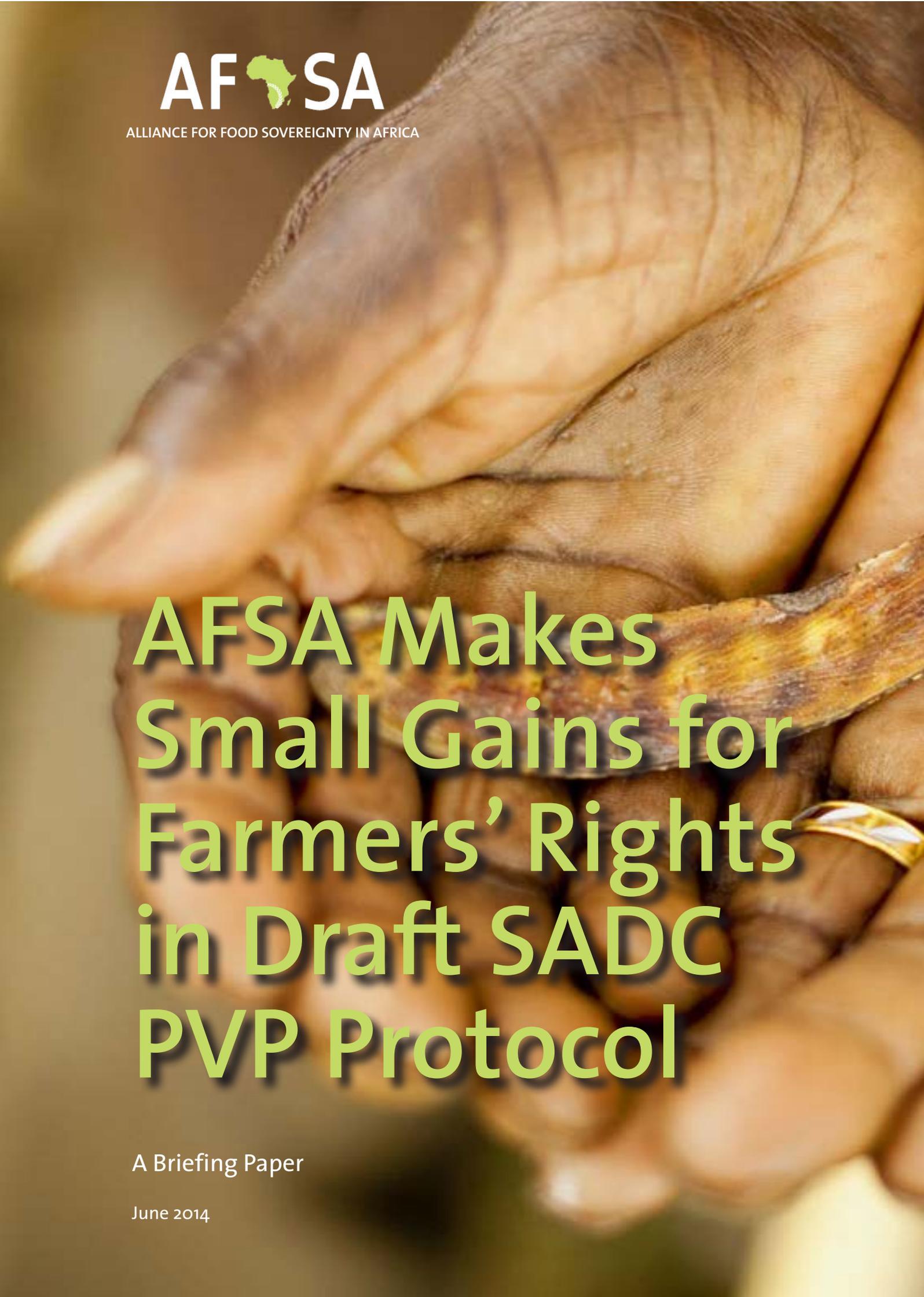




AFSA

ALLIANCE FOR FOOD SOVEREIGNTY IN AFRICA



AFSA Makes Small Gains for Farmers' Rights in Draft SADC PVP Protocol

A Briefing Paper

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The **ALLIANCE FOR FOOD SOVEREIGNTY IN AFRICA (AFSA)**
is a Pan African platform comprising networks and farmer
organisations working in Africa.¹

Acronyms

AFSA	Alliance for Food Sovereignty in Africa
AGRA	Alliance for a Green Revolution in Africa
COMESA	Common Market for East and Southern Africa
FAO	Food and Agriculture Organisation
GM	Genetically modified
ITPGRFA	The International Treaty on Plant Genetic Resources for Food and Agriculture
UPOV	The International Union for the Protection of New Varieties
LDC	Least developed countries
PVP	Plant variety protection
SADC	Southern African Development
TRIPS	Trade-Related Aspects of Property Rights
WTO	World Trade Organisation

