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Nirmalya Syam, Shirin Syed, and Viviana Munoz-Tellez

The UPOV accession process: Preventing appropriate PVP laws for new members

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Abstract

The International Union for the Protection of New Varieties of Plants (UPOV) is an intergovernmental organization established by the International Convention for the Protection of New Varieties of Plants adopted in Paris in 1961. UPOV requires its contracting parties to establish an intellectual property system for plant varieties that favors the interests of commercial plant breeders but does not address the needs of farming systems in developing countries or the rights of smallholder farmers.

The accession process for new countries to UPOV as provided in the UPOV Convention is based on an examination of conformity of the plant variety protection (PVP) law of the acceding country with obligations under the UPOV Convention. Only if the UPOV Council gives a positive decision on the basis of such conformity examination, the acceding state can deposit its instrument of accession. **This accession process does not allow new members any flexibility to adapt their national PVP law to their own needs and accommodate their traditional agricultural sector and related public policy issues such as the livelihoods of farmers, sustainable agriculture, and implications for food security. Prior UPOV members have greater flexibility than new members in enacting domestic legislation to implement the obligations under the 1991 Act** by adopting their own interpretations of the obligations, which cannot be reviewed by the UPOV Council at the time of their accession to the 1991 Act.

The various acts of the convention were essentially negotiated between developed countries. **The UPOV accession procedure is unique compared to intellectual property treaties administered by the World Intellectual Property Organization (WIPO) as well as the accession processes in the World Trade Organization (WTO), the Convention on Biological Diversity and its protocols, or the Food and Agricultural Organization (FAO) International Treaty on Plant Genetic Resources. None of these agreements have an obligatory conformity examination of national legislation before accession.** In addition, the UPOV Council's decisions regarding examination of conformity are not always consistent, and significant discretion is exercised by the UPOV Secretariat in interpreting the provisions of the convention as well as their implementation in national law. The UPOV Council's guidance document for the preparation of laws in accordance with the 1991 Act also provides an extremely narrow interpretation of the provisions of the convention.

Therefore, developing countries should consider whether, instead of accession to UPOV, it would be better for them to adopt their own sui generis system of PVP which allows them to enact a law in accordance with their needs and circumstances. It would also be important for the UPOV Council to adopt a national deference principle in conformity examinations; limit the examinations to a review of adopted laws, as the convention does not mandate the council or the secretariat to intervene in the process of development of national PVP laws; and not undertake additional examinations after a positive decision is given.

1 Introduction

The International Union for the Protection of New Varieties of Plants (UPOV) is an intergovernmental organization with its secretariat based in Geneva. This organization administers the International Convention for the Protection of New Varieties of Plants (hereinafter the UPOV Convention). The UPOV Convention was first adopted in 1961 and was further revised in 1972, 1978, and 1991.

The UPOV Convention was adopted pursuant to initiatives by commercial plant breeders in Europe. The model of protection under UPOV prioritizes commercial breeders' interests over farmers, especially small and medium landholders who make the largest contributions to agriculture and food production in developing countries. The marginalization of interests of the farmer vis-a-vis the plant breeder under UPOV could adversely impact the right to food as well as other human rights.[1] The UPOV Convention provides extremely limited flexibility to developing countries to safeguard their agricultural systems. Moreover, the scope of the flexibilities has been severely restricted in subsequent amendments to the convention. For example, while the 1978 Act of the UPOV Convention required plant variety protection (PVP) to be provided to a limited number of species, the 1991 Act requires protection to be extended to all species.[2]

The agricultural systems and needs of developing countries have not been accommodated in the design of the convention even though it extended flexibility to developed countries such as the United States (U.S.) to join the 1991 Act with a reservation on the applicability of the convention to asexually produced varieties that the U.S. protected under its industrial property law (see box 1). Unlike in the WTO Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS Agreement), members of UPOV do not have the flexibility to determine the method of implementing its provisions[3] or use a transition period before implementing the convention.[4] In contrast, neither in the provisions of the UPOV Convention nor in the accession process is there a possibility to consider the "special requirements" of least-developed countries (LDCs). Under UPOV, least-developed countries (e.g., Niger, Tchad, or Burkina Faso) are obligated to have the same PVP rules as the Netherlands or Germany.

However, countries that are not members of UPOV are free to design their own alternative system of PVP that is tuned in to their agricultural systems, needs, and priorities.[6]

The membership of the UPOV Convention was historically small. It was negotiated and adopted by twelve countries from Western Europe. Within the first 17 years of its life, until the revision of the convention in 1978, it had only attracted the membership of 11 states.[7] The 1991 revision of the convention was negotiated by only 20 UPOV member countries, out of which only one (South Africa) was a developing country.[8] As of November 2021, 76 countries and 2 intergovernmental organizations—the African Intellectual Property Organization (OAPI) and the European Union (EU)—are members of UPOV. Of these,

Box 1

UPOV CONSIDERS THE SPECIAL CIRCUMSTANCES IN THE U.S.

The new text of Article 3 of the 1991 Act, which requires that all genera and species be protected by plant variety rights, would have made it impossible for the U.S. to ratify the act. This is because the U.S. protects asexually reproduced varieties of plants, other than tuber-propagated plants, with patents and not with plant variety rights. To enable the U.S. to accede to UPOV 91, Art. 35.2 was integrated into the act:

[Possible exception] (a) Notwithstanding the provisions of Article 3(1), any State which, at the time of becoming party to this Convention, is a party to the Act of 1978 and which, as far as varieties reproduced asexually are concerned, provides for protection by an industrial property title other than a breeder's right shall have the right to continue to do so without applying this Convention to those varieties.

And so, the U.S. is the only country which has ratified UPOV 91 with a reservation: U.S.: "With a reservation pursuant to Article 35(2) of the 1991 Act."[5]

It is obvious that nowadays it is not possible for new members to formulate such reservations and thus implement UPOV 91 in a flexible way and according to their needs.

61 are party to the 1991 Act, and 17 are party to the 1978 Act.[9] Only 6 countries acceded between 1978 and 1991.[10]

The only means available to a country to join UPOV at present is through a formal accession to the UPOV Convention. Currently, two versions of the UPOV Convention—the 1978 Act and the 1991 Act—are in force. Since 1999, states who wish to accede to the UPOV Convention can only accede to the 1991 Act. Member states who were party to the 1978 Act have the liberty to continue under the same or can shift to the 1991 Act. Indeed, many countries have acceded to the 1978 Act in the second half of the 1990s in order to not be forced to accede to the 1991 Act for membership to UPOV. In this way, they secured more flexibility to develop their own legislation, especially regarding farmers' rights.[11]

States acceding after 1999 have two disadvantages. First, they do not have the choice of joining the earlier 1978 Act, which provides more room for designing PVP (including the farmer's right to use and save seeds) than the 1991 Act. Second, new acceding countries have to undergo a review of the compatibility of their domestic laws with the requirements of the UPOV Convention and obtain approval from the UPOV Council prior to joining the convention. However, prior UPOV members that choose to shift to the 1991 Act do not have to undergo such a review. Consequently, prior UPOV members have greater flexibility than new members in adopting domestic legislation to implement the obligations under the 1991 Act by adopting their own interpretations of the obligations, which cannot be reviewed by the UPOV Council at the time of their accession to the 1991 Act. In addition, this accession requirement imposed on new members enables developed country members seeking extensive protection for their commercial plant breeders to induce, through UPOV Council decisions, legislative reforms to that end in the states looking for accession.

