it is recalled that, in certain countries, trademarks may also be protected on the basis of use and without registration. If the trademark and proposed denomination are not identical, but similar, the trademark, in some cases, may constitute a prior right, the exercise of which may prevent the use of the proposed denomination, and the breeder may be required to propose another denomination. If, in spite of the similarity between the proposed denomination and the trademark, the exercise of the latter will not prevent the use of the proposed denomination, the denomination may be accepted; rejections of denominations by the authority on the basis of similarity to a trademark will, in general, result from oppositions of trademark holders, observations of authorities responsible for trademark registration, or judgments from a competent court. In cases of mere similarity or small likelihood of **association confusion** by users, waivers granted to breeders by prior trademark right holders could be a suitable solution;

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<sup>5</sup> Nice Agreement concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks, of June 15, 1957, as revised in Stockholm on July 14, 1967, and Geneva on May 13, 1977, and amended on September 28, 1979.

(ii) If the proposed denomination is identical with or similar to a well-known mark, it may be unsuitable, even if the well-known mark applies to goods other than those appearing in Class 31 of the Nice Classification;<sup>6</sup>

(iii) Prior rights might also concern trade names<sup>7</sup> and names of famous persons;

(iv) Names and abbreviations of intergovernmental organizations, which are excluded by international conventions from use as trademarks or parts of trademarks, are not suitable as variety denominations;<sup>8</sup>

(v) Prior rights concerning appellations of origin and geographical indications (e.g. "Scotch") may exist under national legislation on grounds of common law or registration;<sup>9</sup>

(vi) In certain cases, prior rights in geographical names (e.g. names of cities or States) may exist; however, there is no general rule on these cases and assessment should be based on the probatory material presented on a case-by-case basis.

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<sup>6</sup> Well-known marks are protected by the Paris Convention for the Protection of Industrial Property (Article 6*bis*) and the Agreement on Trade-Related Aspects on Intellectual Property Rights (Article 16.2 and 3 of the TRIPS Agreement). See also the 1999 WIPO Joint Recommendation Concerning Provisions on the Protection of Well-known Marks.

<sup>7</sup> Article 8 of the Paris Convention.

<sup>8</sup> This recommendation includes names and abbreviations notified pursuant to Article 6*ter* of the Paris Convention.

<sup>9</sup> Articles 22 to 24 of the TRIPS Agreement provide for an obligation for WTO Members to protect geographical indications; the Lisbon Agreement for the Protection of Appellations of Origin and Their International Registration sets up international registration procedures for appellations of origin in the States party to that Agreement.

Paragraph 5

***[Same denomination in all members of the Union]***

**A variety must be submitted to all members of the Union under the same denomination. The authority of each member of the Union shall register the denomination so submitted, unless it considers the denomination unsuitable within its territory. In the latter case, it shall require the breeder to submit another denomination.**

Explanatory Notes – Paragraph (5)

5.1 This provision reflects the importance of a single variety denomination for the effective operation of the UPOV system.

5.2 *Paragraph (5)* provides clear directions both for breeders and authorities:

(a) In relation to subsequent applications of the same variety, the breeder must submit in all members of the Union the denomination that was submitted with the first application. An exception to the above obligation might be appropriate when the proposed denomination is refused by one authority before the denomination is registered by any of the other members of the Union, in which case the breeder is encouraged to submit a new denomination to all authorities in order to obtain a single denomination in all territories.

(b) The essential obligation under paragraph (5) is that authorities should accept the denomination that was submitted and registered with the first application, unless such denomination is unsuitable in their territory (see section 5.3). On that basis, although certain provisions on variety denominations allow for authorities to develop individual guidance concerning best practices, the obligation under paragraph (5) should be given priority, unless there is direct conflict with the provisions of the UPOV Convention. In that respect, it is also recommended to avoid any narrow interpretation of the provisions of the UPOV Convention and related guidance or best practices, which could lead to the unnecessary refusal of variety denominations and, consequently, the unnecessary creation of synonyms for a variety;

New draft of Section 5.2 (b) of document UPOV/EXN/DEN to be considered by the WG-DEN by correspondence (~~double strikethrough~~ and double underlining indicate proposed changes to document UPOV/INF/12/5)

5.2 *Paragraph (5)* provides clear directions both for breeders and authorities:

[...]

