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**INTERNATIONAL UNION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS**  
Geneva

**ADMINISTRATIVE AND LEGAL COMMITTEE ADVISORY GROUP**

**Seventh Session**  
**Geneva, October 29 and 30, 2012**

REPORT

*adopted by the Administrative and Legal Committee Advisory Group*

Opening of the session

\*1. The Administrative and Legal Committee Advisory Group (CAJ-AG) held its seventh session in Geneva on October 29, 2012, starting at 2.30 p.m. and October 30, 2012, under the Chairmanship of the Vice Secretary-General of UPOV.

\*2. The list of participants is reproduced in the Annex to this document. In addition to the *ad hoc* invitations for the International Community of Breeders of Asexually Reproduced Ornamental and Fruit Varieties (CIOPORA), European Coordination Via Campesina (ECVC), and International Seed Federation (ISF), agreed by the CAJ-AG at its sixth session which was held in Geneva on October 18, 2011, (see paragraph 14 of document CAJ/66/2), the CAJ-AG had agreed by correspondence to invite the Association for Plant Breeding for the Benefit of Society (APBREBES) to attend the relevant part of the CAJ-AG to present its views on the participation of observers in the CAJ-AG.

Adoption of the agenda and of the draft schedule

\*3. The CAJ-AG approved the draft schedule for the seventh session of the CAJ-AG as set out in document CAJ-AG/12/7/ INF. On the afternoon of October 29, 2012, at 3.00 p.m., the CAJ-AG discussed the agenda items in the presence of the above mentioned observers. The CAJ-AG continued discussions at 4.30 p.m. and on October 30, 2012, without the presence of the observers.

\*4. The CAJ-AG adopted the draft agenda, after moving agenda item 6 "Explanatory Notes on Propagation and Propagating Material" (document CAJ-AG/12/7/4) after agenda item 3(b).

\*5. The CAJ-AG noted that the comments on relevant explanatory notes from: the Russian Federation (comments of October 29), CIOPORA (comments of October 4 and of October 15, 2012), European Seed Association (ESA) (comments of October 8, 2012) and ISF (comments of October 15, 2012) had been notified to the CAJ and CAJ-AG and posted in the CAJ-AG website.

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\* An asterisk next to the paragraph number indicates that the text is reproduced from the Report on the Conclusions (document CAJ-AG/12/7/6).

## DISCUSSIONS IN THE PRESENCE OF OBSERVERS

6. The CAJ-AG agreed that the report on discussions in the presence of observers would be presented in the draft full report (document CAJ-AG/12/7/7 "Report") and noted that the observers would be invited to comment on the draft of the relevant section of the report (document CAJ-AG/12/7/6 "Report on the Conclusions", paragraph 6).

### Explanatory Notes on the Definition of Breeder under the 1991 Act of the UPOV Convention (document UPOV/EXN/BRD Draft 5) (CAJ-AG agenda item 3(a))

- *Introduction by the Office of the Union*

7. The Office of the Union presented document UPOV/EXN/BRD Draft 5 and referred to the comments of the Russian Federation and ESA.

- *Presentations of views by ECV C*

8. The representative of ECV C recalled the comments submitted by ECV C on October 12, 2011, on document UPOV/EXN/BRD Draft 3 which were considered by the CAJ-AG at its meeting of October 18, 2011 and further commented as follows:

(a) the term "breeder" should be understood in a broad sense and the reference to a non-exhaustive list of examples, in paragraph 7 of document UPOV/EXN/BRD Draft 5, should not represent a limitation on that interpretation;

(b) paragraph 4 of document UPOV/EXN/BRD Draft 5 should be modified as follows "...should be understood to embrace both physical and legal persons. The term person also means various persons". He further explained that a group of persons could be the beneficiary of a breeder's right, for example, for a variety selected through a participatory selection program. He noted that the legislation of the European Union and various national legislations made specific reference to the possibility of a collective breeder's right;

(c) with regard to paragraph 4 of document UPOV/EXN/BRD Draft 5, "legal person" should be defined as any type of entity with rights and obligations, according to the legislation of the country concerned;

(d) in relation to paragraph 9 of document UPOV/EXN/BRD Draft 5, ECV C supported the explanation that a variety already cultivated and merely discovered could not be protected by a breeder's right; and

(e) beyond the amendment of the explanatory notes, he noted that the examples had been replaced by the reference to document C(Extr.)/19/2 Rev. "The Notion of Breeder and Common Knowledge", and noted that document C(Extr.)/19/2 Rev. referred to the propagation of an individual plant discovered in a population of plants and to the discovery of a mutation in a population of plants and the propagation of that mutant. In such cases, ECV C considered that varieties which were the subject of breeders' rights applications should be made subject to prior informed consent, with the benefit being shared with the person(s) having conserved and developed the resources.

### Explanatory Notes on Acts in Respect of Harvested Material under the 1991 Act of the UPOV Convention (document UPOV/EXN/HRV Draft 8) (CAJ-AG agenda item 3(b))

- *Introduction by the Office of the Union*

9. The Office of the Union presented document UPOV/EXN/BRD Draft 5 and referred to the comments of CIOPORA, ECV C and ISF.

- *Presentations of views by CIOPORA*

10. The representative of CIOPORA noted that document UPOV/EXN/HRV Draft 8 did not explain that the determination of whether material was harvested material or propagating material was mainly based on the

definitions in the national law. He encouraged UPOV to seek to develop legal definitions of the terms in order to provide clarity for breeders and to assist in the enforcement of their rights. He acknowledged the difficulty of that task in the absence of definitions in the UPOV Convention.

11. The representative noted the primary importance of propagating material in the UPOV Convention and suggested that UPOV should start by defining that term. In that regard, the representative could not support the sentence in document CAJ-AG/12/7/4 explaining that the possible development of guidance on the notion of propagation and propagating material should be consistent with the provisions for harvested material. He considered that it was necessary to work first on the definition of propagating material and then on harvested material.

12. The representative was of the opinion that document UPOV/EXN/HRV Draft 8 was not improved by removing the examples. He would be pleased to receive information about why the examples caused confusion and why the sentence “reasonable opportunity to exercise his right’ does not mean a reasonable opportunity to obtain a right, for example in another territory“ was deleted.

13. The representative noted that document UPOV/EXN/HRV Draft 8 provided clear explanations of situations when there was unauthorized use; for instance, unauthorized export of material to countries where there was no protection, no protection was available or affordable or simply the breeder had chosen not to protect the variety. He explained that breeders could not exclude countries which were not UPOV members from horticultural production or commercialization. He was of the view that, even in a situation where there was authorized export, or the breeder had exported material himself to a country where there was no protection, the breeder should be able to control the import of cut flowers or of material which was coming back into the territory where the variety was protected. However, he acknowledged that the situation he had just described was not covered in the 1991 Act of the UPOV Convention. He suggested that one solution would be to develop a wide definition of propagating material, because breeders represented by CIOPORA did not have sufficient protection in relation to the harvested material.

- *Presentation of views by ECVV*

14. The representative of ECVV was of the opinion that, beyond the amendment of the explanatory notes, in cases where farmers made use of material of agricultural crops with the aim of propagating a protected variety on their own land, the breeder’s right should cease after the first harvest because the seed or propagating material of the protected variety had not been commercialized, unless the harvested material was commercialized as seed or propagating material.

15. The representative of ECVV commented as follows in relation to conditions and limitations:

(a) he considered that breeders in ornamental, fruit and horticultural sectors had been working to create and develop varieties, the value of which were realized through harvested, rather than propagating material. In such cases, he considered that breeders used practices which went beyond the UPOV Convention. Such practices had the effect of extending the breeder’s right to cover harvested material, rather than limiting it to propagating material, independently of whether the breeder had had reasonable opportunity to exercise his right in relation to the said propagating material, as established in Article 14(2) of the 1991 Act of the Convention;

(b) new forms of direct contracts with farmers, not with propagators, were now proliferating, because breeders found it difficult to capture maximum added value in a system based on licenses for propagating material. Such contracts included “*licenses for producers or traders for harvested material*” under which royalties were established on harvested material. ECVV was of the opinion that the legal basis for those contracts was dubious and did not comply with the UPOV Convention, in particular with the principle of exhaustion of the breeder’s right. He considered that, once the material had been marketed by the breeder or with his consent, no further remuneration could be required.

(c) sophisticated contracts allowing for vertical integration into the supply chain, for example “*Closed loop marketing*” existed. Those contracts contained various commitments, including with regard to breeders’ rights licenses. ECVV considered that those types of contracts were not in line with the UPOV Convention and prevented the enjoyment of the farmer’s privilege in cases in which the optional exception contained in the 1991 Act of the Convention applied.

