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Subject: Comments of ESA European Seed Association with regard to Notification GB6-028 – Art.9 – UPOV/WIPO

Dear Mr Bhatti,

With reference to Notification GB6-028 – Art.9 – UPOV/WIPO, by the present letter, ESA European Seed Association wishes to provide some information and to submit its views on Resolution 8/2013 adopted at the fifth session of the Governing Body, and in particular its paragraph 3 which reads as follows: *“Requests the Secretary to invite UPOV and WIPO to jointly identify possible areas of interrelations among their respective international instruments;”*.

We understand that a first meeting that took place between the Treaty and UPOV as well as WIPO in July 2014 where a few initial ideas were identified, and that this meeting was followed by a flow of subsequent reactions sent to the Treaty Secretariat by various farmers’ and civil society organisations. Following the first meeting, the decision has been taken to refer discussion on the above referred paragraph of Resolution 8/2013 to the Second meeting of the Ad Hoc Technical Committee on Sustainable Use of PGRFA (ACSU) that is to take place in March 2015. Since the abovementioned topic is of very high importance to the seed industry which strongly supports the aims and the system of both the UPOV Convention and the International Treaty, ESA considers it crucial that the views of the seed industry are also taken into consideration in the upcoming discussion at the ACSU.

First of all, we would like to note that the above cited paragraph which requires the identification of areas of interrelations between the Treaty on one side and UPOV and WIPO on the other, is placed in

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Resolution 8/2013 which deals with the Implementation of Article 9, Farmers' Rights. It is therefore obvious that the areas of interrelations to be identified among the mentioned international instruments must relate, in principle, to matters that are relevant in the context of Article 9.

Nevertheless, we would also like to underline that the exercise of identifying areas of interrelations with regard to Farmers' Rights should not be misunderstood and should not mean a paragraph by paragraph scrutiny of the UPOV Convention in relation to the different elements of Farmers' Rights as set out in Article 9. We believe that the joint exercise first has to acknowledge and clearly indicate that the UPOV Convention and the International Treaty have been set up for different purposes and are seeking to achieve different aims. While UPOV aims at encouraging the development of new varieties of plants, for the benefit of society; the aim of the Treaty lies in the conservation and sustainable use of PGRFA and the fair and equitable sharing of benefits arising out of their use (article 1.1). Further on, the joint exercise should also acknowledge that while the two instruments regulate different matters, their systems do not contravene but mutually support each other. This is evident in the following examples:

- The fact that the MLS of the Treaty provides facilitated access to PGRFA for further breeding and (in its current form) clearly acknowledges the value of the breeders' exemption as a form of benefit-sharing which supports the development of new plant varieties;
- On the other end, the open innovation system set up by the UPOV Convention and the exceptions to the breeder's right (private, non-commercial use; breeder's exemption; and the optional agricultural exemption) encourage the conservation and sustainable use of PGRFA. Further on, the breeder's exemption is undeniably a very important way to share benefits arising from the use of PGRFA.

With regard to Article 9, the UPOV Convention clearly should not be scrutinized on how it supports the various elements of Farmers' Rights (such as for example protection of traditional knowledge or the participation of farmers in decision-making on matters concerning the conservation and sustainable use of PGRFA) for the simple reason that it is not a task for UPOV to deliver on such goals; the joint exercise should nevertheless reflect on areas where there are some clear interrelations.

One of such areas of interrelations is the way how the breeder's exemption under the UPOV system makes it possible for farmers to enjoy various forms of benefit sharing (Article 9.2(b)). Further to the fact that in case of commercial varieties high value information exchange is taking place since a lot is made known about the varieties regarding their cultural value and main characteristics (which means less time and efforts for the next breeder to identify where the value of a variety lies), the breeder's exemption also ensures the physical availability of the material for further breeding. This equals to valuable technology transfer since with the variety itself the technology used to develop it is also automatically transferred.¹

Another area of interrelation that the joint exercise cannot ignore is certainly linked to Article 9.3 of the Treaty and the optional "agricultural" or "farm saved seed" exemption in the 1991 UPOV Convention. Here, it has to be noted that there are different versions of the UPOV Convention being applied in UPOV member countries. And also that in the 1991 UPOV Convention there are several exceptions to the right which are relevant with regard to Article 9.3 of the Treaty and which provide

¹ To read more on the benefit-sharing value of the breeder's exemption please refer to the [ESA paper](#) on this topic.

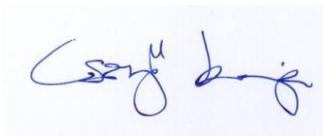
for important leeway as to national implementation. In all countries where the 1978 or the 1991 UPOV Convention applies, national law may, within reasonable limits and subject to the safeguarding of the legitimate interests of the breeder, allow farmers to save and replant on their own farm the seed produced on that same farm without the prior authorization of the right holder. The extent of this exception may vary from country to country also as this exemption is intended for crops where farm saved seed has been used traditionally in a country. Further on, it should not be forgotten that there is also a compulsory exception for private, non-commercial use of protected varieties under the UPOV Convention which allows complete freedom regarding any acts with protected varieties for private, non-commercial purposes.² Therefore, subsistence farmers in developing countries are not prohibited to exchange seed with or sell seeds to other subsistence farmers.

Last, when looking at areas of interrelations between UPOV and the Treaty it has to be mentioned that this exercise cannot be fully accomplished without noting that the implementation of Article 9 is subject to national laws and therefore it is only by looking into the national implementation of both the Treaty and the UPOV Convention in the different countries that one can get a full picture with regard to areas of interrelations.

Dear Mr Bhatti, ESA trusts that you will give due consideration to the opinions addressed in the present letter and will refer our observations to the ACSU, as foreseen in the Notification mentioned in the subject of the present letter. We thank the Treaty Secretariat for this opportunity to bring opinions on this important matter to the attention of the ACSU and we remain at your entire disposal for further information or clarification if required. We look forward to further contribute to the discussion in the ACSU where the seed industry wishes to be represented.

Thank you very much in advance for your consideration.

Yours sincerely,

A handwritten signature in blue ink, appearing to read 'Szonja Csörgő', is centered on a light blue rectangular background.

Szonja Csörgő

Director Intellectual Property and Legal Affairs

Cc : Mr Mario Marino

² For more information on this aspect please refer to the [ESA position on Farmers' Rights](#).