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CAJ/VIII/7

ORIGINAL: German

DATE: September 17, 1981

INTERNATIONAL UNION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS

GENEVA

ADMINISTRATIVE AND LEGAL COMMITTEE

Eighth Session

Geneva, October 12 to 14, 1981

PROPOSALS FOR AMENDING THE GUIDELINES FOR VARIETY DENOMINATIONS

Document prepared by the Office of the Union

1. At its seventh session, the Administrative and Legal Committee examined the proposals for amending the Guidelines for Variety Denominations and, in particular, took the following decisions:

(i) The Delegation of the Federal Republic of Germany would prepare a working paper for the eighth session.

(ii) The member States were invited to inform the Office of the Union of any difficulties, potential or already encountered, resulting from the revision of Article 13 of the Convention.

2. The working paper mentioned under item (i) above and the letter accompanying it are contained in Annex I to this document. Annex II to this document contains an observation by the Delegation of France concerning the question mentioned under item (ii) above. It is recalled that the report on the debate which took place in the Administrative and Legal Committee on the question of a revision of the Guidelines for Variety Denominations is contained in paragraphs 16 to 19 of document CAJ/VII/11.

[Annexes follow]

LETTER DATED SEPTEMBER 14, 1981, FROM THE GERMAN FEDERAL PLANT
VARIETIES OFFICE TO THE OFFICE OF UPOV
SUBJECT: GUIDELINES FOR VARIETY DENOMINATIONS
Reference: UPOV Document CAJ/VII/6

As agreed in the seventh session of the Administrative and Legal Committee, we transmit herewith a proposal for a new draft of the Guidelines which we have prepared in accordance with the discussions in the above-mentioned session. We wish to make the following comments on this draft:

Taking into account Article 6(2) of the Convention, according to which the grant of protection must not be made subject to conditions other than those set forth in the Convention, the proposal has not been drafted as an independent enumeration of conditions for the admission of variety denominations; it consists only of guidelines for the interpretation of the provisions of the Convention, whereby we assume that they neither go beyond the provisions of the Convention nor limit such provisions.

On the basis of this concept, some provisions of Article 13 of the Convention have been cited for information only, in order to make it clear to which provisions the guidelines for interpretation refer. In the recommendations proper, the provisions of Article 13--contrary to the present guidelines--are not repeated since their applicability derives immediately from the Convention.

Furthermore, we have included the "Provisional Rules of Procedure for the Exchange of Variety Denominations" (UPOV document C/V/33).

These Rules of Procedure must in any case be revised for the following reasons:

- Contrary to the remarks in the preamble to the Rules of Procedure, the revised version of the Convention no longer envisages the participation of the Office of the Union in the exchange of variety denominations. Direct exchange between member States, which was thought to be a provisional solution, now forms a rule in the Convention itself. The provisional rules have therefore become final rules.
- In the revised version of the Convention the present term "objections" (which can be brought forward by a member State against variety denominations filed in another member State) has been replaced by the term "observations." Consequently, the UPOV form (see UPOV document CAJ/III/7 and C/XIII/8) has been changed. Besides the adaptation of the wording of the Rules of Procedure, this has practical consequences for the impact of such observations for the competent authority. Furthermore, a part has been included in the new form which concerns observations referring to another right (in particular a trademark). This new part has been added to solve a substantive problem which was not until now regulated in the Rules of Procedure. The problem is that in most member States an identical or similar trademark belonging to a third person does not prevent the registration of a variety denomination, whereas in other member States (Federal Republic of Germany) such is the case. In this event it is not necessarily possible to follow the observations of another member State. In our draft we have therefore provided for a rule which corresponds to agreements which we have already made with other member States.
- In the meantime recommendations on the layout and the contents of official gazettes have been adopted (see UPOV documents CAJ/II/8, C/XII/15, CAJ/III/3, and UPOV/INF/5) which partly overlap with the Annex to the present Rules of Procedure (Layout of Bulletins). In our draft, that Annex has therefore been replaced by a reference to the above-mentioned recommendations.

Since the Rules of Procedure had to be modified for the above-mentioned reasons, since their contents also refer to Article 13 of the Convention and since they serve, formally, the same purpose, namely to ensure that protection for one and the same variety is granted in all member States under the same variety denomination, they have been included in our proposal in order to group all recommendations concerning Article 13 in one instrument.