- *Presentations of views by ISF*

16. The representative of ISF requested the re-introduction of at least some of the illustrative examples of UPOV/EXN/HRV Draft 6, because the examples provided useful clarifications of certain aspects.

17. The representative explained that “reasonable opportunity” should not mean that rights holders should act against each and every case of illegal reproduction of the material in order to allow them to exercise their rights on harvested material coming back into a territory where the rights were valid.

18. The representative considered that the interpretation of “reasonable opportunity” should not be a matter for individual UPOV members and could lead to different decisions in national courts. He believed that harmonization in UPOV, as well as in other relevant fora, created clarity and facilitated the movement of seed. The representative requested the reintroduction of the explanation in document UPOV/EXN/HRV Draft 8 that “reasonable opportunity to exercise his right does not mean a reasonable opportunity to obtain a right”. He was of the view that it should not be necessary for the right’s holder to file for PBR in each and every country where that was possible in order to exercise the rights on harvested material.

19. In relation to the word “unauthorized”, the representative considered that the use was unauthorized if the breeder had not given his explicit authorization. For example, there would be unauthorized use when material was sold on the market as harvested material, and, subsequently, material was brought into the country where the protection was valid, as propagating material .

20. The representative noted that the above opinions could be found in the “ISF view on intellectual property” adopted in June 2012 at the ISF Annual Congress in Rio de Janeiro.

Essentially Derived Varieties under the 1991 Act of the UPOV Convention (revision) (documents CAJ-AG/12/7/3 and UPOV/EXN/EDV/2 Draft 2) (CAJ-AG agenda item 4)

- *Introduction by the Office of the Union*

21. The Office of the Union presented documents CAJ-AG/12/7/3 and UPOV/EXN/EDV/2 Draft 2 and referred to the comments from CIOPORA, ECVC and ISF.

- *Presentations of views by CIOPORA*

22. The representative of CIOPORA considered that the text in Article 14(5)(b) (i) and (iii) of the 1991 Act of the UPOV Convention was unclear and contradictory.

23. In relation to the differences between an essentially derived variety (EDV) and the initial variety, the representative reported that CIOPORA had a position paper which clarified that it was a matter for breeders to decide if a variety was an EDV. He reported that all mutants were considered to be EDVs in relation to the crops covered by CIOPORA. He explained that, if the matter of mutants could be resolved, that would solve 90% of the problems of breeders of vegetatively reproduced ornamental and fruit varieties in regard to EDV.

24. The representative reported that, at the CIOPORA “Conference on Patents and modern PBR in horticultural breeding”, held in Venlo, Netherlands, on September 20, 2012, there was consensus that the plant breeder’s right (PBR) system should protect innovation and not copying. For example, one breeder had expressed the view that the PBR system should promote the creation of the first blue geranium and not the twentieth red geranium.

25. The representative welcomed new discussions on EDVs and noted that the contribution of Japan on matters arising after the grant of the right could inspire those discussions, in particular the need to clarify that a “non-protected” EDV fell under the scope of the right of the initial variety (see document CAJ-AG/11/6/4). He noted that matters concerning “non-protected” EDV were not only relevant for breeders, but also for traders, growers and propagators, because the unauthorized propagation of an EDV would infringe the breeder’s right.

26. The representative was of the opinion that, in document UPOV/EXN/EDV/2 Draft 2, there was insufficient explanation that a “non-protected” EDV fell under the scope of protection of the initial variety. He added that it would be the decision of the breeder of the initial protected variety to protect, or not to protect, the EDV itself. For the sake of market transparency, he was of the opinion that every variety which fell under

the protection should have a denomination. He considered that each variety needed a denomination and a description. He noted that the above matters were not addressed in national laws, nor in the explanatory notes.

27. The representative was in favor of clear rules on EDV for the breeders. He considered that available court decisions were contradictory and not helpful. He also added that court procedures were very expensive, particularly for small and medium enterprises.

- *Discussion*

28. The expert of Germany noted that, although experts might reach consensus on the meaning of certain legal terms, due to the complexity of the legal systems there would be always a risk to obtain different court decisions.

29. The representative of CIOPORA agreed that, ultimately, it would be the courts that decided on particular cases involving EDV, but if there was clear guidance the courts would have less need for interpretation.

30. The Chairman noted that guidelines adopted by the Council were not binding on courts, but recalled the value of UPOV providing clarity on the provisions of the UPOV Convention, as far as that was possible.

- *Presentations of views by ECVC*

31. The representative of ECVC was of the opinion that provisions on EDVs were a limitation on the breeder's exemption. He considered that the definition of EDV in the 1991 Act of the UPOV Convention was unclear and presented problems of interpretation.

32. The representative noted that, in relation to mutations that farmers have discovered and developed in their orchards, some contractual licenses for fruit varieties contained clauses that prevented farmers from benefiting from the EDV provisions in the 1991 Act of the UPOV Convention.

33. The representative was of the view that the concept of EDVs should not be extended to cover unprotected or traditional varieties, in order to avoid the risk of creating artificial breeders' rights.

34. The representative was of the opinion that, in terms of EDV, the characteristics determining the agronomic and/or economic potential must be the most important characteristic, or at least as important as any other essential characteristics.

35. The representative was of the view that the distinctness of EDVs from initial varieties must be phenotypic and any genetic tests must be complementary. He noted that there was no correlation between genetic distance and phenotypic differentiation. He added that molecular markers told us nothing about agronomic or economic value and, therefore, he questioned the usefulness of molecular markers in the process of EDV determination.

- *Presentations of views by ISF*

36. The representative of ISF expressed its support for the revisions presented in document UPOV/EXN/EDV/2 Draft 2.

37. The representative agreed with the comment made by the representative of CIOPORA that the inclusion of an example of a "non-protected" EDV would be useful.

38. The representative referred to the following extract from the "ISF View of Intellectual Property":

"ISF is of the opinion that, for the purpose of EDV assessment, "predominant derivation" may result from:

"(i) The use of plant material of an initial variety for transformation by genetic engineering, selection or back-crossing followed by selection in the breeding process,"

"or

“(ii) The use of molecular marker data, of an initial variety for the purpose of selection of genotypes very close to the genotype of the initial variety, or in the case of hybrids for the purpose of selection of genotypes very close to the genotype of its parental line(s) or of the initial hybrid itself.”

he explained that (i), reflected the typical situation of physical use of the initial variety; the situation under (ii) referred to a case when a company obtained a complete DNA-sequence, or a molecular fingerprint, of one variety, for example of the parent line of the competitor, and then searched in another gene pool for the same fingerprint with the aim of re-creating the same hybrid or a new hybrid.

39. The representative cited the example of indirect derivation provided in document UPOV/EXN/EDV/2 Draft 2, paragraph 9: “Another example of an indirect way in which it might be possible to obtain an essentially derived variety from an initial variety could be the use of a hybrid variety to obtain a variety which is essentially derived from one of the parent lines of the hybrid.” He was of the opinion that the explanation in the document might benefit from clarification.

40. The representative supported the view expressed by the representative of CIOFORA that it was important to “protect the innovator”. He referred to the OECD/FAO Agriculture Outlook Report of 2012 which suggested that agriculture productivity needed to grow by 60 % by the year 2050. He noted that considerable innovation and genetic improvement would be necessary to reach that objective. He reported that the average cost to develop a new variety was 1 to 2 million US dollars and that such a development could take around ten years.

- *Discussion*

41. The Chairman requested the representative of ISF to comment on whether it would be necessary to develop further guidance on essentially derived varieties if document UPOV/EXN/EDV/2 Draft 2 was modified in accordance with ISF’s comments.

42. The representative of ISF explained that, in relation to whether breeders or authorities should be in charge of determining EDV, ISF was of the opinion that it should be the decision of the breeders. He added that UPOV and other organizations could assist in providing guidance, but it should be the breeders who decided those cases. The representative reported that, for several crops, ISF had set a conformity threshold above which the variety was very likely to be the EDV of another variety. He explained that the procedure for setting a threshold comprised the following: establishing a working group by several companies; those companies would provide closely-related material which they considered were EDVs, for example after backcrossing or a sister line developed from another variety; the working group would first look at the pedigree and the development to consider if a variety was an EDV of an initial variety; the molecular conformity would then be examined by the working group, and a threshold would be established. He was of the view that the ones who were involved on a daily basis in breeding the relevant crops should be setting the thresholds to decide on EDV.

