UPOV

# PLANT VARIETY PROTECTION

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UPOV

This issue contains the Records of a Symposium on

NOMENCLATURE

held on October 12, 1983,
on the occasion of the seventeenth ordinary session
of the Council of UPOV*

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# UPOV AND NOMENCLATURE

Frits Schneider*

Whenever man tries to get a grip on a large and unsurveyable quantity of material, facts or dates, he starts to identify the constituent elements and tries to classify them.

Tindell Hopwood wrote in 1959: "The urge to classify is a fundamental human instinct; like predisposition to sin, it accompanies us into the world at birth and stays with us to the end". I think we shall restrict ourselves today to the taxonomical part of this quotation, leaving the "predisposition to sin" for the next symposium, perhaps under the heading "Enforcements and Infringements".

Where plants are the subject matter, the work of identification and classification is performed by using the principles of plant taxonomy, among which nomenclature, the subject of this symposium, is an important tool.

Nomenclature makes it possible to designate every group of plants that can be identified as such by a name or denomination. In this way extensive and, in general, complicated identifying descriptions can be replaced by relatively short names. These names make it possible to communicate about the groups of plants concerned in an easy way. Communication refers not only to research and publications by scientists, but also to all aspects of commercialization, extension services, schooling and so on.

Names also make it possible, for example, to link the results of evaluation work to cultivated varieties and to attach rights to them. For these reasons it is understandable that the International Convention for the Protection of New Varieties of Plants has an essential interest in nomenclature.

The full scientific name of a cultivated plant (e.g. Phaseolus vulgaris L. cv. 'Prelubel', a French bean variety) consists of the name of the genus (Phaseolus), the specific epithet (vulgaris)--together these form the species name--an abbreviation of the name of the author of the name, in this case Linnaeus (L.) and the denomination of the cultivated variety, which always begins with a capital letter and is generally placed between single quotation marks ('Prelubel'). In addition to scientific names there are also common plant names--in this case, French bean.

So, scientific nomenclature, variety naming and common names are the three pillars on which the nomenclature of cultivated plants is built.

Botanical names of taxa as genera, species, etc. are given by botanically trained specialists, who follow the rules laid down in the International Code of Botanical Nomenclature. With respect to breeders' rights, these names play an important role in connection with Article 4 of the UPOV Convention concerning the botanical genera and species which must or may be protected. In Articles 2 and 3 of the Convention, which deal with forms of protection and reciprocity, mention is again made of genera and species and, in these cases also, nomenclature has an influence. Botanical names also have a part to play in the list of classes for variety denominations. The need for this list arises from Article 13(2) of the Convention, where it is said that a denomination must be different from every denomination designating a variety belonging to the same botanical species or a closely related species. I think Mr. Burdet will give you some views on the development of botanical nomenclature.

Denominations of cultivated varieties are chosen by breeders or introducers and are established by registration authorities. They should be in conformity with the International Code of Nomenclature for Cultivated Plants or, where protected varieties are concerned, with the UPOV recommendations on variety denominations, which give a further and more detailed interpretation of Article 13 of the Convention. Mr. Brickell will deal with this subject in his paper and, as he is the Chairman of the International Commission for the Nomenclature of Cultivated Plants, you will be in experienced hands. After Mr. Brickell's paper, Mr. Kunhardt will present us the views of UPOV on variety denominations.

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Common names originate in the language of the common people. They refer mostly to groups of related cultivated varieties and exist mainly at the generic, specific or infraspecific level. The combination of a botanical name and a common name often enables us to define groups of plants more precisely, including those eligible for protection, for instance. For example, the botanical name Brassica oleracea, combined with the common name cauliflower, clearly defines in very few words a specific group of varieties.

Also, where common names embrace a bigger grouping than related botanical taxa, common names can be of crucial importance. This is shown by Article 8 of the Convention, concerning the period of protection, in which vines, forest trees, fruit trees, ornamental trees and rootstocks are mentioned. This is also the case in Articles 5 and 6, which deal with the scope of protection and the conditions required for protection. The implications of the use of common plant names will be made clear to you by Mr. Brandenburg.

There are differing opinions as far as the border between nomenclature and trademarks is concerned. Trademarks can be used in addition to variety denominations to indicate the origin and, as a consequence, the quality of the material belonging to the variety in question. Article 13 of the Convention prescribes that the denomination of a variety is destined to be its generic designation. It is perhaps useful in a meeting at which both botanical and legal people are present to draw attention to the fact that the word "generic" is used here not in its botanical sense but in its legal sense. The effect of the denomination's being a generic designation is that its free use must not be hampered by other rights such as trademarks. It is at this point that trademarks and nomenclature meet each other in the text of the Convention. In his paper Mr. Royon will give us his opinion on variety denominations and trademarks.

[Original: English]

## THE DE CANDOLLE FAMILY AND THE HISTORICAL DEVELOPMENT OF BOTANICAL NOMENCLATURE

Hervé M. Burdet*

Summary

The need to distinguish plants and give them names has always existed. Man has striven to do it in all languages and according to all the systems of thought that have prevailed throughout his history. The modern era, which in this field dates back to the sixteenth century, is characterized by determination to make the various systems for the designation of plants into one universal system: search for common features and synonymity under Bauhin; dogmatic pragmatism and authoritarian schools of thought under Linnaeus or Lamarck.

Botanical nomenclature began with the De Candolle family. Augustin Pyramus De Candolle (1778-1841) introduced certain practices that respected the opinions of his colleagues and rejected the concept of nomenclatural authority in favor of that of established practice attributable to prior use. Alphonse Louis Pierre Pyramus De Candolle (1806-1893) emulated his father and devised a functional system under which the names of plants were governed by a "code," which itself was the product of the consensus of the botanists of their time. This methodological procedure, which endeavored to respect the opinions expressed by the old school and at the same time allow for those of the new, has been endorsed by the international scientific community, as witness the periodical botanical congresses, forums at which not the names of plants, but rather the principles according to which plants should be designated, are debated.

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The Genevan and De Candolle method, consisting in a "democratic" approach and in a search for consensus in the terminology for the designation of plants, has passed the test of time. It is still up to date and universal, and the standard reference in fundamental botany, even though nowadays, for very good reasons, the breeders of varieties usually refer to a system based on a different logic, which Alphonse Louis Pierre Pyramus De Candolle had moreover presented, worked out and described.

Man's desire to designate clearly the plants surrounding him has always existed. The oldest Chinese or Egyptian monuments already bore carvings and inscriptions that depicted and designated plants. All civilizations, from the most ancient known to us up to our own, have sought to establish a terminology for the designation of plants. Primitive cultures of the present day themselves devote an important portion of their language to the designation of plants, and we are bound to look on this circumstance as a reflection of the decisive role played by plants in the existence of mankind.

In our present day, with distances eliminated by communication facilities, it is difficult to imagine what the time was like when certain parts of our planet and their inhabitants did not know the others and were themselves entirely unknown. This isolate, in the biological sense of the term, no doubt explains the diverse origins of a multitude of cultures and civilizations, and their essential originality. It should however be pointed out that it is in its terminology designating plants and animals, in its description of the living world, that the originality of a culture is the most strongly marked; this phenomenon is quite understandable if one considers that, for instance, the law of universal gravitation reduces all types of erected structures and buildings to a very few basic principles, whereas the biological diversity of the environment makes for a multitude of designations, sometimes because the word denoting the plant is not the same in one area as in another, and at other times because the plant so denoted is not the same in one country as in another.

This fundamental difficulty is moreover still very much with us in matters of nomenclature, as even today the two main stumbling-blocks in the area of science under consideration are on the one hand different terms for the same thing, that is, lack of synonymy, and on the other hand identical designations for different things, that is, misconstrued synonymy.

Therefore, unfortunate though it may be, there cannot be spontaneous compatibility between two or more designative systems in the living world, for the historical, linguistic and biological reasons that I have just attempted to set forth. This failure of original, popular (nowadays called "vernacular") nomenclature is consequently quite understandable and forgivable. Nor does it detract in any way from the ethnological, linguistic and cultural value of the designations concerned.

For nomenclature, the modern age began with the sixteenth century. It was a time at which Europe was becoming aware of the existence of the rest of the world, and of its diversity as well as its globality. It was the first time in the history of mankind that a culture realized that the living world, all plants and all animals, was for one thing far vaster, diverse and more complex than originally expected, but for another thing global, and therefore limited, apprehensible and consequently capable of description in its entirety. The scientific world of the time spoke and wrote in Latin. It was therefore that language, the language of nobody in particular, or everyone in general, that was to serve to designate living beings. Thus it is that we owe the first universal designative system for plants in Latin to the historical chance that made Latin the language of science in Europe at a time when the world was becoming, for the first time, a finite entity and known as such. The sixteenth century was an age of intolerance, a mental attitude that was to affect nomenclature also. The task on hand was easy to describe: the compilation of an inventory of the whole range of plants in existence, which were now accessible. Yet, a number of factors complicated what at the outset seemed a simple assignment.

First, the cultural tradition of the time required that everything discovered and said be associated with the discoveries and statements of the Ancients. Yet is was very difficult for the scientists of contemporary central Europe to trace and verify the assertions of Pliny, who lived in southern Italy, and still less Dioscorides, who worked in Asia Minor.

Secondly, there was ideological pressure from the Church, or rather the Churches (there were at least two tearing each other apart in Europe at the time). According to Catholic or Reformed dogma, based on the premise that creation was of divine significance, it was the duty of the scientist, the naturalist and the botanist to discover that significance. In that way the best brains of the age were set the task of looking for the why before the what, the where and the how.

Thirdly, there was individual intransigence, the fruit of dogmatism: every thinking brain was certain of being right, totally right. Four, ten or fifteen brains, each one right, make for four, ten and fifteen different systems. There were more and more vocal outbursts, controversy ran wild and truth was relegated to the wings.

The nomenclature of the time and the designation of plants was nothing more than a lamentable bickering, where each asserted that he held the key of knowledge and authority to the exclusion of any other.

Gaspard Bauhin, who was born in 1560 and died in 1624, was an engaging scientific figure from Basle. Was it due to his basic ideology--he was anabaptist, in other words neither reformed nor papist--that Bauhin had broad-minded ideas? He proposed arbitration as a solution. To put it briefly, what botanist A designated by the letter X was synonymous with what botanist B designated with the letter Y. That seems simplistic today, but at the time the exercise was an ultra-modern one; it was tantamount to rejection of all doctrines, but unfortunately it raised the problem of the identity of the arbiter. Bauhin quite naturally became the first arbiter. He attempted to "freeze" nomenclature and to limit the designations of the 6,000 plants known at the time to the 6,000 names that he allowed. That task (60 years of intense work, as he himself wrote on the title page of his main work the "Pinax") had the merit of creating a nomenclatural consensus that was to last into the middle of the seventeenth century. That consensus was founded on the concept of authority, however; that of Bauhin first, which was undisputed-- but then, with Bauhin gone, the authority, the arbitration and all discipline went too. Arbiters came and went, and their authority was often equalled only by the ferocious dogmatism of their pronouncements.

Linnaeus thought up and established binomial nomenclature. From Linnaeus onwards, every plant had two names, and only two: one denoting the genus and the other the species. During his lifetime, it was Linnaeus who said what names were good names. When he died, in 1778, his system of binomial Latin nomenclature lived on and established itself without difficulty. Unfortunately it rests on the principle of authority, and none of his successors, neither his son nor his disciples, succeeded in winning recognition as valid authorities.

Lamarck, who lived from 1744 to 1829, was entirely typical of his time in that he adopted the mechanics of the Linnaean binomial nomenclature, but rejected the authority of Linnaeus himself. He systematically substituted Lamarckian for Linnaean names on the smallest pretext and indeed often without any pretext, the only reason ultimately being that Lamarck, in the opinion of Lamarck, had to be substituted for Linnaeus.

Alas, had there been only Lamarck... the successors of Linnaeus were innumerable, however, and at the start of the nineteenth century everyone was giving whatever name he liked to whatever plant he liked. The two-century-old efforts of Bauhin were reduced to nothing, not so much because known plants had increased in number from 6,000 to more than 100,000 (the probable number of flowering plants is estimated today at more than 700,000) as because the inventors of new names were multiplying to infinity.

Augustin Pyramus De Candolle was born in Geneva in 1778 and died there in 1841. Geneva was, moreover, the homeland of four generations of scientists of that name, who illustrated the scientific history of our little city in the course of the hundred-odd years from 1817, the date of the foundation by the eldest of our city's Botanical Garden, to 1920, which is the date of the donation of the family collections (library, archives and herbaria) to the city of all the De Candolles' birth. Augustin Pyramus De Candolle, who was the contemporary incumbent of a local botanical tradition that dates back to Jean-Jacques Rousseau, was in Paris the disciple of Jussieu, Desfontaines and L'Héritier. Colleague of Bosc and successor to Lamarck, he was the describer of the flora of France and author of "Prodromus," an ambitious attempt at describing the whole range of plants known at the time. After the revolutionary troubles and changes of regime had ended in Europe, De Candolle returned to Geneva in 1817

and was in particular noted by his compatriots for the foundation of a botanical garden there. What De Candolle in fact brought back to Geneva was far more important than the 17 vehicles containing his herbarium, namely up-to-date, encyclopaedic knowledge, experience of long standing already and a worldwide vision of living phenomena.

Like many other botanical scientists, De Candolle taught; he presented plants and demonstrated the subtle niceties of their classification. It is worth mentioning that he was a spectacularly successful professor, so much so that, within a few months, the whole of Geneva attended his courses and engaged in botany. "Geneva, a city of 40,000 inhabitants, including 40,000 botanists" was how a celebrated visiting traveller put it.

Like many other botanical scientists, De Candolle observed, classified and described the plants that a vast network of collectors sent to him from the four corners of the earth.

Also like many other botanical scientists, De Candolle had his own system, and its profound originality should be mentioned. It was not a "practical" system, in which plants figured only according to their possible interest. Nor was it an artificial system, under which one had only to count stamens and determine numbers of carpels in order to make random groupings of valerians, crocuses and papyrus for instance. Such a system and such a result may have been the fruit, the ultimate finding of the Linnaean method. The De Candolle system was one designed to determine the true relations of plants; it was a flexible system under which, looking beyond strictly descriptive morphology, real affinities were traced, and under which, even though evolution as a theory had not yet seen the light of day, behavioural similarities and adaptive steps were highlighted, describing and foreshadowing the evolutionary phenomenon without actually naming it.

Unlike the majority of other botanical scientists, De Candolle designed his nomenclature at the outset not as a mere verbal expression with a purely denominative purpose, but rather as the backbone of every taxonomic system. According to him it was the abstract formulation of systematic conceptions. From De Candolle onwards, the Latin binomial that designated plants became to botany what the algebraic formula was to mathematics.

This profoundly original step was a milestone in the history of science. For the first time the principle of dogmatic authority was shaken. For the first time the names of plants lost all association with the botanists who chose them. The principle of priority, a fundamental and still-valid principle of plant nomenclature, also appeared. De Candolle simply considered, out of respect for his predecessors, that the name of a plant should be the first ever given to it, regardless of the giver. And yet De Candolle was only a practitioner. Throughout his own descriptive work, notably as he progressed with the writing of "Prodromus," he made use of certain nomenclatural practices, but gave little thought to devising them. The notions of priority, validity and legitimacy were all implicit in the work of De Candolle, yet they were not formulated. In his most abstract publications, however, such as the "Théorie élémentaire de la botanique," which appeared in 1819, De Candolle did expound his basic nomenclatural conceptions: for him, nomenclature had finally ceased to be a mere verbal technique. It had become a modern denominative system independent of its creators and those that made use of it. It was a system that was bound to allow a taxonomic conception to be formulated and a subjective but dispassionate system of rules devised for plants or indeed also for animals. It was not the least of Augustin Pyramus De Candolle's merits that he had disciples and continuators. Either chance or heredity arranged for the best of them to be his own son, Alphonse Louis Pierre Pyramus De Candolle, who was born in 1806, in the middle of his father's Parisian career. He was blessed with a long life, which is by no means unimportant to someone who wishes to impose his ideas: he died in Geneva in 1893. First a lawyer, with botany as a sideline like all Genevans, he gradually acquired a taste for botany and became the continuator of his father's work. He of course continued "Prodromus," the family's magnum opus, contributing to it himself, writing up several families, but he perhaps provided more definite assurance of the work's success by organizing and promoting collaboration. Was that because he was a lawyer, or was it that side of his character that made him study law? Alphonse de Candolle was attracted throughout his life to abstract notions, scientific theories and the speculative side of things. He was the sole case, to my knowledge, of a botanist who began his career not by examining plants, in spite of the fact that his family environment from childhood onwards had been almost entirely made up of plants, but rather by critically examining the botanists of his time and botany as an intellectual exercise.

De Candolle fils was destined to become the theoretician and propagator of the ideas of De Candolle père. A certain calm but efficacious lucidity won Alphonse De Candolle a world reputation:

- first and foremost as a describer of the plant kingdom (through his continuation of "Prodromus");

- then as a botanical theoretician. Alphonse De Candolle was practically the only botanist of his time able to say clearly not only what plants were, but also why and how botany was a science, what the rules were for practising botany and what purpose they served.

Alphonse De Candolle was able to convince all botanists, his contemporaries, that, whereas plants themselves were many and diverse, there could be only one botany to describe them. Drawing on the nomenclatural concepts practised by his father, he won understanding for them and succeeded in having them applied generally. During the second half of the nineteenth century, which was characterized by extreme differences of opinion and partisan and nationalist conceptions of biology and its role, Alphonse De Candolle never ceased to look for a consensus acceptable to all. He, the lawyer, effectively introduced a set of texts which he called quite simply "Lois de la nomenclature botanique." He built up these laws on a foundation of simple principles that were few but novel. His desire was that the laws should be freely acceptable to all. According to him, nomenclatural laws could not be anything but the expression of a consensus. His desire was that the work of the Ancients should not be unnecessarily and pointlessly disputed, and that the priority of designations should be established and respected. Moreover he did not want the system for codifying nomenclatural procedures to be excessively rigid, preferring it to be capable of reconsideration at any time in response to a consensus of contemporary botanists.

For those of you who, as I sometimes do, attend and take part in modern congresses on nomenclature, the ease with which Alphonse De Candolle established his organization is little short of awe-inspiring, above all if one considers the cacophony that used to deafen such meetings in his time. At the London Horticultural Congress of 1866 he made the following simple entry in his personal records: "Horticulturalists and botanists are exchanging aspersions on the absurdity of garden names and on the mobility of a nomenclature that seemed bound to become fixed if only it were declared positive and logical. Happily, we are also exchanging courteous and serious requests with a view to helping each other, if possible, or at least not damaging each other..."

