

South Africa's new Plant Breeders' Rights Act

and its effect on farmers' rights and
farmer managed seed systems



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About this paper

In this briefing paper, we provide a brief analysis of the Plant Breeder's Rights (PBR) Act (Act No.12 of 2018), which has now become South Africa's new plant variety protection (PVP) Act, and which was signed into law by the president on the 29th March 2019.¹ We unpack some of the key provisions affecting the realisation of farmers' rights and discuss issues for further consideration in the development of regulations still to be developed by the Department of Agriculture, Forestry and Fisheries (DAFF). We also outline key issues for further consideration in the work ahead to fully realise farmers' rights, and to support and strengthen farmer-managed seed systems (FMSS) beyond South Africa's revised seed and PVP laws.

Overview

Plant breeders' rights (PBRs) are monopoly, private ownership rights, granted by a national or regional mandated authority, that can be licensed to other breeders in the public and private sectors for a fee, and that allow the breeder as rights holder to collect royalties from farmers for the use of the protected seed or plant variety.

The International Convention for the Protection of New Varieties of Plants (UPOV), crafted mainly by European breeders, was adopted in Paris in late 1961. The UPOV Convention set binding international standards for plant variety protection (PVP) for those countries that become members of UPOV. It has since been revised several times: in 1972, 1978 and 1991. If a country wants to become a member of UPOV, it can now become a member of only UPOV 1991. UPOV 1991 is applied as a one-size-fits-all legal PVP regime for new varieties of plants and fails to consider the specific seed and agricultural systems in different countries. It expressly does not recognise farmers' rights for the reuse and exchange of farm saved protected seed or vegetatively propagated material.

1. Parliamentary Monitoring Group. <https://pmg.org.za/bill/561/>

Article 27.3.b of the World Trade Organization's (WTO) Trade-Related Aspects of Intellectual Property Rights (TRIPS) agreement requires South Africa as a WTO member to provide for the protection of plant varieties, either by patents, or by an effective *sui generis* system, or by any combination of the two. South Africa is currently a member of UPOV 1978, a more flexible PVP regime than UPOV 1991; the latter severely limits any variations to suit national interests and conditions. Acceding to UPOV 1991, as South Africa currently intends to do, significantly strengthens private breeders' rights at the expense of farmers' rights. (See Annex 1 for a comparison between UPOV 1978 and 1991.)

South Africa's previous PVP law, the Plant Breeders' Rights Act No. 15 of 1976 granted IP rights to plant breeders and provides for the protection and enforcement of these rights. It already went beyond its obligations under UPOV 1978 and is, in fact, in line with UPOV 1991. The 1976 PBR Act has now been replaced by a new PBR Act, which was approved by Parliament in October 2018, and signed into law by the president.

The African Centre for Biodiversity (ACB) and civil society organisations (CSOs) engaged directly with the South African national government and various provincial governments on the PBR Bill during the consultation period, and campaigned strongly against it as well as the Plant Improvement Bill (PIB) as part of the architecture that entrenches and deepens historically unequal seed, agricultural and food systems in South Africa. We called for specific exemptions in the PBR Bill for smallholder farmers and their farming systems.² While some provincial governments rejected the PBR Bill on the basis of lack of adequate recognition or protection of smallholder farmers,³ these rejections were overridden at parliamentary

level by a problematic and skewed voting system⁴ and the PRB was then passed by Parliament on 23 October 2018.

The South African government has also indicated that it wishes to join UPOV 1991 as well as the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA). The latter provides obligations for countries to realise farmers' rights (Article 9);⁵ the issue of recognition, protection and implementation of farmers' rights becomes critically important. We have produced a separate briefing that deals with these issues.⁶

The South African seed sector

Twenty-four years after political democratisation in South Africa, economic power remains in the hands of a small elite, with the majority of South Africans experiencing widespread poverty, malnourishment and lack of access to basic services. South African agriculture and seed systems are highly and increasingly dualistic (ACB, 2016). On the one hand, there is a dominant, highly industrialised and consolidated formal industry, within which large multinational and domestic seed companies produce and sell mainly corporate seed that is primarily oriented to large-scale commercial producers. On the other hand, there are marginalised FMSS made up of a large assembly of micro- or smallholder⁷ farmers who produce on the periphery, mainly to supplement household food supplies, based on farm-saved and -exchanged seed.

