

The SADC PVP Protocol:

Blueprint for uptake of UPOV 1991 in Africa



S U M M A R Y



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On 7 April 2015 the African Centre for Biosafety officially changed its name to the African Centre for Biodiversity (ACB). This name change was agreed by consultation within the ACB to reflect the expanded scope of our work over the past few years. All ACB publications prior to this date will remain under our old name of African Centre for Biosafety and should continue to be referenced as such.

We remain committed to dismantling inequalities in the food and agriculture systems in Africa and our belief in people's right to healthy and culturally appropriate food, produced through ecologically sound and sustainable methods, and their right to define their own food and agricultural systems.

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Acronyms

ARIPO	African Regional Intellectual Property Organisation
ACB	African Centre for Biodiversity
CBD	Convention for Biological Diversity
CSOs	civil society organisations
EU	European Union
ITPGRFA	International Treaty on the Protection of Plant Genetic Resources for Food and Agriculture
NDUS	novelty, distinctness, uniformity and stability
LDC	least developed country
PBR	plant breeders' rights
PVP	plant variety protection
SADC	Southern African Development Community
TRIPS	Trade-Related Aspects of Intellectual Property Rights
UPOV	International Union for the Protection of New Varieties of Plants
WTO	World Trade Organisation

Use of terms

Plant Variety Protection (PVP)

Also known as Plant Breeders' Rights (PBR). This is the intellectual property protection given to the right holder over a new plant variety. PVP and PBR are often used interchangeably.

Arusha PVP Protocol

Arusha PVP Protocol is a protocol developed under the African Regional Intellectual Property Organisation (ARIPO). ARIPO is an intergovernmental organisation (IGO) that facilitates cooperation among member states in intellectual property matters. There are currently 19 states that belong to ARIPO.¹ The name of the Protocol 'Arusha' denotes the place where the Protocol was adopted by the members states in Tanzania, 2015. The Arusha PVP Protocol and the ARIPO PVP Protocol are also often used interchangeably.

Farmer-managed seed systems/Farmer seed systems

Also known as the informal seed system. The historical and traditional practices of farmers regarding the management of seed and propagating material, including the in-situ conservation, maintenance and selecting of seed diversity, and the saving, re-using, exchanging and selling of seed amongst family, neighbours and communities.

Introduction and background

The SADC PVP Protocol is a regional plant variety protection (PVP) system developed under the auspices of SADC, titled 'the Protocol for the Protection of New Varieties of Plants (Plant Breeders' Rights) in the Southern African Development Community (commonly referred to as the 'SADC PVP Protocol' or the 'Protocol'). The SADC PVP Protocol was adopted by the 37th Ordinary Summit of Heads of States and Governments of SADC² in Pretoria, South Africa, on 19 and 20 August 2017. At the time of writing, it had since been signed by Angola, Democratic Republic of Congo, Eswatini,³ Zambia, Lesotho and Namibia.

Unlike its counterpart, the Arusha PVP Protocol,⁴ no regulations have yet been made to implement the SADC PVP Protocol. The SADC Protocol can be said to be incomplete and unimplementable until such regulations have also been formally adopted.

This regime is based on a centralised regional harmonisation model, whereby the same model of plant variety protection is adopted by members of a regional economic community to expedite the trade and production of commercially bred seed varieties for the benefit of the seed industry/agribusiness. It is based on UPOV⁵ 1991, a restrictive and inflexible international legal regime that grants extremely strong intellectual property rights to commercial breeders and undermines farmers' rights. The SADC PVP Protocol is part of the legal and institutional architecture designed to facilitate the transformation of African agriculture from peasant-based to inherently inequitable, dated and unsustainable Green Revolution/industrial agriculture. As a PVP regime based on UPOV 1991, it undermines

1. Botswana, The Gambia, Kenya, Lesotho, Malawi, Mozambique, Namibia, Sierra Leone, Liberia, Rwanda, São Tomé and Príncipe, Eswatini, Tanzania, Uganda, Zambia and Zimbabwe.

2. The Southern African Development Community (SADC) is a Regional Economic Community comprising 16 Member States: Angola, Botswana, Comoros, Democratic Republic of Congo, Eswatini, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Tanzania, Zambia and Zimbabwe.