BACKGROUND

More than 80% of all seed in Africa is still produced and disseminated through “informal” seed systems², that is, through on-farm seed saving and unregulated distribution between farmers. This system has survived for centuries and has generated a wide diversity of seed adapted to local agroecological conditions. Efforts by a range of players including, but not limited to, the G8’s “New Alliance for Food Security and Nutrition in Africa”, the Alliance for a Green Revolution in Africa (AGRA), African and foreign governments and the seed industry to expand agricultural production have identified limits to the commercialisation of these systems. These limits include ceilings on yields using “unimproved” seed and those around introducing improved varieties into traditional systems. Their agenda is to restructure seed systems to enable the production and distribution of improved seeds as part of the objective of increasing agricultural yields in Africa. The emphasis is on hybrids (although also some improved open-pollinated varieties) with the possibility of the future expansion of genetically modified (GM) seed beyond South Africa. Improved seed is part of the Green Revolution package of synthetic fertilisers, agrochemicals, credit and sales into global markets.

Donors and potential investors have identified weak governance and regulatory systems and institutions in Africa as immediate obstacles to the expansion of seed systems based on quality controls and intellectual property rights. A key priority in the commercial agenda is to facilitate regional harmonisation of policies and laws to regulate and support investment in seed and agrochemicals. African governments are being co-opted en masse into restructuring their seed laws and supporting the implementation of plant variety protection (PVP) laws through fast-tracked regional harmonisation processes and trading blocs.

One such harmonisation effort is the Southern African Development Community’s Draft Protocol for the Protection of New Varieties of Plants (draft SADC PVP Protocol), which aims to provide secure markets for private investment including, and especially through, the protection of private ownership over seed in the form of intellectual property rights, based on the provisions of UPOV 1991.³

As far back as March 2013, members of AFSA raised serious concerns regarding the draft SADC PVP Protocol,⁴ whose architecture is based on UPOV 1991. Chief among its concerns are that UPOV 1991 is a restrictive and inflexible legal regime that grants extremely strong intellectual property rights to commercial breeders and that it undermines farmers’ rights. Such a regional law will most certainly increase seed imports, reduce breeding activity at the national levels, facilitate monopolisation of local seed systems by foreign companies, and disrupt traditional farming systems upon which millions of African farmers and their families depend for their survival.

Serious concerns were raised about by the lack of consultation with smallholders and civil society regarding the modeling of the draft SADC PVP Protocol on UPOV 1991 and their exclusion from the drafting of said Protocol.

SADC REGIONAL WORKSHOP TO REVIEW DRAFT PROTOCOL FOR PROTECTION OF NEW VARIETIES OF PLANTS

These concerns around the lack of public participation and consultation were heard and addressed by the SADC Secretariat in that some AFSA members⁵ were invited to participate at a SADC Regional Workshop that took place 13-14 March 2014, in Johannesburg, South Africa. The aim of the workshop was to review the draft SADC PVP Protocol. The Seed industry in Africa was well represented at the workshop,⁶ as were several farmer unions/associations.⁷

The proceedings took the form of line-by-line discussions between AFSA members and representatives of the SADC member states of the draft SADC PVP Protocol. Discussions were extremely contentious and, often times, hostile. AFSA members made numerous (continuous) interventions throughout the proceedings.⁸ Indeed, every effort was made on the part of the SADC Secretariat and the chairperson, Dr Banda from Malawi, to give AFSA members a chance to voice their concerns and make their inputs. AFSA members repeatedly placed on record their serious objections to the draft SADC PVP Protocol being based on UPOV 1991. The principal concerns raised included that such a regime:

- Promotes only one particular type of plant breeding system, namely industrial breeding for cultivation in large-scale, monocropping, commercial farming systems.
- Promotes industrial farming systems heavily dependent on high irrigation and synthetic fertiliser and pesticide use and that these systems are ecologically unsustainable and socially unjust.
- Does not embody a *sui generis* (of its own kind) system that seeks to include and support the interests of all affected groups, including farmers, consumers, indigenous communities and local industries.
- Implies that member states of the SADC region turned a blind eye to its smallholders and their seed and farming systems. The provisions dealing with the exclusive rights granted to plant breeders' and the exceptions to those rights render the centuries-old African farmers' practices of freely using, exchanging and selling seeds/propagating material illegal.
- Extended exclusive plant breeders' rights to harvested material including entire parts of plants.
- Forbad farmers from freely exchanging or selling farm-saved protected seed and propagating material, even in circumstances where breeders' interests are not adversely affected, for example, in small amounts or for local rural trade.
- Is contrary to and in violation of the SADC Treaty,⁹ in particular, Articles 5 (1)¹⁰ and Article 6 (2).¹¹
- Is *ultra vires* (beyond the scope of) the SADC Treaty, having regard to Article 5(2)(a).¹²
- Does not take into account that Least Developed Countries (LDCs) that are member states of SADC, including Angola, Lesotho, Madagascar, Malawi, Mozambique, Tanzania and Zambia, have been given an extended transition period of eight years to put in place the intellectual property rights systems required by Article 27.3(b) of the World Trade Organisation's (WTO) Trade-Related Aspects of Property Rights (TRIPS) agreement. This is in recognition of the special requirements of LDCs, their economic, financial and administrative constraints, and the need for flexibility so that they can create a viable technological basis.¹³ Thus there is no legal international obligation for these countries to "provide protection for plant varieties either through patent protection either through patent protection or an effective *sui generis* system or a combination of the two" until 2021, as required by Article 27.3(b) of the TRIPS agreement. In this regard, the SADC Protocol is prematurely imposing obligations on its member states that it is not obliged under international law to implement currently.

After marathon, highly contentious and difficult discussions, AFSA members were able to persuade member states to amend key provisions in the draft SADC PVP Protocol dealing with “disclosure of origin” and “farmers’ rights”. It must be specifically noted that none of the farmers unions/associations present (as mentioned in note 7) gave any support whatsoever, to the concerns raised by AFSA members or the positions taken by AFSA members. Indeed, these farmer unions/associations were ominously silent, even during the marathon session when the heavily contested Article 28(d) of the draft SADC PVP Protocol dealing with farmers’ rights was discussed.

KEY PROVISIONS AMENDED

Disclosure of Origin

AFSA members raised concerns regarding the lack of a disclosure of origin provision in the draft SADC PVP Protocol. This provision aims to avoid a situation where a commercial entity seeks to obtain plant variety protection over biological resources, including plant varieties that belong to or are under the control of farmers and indigenous communities. Reference was specifically made to a recent example of such misappropriation in the “Turkey Purple Carrot” case. Monsanto’s subsidiary Seminis had 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.¹⁴

Requiring full disclosure of information on how the variety is developed in exchange for receiving plant variety protection is also critical for transfer of technology and knowledge to local communities. Moreover, full disclosure of information will enable SADC member states to ensure that varieties that are injurious to health and the environment do not receive protection.

After much discussion and following a positive intervention from the SADC Secretariat that “we cannot exploit farmers,” SADC member states agreed to including, as part of the application requirements for a plant breeder’s rights, a declaration to the effect that the genetic material or parental material acquired for breeding, evolving or developing the variety was lawfully acquired.

Farmers’ rights

Articles 27 and 28 of the draft SADC PVP Protocol were, by far, the most contested set of provisions at the workshop. The provisions in Articles 27 and 28 epitomise the stark tensions between exclusive breeders’ rights granted to the breeder and farmers’ rights. Article 27 sets out the scope of the exclusive rights granted to breeders and Article 28 dealt with the exceptions to such rights.

The concept of farmers’ rights was developed to reflect the contributions made by traditional farmers, particularly in the developing world, to the preservation and improvement of plant genetic resources. The Food and Agriculture Organisation (FAO) Resolution 5/89 defines farmers’ rights as those “rights arising from the past, present and future contributions of farmers in conserving, improving and making available plant genetic resources, particularly in centres of origin/diversity”.¹⁵ Such rights are also recognised in Article 9 of the The International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA),¹⁶ to which Angola, Democratic Republic of Congo, Lesotho, Mauritius, Malawi, Namibia, Swaziland, Seychelles, Zambia and Zimbabwe are contracting parties.¹⁷

Article 27 (1) confers exclusive rights to plant breeders to:

- Produce and multiply propagating material of the protected variety
- Package for purposes of propagation

- Sell, market, export, import and store the protected variety.

Article 27(2) also extends the exclusive rights of the breeder to harvested material, including entire plants and parts of plants.

Anyone who wants to undertake any of the above activities must obtain the consent of the plant breeder in the form of a licence granted by the right holder, and usually upon payment of royalties.

The exception to the plant breeders' rights having a direct bearing on farmers' rights was originally provided in Article 28(d) as follows:

“(d) acts done by subsistence farmers for the use for propagating purposes, on their own holdings, the product of the harvest which they have obtained by planting, on their own holdings the protected variety or varieties covered by Article 27(3) (a)(i) or (ii) to this Protocol.”

