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The International Treaty
ON PLANT GENETIC RESOURCES
FOR FOOD AND AGRICULTURE

**Views, Experiences and Best Practices as an example of possible options for
the national implementation of Article 9 of the International Treaty**

Note by the Secretary

At its [second meeting](#) of the Ad hoc Technical Expert Group on Farmers' Rights (AHTEG), the Expert Group agreed on a revised version of the [template](#) for collecting information on examples of national measures, best practices and lessons learned from the realization of Farmers' Rights

This document presents the updated information on best practices and measures of implementing Article 9 of the International Treaty submitted by Third World Network on 30 July 2019.

The submission is presented in the form and language in which it was received.



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Template for submission of

Measures, Best Practices and Lessons Learned from the Realization of Farmers' Rights as set out in Article 9 of the International Treaty

Basic information

- Title of measure/practice

Implementing Sui Generis Plant Variety Protection System that Recognizes Farmers' Seed Systems, Farmers' Varieties and Advances Farmers' Rights

- Date of submission
06/02/2019
- Name(s) of country/countries in which the measure/practice is taking place
India, Malaysia
- Responsible institution/organization (name, address, website (if applicable), e-mail address, telephone number(s) and contact person)
Examples collected by Third World Network (www.twn.my) Contact person: Sangeeta Shashikant (Legal Advisor), Email: sangeeta@twnetwork.org, Mob: +44 7972175128
- Type of institution/organization (categories)
Civil Society Organization
- Collaborating/supporting institutions/organizations/actors, if applicable (name, address, website (if applicable), e-mail address, telephone number(s))
APBREBES, www.apbrebes.org; Email: contact@apbrebes.org; contact person: François Meienberg, APBREBES Coordinator

Description of the examples



Mandatory information:¹

- Short summary to be put in the inventory (max. 200 words) including:
 - Implementing entity and partners
 - Start year
 - Objective(s)
 - Summary of core components
 - Key outcomes
 - Lessons learned (if applicable)

WTO Members have complete freedom to develop sui generis plant variety protection (PVP) systems that recognize and support farmer managed seed systems and implement Farmers' Rights.

Hence several countries (e.g. India (2001), Malaysia (2004)) have opted to depart significantly from the one-size fits all model of UPOV 1991 and adopt innovative national PVP legislation that includes unique features that balances the different interests (public interests, commercial breeders and farmers), as well as advances the key requirements and objectives of the ITGRFA, the Convention on Biological Diversity (CBD) and its Nagoya Protocol on access and benefit sharing (Nagoya Protocol). Importantly these legislations recognize farmers' seed systems, farmers' varieties and advances implementation of Article 9 of the ITPGRFA.

For example India's Protection of Plant Varieties and Farmers' Rights Act, 2001 (PPVFR Act) grants PVP protection to plant varieties but also recognizes the right of a farmer "to save, use, sow, re-sow, exchange, share or sell his farm produce including seed of a variety protected under this Act in the same manner as he was entitled before the coming into force of this Act: Provided that the farmer shall not be entitled to sell branded seed of a variety protected under this Act." There are also a number of other measures in the legislation that protects farmers' interests and needs.

Malaysia's Protection of New Varieties of Plants Act 2004 includes provisions that recognize farmer seed systems, their need for protection as well as the need for distinct criteria for registration. It grants protection to varieties of farmers, local communities or indigenous people if the plant variety is "new, distinct and identifiable".

India and Malaysia's PVP legislations also includes disclosure obligation i.e. requiring a PVP applicant to *inter alia* declare the source of the genetic material and present evidence of prior informed consent and benefit sharing.

Innovative PVP systems of India and Malaysia has not discouraged its use. To the contrary, the system is widely used by domestic and international companies, government research agencies, universities, individuals and farmers. The implementing entity would be the relevant national PVP authority.

¹ This mandatory information is required in order for the measure/practice to be included in the Inventory.



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Brief history (including starting year), as appropriate

Article 27.3(b) of the WTO-TRIPS Agreement requires WTO Members to provide for protection of plant varieties. The only condition established by Article 27.3(b) is to provide “effective sui generis protection”. “Sui generis” means “unique”, “of its own kind”. Hence, WTO Members have broad policy space to define how the protection is conferred and may opt for sui generis protection that is not UPOV-compliant.

