

CIVIL SOCIETY CONCERNED WITH THE DRAFT PROTOCOL FOR THE PROTECTION OF NEW VARIETIES OF PLANTS (PLANT BREEDERS' RIGHTS) IN THE SOUTHERN AFRICAN DEVELOPMENT COMMUNITY REGION (SADC)

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TO:

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and

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The undersigned organizations are concerned with the conservation of agricultural biodiversity for livelihood security and food sovereignty, promoting farmers' rights and self-determination, and citizens' involvement in the decision-making process.

The undersigned organizations would like to express serious concerns with regard to the Draft Protocol for the Protection of New Varieties of Plants (Plant Breeders' Rights) in the SADC region (hereinafter referred to as the "draft Protocol").

We are of the view that the proposed draft Protocol does not develop a regime that is suitable to the needs of SADC member states nor their farmers. The draft Protocol is modeled after the 1991 Act of the Convention for the Protection for New Varieties of Plants (UPOV 1991). This Convention was developed by industrialised countries to address their own needs, and does not reflect the concerns and conditions of African nations. UPOV 1991 imposes a "one-size-fits-all" inflexible and restrictive legal framework, which limits the ability of countries to design national plant variety protection systems appropriate to individual country's needs and priorities, and balance these with the protection of Farmers' Rights.

We are of the view that by following UPOV 1991 standards, the SADC region is embarking on a path that will adversely affect small-scale farmers who make up the vast majority of the SADC farming systems, threaten livelihoods, exacerbate food insecurity and erode agricultural biodiversity in the region.

Our key concerns with regard to the draft Protocol are:

(a) The WTO-TRIPS Agreement allows its members to develop an “effective sui generis” system for plant variety protection (PVP). The rationale for the flexibility is to allow governments the freedom to adopt a PVP system that is tailored to accommodate the specificities of local agricultural systems. It recognized that “one-size” simply would not fit the different types and needs of farming systems. However, instead of using the policy space innovatively to develop a legal framework that reflects the characteristics and specificities of the agricultural systems, practices and needs of farming communities in the SADC region, the SADC Secretariat appears to have disingenuously simply modeled the draft Protocol after UPOV 1991.

As a result, the draft Protocol is severely restrictive, deficient as well as impractical. It focuses on giving breeders significant rights, but in doing so, the draft Protocol not only disregards and marginalizes small-scale farmers and their varieties, it also adversely impacts on their interests, particularly as it does not allow farmers to continue their customary practices of freely using, exchanging and selling seeds. It clearly fails to recognize that small-scale farmers dominate in the region, and that these farmers and their customary practices are the backbone of SADC’s agricultural farming systems. These farmers play an invaluable role in limiting the cost of production, and contribute to the development of locally appropriate and adapted seeds and to the diversity of crops. Thus, any PVP system that fails to support and promote these systems, and instead adversely impacts on these farming systems, is clearly a recipe for disaster in the region.

The draft Protocol is also severely lacking in flexibilities that allow its most vulnerable members to address their particular socio-economic problems. Instead, it contains elements that undermine the sovereignty of SADC member states and prevent them from taking measures nationally to address their challenges, to protect public interests or their farming communities. The draft Protocol does also not live up to international commitments of the majority of SADC members (e.g. in the context of the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA)) or their expectations with regard to preventing misappropriation of genetic resources and traditional knowledge.

It is worth noting that many countries with modern industrialized farming systems (e.g. in Latin America) are not members of UPOV 1991 and do not base their PVP systems on that model due to its restrictive nature. Thus there is simply no reason for the SADC region to follow UPOV 1991. Clearly no effort has been

made to understand the agricultural system in the SADC region, the challenges it faces and to investigate, explore and assess what would work best for the region.

(b) The proposed legal framework contains provisions that diverge from positions and commitments of SADC members undertaken regionally and internationally around issues concerning community and farmers' rights as well as plant breeders' rights (PBRs).

For example most of the SADC members have ratified the International Treaty on Plant Genetic Resources on Food and Agriculture (ITPGRFA). This Treaty commits its members to develop and maintain appropriate policy and legal measures that promote the sustainable use of plant genetic resources for food and agriculture, such as promoting plant breeding efforts with the participation of farmers. This strengthens local capacity to develop varieties that are particularly adapted to social, economic and ecological conditions, including in marginal areas. SADC members, most of whom are members of ITPGRFA, have also committed to take measures to protect and promote Farmers' Rights.

The Council of Ministers of the Organization of African Unity (OAU – predecessor to the African Union) adopted an African Model Law on “The Protection of the Rights of Local Communities, Farmers and Breeders, and for the Regulation of Access to Biological Resources” (“African Model Law”) and recommended that its Members adopt the Model Law. One of the aims of this Model Law is to provide an effective sui generis option for plant variety protection relevant to African nations. The main aim of this legislation is to ensure the conservation, evaluation and sustainable use of biological resources, including agricultural genetic resources, and knowledge and technologies in order to maintain and improve their diversity as a means of sustaining all life support systems. Some of the specific objectives of this legislation are to:

- a) recognize, protect and support the inalienable rights of local communities including farming communities over their biological resources, knowledge and technologies;
- b) recognize and protect the rights of breeders;
- c) provide an appropriate system of access to biological resources, community knowledge and technologies subject to the prior informed consent of the State and the concerned local communities;
- d) promote appropriate mechanisms for a fair and equitable sharing of benefits arising from the use of biological resources, knowledge and technologies;
- e) promote the supply of good quality seed/planting material to farmers; and
- f) ensure that biological resources are utilized in an effective and equitable manner in order to strengthen the food security of the country.

However, the draft Protocol has simply ignored the Model Law, including critical aspects that are intended to preserve and promote farmers' rights, crop diversity,

and mechanisms to deal with biopiracy and benefit sharing.

The African Group has also championed in the World Trade Organization (WTO), the right and the freedom to determine and adopt appropriate regimes in order to meet the requirement to protect plant varieties by an effective *sui generis* system. In this regard, the African Group stressed that the “appropriate and beneficial approach is to have systems of protection, which can address the local realities and needs”.¹ In recognition of the important role of farming communities and their traditional practices, the African Group has also championed in the WTO “the system of seed saving and exchange as well as selling among farmers”, “as a matter of important public policy to, among other things, ensure food security and preserve the integrity of rural or local communities” as well as the flexibility of members to adopt measures that encourage and promote the traditions of their farming communities and indigenous peoples in innovating and developing new plant varieties and enhancing biological diversity. Further, the Africa Group has called for the TRIPS Agreement and the Convention on Biological Diversity as well as the International Treaty on Plant Genetic Resources to be implemented in a mutually supportive and consistent manner and has promoted the right to require, within their domestic laws, the disclosure of sources of any biological material that constitutes some input in the innovation claimed, and proof of benefit sharing.

Indeed, it is appalling that these important developments have been ignored and the draft Protocol goes in the opposite direction, not only against the positions taken regionally and internationally by African governments, but also against the interests of millions of farmers in the SADC region!

(c) It has been noted that the draft Protocol adopts the restrictive regime of UPOV 1991. However even worse, the draft Protocol imposes this regime on all SADC members by proposing a regional PVP system whereby the SADC regional PBR office has the 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 PVP system. A regional PVP system is aimed not only at simplifying and harmonizing procedures, but also to render national laws inapplicable. This top-down approach effectively denies individual SADC 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.

(d) The proposed centralized approach also makes a mockery of the concept of “effective *sui generis*” PVP system since all SADC members are required to apply the same restrictive PVP model, irrespective of their different levels of

¹ Africa Group’s Communication to the TRIPS Council on “Taking forward the review of Article 27.3(b) of the TRIPS Agreement” (IP/C/W/404)

development. The approach assumes that what works for one country in the region (e.g. South Africa), should work for another country in the same region (e.g. Democratic Republic of Congo). Consequently, the draft Protocol also fails to provide any sort of flexibility to its most vulnerable members to enable them to address their specific socio-economic challenges.

More than half of SADC members are Least Developed Countries (LDCs) of the WTO and are currently not even obliged to implement the provisions of the TRIPs Agreement, including the provisions mandating plant variety protection. Many of these members have either limited experience or no experience with PVP systems and the impacts of plant variety protection will have on food security, farming systems and farmers in their countries. In this light, it is simply inconceivable that SADC members are being asked to consider and accept a centralized top-down regional system, worse still, based on an inflexible regime of UPOV 1991.