Besides the above-mentioned modifications and changes for systematic reasons, the contents of the present Rules of Procedure have not been amended.

[Draft of new version of the Guidelines for Variety Denominations follows]

0396

DRAFT OF A NEW VERSION OF THE GUIDELINES FOR VARIETY DENOMINATIONS

1. The Council refers to the following provisions in Article 13 of the International Convention for the Protection of New Varieties of Plants in the version as adopted on October 23, 1978:

- 1.1. The variety denomination is the generic designation of the variety and its free use in connection with the variety must not be hampered by rights, unless they be prior rights of third parties.
- 1.2. The variety denomination must not be liable to mislead concerning
 - 1.2.1. the characteristics and the value of the variety,
 - 1.2.2. the identity of the variety,
 - 1.2.3. the identity of the breeder.
- 1.3. The variety denomination must be different from any denomination which designates, in any member State of the Union, an existing variety of the same botanical species or of a closely related species.
- 1.4. The competent authority of a member State must not protect a variety which is already protected in another member State
 - 1.4.1. by a designation other than the variety denomination under which the variety is protected in the other member State,
 - 1.4.2. unless it finds that the variety denomination is unsuitable in its State.
- 1.5. The competent authorities of the member States
 - 1.5.1. are to inform the authorities of the other member States of matters concerning variety denominations and
 - 1.5.2. may address observations on the registration of denominations filed to the authorities of other member States.

2. The Council is of the opinion

- 2.1. that the principle mentioned under 1.4.1., according to which one variety is to be registered in all member States under the same variety denomination, should be observed to the largest possible extent,
- 2.2. that therefore the possibility referred in 1.4.2. of declaring a variety denomination adopted in one member State as unsuitable in another State should be made use of only in very special cases,
- 2.3. that it helps to assure the observance of the above-mentioned principles
 - 2.3.1. if the member States, as far as possible, base the requirements imposed on variety denominations, as far as their suitability as generic designations (1.1.), liability to mislead (1.2.) and to cause confusion (1.3.) are concerned, on harmonized views and
 - 2.3.2. if they practise the exchange of information concerning variety denominations, mentioned under 1.5., according to uniform rules.

3. The Council therefore makes the following recommendations to the member States, based on Article 21(h) of the Convention, in order to ensure the observance of the above mentioned principles.

4. When examining whether a filed variety denomination corresponds to the conditions mentioned in 1.1., 1.2. and 1.3., the following aspects should be taken into account as far as the requirements are concerned:

- 4.1. Ad Generic designation
Generic designation means the commonly used and commonly understood designation for a plurality of objects which is intended to help to identify the objects without misleading any party concerned. While for the general botanical groupings there are generic designations in common usage (for instance, "ornamental plants," "vegetables," "cereals," "roses," "peas," "wheat"), such designations have to be created each time for plant varieties. From the establishment of a variety denomination onwards, the same rules apply for these denominations as for generic designations in common usage. This has the following consequences.
- 4.1.1. In order to be suitable as a generic designation, a variety denomination must be recognizable as such. It must be so composed that it cannot be taken for another indication which is usually given to propagating material. Therefore, to cite examples, designations are unsuitable as variety denominations if they wholly or partly consist of:
- 4.1.1.1. Elements which may create the impression that they are indications of quantity, weight, price, date, certification or other indications which are usually formed from such elements or indications which, for instance, can be taken for an abbreviation of such indications since they consist only of two letters; in this context it is noted that in Article 30 of the International Code of Nomenclature for Cultivated Plants of the International Union of Biological Sciences (ICNCP) under normal conditions only denominations consisting of words are considered suitable designations of plant varieties; where nevertheless according to the law of a member State, or according to an established practice in its territory, variety denominations may be formed of numbers, letters or combinations of letters and numbers, the recognizability of a variety denomination should be promoted by forming the variety denomination according to certain general principles (for instance, the highest admissible number and the sequence of the single elements); also combinations of the above-mentioned kind may be considered in a member State to be less objectionable for varieties whose propagating material is normally only marketed to a small number of knowledgeable consumers (hereditary components, rootstocks).
- 4.1.1.2. Geographical designations, if they are liable to create the impression that they form an indication of the geographical origin of the propagating material.
- 4.1.1.3. Names of persons or firms, if they are liable to create the impression that the denomination indicates that the propagating material stems from a certain producer or commercial enterprise.
- 4.1.1.4. Independent words used in the same form as part of a variety denomination consisting of several words or elements in combination with varying additions for a large number of varieties belonging to one breeder if, as a result of their frequent use, they are liable to create the impression that the word is not an element of a variety denomination but an indication of the origin of the variety or of propagating material from a certain enterprise (for instance a trademark).
- 4.1.1.5. Indications which refer to characteristics of the variety, if they are liable to create the impression that they consist of information or advertising on the nature or the value of the variety.
- 4.1.1.6. Denominations which create the impression that they are botanical or technical data, for instance a botanical or common name for botanical genera or species, or breeding terms such as "variety," "cultivar," "hybrid."
- 4.1.1.7. Other indications in common usage if establishing them as variety denominations would monopolize them for the variety and would prevent other breeders from using such indications for marketing propagating material.