2. See <https://acbio.org.za/sites/default/files/2017/03/Lobby-paper-PBR.pdf>; <https://acbio.org.za/sites/default/files/2017/01/ACB-comments-PBR-Bill.pdf>; and ACB 2018. "UPOV 1991 and the ITPGRFA: Key issues for farmer-managed seed systems in South Africa". ACB, Johannesburg.

3. See <https://pmg.org.za/committee-meeting/25412/>

4. See <https://www.acbio.org.za/en/parliamentary-consultation-decision-making-sas-corporate-seed-bills-sham>

5. Article 9 of the ITPGRFA outlines farmers' rights, recognising the historical and ongoing role of farmers and local and indigenous communities in conservation and development of PGRFA and reaffirms the primacy of rights of farmers to save, use, exchange and sell farm-saved seed/propagating material, "subject to national law".

6. ACB 2018. "UPOV 1991 and the ITPGRFA: Key issues for farmer-managed seed systems in South Africa". ACB, Johannesburg.

7. Small-scale refers to enterprise size measured in turnover, while smallholder refers to size and land holdings.



Photo Credit: Bioversity International/R.Vernooy

Commercial seed markets are dominated by genetically uniform, commercially bred seed varieties, including genetically modified varieties. These varieties are bred, produced and sold by multinational seed/agrochemical companies such as Monsanto, Pioneer Hi-Bred and Syngenta, all of which have recently been acquired by other companies.⁸ Indeed, the last few years have witnessed increased concentration and vertical integration of seed and agrochemical companies.

These commercially bred seeds have replaced genetically heterogeneous populations, including landraces, farmer varieties, and, more broadly, farmers' seeds, which capture the diversity of genotypes present in farmers' fields. In South Africa, unlike

most African countries, seed production and distribution are corporate-controlled and primarily serve the needs of a few large commercial farmers. However, this, too, is changing on the continent with the harmonisation of seed laws underway and concomitant changes in seed and intellectual property (IP) laws at the national level.

Figure 1 illustrates the structure of South Africa's seed sector in relation to the seed laws. A wide but marginalised pool of agricultural biodiversity is unregulated, including most indigenous crops and wild biodiversity. These plants can be used, adapted and exchanged by anyone without restriction.

8. Bayer has acquired Monsanto, ChemChina has acquired Syngenta, and DuPont (owner of Pioneer Hi-Bred) has merged with Dow and spun off their agribusiness interests into Corteva. See <https://acbio.org.za/wp-content/uploads/2017/04/Mega-Mergers-Summary-Bayer-Monsanto.pdf>

