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UPOV

CAJ/I/10

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## INTERNATIONAL UNION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS

GENEVA

## ADMINISTRATIVE AND LEGAL COMMITTEE

## First Session

Geneva, April 17 to 19, 1978

## DRAFT REPORT

prepared by the Office of the UnionOpening of the Session

1. The first session of the Administrative and Legal Committee (hereinafter referred to as "the Committee") was held in Geneva from April 17 to 19, 1978. All member States were represented. Of the non-member States invited, Canada, Ireland, Japan, Spain and the United States of America were represented by observers. The list of participants is attached as Annex I to this document.
2. The session was opened by Dr. D. Böringer, Chairman of the Committee, who welcomed the participants.
3. The Chairman briefly recalled the achievements of the three bodies (namely, the Fee Harmonization Working Party, the Working Group on Variety Denominations and the Committee of Experts on International Cooperation in Examination) which the Committee was to replace and whose activities it was to take over, pursuant to the decision taken by the Council at its eleventh ordinary session in December 1978. He expressed his warm thanks to those bodies and to their Chairmen for the results they had obtained not only for UPOV and its member States but also for the non-member States interested in joining UPOV.
4. The Chairman further thanked the Technical Committee, and in particular its Chairman, for having agreed to postpone the next session until November, thus allowing the discussion of questions which were considered by the Council as having priority, especially the relationship between plant variety protection and competition law.

Adoption of the Agenda

5. The Committee unanimously adopted the agenda as appearing in document CAJ/I/1, subject to adding an item "Any other business" under which the following matters were to be dealt with:

- (i) WIPO statistics on plant variety protection;
- (ii) exchange of variety denominations;
- (iii) progress report on the conclusion of bilateral agreements for cooperation in the testing of varieties.

Adoption of the report on the eighth session of the Committee of Experts on International Cooperation in Examination

6. The participants, meeting as the Committee of Experts on International Cooperation in Examination, unanimously adopted the report on the said Committee's eighth session as appearing in document ICE/VIII/6, subject to the following amendments:

- (i) the Delegation of Denmark wished its statement recorded in paragraph 12 to be amended as follows:

"12. The Delegation of Denmark said that preliminary discussions were being held between Denmark and Switzerland on the conclusion of a bilateral agreement on cooperation in examination. In anticipation of such an agreement, Denmark was ready to perform the examination of Red Clover for Switzerland";

- (ii) in the German version of paragraph 14, the last word ("ersetzt") was to be replaced by "erstreckt."

Discussion of Questions Concerning the Revision of Article 13 of the UPOV Convention

7. Discussions were based on documents CAJ/I/2, CAJ/I/3, CAJ/I/6 and CAJ/I/8 which were introduced by the authors of the observations contained in them.

8. In the ensuing general discussion the Delegation of the United States of America raised the general question of the applicability of Article 13 to varieties protected under the US Patent Law. It took the view that the minimum scope of protection provided for by Article 5(1) of the Convention comprised, in the case of vegetatively propagated plants, vegetative propagating material as such only, that is, material sold for propagation purposes, while material sold for planting purposes was excluded. It further took the view that Article 13, and in particular paragraph (7) of the present text, was applicable only to plant material covered by the minimum scope of protection. Since patented plants were not sold for propagation (in fact any propagation thereof was prohibited and constituted an infringement of the patent) but for planting (whether in a private garden or for the commercial production of cut flowers in the case of a rose variety), the Delegation concluded that Article 13 did not apply to plants protected by patents.

9. Several Delegations contested that interpretation of the terms used in Article 5(1) and explained in particular that the member States generally considered any part of the plant, including the whole plant as expressly stated by the second sentence of Article 5(1), used with a view to produce at least a single adult plant as being propagating material. As a consequence, Article 13 was applicable to nursery plants and, supposing that the patentee was selling solely such nursery plants, he had to use the variety denomination when performing such sales.

10. After the Secretary-General had pointed out that Article 13(7) of the present text imposed obligations not only on the breeder but also on third persons, the Delegation of the United States of America concluded that the Article went beyond the concepts of patent law in general.