It was as a result of the above congress that De Candolle really applied himself to the nomenclatural problem as a whole. Responding to a challenge from Karl Koch, the German botanist, who at the same Congress had suggested that gatherings of that kind should serve to examine controversial questions, nomenclature and reforms capable of lessening the congestion caused by synonyms, Alphonse de Candolle set himself to work.

A year later, in Paris, the "Code international de nomenclature botanique et sa jurisprudence" were approved in the following terms:

"The botanists assembled in international congress, in this month of August 1867, having taken cognizance of the collection of "Lois de la nomenclature botanique," written by Mr. Alphonse De Candolle;

"Acting on the report of a commission appointed by them;

"Resolve:

"To recommend the said collection, in the form adopted by the assembly, as being the best guide to be observed for the purposes of nomenclature in the plant kingdom."

Alphonse De Candolle would not have liked it to be said of him, he who rejected the notion of authority, that it was precisely under his authority that botanical nomenclature was codified. And yet that is just what happened. The remarkable thing about this man was that he succeeded in imposing a scientific methodology, an intellectual exercise, and at the same time arranged for it to be systematically criticized and constantly called into question. He also succeeded in designing such a system outside himself, transcending himself so to speak, in a spirit of total self-denial.

Our codes of nomenclature, those of botanists, breeders of varieties, zoologists or bacteriologists, and the periodical congresses that enable them to be developed or adjusted, are the spiritual legacy of Alphonse De Candolle, Genevan democrat and humanist.

[Original: French]

# THE INTERNATIONAL CODE OF NOMENCLATURE FOR CULTIVATED PLANTS: THE CURRENT POSITION AND POSSIBLE FUTURE DEVELOPMENTS

Christopher Brickell*


## Summary

World-wide usage of plants for scientific, commercial and other purposes demands that a precise, international system of naming should be used. It is essential that the name used for a particular plant should be readily understood and correctly applied by people of any nationality.

Unfortunately, although rules for horticultural plant names have been devised in various forms for over 100 years, only relatively recently has a determined effort been made to provide an internationally accepted code for the precise naming of cultivated plants.

In 1952, the International Horticultural Congress approved and adopted a set of rules for naming cultivated plants which was published in 1953 under the auspices of the Royal Horticultural Society as the International Code of Nomenclature for Cultivated Plants.

The most recent edition of this Code was published in 1980 as Vol. 104 of Regnum Vegetabile, one of a series of publications produced under the auspices of the International Bureau for Plant Taxonomy and Nomenclature.

The rules laid down in the International Code of Nomenclature for Cultivated Plants (ICNCP), for convenience often called the "Cultivated Code", are now widely accepted and used by scientific and practical horticulturists as the reference "bible" upon which the naming of the plants they use in their work must be based. Although the rules and regulations crystallised in the 57 Articles of the "Cultivated Code" are not legally binding, it is clear that without widespread acceptance and application of these rules the aims of achieving uniformity, accuracy and fixity in the use of names for cultivated plants of value in horticulture, agriculture and forestry cannot be achieved.

This paper describes briefly the underlying principles of the regulations set out in the "Cultivated Code" and the vital need for very close cooperation and agreement between those organizations involved with the application of names to cultivated plants.

The work of International Registration Authorities for the names of cultivated plants is described and emphasis is placed on the need for links between these authorities and organizations concerned with the application of Plant Variety Rights.

The application of cultivar names and their relationship to trademarked names and "generic names" (in a horticultural, not botanical context) are discussed.

In conclusion, the possibility of arranging joint discussions between representatives of the International Commission for the Nomenclature of Cultivated Plants, UPOV and other interested organizations to agree complementary codes of nomenclatural practice is put forward.


It is stating the obvious to begin this paper by emphasizing that cultivated plants are essential if our civilization is to continue. Less obvious to many, however, is the vital need to ensure that the application of names to cultivated plants is precise and accurate, and that a stable system of naming cultivated plants is agreed and accepted internationally.

World-wide usage of plants for scientific, medical, commercial, aesthetic and other purposes demands that such a precise international system of naming should be used. It is essential that the name used for a particular plant

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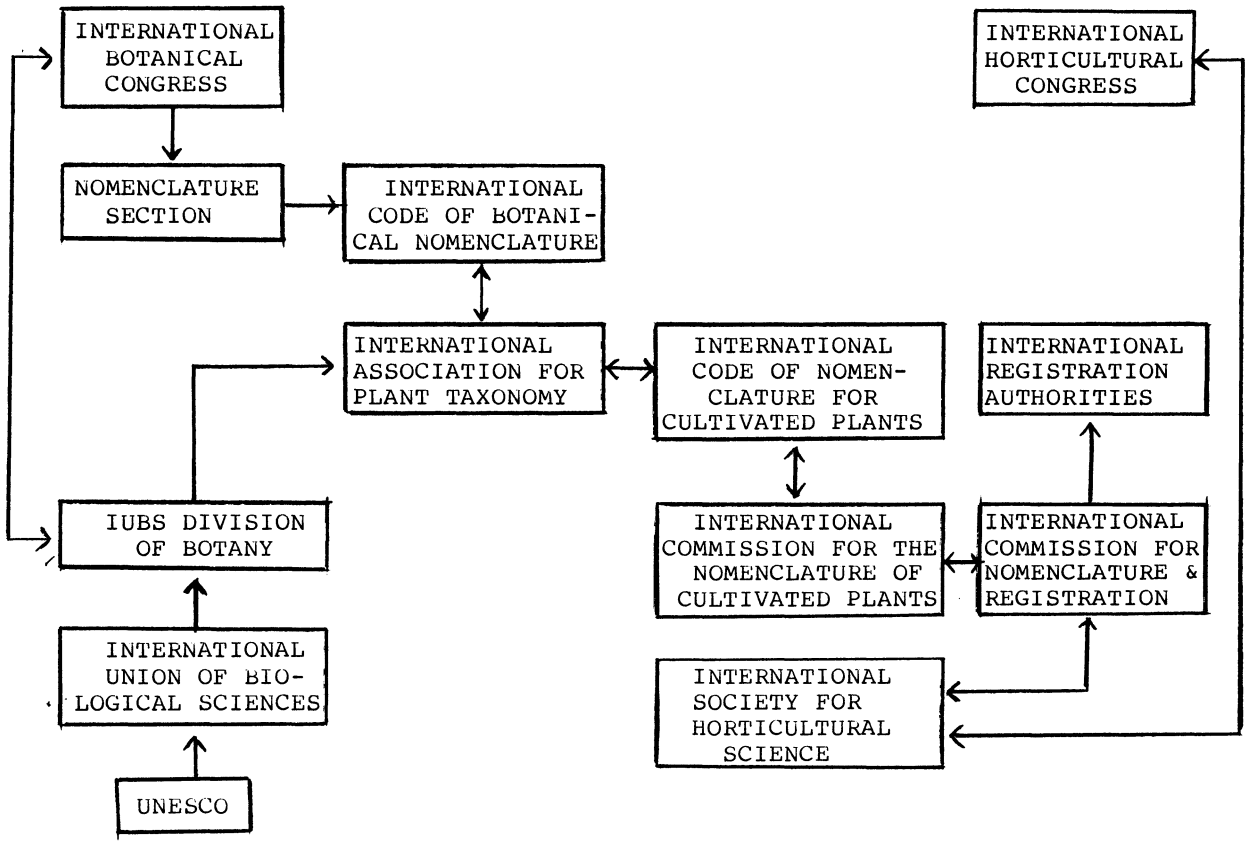
should be readily understood and correctly applied by people of any nationality. If this is not accepted and implemented, very considerable problems may arise, not only in commerce, but in scientific research, with plants used in medicine, and in many other ways.

Unfortunately, although rules for naming cultivated plants have been devised in various forms for over 100 years, only relatively recently has a determined effort been made to provide an internationally accepted code for the precise naming of cultivated plants.

Not until the 1952 International Horticultural Congress, however, was any definite action taken to obtain formal international acceptance of rules of nomenclature for cultivated plants. A draft text for a nomenclatural code for cultivated plants was presented to that Congress. Following its formal adoption, this was published in 1953 by the Royal Horticultural Society of London, on behalf of the Congress, as the International Code of Nomenclature for Cultivated Plants, edited by Professor William Stearn, a botanist. The most recent edition of this Code was published in 1980 as Volume 104 of Regnum Vegetabile, one of a series of publications produced under the auspices of the International Bureau for Plant Taxonomy and Nomenclature.

It may be helpful for those unfamiliar with the international organizations involved with the nomenclature of cultivated and wild plants to see the relationships of these organizations, as indicated in Figure 1, before I describe briefly the underlying aims and principles of the regulations set out in the International Code of Nomenclature for Cultivated Plants, usually referred to as the ICNCP.

Figure 1: INTERNATIONAL ORGANIZATIONS ASSOCIATED WITH THE NOMENCLATURE OF WILD & CULTIVATED PLANTS




It will be very noticeable, of course, that there is no mention of UPOV, CIOPORA or related organizations on this diagram as, at present, there is no direct link to the established pattern of organizations developed originally through Unesco. This, I very much hope, is a situation which can be rectified in the near future, as it is clearly most important that all organizations involved in the use or application of plant names should be closely linked, even though agreement on a common approach will certainly not be easy to achieve.

The Aims, Principles and Rules of the International Code for the Nomenclature of Cultivated Plants (ICNCP)

The rules laid down in the ICNCP, often for convenience called the "Cultivated Code," are now widely accepted and used by scientific and practical horticulturists as the reference "bible" upon which the naming of the plants they use in their work should be based. Although the rules and regulations crystallized in the 57 Articles of the ICNCP are not legally binding, it is clear that without widespread acceptance and application of these rules, the aims of achieving uniformity, accuracy and fixity in the use of names for cultivated plants of value in horticulture, agriculture and silviculture cannot be achieved.

When one considers that man has been applying names to plants from before the time of Theophrastus, over 2,000 years ago, without any precise guidelines, it is understandable that these aims have not yet been fully realized. But during the last 40 years, enormous strides have been made in rationalizing the naming of cultivated plants and providing procedures to be followed in the future.

At this Symposium we are mainly concerned with plants selected or hybridized and then maintained in cultivation by man. The naming of these cultivated varieties by horticulturists, agriculturists, silviculturists and not least botanists, has been a haphazard affair ever since names were given by man to plants. Some cultivated varieties were given names in Latin form, as are wild plants; others have received "fancy names" in the language of the country in which they were named. In both cases, these names were often imprecisely applied and many nomenclatural problems have occurred as a result of confusion between the categories of "cultivated variety" and "botanical variety." In the "Cultivated Code," the ICNCP, cultivated or garden varieties of plants are recognized under the formal category, cultivar, to distinguish them from the botanical variety, varietas. This avoids the usage of the term "variety", which may well be confusing if applied without qualification, as it may refer to a defined cultivated variant of a plant, a botanical taxon or merely to an undefined "kind" or "sort" of plant, without any precise definition of the status of that plant.

The "Cultivated Code" remains flexible in its approach, however, by recognizing common usage and accepting variety (variété, sorte, etc.) as equivalent to the international term cultivar, wherever these words are used to denote a cultivated variety.

The ICNCP gives clear regulations on the way cultivar names should be written and what names are admissible. The most important is that cultivar names are not to be in Latin form, but should be in a modern language using the so-called Roman alphabet. This immediately distinguishes them from botanical varieties, which must be written in Latin form. As from January 1st, 1959, the use of Latin for cultivar names was prohibited under the rules, but the accumulation of hundreds of existing latinized cultivar names such as 'Aurea', 'Nana', 'Prostrata' and 'Variegatus' remains. This has been dealt with by the typographical devices of using Roman type, an initial capital letter and either preceding the cultivar name by the abbreviation "cv." or enclosing it in single quotes. This immediately distinguishes a cultivar name in print from the name of a botanical varietas which is printed in italics and written with a small initial letter.

The ICNCP is divided into six main sections, covering the various aspects of naming cultivated plants. The six Articles in the first section deal with the guiding principles of the Code and set out the need to promote a uniform, accurate and stable method of applying and using cultivar names. The second section (Articles 7 to 26) details the various categories of cultivated plants (genus, species, cultivar, collective name, graft-chimaera, group), whilst the third section (Articles 27 to 32) provides rules governing the formation of cultivar names. The latter section, and the fourth section (Articles 33 to 52) covering the publication and use of cultivar names, are probably the most useful for the majority of horticulturists to consult, but the fifth section (Articles 53 to 56) on cultivar name registration is rising steadily in importance, particularly with the introduction of various international and national measures to provide for plant breeders' rights and to protect buyers of plant material. Under the last section (Article 57), methods are provided for revising and modifying the Code. Although all sections and Articles of the Code are of importance, emphasis should be placed on the three main underlying principles.

The first is the need to use a uniform system of naming cultivated plants which is accepted and, equally importantly, implemented internationally. The ICNCP provides the basic information for such a system and professional and amateur horticulturists, agriculturists and silviculturists should be encouraged by every means possible to follow the rules laid down in the Code.

Secondly, accurate naming of cultivated plants is vital if further confusion is not to occur. A great deal of confusion and error already exists in the naming and identification of cultivars. The practices and procedures which have caused this situation in the past must be discontinued and prevented from occurring again. Indiscriminate naming of cultivars, duplication of cultivar names for distinct cultivars, renaming cultivars and poor documentation when they are originally named are all factors which have contributed to this confusion. Support for international registration procedures and the production of international registers, together with the establishment of cultivar collections, both for reference purposes and taxonomic studies, will help to alleviate these problems.

Thirdly, fixity and stability of cultivar names must be achieved. A cultivar has only one correct name under this Code and this should be the single name by which it should be internationally known. It is possible for a commercial synonym to be provided as an alternative to its correct name, under restricted circumstances. This may occur, for example, where a name is commercially unacceptable in a particular country, when the original name or a translation would have an undesirable implication or connotation. Use of commercial synonyms should be limited, however, as their wide acceptance and usage would contravene one of the main aims of the Code, i.e., fixity and stability of names. Duplication of names within cultivar groups must also be avoided and since January 1, 1959, such duplicated names, although perhaps validly published in other respects, are illegitimate under the Code. As an example of the confusion that can occur with duplicate names, the recently revised Dianthus Register, published in 1982 by the Royal Horticultural Society, includes 52 uses of the cultivar name 'Defiance' during the 18th and 19th centuries for distinct Dianthus cultivars! There are, incidentally, over 27,000 names in that Register. This is an extreme case, but the difficulties that such duplication causes are immense. Clearly, such sources of confusion and error must be eliminated in the future by refusal to register any duplicate of a cultivar name already known to exist, even though it is possible that the cultivar concerned is extinct. Only by insisting on the application of this principle will the fixity and stability of cultivar names be firmly established.

It is important to realise that the rules of the ICNCP are formulated to apply to a very wide spectrum of horticultural, agricultural and silvicultural plants. The misapplication or misuse of cultivar names may have repercussions in horticultural research, in breeding work, on professional growers in the wholesale and retail trade, in farming, forestry and medicine, as well as in gardens. The rules have been formulated after very careful thought by horticulturists and botanists of wide experience. They are reviewed and amended periodically. Most of the rules included in the Code are based on knowledge of past confusion and are designed to minimize this in the future.

It is a relatively simple (if long-winded and time-consuming) process to prepare rules for the establishment of an international code dealing with the nomenclature of cultivated plants, but very much less easy to devise methods by which the rules and regulations of such a code may be established and maintained.

Widespread publicity is, of course, most necessary but in order to "add meat to the bones" practical means of implementing the Code are essential. The two main methods by which this can be done have already been mentioned: the establishment of international registration authorities for cultivar names, and the formation of national, and possibly eventually international, reference collections of cultivars.

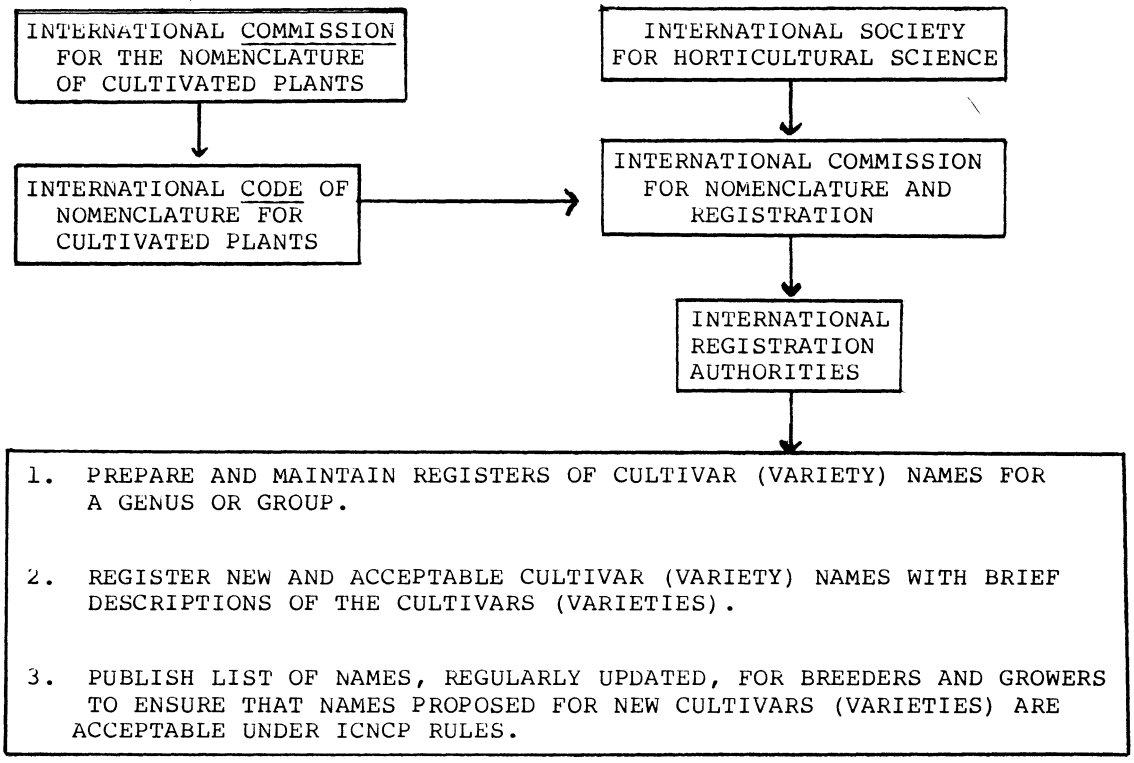
## International Registration Authorities

The impetus for setting up International Registration Authorities (I.R.A.'s) was provided by the first edition of the Code in 1953. Since that date over 60 authorities have been formed. As an example, the Royal Horticultural Society has undertaken responsibility for eight major genera or groups; Conifers, Dahlias, Delphiniums, Dianthus, Lilies, Narcissus, Orchids

and Rhododendrons. Other organizations in countries in many parts of the world have been able to undertake this work with other genera or groups.

