AFSA

ALLIANCE FOR FOOD SOVEREIGNTY IN AFRICA

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AFSA'S COMMENTS ON ARIPO's RESPONSES TO CIVIL SOCIETY: DRAFT LEGAL FRAMEWORK FOR PLANT VARIETY PROTECTION

At the 2013 November meeting of the Administrative Council and Council of Ministers held in Kampala, Uganda, several documents on the proposed legal framework for Plant Variety Protection were distributed. Also circulated was a Matrix[1] containing ARIPO's responses to a detailed submission by civil society organizations (CSO) dated 6th November 2012[2].

We have analysed the responses and are of the view that most of the responses given in the Matrix are evasive and baseless. Attached to this letter in Appendix 1, are detailed responses to ARIPO's Matrix.

From the responses given by ARIPO and the ARIPO document ARIPO/CM/XIV/8, it is obvious that ARIPO is keen to join UPOV 1991, at all costs.[3] It is this decision that is driving policy-making at ARIPO. It is clear that ARIPO is not concerned with whether or not the PVP framework being developed matches the agricultural conditions and realities prevailing in the individual ARIPO member states.

It is also clear that ARIPO's decision to join UPOV 1991 is very much due to its interaction with the UPOV Secretariat, the US Trade and Patent Office (USPTO) and the Community Plant Variety Office of the European Union (CPVO), the French National Seed and Seedling Association (GNIS) and other representatives of the seed industry. ARIPO's document clearly states that the UPOV Secretariat prepared the proposed draft legal framework.[4] We also note that several of the meetings held to discuss the draft legal framework were sponsored by the USPTO and UPOV and perhaps even some of the abovementioned partners.

It is thus no surprise that the entire legal framework is based on UPOV 1991. The CPVO, the US and the seed industry are major proponents of UPOV 1991. UPOV is also only mandated to promote

[1] ARIPO's response is contained in ARIPO-CM-XIV-8-ANNEX 1
[2] See http://www.acbio.org.za/images/stories/dmdocuments/CSOconcernsonARIPO-PVPframework.pdf for the CSO submission to ARIPO dated 6th November 2012.
[3] Paragraph 45 of ARIPO/CM/XIV/8 states: "In view of the fact that the draft instrument has been made consistent with the UPOV Convention (1991 Act) to enable the Organization to join UPOV….it is proposed that the Council of Ministers approve for the draft Protocol to be submitted to the UPOV Council session…."
[4] ARIPO Document ARIPO/AC/XXXVI/9

UPOV 1991 and thus would not be in a position to provide ARIPO and its Member States with independent advice that is beneficial for the region.

We would also like to place on record that ARIPO's assertions that the views and comments of civil society have been taken into account is simply false. Since ARIPO had already decided to adopt the UPOV 1991 model, it clearly never intended to take on board any of the suggestions of civil society. This is obvious from the evasive and often dismissive responses of ARIPO to CSOs comments. In fact, several of ARIPO's responses are based on incorrect and misleading information. See CSO's response in Appendix 1 below.

The lack of involvement of smallholder farmer groups and civil society in the development of the legal framework is a huge concern. In July 2011, the first workshop was held in Accra and in June 2012 an expert meeting was held in Zimbabwe. At both these meetings, the abovementioned partners (industry representatives, USPTO, UPOV, CPVO, GNIS) were present but smallholder farmers and civil society groups were not included in the deliberations. It is only at the third meeting held in Malawi on the repeated insistence of CSOs and at very short notice were two representatives involved in the discussion. While the opportunity to participate in Malawi is very much welcome, albeit that it was a very limited one, overall CSO and farmer participation in the process has been shockingly lacking.

We are of the view that the whole process of developing the draft legal framework is fundamentally flawed, and thus lacks credibility and legitimacy. As a result, the draft legal framework has a number of flaws in particular it does not cater for the interests of smallholder farmers that are the backbone of the agricultural systems in the ARIPO region. The draft legal framework facilitates the misappropriation of genetic resources; strengthens breeders' rights at the expense of public interests and farmers' rights and hinders the ability of national governments to protect their national interests.

We strongly urge you to reconsider and overhaul the content of the draft legal framework and to initiate a credible process for gathering evidence of the agricultural systems prevailing in ARIPO member states, their vulnerabilities, the role of smallholder farmers, market capacity etc. and to undertake evidence based discussions with all relevant stakeholders in particular with smallholder farmers with regard to appropriate legal systems for breeders' and farmers' rights

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APPENDIX 1

COMMENT ON ARIPO'S RESPONSE TO CIVIL SOCIETY ORGANIZATIONS ON THE DRAFT LEGAL FRAMEWORK FOR THE PROTECTION OF NEW VARIETIES OF PLANTS

INTRODUCTION

In a letter dated 6th November 2012, civil society organizations (CSOs) from across sub-Saharan Africa wrote to the Director General of ARIPO raising concerns with regard to the Draft Legal Framework for Plant Variety Protection, which is based on UPOV 1991.[5]

A year after sending the letter, and after repeated requests for a written response, ARIPO Secretariat presented to the Administrative Council and Ministerial meeting in November 2013, in Uganda, a document containing responses to the comments made by CSOs. According to the Secretariat, the responses had "been provided by the experts from the IP Offices and Ministries of Agriculture of ARIPO Member States, at the Regional Workshop in Malawi held from 22-25 July 2013".

It is worth noting that the written response was never officially communicated to CSOs. CSOs only became aware of the written response when participating in the abovementioned meeting in Uganda, and even then only when CSOs insisted that the ARIPO Secretariat share its documentation for the November meetings.