11. The Committee then examined, and decided on, three questions of principle. Firstly, it agreed that the principle contained in paragraph (7), that the variety denomination had to be used even after termination of protection, should be maintained in the Convention. It further agreed that the Convention should continue to contain a statement to the effect that the variety denomination was the generic name of the variety. It finally agreed that the Convention should continue to rule on the relationship between variety denominations and trademarks and that such rules should relate not only to trademarks but also to other rights since it was intended that the use of a variety denomination should encounter no obstacle whatsoever.

12. The Committee examined at length the territorial scope of application of some of the rules contained in Article 13. With respect to the obligation, imposed on any person offering for sale or marketing propagating material of a protected variety to use the denomination of the variety, the Committee agreed that the provisions of paragraph (7) of the present text should be restricted to the territory of the State where the variety was actually protected (or had been actually protected). As to the obligation, imposed on the breeder proposing as variety denomination a designation in respect of which he enjoyed a right liable to hamper the free use of the denomination, to discontinue to assert such right, the Committee was unable to reach agreement on its territorial scope. It therefore decided to submit three alternatives to the Diplomatic Conference, namely that the breeder may not continue to assert his right in:

- (i) all the member States which applied the provisions of the Convention to the genus or species to which the variety belonged,
- (ii) the member State in which the denomination was submitted only, or
- (iii) in all member States.

Finally, the Committee took the same decision with respect to the principle that the variety denomination was the generic name of the variety and that a right could not be applied for or obtained if it was liable to hamper the free use of the denomination.

13. The Committee reconsidered Article 13 paragraph by paragraph on the basis of document DC/3 (or document CAJ/I/2, Annex II) and drew up another new text of Article 13. That text appears in Annex II to this document.

#### Discussions of Questions Concerning the Relationship Between Competition Law and Plant Variety Protection

14. The Delegation of the Federal Republic of Germany reported that the basic reason for discussing the relationship between competition law and plant variety protection was an individual case pending before the Commission of the European Communities.

15. The Delegation of the Federal Republic of Germany introduced document CAJ/I/4 and reported on the outcome of the discussion in the Advisory Committee on Restrictive Practices and Monopolies. It pointed out that the authorities of its country were trying to ensure that the Commission would restrict its decision to the necessary elements and, in particular, would not extend its argumentation to licenses for the multiplication of propagating material.

16. It was feared that the Commission would treat licenses for the multiplication of propagating material--and not only licenses for the distribution of certified seed--in the same way as licenses in the field of industrial products. The Delegation of the Federal Republic of Germany asked for coordination of efforts between the UPOV member States. The Committee recommended that, as a first step, the agricultural services and the plant varieties offices should thoroughly brief the national authorities representing their countries before the Commission on the special features of the multiplication of varieties.

17. It was finally agreed that, in order to allow an exchange of views on this subject, each Delegation should prepare for the next session of the Committee a paper on the special situation prevailing for licenses for multiplication of propagating material. To allow the Office of UPOV to prepare a synopsis for discussion at the next session of the Committee, the Committee agreed that these papers should reach the Office of the Union by September 1, 1978, at the latest.

18. The Committee did not share the fear that the expected decision of the Commission of the European Communities might completely undermine the plant variety protection system. It was pointed out that the situation in States in which no protection could be obtained would be no worse after such a decision than before. As far as imports from such States were concerned, it was stressed that, in line with prior decisions of the Court of Justice of the European Communities, in the field of patents, it would also be possible in future to invoke plant breeders' rights in cases where the imported product was put on the market in that State without the authorization of the breeder. The decision of the Commission of the European Communities would only concern cases where territorially limited licenses were granted by the breeder to two different persons and where the products were imported from the license area of one of those persons to the area of the other.

#### Harmonization of Plant Breeders' Rights Gazettes

19. As time did not permit discussion of this item, the Committee decided to start discussions at its second session.

#### WIPO Statistics on Plant Variety Protection

20. The Delegation of France pointed out that the statistical information which member States were asked to send to WIPO with respect to the number of applications for plant breeders' rights and titles of protection granted were misleading as they were broken down according to the country of residence of the applicant whereas, from the agricultural point of view, what mattered was whether the variety was bred in the country of reference or in another country. It had written in this matter to the Director General of WIPO and had received the answer that it was not possible to change the statistics as they were included in a whole set of statistics on industrial property but that the attention of the reader could be drawn to this matter in a footnote.