(b) The essential obligation under paragraph (5) is that authorities should accept the denomination that was submitted and registered with the first application, unless such denomination is unsuitable in their territory (see section 5.3). On that basis, although certain provisions on variety denominations allow for authorities to develop individual guidance concerning best practices, the obligation under paragraph (5) should be given priority, unless there is direct conflict with the provisions of the UPOV Convention. In that respect, it is also recommended to avoid any narrow interpretation of the provisions of the UPOV Convention and related guidance or best practices, which could lead to the unnecessary refusal of variety denominations and, consequently, the unnecessary creation of synonyms for a variety. In cases where different denominations have been accepted for the same variety by different members of the Union, authorities should accept the denomination that was submitted and registered with the first application, unless that denomination is unsuitable in their territory;

[...]

(c) Due to different alphabetic scripts or systems of writing, it may be necessary to transliterate or transcribe the submitted denomination to enable its registration in another territory. In such cases, both the variety denomination submitted in the application and its transliteration or transcription are regarded as the same denomination. However, a translation would not be considered as the same denomination.

5.3 Whilst a degree of flexibility is appropriate, the following non-exhaustive list may assist the authorities in deciding what is unsuitable. A proposed denomination may be refused by an authority of a member if it transpires that, despite best endeavors (see section 5.5), in its territory

(a) it does not conform to the provisions in paragraphs (2) (for example, the proposed denomination is not different from the denomination of<sup>k</sup> an existing variety of the same plant species or of a closely related species in its territory) and (4) (for example, the proposed denomination is identical to a trademark registered for identical goods); or

(b) it is contrary to public policy.

5.4 In order to permit the correct identification of a variety registered with different denominations due to exceptional cases (see section 5.3 above), in different territories, a regional or international synonym register may be developed by UPOV and/or by some members of the Union.

5.5 To reduce the risk of a variety denomination being considered to be unsuitable within a territory in which protection is to be sought, members of the Union are encouraged to make available to other authorities and breeders, the criteria, guidance and best practices which they apply for variety denominations. In particular, authorities are encouraged to make available any electronic search functions which they use in the examination of denominations in a form which would allow the on-line checking of a proposed variety denomination, against databases of relevant varieties and, in particular, the UPOV Plant Variety PLUTO database. Members of the Union may also choose to provide customized variety denomination checking services. Members of the Union are encouraged to use the UPOV website to provide information on, and links to, such resources.

Paragraph 6

***[Information among the authorities of members of the Union]***

**The authority of a member of the Union shall ensure that the authorities of all the other members of the Union are informed of matters concerning variety denominations, in particular the submission, registration and cancellation of denominations. Any authority may address its observations, if any, on the registration of a denomination to the authority which communicated that denomination.**

Explanatory Notes – Paragraph (6)

6.1 Provisions of paragraph (6) indicate the importance of cooperation and exchange of information among authorities.

6.2 The obligation to inform other members of the Union of matters concerning variety denominations relies on the exchange of official gazettes and other means of publication. It is recommended that the layout of the official gazette be based on the UPOV Model Plant Breeder's Right Gazette (document UPOV/INF/5), in particular, the chapters containing information on variety denominations, should be appropriately identified in the table of contents. However, the UPOV Plant Variety PLUTO database is an important mechanism by which to maximize the availability of information for members of the Union concerning variety denominations in a practical form.

6.3 Paragraph (6) provides for the possibility for a member of the Union to make observations if it considers that a proposed denomination in another member of the Union is unsuitable. In particular with respect to the provisions of paragraph (5), the authority should take into account all observations made by the authorities of other members when deciding on the suitability of a proposed denomination. If the observations refer to an obstacle for approval which, according to the provisions on variety denominations under the UPOV Convention, applies to all members, then the proposed denomination should be refused. If the observation refers to an obstacle to approval only in the member of the Union which has transmitted the observation (e.g. prior trademark right within that territory), the applicant should be informed accordingly. If it is envisaged that protection will be applied for, or if it can be expected that reproductive or propagating material of the variety will be marketed in the territory of the member of the Union which has transmitted the observation, the authority examining the proposed denomination should request the applicant to propose another denomination.

6.4 The authorities making observations and the authority conducting the examination should, as far as possible, endeavor to reach an agreement on the acceptability of a variety denomination.

6.5 It is recommended that a communication of the final decision be addressed to any authority which has transmitted an observation.

6.6 Authorities are encouraged to send information on variety denominations to authorities dealing with the protection of other rights (e.g. authorities responsible for registering trademarks).