This study examines the evolution of the accession provisions under the UPOV Convention from its original iteration in the Act of 1961 to its subsequent amendments in the Acts of 1978 and 1991. It also traces how the accession provision was applied in practice and compares it with accession provisions under other international treaties, such as treaties administered by the World Intellectual Property Organization (WIPO), accession to the World Trade Organization (WTO), accession to the Convention on Biological Diversity (CBD) and its protocols, as well as accession to the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA). The study also explores the accession provisions under UPOV in light of international legal norms and practices relating to accession to treaties. Under such analysis, the study advances some recommendations for reforming the accession process under the UPOV Convention.

2
Accession Process and Practice under the 1961 Act

Article 32 of the 1961 Act of the UPOV Convention dealt with accession and the entry into force of the 1961 Act. It stipulated the following:

(. . .)(3) *Applications for accession shall be considered by the Council having particular regard to the provisions of Article 30.*

Having regard to the nature of the decision to be taken and to the difference in the rule adopted for revision conferences, accession by a non-signatory State shall be accepted if a majority of four-fifths of the members present vote in favor of its application.

Three-quarters of the member States of the Union must be represented when the vote is taken.

Article 32(3) of the 1961 Act thus required the UPOV Council to give "particular regard" to the requirements of Article 30. Article 30 mandated, inter alia, that the member state depositing its instrument of ratification or accession had to be in a position under its domestic law to give effect to the provisions of the convention. This requirement applied to member states signing and ratifying the 1961 Act[12] and new members acceding to the 1961 Act. Moreover, while the council was required to have "particular regard" for Article 30 while considering applications for accession, there was no treaty obligation for a review of domestic law by the council. Instead, it was established that a vote of four-fifths of the members in favor of accession would be sufficient (with at least three-quarters of existing members being present at the time of voting).

In practice, the accession process under the 1961 Act involved a review of existing and proposed legislations relating to PVP of a state desirous of acceding to the convention. For example, in the context of the accession of Sweden, the Consultative Working Committee of UPOV discussed reports concerning the Swedish draft legislation and the explanations offered to the committee by Sweden as an observer state. Based on this discussion, the committee adopted a resolution expressing the opinion that a favorable decision could be taken, subject to the entry into force of the draft law, regarding the accession of Sweden.[13] Subsequently, following the adoption of the proposed law the same year, Sweden applied formally for accession along with an unofficial translation of the new law.[14] The formal application by Sweden and the report of the consultative working committee were submitted to the fifth session of the UPOV Council, and Sweden's accession was unanimously approved.[15]

The 1961 Act was amended in the Diplomatic Conference of 1972 with respect to provisions concerning contribution classes and the suspension of voting rights in the case of arrears in the payment of contributions. These amendments did not affect the provisions relating to accession procedures under the convention.

Following the accession of Sweden, in 1976, the third extraordinary session of the UPOV Council approved the accession of South Africa to the 1961 Act as amended by the Act of 1972. The deliberations of the council were informed by a report from the UPOV Secretariat of the findings of a study conducted by it to ascertain whether the provisions of the South African law met the conditions for accession to the UPOV Convention.[16] A similar process was followed by the UPOV Council while approving the accessions of Israel and Spain.

Thus, although a review of compatibility of domestic legislation with the UPOV Convention was not a legally binding requirement for accession under the 1961 and 1972 Acts, UPOV member states adopted practice within its governing bodies that, in effect, established a review of the compatibility of proposed legislation to implement UPOV prior to the deposit of an instrument of accession. The only legal requirement was that the accession had to be formally accepted by four-fifths of the members present and voting, and no prior examination of conformity of the national law of the acceding country by the UPOV Council was mandated.

3
Accession Process and Practice under the 1978 Act

The 11th session of the UPOV Council held in 1977 agreed to convene a diplomatic conference in 1978 for a revision of the convention. The council discussed a report[17] from a committee of experts[18] established by the Council in 1974 to examine questions of interpretation of the 1961 Act as amended by the 1972 Act and to prepare draft amendments to the convention. Six sessions of the expert committee were held from 1975 to 1977.[19] The expert committee produced a draft revised text of the convention proposing several amendments. These included amendments to the accession procedure requiring states seeking accession to the convention to consult the UPOV Council with respect to their legislation before depositing their instruments of accession. During the 11th session of the council, France proposed a specific provision under Article 32 stipulating that an instrument of accession could be deposited only if the decision of the council advising on the domestic legislation of the acceding state is positive.[20] The implication of the proposed text in Article 32(3) was that any non–member state which has not signed the new act must seek and receive the opinion of the council on the conformity of its legislation to the provisions of the new act and that the instrument of accession can only be deposited if the council decides, by a majority of three quarters (a corresponding amendment was proposed to Article 22), to give a favorable opinion as to the conformity of the legislation of that state to the provisions of the convention.[21] Article 32(3) read as follows:

Any State which is not a member of the Union and which has not signed this Act shall, before depositing its instrument of accession, ask the Council to advise it in respect of the conformity of its laws with the provisions of this Act. If the decision embodying the advice is positive, the instrument of accession may be deposited.

The summary of the main amendments to the convention explained that this amended procedure for accession seemed to be indispensable in view of the special requirements of the convention regarding national laws.[22]

Thus, the 1978 Act legally formalized the procedure of accession based on a positive advice of the UPOV Council regarding the conformity of the national law of the acceding state to the requirements of the convention. As discussed above, this was not a legal requirement under the 1961 Act though member states of UPOV followed this procedure through practice adopted by the UPOV Council.

4
Accession Process and Practice under the 1991 Act

The 1990 session of the UPOV Council considered a basic proposal for a new act of the convention to be submitted to a diplomatic conference in 1991. There was no proposal made at the diplomatic conference relating to the procedure for accession of a new member state. Article 32(3) of the 1978 Act was reproduced in the draft basic text of the 1991 Act as Article 35(3). The provision was retained in the Final Act of 1991 under Article 34(3). However, while Article 22 of the 1978 Act stipulated that the decision of the UPOV Council on a matter under Article 32(3) must be taken by a three-fourth majority, in the 1991 Act the corresponding provision (Article 26(7)) stipulated that such a decision can be taken by a simple majority in the council.

