In this chapter, the minimum requirements for plant variety protection as defined by TRIPS will be analyzed. While plant varieties are only referred to once in the TRIPS Agreement, TRIPS requires that all WTO member States adopt legislation for the effective implementation of plant variety protection, including enforcement.

This chapter will first analyze UPOV, which is a recognized international system for the effective protection of plant varieties. A particular emphasis will be on the 1991 Act of the UPOV Convention, as this is the only available Act for new UPOV member States.\(^1\)

At the same time, WTO member States are not required to join UPOV in order to comply with TRIPS. The analysis will identify the extent to which the UPOV Convention requires a higher level of protection than what is required under TRIPS.

UPOV 1978 is presumed to be closer to the minimum requirement of plant variety protection, and the identification of minimum requirements is the purpose of this chapter.

UPOV 1978 establishes one maximum requirement, as Article 2.1 explicitly excludes double protection on plant varieties, and leaves the decision as to whether to grant patents on plant varieties to the States themselves.\(^2\) UPOV 1991 allows dual protection. Hence, both plant breeders’ rights and patent rights can be granted on a plant variety provided that the requirements for protection are met.\(^3\)

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1 When UPOV 1991 came into force in 1998, only this was open for accession for new members. Those states which were in the process of becoming signatories to the 1978 Act were allowed to proceed.

2 Article 2.1 of UPOV 1978 reads: “Each member State of the Union may recognise the right of the breeder provided for in this Convention by the grant either of a special title of protection or of a patent. Nevertheless, a member State of the Union whose national law admits of protection under both these forms may provide only one of them for one and the same botanical genus or species.”

3 Only recently, such dual protection was recognized in Europe by the decision G 0001/98 (Transgenic Plant/ Novartis II of 20 December 1999), EPO Official Journal 2000 p. 111; see also decision in Technical Board of Appeal: T 1054/96 (13 October 1997), EPO Official Journal 1998, p. 511. See Helfer 2002, p. 24 and Watal 2001, p. 153, for further analysis. In the USA, this practice has been common for the last decade. According to Dan Leskien (personal communication August 29th 2002), all of the 15 most popular plant varieties in the US are now also protected by patents, after being modified by genetic engineering.
The specific requirements of an ‘effective sui generis system’ for plant varieties will then be examined, in Chapter 9.2. We will not analyze in detail the granting of patent protection to plant varieties, which is an option under TRIPS Article 27.3(b), as patent protection for plant varieties undoubtedly fulfills the TRIPS requirements.

### 9.1 Plant Varieties Protection as Defined by UPOV

When analyzing the requirements of UPOV, it is not intended to present all provisions, but rather focus on the most relevant provisions for the purposes of this study. States wanting to become members of UPOV must comply with the standards of UPOV 1991.4 UPOV offers, however, only one option of an ‘effective sui generis system.5 Still, more developing States are parties to UPOV 1978 than to UPOV 1991.

Below, the analysis will be structured by applying the same categories as with regard to patents (Chapter 8.2). This study will focus on both UPOV 1978 and UPOV 1991, to show where the provisions of the two Acts of the UPOV Convention differ, and to identify their minimum requirements. Through this analysis, it will be possible to identify whether and how the requirements of the UPOV Convention differ from those of the TRIPS Agreement with regard to the protection of plant varieties.

#### 9.1.1 Eligibility Criteria

Only plant varieties as defined by Article 1(vi) of UPOV 1991 are eligible for protection. UPOV 1978 does not contain a definition of a variety, but states in Article 2.2 that each member may limit the application of the UPOV Convention to “…varieties with a particular manner of reproduction or multiplication, or a certain end-use.” This latter provision will be analyzed in Chapter 9.1.2 below. The current section will analyze the specific requirements for determining whether a plant variety is eligible for protection.

**Legal criteria:** As was seen in Chapter 2.3.1, the legal criteria for determining whether a plant variety qualifies for protection are: novelty, distinctness, uniformity and stability. Each of these will be analyzed below.

**Novelty** (Article 6.1(b) of UPOV 1978; Article 6 of UPOV 1991). The plant variety must be novel. Selling and disposing of to others the new plant variety for the purpose of exploita-

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4 The following developing countries are part of the UPOV 1978 Convention: Argentina, Bolivia, Brazil, Chile, China, Colombia, Ecuador, Kenya, Mexico, Nicaragua, Panama, Paraguay, South Africa, Trinidad & Tobago, Uruguay. Zimbabwe is in the process of acceding to UPOV 1978.

Present developing country members of the UPOV 1991 Convention are: Azerbaijan, Jordan, Kyrgyzstan, Morocco, Tunisia, Viet Nam and Uzbekistan.

5 In Chapter 9.2, below, more information will be given on possible ‘effective sui generis systems’. There are presently only 64 members of UPOV (WTO has 150 members).