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Proposed Plant Variety Regulations inconsistent with ARIPO's Protocol, violates sovereign rights

London, 17 June (Sangeeta Shashikant) – Draft Regulations to implement the Arusha Protocol for the Protection of New Varieties of Plants released by the African Regional Intellectual Property Organization (ARIPO) are generating controversy for its inconsistency with the Arusha Protocol and its adverse impact on the sovereign rights of ARIPO members.

The Draft Regulations are being discussed at an Expert Review Meeting that begun on 14 June in Harare, Zimbabwe.

At the heart of this controversy is the ARIPO Secretariat's deliberate failure to operationalize in the Draft Regulations, Article 4(1) of the Protocol which safeguards the right of Contracting States to the Protocol to object to the grant of plant breeders' rights (PBRs) and Article 24 which upholds the right of Contracting States of the Protocol to grant compulsory licenses.

These provisions only came about in the Protocol after intense heated debate and discussion during the final stages of negotiations of the Protocol in July 2015 as many ARIPO Members rejected the initial formulation that completely surrendered to the ARIPO Office their right to grant PBRs and to issue compulsory licenses.

Apart from the issue of sovereignty, the Arusha Protocol has been criticized for its bias in protecting the interests of the multinational seed industry while disregarding the interests of smallholder farmers, who are the backbone of Africa's agricultural system, and the protection of local genetic resources from misappropriation (biopiracy).

In a letter to Members of the International Union for the Protection of New Varieties of Plants (UPOV) in March 2016, the Alliance for Food Sovereignty in Africa (AFSA) which is a Pan African platform of civil society networks and smallholder farmers' organisations denounced the ARIPO Secretariat and expressed outrage over the deliberate exclusion of African civil society and smallholder farmers' representatives from the Arusha Protocol negotiations, while facilitating the participation of representatives of foreign entities and the seed industry, including the World Intellectual Property Organization (WIPO), the European Union Community Plant Variety Office (CPVO), the French National Seeds and Seedlings Association (GNIS), the United States Patent and Trademark Office (USPTO) and UPOV.

In advance of the Expert Review Meeting in Harare, an AFSA press release points out that the draft Regulations "make a bad situation much worse".

The press release highlights that the Draft Regulations contain "draconian provisions" against farmers' rights and seed systems ... designed to intimidate and force seed processors, seed suppliers, government certification officers and even farmers' organisations to police and spy

on farmers who use farm-saved protected seed”.

The impact of the proposed Draft Regulations on farmers’ rights and seed systems will be addressed in a follow-up article.

This article focuses on how the Draft Regulations nullifies provisions of the Protocol aimed at protecting the sovereignty of ARIPO Member States.

Operationalizing Contracting States’ Right to Object: Article 4(1) of the Protocol

Article 4(1) of the Arusha Protocol states: “A breeder’s right granted under this Protocol shall, on the basis of one application, be protected in the designated Contracting States *provided the designated Contracting State has not refused the grant.*” (Emphasis added.)

The right of a Contracting State to object was only added after many days of intense and often heated negotiations among ARIPO Members, in the lead-up to the adoption of the ARIPO Protocol.

Given this context, the failure to operationalize the right of a Contracting State to object to the grant, is a serious omission on the part of the ARIPO Secretariat.

The right of a Contracting State to object to the grant of intellectual property is not a new concept. It is implemented in existing Protocols of ARIPO.

For example, the Harare Protocol on Patents and Industrial Designs harmonizes the filing and examination procedures with the ARIPO Secretariat processing applications with regard to patents and utility models. However under this instrument, once the ARIPO Secretariat decides to grant intellectual property, Contracting Parties are given 6 months from the date of notification of ARIPO’s intent to grant patents/utility models, to reject the grant of intellectual property with regard to its territory. In the instance that a Contracting State objects to the grant, ARIPO Office’s issuance of a certificate of grant will not be applicable to the Contracting State that objected to the grant.

A similar system with an expanded time frame of 12 months should be incorporated in the Draft Regulations to operationalize Article 4(1) with the aim of safeguarding the sovereignty and authority of a Contracting State in determining whether or not to grant PBRs.

Such a mechanism should also be expanded to allow a Contracting State some flexibility in conducting its own examination with regard to distinctness, uniformity and stability (DUS), in the event the Contracting State is dissatisfied with the DUS examination conducted by the ARIPO Office. This would be particularly important given the different agro-ecological conditions prevailing among ARIPO Member countries. The inclusion of such a mechanism also strengthens the role of national authorities in the regulation of PBRs.

The Draft Regulations also do not include provisions about ARIPO Members having timely access to all the relevant documentation concerning an application, including the DUS examination report, which are imperative for operationalizing Article 4(1) of the Protocol.

Compulsory Licensing

Another provision in the Draft Regulations that is inconsistent with the Arusha Protocol and

undermines sovereignty is Rule 13 on compulsory licensing.

In the negotiations preceding the adoption of the Arusha Protocol, ARIPO Members insisted that it should be the prerogative of the Contracting States and not the ARIPO Office to grant compulsory licenses in the public interest.

Thus Article 24 of the Arusha Protocol states:

“(1) A compulsory licence shall be granted to an applicant by a Contracting State only for reasons of public interest.

