

Technical Working Party for Ornamental Plants and Forest Trees TWO/50/9**Fiftieth Session****Victoria, British Columbia, Canada, September 11 to 15, 2017****Original:** English**Date:** August 18, 2017

REPORT ON COURT CASES DEALING WITH TECHNICAL MATTERS*Document prepared by an expert from the European Union**Disclaimer: this document does not represent UPOV policies or guidance*

The Annex to this document contains a copy of a presentation on “Technical questions dealt with in recent court cases”, prepared by an expert from the European Union, to be made at the fiftieth session of the Technical Working Party for Ornamental Plants and Forest Trees (TWO).

[Annex follows]

TECHNICAL QUESTIONS DEALT WITH IN RECENT COURT CASES

Presentation by an expert from the European Union



Technical questions dealt with in recent court cases

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Coverage:

Cases dealt with by:

1. The CPVO' Board of Appeal (BoA)
 - Can make a full review of the file
2. General Court of the European Union (GC)
 - Hears actions against decisions of the BoA
 - Reviews facts of the case as presented before the BoA
3. The Court of Justice of the European Union (CJEU)
 - Cannot rule on matters of fact but only on compliance of the Judgement's interpretation of the GC
 - Can annul the judgement of the GC
 - remits the case back to the GC or takes a final judgement



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1. Mandarin 'Tang Gold' (appeal 1)

- Candidate 'Tang Gold' declared D from reference 'Nadorcott'
- Applicant of 'Tang Gold' challenged variety description requesting the use of additional characteristics not in the TP
- Appeal dismissed (BoA):
 - The aim of the DUS test is to establish D but not to measure the distance between varieties
 - The Office has discretionary power on the use of add. characteristics
 - Further action before the GC withdrawn: BoA's decision is final



1. Mandarin 'Tang Gold' (appeal 2)

- Candidate 'Tang Gold' declared D from 'Nadorcott'
- Title holder of 'Nadorcott' was refused to take samples of 'Tang Gold' for his own investigations
- Appeal dismissed (BoA)
 - Sample taking does not fall under the right of public inspection of documents and trials
 - No further action lodged: BoA's decision is final



1. Mandarin 'Tang Gold' (appeal 3)

- Change of the technical protocol during the application procedure
- The new TP was adopted after the material was planted but before the first data were collected
- The new TP contained a characteristic which was crucial to declare 'Tang Gold' distinct from 'Nadorcott'

- BoA ruled that the first observations and not the planting of the material are decisive

- No further action lodged: BoA's decision is final



2. Apple 'Gala Schnitzer'

- PVR granted on the bases of an add. characteristic 'Fruit: width of stripes' was challenged
- The CJEU held that an application may not be rejected solely on the ground that the characteristic found during the technical examination and decisive for assessing distinctiveness was not referred to in either the TQ or in the TG
- President of the CPVO has the power to take a decision on the use of an additional characteristic.
 - No limitations to that power.
 - Legislations does not prevent the inclusion of an additional characteristic even after the formal end of the DUS trial if the data were collected when examining the variety



2. Apple 'Gala Schnitzer'

- Fruit characteristic generally to be assessed over two growing cycles
 - Char. 'Fruit: width of stripes' was at the time of granting assessed over only one growing cycle → not sufficient (CJEU agreed with the plaintiff's opinion); however,
 - BoA should have ordered a second growing cycle instead of confirming the CPVO's decision to grant the rights
- CJEU remitted to case to the CPVO:
 - CPVO has now to decide whether another year of testing has to be conducted or whether data collected during the appeal proceedings can be used
- No further action possible: Judgement is final



3. *Rhododendron simsii* 'HORT04'

- Application refused for lack of U of flower color pattern (width of the white flower margin)
- Appellant claimed successfully that:
 - color pattern is strongly influenced by the environment
 - the examiner has to observe precise growing instructions
- BoA ordered: repetition of the growing trial
- Outcome of the new examination awaited





Thank you!

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