(e) The draft Protocol does not contain concrete mechanisms to prevent misappropriation of genetic resources and associated traditional knowledge and to operationalize the right to 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.

(f) The whole rationale and underlying premise for a draft Protocol, based on UPOV 1991 and applicable at the regional level is unknown to us. We are particularly concerned about the process involved in the development of the draft Protocol. What specific consultations have taken place and with whom? What data and impact assessments have guided the development of the draft Protocol?

It is also important to recall that Article 9(2)(c) of the ITPGRFA recognises the rights of 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.”

Further the UN Special Rapporteur on the Right to Food recommends that governments (i) “prepare right-to-food impact assessments ... in order to ensure that the regime of intellectual property ... which will be chosen will correspond to their development needs and will not result in depriving smallholders from access to their productive resources”; (ii) “Put in place mechanisms 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

It is of outmost importance that any regional law affecting the rights of farmers be formulated and agreed upon through a process that is transparent and inclusive (particularly of the local and farming communities). Additionally, the rationale for such laws must be based on a proper, transparent and participatory impact assessment, empirical data, the needs of small farmers in the region and indeed, the realities, challenges and practices of farming communities in the region.

Attached is a submission by the signatories, which provides in more detail, our specific comments highlighting the key concerns with regard to the draft Protocol.

The undersigned signatories urge the SADC member states to:

1. Reject the Draft Protocol on the basis of UPOV 1991;
2. Reject the legal framework that is based on a "one grant system" (whereby the SADC regional authority has the power to grant and to administer breeders' rights on behalf of its Contracting states).

We are of the view that where a regional framework is justified as a result of impact assessments (discussed elsewhere), such a framework should be flexible and provide policy space to its member states to develop and administer PVP systems according to national needs and priorities. Such a framework must not hinder its member states from taking any steps necessary to promote the national/public interest and the protection of farmers' rights.

3. Ensure that any legal framework for the protection of plant varieties that is applicable to the SADC region:
 - recognizes and supports the contribution of farmers in conserving, improving and making available plant genetic resources for food and agriculture;
 - upholds and promotes farmers' rights to save, use, exchange and sell farm-saved seed/propagating material/harvested material;
 - strikes a fair, equitable, socially just balance between breeders' rights and farmers' rights;
 - enhances agricultural biodiversity and food sovereignty and protects livelihoods;
 - reaffirms and does not hinder the sovereign right of SADC members to take measures necessary to address national challenges and protect the public interest;
 - recognizes that SADC members are at different levels of socio-economic

² See UN General Assembly Document A/64/170 titled "Seed Policies and the right to food: enhancing agrobiodiversity and encouraging innovation".

development and build-in sufficient appropriate flexibilities to accommodate member states' particularities and vulnerabilities.

4. Conduct independent and participatory impact assessments to assess the impact such a PVP system will have on small-scale farmers and rural communities, the right to food, livelihoods, crop diversity etc., in order to inform the process of developing a plant variety protection system for the region.
5. Urgently provide adequate opportunities for consultations with farmers, farmer movements and civil society organizations working in the sector, before any further work is undertaken on the draft Protocol.
6. Urgently define mechanisms for local and indigenous communities and farmers to participate in the decision making on matters related to plant variety protection.
7. Urgently make publicly available all information with regard to the process and timelines involved in developing the draft Protocol. Currently absolutely no information on process or timelines is publicly available.

Please acknowledge receipt hereof. We look forward to hearing from you as soon as possible.

Signatories from the SADC region

1	African Centre for Biosafety	South Africa
2	Never Ending Food - a community based organisation	Malawi
3	Community Development Technology Trust	Zimbabwe
4	Southern African Faith Communities' Environment Institute - a multi-faith environment institute representing a cross-section of faith communities in the SADC region	Southern Africa
5	Pelum Regional Secretariat	Zambia
6	Pelum Tanzania	Tanzania
7	Sustainable Agriculture Tanzania	Tanzania
8	Tanzania Organic Agriculture Movement	Tanzania
9	Tanzania Alliance for Biodiversity	Tanzania
10	Earthlife Africa Ethekeini	South Africa
11	The Biodynamic Agricultural Association of Southern Africa	South Africa

12	Food & G Trust,	South Africa
13	Abalimi Besekhaya - representing the interests of over 3000 urban and rural micro-farmers in Cape Town and Eastern Cape	South Africa
14	Eastern and Southern African Farmers' Forum (ESAFF)	South Africa
15	Surplus People Project	South Africa
16	Community Development Technology Trust	Zimbabwe
17	Kasisi Agricultural Training Centre	Zambia
18	Zambia Climate Change Network	Zambia
19	MUPO Foundation	South Africa
20	Coalition Paysanne de Madagascar (CPM),	Madagascar
21	Small Scale Farmers Forum	Lesotho
22	Co-operative and Policy Alternative Centre (COPAC)	South Africa
23	Trust for Community Outreach and Development (TCEO)	South Africa
24	Masifude,	South Africa
25	Itireleng	South Africa
26	The Rescope Programme,	Malawi
27	Centre for Natural Resource Governance,	Zimbabwe
28	African Biodiversity Network - a network comprising 36 partners from 12 African countries:	Benin, Botswana, Ethiopia, Ghana, Kenya, Mozambique, South Africa, Tanzania, Togo, Uganda, Zambia and Zimbabwe.
29	Biowatch South Africa	South Africa
30	Agrarian Reform for Food Sovereignty Campaign	South Africa
31	Eastern and Southern Africa Small Farmers Forum (ESAFF), operating in 13 countries in the eastern and southern Africa region: MVIWATA; Kenya Small Scale Farmers Forum – KESSFF; ESAFF Uganda, ESAFF Zambia; Zimbabwe Small Organic Smallholder Farmers Forum – ZIMSOFF; Lesotho Small Scale Farmers Forum; ESAFF South Africa; Malawi National Small Scale Farmers Movement - NASFAM); Rwanda (APPPE); ESAFF Burundi; Confédération des Agriculteurs Malagas - CPM; Seychelles Farmers Association – SeyFA; and Mozambique (ROSA).	Tanzania, Kenya, Uganda, Zambia, Zimbabwe, Lesotho, South Africa, Malawi, Rwanda, Burundi, Madagascar, Seychelles, Mozambique
32	Ruzivo Trust	Zimbabwe

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| 33 | DIOBASS Platform | DR Congo |
| 34 | Coalition of scientists and development practitioners
- for agricultural productivity and integrated rural
development strengthening, | DR Congo |

Signatories from outside the SADC region:

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| 35 | MELCA | Ethiopia |
| 36 | Institute for Sustainable Development | Ethiopia |
| 37 | Maendeleo Endelevu Action Program (MEAP) | Kenya |
| 38 | Environmental Rights Action | Nigeria |
| 39 | Health of Mother Earth Foundation | Nigeria |
| 40 | Actions pour le Développement Durable | Benin |
| 41 | Forum Biodiversité | Benin |
| 42 | Nature Tropicale | Benin |
| 43 | SEATINI | Uganda |
| 44 | Food Rights Alliance | Uganda |
| 45 | Volunteer Efforts for Development Concerns (VEDCO) | Uganda |
| 46 | Pelum Kenya | Kenya |
| 47 | Inades Formation | Kenya |
| 48 | Action for Change and Progress – Africa | Kenya |
| 49 | Enda Pronat (environnement developpement action /
Natural Protection Team) | Senegal |
| 50 | The Center for Health Human Rights and Development
(CEHURD) | Uganda |
| 51 | Building Eastern Africa Community Network (BEACON)
-a network of churches, church related organizations and
NGOs in the East and Horn of Africa | Eritrea, Ethiopia, Sudan,
Kenya, Uganda and
Tanzania |
| 52 | Pelum Rwanda | Rwanda |

Signatories from outside of Africa:

- | | | |
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| 53 | Third World Network | Malaysia |
| 54 | Berne Declaration | Switzerland |
| 55 | Development Fund | Norway |
| 56 | GAIA Foundation | UK |
| 57 | Red por una América Latina Libre de Transgénicos | Latin America wide |
| 58 | Acción Ecológica | Ecuador |