43. The expert of the Netherlands understood from the intervention of the representative of ISF that a high degree of similarity between a variety and an initial variety might lead to the conclusion that it was an EDV. He noted that reference was made to molecular, genetic similarity, but wondered what the situation would be if that small molecular difference resulted in a very large phenotypic difference, compared to the initial variety. He gave the example of a breeder introducing *Phytophthora* resistance in a potato variety. The molecular difference would be very small (less than 5%), but the new variety would be very innovative and of great value.

44. The representative of ISF was of the opinion that the introduction of *Phytophthora* resistance would probably bring several other changes to the morphology and the physiology and, therefore, other phenotypic differences. If that was not the case, he said that it would be up to the industry to discuss the matter and to decide if that variety was an EDV or not. He noted that the threshold was set as a trigger for reversing the burden of proof and that such a situation would trigger discussions between the two parties, possibly followed by arbitration; ISF had a set of arbitration rules specifically for handling EDV cases - and of course if that did not help the last resource would be a court case.

45. The expert of Australia requested the views of ISF in relation to the statement in document IOM/IV/2, “Revision of the Convention”: “(ii) the derived variety must retain almost the totality of the genotype of the mother variety and be distinguishable from that variety by a very limited number of characteristics (typically by one)”.

46. The representative of ISF was of the view that it was necessary to prevent varieties which were almost indistinguishable being released on the market. He noted that, if there were a lot of differences, there was no confusion in the market. He argued that, even in the case of some simple methods leading to many phenotypic differences, there was still a lot of work involved in bringing that variety to commercialization, including the need for it to be sufficiently uniform and stable. He recalled that ISF had always been of the view that there should be a limited number of characteristics, one or very few, for a variety to be considered to be an EDV.

Explanatory Notes on Propagation and Propagating Material (document CAJ-AG/12/7/4) (CAJ-AG agenda item 6)

- *Introduction by the Office of the Union*

47. The Office of the Union presented document CAJ-AG/12/7/4 and referred to the comments from CIOPORA and ISF.

- *Presentations of views by CIOPORA*

48. The representative of CIOPORA recalled that the UPOV Convention did not contain a definition of propagating material, therefore it was very difficult for the CAJ-AG to make a recommendation for UPOV members to have a specific definition of propagating material.

49. The representative referred to document CAJ-AG/11/6/6 with a compilation of definitions from UPOV members, which illustrated that there was a wide range of definitions of propagating material. He noted that it was very difficult to achieve harmonization at the level of propagating material because that would mean that many UPOV members would need to change the definitions of propagating material in their laws.

50. The representative suggested that the only thing that UPOV could do was to give a minimum standard for the legal definition of propagating material.

51. The representative noted that, in some laws, propagating material was defined as material which was intended for multiplication. He explained that the following usually were not intended for multiplication: a cut rose, a tree, a pot plant, a cutting and an unrooted cutting. He added that the provision of a cutting to a grower for growing, firstly, a young plant and then a full plant did not authorize the grower to multiply the variety.

52. The representative noted that most people would consider that a cutting was propagating material, but if the definition of "intention" for multiplication was applied, it would not be considered propagating material, because it was not intended for propagation.

53. The representative explained that, if the notion of "intention" for multiplication was retained in a law, almost nothing was protected for crops of concern to CIOPORA, and that would not fulfill the minimum requirements of an effective protection system.

54. The representative noted that from many parts of a plant, an entire plant could be produced, but it would need to be true-to-type. To his knowledge, from an apple, one could not make an apple tree that would be true-to-type; therefore an apple was harvested material, because it could not produce a true-to-type apple tree. However, he considered that, if in the future, somebody could propagate a true-to-type apple from an apple, then it would be propagating material.

- *Discussion*

55. The Chairman cited an extract from the former Model Law reproduced in document CAJ-AG/12/7/4 "Their end-use is a matter of fact but also of intention on the part of those concerned (producer, seller, buyer, user)" and clarified that the intention of the supplier was not the only relevant aspect, but also the intention of the producer, seller, buyer and user. He noted that the purpose of that text was to provide a broader context of what was meant by intention. He explained that even though one party might have not anticipated that the material would be used for propagation, another concerned party might have the intention to use the material for propagation.

56. The representative of CIOPORA agreed that, if the grower had bought a cutting with the intention to use it for propagation, the breeder could act against the grower after the sale had taken place because it would, in fact, infringe the breeder's right. He noted that intellectual property was not only about infringement but also an exclusive right to license and if a cutting was not seen as propagating material from the beginning you could not license it because you did not know the intention of the other party before you signed the contract. He suggested, when developing guidance on the notion of propagating material, to take into consideration not only the enforcement part but also the contractual licensing part.

- *Presentations of views by ISF*

57. The representative of ISF expressed its support of the development of guidance on the notion of propagating material.

58. The representative noted that, in the document prepared by the Office of the Union (document CAJ-AG/11/6/6), there was a range of different definitions of propagating material in national laws.

59. The representative recalled that ISF's preference was that any description of propagating material would contain wording like "can be used for" or "capable of". He was in favor of a broad definition of propagating material that would provide efficient protection to the innovator and noted that all kinds of techniques were available that enable the creation of propagating material from plants.

*Discussion*

60. The expert of Australia asked why breeders were happy to determine what was, or what was not, an EDV, but were not happy to determine what was propagating material.

61. The representative of ISF explained that he would be willing to consider that approach further.

62. The expert of Australia clarified that his question was intended to understand the different approaches and that it did not mean that he accepted that breeders could determine what an EDV was.

63. The representative of ISF proposed the inclusion of the words "can be" or "capable of" in the guidance because it could assist competent authorities in the implementation and interpretation of their laws.

Participation of Observers in the CAJ-AG (document CAJ-AG/12/7/5) (CAJ-AG agenda item 7)

- *Introduction by the Office of the Union*

64. The Office of the Union presented document CAJ-AG/12/7/5.

- *Presentation of views by APBREBES*

65. The representative of APBREBES noted that her comments would deal more with matters of observer status in all UPOV bodies and not just in the CAJ-AG.

66. The representative shared APBREBES views' that deliberations in all UPOV bodies were enhanced by the input from all those that were affected by, and interested in, plant variety protection. She noticed that stakeholder groups were underrepresented or often not represented, for instance, organizations representing farmers and, in particular, smallholder farmers.

67. The representative encouraged UPOV and its bodies to actively seek a higher level of participation from farmers' organizations and from civil society in general.

68. In relation to observer status in the CAJ-AG, after reflecting on APBREBES' initial proposal for a permanent status for particular stakeholder groups, she said that the new proposal of APBREBES would be to extend observer status that existed in the CAJ to the CAJ-AG. She noted that the new proposal would be simpler, more efficient and less bureaucratic.



69. The representative referred to the questions in document CAJ-AG/12/7/5 and noted that, if a decision was taken to extend observer status from the CAJ to the CAJ-AG, answers to those questions would not be necessary.

70. The representative made reference to APBREBES' initial proposal and commented on the questions in document CAJ-AG/12/7/5 as follows:

“(a) the number of permanent places for observers;

The number of places should be considered as a minimum and not as a maximum. The burden should then be on the UPOV body itself to actively seek the participation of underrepresented groups. Of interest particularly to APBREBES was to have permanent representation for the organizations that represent the interests of farmers and smallholder farmers, and civil society in general.

“(b) the definition of the stakeholder groups;”

APBREBES would like to see that organizations, which represented the interests of smallholder farmers and farmers, be represented by permanent places in the CAJ-AG.

“(c) the basis on which it would be decided that an observer organization would represent a stakeholder group;”

In terms of the basis upon which it would be decided which organization would represent a stakeholder group, APBREBES view was that, if there were not a limited number of places, the basis would be the expression of interest by that organization. The burden should be on UPOV to actually seek and actively solicit that kind of input.

“(d) the basis on which to resolve situations where individual observer organizations from within a stakeholder group wished to be represented individually;”

In terms of how to resolve situations when there were multiple organizations wanting to represent a stakeholder group, the practice in other intergovernmental bodies was that those organizations were allowed to determine that among themselves. The places could be interchangeable according to the subject matter that was being discussed. APBREBES would recommend that the CAJ-AG followed the practices in other intergovernmental bodies.

“(e) the basis for supplementing the permanent places on an *ad hoc* basis.”

In relation to the question on the basis for supplementing permanent places, APBREBES noted that civil society organizations had a good history of coordinating among themselves and organizing representation.

## DISCUSSIONS WITHOUT THE PRESENCE OF OBSERVERS

### Explanatory Notes

#### *Explanatory Notes on the Definition of Breeder under the 1991 Act of the UPOV Convention*

\*71. The CAJ-AG considered documents UPOV/EXN/BRD Draft 5 and CAJ-AG/12/7/2, the comments as set out in paragraph 5 and the views expressed by ECVC.

