

Current developments in seed laws harmonisation in Africa

Peter Munyi | October 2022

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Abbreviations

ACP	Africa, Caribbean and Pacific	ISSD	Integrated Seed Sector Development
ACTESA	The Alliance for Commodity Trade in Eastern and Southern Africa	ISTA	International Seed Testing Association
AERC	Africa Economic Research Consortium	ITPGRFA	International Treaty on Plant Genetic Resources for Food and Agriculture
AFCFTA	African Continental Free Trade Agreement	NPTS	National Performance Trials
AFSTA	Africa Seed Trade Association	SACAU	Southern African Confederation of Agricultural Unions
AGRA	Alliance for a Green Revolution in Africa	SADC	Southern African Development Community
ARIPO	Africa Regional Intellectual Property Organisation	SDGs	Sustainable Development Goals
AU	African Union	SMTA	Standard Material Transfer Agreement
AUC	African Union Commission	SPGRC	SADC Plant Genetic Resources Centre
CAADP	Comprehensive Africa Agriculture Development Programme	TASAI	The African Seed Access Index
CAP	Common Agricultural Policy	OAPI	African Intellectual Property Organisation
CBD	Convention on Biological Diversity	OECD	Organisation for Economic Co-operation and Development
CEN SAD	Community of Sahel-Saharan States	PANAP	Pan-African Network for economic Analysis of Policies
CGIAR	Consultative group on International Agricultural Research	PBRs	Plant Breeders' Rights
CILSS	Permanent Interstate Committee for Drought Control in the Sahel	PGRFA	Plant Genetic Resources for Food and Agriculture
COMESA	Common Market for Eastern and Southern Africa	PVP	Plant Variety Protection
CVPO	Community Variety Protection Office	QDS	Quality Declared Seed
DUS	Distinctness, Uniformity and Stability	SACU	Southern Africa Customs Union
EAC	East African Community	TASAI	The African Seed Index
EAFF	Eastern Africa Farmers' Federation	UEMOA	West African Economic and Monetary Union
EG	European Green Deal	UfM	Union for Mediterranean
EOAI	Ecological Organic Agriculture Initiative	UPOV	International Union for the Protection of New Varieties of Plants
EU	European Union	USAID	United States Agency for International Development
ECOWAS	Economic Community of West African States	VCU	Value for Cultivation and Use
FMSS	Farmer-Managed Seed Systems	WASP	West African Seed Program
GFAR	Global Forum on Agricultural Research and Innovation	WTO	World Trade Organisation
GIS	Geographical Indications		
GMOS	Genetically Modified Organisms		
SEMEA	French National Seeds and Seedlings Association		
IFPRI	International Food Policy Research Institute		

Executive summary

The agricultural sector is important in Africa. It is a dominant sector in terms of employment, export earnings, and livelihoods for many populations. It accounts for over 20% of Africa's GDP (AFDB, 2016). Even then, Africa remains a net food importer. This situation is likely to remain as the continent's agricultural sector faces immense challenges from the adverse effects of climate change among others. The structure of Africa's food production system is characterised by a vast majority of farmers engaging with farming activities for a dual purpose-food production for home consumption and for the market. Commercial agriculture is also thriving for some crops.

Seeds are at the core of food production, and seed laws cover a broad range of activities over seed in the agricultural sector. The activities that seed laws cover include seed testing, certification, variety release, and registration, phytosanitary measures, and plant breeders' rights or plant varieties protection. The manner in which each of these activities are regulated in the law has a profound effect on the outcome of seed production, availability, accessibility and therefore how agricultural systems are shaped. In Africa's context, seed laws also have to fit within the unique characteristics and context of small-scale farmers.