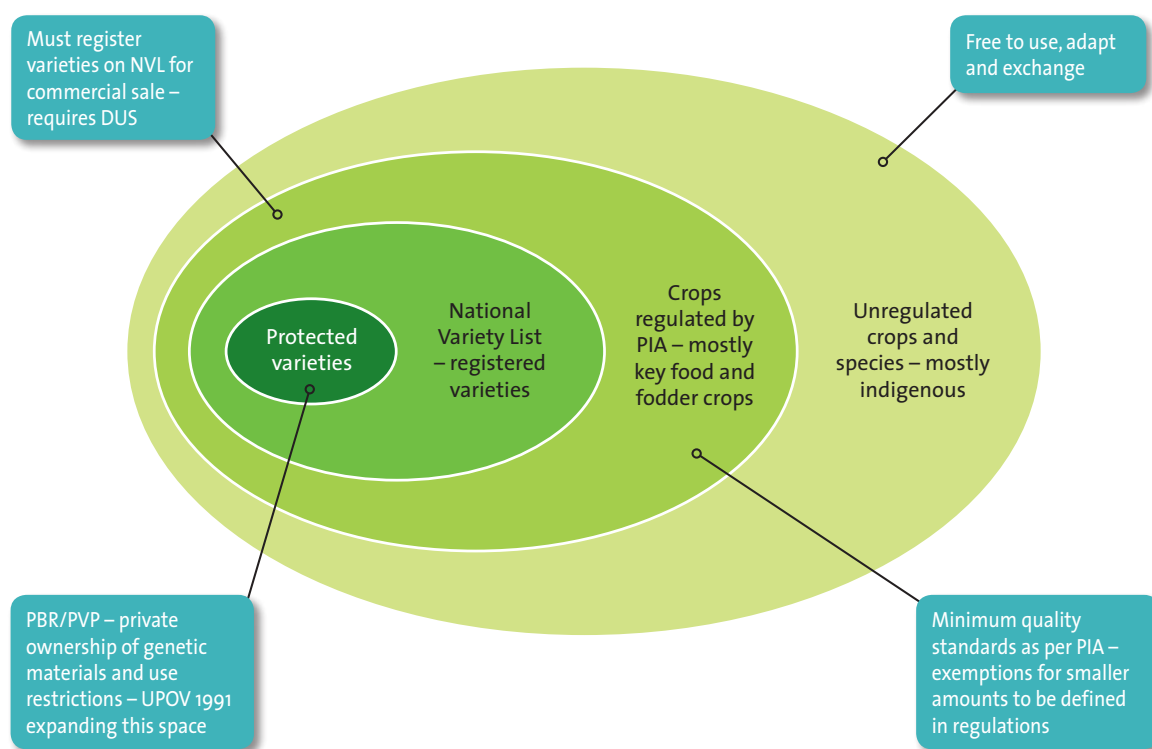


Figure 1: Schematic representation of the South African seed sector and the seed laws

The new PBR Act deals with PVP, that is, exclusive ownership claims over genetic resources. Breeders can seek protection on any variety that passes New, Distinct, Uniform and Stable (NDUS) testing. If successful, this confers exclusive IP rights for a period of time and restricts use by others, including farmers, without royalty payments first being paid.

Despite their marginalisation, smallholder farmers still play a vital role in the conservation and development of agricultural biodiversity, food production and consumption. FMSS can ensure access to affordable seed, adapted to local agroecological conditions, thereby ensuring food availability and nutritional security and contributing to resilient seed and food systems (Almekinders and Louwaars, 2002). FMSS create and maintain the diversity of seed and crops that would otherwise fall into disuse and ultimately disappear. Developing the use, distribution and management of farmers' seed as part of broader, open-pollinated populations is an essential element of this diversity. Farmer seed systems comprise both improved as well as traditional genetic materials,

without the varietal distinction and related standards and certificates that are essential components of the formal seed sector.

However, farmer systems are not recognised, protected, supported or strengthened in policies, laws or programmes. They do not receive financial, institutional or political support. Agricultural support policy is oriented towards integrating a relatively thin layer of black small-scale farmers into the commercial sector, mostly through integration into large-scale commercial value chains. Yet this fails to address the deepening inequalities in the country, which require a systemic, structural transformation of South African seed and food systems. The encroachment of seed laws that are dismissive of FMSS, and their accompanying regulations, restrict farmer seed systems from operating. This will affect rural lives and livelihoods considerably, as well as farmers' ability to innovate and contribute to the development and maintenance of diversity (De Schutter, 2011). It will also lock out any possibilities for new discourses, processes and frameworks to flourish that recognise, protect, strengthen and support FMSS.

