



**Comments on revised Draft Regulations (Draft 2) for Implementing the
Arusha Protocol for the Protection of New Varieties of Plants**

SUBMITTED BY:

African Centre for Biodiversity

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Introduction

African civil society's resistance to the Arusha Protocol for the Protection of New Varieties of Plants ("The Arusha Protocol") is well established, as is its track record of constructive engagement with the Secretariat of the African Regional Intellectual Property Organisation (ARIPO) as well as the Member States of ARIPO.

The concerns of African civil society are well documented and have been communicated to the ARIPO Secretariat, as well as Member States of ARIPO, both in writing and orally over the past few years. Foremost amongst these concerns include that: the Arusha Protocol is based on the International Union for the Protection of New Varieties of Plants (UPOV) 1991, a most inappropriate model for the establishment of Plant Variety Protection (PVP) regimes in developing countries particularly in ARIPO Member States; the Protocol advances a centralised harmonised regime which is unnecessary for the region and which contains several provisions that undermine the sovereign rights of Member States; undermines the realization of farmers' rights; facilitates and/or fails to curb biopiracy; undermines implementation of international treaties such as the Convention on Biological Diversity (CBD), the Nagoya Protocol on Access and Benefit Sharing, and the International Treaty on Plant Genetic Resources for Food and Agricultural (ITPGRFA) as well as various international instruments on human rights.

Three members of civil society representing the African Centre for Biodiversity, the Alliance for Food Sovereignty and the Participatory Ecological Land Use Management (PELUM) attended an expert review meeting on the Draft Regulations for the Implementation of the Arusha Protocol (Draft 1) 14 to 17 June 2016 in Harare, Zimbabwe. At this meeting, our substantive and comprehensive comments on the Draft Regulations were shared with the delegates present, both orally and in writing by the CSOs attending. Although 3 members of civil society was allowed to participate in the proceedings, we place on record our concerns about the un-transparent and flawed process by which the Protocol was developed and the deliberate locking out of African civil society from the deliberations when the Arusha Protocol was adopted on the 6th July 2015¹.

The comments contained in this submission, are in respect of a further draft of the Regulations (Draft 2). In a nutshell in relation to these Regulations (Draft 2), while a great deal of the draconian provisions relating to rural surveillance has been deleted which we welcome, the Regulations are still extremely problematic in that they perpetuate impingement of national sovereignty and continues to flout provisions in the Protocol that cater for the exercise of some national sovereignty; fail to safeguard farmers' rights and farmer seed systems; and to provide safeguards to prevent biopiracy.

These comments have been produced without prejudice to our very strong opposition to the Arusha PVP Protocol and our consistent position that it represents an inappropriate regional legal framework for the ARIPO region, wherein 13 out of the 19 member states are least developed countries and under no legal obligation to implement plant variety protection (PVP) regimes.

These comments are arranged as follows: General Comments in relation to Draft (2) of the Regulations are outlined, followed by specific comments in relation to provisions as well as suggested alternative proposals. All of these are submitted with the intention of safeguarding national sovereignty, protection

¹ See <http://afsafrika.org/open-letter-to-members-of-the-international-union-for-the-protection-of-new-varieties-of-plants-upov-2/>

and enforcement of farmers' rights and to address issues relating to biopiracy.

GENERAL COMMENTS

1. Regulations perpetuate impingement of National Sovereignty, continues to flout Protocol:

We are astonished that this Draft 2 of the Regulations continue to ignore the implementation and operationalisation of Article 4(1) of the Arusha Protocol: the Regulations continue to fail to provide a mechanism for Contracting Parties to object to the grant of Breeders' Rights from being applicable in their respective territories. Member States themselves fought for this right to be included in the Protocol. ARIPO Member States have continuously insisted on retaining the right to be able to object to the grant of any PBR application being operational in its territory. Hence, Article 4(1) of the Arusha Protocol gives Contracting States an explicit right to object to any Plant Breeders' Right (PBR)—as granted by the ARIPO Office, regionally—in which event the PBR will not be awarded national protection. We call upon the drafters and the ARIPO Secretariat to remedy this fundamental defect. Below we have proposed specific language to operationalize Article 4(1) of the Protocol (see below).

2. Draft Regulations fail to safeguard the rights of small-scale farmers.

We are similarly taken aback that the Regulations fail to provide a clear definition for the exception “private and non-commercial purposes” as contemplated in Article 22(1)(a) in order to safeguard the right of small-scale farmers to use, save, exchange and sell seeds even in local markets. This is despite overwhelming evidence of the importance of safeguarding the interest of small-scale farmers who are the backbone of agriculture in the ARIPO region and that such farmers freely and without any impediment, be able to continue to access seed through saving, exchange and purchase from local markets in Africa.²

The Draft Regulations also fail to differentiate between small scale commercial farmers and large scale commercial farmers and treat both categories of farmers as if they were in the same. This is wholly inequitable as the Regulations require small scale commercial farmers along with large scale farmers to pay remuneration when reusing saved seed and propagating on its own holding for varieties which are included in the list of Article 22(2) of the Protocol. Even in the EU, small scale commercial who are much better off economically than their counterparts in the ARIPO Region, are exempt from payment of remuneration. See specific comments below with regard to Rule 14.