This provision was totally unacceptable to AFSA members and they engaged the member states for the better part of seven hours on the second day of the workshop on this provision alone. The provision, modeled on Article 15(2) of UPOV 1991, limits smallholder subsistence farmers, who constitute the majority of farmers in the SADC region, to re-planting farm-saved seeds of the protected variety only on their own fields and to using the product of the harvest only on their own fields. Such farmers are thus not allowed to exchange, barter, or sell either farm-saved seeds of the protected variety or to share the product of their harvest with anyone else (for example, family, neighbours or the community). Smallholders are also not allowed to exchange, barter or sell the product of their harvest if it derived from the replanting of farm-saved seeds of a protected variety.

Several recommendations for a substitute clause were made by AFSA members, some of these were also supported by the FAO representative present. Towards the end of the second day, it did look as if consensus would not be reached on an alternative clause, as almost all the member states present were not prepared to shift their positions to retain the disputed Article 28(d). Continuous interventions by AFSA members eventually prompted representatives from Botswana and South Africa to support the inclusion of an alternative clause and with AFSA members redrafted a compromise exception to plant breeders' rights clause as follows:

“(d) acts done by a farmer to save, sow, re-sow or exchange for non-commercial purposes his or her farm produce, including seed of a protected variety, within reasonable limits and subject to the legitimate interests of the holder of the breeder's right. The reasonable limits and the means of safeguarding the legitimate interests of the holder of the breeder's right shall be prescribed.”

While being an improvement on the clause it has replaced, a great deal will depend on how “non-commercial purposes” and “reasonable limits and safeguarding the legitimate interests of the holder of the breeder's right” will be further elaborated in regulations.

ROAD MAP – WHAT MAY LAY AHEAD

At the time of writing, the SADC Secretariat was unable to provide AFSA with a road map for the draft SADC PVP Protocol. Nevertheless, the SADC Treaty provides some guidance in Article 22 stating that the only binding instruments between SADC member states are Protocols. A Protocol is only given life when it has approved by the Summit of the Heads of States, on the recommendation of the Council of Ministers from each member state responsible for economic planning or finance where after it may be open to signature and ratification. We know of no such recommendation being made and it is therefore not likely that the draft SADC PVP Protocol will

be tabled at the next Summit of the Heads of State due to take place in Zimbabwe in August 2014.

CONCLUSION

While some space was opened through the participation of AFSA members at the very tail end of the workshop, the objections to the draft SADC PVP Protocol being based on UPOV 1991 still remain. Indeed, the road ahead for smallholders and their seed systems continues to look extremely bleak. A radical shift is required at the political level away from a singular system that favours only one kind of plant breeding (industrial) and corporate seed systems that facilitate commercial growing and regional trade in improved and protected seed only and in which smallholders' role is defined as that of passive consumers or growers in certification schemes (that produce improved/protected seed) to a system that embraces a multitude of actors and encourages a diversity of farming systems and seed. Current policy directions are based on the fallacious notion that African hunger is caused by farmer's varieties, which are low yielding and spread disease, employed within a "backward" agricultural system that needs to be modernised. However, the reality is that smallholders continue to provide food for more than 50% of the global population, with scant resources and support, while industrial agriculture, propped up with huge subsidies, investment, infrastructure and research and development, only manages to supply some 30% of our nutritional needs.¹⁸ If we are to deal with food insecurity in Africa, it is vital that our leaders support and help to improve farmer-managed systems and recognise that Green Revolution technology will ultimately benefit an elite few with the resources to enter the system.

The SADC Treaty obliges member states to treat all the farmers in the region equitably. SADC is obliged to conduct meaningful consultation with smallholder farmers to discuss issues of national and regional importance to these farmers including, for example, creating an enabling environment for the protection of farmers' varieties and providing extension support for farmers' seed systems to enable them to flourish. SADC must shift its agriculture policies towards a broad and inclusive approach to food systems, ones in which farmers and consumers should hold substantial control. Africa's rich food history, closely linked to the diverse cultures across the continent, should be recognised and respected as should the farmers who grow diverse food in a sustainable way to enhance agricultural biodiversity, nutrition and ecosystem resilience.