Key provisions and concerns to consider in the development of the regulations

The PBR Act is based on UPOV 1991, which is an inflexible and restrictive system designed to heavily protect breeders, and which fails to protect farmers' rights. Like the Plant Improvement Act No. 11 of 2018, the newly enacted PBR Act encourages and entrenches genetic homogeneity and monoculture farming, with serious negative impacts on biodiversity conservation and sustainable use, adaptability and resilience to changing climatic conditions.

The new PBR Act differs from the 1976 version by:

- Extending breeders' rights to harvested material and products derived from harvested material from the unauthorised use of a protected variety (e.g. maize grain and milled maize);
- Extending breeders' rights over all crops, even though UPOV 1978 allows South Africa a discretionary limit, in order to keep some crops in an open source or public interest space (and in this regard the Act goes beyond UPOV 1991);
- Criminalising the exchange and sale of farm-saved seed from protected varieties;
- Extending breeders' rights from 20 and 25 years to up to 30 years (depending on the plant variety);
- Extending breeder's rights to what is termed

- “essentially derived varieties” (EDVs);⁹
- Using South Africa's criminal justice system and public resources to police farmers in order to enforce the intellectual rights of breeders. Such enforcement is an abuse of state resources, whereas breeders should avail themselves, at their own cost, of civil law remedies.

The sections below outline key concerns with the new PBR Act and provide areas for consideration in the development of the regulations. We maintain that SA should avoid acceding to UPOV 1991, and rather maintain its current obligations under UPOV 1978, allowing more flexibility and ability to respond to future conditions, needs and outcomes. We also support South Africa becoming a Party to the ITPGRFA.

Expanding the scope and duration of a breeder's right

In the newly enacted PBR Act, the duration and scope of the PBR is extended further than previous versions of the Bill. In line with UPOV 1991, Section 15(1) of the PBR Act allows for PBRs to be granted to all plant genera and species. This prevents the South African government from excluding certain crops from PVP and hence private ownership, in the national interest. The Act does not even take advantage of the transition period provided for in UPOV 1991.

The duration of the PBR in Section 8(1) is extended to 20, 25 and 30 years for crops, vines, and tree crops respectively. Even UPOV 1991 does not require a 30-year exclusivity period. The period of operation of the sole right as outlined in Section 9 of the Act prevents the issuance of a compulsory licence during this time (also not clearly defined). Compulsory licences are meant to enable a country to intervene, especially in times of emergencies, in order to protect national interests.

9. A variety must be regarded as being essentially derived from another variety if (i) it is predominantly derived from the initial variety, or from a variety that is itself predominantly derived from the initial variety; (ii) it is clearly distinguishable from the initial variety; and (iii) it conforms to the initial variety in the expression of the essential characteristics that result from the genotype or combination of genotypes of the initial variety, except for the differences which result from the act of derivation.



It is important that the regulations clearly define the duration of breeders' rights for specific crops, as well as the duration of the sole right. It is prudent that the PBR exclusivity period be differentiated for different crops, especially food crops. For crops that have a high variety turnover, such as maize, which is an essential food security crop, this period should be sharply reduced, after which period varieties should be made available for unrestricted use.

The scope of exclusive breeders' rights is dramatically expanded in the PBR Act. Protection given to the holder of the PBR, as outlined in Section 7(2)(a) and (b), extends to **harvested material**, and even to the **products made from the harvested material**, if the original use of the material was unauthorised, unless the breeder has had "reasonable opportunity" to exercise his or her rights. Reasonable opportunity to exercise breeders' rights usually refers to royalty payments.

Section 7(3)(a) and (l), which further applies PBRs to EDVs, is a highly contentious issue – since all new varieties are essentially derived from some combination of existing varieties – and goes a long way towards stymying further research and development. The EDV concept also introduces a double standard (Correa et al., 2015), since it applies only to protected varieties used as an initial source of derivation. No similar protections are provided for farmers' seed that is used to develop new varieties, where the new variety is essentially derived from the farmers' seed. This is so because farmers' seed/varieties are not legally recognised.

