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UPOV RECOMMENDATIONS ON VARIETY DENOMINATIONS

Document prepared by the Office of the Union

The Annex to this document contains the text of the UPOV Recommendations on Variety Denominations as adopted--subject to a further examination at its next [the eleventh] session of the issues raised by Recommendation 6--by the Administrative and Legal Committee at its tenth session.

[Annex follows]

UPOV RECOMMENDATIONS ON VARIETY DENOMINATIONS

The Council of the International Union for the Protection of New Varieties of Plants (UPOV) refers to Articles 6(1)(e) and 13 of the International Convention for the Protection of New Varieties of Plants of December 2, 1961, as revised at Geneva on November 10, 1972, and on October 23, 1978, and in particular to the fact that, according to the said Convention, a variety must be given a denomination destined to be its generic designation before a title of protection can be issued in respect of it.

The Council underlined that the main purpose of the rules laid down in Article 13 is to ensure that, as far as possible, any protected variety is designated in all member States by the same variety denomination, that the registered variety denomination establishes itself as the generic designation and that it is used in the marketing of propagating material, even after the expiration of protection.

The Council considers that such an aim can only be achieved if the broadly worded provisions on variety denominations in Article 13 are uniformly interpreted and applied by the member States, and that the adoption of corresponding recommendations is therefore advisable.

The Council considers further that the adoption of such recommendations for the uniform interpretation and application of the provisions of Article 13 would be of assistance not only to the authorities of member States but also to breeders having to select variety denominations.

The Council, pursuant to Article 21(h) of the 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 member States in connection with variety denominations, recommends that the authorities of member States

- (i) base their decisions on the suitability of proposed variety denominations on the recommendations set out in Part I below,
- (ii) take into account, when assessing such suitability, the recommendations on the exchange of information and on procedure set out in Part II below,
- (iii) give ample information to the breeders on those recommendations so that they can take them into account when selecting variety denominations.

PART I

SUITABILITY OF PROPOSED VARIETY DENOMINATIONS

Recommendation 1

- (1) The variety denomination must be capable of serving as a generic designation.
- (2) Designations that may be taken for indications of another type by which propagating material or harvested material is commonly characterized are not suitable as generic designations and thus as variety denominations. This is applicable regardless of whether or not the indication for which the designation may be taken would in fact be correct.
- (3) Paragraph (2) may also be applicable where the designation is not used alone but as part of a more comprehensive one. The same is true of translations into another language, except where that language is not common in any of the countries in which the variety might be marketed.

(4) Paragraph (2) would preclude, in particular, designations that are identical or may be confused with designations of the following type:

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

Examples: Designations such as "Cherry," "Cerasus," "Cerise," "Kirsche" or a designation comprising the word Cherry, such as "Scarlet Cherry," would be precluded for a fruit variety, but would not be precluded under this paragraph for varieties of a completely different category of plants, for instance for a tomato variety with small fruit or for a rose variety. The designation "Early Snowball" would be precluded for a variety of the genus *Viburnum*, that genus being known by the common name "Snowball" or by corresponding names in various other languages ("boule de neige," "Schneeball"), but would not be precluded under this paragraph for a cauliflower variety.

(ii) Terms used in breeding or in the production and marketing of propagating material.

Examples: "Genus," "Species," "Variety," "Cultivar," "Population," "Hybrid," "Cross," "Line," "Rootstock," "Mutant," "Ecotype," "Three-way," "Inbred," "Top-cross," "F 5," "Elite," "Standard," "Improved," "Basic," "Heterosis" would be precluded.

(iii) Indications usually referring to quantity, weight, price, date or quality, unless it is obvious that they cannot have such a meaning in connection with propagating material or harvested material of the variety. In particular, abbreviations that could be understood as such indications are not suitable.

Examples: The designation "DM 10" would be precluded since it could be taken for an indication of the price in Deutschmarks. Likewise, the designation "Cheaper by the Dozen" could be misunderstood as an indication of the price. "Feb 10" could be mistaken for an indication of date and "Meterlong" for an indication of length. Designations such as "Silver Dollar" or "Happy Four" would not be precluded under this paragraph, however.

(iv) Official control signs, names or acronyms of testing stations or of other authorities with which a variety might be associated. This is not applicable where it would be manifestly unreasonable to establish such an association.