59	GRAIN	Spain
60	No Patents On Life	Germany
61	Washington Biotechnology Action Council	USA
62	Mediation and Project Management Agrobiodiversit	Germany
63	Pesticide Action Network, North America	USA
64	Partners For The Land And Agricultural Needs Of Traditional People (PLANT)	USA
65	Bifurcated Carrots	Netherlands
66	Seed Action Network	Germany
67	Basler Appell gegen Gentechnologie	Switzerland
68	Gen-Ethical Network	Germany
69	The People's Coalition on Food Sovereignty - a global network of grassroots groups of small food producers particularly of peasant-farmer organizations	Global
70	The Schweizerische Arbeitsgruppe Gentechnologie (SAG)	Switzerland
71	Dachverband Kulturpflanzen- und Nutztievielfalt e.V	Germany
72	Apoyo de la Red de Semillas "Resembrando e Intercambiando",	Spain
73	Southeast Asia Regional Initiatives for Community Empowerment (SEARICE)	Philippines
74	Both Ends	The Netherlands
75	USC	Canada
76	Association of Doctors For Environment	Switzerland
77	CENTRO INTERNAZIONALE CROCEVIA	Italy
78	ARCHE NOAH, Seed Savers' Association in Central Europe	Austria
79	"German Campaign against Biopiracy"	Germany
80	Amis de la Terre France (FoE France)	France
81	Réseau Semences Paysannes	(France)
82	Agrecol e.V. (Association for AgriCulture & Ecology)	Germany
83	Local Initiatives for Biodiversity, Research and Development (LI-BIRD)	Nepal
84	CONFEDERATION PAYSANNE (French farmers union, member of Via Campesina)	France



SURPLUS PEOPLE PROJECT



TABIO



CIVIL SOCIETY SUBMISSION ON SADC's DRAFT PROTOCOL ON PLANT BREEDER'S RIGHTS

This submission is divided into two parts. In Part I we provide some general comments, while in Part II we provide specific comments on some of the provisions of the draft Protocol.

PART I: General Comments

Agriculture is the primary source of subsistence, employment and income for a majority of SADC's population, which consists mainly of the rural poor. The agricultural population in the southern and eastern African regions ranges from 39% in Lesotho to 76% in Mozambique in 2010³, and constitutes more than half the population in more than half the countries in southern and eastern Africa. Farms of less than 2 hectares account for 70-90% of all farms in most African countries.⁴

Agriculture is also fundamental to addressing nutrition and food security issues, which remain a critical challenge in the SADC region. The current status of food insecurity in the region can be measured by the prevalence of undernourishment, which is "high" to "very high" (i.e. above 25% of the population) in 8 SADC countries (DRC, Angola, Malawi, Madagascar, Mozambique, Tanzania, Zambia and Zimbabwe).⁵ Further progress towards Millennium Development Goal 1 to halve between 1990 and 2015, the proportion of people who suffer from hunger has been mixed in the SADC region, with 7 SADC countries not being on track: (Tanzania, the DRC, Botswana, Lesotho, Swaziland, Zambia and Madagascar).⁶ Variable weather patterns as a result of climate change including increased incidence of drought and floods, are key factors for continuing chronic vulnerability and food insecurity, particularly in the rural areas.

An estimated 80% of all seed used in Africa originates from the informal seed systems (also known as "farmer-managed seed systems").⁷ For many crops, the estimate is close to 100%.⁸ Farmers rely heavily on farm saved seed, exchanges with relatives and neighbors, bartering with other farmers or local markets to access seeds. Reliance on informal seed sources is independent of whether farmers cultivate local or modern varieties.⁹ The reasons for this include: inadequate access to markets; the market channels are unfavorable to farmer

³ World Bank, "World Databank", <http://databank.worldbank.org/data/home.aspx>

⁴ Hazell, P. & Poulton, C. 2007 "All-Africa review of experiences with commercial agriculture: case study on food staples", background paper for World Bank's Competitive Commercial Agriculture in Sub-Saharan Africa study, p.12

⁵ SADC Regional Agricultural Policy, Priority Policy Issues and Interventions, July 2012, p.8

⁶ SADC Regional Agricultural Policy, Priority Policy Issues and Interventions, July 2012, p. 8

⁷ Smale, M., Byerlee, D. & Jayne, T. 2011 "Maize revolutions in sub-Saharan Africa". *Policy Research Working Paper* 5659. Washington DC, World Bank, Development Research Group, p.7

⁸ Louwaars, N.P., and De Boef, W. S., "Integrated Seed Sector Development in Africa: A Conceptual Framework for Creating Coherence Between Practices, Programs and Policies, *Journal of Crop Improvement* 26:39-59, 2012

⁹ Louwaars, N.P., and De Boef, W. S., "Integrated Seed Sector Development in Africa: A Conceptual Framework for Creating Coherence Between Practices, Programs and Policies, *Journal of Crop Improvement* 26:39-59, 2012

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.¹⁰

Local varieties used are generally derived from mass selection. Mass selection consists of choosing those plants that seem the most interesting in a population and using their seeds to sow the following crop. The operation is repeated generation after generation, which makes it possible to improve crop performance progressively. The plants obtained are neither identical to the previous generation nor identical to each other. The seeds obtained via mass selection contain heterogeneous individuals, which give them abilities of adaptation and resistance. Farmers generally practice mass selection even on commercial open pollinated varieties, a practice the SADC seed protocol would criminalize in preference to the formal seed system where the only role played by the farmer is that of buyer of seed, ensuring therefore more profit for the seed company! Farmers' low purchasing power and other problems associated with the formal seed sector, does make the use of plant variety protection not suited to food crops.

Farming communities for example in the SADC region view saving seeds as a duty, and sharing them as a centuries-old cultural practice. As a result, these communities have managed to establish their control over seeds as a survival mechanism. During planting time, farmers exchange, recycle or replant seeds and planting materials without any restrictions, thus providing themselves with an economic opportunity to sustain their livelihoods. Farmers' rights to harvest, save, store, exchange and replant seeds without hindrance, make up the real basis for food security.

The increasing control of the seed industry by international corporations ably facilitated by the SADC protocol is not in the interest of farmers in the region, and therefore threatens the food security of the entire region. Indeed, countries in the SADC region need to adopt a cautious approach and establish laws that prevent the monopolization and privatization of genetic resources that have always belonged to local communities.

Under the SADC Seed protocol, the unauthorized sale of seeds stored after harvesting a crop grown from the seeds of a protected variety may become forbidden. Yet, in practice, when farmers sell part of their harvest in markets, they do not keep the product of protected seeds separate from that of farm seeds. Because of the importance of seeds as the first link in the food chain, it is indispensable that farmers' seed autonomy be preserved.

¹⁰ Louwaars, N.P., and De Boef, W. S., "Integrated Seed Sector Development in Africa: A Conceptual Framework for Creating Coherence Between Practices, Programs and Policies, *Journal of Crop Improvement* 26:39-59, 2012

It is clear that informal seed systems underpinned by customary farmer practices of using, exchanging, and selling farm-saved seed/propagating material is a foundational pillar of Africa's agricultural system. The farmer-managed seed systems have also played an important role in developing, conserving and improving a diverse range of plant genetic resources.

In this regard it is also important to recall that with the exception of Botswana, Mozambique and South Africa, the rest of the SADC member states are Parties to the ITPGRFA and thus under an obligation to develop and maintain policies and measures that promote and protect the development and maintenance of plant genetic resources diversity as well as Farmers' Rights.

Under Article 6 of the ITPGRFA, Parties have an obligation to "develop and maintain appropriate policy and legal measures that promote the sustainable use of plant genetic resources for food and agriculture". This includes pursuing *fair* agricultural policies that promote the development and maintenance of diverse farming systems; promoting plant breeding efforts with the participation of farmers and strengthening the capacity to develop locally adapted varieties, broadening the genetic base of crops and increasing the range of genetic diversity available to farmers and promoting expanded use of local and locally adapted crops, varieties and underutilized species.

ITPGRFA also recognizes in Article 9.1 "the enormous contribution that the local and indigenous communities and farmers of all regions of the world, particularly those in the centres of origin and crop diversity, have made and will continue to make for the conservation and development of plant genetic resources which constitutes the basis of food and agriculture production throughout the world". Accordingly in Article 9.2 Parties to the ITPGRFA have the responsibility to realize Farmers' Rights and "should ... take measures to protect and promote Farmers' Rights" including protection of traditional knowledge relevant to plant genetic resources for food and agriculture, the right to equitably participate in sharing benefits arising from the utilization of plant genetic resources and the right to participate in making decisions at the national levels on matters related to the conservation and sustainable use of plant genetic resources for food and agriculture.

