



ALLIANCE FOR FOOD SOVEREIGNTY IN AFRICA

AFSA Submission for Urgent Intervention in Respect to Draft ARIPO Plant Variety Protection Protocol (PVP) and Subsequent Regulations

To: The Secretary General of ARIPO
and to

The African Union
and to

The United Nations Economic Commission for Africa
and to

The Member States of ARIPO

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This submission is based on the work previously submitted by African Civil Society and AFSA to the ARIPO Secretary General and ARIPO Secretariat, both verbally and in writing, and more especially upon the legal opinion obtained from Dr Hans Morten, Associate Professor at the Diakonhjemmet University College, Oslo, Norway.

Contents

List of abbreviations and acronyms	4
1. AFSA and the ARIPO PVP PROTOCOL	5
2. Interventions being sought	7
3. Grounds for interventions sought	8
3.1. ARIPO’s failure to comply with Article V of the 1976 Lusaka Agreement establishing the ARIPO (Lusaka Agreement)	8
3.2. Process of the draft ARIPO PVP, particularly the consultation with relevant stakeholders, in context of international law and incorrect information provided to ARIPO Member States	9
3.3. ARIPO’s conduct in light of the UN International Law Commission’s (ILC) 2011 Articles on the responsibility of international organisations and the International Law Association’s (ILA) 2004 Final Report on Accountability of International Organisations	11
3.4. The “effective <i>sui generis</i> system” requirement, as specified in TRIPS Article 27.3(b)	14
3.5. The content of selected provisions of the draft ARIPO PVP, seen in light of the UPOV 1991 requirements	17
3.6. The content of selected provisions of the draft ARIPO PVP, seen in light of farmers’ rights and right to food requirements	18
3.7. Other states’ plant variety protection laws that also encompass farmers’ and other providers’ interests and rights	20
4. Conclusion	21
Notes	22

List of abbreviations and acronyms

ABN	African Biodiversity Network
AFSA	Alliance for Food Sovereignty in Africa
ASBP	Africa Seed and Biotechnology Programme
AU	African Union
CESCR	Committee on Economic, Social and Cultural Rights
CoE	Council of Europe
COMPAS	Comparing and Supporting Endogenous Development Africa
COPAGEN	Coalition for the Protection of African Genetic Heritage
DUS	Distinctiveness, uniformity and stability
ESAFF	Eastern and Southern African Small Scale Farmers' Forum
FAHAMU	Fahamu is a not-for-profit organisation committed to serving the needs of organisations and social movements that inspire progressive social change and promote and protect human rights
ICESCRS	International Covenant on Economic, Social and Cultural Rights
ILA	International Law Association
ILC	International Law Commission
IO	International accountability
IP	Intellectual property
IPACC	Indigenous Peoples of Africa Coordinating Committee
ITPGRFA	International Treaty on Plant Genetic Resources for Food and Agriculture
NGO	Non-governmental organisations
OAPI	Organisations Africaine de la Propriété Intellectuelle
OAU	Organisation for African Unity
PAIPO	Pan-Africa Intellectual Property Organisation
PELUM	Participatory Ecological Land Use Management Association
PROPAC	Plate forme Sous Régionale des Organisations Paysannes d'Afrique Centrale
LDC	Least Developed Countries
ROPFA	Network of Farmers' and Agricultural Producers' Organizations of West Africa
CKS	Community Knowledge Systems
TRIPS	Trade-Related Aspects of Property Rights
UPOV	The International Union for the Protection of New Varieties of Plants
US	United States
WIPO	World Intellectual Property Organisation
WTO	World Trade Organisation

1. AFSA and the ARIPO PVP PROTOCOL

- 1.1 AFSA is the ALLIANCE FOR FOOD SOVEREIGNTY IN AFRICA, a Pan African platform comprising networks and farmer organisations working in Africa, including the African Biodiversity network (ABN), the Coalition for the Protection of African Genetic Heritage (COPAGEN), Comparing and Supporting Endogenous Development (COMPAS) Africa, Friends of the Earth- Africa, Indigenous Peoples of Africa Coordinating Committee (IPACC), Participatory Ecological Land Use Management (PELUM) Association, Eastern and Southern African Small Scale Farmers' Forum (ESAFF), La Via Campesina Africa, FAHAMU, World Neighbours, Network of Farmers' and Agricultural Producers' Organizations of West Africa (ROPPA), Community Knowledge Systems (CKS) and Plate forme Sous Régionale des Organisations Paysannes d'Afrique Centrale (PROPAC).
- 1.2 ARIPO is the African Regional Intellectual Property Organisation (ARIPO). The following countries are members of ARIPO: Botswana, Gambia, Ghana, Kenya, Lesotho, Malawi, Mozambique, Namibia, Sierra Leone, Liberia, Rwanda, Somalia, Sudan, Swaziland, Tanzania, Uganda, Zambia and Zimbabwe (Total: 18 Member States). São Tome and Principe has deposited its Instrument of Accession to the Harare Protocol and will be joining ARIPO on 19 August 2014.
- 1.3 African civil society organisations, many of them members of AFSA made submissions to ARIPO on its Draft Plant Variety Protection law and policies in November 2012.¹ AFSA has itself submitted comments on ARIPO's Response to Civil Society: Draft Legal Framework for Plant Variety Protection, March 2014.²
- 1.4 In both submissions, several serious concerns were raised about the draft ARIPO Plant Variety Protocol and these can be summarised as follows:
 - 1.4.1. The draft legal framework is based on UPOV 1991 (the International Union for the Protection of New Varieties of Plants), a restrictive and inflexible legal regime. UPOV 1991 emanates from industrialised countries in response to the advent of large-scale commercial farming and commercial plant breeding. It is focused solely on promoting and protecting industrial seed breeders that develop genetically uniform seeds/plant varieties suited to mechanised large-scale agriculture. The UPOV 1991 framework is wholly unsuitable for African agriculture and does not remotely reflect or respond to the agricultural systems and conditions prevailing in Africa. It is worth noting that 12 out of 18 members of ARIPO are Least Developed Countries (LDCs) – some of the poorest countries in the world, including the Gambia, Lesotho, Liberia, Malawi, Mozambique, Rwanda, Sierra Leone, Somalia, Sudan, Tanzania, Uganda and Zambia, are not currently under any international obligation to provide any form of plant variety protection as required by Article 27.3(b) of the World Trade Organisation's (WTO) Trade-Related Aspects of Property Rights (TRIPS) agreement, until 2021.
 - 1.4.2. The draft legal framework facilitates industrial-style, monoculture-based farming systems, tilted heavily in favour of protecting the intellectual property rights of commercial seed breeders. It aims to replace traditional varieties with uniform commercial varieties and increase the dependency of smallholders on commercial seed varieties. This system aims to compel farmers to purchase seeds for every planting season or pay royalties to the breeder in the case of reusing farm-saved seeds. In addition, farmers are required to pay for expensive inputs (e.g. fertiliser) since the performance of these commercially protected varieties is often linked to such

inputs, thereby creating vicious cycles of debt and dependence. Such a system will result in the erosion of crop diversity and reduce resilience to threats such as pests, disease and climate change. It will also result in farmer indebtedness in the face of unstable incomes (as revenue would vary depending on seasons). Additionally, these commercially high yielding varieties are very likely to be less suited to the specific agro-ecological environments in which farmers work, and for which locally adapted traditional farmer varieties are, by far, more appropriate.

- 1.4.3. Farmers in Africa rely heavily on farm-saved seed, exchanges between relatives and neighbours, bartering with other farmers, or accessing seeds through local markets. The reliance on informal seed sources is independent of whether farmers cultivate local or modern varieties. The reasons for this include: inadequate access to markets; the market channels are unfavourable to farmers living in remote areas; limited access to financial resources or credit to buy seeds; the inability of a formal system to provide timely and adequate access to quality seeds of improved varieties and to varieties that are specifically adapted to local conditions.

The ARIPO legal framework has the following implications for the exercise of farmers' rights:

- (i) Farmers that use a protected variety will not be allowed to freely exchange or sell farm-saved seed.
- (ii) Farmers are only allowed to use such saved seeds for propagating purposes on his/her own holdings and subject to payment of royalties to the breeder. This limited exception is, however, ONLY applicable to a set of crops that will be specified by the ARIPO Administrative Council.
- (iii) This very limited farmers' exception will not apply to fruits, ornamentals, vegetables or forest trees.
- (iv) There are still further conditions on this hugely limited exception such as requiring farmers to provide information to breeders, the conditions of which are to be elaborated in further regulations to the ARIPO legal framework.

This contrasts starkly with the historical role played by African governments in championing the protection of, and strengthening of, farmers' rights in various international fora. Many ARIPO members are also Parties to the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA), which affirms that "the rights recognised in the Treaty to save, use, exchange and sell farm-saved seed and other propagating material, and to participate in decision making regarding, and in the fair and equitable sharing of the benefits arising from, the use of plant genetic resources for food and agriculture, are fundamental to the realisation of Farmers' Rights, as well as the promotion of Farmers' Rights at national and international levels". It also requires its contracting parties to take responsibility to realise Farmers' Rights and "take measures to protect and promote Farmers' Rights".

