

Comments on the revised draft regulations (draft 3) for implementing the Arusha Protocol for the Protection of New Varieties of Plants

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Contents:

I. INTRODUCTION	2
II. GENERAL COMMENTS.....	3
1. Draft Regulations perpetuate impingement of National Sovereignty, continue to flout Protocol:3	
2. Draft Regulations fail to safeguard the rights of farmers.....	3
4. The Draft Regulations enable biopiracy.....	3
III. SPECIFIC COMMENTS & ALTERNATIVE PROPOSALS	4
III.1 Comment on Rule 2: Applications for a Breeder’s Right	4
III.2 Rights of Contracting States: Operationalizing Article 4 of the Arusha Protocol.	5
III.3 Comment on Rule 15: Exceptions to Breeder’s Right.....	7
III.4 Comment on rule 15(3): Remuneration.....	10
III.5 Comment on rule 15(5): Information to be provided by farmers to the breeders:	10



TWN
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ALLIANCE FOR FOOD SOVEREIGNTY IN AFRICA

I. 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 and farmer organizations 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.¹ 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; undermine the realization of Farmers' Rights; facilitates and/or fails to curb biopiracy; undermine 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.

African civil society and farmer organizations have also on numerous occasions highlighted concerns about the un-transparent and flawed process by which the Protocol was developed and the deliberate locking out of African civil society and farmer representatives from deliberations when the Arusha Protocol was adopted on the 6th July 2015.²

The comments contained in this submission, are in respect of a further draft of the Regulations that will be submitted to the Administrative Council for consideration and adoption. There are a number of serious concerns in relation to the Draft Regulations that have been raised in the past and that continue to remain valid with regard to the revised Draft Regulations that will be presented to the Administrative Council. These concerns are available in the submission by African Centre for Biodiversity at http://acbio.org.za/wp-content/uploads/2016/07/ACB-comments-revised-ARIPO-Regs_270716.pdf

Without prejudice to those concerns, this paper focuses on some of the most problematic aspects that needs to be rectified by ARIPO Member States as these perpetuate impingement of national sovereignty; fail to safeguard Farmers' Rights and farmer seed systems; and 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 (LDCs) and under no legal obligation to implement plant variety protection (PVP) regimes.

¹ See <http://acbio.org.za/wp-content/uploads/2015/02/CSOconcernsonARIPO-PVPframework1.pdf> & <http://acbio.org.za/wp-content/uploads/2015/02/AFSA-letter-ARIPO-March2014-.pdf>

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

II. GENERAL COMMENTS

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

We are astonished that the Draft Regulations continue to ignore the operationalization of Article 4(1) of the Arusha Protocol. The Draft Regulations fail to provide a mechanism for Contracting Parties to object to the grant of plant breeders' rights (PBRs) from being applicable in their respective territories as envisaged by Article 4(1) of the Protocol. Member States themselves fought hard for this right to be included in the Protocol and have continuously insisted on the importance to be able to object to the grant of any PBR application being operational in their respective countries. Hence, we call on ARIPO Contracting Parties to remedy this fundamental defect. We have proposed some text to operationalize Article 4(1) of the Protocol, see below section III.2

2. Draft Regulations fail to safeguard the rights of 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) of the Protocol in order to safeguard the rights of small-scale farmers to freely use, save, exchange and sell seeds and propagating materials of protected varieties even in local markets. This is despite overwhelming evidence that point to the importance of safeguarding the interest of small-scale farmers who are the backbone of agriculture in the ARIPO region. Such farmers should freely and without any impediment, be able to continue to access all seed including protected varieties through, exchange between themselves and purchase from local markets in Africa.³ In short, the exception of "private and non-commercial purposes" should be defined to give small-scale farmers full freedom to operate in relation to protected varieties. These farmers operate on a rather small scale, often farming on land of less than 3 hectares and thus are unlikely to pose any significant threat to the interests of the right holder. See below the discussion and proposals in Section III.3.1.

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 the same. This is wholly inequitable as the Regulations require small scale commercial farmers along with large scale farmers to pay remuneration to the right holder when saving seed for purposes of propagation on their own holding, for protected varieties which are included in the list contemplated by Article 22(2) of the Protocol. Even in the EU, small-scale commercial farmers who are much better off economically than their counterparts in the ARIPO Region are exempt from payment of such remuneration. See below the discussion and proposals in Section III.3.2

See also comments in Section III.4 and III.5, which highlight deficiencies in the Draft Regulations' provisions on the subject of remuneration and provision of information to farmers.

4. 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 thereafter claiming PBRs over such varieties, all without

³ McGuire and Sperling, 2016, "Seed systems smallholder farmers use" available at <http://link.springer.com/article/10.1007/s12571-015-0528-8>

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 proposals in Section III.1

III. SPECIFIC COMMENTS & ALTERNATIVE PROPOSALS

III.1 Comment on Rule 2: Applications for a Breeder’s Right

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

(b) The application will contain:

[.....]