During the November meetings, CSOs were not given any opportunity to provide further feedback on ARIPO's written response nor has any session or consultation been organized to debate and assess the accuracy of the written response presented by ARIPO.

This paper critically analyses the response of ARIPO.

ANALYSIS OF ARIPO'S RESPONSE

On specific Articles

1. In regard to Article 2 (Purpose): CSOs in their submission argued that although currently the seed sector in sub-Saharan Africa is dominated by farmer-managed seed systems (informal sector), the legal framework ignores this fact and develops a legal framework that is focused on strengthening breeders' rights, with no recognition of the contribution of farmers to the conservation and development of plant genetic resources for food and agriculture production. CSOs argued that ARIPO

[5] See http://www.acbio.org.za/images/stories/dmdocuments/CSOconcernsonARIPO-PVPframework.pdf for the CSO submission to ARIPO dated 6th November 2012.

should revise the draft legal framework to include a greater recognition of farmers' rights as found in the OAU Model Law.

In response ARIPO states that the OAU Model Law "provides a framework whose objectives …..address different policy issues". In short ARIPO is arguing that the OAU Model Law is "irrelevant".

ARIPO's claim is incorrect. Part VI of the OAU Model Law is about Plant Breeders Rights (PBRs). It has 29 articles that cover all aspects of PBRs and links with Farmers' rights in Part V of the Model Law. Part V of the Model Law on Farmers' Rights recognizes the contribution of farmers to the development of new varieties, extends protection to farmer varieties not meeting the criteria of distinctness, uniformity and stability, and outlines farmers' rights with regard to protected varieties.

ARIPO also argues "Farmers' rights" should be addressed in separate legislation". This argument suggests that farmers are NOT breeders and thus the proposed legal framework should not cover their rights. But African smallholder farmers have been breeding for centuries and they are the backbone of agriculture systems in sub-Saharan African. And so there is no reason why their contribution and rights should not be treated on an equal footing as those of private sector breeders (most of which are likely to be multinationals).

Second,, ARIPO's argument suggests that the proposed draft legal framework does not impinge on the farmers' rights. Again this is misleading as the draft legal framework does have an adverse impact on farmers' rights. The draft legal framework restricts farmers' rights, particularly as farmers are not allowed to freely exchange or sell farm-saved seeds, when using the protected variety. Use of farm-saved seeds on their own holdings may also be subject to payment of royalties to the right holder. Further under UPOV 1991, any further breeding by a farmer is also limited, as breeders' rights extend to essentially derived varieties.

It is strongly asserted that any legal framework that speaks about varieties and seeds concerns farmers' rights and can adversely impact on the interests of farmers. Thus, such a legal framework should also fully address farmers' rights and treat them on an equal footing with breeders' rights. This is the approach taken by the African Union Model law and in several major developing countries such as in India, Thailand and Malaysia.

ARIPO also argues that the Swakopmund Protocol recognizes some aspects of farmers' rights. In this regard, ARIPO's response is misleading. The Swakopmund Protocol does not even mention "farmers" or to their rights to save, sell and exchange farm saved seeds which is the subject matter being discussed. Neither does it speak about the protection of farmer varieties or the fair and equitable benefit sharing arising from the utilization of farmers' varieties. The Protocol is only about protection of traditional knowledge and does not even extend to genetic resources.

In fact, our analysis finds that the proposed legal framework of PVP undermines the implementation of the Swakopmund Protocol as breeders will be free to use landraces and associated traditional

knowledge to develop new varieties that will be protected by intellectual property. The contribution of farmers in terms of their traditional knowledge that led to the development of landraces will go unrecognized, as there is no obligation in the Draft Protocol on breeders to disclose the origin as well as the contribution of farmers to the development of the new variety for which protection is sought.

2. Article 3 (Genera and species to be protected) – CSOs argued that the provisions contained in the draft legal framework are based on UPOV 1991 and as such the draft legal framework strengthens breeders' rights to the prejudice of farmers' rights. ARIPO in its response states that "the development of the legal framework has been based on the recommendation of the Administrative Council to take into account existing Plant Breeders'Act from member states" adding that the legislation of those member states covers all plant genera and species.

First, it is worth noting that most ARIPO members do not have PVP legislation. According to our research, the only countries that had a PVP law in force when the administrative decision was taken in Nov 2012, and when the ARIPO legal framework was being developed were: Kenya, Zambia, Zimbabwe and Tanzania. At that point the PVP laws of Kenya, Zambia and Zimbabwe were not modeled on UPOV 1991. In fact the 1972 Plant Varieties Act of Kenya did not extend protection to all plant genera and species but only to "plant varieties of such species or groups as may be specified by a scheme made by the Minister"[6]. Article 32 of Zambia's Plant Breeders' Act also extends PBR protection only to genera and species that are prescribed by the Minister. The Act does not extend to all genera and species. Similar provisions can also be found in the context of Tanzania and Zimbabwe[7]. Accordingly the information provided by ARIPO is inaccurate.

It may be argued that recently Kenya and Tanzania have passed legislations based on UPOV 1991 and thus the legal framework is modeled on UPOV 1991. This argument makes little sense as this legislation has barely been in force and their impacts still remain unclear. Additionally, most ARIPO countries have not had PVP legislation and thus are not aware of the impacts (costs and benefits) of having a PVP regime and thus it seems more prudent to have a more limited PVP regime in terms of coverage of species and more flexibility and balance in terms of breeders' and farmers' rights rather than opting for the UPOV 1991 model.

ARIPO's response shows that the draft legal framework has not been developed taking into account the realities prevailing in ARIPO member states.