- 1.4.4. The draft law undermines the sovereign rights of member states through the functioning of a centralised PVP approval system that will supersede national law. It is envisaged that the ARIPO office will have the full authority to grant and administer breeders' rights on behalf of all contracting states (e.g. to decide whether or not to grant protection, issue compulsory licenses, nullify or cancel plant breeders' rights) for varieties protected through the regional system. This top-down approach effectively denies individual ARIPO members from taking any decision related to plant varieties, decisions that are at the very core of national socio-economic development and poverty reduction strategies.

- 1.4.5. The draft law facilitates biopiracy in that it does not require a breeder to disclose the origin of the genetic material used to develop the variety it wishes to protect. Neither does it provide mechanisms for prior informed consent and access and benefit sharing. In the absence of these elements, the draft law sets up a framework for commercial breeders – most of which are likely to be foreign entities – to use local germplasm to develop varieties that are then exclusively appropriated by such breeders through the PVP system established by the regional legal framework. The proposed Protocol will most likely facilitate biopiracy, rather than prevent it. It is unacceptable that while African nations champion “disclosure of origin” provisions and mechanisms for benefit sharing in intellectual property (IP) agreements in various international forums (e.g. the WTO, the World Intellectual Property Organisation (WIPO)), ARIPO – an African regional organisation – is pointedly ignoring such mechanisms.

2. Interventions being sought

- 2.1 The draft ARIPO PVP should not be adopted at the ARIPO Diplomatic Conference now scheduled for March 2015, but should rather be revised in order to comply with the more flexible effective *sui generis* requirement of TRIPS Article 27.3(b), as well as including provisions that recognise farmers’ rights and facilitate the right to food. This revision should be based on a much broader consultation process and by making use of experts from outside of the plant breeders’ rights sector.
- 2.2 The ARIPO Secretariat should review the information that was provided during the process of the draft ARIPO PVP to its member states, and correct any information that is found to not have been adequately substantiated or adequately clear in its content.
- 2.3. The governments of Ghana and Tanzania should commission an independent sustainability impact assessment of the draft plant breeders’ rights, where the social impact is understood as encompassing human rights impacts.³ The assessment should be presented before the respective national parliaments.
- 2.4. ARIPO should request the African Union (AU) and the United Nations Economic Commission for Africa to undertake an assessment in order to identify how the many recent initiatives for enhancing the productivity in the African agriculture can foster publicly initiated participatory breeding and strengthen public extension services.
- 2.5. ARIPO should consider how the many studies on effective *sui generis* systems for plant varieties can be availed to its member states.
- 2.6. The concerns outlined in this submission should be included in the on going efforts to form the Pan-Africa Intellectual Property Organization (PAIPO), decided by the AU and endorsed by ARIPO and the Organisation Africaine de la Propriété Intellectuelle (OAPI).

3. Grounds for interventions sought

3.1. ARIPO's failure to comply with Article V of the 1976 Lusaka Agreement establishing the ARIPO (Lusaka Agreement)

When OAPI, the Francophone intellectual property organisation in Africa, adopted its revised Bangui Agreement in 1999 to comply with the TRIPS Agreement,⁴ the ARIPO said that it would stand by the [then] Organisation for African Unity (OAU) [currently AU] position.⁵ This position is expressed through the African Model Law for the Protection of the Rights of Local Communities, Farmers and Breeders, and for the Regulation of Access to Biological Resource In Relation to International Law and Institutions (African Model Law), that was adopted by the OAU in its first version in 1998, and was revised in 2001 at the AU Lusaka Summit. Ethiopia is the only African state that has adopted a national legislation that builds on the Model Law.

A gap analysis of the Model Law found that “the efforts by ARIPO and OAPI to establish regional plant breeders’ rights protection systems appear to run counter to ... the African Model Law.”⁶ The provisions on plant breeders’ rights are found in Part VI (Articles 28-56) of the Model Law, and these have been subject to criticism by UPOV.⁷ UPOV is, however, not explicitly specified as a relevant organisation by ARIPO, which rather specifies in the Lusaka Agreement Article V that:

The Organization shall establish and maintain close and continuous working relationships with the United Nations Economic Commission for Africa, the World Intellectual Property Organization and the AU.

We are of the opinion that the reference to WIPO cannot be interpreted as implicitly encompassing UPOV, as the 1982 Agreement between the two, which specifies that the Director General of WIPO is also the Secretary-General of UPOV,⁸ deals primarily with internal administrative cooperation and it specifies in Article 3 that the WIPO International Bureau and the UPOV Office shall exercise their respective functions “in complete independence of...” each other.

The lack of consultation with the AU, particularly since its adoption of the African Model Law, on the draft ARIPO PVP is not only regrettable, but does raise the serious concern about the validity of the ARIPO draft PVP Protocol. It must be also noted that the Lusaka Agreement requiring that the relationships shall be “close and continuous” has also not been observed in regard to the process involving the drafting of the Draft ARIPO PVP Protocol. In this regard, one would have expected, at the very least, a close and continuous relationship between ARIPO and the Africa Seed and Biotechnology Programme (ASBP) of the AU. Seed issues under the AU are taken up directly by the ASBP, which was endorsed by the AU in 2007 at the Abuja Conference on Food Security. The ASBP takes international treaties and conventions as its starting point, with specific reference to the ITPGR and the Global Plan of Action for the Conservation and Sustainable Utilisation of Plant Genetic Resources for Food and Agriculture (Global Plan of Action), the Convention on Biological Diversity, and its related Cartagena Protocol on Biosafety. It calls for, inter alia, the strengthening of regional seed production systems, including case studies on key elements of successful commercial and farmer-based seed production systems.⁹

As for UNECA, listed UN resolutions are specified to being part of the “legislative mandates” of the UNECA.¹⁰ In this regard, it is relevant to note that the 2010 General Assembly resolution

on the rights to food specifies that WTO Member States “should consider implementing [TRIPS] in a manner supportive of food security, while mindful of the obligation of Member States to promote and protect the right to food”.¹¹ Similar wording is found in subsequent resolutions. The resolution listed on the UNECA home page was based on the 2010 Special Rapporteur on the Right to Food’s report, where one of the paragraphs reads:

international institutions ... should assist States in implementing ... intellectual property rights which suits their development needs and is based on human rights ... by refraining from imposing on these countries the condition that they go beyond the minimum requirements of the TRIPS Agreement...¹²

As a part of the UN, UNECA is required to assist States by whatever means. Whether ARIPO has sidelined UNECA, or UNECA has chosen itself not to be involved in the draft ARIPO PVP process is not clear to us. Nevertheless, what is patently clear is that UNECA has not actively assisted ARIPO States in securing that intellectual property rights do not “go beyond the minimum requirements of the TRIPS Agreement”.

It is also relevant to note that African States were active in the review of TRIPS Article 27.3(b) in 1999,¹³ but – with the notable exception of a 2008 proposal on amendment of TRIPS, together with the European Union, the ACP Group, and 20 individual States, including Brazil, China and India, on a mandatory requirement for the disclosure of the country providing/ source of genetic resources, consent and benefit-sharing¹⁴ – there has been little emphasis on TRIPS amendments over the last decade.

In summary, ARIPO has not adequately observed Article V of the Lusaka Agreement, and neither the AU nor the UNECA have been adequately attentive to the ARIPO members’ needs for adequate guidance on a suitable plant variety protection system.

3.2. Process of the draft ARIPO PVP, particularly the consultation with relevant stakeholders, in context of international law and incorrect information provided to ARIPO Member States

Organisations representing farmers and the general civil society have not been actively involved in the drafting process of the ARIPO PVP. As outlined in the document on the 14th session of ARIPO’s Council of Ministers,¹⁵ there were two experts meetings in July 2011 and June 2012, with participation from actors such as UPOV and the United States Patent and Trade Office, and a regional consultation held in July 2013. According to the ARIPO secretariat, three specified non-governmental organisations (NGOs) were present at this regional consultation.¹⁶

The 36th Session of ARIPO’s Administrative Council, held in November 2012, noted the concerns about the inadequate consultation process. The ARIPO Secretariat responded stating that the draft ARIPO PVP “would be fully discussed with all stakeholders in 2013 through national and regional consultations”.¹⁷ From the information assembled by us, it seems that the July 2013 consultation is the only consultation convened; hence the promise that there should be “national and regional consultations” has apparently not been fulfilled. Moreover, only the first two days were open to civil society.¹⁸

At the regional consultation in July 2013, ARIPO presented a response¹⁹ to the concerns expressed in a 6 November 2012 letter from 29 African continent-wide and national civil society organisations, all but three based in ARIPO member States.²⁰ This ARIPO response was highly criticised later by the AFSA.²¹ A letter signed by 75 civil society organisations reiterates the criticism²² alleging that the draft ARIPO PVP lacks credibility due to the inadequate process followed, the lack of an impact assessment and the ignoring of farmers’ rights and interests.