3. The Draft Regulations enable biopiracy. The draft Regulations continue to ignore our serious concerns that provisions be made to prevent someone from tweaking local varieties and making very small or minor changes and thereafter claiming plant breeder' rights (PBRs) over such varieties, all without having to obtain the prior informed consent from the farmers and subject to fair and equitable benefit sharing. There is no mention of ‘disclosure of origin’, which ironically has been championed by African countries in various international forums over the years. In fact, the Draft Regulations enable biopiracy by failing to introduce appropriate safeguards and allowing breeders to hide behind confidentiality rules. At the very least, the Regulations should be consistent with that of the SADC PVP Protocol (which has introduced text to prevent the exploitation of African farmers), since numerous Member States of ARIPO also belong to SADC and have agreed to this provision in the SADC PVP Protocol. See Comments below with regard to Rule 2.

² McGuire and Sperling, 2016, “Seed systems smallholder farmers use” available at <http://link.springer.com/article/10.1007/s12571-015-0528-8>

4. **Breeders' rights in respect to genetically modified varieties or organisms.** There is a need for the applicant to comply with Biosafety laws of Contracting Parties before a grant of a breeder's rights can take place in respect of a GM variety or a variety containing GMOs. Arguably, Monsanto and other developers of GM technology for instance will still need at the national levels to comply with biosafety and seed marketing laws to market a GM variety. However, the grant of breeders' rights will provide a strong incentive for the commercialization of GMOs in Contracting Parties where the introduction of the technology has not yet taken place commercially and where it is not only contentious but also vigorously contested. Breeders' rights should only apply in those Contracting States that have approved the particular GM variety for commercial growing in their countries. An application for breeders' rights in respect of GMOs/GM varieties represent a clear and compelling example of a situation where Contracting States must have a clear right to object to breeders rights being applicable in their countries. See specific comments below with regard to Rule 3.

5. The Draft Regulations also raises a number of further issues including:

(a) What obligations do the rights holders have with regard to claims made about the performance of their varieties should these fail in regard to claiming redress?

(b) The Draft Regulations make no mention of how and where the samples of propagating material of the protected variety will be maintained and whether and how Contracting States and public institutions will have access to such material for further breeding.

(c) The Draft Regulations does not contain provisions requiring the ARIPO Office to make publicly available in a timely manner the applications and all related information. See specific comments with regard to Rule 3

SPECIFIC COMMENTS & ALTERNATIVE PROPOSALS

1. Rule 1 Interpretation

A definition should be created for “genetically modified organism” which also includes “genetically modified” and this definition should be broad enough to cover current technology products such as genetically modified seed that is in current commercial production as well as those in the pipeline; products developed as a result of the application of new technologies such as gene editing/silencing and synthetic biology.

2. Rule 2 Applications for a Breeder's Right

To add to Rule 2(1)(b) the following provisions:

(vi) specify the method by which the plant variety is developed

(vii) be supported by documents and information relating to the characteristics of the plant variety which distinguish the plant variety from other plant varieties, such other varieties being named;

(viii)the pedigree information and associated passport data, as available to the applicant, on the lines from which the variety has been derived, along with all such information available to the applicant relating to the contribution of any farmer, community, institution or organization upon which the applicant relied to derive the new variety.

(ix) evidence, that the genetic material or parental material used for breeding, evolving or developing the variety has been lawfully acquired and that, where appropriate, the applicant has complied with prior informed consent and benefit-sharing requirements.”

(x) be supported by documents relating to the compliance of any law regulating activities involving genetically modified organisms in cases where the development of the plant variety involves genetic modification.

We reiterate our previous concerns as to the inadequate information required from the applicant. Thus we propose the inclusion of sub-paragraphs (vi), (vii), (viii) and (ix) to Rule 2(1)(b).

It is important to require an applicant to furnish information concerning the specific method by which the plant variety was developed. This facilitates transfer of knowledge to the local population with regard to the development of the variety. Sub-para (vii) is important to ensure that only varieties that are novel and distinct from local varieties are protected. This is particularly important as local landraces are used as breeding material. It also links to our general concerns about the inadequacy of the Protocol and the previous Draft Regulations in providing safeguards against biopiracy.

We have repeatedly raised our serious concerns that both the Arusha PVP Protocol and the Regulations (Draft 1) have failed to require the applicant to disclose the origin of the variety/breeding material in order to prevent misappropriation of local genetic resources especially landraces. We raised the same concerns regarding the lack of a disclosure of origin provision when we participated in the finalisation in the draft SADC PVP Protocol in March 2014. A disclosure of origin provision will assist in the identification of situations whereby local farmer varieties are utilized in the development of new varieties, and will facilitate implementation of benefit sharing. We have pointed to the misappropriation in the “Turkey Purple Carrot” case as an example of such biopiracy where Monsanto’s subsidiary Seminis purchased farmers’ seed at a farmers’ market in southern Turkey of a certain variety of purple carrot and after a simple process of selection obtained plant variety protection in both the United States and the European Union in respect of the variety, all without payment of fair and equitable benefit sharing.

