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Community Plant Variety Office
Office Communautaire des Variétés Végétales

DECISION N° 38924 AND N° OBJ 14-092

24 OCTOBER 2014

REASONS FOR THE DECISION TO GRANT A CPVR AND NOT TO UPHOLD THE OBJECTION TO THE GRANT OF A RIGHT TO 'Tang Gold' PURSUANT TO ARTICLES 62 AND 59(5) REG. (EC) N°2100/94

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1. Background

1. On 20 June 2011, the Community Plant Variety Office (hereinafter referred to as the "Office") received an application for a Community plant variety right N° 2011/1544 for the variety 'Tang Gold' (with an original denomination of 'Tango') of the species *Citrus reticulata* Blanco from the Regents of the University of California (hereinafter referred to as "UCR"). On 16 September 2011 the Office asked the *Oficina Española de Variedades Vegetales* ("OEVV") (hereinafter referred to as the "Examination Office") to take-over the examination report of the Spanish plant variety right N°2008/4821.
2. On 19 January 2012 the Examination Office sent to the Office the Interim report on technical examination for the testing period 2008-2013 with no remarks and a date for submission of the final examination report of December 2013. On 12 March 2012, the Examination Office informed the Office that a lesion in part of the stem of one plant of the candidate variety in the 5th row was observed and that the said lesion could have caused the lower vegetative development of the affected plant. However, the said occurrence has not prevented to proceed with the DUS testing of the candidate variety.
3. On 17 January 2013 S.A.R.L. Nador Cott Protection (hereinafter referred to as "NCP") requested the Office to become party to the application proceedings on the basis of Article 1(2) of Commission Regulation (EC) N°874/2009 of 17 September 2009 (hereinafter referred to as the "Proceedings Regulation"). In that respect, NCP put forward that it is the holder of the earlier CPVR N°EU14111 of 4 October 2004 for a variety of mandarin with denomination 'Nadorcott' and that 'Tang Gold' has been obtained by irradiation of 'Nadorcott'. On that basis, it claimed to be directly and individually concerned.
4. On 21 March 2013 the *Club de Variedades Vegetales Protegidas* (hereinafter referred to as "CVVP") asked to become party to the application proceedings on the same basis of NCP. On 4 July 2013 the Office acknowledged the status of party to proceedings to NCP. On 16 July 2013 the Office refused the status of party to proceedings to CVVP as it had not furnished proof that it was directly and individually concerned with regards to the application proceedings for 'Tang Gold'.
5. On 15 May 2013, the Examination Office issued the final report on technical examination drafted according to the technical report CPVO-TP 201/2 of 2009. The Office asked on July 2013 the re-drafting of the report in accordance with CPVO-TP 201/ 1 of 2004. The Examination Office initially objected such petition. On 26 September 2013 the Examination Office sent the re-drafted final report on technical examination in the way requested by the Office. On the same date NCP asked the Office to be authorized to visit the trials, to take samples and pictures of the plants at the premises of the Examination Office and to have access to all the documents held by the Examination Office.
6. Following NCP's request, on 5 November 2013 the Office asked UCR for the authorization to take samples of the plants under Article 88(4) of Council Regulation (EC) N°2100/94 of 27 July 1994 on Community plant variety rights (hereinafter referred to as the "Basic Regulation").
7. On 22 and 25 November 2013, UCR requested access to all the documents of the file relating to the application for 'Tang Gold'.
8. With letter dated 25 November 2013 received by the Office on 3 December 2013, CVVP asked the Office to be authorized to visit the trials at the Examination Office and to have access to the documents held by the Examination Office.

9. By return letter of 12 December 2013, UCR made preliminary remarks defending the protectability of 'Tang Gold', informed the Office that consent was not given to the taking of photographs and of the samples of the 'Tang Gold' trees (Article 88.4 Basic Regulation), objected NCP's request of access to documents supporting the DUS examination held by the Examination Office, and objected that a new visit to the trials be organized arguing that the technical examination had been already completed.
10. On 17 January 2014 the Office invited the parties to proceedings to visit the trials on 28 February 2014. Following UCR's refusal, with the same communication the Office did not authorize the taking of samples during the visit of the trials. With further communication of 22 January 2014 the Office invited the parties to proceedings to attend an oral hearing on 26 March 2014.
11. On 29 January 2014 the Office sent the examination report, the draft variety description and the draft report on differences from similar varieties to the parties to proceedings with a deadline for submission of observations up until 28 February 2014.
12. On 28 February a visit took place to the DUS trial field of 'Tang Gold', with the attendance of representatives of the Office, the Examination Office, UCR, NCP and CVVP.
13. Following a request from the parties to proceedings, the Office extended the deadline to file written observations to the final examination report up until 10 March 2014.
14. On 7 March 2014 the Office replied to NCP regarding the request for public access and inspection to the documents held by the Examination Office.
15. On 10 March 2014 UCR and NCP filed written observations to the final examination report.
16. On 11 March 2014 CVVP informed the Office of its intention to lodge a formal objection.
17. Due to the above request to file a formal objection, on 14 March 2014 the Office informed the parties to proceedings to postpone the oral hearing originally scheduled to take place on 26 March 2014.
18. On 17 March 2014 NCP lodged an appeal against the decision of 17 January 2014 not to allow the taking of samples during the visit of the trials. The appeal is pending before the Board of Appeal of the Office under case N°001/2014.
19. On 28 March 2014 NCP filed a confirmatory application asking the Office to reconsider its position pursuant to Regulation (EC) N°1049/2001.
20. By communication of 10 April 2014 to the President of the Office the Examination Office replied to the observations made by NCP regarding the technical examination for the variety 'Tang Gold' sustaining the application of the technical protocol CPVO-TP 201/2, asking the Office to reconsider its decision to this respect, defending the validity of the way in which the DUS test was performed, confirming the uniformity and stability of 'Tang Gold', denying the presence of any symptoms of disease and rebutting NCP allegations on lack of impartiality.
21. By decision of 23 April 2014 the President of the Office rejected NCP's confirmatory application of 28 March 2014.
22. On 24 April 2014 NCP filed written observations to the decision of the President of 23 April 2014 and lodged an appeal against decisions of the Office of 24 February and 7 March 2014. The appeal is pending before the Board of Appeal of the Office under case N°003/2014.

23. With letter of 12 May 2014 the President of the Office replied to the above letter of NCP of 24 April 2014. On the same date, as a measure of administration of the application proceedings, the Office invited the parties to proceedings to file final submissions up until 12 July 2014 and 12 August 2014 for counter-claims.
24. On 13 May 2014 CVVP made observations to the final examination report and on 15 May 2014 filed the grounds of its objection to the application for CPVR 'Tang Gold'.
25. On 14 May 2014 the Office extended the deadlines under point 23 above to CVVP in its capacity as party to proceedings.
26. On 15 May 2014 the Office communicated the objection lodged by CVVP to the other parties to the proceedings with the invitation to file written observations up until 16 June 2014. Following UCR's request, the said deadline has been extended for all parties to proceedings up until 1 July 2014.
27. On 27 May 2014 the Office summoned the parties to proceedings to an oral hearing scheduled to take place on 9 September 2014.
28. Following receipt of comments from the parties to proceedings, by email of 28 May 2014 the Office sent to them the final minutes of the visit to the trials which took place on 28 February 2014.
29. With a letter of 13 June 2014, UCR objected the admissibility of the observations made by CVVP on 13 May 2014 before being admitted as a party to proceedings.
30. On 27 June 2014 UCR filed its written observations to the objection filed by CVVP. On 1 July 2014 NCP filed its written observations to the objection filed by CVVP.
31. On 2 July 2014 NCP made observations to the final minutes of the visit to the trials. The Office replied by return e-mail on 3 July 2014.
32. With communication of 5 July 2014 UCR made observations to the final minutes of the visit to the trials.
33. Respectively on 10, 11 and 12 July 2014 UCR, CVVP and NCP filed the final written observations to the application proceedings for 'Tang Gold'.
34. The Office exchanged the above final written observations among the parties to proceedings and by email of 17 July 2014 extended the time limit to file counterclaims up until 13 August 2014.
35. On 21 July 2014 the Office received from the Examination Office a written communication with a report dated 11 July 2014 in which it replied to the allegations of the parties to proceedings regarding the documents and the conduct of the technical examination, rejecting all the criticisms made in the observations of NCP and CVVP, and providing additional information and documents related to the technical examination of 'Tang Gold'.
36. On 22 July 2014 the Office sent to the parties to proceedings instructions regarding the conduct of the oral hearing.
37. Following a request for public access to documents filed by NCP, on 25 July 2014 the Office sent all documents which had not yet been communicated to the parties to proceedings.
38. On 30 July 2014 UCR filed comments to the instructions regarding the oral hearing sent to the parties to proceedings on 22 July 2014, to which the President of the Office replied on 13 August 2014.

39. On 7 August 2014 the President of the Office replied to the communication of the Examination Office under point 35 above.
40. On 13 August 2014 the parties to proceedings submitted their respective counterclaims in accordance with the deadline given by the Office. The said counterclaims have been exchanged among the parties to proceedings on 20 August 2014.
41. On 21 August 2014, following a request of NCP of 31 July 2014, the Office authorized all parties to proceedings to include one observer to the attendees to the oral hearing.
42. On 9 September 2014 the oral hearing took place pursuant to Article 77 of the Basic Regulation. Following the oral hearing, on 22 September 2014 the Examination Office sent to the President of the Office a document summarizing its position. The said document did not include any new information and the present decision is not based on any new information which does not already exist elsewhere in the file and on which the parties had not been able to comment.

2. Requests of the parties to proceedings

43. The requests put forward by the parties to proceedings, as modified in the document "*Summary of the parties to proceedings arguments*", have been agreed upon at the hearing of 9 September 2014 as follows:

2.1 UCR requests the Office to:

- (a) Reject the arguments submitted by NCP and the opposition of CVVP, and their requests to access to Tang Gold samples, to carry out laboratory analysis and to receive additional documents of the IVIA regarding its technical examination, and consistently, not to grant them a new time limit to file additional observations;
- (b) To uphold the arguments submitted by UCR as far as the validity of the technical examination of Tang Gold and the fulfillment of DUS requirements by the candidate variety;
- (c) Grant a Community plant variety right and register the 'Tang Gold' variety without any further complementary examination;
- (d) Agree on the application of the CPVO-TP 201/2 Protocol, and
- (e) Amend the Final Report, the Description and the Report on Similar Varieties in the way requested in section three of the Request for relief of UCR's brief dated 12 August 2014, whether the CPVO-TP 201/2 Protocol is considered applicable or not and/or with the previous authorization of the President of the Office, if necessary;
- (f) Grant a Community plant variety right and register the "Tang Gold" variety without any further complementary examination.

2.2 NCP requests the Office to:

- (a) Reject the application for CPVR on 'Tang Gold';
- (b) Should the Office not grant the request under (a) above, declare the nullity of the technical examination and order the conduct of a new technical examination;
- (c) Grant access to the supporting documents of the Examination Office's DUS Report;
- (d) Grant access to 'Tang Gold' plant material implanted in the trials at the Examination Office in order to carry out laboratory the analysis requested in the letters dated 26 September 2013, 17 March and 17 May 2014;

(e) Grant a new time limit to file additional observations.

2.3 **CVVP** requests the Office to:

(a) Reject the application for CPVR on 'Tang Gold';

(b) Should the Office not grant the request under (a) above, declare the nullity of the technical examination;

(c) Modify, in the final report for Tang Gold, the notes for characteristic n°28 to 2 ("medium") and to 9 ("present") for characteristic n°31;

(d) Remove from the final report for 'Tang Gold' the part titled "remarks" regarding characteristics n°18 and n°68;

(e) Authorize the taking of samples of trees n°2 and 5 in order to carry out, in respect of the procedural rules guaranteeing the right to be heard to all parties to the proceedings, a laboratory analysis under the supervision of the Office with the aim to verify whether the trees are not infected;

(f) Grant full access to the whole file, including support documents to the final report;

(g) Grant a new time limit to file additional observations upon completion of requests (e) and (f) above.

3. Arguments of the parties

The Office has grouped the arguments of the parties to proceedings in three main headings, namely:

- The conduct of the technical examination;
- The applicable technical Protocol and the characteristics n°68 and n°18 and
- The DUS requirements.

3.1 Arguments of UCR

44. Preliminarily, as regards CVVP's submission of 13 May 2014, UCR opposes its admissibility on the basis that it was filed at a time when CVVP was not party to the proceedings and that said submission was an uninvited comment on the DUS final report on 'Tang Gold', the visit of the trials organized on 28 February 2014 and on UCR's submission filed on 10 March 2014.
45. On the merits, in support of its pleas in law, UCR put forward the arguments summarized below.