Many independent experts have recommended that developing countries should not join the UPOV system as it offers a rigid model inappropriate for developing countries where farmer managed seed systems (informal seed systems) and the practices of freely saving, using, exchanging and selling seeds are prevalent.²

Therefore, several countries (e.g. India, Malaysia) have opted to depart significantly from the one-size fits all model of UPOV 1991 and adopt innovative national PVP legislation that balances the different interests (public interests, commercial breeders and farmers), as well as advances the key requirements and objectives of the ITGRFA, the Convention on Biological Diversity (CBD) and its Nagoya Protocol on access and benefit sharing (Nagoya Protocol). Importantly these legislations recognize farmers’ seed systems, farmers’ varieties and advances implementation of Article 9 of the ITPGRFA.

- Core components of the measure/practice (max 200 words)

India

There are a number of provisions in India’s Protection of Plant Varieties and Farmers’ Rights Act, 2001 (PPVFR Act) that recognize farmers’ seed system, farmers’ varieties and advances Farmers’ Rights. These include:

(i) defines Farmers’ variety and recognizes farmers’ role in breeding and cultivating crops (Section 2, Section 39);

(ii) recognizes granting of PVP to farmer varieties under a separate criterion from new plant varieties (Section 14);

(iii) requires an applicant for PVP to disclose passport data of the parental lines from which the variety for which protection is sought has been derived along with the geographical location in India from where the genetic material has been taken and all such information relating to the contribution,

² For example, The UPOV Convention, Farmers’ Rights and Human Rights - An integrated assessment of potentially conflicting legal frameworks” published by Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) on behalf of the German Federal Ministry for Economic Cooperation and Development” (June 2015) available at <https://www.giz.de/fachexpertise/downloads/giz2015-en-upov-convention.pdf> ; UNDP (2008) “Towards a Balanced Sui Generis Plant Variety Regime”, available at <http://www.undp.org/content/undp/en/home/librarypage/poverty-reduction/toward-a-balanced-sui-generis-plant-variety-regime.html> ; UN General Assembly Document (A/64/170), “Seed Policies and the right to food: enhancing agrobiodiversity and encouraging innovation” available at http://www.srfood.org/images/stories/pdf/officialreports/20091021_report-ga64_seed-policies-and-the-right-to-food_en.pdf



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if any, of any farmer, village community, institution or organization in breeding, evolving or developing the variety (Section 18(1)(e));

(iv) requires an applicant for PVP to disclose genetic material or parental material acquired for breeding, evolving or developing the variety has been lawfully acquired (Section 18(1)(f));

(v) recognizes that a farmer who is engaged in the conservation of genetic resources of land races and wild relatives of economic plants and their improvement through selection and preservation shall be entitled in the prescribed manner for recognition and reward from the Gene Fund: Provided that material so selected and preserved has been used as donors of genes in varieties registrable under the Act (Section 39 (1)(iii));

(vi) recognizes the right of a farmer “to save, use, sow, resow, exchange, share or sell his farm produce including seed of a variety protected under this Act in the same manner as he was entitled before the coming into force of this Act: Provided that the farmer shall not be entitled to sell branded seed of a variety protected under this Act.” (Section 39 (1)(iv))

(vii) breeder has to disclose the expected performance of the registered variety and farmers entitled to compensation if the protected variety fails to perform as claimed by the breeder (Section 39(2));

(viii) an applicant for PVP to disclose in the application information regarding the use of genetic material conserved by any tribal or rural families in the breeding or development of such variety, failing which application to be rejected. (Section 40)

(ix) recognizes the right of communities to compensation for contribution of the people of that village or local community, in the evolution of the variety registered and allowing any person/persons/governmental / NGO to make a claim on their behalf (Section 41)

(x) establishes mechanisms to operationalize fair and equitable benefit sharing arising from use of plant genetic resources. This includes disclosure obligations, inviting claims of benefit sharing with respect to the variety registered (Section 26)

(xi) a farmer cannot be prosecuted for infringement of rights specified in the Act if he/she can prove in court that he/she was unaware of the existence of PVP on the variety (Section 42)

(xii) where an essentially derived variety is obtained from a farmers’ variety, need consent of farmers that have contributed in the preservation/development of such variety (Section 43)

(xiii) farmers/village community not liable to pay any fees in any proceedings under the Act (Section 44).

