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ADMINISTRATIVE AND LEGAL COMMITTEE ADVISORY GROUP

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MATTERS CONCERNING VARIETY DESCRIPTIONS

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1. At its sixth session, held in Geneva on October 18, 2011, the Administrative and Legal Committee Advisory Group (CAJ-AG) considered that it would be appropriate to develop further guidance on variety descriptions, in a separate document, on the basis of the relevant sections in document CAJ-AG/11/6/4 "Matters arising after the grant of a breeder's right" (see CAJ-AG/11/6/7 "Report", paragraph 10).

BACKGROUND

2. Matters with regard to variety descriptions were presented in Cases 3 and 4 of Appendix 1 of Annex I to document CAJ-AG/11/6/4, which are reproduced in the Annex to this document, and in paragraphs 9 and 10 of document CAJ/60/8 "Matters arising after the grant of the breeder's right", which states as follows:

"c) Variety description

"9. Amongst the issues that might arise is the practical matter of determining whether propagating material is of a protected variety by the use of living plant material and/or plant variety descriptions in variety collections, according to the nature of the variety collection, (see document TGP/4 "Constitution and Maintenance of Variety Collections").

"10. With regard to variety descriptions, the determination of whether propagating material is of the protected variety can be less straightforward than when living plant material is held in the variety collection. For example, the propagating material may be of the protected variety, but might not correspond to the variety description in the variety collection because of:

- (i) a recalibration of the scale in the test guidelines (particularly for non-asterisked characteristics¹);
- (ii) variation due to the environmental conditions of the years of testing for characteristics that are influenced by the environment;

¹ "[I]f a characteristic is important for the international harmonization of variety descriptions (asterisked characteristics) and is influenced by the environment (most quantitative and pseudo-qualitative characteristics) [...] it is necessary to provide example varieties" in the Test Guidelines (see document TGP/7, Annex 3, Guidance Note GN 28 "Example varieties", section 3.3 (iii)).
 "1.2.3 Example varieties are important to adjust the description of the characteristics for the year and location effects, as far as possible. [...]" (see document TGP/7, Annex 3, Guidance Note GN 28 "Example varieties", section 1.2.3)

- (iii) variation due to observation by different experts;
- (iv) the use of different versions of scales (e.g. different versions of the RHS Colour Chart).

3. Guidance on variety descriptions is provided in documents TG/1/3 "General Introduction to the examination of distinctness, uniformity and stability and the development of harmonized descriptions of new varieties of plants", TGP/4 "Constitution and maintenance of variety collections", TGP/7/2 "Development of Test Guidelines" and TGP/9/1 "Examining Distinctness".

POSSIBLE MATTERS FOR FURTHER GUIDANCE ON VARIETY DESCRIPTIONS

4. On the basis of Cases 3 and 4 presented in Appendix 1 of Annex I to document CAJ-AG/11/6/4, which are reproduced in the Annex to this document, and of paragraphs 9 and 10 of document CAJ/60/8, the following matters might be considered for further guidance, with particular reference to document TGP/5 "Experience and Cooperation in DUS Testing", Section 6: UPOV Report on Technical Examination and UPOV Variety Description:

- (a) the purpose(s) of the variety description developed at the time of grant of the right (original variety description),
- (b) the status of the original variety description in relation to the verification of the conformity of plant material to a protected variety for the purposes of:
 - (i) verifying the maintenance of the variety (Article 22 of the 1991 Act, Article 10 of the 1978 Act);
 - (ii) the examination of distinctness, uniformity and stability ("DUS") of candidate varieties; and
 - (iii) the enforcement of the right.
- (c) the status of a modified variety description in relation to (a) and (b) above produced, for example, as a result of:
 - (i) a recalibration of the scale in the test guidelines (particularly for non-asterisked characteristics²);
 - (ii) variation due to the environmental conditions of the years of testing for characteristics that are influenced by the environment;
 - (iii) variation due to observation by different experts; or
 - (iv) the use of different versions of scales (e.g. different versions of the RHS Colour Chart).
- (d) situations where an error is subsequently discovered in the initial variety description.

5. The CAJ-AG may wish to identify matters that it considers to be of an administrative and legal nature, which it would wish to pursue in the first instance, and those matters of a more technical nature, which it may wish to propose that the Administrative and Legal Committee (CAJ) to invite the Technical Committee (TC) to pursue in the first instance.

² "[I]f a characteristic is important for the international harmonization of variety descriptions (asterisked characteristics) and is influenced by the environment (most quantitative and pseudo-qualitative characteristics) [...] it is necessary to provide example varieties" in the Test Guidelines (see document TGP/7, Annex 3, Guidance Note GN 28 "Example varieties", section 3.3 (iii)).

"1.2.3 Example varieties are important to adjust the description of the characteristics for the year and location effects, as far as possible. [...]" (see document TGP/7, Annex 3, Guidance Note GN 28 "Example varieties", section 1.2.3)

6. *The CAJ-AG is invited to:*

(a) consider the matters that might be considered for further guidance, as set out in paragraph 4 of this document; and

(b) identify matters that it considers to be of an administrative and legal nature, which it would wish to pursue in the first instance, and those matters of a more technical nature, which it may wish to propose that the Administrative and Legal Committee (CAJ) to invite the Technical Committee (TC) to pursue in the first instance.

[Annex follows]

ANNEX

CONTRIBUTION FROM ARGENTINA



2010 – YEAR OF THE BICENTENARY OF THE MAY REVOLUTION

Ministry of Agriculture, Livestock and Fisheries
National Seed Institute

This document explains a few cases relating to events which occurred subsequent to the granting of breeder's rights in Argentina that were settled by the National Seed Institute (INASE).