3. Previously known as the Kingdom of Swaziland.

4. See ACB (2018b). https://acbio.org.za/sites/default/files/documents/The%20Arusha%20Protocol%20and%20Regulations_Institutionalising%20UPOV%201991%20in%20African%20seed%20systems%20and%20laws.pdf Please refer to the reference list in the full report

5. UPOV is the French acronym for the International Union for the Protection of New Varieties of Plants. It was developed by industrialised countries to address their own plant-breeding and development needs.

farmers' rights to freely save, use, exchange and sell all farm seeds; stifles innovation, raises input costs for farmers and allows commercial breeders to appropriate and privatise historical social knowledge and natural ecological processes embedded in plant genetic resources.⁶ According to Article 47 of the SADC PVP Protocol, the Protocol will come into force 30 days after two thirds of the member states ratify the Protocol and will remain in force, for as long as at least two thirds of the state parties, remain bound by the provisions of the Protocol. However, there is uncertainty as to whether the SADC protocol will have direct legal effect in the respective countries owing to the different current legal systems that the member states have adopted since independence.⁷ It is simply inconceivable that SADC members would willingly bind themselves to a regional system that is centralised, top-down and, worse still, based principally on the inflexible regime of UPOV 1991.

In this summary, we discuss the main elements of the SADC PVP Protocol, while outlining serious concerns with several of its provisions.

Key concerns about the SADC PVP Protocol

Centralised PVP regime

The Protocol creates a centralised PVP regime for SADC member states that ratify the Protocol, where the SADC regional Plant Breeders' Rights Office (PBRO) will have extremely wide powers to grant and administer breeders' rights on behalf of such member states. This includes granting PVP protection, issuing compulsory licences, nullifying or cancelling PBRs and so forth. Furthermore, the SADC protocol prevents

cumulative protection of plant breeders rights thus favoring uniform application. This means that if a variety is protected by the SADC regional PVP system, the same variety cannot also be protected or be given other rights under national law, ostensibly to avoid double protection and different laws applying in respect of the same variety. Disturbingly, there are no specific provisions and mechanisms to enable member states to object to a PBR applying in its territory and thus to exercise their national sovereignty. This is a very serious omission—one addressed by the Arusha PVP Protocol in Article 4(1). Individual SADC members will be denied the right to take sovereign decisions that are in their national interests, touching on the very core of national socio-economic development and poverty reduction strategies.

Lack of an 'effective *sui generis*' PVP system

This centralised PVP—based on UPOV 1991—flouts the 'effective *sui generis*' system option of the TRIPS Agreement, since SADC members who ratify the SADC PVP Protocol will be required to apply the same restrictive PVP model, irrespective of their different levels of agricultural, economic and social development. This single centralised approach assumes that what works for one country in the region (e.g. South Africa), should work for another country in the same region (e.g. Democratic Republic of Congo). Consequently, the Protocol fails to provide any flexibility for its most vulnerable members, namely least developed countries (LDCs),⁸ to enable them to address their specific local agricultural system and socio-economic challenges.

SADC members who are LDCs of the WTO are currently not even obliged to implement the provisions of the TRIPS Agreement, including the provisions mandating plant variety protection. Many of these members have either limited or no experience with

6. See ACB (2018a) Towards national and regional seed policies in Africa that recognise and support farmer seed systems. Available at: http://www.acbio.org.za/sites/default/files/documents/Seed_Policies_in_Africa_report_WEB.pdf.

7. See Munyi, et al. 2016. *Opportunities and threats to harmonisation of plant breeders' rights in Africa: ARIPO and SADC*. Available at: <https://www.eupublishing.com/doi/pdfplus/10.3366/ajicl.2016.0142>

8. LDC countries in SADC include: Angola, Comoros, Democratic Republic of Congo (DRC), Lesotho, Madagascar, Malawi, Mozambique, Tanzania and Zambia.

PVP systems. What will be the likely impacts of such an inflexible regime of PVP on public breeding, on innovation by public research institutions and farmers and on food and nutrition security?

Protection of all genera and species

The Protocol goes beyond UPOV 1991 by allowing PVP protection of all genera and species, whereas even UPOV 1991 provides a transition period for protection. Given that PBRs is a new concept in the region, with unknown effect, it is irrational to extend protection to all genera and species. Flexibility is necessary in order to allow countries to determine which genera or species should be included and which should be excluded from the scope of a national PVP law. Moreover, PBRs tend to be relevant only to crops with commercial value, thus it is also important that the need for PVP standards is differentiated between different categories of crops, such as commercial non-food crops and food crops to ensure equity in domestic food and seed systems. A member state might wish, for example, to exclude certain indigenous plant genera and species from PVP protection in order to guard against misappropriation, private ownership and generally, the erosion of genetic diversity and the marginalisation of local varieties and farmer-managed seed systems.