Argument 1

3.1.1 The conduct of the technical examination

46. As regards the entire conduct of the technical examination UCR put forward the following arguments:
 - The technical examination has been conducted over a period of five years of rigorous and detailed observations and has, thus, been done thoroughly;
 - The Examination Office has duly observed the procedures for the conduct of the technical examination;
 - The visits of the parties to proceedings to the trials have confirmed that all the test trees of the candidate variety have permitted adequate observation of the expression of all the characteristics necessary to determine the DUS requirements;

- The suitability of all of the test trees of the candidate variety has been also confirmed in the course of the last visit of 28 February 2014, which relates to the sixth growing cycle (and hence not to be deemed as relevant for the issuance of the final DUS report as it has been issued on the basis of the results of the observations made in the fourth and the fifth growing cycles, and therefore before the visit of 28 February 2014);
- The differences observed in trees n°2 and n°5 of the candidate variety have been attributed, as repeatedly confirmed by the Examination Office, to environmental and growing circumstances (in particular the lesser development of tree n°5 has been attributed by the Examination Office to an accident blow occurred in the year 2009 which caused a wound whose scarring process was responsible for the flaking observed in the part of the trunk corresponding to the rootstock, which in turn caused a lesser initial development of the tree), which had no effect on the expression of the characteristics to determine the compliance with the DUS requirements;
- The said accident (See the report of incident drawn up by the Examination Office on 12 March 2012) suffered by tree n°5 could explain the smaller size of that tree but is not a disease symptom and did not prevent the assessment of the relevant characteristics. In particular, the sparsely foliated branch is typical in 'Tang Gold' trees (and in 'Nadorcott') that had extremely large crops of fruit in both the previous crop and the crop one year prior (i.e. in 2011);
- The test trees n°2 and n°5 of the candidate variety showed normal vigour, developed in good condition without suffering any disease or pest infestation, after having been exposed to verification both from the applicant itself and from the Examination Office on receipt of the plant material. For this reason both in the intermediate reports on the technical examination and in the minutes of the visits to the trials of the year 2013 (as also demonstrated by the photographs of the trees taken during the visit of the trial of 15 April 2013 which did not show any defoliations nor dead branches, nor any abnormal fruiting of any of the test trees), the Examination Office never mentioned any risk of infection or visible symptoms of diseases (the said conclusion has also been confirmed in the minutes of the visit to the trials of 28 February 2014 where viral or viral-like symptoms were not detected in trunks, branches, shoots, leaves and canopy in any of the five test trees of the candidate variety on the "Carrizo" rootstock, which is not a sensitive species to most of the diseases that can affect citrics. In particular with regard to "Tristeza", the "Carrizo" citrage is tolerant to it, and hence when mandarin trees like 'Tang Gold' are grafted onto a rootstock of this type, they become tolerant to infection by the viral strains of "Tristeza" existing in Spain). The lack of any symptoms has been confirmed with reference to both the original plant material submitted by the applicant and the "Carrizo" rootstock. NCP's expert, Mr Luis Navarro, conducted the test on the initial plant material of 'Tang Gold' and declared that it was virus-free (in this respect no evidence has been submitted by NCP to prove the contrary). Finally, experts from the Examination Office rejected the possibility of a later infection through cutting instruments;
- Even where the alleged diseases of test trees n°2 and n°5 were to be confirmed, in order to invalidate the results of the technical examination the supposed symptoms of disease would have to impede the observation of the adequate expression of the relevant characteristics according to the applicable technical protocol (See Document UPOV TG/1/3). In the case at hand, it has been confirmed that the normal performance of the test has not been affected, as during its performance has been possible to observe the 77 characteristics of the technical protocol in all the test trees;
- As regards the stage of development of the trees compared during the technical examination, under UPOV document TGP/4 on Constitution and maintenance of collections of varieties (Section III, point 3.1.2.5.2) it is required that trees shall be in the same physiological stage, which does not mean that the trees have to have the same age. The duration of the juvenile period is dependent on the manner in which the plant has been produced. For mandarin plants originating from a seed, the juvenile period is approximately between 5 and 13

The attention of the parties to proceedings is drawn to their possibility to appeal against this decision. Notice of appeal shall be filed by the party to proceedings in writing to the attention of the Community Plant Variety Office within two months of the service of the decision.

The attention of the parties to proceedings is drawn to the possibility of an appeal against this decision by a third party to whom it is of direct and individual concern. Notice of such appeal shall be filed in writing to the attention of the Community Plant Variety Office within two months of the publication of the decision.

Appeals are subject to a fee.

years, while for a plant generated from a graft, the juvenile period is non-existent. In the case at hand, both 'Tang Gold' and 'Nadorcott' plants have been found to be at an adult stage, because they were all produced by buds from adult trees. Moreover 'Nadorcott' trees were 12 years old at the time of the examination, which is within the expected useful life for citrus trees. As regards the number of trees in the trials, the number of five is not a requirement of the protocol but a recommendation;

- As regards the conditions of 'Nadorcott' trees, the said plant material of the Examination Office's reference collection was not found to be deteriorated, nor it did impede the performance of the technical examination, nor was it too old. The fact that the 'Nadorcott' trees had a number of fruit at their feet did not prevent the observation of the expression of the characteristics during the trials nor means an inadequate maintenance of those trees by the Examination Office;
- The location of 'Nadorcott' trees in the test plot in different rows and the distance (100 m) separating the respective plots for the 'Nadorcott' and the 'Tang Gold' trees did not affect the assessment of distinctness (as the environmental conditions are the same). Moreover, in the case of assessment by means of notes/single variety records, proximity is not necessary, which is an advantage where the growing test contains a large number of varieties;
- The accuracy of the procedures observed during the technical examination has been confirmed by different independent bodies of the Spanish administration in the course of the national procedures for the registration of the candidate variety in the Register of Commercial Varieties and in the national Register of Protected Varieties, and also by the Office in the course of the procedure for the take-over of the DUS report;
- On the basis of all of the foregoing, the Examination Office has correctly concluded that, following the observations carried out during the last two growing cycles with satisfactory fruiting (namely seasons 2011/2012 and 2012/2013), the candidate variety complies with the DUS requirements and the final DUS report constitutes a sufficient basis to grant a CPVR.

Argument 2

3.1.2 The applicable Technical Protocol and the characteristics n°68 and n°18

47. As regards the technical Protocol to be applied to the final DUS report, the variety description and the report on differences with other varieties, UCR put forward the following arguments:
- An application for registration in the Spanish Register of Protected Varieties was filed on 16 May 2008, indicating in the Technical Questionnaire the characteristics consisting in the very low viability of pollen and the absence of seeds in the fruits in an open situation to cross-pollination from other varieties of citrics. These same characteristics have been also identified in the Technical Questionnaire to the application for a CPVR filed on 20 June 2011 with the Office;
 - The delivery of the plant material took place on 1 August 2008 and the technical examination has been conducted between the years 2008 and 2013;
 - Following UCR's request of 10 February 2010 to conduct the measurement of the characteristics relating to the number of grains of pollen, viability of pollen and of ovules, the Examination Office confirmed that the said measurement would have been done in accordance with the provisions laid down for characteristics n°18 and n°68 of the technical protocol CPVO-TP/201/2 of 2009;
 - The observation of the characteristics commenced in the growing season 2011/2012 corresponding to the fourth cycle of the variety, i.e. the first fruiting cycle after planting the test trees and continued through the next season 2012/2013 with satisfactory fructification results;

- The Examination Office issued the final DUS report at the end of the fifth growing cycle (2012/2013), which for the above referenced reasons has been drafted in accordance with the technical protocol CPVO-TP/201/2 of 2009;
- Notwithstanding the foregoing, the Office instructed the Examination Office to draft the final DUS report in accordance with the technical protocol CPVO-TP/201/1 of 18 November 2004 due to the fact that in a "take-over" procedure, according to the Office's interpretation, the applicable protocol should be that in force at the time of the delivery of the plant material for testing in the test plot, which in this case happened on 1 August 2008, at the time when the 2004 Office technical protocol for mandarins was still in force;
- The Examination Office complied with the Office's request to draft the final DUS report, the variety description and the report on similar varieties in accordance with the technical protocol CPVO-TP/201/1 of 2004 with the consequence that any reference to characteristic n°68 has been omitted and, in relation to characteristic n°18, it is only mentioned as "present" without taking into account that the said presence is practically non-existent and, as a result of that, it does not graduate the expression of this characteristic, as foreseen by the technical protocol CPVO-TP/201/2;
- Contrary to the Office's position, the final DUS report, the variety description and the report on differences with other varieties must be drawn up in accordance with the technical protocol CPVO-TP/201/2 of 28 October 2009, pursuant to its Section VI "Entry into force";
- Section VI "Entry into force" of the said technical protocol is structured as follows:
 1. date of entry into force: 9 November 2009;
 2. the DUS report must be carried out in accordance with the version of the Protocol in force at the time when the technical examination of the candidate variety started;
 3. determine as starting time of the technical examination the date when the first observations on the characteristics of the variety in an independent growing cycle, have been carried out;
 4. in case of a procedure for "take-over" of a DUS report, the relevant point in time is when the Office has requested to purchase the said report which has been drafted in accordance with the protocol in force at the time when the technical examination started (being the starting time of the technical examination the date when the first observations on the characteristics of the variety in an independent growing cycle, have been carried out).
- A different interpretation as from point 4 above would bring to incoherent, illogical and contradictory results vis-à-vis the goals pursued by the Office as expressed under paragraph 13.3.2 of the document "*Entrustment Requirements for CPVO Examination Offices*" approved by the Administrative Council of the Office on 23 June 2011, which states that "the descriptions shall be up-dated on the basis of new growing trials or aligned as far as possible";
- The said document recognizes the need for variety descriptions to be updated appropriately in order to gather the characteristics included in the new applicable examination protocols and also to incorporate the new states or levels of expression of the said characteristics;
- To admit the contrary would lead to describing the candidate variety in accordance with the 2004 protocol when all the measurements have been carried out in accordance with the 2009 protocol;
- Thus, the Office has incurred in the incorrect interpretation of the second paragraph of Section VI of the above-referenced technical protocol in having asked the Examination Office to draft the final DUS report in accordance with the provisions of the technical protocol CPVO-TP 201/1 of 2004;

- The Office has acknowledged that the Examination Office has correctly carried out the technical examination of the candidate variety in accordance with the technical protocol CPVO-TP 201/2 of 2009 which was in force at the moment when the Examination Office started its observations of the characteristics of the candidate variety in an independent growing cycle, namely the season 2011/2012, corresponding to its fourth growing cycle;
- However, as the Office has requested the acquisition of the DUS report within a "take-over" procedure, the Office erroneously considered that the applicable technical protocol would have been CPVO-TP 201/1 of 2004, which is the version considered to be in force when the technical examination started, i.e. not when the first observations on the characteristics of the candidate variety started in an independent growing cycle (the season 2011/2012), but on the date of 1 August 2008, when, according to the Examination Office, the planting of the trees of the candidate variety took place at the test field;
- As regards the determination of the relevant point in time marking the starting of the technical tests to the effect of determining the applicable technical protocol, as a general rule and for all cases (either when the technical examination has been started by the Examination Office in the course of a national procedure or in the course of a 'take-over' procedure initiated by the Office on receipt of an application at EU level), it is clear that Section VI of the 2009 technical protocol stipulates that it coincides with the time when the first observations are made on characteristics in an independent growing cycle (for the purpose of UPOV Test Guidelines for the performance of the examination of Distinctness, Uniformity and Stability, UPOV TG/201/1, a growing cycle has to be interpreted as referring to the fruiting cycle, i.e. three years after plantation of the test trees);
- An overview of technical protocols applicable to other varieties show that in all of them it is determined when the technical examination is to be understood to start, the criterion being always the same: to observe the protocol in force at the moment when the tests started. What changes throughout the various protocols for different varieties is the determination of the starting point which varies according to the type of variety in question. In some cases, so as for mandarins, the said moment is the moment when the first observation started in an independent growing cycle, and in other varieties, it is the date when the plant material is delivered for the starting of the tests;
- Should the Office decide to maintain the 2004 technical protocol, the description of the variety should include characteristic n°68 and the different level of expression of characteristic n°18 of the 2009 protocol as additional characteristics;
- Section 6 "Special tests" of the technical protocol CPVO-TP/201/1 of 2004 allows for the use of additional characteristics in the following two scenarios:
 1. When it is not possible to establish distinctness on the basis of the characteristics included in the applicable technical protocol. In this case special tests will be undertaken with the agreement of the President of the Office;
 2. When the additional characteristics or the different degree of expression of the said characteristics prove to be helpful in determining distinctness, subject to a request of the applicant to that end in the Technical Questionnaire or during the test that the candidate variety has a characteristic which would be helpful to establishing distinctness and if such claim is supported by reliable technical data and provided that a technically acceptable test procedure can be devised.
- UCR has requested (in its Spanish application for PVR submitted on 16 May 2008 and in the subsequent application for CPVR) that the technical examination and the variety description for the candidate variety shall take into consideration a characteristic which is not included in the technical protocol CPVO-TP/201/1 of 2004 (namely characteristic n°68, number of seeds in the fruits in open situation to cross-pollination from other

varieties of citrics) and a new expression of a characteristic already present in the 2004 protocol (namely characteristic n°18, a very low viability of the pollen);