I.R.A.'s are appointed by the International Society for Horticultural Science (ISHS) on the recommendation of the International Commission for Nomenclature and Registration of the ISHS (see Figure 2). Their purpose is to prepare and maintain registers of cultivated plants, to register new and acceptable cultivar names and thus provide lists of cultivar names and, where possible, brief descriptions of the cultivars. These provide a basic reference work for those interested in the group or genus concerned. Such lists are extremely helpful in stabilizing the use of cultivar names, particularly in popular groups or genera where professional and amateur hybridizers exploit the potential variation of the plants with which they are working to produce enormous numbers of cultivars. Without the help of comprehensive lists it would be extremely hard for growers and breeders to be aware of all the cultivar names already published in a bewildering range of books, periodicals and catalogues. If no such list is available it is likely that a grower or breeder may, in perfectly good faith, use a name he believes to be "new" within the genus which has already been used previously. Confusion for both professional and amateur growers is then to be expected.

Figure 2: INTERNATIONAL REGISTRATION AUTHORITIES

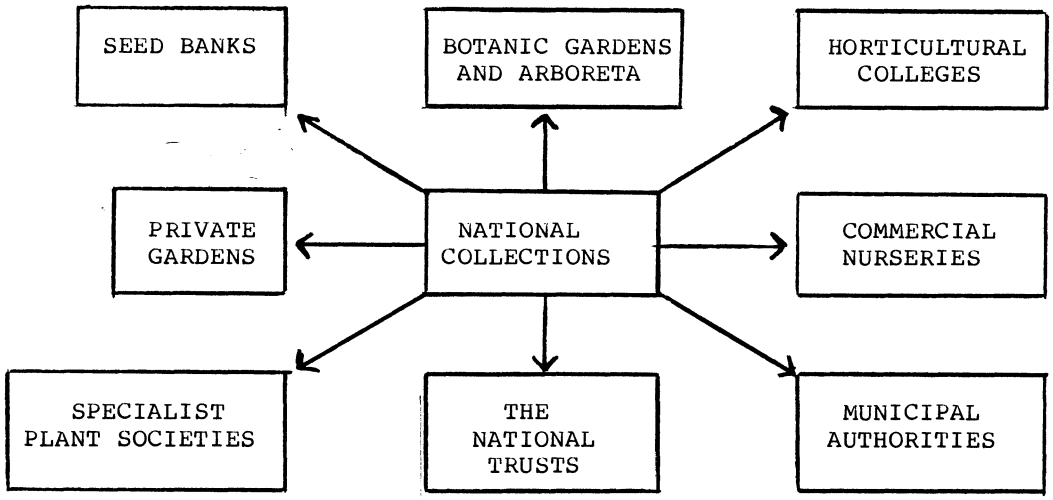



The preparation and publication of such registers is not easy. Most organizations willing to undertake such work have no financial assistance, even though it is directly of value commercially and in horticultural research. A massive research operation is needed to extract from the literature all the names of cultivars in the genus or group concerned, to prepare the initial check list which will eventually become the International Register. Cooperation from individuals and organizations with knowledge of the group or genus is essential in this work. It is extremely important, therefore, for anyone raising and wishing to name a new plant to make certain first that the name has not been used previously; secondly, that it is in accordance with the ICNCP rules and thirdly to ensure that it is properly registered with the appropriate authority. For some genera, no registration authorities exist as yet, but each year applications from various specialist societies and other organizations to become I.R.A.'s are considered by the ISHS and gradually a network of international registers for all the major genera is being formed.

National Collections

The establishment of national collections in Britain is a more recent but very important move in attempts to stabilize cultivar names and their application. Reference collections are being formed to include cultivars and species of individual genera or groups of plants by various organizations, including specialist plant societies, botanic gardens, local municipal authorities, commercial nurseries, horticultural educational establishments and occasionally private individuals. The work is being coordinated by an organization called the National Council for the Conservation of Plants and Gardens (see Figure 3). To give some examples: the Royal Horticultural Society's Garden at Wisley has accepted responsibility for Hosta, Galanthus, Erica, Calluna and Colchicum; the University Botanic Garden at Cambridge has formed national collections for Geranium, Bergenia and Saxifraga; Plymouth Parks Department is dealing with Camellia and Brighton Parks Department with Syringa.

Figure 3: NATIONAL COUNCIL FOR THE CONSERVATION OF PLANTS AND GARDENS ORGANIZATION OF NATIONAL COLLECTIONS




The purposes of these national collections are:

- first to act as "gene banks," so that the genetic variation of the collection will be available for future breeding work and research in horticulture.

- secondly, to act as "living museums," so that they are valuable aids to taxonomic work and identification. By comparison with existing stocks it should be possible, eventually, to ensure that plant names in the nursery trade are stabilized. In addition, it will enable nurserymen wishing to name and introduce new cultivars to make certain by comparison that their proposed new introduction is both distinct from and an improvement upon already existing cultivars. This should ensure, in most cases, that the provision of "new names for old cultivars" does not occur and that the future introduction of very similar cultivars is avoided.

- thirdly, to act as sources of propagating material, particularly in the case of rare and unusual plants, so that limited amounts of material of plants in danger of being lost are propagated and distributed, as well as being available for breeding work.

This is not the place to expand on the role of national collections, but the concept is one which should in future be of immense value in helping to implement the aims of the ICNCP.

At this point I would like to emphasize that the "Cultivated Code" is not designed to serve any one organization or group of people interested in cultivated plants. Its purpose is to attempt to provide a stable method of communication for the precise and accurate usage of the names of cultivated plants by scientists, plant breeders, commercial organizations, amateur growers and, equally as important, the general public. It must be remembered that the names of cultivated plants are used by literally millions of people throughout the world. The "Cultivated Code" has to be formulated without favoring or empha-

sizing the requirements of one particular discipline, organization or group. This does not mean, of course, that their requirements are not taken into account, but the remit of those charged with formulating and amending the ICNCP is to consider a wide overview of the requirements of the three major disciplines involved: horticulture, agriculture and silviculture. It may be argued that this broad remit is a source of weakness in that the "Cultivated Code" does not allow for recent ideas and advances in commercial horticulture, agriculture and silviculture to be catered for adequately, particularly in connection with the trademarking of plant names and the application of plant breeders' rights.

I would not personally accept this argument as the strength of the "Cultivated Code" is that it recognizes and caters for the very wide spectrum of interest involved in the disciplines of horticulture, agriculture and silviculture and does not restrict its provisions by making them applicable only to one section of those interests. It is understandable, and perhaps inevitable, that every section of each of the disciplines referred to previously will pursue its own interests as vigorously as possible, but these interests should not produce a series of different codes of nomenclature that cater for only one section of the industry concerned, without any direct relationship to the international use of names for cultivated plants generally. That way lies chaos, not only for those professionally involved, but for the much larger general public served by the industry. I do not mean to imply that each section of the disciplines involved should conform totally to a single code which may, in some respects, not serve their needs satisfactorily. I am suggesting that, if agreement on general principles can be reached, individual sections of the industry might develop within the main nomenclatural framework separate rules that apply to their particular needs. This already occurs in the ICNCP, which caters for the rather different needs of orchid nomenclature in this way. A separate handbook on orchid nomenclature has been produced and is used by the industry. I must emphasize, however, that any such exceptions must conform to the general pattern of the parent code and should be carefully prepared to avoid contradicting the basic principles, aims and rules of that parent code.

Revision of the Articles of the ICNCP may be made if circumstances justify a change. This has already to some extent taken place, as both the 1969 and 1980 editions of the ICNCP take into account, wherever possible, both trademarking of names and the application of plant breeders' rights, although perhaps not as fully as they should.

As a result of the increase in the number of cultivars protected by plant breeders' rights, legally protected variety denominations (also known as code-names) designated by breeders to serve as an identification of the product are also being incorrectly applied as cultivar names. From the general public's viewpoint, such names for protected cultivars (e.g., Rose MACspash; Dianthus LONboti) have little or no meaning. They are of value only to the breeder or raiser.

Under the Articles laid down in the ICNCP it is intended that each new and distinct cultivar should be given a unique "fancy name" for use in the disciplines involved to distinguish it from other related cultivars.

Clearly, these variety denominations (code-names) do not constitute cultivar names as intended by the ICNCP, but are combinations of letters designating the cultivar for commercial purposes, which must, under the UPOV rules, be used in commercial transactions and be listed in catalogues during the commercial life of the cultivar concerned.

In most cases a "fancy name" is also applied to the cultivar concerned by the breeder. Rose MACspash is known as 'Sue Lawley', the former being a varietal denomination (code-name), whilst the latter is effectively a cultivar name which could be acceptable for formal international registration.

Unfortunately, the situation is complicated by the registration with trademark authorities in some countries of the "fancy name" as a trademark. Different trademark names may be used in different countries for the same cultivar and if, as sometimes occurs, the trademark is in "fancy" form this may create confusion as a cultivar name cannot be registered as a trademark.

The use to the breeder of legally protected variety denominations or code-names is clearly very important, formalizing and extending a procedure which many plant breeders have applied in their work for a very long time.

Equally, the use of trademarks is most important commercially, protecting the owner of the trademark who may take legal action against anyone infringing the trademark for the particular product concerned.

Whilst the commercial requirements for the legal protection of plants may be satisfied by the use of variety denominations and the application of trademarks, problems arise when the "fancy names" used to market the cultivars are trademarked. Individual different trademarked "fancy names" may apparently be applied to a single cultivar in different countries. The use of these different trademarked "fancy names" for a single cultivar in different countries, as occurs now particularly with roses, is a very evident source of confusion. The confusion would become even greater if the trademarked "fancy name" was transferred to another cultivar once the original cultivar to which the name had been applied was deemed no longer commercially viable. The fact that a particular plant variety is no longer apparently in commerce is, in any case, extremely difficult to ascertain on a world-wide scale. Equally, the actual life of a plant variety may last for hundreds of years, particularly with woody plants. The situation could easily arise where several different cultivars were still in cultivation, although not generally commercially available, under the same trademarked "fancy name," because that name had been reused legitimately under the trademark laws several times.

This situation would be totally contrary to the principles and aims of the ICNCP and would be most confusing to the buying public and detrimental to the commercial interests wishing to sell the products to the customer.

The suggestion has been made that the use of a variety denomination or code-name will provide an accurate permanent name for the cultivar concerned and that a number of trademarked "fancy names" all applied to that same cultivar will not cause any confusion. I do not agree with this viewpoint which ignores the usage of plant names by the general public and, in that respect, is unrealistic. Whilst a variety denomination or code-name will serve the purposes of the breeders and the growers by providing a permanent, unchanging "label" for the cultivar, it will be understood by only a minute fraction of the millions of users of plant names, even though it is obligatory for such variety denominations to be included in growers' catalogues.

It has been pointed out in two articles in the journal "Taxon" (by Reda, an attorney-at-law, in "Taxon" 22.1 of February 1973, and by Wuesthoff, a patent lawyer, in "Taxon" 22 of August 1973) that when the International Convention for the Protection of New Varieties of Plants was adopted in 1961 no direct use was made of the established system for naming cultivated plants under the ICNCP. Clearly those formulating the UPOV rules consulted the ICNCP as some of its principles are embodied in the UPOV code. But, as Reda and Wuesthoff point out, a second, apparently unconnected code of nomenclature was created.

Perhaps some of the difficulties that occur today may be traced back to a lack of any direct coordination between the two systems. The ICNCP rules, as I have said, apply to all the cultivated plants from the three disciplines, horticulture, agriculture and silviculture. It should be remembered that by far the greatest number of cultivated plants governed by the rules of the ICNCP will never be affected by the need to apply variety denominations or trademarks to them. The International Commission for the Nomenclature of Cultivated Plants has a duty to cater for this wide diversity of plants, but nevertheless it must also take into account commercial and other changes, so that the interests of plant breeders and those marketing their products are covered.

It is surely desirable for all organizations concerned with plant names to cooperate fully to produce a code acceptable to all the interests involved, whether these are scientific, commercial or consumer. The ICNCP provides a strong and well-tried framework upon which to build. There is a very evident need for cooperative discussion between representatives of those organizations involved, particularly CIOPORA, UPOV and the International Commission for the Nomenclature of Cultivated Plants. I certainly do not pretend it will be easy, or that any one system will prove totally satisfactory to all parties but, unless even worse confusion over the names of cultivated plants is to occur, it is essential that some agreement is reached in the near future, perhaps by the establishment of a working party from the various organizations involved.

[Original: English]

# UPOV AND VARIETY DENOMINATIONS

Henning Kunhardt*

Summary

The concept of variety denomination was not created by the UPOV Convention. It existed already in other fields, as a name for a product and at the same time as the last step of the botanical nomenclature for a variety, and thus as the variety's generic designation. This principle has been adopted by the Convention.

Several consequences may be derived from the nature of the variety denomination for its formation and use, consequences which are partly regulated in the Convention and have partly to be found by deduction.

It follows from the provisions of the Convention that a variety denomination, as soon as it is officially established, is no longer under the breeder's control and shares to a greater degree the actual fate of the variety than the legal fate of the plant breeders' right. The regulation has been adopted mainly in the public interest which is caused by the particularities of the subject of protection (plant varieties).

Furthermore, certain other requirements of a general nature, including the way in which the variety denomination may be formed, can be derived from the nature of the variety denomination. In particular, the variety denomination must, for those circles it is to serve, be recognizable as a variety denomination, pronounceable and easily remembered.

The conditions under which the last-mentioned requirement can be considered fulfilled are not always easy to determine and may be different at different times, in different countries and for different species. In order to avoid friction with the principle of the unity of the variety denomination within the area of UPOV, it would appear to be useful for the member States to agree on certain principles for the interpretation and application of Article 13 of the Convention.

This lecture will concentrate on the function of variety denominations within the industrial property arrangements relating to new varieties of plants, the reasons for the existing provisions of the Convention and the basic conclusions that may be drawn as regards their practical utilization. Detailed questions, such as the possibility of confusion with other variety denominations, misleading denominations or the relationship with trademarks will only be touched on where necessary to understand the points being made. The greater the general consensus on the basic issues of the functioning and purpose of variety denominations within the UPOV system, the easier it will be to reach a consensus on their form and use.

To begin with, a brief look at the background to the present Article 13 of the Convention. The Final Act of the first International Conference for the Protection of New Plant Varieties of May 11, 1957,[1] does not refer to variety denominations among the principles on which it was intended to base the breeders' rights that were to be established. This does not mean, however, that the fathers of the Convention originally assumed that a variety did not need to have a denomination. This is shown by the further discussions on the Convention in a Committee of Experts responsible for preparing a draft of the Convention and in a group of legal experts set up to examine the relationship between protection of the name of new plant varieties and protection of trade names. The Committee of Experts accepted a proposal to "protect the name at the same time as the variety."[2] It was therefore assumed that a variety had a name and the only matter to be resolved was whether and in what way such name was to be regulated by the Convention.

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The origins of this approach were also quite obvious from the debates. Variety denominations were unknown under patent law, from which fundamental elements of the new plant breeder's law were taken, even for plant varieties in those cases where domestic law made them patentable. As far as can be told, it has always been customary to designate plant varieties by means of names. To begin with, common names developed (e.g. for apple).[3] As from the seventeenth century, beginning apparently in France and the Netherlands, it became common practice to adopt invented names when breeding new varieties.[4] The principle that seed was to be marketed under the denomination of the variety was also entered by numerous countries in the provisions governing trade in seed[5] and also in such national provisions on plant breeders' rights as already existed (Netherlands 1941, Federal Republic of Germany 1953).
The starting point for all these regulations was the assumption that a variety name was an indispensable factor in trade since an unequivocal denomination gave purchasers the possibility of effectively choosing the variety they desired.

This general approach was the starting point for the debates when drafting the Convention. Referring to the fact that the International Code of Nomenclature for Cultivated Plants (ICNCP) had been adopted at international level, the FAO made the following proposal for the wording of the provision on variety denominations: "a new variety shall be identified by a fancy name chosen in accordance with the provisions laid down by the International Code of Nomenclature for Cultivated Plants."[6] Although the Committee of Experts and the above-mentioned group likewise felt that the principles of the Code were well-suited, they held that simple reference to the Code raised problems since the special aspects of variety protection were not taken into account in that Code.[7] The subsequent discussions led to the view that the variety name was a generic name that distinguished the variety from all earlier varieties.[8,9] In the version produced by the Drafting Committee,[10] the provision read as follows: "A new plant variety shall be identified by means of a name," followed by rules on the formation and use of variety names. This proposal underwent a number of modifications during the ensuing discussions. For instance, the word "name" was replaced by the word "designation"[11] [subsequently changed to the word "denomination" by the ad hoc drafting committee referred to later in this paragraph]. The purpose of that change was to permit the continuation of a practice that had become quite common, particularly in respect of maize, of combining designations with a set of given figures related in a specific way to the number of days to maturity.[12] Proposals were also made from various quarters to modify the rulings concerning the relationship between variety denominations and trademarks. An ad hoc drafting committee drew up the Article on variety denominations in a form[13] that, with a few editorial changes, was to become Article 13 of the Convention.

Those passages of the adopted wording of interest in this context read as follows: "A new variety shall be given a denomination. Such denomination must enable the new variety to be identified; in particular, it may not consist solely of figures" (paragraphs (1) and (2)). "The denomination of the new variety shall be registered as the generic name for that variety" (paragraph (8)(b)). The exclusion of figures represented a notion already contained in the then Article 23(c) of the ICNCP, although with the possibility of exceptions.

When the Convention was revised in 1978, the issue of variety denominations was very extensively discussed, particularly as regards the relationship between variety denominations and trademarks. The principles dealt with in this paper, however, although debated in great detail, finally remained unchanged in substance. Attempts to include explicit rules on various aspects of the field of application of generic designations in the Convention[14] met with difficulties and were therefore abandoned.[15]

In the basic proposal for a revised text of the Convention[16] and in the proposal by the Administrative and Legal Committee of UPOV,[17] no essential changes to the substance of paragraphs (1), (2) and (8) of Article 13, of particular interest in this context, were proposed. However, a new Article 36A was proposed, which laid down an exception to the provision of Article 13 that prohibited a variety denomination from consisting solely of figures. According to the explanatory notes to that proposal,[18] the exception was to be as restricted as possible and the assumption would be that, in any event, it would only apply for certain genera and species in specific countries. This latter expectation was basically shared by various participants at the Conference, including some from the observer organizations.[19] The exception was then inserted in Article 13. During the discussions, a professional organization

proposed that the previous paragraph (8)(b) of Article 13, which dealt with the variety denomination's role as a generic designation, should immediately follow paragraph (1) as it was necessary to first answer the question of the nature of variety denominations (names) before saying anything else about them.[20] The proposal was accepted in substance and this paper also advocates the view that most of the rules on the formation and use of variety denominations derive from the variety denomination's nature and function as a generic designation.