The implication of the extension of breeders' rights to EDVs is that, if a smallholder farmer acquires the seed through informal channels such as exchange with neighbours, and replants this seed, the private breeder can claim royalties on the entire product of the seed. Smallholder farmers do not necessarily differentiate between

protected and non-protected varieties that enter their seed and production systems (Louwaars and de Boef, 2012).

Section 5 outlines the penalties associated with any contravention of the Act, which are higher than previously, that is, the user may be liable to a fine or imprisonment of up to 10 years. This is particularly harsh for a smallholder farmer or a small-scale enterprise. Definitions should be provided to ensure that smallholder farmers, and the essential, routine activities of FMSS, are not penalised. It is also deeply concerning that public resources will be used to police farmers in order to enforce the private rights of breeders.

Confidentiality and disclosure of origin

UPOV 1991 is interpreted as preventing contracting parties from establishing a disclosure obligation as a condition for granting PVP protection over a new plant variety.¹⁰ According to UPOV 1991, granting a breeders' right shall not be subject to any other conditions beyond NDUS, provided that the variety has a denomination and the required fees are paid. This not only promotes homogeneity and the narrowing of genetic and crop biodiversity, but also prevents countries from complying with the Convention of Biological Diversity (CBD), Nagoya Protocol and the ITPGRFA, with respect to access and benefit-sharing provisions, to obviate biopiracy. Non-disclosure of origin for PVP protection ultimately facilitates biopiracy and the exploitation of the seed diversity in farmers' fields. This is anomalous with patent law, which requires such disclosure for the granting of patents – why then is this not the case for PVP protection? The PBR Act replicates this, as there is no requirement for disclosure of origin or other passport data, or information on how the new variety was bred and the provenance of the variety.

10. Disclosure of origin requirements are needed to prevent misappropriation of genetic resources and associated traditional knowledge, to promote compliance with Convention for Biological Diversity (CBD) access and benefit-sharing requirements, and to prevent misuse of the IP system (Sarnoff and Correa, 2006).

In terms of the PBR Act, Section 6 outlines the inspection of documents submitted in connection with an application for a plant breeders' right:

6. (1) Any person may inspect any document submitted in connection with an application for a plant breeder's right at any reasonable time and upon payment of a prescribed fee.
- (2) The Registrar must furnish a person contemplated in subsection (1), on payment of a prescribed fee, with a copy of the document contemplated in that subsection within seven days.
- (3) Notwithstanding subsections (1) and (2) but subject to subsection (4), a person may not—
- (c) inspect, or be furnished with a copy of, any other prescribed confidential information.

The regulations must define what is considered confidential information, particularly since disclosure of origin is not required as part of the application and grant procedure.

Farmers' rights: Exceptions to plant breeder's rights

The exceptions in the South African PBR Act are provided in Chapter 2, Section 10:

10. (1) Notwithstanding section 32(a), a plant breeder's right in respect of a variety obtained in a legitimate manner does not extend to—
- (a) any act done in respect of that variety for private and non-commercial purposes;
- (b) any act done in respect of that variety for experimental purposes;
- (c) any act done in respect of that variety for the purposes of breeding other varieties and, except where section 7(3) applies, any act contemplated in section 7(1) and section 7(2) in respect of such other varieties; or

(d) a farmer who uses the protected variety in accordance with subsection (2).

(2)(a) In respect of subsection 1(d), the Minister must prescribe—

- (i) the category or categories of farmers who may use the protected variety;
 - (ii) the category or categories of plants that may be used;
 - (iii) the uses to which the protected variety may be put; and
 - (iv) where applicable—
 - (aa) conditions for payment of royalties; and
 - (bb) labelling requirements.
- (b) When the Minister acts in terms of paragraph (a), the Minister must ensure that the legitimate interests of the breeder are safeguarded.