Thus, **a state that is not a member of UPOV and not a signatory to the 1991 Act can become a member by depositing its instrument of accession only after receiving a decision from the UPOV Council embodying a positive advice regarding the conformity of its law to the convention. Such a decision of the council can be taken by a simple majority.**

The 1991 Act came into force on 24 April 1998, one month after at least five states had deposited their instruments of ratification or accession. At the time of its entry into force, four states had joined the 1991 Act through ratification (Denmark, Israel, the Netherlands, and Sweden) and two had joined through accession (Bulgaria and Russia).

In accordance with Article 37(3) of the 1991 Act, no instrument of accession to the 1978 Act could be deposited after the entry into force of the 1991 Act. However, in 1997, the 14th extraordinary session of the UPOV Council decided that any state which had requested advice from the UPOV Council for conformity of its legislation for accession to the 1978 Act *prior to* the entry into force of the 1991 Act or had received a positive or qualified advice from the UPOV Council could deposit its instrument of accession to the 1978 Act within one year of entry into force of the 1991 Act, that is, by April 24, 1999.

Further, in October 1999, after the timeline to deposit instruments of accession to the 1978 Act had expired, the UPOV Council, acting on the recommendation of its consultative committee, unanimously authorized the UPOV Secretary-General, in consultation with the president of the council, to accept instruments of accession to the 1978 Act by India, Nicaragua, and Zimbabwe, provided that the secretary-general, in consultation with the president of the council, was of the opinion that those states had acted expeditiously to complete their legislation and other formalities for the deposit of the instrument of accession. India nevertheless has not joined UPOV but rather adopted a *sui generis* legislation that aims to protect farmers' rights and not only those of breeders. In 2001, Nicaragua acceded to the 1978 Act. Zimbabwe has initiated the process of accession to the 1991 Act and in 2020 requested the UPOV Council to examine the conformity of its law.

Thus, accession to the 1978 Act was in effect closed for all nonmembers of UPOV since April 24, 1999, but remained open for accession for some countries by virtue of a decision by the UPOV Council.

As a result of the evolution of accession rules, currently the accession process of UPOV for states that are not prior members of the union can be initiated by a request of the applicant state to the UPOV Council for an examination of conformity of its national law to the convention. Following such request, the UPOV Secretariat undertakes an analysis of the law as part of its functions to assist the council. The law is then examined by the UPOV Consultative Committee, which makes a recommendation to the council, and then the council makes a decision regarding the conformity of the national law to the convention. In this process, the UPOV Secretariat plays a vital role in shaping the opinion of the consultative committee and the council.

In some instances in the 1990s, the UPOV Council rendered advice to the applicant state regarding accession to the 1991 Act even though the request for conformity examination was made by the applicant state with reference to the 1978 Act. For instance, in 1995, the UPOV Council advised Belarus in response to its request for examination of conformity of its national law with the 1978 Act, that the law was also in conformity with the 1991 Act, and the administrative impediment to examination of all the plant genera and species covered under the 1991 Act could be overcome through cooperation in examination with other PVP offices.

In several other instances, the UPOV Council made a conditional decision regarding conformity of the laws to the terms of the convention. In these instances, the council advised the accession-seeking states that they could deposit their instrument of accession after adoption of the law with revisions, amendments, and implementing regulations as the case may be. Such conditional decisions were given in respect of Estonia (1998),[23] Lithuania (1999),[24] Macedonia (2000),[25] Malaysia (2005),[26] Montenegro (2007),[27] and the Philippines (2007).[28] For some states (e.g., Estonia) where such conditional decision was given, the UPOV Council required the state concerned to "consult" the UPOV Secretariat as to whether the amendments were adequate; other

states (e.g., Macedonia) were advised that the instrument of accession could be deposited only if the amendments were to the "satisfaction" of the UPOV Secretariat. In the case of Malaysia and the Philippines, the UPOV Council decided that the law would be resubmitted to the consultative committee once the additional provisions and amendments are incorporated into the act. However, the Philippines was advised to submit its law for a reexamination once the revisions and amendments were made.

The 1999 session of the UPOV Council also examined the conformity of the draft ministerial decree of Egypt on PVP to the 1991 Act. Based on the suggestions by the secretariat, the council decided that the draft law should incorporate a system of provisional protection and provide for regular publication of details concerning applications for protection and approval of variety denominations. The council requested the secretariat to offer assistance to Egypt in respect of the additional provisions necessary to achieve conformity. In 2002, Egypt adopted a new law and notified the same to the UPOV Secretariat in 2005. The secretariat was of the view that the draft decree that was examined by the council in 1999 was no longer relevant and advised Egypt that the new law of 2002 would have to be submitted for examination by the UPOV Council regarding conformity to the 1999 Act. Between 2009 to 2014, the UPOV Secretariat provided assistance to Egypt regarding various draft amendments to the law. In 2014 the UPOV Secretariat advised that subject to certain further amendments that the secretariat had suggested in 2013, the proposed amendments appeared to be in conformity with the essential provisions of the UPOV Convention. Thereafter, Egypt submitted a request for examination of the law by the UPOV Council in accordance with article 34(3) of the 1991 Act. As recommended by the secretariat, the extraordinary session of the UPOV Council held in 2015 made a positive decision regarding the conformity of the Egyptian draft law to the 1991 Act.

In some instances, the UPOV Council has overlooked apparent contradictions between the requirements of the convention and the provision in the national law, which could have prevented the accession of the country to UPOV. In 2012, the UPOV Council made a positive decision regarding the conformity of a draft PVP law by Ghana, which contained a provision that made the plant breeder's right independent of any measure taken by Ghana to regulate the production, certification, and marketing of material of a variety or the importation or exportation of the material. This provision was literally a reproduction of Article 18 of the 1991 Act of the UPOV Convention. However, the provision was subsequently amended to make the breeder's right subject to any measure taken by Ghana regulating the production, certification, marketing, importation, or exportation of material of a protected variety. Nevertheless, despite the clear contradiction of Article 18 in the revised provision of the law, in 2021, the UPOV Council reconfirmed its positive decision by relying on a different nonauthoritative interpretation of the provision submitted by the responsible minister in an accompanying letter, explaining that the reference to "plant breeder's right" in that provision should be understood to refer to the material of a variety covered by a plant breeder's right.[31] How-

Box 2

THE INTRODUCTION OF EVEN LIMITED FARMERS' RIGHTS IS CONSIDERED TO BE NONCOMPLIANT WITH THE 1991 ACT OF UPOV: THE CASES OF MALAYSIA AND THE PHILIPPINES

The recommendations made by the UPOV Secretariat through the UPOV Council in 2005 upon a review of Malaysian law for conformity with UPOV 1991 concerned, inter alia, a provision in the law that allowed the exchange of reasonable amounts of propagating material among small farmers. The council recommended that the provision should be deleted, stating explicitly that the exchange of protected material for propagating purposes would not be within the scope of exceptions to plant breeders' rights under Article 15 of UPOV 1991. It further recommended that a provision in the Malaysian law stipulating that the breeders' right shall not extend to the sale of farm-saved seeds in situations where a small farmer cannot make use of such seeds on his own holding due to natural disaster, emergency, or any other factor beyond the control of the small farmer, not exceeding the amount of seeds required in his own holding, be moved to provisions under compulsory licensing.[29]