The preamble of the ITPGRFA 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".

Against this background, the proposed draft protocol, which is based on the UPOV 1991 model, gives rise to many concerns. It is tilted heavily in favor of commercial breeders to the detriment of small-scale farmers who will be

restricted from engaging in their customary practices of freely using, selling and exchanging seeds (including protected seeds). Overall the aim of the draft Protocol appears to be to replace local varieties with uniform commercial varieties. This vision, we believe is extremely narrow and shortsighted.

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.¹¹

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 monocropping, 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 agroecological environments. In addition, commercial varieties are simply less suited to the specific agroecological 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.

On farmers' seed systems, De Schutter notes that: "Reliance by farmers on farmers' seed systems allows them to limit the cost of production by preserving a certain degree of independence from the commercial seed sector. The system of unfettered exchange in farmers' seed systems ensures the free flow of genetic materials, thus contributing to the development of locally appropriate seeds and to the diversity of crops. In addition, these varieties are best suited to the difficult environments in which they live. They result in reasonably good yields without having to be combined with other inputs such as chemical fertilizers. And because they are not uniform, they may be more resilient to weather-related events or to attacks by pests or diseases. It is, therefore, in the interest of all, including professional plant breeders and seed companies which depend on the

¹¹ See UN General Assembly Document A/64/170 titled "Seed Policies and the right to food: enhancing agrobiodiversity and encouraging innovation".

development of these plant resources for their own innovations, that these systems be supported.”

These observations suggest that what is needed for agricultural development in the SADC region is not the unbalanced restrictive regime of UPOV 1991. The region requires a more creative approach that support and benefits farmers’ seed systems, on which many livelihoods and the long- term food security and nutrition of the region depends.

PART III: COMMENTS ON CERTAIN PROVISIONS OF DRAFT PROTOCOL

1. Preamble

The preambular paragraph of the draft Protocol recognizes the need for an “effective *sui generis* system” for PVP under Article 27.3(b) of the WTO-TRIPS Agreement. “*Sui generis*” is an adjective borrowed from Latin meaning “of its own kind/genus” or “unique in its characteristics”. However instead of developing a unique framework that is suitable for the needs and interests of the region, the draft Protocol does the exact opposite. It simply implements UPOV 1991, which imposes a “one size fits all” restrictive PVP regime on all SADC members. As a result as well, the draft Protocol contains provisions that hinder SADC members from fulfilling their commitments under the ITPGRFA.

Further, the preambular paragraphs suggests that all SADC members are under an obligation to implement the WTO-TRIPS Agreement obligation to provide effective protection to plant varieties. It should be noted that 8 SADC members are Least Developed Countries (LDCs) members of the WTO. Currently they enjoy a transition period under Article 66.1 of the TRIPS Agreement and thus are under no obligation to implement the TRIPS Agreement and accordingly to provide PVP protection.

The preambular paragraphs also claim that the draft Protocol “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”- and that it will encourage “plant breeding and facilitation of agricultural advancements for the benefit of our society”. We dispute that there is empirical basis to support these assertions. As argued elsewhere in this submission we do not believe that the draft Protocol modeled on UPOV 1991 will deliver the claimed benefits.

The draft Protocol omits critical elements from the preambular paragraphs. This includes acknowledging the contribution of farmers to the development and conservation of plant varieties and the role of women; recognizing farmers’ rights 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. These elements should be highlighted as they are fundamental to the farmer managed seed systems that dominate the SADC region.

2. Regional PVP System: one application, one grant system

The main thrust of the draft protocol is about creating a centralized PVP system in the SADC region. Article 3 of the draft protocol states that PBRs “shall” be granted “on the basis of one application be valid in all Member States”. Other articles of the draft Protocol allow the SADC PBR office to receive PBR applications and grant or to reject the application on behalf of SADC members (Article 4.5(c)). Management of PBRs will also be done regionally. This means important decisions that have a national impact will now be taken at the SADC regional level. This includes deciding whether or not to grant compulsory licenses in the public interest of a SADC member and whether or not to nullify or cancel PBRs that are granted.

The draft Protocol does not prevent SADC members from granting PBRs through their national PVP legislation, where such legislation exists. However, according to Article 3(4) and (5), the regional PVP system will take precedence over national PVP laws. So if a variety is protected by the SADC regional PVP system, the same variety cannot also be protected or be given other rights under national law. Further if a right holder has already been granted rights under the national law and then receives another PBR grant under the SADC regional system, the regional PVP law will prevail over the variety.

What is being proposed is extremely problematic as it denies SADC member states the right to make any decision concerning a variety protected through the SADC PVP system even when it concerns national interests. Each SADC member state is at a different level of development and is likely to feel different impacts of the PVP protection. Accordingly, it is important to ensure that SADC members retain policy space to be able to adopt different strategies to balance farmer-managed seed systems and breeders’ rights and protect other national interests.

The system proposed by the draft Protocol may have been inspired by the EU Community Plant Variety Protection system, which is a centralised system aimed at facilitating the grant of PBRs by harmonizing procedures.

It is, however, difficult to comprehend how a system designed to work in developed countries can be equally applicable to the SADC region, which has as its members, the poorest and most vulnerable segment of the international community. Further, agricultural and farming systems in Europe differ significantly from that found in SADC member states. A one-stop regional system will also facilitate the granting of rights to foreign breeders, thus increasing domination of foreign private sector over local seeds systems and food production.

In summary, considering the potential impact of PVP systems on food security, agricultural biodiversity, livelihoods and generally on national agricultural systems, it is important for each SADC member state to retain significant

flexibility in the domestic implementation and management of PVP systems. This means matters such as whether or not to grant PBRs, to issue compulsory licenses, to nullify or to cancel PBRs, and the scope of genera and species that should be included, should be left up to individual member states. This is vital considering that most of SADC members have never had a PVP system and thus there is little experience of the potential impacts of a PVP system. In addition, if national authorities have a stronger role, applications would need to be translated into local languages, facilitating locals to better understand information on the development of the variety.

3. Persons entitled to Protection & Definition of “Breeder”

The draft Protocol defines a “breeder” as (i) the person or legal entity who bred, or discovered and developed a variety or; (ii) the person or legal entity who is the employer of the aforementioned person or who has commissioned the latter’s work; or (iii) the successor in title of the first or second aforementioned person, as the case may be. Thus Article 11 states that a breeder of a new variety shall be entitled to apply at the SADC PBR Office for protection under the Protocol.

Unlike the African model law and many national laws¹², the SADC Protocol does not specifically recognize farmers, farmer communities, local communities or indigenous people, government entities or other national statutory bodies or research institutes as breeders that are entitled to apply for registration of their varieties under the SADC Protocol.

4. Genera and Species to be Protected (Article 3):

Article 3(1) of the draft Protocol states that the framework “shall be applied to *all* plant genera and species”.

The proposed scope of protection goes beyond UPOV 1991, which requires new members to provide protection to at least 15 plant genera and species, and only requires them to extend to all plant genera and species after 10 years. Article 3(1) does not contain any transition period for SADC Members, as such as soon a country ratifies the Protocol, PBRs can be granted for all plant genera and species.

UPOV 1991 already contains reduced flexibility with regard to coverage of genera and species that should be subject to PBRs in comparison to provisions contained in the 1978 Act of the UPOV Convention (“UPOV 1978”). Under UPOV 1978 (Articles 4(4) and 4(5)), once a country ratifies the Convention, the country only needs to extend PBRs to at least 5 genera or species. This progressively applies to at least 10 genera or species within 3 years, 18 genera and species within 6 years and to 24 genera and species within 8 years. Further, due to special economic, ecological or other difficulties, a country may request UPOV to

¹² See for e.g. Section 16(1), Indian Protection of Plant Varieties and Farmers’ rights (PPVFR), 2001 and Section 13 of the 2004 Malaysian Protection of New Plant Varieties Act 2004.

reduce the minimum numbers or extend the abovementioned duration.

The approach taken by the draft Protocol is concerning. Article 3(1) of the draft Protocol grants no flexibility to countries with regard to scope of protection. It fails to take into consideration that SADC members are at different levels of development and to make any provision for SADC countries that may not be able to provide such extensive protection due to the economic, ecological conditions or other special difficulties prevailing in the Member State.