During the SADC PVP discussions, SADC Secretariat made clear that “we cannot exploit farmers,” resulting in SADC Member States agreeing to include, as part of the requirements for applying for PBRs, a declaration by the applicant to the effect that the “genetic material or parental material acquired for breeding, evolving or developing the variety was lawfully acquired.”

In order to prevent biopiracy and consistent with the SADC Protocol as well as to promote achievement of the objectives of the CBD, the Nagoya Protocol and the ITPGRFA, (all of which require fair and equitable benefit sharing in situations of utilization of genetic resources), Rule 2 (1)(b) of the ARIPO regulations should be amended to add sub-paragraph (viii), which should include text similar to that contained in the SADC Protocol. The relevant text in the SADC PVP Protocol is as follows:

SADC PVP Protocol Article 13 (5): “A valid application shall contain the following:

(e) a declaration that the genetic material or parental material acquired for breeding the variety has been lawfully acquired and the source of such material”

Further, Rule 2 should also make provision for the applicant to disclose the following information:

“pedigree information and associated passport data, as available to the applicant, on the lines from which the variety has been derived, along with all such information available to the applicant relating to the contribution of any farmer, community, institution or organization upon which the applicant relied to derive the new variety.” This will enable ARIPO Member States to avoid misappropriation of genetic resources and facilitate benefit sharing payments.

We propose the inclusion of sub-para (x) for reasons mentioned below. (See comments in connection with Rule 3(1)(f))

3. Rule 3 Examination as to formal requirements

3.1 We propose to amend Rule 3 (1)(f) to add the following bullets for reasons mentioned above.

- **specify the method by which the plant variety is developed**
- **be supported by documents and information relating to the characteristics of the plant variety which distinguish the plant variety from other plant varieties, such other varieties being named;**
- **the pedigree information and associated passport data, as available to the applicant, on the lines from which the variety has been derived, along with all such information available to the applicant relating to the contribution of any farmer, community, institution or organization upon which the applicant relied to derive the new variety.**
- **evidence, that the genetic material or parental material used for breeding, evolving or developing the variety has been lawfully acquired and that, where appropriate, the applicant has complied with prior informed consent and benefit-sharing requirements.”**
- **be supported by documents relating to the compliance of any law regulating activities involving genetically modified organisms in cases where the development of the plant variety involves genetic modification.**

3.2 The fifth bullet has been added as Rule 3(1)(f)(iv) deals with the provision of information by the applicant in respect to characteristics that may have been genetically modified where the variety concerned represents a genetically modified organism (GMO). It is our strong recommendation that there is a need for the applicant to first comply with the biosafety laws of Contracting Parties before a grant of a breeders’ rights can take place in respect of characteristics that may have been genetically modified where the variety concerns represents a GMO. Although arguably, Monsanto and other developers of GMOs would still need to comply with national biosafety and marketing laws to commercialize a GM variety, the grant of breeders’ rights provides a strong incentive for the commercialization of GMOs in Contracting Parties where the introduction of the technology is not only contentious but vigorously contested. Breeders’ rights should only apply in those Contracting States that have approved the particular GM variety for commercial growing in their countries.

The inclusion of the fifth bullet would require the applicant show that it has complied with national biosafety laws.

3.3 Rule 3(2)(b) requires the ARIPO office to publish applications for breeder’s rights in the ARIPO Journal. In the interests of good governance, transparency, access to information and administrative

justice, we strongly recommend that the ARIPO Journal, copies of the application and supporting documentation be made publicly and freely available to all stakeholders. This information should be posted in a timely manner on a dedicated website to facilitate access. Provisions to this effect should be crafted in the Regulations. Such access should also extend to any new, material information supplied by the applicant in response to comments, objections and representations received by the ARIPO Office from Contracting Parties and other interested and affected Parties.

4 Rule 4 Objections to applications

4.1 In order for any person to lodge an objection they must receive timely and adequate notice of the application and the relevant information pertaining to the application. Rule 4(1)(a) refers to an objection being filed within three months of “publication of the application” however, specific provisions have not been crafted for making available in the public domain the publication of the application in a timely and accessible manner. This omission will seriously prejudice any person from objecting to the application and may well serve to nullify the provisions of Rule 4(1).

Thus we recommend that Rule 4 should be amended to include the following:

- **On request, the objectors shall have access to all documentation concerning the application to which the objection is lodged, including the results of analyses or examination in relation to novelty, distinctness, uniformity and stability.**
- **The ARIPO Office shall make available all documentation in relation to the application to which the objection is lodged, within 14 days of receipt of the request or as soon as the relevant documentation is available.**
- **The ARIPO Office shall ensure that the objectors have adequate time but at least 60 days to review the results of analysis and examination reports in relation to novelty, distinctness, uniformity, stability, variety denomination and submit comments on the same to the ARIPO Office, before a decision is taken on the application in relation to which the objection was filed.**

4.2 Rule 4(2) requires that all objections to be accompanied by the fee prescribed in the Second Schedule, which is set at \$250. This amount is beyond the reach of impoverished small- scale farmers and even public interest groups. **We propose that fees should be waived when small-scale farmers and public interest groups make objections. The Rules should also allow for objections to be filed with national authorities, which could then be forwarded to the ARIPO Office.**

