



AFRICAN REGIONAL INTELLECTUAL PROPERTY ORGANIZATION (ARIPO)

REGIONAL WORKSHOP ON THE ARIPO LEGAL FRAMEWORK FOR THE PROTECTION OF NEW VARIETIES OF PLANTS

July 22 to 25, 2013

Ufulu Gardens

Lilongwe, Malawi

The following responses to the comments made by civil society organizations on the ARIPO Legal Framework for the Protection of New Varieties of Plants have been provided by the experts from the IP Offices and Ministries of Agriculture of ARIPO Member States, at the Regional Workshop held from July 22 to 25, 2013, in Malawi.

Article	Comments	Responses
Preamble	It does not recognize the role of women in their contribution to seed saving, selection and breeding	The preamble covers all farmers (including women) In the draft Legal Framework, gender-neutral terms will be used.
Art. 2	The article should take into account a greater recognition of farmers' rights as contained in Part V of the OAU Model Law	The OAU Model Law provides a framework whose objective is to address different policy issues such as conservation, sustainable use of biological resources, community intellectual property rights, farmers' rights including their traditional knowledge and landraces. Recognition of some aspects of farmers' rights is provided for in the Swakopmund Protocol: "Protection of traditional knowledge and access and benefit sharing framework". Farmers' rights need to be addressed in separate legislation, although such legislation should be compatible and mutually supportive.
Art. 3	The provisions contained in the draft legal framework are based on UPOV 1991 and in some areas goes beyond UPOV 1991. As such the draft legal framework adopts standards found in UPOV 1991 that strengthen breeders rights to the prejudice of farmers' rights. This includes coverage of all plant genera and species, extensive duration of protection i.e. of 20-25 years; extensive scope of breeders rights, limited exemptions to breeder rights and severely limited farmers' rights etc	The approach used in the development of the Legal Framework has been based on the decision of the Administrative Council in November 2012 and the recommendation to take into account existing Plant Breeders' Acts from Member States. The legislation of those Member States covers all plant genera and species. Offering protection for all plant genera and species will maximize the benefits provided by the plant variety system from the beginning. Restricting the list of genera and species will reduce the benefits.
Art. 4	ARIPO Member States should retain	ARIPO Member States are convinced that

	significant flexibility in the domestic implementation of the PVP System.	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. Member States can continue to operate at a national level (Art. 39 of the Draft Legal Framework).
Art 6-10	The provisions are restrictive and will lead to misappropriation of farmers' rights Replacing traditional varieties with uniform commercial varieties will lead to erosion of crop diversity	Plant Variety Protection (PVP) encourages the development of new varieties of plants. PVP does not govern unprotected varieties. The CBD and ITPGRFA address the conservation of biological diversity. Separate measures should be put in place in order to ensure conservation of biodiversity (such as establishment of gene banks). Studies have shown that there has been no loss of diversity in a range of crops in different countries. Relevant examples were presented at the Workshop by the participants.
Art. 6.2 Art. 25	Relationship between Treaties (Convention of Biological Diversity (CBD)/ International Treaty (ITPGRFA)...))	The Treaties pursue different objectives, have different scopes of application and require different administrative structure to monitor their implementation. Therefore, those matters should be addressed in separate legislation, although such legislation should be compatible and mutually supportive.
Art. 7.2; 7.3	The Legal Framework should not extend protection to existing varieties	The aim of the transitional novelty provision is to enable the protection of varieties which have been created shortly before protection becomes available for the first time, but which do not fall within the period for novelty in Article 7.2 of the Legal Framework. This provision will be beneficial for all type of breeders, including, for example, public research institutes who have recently released varieties prior to the entry to force of the Legal Framework.
Art. 12	There should be a requirement to specifically indicate whether the variety is genetically modified (GM), mutant, terminator or any other variety produced by modern biotechnology. This serves as a check point that triggers other regulatory safety nets. There is also no provision for disclosure of complete passport (the parental line of the variety, best method of developing the variety) and information about the origin of the genetic material that the variety was based on (disclosure of origin)	The regulation of GMOs should be addressed by separate legislation. The African countries have developed robust Biosafety Regulations which are strictly enforced. It is therefore not appropriate to indicate how the varieties have been developed in the Legal Framework.
Art. 15	Applicant must be required to reveal all information with regard to the variety in the development of the variety that is to be protected e.g. breeding methods used	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.
Art. 16	The pre-grant opposition period should be specified. A 9-month time frame for pre-grant opposition is proposed to allow member states to make determination taking into account their national laws. Provision should be made to waive payment of fees when objection is made by certain communities	The opposition process is non-discriminatory and must ensure that there is national treatment. A right can be canceled or shall be nullified at any time if applicable. The payment of fee is necessary to cover the cost of the procedure and to ensure a genuine