- Therefore, UCR has complied with the obligation to prove that the requested characteristics are helpful characteristics (with great agronomic relevance insofar as they have a decisive impact on the commercial value of the variety¹), and are supported by reliable technical data, which complies with all of the criteria under scenario 2 above (among which it has to be noted also the fact that the said characteristic - the number of seeds in the fruits in open situation to cross-pollination from other varieties of citrics - has been included as a new characteristic under number 68 of the 2009 CPVO protocol, which demonstrates its relevance);
- Since the candidate variety has been deemed to be distinct under the technical protocol of 2004, with no need for new characteristics or new states of expression of existing characteristics, the consideration of characteristics n°18 and n°68 has been addressed under the internal procedure of the Office laid down in Annex 2 to document MEO/07/11, namely the procedure which does not require the approval of the President of the Office. If this were not the case and the candidate variety not to be deemed distinct from other varieties under the 2004 protocol, the Office should start the procedure which enables the use of additional characteristics on condition that the President of the Office authorizes it. In fact, the said procedure cannot be invoked only before the starting of the technical examination at the request of the applicant. In a "take-over" procedure it can also be invoked during or even after the test if the new characteristics are taken into account in the test. In fact the approval of the President must be given before the Office issues a decision to grant protection for CPVR, without meaning that it must be given before the characteristics are taken into account;
- The final DUS report includes remarks on the above expressly requested characteristics under section 7 ("Remarks"). However, the characteristics at hand are not included in the descriptive card of characteristics (which is mandatory following paragraphs 3 and 6 of Office Document MEO/07/13), which omits any reference to characteristic n°68 and which, in relation to characteristic n°18, indicates simply "present" without graduating its presence as it would be required;
- However, the additional characteristics should be included as a remark in the variety description in compliance with the provisions of the Office's "procedure for additional characteristic and new stage of expression in an existing characteristic used for other purposes than establishing distinctness" (Office document No MEO/07/13). Consequently, from the foregoing it is clear that the same applies to new stages of expression of an existing characteristic as it is the case for characteristic n°18 of the 2004 technical protocol;
- As regards the state of expression of characteristic n°18 of the technical protocol CPVO-TP/201/1 of 2004, the candidate variety presented a percentage of viable pollen per fruit of 0.8%, while in the case of the 'Nadorcott' variety this figure was 76.7%;
- According to the technical protocol of 2004 the variety of reference for determining the note of "present" of the said characteristic of pollen viability is the Clemenules variety. The 'Tang Gold' variety differs considerably from the Clemenules variety in this respect; being much closer to the 'Owari' variety, which is the variety of reference which was included in the Protocol of 2009 for the note of "absent";
- When applying the protocol of 2004, which contemplates two states of expression, "absent" and "present", the Examination Office has classified the candidate variety with the note 1 ("present") which, in spite of the enormous difference expressed above, is the same note given to 'Nadorcott';

¹ This means that 'Tang Gold' variety presents a double gametic quasi-sterility, with practically zero viability of its pollen and practically zero fertility of its ovary. Thus, in situations of exposure to cross-pollination of other varieties of citrics, 'Tang Gold' does not pollinate and therefore does not produce seeds in the fruits of other varieties of citrics, in contrast with other varieties whose pollen is very aggressive. In addition to that, 'Tang Gold' fruits are free of seeds or have a very low number of seeds.

- As there is no mandarin variety which has a percentage of viable pollen per fruit of 0%, since the percentage of the candidate variety is less than 1%, even applying the states of expression of the 2004 protocol, the classification of 'Tang Gold' should be 1 "absent" and not "present", to be included in the report on differences between 'Tang Gold' and other similar varieties;
- As regards characteristic n°68, the average number of seeds per fruit in 'Nadorcott' has been established at an amount greater than 12 (qualified as "medium" and a note of 5 while the correct note should have been 7 in light of the classification of the varieties in relation with their capacity to produce seeds), in contrast with the 0.3 of 'Tang Gold'.

Argument 3

3.1.3 The DUS requirements

48. As regards the fulfilment of the DUS requirements, UCR puts forward the following arguments:
- The results of the technical examination have shown that the candidate variety is distinct from the 'Nadorcott' variety in the expression of, at least, the four following characteristics of the technical protocol of 2009: 18, 28, 31 and 68;
 - In particular as regards characteristic n°28 (number of radial grooves at stalk end), 'Tang Gold' is distinct from 'Nadorcott'. For this conclusion to be correctly arrived at, 'Tang Gold' fruit has to be compared with the fruits of the varieties established in the technical protocol as reference for the assignation of one note. Thus, the 'Tang Gold' fruits must be compared with those of the Clemenules variety and not with 'Nadorcott', the result of which being that the 'Tang Gold' fruits have more and deeper radial grooves than those of Clemenules (this is habitual with varieties subjected to mutagenesis where the number and depth of the grooves are greater than in the case of the Clemenules variety), and therefore the note attributed to it should be "3" and not "2";
 - Photographs taken in a day visit to the trials in a growing cycle not covered by the technical examination (the sixth one) cannot replace the assessment of the Examination Office's experts based on their expertise and continuous observation and measures taken during two years;
 - As regards characteristic no 31 (presence of a depression at the distal end), 'Tang Gold' and 'Nadorcott' are distinct. In this respect, 'Tang Gold' fruits should be compared with the distal ends of 'Ortanique' variety which is the example variety for the note of "absent" in both protocols of 2004 and 2009. The distal end of 'Tang Gold' is defined as "truncate". Differently, distal end of 'Nadorcott' is "obcordate" according to UPOV document TGP 14/2 and in the expert opinion of the Examination Office based on observations made in a large number of fruits during two years. Thus, the classification of "absent" shall be given to 'Tang Gold' because, this being a characteristic that admits only two possible notes (absent and present), the candidate variety comes closer to the 'Ortanique' variety, which is the reference variety;
 - As regards uniformity, the results of the technical examination have proved that all the test trees are uniform in the expression of all the characteristics of the 2009 technical protocol, in particular, with respect to the characteristics that are indicators of genetic stability (namely characteristics of the fruits, including their size, shape, skin texture and color, size and shape of the leaves, size and colour of the flowers, growth habit and the presence of some late flowering fruits);
 - The differences observed in some specific aspect of trees n°2 and n°5 do not allow the claim that the said trees are "off-types" as none of the following conditions occur jointly:

1. The plant can be classified as atypical (i.e. when the said plant is clearly and evidently distinguishable from the plants which form the candidate variety and that the said phenotypic variation is significant and evident in the expression of a relevant characteristic of the whole or a part of the plant used in the examination of distinctness);
2. That it is evident that the atypical expression of the plant has a genetic basis and is not due to environmental factors or linked to its cultural practice;
 - The results of the technical examination have denied the existence in the candidate variety of atypical expressions in any of the relevant characteristics and their possible genetic source, whose probability in vegetative-propagation plants is infinitesimal;
 - The lesser development in tree n°5 of 'Tang Gold' test trees did not constitute an atypical expression of a relevant characteristic and was attributed to the damage suffered accidentally by that tree and which was duly reported to the Office;
 - Eventual differences related to vigour of foliage, vigour of tree, estimated production, type of fructification and flowering, were not true or not relevant and could not be considered to assess uniformity because they are not included amongst the characteristics of the applicable Protocol and are due to environmental causes. The alleged genetic instability of trees n°2 and n°5, reversion or chimera were not observed nor proved;
 - As to the supposed genetic source of differentiation between the five trees, rather than environmental causes, Prof. Cubero had shown (See Doc. 7 appended to UCR's submission of 27 June 2014) that such genetic causes only could be suspected when the differences observed are obvious and durable. In particular, regarding the allegation of CVVP as to the role of transposons, their number in citrus is still unknown. A reversion is not possible as the mutagenesis has provoked random modifications in the whole DNA of 'Tang Gold', chromosomal breakages and a reshuffling of the genomic structure. UCR held that the burden of proof of such genetic instability would fall on the objector. UCR recalled that in cases A004/20087 and A005/2008, the Board of Appeal has held that "it is common practice in variety examination to suppose that the clonally propagated plants are genetically identical unless otherwise proven."
 - From all the alleged differences in phenotypic traits invoked by NCP and CVVP, only the tree's growth habit (characteristic n°2) and the colour of the fruit (characteristic n°39) correspond to characteristics that should be observed according to the applicable technical protocol. NCP and CVVP deliberately confuse growth habit with traits that are not included in the protocol such as tree's size or vigour while their method to measure growth habit is not valid as it wrongly relies on measurements taken in a visit to the test field before harvesting fruit and on photographs taken after the end of the test, without following the methodology established by the Protocol. Likewise, the alleged lack of uniformity in the colour of the fruit (characteristic n°39) is based on observations made in a visit after the end of the examination and in partial photographs of isolated fruits, and is rebutted from data of field notebooks, and from the general pictures of the trees taken by the IVIA and by the Office's representative, that indicates that Tang Gold has a uniform upright growth habit and their fruits have an homogeneous red orange colour. Continuous observations and measures made by the experts of IVIA, with the methodology, apparatus and software programs required by the Protocol and the Quality manual cannot be ignored. Explanations provided by the IVIA in the Report sent to the Office by the Examination Office with its 21 July 2014 written communication merits all credibility. The Report issued by Prof. Williams and Mr Pellicer refutes the existence of the differences related to the additional characteristics n°20, 21, 22 and 27 alleged by NCP and CVVP at the very last minute.
 - As regards the requirement of stability, since it has been proved that the candidate variety is uniform, it can also be considered to be stable as stated in UPOV Document TG/1/3 according to which "Experience has shown that when a variety has proved to be uniform it can also be considered to be stable";

- Only in very exceptional cases of doubt about uniformity, which are even more unusual in case of plants from vegetative multiplication which are clones of others, it is envisaged that stability should be tested by cultivating a complementary generation or examining a new batch of seeds or plants to verify that the same characteristics are displayed as in the previous supplied material. However, in the present case, it has been proved that the 'Tang Gold' variety is uniform in all the relevant characteristics and in particular in those which determine distinction from 'Nadorcott';
- The above DUS requirements have been observed in connection with all the test trees without being possible to assert a lesser vegetative development of trees n°2 and n°5 in comparison with the level of development of the other trees in the test plot;
- The level of development of the trees does not correspond to any characteristic of varietal identification of the Office technical protocol;
- In any case the lesser development of tree no 5 must not be confused with its "vigour or robustness" which is not one of the characteristics of the CPVO-TP/201/2 protocol and which does not have any relationship with the growth habit of the tree which is a characteristic related with the growth habit of the whole plant and which can be expressed as "upright", "spreading" or "drooping" (the 'Tang Gold' trees have received a note of 1, corresponding to an "upright growth habit" in each and every one of the five test trees);
- As regards the symptoms of disease in tree n°2 and n°5, no evidence has been submitted and no effects whatsoever have been demonstrated on the phenotypic characteristics of the trees which allegedly suffer from it;
- As regards the presence of defoliation and dead branches in tree n°2 and n°5, it bears no relationship to any of the specific varietal characteristics related with the leaves and branches included in the CPVO-TP/201/2 protocol and is due to circumstances which are exogenous to the said trees, such as the strong winds which had affected the area;
- As regards the existence of a smaller number of fruits in tree n°5 compared to tree n°3 and n°4, it is not relevant as no species of fruit cultivars produces an equal number of fruits in all its trees, and therefore, the number of fruits on the trees is not included among the characteristics of the applicable technical protocol;
- Finally, the results of the technical examination have proven that the candidate variety is not exposed to phenomena of reversion by retro-mutation as none of the plants of the candidate variety existing in the test plot display any atypical expression with an evident genetic basis.