\*72. The CAJ-AG agreed the following concerning document UPOV/EXN/BRD Draft 5:

Paragraph 4	to read as follows: “The term ‘person’ in Article 1(iv) of the 1991 Act of the UPOV Convention should be understood to embrace both physical and legal persons. <u>The term person refers to one or more persons. For the purpose of this document, legal person refers to an entity with rights and obligations in accordance with the legislation of the member of the Union concerned.</u> ”
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Paragraph 9	to read as follows: "With regard to 'discovered and developed', a discovery might be the initial step in the process of breeding a new variety. However, the term 'discovered and developed' means that a mere discovery, or find, would not entitle the person to obtain a breeder's right. <u>Development of plant material into a variety is necessary for a breeder to be entitled to obtain a breeder's right. A person would not be entitled to protection of an existing variety that was discovered and propagated unchanged by that person.</u> "
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\*73. The CAJ-AG agreed that, on the basis of the above amendments, the Office of the Union should prepare a revised version of document UPOV/EXN/BRD Draft 5, to be considered by the CAJ at its sixty-seventh session, to be held in Geneva on March 21, 2013.

\*74. In relation to the views expressed by ECV, the CAJ-AG agreed that it would not be appropriate to include reference to "prior informed consent" and "access to genetic-resources and benefit-sharing" in Explanatory Notes under the UPOV Convention.

*Explanatory Notes on Acts in Respect of Harvested Material under the 1991 Act of the UPOV Convention*

\*75. The CAJ-AG considered documents UPOV/EXN/HRV Draft 8 and CAJ-AG/12/7/2, the comments as set out in paragraph 5 and the views expressed by CIOFORA, ECV and ISF.

\*76. The CAJ-AG agreed the following concerning document UPOV/EXN/HRV Draft 8:

Paragraph 11	to read as follows: "Where a member of the Union decides to incorporate this optional exception into its legislation, 'unauthorized use' would not refer to acts that were covered by the optional exception. Subject to Articles 15 (1) and 16, 'unauthorized use' would refer to acts that were not covered by the optional exception in the legislation of the member of the Union concerned. <u>In particular, 'unauthorized use' would refer to acts that did not comply with the terms and conditions of the optional exception.</u> "
Paragraph 12	to read as follows: "The provisions under Article 14(2) of the 1991 Act mean that breeders can only exercise their rights in relation to the harvested material if they have not <del>been able</del> had a 'reasonable opportunity' to exercise their rights in relation to the propagating material."
Paragraph 13	to read as follows: "The term 'his right', in Article 14(2) of the 1991 Act, relates to the breeder's right in the territory concerned (see paragraph 6 above): a breeder can only exercise his right in that territory. Thus, 'exercise his right' in relation to the propagating material means to exercise his right in relation to the propagating material <i>in the territory concerned</i> . <del>It is a matter for each member of the Union to determine what constitutes "reasonable opportunity" to exercise his right.</del> "

\*77. The CAJ-AG agreed that the comments made by ECV would not be relevant for inclusion in the Explanatory Notes on Acts in Respect of Harvested Material.

\*78. The CAJ-AG agreed that on the basis of the above amendments, the Office of the Union should prepare a revised version of document UPOV/EXN/HRV Draft 8, to be considered by the CAJ at its sixty-seventh session, to be held in Geneva on March 21, 2013. The CAJ-AG further agreed to propose to the CAJ that the CAJ-AG be invited to immediately start work on illustrative examples for a future possible revision. The CAJ-AG also agreed to propose to the CAJ that the CAJ-AG be invited to consider the development of guidance on "reasonable opportunity".

Explanatory Notes on Propagation and Propagating Material

\*79. The CAJ-AG considered document CAJ-AG/12/7/4, the comments as set out in paragraph 5 and the presentations and views expressed by CIOFORA and ISF.

\*80. The CAJ-AG agreed that the Office of the Union should prepare a draft “Explanatory Note on Propagation and Propagating Material Under the 1991 Act of the UPOV Convention” for consideration at its eighth session. The basis of the Explanatory Note would be:

(a) to explain forms of material that could be propagating material, including an explanation on the basis of document UPOV/EXN/HRV Draft 8 that “some forms of harvested material have the potential to be used as propagating material”, in a similar way to that explained in the “Model Law on the Protection of New Varieties of Plants” (“Model Law” - UPOV Publication No. 842), Section 1.19;

(b) to provide a non-exhaustive list of factors that might be considered in deciding whether material is propagating material, such as:

- (i) whether the material has been used to propagate the variety;
- (ii) whether the material is capable of producing entire plants of the variety;
- (iii) whether there has been a custom/practice of using the material for that purpose;
- (iv) the intention on the part of those concerned (producer, seller, buyer, user); and
- (v) whether the plant material is suitable for reproducing the variety unchanged.

\*81. It was noted that the list above was a tentative, initial list that would require further consideration. It was also agreed that, in the preparation of the draft Explanatory Note by the Office of the Union, CIOFORA and ISF should be invited to provide additional factors.

Explanatory Notes on Essentially Derived Varieties under the 1991 Act of the UPOV Convention (revision)

\*82. The CAJ-AG considered documents CAJ-AG/12/7/3 and UPOV/EXN/EDV/2 Draft 2, the comments as set out in paragraph 5 and the views expressed by CIOFORA, ECVC and ISF.

*Revision of the “Explanatory Notes on Essentially Derived Varieties Under the 1991 Act of the UPOV Convention” (document UPOV/EXN/EDV/2 Draft 2)*

\*83. The CAJ-AG agreed the following concerning document UPOV/EXN/EDV/2 Draft 2:

Figure 4	First box to read as follows: Initial Variety “A” (NOT PROTECTED) <del>bred and protected</del> by Breeder 1
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\*84. The CAJ-AG agreed that, on the basis of the text provided by ISF (document CAJ-AG/12/7/3, paragraph 8, reproduced below) with suitable amendments, the Office of the Union should prepare a text on the possibility to use molecular marker data information of an initial variety to obtain essentially derived varieties to be considered for by the CAJ-AG at its eighth session, to be held in October 2013.

“The collection of molecular data from the initial variety and the subsequent application of the obtained DNA profiles with the explicit intention to select for similar genotypes in a particular population, which is mostly related to the initial variety, may also be regarded as predominant derivation from the initial variety. Therefore, for the purpose of EDV assessment, “predominant derivation” may result from: i) The use of – mainly- the plant material of an initial variety for selection or (back) crossing followed by selection in the breeding process, or ii) The use of molecular marker data, collected from an initial variety, for the purpose of selection of genotypes close or similar to the genotype of the initial variety, or in the case of hybrids, close or similar to the genotype of its parent lines.”

\*85. The CAJ-AG agreed that on the basis of the above amendments, the Office of the Union should prepare a revised version of document UPOV/EXN/EDV/2 Draft 2, to be considered by the CAJ at its sixty-seventh session, to be held in Geneva on March 21, 2013.

*The relationship between Article 14(5)(b)(i) and (iii) of the 1991 Act of the UPOV Convention*

\*86. CAJ-AG agreed that, on the basis of the explanatory note 6(ii) on Article 5 “Effects of the Right Granted to the Breeder” presented in document IOM/IV/2 (document CAJ-AG/12/7/3, paragraph 11, reproduced below), the Office of the Union should prepare draft guidance on the relationship between

Article 14(5)(b)(i) and (iii) of the 1991 Act of the UPOV Convention for consideration by the CAJ-AG at its eighth session, to be held in October 2013.

[Extract of the explanatory notes on Article 5 “Effects of the Right Granted to the Breeder” presented in document IOM/IV/2, “Revision of the Convention”]

“5. Paragraph 3. – This paragraph introduces a new concept into the law of plant variety protection: the exploitation – but not the breeding – of a variety that is essentially derived from a protected variety would be subject to the right granted to the breeder of the latter variety (‘dependence’).

“6. The Committee has not yet taken a final position on the question whether the word ‘single’ would be inserted or omitted; at the present stage of the discussions, there seems to be general agreement on the fact that the following conditions should be met for there to be dependence:

“[...]

“(ii) the derived variety must retain almost the totality of the genotype of the mother variety and be distinguishable from that variety by a very limited number of characteristics (typically by one)

“[...]

*Matters concerning essentially derived varieties arising after the grant of a breeder’s right*

\*87. The CAJ-AG noted the presentation by the Delegation of the European Union made to the CAJ-AG at its seventh session.

\*88. The CAJ-AG agreed that, at an appropriate future meeting of the CAJ-AG, the Delegations of Australia, Brazil and the European Union and other members of the Union would be invited to make presentations on their systems concerning essentially derived varieties.

