

# Seminar on Breeder's Exemption in PVP under UPOV Convention

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## Intensive Study on Articles 14 and 15 of the 1991 Act of the UPOV Convention

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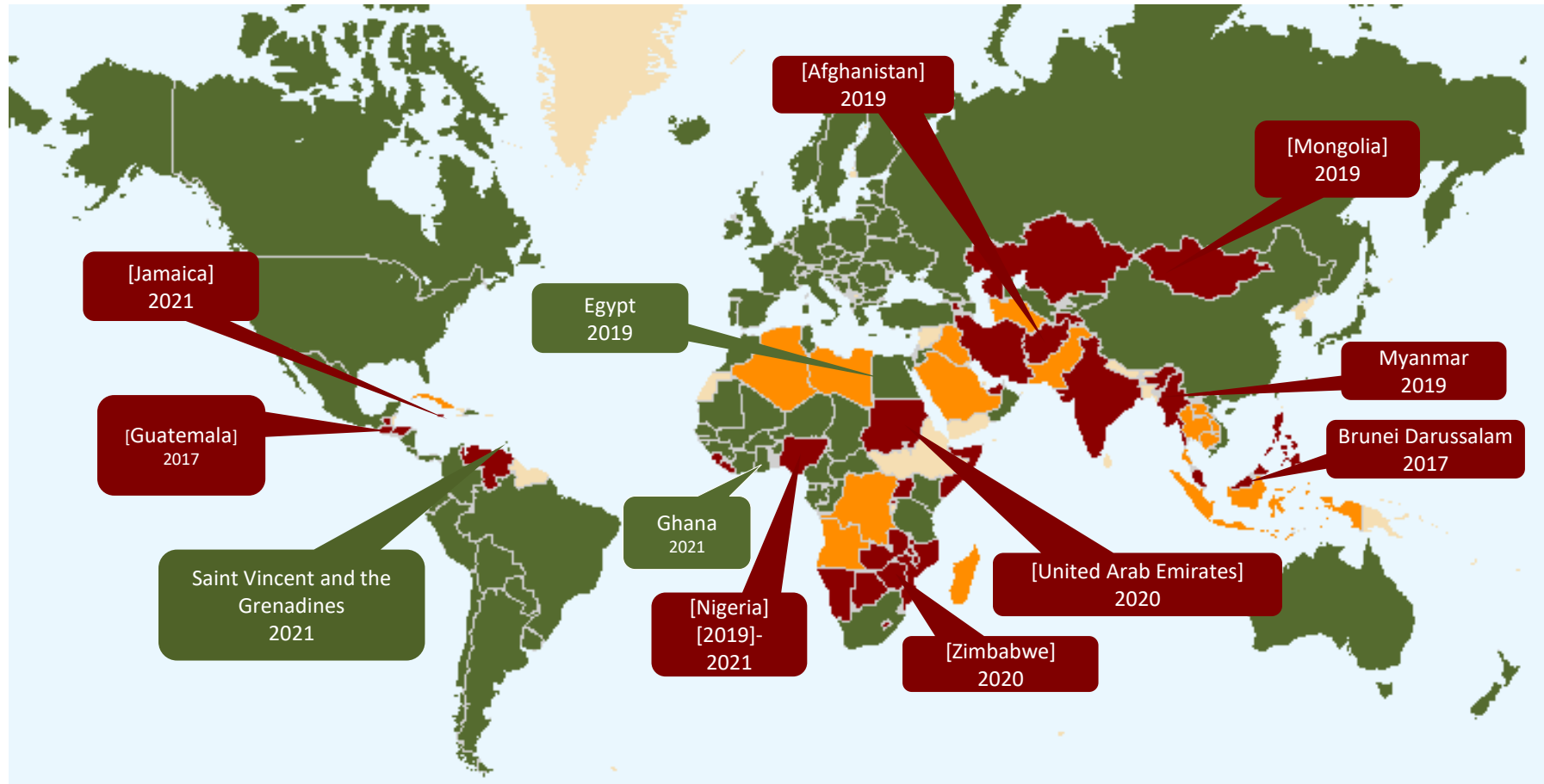
*January 26, 2022, Geneva (via electronic means)*



International Union for the Protection of New Varieties of Plants

# UPOV members and UPOV Council examination of [draft] Laws (2017-2021) (all positive)

Status January 25, 2022



*The boundaries shown on this map do not imply the expression of any opinion whatsoever on the part of UPOV concerning the legal status of any country or territory*

- Members of UPOV (78) (covering 97 States)
- Initiating States (19) and Organization (1)
- States (22) and Organization (1) in contact with the UPOV Office

# PREVIEW

## 1. Scope – Article 14

- a) Acts covered
- b) Material covered
- c) Varieties covered

## 2. Exceptions – Article 15

- a) Acts done privately and for non-commercial purposes
- b) Acts done for experimental purposes
- c) Acts done for breeding other varieties (breeder's exemption")
- d) Optional - Farm-saved seed

## 3. Other systems in the Seed Sector

## **PBR: authorization of breeder required for the following acts in respect of the propagating material of protected variety**

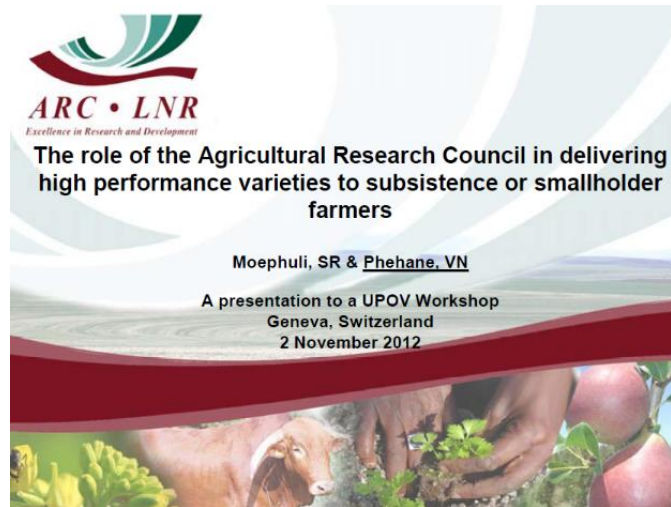
- **Production or reproduction (multiplication)**
- **Conditioning for the purpose of propagation**
- **Offering for sale**
- **Selling or marketing**
- **Exporting**
- **Importing**
- **Stocking for any of the above purposes**

# **Explanatory Notes on Conditions and Limitations Concerning the Breeder's authorization in respect of Propagating Material under the UPOV Convention UPOV/EXN/CAL**

## **Examples of conditions and limitations:**

- Remuneration
- Period
- Method of production or reproduction, export routes
- Material quality and quantity
- Territories concerning the authorization to export
- Conditions of license/sub-license