4.3 Rule 4(4) provides that “The Director General shall, after hearing the parties, if so required, and after considering the grounds and evidence upon which the application has been opposed and after giving reasons for his decision uphold or reject the opposition or permit registration subject to conditions or limitations”. **We respectfully submit that such decision making should not vest solely in the DG but should be considered by an independent committee appointed by the Administrative Council in interests of procedural fairness and administrative justice.**

4.4 Rule 4(5) requires that “The Director General shall prescribe the manner in which oppositions and counterstatements are to be filed and the manner in which any evidence upon which the opponent and the applicant may rely on is to be submitted.” **This should also be performed by an independent committee appointed by the Administrative Council.**

4.5 We also object to Rule 4(7) which allows acts to be delegated to the staff of the ARIPO Office. **In the interest of justice, it would be inappropriate for matters such as those mentioned in Rule 4(4) and 4(5) to be delegated to the staff of the ARIPO Offices.** As mentioned above, an independent committee should be appointed from time to time by the Administrative Council to deal with objections.

5. Rule 5 Examination for grant of breeder’s right

5.1 The Rules on Examination of PBR applications are extremely vague and inadequate.

For instance nowhere in the Regulations does it mention about examination of whether the variety is one that is protectable under the Arusha Protocol (i.e. falls within the definition of a variety), conducting an examination of the novelty standard, and whether the applicant is entitled to file an application as per Article 11 of the Arusha Protocol and the suitability of the proposed variety denomination.

Further Article 18 of the Arusha Protocol states that for examination of distinctness, uniformity and stability, the ARIPO Office may arrange for the examination to be carried out by any competent institution of a Contracting State or of any member of an inter-governmental organization providing an effective system of plant variety protection selected by the Administrative Council and that practical arrangements will be specified in the regulations.

However the Draft Regulations does not bring any clarity to the issue. **It is unclear when an examination will be carried out by a competent institution of a Contracting State and when will it be conducted by a member of an intergovernmental organization.** Questions such as which institution will be the preferred choice for the conduct of technical examination, should the ARIPO office conduct the examination outside of a Contracting State, when a Contracting state has capacity or should be capacitated to conduct technical examination have not been addressed.

Unless this is clarified and national authorities are given a strengthened role, there will be a tendency for the DUS testing to be conducted outside of the ARIPO region, with the consequence of weakening national PVP Offices and crippling the existing capacity at the national level.

In short, the rules on examination of PBR applications needs further detailed discussion and the role of national offices strengthened in the interest of safeguarding national sovereignty.

As a general principle, all DUS testing should be conducted by ARIPO Member States. Each Member State could take responsibility to undertake DUS testing for specific varieties. If for a particular variety DUS testing is to be undertaken by an external office, there should be a clear rationale provided as to why such testing cannot be undertaken by a Contracting Party and such external testing should be with the approval of the Administrative Council.

5.2 Rule 5(2)(e) is concerning as it suggests that plant material will only be given for DUS testing and will not be made available to national authorities. Thus there could be a situation whereby although the

variety is protected in the country, the variety may not be commercialized by the breeder as the breeder may not have a commercial interest in the particular country to do so and neither will the country have access to the plant material. **We strongly recommend that there be clear provisions requiring the ARIPO Office to make available and accessible to every national authority the plant material that is DUS tested and protected.**

5.3 Rule 5(2)(d) is inadequate. The previous version of the Draft Regulations stated “The ARIPO Office shall pay an Examination Office a fee for the conduction of a technical examination, *on the basis of full recovery of expenses incurred...*”. The current Rule 5(2)(d) suggests that Examination office may not fully recover the expenses of DUS. This may prejudice ARIPO Member states wishing to become examination offices, as it may require them to subsidize some of the costs of DUS examination.

6. Rule 6 Technical Questionnaire and Test Guidelines

6.1. Rule 6(1) should be amended as follows: ~~The Director General of ARIPO~~ **“An independent committee appointed by the Administrative Council shall develop and publish Technical Questionnaires and Test Guidelines for each species for conducting technical examination for the consideration and approval of the Administrative Council”.**

In comparison to the previous Draft Regulations, Rule 6(1) strengthens the role of the ARIPO Secretariat at the expense of the Administrative Council. While previously the Administrative Council approved the guidelines, this new Rule 6 does not provide any role for the Administrative Council and vests all powers in the DG of ARIPO.

