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Seed Cooperation: Recommendations

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LIST OF ABBREVIATIONS

BDP	Bundesverband Deutscher Pflanzenzüchter German Plant Breeders' Association
BMEL	Bundesministerium für Ernährung und Landwirtschaft German Federal Ministry of Food and Agriculture
BSA	Bundessortenamt German Federal Plant Variety Office
CNSA	China National Seed Association
CNSTA	China National Seed Trade Association
DCZ	Deutsch-Chinesisches-Agrarzentrum Sino-German Agricultural Centre
DNA	deoxyribonucleic acid
DUS	Distinctness, Uniformity and Stability (Test)
GFA	GFA Consulting Group GmbH, General Agent of the German Federal Ministry of Food and Agriculture
IAK	IAK Agrar Consulting GmbH Leipzig
IAMO	Leibniz-Institut für Agrarentwicklung in Transformationsökonomien Leibniz Institute of Agricultural Development in Transition Economies
IP	Intellectual Property
IPR	Intellectual Property Rights
MARA	Chinese Ministry of Agriculture and Rural Affairs
NAK	Nederlandse Algemene Kwaliteitsdienst Dutch General Inspection Service
PVP	Plant Variety Protection
RAI	Royalty Administration International CV
STV	Saatgut-Treuhandverwaltungs GmbH Seeds Trust Administration Co. Ltd.
UPOV	Internationaler Verband zum Schutz von Pflanzenzüchtungen International Union for the Protection of New Varieties of Plants

1 Summary of the short-term expert mission

The short-term expert mission mainly comprised the participation in the *China-Netherlands-Germany Workshop on Enforcement of Plant Variety Protection (PVP)*, which was organized in the framework of the Sino-German Agricultural Centre.

The workshop was very well organized by the representatives of the involved associations; on the one hand, this relates to the agenda which was characterized by the selected topics of the presentations. On the other hand, the participants in the workshop were well selected. Approximately 70 participants – among them representatives from breeding and sales companies, lawyers, representatives of authorities and associations as well as experts – were very interested in the topics of the workshop. This became evident not only by the many requests at the end of each speech, but also by the intensive discussions with the participants during breaks as well as in the framework of group work.

The division into small groups at the end of the workshop was a very good opportunity to discuss in depth the situation of the implementation of the plant variety rights in China with the participants and to obtain a more detailed picture of the weaknesses of the existing laws and the problems in the implementation of plant variety rights in China. Overall, the mix of participants from different areas was very fruitful.

The idea of debating problems and solutions in smaller working groups should also be borne in mind for future projects. This format is productive. The small working groups were well mixed. Results have been produced which show the need for further action.

There has been a very open discussion within the working groups. The interest in a joint approach could be clearly identified.

The solutions presented from other European countries by the Royalty Administration International CV (RAI) and the Seeds Trust Administration (STV) aroused great interest among the participants and led to many requests. An organization that combines and enforces the legal interests of many breeders (variety right holders) does not exist in China so far.

Further steps to improve the enforceability of plant variety rights in China should be taken at the level of the Chinese organizing association CNSTA. In this respect, it would be a key objective for the association to provide a platform (for example in the form of a working group) for companies in order to jointly coordinate further steps and advance variety protection rights in China. In this context, jointly funded procedures could be initiated against infringers of plant variety rights. This is considered necessary as legal proceedings for the protection of varieties are very expensive and, in part, the incurring costs for the prosecution may exceed the asserted claims. The joint financing of legal disputes even allows for the possibility of conducting, in financial terms, non-economic proceedings which might ultimately be of fundamental importance.

In addition, the establishment of a working group at association level offers the advantage that experiences in prosecution and developments can be exchanged. Members can learn from each other.

2 Results and their evaluation

China is a member of the International Convention for the Protection of Plant Varieties (the so-called UPOV Convention) in the version dated 1978.

This Convention, to which 75 states have acceded worldwide, is an international treaty which guarantees a minimum standard for the protection of plant varieties in the respective member states. The UPOV was last amended in 1991. China has not yet joined this amended version. The amendment significantly extended and strengthened the legal protection of plant varieties. Among other things, the existing limitation of protection to certain plant genera and species was cancelled, the so-called breeding right (exclusive rights and exceptions) was clarified, in particular the scope of protection was extended to also include essentially derived varieties, the duration of protection was increased and an optional regulation on reproduction was introduced.

There is a national plant variety protection act, the “Regulation on the Protection of New Varieties of Plants”, which was defined on the basis of the UPOV Convention dated 1978. Therefore, the innovations brought about by the amended version of the UPOV Convention have not yet been integrated into the Chinese national plant variety protection act.