# Symposium on the Benefits of Plant Variety Protection for Farmers and Growers



## Vuyisile Phehane

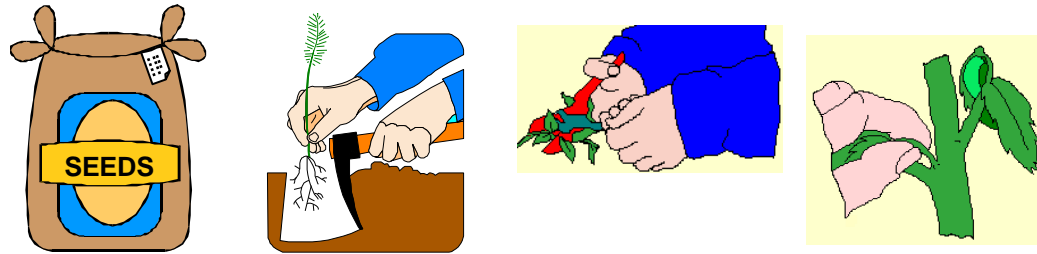


• Delivering high performance varieties to subsistence/smallholder farmers

- Local licensing agreement with a South African company
  - for the commercialization of some of the ARC's citrus varieties.
  - A condition of the license: ensure the participation of smallholder citrus producers in the commercialization value-chain.
- Facilitated partnership with the Citrus Growers' Association to access ARC

## MATERIAL COVERED

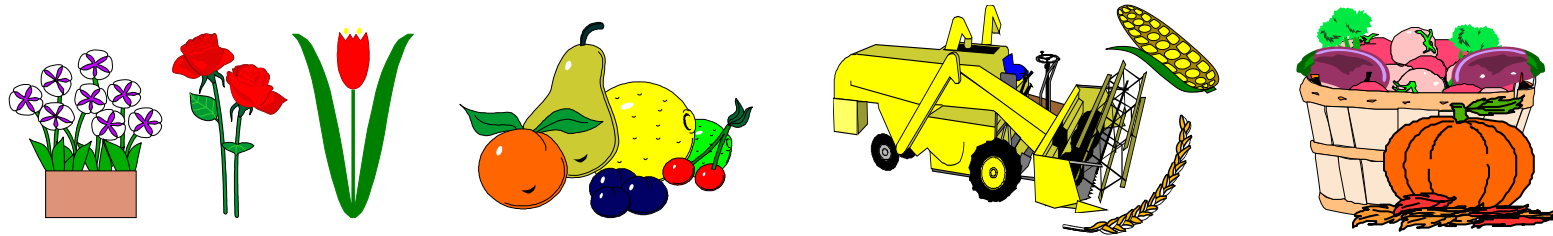
- All propagating material



- Harvested material under certain conditions
- Certain products (optional)

## MATERIAL COVERED

- All propagating material
- **Harvested material**



if obtained through **unauthorized use** of propagating material **unless**, reasonable **opportunity** for breeder to **exercise his right**

- **Certain products (optional)**



## **HARVESTED MATERIAL**

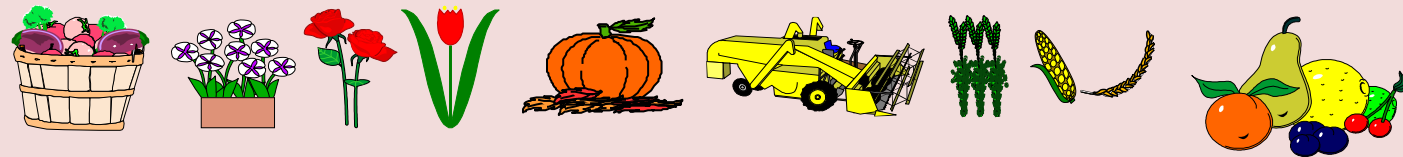
seminar to exchange information on matters concerning  
harvested material and unauthorized use of propagating material

held by

**electronic means on May 27, 2021**

**[https://www.upov.int/meetings/en/details.jsp?meeting\\_id=63048](https://www.upov.int/meetings/en/details.jsp?meeting_id=63048)**

**UPOV has established in September 2021 a Working Group on Harvested  
Material and Unauthorized Use of Propagating Material (WG-HRV)**

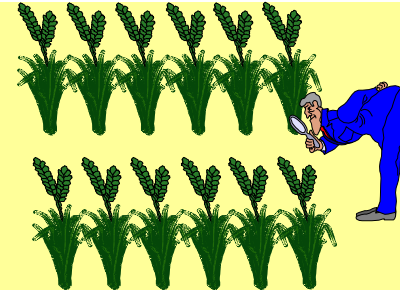


# VARIETIES COVERED (1991 Act)

In addition to the protected variety itself,

## VARIETIES:

- **not clearly distinguishable** from the protected variety



- whose production **requires the repeated use** of the protected variety  
*e.g. hybrids produced using a protected variety (1978 Act also)*
- which are **essentially derived** from the protected variety

# Essentially Derived Varieties

## Article 14

### Scope of the Breeder's Right

(5)[*Essentially derived and certain other varieties*]

(a) [...]

(b) For the purposes of subparagraph (a)(i), a variety shall be deemed to be **essentially derived from another variety (“the initial variety”)** when

(i) it is **predominantly derived from the initial variety**, or from a variety that is itself predominantly derived from the initial variety, **while retaining the expression of the essential characteristics** that result from the genotype or combination of genotypes of the initial variety,

(ii) it is **clearly distinguishable** from the initial variety and

(iii) **except for the differences which result from the act of derivation, it conforms to the initial variety in the expression of the essential characteristics** that result from the genotype or combination of genotypes of the initial variety.

# Essentially Derived Varieties

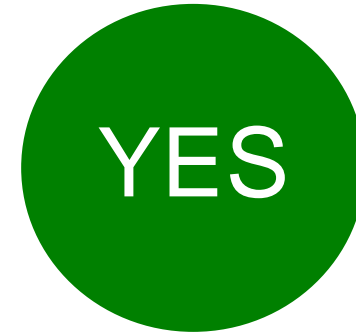
*May be obtained for example by:*

- **selection** of a natural or induced **mutant**
- **selection** of a **somaclonal variant**
- **selection** of a **variant individual** from plants of the initial variety
- **back-crossing**
- transformation by **genetic engineering**

