ARIPO'S PLANT VARIETY PROTECTION LAW BASED ON UPOV 1991 CRIMINALISES FARMERS' RIGHTS AND UNDERMINES SEED SYSTEMS IN AFRICA

The Alliance for Food Sovereignty in Africa [1] is gravely concerned about a draft law developed under the auspices of the Africa Regional Intellectual Property Organisation (ARIPO), dealing with a harmonised regional legal framework for the protection of plant breeders' rights, titled **'Draft Regional Policy and Legal Framework for Plant Variety Protection'.**

ARIPO is in the process of seeking the approval of its Member States [2] to adopt the legal framework, possibly at the next ARIPO Administrative Council and Council of Ministers meeting due to take place 25–29 November 2013 in Kampala, Uganda.

The regional legal framework is part of the broader thrust in Africa to harmonise seed laws at the regional economic community level to ensure regionally seamless and expedited trade in commercially bred seed varieties for the benefit of multinational seed companies. It is also designed to facilitate the transformation of African agriculture from peasant-based to inherently inequitable, dated and unsustainable Green Revolution/industrial agriculture. It is also a mechanism designed to coerce African countries into joining UPOV 1991, a restrictive and inflexible legal regime that grants extremely strong intellectual property rights to commercial breeders and undermines farmers' rights.

The ARIPO legal framework, if approved, will make it illegal for farmers to engage in their age-old practice of freely using, sharing and selling seeds/propagating material; a practice that underpins 90% of the smallholder agriculture systems in sub-Saharan Africa.

The ostensible rationale for the draft legal framework emanates from the ARIPO Secretariat – a committed champion of UPOV 1991–- that a regional PVP system is necessary to promote R&D in new plant varieties and that high performing plant varieties will increase agricultural productivity, improve rural income and ensure food security in Africa. These claims are, in turn, entirely based on those made by the UPOV Secretariat, foreign entities such as the United States Patent and Trademark Office (USPTO), the European Community Plant Variety Office (CPVO) and the seed industry (e.g. the African Seed Trade Association (AFSTA), the French National Seed and Seedling Association (GNIS) and the International Community of Breeders of Asexually Reproduced Ornamental and Fruit Varieties (CIOPORA). All of these entities have vested interests in promoting UPOV 1991. The seed associations represent powerful companies that will make huge commercial gains from the implementation of UPOV 1991 in ARIPO member states.

There is simply no evidence that the presence of a PVP system based on

UPOV 1991 will encourage the development of new varieties where no market exists [3] , which is the situation for most ARIPO Member States. There is also no independent empirical evidence supporting the view that UPOV 1991 will improve rural incomes or food security. Indeed, the adoption of UPOV 1991 is likely to increase seed imports, reduce breeding activity at the national level, facilitate monopolization by foreign companies of local seed systems, and disrupt traditional farming systems.

The process of developing the legal framework has been closed to farmers, farmer organisations, and other members of civil society. The industry and its linked associations such as the CIOPORA, AFSTA, GNIS, USPTO, the UPOV Secretariat, the CPVO) have extensively been consulted.

Civil society organisations and representatives of small-farmer groups – members of AFSA – have submitted a detailed critique of the draft regulations, calling upon ARIPO member states to reject the ARIPO regional legal framework and support the development of seed laws that acknowledge the extensive contribution of farmers as breeders and that uphold and promote the customary practices of small scale farmers to reuse farm saved seed**.**

However, our concerns have not been addressed, as observed at recent ARIPO deliberations on the draft legal framework, held in Lilongwe Malawi, 22–23 July 2013.

Summary of our key concerns:

1. The draft legal framework is based on UPOV 1991, a restrictive and inflexible legal regime**.** UPOV 1991 emanates from industrialised countries in response to the advent of large-scale commercial farming and commercial plant breeding. It is focused solely on promoting and protecting industrial seed breeders that develop genetically uniform seeds/plant varieties suited to mechanised large-scale agriculture. The UPOV 1991 framework is wholly unsuitable for African agriculture and does not remotely reflect or respond to the agricultural systems and conditions prevailing in Africa. It is worth noting that 12 out of 18 members of ARIPO are Least Developed Countries (LDCs) – some of the poorest countries in the world.[4] Ironically, LDCs are not currently, under any international obligation to provide any form of plant variety protection, let alone one based on UPOV 1991!

2. The draft legal framework facilitates industrial-style, monoculture-based farming systems, tilted heavily in favour of protecting the intellectual property rights of commercial seed breeders. It aims to replace traditional varieties with uniform commercial varieties and increase the dependency of smallholders on commercial seed varieties. This system aims to compel farmers to purchase seeds for every planting season or pay royalties to the breeder in the case of reusing farm-saved seeds. In addition, farmers are required to pay for expensive inputs (e.g. fertiliser) since the performance of these commercially protected varieties is often linked to such inputs, thereby creating vicious cycles of debt and dependence.

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

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

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

(i) Farmers that use a protected variety will not be allowed to freely exchange or sell farm-saved seed;

(ii) Farmers are only allowed to use such saved seeds for propagating purposes on his/her own holdings and subject to payment of royalties to the breeder. This limited exception is, however, ONLY applicable to a set of crops that will be specified by the ARIPO Administrative Council.

(iii) This very limited farmers' exception will not apply to fruits, ornamentals, vegetables or forest trees.

(iv) There are still further conditions on this hugely limited exception such as requiring farmers to provide information to breeders, the conditions of which are to be elaborated in further regulations to the ARIPO legal framework.

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

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

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

6. We reiterate our call that ARIPO member states must reject the legal framework and refrain from joining UPOV 1991. We call upon donors to desist from supporting these regulations, which undermine our national sovereignty and policy space. We urgently call for an open, transparent process, involving small farmers, especially, to discuss appropriate seed laws for Africa, where the obligation of protecting biodiversity, farmers' rights, and overall ecological productivity is entrenched as a primary objective.

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NOTES

1] **The Alliance for Food Sovereignty in Africa** (AFSA) http://www.africanbiodiversity.org/content/alliance_food_sovereignty_afsa represents a continental voice *against* the ongoing imposition of industrial agriculture in Africa and *for* food sovereignty through ecological agriculture. AFSA is a broad based alliance of African regional farmers' networks and

African NGO networks along with various other allies. The aim is to bring greater continental cohesion to an already developing food sovereignty movement in Africa.

[2] ARIPO member states include: Botswana, Gambia, Ghana, Kenya, Lesotho, Liberia, Malawi, Mozambique, Namibia, Rwanda, Sierra Leone, Sudan, Swaziland, Tanzania, Uganda, Zambia and Zimbabwe.

[3] Correa, C., “Designing Intellectual Policies in Developing Countries” by Carlos Correa, Third World Network (2010); Dufield, G., “the Role of the International Union for the Protection of new Varieties of Plants (UPOV), Quaker UN House, 2011

[4] Botswana, Gambia, Ghana, Kenya, Lesotho, Liberia, Malawi, Mozambique, Nambia, Rwanda, Sierra Leone, Somalia, Sudan, Swaziland, Tanzania, Uganda, Zambia, Zimbabwe (18 members, 12 members are LDCs (those underlined))