ALLIANCE FOR FOOD SOVEREIGNTY IN AFRICA

APPEAL TO ARIPO AND AFRICAN UNION MEMBER STATES AND UNECA FOR AN EFFECTIVE ARIPO PROTOCOL SUPPORTIVE OF FARMERS' RIGHTS AND THE RIGHT TO FOOD

Harare, Zimbabwe. 29 October 2014

The Director General of the African Regional Intellectual Property Organization (ARIPO)
The Vice Secretary-General – International Union for the Protection of New Varieties of Plants (UPOV)
Observer missions present
Heads of Country delegations
Delegates, Ladies and gentlemen

On behalf of the Alliance for Food Sovereignty in Africa (AFSA), I would like to thank the workshop organizers for considering our *SOS* appeal to participate at this regional ARIPO workshop on the draft ARIPO protocol for the protection of new varieties of plants.

The Alliance for Food Sovereignty in Africa (AFSA) is a Pan African platform representing small holder farmers, pastoralists, hunter/gatherers, indigenous peoples, citizens and environmentalists from Africa who possess a strong voice that shapes policy on the continent in the area of community rights, family farming, promotion of traditional knowledge and knowledge systems, the environment and natural resource management. AFSA has previously raised serious concerns regarding the draft ARIPO protocol for the protection of new varieties of plants. For record purposes, AFSA made submissions to ARIPO on its draft Plant Variety Protection (PVP) protocol that raised key concerns through a detailed submission dated 6th

November 2012 to ARIPO[1]. AFSA further submitted a substantive document containing several grounds upon which AFSA is seeking urgent interventions by ARIPO the AU and the UNECA to urgently revise the draft ARIPO PVP Protocol to protect farmers' rights and the right to food. This document was sent to all member states of ARIPO as well as to the ARIPO Secretariat, and is in the possession of the ARIPO. Recently in July 2014 AFSA published a press release through various media streams of the region appealing to ARIPO, AU and UNECA to seek their attention for legal space within the ARIPO framework on provisions that safeguards farmers' rights **(the right of farmers to freely save, use, exchange, sell farm-saved seeds and to provide farmers and farming communities rewards for their contribution to agro-biodiversity and give them incentives to continue improving and making available plant genetic resources for food and agriculture which are the foundation of modern plant breeding and sustainable agriculture)** and the right to food. Just as was the case in the November 2013 meeting of the Administrative Council and Council of Ministers of ARIPO, held in Kampala, Uganda, AFSA is participating at this regional workshop on the draft ARIPO protocol for the protection of new varieties of plants at our own costs. Worrisomely though our representation as civil society has been restricted by the workshop organizers to only one participant. The assertion by the Director General of ARIPO in his opening address to delegates of this ARIPO workshop "*that this consultation process gives a platform to various stakeholders including civil society to contribute for the successful outcome of the ARIPO protocol*" makes a mockery to the essence of democracy that is usually manifested by advancement of transparent and inclusive decision-making regimes in ARIPO member states as it has now emerged that only one civil society representative is taking part in this Harare workshop.

ARIPO has dismissed these concerns and, instead, presented the draft PVP Protocol to an extraordinary session of UPOV on 11 April 2014, where the UPOV Council assessed the draft PVP Protocol and took a positive decision on the conformity of ARIPO's draft Protocol with

[1] See http://www.acbio.org.za/images/stories/dmdocuments/CSOconcernsonARIPO-PVPframework.pdf for the CSO submission to ARIPO dated 6th November 2012. See also http://afsafrica.org/wp-content/uploads/2014/06/AFSA-letter-ARIPO-March2014-.pdf for AFSA's Comments on ARIPO's Responses to Civil Society.

UPOV 1991. If the draft Protocol is to be adopted without changes at the next Diplomatic Conference of ARIPO, set to take place in March 2015, ARIPO and any ARIPO member that ratifies the Protocol can join UPOV. According to AFSA, this means that any member state of ARIPO can simply side step national consultation processes and ratify the ARIPO Protocol at the expense of their national sovereign rights and further become a UPOV 1991 member, all in one foul undemocratic swoop. We are of the view that the whole process of developing the draft legal framework is fundamentally flawed, and thus lacks credibility and legitimacy.

Farmers' ability to search for new diversity, select new traits, and cultivate and exchange selected materials with community members are the processes that have proved to enhance farmers' capacity to cope with adversity resulting from the consequences of socio-economic transformation, market forces and climate change.

