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SOUTH AFRICA biodiversity | food sovereignty | agroecology | social justice

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**Attention: Dr Noluthando Netnou-Nkoana**

**Department of Agriculture, Forestry and Fisheries**

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**Biowatch SA submission  
on South Africa's accession to the International Treaty on Plant Genetic Resources  
for Food and Agriculture and the approval of the UPOV 1991 Convention**

Thank you for the opportunity to provide input on the decision to accede to the International Treaty on Plant Genetic Resources for Food and Agriculture and the approval of UPOV 1991 Convention. In this regard we submit the following comments.

Yours sincerely

A handwritten signature in black ink that reads "Rose Williams". The signature is written in a cursive, slightly slanted style.

Rose Williams  
Director

**Biowatch South Africa** (Biowatch) is a non-governmental organisation established in 1999, which strives for social and ecological justice within the context of food sovereignty. Biowatch works to challenge unsustainable agricultural practices and to advocate for ecologically viable alternative that safeguards people and land. We have a long track record of working on issues concerning seeds and indigenous knowledge systems internationally, and with small-holder farmers in 5 areas in northern KwaZulu-Natal. Our submission, in response to South Africa's possible accession to the International Treaty on Plant Genetic Resources for Food and Agriculture and the approval of the UPOV 1991 Convention, stems from this experience.

## Introduction

In southern and East Africa 60-90% of farmers, most of whom are women smallholders, rely on seed from the informal system.<sup>1</sup> The extent of farmer seed systems in South Africa is under-studied and under-valued, due to perceptions that small farmers are marginal food producers with unproductive varieties. As more studies are undertaken these perceptions are being challenged: farmers often prefer their own farmer varieties of seed because they are tasty, nutritious, affordable, available timeously for planting, adapted to local conditions, intertwined with traditional cultural and knowledge, and continue to provide better harvests in their resource poor conditions than commercial varieties. Farmers largely receive no state support in the reproduction and conservation of farmer seed varieties, and are coerced into industrial farming systems, with proprietary seed, by government and private sector extension.

South African law requires that competing interests in society are balanced to achieve a just and democratic society, including various rights enshrined in the constitution, such as having sufficient food and water, and an environment that is not harmful to our health and well-being. In this context, propriety and exclusive rights to plant varieties cannot be granted to the private sector without consideration of the rights of farmers, and the impact on food security and livelihoods in general. Consideration should also be given to balancing the needs of the country against and between the obligations inherent in possibly conflicting treaties such as those related to trade under the World Trade Organisation (WTO) and those related to the conservation of biodiversity under the Convention on Biological Diversity (CBD).

Biowatch's response to the two concept notes circulated by the DAFF are motivated by a desire to redress imbalances between commercial and small-holder agriculture, strengthen farmer seed systems in the interests of the conservation of our genetic resources and traditional knowledge, and to increase the resilience especially of small-holder farmers, with the aim of addressing current severe food and nutrition insecurity in South Africa as well as our longer-term food sovereignty.

Strategies aimed at increasing the resilience are very different from a focus on production gains. These should ensure that small-holders receive the support, seed and information they actually want and need through a portfolio of crops and varieties that are not limited to those that suit industrial value chains, commodity market sales and triggers to the sale of other commercial inputs.

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<sup>1</sup> See Louwaars, N.P., & de Boef, W.S. 2012. Integrated seed sector development in Africa: A conceptual framework for creating coherence between practices, programs, and policies. *Journal of Crop Improvement*, 26:1, 39-59 and McGuire, S. and Sperling, L. 2016. Seed systems smallholder farmers use. *Food Security* 8: 179-195

## UPOV 1991

Although South Africa has already signed UPOV 1991, Biowatch SA is against further entrenching the requirements of UPOV '91 and recommends that South Africa withdraws from the UPOV '91 treaty. The reasons for this follow.

The provisions in UPOV '91 are akin to patents as breeders are given rights to the whole living organism - seed and the produce/harvested material grown from the seed. Plants are living organisms, and not technological inventions. Treating this living heritage in the same way as technological objects stifles their natural evolutionary interaction with the environments and farming communities in which our food has evolved over the centuries. This approach is hastening a loss of agricultural diversity with dire implications for the ability of our farming systems to adapt to shocks including erratic weather and new pests.

