

Working Group on Essentially Derived Varieties (WG-EDV)

UPOV/WG-EDV/3/3

**Third Meeting
Geneva, April 27, 2021****Original:** English
Date: August 21, 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 third meeting via electronic means on April 27, 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/3/1.

PRELIMINARY DRAFT TEXT FOR THE REVISION OF THE EXPLANATORY NOTES ON ESSENTIALLY DERIVED VARIETIES UNDER THE 1991 ACT OF THE UPOV CONVENTION

5. The WG-EDV considered document UPOV/WG-EDV/3/2.
6. The WG-EDV noted that the Office of the Union had requested comments or questions to be provided in advance of the meeting by April 22, 2021, on the "Preliminary draft text for the revision of the Explanatory Notes on Essentially Derived Varieties under the 1991 Act of the UPOV Convention", reproduced in Annex I to document UPOV/WG EDV/3/2.
7. The WG-EDV noted that comments had been received prior to the meeting from Brazil, Chile, Mexico, Norway and jointly from the International Seed Federation (ISF), International Community of Breeders of Asexually Reproduced Horticultural Plants (CIOPORA), CropLife International, Asia and Pacific Seed Association (APSA), Seed Association of the Americas (SAA), African Seed Trade Association (AFSTA) and Euroseeds – and that those comments would be presented during the introduction of Annex I to document UPOV/WG-EDV/3/2.
8. The representative of the International Community of Breeders of Asexually Reproduced Horticultural Plants (CIOPORA), on behalf of the breeders' organizations, expressed full support for the preliminary draft text in Annex I to document UPOV/WG-EDV/3/2. He noted that the text of the current explanatory notes in document UPOV/EXN/EDV/2 suggested a very narrow scope of the EDV principle, which greatly endangered the breeding incentive. He was of the view that the proposed text in the preliminary draft was the basis for continued breeding progress and innovation, for the benefit of society.

9. The WG-EDV agreed to modify paragraph 4 of document UPOV/WG-EDV/3/2, Annex I, as follows:

“Predominant derivation concerns the genetic source of the essentially derived variety. The requirement of predominant derivation from an initial variety, or from a variety that is itself predominantly derived from the initial variety, is the key requirement for a variety to be considered an EDV. Predominant derivation ~~means~~ implies that a variety can only be derived from one initial variety”.

10. The WG-EDV agreed that the Spanish version of paragraph 4 of document UPOV/WG-EDV/3/2, Annex I, should be reviewed to ensure clarity and consistency with the text in English.

11. The WG-EDV agreed to modify paragraph 5 of document UPOV/WG-EDV/3/2, Annex I, by the addition of two footnotes, as follows:

“‘Predominant’ derivation means that more of the genome of the initial variety is retained than would be retained by normal crossing and selection with different parents.² A variety should only be considered predominantly derived from the initial variety if it retains almost the whole genome of its initial variety. However, a high degree of genetic conformity alone does not automatically mean that a variety has been predominantly derived. For example, ~~sister lines~~ progenies obtained from the same cross may have a high degree of genetic conformity but ~~neither~~ none of these ~~sister lines~~ progenies obtained should be considered as the initial variety of the other nor as predominantly derived from the other. Convergent breeding³ may also result in a high degree of genetic conformity between two varieties that were developed from different parents without either of the varieties being an initial variety from which the other had been predominantly derived.”

Footnote 2: “Normal crossing and selection” means crossing two or more phenotypically and genetically different parents for the purpose of developing a segregating population for testing and selection.

Footnote 3: “Convergent breeding” occurs when different breeders select independently, within a common pool of germplasm, towards similar plant types having common characteristics (e.g., maturity, plant stature, suitability for mechanical harvesting). As a result of convergent breeding, two varieties bred from the common pool may exhibit a high degree of genetic conformity even though neither variety was predominantly derived from the other.

12. The Delegation of Sweden requested clarification on the term “industrial” in paragraph 7 of document UPOV/WG-EDV/3/2, Annex I. A representative of ISF explained that the term “industrial” was relevant for characteristics that are developed for industrial purposes, for instance, oil characteristics.

13. The WG-EDV agreed to request a review of paragraph 7 of document UPOV/WG-EDV/3/2, Annex I, in relation to the term “industrial”.