3. Article 4 (Regional PVP System: One Application, One Grant): Essentially CSOs have argued that a regional PVP system, whereby the administration and management of breeders' rights rest with the ARIPO office denies individual member states the right to take decisions that are in their interests.

[6] See Section 17, The Seeds and Plant Varieties Act 1972 (Amended 2002)
[7] See Article 3(1) of Zimbabwe's Plant Breeders' Rights Act and Article 13 of Tanzania's Plant Breeders Rights Act of 2002.

To this ARIPO simply responds that "ARIPO members are convinced that provision for plant breeders' rights in the region will allow farmers access to a wide range of improved varieties to contribute to the attainment of the regional goal of economic development and food security."

It is unclear what the basis is for reaching such a conclusion. Was an impact assessment done? Where is the evidence to support the assertion? It is worth recalling that the Special Rapporteur on the Right to Food, Olivier de Schutter has examined this issue and raised concerns over the adverse impacts of UPOV 1991 on food security and smallholder farmers.[8]

ARIPO also argues that member states can continue to operate at the national level. This assertion is misleading as explained below.

4. Articles 6-10 (Conditions of Protection): CSOs raised a number of concerns with regard to Articles 6-10 in particular concerns over the definition of "novelty" and "distinctness", the requirement of "uniformity" which makes it difficult for farmers to register their varieties and which facilitates erosion of biodiversity.

ARIPO in its response argues that the "CBD and ITPGRFA address the conservation of biological diversity" adding that "separate measures should be put in place in order to ensure conservation of biological diversity". Basically ARIPO is arguing that the issue of maintaining biodiversity is not relevant to plant variety protection.

The response is inadequate as the conservation of biological diversity is very much linked to the promotion of agro-biodiversity. In order to promote agro-biodiversity it is important for a PVP system to have appropriate standards of protection. Accordingly a PVP legal framework should be supportive of the objectives of the CBD and the ITPGRFA.

In the case of the proposed draft legal framework, its contents are not supportive of the objectives of CBD and the ITPGRFA. This has been addressed in the CSO submission as well as further below.

To counter CSO's argument on erosion of biodiversity – ARIPO argues that "Studies have shown that there has been no loss of diversity in a range of crops in different countries" adding that "Relevant examples were presented at the Workshop by the participants". In making this assertion no references or supporting evidence is presented by ARIPO.

ARIPO's argument is dismissive of CSO's argument although there is now recognition that the promotion of uniform commercial varieties and the marginalization of farmers varieties, is a major cause of genetic erosion. The Special Rapporteur on the Right to Food Olivier De Schutter has noted

[8] See UN General Assembly Document A/64/170 titled "Seed Policies and the right to food: enhancing agrobiodiversity and encouraging innovation" available at http://www.srfood.org/images/stories/pdf/officialreports/20091021_report-ga64_seed-policies-and-the-right-to-food_en.pdf

that the spread of commercial varieties has accelerated crop diversity erosion: "About 75% of plant genetic diversity has been lost as farmers worldwide have abandoned their local varieties for genetically uniform varieties…..Genetic diversity within crops is also decreasing…Wide-scale genetic erosion increases vulnerability to climate change, new pests and diseases."[9] An expert meeting of the FAO also concluded that "The chief contemporary cause of the loss of genetic diversity has been the spread of modern, commercial agriculture. The largely unintended consequence of the introduction of new varieties of crops has been the replacement – and loss – of traditional, highly variable farmer varieties. This process was the cause of genetic erosion most frequently cited by countries in their Country Reports.[10]

5. In regard to Article 7.2 & 7.3 (Novelty): These articles waive the requirement of novelty and enables the granting of protection to varieties that existed before the entry into force of the legal framework.

CSOs have questioned the value of the Article arguing that if certain varieties are already being cultivated in a country there seems to be little value in granting protection over an existing variety. In fact if this is allowed, there is likely to be a rush of applicants seeking breeder rights over existing varieties, consequently making it more difficult for farmer-managed systems to continue using the varieties. CSOs also queried as to who will have rights over existing varieties that were developed by public institutions using public funds, and which have been licensed to companies.

ARIPO simply responds that the "provisions will be beneficial for all type of breeders". Such a general sweeping response does not address any of the concerns raised by CSOs.

CSOs are also concerned as to what happens to those (farmers, local breeders etc.) that have been using varieties that were not protected. Will they be expected to abandon the use of the varieties or pay royalties to the breeders once the breeder gets plant breeders' rights over the varieties?

6. On the relationship between the draft legal framework and the Convention of Biological Diversity (CBD) & the ITPGRFA, ARIPO argues that the treaties of CBD and the ITPGRFA pursue different objectives, have different scopes of application and require different administrative structures to monitor their implementation and therefore those matters should be addressed in separate legislation, although such legislation should be compatible and mutually supportive.

This is a blatantly erroneous assertion. Article 1.1 of the ITPGRFA states unequivocally:

[9] See UN General Assembly Document A/64/170 titled "Seed Policies and the right to food: enhancing agrobiodiversity and encouraging innovation" available at http://www.srfood.org/images/stories/pdf/officialreports/20091021_report-ga64_seed-policies-and-the-right-to-food_en.pdf

[10] FAO Report on the State of the World's Plant Genetic Resources for Food and Agriculture, 1991 at http://treatylearningmodule.bioversityinternational.org/fileadmin/bioversityDocs/Policy_module/eng.policy_module/Reference_Material/SWRSHR_E.pdf

"The objectives of this Treaty are the conservation and sustainable use of plant genetic resources for food and agriculture and the fair and equitable sharing of the benefits arising out of their use, in harmony with the Convention on Biological Diversity, for sustainable agriculture and food security."