3.2 Arguments of NCP

Argument 1

3.2.1 The conduct of the technical examination

49. As regards the conduct of the technical examination NCP put forward the following arguments:
- The Examination Office has not complied with the rules and the principles governing the conduct of the technical examination as contained in the applicable technical protocol and in accordance to UPOV general Guidelines;
 - The photographs taken by the staff of the Examination Office on the occasion of the visit to the trials of 15 April 2013 are not objective, while the photographs taken by the Office during the visit of 28 February 2014

have shown that the test trees did not develop uniformly. Moreover before the latter visit, the test trees have been pruned by the Examination Office in an attempt to dissimulate their heterogeneity. The said pruning should not have been conducted since it affected the growth habit of the trees which is an essential characteristic of the DUS examination and destroyed parties of the trees which had to be observed for the purpose of the technical examination. However, despite the pruning, the heterogeneity of the trees, instead of being reduced has been accentuated;

- The trees for 'Nadorcott' are considerably older (the said trees have been grafted on 25 June 1999) in comparison to the trees of 'Tang Gold', which have been grafted on 1 August 2008, so that their respective physiologic stage is so different that it does not allow a reliable comparison;
- 'Tang Gold' trees were in their juvenile phase (aged between 1 and 5 years), where 'Nadorcott' trees were in full maturity;
- As an evidence that the difference in growing conditions and physiological stages of the trial trees could have affected the expression of their characteristics, NCP invoked the observations conducted by the "*Consejo Superior de Investigaciones Cientificas*" with trees (presented as) having the same physiological stage and proper cultivation conditions, whose results differed from those obtained by the Examination Office;
- The three 'Nadorcott' trees are positioned in different rows of the test plot (each of them having different irrigation systems and cohabiting with plants of different varieties and at different physiological stages) and the distance among them is considerably higher to that between the 'Tang Gold' trees and, in any case, they are very distant from the test trees of 'Tang Gold';
- The growing maintenance conditions of the 'Nadorcott' trees (namely the overall condition of the trees and of the soil where the trees are planted), as it was observed in the course of the visits to the trials, were not appropriate, as there were fruits of past seasons which had not been harvested;
- As regards the anomalies observed in tree n°5 of 'Tang Gold', allegedly attributed by the Examination Office to environmental factors, the lack of certainty regarding the origin of the said anomalies, which render the said tree an off-type, de facto has reduced the number of test trees to 4, with the consequence that the conduct of the technical examination is not to be deemed valid;
- Under the technical protocol CPVO-TP/201/1 of 2004, the plant material submitted for the conduct of the technical examination shall be free from insects, mites and nematodes at all stages of their development, fungi and viruses and virus-like organisms;
- 'Tang Gold' trees n°2 and n°5 showed less vigour, dead branches and a necrotized part, which could have been caused by a pathogen, such as an infection or a disease. In this respect, the accident occurred to tree n°5 of the test plot, as reported by the Examination Office, has caused a necrosis which could have weakened the tree, which in turn would have been more exposed to infections (such as exocortis or cacherie);
- In connection with the suspected infections of trees n°2 and n°5 of the test plot, the only possibility to exclude such a risk is the conduct of a biologic indexation and laboratory analyses by an independent institution, which have not been done in the case at hand with the effect of rendering the result of the technical examination not suitable to establish distinctness. If the trees were affected by a disease, the technical examination should be annulled due to the breach of the basic rule according to which the plant material should be free from pathogen agents affecting their development and that technical examinations should be conducted in conditions ensuring the normal growth of the plants;

- The report of Dr. Jacquemond and Zemzami confirmed the presence of disease symptoms and rebutted UCR's expert analysis of Dr. Albiach who is not capable of excluding the presence of the Tristeza virus (CTV) as it has been based only on the visual inspection of the test trees during the visit to the test trials of 28 February 2014, while the diagnosis of pathogens can only be conducted by means of biologic laboratory analyses;
- The Examination Office either has not provided all the supporting documentation to the DUS report or has provided erroneous documentation in breach of the applicable technical protocol and of the "*Entrustment Requirements for CPVO Examination Offices*" (hereinafter referred to as the "*Entrustment requirements*");
- As regards the supporting documentation to the DUS report, there are documents of the Examination Office, among which the documents concerning the alleged observations conducted on the 'Nadorcott' variety, which have not been transmitted to NCP;
- According to the Entrustment requirements, the Examination Office has the obligation to keep track of the testing activities performed and shall retain records of the primary observations in variety test related activities (the same obligation applies to the recording of any incident of growth conditions);
- In the case at hand, the said documentation includes only the field notebooks and 32 files with measurements;
- As regards the field notebooks, they are incomplete such as the data relating to the application of quantitative criteria which have been deleted with the consequence of making impossible the evaluation of the conclusions contained in the DUS report (this applies to the observation of characteristic n°28 of the applicable protocol in respect to which NCP cannot verify the notes attributed to both varieties);
- The field notebooks contain only the final annotations of each observation without showing the date when the observation has been done, the tree concerned, the test analysis and the statistic methodology. Moreover there are certain characteristics for which the data do not correspond to the observations allegedly conducted, certain other characteristics for which the data are not comprehensible and there are no observations relating to the 'Nadorcott' variety;
- As regards characteristic n°18 (Anther: viable pollen) of the technical protocol CPVO-TP/201/2 of 2009, the only supporting documents are documents named "Documento 185 – Cultivo polen 2011" and "Documento 186 – Cultivo polen 2012". The said documents are incomplete with the consequence that it is not possible to verify the correct conduct of the technical examination;
- As regards characteristic n°68 (Fruit: number of seeds (controlled manual cross-pollination) of the technical protocol CPVO-TP/201/2, the supporting documents are "Documento 200 – Pol. cruzada 2011" and "Documento 201 – Pol. cruzada 2012";
- According to the technical protocol CPVO-TP/2301/2 of 2009, the examination of characteristic n°68 implies the pollination of at least 10 flowers per tree of the candidate variety (50 flowers) in order to check the number of pips. The available documentation showed that only 15 flowers were pollinated in 2011 and 25 flowers in 2012. Therefore, the Examination Office did only conduct 30% of the observations requested by the Protocol. As regards 'Nadorcott' the Examination Office in 2012 did not conduct any observation. For the said year, the Examination Office refers to certain data of the so-called "Ring Test", which is conducted outside the framework of the technical examination of 'Tang Gold', and that therefore cannot constitute a basis for the granting decision. Furthermore, the pollinating variety is 'Nova' (and not 'Fortune' as it was the case for 'Tang Gold') and therefore the results are not comparable. With regard to 'Nadorcott', in 2011 there are no data, and the data corresponding to 2010 are insufficient to verify if the observations were conducted

in accordance with the applicable rules. Thus, the said documentation does not include any reliable data in this respect which would allow the verification of the results of the technical examination.

Argument 2

3.2.2 The applicable technical protocol and the characteristics n°68 and n°18

50. As regards the applicable technical protocol, NCP put forward the following arguments:

- UCR and the Examination Office allege that the applicable technical protocol is CPVO-TP/201/2 of 2009. To the contrary, the applicable technical protocol is CPVO-TP/201/1 of 2004 and since the final DUS report has been purchased by the Office in the course of a take-over procedure, the technical examination started in 2008 when the protocol in force was that of 2004. Secondly, the first observations of the technical examination have been already conducted during the growing season 2009/2010 (during which the preliminary studies commenced, as it is proved by both the Report of the Examination Office of 11 February 2011, for the purpose of granting the provisional registration of 'Tang Gold' in the Spanish Register of commercial varieties and by Eurosemillas), and hence before the entry into force of the protocol CPVO-TP/201/2 of 2009. For this only reason the applicable protocol shall be that of 2004;
- According to Paragraph VI, second sentence of protocol CPVO-TP/201/2 of 2009, in case of a take-over procedure, the applicable protocol shall be that in force at the time when the technical examination started (the said second sentence having the legal value of a special rule to the general one which applies to all other technical examinations);
- The date of 2008 is the date when the plant material of the candidate variety has been received by the Examination Office;
- The above conclusion is confirmed by the decision of the Administrative Council of the Office of 28 November 2012 (See point 1.2 - Entry into Force) which has been clearly summarized in UPOV Document TWF/45/27 of 21 May 2014 which states that the starting date of the DUS examination is considered to be the due date for submitting of plant material for the first test period. This means that in practice the duration of the test starts at the time when the material is delivered and accepted by an examination Office;
- As a consequence of the foregoing considerations, characteristics n°18 and n°68 cannot be taken into consideration as they do not form part of technical protocol CPVO-TP/201/1 of 2004 applicable to the case at hand;
- As regards in particular characteristic n°18, protocol CPVO-TP/201/1 includes two levels of expression (absent 1 and present 9), while the subsequent protocol includes three levels (weak or very weak 1, medium 2 and high 3). According to the applicable technical protocol, both varieties have the same note, being 9 (present);
- As regards characteristic n°68, it does not appear in protocol CPVO-TP/201/1 of 2004. Moreover, the number of seeds present in 'Nadorcott' is not 20-25 but significantly lower (as acknowledged by the documents provided by the Examination Office and even by UCR, which reports a number of seeds between 8-15 in its several expert reports);
- The said characteristics cannot be added under "remarks" as the procedure under Article 23 of the Proceedings Regulation applicable to cases of additional characteristics has not been followed (which establish that the use of an additional characteristic should be approved in advance by the President of the Office) and it is not possible to use additional characteristics to avoid the applicability of the relevant technical protocol;

The attention of the parties to proceedings is drawn to their possibility to appeal against this decision. Notice of appeal shall be filed by the party to proceedings in writing to the attention of the Community Plant Variety Office within two months of the service of the decision.

The attention of the parties to proceedings is drawn to the possibility of an appeal against this decision by a third party to whom it is of direct and individual concern. Notice of such appeal shall be filed in writing to the attention of the Community Plant Variety Office within two months of the publication of the decision.

Appeals are subject to a fee.

- Where the said characteristics were to be admitted as additional characteristics, the alleged differences with 'Nadorcott' have not been proved as the supporting documentation has been proved to be insufficient, not containing any data of 'Nadorcott' which would enable a comparison between the two varieties.

Argument 3

3.2.3 The DUS requirements

51. As regards the fulfilment of the DUS requirements NCP put forward the following arguments:

Distinctness

- Preliminarily the comparison of 'Tang Gold' has to be made with 'Nadorcott' and cannot be substituted by a comparison with the example variety of the Protocol (See to that effect TGP/4, section 2.1.1.1 "in the case of very similar varieties, it is still necessary to have a direct side-by-side comparison of the varieties"); the fact that some of the photographs used to prove the lack of distinctness (those taken by the Office on the occasion of the visit to the trials of 28 February 2014) were taken after the end of the technical examination is not relevant as phenotypic characteristics shall not change if 'Tang Gold' is stable;
- The technical examination has shown that the candidate variety lacks distinctiveness for the following reasons:
 - The final DUS report and the report on similar varieties show that the candidate variety differs from 'Nadorcott' in only two characteristics pursuant to protocol CPVO-TP/201/1 of 2004, namely characteristic n°28 (number of radial grooves at stalk end) where 'Nadorcott' has a note of 2 and 'Tang Gold' a note of 3, and characteristic n°31 (presence of depression at distal end) where 'Nadorcott' had a note of 9 and 'Tang Gold' a note of 1;
 - In addition to the foregoing characteristics, the Examination Office added under the paragraph "remarks" of the DUS report two more characteristics that are not present in the list of the protocol CPVO-TP/201/1 of 2004, which is the applicable protocol, namely characteristics n°18 and n°68;
 - Contrary to the results of the technical examination, the differences regarding characteristics n°18 and n°68 do not exist;
 - As regards characteristic n°18, the average of viable pollen of 'Tang Gold' is not 0.8% but higher (as acknowledged by the documents provided even by the applicant and by the Examination Office, which reports a viable pollen of 4.3% for 2012) and that the applicable Protocol of 2004 does not mention any variety as reference variety;
 - As regards characteristic n°68, the number of seeds present in 'Nadorcott' is not 20-25 but significantly lower (as acknowledged by the documents provided by the Examination Office and even by UCR, which reports a number of seeds between 8-15 in its several expert reports);
 - As regards characteristic n°31, 'Tang Gold' fruits have a depression at the distal end, which justifies a note of 9, that is the same note of 'Nadorcott';
 - Contrary to the statements of the Examination Office, the radial grooves at stalk end of the fruit are not numerous, but relatively numerous with a note of 2 instead of 3, with the consequence that 'Tang Gold' presents the same level of expression of 'Nadorcott' regarding characteristic n°28, as it is confirmed by the photographs attached to the DUS reports (descriptive card), the photographs taken by the Office and even by

The attention of the parties to proceedings is drawn to their possibility to appeal against this decision. Notice of appeal shall be filed by the party to proceedings in writing to the attention of the Community Plant Variety Office within two months of the service of the decision.