14. The WG-EDV agreed to modify paragraph 8 of document UPOV/WG-EDV/3/2, Annex I, as follows:

“An ‘essential characteristic’ is a characteristic that is essential for the variety as a whole. ~~It should (i) contribute~~ to the principal features, performance or value for use of the variety; ~~and/or (ii) is be~~ relevant for one the following: the producer, seller, supplier, buyer, recipient, ~~or~~ user of the propagating material and/or of the harvested material and/or of the directly obtained products and/or the value chain. ~~and/or~~

~~(iii) — is essential for the variety as a whole.”~~

15. The WG-EDV considered the proposal of the Delegation of Mexico of the addition of examples on what might be considered to contribute to the principal features of the variety. The WG-EDV agreed that the Office of the Union should explore with the Delegation of Mexico the possibility to provide examples, if appropriate, in a revision of the document.

16. The WG-EDV agreed to modify paragraph 9 of document UPOV/WG-EDV/3/2, Annex I, as follows, and, if possible to simplify the text:

“An essential characteristic may or may not be a characteristic used for the examination of distinctness, uniformity or stability (DUS) and/or used for the examination of value for ~~cultivated~~ cultivation and use (VCU).”

17. The WG-EDV considered the proposal from the Delegation of Mexico that it would be useful to incorporate some examples in paragraph 11 of document UPOV/WG-EDV/3/2, Annex I. The WG-EDV agreed that the Office of the Union should invite the WG-EDV to provide examples to be included, if appropriate, in the revision of paragraph 11.

18. The WG-EDV agreed to modify the first sentence of paragraph 12 of document UPOV/WG-EDV/3/2, Annex I, as follows:

“12. The degree of conformity in the expression of essential characteristics of the putative EDV to the initial variety should be assessed on the basis of the expression of the essential characteristics which result from the genotype of the initial variety.”

19. The WG-EDV agreed to modify the first sentence of paragraph 13 of document UPOV/WG-EDV/3/2, Annex I, as follows:

“13. Article 14(5)(b)(iii) does not set an upper limit as to the number of differences which may exist where a variety is still considered to be essentially derived. The number of differences between an EDV and the initial variety is therefore not limited to one or very few differences but may vary taking into account different methods of derivation. The differences may also include essential characteristics.”

20. The WG-EDV noted that the explanation provided in the last sentence of paragraph 13 of document UPOV/WG-EDV/3/2, Annex I, was already covered in paragraph 11 of document UPOV/WG-EDV/3/2, Annex I. However, it was agreed that it would be useful to keep the sentence for the purposes of clarity.

21. The WG-EDV considered the comments from the Delegations of Brazil, Chile and Mexico to improve the clarity of paragraph 14 of document UPOV/WG-EDV/3/2, Annex I, and agreed to the following changes:

“14. Differences resulting from act(s) of derivation are disregarded for the purpose of determining the EDV status of a variety. In that regard, the following clarification is provided:

- (a) In the case of mono-parental varieties, all differences necessarily result from the one or more act(s) of derivation, meaning that all differences are excluded from consideration of the EDV status.
- (b) In the case of a multi-parental variety, the differences between that variety and any of its parent varieties may result from normal crossing and selection or from one or more of the methods of derivation described in paragraphs 15 and 16. Therefore, when determining the EDV status of such a multi-parental variety in relation to one of its parent varieties, it is important to establish whether there have been one or several more acts of derivation. If so, all differences resulting from such act(s) are disregarded for the purpose of determining the EDV status of a variety.”

22. In relation to the proposal by the Delegation of Chile, in paragraph 15 of document UPOV/WG-EDV/3/2, Annex I, to replace “backcrossing” by “repeated backcrossing” and to delete the last sentence, the WG-EDV noted that the first sentence of paragraph 15 provided the examples of Article 14(5)(c) of the 1991 Act of the UPOV Convention. It further noted that, while in the English text of Article 14(5)(c) the term “backcrossing” appeared in singular, in the French and the Spanish texts the term appeared in plural, “*rétrocroisements*” and “*retrocruzamientos*”, respectively.

23. The WG-EDV noted that, in case of any discrepancy among the various texts of the Convention, the French text prevails. The WG-EDV requested the Office of the Union to review paragraph 15 of document UPOV/WG-EDV/3/2, Annex I, to ensure consistency with the wording of the UPOV Convention in different languages.

24. The WG-EDV considered the following changes to paragraph 16 of document UPOV/WG-EDV/3/2, Annex I, in relation to the proposal from the Delegation of Mexico to consider updating the text with currently known methods:

“16. The use of the words ‘for example’ in Article 14(5)(c) clarifies that the list of methods is not exhaustive. The examples of methods provided in Article 14(5)(c) correspond to the methods known in 1991. Since then, further breeding methods breeding methods have evolved and techniques, such as genome editing, have emerged, and other breeding methods that could lead to the development of essentially derived varieties may be developed. Any such methods should be considered, as appropriate if relevant to Article 14(5)(c).”