This letter, sent just before the UPOV examination of the conformity of the draft ARIPO PVP with UPOV 1991,²³ states that the process failed to observe the ITPGRFA Article 9.2(c), which recognises the right of farmers “to participate in making decisions, at the national level, on matters related to the conservation and sustainable use of plant genetic resources for food and agriculture”.

Furthermore, we point out that the International Covenant on Civil and Political Rights, Article 25(a) explicitly specifies a general human right of participation: “Every citizen shall have the right and the opportunity ... [t]o take part in the conduct of public affairs, directly or through freely chosen representatives.” The right of women is specified in Article 7(b) of the Convention on the Elimination of All Forms of Discrimination against Women, which notes that States “shall ensure to women, on equal terms with men, the right ... [t]o participate in the formulation of government policy and the implementation thereof...”

These rights also apply to States’ conduct through international organisations, subject to what is feasible and possible. In principle, while ITPGRFA Article 9.2(c) applies the formulation “national level” [“the right to participate in making decisions, at the national level, on matters related to the conservation and sustainable use of plant genetic resources for food and agriculture”], this cannot be interpreted as to exclude farmers or any organisation from seeking to influence their government’s conduct in any given international organisation with a mandate that relates to plant genetic resources. ARIPO is one such international organisation.

The conduct of ARIPO in the process of the UPOV examination of the draft UPOV PVP’s conformity with UPOV 1991 must also be assessed. In the 2013 ARIPO Council of Ministers meeting, a document on the draft ARIPO PVP was presented – three days before the meeting started. The most relevant part, paragraph 8(ii), reads:

The Council of Ministers will be called upon to approve ... [t]he submission of the revised draft protocol to the UPOV Council Session that will take place in March 2014 for examination on the conformity of the draft protocol with the provisions of the UPOV Convention.²⁴

This wording in itself seems clear. During the Council meeting, one delegation asked that: “paragraph 8(ii) regarding the submission of the draft protocol to the UPOV Council Session be removed”.²⁵ While this could be interpreted as a lack of approval of the proposal to submit the draft ARIPO PVP to UPOV, the relevant delegation clarifies in a separate email the motivation for this request:

The Technical Committee should not have included paragraph 8(II) in the first place as it was redundant. UPOV was involved in the revision workshop of the draft ARIPO protocol for PVP. As such the draft protocol was already UPOV compliant and there was no need for further consultations as the response by the Chief Examiner on page 11 paragraph 70 of the same Report confirms.²⁶

In paragraph 70 of the Report, the ARIPO secretariat informs that UPOV was involved in the revision workshop of the draft ARIPO PVP, and that the submission to UPOV was merely procedural. This information was given in reply to a question by another delegation seeking “clarification on the role UPOV is playing as it appears that ARIPO will further present to the UPOV Council for approval”.²⁷ The phrase “appears” indicates that the procedures were not clear to all ARIPO Member States, even if the document prepared before the ARIPO Council of Ministers was clear that specific approval of the UPOV process was needed. The more interesting part is the subsequent paragraph, with the ARIPO Director General responding:

UPOV becomes relevant only at the operational level *when ARIPO would request it to link its system to that of UPOV, and that would require a separate decision to be taken by the Member States at a future date.*²⁸

While the phrase “link its system” is not fully clear, the fact that the response was directly addressing ARIPO’s submission of the draft ARIPO PVP to UPOV, makes it reasonable to state that ARIPO’s Director General promised that the ARIPO Member States would take a separate decision before the UPOV Council’s examination of the draft ARIPO PVP’s conformity with UPOV 1991. As is common knowledge, the UPOV Council examined the conformity in April 2014.

In the document to the 2013 ARIPO Council of Ministers meeting, two paragraphs address UPOV, both having UPOV in the title. The first states in the text: “The Council of Ministers *will be required to make a determination on the way forward...*”²⁹ The second states in the text: “it is proposed that the Council of Ministers *approve for the draft Protocol to be submitted to the UPOV Council session that will take place in March, 2014...*”³⁰ We have been advised that the report of the 2013 ARIPO Council of Ministers neither makes a specific determination nor *explicitly* approves of the UPOV process, but rather that two delegations’ questions are answered in manners which makes it reasonable to understand that the UPOV process will require a *subsequent* decision by the ARIPO Council of Ministers.

In this context it is relevant to note that UPOV 1991 requires in Article 34.1(b)(iii) that an intergovernmental organisation can only become Party to UPOV 1991 “if it has been duly authorized, in accordance with its internal procedures, to accede to this Convention”. No provisions of the ARIPO Lusaka Agreement, as amended, provide procedures for ARIPO’s membership in other organisations, and it seems that the procedures that the ARIPO Director General specified at the 2013 ARIPO Council of Ministers meeting have not been followed or complied with.

When the UPOV Council examined the conformity of the draft ARIPO PVP with UPOV 1991, it specified that the basis for this was paragraph 73 of the Report of the 2013 ARIPO Council of Ministers meeting, in relation to UPOV 1991 Article 1(viii) (“territory in which the constituting treaty ... applies”) and Article 34.1(b)(iii) (“has been duly authorized ... to accede”).³¹ Paragraph 73 of the Report of the ARIPO Council of Ministers only refers to the adoption of the draft ARIPO PVP “as the basis for the conclusion of a Protocol in 2014”, and makes no reference to an examination by UPOV.

In summary, the process has not been adequate. In this context it is relevant to note that the ARIPO Council of Ministers in November 2013 was verbally informed that “the preparation of the text involved all stakeholders to ensure that the views of farmers ... were taken on board.”³² Based on the fact that ARIPO conducted one consultation where three or two civil society organisations were present cannot be said to be correct or adequate. Finally, ARIPO Member States cannot be said to have given a mandate that the UPOV Council should examine the draft ARIPO PVP.

3.3. ARIPO’s conduct in light of the UN International Law Commission’s (ILC) 2011 Articles on the responsibility of international organisations and the International Law Association’s (ILA) 2004 Final Report on Accountability of International Organisations

We have argued above that the process has been inadequate regarding Article V of the Lusaka Agreement, and regarding the information presented at ARIPO meetings on processes taking place between these meetings. In other words, the conduct of ARIPO must be said to comply neither with its specific rules nor with general standards of good conduct. This

raises the question of whether ARIPO can be held to account for its inadequate conduct. In this regard, one needs to turn to the ILC's Articles on the Responsibility of International Organizations, adopted in 2011 (2011 Articles).³³ Before assessing the content of the 2011 Articles, it is relevant to have a precise understanding of the status of the 2011 Articles in international law.

The ILC was established in accordance with 1947 resolution by the UN General Assembly, to further the purposes specified in the UN Charter Article 13.1(a) on the "promotion of the progressive development of international law and its codification".³⁴ The ILC has proposed texts to a wide range of international treaties and documents, probably its most known document is the Responsibility of States for Internationally Wrongful Acts, adopted in 2001 (2001 Articles).³⁵ While not an international treaty, these 2001 Articles are, nevertheless, applied frequently by courts, such as the international tribunals set up to adjudicate investment disputes. An Article frequently applied is Article 25 on necessity, specifying when a State can invoke necessity to justify an act that is allegedly not in conformity with an international obligation of that State.

Hence, whereas the 2001 Articles must be said to have a high status in international law, despite the fact that they are not supported by any treaty, and whereas the UN General Assembly welcomed the 2001 Articles and the 2011 Articles with similar wording, as both "commends them to the attention of Governments and international organizations without prejudice to the question of their future adoption or other appropriate action",³⁶ the legal status of the 2011 Articles is less clear than that of the 2001 Articles.

The 2001 Articles have been in existence for more years, and the UN regularly maps its application by courts and tribunals through three compilations, with associated resolutions.³⁷ According to one delegation, the 2001 Articles have "been widely accepted since their adoption" and "reflect a widely shared consensus".³⁸ In the absence of similar characterisation of the 2011 Articles, the same is not possible to say with regard to the 2011 Articles, but the initial specification on the UN's follow-up of 2001 Articles is the same as for the 2011 Article.³⁹

A Council of Europe (CoE) Parliamentary Assembly's study on international organisations' accountability presents these general observations on the 2011 Articles:

A major challenge for the ILC in "codifying" the law of international responsibility of international organisations was the general lack of extensive and consistent practice. Hence, at least part of the work of the ILC on responsibility of international organisations may constitute progressive development rather than codification of existing international law. However, given the high authority of the texts the ILC produces, it might well contribute to the formation of custom.⁴⁰

While the title of the CoE's report applies the term accountability, the 2011 Articles do not outline the issue of accountability.⁴¹ This is done through another process of international law experts' legal codification. The International Law Association established a Committee in 1996 "to consider what measures (legal, administrative or otherwise) should be adopted to ensure the accountability of public international Organisations to their members and to third parties..." (IO Accountability),⁴² and the Final Report on the accountability of international organisations was adopted in 2004.⁴³

Hence, the 2011 Articles are relevant in specifying the international obligations of an international organisation, and the IO Accountability is relevant in specifying the accountability of any conduct contrary to *internal* institutional rules or *external* treaty or customary rules.