However, this does not apply for the rule on the unity of variety denominations in all countries of the Union since this represents no directly imperative consequence of the term generic designation. Differing terms may be used in differing linguistic areas for the same object--indeed in other fields this is the rule--without the corresponding denomination losing its characteristic as a generic designation. The requirement of unity of variety denominations derives from the general consideration that it is in the general interest for a variety to have the same denomination throughout the whole territory in which it may be marketed.[21]

As is clear from the background to Article 13, the notion that a variety must have a variety denomination is in no way an invention of the fathers of the Convention. The basic principles for naming varieties, including the assumption that a variety denomination is the generic designation of the variety, already existed and these principles were simply incorporated into the industrial property system for new varieties of plants to ensure that those principles would be observed under this system.

It would therefore also seem admissible to rely on the general principles of designating varieties when interpreting this provision of Article 13 of the Convention.

The term "generic designation" would not generally seem to call for much discussion. However, when drawing certain conclusions as regards the formation and use of variety denominations, it is possible that the effects of the term may in some cases be assessed differently. It would therefore seem useful at this juncture to comment on the term "generic designation." A "genus" in the general or even the legal meaning referred to here is any multiplicity of objects having one or more properties in common and which thus distinguish themselves from other groups of objects. Such genera may be formed in any way whatsoever depending on the properties in respect of which it is wished to characterize the objects. For example, if one wishes to make a proposition covering the whole of animate nature, but nothing else, the generic term "organism" can be used to designate as a genus anything that may be distinguished from inanimate nature by means of the common characteristic of life. If it is wished to make a proposition that is not intended to cover all organisms equally, more restrictively defined genera must be correspondingly formed as is done, for instance, in Article 53 of the European Patent Convention, which excludes "plant or animal varieties" from patentability but not, however, products obtained by means of microbiological processes, that is to say "microorganisms."

For the purposes of the seed trade, groups are often formed in the corresponding international and domestic provisions, such as "cereals," "fodder crops" or "vegetables," depending on regulations that are to apply in common to the species or groups of species designated in that way.

For the implementation of the UPOV Convention, such groupings do not suffice, except in the case of a small number of Articles (third sentence of Article 5(1) "ornamental plants," Article 6(1)(b)(ii) "vines, forest trees, fruit trees and ornamental trees"). In order to implement Articles 2, 3, 4 and 35, it is necessary to form smaller units, that is to say botanical genera and species, to which the system of breeders' rights is to extend. All categories of the botanical nomenclature, that is to say all those plants that are grouped together within one division, class, order, family, genus or species, in each case comprise a genus in the legal sense. Up to this stage, the genera can be designated by means of terms taken from general or scientific language or, in the case of botanical nomenclature, frequently from both.[22] However, this group formation is still not sufficient for the purposes of plant breeders' law since within one species there are a multiplicity of varieties that are to be protected. In the legal meaning, each variety again constitutes a genus, that is to say the sum total of all plants that, taken together, may be distinguished, by means of the configuration of given characteristics they have in common, from all other plant material of the same botanical species.

For these new groups of plants, that is to say varieties, created by breeding, there remain no further terms of general or scientific language still available. The relevant terms must therefore be artificially created. This constitutes the essential, albeit practically the only difference from the generic terms of general language. The purpose of variety denominations is therefore to extend the hierarchy of terms. Indeed, the botanical nomenclature is based on such a hierarchy in the denomination of plants. Article 38 of the 1950 version of the International Code of Botanical Nomenclature supplemented the rules on the names of taxa by expressly stating that plants resulting from breeding operations should preferably be given fancy epithets drawn from living languages. Details are governed by the ICNCP whose Article 7 states: "Cultivated plants are named at three main levels: genus, species, and cultivar (variety)."

Since an artificially created variety denomination must make good the lack of an existing term, it must be suitable to serve to designate the variety as a product name in the same way as an accepted term. This requirement already shows clearly whose interests are to be served primarily by a variety denomination. It is to serve the general public, particularly the user of propagating material. The purpose of the variety denomination for the user is its association for him with certain properties and the designation of the variety by means of the denomination enables him to obtain exactly the propagating material that possesses the genetic properties he requires.

This purpose of variety denominations leads to a certain number of consequences. A number of these are dealt with in Article 13 of the Convention itself. Particular mention may be made of the following points:

The variety denomination is to be used by every person who offers for sale or markets propagating material of the variety. The owner of the plant breeders' rights cannot therefore prohibit such persons from using the variety denomination.

Likewise, there exists no right of prohibition in respect of the same variety denomination used for a variety of an unrelated species.

A breeder is also not allowed to procure for himself a right of prohibition by filing as the variety denomination a denomination in which he already has other types of rights that give him a right of prohibition.

Even the owner of the breeders' rights himself may not use the variety denomination for another variety of the same or of a related species.

The variety denomination does not disappear on expiry of the plant breeders' rights, but remains associated with the variety even on termination of that right.

From these and other rules it transpires that once a variety denomination has been registered in a UPOV State, contrary to the plant breeders' rights themselves, it is taken out of the hands of the breeder and from then on associated not with the breeders' rights but with the actual existence of the variety.

This function of the variety denomination in no way prevents the breeder from also using it as a means of advertising and, indeed, this is common practice. However, a trademark gives more legal possibilities than a variety denomination when used for advertising and has indeed gained increasing significance in the marketing of propagating material, at least for certain species.[23] For the very reason, however, that a trademark lies so extensively in the hands of its owner, particularly as regards its use for various products of the same undertaking (e.g. also for "follow-on varieties"), it is not suited as a means of designation in the given context and cannot replace a variety denomination.

Particularly in view of the fact that breeding firms often prefer to use their trademark as a designation in marketing rather than the variety denomination, it has been claimed that the obligation to market propagating material under the registered variety denomination represents a pointless requirement to regulate marketing under a legal system governing industrial property rights of breeders.[24] It is true, of course, that Article 13 is primarily a provision stipulated in the general interest. It is, however, also a generally recognized principle that the exercise of exclusive rights may also be subjected to rules serving to preserve the public interest. For instance, this notion also underlies Article 9 of the Convention.

The fact that, as described above, a variety denomination is intended primarily to serve the user of propagating material as a product name means that it must also be formed in such a way that it can be used by the average purchaser of propagating material in the same way as product designations taken from usual language. This entails, in particular, that its function as a variety denomination is recognizable and that it is pronounceable and easy to remember. To what extent designations of the afore-mentioned type are suited to the purposes of the user, however, is not easy to say. This can be influenced by differing traditions in differing States or by specific market situations in a given State in respect of certain species. The Convention therefore contains no stipulations as to the requirements that must be fulfilled by a variety denomination to make it suitable as a generic designation. A number of principles may nevertheless be derived, with some prospect of broad consensus, from the function of the variety denomination as described above.

It is certain that a variety denomination fails completely to fulfill its function when it is formed in such a way that it can be taken for information of another kind that can be used in respect of propagating material. Such information with which a variety denomination may therefore not have any similarity can constitute not only technical particulars, such as "selection" or "hybrid," or indications of source, such as "Burgundy," but also terms whose content may be understood as a general advertising statement, such as "elite" or "special quality."

It has probably been accepted in the meantime that the function of the variety denomination excludes it being used as the subject matter of another type of right (particularly of a trademark) to enable the breeder to counter the obligation to use the variety denomination by exercising his right of prohibition. How national legislation is to achieve this is still left to the UPOV States under the new text of the Convention. In any event, the Convention no longer requires loss of the trademark rights themselves or a statement by the breeder waiving his rights under the trademark. Thus, the solution whereby the breeder can register the same designation as a trademark and as a variety denomination, on condition that he cannot use the trademark rights to prohibit use of the variety denomination by other persons, remains in compliance with the Convention.[25]

A different configuration of the provisions on conflict between variety denominations and trademarks, as in the past, is unlikely to cause many problems as regards the possibility of using them on the territory of the UPOV States. The linguistic requirements, however, to be met by a variety denomination are somewhat more difficult. According to Article 13(5) of the Convention, the same variety denomination must be registered for a variety in all member States of the Union. The provision also contains the reservation, however, that this does not apply where the competent authority considers that the denomination is unsuitable in its State. It is desirable to take steps to ensure that the least possible use will be made of this exception. This is most likely to be achieved for a large number of UPOV States if a degree of consensus can be found as to the requirements that such denominations must meet in order to qualify as generic designations. It would be of advantage if the principles according to which variety denominations are formed could be harmonized to a greater degree than has so far been the case by all the areas concerned by this question, that is to say not only plant breeders' rights but also botanical nomenclature and seed trade law.[26]

Recommendations for the interpretation and application of Article 13 of the Convention have been drawn up by UPOV to assist in achieving a broad consensus. It may be noted here in that respect that the Convention contains but a small number of explicit rules for the selection of variety denominations. This does not mean that the need for common principles can be waived. The objective set out in the preamble to the Convention, according to which matters of plant breeders' rights should be resolved by all UPOV States "in accordance with uniform and clearly defined principles," also applies to variety denominations. The fact of not including a ruling in the Convention itself and the development of suitable principles by the UPOV bodies in accordance with Article 21(h) of the Convention permits greater flexibility in setting up and further developing principles for variety denominations.

The existing Guidelines for Variety Denominations[27] are also intended to ensure uniform application of the provisions on variety denominations. These have been of advantage in the collaboration between the States of the Union. However, they have also been frequently subjected to criticism from the breeders. The new recommendations attempt to create a broader basis for a

consensus. They are therefore explicitly conceived as recommendations serving solely to interpret Article 13 of the Convention but not to extend its content. To complement the remarks made in detail as regards the suitability or unsuitability of designations as variety denominations, the principle is laid down that the authorities of the UPOV States should reach agreement on variety denominations in any disputed individual case rather than make use of the above-mentioned exception. The recommendations will also be of use to the breeder since they will be able to assess with greater certainty those variety denominations that are likely to be accepted throughout the whole of the UPOV member States. There would thus seem justification for claiming that these recommendations also represent a suitable means towards achieving a balance between the requirements of public interest and the free exercise of breeders' rights, that being a further objective stated in the preamble to the Convention.

FOOTNOTES

1. Actes des conférences internationales pour la protection des obtentions végétales 1957 - 1961, 1972, Geneva (UPOV) 1974, page 27
2. Actes, page 33
3. See hereto and below, Stearn, Historical Introduction to the ICNCP 1953
4. As regards the development of systemization of naming up to the current ICNCP System, see lectures by H.M. Burdet, "The De Candolle Family and the Historical Development of Botanical Nomenclature" and C.D. Brickell, "The International Code of Nomenclature for Cultivated Plants : The Current Position and Possible Future Developments."
5. E.g. in Italy by the Regio Decreto-Legge of 1.7.1926, "Repressione delle Frodi nella Preparazione e nel Commercio di Sostanze di Uso Agrario e di Prodotti Agrari," in France by means of the Décret of 11.6.1949 under the "Loi sur la Répression des Fraudes" of 1905, in the United States by means of the "Federal Seed Act" of 9.8.1939 and also in the OECD schemes for the certification of seed, set up as from 1958
6. Actes, page 88
7. Actes, pages 37 and 47
8. Actes, page 47
9. Actes, page 84
10. Actes, page 53
11. Actes, page 74
12. Deutscher Bundestag, Drucksache V/1630, page 53; Wuesthoff, Kommentar zum Sortenschutzgesetz, Weinheim / New York 1977, page 335 (Comments on Article 13 of the Convention)
13. Actes, page 121
14. Conference document DC/4, Records of the Geneva Diplomatic Conference on the Revision of the International Convention for the Protection of New Varieties of Plants, 1978 (UPOV) Geneva 1981, page 83
15. See report of the Working Group on Article 13, Conference document DC/78, Records, page 117
16. Records, Article 13, pages 32 to 35
17. Records, page 84
18. Records, page 69
19. Records, page 138, paragraphs 133, 135
20. Proposal by the International Association of Plant Breeders for the Protection of Plant Varieties (ASSINSEL), Records, page 88
21. Cf. Schade-Pfanner, Das Internationale Übereinkommen zum Schutz von Pflanzenzüchtungen, Weinheim 1962 (Offprint from GRUR Int. 1982, Volume 7/8)
22. Concerning the possible problems arising herefrom, see lecture by W.A. Brandenburg, "The Implications of the Use of Common Plant Names"
23. See lecture by R. Royon "Variety Denominations and Trademarks"
24. Cf. Wuesthoff, op. cit., page 87, paragraph 10 note 2; Records, page 132, paragraph 59; page 137, paragraph 126

25. As proposed in the draft for a new plant variety protection law in the Federal Republic of Germany

26. As also Brickell, op. cit.

27. UPOV document C/VII/22

[Original: German]

# THE IMPLICATIONS OF THE USE OF COMMON PLANT NAMES

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Summary

Plant naming goes far back into the history of mankind. This is obviously connected with the fact that communication, including communication concerning utilization of plants or plant parts, is one of the oldest notable aspects of human civilization.

As to botanical nomenclature, Latin was and is used as the scientific language, by international agreement. Common plant names, however, are much more important than we usually assume. They have somehow a taxonomic status, although this is not officially recognized in most cases.

The use of common plant names has its implications in relation to:

- botanical taxa
- crop history and designation
- provenances
- cultivars and cultivar classification
- hybrids.

## Introduction

Both common and scientific names are used to denominate plants. By having plant names, we have at our disposal an effective system to communicate about plants, to store information about plant characters, and to arrange plant groups in one way or another for various purposes.

Scientific plant names are formed under the principles and rules of two nomenclatural codes:

- the International Code of Botanical Nomenclature (ICBN, 1983), and
- the International Code of Nomenclature for Cultivated Plants Code" (ICNCP, 1980).

As far as cultivated plants are concerned, the question arises whether common plant names have, or may have, a taxonomic status. Implications of the use of common plant names are to be investigated in relation to:

- botanical taxa
- crop history and designation
- provenances
- cultivars and cultivar classification
- hybrids.

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## Common Names and Botanical Taxa

Botanical nomenclature is regulated by the principles, rules and recommendations of the ICBN. The notation of the Latin name of any given taxon is regulated for each rank. This means that the name indicates whether the taxon is a family, a genus, a species, etc. For a name to be legitimate, at least a nomenclatural type must be designated. The connection between plant material and its name is warranted by the nomenclatural type. Together with a full description by the original author and illustrations drawn or referred to by the author, this nomenclatural type forms the starting-point for a definitive identification of plant material. Common names assigned to botanical taxa mostly give no indication of rank, no indication whether they designate a genus, a species or even an infraspecific taxon. Common plant names are formed by common people of different nationalities and different languages and, as a result, they are difficult to manage in international affairs. Common names are not connected in a fixed way to any plant groups or taxa. Going back into time, we may see changes in views concerning the assignment of common names to taxa. Current views sometimes even totally disagree with those of two hundred years ago. Moreover, there are cases in which the interpretation of two hundred years ago is maintained in one language, but not in another. The result of this situation may be that names are etymologically seen as synonymous but, at the same time, have a very different meaning in relation to the taxa to which they refer. It is obvious that confusion will then be the result when using common names in international affairs. Yet, common plant names still have their significance. They are telling us something about the original usage of plant material concerned, and about useful, or just striking characters.

## Crop History and Designation

Crop names must not be mixed up with common names assigned to botanical taxa. Before considering crop names and their significance for taxonomy, it is necessary to discuss crop history, because the study of the development of cultivated plants is as relevant to the understanding of the current range of crops, as are phylogenetic multidisciplinary studies to modern plant classification systems.

During the late Middle Ages and the Renaissance period, several herbals were written. These are compilations of botanical, medicinal and agricultural data on plants. Many herbals, such as those produced by Brunfels, Dodoens and Fuchs, were written in common language. Apart from all the data described, very interesting aspects of these herbals are the classification system used and the fact that they are in many cases the oldest recorded reference to crop names.

The classification systems used had, for the most part, very practical aims. They were not designed in order to reflect biosystematic relationships, but to classify plants according to their usage by man, their growing system, or their useful parts. Grasses and clovers, for example, were classified in one group because of their similar usage, despite their botanical differences. Some frequently used terms, such as grain, have been conserved in modern language. Grains include wheat, rye, barley, oats and also buckwheat, although the latter does not belong to the Gramineae. As far as crop names are concerned, in herbals we find that some crops were completely mixed up under one name. For example, the Dutch word "pee(n)" was often used for both Pastinaca sativa (parsnip) and Daucus carota (carrot). They were described in several herbals as the yellow-flowering, white "peen", which is the parsnip, and the white-flowering, red and yellow "peen", which is the carrot. Similar confusion existed about beets and rapes. In fact, it was not really confusing. What are now considered to be completely different crops, belonging even to different genera, were then treated as just one crop, with one name, because of general resemblance of plant habit or because of the same usage and growing system.

Some changes in crop definition are to be attributed to the fact that many plants were introduced into Europe in the 16th and 17th century. When they were brought into cultivation, the common plant name was acting both as the equivalent of the botanical name and as the crop name. As a result of later introductions of new plant material, new common names which are actually crop names, appeared. Similar developments also occurred when plants became more intensively domesticated in their natural distribution area.

The original common name for Brassica oleracea was cabbage, although dictionaries described cabbage as headed kale. We now find in the Multilingual Glossary of Common Plant Names, in addition to cabbage, the names kohlrabi, marrow-stem kale, curly kale, cauliflower, sprouting broccoli, white cabbage, red cabbage, pointed-headed cabbage, Savoy cabbage, and Brussels sprouts. In addition to the common name indicating the species, there are several common names indicating different crops. Attempts are made to name these crops with the aid of botanical nomenclature, but this will hardly be a practical approach. Too many special ranks, such as convariety, are needed to describe variation within cultivated plants and, furthermore, inconsistency arises in botanical classification when both natural variation and variation in cultivation are mixed up. Common names designate crops in an unequivocal way, but there are limitations.

As far as Cucumis sativus is concerned, a distinction is made in many regions between cucumber (fruits mostly large and parthenocarpous) and gherkin (fruits small, mostly non-parthenocarpous). With the development of cultivars with small fruits that are fully parthenocarpous problems arise in deciding to which crop they belong. In some cases they will be assigned to cucumber, in other cases to gherkin, mostly according to their descendance. Since cucumber and gherkin, unlike Brassica oleracea, have never been attributed to different infraspecific taxa no botanical names are available for distinguishing between them.

From these examples, it can be seen that crop names have a taxonomic status, whichever taxonomic approach is preferred. Since we have to accept that taxonomy of cultivated plants deals with classification and nomenclature on botanical, agricultural and purely pragmatic criteria, from the viewpoint of all users of names, both breeders and consumers, we have to study how to treat crops names properly in taxonomy.