NDUS criteria

There is a strong view that the PVP protection criteria, namely novelty, distinctness, uniformity and stability (NDUS) clearly disregard landraces and farmers' varieties. The view is that this exclusion and lack of recognition of landraces and farmer varieties effectively excludes farmers from the definition of 'breeder' in the Protocol and this in turn, precludes landraces from obtaining protection.⁹ The concern is that SADC has chosen to follow the flawed approach of UPOV 1991, which only encourages standardisation and homogeneity based on the NDUS criteria, rather than developing

a legal framework that also rewards agrobiodiversity and encourages farmers to rely on a diversity of crops, which is important to protect livelihoods in the face of the emerging threat of climate change and the challenges of food security facing the region. Theoretically, PVP may benefit farmers by protecting their diverse varieties from biopiracy.¹⁰ Unfortunately, with the NDUS requirements, this may not work for farmers. Furthermore, applying for PVP protection will be costly and difficult to manage for farmers or even small seed enterprises as PVP systems involve significant costs which are related to NDUS testing and assessment. This must be taken into account by the LDCs within SADC, and then raises a much broader question about comprehensive protection and recognition of farmers' varieties—a question that really should be addressed in a comprehensive policy for farmer-managed seed systems.

Disclosure of origin

Due to CSO pressure, the SADC PVP Protocol includes, as part of the application requirements for the grant of a plant breeder's right, a declaration from the breeder that the genetic material or parental material acquired for breeding, evolving or developing the variety was lawfully acquired. These provisions are intended to contribute towards preventing the misappropriation of genetic resources, an improvement on the previous draft where no such provision was included. However, it still does not provide for the right to benefit-sharing from the use of genetic resources that may have been acquired from farmers and local and indigenous communities. Consequently, the Protocol fails to support the objectives and the obligations under the Convention for Biological Diversity (CBD), the Nagoya Protocol on Access and Benefit Sharing and the International Treaty for Plant Genetic Resources for Food and Agriculture (ITPGRFA). It is important that PVP legislation and those laws and regulations that are crafted to implement the ITPGRFA, CBD and Nagoya

9. See Correa et al. (2015) *Plant variety protection in developing countries: A tool for designing a sui generis plant variety protection system: An alternative to UPOV 1991*. Available at: <http://www.apbrebes.org/files/seeds/ToolEnglishcompleteDez15.pdf>.

10. See ACB (2018) *Towards national and regional seed policies in Africa that recognise and support farmer seed systems*. Available at: http://www.acbio.org.za/sites/default/files/documents/Seed_Policies_in_Africa_report_WEB.pdf

Protocol are all supportive of one another and contain explicit provisions in this regard, so that these laws operate in tandem on these critical issues.

Scope of breeders' rights

Article 27 in the SADC PVP Protocol has expanded the PVP rights conferred to breeders to such a degree that such rights are comparable to those granted under patent laws. Article 27 in essence provides that acts related to production or reproduction (multiplication), conditioning for the purpose of propagation, offering for sale, selling or other marketing, exporting, importing and stocking for any of these mentioned purposes, require the authorisation of breeders (Article 27(1)), and may be subject to conditions and limitations (Article 27(2)). Further to that, Article 27 (3) states that the use of harvested material shall require the authorisation of the breeder unless the holder has had reasonable opportunity to exercise his/her right in relation to the said propagating material, while Article 27(4) states that all the aforementioned provisions in the Protocol shall be extended to essentially derived varieties. In a previous UPOV model, UPOV 1978, the saving, re-use and exchange by farmers of seed for non-commercial purposes was not as expressly restricted. However, these rights can still be legally exercised by a farmer if they fall under the exceptions provided under Article 28 of the SADC PVP Protocol, which are subject to certain conditions. With respect to harvested material as mentioned under Article 27(3) it should be noted that UPOV 1978 does not require extending the exclusive rights to harvested materials or other marketed products, except only for ornamental plants that are used for propagating purposes. However, the SADC PVP Protocol relating to harvested material is not as draconian as the Arusha PVP Protocol, which extends restrictions even to the harvested products, unless the breeder has had reasonable

opportunity to exercise the right in relation to the propagating material as is provided for by Article 21(3)(b) of the Arusha Protocol.¹¹ By extending protection to essentially derived varieties under Article 27(4), (5) and (6), the Protocol places significant restrictions on farmers' ability to freely use protected varieties for research and breeding purposes, thus limiting the development of new varieties from the protected varieties—especially for farmers who breed and adapt varieties to their local conditions by selection.