Examples: "British Standards Institution" or the abbreviations "BSI" and "BS" (prefix denoting a British standard) would be precluded, as would "OECD Seed Scheme," "Seed Scheme" or simply "Scheme." Designations comprising the three capital letters "ISO," "SOC" or "BSA" would also be precluded, as they might be construed as referring to the International Organization for Standardization, the French Official Control Service for seed or the Federal Plant Varieties Office in Hanover.

(v) Designations which consist only of geographical names.

Examples: "Evesham" or "Cavaillon" would be precluded. Designations referring to historical regions or countries existing only in literature ("Arcadia," "Utopia") or to places or regions that are remote or manifestly of no significance in terms of plant growing ("Manhattan," "Soho," "Copacabana") would not be precluded under this paragraph, however.

Recommendation 2

(1) Designations that are difficult to remember or pronounce for the average user are unsuitable as generic designations and thus as variety denominations. In the case of varieties that are exclusively marketed within a limited circle of knowledgeable persons, as in the case of parent varieties for the production of hybrids, the average user should be taken to mean the average knowledgeable person in that circle.

(2) Paragraph (1) would preclude the following in particular:

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

Examples: "ZKXV" would be precluded under this paragraph, unlike "STM," which consists of three letters only, or "Jeuvensam," which is pronounceable in syllables.

(ii) A number (where allowed at all, either alone or as an adjunct) consisting of more than four digits, unless the number has a special significance that makes it exceptionally easy to remember.

Examples: "11537" would be precluded.

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

Examples: "To be or not to be" would not be precluded under this paragraph because of the shortness of the words.

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

Examples: "Dimlunmarmar" would be precluded but "Doremifa" would not under this paragraph. "Oldfarmersjoy," being easy to remember, should not be considered as precluded under this paragraph despite its length.

(v) Combinations of letters and numerals, unless they are used in that order in the case of species for which that type of denomination is established practice, for example maize and sorghum.

Examples: "TC 15" would not be precluded under this paragraph for a maize variety, unlike "15 TC."

(vi) Designations containing elements that would cause difficulties when expressed in speech or transmitted by telex, for instance special signs like hyphens, subscript or superscript numbers, or alternating upper and lower cases.

Examples: "A.Z.B.-35," "Medici-A-M²," "AvTM 512" and "Gold-morgen⁷⁷" would be precluded.

Recommendation 3

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

Examples: The designations "Latest Development," "Success of the Enterprise," "Sales Hit" would be precluded. See also the examples of designations precluded under Recommendation 1.

Recommendation 4

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

(2) Paragraph (1) would preclude the following in particular:

(i) Designations in which the applicant himself has some other right (for instance a right in the name or a trademark) which he could assert, as from the time when the variety denomination is approved, to oppose use of the variety denomination by others, either at any time or at least after the expiration of protection.

Examples: Designations containing the name or trade name of the breeder or of the owner of the variety would be precluded.

(ii) Designations in which third parties have prior rights that stand in the way of the use of the variety denomination. The proper names of other persons would not be precluded as variety denominations or parts of denominations in the case of:

- (a) Dedications to public figures who cannot be mistaken for well-known breeders or owners of varieties, on condition that the applicant can prove that the persons, or if recently deceased their survivors, have agreed to such use;
- (b) Historical figures or characters in literature.

Examples: "Peter the Great" would not be precluded except, pursuant to Recommendation 5, for a particularly small-growing variety. "Felix Krull," a character in a novel by Thomas Mann, or "Return of Ulysses" would not be precluded under this paragraph, but "Felix Krull" would if there were a well-known breeder of that name. Names of politicians, actors, musicians or sportsmen, for instance "Nelly Melba," unless identical with the name of a well-known breeder or owner of varieties, would not be precluded under this paragraph, provided that the agreement of the owner of the name, or that of his survivors if the owner of the name is recently deceased, is obtained.

(iii) Designations that are contrary to public policy in the member State concerned.

Recommendation 5

(1) A variety denomination is liable to mislead and therefore not suitable if there is a risk of it creating a wrong impression as to the characteristics and value of the variety.

(2) Paragraph (1) would preclude the following in particular:

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

Examples: "Glacier" for a red-flowered ornamental variety or "Daddy Longlegs" for a short-stemmed tulip variety would be precluded.

(ii) Designations that refer to attributes of the variety in such a way that the impression is created that only this variety possesses them, whereas in fact other varieties of the species in question have or may have the same attributes.

Examples: "Winter Hardy," "Truly Resistant," "Protein," or "Double Low" for a swede rape variety would be precluded.

(iii) Comparative and superlative designations.