Summarized Key Concerns raised by Civil Society:

1. **The draft ARIPO Protocol is based on the 1991 Act of the Convention for the Protection for New Varieties of Plant (UPOV 1991), a restrictive and inflexible legal regime. UPOV 1991 came about with the development in industrialized nations of large scale commercial farming and professional breeding focused on producing uniform varieties that may give higher yields under specific conditions.** In comparison to previous versions (i.e. UPOV 1978), UPOV 1991 is rigid, with very limited flexibility given to governments to design a regime that reflects national conditions and realities.

Neither AFSA nor other like-minded Pan African civil society groups harbour any blanket objections to innovation and technological advancement in our agricultural sectors. Article 27.3(b) of the TRIPS agreement provides for member states to provide for the protection of plant varieties either by patents or by an effective sui generis system or by any combination thereof. It is important to note that 13 of ARIPO's 19 member states are LDCs. Of the 13 LDCs, 4 are non-WTO members and thus do not have to implement the TRIPS Agreement at all. 9 other LDCs are members of the WTO but are currently not obliged to comply with the TRIPS Agreement,

with the exception of Article 3, 4 and 5, until 1 July 2021, and this period can be extended. In these countries the majority of the population live below the poverty line (e.g. Burundi (81%), Malawi (73.9%)), with low levels of adult literacy, access to electricity, water and sanitation and a high prevalence of HIV infections and other diseases.

Only 6 ARIPO members i.e. (Botswana, Ghana, Kenya, Namibia, Swaziland and Zimbabwe) need to implement sui generis systems for PVP. However, in essence these six particular member countries of the ARIPO region also face similar challenges as the LDCs.

There is a misconception that UPOV 1991 represents this "effective sui generis system". In fact there are a broad range of such systems, including legislation in Ethiopia, India, Malaysia and Thailand that can be evaluated. The requirements of UPOV, particularly UPOV 1991, which is the only act of the UPOV Convention that is currently available – is considerably stricter than the requirements of TRIPS Article 27.3(b). 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 and supportive of the CBD and ITPGRFA thus there is no reason for ARIPO not to do the same.

The vast majority of agriculture in the ARIPO countries is dominated by small-scale farmers, many involved in subsistence farming, heavily reliant on informal systems for access to seeds, irrespective of whether farmers cultivate local or modern varieties. There are also other significant challenges as well which may vary from country to country such as poor access to productive assets (land and water); weak rural institutions, persisting droughts, land degradation, soil erosion, poorly functioning markets, poor storage and transport facilities etc. Farmers also have little government support with African countries spending only 3% of their budget on

agriculture, disproportionate to the size of the sector in terms of employment and economic activity. In addition, many of the ARIPO members have no experience in dealing with PVP issues or the impacts as they have never had a PVP legislation.

Against this background, what ARIPO members need is flexibility to pursue suitable policies that can evolve as the agricultural systems develop. UPOV 1991 does not provide such a framework. Adopting the UPOV 1991 legal framework and joining UPOV essentially ties ARIPO members to a system that was intended for developed countries and ARIPO members will only be able to operate within the rigid parameters set out. Such a framework is simply unsuitable as it does not reflect the agricultural and socio-economic conditions prevailing in ARIPO member state.

Currently under the WTO-TRIPS Agreement developing countries have full freedom to design effective sui generis PVP system that is relevant to their individual conditions and needs. LDCs are not under obligation to have PVP regimes in place. ARIPO should use this policy space to work out a more flexible legal regime that balances breeders and farmers rights and benefits the ARIPO population and NOT just blindly follow the UPOV route, simply because it is championed by the UPOV Secretariat, the EU, the US and the seed industry.

2. The draft Protocol based on UPOV 1991 is tilted heavily in favor of commercial breeders and their varieties to the detriment of small-scale farmers and accelerates erosion of biodiversity. Overall the draft legal framework is about replacing local varieties with uniform commercial varieties (many of which are likely to be imported). On this Olivier De Schutter, the Special Rapporteur on the Right to Food, makes several pertinent findings in his report to the UN General Assembly.