Starting with the 2011 Articles, the most relevant is Article 10 on the existence of a breach of an international obligation, which reads:

1. There is a breach of an international obligation by an international organization when an act of that international organization is not in conformity with what is required of it by that obligation, regardless of the origin or character of the obligation concerned.
2. Paragraph 1 includes the breach of any international obligation that may arise for an international organization towards its members under the rules of the organization.

This must be read as to imply that ARIPO has both general obligations and specific obligations towards its members, the latter being specified by the rules of ARIPO. Presenting incorrect information about the consultation process or promising that a separate decision would be taken before the UPOV examination must be said to be conduct that does not comply what is required of ARIPO.

The IO Accountability specified accountability on “three levels which are interrelated and mutually supportive”.⁴⁴ The first level is the existence of systems for internal and external monitoring. The second and third levels are on the IO’s acts or omissions in relation to rules of international and/or institutional law. The second level is on liability for injurious consequences, which are *not* a breach of such rules. The third level is responsibility for acts or omissions, which *do* constitute a breach of such rules. It specifies environmental damage as an example of injurious consequences and “violations of human rights or humanitarian law, breach of contract, gross negligence”⁴⁵ as an example of a breach.

The question arises as to whether the ARIPO Secretariat’s acts and omissions can be seen as being grossly negligent. As discussed above, there were promises in 2012 of national and regional consultations,⁴⁶ of which only one was held, and the verbal information presented before the ARIPO Council of Ministers that the preparation of the draft ARIPO PVP had involved all stakeholders, including farmers⁴⁷ cannot be considered correct. In this context, it is also relevant to note that the IO Accountability outlines recommended rules and practices under the first level, which encompass several dimensions, including transparency and relationship to NGOs, and includes the need to “at regular intervals convene a briefing where representatives of particular NGOs may be given an opportunity to present their views...”⁴⁸

Moreover, we reiterate the concern about the lack of an explicit decision approving of the submission of the draft ARIPO PVP to UPOV, rather promising that a separate decision on this was to “be taken by the Member States at a future date”.⁴⁹

Do these acts and omissions represent gross negligence? In the Black Law’s Dictionary, gross negligence has two cross-referenced definitions. One cross-referenced definition states that gross negligence represents “as an act or omission in reckless disregard of a legal duty....” The second reference specifies that what distinguishes gross from ordinary negligence is a matter of degree of such recklessness. The gross negligence in the Oxford Dictionary of Law Enforcement is “high degree of negligence...” As the term recklessness is introduced, it is relevant to clarify also this term, defined by Black’s Law Dictionary as “a greater default than negligence, but a lesser degree than intentional wrongdoing”.

We have been advised that the incorrect information provided by two ARIPO staff persons in the 2013 ARIPO Council of Ministers meeting must be considered as constituting gross negligence. This is compounded by the draft ARIPO PVP being presented to the UPOV Council (before the ARIPO Diplomatic Conference – originally scheduled for August 2014, but now

postponed to March 2015), without their being explicit approval and *despite* the fact that the oral information given to the 2013 ARIPO Council of Ministers meeting specified that the UPOV process would require a separate decision at a future date. This is all the more concerning given that ARIPO's 2013 response to the civil society's 2012 letter⁵⁰ cannot be said to represent comprehensive consultation on the draft ARIPO PVP Protocol.

3.4. The “effective *sui generis* system” requirement, as specified in TRIPS Article 27.3(b)

Of relevant in a WTO context is that 12 of ARIPO's 18 member states are LDCs. They are currently not obliged to comply with the TRIPS Agreement, with the exception of Article 3, 4 and 5, until 1 July 2021, and this period can be extended.⁵¹ Of the ARIPO members that are also WTO members, nine are LDCs. It must be emphasised that the frequent references to the TRIPS requirement in this section is made because 15 of the 18 countries that are ARIPO members are also WTO members, even if only six of these (Botswana, Ghana, Kenya, Namibia, Swaziland and Zimbabwe) are not least-developed countries, currently required to comply with the TRIPS requirement on plant variety protection, as found in Article 27.3(b): “...Members shall provide for the protection of plant varieties either by patents or by an effective *sui generis* system or by any combination thereof.”

There is a misconception that UPOV represents this “effective *sui generis* system”. In fact there are a broad range of such systems, including legislation in Ethiopia, India, Malaysia and Thailand, as will be further elaborated below. The requirements of UPOV, particularly UPOV 1991, which is the only act of the UPOV Convention that is currently available – is considerably stricter than the requirements of TRIPS Article 27.3(b).

Here, the essence is to identify the requirements of an “effective *sui generis* system”. As the term “effective” indicates, it cannot simply be any system, but a system that serves the overall purpose of the right to prevent others' commercial exploitation – for a certain time – of something that is new, adequately clearly described and replicable.

We have been advised that the TRIPS Agreement establishes six overall requirements, some of which allow for a rather wide range of flexibilities.⁵²

Effective enforcement. If a system shall be compatible with TRIPS, effective enforcement must be considered to be implicit. TRIPS Article 41.1 – which is the first paragraph in Part III on enforcement – reads: “Members shall ensure that enforcement procedures as specified in this Part are available under their law so as to permit effective action against any act of infringement...”

Clear criteria: The law must specify the criteria, in addition to novelty, that plant varieties must meet in order to be eligible for protection. The most common are the criteria of distinctiveness, uniformity and stability (DUS), but UPOV 1978 uses the term homogeneous, not uniform. Moreover, the Malaysian New Plant Varieties Act of 2004 specifies that varieties developed by farmers must fulfill the requirement of being new, distinct and *identifiable*. Hence, the DUS are not the only criteria that can be introduced for plant variety protection to be TRIPS compatible. Therefore, varieties developed by farmers, provided that they fulfill the requirements as specified in the relevant national legislation, can be included in an “effective *sui generis* system” – for the benefit of local farming communities. The determination is made based on whether the criteria specified in the relevant legislation are met.

Exclusions from plant variety protection: This could include a general exclusion provision, mirroring what is found in Article 2.2 of UPOV 1978:

Each Member State of the Union may limit the application of this Convention within a genus or species to varieties with a particular manner of reproduction or multiplication, or a certain end-use.

This provision does not discriminate between varieties of foreign and domestic origin as such, but gives a basis for excluding certain varieties that do not perform according to the conditions. TRIPS Article 27.2 has an exclusion provision that allows its members to:

... 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.

The latter part of the paragraph obviously limits its applicability. However, the environment, life and health concerns do provide a certain basis for risk assessment, particularly in the context of the adventitious spread of plants into the wild. This can no longer be considered as merely a hypothetical and speculative risk, in particular with regard to transgenic plants, which are potentially dominant over other plants in a different manner than plant varieties. Such spread could have consequences for the health of the plants found in the wild. Moreover, if the transgenic plants are dominant over traditional plants cultivated in the fields, these traditional plants can also be seriously affected.

Exclusive rights: The three acts of producing, marketing and selling seeds cover the potentially infringing acts that are most damaging to the right holder. These are the three acts included in UPOV 1978. These are acts one would reasonably expect competitors to the right holders to undertake. A farmer can also undertake these acts, provided that the infringement is on a certain scale and with a commercial motivation, implying that he or she is a competitor and not an “end-user”. Hence, if propagating acts, which take place on the farm, are to be classified as “commercial” they must be on a certain scale, and for the purpose of gaining a profit.

In order to examine the scope of the exclusive rights of the breeders under an “effective *sui generis* system”, there will be an examination of two provisions of the OAU Model Law, to see if they can be included in such a system.

In accordance with Article 31 of the OAU Model Law, farmers are allowed to undertake a number of acts, most of which are not considered to affect the enjoyment of plant breeders’ rights. Paragraph (b) of Article 31 allows for selling of plants for purposes other than propagation.⁵³ Paragraph (c) of Article 31 allows for the selling of plants or propagating material grown on a farm *within* the farm without any restrictions as to the end use.⁵⁴ These two paragraphs therefore set restrictions on what can be done with the propagating material of a protected variety. Are these provisions in compliance with the “effective *sui generis* system” requirement?

With regard to Article 31(b) of the OAU Model Law, it is an accepted practice that farmers can sell plants or propagating material of his/her own harvest for food. If the seller makes sure that what is sold is not used for propagating purposes, such selling for food cannot be said to represent any infringement of the plant breeders’ rights.⁵⁵ While the subsequent use of the purchased material is difficult to control, the farmer who sold the propagating material for food, and hence acted in good faith, cannot be held liable if the material is later used for propagating and commercial purposes.

With regard to selling *within* the farm, this poses difficult questions regarding the ownership patterns on the farm. The situation covered by Article 31(c) of the OAU Model Law must be presumed to be a large farm with several farmers operating under some contractual relationship with the owner of the whole farm. Provided that these circumstances are met, paragraph (c) of Article 31 applies as to allow the selling between farmers operating on this farm. The market generated within one such farm can be rather limited, but can also represent competition between the farmer and the breeding company.

