

Working Group on Essentially Derived Varieties (WG-EDV)**UPOV/WG-EDV/2/3****Second Meeting
Geneva, February 4, 2021****Original: English
Date: March 15, 2021**

REPORT*adopted by the Working Group on Essentially Derived Varieties**Disclaimer: this document does not represent UPOV policies or guidance***OPENING OF THE MEETING**

1. The Working Group on Essentially Derived Varieties (WG-EDV) held its second meeting via electronic means on February 4, 2021, chaired by Mr. Peter Button, Vice Secretary-General of UPOV.
2. The meeting was opened by the Chair, who welcomed the participants.
3. The list of participants is reproduced in the Annex to this report.

ADOPTION OF THE AGENDA

4. The WG-EDV adopted the draft agenda as proposed in document UPOV/WG-EDV/2/1.

JOINT PRESENTATION BY BREEDERS' ORGANIZATIONS AND DISCUSSION IN RELATION TO ISSUES FOR CONSIDERATION

5. The WG-EDV considered document UPOV/WG-EDV/2/2.
6. The WG-EDV received a joint presentation on behalf of the international breeders' organizations, made by the representative of the International Community of Breeders of Asexually Reproduced Horticultural Plants (CIOPORA). The joint presentation and the narrative, are reproduced in Annexes I and II, respectively, of document UPOV/WG-EDV/2/2.
7. The Delegation of Argentina thanked the breeders' organizations for their presentation. It noted the explanation provided in slide 15 concerning mutations in apple and requested clarification on which part of the text of the current Explanatory Notes on Essentially Derived Varieties under the 1991 Act of the UPOV Convention (document UPOV/EXN/EDV/2) the breeders' organizations understood to indicate that not all mutations would be considered to be EDVs.
8. The Delegation of Sweden expressed appreciation to the breeders' organizations for the presentation. It requested clarification on whether changes in the color of the apples or ornamental varieties could be considered as "cosmetic" or considered as changes in essential characteristics. In relation to the proposal in the presentation that the "revised Explanatory Notes affirms EDV-related roles and accountabilities in the PBR system and defines processes for managing EDV cases, including assessing EDV, relevant guidelines and options for dispute resolution", it requested clarification on whether those aspects would go beyond the scope of the Explanatory Notes.

9. In relation to the point raised by the Delegation of Argentina, the representative of CIOPORA explained that the third sentence of paragraph 9 of document UPOVEXN/EDV/2 provided that “[t]he differences must not be such that the variety fails ‘to retain the expression of the essential characteristics that result from the genotype or combination of genotypes of the initial variety’”. He explained that the current wording could imply that, if a derived variety was different in one essential characteristic, then that variety would fail to retain the expression of the essential characteristics of the initial protected variety and would be considered to be outside the scope of EDV. In reply to the first question from the Delegation of Sweden, he confirmed that changes of colors of fruits, for example apples, or of ornamental varieties, were not cosmetic and the change of color would be considered as a change to an essential characteristic, with important commercial value.

10. In reply to the second question from the Delegation of Sweden, a representative of the International Seed Federation (ISF) explained that the holder of the breeder’s right of the protected initial variety was fully entitled to pursue the assertion of that right against any putative essentially derived variety from that protected initial variety. He was of the view that the breeder of the initial protected variety was in the best position to make a determination as to whether or not a new variety could be an essentially derived variety. In his opinion, it was not within the competencies of the Plant Breeders’ Rights (PBR) authority to evaluate what would be the essential characteristics of every variety, because the examination of Distinctness, Uniformity and Stability (DUS) did not necessarily identify the essential characteristics. He concluded that it was up to the breeder of the initial protected variety to identify potential EDVs and pursue different options for negotiations and dispute resolution, such as arbitration or judicial procedures.

11. In relation to the comments provided by the representative of CIOPORA on paragraph 9 of document UPOVEXN/EDV/2, the Delegation of Argentina also wondered if the explanation of essential characteristics, as provided in paragraph 6 of document UPOVEXN/EDV/2, had the possibility to be understood as meaning that almost any characteristic could fall within the notion of essential characteristics.