De Schutter notes that while commercial varieties may improve yields in the short term, their performance is often linked to use of inputs (e.g. fertilizers) and water availability and thus farmers who acquire these inputs may find themselves eventually trapped in a vicious circle of debt as a result of bad harvest. This scenario is particularly likely when a farmer has switched to

mono-cropping, and his/her revenue is very much dependent on how good the harvest is. He also observes that the focus on promoting only commercial varieties will in the end result in a progressive marginalization or disappearance of local varieties. This is particularly so, when farmers are encouraged to use commercial varieties with incentive packages that include access to credit, fertilizers and pesticides. This development is deeply problematic as farmer managed seed systems are particularly important to resource-poor farmers in resource poor agro-ecological environments. In addition, commercial varieties are simply less suited to the specific agro-ecological environments in which farmers work and for which farmers' varieties may be more appropriate.

De Schutter also stresses that the spread of commercial varieties also accelerates crop diversity erosion, adding that about 75% of plant genetic diversity has been lost as farmers worldwide have abandoned their local varieties for genetically uniform varieties that produce higher yields under certain conditions. Genetic diversity within crops is also decreasing. Wide-scale genetic erosion increases vulnerability to climate change, new pests and diseases.

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

African nations as a group have championed and called for the strengthening of farmers' rights in various international fora. Many ARIPO members are members to the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA) which affirms that "the rights recognized in the Treaty to save, use, exchange and sell farm-saved seed and other propagating

material, and to participate in decision-making regarding, and in the fair and equitable sharing of the benefits arising from, the use of plant genetic resources for food and agriculture, are fundamental to the realization of Farmers' Rights, as well as the promotion of Farmers' Rights at national and international levels". It also requires its contracting parties to take responsibility to realize Farmers' Rights and "take measures to protect and promote Farmers' Rights".

However despite international commitments to realize farmers' rights, the proposed legal framework goes in an opposite direction. The draft law is tilted heavily in favor of commercial breeders (which are likely to be foreign breeders) with the total elimination of farmers' rights as follows:

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

(ii) Farmers are only allowed to save seeds for propagating purposes on his/her own holdings but this may be subject to payment of royalties to the breeder.
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".

(iii) Further conditions on this limited exception such as requiring farmers to provide information to breeders will be elaborated on in the regulations.

The legal framework not only fails to recognize farmers' rights as an integral part of the agricultural innovation systems, it effectively undermines farmers' rights. This approach poses a problem as farmers are expected to purchase seeds for every planting season or pay royalties to the breeder in the case of farm-saved seeds as well acquire inputs (e.g. fertilizer) as the performance of commercial varieties is often linked to such inputs, thus creating the risk of indebtedness and a vicious circle of debt, as a result of bad harvest. Effectively, the draft legal framework will make illegal the practise of freely using, sharing and selling seeds/propagating

material with regard to use of protected seed/propagating material. This practise underpins 90% of the smallholder agricultural system of sub-Saharan Africa.

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

5. **The draft Protocol facilitates biopiracy**. The draft legal framework does not require a breeder to disclose the origin of the genetic material used to develop the variety it wishes to protect and neither does it provide mechanisms for prior informed consent and access and benefit sharing. In the absence of these elements, the draft Protocol sets up a framework for breeders, most of which are likely to be foreign entities, to use local germplasm to develop varieties, which are then exclusively appropriated through the PVP system set up by the draft Protocol. More specifically the proposed Protocol will most likely end up facilitating bio- piracy, rather than preventing it. It is unacceptable that while African nations champion in various international forums (e.g. the WTO, WIPO) for disclosure of origin and mechanisms for benefit sharing in IP agreements, ARIPO, an African regional organization, is ignoring such mechanisms.

6. **Draft Protocol contains significant shortcomings**. The impact of many of the aspects of the legal framework has not been thought through thoroughly. For example the section on "publication of information" lists information that should be published by the ARIPO office. However it also states: "No confidential information as indicated in the application form shall be published without the written consent of the breeder of the variety." This provision conveniently

allows applicants of PVP to conceal information with regard to breeding and development of a variety.

There is no logical reason for allowing a breeder to conceal information. Since a breeder is getting protection, it is important for the breeder to reveal all information with regard to breeding and development of the variety that is to be protected (e.g. the parental lines, complete passport data of the variety it wishes to protect). Otherwise, even after expiry of their rights, breeders will be able to keep their breeding/development methods (e.g. the parental lines of the protected variety) a trade secret. Including a confidentiality clause as explained above is detrimental to the interest of ARIPO members, and its constituents (farmers and the general public) as it will facilitate biopiracy, make it difficult to operationalize pre-grant opposition procedures, benefit sharing arrangements and prevent transfer of technology/information to local entities.