Exceptions and limitations: The AU Model Law's two provisions outlined above are also related to legitimate exceptions, and below we will rather identify the basis for issuing compulsory licenses for ensuring the public interest.

Protection of public interest, including the failure of the right holder to provide adequate amount of the protected variety, must be the basis of any compulsory license provision in an 'effective *sui generis* system'. This is specified by UPOV 1978 Article 9:

1. The free exercise of the exclusive right accorded to the breeder may not be restricted otherwise than for reasons of public interest.
2. When any such restriction is made in order to ensure the widespread distribution of the variety, the Member State of the Union concerned shall take all measures necessary to ensure that the breeder receives equitable remuneration.

Ensuring distribution of the variety will allow the farmers to grow sufficient amounts of food and hence provide the food to those depending upon it. Also with regard to compulsory licenses, human rights principles and provisions can be referred to in order to justify such compulsory licenses. It is relevant to stress that the US legislation (7 U.S.C. § 2404) allows compulsory licensing if this is:

... necessary in order to insure an adequate supply of fiber, food, or feed in this country and that the owner is unwilling or unable to supply the public needs for the variety at a price which may reasonably be deemed fair.

Hence, both availability and economic accessibility can be a basis for the issuing of the compulsory license. The fact that the draft ARIPO PVP Article 24 refers to public interest, but without specifying what falls within the public interest is regrettable.

Revocation (nullity) and forfeiture (cancellation): The phrases in parenthesis are those applied in the draft ARIPO PVP and in UPOV 1991, but UPOV 1978 applies nullity and forfeiture. Revocation can be decided because the eligibility requirements were later found not to have been met, and forfeiture can be decided because of inadequate conduct in the exercise of the right. These two acts of revocation and forfeiture are not specified in detail in TRIPS, only that all States shall provide an opportunity for judicial review of such decisions, as specified in Article 32. As explained in greater detail elsewhere,⁵⁶ there is a basis for revoking exclusive rights based on public interest concerns. India's Protection of Plant Varieties and Farmers' Rights Act is an example of national legislation that authorises revocation if the protection is "not in the public interest".⁵⁷

In summary, there is nothing in the TRIPS Agreement that prevents an understanding of breeders to encompass farmers. Moreover, TRIPS does not prevent the possibility of including specific requirements that the breeders must comply with, such as specifying origin or providing benefit-sharing with the original providers of the genetic material, as long as

these requirements are not seen as additional eligibility requirements for being granted the exclusive rights.

3.5. The content of selected provisions of the draft ARIPO PVP, seen in light of the UPOV 1991 requirements

One of the most disturbing aspects of the draft ARIPO PVP is that in certain regards it goes further than UPOV 1991. These instances are the explicit requirement that all genera and species shall be protected from day one (Article 3); that the right-holder can withhold confidential information (Article 15.2); that remuneration is to be paid by small scale commercial farmers (Article 22.3); and that the enforcement provisions encompass also any other breach of this legal framework (Article 35). Each of these will be specified below.

Number of genera and species: While the draft ARIPO PVP provides that it shall be applied to all genera and species, UPOV 1991 says that this can be delayed until ten years after a State becomes a party to the UPOV Convention. UPOV 1991 Article 3.2(i) specifies that by the day a State is bound by UPOV 1991, its provisions must apply to at least 15 plant genera or species.

Withholding confidential information: One of the primary rationales behind both patent and plant variety protection is to enable publicly available information about new inventions or varieties, while allowing the time-limited exclusive rights on these inventions or varieties. The term patent comes from the verb *pateo*, which means “disclose” or “expose”. Based on this understanding, it is highly surprising that the draft ARIPO PVP includes Article 15.2. This provision can be said to disturb the delicate balance between private and public interests that the patent and plant variety system seeks to provide.

Remuneration paid by small scale commercial farmers: There seems to be an understanding that all farmers are under a strict requirement to pay remuneration to the right-holder. This is not correct. With the notable exception of the “technology use fee”, that the company Monsanto charges in certain countries on top of the price of the seeds, the actor with time-limited exclusive rights makes profit by charging a given price on the product sold, as opposed to collected remuneration from farmers. As an example, the United States (US) PVP Act includes a right to save protected seed that also extends to bona fide selling of protected seeds “for other than reproductive purposes” (7 U.S.C. § 2543).⁵⁸ Moreover, when the US Plant Variety Protection Act specifies what constitutes infringements it does not include protected material that is harvested and replanted on a farmer’s field (7 U.S.C. § 2541(a)).⁵⁹ This does not imply that the US law is necessarily the most suitable for the African context, but it does demonstrate that the draft ARIPO PVP Protocol gives stronger rights to the breeders than what they enjoy in the most advanced industrialised countries. When UPOV 1991 addresses remuneration (Articles 13 and 17), it does so in the context of compensating the right holder if another producer is granted a compulsory license to produce the protected variety. Hence, including provisions requiring farmers to remunerate breeders – as is done in draft ARIPO PVP Article 22.3 – is not required by any legal instrument nor is it justified.

Enforcement against other breach of this legal framework: While this can be criticised as not specifying justified forms of enforcement⁶⁰ or the competence required by the relevant public bodies, it is considered more serious that enforcement shall not only apply to alleged infringements of breeders’ rights, but also to “any other breach...” It is not entirely clear what might potentially fall under this, but general and broadly worded provisions allowing for dispute settlement or any other legal enforcement are to be discouraged. Allowing procedures over issues not related to alleged infringements of breeders’ rights mirrors the so-called non-violation provision of TRIPS,⁶¹ which is so controversial that it has not been implemented.

It is also relevant to note that the UPOV Council has clarified that it does not, as such, object to any provisions in plant breeders' rights legislation that seek to promote disclosure of origin, emphasising that "UPOV encourages information on the origin of the plant material...";⁶² or to obtain free, prior and informed consent stressing that "UPOV encourages the principles of transparency and ethical behavior";⁶³ or foster benefit-sharing, by noting that UPOV contains "inherent benefit-sharing principles..."⁶⁴ The UPOV Council specifies, however, that neither of these requirements can represent additional conditions for plant variety protection. This indicates that States are free to include such provisions for the benefit of their farmers and others who provide genetic material in their legislation.

In summary, the existence of these four provisions in the draft ARIPO PVP and the lack of provisions that specify a certain conduct by the breeders and more specific benefits accruing to the farmers and other providers imply that the draft ARIPO PVP is not adequately formulated to ensure an adequate balance between private and public interests.

3.6. The content of selected provisions of the draft ARIPO PVP, seen in light of farmers' rights and right to food requirements

The core content of the right to food is specified by the UN Committee on Economic, Social and Cultural Rights (CESCR) to encompass *availability*, including both quantity and quality; *accessibility*, both economic and physical accessibility; and cultural or consumer *acceptability*, requiring that non-nutrient-based values are also taken into account.⁶⁵ Moreover the General comment 12, which is not legally binding on the States that are Party to CESCR, emphasises that "sustainability" incorporates the notion of long-term availability and accessibility".⁶⁶

Concerns around existing plant variety protection include inadequate availability and unfair prices. If a compulsory license is issued to others than the rights-holders to produce a protected variety, the right-holder is to be remunerated, and the exclusive right will continue to be exercised for the duration of the protection term. As the draft ARIPO PVP contains no provision similar to UPOV 1978 Article 2.2, which contains a possibility to limit its application to "varieties with a particular manner of reproduction or multiplication, or a certain end-use", and as the draft ARIPO PVP provisions on nullity and cancellation of the draft ARIPO PVP explicitly prevents such acts for public purpose-reasons (see Articles 28.2 and 29.2), this could detrimental to the public interest.

The right to food as outlined in the International Covenant on Economic, Social and Cultural Rights (ICESCR) is specified in more detail in Article 11.2(a), in the context of the right to be free from hunger. It requires States to take measures to "improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge..." While this provision only specifies food as an end-product, it is reasonable to infer that also distribution of *food-producing resources* are to be included.⁶⁷ It is far cheaper to engage in the effective distribution of food-producing resources than to engage in the effective distribution of food once it is produced. Relevant in this context is the right to enjoy the benefits of scientific progress and in applications, as recognised in ICESCR Article 15.1(b), which is strengthened by ICESCR Article 15.2:

The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture.

Diffusion of science in essence covers the same subject matter as ICESCR Article 11.2(a), as outlined above. At the same time, the moral and material rights of producers of any scientific,

literary or artistic production is to be protected by ICESCR Article 15.1(c), and it must be emphasised that also persons and communities that might not be granted protection by national patent or plant variety offices are entitled to enjoy the rights recognised by Article 15.1(c)

Plant breeding can impact on the right to food in a positive manner; however if the only commercial actors are becoming seed providers, and these are allowed to engage in anti-competitive practices of various kinds, the availability and the economic accessibility of new plant varieties might be affected, which can affect the right to food in a negative manner. It is obvious that the ARIPO has a mandate, which encompasses concerns relating to the right to food. In this context it is relevant to note two paragraphs from the (non-binding) most recent UN resolution on the right to food, which:

Requests all States and private actors, and international organizations within their respective mandates, to take fully into account the need to promote the effective realization of the right to food for all, including in ongoing negotiations in different fields.