12. In relation to the question raised by the Delegation of Argentina, another representative of ISF noted that it was important to understand what was meant by “retain the expression of the essential characteristics” in paragraph 9 of document UPOVEXN/EDV/2. She noted that it could be understood either as requiring an EDV to retain “all” the essential characteristics or as meaning that an EDV does not need to retain “all” the essential characteristics of the initial protected variety because some differences on essential characteristics might result from the act of derivation or particular breeding methods. She explained that the breeders’ organizations were supportive of the latter interpretation because “the number of differences between an essentially derived variety and its initial variety is not necessarily limited to one or very few differences, and may also include differences in essential characteristics, taking into account different breeding methods”, as provided in the presentation and its scenarios.

13. The Delegation of Kenya expressed appreciation for the presentation and noted that the concept of essentially derived varieties provided the means by which the UPOV Convention strike a balance between the scope of the breeder’s right, on the one hand, and the breeder’s exemption, on the other hand. It was important to ensure that the rights of the breeders of initial varieties did not undermine the principle of the breeder’s exemption to encourage the use of the best protected varieties in breeding programs in order to develop new varieties for the benefit of society. He noted that it would be important for breeders to have clarity on the EDV concept in order to avoid unintended inhibition in their use of the breeder’s exemption.

14. The representative of CIOPORA expressed support for the comment made by the Delegation of Kenya and clarified that when differences result from random recombination produced by regular crossing and selection, that would typically not result in EDVs. He confirmed that, in the proposals concerning EDVs, there was no intention to block innovations reaching the market for commercialization, to the contrary the proposals for a clear EDV principle provided incentives to breed more diverse varieties. He explained that breeders were aware of the innovative capacity of new breeding technologies. He said that a clear EDV concept would provide the basis for the negotiation between the breeder of the initial protected variety and the breeders involved in the development of EDVs. He was of the view that breeders would find agreements on commercializing the EDVs when there was added value in bringing those EDVs to the market.

15. The WG-EDV agreed to request the Office of the Union to prepare a preliminary draft text for a revision of document UPOV/EXN/EDV/2 for consideration by the WG-EDV at its third meeting, on the basis of the proposals presented in the joint presentation by the international breeders’ organizations, taking into account the points raised during the meeting by the Delegations of Argentina, Kenya and Sweden and the clarifications provided by the representatives of the breeders’ organizations.

DATE AND PROGRAM OF THE THIRD MEETING

16. The WG-EDV recalled the agreed timeline at its first meeting, held on December 8, 2020, as reported in document UPOV/WG-EDV/2/2, paragraphs 2 to 4 (see also document UPOV/WG-EDV/1/3 "Report", paragraphs 6 to 8):

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| <u>April/May 2021</u> [date to be decided] | Third Meeting of the WG-EDV (by virtual means): - consideration by the WG-EDV of a preliminary draft text for revision of UPOV/EXN/EDV/2 (to be posted at least 4 weeks before the third meeting) |
| <u>June/July 2021</u> [date to be decided] | Consideration of UPOV/EXN/EDV/3/Draft 1 by correspondence (6 weeks for comments) |
| <u>October 2021</u> [date to be decided] | Fourth Meeting of the WG-EDV (at the fringes of the CAJ session) - consideration of UPOV/EXN/EDV/3/Draft 2 by correspondence (to be posted 6 weeks before the fourth meeting in English) |

17. The WG-EDV agreed that the third meeting of the WG-EDV be held via electronic means, on April 27, 2021 from 12 to 2 p.m. (Geneva time).

18. The following program was agreed for the third meeting of the WG-EDV:

1. Opening of the meeting
2. Adoption of the agenda
3. Preliminary draft text for the revision of the Explanatory Notes on Essentially Derived Varieties under the 1991 Act of the UPOV Convention
4. Date of the fourth meeting

19. The WG-EDV agreed that it would be helpful for the Office of the Union to hold information sessions on EDV in English, French and Spanish for members of the Union and participating observer organizations in the WG-EDV.