The predecessor of the ITPGRFA was the voluntary International Undertaking on Plant Genetic Resources for Food and Agriculture. When the CBD was adopted in May 1992, countries also adopted Resolution 3 of the Nairobi Final Act, which recognised the need to seek solutions to outstanding matters concerning plant genetic resources, in particular:
a) access to *ex situ* collections not addressed by the Convention, and
b) the question of Farmers' Rights.

It was requested that these matters be addressed within FAO's forum. Thus in 1993, the FAO Conference accordingly adopted Resolution 7/93 for the revision of the International Undertaking and requested FAO to provide a forum in the Commission on Genetic Resources for Food and Agriculture (CGRFA), for the negotiation among governments, for
a) the adaptation of the International Undertaking on Plant Genetic Resources, in harmony with the CBD; *(emphasis added)*
b) consideration of the issue of access on mutually agreed terms to plant genetic resources, including *ex situ* collections not addressed by the CBD; and
c) the issue of the realization of Farmers' Rights.

The negotiations for the revision of the Undertaking in harmony with CBD, started in November 1994. Although the scope of the Undertaking is limited to plant genetic resources for food and agriculture, this mandate, adopted after careful negotiation, is not limited to the *ex situ* collections not addressed by the CBD.[11]

Therefore, completely contrary to ARIPO's assertion, the CBD and ITPGRFA share the same objectives and the history of the Treaty is clearly rooted in the CBD objectives.

We would also like to point out that ARIPO's response is the same (word for word) as what is stated in the UPOV Communication Strategy (CC/86/5) prepared by the UPOV Secretariat.

Additionally African nations have been major champions of the CBD and the ITPGFRA. As such, the draft legal framework must facilitate and not undermine the achievement of the CBD and ITPGFRA objectives.

The CBD has three main objectives: the conservation of biological diversity, the sustainable use of its components and fair and equitable sharing of benefits arising from the utilization of genetic resources.

It is widely acknowledged that misappropriation of genetic resources including plant genetic resources are widespread and having a disclosure of origin in intellectual property applications will go a long way to reducing such activity. The draft legal framework does not contain a disclosure of origin provision thus the legal framework is not supportive of one of the most important components

[11] http://www.fao.org/ag//CGRFA/iu.htm

of the CBD – fair and equitable benefit sharing- a component that has been championed by African nations in all fora.

In addition, the Nagoya-Protocol on Access and Benefit Sharing, already ratified by several ARIPO members states in Article 12.4: "*Parties, in their implementation of this Protocol, shall, as far as possible, not restrict the customary use and exchange of genetic resources and associated traditional knowledge within and amongst indigenous and local communities in accordance with the objectives of the Convention."* The ARIPO draft legal framework contradicts the Nagoya Protocol as it restricts the exchange of genetic resources.

The ITPGRFA is concerned with the sustainable use of plant genetic resources for food and agriculture including: the development and maintenance of diverse farming systems and promoting plant breeding efforts with the participation of farmers, strengthening the capacity to develop varieties adapted to social, economic and ecological conditions; realizing farmers rights in particular 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.

The draft legal framework simply fails to recognize the contribution of African smallholder farmers to breeding, their farming systems and their rights.

The CBD and the ITPGRFA touch on matters directly connected to the plant variety protection, but the content of the proposed ARIPO legal framework is neither supportive nor compatible with the objectives of the CBD and ITPGRFA. In fact ARIPO's failure to include a disclosure of origin provision and to reflect farmers' interests in the draft legal framework weakens and undermines the CBD and ITPGRFA objectives. The proposed legal framework needs to be revised to bring it in line with the vision of African nations that aspire to see the full implementation of the CBD and the ITPGRFA principles. Several developing countries have PVP laws that are consistent with the CBD and ITPGRFA thus there is no reason for ARIPO not to do the same.

7. On Article 12 (Filing Procedures): CSOs submitted that the provision in the draft legal framework is inadequate as there is no requirement to indicate whether a variety is genetically modified, terminator technology has been used or any other variety produced by modern biotechnology and nor is there a requirement on the applicant to disclose complete passport data of the variety for which protection is sought.

In response ARIPO argues that GMO regulation should be addressed separately.

This argument is flawed. CSOs are not arguing that the proposed legal framework should contain biosafety provisions. CSOs are submitting that the proposed framework should be crafted in a way that facilitates implementation of the GMO regulation as well as the existing ban on terminator technology and other future regulation in the context of modern biotechnology. It is crucial that there is some coherence in the implementation of different legislation where it concerns the protection of

health and the environment. For instance, if an application for protection of a GMO variety is received, it should serve as a checkpoint that triggers other regulatory safety nets. For e.g. the draft legal framework should require the applicant seeking protection for a variety involving genetic modification to provide documentation relating to compliance with biosafety regulations. The draft legal framework should also make clear that no variety which involves any technology which affects the public order or morality and is injurious to the life or health of human beings, animals or plants, shall be given protection. Several countries have provisions mentioned above in their PVP legislation.

The approach proposed by ARIPO does not facilitate coherence in the implementation of different legislations and effectively compromises public interests.

Further, in its response, ARIPO evasively argues "it is not appropriate to indicate how the varieties have been developed in the legal framework."

ARIPO does not explain why the draft legal framework does not require the applicant to disclose the complete passport data of the variety (e.g. the parental lines of the variety, origin of the variety) and information on the development of the variety (e.g. the best method of developing the protected variety). Such disclosure is critical to prevent misappropriation of plant genetic resources.

The problem of misappropriation of genetic resources in the context of plant genetic resources is real. The recent publication of an article titled "Biopiracy of Turkey's purple carrot" clearly illustrates the problem. In that case Seminis (a Monsanto subsidiary) bought some farmers seeds from Turkey, and after a simple process of selection, the company obtained plant variety rights in the US and EU.[12] Accordingly, it is important for ARIPO member states to take concrete steps to safeguard their resources from misappropriation.