According to the Chinese experts, one particular problem is that not all species can be protected under existing Chinese national plant variety rights.

According to the Chinese experts, however, efforts are already being made to amend the act. Relevant government drafts are already in place and address this “weakness”.

Overall, there seem to be already attempts by all economic stakeholders and also by the public authorities to adapt the existing rules to the requirements for a functioning protection system and to improve the situation accordingly. In due consideration of the recommendations set out below, the protection system and the implementation of plant variety rights in China can be further improved.

Impacted plant breeders reported that the enforcement of legal claims is sometimes tricky, as far as a variety protection exists for a particular variety. The taking of evidence by obtaining infringing material faces difficulties. Plant variety protection requests special knowledge or know-how which cannot automatically be expected among local authorities or police. An information campaign or internal trainings could sensitize about plant variety protection. The installment of a respective executive special authority could be helpful in this matter.

Another problem was to prove the identity of the varieties in question. Certain test procedures are necessary for this. There are DUS test procedures in which the identity is analyzed based on the description of the variety. These procedures take a long time. Moreover, there are only a few laboratories that can carry out such analyses. Where such analyses are available, they are partially not recognized by the courts.

There are courts in China which are specialized in Intellectual Property Rights. However, judges often have no experience with plant variety rights. This is seen as a serious shortcoming.

3 Recommendations

- It is recommended that the People's Republic of China signs the UPOV Convention as it stands (1991) and fully implements the standard of plant variety rights contained in this Convention at national level.
- The government draft of the Chinese national plant variety rights act should be checked for compliance with the specifications of UPOV 1991. These examiners could be representatives of the German Federal Plant Variety Office and the Dutch NAK.
- Intellectual property rights could be complemented by plant variety rights / PVP on the level of academia and jurisdiction
- Breeding companies should be informed of the means available to them in the event of infringements of protected plant varieties. In this respect, with the help of BDP and Plantum, CNSTA will develop a "tool kit" that can be handed over to the companies.

In order to implement the above-mentioned recommendations, the following individual measures are recommended to be taken by the parties below.

List of relevant parties and brief description of the measures to be taken by them:

❖ Tasks of CNSTA

Establishment of a working group at CNSTA level.

The Chinese breeders' association should establish a working group in order to organize the "business" (seeds industry/breeders). In the framework of this working group, a guideline (or a position paper) should be drawn up describing what measures the companies may take in the case of infringements in order to exercise plant variety rights.

The guideline should be a comprehensive concept for companies whose rights have been infringed as a means to orient themselves, and should focus on:

- Clarification of infringements of plant variety rights (e. g. by means of test purchases)
- Preservation of evidence (DUS tests, comparative growing, DNA analysis)
- Enforcement of rights (catalogue of lawyers specialized in plant variety rights, courts with a special jurisdiction for variety protection disputes)
- Contact partners who can provide further information (e. g. association)

A working group at CNSTA and the exchange thus inspired between the companies will lead to a stronger solidarity among the breeders operating in China and will result in a better cooperation between the companies. At the association level, companies will have the opportunity to exchange experiences and develop joint strategies for safeguarding their plant variety rights.

This ensures that all companies are on the same level of knowledge.

Another possible measure, which can certainly be seen at a further, more advanced level, would be the creation of a joint venture by the breeding companies (organized in the association) with the objective of exercising the plant variety rights.

This joint venture should employ qualified personnel (such as agricultural engineers and lawyers) with experience in investigating and prosecuting infringements of plant variety rights who jointly implement the plant variety rights for all members of this joint venture.

Such an alliance provides a platform for all members of the joint venture; due to the bundling of issues on plant variety rights, very expensive legal disputes and exemplary legal proceedings can be jointly financed. Joint financing offers options for prosecution which do not have to be oriented towards purely economic considerations; also, non-economic procedures (for example because of small litigation values) dealing with important legal issues which, in turn, may be of prejudicial importance for future proceedings, could be financed this way.

At the level of the Chinese seed association (CNSTA) or at the level of a joint venture to be set up, farmers should be informed jointly/uniformly of rights and obligations relating to plant variety rights (by way of example, all the seeds invoices/packages could be labelled with information on variety protection and legal provisions and a national seal), as well as multiplication firms associated by contract with the breeders (i. e. holders of plant variety rights or beneficiaries). This information could be developed and implemented in a uniform manner at the association level. Common understanding on the benefits of plant variety protection is important on all levels; using certified seed ensures better yield and quality for farmers, better reputation among Chinese consumers and better recognition at international markets.