- **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.**
- **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.**
- **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.**

Serious concerns have been raised of the failure of the Arusha Protocol and the Draft Regulations to require the applicant to disclose the origin of the variety/breeding material in order to prevent misappropriation of local genetic resources.

CSOs and farmer representatives participating in the finalization of the draft SADC PVP Protocol in March 2014 raised similar concerns. 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. An example of misappropriation is the “Turkey Purple Carrot” whereby 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 benefits.

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.”⁴

In order to prevent biopiracy and be 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 needs to be amended.

The first bullet proposed for inclusion in Rule 2(1)(b) is similar to that contained in the SADC Protocol. The second bullet point is proposed to require the applicant to disclose the source of the genetic material and for the applicant to declare if any community has contributed to the development of the new variety. This declaration will facilitate fair and equitable benefit sharing to the relevant communities.

Many ARIPO Members are also Contracting Parties of the CBD and the ITPGRFA and have a commitment to operationalize fair and equitable benefit sharing. Given that PVP applications are an important checkpoint for the implementation of access and benefit sharing legislation, the proposed two bullets are essential.

The third bullet point is proposed as an applicant should first comply with biosafety laws before a grant of breeders’ rights is obtained over a GMO variety. Some may argue that this provision is not necessary as Monsanto and other developers of GMOs would still need to comply with national biosafety and marketing laws to commercialize a GM variety. However, the grant of breeders’ rights provides a strong incentive for the commercialization of GMOs in countries where the introduction of the technology is not only contentious but vigorously contested, thus breeders’ rights over GMO varieties should only be accorded in countries that have approved the particular GM variety for commercial growing.

Finally the inclusion of the abovementioned paragraphs ensures mutual supportiveness and coherence of laws at the national level.

III.2 Rights of Contracting States: Operationalizing Article 4 of the Arusha Protocol.

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 omission on the part of the ARIPO Secretariat. This omission needs to be highlighted and rectified.

⁴ <http://acbio.org.za/wp-content/uploads/2015/02/AFSA-Briefing.pdf>

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 does not recognize the right of ARIPO Members to have access to the applications as well as to the technical examination reports. Timely access to the applications as well as to the examination reports is imperative to safeguard the right of a member state to object to the grant of PBRs. 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.

Recommendation: To Add Proposed Text (Rule 9bis)

Rights of Contracting States

- (1) The ARIPO Office shall promptly make available to Contracting States the application received and all documentation related to the application including examination results concerning novelty, distinctness, uniformity and stability as well as variety denomination.**
- (2) Where the ARIPO Office has decided to grant breeder's right, it shall promptly notify the Contracting States in writing.**
- (3) On receiving this written notification a Contracting State may:**
 - (a) within 12 months make a written communication to the ARIPO Office, 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) within 12 months make a written communication to the ARIPO Office 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 novelty, distinctness, uniformity and stability. In this case, the Contracting State may inform the ARIPO Office within 36 months of receiving the notification mentioned in (2), that if the ARIPO Office grants breeders' right, 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.

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 3(a));
- (iii) the text safeguards the right of Contracting states to undertake DUS examination in its own fields, if it is dissatisfied with the Examination report. This is important due to differences in climate and soil among ARIPO Members.

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 time limits of 12 months and 24 months. .

At the very least sub-paras (1), (2) and 3(a) should be included in the Draft Regulations.

III.3 Comment on Rule 15: Exceptions to Breeder's Right

III.3.1 Lack of Definition for Exception "acts done privately and for non-commercial purposes"

Sub-rule 15(1) of the Protocol states that breeders' rights shall not extend to Article 22(1) of the Protocol, which refers to "acts done privately and for non-commercial purposes". However, the lack of definition creates significant uncertainty as to which acts are exceptions to breeders' rights.

Existing literature and evidence are conclusive of the need for policy to accommodate the needs of small-scale farmers.⁵ Moreover 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 reusing farm saved seed, and through exchange and purchase from the local markets. One study across six countries and 40 crops concluded that smallholder farmers get seeds mainly from local markets (51%); their own stock (31%); from neighbours (8.6%); from government / NGOs / UN (7.3%) and from agro-dealers (2.4%).⁶

As such it is important to safeguard the practices of freely being able to use, save, exchange and sell in local market. This will enable widespread uptake and dissemination of new varieties among farmers. Smallholder farmers generally own less than 2 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. Moreover most ARIPO

⁵ See for example the 2015 FAO Voluntary Guide for National Seed Formulation.

⁶ McGuire and Sperling, 2016, "Seed systems smallholder farmers use" available at <http://link.springer.com/article/10.1007/s12571-015-0528-8>

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".

Smallholder 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 defining the exception of acts done privately and for non-commercial purposes. The Draft Regulations fail to include such a definition. 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, resulting in a significant legal uncertainty as to what is allowed and not allowed with regard to the protected variety.

Failure to accommodate the interest of smallholder farmers would also confirm that the Arusha Protocol is biased in favour of commercial interests and set against the wellbeing and interests of African smallholder farmers that are the backbone of agricultural systems in Africa.