It is important to have disclosure of origin in the PVP law so that no PVP is granted if the right holder does not disclose the necessary details of the origin of the material, and where applicable, prior informed consent and benefit sharing. If it is not included in the PVP law, then the right holder will get his/her PVP right although it fails to provide full disclosure. Including it in the PVP law is important to incentivize the right holder to provide accurate information on the issue of disclosure.

Requiring the applicant to specify "the method by which the plant variety is developed" is also critical to facilitate transfer of knowledge to the local community. It is not clear why including such information is "inappropriate".

Considering that the applicant is getting extensive protection for its variety, full disclosure concerning the origins and development of the variety must be mandatory. Some countries have extensive provisions requiring the applicant to provide information on the origins of the variety, how it was developed as well as information on compliance with national regulation concerning GMOs and

[12] See http://www.twnside.org.sg/title2/intellectual_property/info.service/2014/ip140212.htm

access and benefit sharing[13] and there is no reason for ARIPO not to have similar provisions in the draft legal framework.

8. In regard to Article 15 (Publication of Information): ARIPO states that information on the breeding history, genetic origin and the origin of the plant material used in the breeding of the variety would be required to be provided where this facilitates the examination of the variety. Confidential information will only be published with the consent of the breeder.

This argument is fundamentally flawed. The proposed legal framework grants a breeder protection over its variety for the duration of 20-25 years. Since this protection is granted, there is no logic in allowing the breeder to conceal information. Additionally ARIPO states the breeder may be required to provide information "where this facilitates examination". Again there is no logic to adopting such an ad hoc approach. A breeder should make all information publicly available including the origin of the variety, its parent lines, breeding history etc. Such disclosure is important for the transfer of knowledge to local communities as well as to prevent misappropriation of plant genetic resources.

This information is also increasingly more and more important for producers and consumers. For instance, it is important to note that disclosure of breeding information is now a standard norm for organic breeding: "*Organic plant breeders shall disclose the applied breeding techniques. Organic plant breeders shall make the information about the methods, which were used to develop an organic variety, available for the public latest from the beginning of marketing of the seeds*" (IFOAM Norms for Organic Production and Processing, Version 2012).[14] Other principles for organic breeding state "*The breeding process, the starting material (e.g. used crossing parents, starting populations), and the applied breeding techniques will be disclosed to enable producers and consumers to choose varieties according to their values (e.g. clear declaration of varieties derived from mutation breeding).*"[15]

In its submission, CSO concretely argues for full disclosure. ARIPO's response does not address the specific arguments made in the submission.

9. In regard to Article 16 (Objection): CSOs have argued that sufficient time should be granted for pre-grant opposition and payment of fees should be waived when an objection is made by CSOs, locals and farmer communities. In response, ARIPO argues national treatment (i.e. foreigners and locals should be treated equally).

However, CSOs have not argued that foreigners should be treated differently from locals. CSOs are calling for fees to be waived for vulnerable communities (irrespective of foreign or local). In any case it is unlikely that foreign vulnerable communities will be filing pre-grant oppositions. ARIPO needs to

[13] See e.g. Section 12 of the 2004 Plant Variety Protection Act of Malaysia
[14] http://www.ifoam.org/sites/default/files/page/files/ifoam_norms_version_august_2012_with_cover_0.pdf
[15] http://www.fibl.org/fileadmin/documents/de/news/2011/messmer-wilbois-etal-2011-positionpaper.pdf

consider that most smallholder farmers are vulnerable and thus would greatly benefit from such a waiver.

The draft legal framework allows pre-grant opposition "at any time prior to the refusal or to the grant of the right". This means that if a right holder is given a PBR 2 months after publication, there will be no time to mount any opposition. CSOs have proposed that the draft legal framework provide a time frame of "at least 9 months after publication of the application and any further time before the application is disposed of, for a written objection to be made with regard to published application".

In response, ARIPO argues that a right can be canceled or nullified at any time if applicable. ARIPO's answer only deals with post-grant opposition while CSOs have made a proposal in the context of pre-grant opposition.

CSOs have also argued that the grounds for objection are limited and should be expanded to include e.g. public interests as well as where the variety has an adverse effect on the environment. ARIPO argues that the issue of environment needs to be addressed separately. ARIPO does not address the issue of public interests.

ARIPO's argument makes little sense. Objections to registration of new varieties must be allowed on public interest grounds including that the new variety may have an adverse effect on the environment.

10. On Article 21 (Scope of Breeder's Right) – This article concerns breeders' rights. CSOs argued that UPOV 1991 vastly extends breeder's rights and restricts the scope of other breeders to innovate around the protected varieties. In response ARIPO states that the 1991 Act of the UPOV Convention has been examined by ARIPO Member states and considered to be "appropriate". This is an evasive response.

Thus far, no analysis has been presented by ARIPO as to why it is suitable for its Member States. To-date not a single country in sub-saharan Africa is a member of UPOV 1991. In addition, 12 out of 18 members of ARIPO are least developed countries, i.e. some of the poorest and most vulnerable economies in the world. Further, many ARIPO members do not even have a national plant breeders' rights law in place. So on what basis is it being claimed that the UPOV 1991 Convention is suitable? What is the evidence that UPOV 1991 convention is "appropriate"? Has an impact assessment ever been carried out?