# Essentially Derived Varieties

**Can EDVs be protected in their own right?**

- same criteria for protection

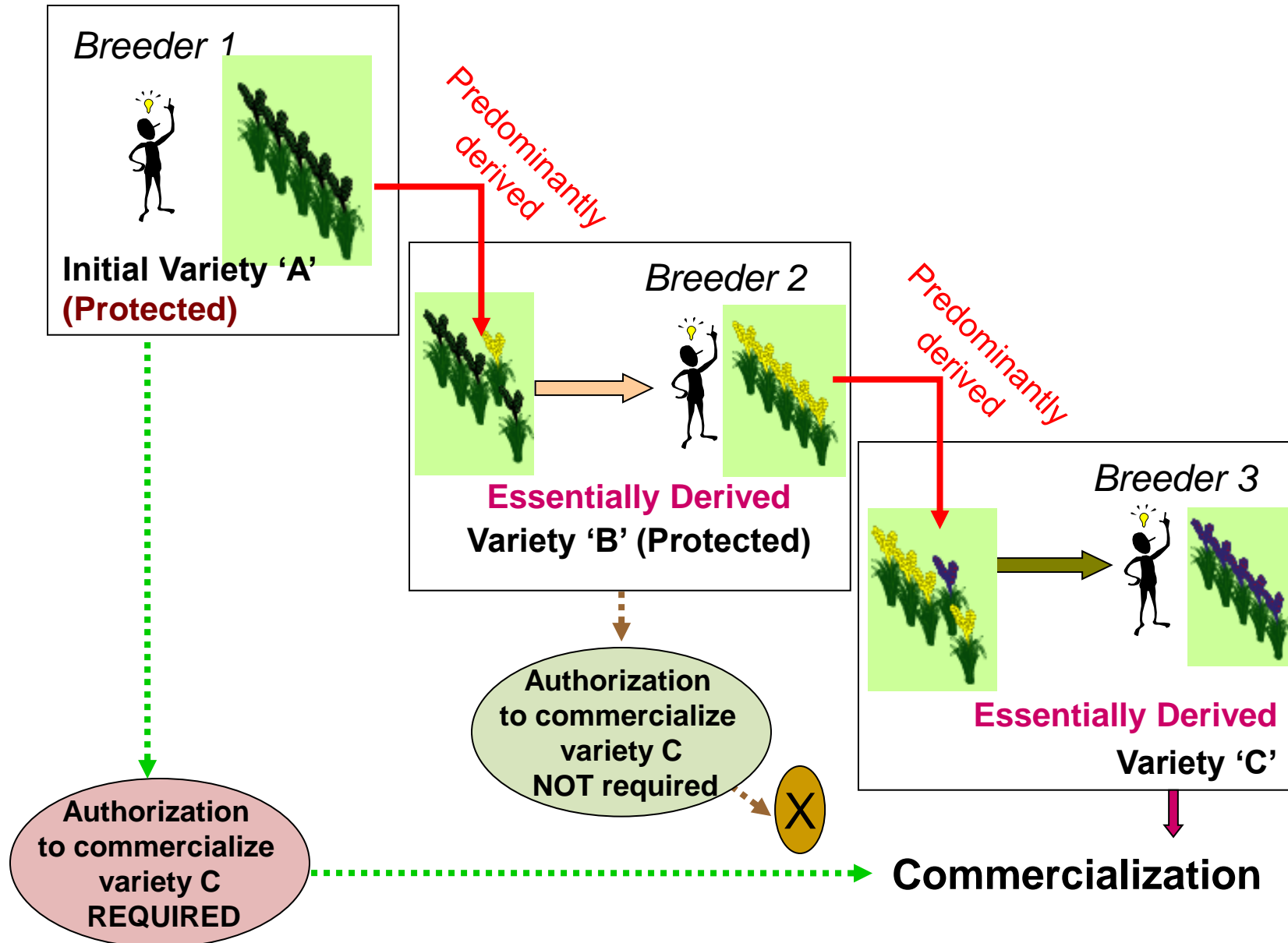


**Can EDVs be commercially exploited?**

Requires the authorization of the PBR holder of the  
INITIAL VARIETY and the PBR holder of the EDV



# Essentially Derived Varieties



# Development of Soft Law on Essentially Derived Varieties (EDV)

## 1. Seminar on the Impact of Policy on Essentially Derived Varieties (EDVs) on Breeding Strategy 2019



## 2. Working Group on Essentially Derived Varieties (WG-EDV) 2019-2021

to draft a **revision** of the  
**Explanatory Notes on  
Essentially Derived Varieties**  
2021 approved by  
**Administrative and Legal Committee (CAJ)** now under  
consideration by the **UPOV Consultative Committee**

- *Evolution of breeding techniques has created new opportunities/incentives for predominately deriving varieties from initial varieties, more rapidly and at a lower cost*

# PREVIEW

## 1. Scope

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## 2. Exceptions

- a) Acts done privately and for non-commercial purposes
- b) Acts done for experimental purposes
- c) Acts done for breeding other varieties (breeder's exemption")
- d) Optional - Farm-saved seed

## 3. Other systems in the Seed Sector



# EXCEPTIONS TO THE BREEDER'S RIGHT

## EXPLANATORY NOTES

**E**



**UPOV/EXN/EXC/1**

**ORIGINAL:** English

**DATE:** October 22, 2009

**INTERNATIONAL UNION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS**  
GENEVA

**EXPLANATORY NOTES ON**  
**EXCEPTIONS TO THE BREEDER'S RIGHT**  
**UNDER THE 1991 ACT OF THE UPOV CONVENTION**

[https://www.upov.int/edocs/expndocs/en/upov\\_exn\\_exc.pdf](https://www.upov.int/edocs/expndocs/en/upov_exn_exc.pdf)