	such as farmers and civil societies. Objection should be made through national offices as well as the ARIPO Office. Grounds of opposition should include where granting of PBR is not in the public interest of ARIPO Member States or where the variety may have an adverse effect on the environment.	basis for the opposition. Regulations concerning the environment should be addressed by separate legislation
Art. 21	UPOV 1991 vastly extends the rights of the breeders and severely restricts the scope of other breeders to innovate around the protected varieties.	The 1991 Act of the UPOV Convention has been examined by ARIPO Member States and considered to be appropriate. With regard to the use of a protected variety for breeding "other" varieties, the authorization of the breeder of the protected variety is not required in either the 1978 Act ("Authorization by the breeder shall not be required ... for the utilisation of the variety as an initial source of variation for the purpose of creating other varieties ... ") or the 1991 Act ("The breeder's right shall not extend to ... acts done for the purpose of breeding other varieties"). In addition, acts done with the "other" varieties (e.g. marketing), do not require the authorization of the breeder of the protected variety except for the circumstances specified in the 1978 Act and the 1991 Act. Article 5(3) of the 1978 Act specifies that the "authorization shall be required ... when the repeated use of the variety is necessary for the commercial production of another variety". The 1991 Act specifies that the authorization of the breeder is required, where the provisions of Article 14(5) (essentially derived and certain other varieties) apply, in respect of the acts for material covered under Article 14(1) to (4). This clarifies that the authorization of the breeder for the use of protected varieties for breeding purposes is required under neither the 1978 Act nor the 1991 Act.
Art. 22	Compulsory exceptions narrowly interpreted limited farmer exception only for agricultural crops specified by the Administrative Council on condition royalty is paid by the farmer to the breeder. Fruits, ornamentals, vegetables and forest trees are explicitly excluded from the scope of the exception. 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. ARIPO Administrative Council (and not member states) will be responsible Restrictions on customary practices of saving, sharing and trading seed undermines farmers rights and threatens food security	ARIPO 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.
Art. 24	Exceptions should include the following grounds: -where the exercise of the breeder's right involves issues pertaining to food security, nutrition and health -Where there is an anti-competitive practices by the rights holder -Where the proportion of plant variety	The 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.

	<p>offered for sale is being imported</p> <p>-Where requirements of the farming community for propagating material of a particular variety are not met</p> <p>-For socio-economic reasons and the development of indigenous and traditional technologies (refer to Article 33 of the OAU Model Law)</p>	
Art. 28 & 29	Flexibility should be made in the provision to enable Member States to decide on nullity and cancellation where applicable. The provision should also enable individual Member States to allow for post-grant opposition	The experts agreed that the authority responsible for granting the right must also be the authority responsible for nullity and cancellation.
Art. 35 & 36	It is important that Member States retain maximum flexibility at the national level with regard to enforcement of PBR (See Article 44(2) of the TRIPs Agreement).	The Legal Framework sets minimum measures for the enforcement of PBR and provides flexibility for Contracting States to ensure that accessible and appropriate enforcement measures are available.
Art. 38	The grant of regional breeder's rights will have significant implications for the national interests of the contracting parties. It may prevent Member States from taking any individual action with regard to PVP if it is a matter of national interest.	Art. 39 provides that the Legal Framework shall be without prejudice to the right of the Contracting States to grant national plant breeders' rights for plant varieties, subject to the provisions of Article 40.