21. The question was discussed whether it might be worthwhile publishing information which was more appropriate from the agricultural point of view and more detailed in the UPOV Newsletter.

22. In the discussions on that question, it was considered whether the value of such additional publication justified the work involved for the national authorities. It was finally decided to discuss this item again after the Diplomatic Conference.

#### Observations on the Exchange of Variety Denominations

23. The Delegation of France reported that in cases where an objection was filed against a variety denomination because of the existence of a trademark, the breeder might wish to get in touch with the trademark owner to obtain the latter's permission to use the variety denomination. The Delegation therefore proposed that the name of the trademark owner be indicated in any objection based on the existence of a trademark.

24. The Committee agreed that all States whose offices checked variety denominations against trademarks would be invited also to state the name and address of the trademark owner on the forms used to file objections.

Progress Report on the Conclusion of Bilateral Agreements for Cooperation in the Testing of Varieties

25. Following the practice of the Committee of Experts on International Cooperation in Examination, all Delegations reported on bilateral agreements concluded --or envisaged--by their authorities with those of other member States on cooperation in the testing of varieties.

26. Two bilateral agreements had been signed since the last session of the Committee of Experts on International Cooperation in Examination, namely one between Switzerland and the Federal Republic of Germany and the other between Switzerland and France, while several other bilateral agreements were either in the drafting stage or under discussion. In this connection, some new member States of UPOV expressed their appreciation of the help received from the other member States in the examination of varieties.

27. The Committee confirmed that in future the statistics and the survey on the exchange of examination reports between member States would not be dealt with by the Committee but by the Technical Committee.

28. The Committee further decided that offers from member States to undertake examinations for other member States with regard to certain species would be discussed in the Technical Committee as would problems which might arise in future as a result of the testing facilities of some member States for certain crops having reached saturation point, meaning that those States would no longer be able to undertake the examination of varieties of those crops for further States.

29. The Committee took note of the report of the Delegation of Sweden that in addition to the offers for examination with respect to dill and timothy made in the past, that country was now prepared to undertake tests for white cabbage and for lettuce under glass or--alternatively--lettuce in the open or greenhouse tomatoes.

Program for the Second Session of the Committee

30. The Committee agreed that the agenda of its second session to be held from November 15 to 17, 1978, should include the following items: relationship between competition law and plant variety protection; harmonization of plant breeders' rights gazettes. Pending the decision by the Consultative Committee, the agenda should also include an exchange of views on the long-term development of the Union and on closer cooperation between the member States. The item "Model Law on Plant Variety Protection" should only be included if the Office of the Union were able to distribute a draft in time to allow thorough preparation by correspondence; otherwise the item should be postponed to 1979.

[Two Annexes follow]

## ANNEX I

## LIST OF PARTICIPANTS/LISTE DES PARTICIPANTS/TEILNEHMERLISTE

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Dr. H. MAST, Vice Secretary-General  
Dr. M.-H. THIELE-WITTIG, Senior Technical Officer  
Mr. A. HEITZ, Administrative and Technical Officer

[End of Annex I,  
Annex II follows]

## DRAFT OF DOCUMENT DC/4

## DRAFT REVISED CONVENTION

Additional Proposal for Article 13 Submitted by the  
Administrative and Legal Committee

1. Pursuant to the decision taken by the Council at its eleventh ordinary session in December 1977 (see document C/XI/21, paragraph 14(ii)), the Administrative and Legal Committee reexamined, at its first session, held from April 17 to 19, 1978, the question of Article 13. It reached agreement on the additional proposed new text appearing in the Annex to this document.

2. It is recalled that delegations and observers invited to the Diplomatic Conference are given the opportunity to comment on the documents which are submitted to them and to present alternative proposals for amendment of any Article of the Convention.

3. The Administrative and Legal Committee desires to emphasize the following points:

(i) Compared with the present text of Article 13, paragraphs (3) and (4) have been interchanged in order to avoid the competent authorities being bound by the Convention to check the proposed variety denominations against other rights of the breeder and of third parties which might prevent the free use of the said denominations. This inversion does not prevent, however, any authority from undertaking such check.