6.2 Rule 6(2) only mentions that a list of the Questionnaire and test guidelines will be published in the ARIPO Journal. There is no indication that this Journal will be publicly available. Nevertheless listing in the Journal is not sufficient. **The Technical Questionnaire as well as all Test Guidelines should be freely and publicly accessible.**

6.3. **Rule 6(3) should be amended so that existing Questionnaire and Guidelines are only utilized with the approval of the Administrative Council.**

7. Rule 8 Examination reports

7.1 Rule 8(2)(a) provides that “An examination report on the results of any technical examination which has been carried out or is in the process of being carried out for official purposes in Contracting States **and any member of an inter-governmental organization providing an effective system of plant variety protection** may be considered by the ARIPO Office to constitute a sufficient basis for decision, provided that the material submitted for the technical examination has complied, in quantity and quality, with any standards that may have been laid down in the specific Test Guidelines, pursuant to Articles 17 and 18 of the Protocol.” We are extremely concerned that such an office may well function only as a rubber stamping one if these DUS tests are going to be either conducted abroad or DUS tests already conducted are purchased and submitted by the applicant and approved by the ARIPO Office. If this is the case, then not only are powers and sovereignty taken away from national PBR offices in respect to plant varieties, but these are given to a foreign entity and the ARIPO office functions merely as a rubber stamping office for decisions made by foreign plant variety offices such as for example, the European Union’s Community Plant Variety Office (CPVO).

8. Rights of Contracting States: Operationalizing Article 4 of the Arusha Protocol.

8.1 A major point of controversy and the subject matter of heated negotiation especially during the final round of negotiations was the right of countries to object to the grant of PBRs. Article 4 of the Arusha Protocol states “A breeder’s right granted under this Protocol shall, on the basis of one application, be protected in the designated Contracting States *provided the designated Contracting State has not refused the grant.*”

However there is nothing in the Draft Regulation to operationalize the right of a Contracting State to object to the grant. This is a serious (and presumably deliberate) omission on the part of the ARIPO Secretariat. This omission needs to be highlighted and rectified.

ARIPO Member states should have a right to object to the grant as well as to conduct their own DUS examination. This is to safeguard and enforce its sovereign rights. It also needs to be acknowledged that there are differences in climatic, soil and other agronomic conditions in the countries that constitute ARIPO member states. For instance, a variety which might be uniform and stable when tested in a country outside of the ARIPO region but may not be stable and uniform when tested in Botswana. Similarly a variety, which shows uniformity and stability in Kenya, may not show stability and uniformity in Sierra Leone or Liberia. The Draft Regulations fail to take into account the differences in climate and soil that exists between countries and the impracticality of a centralised, fast track one grant system for many diverse countries. Thus it is important for Contracting States to retain the right to conduct its own DUS examination.

The Draft Regulations also do not recognize the right of ARIPO Members to have access to the applications as well as to the technical examination report. Timely access to the applications as well as to the examination report is imperative to safeguard the right of a member state to object to the grant of PBRs.

Further, an application for breeders’ rights in respect of GMOs/GM varieties represent a clear and compelling example of a situation where Contracting States must have a clear right to object to breeders’ rights being applicable in their countries.

Accordingly it is important to introduce text in the Draft Regulations that clearly outlines the rights of Contracting States in relation to examination and grant of PBR applications.

Proposed Text (Rule 8bis)

Rights of Contracting States

(1) Where the ARIPO Office has received an application from the applicant and confirmed compliance with Articles 12, 13 and 14 of the Arusha Protocol and related provisions in the Regulations, the application form together with all documentation related to the application as well as results of examination of compliance with Article 7 and 27 will be made available promptly to the Contracting State.

(2) Where the ARIPO Office has received Examination Report(s) concerning the distinctness, uniformity and stability of the variety which is the subject of the application, the Report(s) shall be communicated to the Contracting States within 14 days of receipt by the ARIPO Office.

(3) Where the ARIPO Office has decided to grant breeder's right, it shall promptly notify in writing the Contracting States and on receiving the notification mentioned a Contracting State may:

(a) make a written communication to the ARIPO Office within 12 months of receiving the written notification mentioned in (3), that if breeder's right is granted by the ARIPO Office the breeder's right shall not have any effect in its territory; or

(b) make a written communication to the ARIPO Office within 12 months of receiving the written notification mentioned in (3), that it is not satisfied with the Examination Report(s) and the decision of the ARIPO Office and has undertaken or intends to undertake its own technical examination of distinctness, uniformity and stability. In this case, the Contracting State may inform the ARIPO Office within 24 months of receiving the notification mentioned in (3), that if breeders' right is granted by the ARIPO Office, it shall not have any effect in its territory.

(4) Where a Contracting State decides to undertake its independent technical examination as mentioned in paragraph 3(b), the ARIPO Office and the right holder shall within 14 days of request by a Contracting State make available to the Contracting State in adequate quantities and quality, the material needed for technical examination together with the requested fees.

(5) A Contracting State may also notify the ARIPO Office that it requires additional time beyond that stated in paragraph (3)(b) to complete its examination, which shall be accepted by the ARIPO Office.

Explanation: The proposed text has three main objectives: (i) it makes clear that the application form, and results of examination of novelty, distinctness, uniformity and stability will be sent to the Contracting State; (ii) the text operationalizes the right to object by giving a Contracting State a duration of 12 months, following receipt of notification that the ARIPO Secretariat will grant PBR to object to the grant (see sub-para (a)); (iii) the text safeguards the right of Contracting states to undertake DUS examination on its own fields, if it is dissatisfied with the Examination report. This is important due to differences in climate and soil among ARIPO Members. Sub-para 3(b) allows a Contracting State to undertake its own assessment.