Matters arising after the grant of a breeder’s right

\*89. The CAJ-AG considered document CAJ-AG/11/6/4.

\*90. The CAJ-AG considered that it would be appropriate to develop further guidance in separate documents for the following matters, on the basis of the relevant sections in document CAJ-AG/11/6/4:

- (a) Cancellation of the breeder’s right;
- (b) Nullity of the breeder’s right;
- (c) Variety denominations; and
- (d) Variety descriptions.

\*91. The CAJ-AG agreed that the Office of the Union should seek clarification on the issues that the European Union and the Russian Federation intended to be covered in relation to possible further guidance on provisional protection.

\*92. The CAJ-AG agreed that the Office of the Union should seek clarification on the issues that the Russian Federation intended to be covered in relation to possible further guidance on filing of applications and enforcement of breeders’ rights.

\*93. In the light of other developments and matters considered by relevant guidance [already] under consideration the CAJ-AG agreed not to continue discussions on:

- (e) Material covered by the breeder’s right;
- (f) Essentially derived varieties;
- (g) Exhaustion of the breeder’s right;
- (h) Providing information on varieties covered by the breeder’s right.

Matters referred by the CAJ to the CAJ-AG for consideration since the sixth session of the CAJ-AG

\*94. The CAJ-AG considered document CAJ-AG/12/7/5.

\*95. With regard to the request of the CAJ to consider the suggestion to include a limited number of permanent places for observers representing various stakeholder groups such as farmers, breeders and certain other observer non-governmental organizations (NGOs) in the CAJ-AG and to allow the stakeholder groups to coordinate on the persons to occupy those places at each session of the CAJ-AG, according to the matters under consideration, the CAJ-AG noted that document UPOV/INF/7 "Rules of Procedure of the Council", Rules 36 and 20, states as follows:

"Rule 36: Establishment of Committees

"(1) The Council may set up permanent or temporary committees to prepare its work or to examine technical, legal or any other questions of interest to UPOV.

"(2) When setting up any committees, the Council shall establish the terms of reference of that committee and shall determine whether and to what extent observers will be invited to the meetings of the committee; the Council may, at any time, decide changes in the initial terms of reference and in the decision concerning observers."

"Rule 20: Observers and Experts

"(1) Observers and experts may take part in debates at the invitation of the chairman.

"(2) They may not submit proposals, amendments or motions, and have no right to vote."

\*96. The CAJ-AG agreed that it, in that context, the CAJ-AG should seek further guidance from the CAJ before making a proposal.

Date and program for the eighth session

\*97. Subject to approval by the Administrative and Legal Committee (CAJ) at its sixty-seventh session, to be held on March 21, 2013, the CAJ-AG agreed the following program for its eighth session, to be held in October 2013:

1. Opening of the session
2. Adoption of the agenda
3. Explanatory Notes on Essentially Derived Varieties under the 1991 Act of the UPOV Convention (revision)
4. Explanatory Notes on Propagation and Propagating Material
5. Possible revision on cancellation of the breeder's right
6. Possible revision on Nullity of the breeder's right
7. Possible revision on Variety denominations
8. Possible revision on Variety descriptions
9. Matters arising after the grant of a breeder's right on: provisional protection, filing of applications and enforcement of breeders' rights.
10. Matters referred by the CAJ to the CAJ-AG for consideration since the seventh session of the CAJ-AG
11. Date and program for the ninth session

\*98. The CAJ-AG noted that subject to any changes that the CAJ might agree at its sixty-seventh session, to be held on March 21, 2013, the sixty-eighth session of the CAJ would be held on October 21 and 22, 2013, and that the eighth session of the CAJ-AG would be held on October 25, 2013.

99. *This report was adopted by correspondence.*

[Annex follows]

ANNEXE / ANNEX / ANLAGE / ANEXO

LISTE DES PARTICIPANTS / LIST OF PARTICIPANTS /  
TEILNEHMERLISTE / LISTA DE PARTICIPANTES

(dans l'ordre alphabétique des noms français des membres/  
in the alphabetical order of the names in French of the members/  
in alphabetischer Reihenfolge der französischen Namen der Mitglieder/  
por orden alfabético de los nombres en francés de los miembros)

I. MEMBRES / MEMBERS / VERBANDSMITGLIEDER / MIEMBROS

ALLEMAGNE / GERMANY / DEUTSCHLAND / ALEMANIA



Michael KÖLLER, Referent, Ministerium für Ernährung, Landwirtschaft und Verbraucherschutz, Wilhelmstrasse 54, 10117 Berlin  
(tel.: +49 30 18529 4044 e-mail: Michael.Koeller@bmelv.bund.de)



Barbara SOHNEMANN (Frau), Justiziarin, Leiterin, Rechtsangelegenheiten, Sortenverwaltung, Gebühren, Bundessortenamt, Postfach 610440, 30604 Hannover  
(tel.: +49 511 95665624 fax: +49 511 95669600  
e-mail: barbara.sohnemann@bundessortenamt.de)

AUSTRALIE / AUSTRALIA / AUSTRALIEN / AUSTRALIA



Doug WATERHOUSE, Chief, Plant Breeder's Rights Office, IP Australia, 47 Bowes Street, Phillip ACT 2606  
(tel.: +61 2 6283 7981 fax: +61 2 6283 7999 e-mail:  
doug.waterhouse@ipaustralia.gov.au)

BELGIQUE / BELGIUM / BELGIEN / BÉLGICA



Françoise DE SCHUTTER (Mme), Attachée, Office belge de la Propriété intellectuelle (OPRI), 16, bvd Roi Albert II, B-1000 Bruxelles  
(tel.: 32 2 277 9555 e-mail: francoise.deschutter@economie.fgov.be)

BOLIVIE (ÉTAT PLURINATIONAL DE) / BOLIVIA (PLURINATIONAL STATE OF) /  
BOLIVIEN (PLURINATIONALER STAAT) / BOLIVIA (ESTADO PLURINACIONAL DE)



Sergio Rider ANDRADE CÁCERES, Director Nacional de Semillas del INIAF, Instituto Nacional de Innovación Agropecuaria y Forestal (INIAF), Avenida 6 de agosto, Nro. 2170, Edificio Hoy, Mezanine, 4793 La Paz  
(tel.: +591 2 2441153 fax: +591 2 2441153 e-mail: rideran@yahoo.es)



Freddy CABALLERO LEDEZMA, Responsable: Unidad de Fiscalización y Registros, Fiscalización y Registros de Semillas, Instituto Nacional de Innovación Agropecuaria y Forestal (INIAF), Capitán Ravelo No. 2329, Belisario Salinas, No. 490, 4793 La Paz  
(tel.: +591 2 2441153 fax: +591 2 2441153 e-mail: calefred@yahoo.es)

Luis Fernando ROSALES LOZADA, Primer Secretario, Misión Permanente, 139, rue de Lausanne, 1202 Ginebra  
(tel.: +41 22 908 0717 fax: +41 22 908 0722 e-mail: fernando.rosales@bluewin.ch)

BRÉSIL / BRAZIL / BRASILIEN / BRASIL



Helcio CAMPOS BOTELHO, Director, Department of Intellectual Property and Agricultural Technology, Secretariat of Agricultural Development and Cooperativism, Ministério da Agricultura, Livestock and Food Supply, Esplanada dos Ministérios, Bloco 'D', Anexo A, Sala 233, Brasilia, D.F.70043-900  
(tel.: +55 61 3218 5202 fax: +55 61 3321 4524 e-mail: helcio.botelho@agricultura.gov.br)



Luís Gustavo ASP PACHECO, Federal Agricultural Inspector, National Plant Variety Protection Office (SNPC), Ministry of Agriculture, Livestock and Food Supply, Esplanada dos Ministerios, Bloco 'D', Anexo A, sala 250, CEP 70043-900 Brasilia , D.F.  
(tel.: +55 61 3218 2461 fax: +55 61 3224 2842 e-mail: luis.pacheco@agricultura.gov.br)

CANADA / CANADA / KANADA / CANADÁ



Sandy MARSHALL (Ms.), Senior Policy Specialist, Plant Breeders' Rights Office, Canadian Food Inspection Agency (CFIA), 59 Camelot Drive, Ottawa Ontario K1A 0Y9  
(tel.: +1 613 773 7134 fax: +1 613 773 7261 e-mail: sandy.marshall@inspection.gc.ca)

CHILI / CHILE / CHILE / CHILE



Jaime IBIETA S., Director, División Semillas, Servicio Agrícola y Ganadero (SAG), Ministerio de Agricultura, Avda. Presidente Bulnes 140, piso 2, Santiago de Chile  
(tel.: +56 2 345 1561 fax: +56 2 697 2179 e-mail: jaime.ibieta@sag.gob.cl)