We also have to face consequent problems like the fact that crop names sometimes have only local significance. Crops names are, however, unambiguous at the regional level. Under domestication, cultivated plants are evolving quickly and sometimes divergently, and it may be an advantage to base the classification of cultivated plants partly on crops. We could start then from common crop names to warrant a flexible system for nomenclature.

## Provenances

In silviculture, provenances of plants play an important role. In some cases, provenances are treated as cultivars, if conditions with respect to distinctness, uniformity and stability are fulfilled. In other cases, global provenances are described botanically, as subspecies, botanical varieties or even geographical races, although the latter term must be avoided because of its ambiguity. Common names also appear in naming plants in such cases. In the case of Pinus nigra (black pine), names like Austrian Pine, Crimean Pine, Pyrenean Pine and Corsican Pine, being equivalent to botanical variety names, indicate such global provenances.

Provenances are not to be confused with crops. Provenances refer to natural variation directly exploited by man, whereas crops consist of selected or bred plant material.

For global provenances, however, common plant names make sense in the taxonomy of cultivated plants where a species like Pinus nigra is concerned, a species which is characterised by clinal variation, although its total distribution area is disjunct. In that case, it is not possible to name infraspecific taxa unequivocally by using Latin names. Common plant names are then useful just to indicate the original provenance from which plant material with special characters that are important in cultivation was distributed over plantations.

## Cultivars

According to the ICNCP, the full name of a cultivar comprises the botanical or common name of a species and the cultivar epithet. It is notable that in this case common names are allowed, but that they have to refer to a species and not to a crop. So, under the ICNCP the full cultivar name for cauliflower cultivars may not comprise the name cauliflower, but has to comprise the name cabbage, which is the equivalent of the species name Brassica oleracea. It can be seen from this that the position of common names referring to crops has not been regulated.

According to Article 50 of the ICNCP, "not more than one cultivar may have the same name within the same cultivar class." Note 1 to that Article explains that "by cultivar class is meant the taxonomic unit, or assemblage of taxonomic units, within which the use of a cultivar name for two distinct cultivars would lead to confusion. It can correspond, for example, to one or more genera, species, subspecies, or cultivar groups." In the Appendix to the UPOV Guidelines for Variety Denominations, some of the classes, like classes 1 to 3 which are the grains or cereals, refer to old classification systems. If one compares the botanical nomenclature of Beta vulgaris in the Multilingual Glossary of Common Plant Names, the above-mentioned Appendix and Zander's Handwörterbuch der Pflanzennamen, it remains unclear to which cultivar class the "Stielmangold" and the "Gelbe Bete" belong.

To define cultivar classes unequivocally it is necessary to indicate their limits by mentioning common crop names. By doing this, the cultivar class concept will become more flexible and, furthermore, when new crops originate, it will be an easy procedure to judge whether or not they have to be assigned to one of the cultivar classes of the above-mentioned Appendix.

Hybrids and Common Names

According to the ICBN (Article 28, note 1), in some cases both Codes (the ICBN and the ICNCP) may be followed; authors are left a free choice which Code they apply in the nomenclature of cultivated plants.

Particularly where cultivated interspecific and intergeneric hybrids are concerned, similar taxonomic treatments cannot always be compared because of the use of different nomenclature systems:

- Lilium Midcentury Hybrids is a collective name in modern language under the ICNCP;
- Astilbe x arendsii is a collective name in Latin under the ICBN.

Under the Appendix to the ICBN concerning the names of hybrids (Hybrid Appendix), a collective name for a hybrid must be reserved for all kinds of combinations between parental taxa. So, it cannot be derived from the name whether we are dealing with recurrent backcrosses, real $F_1$ hybrids or their reciprocals. Under the ICNCP, however, hybrids which mainly resemble one parental taxon must be assigned to that particular parental taxon. So, under the ICBN, backcrosses between Triticum and Secale have always to be named X Triticosecale (common name triticale), but under the ICNCP when a Triticum species was used as the recurrent parent, they must be assigned to that Triticum species. Looking at triticale and plant breeders' rights, we therefore have a lot of trouble in deciding what is wheat, what is triticale and what is rye.

Recently, the Hybrid Appendix was entirely rewritten. However, neither in this new draft, nor in any other proposal concerning the nomenclature of hybrid plants, has any distinction been made between hybrids which have arisen in cultivation and wild or weedy hybrids. From plant breeding evidence it can be derived that crossing procedures determine to a great extent the resulting hybrid cultivated plants. The nature of hybrid cultivated plants is, in general, completely different from the nature of wild or weedy hybrid plants; this difference should be reflected in nomenclature.

The ICNCP is meant to regulate the nomenclature of cultivated plants. Besides this, it also tends to regulate classification and registration of cultivated plants. It therefore seems logical that the ICNCP (and only the ICNCP) should contain the nomenclature rules for hybrid cultivated plants. In this respect, common names like triticale should also be taken into account. Naming of wild and weedy hybrids should remain subject to the ICBN. The link between the two Codes should be more clearly stated in order to avoid confusing situations in nomenclature.

In the future, more efforts have to be made, in close international cooperation, to develop a uniform classification system, connected with unequivocal nomenclature rules for cultivated plants.

Further study concerning crop definition and denomination is urgently needed in order to evaluate the use of common crop names in taxonomy.

[Original: English]

# VARIETY DENOMINATIONS AND TRADEMARKS

René Royon*


## Summary

I. EXPOSITION OF THE ISSUE - WHY IT IS TOPICAL

- The ever-increasing number of new plant varieties makes it urgent to organize a more consistent system of nomenclature.
- The UPOV Convention has created a compulsory means of nomenclature for protected varieties, the "denomination".
- It has also officially recognized the right to trademarks which was internationally established by the 1883 Paris Union Convention.
- The rule of the combined use (and of the independence) of denominations and trademarks has long been and is still being seriously jeopardized.
- Hence, the need for a better and clearer definition of the respective functions of denominations and trademarks.

II. DENOMINATIONS AND NOMENCLATURE

1. The International Code of Nomenclature of Cultivated Plants

- Article 3 aims at the uniformity, accuracy and fixity of denominations.
- Article 27 adds that "denominations must be fancy names".

2. Article 13, paragraph 2 of the UPOV Convention

- It is far more "open" than the above-mentioned Code.
- It rules out only 2 types of denominations:
  - those consisting solely of figures (and yet allowing for exceptions);
  - those that might be misleading or cause confusion concerning the breeder or the variety.

3. The implementation and interpretation of Article 13

A. Denomination = fancy names with a commercial value

- This is the opinion of those in favor of the Code of Nomenclature (Article 27 as mentioned above).
  In its most extreme outward expressions, it aims:

  either at eradicating the use of trademarks,

  - Example: Section 5A of the United Kingdom Plant Varieties and Seeds Act (1968 Amendment), whereby trademarks were authorized only if used for more than one variety. Section 5A was eventually repealed in July 1983.

  or at depreciating the role of trademarks.

  - 1st example: the Danish Decree of August 5, 1970, whereby trademarks cannot be used in a more conspicuous way than denominations.
  - 2nd example: the UPOV Guidelines on Variety Denominations of October 1973, and the UPOV Recommendations on Variety Denominations of May 1983, both of which tend to give denominations a role that may compete with that of trademarks by demanding of the former that they should be "easy to pronounce and easy to remember for a purchaser of average attention".


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- Appreciation of that theory
  - Fancy names fall short of the requirements of an accurate, universal and permanent nomenclature.
  - Nothing, in the text of Article 13 of the Convention, permits to construe denominations in such a restrictive way.
  - That theory causes denominations and trademarks to overlap and does, in some cases, constitute an offence against trademark rights.

B. Denominations = a means, pure and simple, of reference and identification of the variety

- The principle:
  - any denomination, however "flat" it may be, can be used provided it is "distinct";
  - the system used by maize breeders: letters and figures;
  - the SNPNH system, internationally extended by CIOPORA: combinations of syllables forming words and figures.
- The advantages of such systems:
  - they are in conformity with Article 13 of the Convention;
  - they eliminate searches for prior use : denominations can be created instantly and at any time;
  - the denominations are accurate, unique and final;
  - the denominations are acceptable in any language;
  - because they are totally "colorless" denominations do not encroach on the domain of trademarks; both can "live together" without confusion for users.

III. TRADEMARKS

1. **Their role:**

- trademarks as an indication of origin;
- trademarks as an instrument of publicity and as a means to win over new markets.

2. **Their interest**

- trademarks are not a mere "makeshift", to be used only in countries where plant breeders' rights are not available;
- their advantages are as follows:
  - they give fancy names a much larger "scope of protection";
  - their term is independent from that of the plant patent or plant breeders' rights certificate; they never become public and can be renewed indefinitely;
  - the trademark infringement action is an efficient means of defence for breeders;
  - any given trademark can be used again for several successive and different varieties;
  - trademarks can be "stockpiled" with a view to being used at a later date for varieties that do not even exist yet;
  - according to markets and depending on circumstances (legal or commercial) different trademarks can be used to sell the very same variety (on the other hand, the variety shall be referenced by one single denomination);
  - breeders who hold a well known trademark can license it against a financial consideration even in countries where their variety is not protected.

IV. CONCLUSION

Denominations and trademarks have a different purpose

- Denominations are the identity card of the variety; they must be accurate and unchanging in space or in time in accordance with the principle laid down by the International Code of Nomenclature.

- According to Article 13 of the Convention it is enough for them to be "easily recognizable" in the course of commercial transaction.

- The trademarks function is to rally the goodwill. It is for them, and not for denominations, to be "easy to pronounce and to remember for the average public".

- Breeders must be able to use them in a more "conspicuous" way than denominations.

- One should therefore leave to denominations what belongs to denominations and to trademarks what pertains to trademarks.

As a consequence:

- all regulations, measures or recommendations likely to be a breach of trademark law or likely to hinder the free exercise of trademark rights should be repealed;

- the nomenclature systems of the trade, which are in conformity both with the principles of nomenclature and with the Union rules, and which have been an "established practice" for the past 30 years, should be officially acknowledged and accepted.

I should like today to give an account of a problem that is close to the hearts of breeders because, while it does not affect the protection of plant varieties as such, in other words the protection of the product, it does have to do with their day-to-day business in plant varieties. One might wonder for what reasons the problem of variety denominations and above all that of trademarks should arise in connection with plant varieties, in view of the fact that the 1961 Convention, as revised in 1978, provides essentially for the protection of the product.

As was said this morning, nomenclature has always been a problem throughout the centuries, and Mr. Burdet's lecture gave us a very interesting account of its historical aspects. I think it may be deduced from this morning's lectures that existing nomenclature systems have the merit of existing, but that they are not entirely satisfactory. Indeed, owing to the intensification of research into new varieties, and to the growing number of those varieties, the old rules of nomenclature are today proving inadequate. What is needed, therefore, is a more consistent nomenclature system, applicable not only today but above all in the future.

The UPOV Convention has of course embarked on this problem in a more restricted framework, as it applies only to protected varieties, whereas protected varieties represent only a relatively minute percentage of plant varieties as a whole. The UPOV Convention introduced a compulsory nomenclature for protected varieties, namely the variety denomination. That is the subject of Article 13, which everyone knows and which Mr. Kunhardt expounded to us so expertly this morning.

Alongside this need for nomenclature, breeders have in addition to refer to trademark legislation. This is due, and indeed increasingly due, to the transformation of distribution circuits, marketing methods, the "internationalization" of those methods and the necessity, for the professionals that they are, to provide better protection for their advertising investment. Flowers have today become a veritable industrial product. We should not forget this. Moreover, the UPOV Convention establishes the breeder's right to a trademark in Article 13(9) of the 1961 text and in Article 13(8) of the 1978 text, the right to a trademark having been itself introduced by the Paris Union Convention of 1883.

This principle of duality and independence of the denomination on the one hand and of the trademark on the other has for quite a number of years been the subject of serious violations. The violations seem to be due partly to what I regard as a regrettable confusion between the individual roles of the denomination and the trademark--which is why it is going to be important in this lecture to identify accurately and demarcate those roles--but partly also to a sometimes deliberate desire to eliminate the trademark. We shall see in a moment the reasons why this desire has manifested itself in one form or another.

First let us consider the denomination problem and the problem of nomenclature.

The International Code of Nomenclature for Cultivated Plants, which was presented to us this morning, has no legal foundation. Nevertheless it has the great merit of setting out the problem well. The purpose of Article 3 of that Code is to promote uniformity, accuracy and fixity of denominations of agricultural, horticultural and silvicultural varieties, a purpose on which I think all breeders and all professionals agree. As for the means of achieving that purpose, however, in other words the actual nomenclature system, Article 27 of the Code specifies that "denominations must be fancy names." This is the disturbing aspect of the nomenclature system.

What does the UPOV Convention say? I do not intend to repeat in detail the explanations given to you this morning by Mr. Kunhardt, but, briefly, the UPOV Convention says that the protected variety must be designated by a denomination destined to be its generic designation. It is therefore a far more "open" definition than that in the Code of Nomenclature. The Convention does not lay down any prohibition regarding the formation of denominations; it merely states two restrictions in Article 13(2). First, the denomination must not consist solely of figures except where this is an established practice. This restriction is thus itself subject to exceptions. Secondly, 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.

The difficulties that I mentioned in my introduction arise precisely out of the interpretation to be given to Article 13 of the Convention. Since the entry into force of the Convention, two totally different and opposite conceptions have been at odds with each other regarding the nature and role of the denomination. One of these, that of the "botanists," which in my opinion is a restrictive conception, considers that the generic denomination identifying the variety should preferably, and in accordance with the Code of Nomenclature, be a fancy name with commercial value, which obviates the use of a trademark in conjunction with it. The other, based on more strict interpretation, considers that the denomination may, at the discretion of the breeder, be either a fancy name, pleasant to the ear, and one that "sells," or alternatively a reference, which in certain cases I might describe as colorless, odorless and tasteless, and which merely plays its part of identifying the variety without encroaching on the role of the trademark, that being to ensure the promotion of the variety. Let us look more closely at these two conceptions.

First let us look at the conception of the variety denomination as being a fancy name with commercial value. That in fact is the conception of the supporters of the Code of Nomenclature, as explained by Mr. Brickell this morning. The effect of this conception, in some of its more extreme guises, has been to cause either the total elimination of the trademark as used by a great many breeders, or the depreciation of the trademark.

I have taken three examples of legislation or regulation known to us. The first example is that of Section 5A of the United Kingdom Plant Varieties and Seeds Act, as worded following an amendment in 1968. At that time, the Plant Variety Rights Office of the United Kingdom had a provision inserted in the Act according to which a trademark used in conjunction with a denomination was authorized only if used for more than one variety. In other words, company trademarks were accepted, but not trademarks on products. At the same time, the United Kingdom Office refused to register denominations consisting of a combination of syllables and figures, which I would call code denominations. Breeders then needed in addition a fanciful, commercial name to market their products. The result was that the twofold purpose of this legislative provision, namely the introduction of a nominative designation on the one hand and

the elimination of trademarks on the other, was achieved. However, following a change of attitude on the part of the Plant Variety Rights Office, and also in response to pressure from professional circles, this provision of Article 5A of the United Kingdom Act was very fortunately repealed in July 1983.

The second example that I wish to mention is that of the Danish Decree of August 5, 1970. In this Decree, the Danish legislator, while implicitly recognizing the breeder's right to a trademark, introduced the additional requirement that the trademark should appear after the denomination, that it should not be used in a more conspicuous way than the denomination and that it should not be printed in larger characters than the denomination or in a manner or color different from those of the denomination. With such an accumulation of constraints, it is obvious that the trademark, while in fact tolerated, becomes virtually inoperative. Moreover if, in the same way as the trademark and in accordance with the wishes of the advocates of the first conception, the denomination is a fancy name, such an arrangement results in a double fancy name--both names being of equal value--which is a source of extreme confusion for users. In my opinion, it has to be said that this Decree imposes unreasonable and unnecessary restrictions on the manner in which trademarks may be used in the field of new plant varieties. It is furthermore a text which, as far as I can see, is unique with regard to the free use of trademarks at the international level.

A third example that I wish to give is that of the UPOV Guidelines on Variety Denominations adopted by the Council in October 1973, which very recently, in May 1983, were the subject of a new proposal: UPOV document IOM/I/5 sets out recommendations to the UPOV Council for their amendment. Clearly, to paraphrase certain expressions from the Guidelines themselves, "to an observer of average attentiveness" the Guidelines do not seem to encroach on the trademark. In fact, the oblique and highly subtle manner in which denominations are regulated is an encroachment not so much on the right to a trademark as to the use that breeders are liable to make of trademarks, in that they give the denomination the very characteristics of a trademark. For instance, they require or recommend that the denomination be both "easy to pronounce and easy to remember for a purchaser of average attention." For one thing, the vocabulary used is clearly borrowed direct from trademark law. Any basic trademark manual states that, for a trademark to win the favor of the public, it has to be attractive, easy to remember and easy to pronounce for that public. It is equally well known that in trademark law fraudulent imitation is assessed by placing oneself in the position of the "consumer of average attentiveness." Even the classes mentioned in the annex to the recommendations are borrowed from trademark legislation. In a word therefore, the two documents have the effect of giving the denomination a role that competes with the role of the trademark, by requiring that it be "easy to pronounce and easy to remember."

What are the possible criticisms of this conception of the denomination? First there is the fact that the fancy name is a poor way of building up a lasting system of nomenclature. Nomenclature as defined by the Code mentioned earlier requires that denominations be accurate, universal and permanent. Yet it is very difficult for a fancy name to be accepted in every country of the world. Indeed it is difficult for a fancy name even to be pronounceable in every country of the world. Some names which are suitable in some countries are not suitable in others. I could mention, in connection with rose varieties, commercial appellations such as "Irish Mist" which, to British ears, may have very pleasant connotations, but in Germany evokes something entirely different; "Casino," which goes very well in France, but less so in Italy; "Chinchin" which again sounds very good in both France and Italy, but is unfortunately liable to bring a smile or a blush to Japanese faces; "Maria Callas," which was a very good name in France, was less acceptable in the United States of America, where the lady in question had some difficulties with the press. The list of possible examples is endless.

A fancy name may also run the risk of coming up not only against previously recorded denominations (thereby making an anticipation search necessary), but also against trademark registrations effected by third parties, for instance in Class 31, and of giving rise to conflict as a result. In that case it would be necessary to undertake anticipation searches, which in my opinion are a source of expense out of all proportion to the commercial value of a number of varieties.

Moreover, we should not overlook the fact that the denomination is chosen independently of all marketing strategy. To identify the variety, the denomination has to be capable of being chosen by the breeder instantaneously, as soon as breeding is completed or protection secured. A fancy name does not readily lend itself to formulation in this way.