III.3.2 Need to Exempt small-scale commercial farmers from payment of remuneration for saving seed of protected variety on own holding

Rule 15(2) is established in connection with Article 22(2) of the Protocol, which allows farmers to save seed for propagating purposes *on their own holdings* with regard to crops specified by the Administrative Council, however it appears subject to payment of remuneration.

Article 22(3) of the 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 15(4) suggests that both will pay the same level of remuneration. The Draft Regulations does not define small-scale commercial farmers or large-scale commercial farmers. A list to be submitted to the Administrative Council highlights agricultural and vegetable crops for which a farmer may save and propagate seed of protected varieties on the farmer's own holding. The list includes the acreage that defines a smallholder farmer. The details vary country by country. For instance Ghana lists crops such as maize, rice, cassava, cowpea, yams as crops for which seed saving may be allowed while smallholder farmers are defined as having a holding of between 0.25 to 0.80 hectares in relation to the crops listed. But there is nothing in the Draft Regulations that exempt these farmers from payment of remuneration, suggesting that these farmers may have to pay remuneration for saving seed for propagating purposes on their holdings.

In Europe, small farmers (most of whom are small scale commercial farmers) are exempted from payment of remuneration for saving and propagating on their own holding, protected varieties identified in a list. The EU regulations define small farmers as those that do not grow plants on an area bigger than which would be needed to produce 92 tons of cereals or 185 tons of potatoes. The area to produce 92 tons of cereals in Europe is about 15hectares (based on an average yield of 6 tons/ha)⁷.

⁷ <http://data.worldbank.org/indicator/AG.YLD.CREL.KG?end=2014&start=2014&view=map>

15hectares is also near to the average farm size in Europe (16.1ha in 2013).⁸ 6 Member states of the EU have an average farm size under 10hectares. In any case, the main principle is that small-scale commercial farmers are excluded from paying any remuneration for saving seeds for propagating purposes on the farmers' own holding for crops identified in a list.

In Switzerland, a farmer has an average holding of 22 hectares and ALL farmers (small or large) are exempted from having to pay remuneration for saving and propagating seed of a protected variety on the farmers own holding. However a similar exemption is absent in Rule 15 meaning that African small-scale commercial farmers with a lower economic status than European small commercial farmers will have to pay remuneration. To rectify the inequity in Rule 15, the following recommendations are made.

Recommendation: To add to Rule 15(1)

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.

Options for defining small-scale farmers:

Option A: A small-scale farmer is someone that earns less than US\$10,000 per year from farming. This is the definition of resource-poor farmers in the licensing agreement of Syngenta on Golden Rice.⁹

Option B: A small-scale farmer is someone whose total earnings from sales of farm-saved seed do not exceed the average household income. This approach is taken by the draft Ethiopian PBR Bill.¹⁰

Option C: A small-scale farmer is a farmer whose farming operations do not exceed 2 hectares of cultivated land.¹¹

Recommendation: To add to Rule 15(2)

With regard to the list of crops specified by the Administrative Council for purposes of Article 22(2) of the Protocol, 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 tons of cereals per harvest. In the case of potatoes, irrespective of the area on which they grow plants other than potatoes, do not

⁸ http://ec.europa.eu/eurostat/statistics-explained/index.php/Farm_structure_statistics

⁹ http://www.goldenrice.org/Content1-Who/who4_IP.php

¹⁰ B. De Jonge, Plant Variety Protection in Sub-Saharan Africa: Balancing Commercial and Smallholder Farmers Interests (2014), Journal of Politics and Law, 7(3), 100-111.

¹¹ 2015 Food and Agriculture Organization of the United Nations. SARAH K. LOWDER, JAKOB SKOET and TERRI RANEY;

http://ac.els-cdn.com/S0305750X15002703/1-s2.0-S0305750X15002703-main.pdf?_tid=fdac556c-a72f-11e6-9741-00000aacb362&acdnat=1478773704_805c38e47a02722c4b5cd39430b679e5. This paper was prepared as background research for The State of Food and Agriculture 2014, available at <http://www.fao.org/publications/sofa/en>

grow potatoes on an area bigger than the area, which would be needed to produce 185 Metric tons of potatoes per harvest.

The proposed definition is similar to that found at the European level. It is also clear that other farmers (i.e. large scale commercial farmers) shall be required to pay remuneration, the basis of which needs further discussion (see below).

III.4 Comment on rule 15(3): Remuneration

Rule 15(4)(a) should be amended to delete reference to small scale commercial farmers as explained above such farmers should be exempt from payment of remuneration.

Further it is unclear what is meant by “*shall be reasonably 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 reasonably 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.

III.5 Comment on rule 15(5): Information to be provided by farmers to the breeders:

The present text of Rule 15(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 makes farmers vulnerable 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.

Recommendation: To amend Rule 15(5) as follows:

(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 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 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 the farmer saves. 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.