Also, information campaigns should be organized at association level to inform about "false", non-certified seeds, qualities, warnings of the economic consequences when sowing "false" seeds, yield loss, etc.

Knowledge and awareness should be developed of the requirements on officially certified seeds; how to identify it; to whom the buyer has to turn in case of suspicion of falsification (setting up of a central/online reporting point through CNSTA).

Furthermore, information campaigns should raise awareness among farmers, authorities and decision-makers of the importance of breeding progress for the Chinese economy.

The State must recognize that the right legal framework helps farmers to counteract rural depopulation and to secure food requirements.

❖ **Tasks of Plant Variety Office, Politics**

The Office for Variety Protection (MARA) should be further strengthened. The tasks of the Office should be clearly defined:

- Registration of varieties and granting of protection rights.
- It is not the task of MARA to prosecute infringements of variety rights; this is the task of the companies (private-sector activities) on the one hand, and also the task of the State or its law enforcement authorities on the other.
- Further development of a functioning DUS system (uniform variety description).
- Possibly setting up of an administrative organization (downstream authorities) to ensure seed quality.
 - As the quality of the seeds for the farmer is difficult to detect while purchasing, seed quality should be officially declared in accordance with (statutory) parameters in the process of seed multiplication and marked by appropriate documents (labels/tags) on products (→ Introduction of an official certification procedure for certified seeds).

- Furthermore, it would be the task of such an authority on behalf of the State to prosecute infringements of variety protection rights if these are known to the authority or indicated by the economy.
- Creation of a jurisdiction e.g. at China University of Political Science and Law (CUPL), that specializes in infringements of plant variety rights.
- Special jurisdiction for IP matters already exists at the judicial level, i. e. special courts dealing with industrial property rights.
- Installment of a jurisdiction specialized in legal field of plant variety rights.
- Special jurisdiction of courts should be further developed and be responsible for infringements of plant variety rights instead of regional courts.
- The judges should be specially trained for plant variety rights.
- Training of the police. Development of a brochure/guideline for regional police departments, which can be made available to the regional police officers if suspicious cases are reported.

❖ **Tasks of the Economy**

In order to enforce plant variety rights, it is imperative that the breeders consistently apply for plant variety protection for their varieties. Waiver of registration and register examination automatically leads to the loss of entitlements resulting from the property right, simply because no plant variety rights will be granted for the variety in question.

By way of example, only 8 % of the registered vegetable varieties are protected by property rights so far.

Companies should have new breeds consistently registered for the protection of varieties.

Further, laboratories should be set up to carry out tests to determine the identity of varieties. These tests, as standard procedures, should be subject to uniform criteria so that the identification of varieties can be made on a common, widely recognized basis. The purpose of this is to ensure that the test results are recognized by the courts.

The granting of plant variety rights in China shall already be free of charge, meaning that only the period between filing the application and the grant of protection remains a factor to be taken into account, when new varieties are introduced on the market.

❖ **Tasks of the State and its Authorities**

- Establishment of reference laboratories developing methods for the determination of varieties and defining them as a standard method for other (private) laboratories (task in cooperation with the economy).
- Establishment of a functioning DUS test system.
- Certification of reference laboratories so that they can be entrusted by the courts with the identification of varieties in the case of legal evidence (legally recognized certified laboratories).

- Development of a directive for sampling that meets the legal requirements, and establishment of training courses for sampling personnel, as well as issuance of certificates for sampling personnel.
- Development of solutions as to how and at which locations variety material can be stored so that it can still be used as evidence in court proceedings in order that the identity of the incriminated material (evidence) cannot be questioned.
- If necessary, reference material might be required to prove the identity of a variety (comparative cultivation). It is to be clarified who may provide this reference material. This is, on the one hand, the holder of the plant variety right who is obliged to maintain a certain variety with its specific characteristics in the context of maintenance breeding.

❖ **Tasks of BDP/Plantum**

- A follow-up meeting should be held after the implementation of the first steps (in 1-2 years). The agenda of a planned meeting with Chinese government representatives and UPOV in 2020 would offer a good opportunity to repeat such a meeting.
- In addition, regular telephone conferences should be held, for example every six months or when specific issues need to be discussed.
- Examination of the new variety rights for UPOV 91 compatibility, also with regard to arrangements for the amount of compensation/"penalties". Previous "penalties" were considered too low and not sufficiently dissuasive by many companies concerned.
- Organization of further workshops if the recommended structures are planned.