Exceptions to breeders' rights and opportunities towards realisation of farmers' rights

The provisions dealing with exemptions to breeders' rights are crucially important. In this regard, one must ask the question: how far short do these exceptions fall from the realisation of farmers' rights as recognised in Article 9 of the ITPGRFA, to which Angola, Botswana, Democratic Republic of Congo, Eswatini, Lesotho, Madagascar, Mauritius, Malawi, Mozambique, Namibia, Seychelles, South Africa, Tanzania, Zambia and Zimbabwe are contracting parties?¹² The exceptions to breeders' rights in the Protocol relate to acts done by a farmer for "private and non commercial purposes" which according to UPOV 1991 is a compulsory exemption, and to the UPOV 1991 optional exemption –the so called 'farmers' privilege' in regard to "acts done by a farmer to save, sow, re-sow or exchange for non-commercial purposes his or her farm produce, including seed of a protected variety, within reasonable limits and subject to the legitimate interests of the holder of the breeder's right", being an improvement on the clause contained in a previous SADC draft.¹³

The use of the term 'private and non-commercial' could signify the use of protected varieties for subsistence purposes only. However, UPOV 1991 interprets 'private and non-commercial use' in its narrow sense.

11. Subject to Articles 22 and 23, the acts referred to in paragraph (1) items (a) to (g), in respect of: ... (b) products made directly from harvested material of the protected variety falling within the provisions of paragraph (a).

12. See list of membership of the ITPGRFA: [http://www.fao.org/planttreaty/countries/membership/en/?page=1&ipp=20&no_cache=1&tx_dynalist_pi1\[par\]=YToxOntzOjE6IkwiO3M6MToiMCI7fQ.](http://www.fao.org/planttreaty/countries/membership/en/?page=1&ipp=20&no_cache=1&tx_dynalist_pi1[par]=YToxOntzOjE6IkwiO3M6MToiMCI7fQ.)

13. The plant breeder's right shall not extend to "acts done by subsistence farmers for the use for propagating purposes, on their own holdings, the product of the harvest which they have obtained by planting, on their own holdings the protected variety of varieties covered by Article 26(3)(a)(i) or (ii) to this Protocol. See Article 27(d) of the draft SADC PVP Protocol 2012: <http://www.ip-watch.org/weblog/wp-content/uploads/2013/04/SADC-Draft-PVP-Protocol-April-2013.pdf>.

As a result, practices such as exchange, selling and even trading of seed surpluses on the local grain market cannot be considered to fall within the boundaries of the private and non-commercial use exception making it illegal in the SADC countries.¹⁴ Particularly, the sharing and exchange of farm-saved seed among smallholder farmers is the bedrock of African agricultural systems ensuring food security and seed conservation and thus there is a need to expand the 'private and non-commercial' use exemption not only to all resource poor farmers¹⁵ but also to all smallscale farmer. What constitutes a small scale farmers will differ from country to country and it may not be feasible for a regional harmonised PVP system to provide such a definition. Such a task must fall on individual member states to do so in their national PVP laws, after consultation with smallholder farmers and other stakeholders in their respective countries.

When it comes to the interpretation of the so called 'farmers' privilege' as per Article 28 (d) of the SADC protocol, a great deal will depend on how "non-commercial purposes", "reasonable limits" and "the legitimate interests of the holder of the breeder's right" will be further elaborated/interpreted. On the one hand, as noted above, "non-commercial purposes" should be clearly defined in such a way that it does not restrict the rights of farmers. On the other hand, "reasonable limits" and "the legitimate interests of the holder of the breeder's right" should be defined so as not to restrict the scope of use of the protected material and also so as to exempt smallholder farmers from paying royalties. 'Non-commercial' should be given a broad interpretation, so that smallholder farmers have full freedom to operate when using protected varieties, including the right to exchange and sell seeds and propagating material.