Encourages all relevant international organizations and agencies to bring a human rights perspective and the need for the realization of the right to food for all to their studies, research, reports and resolutions on the issue of food security.⁶⁸

It seems obvious that the ARIPO has not adequately facilitated a process whereby the right to food for all is fully taken into account, including in ongoing negotiations. In an African context, where such a high proportion of farmers depend on farm-saved seeds, and where the legislation and institutions for curbing anti-competitive practices might differ between countries, this is an unforgivable and unwarranted omission.

Environmental concerns are specified to a larger extent in the 2004 Voluntary Guidelines to support the progressive realization of the right to adequate food in the context of national food security, negotiated under the auspices of the Food and Agriculture Organisation.

The Voluntary Guidelines also recognise farmers' rights as regards the right to food in a similar manner to the wording of Article 9.2 of the ITPGRFA. However, the right that farmers have to "save, use, exchange and sell farm-saved seed/propagating material..." as specified in Article 9.3 of the ITPGRFA is not explicitly recognised in the Voluntary Guidelines.

The benefit-sharing provision of ITPGRFA Article 9.2(b) is further specified by its Article 13.2; however, the economic benefits have not materialised as quickly as expected.⁶⁹ The other benefits, as specified in ITPGRFA Article 13.2, include information, technology and capacity-building.

These are all important and also emphasised in the ICESCR. The measures that States are required to take "to improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge" (ICESCR Article 11.2(a)) must be done with concern for the environment and in order to provide for the availability of both food and food-producing resources. Well-functioning distribution, processing and market systems need to be in place for this to occur.

A risk is that the State has no effective measures in place to facilitate the right to food in an appropriate manner. For example, there is risk if the State has a plant variety protection legislation that serves the interests of the breeders at the expense of the many farmers,

combined with no effective anti-competition legislation or institutions in place, or lack of resources to facilitate breeding efforts, implying that new varieties are only provided by one or a few commercial actors.

3.7. Other states' plant variety protection laws that also encompass farmers' and other providers' interests and rights⁷⁰

It is important to clarify the scope of national legislation that is in compliance with Article 27.3.b requirements of the TRIPs agreement. In this regard, three laws from Asian States will be briefly discussed. None of this legislation has been challenged during the regular reviews undertaken by the TRIPs Council and by the Trade Policy Review Body, and none of the three States are UPOV members.

First, the Malaysian New Plant Varieties Act 2004 (Act 634) specifies in Section 13.1(d) that “a farmer or group of farmers, local community or indigenous people who have carried out the functions of a breeder” can be among those who may apply for breeders' rights. Section 14.1 lists the overall requirements for distinguishing a variety eligible for protection from one that is not, more specifically, that the variety must be new, distinct, uniform, and stable (DUS); however, Section 14.2 reads:

... where a plant variety is bred, or discovered and developed by a farmer, local community or indigenous people, the plant variety may be registered as a new plant variety and granted a breeder's right if the plant variety is new, distinct and identifiable.

This provision thus introduces alternative requirements, namely distinct and identifiable, for farmers' varieties. As the Malaysian Plant Varieties Act has never been subject to criticism in the WTO, this provision must be considered to be within the scope of the “effective *sui generis* system” requirement of TRIPs Article 27.3(b), and can serve as a model for other states.

Second, the Thailand Plant Varieties Protection Act 1999 (Act 2542) has a separate Chapter titled “Protection of Local Domestic Plant Varieties”, which is either a “variety existing only in a particular locality...” or a “variety not registered as a new plant variety” (Section 43). Hence, these are varieties that do not comply with the DUS requirements, but which are nevertheless important to protect. Section 48 requires any collector to make a profit-sharing agreement when using such varieties, and Section 49 requires that 20 percent of the profits derived from licensing rights be allocated to the persons who conserve or develop the variety, 60 percent of which shall be allocated to the community. In other words, 12 percent of the profits shall be allocated to the community from where the variety is taken. In principle, this amount can be considerable, but in practice no benefits have yet materialised.⁷¹

Third, the title of the India Protection of Plant Varieties and Farmers' Rights Act 2001 (Act 53) gives an indication that farmers' rights are to be recognised parallel to breeders' rights. This is also specified in the first provision under the Chapter on farmers' rights, through the application of the term “like manner” (Section 39.1(i)). In addition, the rights of whole communities are recognised, on the condition that they have “contributed significantly to the evolution of the variety” (Section 41.2). Benefit-sharing is to be arranged by a reward from the Gene Fund, as specified in Section 45; see also Sections 26 and 41. In a study on best practices from various countries for the realisation of the four rights recognised in ITPGRFA Article 9, the 2001 Act is chosen as a best practice example for realising the right of farmers to save, use, exchange and sell farm-saved seed.⁷²

Three provisions are highlighted in India's PVP Act. First, the rights extend also to seed of a variety protected under the Act, but not as branded seed (Section 39.1(iv)). Second, farmers can claim compensation if the propagating material fails to perform as expected (Section 39.2). Third, Section 42 gives protection if the farmers use propagating material without knowing that it is protected, this is so-called innocent infringement. Moreover, as seen above,⁷³ the breeders' right can be cancelled on the basis of public interest and there is, in accordance with Article 47.1, a basis for issuing a compulsory license if "the variety is not available to the public at a reasonable price..." Moreover, the number of farmers' varieties for which protection has been applied for exceeds the number of other new variety applications. In 2012, an outstanding year, almost 74 per cent of all applications were for farmers' varieties.⁷⁴ The Indian Act is therefore an example of a legislation that combines farmers' rights and plant breeders' rights.

In summary, adequately adapted legislation can promote the recognition of the breeding efforts of farmers and farming communities, as these three States illustrate. To the knowledge of the author, there is nothing indicating that these laws have impeded the breeding industry's efforts.

4. Conclusion

While structural changes of Africa's agriculture must take place, it is not wise to promote this through adoption of the least flexible approach in the realm of plant breeders' rights, as set out in the draft ARIPO PVP. It can be argued that the draft ARIPO PVP as currently formulated represents a protection regime that goes further than UPOV 1991, hence it is correct to describe it as "UPOV 1991+." This is surprising, as there is currently *no* Sub-Saharan African State that is bound UPOV 1991.⁷⁵

As has been argued, there is nothing that prevents the ARIPO Member States from adopting legislation for plant variety protection that ensures the rights of agricultural actors besides commercial breeders and that would still be in full compliance with the TRIPS agreement. Agricultural innovation and enhanced productivity, as well as efforts to maintain agricultural biodiversity and promote the right to food and farmers' rights, can best be achieved by providing better public extension services to farmers and by facilitating participatory breeding, as further specified in the UN Secretary-General's 2013 report *Agricultural technology for development*.⁷⁶ Relying solely on the provision of new seeds by commercial breeders can result in increased vulnerability for many farmers in the ARIPO Member States.

ARIPO specifies that there will be regulations based on the draft ARIPO PVP, with the aim "that the situation of small holder farmers will be taken into consideration in relation to farm-saved seeds..."⁷⁷ While such regulations can be relevant for the interpretation of the draft ARIPO PVP, it is the wording of the Protocol that will prevail and not non-binding regulations. According to the document presented to the 14th Session of the ARIPO Council of Ministers' meeting in 2013, draft implementing regulations shall be prepared before the ARIPO Diplomatic Conference, now scheduled for March 2015,⁷⁸ but it did not specify the coverage and number of such implementing regulations. It is the text of the Protocol that will be the decisive factor in ensuring an adequate balance between private and public interests