In 2007, the UPOV Council made a similar recommendation regarding provisions under the law of the Philippines relating to farmers' traditional right to save, use, exchange, share, or sell their farm produce of a protected variety. The council was of the view that if such acts are "for the purpose of reproduction, those acts would constitute infringements of the breeder's right contrary to Article 14(1) of the 1991 Act, independently of whether such a reproduction is undertaken under a commercial marketing agreement or outside such a commercial marketing agreement." The council also advised that the provision allowing exchange and sale of seeds among and between small farmers would constitute an infringement of the breeder's right under the convention, interpreting that the exception for farmers under Article 15(2) of the 1991 Act requires that such an exception be implemented "within reasonable limits and subject to the safeguarding of the legitimate interest of the breeder [. . .] in relation to any variety in order to permit farmers to use for propagating purposes, *on their own holdings*, the protected variety [. . .]."[30] In other words, the farmers' exception could not be extended to allow the exchange or sale of seeds to other farmers for use within their own holdings.

ever, in 2005, the UPOV Council advised Malaysia to delete a provision denying plant variety registration and grant of breeder's right in respect of any plant variety that may affect public order or morality or whose cultivation, reproduction, or use could have a negative impact on the environment. The council held that the provision contradicted the requirement in Article 18 that the breeder's right shall be independent of measures to regulate the production, marketing, or certification of the material of a variety.[32]

In 2014, the extraordinary session of the UPOV Council made a positive decision regarding the conformity of the draft African Regional Intellectual Property Organization (ARIPO) Protocol for the Protection of New Varieties of Plants to the 1991 Act. The ARIPO Protocol established a legal system of plant variety protection based on the 1991 Act of the UPOV Convention for the member states of ARIPO ratifying the protocol. Several farmer and civil society organizations in Africa and across the world have expressed serious concerns regarding the draft ARIPO Protocol, particularly its ignorance of the primacy of the informal seed system in the agricultural sector in ARIPO member states and the marginalization of farmer's rights.[33] Nevertheless, the UPOV Council made a positive decision to enable ARIPO to accede to the 1991 Act of the UPOV Convention ignoring the requirement under Article 34 of the 1991 Act that an intergovernmental organization could become a member to the 1991 Act if it has legislation relating to the grant and protection of plant breeder's rights, and *all* its member states are bound by it.[34] However, after the ARIPO Protocol was adopted at a diplomatic conference in Arusha in 2015 with some changes to the draft that was examined positively by the UPOV Council in 2014, which made the breeder's right granted under the protocol by the ARIPO Office subject to the grant not being refused by the designated contracting state, the UPOV Secretariat recently gave an opinion to the UPOV Consultative Committee that the positive decision of the UPOV Council regarding the conformity of the law of ARIPO with that of UPOV was no longer relevant.[35]

ANALYSIS OF THE CURRENT PROCESS TO ACCEDE TO UPOV

The aforementioned examples suggest that the UPOV Secretariat has considerable influence in assisting the UPOV Council in performing its advisory function under Article 34(3) for the accession of nonmembers. The analysis of the domestic law of the applicant state with the requirements of the convention undertaken by the secretariat plays the most important role in the process. This function essentially involves the act of interpretation of both the provisions of the convention as well as provisions of implementing domestic law. However, the exercise involving examination of questions of law is subject to the discretion of the UPOV Secretariat, whereby they can also base their analysis on a guidance document for preparation of laws based on the 1991 Act, adopted by the UPOV Council in 2017.[36] This guidance document provides an extremely narrow interpretation of the provisions of the convention.[37]

In some instances such as in Malaysia, the UPOV Council has undertaken a literal and restrictive but not contextual interpretation of the provisions relating to exceptions to the breeder's right. The recommendation by the UPOV Council to remove the provision allowing small farmers to sell farm-saved seeds where the farmer cannot make use of the seeds in their own holdings because of emergency situations beyond their control and instead resort to the use of compulsory licenses in such situations seems impracticable. The UPOV Council does not seem to have considered how it would be possible for a small farmer in an emergency situation to go through the process for a compulsory license. The provision in Malaysian law was adapted to the situation on the ground based on the country's experiences. The UPOV Council's proposed solution ignored this reality.

Analyzing laws without knowledge of the real situation is certainly not a good solution.

5
Accession Provisions under Other International Treaties

In view of the limitations that the conformity examination-based accession process imposes on new members under the UPOV Convention, this section compares the accession process with some other selected treaties related to intellectual property (IP) and biodiversity.

WIPO TREATIES

While some IP treaties administered by WIPO require that a state acceding to the specific treaty must be in a position to give effect to the provisions of the treaty at the time of depositing its instrument of accession, none of the WIPO treaties require other member states to give their consent to the accession by another state. There is also no requirement for an examination of conformity of the law of the applicant state to the obligations under the treaty in any WIPO instrument.[38]

WTO ACCESSION

The terms of accession of a nonsignatory state to the WTO are based on a negotiated international agreement between the acceding member and the existing WTO members. These terms are negotiated in a working party constituted for such purpose, and the accession protocol is drawn based on the commitments made in the working party report. The negotiation for accession involves a hard bargain wherein incumbent members use the lure of membership to induce policy and legislative changes in the country seeking accession. This seems similar to the objective of the accession process in UPOV, wherein incumbent members use the lure of membership to induce legislative changes in the acceding state. During the accession negotiations, WTO members may invite acceding governments to present legislation for review in draft form.

However, the WTO accession process is based on negotiation, which allows some flexibility for acceding states to reflect their preferences in the negotiated accession protocol in light of their specific circumstances. While the process involves a review of draft legislation and submission of a legislative action plan, this exercise essentially involves the applicant member performing a self-assessment of the extent to which their domestic trade-related laws and policies conform to WTO rules and action plan in terms of legislative and policy measures to bring the same into conformity to WTO rules. Even where members request the submission of draft legislation for review, there is no obligation to comply with this request. In fact, governments sometimes prefer to present legislation after it is enacted. In contrast, the opinion of the existing members as to the conformity of the domestic law to the provisions of UPOV, as expressed in a council decision, is not subject to negotiation with the accession-seeking state. Moreover, while in the WTO accession is possible based on a commitment to implement certain measures in the future, in UPOV, the deposit of an instrument of accession is not possible without the prior adoption of a law in full conformity with the UPOV Convention, which requires in some cases implementation of the legal amendments recommended by the UPOV Council.