At a more basic level, the justification for automatically extending protection to all plant species remains unclear. In fact as it is currently drafted (scope covering all species, expansive breeders' rights, narrow breeders' exemption and even more restrictive farmers exception), the draft Protocol is more likely to hinder farmers' access to improved varieties and breeding efforts in the SADC region.

We believe rather than a blanket application of PVP across all species, SADC member states should retain policy space and apply PVP selectively and gradually. For instance, the Indian PVP law does not automatically cover all genera and species. It allows the central government to determine which genera and species will be covered by the Act. Further, it makes it clear that no variety, which is injurious to the life or health of human beings, animals or plants shall be registered.¹³ In addition, in the interest of the public, any genera or species may be removed from the scope of the Indian law.¹⁴

The flexibility to limit PVP protection to certain species/genera and to exclude specific genera/species is critical as it allows members states to take measures necessary to protect public interest, food security, specific indigenous crops or the interests of specific communities as well as to address any specific challenges arising nationally.

5. PBR Register and Powers of Registrar

Article 5(2) of the draft Protocol identifies information that should be maintained in the PBR register. Article 5(6) of the draft Protocol grants the Registrar the "discretion to determine...particulars in the register that should be open for the public inspection". Article 5(7) adds that the discretion granted to the Registrar shall be "diligently exercised with due regard to the confidentiality of a particular information".

Below we have raised concerns that Article 20 of the draft Protocol which gives the right holder the option to plead "confidentiality" and refuse disclosure. Article 5(6) not only facilitates the right holder in its refusal to disclose, it goes beyond this and allows the Registrar to limit disclosure even where the right holder does not require it.

¹³ Section 29(3), Indian Protection of Plant Varieties and Farmers' rights (PPVFR), 2001

¹⁴ Section 29(4), Indian Protection of Plant Varieties and Farmers' rights (PPVFR), 2001

We are of the view that there is simply no justification for provisions such as Article 5(6) and (7) as well as Article 20, see below.

6. Conditions of Protection (Articles 6-10)

According to Article 6 of the draft Protocol, breeders' rights shall be granted where the variety is Novel (N), Distinct (D), Uniform (U) and Stable (S). The conditions of NDUS are defined in Articles 6-10 of the draft Protocol. They are based on UPOV 1991¹⁵. The requirements of uniformity and stability make it impossible for farmer breeders to register any new varieties they develop, as these varieties are inherently unstable and in permanent evolution. The requirement of uniformity is also a threat to food security, as an increasingly narrow genetic base equals genetic vulnerability, making crops vulnerable to pests and climate stress.

It is concerning that SADC has chosen to follow the flawed approach of UPOV 1991 which only encourages standardization and homogeneity rather than develop a legal framework that also rewards agro-biodiversity and supports farmers to rely on a diversity of crops which is important to protect livelihoods in the face of the emerging threat of climate change and the challenge of food security facing the region.

Further, as with UPOV 1991, the draft Protocol (Article 7) defines novelty in terms of whether a variety has been sold or disposed off with the consent of the breeder. The variety is considered to be novel if it has not been sold/disposed off in the SADC region earlier than one year before the date of application; and outside of the SADC region earlier than 4 years for other varieties and 6 years for trees and vines. The article thus distinguishes between sale/disposal in the SADC region and outside the region. The positive value of this distinction is not obvious. But the novelty standard set out in the draft Protocol is low in that it allows varieties that have been commercialized for between 4-6 years outside of the SADC region to be considered novel. If the aim of the draft Protocol is to introduce new varieties in the SADC region, then this article contradicts that aim as it facilitates delay in the introduction of new varieties.

The definition of "distinctness" in Article 8 can be made more specific by making clear that a variety that is a candidate for protection must be clearly distinguishable from any variety that is a matter of common knowledge anywhere in the world. Further the definition of common knowledge must include events that would not necessarily be known to the public, for instance the addition of a variety to a reference collection. It should also include any form of publication (not just limited to "professional" publication).

The NDUS criteria as well as the definition of breeder ("discovered and developed a variety") do raise significant concerns about misappropriation of

¹⁵ Articles 7-10 of UPOV 1991 define "Novelty", "Distinctness", "Uniformity", "Stability"

genetic resources particularly in the absence of concrete mechanisms that will require the applicant wanting plant variety protection to disclose the origins of the variety developed, and provide evidence of prior informed consent and benefit sharing.

7. Filing of Application

Article 12 of the draft Protocol lists some requirements for filing of a PBR. However, a number of critical elements are missing from this list.

For instance the Malaysian 2004 PVP Act (Section 12) requires an application for PBR *inter alia* to:

- specify the method by which the plant variety is developed;
- be supported by documents and information relating to the characteristics of the plant variety which distinguish the plant variety from other plant varieties;
- contain information relating to the source of the genetic material or the immediate parental lines of the plant variety;
- be accompanied with the prior written consent of the authority representing the local community or the indigenous people in cases where the plant variety is developed from traditional varieties;
- be supported by documents relating to the compliance of any law regulating access to genetic or biological resources;
- be supported by documents relating to the compliance of any law regulating activities involving genetically modified organisms in cases where the development of the plant variety involves genetic modification.

The Indian PVP law (Section 18) requires an application for PBR protection to include:

- an affidavit sworn by the applicant that such variety does not contain any gene or gene sequence involving terminator technology;
- complete passport data of the parental lines from which the variety has been derived along with the geographical location from where the genetic material has been taken and all such information relating to the contribution, if any of any farmer, village community, institution or organization in breeding, evolving or developing the variety;
- declaration that the genetic material or parental material acquired for breeding, evolving or developing the variety has been lawfully acquired.

These elements are important to safeguard against misappropriation of genetic resources and associated traditional knowledge and to operationalize benefit sharing. SADC members have long championed in various international fora such as WIPO and the WTO, for intellectual property systems to incorporate a mandatory disclosure of origin requirement that would include proving prior

informed consent and benefit sharing. Thus it is puzzling to note that such a fundamental requirement is not adequately addressed by the draft Protocol.

Requiring full disclosure of information with regard to how the variety is developed in exchange for receiving plant variety protection is also critical to transfer technology and knowledge to the local communities. Moreover, full disclosure of information will enable SADC member states to ensure that varieties that are injurious to health and the environment do not receive protection.

8. Publication

Article 20 of the draft Protocol deals with publication of information. It lists information that should be published by the SADC PBR office at regular intervals. 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 PBRs that do not wish to disclose important information with regard to breeding and development of a variety to hide behind “confidentiality”.

In the patent system, patent holders are given 20 years protection from the filing date and in return, patent applications must be published and the applications must also disclose the invention in a manner sufficiently clear and complete for the invention to be carried out by a skilled person including the best way of working the invention. This is to ensure that once the protection period expires, others have the technological information necessary to develop the invention. The same should apply to PBRs. In return for PBRs, the applicant must be required to reveal all information with regard to breeding and development of the variety that is to be protected (e.g. the parental lines of the protected variety). Otherwise breeders that apply for PVP can keep their breeding/development methods (e.g. the parental lines of the protected variety) a trade secret even after expiry of their rights.

Effectively, the confidentiality clause in Article 20 enables the right holder to maintain exclusive monopoly rights over the variety (e.g. hybrid varieties) even after expiry of the protection, preventing transfer of technology and knowledge to local entities. Since breeders are getting certain exclusive rights, their application should be publicly available, with breeders required to make full disclosure including complete passport data and disclosure of origin of the genetic material used to develop the new varieties.

We see no value in Article 20. If a breeder is allowed to hide behind confidentiality, important information may be withheld, making it more difficult, if not impossible to challenge the application e.g. through pre-grant opposition procedures or to operationalize benefit sharing arrangements, even if a variety is developed using local germplasm. The breeder would also be able to more easily

manipulate the system.

Further Article 24 (3)(f) of the draft Protocol suggests that only selected information about the grant will be published. There is no justification for this. It is important to publish all details with regard to the grant of the PBR.

9. Pre-grant Objections

Article 21 of the draft Protocol allows for pre-grant objections to be filed with regard to published applications. This article allows “any person” to submit within 60 days a written and reasoned objection to the SADC PBR Office. The notice of objection has to *inter alia* specify the grounds on which the objection is based and be accompanied with proof of payment of fees. Effectively the draft Protocol is creating a pre-grant opposition system at the regional level, whereby objections are filed at the SADC PBR office, and decisions on the objections are applicable across the SADC region.