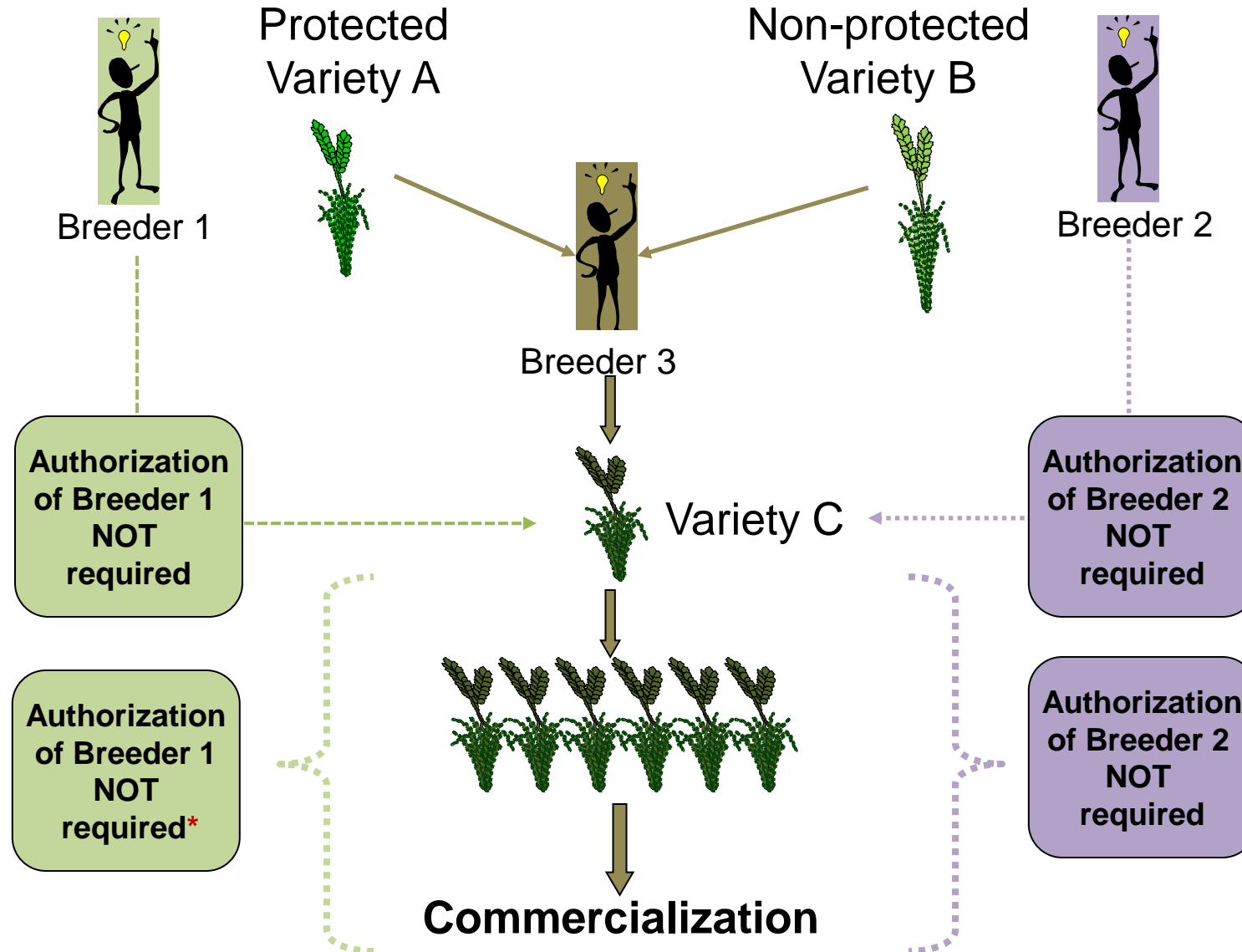
# EXCEPTIONS TO THE BREEDER'S RIGHT

## Compulsory

Acts done:

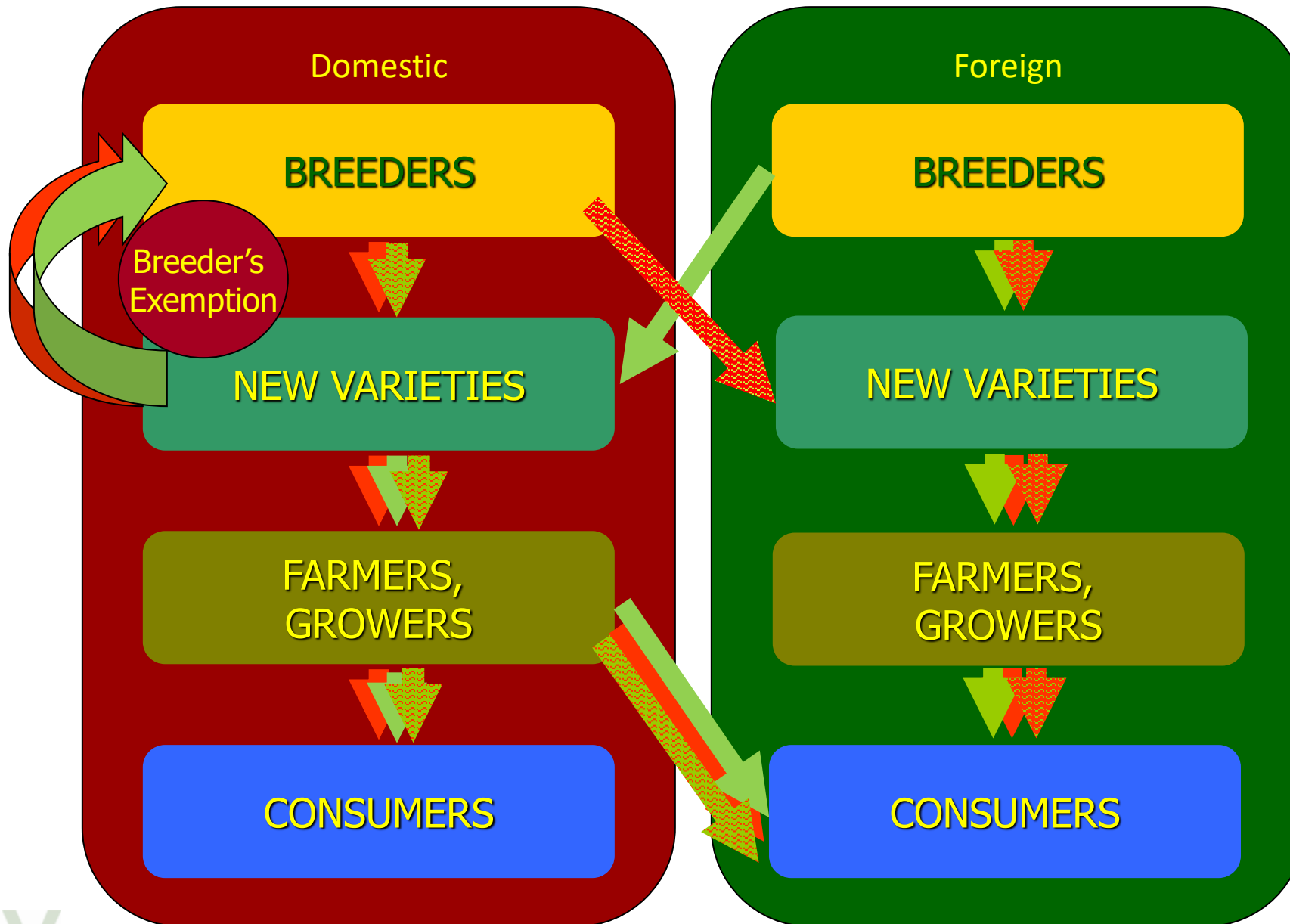
- privately and for non-commercial purposes
- for experimental purposes
- **breeding other varieties (“breeder’s exemption”)**

# The Breeder's Exemption



\* Except for:

- (i) varieties which are essentially derived from the protected variety, where the protected variety is not itself an essentially derived variety,
- (ii) varieties which are not clearly distinguishable in accordance with Article 7 from the protected variety and
- (iii) varieties whose production requires the repeated use of the protected variety.