In reality only a fraction of developing countries are members of the UPOV Convention (about 22) and most of these have not ratified the 1991 Convention and continue to be members of UPOV 1978, as the latter Convention is more flexible. The few that have signed the UPOV 1991 have done so due pressure from the US & EU. It is worth noting that even major developing countries with more advanced agricultural economies such as India and Thailand are not members of UPOV.

It is critical that policies are supported by concrete evidence. In this, case policy is being driven by the desire to join UPOV 1991, even if there is no evidence of its suitability to the region.

ARIPO's second argument is disingenuous. It argues "authorization of the breeder for the use of protected varieties for breeding purposes is required under neither the 1978 Act nor the 1991 Act." But this argument deliberately ignores the fundamental differences in the scope of breeders rights between UPOV 1978 and UPOV 1991.

Under UPOV 1978, Article 5(3), breeders are allowed to use a protected variety as an initial source of variation for the purposes of creating other varieties or for the marketing of such varieties. Breeder authorisation is ONLY required in cases of "commercial production of another variety" where "repeated use of the protected variety is necessary". This means that if a breeder uses a protected variety to develop another variety, the second variety can be commercialized without having to pay the breeder royalties provided there is no repeated use of the protected variety.

In comparison, UPOV 1991 is more restrictive. The Convention states that the protected variety can be used for further breeding but breeders' authorization is needed in cases where the variety developed from the protected variety is an (i) essentially derived variety (EDV); (ii) variety which are not clearly distinguishable from the protected variety; and (iii) varieties whose production requires the repeated use of the protected variety.

The concept of EDVs is highly contentious and uncertain. Many advanced developed countries are grappling with this concept and its implementation. What is or is not an EDV is a question subject to extensive court and arbitration disputes. The International Seed Federation (ISF) has developed a specific regulation called the "Regulation for the Arbitration of Disputes concerning Essential Derivation (RED) and they have developed specific guidelines to deal with disputes on EDVs of perennial ryegrass, maize, oilseed, rape, cotton and lettuce.

Under UPOV 1991, breeders' authorization is also needed where the production of a new variety requires "repeated use" of the protected variety, irrespective of whether it is for commercial or non-commercial use. This is more restrictive than UPOV 1978 whereby authorization is only required in situations of "commercial production".

From this it is not accurate to say that UPOV 1991 allows innovating around existing varieties, because the room to innovate around existing varieties is limited in comparison to what is provided by the AU Model law and by UPOV 1978.

Additionally, it is simply unimaginable that smallholder farmers of ARIPO member states (most of which are the poorest countries) will be able to deal with the EDV concept and stand up against the mighty resources of seed companies. Once a smallholder farmer uses the protected variety for further breeding by selection it is possible that the seed companies will demand payment from the smallholder farmer. And the farmer will have no choice but to comply, as she/he will not have the capacity to argue that its variety is not an EDV.

11. In regard to Article 22 (Exceptions to Breeders' Rights & Farmers' Rights): This article addresses exceptions to breeders' rights as well as farmers' rights. The draft legal framework contains

a limited farmers' right exception. This limited exception only allows farmers to use farm-saved seed or other propagation material on their own holding. Farmers are not allowed to sell (even small amounts) or exchange farm-saved seed. This limited exception is ONLY applicable to "agricultural crops and vegetables with a historical common practice of saving seed" which are specified by the Administrative Council. This limited exception does not apply to "fruits, ornamentals, other vegetables or forest trees".

CSOs have argued that the resulting effect is that should member states wish to provide exceptions in the interests of farmers, they will have to limit the exception to the parameters set out in the draft legal framework. In addition, it will be the ARIPO Administrative Council (and not member states) that will determine which plants should benefit from the severely limited farmers' exception. Further even when the exception is used, farmers may still have to pay royalties to the breeder.

In response, ARIPO simply states "it will ensure, in the development of the regulations that the situation of small holder farmers will be taken into consideration in relation to farm saved-seed, in consultation with the Member States".

This response reflects ARIPO's priority. Clearly it finds it unnecessary to fully address issues concerning farmers' rights, although smallholder farmers are the backbone of agricultural systems in ARIPO member states. ARIPO's response is simply unacceptable.

The draft legal framework states that the limited farmers exception may be subject to "different level of remuneration" (i.e. payment of royalties by farmers"). Also farmers will be asked to provide information to the breeder e.g. on their use of farm saved seeds. In Europe this has led to harassment by breeders of small farmers and requiring farmers to give information is the subject of court battles.[16] It is also worth noting that even the Swiss Parliament has rejected the idea of requiring farmers to give information to breeders..

CSOs have argued that there is no justification for such a limited farmers' exception, which is based on UPOV 1991, adding that the limited exception strengthens breeders' rights at the expense of smallholder farmers.

CSOs proposed innovative ways of protecting breeders rights and ensuring that farmers' rights are also protected. CSOs referred to Section 39 of the Indian Protection of Plant Varieties and Farmers' rights (PPVFR) 2001, which allows farmers to save, use, sow, re-sow, exchange, share or sell his farm produce including seed of a variety protected under the legislation "in the same manner as he was entitled before the coming into force" of this legislation, with the condition that "farmers shall not be

[16] See http://www.grain.org/article/entries/541-seed-laws-in-europe-locking-farmers-out

entitled to sell branded seed of a variety protected under the Act".[17] The PPVFR Act also treats farmer varieties on an equal footing to varieties produced by formal breeders.

The Indian PPVFR also makes provision for compensation of farmers if the protected variety fails to live up to the expected performance. Farmers also cannot be held liable for infringement if a farmer was not aware of the existence of the breeder's right. Farmers are also exempt from payment of any fees.

CSOs also referred to Articles 30-31 of the AU Model Law, which has interesting provisions that balance breeders' and farmers' rights.