CHINE / CHINA / CHINA / CHINA



LV Bo, Director, Division of Variety Management, Bureau of Seed Management, Ministry of Agriculture, No. 11 Nongzhanguannanli, Beijing  
(tel.: +86 10 59193150 fax: +86 10 59193142 e-mail: lvbo@agri.gov.cn)



Xiaohong YAO (Mrs.), Deputy Division Director, State Intellectual Property Office of P.R. China, International Cooperation Department SIPO, 6 Xitucheng Road Haiden District, 100088 Beijing  
(tel.: +86 10 59193150 fax: +86 10 59193142 e-mail: yaoxiaohong@sipo.gov.cn)

COLOMBIE / COLOMBIA / KOLUMBIEN / COLOMBIA



Ana Luisa DÍAZ JIMÉNEZ (Sra.), Directora Técnica de Semillas, Dirección Técnica de Semillas, Instituto Colombiano Agropecuario (ICA), Carrera 41 No. 17-81, Piso 4°, Bogotá D.C.  
(tel.: +57 1 3323700 fax: +57 1 3323700 e-mail: ana.diaz@ica.gov.co)

DANEMARK / DENMARK / DÄNEMARK / DINAMARCA



Gerhard DENEKEN, Head, Department of Variety Testing, The Danish AgriFish Agency (NaturErhvervstyrelsen), Ministry of Food, Agriculture and Fisheries, Teglvaerksvej 10, Tystofte, DK-4230 Skaelskoer  
(tel.: +45 5816 0601 fax: +45 58 160606 e-mail: gde@naturerhverv.dk)

ESPAGNE / SPAIN / SPANIEN / ESPAÑA



Luis SALAICES, Jefe de Área del Registro de Variedades, Oficina Española de Variedades Vegetales (OEVV), Ministerio de Agricultura, Alimentación y Medio Ambiente, Calle Alfonso XII, No. 62, 2a Planta, E-28014 Madrid  
(tel.: +34 91 3476712 fax: +34 91 3476703 e-mail: luis.salaices@magrama.es)

ESTONIE / ESTONIA / ESTLAND / ESTONIA



Renata TSATURJAN (Ms.), Chief Specialist, Plant Production Bureau, Ministry of Agriculture, 39/41 Lai Street, EE-15056 Tallinn  
(tel.: +372 625 6507 fax: +372 625 6200 e-mail: renata.tsaturjan@agri.ee)

ÉTATS-UNIS D'AMÉRIQUE / UNITED STATES OF AMERICA /  
VEREINIGTE STAATEN VON AMERIKA / ESTADOS UNIDOS DE AMÉRICA



Kitisi SUKHAPINDA (Ms.), Patent Attorney, Office of Policy and External Affairs, United States Patent and Trademark Office (USPTO), Madison Building, West Wing, 600 Dulany Street, MDW 10A30, Alexandria VA 22313  
(tel.: +1 571 272 9300 fax: +1 571 273 0085 e-mail: kitisi.sukhapinda@uspto.gov)



Paul M. ZANKOWSKI, Commissioner, Plant Variety Protection Office, United States Department of Agriculture (USDA), National Agricultural Library (NAL), 10301, Baltimore Ave., Beltsville MD 20705  
(tel.: +1 301 504 5518 fax: +1 301 504 5291 e-mail: paul.zankowski@ams.usda.gov)



Minna MOEZIE (Ms.), Patent Attorney, Office of External Affairs, U.S. Patent and Trademark Office (USPTO), U.S. Department of Commerce, United States Patent and Trademark Office (USPTO), Department of Commerce, P.O. Box 1450, Alexandria VA 22313-1450  
(tel.: +1 571 272 9300 fax: +1 571 273 0085 e-mail: minna.moezie@uspto.gov)



Ruihong GUO (Ms.), Associate Administrator, Agricultural Marketing Service, 1400 Independence Avenue, SW, Room 3071, Washington D.C. D.C.  
(tel.: 202 720 5115 fax: 202 720 8477 e-mail: ruihong.guo@ams.usda.gov)



Karin L. FERRITER (Ms.), Intellectual Property Attaché, United States Mission to the WTO, 11, route de Pregny, 1292 Chambesey  
(tel.: +41 22 749 5281 e-mail: karin\_ferriter@ustr.eop.gov)

FRANCE / FRANCE / FRANKREICH / FRANCIA



Mlle Virginie BERTOUX, Ingénieur GEVES, Instance nationale des obtentions végétales (INOV), Groupe d'étude et de contrôle des variétés et des semences (GEVES), 25 Rue Georges Morel, CS 90024  
(tel.: +33 2 41 22 86 49 fax: +33 2 41 22 86 01 e-mail: virginie.bertoux@geves.fr)

HONGRIE / HUNGARY / UNGARN / HUNGRÍA



Ágnes Gyözöné SZENCI (Mrs.), Senior Chief Advisor, Agricultural Department, Ministry of Agriculture and Rural Development, Kossuth Tér. 11, H-1055 Budapest, Pf. 1  
(tel.: +36 1 7953826 fax: +36 1 7950498 e-mail: gyozone.szenci@vm.gov.hu)



Szabolcs FARKAS, Head, Patent Department, Hungarian Intellectual Property Office (HIPO), 2, Garibaldi utca, H-1054 Budapest  
(tel.: +36 1 4745902 fax: +36 1 474 5596 e-mail: szabolcs.farkas@hipo.gov.hu)



Katalin MIKLO (Ms.), Head, Agriculture and Plant Variety Protection Section, Hungarian Intellectual Property Office, Garibaldi U. 2., H-1054 Budapest  
(tel.: 36 1 474 5898 fax: 36 1 474 5850 e-mail: katalin.miklo@hipo.gov.hu)

IRLANDE / IRELAND / IRLAND / IRLANDA



Donal COLEMAN, Controller of Plant Breeders' Rights, Department of Agriculture, National Crops Centre, Backweston Farm, Leixlip, Co. Kildare  
(tel.: +353 1 630 2902 fax: +353 1 628 0634 e-mail: donal.coleman@agriculture.gov.ie)

ISRAËL / ISRAEL / ISRAEL / ISRAEL



Omar ZEIDAN, Chairman of PBR Council, Deputy Director Extension Services, Ministry of Agriculture, P.O. Box 28, Beit-Dagan 50250  
(tel.: +972 3 9485948 fax: +972 3 9485668 e-mail: ozaidan@shaham.moag.gov.il)

Michal GOLDMAN (Mrs.), Registrar, Plant Breeder's Rights Council, Ministry of Agriculture, P.O. Box 30, Beit-Dagan 50250  
(tel.: +972 3 9485902 fax: +972 3 9485903 e-mail: michalg@moag.gov.il)

JAPON / JAPAN / JAPAN / JAPÓN



Takashi UEKI, Director, Plant Variety Protection Office, New Business and Intellectual Property Division, Food Industry Affairs Bureau, Ministry of Agriculture, Forestry and Fisheries, 1-2-1 Kasumigaseki, Chiyoda-ku, 100-8950 Tokyo  
(tel.: +81 3 6738 6444 fax: +81 3 3502 5301 e-mail: takashi\_ueki@nm.maff.go.jp)



Akiko NAGANO (Ms.), Associate Director, New Business and Intellectual Property Division Food Industry Affairs Bureau Ministry of Agriculture, Forestry and Fisheries (MAFF),  
(tel.: +81-3-6738-6444 fax: +81-3-3502-5301 e-mail: akiko\_nagano@nm.maff.go.jp)

KENYA / KENYA / KENIA / KENYA

Simon Mucheru MAINA, Senior Inspector, Kenya Plant Health Inspectorate Service (KEPHIS), P.O. Box 8145, 30100 Eldoret  
(tel.: +254 722 427 718 e-mail: smaina@kephis.org)

LETONIE / LATVIA / LETTLAND / LETONIA



Sofija KALININA (Mrs.), Senior Officer, Seed Control Department, Division of Seed Certification and Plant Variety Protection, State Plant Protection Service, Lielvārdes iela 36/38, LV-1006 Riga  
(tel.: +371 673 65568 fax: +371 673 65571 e-mail: sofija.kalinina@vaad.gov.lv)

LITUANIE / LITHUANIA / LITAUEN / LITUANIA



Arvydas BASIULIS, Deputy Director, State Plant Service under the Ministry of Agriculture of the Republic of Lithuania, Ozo 4A, LT-08200 Vilnius  
(tel.: +370 5 237 5611 fax: +370 5 273 0233 e-mail: arvydas.basiulis@vatzum.lt)