The attention of the parties to proceedings is drawn to the possibility of an appeal against this decision by a third party to whom it is of direct and individual concern. Notice of such appeal shall be filed in writing to the attention of the Community Plant Variety Office within two months of the publication of the decision.

Appeals are subject to a fee.

the documentation provided by the applicant including its US patent where the depression at the distal end is also confirmed for 'Tang Gold';

- The inexistence of the difference between the above characteristics n°28 and n°31 has been confirmed by the applicant's description of the candidate variety, where the said characteristic n°28 has been scored as moderate;

Uniformity

- As regards the requirement of uniformity, NCP puts forward the following arguments:
- The different size of trees n°2 and n°5 has not been invoked as a basis for the claim of non-uniformity. The differences in growth habit and vigour have been invoked to substantiate the lack of uniformity's claim, the first included as a characteristic in the CPVO Protocol and the latter being considered by UCR's experts themselves as an essential characteristic for the assessment and description of mandarins (in the expert reports that were filed before the Spanish courts). Besides, again UCR's experts themselves (in the expert reports filed before the Office) have acknowledged that significant differences in vigour and tree size (as the one existing in 'Tang Gold' trial trees) constitute an evidence of genetic instability of a variety;
- Pursuant to the technical protocol CPVO-TP/201/1 of 2004, a candidate variety is to be considered sufficiently uniform if the number of off-types does not exceed 0 out of 5 test plants;
- Trees n°2 and n°5 are not uniform as regards the growth habit (characteristic n°2);
- According to the final DUS report, the trees of the candidate variety have a note of 1 corresponding to "upright", which is the same as 'Nadorcott' trees;
- Contrary to the statements of the Examination Office, test trees n°2 and n°5 have not an upright habit but an open/horizontal/spreading habit (namely a spreading crown shape) in comparison to test trees 1, 3 and 4 which have an upright habit (the same lack of uniformity can be observed in the single parts of each test trees);
- Moreover, tree n°5 shows lack of flowering, the colour of the fruits is different from the other test trees, leaves are yellow (chlorotic), and the fruiting is different in comparison to the rest of trees under examination with the consequence of affecting the expression of characteristics relating to flowering and fruiting such as characteristics n°20, 21, 22 and 39;
- As regards characteristic n°27 observed on tree n°5, the fructification has appeared as clustering while in the remaining trees it is not. The said fructification is irregular among the trees, as in some tree is abundant and in others weak;
- The said fruit production has shown to be lesser and irregular as no trees showed an extraordinary fruit production as of their second year. Two of the trees did not even fructify until 2012 and trees n°2 and n°5 had very weak production during the growing cycle 2012/2013;
- The presence of off-types can be excluded only if there is evidence that excludes the genetic origin of the observed anomalies;
- The burden of proof to that effect shall be borne by the applicant who shall furnish proof that the different behaviour is due to specific environmental reasons;

- The alleged environmental origin of anomalies cannot be presumed in cases of vegetative propagated varieties, while the genetic origin has not been excluded;
- The alleged accident to tree n°5 has not been identified with certainty as the origin of the anomalies, while also other possible explanations have been put forward by the Examination Office, thus showing irregularities in the conduct of the technical examination by the Examination Office who has never informed the Office of the circumstance that the said accident took place during the grafting process;
- In order to exclude the genetic origin of the said anomalies (regarding both retro mutation and chimeras as origin of the heterogeneity of the plants), it is necessary to increase the number of test trees and to extend the examination in order to verify that the trees identified as off-types show the same behaviour in comparison to other trees;
- As regards the origin of the anomalies observed in the 'Tang Gold' trees, there is a high probability that it is genetic due to the instability of citrics and the micro-propagation processes which have an impact on the genetic variability of plants;
- According to UPOV (Document TGP/10 on the examination of uniformity) mutations and chimeras are deemed to be causes of heterogeneity of plants under technical examination;
- In order to exclude the presence of mutations or chimeras, a higher number of plants have to be examined. To the contrary, if the said trees n°2 and n°5 were not considered to be off-types, they should be excluded from the technical examination provided that the number of test trees is sufficient for its completion, which is not the case as the technical protocol CPVO-TP/201/1 establishes a minimum number of 5 trees;
- Therefore, the lack of uniformity of 'Tang Gold' is not due to fortuitous cultivation circumstances. 'Tang Gold' could not be considered uniform, according also to numerous decisions of the Office's Board of Appeal (cases 004/2008 and 005/2008, cases 005/2003 and 006/2003, case A 005/2004). The position of the Examination Office (according to which the different behaviour of trial plants, which are in theory genetically identical, does not affect the fulfilment of the uniformity and stability requirements) is incorrect.

Stability

- As regards the requirement of stability, NCP put forwards the following arguments:
- The requirement of stability is strictly linked to that of uniformity. Therefore, since uniformity has not been proved, it has to be excluded that the candidate variety is stable.

3.3 Arguments of CVVP

Argument 1

3.3.1 The conduct of the technical examination

52. As regards the conduct of the technical examination CVVP put forward the following arguments:
- The results of the technical examination cannot be completely analysed due to the absence of all the relevant supporting documentation to the final technical report. The only available documentation consists of the field notebooks of the years 2011-2012 and 2012-2013 which do not include the individual rate of the measurements done on each of the trees necessary in order to obtain the average rates nor can be verified

the ranges that determine the allocation of one or of another note, which have been deleted by the Examination Office;

- The Examination Office has not granted access to the raw data regarding each of the test trees and the methodology used for the conduct of the technical examination in breach of the "Entrustment requirements for CPVO Examination Offices", which establishes under paragraph 9.2 ("Records") that retention of records and primary observations in variety test activities shall be not less than 5 years. Therefore, the Examination Office shall have kept the raw data at least up until 12 July 2009. The absence of the raw data is confirmed for characteristics n°28 and n°31 for which it has not been possible to verify the result of the technical examination;
- As regards the notes attributed in the final report to characteristics n°28 (number of radial grooves at stalk end) and n°31 (fruit: presence of depression at distal end), they are not correct;
- Characteristic n°28 has been scored as "high" with a note of "3" for 'Tang Gold'. However, the number of radial grooves is nearly the same in both varieties 'Tang Gold' and 'Nadorcott' with the result that the correct score should have been "moderate" with a note of "2" instead of "3" with the consequence of no difference with 'Nadorcott' and the final technical report should be modified accordingly;
- As regards characteristic n°31, the attributed score of "absent" equivalent to a note of "1" so that 'Tang Gold' do not present a depression at distal end, is not correct as both 'Tang Gold' and 'Nadorcott' present the said characteristic;
- Therefore, the above note for characteristic n°31 shall be changed into a note of "9", which would lead to the same note attributed for this characteristic to 'Nadorcott';
- In addition to the foregoing, the Examination Office has not sent any document reporting on any possible accidents suffered by the test trees during the course of the technical examination in breach of paragraph 10.1 (Crop Management) of the "Entrustment Requirements for CPVO Examination Offices";
- As a result of the foregoing considerations, the incompleteness of the administrative file damages CVVP's right to a good administration as per Art. 41 of EU Charter of Fundamental Rights. The data communicated by the Examination Office contain inconsistencies and do not respect the "Entrustment requirements".

Argument 2

3.3.2 The applicable technical protocol and the characteristics n°68 and n°18

53. As regards the applicable technical protocol and the use of characteristics n°68 and n°18, CVVP put forward the following arguments:
- The applicable technical protocol is protocol CPVO-TP/201/1 of 18 November 2004 in force at the time when the technical examination started in 2008 (namely during the growing cycle 2009-2010 when the first observations of the candidate variety were conducted);
 - Even where the technical examination was not a "take-over" procedure, the applicable technical protocol would still be that of 2004. In fact the technical protocol CPVO-TP/201/2 of 2009 entered into force on 9 November 2009 and Section VI establishes that technical examinations started before that date were to be conducted under the previous version;

- Moreover, the fact that the applicable protocol is that of 2004 is also confirmed by the Document CPVO-TP/TEMPLATE/0 of 28 November 2012 adopted by the Administrative Council of the Office in which the meaning of "start of the test" is clarified as being "*the due date for submitting of plant material for the first test period*" (See also in this respect UPOV Document TWF/45/27 prepared for the fruit experts meeting of 26-30 May 2014);
- As regards the part of the final examination report under "remarks", mention is done to characteristics n°68 and n°18 which cannot be taken into consideration as none of the criteria to be considered as additional characteristics has been satisfied in the proceedings at hand nor have the procedures established under Documents MEO/07/12 and MEO/12/04-4 of the Office regarding the adoption of additional characteristics, be observed (namely the Office is required to use the form for a proposal for the use of an additional characteristic, following which the relevant Committee of the Office shall propose to the President to adopt a decision for the acceptance of an additional characteristic. The decision to accept the proposal of the Committee is left to the President of the Office. If accepted the said decision shall be published on the web page of the Office and shall be notified to UPOV);
- Accordingly, pursuant to paragraph 13 of Document MEO/07/12, as the technical examination was not completed when the application for a CPVR was submitted on 20 June 2011, the Examination Office should have contacted the Office in order to inform it about its observations and provide the data as required in the template "proposal for the use of an additional characteristic". The same procedure applies when the Office has informed the Examination Office that it would like to take over the DUS report at a stage where the technical examination was still on-going;
- In the present case the Office informed the Examination Office of its intention to "take-over" the final report before 26 September 2011 and hence during the conduct of the technical examination, namely during the growing cycle 2011-2012;
- The above considerations show that the procedure of paragraph 14 of the Office Document MEO/07/12 is not applicable where the application for a CPVR has been filed when the technical examination has been completed with the final technical report to be "taken-over" by the Office (paragraph 14 refers to the case where a technical examination has been terminated before an application for CPVR has been filed and where it appears that an additional characteristic has been used by the Examination Office in order to take a decision on distinctness);
- The above requirements for the use of additional characteristics are made obligatory for Examination Offices as it is established under the Entrustment requirements for CPVO Examination Offices, paragraph 11.5;
- Notwithstanding the foregoing, there is no evidence in the application file that the above procedure has been observed nor of the adoption of a decision of the President to authorize the use of characteristic n°68 and of the amended state of expression of characteristic n°18;
- In the light of the foregoing the information under "remarks" of the final technical report should be removed and characteristics n°68 and n°18 not to be taken into consideration for the purpose of establishing distinctness;
- Even where characteristic no 18 would be taken into consideration, the note attributed as "absent" is not correct. In this respect, it is not true that the percentage of viable pollen for fruit of the 'Tang Gold' variety is less than "1" and that the level of these characteristics can be classified as "absent";
- To the contrary the average value contained in the notebook corresponding to the 2012-2013 cycle indicates that the percentage of germination of pollen used was 4,3%. Secondly the studies carried out by the

applicant show that the percentage of germination of pollen for the 'Tang Gold' variety has never been equal to 0% (in the application for a CPVR the applicant has indicated under paragraph 6 of the Technical Questionnaire that the pollen viability could get to rates closed to 10% but never to be qualified as absent). Therefore, 'Tang Gold' pollen is viable, with the effect that the note of "9" (present) attributed to the 'Tang Gold' variety in respect of characteristic n°18 ("Antera: pollen viable") is correct and shall not be modified.