(2) The National Authority, when granting a compulsory licence, pursuant to paragraph (1), shall stipulate the acts covered and specify the reasonable conditions which shall include the payment of equitable remuneration to the breeder.

(3) The regulations shall lay down details on the implementation of the provisions under paragraphs (1) and (2).”

Instead of implementing Article 24, the Draft Regulations empowers the ARIPO Office to interfere in the granting of a compulsory license and to impose its views and conditions on Contracting States, making a mockery of Article 24 and sovereign rights of Contracting States.

For example, Rule 13 suggests that a Contracting State has to make an application for a compulsory licence (presumably to the ARIPO Office). The applicant has to show that prior negotiations with the right holder had been unsuccessful, although in the case where the applicant is a Contracting State, the ARIPO Office in the case of *force majeure* (unavoidable event) may waive this condition.

The Draft Regulations include provisions on using the forms prescribed by the ARIPO Office, payment of fees, conducting of hearing and oral evidence presumably at the ARIPO Office. The Regulations also allow the ARIPO Office the right to interfere in the granting of a compulsory licence by proposing an amicable settlement, and even by suspending proceedings on the grant of such licence. Rule 13(4) suggests that any decision of a Contracting State to grant a compulsory licence has to be sent to the ARIPO Office for its record and “concurrency” (meaning agreement).

These and other aspects in Rule 13 undermine the implementation of Article 24 by Contracting States. There is simply no justification for a Contracting State i.e. a sovereign nation to be answerable to an intellectual property office, in this case the ARIPO Office, for its action when a public interest event requires the issuance of a compulsory license.

Rule 13 has been reviewed, and amendments made to make clear that under Article 24 of the Protocol, a government has the right to issue a compulsory licence for public interest reasons on its own initiative without having to make any applications or fulfill any conditions. Any rule that interferes with this authority should be deleted. It is also for the Contracting States to determine at the national level the procedure for issuing a compulsory license when requested by a third party.

Burdensome conditions that hinder prompt utilization of compulsory licences such as requiring an applicant to prove failed prior negotiations with the right holder in his/her request for a compulsory license, requiring a statement justifying why the invention constitutes a significant technical progress of considerable economic interest to the public [Rule 13(5)(iv)],

and conditions pertaining to persons granted a compulsory licence [Rule 13(6)] all go beyond the scope of Article 24 and should be deleted.

The WTO Trade Related Agreement on Intellectual Property Rights (TRIPS Agreement) places no conditions or restrictions with regard plant variety protection, except to require WTO members (except for LDCs) to put in place an effective sui generis system of protection for plant varieties. Least developed countries enjoy a transition period until July 2021 (which is likely to be extended), and thus are under no obligation to put in place any type of plant variety protection system.

What also needs to be clear in the Draft Regulations is that the ARIPO Office and the right holder shall provide the necessary seeds or propagating material to the person or entity to whom a compulsory licence has been issued.

Compulsory licensing may be an important tool in situations such as where the propagating material is not available as the right holder has no economic interest in a Contracting State, the propagating material is available at an unaffordable price, where a high proportion of the propagating material is being imported, to remedy anti-competitive practices of the right holder etc. Thus the need to ensure the Contracting State has the right to issue CLs in the interest of the public and the procedure for issuance is straightforward and not subject to onerous conditions.

Other Gaps in the Draft Regulations, Weakening National Capacity

A principle critique against the Arusha Protocol was its harmonization of UPOV's standards on plant variety intended mainly for agricultural systems in industrialized countries which are heavily dependent on the commercial seed sector, and the application of such harmonized standards to a region that is made up of the world's poorest and vulnerable communities. Thirteen out of the 19 ARIPO Members are categorized by the United Nations as "Least Developed Countries". These countries are heavily dependent on agricultural systems managed by small-scale farmers dependent on seed saving, and on neighbors, relatives and local markets for access to seeds. Most of these countries have never implemented a plant variety protection system. Such systems are alien to the majority of the developing countries.

The Draft Regulations further strengthen the centralizing of authority and power in the ARIPO Office to receive and examine applications, to delegate field examination and to collect fees. This further weakens the role and capacity of national authorities that are already insufficient.

The Draft Regulations further undermines the role of national authorities by leaving open the question of where the DUS examination will take place. This opens up the strong possibility that most of the DUS examination and other testing will be outsourced to entities outside the ARIPO region, most likely the Community Plant Variety Office of the European Union, a major supporter of the Arusha Protocol.

The Draft Regulations also fails to address how fees collected by the ARIPO Office will be shared with national plant variety protection (PVP) offices. As most PBR applications will be filed regionally with the ARIPO Office collecting fees, the sustainability of national PVP offices will come into question, further weakening the role of national governments in the regulation of PVP.

There are also no provisions in the Regulations about how and where the protected propagating material will be maintained, and whether and how Contracting States will have access to such

material especially where the material is not marketed.

Thus it is crucial for ARIPO Members to propose changes to the Draft Regulations and if necessary to the Arusha Protocol to retain national sovereignty to take important decisions that impact on millions of smallholder farmers, their seeds systems and livelihoods.

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