This report reviews the current status of seed laws internationally, at the continental level in Africa, in the EU, in the US as well as international programs of relevance to seed laws in Africa. The review of EU laws is based on the fact that the EU is a key trading partner with African countries and regional economic blocs and that policy developments in the EU such as the European Green Deal (EGD) are likely to have an impact on seed laws in the EU and beyond. The brief review of US seed laws and US seed programs in Africa are highlighted with a view to demonstrate other external parties' actions in influencing seed laws in Africa. This report also reviews the debates informing the status of these laws. These debates revolve around the rights of farmers to save, reuse, and exchange or sell farm-saved¹ seed. Saving, re-using, exchanging or selling farm-saved seed is

not only a practice that farmers especially in Africa have been engaging for a long time as a strategy to overcome the challenge of accessing seed, but is also recognized as a farmer right internationally. This practice has contributed immensely towards the conservation of plant genetic resources for food and agriculture. Further, the report examines the extent to which African farmers participate in the processes for the formulation of seed policies, noting that participation is necessary if seed laws, policies and programmes are to be relevant, effective and sustainable.

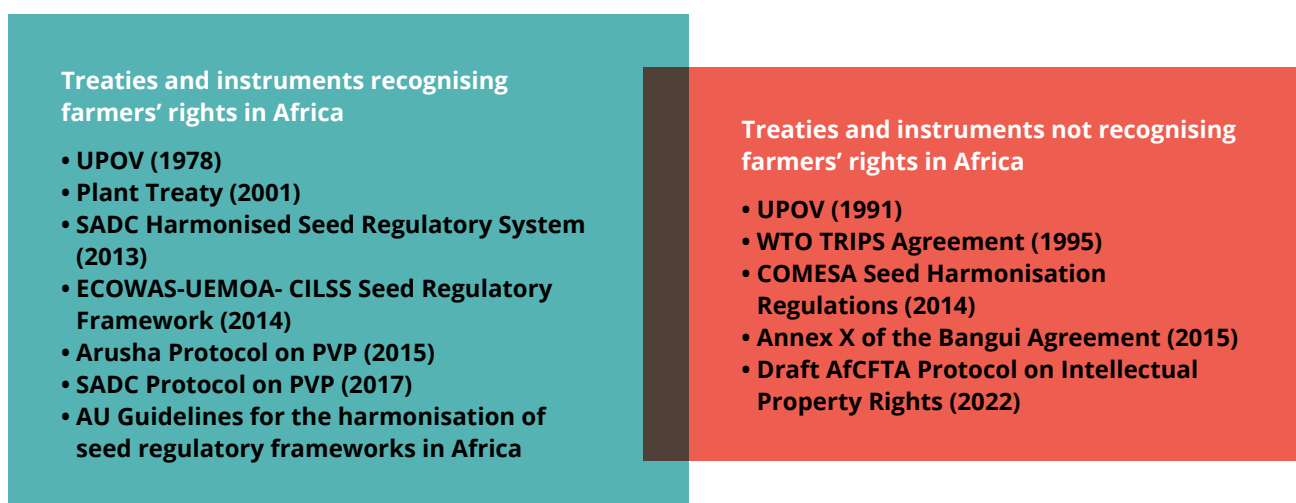
Promotion of agroecological, healthy and affordable food systems in Africa cannot be achieved without farmers participating in seed policy making processes. These policies include those concerning maintaining the rights of farmers to save, use and exchange farms-saved seeds and harvests of protected as well as indigenous varieties. There is a wide range of treaties, instruments and policies that regulate seed laws at the international level, continental level, regionally in Africa as well as at the national level.

Workers at the SEMOC Seed Processing Plant filling sacks with rice seeds on the production line.

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¹ As a legal term, farm-saved seeds refer to seeds and propagating material of protected varieties that a farmer retains from own harvest for planting. This is the context in which we use this term.

Figure 1. Recognition of farmers' rights in treaties and instruments on seed and plant breeding

This paper examines international, continental and regional-level treaties, instruments and policies and attempts to identify activities that DG INTPA F3 could support to maintain and promote farmers rights. Indeed, some of the treaties already in existence recognize farmers' rights or are crafted in a manner that allow for these rights, while others do not at all. An overview of these treaties is tabulated above (Figure 1).