Argument 3

3.3.3 The DUS Requirements

54. As regards the fulfilment of the DUS requirements CVVP put forward the following arguments:

- The technical examination has revealed that the test trees of 'Tang Gold' show important differences. In particular trees n°2 and n°5 have not developed as the others and have less vigour, which can be attributed to genetic instability of citrus obtained by irradiation and to the presence of diseases caused by viruses such as exocortis or caquexia;
- In particular there was no difference in the expression of characteristic n°28 between 'Nadorcott' and 'Tang Gold'. 'Tang Gold' should have been given a note of "2" instead of "3" that was attributed for the said characteristic. Likewise, 'Tang Gold' should have had a note of "9" instead of "1" for characteristic n°31 of the applicable protocol. Furthermore, the note for characteristic n°18 already attributed to 'Tang Gold' should not be changed. Finally, even if 'Tang Gold' was found with a difference of one note for characteristic n°28 or n°31, *quod non*, this would not suffice to establish distinctness according to UPOV TGP/9/1, Art. 7 of the Basic Regulation, and Decisions of the Board of Appeal 005/2007 [Sumost 01] and A 002/2000 [Estrade], among others;
- Moreover, as regards the level of fructification and flowering of tree n°5, it has been higher than the rest of the trees. Tree n°5 has shown a desquamation on its trunk which causes an abundant flowering and an abnormal fruiting;
- The fact that the above observed desquamation has been caused by an accident (namely a hit of a tractor) cannot exclude the presence of diseases but reinforces it, since a wound on the trunk of a tree is an important source of infection that could have facilitated the entry of viruses that seem to have affected tree n°5;
- Also tree n°2 shows symptoms of diseases as it has a smaller size, dead branches, defoliation and clorisis on its leaves;
- As a consequence, the candidate variety is not uniform and stable and shall not be granted protection (if the above-mentioned differences were to be attributed to environmental factors, tree n°2 and n°5 should be excluded from the technical examination with the effect that the number of test trees would be inferior to five and hence insufficient for the conduct of the technical examination pursuant to the requirements of the applicable technical protocol N°CPVO-TP/201/1 of 2004).

4. Reasons for the Decision

4.1 On the admissibility of CVVP's submission of 13 May 2014

55. In its reply to CCVP's submission of 13 May 2014, UCR challenged the admissibility of the said submission as it was filed before CVVP became party to proceedings.
56. In this respect, first, the Office notes that by e-mail of 12 May 2014 CVVP had announced the lodging of an objection on 15 May 2014. However, when the Office received CVVP's submission on 13 May 2014, it treated it as the objection filed earlier than it was announced. Secondly, CVVP's first argument (under the heading '*Segunda*', as their first allegation was in fact a summary of the proceedings at that stage) was that the visit to the trials confirmed the fact that the technical examination does not allow to conclude that the variety 'Tang Gold' fulfils the criteria required for protection.
57. The Office has considered that the comments on the visit to the trials, on the final DUS report and on the alleged incompleteness of the administrative application file are all put forward in support of the allegation that "*the observation and the measures of the characteristics do not allow to conclude, pursuant to the Office protocol, that Tang Gold is a uniform variety (neither distinct, stable or new)*" (free translation of page 10 of CVVP's submission of 13 May 2014).
58. In the light of the foregoing considerations, the Office accepts to take into account CVVP's submission of 13 May 2014, along with that dated 15 May 2014, as being part of the objection lodged by CVVP against the application for protection for the variety 'Tang Gold'.

4.2 On the conduct of the technical examination

59. In essence the parties to proceedings have assumed procedural mistakes in the conduct of the technical examination, including lack of documentation and data, lack of impartiality of the Office and the Examination Office, non-suitability of the test trees of the candidate variety due to alleged symptoms of diseases and genetic instability, different stage of development between the test trees of 'Tang Gold' and the trees of the reference variety 'Nadorcott', the maintenance conditions and location of the 'Nadorcott' trees in the trial plot.
60. All of the above arguments as summarized under point 3 above have been grouped as referring to the conduct of the technical examination.

On the alleged lack of documentation and the lack of impartiality on the side of the Office and of the Examination Office

61. As regards, first, the alleged lack of documentation and of data, the parties to proceedings have regularly been provided and updated with documents in the file either on the initiative of the Office or following requests for access to documents. The Office has replied to the said requests providing documents held by it but also requested the Examination Office to provide documents. Moreover, as regards the field notebooks, they are used by experts of the Examination Office to note the observations carried out in the field trials. Therefore, the field notebooks are used in connection with visual observations of the characteristics concerned. The data extrapolated from those observations are uploaded into the Examination Office's central data-base which includes all the data of the characteristics observed for all the varieties of the species concerned, in this case for mandarins. Based on both the analysis conducted by the examiner of the data in the data base and his own experience on the varieties which have been observed, a note can be given to

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each characteristic observed in order to draw up a conclusion on the DUS requirements and, hence, establish the variety description.

62. Not only did the parties to proceedings have access to the above documentation but have also been allowed to visit the trials.
63. Therefore, the technical examination has been conducted in full transparency and, contrary to NCP and CVVP assertions, without restricting access to the supporting documentation to the DUS test.
64. As regards the alleged lack of impartiality on both the Office and the Examination Office, the said claim remained unsubstantiated and unproved. To the contrary, the technical examination has been conducted under the supervision of the Office and in compliance with the entrustment requirements established by the Administrative Council of the Office. Moreover, all the parties to proceedings had access to the documentation of the file, have commented on the documents herein and have presented their final conclusions in the oral hearing of 9 September 2014. As regards the visits to the trials, the first one was done on 20 December 2010 with the participation of Eurosemillas, NCP, UETIV and the OEVV. The second visit was done on 24 March 2011 on request of both NCP and CVVP. The third visit was done on 15 April 2013 on request of NCP and CVVP. Finally, the last visit organized by the Office was done on 28 February 2014. As regards the requests for public access to documents and the requests to take samples from the trial the Office has issued two decisions which have been appealed to the Board of Appeal of the Office, appeal numbers A001/2014 and A003/2014. Accordingly, NCP's and CVVP's requests to be given access to the supporting documents of the DUS technical report and to the taking of samples of the plant material of the candidate variety should be dismissed since the Office has already taken final decisions on those matters.

On the alleged symptoms of diseases regarding 'Tang Gold' test trees n°2 and n°5

65. As regards the alleged symptoms of diseases claimed by both NCP and CVVP regarding test trees n°2 and n°5 of 'Tang Gold', it has to be observed, first, that the plant material for the conduct of a DUS test must comply with rigid phytosanitary requirements as a condition for the said material to be accepted by the Examination Office. The applicant shall provide the Examination Office with the supporting documentation showing that the obligation to supply virus-free material for DUS testing has been fulfilled. Such documentation was submitted in this case. Consequently, in cases when plant material submitted by an applicant is not virus-free, it is not accepted by the Examination Office. If the Examination Office would suspect any virus, it would order the analysis of the material. In the case at hand, the Examination Office did not find any infection on the plant material and as it came from the USA, it had to be placed in quarantine and was hence verified by independent laboratory tests at IVIA. For these reasons the Office has no doubt as to the fact that the material submitted was virus free.
66. If the said trees had become infected during the trial, the Examination Office would have identified effects of such diseases on the trees, which it did not do. The Office received no remarks as to the impossibility to make observations of characteristics listed in the applicable technical protocol. Conversely, the Examination Office, in its report of incident dated 17 January 2012, has indicated that other abnormalities, apart from the lesser development of tree n°5, could not be observed visually.
67. As stated above, no symptoms of diseases have been observed on the trees once entered into the test trials. There is no evidence that the accident to test tree n°5 was an entry point for viruses as alleged. The scar that can be seen above the graft union in the bark of tree n°5 is indicative of the natural healing process which the tree undertook in order to prevent infection by external pathogens.
68. Notwithstanding the foregoing, even if the symptoms alleged to be the result of diseases (namely 'Tang Gold' trees n°2 and n°5 have shown a lower vigour, dead branches and a necrotic part) were actually caused by a

disease, *quod non*, such symptoms did not affect the observation of any characteristics. There was no indication of diseases as the observations made on trees n°2 and n°5 for all characteristics correlated with the observations made on the three other trees of 'Tang Gold' for all the characteristics. Furthermore, the rootstock used for the grafting, namely citrange 'Carrozo', is tolerant to the majority of diseases in Citruses. NCP and CVVP have requested the Office that tests be carried out to confirm or rule out the existence of diseases. The Office does not believe that this is necessary taking into account that no disease related symptoms have been detected. In addition, it would be difficult to decide which viruses should be tested taking into account the fact that there are no specific symptoms detected. The practice of Examination Offices in the EU is not to organize disease tests under the above described circumstances. To introduce such extra tests on requests of parties to proceedings when it is unfounded would unnecessarily delay proceedings and introduce administrative burdens to the detriment of efficiency for parties to proceedings as well as Examination Offices.

69. On the basis of the foregoing considerations, the Office rejects the argument according to which trees n°2 and n°5 are off-type trees or that they were not in the healthy condition at the time of submission of material for testing or during their subsequent growth.

On the alleged genetic instability of 'Tang Gold' test trees n°2 and n°5

70. As regards the alleged different attitude observed in trees n°2 and n°5 due to genetic instability of the variety or a genetic reversion, the attitude of the trees, as observed under "characteristic no 2: growth habit" of the Protocol, has been mixed up with the concepts of vigour, size and of abundance of vegetation. As confirmed by the Board of Appeal in cases A004/2008 and A005/2008, "*it is common practice in variety examination to suppose that the clonally propagated plants are genetically identical unless otherwise proven*". As explained by Professor Williams in the oral hearing of 9 September 2014 "*double gametic infertility permanently and irreversibly distinguishes the 'Tang Gold' genome from the original 'Nadorcott' genotype*". A reversion is not possible as the mutagenesis has provoked random modifications in the whole DNA of 'Tang Gold', chromosomal breakages and a reshuffling of the genomic structure. Consequently, 'Tang Gold' can be considered to be stable, thus, dispelling the theory that trees n°2 and n°5 were off-chance chimera mutations. Therefore, the Office is convinced of this explanation and rejects the argument according to which trees n°2 and n°5 show genetic instability.

On the alleged different physiological stage among 'Tang Gold' and 'Nadorcott' trees and the maintenance condition of 'Nadorcott' trees

71. As regards the assertion that the plants of 'Tang Gold' and 'Nadorcott' were not in the same physiological stage in terms of maturity, the Office observes that the trees fulfil the requirements of UPOV document TGP/4 (paragraph 3.1.2.5.2), as they all are in their adult fruit-bearing phase. The age difference between 'Tang Gold' and 'Nadorcott' trees is immaterial, as long as the two sets of trees are in the fruit-bearing stage. It is common practice amongst all CPVO entrusted examination Offices for fruit crops, that trees of the candidate variety are compared to trees of the most similar variety of a different age and located in a different field plot. This particular working practice still leads to a solid and reliable declaration on distinctness. As reference collections keep including varieties that were granted protection, there is necessarily a time gap between some of the oldest varieties and the newest ones. As signalled in the UPOV Document TGP/4, old material needs regeneration² which implies that observations should be made on plants at the same physiological stage, although the plants may be of different ages.

² See Paragraph 3.1.2.5.2: with respect to the living plant material already included in the variety collection, there are situations which require the renewal of that material, such as: (...) (iii) in variety collections of trees and non-seed-propagated perennial varieties (see Section 3.1.2.4.2). Observations should be made on plants at the same physiological

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72. However, in the opinion of Examination Office there was no need to regenerate the 'Nadorcott' plant material at the time of the DUS trials for 'Tang Gold', since the plant material was in a healthy condition and expressed correctly all its characteristics, as experienced by the Examination Office during several years of observations. The Office sees no reason to doubt that opinion.
73. Finally, as regards the asserted poor maintenance conditions of 'Nadorcott' trees, it has to be pointed out that the Examination Office is the sole authority entrusted with the conduct of technical examinations for citrus and that it possesses a wide living reference collection. Taking into account the experience acquired by the Examination Office it has been able to implement conditions on how to best grow and maintain the reference collection. The conditions under which the Examination Office maintains trees of 'Nadorcott' in the living reference collection are the same as for all the other varieties. As it is in the case at hand, in variety collections of trees, the plants are maintained under cultivation. In this respect the Examination Office carries out routine cultural practices, including the selection of homogenous rootstocks which ensures that distinctness is based on differences in the genotype rather than on differences due to environmental conditions or a rootstock/candidate variety interaction. As regards the fact that 'Tang Gold' trees were positioned in rows not close to those of 'Nadorcott', it has to be pointed out that both varieties' plants have been grown in the same agro-climatic environment and under the same growing conditions.
74. Furthermore, it is usual practice that for practical reasons the reference collection is kept in a different plot to the DUS trial field, but under the same agro-climatic environmental conditions. This therefore has no effect on the ability to observe candidate varieties and reference varieties together, since in case of doubt, the different plant parts (e.g. leaf, fruit, etc.) can be picked by the examiner and directly compared to each other. For all of the reasons stated above, the Office is convinced that the DUS trial was carried out correctly. The Office did review all the documents submitted by the parties to proceedings and in particular the reports from technical experts appointed by the parties and the supporting scientific literature. However, this documentation is not deemed to be pertinent to the case at hand. In this respect, it has to be noted that the DUS test is based only on the observations of the characteristics made by the Examination Office on the plant material received. The said plant material showed no signs of infections. Therefore, all 'Tang Gold' trees could be validly used for the purpose of assessing the DUS requirements. Consequently, the DUS trial could proceed in the correct manner even though trees n°2 and n°5 showed a less vigorous growth. However, this did not affect the expression of characteristics nor did the fact that the 'Nadorcott' trees were positioned in a near-by plot render the comparisons between both varieties unsuitable.
75. Therefore, NCP's and CVVP's requests to declare the technical examination null and void and to authorize the conduct of a new technical examination shall not succeed. In fact, as from the date of the request of take-over of the technical report for the candidate variety 'Tang Gold', the technical examination has been conducted under the control of the Office. The Office shall exercise the discretionary power attributed to it under Article 57(3) of the Basic Regulation and consider whether the examination report can constitute a sufficient basis for a decision or whether to provide for a complementary examination. For reasons of legal certainty and of sound administration, the technical examination of a candidate variety must be stringent and full pursuant to the applicable guidelines and the instructions given by the Office. In the present case, in the light of the arguments set out above, the Office is convinced that the technical examination and the technical report thereof constitute a sufficient basis for a decision within the meaning of Article 57(3) of the Basic Regulation.
76. Accordingly, in the light of the unfounded or, as the case may be, ineffective nature of the complaints put forward by NCP and CVVP, the pleas in law regarding the conduct of a supplementary examination and the

stage, although the plants may be of different ages. Nevertheless, at some time, the plants may become over-mature (i.e. too old for observations) and need to be replaced.