(ii) The addition of the words "When a variety is offered for sale or marketed" in paragraph (9) aims at ensuring that additional indications, in particular trademarks and trade names, are excluded from the designation of varieties in official documents issued by a government agency.

(iii) The second sentence of paragraph (9) aims at ensuring that the additional indication does not overshadow the variety denomination and that the denomination remains capable of fulfilling the functions assigned to it.

[[Annex follows]]

[Annex to document DC/4]

NEW TEXT OF ARTICLE 13 PROPOSED  
BY THE ADMINISTRATIVE AND LEGAL COMMITTEE

## Article 13

Variety Denomination

- (1) A variety shall be designated by a denomination.
- (2) Such denomination must enable the variety to be identified; in particular, it may not consist solely of figures. It must not be liable to mislead or to cause confusion concerning the characteristics, value or identity of the variety or the identity of the breeder. In particular, it must be different from every denomination which designates, in any member State of the Union, an existing variety of the same botanical species or of a closely related species.
- (3) The denomination of the variety shall be submitted by the breeder to the authority referred to in Article 30. If it is found that such denomination does not satisfy the requirements of the preceding paragraph, the authority shall refuse to register it and shall require the breeder to propose another denomination within a prescribed period. The denomination shall be registered at the same time as the title of protection is issued in accordance with the provisions of Article 7.
- (4) (a) If the breeder submits in a member State of the Union as the denomination of a variety a designation in respect of which he enjoys a right which could hamper the free use of the variety denomination, he may not, as from the time when the variety denomination is registered, continue to assert his right in order to prevent the free use of the variety denomination [Alternative 1: in any member State of the Union applying the provisions of the Convention to the genus or species to which the variety belongs] [Alternative 2: in that State] [Alternative 3: in any member State of the Union].
- (b) Prior rights of third parties shall not be affected. If, by reason of a prior right, the use of the denomination of a variety is forbidden to a person who, in accordance with the provisions of paragraph (7), is obliged to use it, the competent authority shall require the breeder to submit another denomination for the variety.
- (5) A variety must be submitted in member States of the Union under the same denomination. The authority competent for the issue of the title of protection in each member State of the Union shall register the denomination so submitted, unless it considers that denomination unsuitable in that State. In this case, it may require the breeder to submit a translation of the original denomination or another suitable denomination.
- (6) The competent authority of each member State of the Union shall ensure that the competent authorities of the other member States of the Union are informed of matters concerning variety denominations, including in particular the submission, registration and cancellation of such denominations. Any authority may address its objections, if any, to the registration of a denomination to the authority which communicated that denomination.\*
- (7) Any person who, in a member State of the Union, offers for sale or markets reproductive or vegetative propagating material of a variety protected in that State shall be obliged to use the denomination of that variety, even after the expiration of the protection of that variety, in so far as, in accordance with the provisions of paragraph (4)(b), prior rights do not prevent such use.

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\* This provision could be supplemented by adding to Article 21 an additional subparagraph according to which the duties of the Council would include the task to "adopt rules of procedure for the mutual information of authorities of member States on variety denominations."

(8) From the date of issue of a title of protection to a breeder in a member State of the Union:

(a) the denomination of the variety may not be used, in any member State of the Union, as the denomination of another variety of the same botanical species or of a closely related species;

(b) the denomination of the variety shall, [Alternative 1: in any member State of the Union applying the provisions of the Convention to the genus or species to which the variety belongs] [Alternative 2: in that State] [Alternative 3: in any member State of the Union], be regarded as the generic name for that variety. Subject to the provisions of paragraph (4)(b), no person may, [Alternative 1: in any member State of the Union applying the provisions of the Convention to the genus or species to which the variety belongs] [Alternative 2: in that State] [Alternative 3: in any member State of the Union], apply for, or obtain, a right which could hamper the free use of the denomination.

(9) [When a variety is offered for sale or marketed],<sup>1</sup> it shall be permitted, in respect of the same product, to add a trademark or a trade name to the denomination of the variety. [If such an indication is added, the denomination must be easily recognizable.]<sup>1</sup>

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<sup>1</sup> Some delegations prefer the omission of the words in square brackets.

[End of document]