Given that the TRIPS Agreement is the only WTO-covered agreement that creates positive legal obligations on the part of members on IP, it is apt to compare the terms negotiated in this area with the accession process to UPOV. An analysis of commitments in relation to TRIPS in working party reports of acceding WTO members shows that members have generally committed to taking action in the future (e.g., implement the provisions of TRIPS fully by a certain date, commit generally to undertake necessary amendments to relevant laws and regulations to implement TRIPS, commit to not lowering the level of protection if a transition period is availed, etc.). However, in none of the working party reports was the accession of a member to the WTO conditional upon a review and positive advice by existing members of the consistency of the laws of the acceding member to the requirements of the TRIPS Agreement.

CONVENTION ON BIOLOGICAL DIVERSITY AND ITS PROTOCOLS

The UN Convention on Biological Diversity (CBD) has made accession to the convention and its protocols open to any state without any condition.[39] The Nagoya Protocol to the CBD also allows accession to the protocol by any state that is party to the CBD.[40]

INTERNATIONAL TREATY ON PLANT GENETIC RESOURCES FOR FOOD AND AGRICULTURE

The International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA) of the Food and Agricultural Organization (FAO) also follows an open approach to accession. Under Article 27 of the treaty, accession is open to any member state of the FAO as well as member states of the United Nations or any of its specialized agencies or the International Atomic Energy Agency. There is no requirement for an examination of the conformity of national laws to the provisions of the treaty prior to accession. Ironically, the positive conformity examination-based approach to UPOV accession also puts at risk the implementation of the ITPGRFA for states that are parties to both treaties.

6
International Law on Treaty Accession and the UPOV Convention

The international law relating to treaties has been codified in the Vienna Convention on the Law of Treaties (VCLT). Articles 2 and 11 of the VCLT state that accession is one of the acts through which a state establishes on the international plane its consent to be bound by the treaty. Article 15 of the treaty explains that the consent of a state to be bound to a treaty by accession arises when the treaty provides that such consent may be expressed by a state by means of accession, or it is otherwise established by implication that the negotiating states to the treaty agreed that consent may be expressed by accession, or if the parties to the treaty have subsequently agreed that consent may be expressed by accession. The conditions under which accession may occur and the procedure involved depend on the provisions of the treaty.

Accession is fundamentally a process by which states that did not participate in the negotiation of a treaty or affix their signatures to the treaty can become parties to it "on a status exactly the same as that enjoyed by those States that negotiated, signed and ratified them in a normal way."[41] A general principle of the international law on treaty accession is that a state can accede to a treaty only with the consent of all the parties to the treaty. The consent of the parties to the treaty regarding the accession of new states may be governed by an accession clause. Through the terms of the accession clause, parties to the treaty can set the conditions which must be met by a nonsignatory state to accede to the treaty.

Generally, the accession provisions of a treaty are of three types: (1) open accession, wherein signatory states preauthorize the accession of applicant states when the treaty is adopted; (2) closed accession, wherein the treaty is generally not open to accession and an applicant state can accede only if the parties to the treaty subsequently consent to the accession; and (3) semi-open accession, wherein the consent of all or a specified majority of the parties to the treaty are required for allowing an applicant state to accede.[42]

The 1991 Act adopts a mix of open and semi-open approaches to accession. Accession is, as noted above, open to members of UPOV that are parties to a previous act of the convention; it is semi-open and subject to a positive decision based on a conformity examination for new members. A similar approach was also adopted in the 1978 Act of the convention. The 1961 Act was completely semi-open in the sense that accession could occur based on a four-fifths majority consent of the existing members of the UPOV Council.

Consequently, there is a double standard wherein members that are party to a previous act accede to the 1991 Act without any conformity examination and a positive decision of the UPOV Council, but new members are subjected to a conformity examination. This double standard in the accession process resulted in prior members acceding to the 1991 Act with PVP laws containing provisions which would be denied to a new member acceding to the 1991 Act. For example, "UPOV 1991 countries such as the US and Switzerland do not limit free farm-saved-seed to small farmers which is viewed not compliant with the UPOV 1991 requirements. For Switzerland this led to the ironic situation that Liechtenstein was not allowed to join UPOV 1991 by reference to the PBR Act of Switzerland, a practice Liechtenstein used for all other IP laws."[43]

However, **this study found no other international treaty on IP or biodiversity that requires prior adoption of domestic law to give effect to the provisions of a treaty as conditionality upon which the accession of the state is contingent.** As mentioned, even the WTO accession process wherein existing members try to induce economic policy changes in the acceding member does not involve a process where accession could only occur if the incumbent members give a positive decision regarding the conformity of the applicant member's domestic law to WTO rules. The study also did not find any other treaty which has different standards of accession for members based on their membership in any existing treaty. **The adoption of different standards for accession for nonmembers of the union to different acts of the convention seems unique to UPOV.**

7
Alternative Interpretation of Article 34.3

As stated above, Article 34.3 of the 1991 Act of the UPOV Convention adopted the rule of accession applicable to nonmembers of the union under the 1978 Act. Article 34.3 of the 1991 Act states as follows:

Any State which is not a member of the Union and any intergovernmental organization shall, before depositing its instrument of accession, shall ask the Council to advise it in respect of the conformity of its laws with the provisions of this Convention. If the decision embodying the advice is positive, the instrument of accession may be deposited.

In practice, as noted above, the examination of conformity of the law of an acceding state to the UPOV Convention is undertaken by the UPOV Secretariat. According to an information document adopted by the UPOV Council in 2017, the process of advice of the council under Article 34.3 involves the following steps: (1) submission of a request for the advice of the council by the state or intergovernmental organization seeking accession, (2) preparation of a document with an analysis of the law by the UPOV Secretariat, (3) preliminary examination of the law by the UPOV Consultative Committee, and (4) a decision embodying the advice of the council.[44]

The guidance adopted by the council also explains the following scenarios concerning the decision of the council: (1) if the decision of the council is positive on the conformity of an adopted law, the instrument of accession can be submitted if the law is not amended in the meantime; 2) if the decision of the council is positive about the conformity of a draft law, the instrument of accession can be deposited if the draft law is adopted with no changes and enters into force; (3) where the decision of the council is positive about the conformity of a draft law but changes are introduced during the procedure of adopting the law, the UPOV Secretariat would analyze the changes and present its opinion as to whether they do not affect the substantive provisions of the convention and, if so, invite the council to reaffirm its decision of conformity, and thereafter the instrument of accession could be deposited; (4) if the decision of the council on the conformity of a draft law is positive but subject to modifications, the instrument of accession may be deposited if the modifications are made and the law is adopted with no other changes and enters into force; and (5) if the decision of the council is that modifications to the law are required, the amended law would have to be submitted for examination to the council.

The practice followed in implementing the provisions relating to the advice of the council as to the conformity of the laws of the acceding state shows that much of it depends on how the provision is interpreted. In its plain reading, Article 34.3 places an obligation on a non–member state of the union seeking accession to ask the council to advise it in respect of the conformity of its laws to the convention. Article 34.3 states nothing about how the council should undertake this advice.