The proposal in sub-para 3(a) follows the approach taken in ARIPO's Harare Protocol on Industrial Property, wherein Contracting Parties have 6 months to object to the grant of patents by the ARIPO Secretariat. The subject of PBR requires more time, and field assessment, thus the extended timelimits of 12 months and 24 months with the option of requesting for more time.

9. Rule 12 Register of Breeder's Right

1. Having regard to our comments above, **we propose that Rule 12(1) be amended to include** the specific method by which the plant variety was developed and the characteristics of the variety which

distinguish it from existing varieties; the application form and related documentation, the analyses and examination reports relating to novelty, distinctness, stability and uniformity and details showing that the genetic material or parental material acquired for breeding, evolving or developing the variety was lawfully acquired.

It should also be mentioned that all documents should be accessible to the public within 14 days of receipt of the documents.

2. We also propose amending Rule 12(2) as follows:

(a) The ARIPO Register of Breeders' Rights shall be open for public inspection and **shall be made available immediately upon it being updated.**

(b) Copies of extracts from the Register shall be provided upon payment of prescribed fee as provided in the Second Schedule **provided that for farmers and public interest organisations, no fee shall be required.**

(c) ~~The~~ Director General of the ARIPO Office ~~may~~ **shall** provide for public inspection of the Register on the premises of National Authorities”

This amendment is important as those interested in information relating to the grant of PBRs are at the national level. Interested persons at the national level cannot be expected to make a trip to the ARIPO Office in Harare to access information. Making the needed information available at the national level is not a difficult task in this day and age of digital connectivity.

3. It is also important to encourage an applicant to reveal all relevant information. Thus the Draft Regulations should include the following text.

“The ARIPO Office shall encourage the applicant to make publicly available all information concerning its application. No information relevant to the interests of the public or the farming communities in the Contracting States shall be kept confidential”

10. Rule 14 Exception to Breeder's Right

1. *Defining “acts done privately and for non-commercial purposes”*: With regard to Article 22(1), we strongly believe that the exception “privately and for non-commercial purposes” must be defined in Rule 14(1) as follows: **The exception of “acts done privately and for non-commercial purposes” in Article 22(1)(a) of the Protocol shall be understood as allowing small-scale farmers to save, use, exchange and sell to local markets and other small-scale farmers farm saved seed or propagating material of the protected variety.**

Existing literature and evidence are conclusive of the need for policy to accommodate the needs of small-scale farmers.³ In fact an objective of the Arusha Protocol is to facilitate access by farmers to new varieties and to enable local adaptation of the variety. Most farmers in the ARIPO region are small-scale farmers. And there is extensive evidence that these farmers access seed by saving, through exchange and purchase from the local markets. As such it is important to safeguard the practices of

³ Jarvis, D.I. *et al.* 2011. An Heuristic Framework for Identifying Multiple Ways of Supporting the Conservation and Use of Traditional Crop Varieties within the Agricultural Production System, *Critical Reviews in Plant Sciences*, 30:1–2, 125–176, DOI: 10.1080/07352689.2011.554358. Vernooy, R., Shrestha, P. and Sthapit, B. 2015. *Community Seed Banks: Origins, evolution and prospects*. Abingdon, Oxon: Routledge.

freely being able to reuse, save, exchange and sell in local market. This will enable widespread uptake and dissemination of new varieties among farmers.

Small-scale farmers generally own less than 5 hectares and thus allowing the freedom to use, save, exchange and sell farm-saved seeds/propagating material is not going to threaten the rights of foreign companies, most of which are likely to be interested in foreign markets. The PVP legislation of several countries allow farmers' rights to save, use, exchange and sell farm-saved seeds/propagating material. Moreover most ARIPO members are members of the ITPGRFA, which means they are under an obligation to facilitate the realization of farmers' rights'. The ITPGRFA clearly states that the right to "save, use, exchange and sell farm-saved seed and other propagating material" is "fundamental to the realization of Farmers' Rights, as well as the promotion of Farmers' Rights at national and international levels".

Small-scale farmers should be allowed to freely exchange with other farmers and sell to their local markets their farm saved seed and propagating material. This may be achieved by including an interpretation to the exception of acts done privately and for non-commercial purposes in Article 22(1)(a) of the Arusha Protocol. The Draft Regulations fails to include such an interpretation. This is a serious omission in the Draft Regulations.

This is not a matter that should be left up to each government as every government may adopt different interpretations.

Failure to accommodate the interest of small-scale farmers would confirm that the Arusha Protocol is biased in favour of commercial interests and set against the wellbeing and interests of African farmers.

2. *List of Crops With Historical Practise of Saving Seeds*: Rule 14(2) simply repeats the first part of the provisions of Article 22(2) of the Arusha Protocol and as such does not add clarity on the process to be embarked upon to compile this list. The making of this list must be done in an open and transparent way and that requires a high level of participation by farmers. Further, it is our respectful submission that it should be the Contracting States that should to determine these crops as these crops may vary from country to country and from time to time. Then once determined by the Contracting States, this list should be adopted by the Administrative Council as a mere formality. It is not for the Administrative Council to impose a list of crops on Contracting States and their farmers as suggested in Rule 14(2). Rule 14(2) should be amended as follows:

In the case of the provision under Article 22 (2) of the Protocol, **each Contracting State shall inform the Administrative Council of the agricultural crops and vegetables with a historical common practice of saving seed in its State following broad consultations with farmers, and such crops and vegetables shall be included by the Administrative Council in the list mentioned in Article 22(2)** ~~the Administrative Council shall specify from time to time a list of crops with historical practice of saving seeds that shall not include fruits, ornamentals, other vegetables or forest trees after consultation with the Contracting States.~~

3. *Small scale commercial farmers vs. large scale commercial farmers (Rule 14(4))*: The approach taken by the Draft Regulations with regard to remuneration is inconsistent with the Arusha Protocol and flawed.