(xiv) establishes a Gene Fund to facilitate *inter alia* fair and equitable benefit sharing payments to local farmers and communities as well as supporting the conservation and sustainable use of genetic resources including in-situ and ex-situ collections (Section 45)

For India’s Protection of Plant Varieties and Farmers’ Rights Act, 2001 (PPVFR Act) see, <https://indiacode.nic.in/bitstream/123456789/1909/1/200153.pdf>



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Malaysia

Utilizing the policy space accorded by the TRIPS Agreement, Malaysia enacted the Protection of New Varieties of Plants Act 2004. This law is unique as it delicately balances the different interests as well as furthers implementation of the ITPGRFA, the CBD, the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) and mutual supportiveness among national laws. Some of the unique features of this law include:

- (i) recognition of farmer seed systems and their need for protection as well as their need for distinct criteria for registration. It grants protection to varieties of farmers, local communities or indigenous people if the plant variety is “new, distinct and identifiable”
- (ii) requiring an applicant for plant breeders’ rights (PBR) to *inter alia* declare the source of the genetic material or the immediate parental lines of the variety, present evidence of prior informed consent as well as show compliance with access and benefit sharing. These requirements are aimed at preventing ‘biopiracy’, facilitating fair and equitable benefit sharing, supporting implementation of other national laws.
- (iii) recognizing as an exception to PBRs, the absolute right of small farmers to save seeds/propagating materials on their own holding, to exchange seed/propagating material among small farmers and to sell farm saved seeds in situations where a small farmer cannot make use of the farm saved seed on his own holdings due to circumstances beyond the farmer’s control.
- (iv) requiring the PVP holder to make available propagating material, of reasonable quality, in reasonable quantities and at a reasonable price.

Malaysia’s Protection of New Varieties of Plants Act 2004 is available at <http://pvpbkt.doa.gov.my/>

- Description of the context and the history of the measure/practice is taking place (political, legal and economic framework conditions for the measure/practice) (max 200 words)

In many developing countries, more than 80% of the seeds/propagating material is from the farmer managed seed system (informal seed sector) through practices of freely saving, using, exchanging and selling seeds among farmers. However, the value, needs and practices of this sector is not fully recognized by UPOV modelled PVP systems. A Study on behalf of the German Federal Ministry for Economic Cooperation and Development concluded that UPOV 91-based PVP laws did not advance the realisation of Farmers’ Rights; rather they are effective in the opposite direction.³

WTO Members have complete freedom to develop sui generis PVP systems that recognize and support implementation of Farmers’ Rights and as shown above, several developing countries have done so. Evidence available suggests that non-UPOV sui generis PVP systems do work effectively.

³The UPOV Convention, Farmers’ Rights and Human Rights - An integrated assessment of potentially conflicting legal frameworks” published by Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) on behalf of the German Federal Ministry for Economic Cooperation and Development” (June 2015) available at <https://www.giz.de/fachexpertise/downloads/giz2015-en-upov-convention.pdf>



In India smallholder farmers supply around 80% of the seed required in India. 86% of farmers operate on land holding of less than 2 hectares while less than 1% hold more than 10 hectares.⁴ This national context led India to adopt a unique PPVFR system that advances implementation of Farmers' Rights.

The uniqueness of India's PPVFR Act has not discouraged use of the PVP system. On the contrary, a large number of PVP applications have been filed and granted in India. As at July 2017, 15053 PVP applications were filed with 2,439 applications concerning new plant varieties, of these 2143 were filed by the private sector. 2688 varieties have been granted protection⁵. In addition, India has utilized the Gene Fund set up under its PPVFR Act to establish awards, rewards and recognition for farmers and farming communities involved in the conservation of genetic resources used as donors of genes in varieties registrable under the Act.