# KSVS Symposium on Plant Variety Protection Seoul, Republic of Korea (September 3, 2015)

## Korean Rose Breeding Converts a Royalty Payer into a Receiver

Charlie Jeong/wonwoo trading

## Becoming Royalty Receiver

1. Korean pay rose royalty abroad about 1,040,000plants in year 2014
2. GARES rose varieties are sold about million in year 2014
3. Korea change from royalty payer to royalty receiver

## ADVANTAGES OF THE BREEDER'S EXEMPTION

- **Germplasm** sources remain **accessible** to the community of breeders
- **Genetic basis** for plant improvement is **broadened** and is actively conserved
- Variety **improvement** is enhanced
- Opportunity for all **breeders to share** in benefits of breeding activities

# EXCEPTIONS TO THE BREEDER'S RIGHT

## Compulsory

Acts done:

- **privately and for non-commercial purposes**
- for experimental purposes
- breeding other varieties (breeder's exemption")

# EXCEPTIONS TO THE BREEDER'S RIGHT

- Compulsory

(i) Acts done privately **and** for non-commercial purposes

- propagation of a variety by a **farmer exclusively** for the production of a **food crop to be consumed entirely by that farmer and the dependents of the farmer** living on that holding

**therefore**

**“subsistence farming”** where these constitute acts done privately and for non-commercial purposes, may be considered by a UPOV member to be excluded from the scope of the breeder's right

Acts Possibly falling within the scope of the exception





## WORK IN UPOV ON SMALLHOLDER FARMERS

Development of guidance regarding the implementation of the exception of acts done privately and for non-commercial purposes in relation to smallholder farmers **(WG-SHF)**



UPOV members and UPOV observers have provided their experience and views – no legal action by breeders has been reported on acts concerning protected varieties by smallholder farmers not involving their commercial exploitation

# EXCEPTIONS TO THE BREEDER'S RIGHT

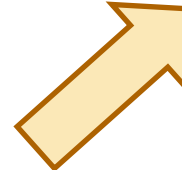
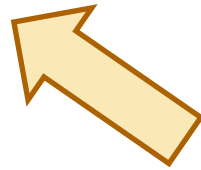
## Compulsory (1991 Act)

Acts done:

- privately and for non-commercial purposes
- for experimental purposes
- breeding other varieties (breeder's exemption")

Optional

Farm-saved seed ?



## OPTIONAL EXCEPTION TO THE BREEDER'S RIGHT

### Farm-saved seed – Article 15(2)

A Contracting Party may restrict the breeder's rights in order to permit farmers to use:

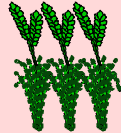
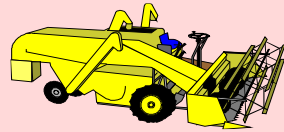
- for propagating purposes on their own holdings  
the product of the harvest
- obtained on their own holdings  
from the protected variety
- within reasonable limits
- subject to safeguarding legitimate interests of the breeder

*[Recommendation of the Diplomatic Conference on Article 15(2)]*

# OPTIONAL EXCEPTION TO THE BREEDER'S RIGHT

**Product of the harvest** can be used for propagating purposes

small grain cereals:



harvested product may = propagating material

Fruit, ornamentals and vegetables:



harvested product may  $\neq$  propagating material

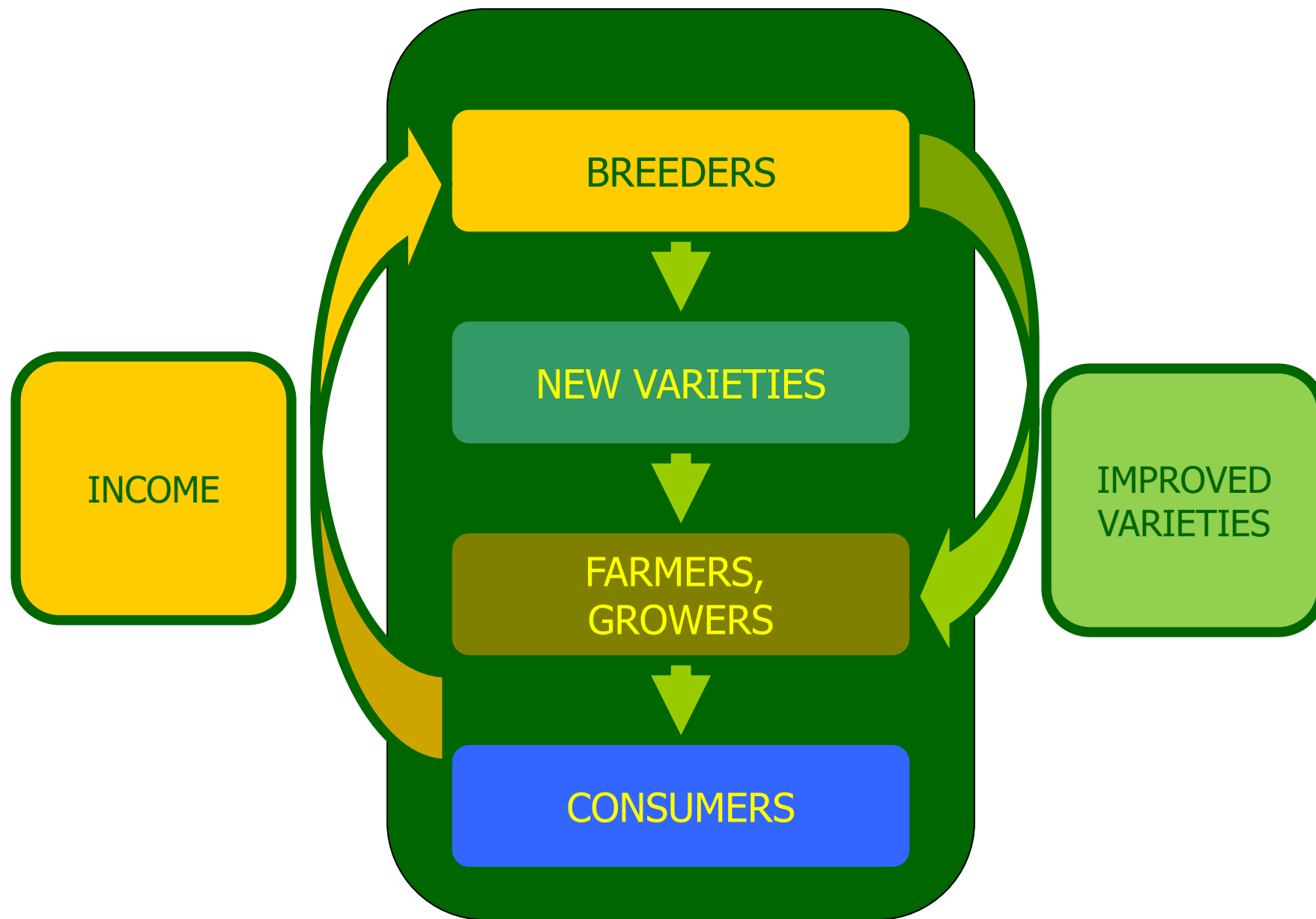
# OPTIONAL EXCEPTION TO THE BREEDER'S RIGHT

## Reasonable limits and safeguarding the legitimate interest of the breeder

Possible factors:

- Type of variety
- Size of holding/crop area/crop value
- Proportion/amount of harvested material
- Remuneration to the breeder

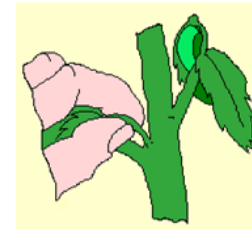
Review over time



- Plant breeding is long and expensive

**BUT**

- Plant varieties can be easily and quickly reproduced



- Breeders need effective protection and enforcement measures to recover investment



# International Seminar on the Enforcement of Plant Breeders' Rights under the UPOV Convention, Hanoi, Viet Nam, 2016

## Key findings

- To obtain the full benefit of the UPOV PVP system it is necessary to have effective enforcement measures
- It is primarily the responsibility of breeders to enforce their rights
- UPOV members are required to provide for appropriate legal remedies for effective enforcement

## Impact of lack of, or insufficient, effective enforcement

- Agricultural productivity endangered
- Livelihood of farmers and rural economies put at risk
- Introduction of improved varieties and genetics delayed
- Investment in breeding reduced
- Disease problems increased
- Reduced tax income

# challenges and opportunities

## Some examples of PBR infringements identified

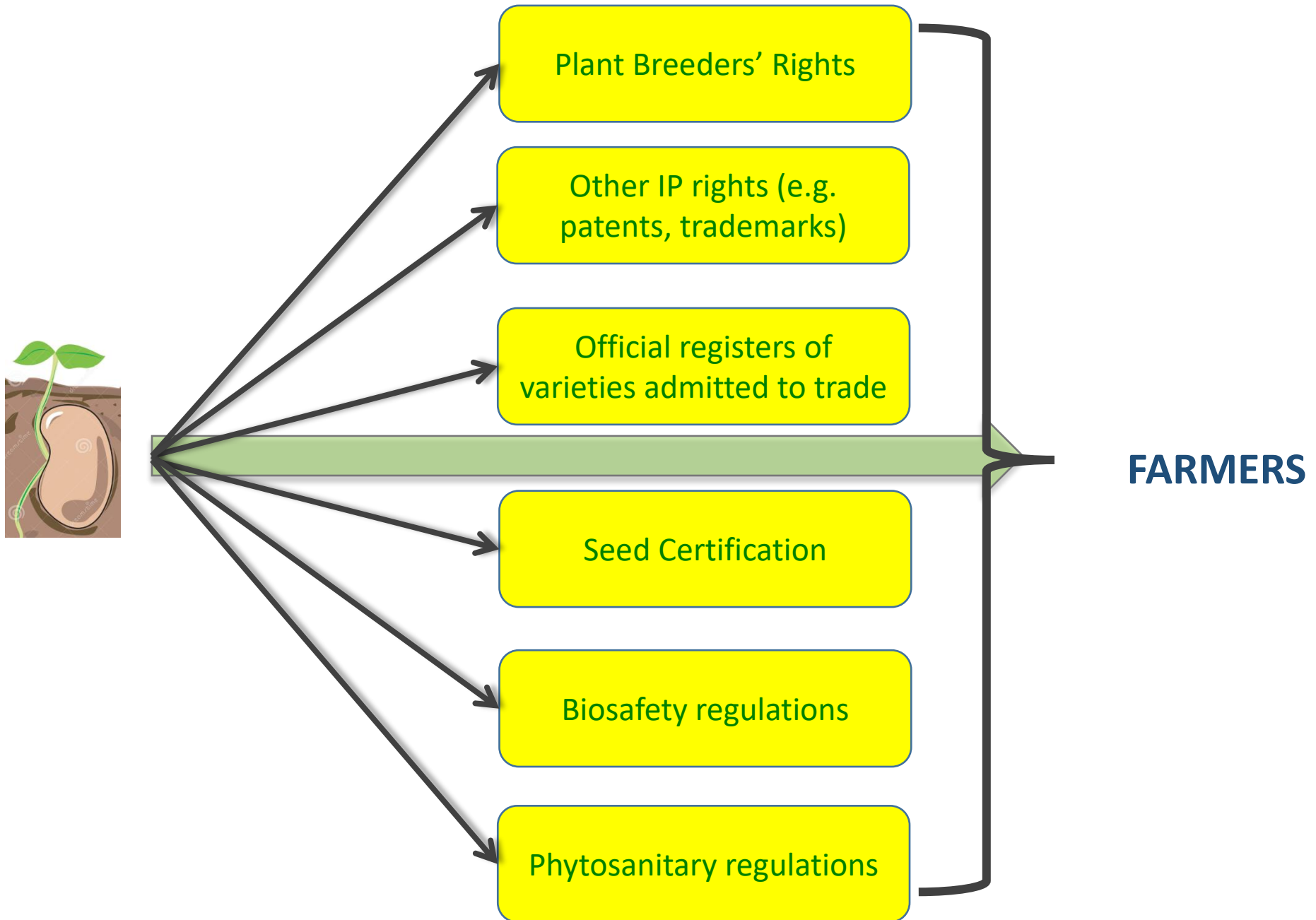
- Propagation beyond authorized quantities
- Unauthorized exports/imports
- Packaging of harvested crop (e.g. grain, ware potatoes) for sale as propagating material (e.g. brown/white bagging)
- Use of farm-saved seed in a way that does not comply with relevant legislation
- Sale of a protected variety under another name