- (i) Article 22(3) of the Arusha Protocol speaks of different level of remuneration to be paid by small scale commercial farmers and large scale commercial farmers. But this differentiation is not reflected in the Draft Regulations. In fact Rule 14(4) suggests that the same level of remuneration will be paid by both.
- (ii) The Draft Regulations does not define small scale commercial farmers or large scale commercial farmers.
- (iii) It is incredible that the Draft Regulations requires small-scale farmers to pay the right holder remuneration for saving and propagating on their own holding the protected variety. Even, the EU *where small scale farmers have a better economic status*, exempts small farmers including small scale commercial farmers from payment of remuneration for saving protected seed and propagating on their own holding for the list of varieties that have been identified.

The EU regulations define small farmers in the context of its own specificities but sets as a general standard that small farmers are those that do not grow plants on an area bigger that which would be needed to produce 92 tonnes of cereals or 185 tonnes of potatoes. The EU differentiates between varieties which are fodder plants, potatoes and which fall within the EC Council Regulation No. 1765/92. In any case, the main principle is that small scale commercial farmers should be excluded from paying any remuneration for saving and propagating seeds for crops identified in a list.

This aspect is missing from the Draft ARIPO Regulations as it requires all farmers to pay remuneration for saving protected seed and propagating on his or her own holding. This is so despite previous agreement among ARIPO member states as documented in ARIPO documents “It was also added that where such traditional practice of saving seeds occur, small holder farmers shall not be required to pay any remuneration or compensation to the breeder.” (see paragraph 13 of ARIPO/CM/XIV/8).

Given the above we propose that Rule 14 should clarify that with regard to the list of crops and vegetables specified by the Administrative Council in accordance with Article 22(2), small-scale commercial farmers shall not be required to pay any remuneration to the holder.

For this purpose, small-scale commercial farmers may be defined as those that plant the varieties specified in the list, irrespective of the area on which they grow other plants, do not grow such varieties on an area bigger than the area needed to produce 92 tonnes of cereals per harvest. In the case of potatoes, irrespective of the area on which they grow plants other than potatoes, do not grow potatoes on an area bigger than the area which would be needed to produce 185 Metric Tones of potatoes per harvest.

Other farmers (i.e. large scale commercial farmers) shall be required to pay remuneration, the basis of which needs further discussion.

This approach is consistent with Article 22(3) of the Arusha Protocol as there will be differentiation between the level of remuneration between small scale commercial farmers (which do not have to pay any remuneration) and large scale commercial farmers (which have to pay remuneration).

4. *Remuneration:* Rule 14(4)(a) should be amended to delete reference to small scale commercial farmers as such farmers should be exempt from payment of remuneration.

Further its unclear what is meant by “sensibly lower than the amount charged for the licensed production of propagating material of the lowest category qualified for official certification, of the same variety in the same area” in sub-para (b) and “the level of remuneration shall be sensibly lower than the amount which is normally included, for the above purpose, in the price at which propagating material of the lowest category qualified for official certification, of that variety is sold in that area, provided that it is not higher than the aforesaid amount charged in the area in which that propagating material has been produced” in sub-para (c).

This vague text does not provide any certainty with regard to payment of remuneration. This lack of certainty is against the interests of African farmers. ARIPO Member states should query the ARIPO Secretariat as to the basis for the abovementioned text on remuneration, what it actual means in terms of monetary payments that will need to be made and assess whether it is reasonable and affordable for African farmers taking into account their circumstances..

5. *Information to be provided by farmers to the breeders:* Rule 14(5) is open-ended as it requires all farmers to provide information to the breeder irrespective of whether they have utilized the protected variety. This opens farmers to harassment and intimidation.

It is critical to note that even in the EU, the provision of information by farmers to breeders is extremely controversial to the extent that the European Court of Justice has placed limits on the right holders' right to information. For example, in Germany, seed companies wrote letters to all "farmers" (including dead farmers and people who were not farmers) demanding a full inventory each year of what seed they are growing, to determine the royalty on farm-saved seed that the companies should collect. This matter was taken up to the European Court of Justice which ruled that the seed companies cannot indiscriminately wrestle such information out of the farmers without prior evidence of use. *Schulin v Saatgut* (C-305/00, 2003) established that a breeder could not request information from a farmer regarding use of farm saved seeds without prior evidence of such use. *Schulin v Jäger* (C-182/01, 2004) confirmed the 2003 ruling.