The report finds that the international discussions around how farmers' rights should be implemented at the national level continue at the International Treaty and Plant Genetic Resources for Food and Agriculture (Plant Treaty) notwithstanding the provisions of this treaty. Similarly, what constitute acts that are private and non-commercial insofar as exemptions to breeders' rights are concerned, and how a farmer may save seeds on their own holdings, while at the same time taking care of the legitimate interests of a holder of Plant Variety Protection (PVP), remains contentious at the International Union for Protection of new Varieties of Plants (UPOV). In Africa, continental instruments and regional instruments are all at variance as to how the balance between farmers' rights, and the rights of holders of PVP is to be found. The AfCFTA follows the UPOV 1991 model, with the UPOV 1978 model not being available for subscription. The African Union guidelines for the harmonisation of seed regulatory frameworks in Africa mention farmers' rights but do not give detailed mention on how they may be attained. On the other hand the Arusha Protocol provides explicit considerations for farmers' rights by broadening the farmers' privilege provisions. Coherence is necessary, given that the level of adoption and application of these different instruments varies. At the same time,

the EU has long experience in balancing rights of PVP holders and those of small-scale farmers and this is a transferrable experience to the African continent where policy coherence is necessary.

With regard to seed testing, certification, registration and varietal release, continental policies are incoherent. Although regional bodies ECOWAS and SADC provide for a system of recognition of landraces in their seed schemes, COMESA does not. In the EU, conservation varieties are specifically provided for. Using the EU experience, landraces and similar varieties should be uniformly provided for in the regional seed schemes in Africa. Possibilities should be explored in Africa to have a continental-wide system that formally recognizes landraces. Such a system could include elements such as provisions on the scope of schemes for landraces and conservation varieties, and also agroecological areas where they are grown.

On the matter concerning participation of African farmers and farmer organisation in seed policy making processes, this report finds that the AU has an elaborate institutional structure at the Commission level of taking on board views of non-state actors. However, it appears this structure is not being used to the fullest, either by the AU but also the non-state actors. Farmer organisations should maximise the utility of this structure at the AU in making their views known. Further, for the regional trading blocs and intellectual property organisations, deliberate and intentional efforts should be made to expand their scope of entertaining views from farmer groups, civil society organisations and non-state actors. Policies on how civil society actors should engage with these institutions should be put in place and

made known. In return, civil society organisations, farmer organisation and other non-state actors need support from continental institutions such as the AU Commission and beyond as the constituencies which they speak for - small-scale farmers - can hardly sustain them. The EU programmes that support non-state actors could be extended to farmer organisations in Africa. Such support programmes can be viewed through the lens for realisation of farmers' rights within the framework of the Plant Treaty and also of international human rights frameworks, including the right to food.

Overall, the EU and member states stand in strategic position in enabling Africa to find a balance between farmers' rights and rights of PVP holders. This balance will contribute immensely to the agroecological approach for food production in Africa, the EU and beyond. African countries that are members of the Plant Treaty and increasingly becoming members of the UPOV 1991, the two basic legal framework on matters concerning farmers' rights, could partner with the EU in finding this balance. Supporting farmer organisations participation in seed policy making processes is part and parcel of finding this balance and also in attainment of farmers' rights. This is one element that DG INTPA could take up and support as part of the EU's international partnership and development policy programmes.

Finally, the AfCFTA, the African regional economic blocs and intellectual property institutions require support in making coherent the various seed laws and policies in place. All these laws and policies are intended to support, and not impede, food production in Africa. EU institutions may have an influential role in this regard by requiring African countries to adhere to new seed regulation aligned to the European Green Deal, as part of the wider effort to mainstream the farm to fork strategy in national and regional policies. It does not necessarily follow that implementation of UPOV 1991 should deny the rights of farmers to save, use, sell and exchange protected seeds. In any event, clarity should be contained in all the instruments on seed laws being put in place that rights accruing to indigenous varieties are different and distinct to those accruing to protected varieties.

Bags are filled with seeds during a seed distribution in Ethiopia carried out by FAO.

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Résumé exécutif

Le secteur agricole est important en Afrique. C'est un secteur dominant en termes d'emploi, de recettes d'exportation et de moyens de subsistance pour une bonne partie de la population. Il représente plus de 20 % du PIB de l'Afrique (AFDB, 2016). Malgré cela, l'Afrique reste un importateur net de denrées alimentaires. Cette tendance devrait se poursuivre, car le secteur agricole du continent fait face aux défis considérables, notamment en raison des effets néfastes du changement climatique. La structure du système de production alimentaire africain est caractérisée par une grande majorité d'agriculteurs exerçant des activités agricoles à double fin - production alimentaire pour la consommation domestique et pour la vente sur le marché. L'agriculture commerciale est également développée pour certaines cultures.