A strict interpretation of Article 34.3 would suggest that the UPOV Council can only examine the conformity of an adopted law and not a draft bill. The requirement under the article is that the acceding state must seek the advice of the Council on the conformity of its "laws." However, in practice, the council has been requested by acceding states to examine the laws before they are formally adopted by the legislature.

Moreover, once the UPOV Council has given a positive decision, there should not be any further scope for the UPOV Secretariat or the council to review any changes to the law. Such a strict interpretation would be supported if Article 34.3 is read alongside Article 36, which lays down that at the time of depositing its instrument of accession, the state concerned shall notify the secretary-general of its legislation governing breeder's rights (Article 36.1). Moreover, Article 36.2 also states that any changes in legislation should be promptly notified to the secretary-general. Further, Article 36.3 clearly states that the responsibility of the UPOV Secretariat is to publish the information concerning legislation or changes thereto communicated by the state parties. The UPOV Convention does not confer powers on the UPOV Secretariat to induce the review based on notification submitted pursuant to Article 36 or to present its opinion on the legislation of an acceding state after the council has given a positive decision under Article 34.3 even where the positive decision is accompanied with advice to incorporate additional requirements for adjusting the law.

Therefore, the guidance adopted by the UPOV Council on how to become a member of UPOV should be revised to the effect that if the UPOV Council gives a positive decision regarding the conformity of an adopted or draft law, subject to modifications, the acceding state may deposit its instrument of accession along with a communication under Article 36.1 indicating the legal provisions adopted, including any amendments advised by the council.

The current accession procedure also appears unreasonable, as every member state could change its law directly after the deposit of its instruments of accession. There is no mechanism

in UPOV to address cases of noncompliance with the convention after a state has joined.

Another fundamental issue is how the UPOV Secretariat and the council narrowly interpret the substantive provisions of the UPOV Convention and the conformity of the law of an acceding state. Following such a narrow approach to interpretation, the UPOV Council has rejected national laws of Malaysia and the Philippines that allowed the exchange and sale of seeds or propagating material by small farmers to a certain extent (see box 2). The application of a national deference standard[45] in such cases could have led to an interpretation that such exceptions were consistent with the convention.

Moreover, it should also be noted that the UPOV guidance document for the preparation of laws under the 1991 Act, in which the individual UPOV articles are interpreted, is based on a set of explanatory notes, which are approved by the UPOV Council. In the introduction to each of the explanatory notes, it is stated that "[t]he only binding obligations on members of the Union are those contained in the text of the UPOV Convention itself." Therefore, these are merely voluntary guidance and not authoritative interpretation of the convention. However, this clarification is missing in the guidance document, which thus creates the impression that it contains authoritative interpretation of the provisions of the 1991 Act. However, this is not the case, and contracting parties could adopt a different interpretation. Therefore, it will be important to revise the UPOV guidance document for the preparation of laws under the 1991 Act to clarify that contracting parties have the flexibility to interpret the UPOV Convention in general and the scope of the exception to breeders' rights in particular in their own way.

The council could also develop a new guidance document for the assessment of national laws by the secretariat based on the principle of national deference. Such a guidance document could clarify that where there is scope of alternative interpretations of any provision of the 1991 Act, the decision of the council as to the conformity of the national law of an acceding state to the 1991 Act should be based on the principle of national deference. Accordingly, the council would accept the legitimate interpretation of the provision of the convention adopted by the state concerned.

8
Conclusion

The UPOV Convention has followed a mix of open and semi-open approaches to accession depending on whether the acceding state was an existing member of the union under an earlier act or not. For prior members of the union, accession simply requires the deposit of an instrument of accession. For non-prior-member states, an additional process of binding advice of the UPOV Council regarding the conformity of the national legislation to the obligations under the convention is required. Such an acceding state can deposit its instrument of accession only if the UPOV Council gives a positive decision about the conformity of the national law to the obligations under the convention.

This accession process for new members exacerbates the problem that the UPOV Convention does not allow members any flexibility to enact their national PVP law in accordance with their own needs. This is despite the fact that the WTO TRIPS Agreement provides flexibility to its members to enact PVP laws of a *sui generis* nature that are appropriate to their own needs. UPOV does not accommodate differences in the agricultural sector and related public policy issues such as the livelihoods of farmers, sustainable agriculture, and implications for food security. The 1978 Act was negotiated by 9 European countries and 1 developing country, and the 1991 Act was negotiated by 19 industrialized countries and 1 developing country. This clearly did not reflect the interests of agricultural systems in the Global South. Nevertheless, this system—without the possibility of adjustments—is now imposed on all countries (e.g., by means of free trade agreements). Therefore, the very countries that need maximum flexibility in implementing UPOV do not get it. The way the conformity examination is done aggravates this problem instead of alleviating it.

The UPOV Convention is the only treaty on IP that follows this approach. None of the treaties administered by WIPO, the accession process under the WTO Agreement, the CBD, the Nagoya Protocol, or the ITPGRFA have such a conditionality. On the contrary, they follow an open approach to accession, which does not require the consent of the existing members.

Nevertheless, the international law relating to treaty accession essentially defers to the process of accession agreed to by the signatories to the treaty. In this respect, the rule of accession under the UPOV Convention is legitimate under the Vienna Convention on the Law of Treaties. However, it is important to recognize that the process of accession was essentially agreed upon by a few countries, most of which were developed countries, during the adoption of the 1978 Act of the convention. This led to an accession process that is inequitable.

Therefore, if a country wants to accede to the UPOV system, not only does it have to consider whether the thrust of the treaty is right for it, but it also has to be aware that it is a treaty that, unlike any other in the world, does not give new members the flexibility to implement it in a way that is appropriate and adequate to their needs. Such consideration could be the basis for a country to opt not to seek accession to UPOV but rather to adopt alternative *sui generis* systems of PVP that are more flexible and balanced.

While the adoption of a *sui generis* system of PVP without acceding to UPOV is the best policy choice for a developing country, it is nevertheless important to improve the accession process under UPOV for scenarios where a developing country might have to accede to UPOV (e.g., under an obligation in a free trade agreement).

First, in terms of procedure, states seeking accession should only seek advice from the UPOV Council regarding the conformity of *adopted* laws. While some states have requested conformity examination in respect of laws under legislative consideration, this is not a requirement based on a literal reading of Article 34.3 of the 1991 Act. The guidance adopted by the UPOV Council on how to become a party to UPOV,[46] however, suggests that a state seeking accession could also submit draft laws for conformity examination. Such a suggestion should be removed from the guidance document, as this is beyond the requirement under Article 34.3. Such a procedure would also ensure that national legislation does not blindly follow the interpretation of the UPOV Secretariat, which, as has been shown in this study, is not always made in full knowledge of national circumstances and needs. Rather, the UPOV Council would have to deal with legislation that has been drafted by the legislator with knowledge of national needs. The UPOV Council or the secretariat are not mandated to intervene in the process of adoption of legislation by national legislatures.