The resilience of rural communities is also compromised by forbidding the exchange and sale of saved seed where protected varieties inadvertently enter farmer seed systems, and farmers will be indebted to the breeder or even criminalised. Since the breeder's monopoly extends to the harvest of the farmer's crop the breeder can claim ownership of the output (e.g. wheat) and the products of the output (e.g. wheat flour) if the farmer used a protected variety without paying royalties. In this way multinational companies (who mostly hold these rights) are gaining control over the trade in processed foods, ornamentals and other high-value commodities. This is compounded by the current Plant Improvement Bill limiting sales of seed, and thus exchange, to varieties registered on the national varieties list which must comply with DUS and VCU requirements. We also note that extending breeders' rights to the product of registered varieties is optional even under UPOV '91 and question why South Africa has included this in the Plant Breeders' Rights Bill of 2015.

This iron-fisted approach to protecting the rights of seed breeders must consider the increasing consolidation of seed companies /seed breeding entities and the introduction of technologies that force farmers to grow crops with expensive and toxic chemical inputs. These trends are locking farmers into increasingly expensive technology and input packages that are creating dependence and debt, and threatening food security and the ability of farmers to rely on their own resources for their livelihoods.

Trade agreements do not require that South Africa acquiesce to the stringent requirements of UPOV '91. In terms of South Africa's compliance to the TRIPS agreement under the WTO: parties can exempt plants from patents and are only required to implement a *sui generis* system for plant variety protection<sup>2</sup>, and are entitled to adopt measures to protect public health and nutrition<sup>3</sup> and even exclude inventions from patentability to protect life and health<sup>4</sup>. This provides an opportunity to balance the interests of all affected groups including farmers, consumers, indigenous

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<sup>2</sup> Article 27.3 (b) "Members can exclude plants from patenting but shall provide for the protection of plant varieties either by patents or **by an effective *sui generis* system** or by any combination thereof."

<sup>3</sup> Article 8.1 Parties can "adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development".

<sup>4</sup> Article 27.2 "Members may exclude from patentability inventions, the prevention within their territory of the commercial exploitation of which is necessary to protect *ordre public* or morality, including to protect human, animal or plant life or health or to avoid serious prejudice to the environment, provided that such exclusion is not made merely because the exploitation is prohibited by their law."

communities and breeders. South Africa could rather look to international examples (e.g. India, Ethiopia) that include provisions to protect farmer seed systems and the conservation of genetic resources and associated traditional knowledge.

UPOV as an organisation is accused of not being transparent in a variety of ways (secrecy of meetings and documentation, exclusion of observer status to civil society) that limit public and farmer oversight of its dealings. The Convention's parties are predominantly economically advantaged nations, whose economies benefit most from the Convention. By signing and now implementing UPOV '91, South Africa further distances itself from African and developing nation partners. This is reputational risk for South Africa.

UPOV doesn't recognise the moral and economic rights of farmers who developed the original breeding material/germplasm, only the rights of 'conventional' breeders (who develop UPOV-approved varieties).

There is little data showing the benefit of protecting plant intellectual property rights for increasing the breeding of new varieties.<sup>5</sup>

South Africa is already bound by the UPOV 1978 Convention, which adequately protects the rights of plant breeders by: allowing the state to grant protection via patents or plant breeders' rights; identifying registered varieties as distinct, uniform and stable; and extending exclusive breeders' rights over propagating material of registered varieties and harvested material for ornamental plants for a minimum period of at least 15 years.

UPOV '78, however, provides South Africa with some flexibility to respond to our developmental needs in the interests of food security and the livelihoods of a majority of our farmers, which are removed under UPOV '91. These flexibilities include:

- To limit the Act's application within a particular genus or species to varieties with a particular manner of reproduction or multiplication, or a certain end-use. This provides South Africa with the opportunity to exempt small-holder production, farmer seed varieties (which cannot and shouldn't meet DUS requirements), and circumstances where registered seeds enter the farmer seed system and are often not distinguishable from farmer varieties. Protected varieties of seed may enter small-holder systems in a variety of ways, for example occasionally purchasing food as seed in difficult years, seed provided through Department of Agriculture and private sector developmental projects (often in unlabelled packaging), exchange, gifting especially through customary practices such as marriage, and retail purchases in years when there is enough cash to do so. Farmers should be free to continue saving, exchanging and bartering seed as they have always done including protected varieties that enter their systems.
- To protect breeders rights over a variety's reproductive or vegetative propagating material but **not** that of harvested material of protected varieties (except of ornamental plants). This is essential to ensure the fundamental and ages old farmers' right to save, exchange and replant seed; and in so doing ensure the continued development of agricultural diversity in