6.7 A model form for observations on proposed denominations submitted in another member of the Union can be seen in Annex II. A model form for a reply to observations can be seen in Annex III. Copies of these communications should be sent at the same time to the authorities of the other members of the Union.

6.8 The contribution of data by members of the Union to the PLUTO database provides support for the examination of variety denominations. Members of the Union are encouraged to provide data as soon as practical after it is published by the authority(ies) concerned. The PLUTO database will be updated with new data as quickly as possible after receipt, in accordance with the uploading procedure. The PLUTO database can, as necessary, be updated with corrected data, in accordance with the uploading procedure.

Paragraph 7

***[Obligation to use the denomination]***

**Any person who, within the territory of one of the members of the Union, offers for sale or markets propagating material of a variety protected within the said territory shall be obliged to use the denomination of that variety, even after the expiration of the breeder's right in that variety, except where, in accordance with the provisions of paragraph (4), prior rights prevent such use.**

Explanatory Note – Paragraph (7)

7.1 If it is found that prior rights of a third party prevent the use of the registered variety denomination, the authority shall require the breeder to submit another denomination. Article 22(1)(b)(iii) of the 1991 Act provides that the breeder's right may be cancelled if "the breeder does not propose, where the denomination of the variety is cancelled after the grant of the right, another suitable denomination."

7.2 The following items provide guidance in relation to changes of registered variety denominations:

(a) The UPOV Convention requires a change of the registered denomination where the denomination of the variety is cancelled after the grant of the right. The competent authority should cancel a variety denomination if:

- (i) by reason of a prior right, the use of the denomination of a variety is forbidden to a person who, in accordance with the provisions of paragraph (7), is obliged to use it (see paragraph (4) "Prior rights of third persons");
- (ii) the denomination is unsuitable because it is contrary to the provisions in paragraph (2) "Characteristics of the denomination";

(b) In cases where the registered denomination is subsequently refused in another member of the Union because it is unsuitable in that territory (e.g. prior right), at the request of the breeder, the authority may consider it appropriate to change the denomination to the denomination registered in the said other member of the Union (see provisions in paragraph (5) "Same denomination in all Contracting Parties"); and

(c) In general, subject to (a) and (b) above, it would not be appropriate for the authority to change a registered denomination following a request by the breeder.



Paragraph 8

***[Indications used in association with denominations]***

**When a variety is offered for sale or marketed, it shall be permitted to associate a trademark, trade name or other similar indication with a registered variety denomination. If such an indication is so associated, the denomination must nevertheless be easily recognizable.**

This provision is self-explanatory.

[Annexes follow]

## ANNEX I

UPOV Variety Denomination Classes:  
A Variety Denomination Should not be Used More than Once in the Same Class

For the purposes of providing guidance on the third and fourth sentences of paragraph 2 of Article 20 of the 1991 Act and of Article 13 of the 1978 Act and the 1961 Convention, variety denomination classes have been developed. A variety denomination should not be used more than once in the same class. The classes have been developed such that the botanical taxa within the same class are considered to be closely related and/or liable to mislead or to cause confusion concerning the identity of the variety.

The variety denomination classes are as follows:

- (a) General Rule (one genus / one class): for genera and species not covered by the List of Classes in this Annex, a genus is considered to be a class;
- (b) Exceptions to the General Rule (list of classes):
- (i) classes within a genus: List of classes in this Annex: Part I;
- (ii) classes encompassing more than one genus: List of classes in this Annex: Part II.

## LIST OF CLASSES

Part I*Classes within a genus*

	<u>Botanical names</u>	<u>UPOV codes</u>
Class 1.1	Brassica oleracea	BRASS_OLE
Class 1.2	Brassica other than Brassica oleracea	other than BRASS_OLE
Class 2.1	Beta vulgaris L. var. alba DC., Beta vulgaris L. var. altissima	BETAA_VUL_GVA; BETAA_VUL_GVS
Class 2.2	Beta vulgaris ssp. vulgaris var. conditiva Alef. (syn.: B. vulgaris L. var. rubra L.), B. vulgaris L. var. cicla L., B. vulgaris L. ssp. vulgaris var. vulgaris	BETAA_VUL_GVC; BETAA_VUL_GVF
Class 2.3	Beta other than classes 2.1 and 2.2.	other than classes 2.1 and 2.2
Class 3.1	Cucumis sativus	CUCUM_SAT
Class 3.2	Cucumis melo	CUCUM_MEL
Class 3.3	Cucumis other than classes 3.1 and 3.2	other than classes 3.1 and 3.2
Class 4.1	Solanum tuberosum L.	SOLAN_TUB
Class 4.2	Tomato & Tomato rootstocks	
	Solanum lycopersicum L. (synonym: Lycopersicon esculentum Mill.)	SOLAN_LYC
	Solanum cheesmaniae (L. Ridley) Fosberg (Lycopersicon cheesmaniae L. Riley)	SOLAN_CHE
	Solanum chilense (Dunal) Reiche (Lycopersicon chilense Dunal)	SOLAN_CHI
	Solanum chmielewskii (C.M. Rick et al.) D.M. Spooner et al. (Lycopersicon chmielewskii C. M. Rick et al.)	SOLAN_CHM