Notes

- 1 Submission by African CSOs to ARIPO on its Draft PVP Law and Policies, November 2012. [Online] Available at: <http://www.acbio.org.za/images/stories/dmdocuments/CSOconcernsonARIPO-PVPframework.pdf>.
- 2 <http://www.acbio.org.za/images/stories/dmdocuments/AFSA-letter-ARIPO-March2014.pdf>.
- 3 A document recognising this link between sustainability impacts and human rights impacts is OECD 2012. **Recommendation of the Council on Common Approaches for Officially Supported Export Credits and Environmental and Social Due Diligence** (the 'Common Approaches'), 5.
- 4 Kongolo, T. 2000. The New Oapi Agreement as Revised in February 1999. Complying with TRIPS. *The Journal of World Intellectual Property* 3(5): 717–735.
- 5 RAFI 1999. TRIPS Traps or Dice? Gambling with World Food Security, Echoes 15. [Online] Available at: www.wcc-coe.org/wcc/what/jpc/trips.html.
- 6 Munyi, P., Tonye Mahop, M., du Plessis, P., Ekpere J. & Bavikatte, K. 2012. **Gap Analysis Report on the African Model Law on the Protection of the Rights of Local Communities, Farmers and Breeders, and for the Regulation of Access to Biological Resources, Commissioned by the Department of Human Resources, Science and Technology of the African Union Commission**, 55. [Online] Available at: www.abs-initiative.info/uploads/media/GAP_Analysis_and_Revision_African_Model_Law_FINAL_2902_01.pdf.
- 7 In a 2001 conference on the OAPI's Revised Bangui Agreement, adopted in 1999 and including an Annex 10 on plant variety protection, UPOV spent most of its presentation criticising the 2000 OAU Model Legislation. UPOV's performance, according to one observer, "offended the conference's host". Dutfield, G. 2012. Plant intellectual property, food security and human development: institutional and legal considerations and the need for reform. IN J. McMahon & M. Geboye Desta, eds., **Research Handbook on the WTO Agriculture Agreement: New and Emerging Issues in International Agricultural Trade Law**. Cheltenham: Edward Elgar.
- 8 **WIPO/UPOV 1982 Agreement (UPOV/INF/8)**. [Online] Available at: www.upov.int/edocs/infdocs/en/upov_inf_8.pdf.
- 9 ASBP (African Seed and Biotechnology Programme) 2009. African Seed and Biotechnology Programme. African Union, Addis Ababa.
- 10 See <http://www.uneca.org/pages/mandates>.
- 11 UN 2011. **A/RES/64/159, The right to food** [adopted in 2010], paragraph 26 (extract); see also paragraph 16, specifying the responsibility of international organisations.
- 12 Special Rapporteur on the right to food 2010. **A/64/170, Seed policies and the right to food: enhancing agrobiodiversity and encouraging innovation**, paragraph 57(b) (extracts).
- 13 For a summary, see Mwalanda, C. T., Gueye A. & Louzet E. 2001. **An Issues Paper: Africa and the Multilateral Trading Systems Doha and Beyond High-Level Brainstorming Meeting for African Trade Negotiators Preparatory to the Fourth WTO Ministerial Conference**, paragraph 42. [Online] Available at: http://repository.uneca.org/bitstream/handle/10855/3357/Bib.%2027473_1.pdf?sequence=1.
- 14 ACP Group et al. 2008. **TN/C/W/52**, paragraph 4.
- 15 ARIPO 2013. **ARIPO/CM/XIV/8, Consideration of the Revised ARIPO Legal Framework for Plant Variety Protection, document to the 14th Session of the Council of Ministers**. [Online] Available at www.ip-watch.org/weblog/wp-content/uploads/2013/11/ARIPO-CM-XIV-8-REVISED-DRAFT-ARIPO-LEGAL-FRAMEWORK-FOR-PLANT-VARIETY-PROTECTION.pdf.
- 16 ARIPO 2013. **ARIPO/CM/XIV/8, Consideration of the Revised ARIPO Legal Framework for Plant Variety Protection, document to the 14th Session of the Council of Ministers**, paragraph 8.
- 17 The report from the meeting has been requested from the ARIPO secretariat via email on several occasions, but with no substantive response – only a message reading "Received with thanks." The information about the meeting is from the Nov-Dec 2012 issue of **ARIPO Magazine** 2(6): 5.
- 18 While the ARIPO says that the consultation lasted 22-25 July 2013, the civil society organisations specify the dates to 22-23 July; see the Alliance for Food Sovereignty in Africa (AFSA) 2013, **ARIPO's Plant variety protection law based on UPOV 1991 criminalises farmers' rights and undermines seed systems in Africa**, 2. [Online] Available at: www.grain.org/bulletin_board/entries/4802-aripo-s-plant-variety-protection-law-criminalises-farmers-and-undermines-seed-systems-in-africa.
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- 21 AFSA 2014. AFSA's comments on **ARIPO's responses to civil society: draft legal framework for plant variety protection**. [Online] Available at: www.acbio.org.za/images/stories/dmdocuments/AFSA-letter-ARIPO-March2014%20.pdf.
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- 24 ARIPO 2013. **ARIPO/CM/XIV/8, Consideration of the Revised ARIPO Legal Framework for Plant Variety Protection**, paragraph 8(ii).
- 25 ARIPO 2013. **ARIPO/CM/X1 V/16, Council of Ministers, Fourteenth Session, Report**, paragraph 72 (extract).
- 26 **Email from Willie Mushayi 26 June 2014** (extract).
- 27 ARIPO 2013. **ARIPO/CM/X1 V/16, Council of Ministers, Fourteenth Session, Report**, paragraph 69 (extract).
- 28 ARIPO 2013. **ARIPO/CM/X1 V/16, Council of Ministers, Fourteenth Session, Report**, paragraph 71 (extract; emphasis added).
- 29 ARIPO 2013. **ARIPO/CM/XIV/8, Consideration of the Revised ARIPO Legal Framework for Plant Variety Protection, document to the 14th Session of the Council of Ministers**, paragraph 42 (emphasis added). [Online] Available at: www.ip-watch.org/weblog/wp-content/uploads/2013/11/ARIPO-CM-XIV-8-REVISED-DRAFT-ARIPO-LEGAL-FRAMEWORK-FOR-PLANT-VARIETY-PROTECTION.pdf.
- 30 ARIPO 2013. **ARIPO/CM/XIV/8, Consideration of the Revised ARIPO Legal Framework for Plant Variety Protection, document to the 14th Session of the Council of Ministers**, paragraph 45 (emphasis added). [Online] Available at: www.ip-watch.org/weblog/wp-content/uploads/2013/11/ARIPO-CM-XIV-8-REVISED-DRAFT-ARIPO-LEGAL-FRAMEWORK-FOR-PLANT-VARIETY-PROTECTION.pdf.
- 31 UPOV 2014. **C(Extr.)/31/2; UPOV Council, Examination of the conformity of the Draft ARIPO Protocol for the Protection of New Varieties of Plants with the 1991 Act of the UPOV Convention**, paragraph 7.
- 32 ARIPO 2013. **ARIPO/CM/X1 V/16, Council of Ministers, Fourteenth Session, Report**, paragraph 63 (extract).
- 33 International Law Commission 2011. **A/66/10, Report of the International Law Commission Sixty-third session (26 April–3 June and 4 July–12 August 2011)**, 52-172.
- 34 UN General Assembly 1947. **A/RES/174(II), Establishment of an International Law Commission**.
- 35 International Law Commission 2011, **A/56/10 Report of the International Law Commission Fifty-third session, (26 April–1 June and 2 July–10 August 2001)**, 29-365.
- 36 UN General Assembly 2002. **A/RES/56/83, Responsibility of States for internationally wrongful acts** (adopted in 2001), paragraph 3 (extract); UN General Assembly 2012, **A/RES/66/100, Responsibility of international organizations (adopted in 2011)**, paragraph 3 (extract).
- 37 See reports **A/62/62, A/65/76, A/68/72**, and resolutions **A/RES/62/61 A/RES/65/19** and **A/RES/68/104**, the latter in which the states "acknowledge the importance and usefulness of the articles..." (paragraph 2).
- 38 Norway (on behalf on Nordic states) 2013. **C6: State Responsibility**. [Online] Available at: www.norway-un.org/Statements/Committee-Meetings/C6-State-Responsibility; in both 2007 and 2010 the summing up of the deliberations of the Sixth Committee of the UN General Assembly noted that the 2001 Articles "had become an authoritative statement..." and "were being extensively referred to in practice"; see www.un.org/en/ga/sixth/62/RespSt.shtml and www.un.org/en/ga/sixth/65/RespStatesWrong.shtml.
- 39 See paragraph 4 of both resolutions.
- 40 Council of Europe Parliamentary Assembly's Committee on Legal Affairs and Human Rights 2013. **Accountability of international organisations for human rights violations**, Doc. 13370, paragraph 20 (extract).
- 41 Chatham House 2011. **Meeting Summary, Legal Responsibility of International Organisations in International Law, Summary of the International Law Discussion Group meeting held at Chatham House on Thursday, 10 February 2011**, 2 stating that the 2011 Articles "deals solely with legal responsibility and ... not ... accountability".
- 42 International Law Association 2004. **Accountability of International Organisations, Final Report**, 4. [Online] Available at: <http://www.ila-hq.org/en/committees/index.cfm/cid/9>.
- 43 International Law Association 2004. **Resolution No. 1/2004, Accountability of International Organisations**. [Online] Available at: <http://www.ila-hq.org/en/committees/index.cfm/cid/9>.
- 44 International Law Association 2004. **Accountability of International Organisations, Final Report**, 5. [Online] Available at: <http://www.ila-hq.org/en/committees/index.cfm/cid/9>.
- 45 International Law Association 2004. **Accountability of International Organisations, Final Report**, 5. [Online] Available at: <http://www.ila-hq.org/en/committees/index.cfm/cid/9>.