Finally, fancy names are necessarily limited in number. This morning the Carnation Register was mentioned, in which 27,000 varieties of carnations are to be found. I was able to glance at this work a moment ago and I found, for instance, by turning pages quite at random (and I probably did not pick the most striking names or examples), 12 varieties of carnations under "Victoria," 18 under "Goliath" and 33 under "Venus." This is an indication of how difficult it is to find fancy commercial names that are really new.

The second criticism that one can make of this conception is that, from a legal point of view, there is nothing in the text of Article 13 of the Convention that justifies such a restrictive interpretation of the denomination concept. Indeed I would venture to say that such an interpretation has become still less acceptable since Article 13 was reworded. Under the former Article 13(2) (of the 1961 text) it was said of the denomination that "in particular, it may not consist solely of figures." The expression "in particular" led one to believe that other prohibitions would be possible. In Article 13(2) of the 1978 version it is said that the denomination "may not consist solely of figures except where this is an established practice." The words "in particular" have been removed. I feel that their removal has a certain number of practical implications. It is therefore wrong, in my opinion, to try and limit, by means of such a restrictive, subjective interpretation, the range of possibilities made available to the breeder by the Convention for the choice and formation of a denomination.

Finally, the third criticism that one can make is that this conception causes the denomination to overlap the trademark, and that in certain cases it is a real infringement of the right to a trademark, which in turn could lead under certain circumstances to litigation.

Now I feel that it is important, having developed our argument thus far, to say something of the deep-seated reasons that have induced certain countries or offices to take this negative attitude to the more conspicuous use of the trademark, and the use of rather unattractive code denominations. I believe that the first reason is that the writers of the 1961 Convention were for the most part representatives of ministries of agriculture, who were very familiar with the principles of nomenclature and hence very conscious of the precepts of the Code of Nomenclature. I believe that there was a definite desire to do the right thing and to respect the rules of nomenclature. That in itself is a praiseworthy intention.

The second reason, which is less easy to explain, is that a great many circles favorable to this first conception thought or feared that, through the medium of the trademark, the breeder might prolong the duration of the monopoly in his variety afforded him by the protection of new plant varieties. Here some things do need to be made clear. It is indeed a universally recognized principle of law that the trademark in which a firm has invested money for a certain number of years remains the property of that firm even after expiry of the term of validity of the patent that it may also have filed for the protection of the product marketed under the trademark. This is a practice that is widespread in the world of industrial patents, pharmaceutical products, chemicals, etc. When the product becomes public property, the trademark does not. The same can happen with plant varieties, and there is no reason why it should not happen, or why breeders should be treated more restrictively and more severely than inventors in the industrial field. Everyone can make freeze-dried coffee, but those who do not have a license or who are not authorized to do so may not use the "Nescafé" trademark if they are not part of the Nestlé group. Anyone may use the process of dry copying of documents, but on the other hand only the Rank Xerox firm may use the "Xerox" trademark. Again, anyone is free to find and copy the formula for the perfume "Miss Dior" and put it on the market, but that special variety of perfume may only be marketed under the "Miss Dior" trademark by the Dior firm itself. It is a right, therefore, and such an acquired right not must be touched.

Moreover, I would make one remark of a practical nature: it does seem unlikely nowadays that a breeder should want to prolong the protection of a variety, in view of the shorter and shorter rotation cycle of products. It used to happen quite often, for instance with ornamental plants, that a variety lasted 20, 30, 40 and even 50 years and more. Today, the renewal of products is much more rapid, and that precisely on account of the intensification of research throughout the world, the growing number of breeders and the more rapid results that modern technology makes possible.

The second conception is that of the denomination regarded as a mere means of reference to and identification of the variety. The principle is as follows: the advocates of this doctrine consider that the sole purpose of the denomination created by the UPOV Convention is to provide a reference for the variety and also for the title of protection covering that variety. The denomination has to be treated in the same way as the special denomination required for pharmaceutical specialities, which is also a generic denomination without any advertising function and one that can also be combined with a trademark. Consequently any denomination is acceptable provided that it is distinctive.

Breeders have resorted to various systems. Maize breeders, for instance, have used systems of combined letters and figures, the figures indicating a maturity date. The best known system operating on these lines, however, is that of the SNPNH (Syndicat national des producteurs des nouveautés horticoles), which in France is applied to all vegetatively reproduced plants and, with respect to certain species, is currently being extended internationally by CIOPORA. Under this system the denomination is composed of a word form and figures. The word form is itself made up of the first three letters of the breeder's name, so that the origin of the variety is known at the outset. One or more syllables are placed alongside the word form in order to make the whole thing pronounceable and make it into a sufficiently distinctive denomination.

This system, in my opinion, has a certain number of advantages which in fact are the reverse of the disadvantages that I have just set forth.

In terms of pure nomenclature, the denomination may be made up by the breeder himself, instantaneously, at whatever time he sees fit, and without any anticipation search. It would only be in the rarest of cases that two denominations would be similar, especially if one were to combine juxtaposed syllables with figures. Moreover, the denomination identifies every variety in a perfectly individual manner, as the name of the breeder is indicated by what may be a distinctive word form, and the figures may for instance be a chronological registration number or a date of breeding or earliness.

Such a denomination is unique and final, regardless of the life expectancy of the product, and this in my opinion is an essential principle in nomenclature. The denomination may moreover be adapted in this way to any country and to any language. It is readily classifiable by modern data processing methods. Finally, being perfectly neutral, the denomination does not encroach on the advertising preserve of the trademark and is not a cause of confusion in the way in which a double fancy appellation might be. This makes for peaceful coexistence of the denomination and the trademark.

From a legal standpoint, this system is in all respects consistent with the requirements of Article 13 of the UPOV Convention. It corresponds to an established use of 30 years' standing, as the first register used in France dates back to 1954. I would add that this register used in France received, for other reasons, official approval from the French Plant Variety Protection Office. Still in a legal context, this system has been upheld in court actions that have taken place in Germany. Thus a case law already exists that confirms the validity of such denominations. I could refer to the example of a decision of the Federal Patent Court of April 1975 concerning the denomination "Tanolfeu 1971."

Finally, the system is an optional one, which means that breeders who have no major interest in the use of trademarks are not obliged to avail themselves of it. The system is thus compatible with the use of fancy denominations that themselves have commercial attractiveness.

Let us now deal with the trademark. What are the functions of the trademark? I think both of its functions should be stressed, as more often than not the emphasis is on one of them only, namely the function of indicating origin. Of course, while the denomination designates the product in terms of its intrinsic nature, the function of the trademark is to identify the product by indicating its source, the source being moreover not necessarily a single enterprise--in our case the breeder--but possibly also groups of enterprises. I could mention the examples of subsidiaries or alternatively enterprises tied to the original breeder by the operation of assignments or trademark licenses.

However, apart from this function of indicating origin, which I might venture to describe in historical terms as the trademark's corporative function, the trademark has a growing tendency, due to the intensification of advertising and under the influence of licensing and mass distribution, to take on the role of an instrument of competition and market penetration. The trademark is therefore tending more and more to distinguish the product itself--in our case the variety--the merchandise, the service, and less and less the enterprise that created it. This is especially discernible in the public at large, which often knows the trademark but is completely ignorant of the firm that marketed the product concerned. On the other hand among industrialists, or at least at a fairly high level in the distribution structure, the origin of the product is known. In our case, for instance, those who purchase propagating material generally know the origin of the variety, whereas the general public usually does not know it and indeed has no need to know it in view of the new distribution circuits.

The trademark is therefore a means of winning over the market and accumulating goodwill. Through publicity, it can in time acquire a considerable financial value which has to be respected. So much for the function of the trademark.

What interest does it have with regard to the marketing of new plant varieties? There is a widely held idea that the interest of trademark protection is that of a mere "second best," or a mitigating factor in countries in which breeders cannot derive protection for their varieties from either plant variety protection or plant patents. I should like to make it clear that this idea is quite wrong. The trademark protection of fancy names that serve for the marketing of varieties has a quite different function, and is of a quite different nature from the protection of plant varieties. Breeders resort to it under the same circumstances and for the same reasons as inventors and enterprises in the industrial sector.

Of course protection by trademark does not necessarily have the same commercial interest for all breeders. That interest is variable according to the nature of the species and the forms of distribution of its varieties, and naturally the marketing policy of each enterprise. Moreover, in view of the optional character of the trademark, breeders, just like industrialists, can always sell their products without any registered mark if they so wish.

Of all the acknowledged advantages of the trademark, there are some that I would mention here. First the trademark affords the fancy name a wider area of protection than the denomination could. The filing of a fancy name as a trademark in Class 31 enables its owner to protect his advertising investment and to exercise his monopoly in relation to a very large number of products, and not only those of the same or a neighboring species. For instance, a trademark filed in Class 31 to designate flowers has even been successfully invoked against use by third parties for artificial flowers, despite the fact of the latter being in a separate class, namely Class 26. A further point which is actually very important is that the scope of protection of the mark covers not only what I would call identical reproduction, but also imitations. This is why, from a nomenclatural point of view, "Peace" and "Peaceful" are two denominations that could be considered different, whereas from the trademark point of view, if the "Peace" trademark were sufficiently well known, "Peaceful" will very probably be held to infringe it.

This morning the re-use of fancy names was spoken of. I fully share the opinion of Mr. Brickell, namely that the denomination once given has to stay, has to remain attached to the variety throughout its commercial life and even beyond. The situation is entirely different with trademarks. The trademark may be re-used for successive, different varieties. There is a growing tendency for the commercial life cycle of products to shorten; sometimes the

research aims of breeders in a particular area of interest are to make successive improvements to a product which nevertheless retains a certain number of essential characteristics, such as color. Now, where a variety initially marketed by its breeder under a good trademark is overtaken and replaced on the market by an improved variety, the breeder can take advantage of the notoriety of the known trademark for the marketing of the improved variety. On the other hand, from the point of view of nomenclature, the new variety would naturally have to be identified by a new and distinct denomination.

Whereas a denomination cannot be conceived for a purpose other than the designation of an existing variety, trademarks can be created and registered even before the variety exists. Some firms, not only in the world of plant varieties but also in the industrial world in general, file and keep ready for use a portfolio of trademarks, including marks that have been subjected to thorough anticipation searches, and possibly acceptance and market testing.

Where a protected variety, whether protected by a plant patent or by a plant variety certificate, is infringed by a third party, but where at the same time use has been made of the commercial appellation, the breeder may well have an interest in bringing action for trademark infringement, as proof is often more readily adduced and the procedure is often less cumbersome than in an action for infringement of a patent or plant variety certificate. I would go so far as to say that in some countries that do not protect reproductive material as such, the trademark also allows the finished product to be monitored at the marketing stage, by which means the breeder is given a certain means of controlling the quality of successive crops.

I shall now proceed directly to my conclusion. I believe that the explanations that I have given will have enabled you to appreciate that denominations and trademarks are different in their ultimate purpose. As soon as one has grasped and fully understood this problem, dialogue between the advocates of the two conceptions concerned becomes possible.

The denomination must be the official identity card of the variety; it must be accurate and unchanging in terms of both space and time, according to the principles of the International Code of Nomenclature. It must allow the variety to be catalogued without ambiguity. And, according to Article 13 of the Convention, it is sufficient for the denomination to appear in an easily recognizable fashion in business transactions involving reproductive material.

The trademark, on the other hand, has a commercial, promotional function. It is the trademark that brings in the customers; it is the trademark, and not the denomination, that has to be "easy to pronounce and easy to remember for a purchaser of average attentiveness." One should render unto the denomination those things that are the denomination's, and unto the trademark those things that are the trademark's. That is why all provisions, all measures and all recommendations liable to encroach on the right to the trademark or hamper its free use must be firmly removed. Moreover, professional nomenclature systems, which obviously are open to improvement, but which respect the principles of nomenclature, its objectives and the law of the Union, and which represent an "established use" of some 30 years' standing, should also be officially recognized and accepted.

With that in mind I should like, on behalf of CIOPORA, to endorse the wishes of Mr. Brickell and Mr. Kunhardt, expressed this morning, for dialogue and concerted action on the part of all the circles concerned in order that the best and most equitable solution to this problem may be found.

[Original: French]

REPORT OF DISCUSSIONS

prepared by the Office of the Union
and approved by the speakers

1. The lectures were followed by a panel discussion which was presided over by Dr. W. Gfeller, President of the Council of UPOV. Dr. Gfeller was assisted by a panel comprising Mr. F. Schneider, 'Rapporteur', the five lecturers (Mr. H.M. Burdet, Mr. C.D. Brickell, Mr. H. Kunhardt, Ir. W.A. Brandenburg and Mr. R. Royon) and Dr. H. Mast, Vice Secretary-General of UPOV.

2. The President said that he was sure that he could speak for all the delegates in thanking Mr. Schneider for his introduction to the subject of the Symposium and in thanking the lecturers for their informative and stimulating papers. He then invited questions to the panel.

3. Mr. D'Hoogh noted that Article 10 of the UPOV Guidelines for Variety Denominations stated that "a new variety may not be given a denomination which has been applied previously to a species of the same class ... if ... the old variety is still in cultivation or its denomination is still of particular importance." He said that he would like to hear Mr. Brickell's view on the matter of reusing old denominations that were a hundred years old or more, for example, and were no longer used, except possibly in the registers.

4. Mr. Brickell said in reply that the answer really depended on the type of plant. If it were a woody plant, a tree or a shrub, it was almost certain that it would still be "in cultivation". He thought that it was important to distinguish "in cultivation" from "in commerce." In the case of crop plants where it was fairly clear that they had become extinct, or in the case of annuals or possibly even some herbaceous plants, reuse of names could be considered. At the moment it was not permitted under the ICNCP except where it was known absolutely that the variety was extinct. Such cases still had to be referred to the Commission, and that had rarely been done. Mr. Brickell believed that in the majority of cases it was better not to reuse a variety name. He did not think that anyone could say with great certainty that a variety was "out of cultivation," even if it could be said that it was "out of commerce".

5. Dr. Büchting referred firstly to the lectures that had been given in the morning and noted the efforts of the speakers to enclose variety denominations more or less within the botanical nomenclature, that was to say to take them over and to make them an extended integral part of it. However, whereas the botanical nomenclature dealt with the species of the plant, its membership of a genus and the like, the variety denomination served, as its name said, to identify the variety and, in fact, constituted a trade denomination, that is to say the name of a specific product. It was a product, however, that was only on the market for a relatively short time, or in any case for a very limited period of time. In other words, the variety, that was to say the trade product, had no everlasting value. In any event, its lifetime was not comparable with that of species and genera of the botanical nomenclature. One had only to look at the background to the use of variety denominations to unmistakably see that the variety denomination fulfilled two important functions. The first was the function that had just been mentioned, that was to say to designate the product. That involved, however, a certain function of origin since in practical plant breeding firms, the variety denomination was frequently also used to give an indication of the particular firm. This latter function of variety denominations was indeed still common practice today in many cases and one that was extensively used. That was not only the case in his own country, the Federal Republic of Germany, but also in many UPOV member States, including those that had become members only a short time ago. Although, on the one hand, the plant breeders had decided, as things developed, particularly with a view to the creation of the Convention and thus also with a view to the founding of UPOV, that variety denominations were to be used as a rule, particularly in the case of agricultural varieties, exclusively as such, on the other hand, the fact that variety denominations had long since had an inherent function of origin was not to be ignored. It could not be just dropped.

Dr. Büchting referred in that connection to two passages in the wording of the Convention from which he felt that it was to be seen that the experts who had drafted the Convention had fully acknowledged that fact. For instance, the third sentence of Article 13(2) of the revised text stated that it, the variety 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. It was also explicitly laid down in the first sentence of Article 13(3) that it was the breeder who proposed the denomination of the variety. Since variety denominations under Article 13 of the UPOV Convention had again been brought to the fore and it was the intention of the UPOV Council to replace the current non-binding guidelines by non-binding recommendations, then one might indeed point out that since the guidelines had been issued a basic change had taken place insofar as UPOV currently comprised an incomparably larger number of member countries than had been the case at that time. The way in which variety denominations were dealt with in those member countries, as Mr. Kunhardt had in fact pointed out, was often quite different in practice. Nevertheless, it could be noted that the important functions of the variety denomination that had been previously referred to were more or less accepted in all the member countries. Certain differences resulted in practice for the varying species of cultivated plants, deriving from the differing biological bases and therefore from the differing stages in propagation or generation at which the seed reached its final consumer. In the case of hybrid varieties for instance--and hybrid breeding was today continuously on the march--the consumer's seed represented the first or, at most, the second generation and it was therefore particularly easy to understand if in such cases a direct link with the breeder existed in the mind of the seed consumer and that should in practice be reflected in the variety denomination. For that same reason, the common practice had also arisen of using combinations of letters and figures or of words and figures since that type of variety denomination appeared particularly suited to the above-mentioned circumstances and demands. However, since the representatives of the administration, that was to say the official quarters, continually expressed their concern that variety denominations were frequently incapable of being remembered or pronounced or recognized by the trade, he wished to mention two facts in reply. The prime concern of breeders was indeed that the variety denomination should promote the marketing of the variety. The denomination had therefore to be easy to remember, to be pronounceable and to be recognizable as such. That was the very basic interest of the breeders themselves. A second aspect was that the seed consumer, whether he were a European farmer or an overseas farmer, was indeed no longer illiterate. Farmers certainly understood the multiplicity of variety denominations and were fully capable of evaluating them correctly.

6. Mr. Brickell said that he would like to comment on just two points made by the last speaker. Mr. Brickell did not think that it was correct to say that botanical nomenclature was involved; horticultural nomenclature, however, certainly was. Secondly, Dr. Büchting had suggested that the commercial life of a variety and, in some cases, even the period for which it survived after commerce in it had finished, were very short. Mr. Brickell believed that one had only to look at a genus like the rose to find quite a number of examples which were at least 300 to 400 years old and which were still cultivated and still sold. Looking back into Gerard's Herbal, for example, one found many plants grown that long ago, and given names at that time, which were still available today in commerce. That was one of the reasons why he felt that it was very difficult to suggest that names should be reused.

7. The President invited Dr. Pirson, Chairman of the Nomenclature Committee of the International Seed Testing Association (ISTA) to inform the meeting on the work performed by his Committee in connection with the maintenance and development of the ISTA List of Stabilized Plant Names.