In Malaysia, smallholder farmers are an important source of seeds, often from local markets, farm saved seed, relatives and neighbours. Hence ensuring protection of the needs and interests of farmers is essential leading to a sui generis PVP system. Malaysia, which began operationalizing its PVP system in 2008, received 299 PVP applications between 2008 and 2018. International companies filed the majority of these applications (61%). Domestic private companies (12%), government research agencies (17%), universities (7%) and individuals (3%) accounted for the remaining applications filed.

- To which provision(s) of Article 9 of the International Treaty does this measure relate

- Art. 9.1 ✓
- Art. 9.2a ✓
- Art. 9.2b ✓
- Art. 9.2c □
- Art. 9.3 ✓

Other information, if applicable

- Please indicate which category of the Inventory is most relevant for the proposed measure, and which other categories are also relevant (if any):

No.	Category	Most relevant ⁶	Also relevant ⁷
1	Recognition of local and indigenous communities', farmers' contributions to conservation and sustainable use of PGRFA, such as awards and recognition of custodian/guardian farmers		X

⁴ <https://timesofindia.indiatimes.com/india/slide-in-farm-size-but-women-land-owners-rise-agri-census/articleshow/66035943.cms>

⁵ <http://www.plantauthority.gov.in/pdf/Status%20Crop%20wise%20Application1.pdf>

⁶ Please select only one category that is most relevant, under which the measure will be listed.

⁷ Please select one or several categories that may also be relevant (if applicable).



2	Financial contributions to support farmers conservation and sustainable use of PGRFA such as contributions to benefit-sharing funds		X
3	Approaches to encourage income-generating activities to support farmers' conservation and sustainable use of PGRFA		
4	Catalogues, registries and other forms of documentation of PGRFA and protection of traditional knowledge		
5	In-situ/on-farm conservation and management of PGRFA, such as social and cultural measures, community biodiversity management and conservation sites		
6	Facilitation of farmers' access to a diversity of PGRFA through community seed banks ⁸ , seed networks and other measures improving farmers' choices of a wider diversity of PGRFA.		
7	Participatory approaches to research on PGRFA, including characterization and evaluation, participatory plant breeding and variety selection		
8	Farmers' participation in decision-making at local, national and sub-regional, regional and international levels		
9	Training, capacity development and public awareness creation		
10	Legal measures for the implementation of Farmers' Rights, such as legislative measures related to PGRFA.	X	
11	Other measures / practices		

- In case you selected 'other measures', would you like to suggest a description of this measure, e.g. as a possible new category? _____
- Objective(s)

Implementing non-UPOV effective sui generis PVP System that recognizes farmers' past, present and future contribution to the development of plant genetic resources, the value and characteristics of their varieties and advances implementation of Farmers' Rights.

- Target group(s) and numbers of involved and affected farmers⁹
Policy makers, farmers and civil society organizations.
- Location(s) and geographical outreach
- Resources used for implementation of the measure/practice

⁸ Including seed houses.

⁹ Any classification, e.g. of the types of farmer addressed, may be country-specific.



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- How has the measure/practice affected the conservation and sustainable use of plant genetic resources for food and agriculture?

The measure/practice is positive for conservation and sustainable use as there are incentives provided toward those objectives. For instance, India has utilized the Gene Fund set up under its PPVFR Act to establish awards, rewards and recognition for farmers and farming communities involved in the conservation of genetic resources used as donors of genes in varieties registrable under the Act. The measure/practise also promotes fair agricultural policies, supports development and maintenance of diverse farming systems, encourages farmer led plant breeding, increases the range of genetic diversity available to farmers etc.