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- 47 ARIPO 2013. **ARIPO/CM/X1 V/16, Council of Ministers, Fourteenth Session, Report**, paragraph 63.
- 48 International Law Association 2004, **Accountability of International Organisations, Final Report**, 16. [Online] Available at: <http://www.ila-hq.org/en/committees/index.cfm/cid/9>.
- 49 ARIPO 2013. **ARIPO/CM/X1 V/16, Council of Ministers, Fourteenth Session, Report**, paragraph 71.
- 50 See notes 23 and 24.
- 51 WTO 2013. **IP/C/64, Extension of the Transition Period Under Article 66.1 for Least Developed Country Members, Decision of the Council for TRIPS of 11 June 2013**, paragraph 3, acknowledging “the right of least developed country Members to seek further extensions of the period...”
- 52 This section builds on section 9.2 in Haugen, H.M. 2007. **The Right to Food and the TRIPS Agreement – With a Particular Emphasis on Developing Countries’ Measures for Food Production and Distribution** (Raoul Wallenberg Institute Human Rights Library Vol. 30). Leiden and Boston: Martinus Nijhoff Publishers.
- 53 Article 31(b) reads: “...any person or farmers’ community may [...] sell plant or propagating material of that variety as food or for another use that does not involve the growing of the plants or the propagation of that variety.”
- 54 Article 31(c) reads: “...any person or farmers’ community may [...] sell within a farm or any other place at which plants of that variety are grown any plants or propagating material of that variety at that place.”
- 55 See in this context the Standard Material Transfer Agreement under the ITPGRFA, approved at the first session of the ITPGRFA’s Governing Body; see FAO 2006. **IT/GB-1/06/Report**, Appendix G, Article 2 where “...products used for food, feed and processing” are excluded from the scope of the standard MTA.
- 56 Haugen, H.M. 2007. **The Right to Food and the TRIPS Agreement – With a Particular Emphasis on Developing Countries’ Measures for Food Production and Distribution** (Raoul Wallenberg Institute Human Rights Library Vol. 30). Leiden & Boston: Martinus Nijhoff Publishers, 245-248.
- 57 India’s Protection of Plant Varieties and Farmers’ Rights Act Article 34(h), allowing for revocation if “the grant of the certificate of registration is not in the public interest.” What is considered as “not in the public interest” is not defined, but this is more specified by the India Patent Act, Article 66, applicable if “a patent or the mode in which it is exercised is mischievous to the State or generally prejudicial to the public...”
- 58 The relevant part recognises the right “for a person to save seed produced by the person from seed obtained, or descended from seed obtained, by authority of the owner of the variety for seeding purposes and use such saved seed in the production of a crop for use on the farm of the person, or for sale as provided in this section. A bona fide sale for other than reproductive purposes, made in channels usual for such other purposes, of seed produced on a farm either from seed obtained by authority of the owner for seeding purposes or from seed produced by descent on such farm from seed obtained by authority of the owner for seeding purposes shall not constitute an infringement.”
- 59 What is specified as constituting infringements are: sell or market; import; sexually multiply; producing a hybrid; use seed which had been marked “Unauthorized Propagation Prohibited”; dispense the variety to another without notice as to being a protected variety; condition for the purpose of propagation; stock; perform any of the foregoing; instigate or actively induce performance of any of the foregoing.
- 60 Six forms of enforcement are specified in a non-binding document; see UPOV 2009. **UPOV/EXN/ENF/1, Explanatory Notes on the Enforcement of Breeders’ Rights under the UPOV Convention**; civil, customs, administrative, criminal, dispute settlement, and specialised courts.
- 61 The basis is GATT Article XXII.1(b) and (c), which allow any party alleging that “any benefit accruing to it ... is being impeded as the result of ... the application by another contracting party of any measure, *whether or not it conflicts* with the provisions of this Agreement, or ... the *existence of any other situation*” (emphasis added) to “make written representations or proposals to the other contracting party or parties” The outcome can, in accordance with GATT Article XXIII.2 be “a ruling on the matter...” TRIPS Article 64.2 reads: “Subparagraphs 1(b) and 1(c) of Article XXIII of GATT 1994 shall not apply to the settlement of disputes under this Agreement for a period of five years from the date of entry into force of the WTO Agreement.”
- 62 UPOV 2003. **Reply of UPOV to the Notification of June 26, 2003, from the Executive Secretary of the Convention on Biological Diversity (CBD): Access to genetic resources and benefit-sharing, adopted by the Council of UPOV at its thirty-seventh ordinary session on October 23, 2003**, paragraph 8.
- 63 UPOV 2003. **Reply of UPOV to the Notification of June 26, 2003, from the Executive Secretary of the Convention on Biological Diversity (CBD): Access to genetic resources and benefit-sharing, adopted by the Council of UPOV at its thirty-seventh ordinary session on October 23, 2003**, paragraph 10.
- 64 UPOV 2003. **Reply of UPOV to the Notification of June 26, 2003, from the Executive Secretary of the Convention on Biological Diversity (CBD): Access to genetic resources and benefit-sharing, adopted by the Council of UPOV at its thirty-seventh ordinary session on October 23, 2003**, paragraph 17.
- 65 CESCR 1999. **General Comment No. 12: The Right to Adequate Food (Art. 11 of the Covenant)**, paragraphs 8, 11-13.

- 66 CESCR 1999. **General Comment No. 12: The Right to Adequate Food (Art. 11 of the Covenant)**, paragraph 7.
- 67 In this context, see FAO 2004. **Voluntary Guidelines to support the progressive realization of the right to adequate food in the context of national food security** [negotiated by States, including those not parties to the ICESCR], paragraph 8.5 (“States should, within the framework of relevant international agreements, including those on intellectual property, promote access by medium- and smallscale farmers to research results enhancing food security”); see also UN Human Rights Council 2014, **A/HRC/RES/25/14, The right to food**, paragraph 19, acknowledging that “access to land, water, seeds and other natural resources is an increasing challenge for poor producers...”; see also paragraph 15 on “support for the development of adapted technologies...”
- 68 **A/HRC/RES/25/14, The right to food**, paragraphs 22 and 23.
- 69 Correa, C.M 2013. **ITPGRFA: Options to Promote the Wider Application of Article 6.11 of the SMTA and to Enhance Benefit-Sharing Legal Opinion**. [Online] Available at www.evb.ch/cm_data/ITPGRFA_Legal_opinion_Final_130731.pdf.
- 70 This section is drawn from Haugen, H.M 2014. The Right to Food, Farmers’ Rights and Intellectual Property Rights: Can Competing Law Be Reconciled? IN **Rethinking Food Systems: Structural Challenges, New Strategies and the Law**, eds. Brilmayer, L., Claeys, P., Lombek, N. & Wong, A.. Springer, Heidelberg, 214-216.
- 71 As reported by Lertdhamtewe, P. 2012. Thailand’s plant protection regime: a case study in implementing TRIPS. **Journal of Intellectual Property Law & Practice** 7(3): 186-193, at 192, there has still not been any Ministerial Regulation on the profit-sharing agreement, implying that no farmers have been able to claim benefits under the benefit-sharing agreement.
- 72 Winge, T., Andersen, R. & Ramanna-Pathak, A. 2013. Combining Farmers’ Rights and Plant Variety Protection in the Indian Law. In **Realising Farmers’ Rights to Crop Genetic Resources: Success Stories and Best Practices**, eds, Andersen, R. & Winge T. London: Routledge.
- 73 Note 63 and accompanying text.
- 74 India Protection of Plant Varieties and Farmers’ Rights Authority (PPVFR Authority) 2012. **Annual Report 2011-12**, iii, reporting the following number of applications for registration and protection: new varieties 149, extant varieties 177, and farmers’ varieties 921; the numbers for 2012, according to the PPVFR Authority 2013. **Annual Report 2012-13**, ix are: new varieties 176, extant varieties 243, and farmers’ varieties 359.
- 75 Tunisia and Morocco are parties to UPOV 1991; Ghana and Tanzania are in the process of adopting legislation that seeks to be in compliance with UPOV 1991. In addition to Mozambique, Ghana and Tanzania are the only countries that are a part of four recent initiatives to boost the productivity of African agriculture, with partnerships with the private sector underpinning each of these initiatives: G8’s New Alliance for Food Security and Nutrition; World Economic Forum’s (WEF) New Vision for Agriculture; WEF/NEPAD/AU’s Grow Africa; Rockefeller and Bill & Melinda Gates Foundation’s Alliance for a Green Revolution in Africa.
- 76 UN Secretary-General 2013. **A/68/308 Agricultural technology for development, Report of the Secretary-General**.
- 77 ARIPO 2013. **ARIPO-CM-XIV-8-Annex I, Responses to the comments made by civil society organizations**, 3. [Online] Available at: www.ip-watch.org/weblog/wp-content/uploads/2013/11/ARIPO-CM-XIV-8-ANNEX-I-ARIPO_experts_meeting_matrix_July-25_2013_update-3_.pdf.
- 78 ARIPO 2013. **ARIPO/CM/XIV/8, Consideration of the Revised ARIPO Legal Framework for Plant Variety Protection, document to the 14th Session of the Council of Ministers**, paragraph 44. [Online] Available at: www.ip-watch.org/weblog/wp-content/uploads/2013/11/ARIPO-CM-XIV-8-REVISED-DRAFT-ARIPO-LEGAL-FRAMEWORK-FOR-PLANT-VARIETY-PROTECTION.pdf.