20. *This report was adopted by correspondence.*

[Annex follows]

ANNEXE / ANNEX / ANEXO

LISTE DES PARTICIPANTS / LIST OF PARTICIPANTS / LISTA DE PARTICIPANTES

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

I. MEMBRES / MEMBERS / MIEMBROSARGENTINE / ARGENTINA / ARGENTINA

María Laura VILLAMAYOR (Sra.), Coordinadora de Relaciones Institucionales e Interjurisdiccionales, Instituto Nacional de Semillas (INASE), Ministerio de Agricultura, Ganadería y Pesca, Buenos Aires
(e-mail: mlvillamayor@inase.gob.ar)

Raimundo LAVIGNOLLE (Sr.), Asesor en Registro y Propiedad de Variedades Vegetales de la Presidencia del INASE, Instituto Nacional de Semillas (INASE), Ministerio de Agricultura, Ganadería y Pesca, Buenos Aires
(e-mail: rlavignolle@inase.gov.ar)

AUSTRALIE / AUSTRALIA / AUSTRALIA

Nik HULSE (Mr.), Chief of Plant Breeders' Rights, Plant Breeder's Rights Office, IP Australia, Woden
(e-mail: nik.hulse@ipaaustralia.gov.au)

Edwina VANDINE (Ms.), Senior Examiner, IP Australia, Woden
(e-mail: nik.hulse@ipaaustralia.gov.au)

BRÉSIL / BRAZIL / BRASIL

Stefânia PALMA ARAÚJO (Ms.), Federal Agricultural Inspector, Head of Division, Serviço Nacional de Proteção de Cultivares (SNPC), Ministry of Agriculture, Livestock and Food Supply, Brasília D.F.
(e-mail: stefania.araujo@agricultura.gov.br)

Ricardo ZANATTA MACHADO (Mr.), Federal Agricultural Inspector, Coordinator, Serviço Nacional de Proteção de Cultivares (SNPC), Ministry of Agriculture, Livestock and Food Supply, Brasília D.F.
(e-mail: ricardo.machado@agricultura.gov.br)

CANADA / CANADA / CANADA

Anthony PARKER (Mr.), Commissioner, Plant Breeders' Rights Office, Canadian Food Inspection Agency (CFIA), Ottawa
(e-mail: anthony.parker@canada.ca)

Ashley BALCHIN (Ms.), Examiner, Plant Breeders' Rights Office, Canadian Food Inspection Agency (CFIA), Ottawa
(e-mail: ashley.balchin@canada.ca)

CHILI / CHILE / CHILE

Manuel Antonio TORO UGALDE (Sr.), Jefe Departamento, Registro de Variedades Protegidas, División Semillas, Servicio Agrícola y Ganadero (SAG), Santiago de Chile
(e-mail: manuel.toro@sag.gob.cl)

CHINE / CHINA / CHINA

CUI Yehan (Mr.), Division Director, Division of Plant Variety Protection, Development Center of Science and Technology (DCST), Ministry of Agriculture and Rural Affairs (MARA), Beijing
(e-mail: cuiyehan@agri.gov.cn)

Wen WEN (Ms.), Deputy Division Director, Division of New Plant Variety Protection, Development Center of Science and Technology, Ministry of Agriculture and Rural Affairs (MARA), Beijing
(e-mail: wenwen@agri.gov.cn)

Judan LI (Ms.), Associate Professor, Institute of Law, China Academy of Social Sciences, Beijing
(e-mail: lijudan@cass.org.cn)

Ruixi HAN (Mr.), Deputy Director, Division of DUS Tests, Development Center of Science and Technology, Ministry of Agriculture and Rural Affairs (MARA), Beijing
(e-mail: wudifeixue007@163.com)

DENG Chao (Mr.), Division Deputy Director, Division of DUS Tests, Development Center of Science and Technology, Ministry of Agriculture and Rural Affairs (MARA), Beijing
(e-mail: dengchaowin@sina.com)

Xuhong YANG (Ms.), Examiner, Division of DUS Tests, Development Center of Science and Technology, Ministry of Agriculture and Rural Affairs (MARA), Beijing
(e-mail: yangxuhong@agri.gov.cn)