Another shortcoming in the draft legal framework is there no provision that disallows the registration of certain varieties, for instance varieties which affect public order, or morality, human, animal and plant life and health or which adversely impact the environment. Several other national jurisdictions such as Zambia, Zimbabwe, include such a provision in their PVP legislations.

7. **The basis for draft legal framework is fundamentally flawed.** The ARIPO Secretariat is championing UPOV 1991 entirely on the claims made by the UPOV Secretariat (which has an interest in promoting UPOV 1991), foreign entities such as the United States Patent and Trademark Office (USPTO), and the European Community Plant Variety Office (CPVO) and the seed industry (e.g. the African Seed Trade Association (AFSTA), the French National Seed and Seedling Association (GNIS) and CIOPORA). These entities are involved to protect their own interests as they represent the major breeders (i.e. beneficiaries of the system).

The ARIPO Secretariat itself has not conducted any independent costs-benefit analysis or assessment of the impact of the proposed framework. In short except for the extensive propaganda and claims of the UPOV Secretariat and entities with vested commercial interests,

there is simply no empirical basis for the legal framework. This is unacceptable especially considering that most of the ARIPO members are LDCs and with no experience with the impact of PVP, what more with the impact of UPOV 1991.

8. **The process of developing the legal framework and policy has largely been closed to farmers, farmer organisations or other members of civil society, while industry associations (e.g. CIOPORA, African Seed Trade Association (AFSTA), French National Seed and Seedling Association (GNIS)) and foreign organizations such as the United States Patent and Trademark Office (USPTO), the UPOV Secretariat, the European Community Plant Variety Office (CPVO) have been consulted extensively.**

The process adopted by ARIPO is flawed in that there has been inadequate consultation with relevant stakeholders, including organisations representing farmers and the general civil society, as required by international law, particularly that outlined in the International Covenant on Civil and Political Rights, the Convention on the Elimination of All Forms of Discrimination against Women and the International Treaty on Plant Genetic Resources for Food and Agriculture. It needs to be recalled that Article 9(2c) of the ITPGRFA recognises the rights of the local and indigenous communities and farmers "to participate in making decisions, at the national level, on matters related to the conservation and sustainable use of plant genetic resources for food and agriculture."

The UN Special Rapporteur on the Right to Food has also recommended that governments: "Put in place mechanism ensuring the active participation of farmers in decisions related to the conservation and sustainable use of plant genetic resources for food and agriculture particularly in the design of legislation covering…. the protection of plant varieties so as to strike the right balance between the development of commercial and farmers' seed systems"[2].

Opening remarks and presentations already made at this workshop emphasized that most of the delegates from ARIPO member states have **limited knowledge on the ARIPO draft protocol**.

[2] See UN General Assembly Document A/64/170 titled "Seed Policies and the right to food: enhancing agro-biodiversity and encouraging innovation"

In fact key facilitators have already acknowledged that some delegates from ARIPO member states might not be aware of the existence of ARIPO as a regional organisation, hence the need to create awareness on both the organisation entrusted with the mandate for the development of this regional protocol and the framework of the ARIPO protocol itself. It is difficult to now expect delegates who have not yet comprehended the context of the draft protocol and what it stands for to make any meaningful recommendation to their respective governments in embracing this protocol and further adoption of the draft regulations at the ARIPO diplomatic conference scheduled for March 2015 (just four months from now). Well the Vice-Secretary General of UPOV has proposed to delegates in this workshop to enrol for distance learning courses through the links provided in his presentation so that delegates can "ably" understand the UPOV 91 system of plant variety protection (within the limited period available) while the process of its domestication in Africa is being adopted by users in the respective ARIPO member states. 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. Rather ARIPO has already decided to adopt the UPOV 1991 model, and it is clearly blocking any efforts to take on board suggestions of civil society. This is obvious from the evasive and often dismissive responses of ARIPO to CSOs comments.

9. **ARIPO has failed to comply with Article V of the 1976 Lusaka Agreement establishing the ARIPO (Lusaka Agreement),** which requires ARIPO to consult with the AU and UNECA. Such failure to consult raises serious questions about the validity of the draft PVP Protocol.