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annulment of the current one cannot be upheld. Likewise, it is apparent from the foregoing that also the request to grant a new time limit to file additional observations cannot be upheld. The parties to proceedings have had ample opportunity to comment orally or in writing pursuant to Article 75 and 77 of the Basic Regulation during the entire duration of the application procedure. Moreover, in the hearing of 9 September 2014 no new elements have been presented by the parties to proceedings which have convinced the Office of the need to establish a new time limit for the submission of additional observations. Accordingly, based on the above conclusion that the Office found the technical report a sufficient basis for a decision, also the pleas in law that the parties to proceedings shall be granted a supplementary time limit to file additional observations cannot be upheld.

4.3 On the applicable technical protocol

77. Rather than carrying out its own technical examination, the Office has decided to avail itself of the provisions outlined in Article 27 '*Other examination reports*' of Commission Regulation (EC) N°874/2009, and take-over the technical report for 'Tang Gold' which was applied for earlier in Spain on 16 May 2008.
78. The Office made its request for a "take-over" of the technical report of 'Tang Gold' on 13 September 2011. The Office thereby became a party to the proceedings in application of Article 27 of Commission Regulation (EC) N°87/2009 and followed the conduct of the technical examination of 'Tang Gold' from that moment onwards.
79. The technical examination of 'Tang Gold' lasted five years, between the submission of plant material in 2008 and the final observations made in the 2012-2013 growing period. The first three years of the technical examination were "establishment years" whereby the plants of 'Tang Gold' were allowed to grow to the adult stage. No observations on characteristics were made during the establishment years. The first observations on characteristics were made during the 2011-2012 growing period when the first proper fruiting period occurred. This was considered as the first independent growing cycle during which observations on characteristics could commence in accordance with section III.5 of the Office's mandarin protocol CPVO TP-201 (Conduct of tests – Trial designs and growing conditions), which states "*The minimum duration of tests (independent growing cycles) will normally include at least two satisfactory crops of fruit*".
80. At the time when the first observations on characteristics of 'Tang Gold' were made in 2011-2012, pursuant to the applicable national legislation, the Spanish Office applied the Office's protocol version CPVO TP-201/2 for the technical examination regarding the Spanish procedures for national listing and plant breeders' rights, since this protocol had already entered into force on 9 November 2009. On the aforesaid date when the request for "take-over" was sent to the Spanish Office, the observations on the characteristics in the independent growing cycles of 'Tang Gold' were already under way using protocol CPVO TP-201/2.
81. When the Office received the final technical report and variety description of 'Tang Gold' from the Spanish Examination Office on 3 June 2013 as a consequence of its earlier take-over request, the Office noticed that the technical report had been drawn up on the basis of protocol CPVO TP-201/2. However, following a literal interpretation of the end of the second paragraph of section VI of the protocol, (which reads: "...*such report can only be accepted if the technical examination has been carried out according to the Office TP which was in force at the moment when the technical examination started.*"), the Office requested that the Spanish examination Office on 18 July 2013 redraft the technical report and variety description of 'Tang Gold' in accordance with previous protocol CPVO TP-201/1. In the case at hand, the literal interpretation of the end of the second paragraph of section VI of the protocol had as effect that the technical report for 'Tang Gold' should have been formulated in accordance to the previous version of the mandarin protocol CPVO TP-201/1, since that protocol was in force at the time the technical examination commenced in 2008 with the submission of plant material of 'Tang Gold' to the Spanish examination Office.

82. On 24 September 2013 the Office received from the Spanish examination Office the revised technical report and variety description of 'Tang Gold' based upon the previous protocol CPVO TP-201/1 that it had requested, albeit with remarks on the status of characteristics n°18 and n°68 which no longer appeared in the variety description. On 28 January 2014 the said revised report and variety description were forwarded to the representative of the applicant for comments.
83. On 10 March 2014 the applicant sent written observations to the draft report and variety description of 'Tang Gold' based upon the previous protocol CPVO TP/201/1. In essence it argued that the technical report and variety description for 'Tang Gold' should be drawn up according to the latest protocol CPVO TP-201/2, since the conditions for the take-over of a technical report should be the same as that for a technical examination being carried out on request of the Office. Furthermore, at the moment the application for 'Tang Gold' was filed with the Office on 20 June 2011, and when the Office made its request for a take-over on 13 September 2011, the current protocol CPVO TP-201/2 had already been in force for almost two years. Thus, the legitimate expectations of the applicant were that the Office would base its decision on the latest protocol, upon which the technical examination was carried out for the Spanish national procedures. Any different interpretation, based on the previous protocol, would be incoherent, illogical and technically fictitious, since all observations were carried out in reality according to the latest protocol CPVO TP-201/2. The other parties to proceedings contended the above findings, requesting in essence the application of the previous Office protocol CPVO TP/201/1.
84. Having regard to the above, the question to be answered is, first, what is the rationale of Section VI "Entry into force" of the aforesaid protocol, for the purpose of the conduct of technical examinations and of "take-over" procedures and, secondly, its interpretation and the effects thereof in connection with the specific case at hand.
85. Section VI "Entry into force" of the aforesaid protocol states:
- "The present protocol enters into force on 09/11/2009. Any on-going DUS examination of candidate varieties with observations started before the aforesaid date will not be affected by the approval of the new TP. Technical examinations of candidate varieties are carried out according to the TP in force [at the time] the first observations are made on characteristics in an independent growing cycle.*
- In cases where the Office requests to take-over a DUS report for which the technical examination has either been finalized or which is in the process of being carried out at the moment of the request, such report can only be accepted if the technical examination has been carried out according to the CPVO Technical Protocol which was in force at the moment when the technical examination started'.*
86. As regards, first, the application of the technical protocol in force at the time the technical examination started for the Spanish national procedures, the Spanish authorities have applied the first paragraph of Section VI "Entry into force" of the aforesaid protocol (hereinafter referred to as "Section VI of the protocol"), in the same manner as the Office would have applied it, had it ordered a technical examination to be carried out on its behalf. In this respect the Office acknowledges that the Spanish examination Office has carried out the technical examination of 'Tang Gold' correctly for the Spanish national procedures according to the latest protocol CPVO TP-201/2.
87. As regards the subsequent CPVR application for 'Tang Gold', insofar as the technical report was the subject of a "take-over", the second paragraph of section VI of the protocol was applied by the Office. For that reason, the Office asked the Spanish Examination Office to redraft the technical report and variety description of 'Tang Gold' in accordance with the previous protocol CPVO TP-201/1.

88. In order to answer the first indent of the question under paragraph 84 above, there is a need to clarify at the outset why the two paragraphs of Section VI of the protocol have been introduced. In this connection, first, it shall be noted that the most recent approved Office protocols shall be applied for the conduct of technical examinations. In general all technical protocols undergo continuous evolution and are subject to review by technical experts. The technical protocol for mandarins is not an exception. Breeding efforts in the field of mandarins have led to developments whereby new characteristics have been added, while the levels of expression and the range of variation have changed for other characteristics. It is also for this reason that Article 87(4) of the Basic Regulation establishes that the Office may adapt official variety descriptions in respect of the number and type of characteristics or of the specified expressions of those characteristics, in order to render the description of the variety comparable with the descriptions of other varieties of the taxon concerned, even after a grant decision.
89. Thus, in order to secure the applicability of the latest available version of technical protocols, it has been established that under the first paragraph of Section VI of the protocol, the relevant date has been deemed to be the date when the first observation of the characteristics of the candidate variety in an independent growing cycle took place. The protocol in force at that date shall be applied and maintained during the technical examination. To this effect, Article 56(4) of the Basic Regulation entitles the Office to determine the date on which the technical examination shall start.
90. It is a well-established principle that the decision to grant plant variety rights can be based on the results of technical examinations which have already been carried out by other examination authorities (the so called "take-over" procedure). To this effect, UPOV document TGP/5 "Experience and cooperation in DUS testing – Introduction" of 30 October 2008, at paragraph 1.(c) underlines that: "*This possibility allows for members of the Union to accept DUS reports on varieties already examined by another member of the Union. Such an approach is encouraged as an important means of minimizing the time for DUS examination and minimizing the cost of DUS examination by reducing duplication*". However, the taking-over of technical reports at Community level from national examination Offices cannot contravene the acknowledged general rule that technical examination shall be conducted according to the protocol in force at the time the first observation of the characteristics in an independent growing cycle took place.
91. The application of the said rule without allowing any exceptions would have led to the result of limiting the possibility of taking-over reports any time a technical protocol has undergone an up-date with a subsequent new version coming into force in between the conduct of the technical examination at national level and the subsequent application for a CPVR with the Office. In all these cases, the technical examination started at national level would be concluded under a previous version of the protocol, thus preventing the Office from taking-over the report resulting from the said technical examination.
92. For the above reasons, the second paragraph of Section VI of the protocol has been introduced as an exception to the general rule in order to allow for the taking-over of national technical reports to enable the Office to evaluate whether the existing final report can constitute a basis for the granting of a CPVR. Otherwise, the Office would have to order the repetition of a new technical examination, with the consequence of increasing the duration and costs of DUS examinations, which would result in duplications of the examination already carried out at national level. In other words, the said provision allows for flexibility without ruling out that the Office, on a case-by-case basis, can give instructions to conduct a new technical examination as provided for under Article 56(2) of the Basic Regulation (this principle was confirmed by the Court of Justice in its judgment of 15 April 2010 in Case C-38/09 P, *Ralf Schröder v CPVO* ('Sumcol 01'), not yet published, paragraph 77).
93. It is, therefore, critical for the Office to be in a position to "take-over" technical reports for varieties which have been applied for previously on a national level. The second paragraph of Section VI of the protocol was therefore adopted to ensure that the technical report being the subject of the "take-over" is still acceptable to the Office although a new protocol has been adopted subsequent to the DUS test of the variety made under a

national proceeding. Accordingly, the wording was adopted to open up for the Office to take over DUS reports under the circumstances mentioned above and not to exclude reports to be taken over in cases such as the one at hand. This same second paragraph of Section VI of the protocol can consequently be found in numerous Office's agricultural and vegetable protocols dating from a similar period of time as the Office mandarin protocol CPVO TP-201/2. Furthermore, in the agricultural and vegetable sectors, there is no substantial time lag between the beginning of the technical examination upon submission of plant material, and the observation of the characteristics, since these events take place in the same growing season within a matter of weeks or a few months between one another.