Taking the important exceptions in turn:

Section 10(1)(a) provides for exceptions for private and non-commercial purposes. As with UPOV 1991, from where this concept is copied, "private and non-commercial purposes" is not defined in the PBR Act. "Private and non-commercial use" is sometimes interpreted to include the propagation of a variety by "a farmer and the dependents of the farmer living on that holding only" (UPOV, 2015:5),¹¹ and excludes any forms of exchange and local rural trade of farm-saved seed of protected varieties. Yet UPOV's website states that "UPOV Contracting Parties have the flexibility to consider, where the legitimate interests of the breeders are not significantly affected, in the occasional case of propagating material of protected varieties, allowing subsistence farmers to exchange this against other vital goods within the local community".¹² De Jonge et al. (2015) argue that this indicates UPOV's willingness to accept a broader definition of "private and non-commercial" than its previous position, and that countries can decide for themselves what farmer activities should fall into this exemption. It is important that this exception is broadly defined in the regulations, to provide full exemption to smallholder

11. It is important to note that UPOV contracting parties can make their own interpretations of the Convention, in accordance with the Vienna Convention on the Law of Treaties, in implementing their obligations.

12. <http://www.upov.int/about/en/faq.html#Q30>



Photo Credit: NJRZA

farmers to exchange and trade in local markets, and to protect their seed systems that are intricately connected to smallholder production. The latter includes the sale of surplus farm-saved seed and harvest and products derived from such seed, and these should thereby be excluded from the scope of the breeders' rights (De Jonge et al., 2015).

Section 10(1)(d), together with Section 10(2), says that farmers may be exempted from the law, based on the Minister indicating the **categories of farmers**, the **category of plants**, and the **uses to which the variety may be put**, while ensuring the legitimate interests of the breeder are safeguarded. Which category of farmers, which plants, which uses, what will constitute the legitimate interest of the breeder in this context, will all need to be clearly defined.

In the course of our work in regard to the National Policy on Comprehensive Producer

Development Support,¹³ we proposed that a similar definition of smallholders could be adopted for the purposes of this Act as well, where all agricultural and seed enterprises with a turnover of R5 million or less are considered to fall within the exceptions contemplated in Section 10(2) and that such farmers be free to use and exchange farm-saved protected seed without having to pay royalties.

A proper consultation process should be undertaken with smallholder farmers and small- and medium-scale seed entrepreneurs, to assist in defining these categories. The regulations must also define the "legitimate interests of the breeder" and explain how this relates to those exempt from the Act, and on what basis.

While good exemptions may open some space for farmer seed systems to operate, a great deal will depend on how the

13. https://www.daff.gov.za/docs/media/Draft%205%20ver%203%20Policy%20on%20CPDS_30May2018_accepted%20change.pdf

regulations deal with the many gaps in the PBR Act. As things stand, there is no explicit provision in the PBR Act allowing smallholder farmers to freely exchange and sell farm-saved seed of protected varieties, including engaging in local rural trade. If South Africa ratifies UPOV 1991, government authorities will be unable to permit exemptions beyond these narrow interpretations of farmers' privilege – exemptions that are essential in order for the state to fulfil its constitutional obligations towards the realisation of social and economic justice.

UPOV 1991 and the ITPGRFA

As South Africa considers joining UPOV 1991 and simultaneously the ITPGRFA, we believe it imperative to point out that these two international conventions are contradictory and conflicting. UPOV 1991 is heavily tilted in favour of commercial breeders, to the detriment of customary practices of freely using, exchanging, and selling seed.

UPOV 1991 fails to acknowledge FMSS and the role of farmers in ongoing biodiversity conservation and use; imposes unnecessary and destructive restrictions on farmers' access to, adaptation and use of genetic materials; and presents obstacles to the realisation of Articles 5, 6 and 9 of the ITPGRFA, as we have discussed in a previous briefing.¹⁴

The South African government should develop regulations with the ITPGRFA in mind, recognising and promoting the role of smallholder farmers in reproduction, maintenance, use and exchange of agricultural biodiversity to give effect to the Treaty. As indicated above, joining UPOV 1991 will completely stymie these efforts.