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<sup>5</sup> GAIA/GRAIN, 1998. 'Ten reasons not to join UPOV: Global Trade and Biodiversity in Conflict,' Issue 2, accessed at [www.grain.org/article/entries/1-ten-reasons-not-to-join-upov](http://www.grain.org/article/entries/1-ten-reasons-not-to-join-upov), citing L.J. (Bees) Butler, 'Plant breeders' rights in the US: Update of a 1983 study' in Joeroen van Wijk and Walter Jaffé (eds), *Intellectual property rights and agriculture in developing countries*, University of Amsterdam, 1996

response to our local climate and cultural context, and the resilience of our farming inherent in the diversity of farmers' varieties. South Africa could also use this flexibility, as other countries have, to allow small-holders to sell seed in the informal market to other small-holders in whatever quantity they require even if this includes protected varieties and to cash crop with protected varieties, in the interests of increased rural prosperity and food sovereignty.

Exercising our flexibility within these international regimes enables the protection of our farmers' livelihoods, and ultimately the people relying on their food, from the profiteering of international corporations.

## **International Treaty on Plant Genetic Resources for Food and Agriculture**

Biowatch SA strongly supports South Africa's accession to the International Treaty on Plant Genetic Resources for Food and Agriculture, in particular in the realisation of Farmers' Rights under Article 9 which includes:

- Protecting traditional knowledge relevant to plant genetic resources
- Recognising the right to equitably share benefits from the use of plant genetic resources
- Recognising the right to participate in making national-level decisions related to the conservation and sustainable use of plant genetic resources.
- The right that farmers have to save, use, exchange and sell farm-saved seed/propagating material, subject to national law and as appropriate.

Biowatch is strongly in favour of upholding the right to save, use, **exchange and sell** farm-saved seed for the reasons stated above, and in this regard note that the current Plant Improvement and Plant Breeders' Rights Bills prevent the exercise of these farmers' rights – by preventing sale and defining sale as including exchange of seed - and should not proceed to enactment.

Biowatch, however, also has some concerns about the Treaty with regard to the multilateral system of access and benefit-sharing (Articles 10 to 13), which allows contracting parties agree to provide facilitated access to genetic resources of sixty-four crops and forages that are crucial for food security worldwide and facilitates plant germplasm exchanges and benefit-sharing through the Standard Material Transfer Agreement (SMTA).<sup>6</sup> Notwithstanding the objectives of increasing agricultural diversity, equitably sharing benefits with the farmers and communities that have developed this diversity to date, and farmer participation in decision-making there have been flaws in the implementation of this Treaty. This includes the following:

- the skewed contribution of publicly-held germplasm to the multi-lateral system with little contribution from the private sector.
- the patenting of genetic information that limits the access and use of plant genetic resources, thereby invalidating the treaty.<sup>7</sup>

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<sup>6</sup> The multilateral system of access and benefit sharing: Case studies on implementation in Kenya, Morocco, Philippines and Peru, Bioversity International, 2012. Accessed at <https://www.bioversityinternational.org/e-library/publications/detail/the-multilateral-system-of-access-and-benefit-sharing/>

<sup>7</sup> Via Campesina, October 2017, accessed at <https://viacampesina.org/en/viith-session-international-seed-treaty-lets-not-sweep-peasants-rights-seeds-carpet/>

- Access to publicly held crop variety collections by private companies, such as has happened with Monsanto's access as a partner in the Water Efficient Maize for Africa project to germplasm taken over from the Drought Tolerant Maize for Africa Project, which accessed public collections obtained from farmers.

Besides agreeing to South Africa's accession to the Treaty we also affirm the importance of developing legislation and policies on the conservation and sustainable use of plant genetic resources for food and agriculture, and the fair and equitable sharing of the benefits arising out of their use - including preventing their monopolisation by private companies and ensuring the fundamental protection of farmers' rights in all legislation related to the use of plant genetic resources in food and agriculture include seed legislation.