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	<u>Botanical names</u>	<u>UPOV codes</u>
	Solanum galapagense S.C. Darwin & Peralta (Lycopersicon cheesmaniae f. minor (Hook. f.) C. H. Müll.) (Lycopersicon cheesmaniae var. minor (Hook. f.) D. M. Porter)	SOLAN_GAL
	Solanum habrochaites S. Knapp & D.M. Spooner (Lycopersicon agrimoniifolium Dunal) (Lycopersicon hirsutum Dunal) (Lycopersicon hirsutum f. glabratum C. H. Müll.)	SOLAN_HAB
	Solanum pennellii Correll (Lycopersicon pennellii (Correll) D'Arcy)	SOLAN_PEN
	Solanum peruvianum L. (Lycopersicon dentatum Dunal) (Lycopersicon peruvianum (L.) Mill.)	SOLAN_PER
	Solanum pimpinellifolium L. (Lycopersicon pimpinellifolium (L.) Mill.) (Lycopersicon racemigerum Lange)	SOLAN_PIM
	and hybrids between those species	
Class 4.3	Solanum melongena L.	SOLAN_MEL
Class 4.4	Solanum other than classes 4.1, 4.2 and 4.3	other than classes 4.1, 4.2 and 4.3

## LIST OF CLASSES (Continuation)

## Part II

## Classes encompassing more than one genus

	<u>Botanical names</u>	<u>UPOV codes</u>
Class 201	Secale, Triticale, Triticum	SECAL; TRITL; TRITI
Class 202	Megathyrus, Panicum, Setaria, Steinchisma	MEGAT; PANIC; SETAR; STEIN
Class 203*	Agrostis, Dactylis, Festuca, Festulolium, Lolium, Phalaris, Phleum and Poa [ <u>Neotyphodium, Epichloe</u> ]	AGROS; DCTL; FESTU; FESTL; LOLIU; PHALR; PHLEU; POAAA; <u>EPICH; NEOTY</u> Error! Bookmark not defined.
Class 204*	Lotus, Medicago, Ornithopus, Onobrychis, Trifolium	LOTUS; MEDIC; ORNTP; ONOBR; TRFOL
Class 205	Cichorium, Lactuca	CICHO; LACTU
<u>[Class 205B]</u>	<u>[Cichorium intybus L. var. sativum]</u>	<u>[CICHO_INT_SAT]</u>
Class 206	Petunia and Calibrachoa	PETUN; CALIB
Class 207	Chrysanthemum and Ajanía	CHRYS; AJANI
Class 208	(Statice) Goniolimon, Limonium, Psylliostachys	GONIO; LIMON; PSYLL
Class 209	(Waxflower) Chamelaucium, Verticordia	CHMLC; VERTI; VECHM
Class 210	Jamesbrittania and Sutera	JAMES; SUTER
Class 211	(Mushrooms) Agaricus Agrocybe Auricularia Dictyophora Flammulina Ganoderma Grifola Heridium Hypsizygus Lentinula Lepista Lyophyllum Meripilus Mycleptodonoides Naematoloma Panellus Pholiota Pleurotus Polyporus Sparassis Tricholoma	AGARI AGROC AURIC DICTP FLAMM GANOD GRIFO HERIC HYPSE LENTI LEPIS LYOPH MERIP MYCOL NAEMA PANEL PHLIO PLEUR POLYO SPARA MACRO
Class 212	Verbena L. and Glandularia J. F. Gmel.	VERBE; GLAND
Class 213	Eupatorium L. Acanthostyles R. M. King & H. Rob. Ageratina Spach Asplundianthus R. M. King & H. Rob. Bartlettina R. M. King & H. Rob. Campuloclinium DC. Chromolaena DC. Conoclinium DC. Cronquistianthus R. M. King & H. Rob. Eutrochium Raf. Fleischmannia Sch. Bip. Praxelis Cass. Vioreckia R. M. King & H. Rob.	EUPAT - AGERT - - - - - - - EUTRO - - -

[Annex II follows]

\* Classes 203 and 204 are not solely established on the basis of closely related species.