Sigita JUCIUVIENE (Mrs.), Head, Division of Plant Variety, Registration and Legal Protection, State Plant Service under the Ministry of Agriculture of the Republic of Lithuania, Ozo St. 4a, LT-08200 Vilnius  
(tel.: +370 5 234 3647 fax: +370 5 237 0233 e-mail: sigita.juciuviene@vatzum.lt)

MAROC / MOROCCO / MAROKKO / MARRUECOS



Amar TAHIRI, Chef de la Division du contrôle des semences et plants, Office National de Sécurité sanitaire des Produits alimentaires (ONSSA), Ministère de l'Agriculture et de la Pêche Maritime, Rue Hafiane Cherkaoui, B.P. 1308, Rabat-Instituts  
(tel.: +212 537 771085 fax: +212 537 779852 e-mail: amar.tahiri@gmail.com)

MEXIQUE / MEXICO / MEXIKO / MÉXICO



Enriqueta MOLINA MACÍAS (Srta.), Directora General, Servicio Nacional de Inspección y Certificación de Semillas (SNICS), Secretaría de Agricultura, Ganadería, Desarrollo Rural, Pesca y Alimentación (SAGARPA), Av. Presidente Juárez, 13, Col. El Cortijo, Tlalnepantla, Estado de México 54000  
(tel.: +52 55 3622 0667 fax: +52 55 3622 0670 e-mail: nriqueta.molina@sagarpa.gob.mx)



Eduardo PADILLA VACA, Subdirector, Registro y Control de Variedades Vegetales, Servicio Nacional de Inspección y Certificación de Semillas (SNICS), Av. Presidente Juárez 13, Col. El Cortijo, 54000 Tlalnepantla, Estado de México  
(tel.: +52 55 3622 0667 fax: +52 55 3622 0670 e-mail: eduardo.padilla@snics.gob.mx)

NORVÈGE / NORWAY / NORWEGEN / NORUEGA

Marianne SMITH (Ms.), Senior Executive Officer, Royal Ministry of Agriculture, P.O. Box 8007 Dep., N-0030 Oslo  
(tel.: +47 22 24 9264 fax: +47 22 24 9559 e-mail: marianne.smith@lmd.dep.no)



Tor Erik JØRGENSEN, Head of Section, Norwegian Food Safety Authority, Felles postmottak, P.O. Box 383, N-2381 Brumunddal  
(tel.: +47 6494 4393 fax: +47 6494 4411 e-mail: tor.erik.jorgensen@mattilsynet.no)



Bell Batta TORHEIM (Mrs.), Programme Coordinator, The Development Fund, Grensen 9b, Miljøhuset, N-0159 Oslo  
(tel.: +47 23 109600 fax: +47 23 109601 e-mail: bell@utviklingsfondet.no)

NOUVELLE-ZÉLANDE / NEW ZEALAND / NEUSEELAND / NUEVA ZELANDIA



Christopher J. BARNABY, Assistant Commissioner / Principal Examiner, Plant Variety Rights Office, Intellectual Property Office of New Zealand, Private Bag 4714, Christchurch 8140  
(tel.: +64 3 9626206 fax: +64 3 9626202 e-mail: Chris.Barnaby@pvr.govt.nz)

PARAGUAY / PARAGUAY / PARAGUAY



Dolía Melania GARCETE GONZALEZ (Sra.), Directora, Dirección de Semillas (DISE), Servicio Nacional de Calidad y Sanidad Vegetal y de Semillas (SENAVE), Gaspar Rodríguez de Francia No. 685, e/ Julia Miranda Cueto y R. Mariscal Estigarribia, Asunción  
(tel.: +595 21 577243 / 584645 fax: +595 21 582201  
e-mail: dolia.garcete@senave.gov.py)



Roberto ROJAS GONZALEZ, Director, Asesoría Jurídica del Servicio Nacional de Calidad Sanidad Vegetal y de Semillas (SENAVE), Humaita No. 145 entre Nstra, Señora de Asunción e Independencia, Asunción  
(tel.: 595 21 496072 fax: 595 21 496072 e-mail: roberto.rojas@senave.gov.py)

PAYS-BAS / NETHERLANDS / NIEDERLANDE / PAÍSES BAJOS



Marien VALSTAR, Sector Manager Seeds and Plant Propagation Material, Ministerie van Economische Zaken, Landbouw en Innovatie, P.O. Box 20401, NL-2500 EK Den Haag  
(tel.: +31 70 379 8911 fax: +31 70 378 6153 e-mail: m.valstar@minInv.nl)



Krieno Adriaan FIKKERT, Secretary, Plant Variety Board (Raad voor Plantenrassen), Postbus 40, NL-2370 AA Roelofarendsveen  
(tel.: +31 71 3326310 fax: +31 71 3326363 e-mail: k.fikkert@naktuinbouw.nl)



Groenewoud KEES JAN, Secretary to the Plant Variety Board, Postbus 40, NL-2370 AA Roelofarendsveen  
(tel.: +31713326310 fax: +31713326363)



Vera OSTENDORF (Ms.), Jurist, Ministry of Agriculture, Nature and Food Quality, P.O. Box 20401, NL-2500 EK Den Haag  
(tel.: +31 70 378 4180 fax: +31 70 378 6127 e-mail: v.i.ostendorf@minInv.nl)

POLOGNE / POLAND / POLEN / POLONIA



Edward S. GACEK, Director, Research Centre for Cultivar Testing (COBORU), PL-63-022 Slupia Wielka  
(tel.: +48 61 285 2341 fax: +48 61 285 3558 e-mail: e.gacek@coboru.pl)



Marcin BEHNKE, Vice Director General, Research Centre for Cultivar Testing (COBORU), PL-63-022 Slupia Wielka  
(tel.: +48 61 285 2341 fax: +48 61 285 3558 e-mail: m.behnke@coboru.pl)

RÉPUBLIQUE DE CORÉE / REPUBLIC OF KOREA / REPUBLIK KOREA / REPÚBLICA DE COREA



CHOI Keun-Jin, Director of Variety Testing Division, Korea Seed & Variety Service (KSVS), Ministry for Food, Agriculture, Forestry and Fisheries (MIFAFF), 39 Taejang-ro, Yeongtong-gu, Gyeonggi-do, Suwon-si 443-400  
(tel.: +82 31 8008 0200 fax: 82 31 203 7431 e-mail: kjchoi1001@korea.kr)



Oksun KIM (Ms.), Plant Variety Protection Division, Korea Seed & Variety Service (KSVS) / MIFAFF, 328, Jungang-ro, Manan-gu, Anyang, 430-016 Gyeonggi-do  
(tel.: +82 31 467 0191 fax: +82 31 467 0160 e-mail: oksunkim@korea.kr)



Min Jung KIM (Ms.), Patent Examiner, Korean Intellectual Property Office (KIPO), Government Complex Daejeon, Building 4, 189, Cheongsa-ro, Seo-gu, Daejeon Metropolitan City 302-701  
(tel. +82 42 4815550 fax: +82 42 4723514 e-mail: koremily99@kipo.go.kr)

RÉPUBLIQUE DE MOLDOVA / REPUBLIC OF MOLDOVA / REPUBLIK MOLDAU / REPÚBLICA DE MOLDOVA



Mihail MACHIDON, President, State Commission for Crops Variety Testing and Registration (SCCVTR), Bd. Stefan cel Mare, 162, C.P. 1873, MD-2004 Chisinau  
(tel.: +373 22 220300 fax: +373 2 211537 e-mail: mihail.machidon@yahoo.com)



Ala GUŞAN (Mrs.), Head, Inventions and Plant Varieties Department, State Agency on Intellectual Property (AGEPI), 24/1 Andrei Doga str., MD-2024 Chisinau  
(tel.: +373 22 400582 fax: +373 22 440119 e-mail: office@agepi.md)

RÉPUBLIQUE DOMINICAINE / DOMINICAN REPUBLIC / DOMINIKANISCHE REPUBLIK /  
REPÚBLICA DOMINICANA

Agnes CISHEK HERRERA (Sra.), Viceministra de Planificación Sectorial Agropecuaria,  
Ministerio de Agricultura, Km. 6 1/2 de la Autopista Duarte, Urbanización Jardines del  
Norte, Santo Domingo D.N.

(tel.: +1 809 547 388 e-mail: agnes.cishek@agricultura.gob.do)

Dora Luisa SÁNCHEZ BOROMINO (Sra.), Directora, Oficina de Tratados Comerciales  
Agrícolas (OTCA), Ministerio de Agricultura, Km. 6 1/2 de la Autopista Duarte,  
Urbanización Jardines del Norte, Santo Domingo D.N.

