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ARIPO Draft Regulations on Plant Variety Penalizes Small Farmers

23 June, London (Sangeeta Shashikant) – In advance of an Expert Meeting to review Draft Regulations for the Implementation of the Arusha Protocol for the Protection of New Varieties of Plants, the Secretariat of the African Regional Intellectual Property Office (ARIPO) released a draft that is adverse to the interests of small farmers.

The Expert Meeting met in Harare from 14 to 16 June 2016. Participants included government representatives from the ARIPO region, the African Seed Trade Association (AFSTA), the International Union for the Protection of New Varieties of Plants (UPOV), the Community Plant Variety Office (CPVO) and the French seed industry (Groupement National Interprofessionel des Semences et plants – GNIS).

In a surprising move, the ARIPO Secretariat also facilitated the participation of civil society representatives from the Alliance for Food Sovereignty in Africa (AFSA) and the African Centre for Biodiversity (ACB). This is undoubtedly due to the outrage expressed by these groups on the ARIPO Secretariat's bias in enabling the participation of the abovementioned entities while deliberately excluding civil society's participation in the negotiation of the Arusha Protocol.

In its statement released prior to the Expert Meeting, AFSA condemned the Draft Regulations, calling for the Regulations to be "scrapped in their entirety" highlighting that the Draft Regulations included provisions "designed to intimidate and force seed processors, seed suppliers, government certification officers and even farmers' organizations to police and spy on farmers who use farm-saved protected seed."

The Draft Regulations also fail to expressly recognize the right of small-scale farmers to freely continue to save, re-use, exchange and sell seeds/propagating material of the protected variety.

In fact, the Draft Regulations require small-scale commercial farmers to remunerate the right holder for saving seeds of the protected varieties, although in the European Union (EU), such farmers are exempt from payment of remuneration.

The EU is a strong proponent of the Arusha Protocol.

Obviously, the Draft Regulations are contrary to the vast literature and evidence that recommend that seed laws and policies, including plant variety protection systems, should safeguard the interests of smallholder farmers. These farmers often work on plots less than 10 hectares, are the main food producers in Africa, and the future of sustainable food systems.

Third World Network (TWN) and the African Centre for Biodiversity (ACB) released detailed comments on the Draft Regulations highlighting in particular the implications for small farmers and proposing recommendations for the consideration of ARIPO Members.

Their analysis also points out that Rule 12 of the Draft Regulations (on the exception to breeders' rights and connected to farmers' interests) reflects 17 sub-rules copied almost *verbatim* from the EU regulations on the same subject with almost no effort made to develop a set of rules suitable to the needs of the ARIPO region which comprises 19 sub-Saharan countries, of which 13 have been categorized by the United Nations as "least developed countries" (LDCs) i.e. the poorest countries in the world. Further, many aspects of the Draft Regulations especially Rule 12 are incomprehensible, presumably since it is a cut and paste of the EU Regulations.

This article features some of the problematic aspects of Rule 12 in the initial Draft Regulations released by the ARIPO Secretariat for discussion at the Expert Meeting.

According to a press release issued by the ARIPO Secretariat on 22 June, the Expert Meeting finished its review on 17 June with the creation of a "subcommittee to clean up the new draft regulations on their behalf for further scrutiny". The sub-committee was made up of experts from Liberia, Kenya, Tanzania, Uganda, Zambia (as Chair) and Zimbabwe. The consultant, Dr. Evans Sikinyi, who guided the experts in the review process, was also part of this sub-committee, according to the press release.

It further states that the sub-committee met on 18-19 June and that the revised Draft Regulations will be circulated for further scrutiny and comments. The ARIPO Secretariat will consolidate the comments received into a draft to be submitted to the Technical Committee on Plant Variety Protection. The final text of the draft regulations will, after this review, be submitted to the Fortieth Session of the Administrative Council for adoption.

Small-scale farmers and remuneration

The lack of any provision that safeguards the right of small-scale farmers to freely save, use, exchange and sell farm saved seed and propagating material of the protected variety is the chief reason why civil society and farmer groups remain opposed to the Arusha Protocol.

A human rights impact assessment of the UPOV system in Kenya, Philippines and Peru published by Berne Declaration concludes that "restrictions on the use, exchange and sale of farm-saved PVP seeds….could negatively impact on the functioning of the informal seed system, because if implemented and enforced….would sever the beneficial interlinkages between the formal and informal seed systems. Moreover, selling seeds is an important source of income for many farmers. From a human rights perspective, restrictions on the use, exchange and sale of protected seeds could adversely affect the right to food, as seeds might become either more costly or harder to access. These restrictions could also affect other human rights, by reducing the amount of household income which is available for food, healthcare or education".