General Comments	Arguments/ replies
<p>The Framework fails to recognize farmer's rights as an integral part of the innovation process</p> <p>The Legal Instrument does not incorporate elements pertaining to plant breeders and farmer's rights agreed to in the OAU Model and Article 9.1 of the ITPGRFA</p>	<p>Recognition of some aspects of farmers' rights is provided in the Swakopmund Protocol.</p> <p>Farmers' rights should be addressed in separate legislation, although such legislation should be compatible and mutually supportive.</p> <p>Farmers that develop new varieties will be entitled to obtain protection under the legal framework.</p>
<p>The Legal Framework provides one-size -fit-all PVP system that does not take into account the specificities of national agricultural systems</p>	<p>The legal framework has been developed in line with the UPOV Convention because the UPOV system has proven to be effective in a range of different countries with different agricultural systems including developing and developed countries.</p> <p>The positive impact of PVP has been documented in developed and developing countries in various regions of the world, including Argentina, Brazil, Canada, China, Japan, Kenya, Poland, Republic of Korea and South Africa.</p> <p>Many examples are available on the increased number of breeders after the introduction of PVP. For example, after the introduction of PVP in Kenya, the number of breeding entities doubled within seven years and continued to rise thereafter, with increases in the number of breeding entities in a range of agriculture, vegetable and ornamental crops. Information from the Republic of Korea and Canada has also provided data on the increased investment in breeding.</p> <p>Under the UPOV Convention, there are no restrictions on who can be considered to be a breeder: a breeder might be an individual, a farmer, a researcher, a public institute, a private company etc. For example, information is available on the use of plant variety protection by farmer-breeders of rice, potato and gentians in the Republic of Korea, the Netherlands and Japan, respectively.</p> <p>Information from China (e.g. maize, wheat) and the Republic of Korea (rice), amongst others, has indicated an increase in the number of applications by breeders in both the public and private sector after the introduction of PVP. In Brazil and South Africa, information has been presented on the way in which PVP can be used to enhance public-private partnerships, with the Agricultural Research Council in South Africa using PVP in order to ensure the participation of smallholder producers in the commercialization value-chain.</p> <p>Membership of UPOV is an important global signal for breeders to have the confidence to release their varieties in the region. The case of the development of the cut-flower industry in Kenya indicates how the value of the export market was increased by 8-fold after Kenya</p>

	<p>became a UPOV member and had access to the best varieties from foreign breeders. In the case of Argentina, access to foreign-bred soybean, lucerne and strawberry varieties provided an example of the importance of new varieties for meeting export needs. Furthermore, under the UPOV Convention, foreign-bred varieties, once available in a country, can be freely used for breeding under the breeders' exemption. Several examples exist of domestic breeders using foreign-bred varieties in their breeding programs and data from Republic of Korea has shown how the number of applications from residents now greatly exceeds the number of applications by non-residents.</p>
<p>The Legal Instrument is based on the UPOV 91 and is likely to result in progressive marginalization of farmer managed seed systems and the disappearance of local varieties</p> <p>The plant variety protection system promotes standardization and homogeneity rather than agro-biodiversity</p> <p>About 75% of plant genetic diversity has been lost as farmers world-wide have abandoned the local varieties for genetically uniform varieties that provide higher yields under certain conditions</p> <p>Concerns have been raised with regards to the protection of conservation of agricultural biodiversity for livelihood security and food sovereignty, farmers rights and self-determination, citizens involvement in decision-making process, the industrialization and privatization of Africa's food systems and commodification of nature and knowledge</p>	<p>PVP encourages the development of new varieties of plants. PVP does not govern unprotected varieties. The CBD and ITPGRFA address the conservation of biological diversity.</p>
<p>The adoption of the Instrument will make farmers to become increasingly dependent on expensive input, creating the risk of indebtedness in the face of unstable incomes</p> <p>The Draft Legal Framework does not meet the needs of ARIPO Member States since more than 80% of seed supply is produced by informal/farmer managed seed systems.</p>	<p>The ARIPO Legal Framework will encourage the development of new varieties of plants by giving farmers more choice than before. The provisions 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. With regard to landraces, subsistence farmers will be able to continue what they were used to do. Governments have put in place parallel regulations to ensure that the interests of subsistence farmers are safeguarded. Subsistence farming will be covered by the exception for private and non commercial purposes.</p>
<p>The Instrument will create an imbalance between the private and public sectors in agricultural research, with R&D being oriented towards meeting the needs of farmers in rich countries while needs of poor farmers in developing countries are comparatively neglected</p>	<p>There are no restrictions on who can be considered to be a breeder under the UPOV system: a breeder might be an individual, a farmer, a researcher, a public institute, a private company etc Information from a range of countries has demonstrated that many types of breeders use</p>

	<p>plant variety protection. For example, the UPOV system is very actively used by public institutes to deliver improved varieties to farmers, including in the form of public-private partnerships. The experts meeting noted that the public-private partnership in the WEMA Project relied on the existence of plant variety protection.</p>
<p>Access to credit is packaged with commercial varieties which disadvantages the small holder farmer</p>	<p>Access to credit is not a matter related to Plant Variety Protection.</p>