Ce rapport passe en revue le statut actuel des lois sur les semences au niveau international, au niveau continental en Afrique, dans l'UE, aux États-Unis ainsi que les programmes internationaux en rapport avec les lois sur les semences en Afrique. L'examen des lois de l'UE est basé sur le fait que l'UE est un partenaire commercial clé pour les pays africains et les blocs économiques régionaux et que les développements de la politique de l'UE tels que le Pacte vert pour l'Europe (PVE) sont susceptibles d'avoir un impact sur les lois semencières dans l'UE et ailleurs. Les lois américaines sur les semences et les programmes américains sur les semences en Afrique sont brièvement passés en revue afin de souligner les actions d'acteurs extérieurs qui influencent les lois sur les semences en Afrique. Ce rapport passe également en revue les débats relatifs à ces lois. Ces débats portent en particulier sur les droits des agriculteurs à conserver, réutiliser, échanger ou vendre des semences de ferme. La conservation, la réutilisation, l'échange ou la vente de semences de ferme est non seulement une pratique que les agriculteurs, surtout en Afrique, utilisent depuis longtemps comme stratégie pour surmonter le problème de l'accès aux semences, mais elle est également reconnue comme un droit des agriculteurs au niveau international. Cette pratique a contribué grandement à la conservation des

ressources phytogénétiques pour l'alimentation et l'agriculture. En outre, le rapport examine dans quelle mesure les agriculteurs africains participent aux processus de formulation des politiques semencières, en soulignant que cette participation est nécessaire pour que les lois, politiques et programmes relatifs aux semences soient pertinents, efficaces et durables.

La promotion de systèmes alimentaires agroécologiques, sains et abordables en Afrique ne peut être réalisée sans la participation des agriculteurs aux processus d'élaboration des politiques semencières. Ces politiques comprennent notamment les aspects relatifs au maintien des droits des agriculteurs à conserver, utiliser et échanger les « semences de ferme »² et les cultures de variétés protégées mais aussi locales. Il existe un large éventail de traités, d'instruments et de politiques qui réglementent les lois sur les semences au niveau international, et en Afrique au niveau continental régional et national. Ce document examine les traités, instruments et politiques au niveau international, continental et régional et tente d'identifier les activités que la DG INTPA F3 pourrait soutenir pour préserver et promouvoir les droits des agriculteurs. En effet, certains des traités existants reconnaissent les droits des agriculteurs ou sont conçus de manière à permettre l'exercice de ces droits, alors que d'autres ne le font pas du tout. Un aperçu de ces traités est présenté ci-dessous (Illustration 2).

Des travailleurs remplissent des sacs de semences de riz dans l'usine SEMOC pour le traitement de semences.

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² En tant que terme juridique, les « semences de ferme » désignent les semences et le matériel de multiplication de variétés protégées qu'un agriculteur conserve de sa propre récolte pour les planter. C'est dans ce contexte que ce terme est utilisé dans ce rapport.

Illustration 2. Reconnaissance des droits des agriculteurs dans les traités et instruments relatifs aux semences et à la sélection végétale**Traités et instruments reconnaissant les droits des agriculteurs en Afrique**

- UPOV (1978)
- Traité international sur les ressources phytogénétiques (2001)
- Système harmonisé de réglementation des semences de la CDAA (2013)
- Cadre réglementaire semencier de la CEDEAO-UEMOA-CILSS (2014)
- Protocole d'Arusha sur la POV (2015)
- Protocole de la CDAA sur la POV (2017)

Traités et instruments ne reconnaissant pas les droits des agriculteurs en Afrique

- UPOV (1991)
- Accord ADPIC de l'OMC (1995)
- Règlement sur l'harmonisation des semences du COMESA (2014)
- Annexe X de l'Accord de Bangui (2015)
- Projet de protocole ZLECAf sur les droits de propriété intellectuelle (2022)