25. The WG-EDV agreed to request the Office of the Union to review the text of paragraph 16 of document UPOV/WG-EDV/3/2, Annex I, taking into consideration the comments received, while maintaining the general reference to existing technologies and future developments.

26. The WG-EDV considered the comment from the Delegation of Mexico to delete the last sentence of paragraph 25 of document UPOV/WG-EDV/3/2, Annex I, and decided to keep the last sentence, as it provided guidance on a useful matter, but agreed to the review of the text in English and Spanish for consistency and clarity purposes.

“25. Once the plant breeder’s right of the initial variety (variety A) has ceased, the authorization of the breeder of the initial variety is no longer required for the commercialization of variety B. In such a situation, and if the plant breeder’s right of the essentially derived variety is still valid, only the authorization of the titleholder of the essentially derived variety B would be required for the commercialization of variety B. Furthermore, if the initial variety A was never protected, only the authorization of the titleholder of the essentially derived variety B would be required for the commercialization of variety B.”

27. In reply to a comment by the Delegation of Canada, regarding situations where the breeder of the initial variety and the breeder of the putative EDV was the same person, the Chair recalled that the CAJ had considered that matter in the context of a request from the Technical Committee concerning breeding activities of particular interest for the ornamental sector (see document CAJ/47/18 “Report”, Annex III).

28. The WG-EDV agreed to request the Office of the Union to assess if it would be useful that guidance on that document be introduced in the explanatory notes, or if the matter should be further considered separately by the CAJ.

29. The WG-EDV considered the comments made by the Delegations of Brazil, Chile, the European Union and the United States of America and agreed to review the second and third sentences of paragraph 34 of document UPOV/WG-EDV/3/2, Annex I, to address the following:

- (a) avoid implying that the PBR authority was required to manage and resolve EDV-related disputes;
- (b) reinforce the need for the “independence” of experts that might be consulted in the context of EDV-related disputes; and
- (c) provide information on how to find independent experts.

30. In reply to a question from Norway on the rationale and implications of Section III “Options for the Enforcement of Breeders’ Rights in relation to EDVs”, the Chair recalled the text in paragraph 2 of the preamble of document UPOV/WG-EDV/3/2, Annex I:

“2. These Explanatory Notes provide guidance on “Essentially Derived Varieties” under the 1991 Act of the International Convention for the Protection of New Varieties of Plants (UPOV Convention). The purpose of this guidance is to assist members of the Union and relevant stakeholders in their considerations in matters concerning essentially derived varieties. The only binding obligations on members of the Union are those contained in the text of the UPOV Convention itself, and these Explanatory Notes must not be interpreted in a way that is inconsistent with the relevant Act for the member of the Union concerned.”

31. The Delegation of Australia was of the view that the explanatory notes should avoid text that might be inconsistent with other approaches taken by members of the Union. Australia formerly reserved its position at that time and it reported that Australia would be undertaking a broad consultation process with all the sectors potentially affected by the proposed changes.

32. The WG-EDV agreed the following changes to the flowchart and requested the Office of the Union to review the changes for consistency with the document:

- (a) to change first box as follows: ~~is~~ Variety X is suspected to be an EDV of an Initial Variety (IV)?
- (b) to add another diamond under the first one with the following explanation: Variety X does not meet the distinctness condition, does not qualify for PBR and falls within the scope of protection of the IV;
- (c) to change the footnote 2 as follows: see paragraphs 7 to ~~42~~ 10.

33. The Delegation of Japan requested, in addition to the information on court decisions in paragraph 39 of document UPOV/WG-EDV/3/2, Annex I, the compilation of practices, contract examples and guidance available from breeders’ organizations relevant for EDV considerations, if possible crop by crop.

34. The WG-EDV agreed that the proposal from the Delegation of Japan should be presented to the CAJ for further guidance.

35. The WG-EDV agreed to request the Office of the Union to prepare a revision of document UPOV/EXN/EDV/2 (UPOV/EXN/EDV/3 Draft 1), on the basis of the text in Annex I of document UPOV/WG-EDV/3/2 incorporating the conclusions of the WG-EDV at its third meeting, for consideration by the WG-EDV by correspondence.