(A) EXAMPLES OF NULLITY AND CANCELLATION OF BREEDER'S RIGHTS OWING TO NON-COMPLIANCE WITH THE DISTINCTIVENESS REQUIREMENT.- (Article 6.1(a) 1978 UPOV ACT and Article 30(d) of Law No. 20.247 on Seeds and Phylogenetic Creations)

It is worth noting that in Law No. 20.247 on Seeds and Phylogenetic Creations, which is the national standard that regulates breeder's rights in Argentina, under the heading "cancellation of the property title", Article 30 makes several assumptions concerning the expiry of breeder's rights.

Article 30(d) expressly envisages cancellation of title "when the owner does not provide a live sample of the same with characteristics identical to those of the originals, at the request of the Ministry of Agriculture, Livestock and Fisheries".

Article 30(d) of Law 20.247 on Seeds and Phylogenetic Creations is drafted in such a way as to cover both the grounds for "nullity of breeder's rights" due to lack of novelty and distinctness of the protected new plant variety, which are provided for in Article 10(1) of the 1978 UPOV ACT and the grounds for cancellation of the rights protected, and Article 10(2) of the same Act, if the protected variety does not satisfy the requirements of uniformity and stability allowing the reproduction of the variety with the same characteristics defined at the time protection was granted.

[...]

◆ CASE 3: Soybean variety [considered under section (d) *Variety description* – paragraphs 22 to 24 of main document]

For a sample provided by the breeder of a soybean variety entered in the National Registry of Cultivar Property with a view to its inclusion in the Collection of Soybean Varieties, it was noted that the reaction to the peroxidase assay was "negative" and was thus the opposite to the behavior accordingly declared when it was entered as "positive", as a result of which the Technical Division apprised the breeder of the situation. This characteristic is part of the description for soybean varieties and is used to divide the said varieties into groups based on their reaction.

The breeder replied that he had checked the record and had just run the analysis again and that the correct result was "negative" and that "there has been a mistake in the original declaration, which is why he asks that the reaction to peroxidase be corrected in the original file".

The Technical Division issued a report that was sent to the Legal Division for a ruling, in which it concluded that the sample provided differed in the expression of one characteristic with regard to the original description on the basis of which title was granted. Accordingly, the applicable provision was Article 30° incl. (d) of Law No. 20.247 and concurrent passages from its Regulations, leading to the declaration of cancellation for the title to property granted.

The Legal Division wished to bring the technical report that had been prepared to the attention of the breeder.

All of the information, including the reply of the breeder, who argued inter alia that “the characteristic which differed from the original description has no bearing on agriculture and livestock and does not affect producers’ interests, and that despite the error, the variety continues to be different from the others”, was laid before the highest authority together with the foregoing technical report, for information and any action it might deem necessary.

At this point, the National Seed Board (which advised the President of INASE) stated the following opinion: “The arguments put forward by the breeder are worthy of consideration, especially when he notes that the seed coat’s reaction to the peroxidase test is an indicator used as a basis for differentiation from other varieties of the same species, which were already registered or whose registration was pending at the time of his application, and that it is not germane from an agronomic standpoint. The foregoing underscores the fact that, according to the report by the Institute, the change does not affect third party rights, given that there is no variety already registered or whose registration is pending, the only distinguishing feature of which with regard to the variety in question is the reaction to the peroxidase test.”

Consequently, the Committee members “*agreed to accept the correction in the descriptor*”. The highest authority within INASE agreed with the Committee and accepted the correction requested by the author.

(File INASE 284/99)

- ◆ CASE 4: Alfalfa variety [considered under section (d) *Variety description* – paragraphs 22 to 24 of main document]

This case involved a challenge by a breeder who owned a registered alfalfa variety and was opposed to the subsequent registration of another variety of alfalfa presented by a third party, based on the lack of difference between the two varieties.

With regard to this challenge, the applicant claimed that both the morphological and plant health differences between the two varieties must be evaluated at the time of registration of the original variety and in accordance with the descriptive characteristics, by the breeder, when the plant variety is registered and the breeder’s right therein is granted, and that if variations are produced from the original registered variety, they must be registered; otherwise, they cannot be invoked.

INASE considered that in accordance with Article 20 of the Law on Seeds, if the variations in the protected registered variety are not sufficient to consider that a new variety is involved, they will not be taken into consideration as criteria for distinctiveness, and if they are sufficient for this purpose and the owner of the registered variety wishes to exercise right of title in the material which has undergone the variations, it shall be registered as a new variety, given that the variations would lead us to believe that the said material meets the characteristics for distinctness referred to in Article 26 of Decree 2183/91.

It added that there was no doubt that the elements to be taken into consideration for verifying whether an already registered variety was different from another for which registration was sought were those which were required or were submitted when the first variety was registered. However, there was no doubt either that, when the first variety was registered, if certain information was not sought, such as that referring to behavior in the face of specific types of adversity, stemming from disease, plague or ecophysiological factors, and in accordance with the information provided by the party seeking the new registration, both varieties were differentiated precisely due to the said characteristics which were not evaluated at the outset, the sample submitted by the owner of the first variety should prima facie be accepted as valid, on the condition that it feature the characteristics on the basis of which it was registered, and the new characteristics were not incompatible with any other elements that could be derived from data available when the first variety was registered.

(INASE File 557/97)

[...]