A regional level pre-grant opposition system has pros and cons. For those wishing to object to the grant of an application, such a system would be useful as if the opposition succeeds the application will be rejected across all SADC countries. However, such a system may not be an optimal option for the region. Consider for instance an objection being filed from 2 SADC Members arguing that the grant of PBR is not in their national interest. The dilemma that will then emerge is whether the SADC PBR office should refuse to grant PBR because of the interests of the 2 SADC members.

It has been noted above that a regional “one size fits all”, top-down approach that entrust critical national decisions with regard to PBRs to a regional authority, is fundamentally flawed. It is thus important to ensure that each SADC member state retains flexibility to receive pre-grant objections at the national level and to decide whether or not to approve the PVP applications.

In addition, the following specific observation are made with regard to Article 21:

- (a) Sufficient time should be provided for submission of a written and reasoned objection particularly as farmer and local communities have many constraints and little resources and therefore need time to mount an opposition. A period of 60 days is insufficient. A period of at least 9 months after publication of the application and any further time before the application is disposed of should be considered for a written objection to be made with regard to published application. It is also important to expressly require the pre-grant objection to be given due consideration before a decision is made to grant protection.
- (b) Provision should also be made for payment of fees to be waived when objection is made by certain communities e.g. the local communities, farmers, civil society groups etc. as the fees may deter interested persons from making an objection.

- (c) Grounds for submitting an objection in Article 21(4) should also include where granting PBR is simply not in the public interest of a SADC member state; where the variety may have an adverse effect on the environment; or where the application fails to provide full disclosure of information as expressed above.
- (d) Article 21 is tilted in favor of the right holder. It provides for the PBR applicant to receive the notice of objection and replying to the objection (counter-statement). However no provision is made for the opposing party to receive the counter-statement and the accompanying evidence.
- (e) There is also no requirement in Article 21 for the Registrar to provide written grounds for rejecting the objections raised in the pre-grant opposition. Other vital elements such as - whether or not a hearing on the objection will be held, who will be invited to participate in the hearing, who will decide on the objection, whether the application can be refused on a ground of objection not relied on by the opposing party, whether correction of the notice of objection is allowed - are missing from Article 21. It is unclear whether these aspects will be dealt with in the Regulations.

10. Duration of Protection

The draft Protocol (Article 25) follows UPOV 1991 and prescribes the duration of PBR protection to begin from the date of grant of the breeders' right for a period of 25 years for trees and vines and 20 years for all other genera and species. It further states that the Advisory Council may extend these periods by up to 5 years (optional 5-year extension).

The period proposed by the draft Protocol is excessively long, particularly in view of the blanket application of the draft Protocol covering all plant genera and species; that most SADC members have never had a PVP legislation and thus are unaware of its potential impacts; and the vulnerability of many of the SADC members.

There is no logical explanation for SADC to simply adopt the UPOV 1991 standard as it provides no flexibility to SADC members, which are at different levels of development. In addition, the combined strategy of extended scope and longer protection makes little sense, since the agricultural landscape in SADC member states is dominated by farmer-managed seed systems. Allowing for extended protection does not in any way benefit these systems. It only benefits commercial seed breeders, which are more likely to be multinational companies and allows such breeders to dominate seed production and to extract royalties from local farmers for the duration of protection. It also does little in terms of developing agricultural innovation.

The draft Protocol has failed to consider other options that allow sufficient

protection as well as flexibility to SADC member states. For example the Indian law grants an initial period of protection of 9 years for trees and vines and 6 years for other crops.¹⁶ This period may be reviewed and renewed for the remaining period on payment of fees, subject to the condition that the total period of validity shall not exceed the duration of 18 years for trees and vines and 15 years from the date of registration of the variety. Further, the Indian law does not automatically cover all genera and species. The Act also allows the central government to determine which genera and species will be covered by the Act.¹⁷ In addition, in the interest of the public, any genera or species may be removed from the scope of the Indian law.¹⁸

In comparison to the UPOV model, this option would provide adequate protection, ensures that only interested breeders continue to receive protection, and would allow SADC members flexibility to not renew protection, if it is not in the interest of SADC members.

There is also no sound justification for an optional 5-year extension to be added to an excessively long period of protection. Moreover there is no information on which grounds an extension would be allowed. A request from the breeder should certainly not be sufficient to extend protection.

11. Scope of the Plant Breeder's Right & Exceptions to Breeder's Right

Articles 26, 27 and 28 of the draft Protocol define the scope of rights that a right holder is entitled to and the rights of farmers and other actors vis-à-vis the protected variety. This section deals with Articles 26 and 27 while next section below deals with the issue of exhaustion of breeder's right (Article 28).

These provisions are modeled after Articles 14, 15 and 16 of UPOV 1991¹⁹ and thus they greatly extend the rights of the breeders, severely restrict the scope of other breeders to innovate around the protected varieties and limit farmers' right to freely exchange, share and sell farm-saved seeds/propagating material.

Article 26 of the draft Protocol prohibits without the breeder's consent:

- (i) production or reproduction (multiplication);
- (ii) conditioning for the purpose of propagation;
- (iii) offering for sale;
- (iv) selling or other marketing;
- (v) exporting;
- (vi) importing; and
- (vii) stocking for the above purposes

¹⁶ Section 24, Indian Protection of Plant Varieties and Farmers' rights (PPVFR), 2001

¹⁷ Section 29(3), Indian Protection of Plant Varieties and Farmers' rights (PPVFR), 2001

¹⁸ Section 29(4), Indian Protection of Plant Varieties and Farmers' rights (PPVFR), 2001

¹⁹ See Article 14, UPOV Convention, 1991

The prohibited actions apply to the propagating material of a protected variety as well as to the harvested material (including entire plants and parts of plants) obtained through the illegitimate use of propagating material. The rights granted to the right holder extend to “essentially derived” varieties, varieties that are not clearly distinguishable from the protected variety and varieties whose production requires repeated use of the protected variety.

The list of prohibited activities in the draft Protocol goes beyond UPOV 1978 which required prior authorization of the breeder only with regard to “production for purposes of commercial marketing”, “offering for sale” and “marketing” of “reproductive or vegetative propagating material” of the protected variety. By focusing on the commercial marketing of propagating material, UPOV 1978 implicitly allows the production of propagating material of a protected variety for non-commercial purpose e.g. allowing farmers to exchange seeds. The scope of Article 26 also goes beyond UPOV 1978, in that the Convention does not extend to “harvested material” or to essentially derived varieties.

In addition, Article 27 of the draft Protocol on exceptions to breeder’s right are severely limited. The article states that plant breeder’s rights shall not extend to:

- (a) acts done privately and for non-commercial purposes;
- (b) acts done for experimental purposes;
- (c) acts done for the purpose of breeding other varieties except for essentially derived varieties and other varieties defined in Article 26(3).
- (d) acts done by subsistence farmers for propagating purposes on their own holding, the product of the harvest which they have obtained by planting on their own holdings the protected variety or varieties covered by Article 26(3)
 - (a) (i) and (ii).

Both Articles 26 and 27 raise a number of concerns.

First, the provisions by extending protection to essentially derived varieties, places significant restrictions to freely using protected varieties for research and breeding purposes, thus limiting development of new varieties from the protected varieties – especially for farmers who breed and adapt varieties to their local conditions by selection. This is in comparison to Article 5(3) of UPOV 1978, which explicitly allows the use of a protected variety as an initial source of variation for the purposes of creating other varieties or for the marketing of such varieties. In this case, breeder’s authorization is only required in cases of repeated use of the protected variety. However, this option is not available under the draft Protocol as it is based on UPOV 1991.

Second, the farmers’ exception in sub-paragraph (c) is severely limited in scope. It only allows an exception for “subsistence farmers” to use “for propagating purposes on their own holdings, the product of their harvest which they have obtained by planting on their own holdings” the varieties protected under the draft Protocol.

So effectively under the draft Protocol, if farmers plant protected varieties, they are only allowed to use the product of their harvest (i.e. seeds) for further propagating purposes on their own holdings. For example, small-grained cereals, where the harvested grain can also be used as seed. However this limited exception is only applicable to “subsistence farmers”. While no definition is provided, the exception is clearly intended to only apply to situations where farm-saved seed is for the survival of the farmer. The proposed exception is even more restrictive than the exception found in UPOV 1991.