YANG Yang (Ms.), Senior Examiner, Division of Plant Variety Protection, Development Center of Science and Technology (DCST), Ministry of Agriculture and Rural Affairs (MARA), Beijing
(e-mail: yangyang@agri.gov.cn)

ÉGYPTE / EGYPT / EGIPTO

Shymaa ABOSHOSHA (Ms.), Agronomic Engineer, Plant Variety Protection Office (PVPO), Central Administration for Seed Testing and Certification (CASC), Giza
(e-mail: sh_z9@hotmail.com)

ÉQUATEUR / ECUADOR / ECUADOR

Paulina MOSQUERA HIDALGO (Sra.), Directora Nacional de Obtenciones Vegetales y Conocimientos Tradicionales, Servicio Nacional de Derechos Intelectuales (SENADI), Quito
(e-mail: pcosquera@senadi.gob.ec)

Yadira YACELGA (Sra.), Delegada, Dirección Nacional de Obtenciones Vegetales, Servicio Nacional de Derechos Intelectuales, Quito
(e-mail: yadiyacelga@gmail.com)

ÉTATS-UNIS D'AMÉRIQUE / UNITED STATES OF AMERICA / ESTADOS UNIDOS DE AMÉRICA

Elaine WU (Ms.), Principal Counsel and Director, Office of Policy and International Affairs, U.S. Patent and Trademark Office, U.S. Department of Commerce, Alexandria
(e-mail: elaine.wu@uspto.gov)

Jeffery HAYNES (Mr.), Commissioner, Plant Variety Protection Office, USDA, AMS, S&T, Washington D.C.
(e-mail: Jeffery.Haynes@usda.gov)

Christian HANNON (Mr.), Patent Attorney, Office of Policy and International Affairs (OPIA), U.S. Patent and Trademark Office (USPTO), Department of Commerce, Alexandria
(e-mail: christian.hannon@uspto.gov)

Ruihong GUO (Ms.), Deputy Administrator, AMS, Science & Technology Program, United States Department of Agriculture (USDA), Washington D.C.
(e-mail: ruihong.guo@usda.gov)

FRANCE / FRANCE / FRANCIA

Yvane MERESSE (Mme), Responsable INOV, Groupe d'Étude et de Contrôle des Variétés et des Semences (GEVES), Beaucauzé cedex
(e-mail: yvane.meresse@geves.fr)

Catherine MALATIER (Mme), Assistante INOV, Groupe d'étude et de contrôle des variétés et des semences (GEVES), Beaucauzé cedex
(e-mail: catherine.malatier@geves.fr)

JAPON / JAPAN / JAPÓN

Teruhisa MIYAMOTO (Mr.), Deputy Director of Plant Variety Office, Intellectual Property Division, Food Industry Affairs Bureau, Ministry of Agriculture, Forestry and Fisheries (MAFF), Tokyo
(e-mail: teruhisa_miyamoto170@maff.go.jp)

Yoshiyuki OHNO (Mr.), Examiner, Intellectual Property Division, Food Industry Affairs Bureau, Ministry of Agriculture, Forestry and Fisheries (MAFF), Tokyo
(e-mail: yoshiyuki_ono300@maff.go.jp)

KENYA / KENYA / KENYA

Simon Mucheru MAINA (Mr.), Head, Seed Certification and Plant Variety Protection, Kenya Plant Health Inspectorate Service (KEPHIS), Nairobi
(e-mail: smaina@kephis.org)

Luca's SUVA (Mr.), Senior Plant Inspector, Kenya Plant Health Inspectorate Service (KEPHIS), Nairobi
(e-mail: lsuva@kephis.org)

MEXIQUE / MEXICO / MÉXICO

Leobigildo CÓRDOVA TÉLLEZ (Sr.), Titular, Servicio Nacional de Inspección y Certificación de Semillas (SNICS), Secretaría de Agricultura y Desarrollo Rural (SADER), México
(e-mail: leobigildo.cordova@agricultura.gob.mx)

Víctor Manuel VÁSQUEZ NAVARRETE (Sr.), Director de Variedades Vegetales, Servicio Nacional de Inspección y Certificación de Semillas (SNICS), Secretaría de Agricultura y Desarrollo Rural (SADER), México
(e-mail: victor.vasquez@agricultura.gob.mx)