Conclusion

The key issues highlighted in this briefing should be incorporated in seed laws and policies, to ensure that political space is provided for farmers' activities to operate and thrive as part of farmer seed systems, for both the continuous evolution and improvement of seed through natural and farmer co-selection. Even if these considerations are reflected in the regulations, there remain serious concerns about the orientation of this piece of legislation, that is, towards entrenching the power of large-scale commercial breeders at the expense of smallholder farmers and progressive transformation of the agro-food system.

While there remain significant issues to be clarified in the regulations, many of the above-mentioned issues, such as farmers' rights and the role of FMSS are not addressed in current agriculture and seed policies. This requires a separate process, bringing together the diversity of stakeholders working across the agriculture, environment and conservation sectors, to ensure farmers' rights, farmers' seed, and farmers' seed systems are adequately recognised, strengthened and supported.

Promoting the use of farmers' varieties, and farmers' seed more generally, requires the space for such heterogeneous seed to be sold and exchanged on the market, and the promotion of farmers' rights to continue these routine activities. Farmers' rights to save, use, exchange and sell farm-saved seed is a *sine qua non* for their contributions to the ongoing evolution of crop diversity and their use.

14. See ACB, 2018. "UPOV 1991 and the ITPGRFA: Key issues for farmer-managed seed systems in South Africa", ACB, Johannesburg.

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Abbreviations

ACB	African Centre for Biodiversity
CBD	Convention of Biological Diversity
CSOs	Civil society organisations
DAFF	Department of Agriculture, Forestry and Fisheries
EDVs	Essentially derived varieties
FMSS	Farmer-managed seed systems
IP	Intellectual property
ITPGRFA	International Treaty on Plant Genetic Resources for Food and Agriculture
NDUS	New, Distinct, Uniform and Stable
NVL	National Variety List
PIA	Plant Improvement Act
PBR	Plant breeder's rights
PIB	Plant Improvement Bill
PVP	Plant variety protection
TRIPS	Trade-Related Aspects of Intellectual Property Rights
UPOV	International Convention for the Protection of New Varieties of Plants
WTO	World Trade Organization

Annex 1: Comparisons between UPOV 1978 and UPOV 1991

Subject	UPOV 1978 Act	UPOV 1991 Act
Flexibility	Contains number of flexibilities for farmers and breeders.	More restrictive.
Minimum scope of coverage	Increasing number of genera or species required to be protected, from five at time of accession, to 24 eight years later.	Increasing number of genera or species required to be protected, from 15 at time of accession, to all genera and species ten years later (five years for member states of earlier UPOV Act).
Eligibility requirements	Novelty, distinctness, uniformity and stability.	Novelty, distinctness, uniformity and stability.
Minimum exclusive rights in propagating material	Prohibits production for purposes of commercial marketing, offering for sale; marketing; repeated use for the commercial production of another variety.	Prohibits production or reproduction; conditioning for the purposes of propagation; offering for sale; selling or other marketing; exporting; importing or stock for any of these purposes without authorisation of breeder. This extends to essentially derived varieties.
Minimum exclusive rights in harvested material	No such obligation, except for ornamental plants used for commercial propagating purposes.	Same actions as above if harvested material, and products of harvested material, obtained through unauthorised use of propagating material and if breeder had no reasonable opportunity to exercise his or her right in relation to the propagating material.
Breeders' exemption	Implicitly allowed under the definition of minimum exclusive rights.	Allowed at the option of the member state within reasonable limits and subject to safeguarding the legitimate interests of the right holder.
Farmers' privilege	Implicitly allowed under the definition of minimum exclusive rights.	Allowed at the option of the member state within reasonable limits and subject to safeguarding interests of the right holder.
Minimum term of protection	18 years for grapevines and trees; 15 years for all other plants.	25 years for grapevines and trees; 20 years for all other plants.

Source: Helfer (2004)



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