Thus we propose the following amendments:

(5) Information to be provided by farmers to breeders

For the purpose of implementing Article 22 (3) of the Protocol in these Regulations, **unless a breeder has prior evidence of use by farmer of a specific protected variety, a breeder shall not be entitled to request information from a farmer. In requesting information from the farmer, the breeder should specify the specific protected variety for which it requires information and the evidence it has with regard to prior use by the farmer. The** ~~on the~~ information to be provided by the farmer to the breeder, ~~the following should be included~~ **shall be limited to:**

- (a) ~~The details of the farmer and~~ address including the location of farmer`s own holding;
- (b) The details of **use of** the protected variety ;
- ~~(c) — Quantity of seed saved;~~
- ~~(d) — The detail of the processor if the saved seed has been processed.~~

Point (c) has been deleted as the breeder is not entitled to know generally how much seed is saved by the farmer. The breeder is only entitled to information with regard to use of the protected variety. The breeder is not entitled to any information with regard to processing of seed. This information is not contemplated in Article 22(3) of the Protocol and is ultra vires the scope and ambit of these Regulations. Thus sub-rule (c) and (d) should be deleted.

11. Rule 15 Proceedings before ARIPO

12.1. Rule 15(1) should be amended as follows to include **Any person who files an objection as provided by Article 16 of the Protocol.**

12.2 Rule 15(4)(d) is rather unfair as it allows the ARIPO Office leeway for not following the service rules mentioned in (a), thus it should be deleted.

12. Rule 18 Appeals

12.1 In regard to Rule 18(2), the Rules and Procedures specified in Article 34(8) of the Protocol should be in the public domain and its easy access by the public should be provided for. Technically speaking, until these Rules and Procedures are made the Appeal Board will not be able to function as a crucial institution to ensure administrative and due process.

12.2 The Board of Appeal is supposed to be an independent body with functions that includes reviewing the decisions of the ARIPO Office. Given this it's rather strange for the ARIPO Office to be the Secretariat of the Board of Appeal (Rule 18)(3b) and for the ARIPO Office to be taking evidence (Rule 18(5)) and to appoint an expert (Rule 18(6)). Further Article 34 of the Protocol is clear that the Board shall make its own rules of procedure, thus questioning the need for sub-para 5 and 6. In view of these comments Rule 18 should be amended.

13. Rule 20 Apportionment and determination of costs

14. Rule 20(1)(b) dealing with the awards of costs in various circumstances to be set by the ARIPO Office. We strongly recommend that first, this award as to costs should be not set by the ARIPO Office but by an independent committee called for above. Second, we bring to the attention of the ARIPO Secretariat and Member States, the decision of the Constitutional Court of South Africa on the issue of adverse costs being awarded in the case of public interest litigation. In the case of *The Trustees, Biowatch Trust v Registrar: Genetic Resources* 2005 (4) SA 111 (T); 2009 (6) SA 232 (CC) a legal precedent was set regarding the "conditions within which public interest organisations can litigate without expecting the chilling effect of costs orders being made against them, and helped develop legal clarity and guidance on when costs can be applied"⁴. The relevant Provisions set out in the South Africa's National Environmental Management Act (NEMA), No. 107 of 1998 on awarding of costs in public interest cases is also supported in the South African Constitution and is instructive for the redrafting of Rule 20:

Section 32(2) "A court may decide not to award costs against a person who, or group of persons which, fails to secure the relief sought in respect of any breach or threatened breach of any provision including a principle of this Act or any other statutory provision concerned with the protection of the environment or the use of natural resources if the court is of the opinion that the person or group of persons acted reasonably out of a concern for the public interest or in the interest of protecting the environment and had made due efforts to use other means reasonably available for obtaining the relief sought."

⁴ A Landmark Victory for Justice. Biowatch's Battle with the South African State and Monsanto THE INSIDE STORY. Rachel Wynberg and David Fig. March 2013.
<http://www.biowatch.org.za/docs/misc/2013/A%20Landmark%20Victory%20for%20Justice.pdf>

13. Rule 22 Compulsory Licenses

13.1 The issue of Contracting States granting a compulsory license is a matter that falls within the sole discretion of the Contracting Party and is not a matter for those administering the Protocol to direct. Therefore Rule 22(1) should be amended as follows:

(1) Where a National Authority of a Contracting State grants a compulsory license of a breeder's right for reasons of public interest in accordance with Article 24 of the Protocol, the following ~~should~~ **guidelines may** be considered:

13.2 Rules 22(1)(c), (g), (h) are far too prescriptive and restrictive and should be deleted. These sub-paras also do not support the sovereignty and interest of Contracting Parties. For example if a Contracting Party decides to issue a compulsory license in its own national interest, why should it have to try to obtain a voluntary license as suggested in sub-para (c). Further when a CL is issued, why should a government be limited to only supplying domestic markets as mentioned in sub-para (g). There is simply no legal basis or rationale for the inclusion of these conditions.

13.3 Sub-para (d) should be amended as follows: the right holder **may** ~~should~~ be paid equitable remuneration ~~in the~~ **depending on the** circumstances of each case.

The reason for this amendment is that there are events whereby payment of remuneration may not be appropriate, such as where CL is issued to remedy anti-competitive behaviour.