Second, when a positive advice is given, it should not be qualified. A positive advice would imply conformity to the convention. Therefore, after a positive advice is rendered by the UPOV Council based on a conformity examination, the examined law should not be subjected to further review by the UPOV Secretariat before the deposit of an instrument of accession. The UPOV Convention does not confer powers of any additional examination of the law of an acceding state. After a conformity

examination with a positive advice, the only obligation on the acceding state, while depositing the instrument of accession, is to notify the UPOV Secretariat of its law under Article 36, with the secretariat being mandated to only publish the same and inform other members. Therefore, the guidance adopted by the UPOV Council on how to become a member of UPOV should be revised to the effect that if the UPOV Council gives a positive decision regarding the conformity of an adopted or draft law, then the acceding state may deposit its instrument of accession along with a communication under Article 36.1 indicating the legal provisions adopted, including the modifications made in the law after the decision of the UPOV Council, based on their own initiative or on the advice of the council.

Besides the procedure relating to the rendering of advice under Article 34.3, a substantive issue is that the conformity examination essentially involves issues of interpretation of both provisions of the 1991 Act as well as terms of the national law implementing or giving effect to those provisions. Given the prevalence of indeterminate language in various provisions of the 1991 Act, particularly in relation to the scope of exceptions to breeders' rights, it would be pertinent that the UPOV Council is guided by a rule of national deference in interpreting how a national law has given effect to such provisions. Nothing in the convention prevents the council from adopting such a rule of interpretation. It would be crucial that countries that accede to the UPOV Convention have enough room to establish a national law that meets their requirements and needs and decide on the appropriate scope and modality of implementing the obligations under UPOV. This study shows that the existing system of accession to the UPOV system is uniquely inflexible and does not allow developing countries the flexibility to implement national PVP laws in a manner that can sufficiently accommodate their interests. The main problem already lies in the fact that a PVP system was developed more than 30 years ago by a few industrialized countries, which is now to be imposed on the whole world.

A fair and balanced convention should have an equitable and nondiscriminatory accession procedure. As accession is fundamentally a process that is meant to allow states that did not participate in the negotiations or sign a treaty to become party to it on exactly the same status as the parties that had negotiated and signed the treaty, a fair and balanced accession process for UPOV would imply that acceding states should have the space to define the terms of their accession. States acceding to the 1991 Act as prior members of UPOV implicitly have some flexibility in this regard, as their national laws are not subjected to a conformity examination by the UPOV Council. However, such flexibility is denied to states that are not prior members of UPOV. Thus, acceding states cannot become parties to UPOV on an equal footing with current member states.

Therefore, developing countries should consider whether, instead of accession to UPOV, it would be better for them to adopt their own sui generis system of PVP. Where necessary, discussions on multilateral cooperation concerning PVP could be pursued under the aegis of other fora, such as the FAO, with the participation of all states on an equal footing, as well as all stakeholders representing farmers and smallholders besides the breeders (unlike in UPOV). In this way, breeders' interests would also be balanced with those of the farming community, and fundamental human rights would be respected.

Abbreviations

ARIPO	African Regional Intellectual Property Organization
CBD	Convention on Biological Diversity
FAO	Food and Agriculture Organization
IP	Intellectual Property
ITPGRFA	International Treaty on Plant Generic Resources for Food and Agriculture
OAPI	Organisation Africaine de la Propriété Intellectuelle
PVP	Plant Variety Protection
TRIPS	Agreement on Trade Related Aspects of Intellectual Property Rights
UPOV	International Union for the Protection of New Varieties of Plants
U.S.	The United States
VCLT	Vienna Convention on the Law of Treaties

Endnotes

1 Berne Declaration et. al. (2014), *Owning Seeds: Accessing Food: A Human Rights Impact Assessment of UPOV 1991 Based on Caase Studies in Kenya, Peru and the Philippines.* Available from www.publiceye.ch/fileadmin/doc/Saatgut/2014_Public_Eye_Owning_Seed_-_Accessing_Food_Report.pdf.

2 New members of the union need to protect all plant genera and species 10 years after they become bound by the Convention (UPOV 1991, Art. 3)

3 Article 1.1, TRIPS Agreement.

4 TRIPS has a transition period for LDCs to protect IPRs, which has been regularly extended since it came into force. According to the WTO, this is done "in recognition of their special requirements, their economic, financial and administrative constraints, and their need for flexibility in order to create a viable technological base." Communication by the WTO, June 29, 2021, https://www.wto.org/english/news_e/news21_e/trip_30jun21_e.htm#:~:text=TRIPS-,WTO%20members%20agree%20to%20extend%20TRIPS%20transition%20period%20for%20LDCs,Intellectual%20Property%20Rights%20(TRIPS).

5 See list of members: www.upov.int/edocs/pubdocs/en/upov_pub_423.pdf

6 See Carlos M. 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," APBREBES. Available from www.apbrebes.org/files/seeds/files/ToolEnglishcomplete.pdf.

7 At the end of 1979, UPOV was comprised of the following member states: Belgium, Denmark, France, Germany, Israel, Italy, the Netherlands, South Africa, Sweden, Switzerland, and the United Kingdom. See UPOV Document C/XIV/2, August 1, 1980. Available from www.upov.int/edocs/mdocs/upov/en/c_xiv/c_xiv_2.pdf.

8 Carlos M. Correa et al., Plant Variety Protection in Developing Countries: A Tool for Designing a Sui Generis Plant Variety Protection System: An Alternative to UPOV 1991, APBREBES, 2015.

9 UPOV, Members of the International Union for the Protection of New Varieties of Plants, Status on November 3, 2021. Available from www.upov.int/edocs/pubdocs/en/upov_pub_423.pdf.

10 Australia, Czechoslovakia, Hungary, Ireland, Israel, and Poland. See UPOV Document C/26/2, July 9, 1992. Available from www.upov.int/edocs/mdocs/upov/en/c_26/c_26_2.pdf.

11 See Karin Peschard, "Searching for flexibility: Why parties to the 1978 Act of the UPOV Convention have not acceded to the 1991 Act." APREBES, October 2021. Available from www.apbrebes.org/sites/default/files/2021-10/Apbrebes_UPOV-Flexibility_EN_10-21_def.pdf.

12 The original version of the UPOV Convention (the 1961 Act) was open to signature by member states until December 2, 1962, subject to ratification. After this date, new member states could also join the convention through the accession process.

13 UPOV Council document C/V/7. Available from www.upov.int/meetings/en/doc_details.jsp?meeting_id=87&doc_id=290616

14 UPOV Council document C/V/7 Add. Available from www.upov.int/meetings/en/doc_details.jsp?meeting_id=87&doc_id=290580

15 UPOV Council document C/V/26. Available from www.upov.int/meetings/en/doc_details.jsp?meeting_id=87&doc_id=290699

16 UPOV Council document C(EXTR.)/III/2. Available from www.upov.int/meetings/en/doc_details.jsp?meeting_id=357&doc_id=291243.