PAYS-BAS / NETHERLANDS / PAÍSES BAJOS

Kees Jan GROENEWOUD (Mr.), Secretary, Dutch Board for Plant Varieties (Raad voor Plantenrassen), Roelofarendsveen
(e-mail: c.j.a.groenewoud@raadvoorplantenrassen.nl)

POLOGNE / POLAND / POLONIA

Alicja RUTKOWSKA-ŁOŚ (Ms.), Head, National Listing and Plant Breeders' Rights Protection Office, The Research Centre for Cultivar Testing (COBORU), Slupia Wielka
(e-mail: a.rutkowska-los@coboru.gov.pl)

Marcin KRÓL (Mr.), Head, DUS Testing Department, Research Centre for Cultivar Testing (COBORU), Slupia Wielka
(e-mail: m.krol@coboru.gov.pl)

Michał REBARZ (Mr.), Head, Foreign Cooperation Office, Research Centre for Cultivar Testing (COBORU), Slupia Wielka
(e-mail: m.rebarz@coboru.gov.pl)

Karolina LENARTOWICZ (Ms.), Head, DUS Testing and Variety Identity Verification Unit, Research Centre for Cultivar Testing (COBORU), Slupia Wielka
(e-mail: k.lenartowicz@coboru.pl)

RÉPUBLIQUE-UNIE DE TANZANIE / UNITED REPUBLIC OF TANZANIA /
REPÚBLICA UNIDA DE TANZANÍA

Twalib Mustafa NJOHOLE (Mr.), Registrar of Plant Breeders' Rights, Plant Breeders Rights' Office, Ministry of Agriculture (MoA), Dodoma
(e-mail: twalibnjohole8@gmail.com)

Dorah Herman BIVUGILE (Ms.), Research Officer, Tanzania Official Seed Certification Institute (TOSCI), Morogoro
(e-mail: info@tosci.go.tz)

SUÈDE / SWEDEN / SUECIA

Carina KNORPP, Senior Advisor, Animal and Food Division, Ministry of Enterprise and Innovation, Stockholm
(e-mail: carina.knorpp@regeringskansliet.se)

Jens WEIBULL (Mr.), Senior Officer, Swedish Board of Agriculture, Alnarp
(e-mail: jens.weibull@jordbruksverket.se)

UNION EUROPÉENNE / EUROPEAN UNION / UNIÓN EUROPEA

Päivi MANNERKORPI (Ms.), Team Leader - Plant Reproductive Material, Unit G1 Plant Health, Directorate General for Health and Food Safety (DG SANTE), European Commission, Brussels
(e-mail: paivi.mannerkorpi@ec.europa.eu)

Martin EKVAD (Mr.), President, Community Plant Variety Office (CPVO), Angers
(e-mail: ekvad@cpvo.europa.eu)

Dirk THEOBALD (Mr.), Senior Adviser, Community Plant Variety Office (CPVO), Angers
(e-mail: theobald@cpvo.europa.eu)

Stefan HAFFKE (Mr.), Policy Officer, Directorate General for Health and Food Safety (DG SANTE), Brussels
(e-mail: stefan.haffke@ec.europa.eu)

Jean MAISON (Mr.), Deputy Head, Technical Unit, Community Plant Variety Office (CPVO), Angers
(e-mail: maison@cpvo.europa.eu)

Cécile COLLONNIER (Ms.), Technical Expert, Community Plant Variety Office (CPVO), Angers
(e-mail: collonnier@cpvo.europa.eu)

VIET NAM / VIET NAM / VIET NAM

PHAM Thai Ha (Ms.), Examiner, Department of Crop Production (DCP), Plant Variety Protection Office (PVPO), Ministry of Agriculture and Rural Development (MARD), Hanoi
(e-mail: Hapt.tt@mard.gov.vn)

II. ORGANISATIONS / ORGANIZATIONS / ORGANIZACIONES

CROPLIFE INTERNATIONAL

Marcel BRUINS (Mr.), Consultant, CropLife International, Bruxelles
(e-mail: mbruins1964@gmail.com)