Examples: "Earliest of All," "Longest Possible" or "Later and Longer" would be precluded.

(iv) Designations that refer to a particular region, where the variety has no connection with that region.

Example: "French Pride" for a variety not having any connection with France would be precluded.

(v) Designations that convey the impression that the variety is derived from or related to another variety when in fact that is not the case.

Examples: "Bintje's Grandchild" would be precluded for a potato variety for which the well-known variety "Bintje" did not serve as the initial source of variation, as would "From Dagobert's Stable" for a variety bearing no relation to another variety with the denomination "Dagobert."

Recommendation 6

(1) A variety denomination is liable to mislead and therefore not suitable if there is a risk of it conveying a wrong impression as to the identity of the breeder.

Examples: See the examples given for Recommendation 4(2)(ii), where the names of historical figures, characters in literature or public figures are identical with the names of well-known breeders or owners of varieties. Misleading geographical names forming part of a variety denomination may also be precluded under this paragraph.

(2) Where a breeder uses the same verbal component in the denominations of his varieties, third parties may be prohibited from using that component if, under the circumstances of the individual case, such use is liable to mislead.

Examples: A breeder might use the component "Kit" at the beginning of the denominations of varieties filed by him, for instance "Kitchen," "Kittycat" or "Kitbag."

Recommendation 7

(1) A designation identical or similar to a designation under which a variety of the same or a related botanical species has been made known or officially registered or under which material of that variety has been marketed is not suitable, because it is liable to cause confusion or to mislead.

(2) Paragraph (1) is not to be applied where the variety made known or registered earlier or already marketed is no longer cultivated and its denomination has not acquired any particular importance, except where special circumstances might nevertheless cause a risk of the public being misled.

Examples: Since the variety already bearing the denomination "Bintje" is still cultivated, that designation would be precluded for any other potato variety. It would also be precluded if Bintje were no longer cultivated, as the denomination has attained considerable importance. "Brown Marga" would not be precluded under this paragraph if "Marga" had been the denomination of a variety cultivated in the past that had not attained any particular importance.

Recommendation 8

Names and acronyms of organizations which are excluded by international conventions from use as trademarks or parts of trademarks are not suitable as variety denominations.

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

Recommendation 9

For the purposes of the fourth sentence of Article 13(2) of the Convention, all taxonomic units are considered closely related that belong to the same botanical genus or are contained in the same class in the list in Annex I to these Recommendations.

PART II

PROCEDURE

Recommendation 10

(1) When rendering its decision on the suitability of a variety denomination, the authority referred to in Article 30(1)(b) of the Convention (hereinafter referred to as "the authority") takes into account all observations made by the authorities of other member States.

(2) The authorities accept as far as possible a variety denomination established in another member State even if they have objections to it.

Recommendation 11

(1) The information exchanged between the authorities of member States on variety denominations and the communication of observations on proposed variety denominations, provided for in Article 13(6) of the UPOV Convention, are effected by the exchange of the official gazettes published by the member States according to Article 30(1)(c) of the UPOV Convention. The layout of these official gazettes is to be based on the UPOV Model Plant Variety Protection Gazette (document UPOV/INF/5) and on any other recommendations made by UPOV; in particular, the chapters containing information on variety denominations should be appropriately identified in the table of contents.

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

Recommendation 12

(1) Each authority examines the filed variety denominations published in the gazettes of the other member States. If it finds a variety denomination to be unsuitable, it proceeds as follows:

(i) It communicates its observations, together with its reasons, to the authority that has published the variety denomination, on the form reproduced in Annex II to these Recommendations, as soon as possible but not later than three months after publication of the issue concerned. (In certain countries, the statutory period for filing comments on a proposed denomination may be less than three months, after which time comments may no longer be acceptable for consideration.)

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

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

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

(ii) If the observation refers to a circumstance that is an obstacle to registration only in the State of the authority that has made the observation, and not in the State of the authority that has published the filed denomination (e.g. the denomination is identical to someone else's trademark in the former State only), the latter authority, depending on the circumstances of the case, either rejects the filed denomination or informs the applicant accordingly, requesting him to file another variety denomination if he also intends to apply for protection, or market propagating material of the

variety, in the member State of the authority that has transmitted the observation. If this procedure does not result in the filing of another variety denomination, no communication need be addressed to the authority that has transmitted the observation.

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

- Annex I: List of Classes for Denomination Purposes.
- Annex II: Form for the Transmittal of Observations on a Proposed Variety Denomination.]

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