- 4.1.2. In order to be used as a generic denomination by the purchaser of propagating material, the variety denomination must be easy to remember and to pronounce for a purchaser of average attentiveness. This requirement may be jeopardized depending on the circle of possible purchasers in cases of designations which, for instance,
 - 4.1.2.1. are not pronouncable in the form of syllables, irrespective of whether the syllables have a meaning,
 - 4.1.2.2. are very long, for instance excessively long words, more than three words, if the variety denomination is formed of several words, figures (where figures are admitted as such or as additions) which consist of more than four numbers or combinations of letters (where letters are admitted as such or as additions) which cannot be pronounced as syllables and consist of more than three letters.
 - 4.1.2.3. contain elements which are not usually reproduced, for example, when expressed in speech or by telex (for instance, special signs like hyphens, alternation of upper case and lower case).
- 4.1.3. To be used as a generic designation for the variety, the variety denomination must not contain any element which during the period of protection or after its expiration prevents or hinders the unlimited use of the variety denomination by anyone offering for sale or marketing propagating material of the variety. Designations in which the breeder has another right (for instance, right in a name, trademark) are therefore unsuitable as variety denominations unless the law of the member State in question provides that such rights cannot be opposed to the use of the variety denomination.
- 4.2. Ad Misleading

Even if a variety denomination is not excluded under the principles set out in 4.1. because the elements of the denomination mentioned therein are chosen in such a way that its recognizability as a variety denomination is not called into question, the unsuitability of the denomination can stem from the fact that it is misleading. This danger may concern

 - 4.2.1. the characteristics or the value of the variety in the case of denominations which
 - 4.2.1.1. create the impression that the variety has particular features which in reality it does not have,
 - 4.2.1.2. refer to special features and create the impression that only this variety has those features while in reality other varieties of the species in question may also possess them,
 - 4.2.1.3. create the impression that the variety originates from another variety or is related to it, when in fact this is not the case,
 - 4.2.2. the identity of a variety in the case of a denomination
 - 4.2.2.1. under which in the past a variety was officially registered or propagating material of that variety was marketed, except in the case where the old variety is no longer cultivated and its variety denomination has not attained major importance,
 - 4.2.2.2. which creates the impression that the variety comes from a certain country or territory, if this is not the case,
 - 4.2.2.3. which may, as a result of the use of botanical or technical breeding terms, mislead as to the species to which the variety belongs or as to its manner of breeding or its breeding stage,
 - 4.2.3. the identity of the breeder in the case of a variety denomination which
 - 4.2.3.1. contains the name of the original breeder or of the owner of the breeder's right since, in view of the possibility of transferring the right, these are not necessarily identical and since after the expiration of the period of protection each breeder has the right to work with the variety so that such denominations may lead to erroneous conclusions as to the legal status of the varieties,

4.2.3.2. contains the name of another person if thereby the impression is created that this person is the original breeder or the owner of the breeder's right.

4.3. Ad Liability to cause confusion

The variety denomination may not be identical with a variety denomination under which, in that or in another member State, a variety of the same or of a related genus or species has been officially registered or propagating material of such variety has been marketed, nor may it be similar to another variety to such a degree that a purchaser of average attentiveness may become confused.