ANNEX II

Model Form for Observations on Proposed Variety Denominations Submitted to Another Member of the Union

From:

\_\_\_\_\_ Your ref.

\_\_\_\_\_ Our ref.

**Observations on a Submitted Variety Denomination**

To:

Submitted Variety Denomination: \_\_\_\_\_

Genus/Species (Botanical name): \_\_\_\_\_ UPOV Code: \_\_\_\_\_

Gazette: \_\_\_\_\_  
(number/year)

Applicant: \_\_\_\_\_

Observations:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

If the observations refer to a trademark or another right, name and address of the holder thereof (if possible):

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Copies sent to the authorities of the other members of the Union

Date:

\_\_\_\_\_  
\_\_\_\_\_

Signature:

\_\_\_\_\_

Model Reply to Observations on Proposed Variety Denominations  
Submitted to Another Member of the Union

From:

\_\_\_\_\_  
Your ref.

\_\_\_\_\_  
Our ref.

**Reply to Observations on a Submitted Variety Denomination**

To:

In reply to your objection to the denomination [ .....] for the variety of [Botanical name/UPOV code], we wish to inform you that:

1.  In our opinion there is sufficient difference between the names ..... and ..... both in writing and pronunciation. Therefore the [authority] sees no reason to reject the denomination.
2.  The [authority] accepted this denomination and no objections were received during the prescribed period after publishing.
3.  This variety has been registered under this name on .....
4.  First publication as proposed denomination in .....
5.  The applicant has been requested for another denomination.
6.  This is the same variety.
7.  Application on the variety has been withdrawn/rejected.
8.  The applicant has withdrawn the proposed denomination for the variety.
9.  Other

Copies sent to the authorities of the other members of the Union

Date: \_\_\_\_\_

Signature: \_\_\_\_\_

[Endnotes follow]