All of these suggestions have been ignored by ARIPO. No response has been received from ARIPO as to why the suggestions proposed are not workable. It appears that these options have simply been dismissed out of hand.

12. Article 24 (Restrictions on the Exercise of Breeder's Right): This article states that the ARIPO office can grant compulsory licenses "only for reasons of public interests". CSOs argued that it would be beneficial for the draft legal framework to elaborate in an open-ended way on circumstances that warrant restrictions of breeders' rights. Some such circumstances are: where it involves issues pertaining to food security or nutritional and health needs, where there are anti-competitive practises by the right holder; where a high proportion of plant variety offered for sale is being imported; where requirements of the farming community for propagating material of a particular variety are not met; for socio-economic reasons and for developing indigenous and other technologies. CSOs also proposed that ARIPO draws on Article 33 of the OAU Model law.

ARIPO, in its response submits that "experts agreed that the general provision of public interest in the text provides sufficient coverage of restrictions in the exercise of the breeder's right".

ARIPO's response is inadequate. Some specificity is needed for an effective law.

CSOs also argued that the draft legal framework undermines the sovereign right of each member state to take measures that are in the national interests, as when a government wishes to intervene by granting a CL, it will have to seek approval of ARIPO and/or the Administrative Council. CSOs have proposed that member states should be given complete freedom to impose restrictions on the exercise of breeders' rights that it deems fit. This concern has not been addressed by ARIPO.

13. Article 28 & 29 (Nullity and Cancellation): These articles give the ARIPO office complete authority to nullify and cancel breeder's right. Member states' role is being set aside. These articles also limit the grounds on which member states can nullify and cancel a PBR. CSOs have argued that member states should have full flexibility and authority over the nullification and cancellation of breeders' rights as well as be able to prescribe in their national law other grounds to nullify or cancel

[17] "Branded seed is described in the Indian PVPFR legislation as "any seed put in a package or any other container and labeled in a manner indicating that such seed is of a variety protected under this Act".

PBRs. Member states may have specific national circumstances that may warrant nullification and cancellation of PBRs.

ARIPO response is evasive. It states: "The experts agreed that the authority responsible for granting the right must also be the authority responsible for nullity and cancellation".

No reason has been given as to why member states cannot retain full authority in the nullification and cancellation of PBRs. What possible benefit could there be to members states in giving up this critical right? No response has been given as to why there is a limitation on grounds for nullification and cancellation of PBRs. CSOs have also proposed that the draft legal framework should also enable individual Member States to allow for post-grant opposition. No response was received from ARIPO.

14. Article 38 (Uniform Effect of Regional breeders' rights): This article states that regional breeders' rights may not be granted, transferred or terminated otherwise than on an uniform basis. CSOs argued that the article impinges on sovereign rights and prevents member states from taking any individual action with regard to PVP even if it is a matter of significant national interest. According to the legal framework the ARIPO office or the Administrative Council will take decisions on PVP.

ARIPO in its response counter-argues that the legal framework is without prejudice to the right of Contracting States to grant national plant breeders' rights for plant varieties.

Its response is misleading as the legal framework clearly encroaches on national rights as explained below:

- The proposed legal framework does allow ARIPO members to grant national plant breeders rights for plant varieties. However the legal framework also states that if a right holder obtains regional protection for a variety then the national protection granted to that same variety will not be applicable (Article 39). This suggests that the regional system supersedes the national PVP system.

- The ARIPO office (and not member states) has full authority to grant breeders' rights and to administer such breeders' rights on behalf of the Contracting States. Once an application is filed in the ARIPO office and granted, it is automatically applicable to all ARIPO member states.

- The ARIPO office (and not member states) has full authority to grant compulsory license, nullify and cancel the PBR.

CSOs' argument that countries are giving up the sovereign right to regulate PVP still stands and its comments on "Uniform Effect of Regional Breeders' Rights" remain relevant.

What is being proposed by ARIPO is extremely problematic as it denies a member state the right to make any decision concerning PVP even when it concerns national interests. Each ARIPO member

state is at a different level of development and may wish to adopt different strategies with regard to balancing support for farmer seed systems and breeders' rights. However, as the legal framework is currently drafted, it denies individual member states the right to take decisions that are in their interests.

Section on General Comments

15. On Farmers' Rights: ARIPO argues that the Swakopmund Protocol recognizes some aspects of farmers' rights and that such rights should be addressed in separate legislation which should be mutually supportive. CSO's response to these points have been addressed above.

ARIPO's argument that farmers can have their varieties protected under the ARIPO proposed legal framework is flawed, as it is a well-known fact that farmers' varieties tend not to meet the NDUS criteria as farmer varieties are constantly evolving. It is for this reason some countries such as India, Malaysia, the African Model law have developed innovative approaches to accommodate farmers' interests. The draft legal framework simply ignores farmers' interests.

16. UPOV 1991: ARIPO argues that the UPOV system is the most effective and the positive impact of PVP has been documented in developed and developing countries. It cites the examples of Argentina, Poland, Korea, China, Canada, Brazil, Japan, Kenya and South Africa. It also speaks about an increase in number of breeders and PVP applications in both the public and private sector after the introduction of PVP. It also mentions that membership of UPOV is an important global signal for breeders to have the confidence to release their varieties in the region.

In making its arguments, ARIPO provides no references or supporting evidence. The information provided by ARIPO is selective for reasons mentioned below:

(a) There is vast distinction between UPOV 1991 and UPOV 1978. UPOV 1978 is a far more flexible regime as explained in the CSO submission. Most of the countries mentioned by ARIPO (i.e. Argentina, South Africa, China, Canada, Brazil and Kenya) are actually members of UPOV 1978.