The Draft Regulations do little to appease this concern of civil society and farmer groups. It fails to utilize the opportunity to interpret the exception of "acts done privately and for non-commercial purposes" in the Arusha Protocol to allow small-scale farmers, to continue the practices of freely saving, using, exchanging and selling farm-saved seed/propagating material.

The Draft Regulations only operationalize Article 22(2) of the Protocol which allows for the use of the protected material on the farmers' own holding, although the application of this exception is limited to the list of varieties "with a historical common practice of saving seed in the Contracting States specified by the Administrative Council which shall not include fruits, ornamentals, other vegetables or forest trees". The Arusha Protocol further states that small-scale commercial farmers and large- scale commercial farmers will pay a different levels of

remuneration.

Borrowing text from the EU Regulations, the Draft Regulations define small-scale commercial farmers and requires such a farmer to pay remuneration for saving seed for purposes of propagation on her own holding.

This proposal raises concern as even in the EU, small farmers who in comparison have better economic status are exempt from payment of remuneration when saving seed on their own holdings.

In their analysis, TWN and ACB propose that the Draft Regulations be revised to reflect three categories of farmers. The first category is that of small-scale farmers to be free to use the protected variety, to save, exchange and sell farm saved seed or propagating material of the protected varieties. This is achieved by interpreting the exception of private and non-commercial use in Article 22(1)(a) of the Protocol. This category is to secure the interests of small scale farmers often working on land less than 5 hectares, and to facilitate rural development.

The second category of farmers are the small-scale commercial farmers who, as in the EU, should be allowed without payment of remuneration to save and propagate varieties specified in the list of the Administrative Council on their own holdings. The third category of farmers would be large-scale commercial farmers who would need to pay remuneration for saving and propagating protected varieties.

With regard to remuneration that should be paid, Rule 12 reflects the convoluted legal language contained in the EU Regulations, but without any clarity on its specific meaning. For instance Rule 12(4)(ii) states in the event there is no contract with the right holder, "the level of remuneration shall be sensibly lower than the amount charged for the licensed production of propagating material of the lowest category qualified for official certification, of the same variety in the same area."

It further states in sub-paragraph (iv): "The level of remuneration shall be considered to be sensibly lower, if it does not exceed the one necessary to establish or to stabilize, as an economic factor determining the extent to which use is made of the derogation, a reasonably balanced ratio between the use of licensed propagating material and the planting of the product of the harvest of the respective varieties covered by a breeder's right and such ratio shall be considered to be reasonably balanced, if it ensures that the holder obtains, as a whole, a legitimate compensation for the total use of his or her variety."

The Draft Regulations does not contain any explanation on the specific meaning of the provisions on remuneration. In the EU context, the provisions are understood as fixing the remuneration level at 50% of the cost for licensing propagating material.

Provision of information by farmers, seed processors, certification agencies

Rules 12(7) to 12(15) of the Draft Regulations put an obligation on the farmer, the seed processors as well as official certification agencies to provide the right holder with the information requested with regard to use of his/her protected variety. For purposes of monitoring the use of the protected varieties, Rules 12(13) and (14) of the Draft Regulations require the farmer and the seed processors to give evidence in support of their disclosure with regard to use of the protected variety, if requested by the right holder. In this regard farmers and seed processors are expected to retain evidence for at least 5 years.

Rule 12(16) states that a violation of the rules will result in infringement of breeders' rights. Rule 12(17) further gives the right holder the right to sue the farmer, seed processor or the certification agency to fulfill his/her obligations under the rules. And sub-para (ii) even goes as far as to impose a penalty for repeated and intentional non-compliance with the prescribed rules. The minimum penalty is set at four times the amount charged for the licensed production.

These rules lack legal legitimacy, as the Protocol does not speak about provision of information by seed processors, the certification agencies or the monitoring of farmers, seed processors, the certification agencies etc. Rules 12(16) and 12(17) effectively expand the scope of breeders' rights listed in Article 21 of the Protocol. In addition, these Rules are connected with enforcement of breeders' right, which according to Article 35 of the Protocol falls within national jurisdiction.

The Draft Regulations are designed to allow right holders to harass and intimidate farmers in the ARIPO region. Thus similar rules in the EU context have generated significant controversy resulting in the European Court of Justice placing limits on the right holders' right to information. For example, in the case of Schulin v Saatgut (C-305/00, 2003) and then subsequently in Schulin v Jäger (C-182/01, 2004) it has been established that a breeder cannot request information from a farmer regarding farm-saved seed without prior evidence of such use.

According to Francois Meienberg from Berne Declaration, the Swiss Parliament has rejected similar provisions.

For reasons mentioned above, analysis released by the TWN and ACB calls for the deletion of Rules 12(7) – 12(17) of the Draft Regulations.

Note: This article is a follow-up to a previous article titled "Proposed Plant Variety Regulations inconsistent with ARIPO's Protocol, violates sovereign rights" dated 17th June 2016.