Conclusion and recommendations

Consideration of distinctions between the SADC and Arusha PVP Protocols

Several SADC member states (more than half) also belong to ARIPO. SADC member states who are both members of ARIPO and SADC will be confronted with the anomalies that are contained in the provisions for exceptions to breeders' rights between the two PVP Protocols.¹⁶ This is bound to cause confusion about which Protocol to ratify, due to the vast discrepancies between the main provisions of the Protocols.

Issues of national sovereignty

As mentioned before, a rather disturbing element in the SADC PVP Protocol is that the Protocol does not make any provision for contracting parties to object regionally to the grant of a PBR in its territory, as has been provided for in the Arusha PVP protocol. Since the Protocol has already been adopted, it would be very difficult to rectify this omission. It is an open question whether regulations can repair such a fundamental defect of the SADC PVP Protocol.

Disclosure of origin

The requirement for ascertaining that genetic material has been lawfully acquired and the disclosure of source of the material is a key step towards safeguarding against the misappropriation of genetic material. This provision is not contained in the Arusha PVP Protocol. However, it does not go far enough, in that it does not require that farmers are able to participate in benefit sharing. Again, can regulations repair such a defect and align the Protocol with national-level access and benefit sharing laws?

14. See De Jonge, B. 2014. Plant Variety Protection in sub-Saharan Africa: Balancing commercial and smallholder farmers' interest. Available at: https://www.researchgate.net/publication/272802664_Plant_Variety_Protection_in_Sub-Saharan_Africa_Balancing_Commercial_and_Smallholder_Farmers'_Interest

15. Ibid

16. ACB 2018b. https://acbio.org.za/sites/default/files/documents/The%20Arusha%20Protocol%20and%20Regulations_Institutionalising%20UPOV%201991%20in%20African%20seed%20systems%20and%20laws%20Summary.pdf.

Exceptions for breeders' rights

The exemptions for breeders' rights in the SADC PVP Protocol allow farmers include acts done by a farmer for "private and non commercial purposes" and acts done by a farmer to save, use, sow, re-sow and exchange farm-saved seed and other propagating material of protected varieties subject to reasonable limits and safeguarding the interests of the breeder. The Arusha PVP Protocol only provides limited exceptions for specific categories of farmer, and subject to a list of agricultural crops and vegetables, specified by the Administrative Council and associated with the historical practice of saving seed in the contracting states, and which excludes fruits, ornamentals, other vegetables and forest trees for use of the propagating material and product harvested on the farmer's own holding.¹⁷ Furthermore, this would still be subject to the payment of royalties by small-scale farmers and large-scale commercial farmers.¹⁸ This shows that exemptions only apply to smallholder farmers who will be exempted from paying royalties. However, small-scale commercial farmers may be put at an economic disadvantage compared to those in Europe as they will be required to pay remuneration to the breeders.

Will the regulations to implement the SADC PVP Protocol adopt broader interpretations for 'private and non-commercial purposes' as outlined under Article 28(a)? In addition, in relation to Article 28(d), wide definitions would have to be made for the 'farmer' as contemplated in that section in relation to (i) 'private and non-commercial purposes', (ii) 'reasonable limits' and (iii) 'safeguarding the interests of the breeder'.

While we remain steadfastly opposed to centralised PVP regimes based on UPOV 1991, we propose that if regulations are prescribed on these, they should implement farmers' rights and not limit any of farmers' activities related to the use of protected varieties. This would require appropriate definitions of 'farmer' to include smallholder farmers and a small-scale commercial farmers as farmers who would not be subject to the payment

of royalties to breeders. There may be a need for clear distinctions and definitions of the different categories of farmer within the SADC region, such as smallholder farmers, small-scale commercial farmers and large-scale commercial farmers in terms of the size of cultivated land, the type of crop being planted, total income or profit from seed/crop sales per year, and so on, and as per agreement through consultations with member states as these factors vary from country to country. In a set of comments submitted to ARIPO in regard to draft regulations, African CSOs stressed that even the European Union (EU) exempts small-scale farmers (including small-scale commercial farmers) from paying remuneration for saving and re-using protected seed and propagating these on their own holdings where such seed and propagating material appears on a list of varieties identified as protected, with the result that these farmers are in a far better economic situation than African farmers. It would be unethical and grossly unfair to place African small-scale commercial farmers at a greater disadvantage than their wealthier European counterparts. At the very least, they should be given an exemption from paying remuneration, as is the case in the EU.