Related genera and species are deemed to be those contained in the same class in the list of classes (Annex I).

4.4. Ad Procedure

4.4.1. The decision on the suitability of a variety denomination according to the above mentioned principles is taken by the authority of the member State in which the variety denomination has first been registered. This authority shall, in taking the decision, consider as far as possible observations which have been submitted by authorities of other member States.

4.4.2. The authorities of member States shall take over the variety denomination which has been registered in another member State even in cases where it has objections to the variety denomination, unless the variety denomination cannot be taken over because

4.4.2.1. registration would infringe prior rights of third parties,

4.4.2.2. the variety denomination is not pronounceable in the language concerned or if other reasons exist which make the denomination unsuitable as a generic designation in the member State concerned,

4.4.2.3. national provisions prohibit its registration,

4.4.2.4. the denomination is liable to give offence.

4.5. The above recommendations

4.5.1. give examples of reasons which may be contrary to the registration of a variety denomination; they are not exhaustive and are to be considered by the member States according to their national conditions,

4.5.2. refer only to variety denominations, not to other additions, which according to the national law of the member States may be added to variety denominations without forming part of the variety denomination.

5. The procedure for the mutual information of the member States on variety denominations and for the submission of observations on filed variety denominations is as follows:

5.1. The vehicle of mutual information shall be the official gazettes published according to Article 30(1)(c) of the Convention.

5.1.1. The official gazettes shall be composed according to the recommendations of UPOV concerning official gazettes for plant variety protection. The chapters containing information on variety denominations shall be accordingly identified in the table of contents.

5.1.2. The publications concerning variety denominations shall be made as early as possible and shall contain information on the following facts, also for variety denominations intended to serve as a substitute for previously filed, accepted or registered variety denominations.

5.1.2.1. Filing of variety denominations against which the authority with which the application has been filed has no objections after having examined it.

- 5.1.2.2. Rejections, deletions and withdrawals of published, accepted and registered variety denominations.
- 5.1.2.3 Acceptance and registration.
- 5.1.3. The competent authority of each member State sends to the competent authorities of the other member States a previously agreed number of copies of the official gazette immediately after its publication.
- 5.2. After receipt of the official gazettes of other member States, each competent authority examines the filed variety denominations which have been published in that gazette. If the authority finds a variety denomination to be unsuitable, it proceeds as follows:
 - 5.2.1. Not later than three months after the publication of the official gazette in which the filed variety denomination was contained, it transmits, on a form according to Annex II, to the authority which has published the variety denomination its observations and states its reasons.
 - 5.2.2. A copy of the above-mentioned communication is sent at the same time to the competent authorities of the other member States.
- 5.3. The authority that has published the filed denomination immediately examines the observations made by the authorities of the other member States and proceeds as follows:
 - 5.3.1. If the observation refers to an obstacle to registration which according to the Convention applies for all member States, the competent authority will, if in doubt, accept the observation and reject the filed denomination. If the competent authority does not share the misgivings of the other authority, it informs the other authority and gives its reasons. As far as possible the offices concerned shall endeavor to reach agreement.
 - 5.3.2. 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 (for instance, the identity of the denomination with another's trademark), the latter authority will inform the applicant accordingly and will request 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.

[List of Classes follows]

Lists of Genera and Species which are considered as related to each other
within the meaning of Article 13(2).

(List of Classes)

(The List of Classes has still to be prepared).

[Form follows]

0402

PROPOSED AMENDED FORM
FORMULAIRE AMENDE PROPOSE
VORGESCHLAGENES GEÄNDERTES FORMBLATT

From/Von/De

Your ref./Ihr Zeichen/Votre réf.

Our ref./Unser Zeichen/Notre réf.