The draft Protocol clearly does not allow farmers to freely exchange, share or sell (even small amounts) farm-saved seeds/propagating material, a practice that underpins agricultural systems in Africa. Any use of the protected material that falls outside the limited exception will require farmers to pay royalties to breeders. The limited exceptions of Article 27 do not even allow for rural trade, which is critical to improve rural standards and reduce poverty.

It is rather perplexing that while the preambular paragraphs of the draft Protocol highlight the need for farmers to access a wide range of improved varieties to attain economic development and food security, the substantive provisions of the draft Protocol do not recognise the contribution of farmers nor give them rights that will without paying royalties, enable them to develop new varieties and to exchange, share and sell farm-save seed/propagating material to improve their socio-economic conditions. In fact, the proposed provision sets the ground for seed companies to harass and intimidate farmers for payment of royalties as is happening in many industrialized countries. For instance in Germany the seed companies have written letters to all “farmers” (including dead farmers) demanding a full inventory each year of what seed they are growing to determine the royalty on farm-saved seeds that the companies should collect.²⁰

Third, the exceptions provided by Article 27 are extremely limited and tend to be interpreted narrowly. For instance according to an UPOV document, only “...propagation of a variety by a farmer exclusively for the production of a food crop to be consumed entirely by that farmer and the dependents of the farmer living on that holding, may be considered to fall within the meaning of acts done privately and for non- commercial purposes”. This means that even consumption by the farmer and his/her neighbor or the village would not fall within the exception.²¹

Fourth, according to the draft Protocol where a variety is protected under the regional PVP mechanism the regional PVP law will supersede national PVP law. This means that even if, at the national level, SADC members have better farmers’ rights provisions or exceptions, such exceptions will not apply to varieties protected under the regional system.

²⁰ Guy Kastler, Seed laws in Europe: locking farmers out, Seedling – July 2005

²¹ Guidance for the preparation of Laws based on the 1991 Act of the UPOV Convention. UPOV/INF/6/2

Finally on a more general note, there is simply no reason for the SADC region to base its draft Protocol on the basis of UPOV 1991 particularly, when its terms are widely critiqued as being unsuitable for the circumstances of developing countries. In fact it is worth noting that a number of countries with highly industrialized farming systems such as Brazil and Argentina do not adopt the restrictive regime of UPOV 1991. Instead they implement UPOV 1978 provisions that contains more flexible provisions that allow breeding around protected varieties, and do not contain restrictive exceptions such as those found in UPOV 1991.

There are also other approaches for e.g. the African model law and certain national legislations that strike a balance between breeders' rights and farmers' rights and which are more suited to the SADC region.

Other sui generis options

African Model Law – Article 30 of the Model law grants the right holder the exclusive right to sell and produce the protected variety. The rights do not extend to essentially derived varieties or to harvested material.

Exceptions to PBR granted in Article 31 include

- to propagate, grow and use plants of that variety for purposes other than commerce;
- use of the protected variety in further breeding, research or teaching
- to use plants or propagating material of the variety as an initial source of variation for the purpose of developing another new plant variety except where the person makes repeated use of plants or propagating material of the first mentioned variety for the commercial production of another variety.

Farmers' rights under Article 26 and 31 of the African Model Law include the right to use the protected varieties to develop farmer varieties and to save, use, multiply, process and exchange farm-saved seed of protected varieties. The farmers may also sell the farm-saved seed/propagating material of a protected variety provided it is not on a commercial scale.

Indian PVPFR Act 2001 – Article 28 grants the right holder an exclusive right to produce, sell, market, distribute, import or export the variety. The same rights extend to EDVs only if the EDV is registered as a protected variety under the Act. The Act does not explicitly extend rights to harvested materials.

Under the Act (Article 30), use of the protected variety for experiment or research is allowed. It also allows use of the protected variety as an initial source of variety for purpose of creating other varieties provided that breeder' authorization is required where there is repeated use of the protected variety as a parental line is necessary for commercial production of other newly developed variety.

On farmers' exception, the Act (Article 39) allows a farmer to save, use, sow, re-sow, exchange, share or sell his/her farm produce including seed of the protected variety in the same manner as the farmer was entitled to before the PVPFR came into force. The farmer is also allowed to sell the seeds provided it is not "branded seed" (i.e. seed put in a package or any other container and labeled in a manner indicating that such seed is of a variety protected under the Act).

12. Exhaustion of Breeder's right

A right holder given the sole right to commercially exploit a product may exercise the right by selling the product. The seller's rights over that product are then considered to be exhausted and the buyer of the product would then have certain rights depending on the exact nature of rights granted under the relevant legislation. The TRIPS Agreement gives WTO members complete freedom to determine the scope of exhaustion of rights.

Article 28 of the SADC Protocol, which is based on the UPOV 1991 standards, limits the scope of exhaustion of rights. It states that breeder's rights will not extend to any material of varieties protected under the Protocol, which has been sold or otherwise marketed in the SADC region by the breeder or with the breeder's consent provided there is no further propagation of the variety or it does not involve an export of material of the variety which enables propagation of the variety into a country which does not protect varieties of that plant genus. Export of the material is allowed if it is for final consumption purposes. "Material" is defined as propagating material of any kind, harvested material including entire plants or parts thereof and any product made directly from the harvested material.

The limited exhaustion of rights contained in the draft Protocol raises a number of concerns.

The draft Protocol opts for regional exhaustion of rights rather than international exhaustion of rights. With the latter option, breeder's rights would be exhausted once the material is sold or otherwise marketed in any part of the world. The text is currently limited to material commercialized in the SADC region.

The draft Protocol only allows exhaustion of rights once the material has been sold by the breeder or with the breeder's consent. The scope of exhaustion should extend to material that has been placed on the market even without the breeder's consent, for e.g. where it is put on a market through the use of compulsory license. The rationale being that even in the case of compulsory license, the breeder would still have obtained equitable remuneration. Thus it should not be entitled to further remuneration on the same variety.

13. Measures regulating commerce

Article 29 of the draft Protocol states that PBR shall be independent of any measure taken by SADC or by any SADC Member state to regulate within its territory the production, certification and marketing of material of varieties or the importing or exporting of such material.

This article, which is modeled on Article 18 of UPOV 1991, suggests that nothing should interfere with the granting of PBR. In fact in relation to Article 18 of UPOV 1991, the UPOV Council has gone as far as to say that introduction of a mechanism for the disclosure of countries of origin or geographical origin of genetic resources should not be introduced as a condition for plant variety protection.²²

Consequently this means that Article 29 draft Protocol could be interpreted as disallowing the introduction of a mechanism for disclosure of origin as a condition for PBR protection. It has been noted above, such a mechanism has been championed by SADC members in international fora such as in the WTO and WIPO and is vital to prevent misappropriation of genetic resources and associated traditional knowledge and to enforce obligations of prior informed consent and fair and equitable benefit sharing under the Convention of Biological Diversity.

Further, Article 29 may prevent SADC member states from excluding from PBR 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. Some national legislations already incorporate these exclusions in their PVP legislations, prohibiting the registration of such varieties.²³

14. Maintenance of the Protected Variety

The draft Protocol (Article 30) places throughout the duration of protection an obligation on the right holder to make available at the request of the SADC PBR Office “reasonable samples” of the protected variety. To ensure that this obligation is fulfilled the draft Protocol also requires the right holder to provide all such information and assistance as requested including facilities for the

²² In relation to the provisions under Article 18 of the 1991 Act of the UPOV Convention, at its thirty-seventh ordinary session on October 23, 2003, the Council of UPOV adopted the “Reply of UPOV to the Notification of June 26, 2003, from the Executive Secretary of the Convention on Biological Diversity (CBD)” (http://www.upov.int/news/en/2003/pdf/cbd_response_oct232003.pdf); paragraph 9 is reproduced below:

“9. [I]f a country decides, in the frame of its overall policy, to introduce a mechanism for the disclosure of countries of origin or geographical origin of genetic resources, such a mechanism should not be introduced in a narrow sense, as a condition for plant variety protection. A separate mechanism from the plant variety protection legislation, such as that used for phytosanitary requirements, could be applied uniformly to all activities concerning the commercialization of varieties, including, for example, seed quality or other marketing related regulations.”