36. The WG-EDV recalled the following timeline agreed at its first meeting, held on December 8, 2020 (see document UPOV/WG-EDV/1/3 "Report", paragraph 9) and agreed that, on the basis of the comments received on document UPOV/EXN/EDV/3 Draft 1, the Office of the Union would prepare a new draft of document UPOV/EXN/EDV/3 (UPOV/EXN/EDV/3 Draft 2), and possible recommendations from the WG-EDV to the CAJ, as appropriate, for consideration by the WG-EDV, at its fourth 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 (to be posted 6 weeks before the fourth meeting in English)

DATE AND PROGRAM OF THE FOURTH MEETING

37. The WG-EDV agreed that its fourth meeting (WG-EDV/4) should be held on October 19, 2021, by electronic means and agreed to the following program:

1. Opening of the meeting
2. Adoption of the agenda
3. Draft text for the revision of the Explanatory Notes on Essentially Derived Varieties under the 1991 Act of the UPOV Convention
(documents UPOV/WG-EDV/4/2 and UPOV/EXN/EDV/3 Draft 2)
4. Recommendations from the WG-EDV to the CAJ, if appropriate (document UPOV/WG-EDV/4/3)
5. Date and program of the fifth meeting, if applicable

38. *This report was adopted by correspondence.*

[Annex follows]

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 / MIEMBROS

ARGENTINE / 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)

María Lilia LOSADA (Sra.), Profesional Técnica, Dirección de Registro de Variedades, Instituto Nacional de Semillas (INASE), Ministerio de Agricultura, Ganadería y Pesca, Buenos Aires
(e-mail: mlosada@inase.gob.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)

Paul GARDNER (Mr.), Director, Domestic Policy & Legislation, IP Australia, Woden
(e-mail: paul.gardner@ipaaustralia.gov.au)

Henry BOLTON (Mr.), Assistant Director, International Policy & Cooperation Policy and Stakeholders Group, IP Australia, Woden
(e-mail: Henry.Bolton@ipaaustralia.gov.au)

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

Cathy DOUGLAS (Ms.), Senior Examiner, IP Australia, Woden
(e-mail: cadouglas@hotmail.com.au)

BRÉSIL / BRAZIL / BRASIL

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

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)

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 Certification (CASC), Giza
(e-mail: mahasen.f.gad@gmail.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

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)

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

FRANCE / FRANCE / FRANCIA

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

Catherine MALATIER (Mme), Assistante INOV, Groupe d'étude et de contrôle des variétés et des semences (GEVES), Beaucouzé 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)

Takeshi SUGISAWA (Mr.), Senior Examiner, Intellectual Property Division, Food Industry Affairs Bureau, Ministry of Agriculture, Forestry and Fisheries (MAFF), Tokyo
(e-mail: takeshi_sugisawa820@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)

Michihiro ASAKAWA (Mr.), Examiner, Intellectual Property Division, Food Industry Affairs Bureau, Ministry of Agriculture, Forestry and Fisheries (MAFF), Tokyo
(e-mail: michihiro_asakawa290@maff.go.jp)

Daisuke FUJITSUKA (Mr.), Official, PVP Office, Intellectual Property Division, Food Industry Affairs Bureau, Ministry of Agriculture, Forestry and Fisheries (MAFF), Tokyo
(e-mail: daisuke_fujitsuka080@maff.go.jp)

KENYA / KENYA / KENYA

Gentrix Nasimiyu JUMA (Ms.), Chief Plant Examiner, Kenya Plant Health Inspectorate Service (KEPHIS), Nairobi
(e-mail: gjuma@kephis.org)

MEXIQUE / MEXICO / MÉXICO

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)

Ana Lilia ROJAS SALINAS (Sra.), Jefa, Departamento de Armonización Técnica, Servicio Nacional de Inspección y Certificación de Semillas (SNICS), Secretaría de Agricultura y Desarrollo Rural (SADER), México

(e-mail: ana.rojas@snics.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

Marcin KRÓL (Mr.), Head, DUS Testing Department, Research Centre for Cultivar Testing (COBORU), Slupia Wielka

(e-mail: m.krol@coboru.gov.pl)

RÉPUBLIQUE DOMINICAINE / DOMINICAN REPUBLIC / REPÚBLICA DOMINICANA

María Ayalivis GARCÍA MEDRANO (Sra.), Directora, Oficina para el Registro de Variedades y Obtenciones Vegetales (OREVADO), Santo Domingo

(e-mail: mgarcia@orevado.gob.do)

SUÈDE / SWEDEN / SUECIA

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)

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)

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)

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

EUROSEEDS

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

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

Sangeeta SHASHIKANT (Ms.), President, Association for Plant Breeding for the Benefit of Society (APBREBES), Lausanne
(e-mail: sangeeta@twnetwork.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)

Diego A. RISSO (Mr.), Director Ejecutivo, Seed Association of the Americas (SAA), Montevideo
(e-mail: drisso@saaseed.org)

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)

Mirta ANTONGIOVANNI (Ms.), Manager Global of Regulatory Affair and Register of Varieties, GDM Seeds, Buenos Aires
(e-mail: mantongiovanni@gdmseeds.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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