Consequently, there is a need for transparency and adequate participation in the development of SADC PVP regulations for the implementation of the PVP Protocol. This policy-making process should be inclusive of all concerned stakeholders, including African farmers' and civil society organisations, and should entail a series of proper consultations to promote an unbiased decision-making process before and after the regulations are drafted and endorsed.

Recommendations for SADC Member states

In light of the issues highlighted on the SADC PVP Protocol, particularly the highly restrictive and inflexible centralised PVP regime based on UPOV 1991, we urge SADC member states not to ratify the SADC PVP Protocol. In a separate publication, we have

17. See Article 22(2) of the Arusha PVP Protocol.

18. See Article 22(3) of the Arusha PVP Protocol.

argued similarly why SADC and, for that matter, ARIPO member states should also not ratify the ARIPO PVP Protocol.

Least developed countries within SADC should take advantage of the extension period—as provided for in the TRIPS Agreement—to develop suitable and flexible PVP systems that balance breeders' rights and farmers' rights and then too, only at the end of the extension period. For African countries that are bound by the TRIPS Agreement, TRIPS does provide the flexibility for a *sui generis* system to be tailored in order to cater for national interests and agricultural systems. Such *sui generis* systems can both meet WTO obligations and also ensure an equitable seed regime, unlike UPOV's standard, one-size-fits-all model, developed to suit an already established European seed and agribusiness context. India, Malaysia and Thailand, for example, have developed *sui generis* PVP systems that respond to their local agricultural context.¹⁹

For those countries that must put PVP laws in place, we recommend the following:

- Each country should undertake independent and participatory impact assessments to assess what impact an intended PVP system will have on smallholder farmers and rural

communities. It must be noted that UPOV 1991 poses a threat to the realisation and enjoyment of human rights, particularly the right to food, through restrictions on the use, exchange and sale of protected seeds which, coupled with high and increasing seed prices and reducing household income may affect access to food, healthcare and education.²⁰ Therefore such an assessment must consider the respect and protection of human rights, including the right to food, livelihoods and crop diversity.

- Adequate consultations need to be undertaken with concerned stakeholders, including African smallholder farmers, indigenous and local communities and CSOs. This should involve a series of public dialogues and consultations, taking into account the results of the impact assessment studies.
- Member states should ensure that their obligations under international agreements including the CBD, the ITPGRFA and the Nagoya Protocol on Access and Benefit Sharing, as well as a range of international instruments to protect human rights, are reflected in their PVP laws, particularly in regard to the implementation of farmers' rights and safeguards against biopiracy.

19. See Correa (2015) *Plant variety protection in developing countries: A tool for designing a sui generis plant variety protection system: An alternative to UPOV 1991*. Available at: <http://www.apbrebes.org/files/seeds/ToolEnglishcompleteDez15.pdf>.

20. See Berne Declaration et al. (2015) *Owning seeds, accessing food: A human rights impact assessment of plant variety protection*. Available at: https://www.publiceye.ch/fileadmin/files/documents/Handelspolitik/Factsheet_2015_01_DB_HRIA_UPOV_EN.pdf

Annex

Main comparisons between SADC and ARIPO PVP Protocols

	SADC PVP Protocol	Arusha Protocol
Approval and adoption	Adopted by the 37th Ordinary Summit of Heads of States and Governments of SADC in Pretoria, South Africa on 19 and 20 August 2017. No regulations developed to date.	The Protocol was adopted by a Diplomatic Conference of ARIPO at Arusha, Tanzania, in July 2015. The Regulations were adopted by ARIPO's Administrative Council in Malawi, November 2017.
Signatories	Angola, Democratic Republic of Congo, Zambia, Eswatini and Namibia.	Ghana, The Gambia, Mozambique, São Tomé and Príncipe, and Tanzania.
Comes into force	When and while two thirds ratify/accede to the Protocol.	When four countries ratify/accede. So far none have ratified.
Member states	16 member states: Angola, Botswana, Comoros, Democratic Republic of Congo, Eswatini, Lesotho, Madagascar, Malawi, Mozambique, Namibia, Seychelles, South Africa, Tanzania, Zambia, Zimbabwe.	19 member states: Botswana, The Gambia, Ghana, Kenya, Eswatini, Lesotho, Malawi, Mozambique, Namibia, Sierra Leone, Liberia, Rwanda, São Tomé and Príncipe, Somalia, Sudan, Tanzania, Uganda, Zambia and Zimbabwe.
Member states that are LDCs	9	13
Member states who are members of the ITPGRFA	11	14
Objections	No provision or mechanism to enable member states to object to a PBR applying in its territory. Pre-grant objections by any person must be submitted within 60 days after an application for PBRs is made (Article 22(2)).	Article 4(1) of the Protocol and Rule 12 of the Regulations, allows contracting parties to object to a PBR being extended to its territory, within six months from the date on which the PBR application is filed. Provides three months for a pre-grant objection (Article 16). \$250 fee for objection (Rule 5(2)). The decision to prevent the PBR in a territory needs to be justified to the ARIPO PBR office (Rule 12(1)(a)(iii)).