²³ See for e.g. Article 15, Malaysian Protection of New Plant Varieties Act, 2004; Article 29(1) of the Indian Protection of Plant Varieties and Farmers’ rights (PPVFR), 2001

inspection by or on behalf of the SADC PBR Office of the measures taken for the maintenance of the variety.

Indeed, the matter of timely deposit of samples in reasonable quantities is important. In this regard the draft Protocol contains several gaps.

Article 30 seems to suggest that at the request of the SADC PBR office, the right holder will maintain samples of the protected variety, at its facilities. Maintenance of the samples may be verified or inspected by the SADC PBR Office. Thus the draft Protocol does not explicitly provide for a SADC centralized mechanism or a one-stop centre, for the deposit and maintenance of the samples. Further there is no mention of who will bear the expense of maintaining the samples.

The Article 30 requirement is ad-hoc and discretionary in that samples are to be made available only at the request of the SADC PBR Office. If no request is made, no samples have to be made available. It would seem prudent to mandatorily require the applicant to deposit samples of seeds or any other propagating material at the time of filing an application for PBR. Failure of the applicant to provide the relevant samples should result in the application being abandoned.

15. Compulsory Licenses

Article 32 of the draft Protocol allows any interested person, on payment of a prescribed fee to apply to the SADC PBR Office for a compulsory license on the grounds that (i) it is necessary to safeguard the public interest in any SADC Member state and (ii) the right holder unreasonably refuses to grant the person a license. It also states that an application for a compulsory license can only be made after 3 years following the grant of PBR and the right holder will be paid “equitable remuneration”.

Compulsory licenses (CLs) are a critical policy instrument for governments as well as other persons to use to override exclusive rights granted to the breeder, subject to payment of adequate remuneration to the breeder. However in its present form, Article 32 suffers several shortcomings and is likely to prevent SADC governments or other interested persons from making effective use of the instrument.

CLs are national policy tools but in the case of the draft Protocol, CLs will be considered and administered by the SADC PBR Office. Article 32 requires that an application for a CL be made to the SADC PBR Office, which suggests that the decision on whether or not to grant a CL will be taken by the SADC PBR Office. As a result even when a government wishes to intervene by granting a CL, to override breeder’s rights over a variety, it will have to seek approval of the Secretariat. This effectively undermines the sovereign right of each member state to take measures that are in its national interests. It is thus important that

individual SADC member states are given complete freedom to impose restrictions on the exercise of breeders' rights in their country as it deems fit.

Further noting the socio-economic challenges that currently prevail in SADC member states, and the potential abuse of PBR rights that are granted to breeders, it would be beneficial to incorporate more specific grounds that could lead to the issuance of a compulsory license. Some such grounds are: where it involves issues pertaining to food security or nutritional and health needs, where there are anti-competitive practices 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; the seed or propagating material is not available at a reasonable price. On this it is important to draw on Article 33 of the African Model law.

There is no justification for allowing the issuance of CLs only after the expiration of three years from the date of the grant of PBRs. This requirement is not even found in UPOV 1991. The draft provision is unnecessarily restricting the use of CLs. If a government finds there to be solid reasons for issuing CLs, it should be allowed to do so. If such conditions do not exist, the grant of CLs can always be refused. Thus, there is no valid reason to subject important policy flexibilities to frivolous conditions.

There is also no justification for allowing the grant of CLs only after the right holder refuses to grant a voluntary license. There are scenarios such as public non-commercial uses, national emergencies and situations of extreme urgency, to remedy anti-competitive practices, where governments must have complete freedom to issue CL, without having to show that negotiations with the right holder have not been successful.

Lastly, Article 32 is short on details. For instance it is unclear about the period within which a decision will be taken on the CL application, whether a hearing will be held, who will participate in the hearing, how will equitable remuneration will be decided etc. The lack of detail creates uncertainty and makes it impossible to operationalize CLs efficiently and effectively.

16. Nullification of the Breeder's right (Article 35)

The SADC PBR Office has complete authority to nullify a breeder's right on ground mentioned in Article 35. The Article limits the grounds on which the SADC PBR Office can nullify and cancel PBR. On this as well the draft Protocol has based its provisions on UPOV 1991.

It is important that each member state has full flexibility to nullify breeders' rights over a protected variety. Currently as the draft Protocol is drafted this is not allowed as only the SADC PBR Office has authority to nullify and cancel

breeders' rights. But the flexibility is important as member states may have specific national circumstances that may warrant the nullification of PBRs.

17. Cancellation of Breeder's rights (Article 36)

Article 36 provides an exhaustive list of grounds for the cancellation or termination of PBRs, after it has been granted. The grounds are if the (i) variety no longer meets the criteria of uniformity and stability; (ii) the breeder fails to provide the SADC PBR Office information document or material necessary for verifying the maintenance of the variety; (iii) the breeder fails to pay fees; and (iv) the breeder fails to propose a suitable denomination where the earlier denomination is cancelled.

Since it is based on UPOV 1991, the Article suffers from a number of gaps and defects. For instance it is unclear if the SADC PBR Office can initiate cancellation of the grant; who will examine and take the decision on the cancellation and termination of the PBR; and whether the PBR grant can be invalidated on application of an interested person. It would definitely be important for the draft Protocol to include a post grant opposition mechanism.

The grounds provided by the Article are extremely narrow and exclude important grounds such as (i) where the grant has been based on incorrect or false information furnished by the applicant; (ii) documents required for the registration of the PBR have not been provided by the breeder; (iii) the breeder has failed to provide the necessary seeds or propagating material to the person to whom a compulsory license has been issued; (iv) the PBR grant is not in the public interest; (v) the breeder has failed to comply with the provisions of the Act and the regulations or the direction of the Registrar.

It is important that each member state has full flexibility to cancel breeders' rights on grounds other than those mentioned in Article 36. Currently as the draft Protocol is drafted this is not allowed as the decision to cancel or terminate breeder's rights can only be taken at the regional level. So if a country finds the protection of a variety to be prejudicial to its interests, it has no power to cancel the grant. This undermines the national sovereignty of each country member.

18. Enforcement

Article 39 of the draft Protocol allows the right holder to apply for a preliminary injunction or civil action to prohibit the action. The proposed provision is general, vague and without proper safeguards against abuses by the right holder. For instance in certain circumstances (e.g. where the government intervenes to restrict breeders' rights), the granting of an injunction will not be appropriate and remedies should be limited to payment of reasonable remuneration.

Article 39 also grants relief to the right holder by way of suspension by the authorities of the release into free circulation, forfeiture, seizure or destruction of material produced in contravention of plant breeders' rights. Again since the provision is vague, the exact nature cannot be determined. For instance, is this provision concerning border measures? If so, it needs to be stressed that customs authorities will not through visual inspection be able to determine infringements of PBRs. Thus extending border measures to PBR is simply not acceptable.

The Article also states that regulations under the Protocol will further detail procedures of civil proceedings and powers that civil courts in SADC members have to enforce the Protocol. The article does not provide any explanation as to what will be the impact on other SADC members, of a decision taken by a particular civil court.

19. Protection of Existing Varieties:

Article 42 of the draft Protocol allows PBRs to be granted for an existing variety that is not new on the date of entry into force of this legal framework, with licenses granted on reasonable terms to allow continuation of any exploitation initiated in good faith. This suggests that the draft legal framework will apply retrospectively to grant protection to existing varieties, even if they do not fulfill the criteria of novelty.

The value of this Article is not clear. 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.

20. Gaps in the draft Protocol

In comparison to other sui generis PVP systems, there are a number of gaps in the draft Protocol. Some of these gaps have been highlighted above. The gaps include:

- No provision requiring the breeder to give information about the expected performance of the registered variety, and the right of farmers to claim compensation if the material fails to perform. This is to ensure that seed companies do not make exaggerated claims about the performance of their varieties and that farmers can claim compensation in the event suffer losses;
- A positive requirement on the breeder to provide adequate supply of seeds or material of the variety at an affordable price, failing which governments are obligated to intervene. This is to ensure that if breeders wish to protect their varieties, they also commit in return to ensure access by farmers.
- Provisions that exempt farmers from payment of fees e.g. in filing pre-grant oppositions

- Provisions that safeguard farmers who unknowingly violate the rights of a breeder e.g. if he/she were not aware of the existence of breeders' rights. This is important considering the low literacy levels in the region.