## ENDNOTES

- a Comment by South Africa in reply to UPOV Circular E-19/041:  
"In the attached Annex to UPOV Circular, p1(4) (iv) to change to (vi)."
- b Comment by the CPVO in reply to UPOV Circular E-19/002 seeking approval of draft report UPOV/WG-DEN/5/3 Prov.  
"6. The WG-DEN agreed to add a new Section 1.3 to read as follows:  
"1.3 If an authority allows a denomination to be registered when the breeder of the variety is also the holder of a trademark that is identical to the variety denomination, the authority should inform the breeder of the obligation to allow the use of the denomination in connection with the variety, even after the expiration of the breeder's right."  
CPVO commented: "As far as the authority is made aware."
- c Proposal by New Zealand in reply to UPOV Circular E-19/041:  
"Section 2.3.3  
"1. It is questionable whether the use of the wording "general recommendation" is appropriate. The recommendation has a number of exceptions and may not be considered general. The following may be more accurate:  
"A difference of only one letter or one number may be considered to be liable to mislead or cause confusion concerning the identity of the variety, however, the following situations are acceptable."
- d Proposal by the CPVO in reply to UPOV Circular E-19/002 seeking approval of draft report UPOV/WG-DEN/5/3 Prov.  
"11. The WG-DEN agreed to amend Section 2.3.3 (a) to read as follows:  
"[...] Examples of suitable denominations: in the English language, 'Harry' and 'Larry', 'Meagan' and 'Reagan', 'Kinky' and 'Binky', 'Hagar' and 'Magar', and 'Manuela' and 'Emanuele' would not cause confusion; However, 'Bough' and 'Bow' might cause confusion (in phonetic terms);  
CPVO commented: "We suggest to remove this example which does not fully illustrate a) 'a difference of only one letter'."
- e Proposal by the CPVO in reply to UPOV Circular E-19/002 seeking approval of draft report UPOV/WG-DEN/5/3 Prov.  
"11. The WG-DEN agreed to amend Section 2.3.3 (a) to read as follows:  
"[...] Examples of unsuitable denominations: 'Helena' and 'Elena', 'Jozephine' and 'Josefin', 'Manuela' and 'Manuelle', 'Paqou', 'Pacou' and 'Pakou', 'Philip' and 'Filip', and 'Poge' and 'Poje', and 'Zophia' and 'Sophia' could cause confusion phonetically but not visually."  
CPVO commented: "We suggest to remove 'Jozephine' <> 'Josefin', 'Manuela' <> 'Manuelle', 'Philip' <> 'Filip' which do not fully illustrate a) 'a difference of only one letter'."
- f Proposal by the CPVO in reply to UPOV Circular E-19/041:  
"As regard the New draft of the Section 2.3.3 (a)  
(i) difference of one letter provides for a clear visual **or**and phonetic difference, e.g. if it concerns a letter at the beginning of a word:  
"The practice shows that the meaning of words often plays an important role and can be sufficient to avoid confusion, even if the two criteria are not met.  
"In examples like 'Power' <> 'Poker' or 'Angle' <> 'Ankel' <> 'Angel', the visual or the phonetic similarity does not lead to confusion because the meaning of these words is clear.  
"The CPVO is of the opinion that in this case, the requirement to have both a visual and phonetic difference might lead to a more restrictive approach, whereas the consideration of the concept could contribute to refine it and allow to keep the initial wording version "visual **or** phonetic" difference".  
The CPVO therefore suggests to introduce the concept as an additional criteria in the assessment of the similarity."
- g Proposal by New Zealand in reply to UPOV Circular E-19/041:  
"Section a) i currently addresses the exception for a letter providing visual or phonetic difference. We propose that the exception for numbers should be added, as highlighted below.  
"2.3.3 Identity of the variety  
(a) As a general recommendation, a difference of only one letter or one number may be considered to be liable to mislead or cause confusion concerning the identity of the variety, except where the:  
(i) difference of one letter provides for a clear visual and phonetic difference, e.g. if it concerns a letter at the beginning of a word:  
(ii) **difference of one number provides for a clear numeric or sequence difference**  
"Example ~~1~~s of suitable denominations: in the English language, 'Harry' and 'Larry', 'Meagan' and 'Reagan', 'Kinky' and 'Binky', and 'Hagar' and 'Magar', 'PremP009' and 'PremP109'"
- h Original proposed option for paragraph (b).
- i Proposal by New Zealand in reply to UPOV Circular E-19/041:  
"3. 2.3.4 b) We question if theme is correct because interpretation could be very broad and can include many possibilities. If one breeder wishes to use the names of national mountains or rivers that should not necessarily exclude other breeders using them as well. The intent of the paragraph is to address the use of suffixes, prefixes, the same word as stated later in the paragraph. The following text is suggested.  
"A word format, pattern or combination may become associated with a breeder by custom and practice. However, for such types to become associated with a breeder, it would be necessary to comprise of a common word, prefix or suffix. In such cases, the authority may consider that the use of that wording type for denominations of varieties by another breeder may mislead or cause confusion concerning the identity of the breeder;"
- j Proposal by France in reply to UPOV Circular 19/041  
"... alinea (b) of the 2.3.4 section dealing with the theme:  
"(b) A theme may become associated with a breeder by custom and practice. However, for such "themes" to become associated with a breeder, it would be necessary for the themes to be accompanied by a common word, prefix or suffix. In such cases, the authority may consider that the use of that theme for denominations of varieties by another breeder may mislead or cause confusion concerning the identity of the breeder;  
"Example of unsuitable denomination: 'ABC red' proposed by a breeder (Breeder 2) when 'ABC white', 'ABC blue' and 'ABC yellow' are registered by another breeder (Breeder 1)."  
France commented: "We do not accept to give an exclusivity on a specific theme to a breeder. It is too complicated to implement by the office, especially as the theme is not always well known.  
"We propose to keep section 2.3.4 only with alinea (a) and to delete alinea (b)."
- k Comment by the CPVO in reply to UPOV Circular E-19/002 seeking approval of draft report UPOV/WG-DEN/5/3 Prov., which was not reflected in adopted report UPOV/WG-DEN/5/3  
"21. The WG-DEN agreed to amend Section 5.3 (a) to read as follows:  
"(a) it does not conform to the provisions in paragraphs (2) (for example, the proposed denomination is not different from an existing variety of the same plant species or of a closely related species in its territory) and (4) (for example, the proposed denomination is identical to a trademark registered for identical goods);"  
CPVO commented: "from the denomination of an existing variety."