References

- 1 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).
- 2 Smale, M., Byerlee, D. & Jayne, T. 2011 "Maize revolutions in sub-Saharan Africa". *Policy Research Working Paper 5659*. Washington DC, World Bank, Development Research Group, p.7.
- 3 International Convention for the Protection of New Varieties of Plants of December 2, 1961, as revised at Geneva on November 10, 1972, and October 23, 1978.
- 4 Civil Society Submission on SADC PVP Protocol (2013) [Online] Available at: <http://www.acbio.org.za/images/stories/dmdocuments/CSO-submission-SADC.pdf>. Accessed on 6 June 2014.
- 5 The AFSA members who participated at the workshop included the African Centre for Biosafety (ACB) Zimbabwe Small-scale Organic Farmers Forum (ZIMSOFF), East and Southern Africa Farmers Forum (ESAFF), Centre for Environmental Policy and Advocacy (CEPA), Tanzania Alliance for Biodiversity (TABIO), Community Development Technology Trust (CTDT) and the Food Sovereignty Campaign/Surplus People's Project (SPP).
- 6 Seed Traders Association of Malawi, National Seed Trade Association Angola, Pannar South Africa, Tanzania Seed Trade Association, Zambia Seed Trade Association, Seed Co Zimbabwe, and the South African National Seed Organisation (SANSOR) and the Zimbabwean National Farmers Union.
- 7 Southern African Commercial Agriculture Union (SACAU), Lesotho National Farmers Union, Small Farmers Welfare Fund Mauritius, Seychelles Farmers Association.
- 8 SADC (2014) Record of Proceedings of a SADC Regional Workshop to Review the Draft Protocol for the Protection of New Varieties of Plants (Plant Breeders' Rights) in Southern African Development Community Region. Johannesburg, 13-14 March 2014.
- 9 The Treaty of the Southern African Development Community. [Online] Available at: http://www.sadc.int/files/9113/5292/9434/SADC_Treaty.pdf. Accessed on 10 June 2014.
- 10 Article 5(1) deals with the objectives of the SADC Treaty, including those around alleviating poverty, supporting the socially disadvantaged and protecting the environment.
- 11 Article 6 (2) obliges SADC and its member states to not discriminate against any person on the grounds of gender, religion, political views, race, ethnic origin, culture or disability.
- 12 Article 5(2)(a) deals with harmonisation and here the Article clearly contemplates harmonisation of political and socioeconomic plans and policies, whereas the draft SADC PVP Protocol is about harmonisation of rules and procedures for the grant of private law rights, and is not within the purview of what is contemplated by the SADC Treaty and is therefore not consistent with what the SADC Treaty envisages harmonisation should entail.
- 13 World Trade Organisation (n.d.) Responding to least developed countries' special needs in intellectual property. [Online] Available at: http://www.wto.org/english/tratop_e/trips_e/ldc_e.htm. Accessed on 13 May 2014.
- 14 Third World Network. (2014) Biopiracy of Turkey's Purple Carrot. [Online] Available at: http://www.twinside.org.sg/title2/intellectual_property/info.service/2014/ip140212.htm. Accessed on 10 June 2014.
- 15 FAO (1998) Resolution No. 5/89 adopted by FAO Conference, 25th Session, Rome, 11-20 November 1998.
- 16 The International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA) that entered into force in 2004 is the first legally binding international agreement that recognises farmers' rights. The Treaty defines farmers' rights as "rights arising from the past, present and future contributions of farmers in conserving, improving and making available plant genetic resources, particularly those in the centres of origin/diversity". Article 9 of the Treaty states that:
The Contracting Parties recognize the enormous contribution that the local and indigenous communities and farmers of all regions of the world, particularly those in the centres of origin and crop diversity, have made and will continue to make for the conservation and development of plant genetic resources which constitute the basis of food and agriculture production throughout the world.
The Contracting Parties agree that the responsibility for realizing Farmers' Rights as they relate to plant genetic resources for food and agriculture rests with national governments. In accordance with their needs and priorities, each Contracting Party should, as appropriate, and subject to its national legislation, take measures to protect and

promote Farmers' Rights, including: (a) protection of traditional knowledge relevant to plant genetic resources for food and agriculture; (b) the right to equitable participate in sharing benefits arising from the utilization of plant genetic resources of food and agriculture; and (c) 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.

According to the IT-PGRFA, the responsibility to realize farmers' rights through measures of protection and promotion rests with national governments. That means governments may or may not implement them. However the Treaty Preamble stresses the need to promote farmers' rights both nationally and internationally.

- 17 ITPGRFA (n.d.) Plant Treaty. [Online] Available at: http://www.planttreaty.org/list_of_countries. Accessed on 10 June 2014.
- 18 ETC Group (2009) Who will feed us? [Online] Available at: http://www.etcgroup.org/sites/www.etcgroup.org/files/ETC_Who_Will_Feed_Us.pdf. Accessed on 13 June 2014.