10. **ARIPO has furnished incorrect information to ARIPO Member States**, and that Member States did not give a mandate that the UPOV Council should examine the draft ARIPO Protocol for the Protection of New Varieties of Plants. The provision of incorrect information by ARIPO constitutes gross negligence on the part of ARIPO, in the light of the UN International Law Commission's 2011 Articles on the responsibility of international organisations and the International Law Association's 2004 Final Report on Accountability of International Organisations.

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11. **ARIPO has not adequately facilitated a process whereby the right to food for all is fully taken into account**. In an African context, where such a high proportion of farmers depend on farm-saved seeds, and where the legislation and institutions for curbing anti-competitive practices might differ between countries, this is an unwarranted omission.

14. **ARIPO's adoption of the least flexible approach in the realm of plant breeders' rights, as set out in the draft ARIPO PVP Protocol, represents a protection regime that goes further than UPOV 1991, hence it is correct to describe it as "UPOV 1991**+". This is disconcerting, given that currently *no* sub-Saharan African State is bound by UPOV 1991.

AFSA is seeking the following specific interventions:

1. Basing on the concerned outlined, AFSA wish to appeal to policy makers from ARIPO member states to object to any efforts for the immediate planning for the diplomatic conference scheduled to be held in March 2015. Instead ARIPO member states should be granted time and resources to initiate an evidence-based impact assessment/cost-benefit analysis of the proposed draft legal framework. Such analysis should take into account the conditions prevailing within the ARIPO region, the actual situation with regard to seed, the role of small-scale farmers, the state of seed industry in the region, is it locally or foreign owned. It should assess whether the draft legal framework corresponds to the development needs of ARIPO members and will not result in depriving smallholders from access to their productive resources. ARIPO should seek consensus and contributions from all stakeholders including CSOs and small-scale farmers from across the region. ARIPO should defer the process for adopting the draft legal framework until there is clarity on the outcome of the impact assessment and consultations with CSOs and small-scale farmers, and a better draft legal framework for PVP that corresponds to the interests of the region. The draft ARIPO PVP Protocol should be immediately revised in order to comply with the more flexible effective *sui generis* requirement of TRIPS Article 27.3(b), as well as including provisions that recognise farmers' rights and facilitate the right to food. This revision should be based on a much broader consultation process and by making use of experts from outside of the plant breeders' rights sector.

2. The ARIPO Secretariat should review the information that was provided during the presentation of the draft ARIPO PVP to its member states, and correct any information that is found to not have been adequately substantiated or adequately clear in its content.
3. The governments of Ghana and Tanzania, both of whom are in the process of adopting legislation based on UPOV 1991, should commission an independent sustainability impact assessment of the draft plant breeders' rights, where the social impact is understood as encompassing human rights impacts. The assessment should be presented to the respective national parliaments.
4. ARIPO should consider how the many studies on effective *sui generis* systems for plant varieties can be made available to its member states.

Point to Note

1. The full submission can be viewed at **http://tinyurl.com/ka2ad7k**
2. AFSA members include the African Biodiversity network (ABN), the Coalition for the Protection of African Genetic Heritage (COPAGEN), Comparing and Supporting Endogenous Development (COMPAS) Africa, Friends of the Earth–Africa, Indigenous Peoples of Africa Coordinating Committee (IPACC), Participatory Ecological Land Use Management (PELUM) Association, Eastern and Southern African Small Scale Farmers' Forum (ESAFF), La Via Campesina Africa, FAHAMU, World Neighbours, Network of Farmers' and Agricultural Producers' Organizations of West Africa (ROPPA), Community Knowledge Systems (CKS) and Plate forme Sous Régionale des Organisations Paysannes d'Afrique Centrale (PROPAC).
3. The following countries are members of ARIPO: Botswana, Gambia, Ghana, Kenya, Lesotho, Malawi, Mozambique, Namibia, Sierra Leone, Liberia, Rwanda, Somalia, Sudan, Swaziland, Tanzania, Uganda, Zambia and Zimbabwe (Total: 18 Member States). São Tome and Principe has deposited its Instrument of Accession to the Harare Protocol and joined ARIPO on 19 August 2014.
4. For more background information on AFSA's concerns regarding the ARIPO PVP Protocol, see *ARIPO's Plant Variety Protection Law Based on UPOV 1991 Criminalises*

Farmers' Rights and Undermines Seed Systems in Africa. Available at: http://www.acbio.org.za/images/stories/dmdocuments/AFSA-ARIPO-Statement.pdf.