- Please describe the achievements of the measure/practice so far (including quantification) (max 200 words)

The uniqueness of India's PPVFR Act has not discouraged use of the PVP system. On the contrary, a large number of PVP applications have been filed and granted in India. As at July 2017, 15053 PVP applications were filed with 2,439 applications concerning new plant varieties, of these 2143 were filed by the private sector. 2688 varieties have been granted protection¹⁰. In addition, India has utilized the Gene Fund set up under its PPVFR Act to establish awards, rewards and recognition for farmers and farming communities involved in the conservation of genetic resources used as donors of genes in varieties registrable under the Act. These are the Plant Genome Saviour Community Award, Plant Genome Saviour Farmer Reward and Plant Genome Saviour Farmer Recognition. Thus far, several awards, rewards and recognition have been handed out. These include cash rewards to 10 farming communities of 10 lakh rupees (about US\$15,700) each between 2009 and 2011; and to 10 farmers, one lakh rupees (US\$1,570) each in 2012. Recognition (citation and memento) has also been given to 16 farming communities (2007-2010) and 15 farmers (2012).

Importantly a major achievement of India's PPVFR is the implementation of measures that promote Farmers' Rights in particular recognizing the right of a farmer "to save, use, sow, resow, exchange, share or sell his farm produce including seed of a variety protected under this Act in the same manner as he was entitled before the coming into force of this Act: Provided that the farmer shall not be entitled to sell branded seed of a variety protected under this Act."

Malaysia, which began operationalizing its PVP system in 2008, received 299 PVP applications between 2008 and 2018. International companies filed the majority of these applications (61%). Domestic private companies (12%), government research agencies (17%), universities (7%) and individuals (3%) accounted for the remaining applications filed.

In Malaysia, smallholder farmers are an important source of seeds, often from local markets, farm saved seed, relatives and neighbours. Hence implementation of measures that safeguard and promote Farmers' Rights is a major achievement of the PVP Act in Malaysia.

- Other national level instruments that are linked to the measure/practice

¹⁰ <http://www.plantauthority.gov.in/pdf/Status%20Crop%20wise%20Application1.pdf>. For more information see also <http://plantauthority.gov.in/>



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- Are you aware of any other international agreements or programs that are relevant for this measure/practice?
 - Convention on Biological Diversity
 - Nagoya Protocol on Access to Genetic Resources and Equitable Sharing of Benefits Arising from their Utilization
 - UN Declaration on the Rights of Peasants and Other People Working in Rural Areas -UN Declaration on the Rights of Indigenous Peoples (UNDRIP)
 - Human rights instruments related to right to food and women.
- Other issues you wish to address, that have not yet been covered, to describe the measure/practice

Lessons learned

- Describe lessons learned which may be relevant for others who wish to do the same or similar measures/practices (max 250 words).
 1. WTO Members have complete freedom to develop *sui generis* PVP systems that recognize and support farmer managed seed systems and implementation of Farmers' Rights.
 2. It is feasible to implement a successful non-UPOV *sui generis* PVP systems that grant PVP protection and reflects the needs and interests of farmer managed seed systems as well as advances Farmers' Rights implementation. It is not recommended for countries to join the UPOV system, for it undermines farmer managed seeds systems and implementation of Farmers' Rights.

Often accompanied by inaccurate and misleading information about the benefits of the UPOV system, there is a lot of pressure especially on developing countries to join UPOV and compromise on Farmers' Rights. Usually no information is provided on alternative *sui generis* PVP systems, the importance of the informal seed sector and Farmers' Rights.

Countries joining UPOV 1991 have very little room to manoeuvre, as they have to present their legislation to the UPOV Council for assessment of conformity with the 1991 Act.¹¹ To assess conformity, the UPOV Secretariat scrutinises a country's legislation, rejecting any clause that in its view is inconsistent with its understanding of the 1991 Act. Only if the decision is positive (in conformity) can the said country become a member of UPOV 1991.

There are many examples of UPOV rejecting clauses implementing Farmers' rights. For instance, in the case of Malaysia, UPOV called on Malaysia *inter alia* to delete from its PVP legislation disclosure requirements that are important to facilitate fair and equitable benefit sharing as well as provisions that allow exchange of propagating materials among small farmers.