(tel.: +1 809 547 3888 fax: +1 809 227 3164 e-mail: dsanchez@otcasea.gob.do)



Ysset ROMAN (Sra.), Ministro Consejero, Misión Permanente, 63 Rue de Lausanne,  
Ginebra, Suiza

(tel.: +41 22 715 3910 e-mail: mission.repdom@rep-dominicana.ch)

RÉPUBLIQUE TCHÈQUE / CZECH REPUBLIC / TSCHECHISCHE REPUBLIK /  
REPÚBLICA CHECA



Daniel JUREČKA, Director, Plant Production Section, Central Institute for Supervising and  
Testing in Agriculture (ÚKZÚZ), Hroznová 2, 656 06 Brno

(tel.: +420 543 548 210 fax: +420 543 217 649 e-mail: daniel.jurecka@ukzuz.cz)

ROUMANIE / ROMANIA / RUMĂNIEN / RUMANIA



Mihaela-Rodica CIORA (Mrs.), Head of Technical Department, State Institute for Variety  
Testing and Registration (ISTIS), 61, Marasti, Sector 1, P.O. Box 32-35, 011464 Bucarest  
(tel.: +40 213 184380 fax: +40 213 184408 e-mail: mihaela\_ciora@yahoo.com)



Mirela Dana CINDEA (Mrs.), Expert, State Institute for Variety Testing and Registration  
Romania, 61, Marasti, Sector 1, Bucarest

(tel.: 021 318 43 80 fax: 021 318 44 08 e-mail: istis@easynet.ro)



Teodor Dan ENESCU, Expert Soya, Potato and other Agronomical species, State Institute  
for Variety Testing and Registration (ISTIS), 61, Marasti, sector 1, P.O. Box 32-35, 011464  
Bucarest

(tel.: +40 21 318 43 80 fax: +40 21 318 44 08 e-mail: teonscu@yahoo.com)

ROYAUME-UNI / UNITED KINGDOM / VEREINIGTES KÖNIGREICH / REINO UNIDO



Andrew MITCHELL, Controller of Plant Variety Rights, The Food and Environment  
Research Agency (FERA), Whitehouse Lane, Huntingdon Road, Cambridge CB3 0LF  
(tel.: +44 1223 342 384 fax: +44 1223 342 386 e-mail: andrew.mitchell@fera.gsi.gov.uk)

SUISSE / SWITZERLAND / SCHWEIZ / SUIZA



Eva TSCHARLAND (Frau), Juristin, Direktionsbereich Landwirtschaftliche Produktionsmittel, Bundesamt für Landwirtschaft, Mattenhofstrasse 5, CH-3003 Bern (tel.: +41 31 322 2594 fax: +41 31 323 2634 e-mail: eva.tscharland@blw.admin.ch)

TURQUIE / TURKEY / TÜRKEI / TURQUÍA



Kamil YILMAZ, Director, Variety Registration and Seed Certification Centre, Ministry of Agriculture and Rural Affairs, P.O. Box 30, 06172 Yenimahalle - Ankara (tel.: +90 312 315 4605 fax: +90 312 315 0901 e-mail: kyilmaz60@hotmail.com)

UNION EUROPÉENNE / EUROPEAN UNION / EUROPÄISCHE UNION / UNIÓN EUROPEA



Päivi MANNERKORPI (Ms.), Chef de secteur - Seed and Plant Propagating Material, Direction Générale Santé et Protection des Consommateurs, Commission européenne (DG SANCO), Rue Froissart 101, 2/180, 1040 Bruxelles, Belgium (tel.: +32 2 299 3724 fax: +32 2 296 9399 e-mail: paivi.mannerkorpi@ec.europa.eu)



Martin EKVAD, President, Community Plant Variety Office (CPVO), 3, boulevard Maréchal Foch, CS 10121, 49101 Angers Cedex 02 (tel.: +33 2 4125 6415 fax: +33 2 4125 6410 e-mail: ekvad@cpvo.europa.eu)



Muriel LIGHTBOURNE (Mme), Head of Legal Affairs, Community Plant Variety Office (CPVO), 3, Bd. Maréchal Foch, CS 10121, 49101 Angers Cedex (tel.: +33 2 41 256414 fax: +33 2 41 256410 e-mail: lightbourne@cpvo.europa.eu)



Isabelle CLEMENT-NISSOU (Mrs.), Policy Officer, Direction Générale Santé et Protection des Consommateurs, Commission européenne (DG SANCO), rue Froissart 101, 1040 Bruxelles (tel.: +32 229 87834 fax: +33 229 60951 e-mail: isabelle.clement-nissou@ec.europa.eu)

VIET NAM / VIET NAM / VIETNAM / VIET NAM



Nguyen Quoc MANH, Deputy Chief of PVP office, Plant Variety Protection Office of Viet Nam, No 2 Ngoc Ha Street, Ba Dinh Dist, (84) 48 Hanoi (tel.: +84 4 38435182 fax: +84 4 37344967 e-mail: quocmanh.pvp.vn@gmail.com)



## II. ORGANISATIONS / ORGANIZATIONS / ORGANISATIONEN / ORGANIZACIONES

### ASSOCIATION FOR PLANT BREEDING FOR THE BENEFIT OF SOCIETY



Susan H. BRAGDON (Ms.), Executive Director of APBREBES, Association for Plant Breeding for the Benefit of Society, 3130 SE Lambert Street, Portland , OR97202, États-Unis d'Amérique  
(tel.: +1 503 772 9595 e-mail: bragdonsh@gmail.com)

### COMMUNAUTÉ INTERNATIONALE DES OBTENTEURS DE PLANTES ORNEMENTALES ET FRUITIÈRES À REPRODUCTION ASEXUÉE (CIOPORA) / INTERNATIONAL COMMUNITY OF BREEDERS OF ASEXUALLY REPRODUCED ORNAMENTAL AND FRUIT PLANTS (CIOPORA) / INTERNATIONALE GEMEINSCHAFT DER ZÜCHTER VEGETATIV VERMEHRBARER ZIER- UND OBSTPFLANZEN (CIOPORA) / COMUNIDAD INTERNACIONAL DE OBTENTORES DE VARIETADES ORNAMENTALES Y FRUTALES DE REPRODUCCIÓN ASEJUADA (CIOPORA)



Edgar KRIEGER, Secretary General, CIOPORA - International Community of Breeders of Asexually Reproduced Ornamental and Fruit Plants (CIOPORA), Postfach 13 05 06, 20105 Hamburg , Germany  
(tel.: +49 40 555 63702 fax: +49 40 555 63703 e-mail: edgar.krieger@ciopora.org)



Mr. Alain MEILLAND, Vice-President de CIOPORA & Président d' AOHE, Meilland International, Domaine Saint André, F-83340 LE CANET DES MAURES, France  
(tel.: +33 494 500320 fax: +33 494 479829 e-mail: meilland.a@wanadoo.fr)

### EUROPEAN COORDINATION VIA CAMPESINA (ECVC)



Carlos MATEOS, Technical Advisor, Rue de la Sablonnière 18, Bruxelles 1000, Belgique  
(tel.: +32 2 217 3112 e-mail: cmateos@coag.org)

### INTERNATIONAL SEED FEDERATION (ISF)



Marcel BRUINS, Secretary General, International Seed Federation (ISF), 7, chemin du Reposoir, 1260 Nyon, Switzerland  
(tel.: +41 22 365 4420 fax: +41 22 365 4421 e-mail: isf@worldseed.org)

Jean DONNENWIRTH, International Intellectual Property Manager, Pioneer Hi-Bred S.A.R.L., Chemin de l'Enseigne, 31840 Aussonne , France  
(tel.: +33 5 6106 2084 fax: +33 5 6106 2091 e-mail: jean.donnenwirth@pioneer.com)



Michael ROTH, Intellectual Property Consultant, 4393 Westminster Place, E2NA, 63108  
St. Louis, MO, United States of America  
(tel.: +1 314 210 1832 e-mail: seed.law@gmail.com)

III. BUREAU / OFFICER / VORSITZ / OFICINA



Peter BUTTON, Chair

IV. BUREAU DE L'UPOV / OFFICE OF UPOV / BÜRO DER UPOV / OFICINA DE LA UPOV



Peter BUTTON, Vice Secretary-General



Yolanda HUERTA (Mrs.), Legal Counsel



Julia BORYS (Mrs.), Senior Technical Counsellor



Fuminori AIHARA, Counsellor



Ben RIVOIRE, Consultant



Leontino TAVEIRA, Consultant

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