8. Dr. Pirson stated that the nomenclature stabilized by ISTA was more at home in fact in the botanical area. It dealt with the stabilization of names of species of cultivated plants. ISTA had not carried out its stabilization any lower taxonomically than the species level. That meant that in fact some cultivated plants were not clearly designated in the ISTA list by their scientific names. For instance, there existed names, such as Vicia sativa, that covered both weeds and cultivated forms. As yet, ISTA had no terms of reference extending beyond stabilization down to species level. However that might be, the work was very important since the demarcation of species of

cultivated plants by means of taxa had to be modified with relative frequency and the name would therefore be continuously subject to updating. It had therefore been most urgent to revise the ISTA List of Stabilized Plant Names and to extend it considerably to ornamental plants that had not previously been covered by the List. UPOV had now requested ISTA to include in their stabilization those names that concerned vegetatively propagated plants and ISTA had received a list of plants from UPOV. For some of those plants, in fact, more up to date names had been stabilized. The List also contained some names that simply could not be stabilized since they concerned non-defined bastards. ISTA understood non-defined bastards as being those forms that could have a completely different external aspect, that is to say for which there existed no lectotype, no defined type, and therefore could not be unequivocally named. That was the problem that repeatedly faced scientific nomenclators. He believed that that was everything for the moment that he could say on the subject. As far as future work was concerned, he might perhaps add that ISTA had been given the task of stabilizing the most important weed species, that was to say those species that repeatedly occurred in the legislation of various countries since as noxious weeds they were contrary to the standards for approval, for certification. That was of course a further task that would not be completed in the near future and that would extend far beyond the forthcoming three year period of ISTA's activities. As to the question of what stabilization actually meant, he could perhaps say that stabilization was to identify the currently valid scientific name--as far as that was possible--and to make it binding for ISTA for at least a six-year period. On expiry of that six-year period, the name could be updated, where that proved to be absolutely necessary, and replaced by a different name. He could guarantee however that it had only proved necessary so far in exceptional cases to change names again after only six years. Of course, it could not be altogether ruled out. ISTA had unfortunately to live with that eventuality.

9. Mr. Kirker wished to give his strong support to the explanations given by Mr. Royon in his excellent and perfectly clear lecture as regards the distinction to be made between trademark law and that of plant variety protection. He wished simply to state on behalf of AIPPI and of the owners of trademarks in general, that there was truly a need when regulating plant variety protection to avoid anything that could lead to a deterioration or an erosion of trademark law as laid down in the Paris Convention and in the relevant domestic trademark laws.

10. Mr. Skov said that reference had been made to the special regulation concerning the use of trademarks in connection with variety denominations, introduced in Denmark 13 years ago in order to ensure that the public would understand what was the denomination and what was the trademark. He wished to draw attention to what had been said by Mr. Kunhardt about the nature of the denomination, and by Mr. Brickell about the use of the denomination. Mr. Skov thought that the Danish authorities had good reasons for such a regulation. He had to say that he could not promise that it would be changed or, in other words, he could promise that it would not be changed.

11. Dr. Byrne said that he would be interested in hearing more from Mr. Royon about his statement concerning the ability of the owner of a trademark to control the use of the variety in subsequent marketings of it.

12. Mr. Royon said in reply that he would like to underline what he had said earlier. The control by a breeder of a trademark applied to a variety after protection for the variety, whether by plant breeder's right certificate or plant patent, had expired was more and more seldom to be seen. He knew of a few cases concerning rose and carnation varieties where firms, mainly firms selling through catalogues, accepted to pay a nominal and reduced royalty for the right to continue to use the sales appeal of a trademark which had been promoted by the breeder for 15 or 20 years. Firms that did not accept to pay such a royalty to use the trademark used the product and the variety denomination freely.

Mr. Royon believed that the main use being made of trademarks after the commercial life of the product was in connection with varieties which were in a given market niche and which represented subsequent improvements of a given variety. That was especially the case in the commercial growers' market, by

which he meant the cut-flower market. When an improvement was found to a variety released say ten years ago, an improvement, for example, in the same color range and with the same commercial interest for the users, some breeders had sought protection for the new variety. As required, they had given the variety a new and distinct denomination, but in some cases they had then tried to build upon the trademark which was known to the public. He understood that the practice was working in many cases.

13. Dr. Leenders felt that he should begin by pointing out that variety denominations and trademarks were used in very different ways. Among breeders of agricultural crops, for example, maize breeders had a separate or special approach. Vegetable breeders sometimes followed a slightly different practice, and the breeders of ornamental plants also had their own ways, as described by Mr. Royon.

Dr. Leenders thought that several solutions to the problem had been possible when the Convention was drawn up. First, the solution chosen, namely to allow a trademark to be added to a variety denomination, the latter being declared generic. Another solution could have been not to regulate anything; in the United States Plant Variety Protection Act the question had not been regulated. Yet another solution would have been for the Convention to state that a variety denomination could be trademarked, but that the trademark rights could not be invoked against anyone who legally commercialized, even legally produced, the variety, whilst it was protected or even after the protection had expired.

Dr. Leenders was not quite sure whether the solution chosen at the time was the best solution. He was inclined to say that it was not. The problem had been under discussion for more than 20 years and was growing rather than diminishing. In addition to the difficulties to which Mr. Royon had referred, there was the problem of non-protection of a variety denomination against a trademark for a neighboring product. For instance, a chemical product that could be used to treat barley could be given a name similar to the name of a leading barley variety. If the breeder had not trademarked his variety denomination then the manufacturer could trademark the name of his chemical, and thus profit from the publicity made by the breeder.

Mr. Kunhardt had said that he believed that variety denominations were not that much used as commercial names. As far as agricultural and horticultural varieties were concerned that was not true. Breeders took great precautions and did their best to select very good variety names. They used them as commercial names and they advertised with them.

Dr. Leenders concluded by saying that ASSINSEL believed that the problems had not yet been solved and that further fundamental discussions were necessary. As he had said, practice in the various sectors was very different. The difficulties were not getting smaller and would certainly not be solved by the proposed recommendations. Much had been learned in the 20 years that had passed and ASSINSEL believed that a better solution than the current one was probably possible.

14. Mr. Royon wished first to give his fullest support to the initial comment made by Dr. Leenders that the need for trademark rights was felt quite differently for the different categories of plants and for the different methods of marketing. Even within the area of ornamental plants or vegetatively reproduced fruit plants, which CIOPORA represented more particularly, differing systems were used. Small breeders who did not invest in publicity were less interested in using trademarks than firms that went in for more advertising. Mr. Royon believed that that comment needed emphasizing and that it should be taken into account in any subsequent discussions that might take place.

Mr. Royon then wished to return to the second remark made by Dr. Leenders. Dr. Leenders envisaged a number of solutions as regards the approach to the problem of denomination. He had quoted, if Mr. Royon had understood properly, three solutions: the first solution, that contained in the Convention, was to require each variety to have a denomination; the second, that contained in American legislation, under which the certificate or plant patent was given a number; the third, was that the denomination could be filed as a trademark. Mr. Royon wished to express very serious reservations on that third solution.

In most of the countries throughout the world, trademark legislation required that the trademark, to be valid, should not constitute the necessary designation of products. Once a denomination becomes the necessary designation in a given country there was great probability that it would be used abroad. Where a trademark was registered abroad for that denomination it was likely to be regarded as invalid. Various important court decisions, taken at the highest level, existed in that respect. There was, in particular, a decision taken by the French Court of Cassation in February 1964 which was absolutely formal in that respect. There also existed two decisions taken by the Italian Court of Cassation in 1977 or 1978 which had invalidated trademarks used in fact throughout the world as the generic names of products.

Mr. Royon wished to make a third remark. He believed that if the problem was to be solved it would have to be approached with an open mind and with the greatest possible amount of flexibility. Any interventionism in that respect would be detrimental, either because it would place unreasonable constraints on the breeder's trade or because it would be likely to endanger acquired rights. The Danish representative had previously said that when, in 1970, the Danish authorities had published the decree outlined by Mr. Royon, the purpose, in itself praiseworthy, was to make it clear to the general public what constituted the denomination and what constituted the trademark. Now, some 10 or 15 years after the promulgation of the decree, it could be seen that precisely because some denominations were fancy names just like trademarks, the result was that the public no longer knew which was the denomination and which was the trademark. That was an example of interventionism with consequences diametrically opposed to the original aims. In conclusion, Mr. Royon also referred to the fact that in France, where the SNPNH system he had described had been operating for 30 years, he had never heard of complaints from the professionals and even less from the public. Everyone's interest was served and the arrangements worked quite normally.

15. Dr. Leenders said that he just wished to make it clear that he had not mentioned as one of the possible solutions the trademarking of variety denominations for the propagating material. Mr. Kunhardt had said earlier that in Germany it was possible to trademark a variety denomination but that the breeder had to refrain from asserting his trademark rights. Dr. Leenders said that he had used practically the same words himself when listing possible solutions. He had, of course, been aware of the case-law against trademarking a variety name for a variety or for varietal material.

16. Mr. Slocock said that he wished to stress that what he had to say was not a prepared statement but a reaction to what he thought had been a very interesting series of lectures and discussions. He noted that AIPH was not a breeders' organization, but one representing users and producers of plants. To that extent, AIPH in many ways shared common interests with the public as a whole.

Mr. Slocock said that his impression of the day's proceedings divided into two halves. He had found in the lectures given during the morning a convincing exposition of the background, history and development of nomenclature. He had been a botanist many years ago and had found in the lectures a compulsive argument for the rationale of a logical system of nomenclature. During the afternoon, however, a totally conflicting argument had been presented, where nomenclature was almost an inconvenience, where the naming of a plant was mainly designed to promote and market it. He thought that there was a need to reach a better balance and he wished to echo those who had urged discussion on the interpretation and indeed the improvement of Article 13 of the Convention. It seemed to him that a most unfortunate situation had been reached where it was necessary, as Mr. Royon said, to use, for instance, the same trademark for two varieties that were patently different. To preserve the authority of a nomenclatural system it would surely be essential to come to a much better compromise. He had to state on behalf of AIPH, that its members attached a great deal of importance to the "recognizability" of the variety denomination, as advocated in Article 13(8). They very much regretted the tendency in recent years to promote the trademark at the expense of the authority of the variety denomination, and indeed to extend the rights of breeders by that means. He urged UPOV to promote discussion between the various interested parties, of which AIPH was certainly one.

17. Dr. Böringer observed in that respect that he perceived no great problems, at least not as far as most of the sexually reproduced species and varieties were concerned. Problems existed primarily in the case of vegetatively reproduced long duration varieties, although not to the same extent in the case of cut flowers and pot plants. Mr. Royon had mentioned in his comments that the breeders were flexible but that the system that had been used in France since 1954 could be improved. He therefore wished to ask Mr. Royon what type of improvements he would have liked.

18. Mr. Royon pointed out that he had not said that the breeders were flexible. He had simply expressed the wish that the regulations themselves should remain sufficiently flexible in their application. What he had in fact said was that the rules used by the breeders represented by CIOPORA could be improved, just as any arrangements could be improved, at least he hoped so. Mr. Royon acknowledged that his view was an optimistic one and was a hope for improvement in the long term as was, in fact, the improvement of plants. He nevertheless believed that when he had said perfectible it was not meant as a concession to those authorities who advocated the opposite concept. Indeed, for breeders and for users, the system worked perfectly well. It could not have been possible to use a system for thirty years without there having been some upsets if the system had not corresponded both to the needs of the profession and also to the needs of the general public. One could not fool all the people all the time.

What Mr. Royon believed was perfectible was perhaps the system, and particularly the UPOV recommendations for variety denominations. It seemed to him that account had to be taken indeed of the first observation made by Dr. Leenders: not all firms had the same commercial policy, not all species had the same needs as far as marketing was concerned. It was certain that a variety which was the subject of transactions basically between the breeder and another professional did not pose the same problems in respect of trademarks as did a variety that was essentially marketed by mail order or sold in plastic bags in supermarkets, for example. What he had wanted to say was that account had to be taken of the possible differences and he had finished his paper by expressing the wish that there should be concerted action between the various circles involved in order to improve the system and in order to reach a modus vivendi for everyone. Indeed, what he regretted was that the professional organizations had not been consulted when the May 1983 recommendations were drawn up.

19. Mr. Simon wished to put a question to Mr. Royon who, during his paper, had demonstrated the merits of trademarks and the extent of their coverage. Mr. Simon shared altogether the opinion expressed by Mr. Royon as regards the use of such trademarks compared with the protection that could be given by patents or by plant variety certificates. Mr. Royon had shown in particular that it was useful for a private individual to be able to continue marketing an unprotected variety under a trademark. Of course, he had also explained that that same variety could be marketed by other persons who did not own that trademark on condition that they did not use the trademark. Mr. Simon noted that the practice had arisen of publishing the name of a variety in trade catalogues followed by a reference to the fact that it was a "protected variety." That applied not only to protected varieties but also to unprotectable varieties or varieties that were no longer protectable by means of plant variety certificates, but which were marketed under trademarks. He wished to know Mr. Royon's views on the matter which, in his view, led to confusion, at least as far as the users were concerned.

20. Mr. Royon stated that he was quite in agreement with the views of Mr. Simon. It was an obvious abuse of the law and a reprehensible practice.

21. Dr. Byrne remarked that he had already asked Mr. Royon to elaborate on his comment that a trademark could be used during the period of protection for a plant variety to control the marketing of that variety. His question had not been sufficiently specific; he was really concerned to have Mr. Royon's observations on the extent to which a trademark could be used during the period of protection, bearing in mind that within the EEC and in the United States of America, for example, there were rules of law that prevented the use of trademarks after goods, products, plants, whatever, had been put into circulation.

22. Mr. Royon explained that when he had said that a trademark could be used by its owner, who happened to be a breeder, or by the exclusive licensee even during the period the variety was protected, he had wished to say that the breeder or the trademark owner could have recourse, in particular, to actions for infringement or fraudulent imitation of the trademark which enabled court decisions to be obtained much more rapidly than was the case for infringement of patents or plant variety certificates. It was difficult to go into detail, but he wished simply to point to all the possibilities provided by trademark law, which were indeed very large!

As regards the more specific remark made by Dr. Byrne concerning exhaustion of rights, Mr. Royon believed that one could not attribute to a trademark more rights than it in fact afforded. As the case-law of the EEC currently stood, once a trademark had been lawfully placed on a product, that product had to be able to move freely within the Common Market. However, in those countries where only the propagating material was protected, it was extremely difficult to control imports and exports of protected varieties. Where such material or the end product moved from one country to the other it was extremely difficult to know whether the material or end product had been lawfully produced as far as the patent legislation or the plant variety protection laws were concerned. Trademarks indeed enabled a breeder to extend the protection to some degree and, in any event to extend his control by obliging users to make use of that trademark only where they were duly authorized. It was therefore not a question of enabling the breeder to demand payments beyond the first stage at which a royalty was received, but rather to enable him to request that checks be made to ascertain whether the product in circulation with that trademark was in fact lawfully marked. That was a great advantage.

23. Mr. Samperi wished to express a few reflections on the matter under discussion. In Italy, the trademark law prohibited any use of a generic name as a trademark. In the same way, the plant variety protection law prohibited any use of a variety denomination as a trademark. It seemed obvious that a patent could not be awarded during the administrative phase. But, assuming that the administrative office had made an error when granting the patent, it would be difficult to propose a hypothesis of acquired rights in the case of such an error. It appeared necessary to Mr. Samperi to apply the law in such a way as to guarantee the rights of the national and international community and not so as to guarantee hypothetical acquired rights which, in his view, did not exist. Nevertheless, he agreed with Mr. Royon that some cases required looking at with flexibility, but even in such cases "est modus in rebus." Mr. Royon had said that the law would have to be improved, but in such a case it would be necessary to say in a precise manner where the defect lay, if there was one, and to discuss it if the necessary amendment were to be reached. In any event, it would be as well not to create acquired rights in abuses.

As far as the lawful movement of a trademark within the Common Market was concerned, Mr. Samperi wished to point out that the Community trademark did not yet exist and that one could only talk of the national marks. In such a case, one would also have to ask whether the trademark had been granted in accordance with the law, failing which it was impossible to presume acquired rights. That was a question that it was absolutely necessary to examine when the laws were renewed. However, Mr. Samperi could not easily conceive the possibility, either under trademark or plant variety protection law, of using a generic denomination as a trademark for the purpose of preventing others from using the same name.

24. Mr. Espenhain said that he wished to address a remark to Mr. Royon and to make a comment about nomenclature in general. Mr. Royon had referred to the Danish legislation concerning the addition of a trademark to a denomination. Mr. Espenhain understood Mr. Royon to have said that even if the aim of the legislation had been right, its effect had not been fully successful. Mr. Espenhain thought that Mr. Royon might be right, but he believed that this was not only a Danish phenomenon. Trademarks added to variety denominations in other countries without such legislation were also fantasy names.

Mr. Espenhain said that he also wished to comment on existing difficulties with the naming of cultivars or species of agricultural and horticultural crops, as mentioned by Mr. Brandenburg with reference to gherkin and cucumber. There were some difficulties in Denmark, especially with vegetables.

Mr. Espenhain said that he was raising the question because international breeders' and seed growers' organizations were present. In the last ten years there had been more and more cases of seed companies going to the Orient, finding new vegetable crops and bringing them back to Europe. In itself, that was a very good thing. But then the problems began, because the new species were often given a wrong and misleading denomination. A committee had been set up in Denmark to try to give a common name and a Latin name to such new species. Mr. Espenhain expressed the hope that cooperation with the Danish seed companies would be fruitful and that the naming of the new species would be improved. He thought, however, that it was not only a Danish problem, but one that could occur every time a new species was introduced to Europe. He therefore urged all seed companies and breeders to be more careful when choosing names for newly introduced species.

25. Mr. Schlosser said that he wished to put a basic question to Mr. Royon. He understood it to be Mr. Royon's suggestion that a breeder should commercialize a new variety under a fancy name, which was in fact the trademark, and select a bland or colorless variety denomination. For example, one might pick "Victoria" for a rose and use a variety denomination such as 'D127'. If a breeder did that, did not the trademark in fact become the variety denomination through constant use? The public learned to identify that rose by the name "Victoria"; it did not use 'D127'. How could the breeder guard against the possibility, to put the question succinctly, of the trademark's becoming the variety denomination?

26. Dr. Mast took up the question and commented that it had been in his mind ever since the lecture given by Mr. Royon. Mr. Schlosser was right. If a variety denomination was completely bland and colorless and at the same time a powerful, easily rememberable trademark was used, both the public and the trade would use the trademark and he felt that the danger then existed that the trademark would become a generic designation and thereby forfeit its validity. He could recall that such had been the concern of the Chairman of the Working Group that, during the negotiations that ran from 1957 to 1961, had prepared a text that became Article 13 of the UPOV Convention. The variety denomination had been declared to be the generic designation primarily of course to ensure in a simple way that it would be kept freely available to every user of the variety. On the other hand, numerous references were made during the negotiations to the fact that by formally stating that the variety denomination was the generic designation the trademark would be protected from "degenerating" to a generic designation and consequently losing its validity, which was indeed a nightmare for any owner of a trademark. Perhaps Mr. Royon could in fact comment on whether the system that he favored so much could not indeed represent a danger from that point of view.