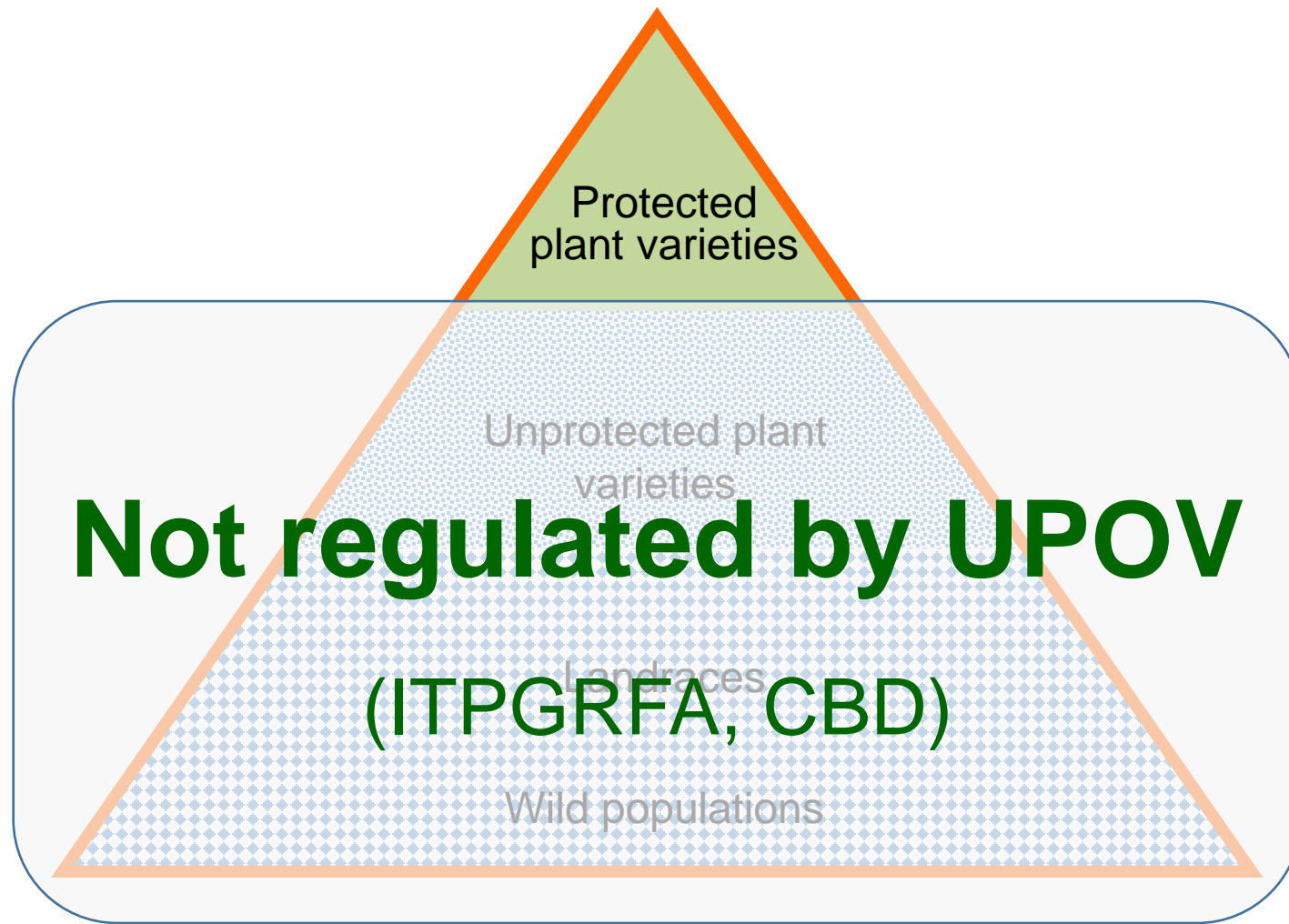
## Cont. challenges and opportunities

### Initiatives endorsed by breeders

- work with end users
- work with relevant authorities
- invest in gaining understanding by farmers
- organizations acting on behalf of breeders
- Investigate possibilities for markers to be included in protected varieties

### 3. Other systems in the Seed Sector





# UPOV Convention, Article 18

## Measures Regulating Commerce

The breeder's right shall be **independent** of any measure taken by a Contracting Party to regulate within its territory the **production, certification and marketing** of material of varieties or the **importing or exporting of such material**. In any case, such measures shall not affect the application of the provisions of this Convention.

# CONDITIONS FOR GRANTING A BREEDER'S RIGHT

## 1991 Act Art. 5

*Criteria to be satisfied*

- NOVELTY
  - DISTINCTNESS
  - UNIFORMITY
  - STABILITY
- 
- DUS**
- VARIETY DENOMINATION
  - FORMALITIES and PAYMENT OF FEES