INTERNATIONAL SEED FEDERATION (ISF)

Hélène KHAN NIAZI (Ms.), International Agriculture Manager, International Seed Federation (ISF), Nyon
(e-mail: h.khanniazi@worldseed.org)

Justin J. RAKOTOARISAONA (Mr.), Secretary General, African Seed Trade Association (AFSTA), Nairobi
(e-mail: justin@afsta.org)

Magali PLA (Ms.), Head of Industrial Property and Intelligence Technology, Limagrain, Gerzat
(e-mail: magali.pla@limagrain.com)

Judith DE ROOS-BLOKLAND (Ms.), Legal Counsel, Regulatory and Legal Affairs, Plantum NL, Gouda
(e-mail: j.deroos@plantum.nl)

Jean DONNENWIRTH (Mr.), Delegate and Global PVP Lead Corteva, CORTEVA agriscience, Aussonne
(e-mail: jean.donnenwirth@corteva.com)

John Howard DUESING (Mr.), Consultant, Consulting EDV Project Manager, American Seed Trade Association (ASTA), West Des Moines
(e-mail: jhd3@mchsi.com)

EUROSEEDS

Szonja CSÖRGÖ (Ms.), Director, Intellectual Property & Legal Affairs, Euroseeds, Bruxelles
(e-mail: szonjacorgo@euroseeds.eu)

ASSOCIATION FOR PLANT BREEDING FOR THE BENEFIT OF SOCIETY (APBREBES)

François MEIENBERG (Mr.), Coordinator, Association for Plant Breeding for the Benefit of Society (APBREBES), Zürich
(e-mail: contact@apbrebes.org)

COMMUNAUTÉ INTERNATIONALE DES OBTENTEURS DE PLANTES HORTICOLES À REPRODUCTION ASEXUÉE (CIOPORA) / INTERNATIONAL COMMUNITY OF BREEDERS OF ASEXUALLY REPRODUCED HORTICULTURAL PLANTS (CIOPORA) / COMUNIDAD INTERNACIONAL DE OBTENTORES DE PLANTAS HORTÍCOLAS DE REPRODUCCIÓN ASEXUADA (CIOPORA)

Edgar KRIEGER (Mr.), Secretary General, International Community of Breeders of Asexually Reproduced Horticultural Plants (CIOPORA), Hamburg
(e-mail: edgar.krieger@ciopora.org)

Jan DE RIEK (Mr.), Molecular Genetics & Breeding - Group Leader and CIOPORA co-vice president, Plant sciences unit, ILVO-Plant, Flanders research institute for agriculture, fisheries and food, Melle
(e-mail: jan.deriek@ilvo.vlaanderen.be)

SEED ASSOCIATION OF THE AMERICAS (SAA)

Alfredo PASEYRO (Mr.), Director Ejecutivo, ASA Asociación Semilleros Argentinos
(e-mail: alfredo.paseyro@asa.org.ar)

Stevan MADJARAC (Mr.), Germplasm IP Lead, Bayer Crop Science, Ankeny
(e-mail: stevan.madjarac@bayer.com)

Marymar BUTRUILLE (Ms.), Germplasm IP Scientist Lead, Bayer Crop Science, Ankeny
(e-mail: marymar.butruille@bayer.com)

ASIA AND PACIFIC SEED ASSOCIATION (APSA)

Kanokwan CHODCHOEY (Ms.), Executive Director, Asia and Pacific Seed Association (APSA), Bangkok
(e-mail: may@apsaseed.org)

III. BUREAU / OFFICER / OFICINA

Peter BUTTON (Mr.), Chair

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

Peter BUTTON (Mr.), Vice Secretary-General

Yolanda HUERTA (Ms.), Legal Counsel and Director of Training and Assistance

Ben RIVOIRE (Mr.), Head of Seed Sector Cooperation and Regional Development (Africa, Arab Countries)

Leontino TAVEIRA (Mr.), Head of Technical Affairs and Regional Development (Latin America, Caribbean)

Manabu SUZUKI (Mr.), Technical/Regional Officer (Asia)

Caroline ROVERE (Ms.), Communication and Events Officer

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