Observations on a Submitted Variety Denomination
Bemerkungen zu einer angemeldeten Sortenbezeichnung
Observations sur une dénomination variétale déposée

To/An/A

Variety Denomination:
Sortenbezeichnung: _____
Dénomination variétale: _____

Species (in Latin):
Art (auf lateinisch): _____
Espèce (en latin): _____

(Month/Monat/Mois) (Year/Jahr/Année)

Bulletin:
Amtsblatt: _____
Bulletin: _____

(Page/Seite)

Applicant:
Anmelder: _____
Demandeur: _____

Observations:
Bemerkungen:

If the observations refer to a trademark or another right, name and address of the holder thereof (if possible):
Falls sich die Bemerkungen auf ein Warenzeichen oder ein anderes Recht beziehen, Name und Anschrift des Inhabers (falls möglich):
Si les observations se réfèrent à une marque de fabrique ou à un autre droit, nom et adresse de son titulaire (si possible):

Copies to the competent authorities of the other UPOV member States.
Kopien an die zuständigen Behörden der anderen UPOV-Verbandsstaaten.
Copies aux services compétents des autres Etats membres de l'UPOV.

Date/Datum:

Signature/Unterschrift:

[Annex II follows]

OBSERVATION FROM THE DELEGATION OF FRANCE
CONCERNING VARIETY DENOMINATIONS, DATED AUGUST 11, 1981

1. Principles

The variety denomination shall enable the variety to be identified without risking errors or confusion.

Among other principles, UPOV recommends the use of fancy names.

Examples: DELFICA, ERGANOL, TADO, CHAMPLEIN.

2. Problems encountered

The problems encountered stem from difficulties in finding fancy names which:

- are easy to remember;
- are easy to pronounce in the countries in which the varieties may be marketed;
- have, nevertheless, as in the case of certain species, an economic impact by directing the attention of the user to the variety where no trademark is attached to the variety denomination;
- are not likely to cause confusion between variety denominations within the same class or between variety denominations and trademarks.

It follows that:

- the number of objections is increasing year by year;
- synonyms are appearing frequently
 - . for the same varieties of maize, sorghum and sunflower it is not rare to find two or three synonyms under which the variety is marketed in the United States of America, in France or in Italy;
 - . the coexistence of these synonyms, while permitted, seriously endangers the international seed trade.

3. Wording of Article 13 of the Convention (Act of 1978)

By determining that a variety denomination may not consist of figures only (unless there is an established practice for designating varieties), Article 13(2) no longer excludes the use of a variety denomination consisting of a word and followed by figures, for example: HODGSON 80, BUT 9, or which consists of letters and figures, for example: R X 52, X L 24.

The possibilities deriving from the new version of Article 13 make it absolutely necessary to study concerted action by member States on how to harmonize the treatment of nationals of the old and the new members.

The fact that the free use of the variety denomination in connection with the variety must not be hampered, even after expiration of the protection, suggests that the following variety denominations are excluded: ANJOU 303, PAU 280; the same will be true for variety denominations which contain the whole or almost the whole name of the breeder or the producer of the seed, for instance: RIVOL-MARTIN, DUPONT-MONA, CARGI-NOVA.

4. Objectives

Each rule has a positive and a negative side, and the choice of a variety denomination should conform to the following objectives, without departing from well-established practice:

- low risk of confusion;
- as easy as possible to remember;
- familiar pronunciation in various languages;
- sufficient attractiveness to serve as a marketing factor if no trade-mark is added to the variety denomination and if one wishes to take account of the problems of the breeder or his successor in title;
- minimizing the number of objections.

The Guidelines for Variety Denominations issued by UPOV can therefore only consist of a compromise between the advantages and disadvantages.

5. Possible measures

It should be considered whether the measures suggested below form such a compromise.

(a) Use of fancy names:

- consisting in between one and three words;
examples: BELLENOR
 CORSO FLEURI
 BELLE DE NUIT
- consisting of one word followed by figures, without an existing meaning;
examples: BUT 234
 STAR 304
- possible use of the same prefix or suffix (which may consist of one or two syllables to designate the various varieties)
examples:

MEIGIKATAR	EVASEM
MEIGIGOLO	OLGASEM
MEICINA	BARFALLA
LIMATEX	BARLIBA
CATELOR	BARFONA
RECOLOR	

(b) Use of variety denominations which consist of letters followed by figures, without an existing meaning

examples:

RX 79	RX 82	NK 75	NK 230
XL 24	XL 33	KWS 34	KWS 605
LG 5	LG 11		

knowing that

on the one hand the risk of confusion and the difficulty to remember them are considered

- . less by some,
- . as great by others;

on the other hand, their use in international trade should not present difficulties in pronunciation.

[End of Annex II and of document]