**NO OTHER CONDITIONS!**



## WHERE GMO CROPS ARE GROWN

22 Crops in 41 Countries

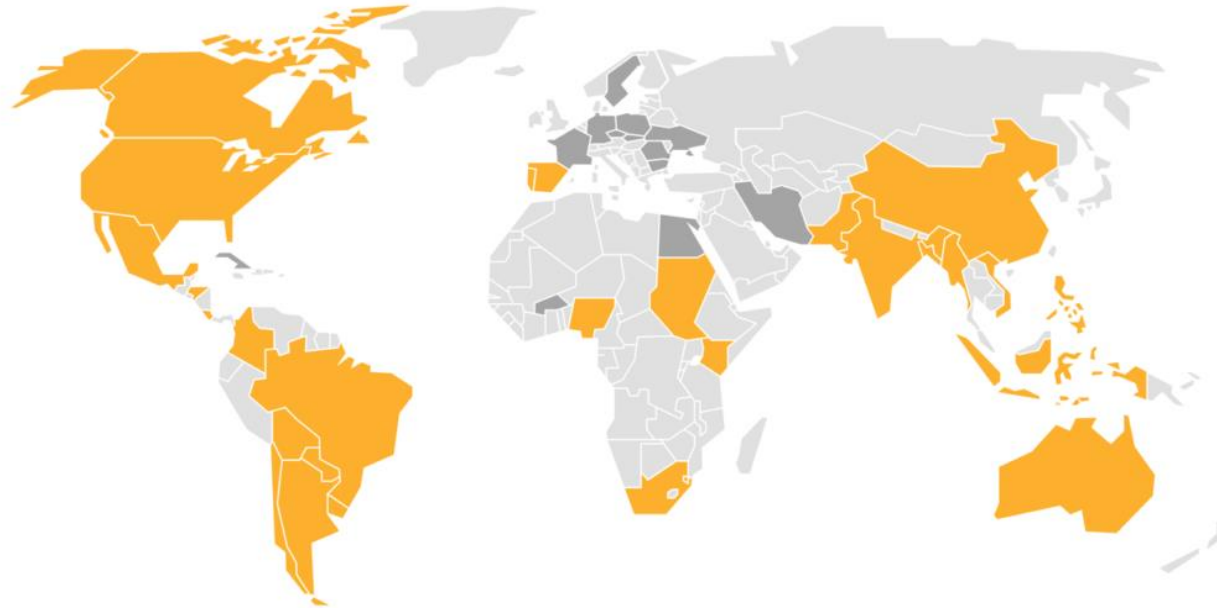
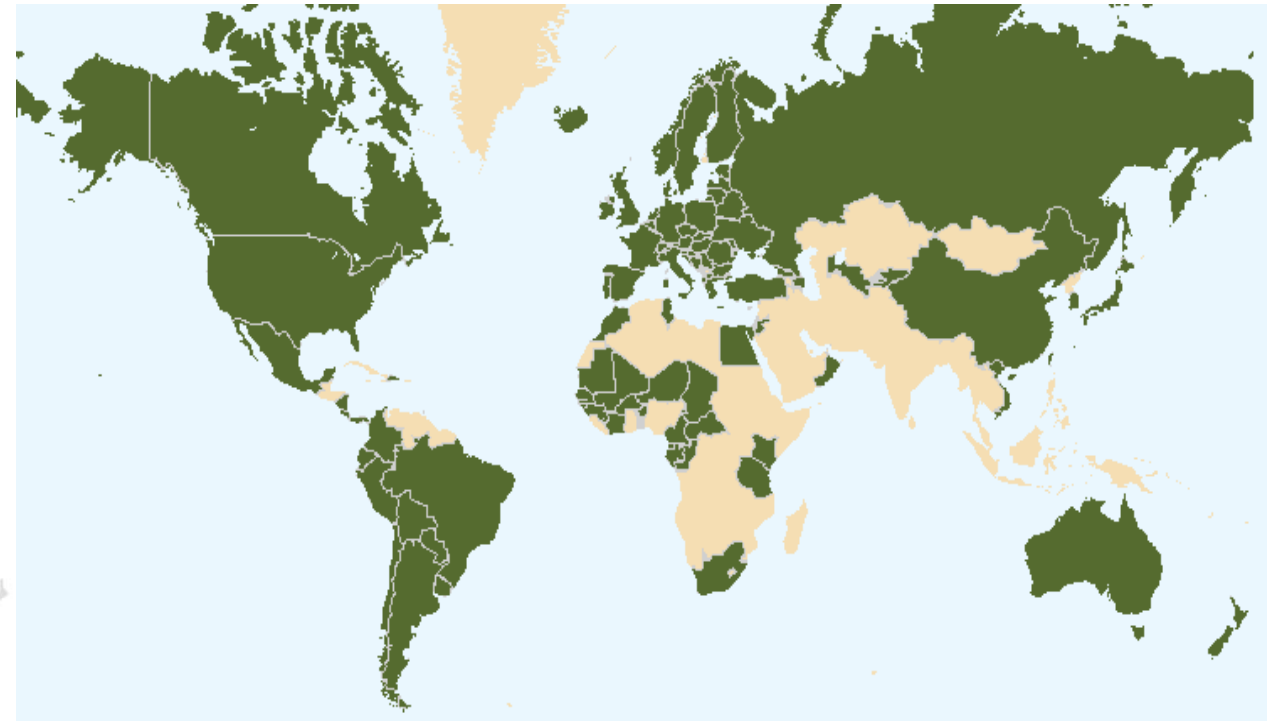
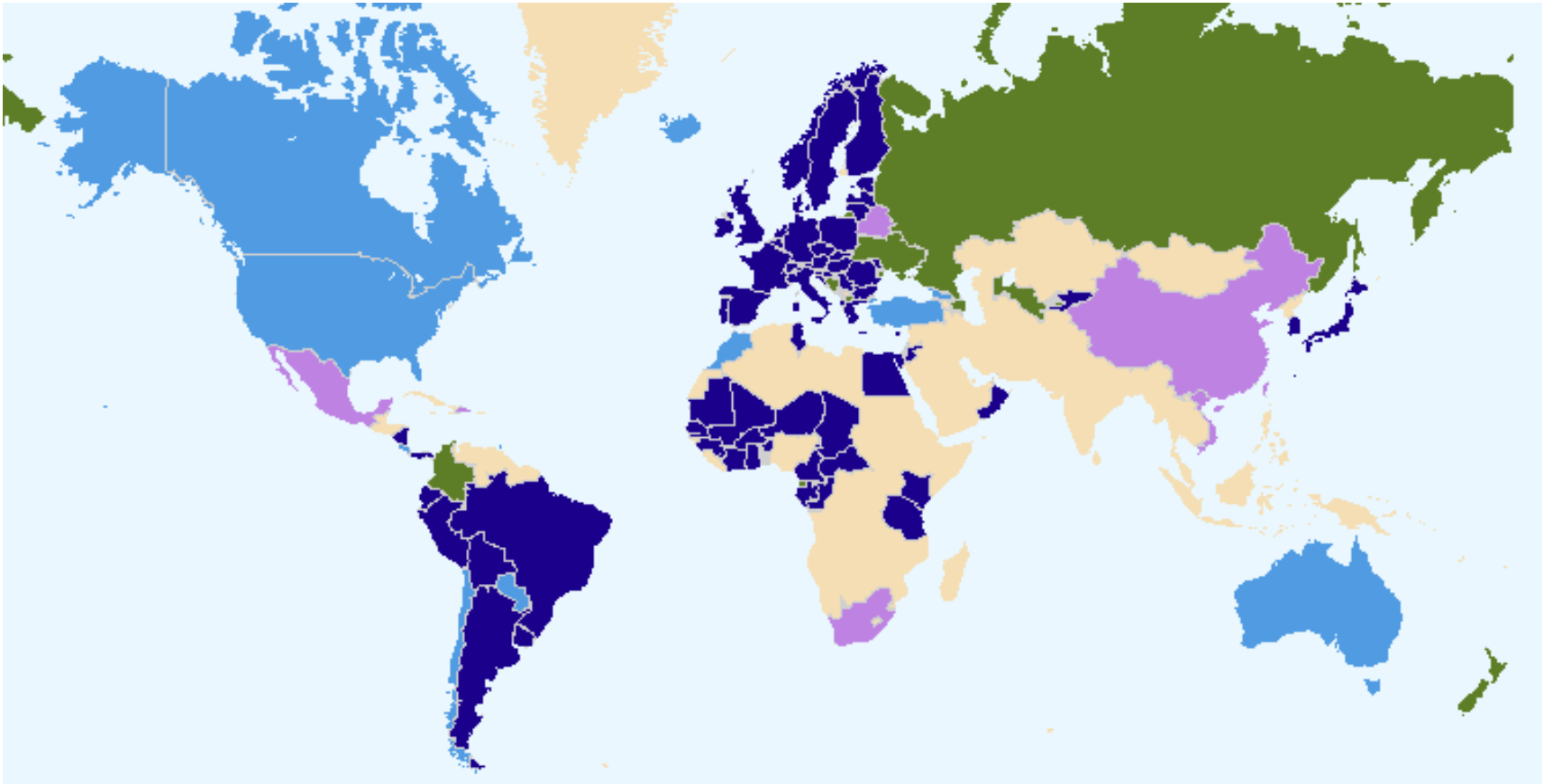
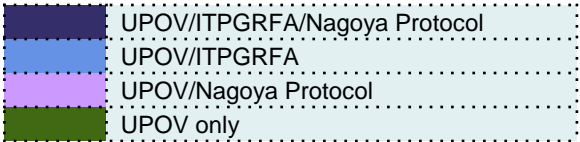


Photo source: [Genetic Literacy Project](https://geneticliteracyproject.org/2020/04/28/where-are-gmo-crops-grown-glp-infographics-document-the-global-growth-of-agricultural-biotechnology-innovation/) | April 28, 2020:  
<https://geneticliteracyproject.org/2020/04/28/where-are-gmo-crops-grown-glp-infographics-document-the-global-growth-of-agricultural-biotechnology-innovation/>



*The boundaries shown on this map do not imply the expression of any opinion whatsoever on the part of UPOV concerning the legal status of any country or territory*

States bound by the **UPOV Convention** indicating those that are also bound by the ITPGRFA and/or the Nagoya Protocol  
as of January 25, 2022



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# Benefit of Society