In the case of the Philippines, UPOV found the farmer's exception in Philippines PVP legislation that support the right of small farmers to save, use, exchange and sell farm-saved seed/propagating material to be inconsistent with UPOV. In its comments UPOV notes *inter alia* "if 'exchange, share or sell (*sic*) of their farm produce of a variety protected under this Act' is for the purpose of reproduction, those acts would constitute infringements to the breeder's right [...]. The exchange and

¹¹ Article 34(3) of the 1991 Act.



sale of seeds among and between said small farmers [...] would constitute an infringement to the breeder's right."¹² UPOV called for the Section to be amended, meaning deletion of provisions that safeguards Farmers' Right.

Accordingly using the policy space accorded by WTO-TRIPS Agreement, countries should opt for alternative sui generis PVP systems as done by India and Malaysia. These models are successfully being implemented at the national level.

3. In granting protection to farmers' varieties, it may be better to accord a remuneration right rather than "exclusive rights".¹³

- What challenges encountered along the way (if applicable) (max 200 words)

-North-South trade agreements that obligate developing countries to adopt UPOV 1991.
-Pressure by developed countries and UPOV Secretariat to join UPOV 1991 and delete provisions from national PVP legislation that support farmer managed seed systems and implementation of Farmers' Rights.

- What would you consider conditions for success, if others should seek to carry out such a measure or organize such an activity? (max 100 words)

First and foremost, it is important to have political will to establish an alternative sui generis PVP system. Further, the following objectives should be considered¹⁴:

- adapted to the agricultural, socio-economic and cultural country/region profile;
- consistent with and supportive of policies on conservation and sustainable use of plant biodiversity for food and agriculture;
- achieves the right balance between breeders' rights and those of farmers and the society at large;
- recognizes and supports the farmer managed seed system;
- safeguards against misappropriation of local genetic materials;
- preserves traditional knowledge associated with genetic resources and the traditional farming practices of saving, using, exchanging and selling seeds/propagating material, having in view the importance of ensuring the livelihood of farming communities, the continuous adaptation of seeds/ propagating material to the evolution of agricultural ecosystems, and food security;
- respects, protect and fulfil states obligations regarding the right to food, the right to enjoy the benefits of scientific progress and its application, the rights of indigenous peoples and the rights of peasants and other people working in the rural areas;
- is supportive of and does not counter the objectives and the obligations under the CBD, the Nagoya Protocol and the ITPGRFA.

¹²UPOV doc. C(Extr.)/24/2 available at http://www.upov.int/edocs/mdocs/upov/en/c_extr/24/c_extr_24_02.pdf

¹³ For further information see "Plant Variety Protection in Developing Countries: A Tool for Designing a Sui Generis Plant Variety Protection System: An Alternative to UPOV 1991 ». It is available at <http://www.apbrebes.org/news/plant-variety-protection-developing-countries-tool-design-sui-generis-plant-variety-protection> in english, french and Spanish.

¹⁴ The list of objectives are drawn from 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, APBEBES, 2015, available at <http://www.apbrebes.org/news/new-publication-plant-variety-protection-developing-countries-tool-designing-sui-generis-plant>, p. 48



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Development of an effective sui generis PVP regime is ultimately also very much dependent on the process for the development of such a regime. The process should be well-defined, transparent and inclusive based on a sound assessment of the factual and empirical evidence.¹⁵

Further information

- [Link\(s\) to further information about the measure/practice](#)

There are different possibilities available to countries wishing to develop alternative sui generis PVP system that reflects local agricultural system, is supportive of farmer seed systems and Farmers' Rights. A useful tool with possible model provisions to consider is "Plant Variety Protection in Developing Countries: A Tool for Designing a Sui Generis Plant Variety Protection System: An Alternative to UPOV 1991 ». It is available at <http://www.apbrebes.org/news/plant-variety-protection-developing-countries-tool-design-sui-generis-plant-variety-protection> in english, french and Spanish.

Another important reference is the African model legislation for the protection of the rights of local communities, farmers and breeders, and for the regulation of access to biological resources available at <https://www.wipo.int/edocs/lexdocs/laws/en/oau/oau001en.pdf>

¹⁵ For further information on steps to consider in developing a sui generis PVP regime see Chapter 5 of 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, APBEBES, 2015, available at <http://www.apbrebes.org/news/new-publication-plant-variety-protection-developing-countries-tool-designing-sui-generis-plant>