27. Mr. Royon believed that the reply that had to be given to Mr. Schlosser and to Dr. Mast was the reply given in trademark practice throughout the world, whether in respect of plant varieties or of industrial products. If a product became well known under its trademark, the trademark ran the risk of losing its distinctive nature since the public generally knew only the trademark. Anyone with a headache went to the chemist's to buy "Aspro" and not acetylsalicylic acid tablets. The owner of a trademark must be forever watchful of the use made of his mark by his licensees and by all those he had authorized, directly or indirectly, to make use of his mark. That was a monitoring task that went on unendingly and it was only by so doing that he could safeguard his monopoly, which he had to assert in the contracts he concluded and in his control of those contracts, and that he could defend his trademark. Frigidaire, for example, had run the risk on many occasions of its trademark falling into the public domain. In France, many were the people who instead of saying "a refrigerator" in fact said "a frigidaire" since the trademark had become so well known that it was often taken by the general public to mean the name of the product. However, General Motors had devoted such great efforts to protecting its trademark that it had been able to maintain its rights. It was quite simply a matter of defending the use of one's trademark. A mark did not become generic because it was used by the public as a generic term but, quite simply, because the owner allowed it to be so used and because there was no other way of naming the product. Mr. Royon felt that it was a problem shared by all trademarks and not only those for plant varieties.

28. Mr. Samperi noted that what had been said by Mr. Royon concerned infringement. However, attention had also be paid to maintaining the possibility of defending the trademark. Mr. Samperi believed that it was not sufficient to refer in the case of an infringement to the right or the lack of a right to use a word, for example words such as "Frigidaire" or "Aspro" that had taken on quite specific meanings for the consumer, but that something would have to be done to prevent the possibility of abusively using trademarks. Provisions had to be devised that would practically and effectively prevent abuses.

29. Mr. Royon stated in reply that it seemed to him that CIOPORA actively encouraged breeders to always use the denomination together with the trademark when they marketed their varieties for the very purpose of maintaining the possibility of defending their trademark quite separately from the matter of protecting the product. If the Convention had not instituted a denomination, it would have to have been invented. In fact, it had been invented, since the type of denomination he had described was that used in the French system as from 1954 onwards, that was to say seven years before the Convention. Why had that system been set up? Indeed, for the very reason that the former practice, prior to 1954, and even before the war, which consisted in giving the product a pleasant trade name and subsequently filing that name as a trademark, had led to an altogether ridiculous system. That was the conclusion arrived at in the judgement of the Court of Cassation that he had cited previously. In some cases, where use of a trademark was combined with entry, for example, in the French register or catalogue, the user found himself caught everytime he made a move. If he did not use the breeder's trade name, he was in trouble with the fraud squad since he was required to use that name, or if he used it to comply with the law on fraud, then the breeder who owned the mark took action for infringement. It was therefore a quite ridiculous system and marks that were used in such a way were quite justifiably, according to the view of Mr. Royon, declared to be invalid. The system of denominations was absolutely essential for the very reason that it supported trademarks. The use of trademarks had indeed to be correct and intelligent.

30. Mr. Fikkert said that he was slightly worried by the expression "to control the variety", that is the material, "by a trademark". He thought that the way to control the material was by a plant variety certificate or a plant patent; a trademark was solely to protect a name. He had the impression that most of the lecturers had emphasized that groups of plants on each classification level, such as family, genus, species and cultivar should be identified by a denomination, and preferably by one denomination only. One of the purposes seemed to be that the general public, worldwide, should be able to identify a specific group of plants through its denomination. Mr. Fikkert believed that meant that the denomination had to be easily recognizable and had to mean something to the average member of the public. He considered that, for cultivars in particular, the use of flat, colorless denominations increased the risk of confusion, especially when a trademarked fancy name was also used in a more conspicuous way. After all, a trademark could be attached to any variety.

31. Dr. Byrne, noting that the discussion had so far been about the use of trademarks to control material, said that he would like to turn it in a slightly different direction by touching on the use of plant breeders' rights law to promote trademarks. It seemed possible to register three words as the name of a variety. One might, for example, register "Harlequin Pretty Lady," "Harlequin" being for the breeder the 'series name,' and "Pretty Lady" the 'variety name'. Dr. Byrne believed that such a name could be registered in the United Kingdom and, presumably, in other States. The breeder could then register "Harlequin" as a trademark. He obviously would not register "Pretty Lady" because that was the 'variety name,' the generic identity of the plant material in question. Then, under plant breeders' rights law, the breeder could insist that the registered name, "Harlequin Pretty Lady," be used to identify the reproductive material. Dr. Byrne concluded that if he was correct in believing that, then plant breeders' rights law could be used to promote trademarks in a way which might not be desirable.

32. Mr. Royon replied that he had not altogether followed the first part of Dr. Byrne's argument, particularly whether he wished to enter as the denomination, at the time the application for the new plant variety certificate was

filed, "Harlequin Pretty Lady," or simply "Pretty Lady." In his view, if the former were the case, then the reply was simple. If "Harlequin Pretty Lady" was entered as the denomination, "Harlequin" would not be valid for registration as a trademark. It would be altogether invalidated, all the more so because it applied to the same product. However, if "Pretty Lady" were filed as the denomination and "Harlequin" filed as a trademark and, subsequently, when marketing the variety, "Harlequin Pretty Lady" were used, nothing would oppose that. Indeed, exactly that situation existed currently in Denmark, except perhaps that greater preeminence could be given to "Harlequin" as compared with "Pretty Lady." What had to be understood, however, was that when the protection expired, "Pretty Lady" would fall into the public domain as a denomination and the breeder or the owner of the mark would no longer have any interest in investing money in advertising for that denomination. Why should he give publicity to an appellation that was to fall into the public domain? According to Mr. Royon's views, that constituted the very problem of trademarks and explained why there had never been any question of trademarks controlling material or a variety. They constituted an additional support for marketing but one which was completely separate and which in certain cases was necessarily involved in marketing; that was what happened in the case of patents and it was also what happened in the case of pharmaceutical products. Everyone knew that pharmaceutical products were covered by patents or by certification but, in addition, trademarks played an essential part in their marketing. Those were two quite separate legal concepts and they should not be confused.

33. Mr. Espenhain found himself in agreement with Mr. Royon's answer. If "Harlequin" had been approved as a part of the variety denomination then the Danish authorities would not permit it to be subsequently approved as a trademark. Mr. Royon was correct in saying that if the variety denomination was "Pretty Lady" and there was a trademark "Harlequin," then that would be permitted as an addition, following the denomination. It would not be permissible, however, to take one part of a variety denomination and have that registered as a trademark.

34. Mr. Simon wished to comment that as the discussions progressed he noted that the center of the debates was shifting. After having heard the paper by Mr. Royon it had been possible to see, in the background, the shadows that denominations could cast on trademarks, but not the shadows that trademarks could cast on denominations. Finally, as the discussions went on, it could be seen that trademarks could cast shadows on variety denominations. That was proved by the fact that the general public, the user, ended up confusing the trademark with the generic designation, which raised the question of the future of generic designations. It was therefore necessary to achieve a proper balance between the use of trademarks and the use of generic designations. If trademarks were to fully supplant generic designations, it was clear that some States could be led to take statutory measures that were not desirable. Those were the conclusions that Mr. Simon felt he had to draw from the debate which was interesting because it showed the balance that had to be found both for protecting use of the generic designation and for maintaining the value of a trademark.

35. Mr. Whitmore said that his comment was related to that of Mr. Simon. He would also like to associate himself with the point made earlier by Mr. Schlosser. He had listened with interest to Mr. Royon's reply, but was still somewhat confused. Surely, if a breeder used a trademark to identify a single variety, then it effectively became a generic name. If the breeder had also obtained plant breeders' rights using a code or a bland denomination, then effectively the variety could finish up with two generic names. Mr. Whitmore said that he could not speak for the New Zealand Trademarks Office, but he wondered if it would be happy to grant registration as a trademark to a fancy name that was used to identify a single variety.

36. Mr. Royon felt that he had to reply very energetically to the comments made by Mr. Simon. If it had not been clear from his paper that trademarks could cast shadows upon denominations, then he had given a bad paper. The advertising aim of a trademark, in all fields of industry, was to supplant the generic designation. The purpose of a trademark was to attract customers and

advertising was based on that trademark. If one wished to envisage intervention by the public authorities, then breeders were going to demand that intervention be made not only in respect of plant varieties but also for pharmaceutical products, for industrial products, since there was absolutely no legal reason, and also no public interest, that breeders be treated in a more restrictive way than the owners of trademarks in other fields of commercial or industrial activity.

37. Mr. Simon regretted that Mr. Royon thought he had said what he had not said. He confirmed his will to find a proper balance between trademarks and denominations. When speaking of shadows cast by trademarks on denominations, he had been thinking, for example, of the following situation. In France, when marketing a variety of fruit tree, only the trademark was used. Mr. Royon knew quite well that a number of varieties could be sold under the same trademark and that constituted a problem in respect of the users who, indeed wished to know what varieties they were buying. Mr. Royon had himself said that the trademark had to be accompanied by the variety denomination. Mr. Simon considered that if there was no longer a variety denomination then shadows existed.

38. Mr. Fikkert said that he wished to ask Mr. Brickell whether the international registration authorities registered names that were known to be trademarked as cultivar denominations.

39. Mr. Brickell confirmed that they did not.

40. Dr. Böringer concluded by observing that Mr. Royon had thrown particular light in his lecture and in the discussion on one aspect of the suject matter of the Symposium. However, the Symposium had also dealt with a number of other aspects. When looking at all of the aspects together, he was in fact quite satisfied with the outcome of the Symposium. Mr. Burdet had opened the proceedings in the morning and everyone had had the uplifting feeling that as a breeder or as someone who dealt with nomenclature, or even simply as a consumer in that field, he was not only concerned with "Aspro" or "Nescafé", as had been referred to a number of times, but with plants and plant varieties that were essential to life. The world could live without "Aspro" or without "Nescafé" but it could not live without plants and it was his opinion that the discussions had placed that fact in its true light. He was firmly convinced that the Convention offered a balanced system that set off the interests of the breeder, who wished to have his variety protected, against those of the consumer. It was also his opinion, finally, that further discussions between the various representatives and groups could be of great value. He hoped that such discussions could take place in Geneva in November when the draft for the recommendations for variety denominations was to be discussed. He believed that, all in all, the views were not that far apart if one started from the principle--to speak once more finally of trademarks--that the rule had to be applied that a variety denomination could be accompanied in the course of trade by a trademark. As far as the configuration of the variety denomination as such was concerned, and that was in fact the crux of the matter, it was surely possible to reach agreement in the end.

41. Dr. Leenaers said that he found Dr. Böringer's words encouraging. Dr. Leenaers believed that one of the reasons why there had been so much discussion over so many years was that the variety denomination was a kind of hybrid. It had been pointed out that a variety denomination served to identify the variety but, at least for the members of ASSINSEL, the variety denomination also had a very important commercial function. It was used in advertising. The Convention specified that the denomination was generic and, of course, that was accepted, although in no other section of the whole of industry would there be anyone spending substantial sums of money on advertising generic names. Dr. Leenaers considered that declaring a variety denomination to be a generic name was not a natural thing. It would seem to him that if one talked about wheat varieties, wheat would be the generic name and then there were 200 or 300 variety names. He considered that to be the origin of all the discussions that had taken place. He hoped that there would be further discussions on the matter.

42. The President of the Council invited Mr. Schneider to summarize the day's proceedings.

43. Mr. Schneider expressed the hope that the Symposium had made clear the importance and significance of the role played by nomenclature with respect to the International Convention for the Protection of New Varieties of Plants. That role was determined not only by Articles in the Convention and recommendations of the Council about denominations of cultivated varieties, but also by the use of botanical nomenclature in national legislation, as a consequence of Article 4 concerning botanical genera and species which must or may be protected, and by the use of common names, especially the common names for bigger groups of cultivated plants which had a special use in common (such as ornamentals, rootstocks, cut flowers, forest trees and so on).

Another effect of the Symposium had been that it had brought together botanical people, breeders, consumers and breeders' rights authorities, making it possible to exchange knowledge on the subject of nomenclature and trademarks and to learn something about each other's way of thinking, methods and philosophies.

Mr. Schneider thought that some important conclusions could be drawn from the papers presented and the discussions. The views of botanical people on the formation and use of denominations of cultivated varieties, on the conditions they had to fulfill and on their use as trademarks, appeared to be largely in agreement with the views of UPOV. That had resulted in a mutual proposal to organize further cooperation, perhaps in the form of a subgroup in which the parties could discuss with each other the possibilities for standardizing recommendations concerning the formation and use of denominations of cultivated varieties. That same subgroup could try to initiate better cooperation between, in the language of the Cultivated Code, statutory and non-statutory registration authorities.

Another conclusion was that the fact that both of the codes for nomenclature, the Botanical Code and the Cultivated Code, were concerned with the naming of cultivated plants, frequently had an ambiguous effect, especially in connection with the classification of cultivated plants. On the botanical side that problem should be studied further. Mr. Schneider hoped that the effect of such further study would be that it would be clear for any user in the future when he had to follow the Botanical Code and when the Cultivated Code should be used. It had been made clear that nomenclature with respect to the classification of cultivars needed further clarification in the form of clear rules and recommendations in the Cultivated Code, and that the significance and use of common names should find a more conspicuous place in that Code.

Mr. Schneider confessed that he had some difficulty in finding a satisfying conclusion regarding the relationship between variety denominations and trademarks. He had the feeling that all could agree that they were different things, ruled by different legislations and philosophies, but that for the rest, the botanical world and the UPOV authorities had a quite different view from that of the breeders on the formation of denominations and the application of trademarks. In his personal opinion, one of the most important causes, or perhaps the most important cause, was the difference in the views of the parties concerning their responsibility to consumers. Mr. Schneider believed that the discussion had brought the parties no closer to each other. The only consolation was that it had formed a good preparation and training for the hearing of the professional organizations in November 1983. Not only had the papers been very clear in their content and in their way of presentation, but the follow-up had given an informative picture of problems concerning nomenclature and trademarks. Mr. Schneider concluded that for him to make further remarks could only spoil that clear picture.

44. The President of the Council closed the Symposium by again expressing his appreciation of the lectures given and by thanking all who had participated in the discussions, and in particular Mr. Schneider for his contribution as 'Rapporteur'.

# LIST OF PARTICIPANTS

## I. MEMBER STATES

Belgium: J. Rigot; R. D'HOOGH

Denmark: H. Skov; F. Espenhain

France: Y. Van Haecke; M. Simon

Germany (Fed. Rep. of): D. Böringer; H. Kunhardt

Hungary: B. Szaloczy; J. Bobrovszky

Ireland: P.J. O'Leary

Israel: H. Gelmond (Mrs)

Italy: S. Samperi

Japan: T. Ishiki; T. Kato

Netherlands: W.F.S. Duffhues; M. Heuver; K.A. Fikkert; F. Schneider

New Zealand: F.W. Whitmore

South Africa: J. Le Roux; D.C. Lourens

Spain: F. Miranda de Larra y Onis; J.-M. Elena Rossello; J.R. Prieto Herrero

Sweden: S. Mejegård; A.O. Svensson

Switzerland: W. Gfeller; R. Kämpf; J.-D. Pasche

United Kingdom: F.H. Goodwin; J.M. Allfrey; J.L. Sneddon

United States of America: S.D. Schlosser

## II. OBSERVER STATES

Argentina: H.C. Gonzalez

Austria: J. Steinberger

Egypt: A.-R.H. Shehata

Panama: C. Vasquez (Mrs)

Yugoslavia: D. Jelic

## III. INTERGOVERNMENTAL ORGANIZATIONS

Food and Agriculture Organization of the United Nations (FAO): W.P. Feistritzer

Commission of the European Communities (CEC): D.M.R. Obst

European Free Trade Association (EFTA): J.G. Petersson

International Board for Plant Genetic Resources (IBPGR): P.M. Perret

International Seed Testing Association (ISTA): H. Pirson; F. Marschall

## IV. INTERNATIONAL NON-GOVERNMENTAL ORGANIZATIONS

Association of Plant Breeders of the European Economic Community (COMASSO): J. Winter (Federal Republic of Germany); R.C.F. Macer (United Kingdom); R. Petit-Pigeard (France)

International Association for the Protection of Industrial Property (AIPPI): G. Kirker (Switzerland)

International Association of Horticultural Producers (AIPH): M.O. Slocock (United Kingdom); H. Aaquist (Denmark); J.N. Kras (Netherlands)

International Association of Plant Breeders for the Protection of Plant Varieties (ASSINSEL): C. Mastenbroek ( Netherlands); H.H. Leenders (Switzerland); C.-E. Büchting (Federal Republic of Germany); G.J. Urselmann (Netherlands)

International Community of Breeders of Asexually Reproduced Fruit Tree and Ornamental Varieties (CIOPORA): J. Van Andel (Netherlands); R. Kordes (Federal Republic of Germany); R. Royon (France); P. Favre (Switzerland); W. Fiedler (Federal Republic of Germany)

International Federation of the Seed Trade (FIS): H.H. Leenders (Switzerland); J.A.C. Veglio (Switzerland)

## V. INDIVIDUAL PARTICIPANTS:

C. Boucher (Miss) (France); N.J. Byrne (United Kingdom); G. Dworkin (United Kingdom); B. Ford-Lloyd (United Kingdom); M.J. Hijink (Netherlands); J. Larsen (Denmark); R. Salzmann (Switzerland); O. Steinemann (Switzerland

## VII. OFFICERS:

W. Gfeller (President of the Council); J. Rigot (Vice-President of the Council)

## VIII. OFFICE OF UPOV:

H. Mast (Vice Secretary-General); M.-H. Thiele-Wittig; A. Heitz; A. Wheeler; K. Shioya

## CALENDAR

1984

UPOV Meetings

| | |
|---|---|
| October 9 to 11<br>Valencia (Spain) | Technical Working Party for Fruit Crops<br>(Subgroup on October 8) |
| October 16 | Consultative Committee |
| October 17 to 19 | Council |
| November 6 and 7 | Technical Committee |
| November 8 and 9 | Administrative and Legal Committee |

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The International Union for the Protection of New Varieties of Plants (UPOV)--an international organization established by the International Convention for the Protection of New Varieties of Plants--is the international forum for States interested in plant variety protection. Its main objective is to promote the protection of the interests of plant breeders--for their benefit and for the benefit of agriculture and thus also of the community at large--in accordance with uniform and clearly defined principles.

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