Today there is no opportunity for ARIPO members to join UPOV 1978 as only membership to UPOV 1991 is allowed. And so any of the claimed benefits of joining UPOV cannot be generalized as done by ARIPO.

Further it is worth noting that there is limited independent assessments available on the impact of joining UPOV and not joining UPOV. The impact assessment that tends to be often referred to has been done by the UPOV Secretariat. Such an assessment has limited credibility as UPOV has a mandate to champion its own instrument. The methodology that forms the basis of UPOV's impact assessment is also flawed.

(b) It is too simplistic to suggest that what works in the countries mentioned above should also work in the ARIPO region, whereby about 12 out of 18 ARIPO members are LDCs. None of the countries

mentioned by ARIPO are LDCs. Conditions that prevail in the countries (e.g. Argentina, Japan, Korea, China, Canada) mentioned do not exist in the ARIPO region.

(c) ARIPO refers to the success of the Kenyan cut flower industry as one of the main reasons for adopting the UPOV 1991 model. It is worth noting that in the case of Kenya most of the PBR titles granted are for ornamental plants and are held by non-residents. It is also important to note that Kenya is not a member of UPOV 1991 but a member of UPOV 1978. Its Plant Breeders Act adopted in 1972 (amended in 2002) did not comply with the provisions of UPOV 1991 that are now included in the proposed legal framework. This shows that it is not necessary to adopt the draconian UPOV 1991 for an effective plant variety protection system. Ethiopia, another country with a booming flower industry, shows that this development is also possible without being a UPOV Member.

What is needed is a system that matches the realities and conditions of ARIPO member states.

(e) ARIPO also speaks about South Africa as a success story, although without providing any supporting evidence. But South Africa is also a member of UPOV 1978 and South Africa's draft national IP policy tells a different story. It speaks of a high level of concentration in South Africa's seed market, which is dominated by foreign multinational companies. It also states that its law needs to be amended to bring it in line with the International Treaty on Plant Genetic Resources by recognizing the right of farmers to sell, exchange and use farm saved seed. In the case of South Africa, most of the PBR titles are held by foreign companies.

(d) ARIPO further puts Canada and China forward as examples of a successful PVP system. Both of these countries are not members of UPOV 1991 and neither are their laws modeled on the provisions of UPOV 1991.

(e) ARIPO also speaks of how the number of breeders have increased with the introduction of PVP systems. As noted above, the examples given are mostly of countries that have joined UPOV 1978.

Additionally, it is inappropriate to rely on "number of breeders" as the main indicator of success of PVP systems. It is important to take into account issues such as food security, agro-biodiversity as well as the impact on smallholder farmers particularly in terms of availability of affordable seed/propagating material.

ARIPO's approach to PVP systems is too simplistic and extremely narrow. ARIPO has not bothered to assess other innovative approaches to PVP that have been adopted by countries such as India, Malaysia and Thailand. For e.g. in India, between 2007 and February 2014, 6310 PVP applications have been received. Of these 904 titles have been granted. Clearly ARIPO's response that being a member of UPOV is an important global signal for breeders to have the confidence to release their varieties in the region – is flawed.

17. Farmers' Rights – ARIPO argues that the legal framework will give farmers more choice in terms of varieties which will contribute to economic development and food security. It adds that

farmers can continue to use their landraces and governments will ensure through regulations that the interests of subsistence farming will be safeguarded. It further states that subsistence farming will be covered by the exception of private non-commercial use.

ARIPO's response is simply unacceptable. If the true aim is to give farmers greater access to varieties to improve livelihoods and food security, the draft legal framework would have recognized the right of farmers to freely save, use, exchange and sell (at least some reasonable amounts) of farm-saved seeds and propopagating materials. Farmers also would have been granted a broader breeders' exemption (e.g. without limitations such as EDVs). But the proposed legal framework does not do that. Instead it severely limits farmers rights as discussed above. The approach taken by the draft legal framework is only aimed at protecting the rights of the breeders at the expense of farmers' interests. Most farmers in sub-saharan Africa access seed/propagating material using informal seeds sytems due to a number of reasons e.g. affordability and availability of the seed/propagating materials. The draft legal framework simply ignores this reality and only caters for the rights of breeders.

Small-scale farming is at the heart of food production systems. Since the draft legal framework sidelines the interests of smallholder farmers, it is difficult to see how food security can be achieved.

ARIPO's response on subsistence farmers is contradictory. If the interests of subsistence farmers are covered by the private non-commercial use exception, then why are governments enacting regulations to safeguard the interests of subsistence farmers. Additionally it is not sufficient to only make provision for subsistence farming. It is equally important for farmers to have greater rights in terms of being able to exchange and sell farm saved seeds that allow them to increase stability of household incomes and improve their livelihoods. This is critical in reducing the vast poverty that prevails in the ARIPO region. It is also important to include in the draft legal framework other safeguards (discussed above) that protect the interests of farmers.

18. Imbalance: ARIPO argues that there is no restriction on who can be considered a breeder. While that may be correct, the reality (as explained above) is that varieties of smallholder farmers in the ARIPO region are unlikely to be able to meet the standards set out in the draft legal framework. These farmers also will not be able to afford the fees for filing, maintaining and enforcing PBR. It is for this reasons some developing countries have developed innovative approaches to protect and safeguard the interests of their smallholder farmers.

CSOs have not argued against PVP protection. CSOs have submitted that it is critical to have a sui generis regime for the protection of plant varieties that suits the realities and conditions prevailing in the ARIPO region and that recognizes the diverse farming systems that exists in the ARIPO region.

The current draft legal framework is not suited to the needs and interests of the ARIPO region.

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