94. While the above construction has been clarified in the sense that Section VI of the protocol establishes a general and a specific provision which respectively deal with the choice of the applicable protocol and the case of "take-overs", as to the implications in the case at hand, a literal interpretation of the above provisions would lead to a result contrary to the general rule pursuant to which the technical protocol in force at the time the first observation of the characteristics in an independent growing cycle took place, shall apply. To admit the contrary in the present case would lead to a technical report based upon a protocol which was no longer in force at the time when the first observation of the characteristics of the candidate variety started in Spain, when in reality the technical examination was carried out correctly by the Spanish authorities based upon the latest version of the protocol CPVO TP-201/2. As mentioned above, the purpose of introducing the text in question was to address another situation than the one at hand.
95. Furthermore, the above reasoning would contradict the context and the purpose according to which Section VI of the protocol has been adopted with regards to "take-over" requests. The said line of reasoning would have the result of practically preventing the "take-over" of the technical report as it would oblige the Spanish Office to base the results of the technical examination on a protocol which was no longer in force at the time the technical examination started within the meaning of the first paragraph of Section VI itself. Therefore, the said interpretation would amount to contravening the aim of the provision under the second paragraph of Section VI of the protocol. It would result in a simple arithmetic exercise which would ignore the underlying principles as clarified above. In this respect, the interpretation of Section VI of the protocol to be employed has, therefore, to balance the literal wording of the provision at hand with the need to accommodate them to the specific needs of the CPVR legal order, with a special attention to the species at stake. Consequently, it is correct to make a teleological interpretation in order to ensure that the underlying goals and requirements of the CPVR legal order and its particular context of application in the case at hand are adhered to.
96. The anomaly of the second paragraph of Section VI of the protocol arises with respect to the particular situation to be found for fruit tree species, and for which the said second paragraph was not conceived. In such species there is an establishment period between the commencement of the technical examination with the submission of plant material, and the first observation on characteristics of the adult trees for the initial independent growing cycle of the candidate variety. This establishment period is normally two years, but as was the case for 'Tang Gold' (three years) can sometimes be longer. The problem can arise if a new version of the protocol comes into force during the establishment period of the candidate variety like in the case at hand. That is the reason why for a technical examination the newest version of the protocol must be used – as long as no observations on characteristics have yet been made – to ensure that the technical examination is carried out according to the latest Office-agreed standards.
97. Further justification for the use of the Office protocol CPVO TP-201/2 for the technical examination of 'Tang Gold' is illustrated in chapter III.2 (Conduct of tests – Material to be examined) of the aforesaid protocol, which states "*Candidate varieties will be directly compared with other candidates for Community plant variety rights tested at the same Examination Office, and with appropriate varieties in the variety collection*". As it happens, and in application of the first paragraph outlined above, the Spanish examination Office were examining other mandarin varieties on behalf of the Office using protocol CPVO TP-201/2 during the same independent growing cycles as 'Tang Gold', but for which the technical examination with the submission of plant material occurred before the entry into force of protocol CPVO TP-201/2. Thus to adhere to the

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principles of chapter III.2, the Spanish examination Office were obliged to compare 'Tang Gold' with those other candidate mandarin varieties using the same version of the protocol (CPVO TP-201/2), in order to make their technical examinations meaningful.

98. Therefore, the Office has interpreted the end of the second paragraph "*...according to the CPVO TP which was in force when the technical examination started*" of Section VI of the protocol, as being the moment when the first observations were made on the submitted plant material. This would concur with the spirit of the first paragraph of Section VI of the protocol. Since the first observations of characteristics of 'Tang Gold' took place in 2011, the protocol in force at the time was CPVO TP/201/2. This approach justifies the Office taking over the first technical report received from the Spanish authorities on 3 June 2013, since they carried out the DUS test for national purposes according to CPVO TP/201/2.
99. As is explained under point 4.4 below, the candidate variety is distinct no matter which of the two protocols are applied. If the decision would be based on CPVO TP-201/1 it would be necessary for the holder to immediately after the date of grant ask the Office to update the variety description under Article 87(4) Basic Regulation, which would add unnecessary administrative burdens on the holder and the Office. In addition, the existence of Article 87(4) Basic Regulation supports the above position of the Office that it is appropriate to use as update protocols as possible as long as other interests are not infringed or hampered.

4.4 On the DUS requirements

Distinctness

100. As regards characteristic n°68, the data obtained by the Examination Office during the DUS trials for 'Tang Gold' can be taken into account since the Office is of the opinion that the newest version of the technical protocol applies. Thus, there is no need to consider whether the observations made for 'Tang Gold' regarding characteristics n°68 and n°18 should be retraced under paragraph 17 "Remarks" of the final report or as a remark in the variety description, neither to follow the procedure regarding the adoption of additional characteristics.
101. The Examination Office has clarified, during the oral hearing held on 9 September 2014, that the observation of characteristic n°68 had been carried out following the prescriptions of the Office Protocol CPVO TP/201/2, i.e. through the manual pollination of 50 flowers per campaign (i.e. 10 flowers per tree) and the observation of those of the 50 flowers that could fructify and then be spotted on the trees, and this over three successive campaigns of 2010-2011, 2011-2012, 2012-2013 for 'Tang Gold'. On the same occasion the Examination Office has explained in detail the procedure followed to make the manual pollination of the flowers. In particular, the Examination Office has confirmed that always 50 flowers are manually pollinated. In that respect the technical expert of the Office, has during the oral hearing underlined that *"as to the methodology for 68 to be observed in the Protocol, requests 50 flowers. The Examination Office always pollinates 50 flowers but the observation of the characteristic is on the fruits not on the flowers. In the last line of page 5 of the Protocol, it is established that the observation shall be done on at least 2 fruits per plants, meaning 10 fruits. As long as there are 10 fruits the observation can be done"*.
102. As regards the number of fruits, the Examination Office has confirmed that during the first year of observation, 10 fruits were obtained, in the second 6 and in the third one 25 fruits. Therefore, since the observations are carried out during two growing cycles, the procedure has been correctly observed. Therefore, in the opinion of the Office the Examination Office has complied with the methodology established under the applicable protocol and the characteristic concerned can be taken into consideration.
103. As regards characteristic n°18, the Examination Office considers that, owing to the particularities of existing mandarin varieties, the note 1 "absent" should correspond to levels of expression ranging from "absent to very low" regarding pollen viability. Otherwise, this characteristic would not be useful in order to discriminate between varieties, as almost all varieties would fall under 2 "medium" or 3 "many" using the latest version of

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the CPVO protocol, or 9 "present" under the previous version of said protocol. The Office agrees with the Examination Office view's point on the matter. Under the previous version of the protocol, where characteristic n°18 was Qualitative, it meant almost all varieties would have fallen under the state 9 "present", which would not make the said characteristic useful for discrimination purposes. To the contrary, under the current version of the protocol, characteristic n°18 is Quantitative, which reflects the amount of the viable pollen.

104. During the hearing held on 9 September 2014, UCR has underlined that the variety 'Owari', which is the example variety both in the UPOV test guideline TG/201/1 of 2003 and in the Office Protocol CPVO TP/201/2 for the note 1 "absent or very few", has a percentage of pollen germination amounting to 5%, more than 'Tang Gold', which scores 1,7%. The Office is satisfied with the explanations of both the Examination Office and UCR.
105. As regards characteristics n°28 (fruit: number of radial grooves at stalk end) and n°31 (fruit: presence of depression at distal end), NCP and CVVP indicate that 'Tang Gold' and 'Nadorcott' should receive the same notes for both. In contrast, UCR responds that 'Tang Gold' had to be compared, as was done by the Examination Office, with the example varieties (respectively 'Nova' and 'Clemenules' for characteristic n°28 and 'Ortanique' and 'Arrufatina' for characteristic n°31), and not with 'Nadorcott'. UCR adds that a difference even in one level of expression of one or more qualitative characteristics, such as characteristic n°31, can be sufficient.
106. As indicated under UPOV document TGP/9, paragraph 5.2.3.2, "In qualitative characteristics, difference between two varieties may be considered clear if one or more characteristics have expressions that fall into two different states in the Test Guidelines. Varieties should not be considered distinct for a qualitative characteristic if they have the same state of expression."
107. For quantitative characteristics, such as characteristic n°28, the same UPOV document TGP/9 clarifies: 5.2.3.2.3.4 Document TGP/7/1, Annex 3: GN 20, explains that, in the case of quantitative characteristics, it is necessary to determine the appropriate range to describe the characteristic. In general, a standard "1-9" scale is used, but a "limited" range (Notes 1-5) and a "condensed" range (Notes 1-3) have also been accepted. Thus, when deciding on the number of Notes required to establish distinctness, the range of the scale needs to be taken into account.
108. A condensed range was adopted in the case at hand.
109. Therefore, the Office considers that for both characteristics n°28 and n°31, the two varieties are distinct, as there is a difference of one note for characteristic n°28, and 'Tang Gold' received the note of 1 "absent" for characteristic n°31 whereas 'Nadorcott' was given a note of 9 "present".
110. As regards characteristics n°68 and n°18, as they are official characteristics of the official protocol in force, the Office considers their need of having been observed. In this respect, the differences between 'Nadorcott' and 'Tang Gold' are very clear for these two characteristics as observed by the Examination Office.

Uniformity

As regards the arguments relating to the alleged lack of uniformity of 'Tang Gold', they have already been addressed above under points 65-69, "On the alleged symptoms of diseases regarding 'Tang Gold' test trees n°2 and n°5", in particular regarding whether trees n°2 and n°5 are off-types and whether 'Tang Gold' is genetically stable.

111. Furthermore, as mentioned by UCR, for vegetatively propagated varieties which constitute clone plants for the same variety like in the present case, it would be highly unlikely, if not impossible, to observe a lack of uniformity.

Stability

112. As regards the alleged lack of stability, reference is made to UPOV document TG/1/3, paragraph 7.3.1.1, as follows: "*In practice, it is not usual to perform tests of stability that produce results as certain as those of the testing of distinctness and uniformity. However, experience has demonstrated that, for many types of variety, when a variety has been shown to be uniform, it can also be considered to be stable*".
113. The parties have not produced any arguments that have convinced the Office that the above mentioned principle should not apply in this particular case.
114. On the basis of the common UPOV practice and based on the final report prepared by the Examination Office, the Office considers that Tang Gold is stable.
115. The candidate variety is, therefore, considered to fulfil the DUS requirements as per Article 7 through 9 of Council Regulation (EC) 2100/94. The fact that the candidate variety has been found DUS means that it is a variety in itself. In this respect, as regards the contention that 'Tang Gold' is an EDV of 'Nadorcott', the Office does not have competence to decide upon that but the Basic Regulation stipulates the conditions under Article 13(6) for which a variety may be considered an EDV and the procedure for the entry of an EDV into the Register of CPVRs under Article 87(2)(h). The objection is consequently rejected pursuant to Article 59 of the Basic Regulation. The request of NCP and CVVP that the Office refuse the variety pursuant to Article 61 of the Basic Regulation is rejected.
116. On the basis of the above grounds, the Office has reached the conclusion that the technical examination has been conducted according to the applicable technical protocol CPVO-TP 201/2, and the results of the said technical examination have shown that the candidate variety complies with the DUS requirements in the Basic Regulation. Consequently, the arguments put forward by CVVP and NCP cannot succeed and cannot lead to the conclusion that the technical examination should be declared null and void nor that a complementary examination shall be conducted pursuant to Article 57(3) of the Basic Regulation. Furthermore, the parties to proceedings have had ample opportunity to file their respective written observations and supporting documentation at any time during the application procedure and no new elements have been put forward during the hearing of 9 September 2014 which would justify the granting of a new time limit for further observations.

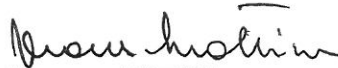
5. Decision on the Requests of the parties

117. UCR's request that a Community Plant Variety Right to the application N°2011/1544 for the variety 'Tang Gold' be granted following the application of the CPVO-TP 201/2 Protocol is upheld.
118. CVVP's objection and the request of NCP to reject application N°2011/1544 for the variety 'Tang Gold' are rejected.
119. NCP's and CVVP's requests that the Office organizes a new technical examination are rejected.
120. NCP's and CVVP's requests to have access to documents and to be authorized to take samples have already been adjudicated on by the Office and appeals are pending before the Board of Appeal. The Office does not take new decisions on these requests.
121. NCP's and CVVP's requests to file additional observations are rejected.
122. CVVP's request to modify, in the final report for Tang Gold, the notes for characteristic n°28 to 2 ("medium") and to 9 ("present") for characteristic n°31 is rejected.
123. CVVP's request to remove from the final report for 'Tang Gold' the part titled "remarks" regarding characteristics n°18 and n°68 is rejected.

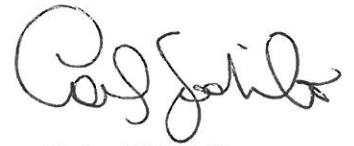
124. The parties to proceedings receive a copy of this decision.



Dirk THEOBALD



Francesco MATTINA



Carlos GODINHO

Taken under the authority of the President of the Office,



Martin EKVAD