	SADC PVP Protocol	Arusha Protocol
NDUS: Distinctiveness	<p>It must be clearly distinguishable from any variety that is a matter of common knowledge <i>anywhere in the world</i>. Further, Article 9(2) outlines factors for a variety to be of common knowledge such as:</p> <ul style="list-style-type: none"> • Exploitation of the propagating material or harvested material of the variety has already been marketed for commercial purposes; • Entry of the variety in an official list or register of varieties in any SADC member state or outside the SADC region or precisely described in any professional publication; or • Inclusion of the variety in a publicly accessible plant varieties collection must include events that would not necessarily be known to the public, for instance the addition of a variety to a reference collection. It should also include any form of publication (not just limited to 'professional' publication). 	<p>If it clearly distinguishable from any other variety whose existence is a matter of common knowledge at the time of filing the application.</p> <p>No definitions of what constitutes common knowledge.</p>
Duration of protection	<p>25 years for trees and vines and 20 years for all other genera and species. It further states that the Advisory Council may extend these periods by up to five years (optional five-year extension), thus going beyond UPOV 1991.</p>	<p>25 years for trees and vines and 20 years for all other genera and species. (Article 26)</p>

	SADC PVP Protocol	Arusha Protocol
Exceptions	Article 28(d) Acts done by a farmer to save, use, sow, re-sow or exchange for non-commercial purposes his or her farm produce including seed of a protected variety, within reasonable limits subject to the safeguarding of the legitimate interests of the holder of the breeder's right.	Article 22(2) The limited farmer exception allowed by the Protocol is allowed only for agricultural crops specified by the Administrative Council on condition royalty is paid by the farmer to the breeder. Fruits, ornamentals, vegetables and forest trees are explicitly excluded from the scope of the exception of the Protocol. Article 22(3) The conditions for the implementation of the provisions under paragraph (2), such as the different level of remuneration to be paid by small-scale commercial farmers and large-scale commercial farmers and the information to be provided by the farmer to the breeder, shall be stipulated in the regulations.
Disclosure of origin	Requires a declaration that parental, genetic material was obtained lawfully (Article 13(5)(e)), but does not ensure obligations to these other international agreements are met.	Fails to provide any provision or mechanism to ensure lawful acquisition of genetic material.
Protection of existing varieties	Article 40 allows for the granting of a PBR retrospectively to existing varieties, even if they do not fulfill novelty criteria.	No provision.

Source: ACB 2018b

	ARIPO	SADC	ITPGRFA	UPOV member (1978 or 1991)	WTO member	Least developed country designation	National PBRs law in place
Angola		•	•		•	•	
Botswana	•	•			•		
Comoros		•		•*		•	
DR Congo		•	•		•	•	
Djibouti			•		•	•	
Eswatini	•	•	•		•		
Gambia	•				•	•	
Ghana	•		•		•		
Kenya	•		•	•***	•		•
Lesotho	•	•	•		•	•	
Liberia	•		•			•	
Madagascar		•	•		•	•	
Malawi	•	•	•		•	•	
Mauritius		•	•		•		
Mozambique	•	•			•	•	•
Namibia	•	•	•		•		
Rwanda	•		•		•	•	•
Sao Tome & Principe	•		•			•	
Sierra Leone		•	•		•	•	
Somalia	•					•	
South Africa		•		•**	•		•
Sudan	•		•			•	
Tanzania	•	•	•	•***	•	•	•
Uganda	•		•		•	•	•
Zambia	•	•	•		•	•	•
Zimbabwe	•	•	•		•		•
Total	18	16	20	4	21	18	8

* through the African Intellectual Property Organization (OAPI) ** UPOV 1978 *** UPOV 1991

Adapted from Munyi et al., 2016



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