17 UPOV Council document C/XI/11. Available from www.upov.int/meetings/en/doc_details.jsp?meeting_id=429&doc_id=289777.

18 The Committee of Experts was composed of experts appointed by each member state of UPOV. UPOV document C/VIII/17. Available at www.upov.int/edocs/mdocs/upov/en/c_viii/c_viii_17.pdf.

19 It is noteworthy that in 1975, members of the committee visited the U.S. and Canada to discuss with government officials and local plant breeders the systems of plant variety protection in place or being developed in both countries. This cooperative approach is in sharp contrast to the conformity examination of national law that has been the basis for accession to UPOV.

20 UPOV Council document C/XI/21. Available from www.upov.int/meetings/en/doc_details.jsp?meeting_id=429&doc_id=289789.

21 Diplomatic Conference on the Revision of International Convention for the Protection of New Varieties of Plants (UPOV/DC/78/PCD), October 9–23, 1978, Geneva, document DC/3. Available from www.upov.int/meetings/en/doc_details.jsp?meeting_id=495&doc_id=282357.

22 UPOV document DC/PCD/1. Available from www.upov.int/meetings/en/doc_details.jsp?meeting_id=495&doc_id=282487.

23 UPOV Document C/32/16, July 18, 2000, paragraph 12. Available from www.upov.int/edocs/mdocs/upov/en/c_32/c_32_16.pdf.

24 UPOV Document C/33/18, November 16, 2000, paragraph 11. Available from www.upov.int/edocs/mdocs/upov/en/c/33/c_33_18.pdf.

25 UPOV Document C/34/16, November 22, 2001, paragraph 11. Available from www.upov.int/edocs/mdocs/upov/en/c_34/c_34_16.pdf.

26 UPOV Document C(Extr.)/22/3, April 8, 2005, paragraph 8. Available from www.upov.int/edocs/mdocs/upov/en/c_extr/22/c_extr_22_3.pdf.

27 UPOV Document C/41/17, January 22, 2008, paragraph 15. Available from www.upov.int/edocs/mdocs/upov/en/c/41/c_41_17.pdf.

28 UPOV Document C(Extr.)/24/5, August 27, 2007, paragraph 8. Available from www.upov.int/edocs/mdocs/upov/en/c_extr/24/c_extr_24_05.pdf.

29 UPOV Document C(Extr.)/22/2. Available from www.upov.int/edocs/mdocs/upov/en/c_extr/22/c_extr_22_2.pdf.
30 UPOV document C(Extr.)/24/2. Available at www.upov.int/edocs/mdocs/upov/en/c_extr/24/c_extr_24_02.pdf.
31 For a critique on the process, see APBREBES, Reply by APBREBES to Circular E-21/077: Comments by APREBES on the Document „Developments on the Plant Variety Protection Act (Act 1050 of 2020) of Ghana (document C/developments/2021/1). Available at www.apbrebes.org/sites/default/files/2021-07/Comments%20PVP%20Act%20of%20Ghana_APBREBES_fin.pdf.
32 UPOV document C(Extr.)/22/2. Available from www.upov.int/edocs/mdocs/upov/en/c_extr/22/c_extr_22_2.pdf
33 A substantial criticism came from the farmers' organization La Via Campesina: https://viacampesina.org/en/aripo-s-draft-protocol-for-the-protection-of-new-varieties-of-plants-draft-protocol-undermines-farmers-rights-lacks-credibility-legitimacy/
34 See APBREBES, "UPOV breaking its own rules to tie-in African countries," April 11, 2014. Available at www.apbrebes.org/press-release/upov-breaking-its-own-rules-tie-african-countries.
35 UPOV Document CC/99/INF/4. Available from www.apbrebes.org/sites/default/files/cc_99_inf_4_0.pdf.
36 UPOV Document UPOV/INF/6/5, April 6, 2017. Available from www.upov.int/edocs/infdocs/en/upov_inf_6.pdf.
37 Sangeeta Shashikant and Francois Meienberg, "International Contradictions on Farmers' Rights: The interrelations between the International Treaty, its Article 9 on Farmers' Rights and Relevant Instruments of UPOV and WIPO," Third World Network and the Berne Declaration, October 2015, p. 8. Available from www.twn.my/title2/intellectual_property/info.service/2015/ip151003/457628655560ccf-2b0eb85.pdf.
38 For example, Article 26.2 of the WIPO Rome Convention (protection of performers, producers of phonograms, and broadcasting organizations) requires that a state acceding to the convention must be in a position to give effect to the provisions of the convention at the time of the deposit of its instrument of accession. But there is no corresponding provision requiring examination of conformity of legislation of an acceding member (unlike in UPOV). The same applies for Article 27.2 of the Geneva Act 1999 of the Hague Agreement (designs) and Article 25.2 of the Paris Convention (industrial property).
39 UN Convention on Biological Diversity, Article 35.
40 Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity, Article 33.
41 "Article 12. Accession." *The American Journal of International Law 29* (1935): 812–43. https://doi.org/10.2307/2213679.
42 See Vinci Fon and Francesco Parisi, "Formation of International Treaties," George Mason University School of Law Law and Economics Research Paper No. 05-33 and University of Minnesota Law School Legal Studies Research Paper No. 07-16, 2005, Available from https://is.gd/spZwVm
43 Michael Andreas Kock, *Intellectual Property Protection for Plant Related Innovation - Fit for Future?* Springer, 2022.
44 UPOV document UPOV/INF/13/2. Available from https://deliverypdf.ssrn.com/delivery.php?ID=910024021106119092087104075108101126039006020032019035067001092010126082094066079007039055026029057040105073016116118092067058075059082077027126107097064089095084002055124024097117006123066073119115103091081023112094065005017122127086006127102086&EXT=pdf&INDEX=TRUE.
45 A national deference standard of interpretation is a rule wherein, in interpreting the scope of a treaty provision (where different interpretations are possible), the interpretation adopted by the state party imple menting the provision is adopted. For example, in the WTO Agreement on Anti-Dumping, WTO panels are required to follow the national deference approach.
46 UPOV document, UPOV/INF/13/2. Available from www.upov.int/edocs/infdocs/en/upov_inf_13.pdf.

The South Centre is the intergovernmental organization of developing countries that helps developing countries to combine their efforts and expertise to promote their common interests in the international arena. The South Centre was established by an Intergovernmental Agreement which came into force on 31 July 1995. Its headquarters is in Geneva, Switzerland.

South Center
Switzerland | south@southcentre.int | www.southcentre.int

The Association for Plant Breeding for the Benefit of Society (APBREBES) is a network of civil society organizations from developing and industrialized countries. The purpose of APBREBES is to promote plant breeding for the benefit of society, fully implementing Farmers' Rights to plant genetic resources and promoting biodiversity.

Association for Plant Breeding for the Benefit of Society (APBREBES)
Switzerland | contact@apbrebes.org | www.apbrebes.org