Le rapport constate que les discussions internationales sur la manière dont les droits des agriculteurs devraient être appliqués au niveau national se poursuivent dans le cadre du Traité international sur les ressources phytogénétiques pour l'alimentation et l'agriculture (TIRPAA), malgré les dispositions de ce traité en faveur des droits des agriculteurs. De même, la définition des actes qui sont privés et non commerciaux en ce qui concerne les exemptions aux droits des exonérations, et la manière dont un agriculteur peut conserver des semences sur sa propre exploitation, tout en prenant soin des intérêts légitimes d'un titulaire de la protection des obtentions végétales (POV), restent des questions litigieuses au sein de l'Union internationale pour la protection des obtentions végétales (UPOV). En Afrique, les instruments continentaux et régionaux sont en désaccord entre eux sur la manière de trouver un équilibre entre les droits des agriculteurs et les droits des détenteurs de POV. La ZLECAf suit le modèle UPOV 1991, le modèle UPOV 1978 n'étant pas disponible pour de nouvelles signatures. Les lignes directrices de l'Union africaine pour l'harmonisation des cadres réglementaires des semences en Afrique mentionnent les droits des agriculteurs, mais ne donnent pas de détails sur la manière dont ils peuvent être exercés. En revanche, le Protocole d'Arusha prend explicitement en compte les droits des agriculteurs en élargissant les dispositions relatives aux privilèges des agriculteurs. La cohérence des politiques est nécessaire, étant donné que le niveau d'adoption et d'application de ces différents instruments est variable. Parallèlement, l'UE a une longue expérience en ce qui concerne l'équilibre entre les droits des obtenteur et ceux des petits exploitants agricoles, et cette expérience peut être transférée sur le continent africain où la cohérence des politiques est nécessaire.

En ce qui concerne les essais de semences, la certification, l'enregistrement et l'homologation variétale, les politiques africaines sont incohérentes. Alors que des organismes régionaux comme la CEDEAO et la CDAA prévoient un système de reconnaissance des variétés locales dans leurs programmes de semences, le COMESA ne le fait pas. Dans l'UE, des mécanismes de conservation de variétés locales sont spécifiquement prévues. En s'appuyant sur l'expérience de l'UE, les variétés locales et les variétés similaires devraient être prises en compte de manière uniforme dans les programmes régionaux de semences en Afrique. Les possibilités devraient être explorées en Afrique pour avoir un système de reconnaissance des variétés locales à l'échelle continentale, allant au-delà de la fourniture formelle de ces variétés. Il s'agit d'étendre le champ d'application des règlements sur les semences aux variétés locales et aux variétés de conservation, en y intégrant les zones agroécologiques où elles sont cultivées.

Quant à la question de la participation des agriculteurs africains et de leurs organisations aux processus d'élaboration des politiques semencières, le présent rapport constate que l'UA dispose d'une structure institutionnelle élaborée au niveau de la Commission pour prendre en compte les points de vue des acteurs non gouvernementaux. Cependant, il semble que cette structure n'est pas exploitée de manière satisfaisante, que ce soit par l'UA ou par les acteurs non gouvernementaux. Les organisations paysannes devraient mieux utiliser cette structure au sein de l'UA pour faire connaître leurs points de vue. En outre, pour les blocs commerciaux régionaux et les organisations de propriété intellectuelle, des efforts délibérés et volontaires doivent être déployés

pour étendre leur champ d'action pour recueillir les avis des groupes d'agriculteurs, des organisations de la société civile et des acteurs non gouvernementaux. Il faudrait mettre en place des mécanismes, et les faire connaître des politiques, précisant la manière dont les acteurs de la société civile peuvent s'engager auprès des institutions en charge des politiques semencières. En retour, les organisations de la société civile (les organisations d'agriculteurs et d'autres acteurs non gouvernementaux) ont besoin du soutien d'institutions continentales telles que la Commission de l'UA et d'autres instances, car les groupes qu'ils représentent - petits exploitants agricoles - ne peuvent guère les soutenir financièrement. Les programmes de l'UE qui aident les acteurs non-gouvernementaux pourraient être étendus aux organisations d'agriculteurs en Afrique. Ces programmes de soutien aux organisations de la société civile peuvent être envisagés sous l'angle de la mise en œuvre des droits des agriculteurs dans le cadre du traité TIRPAA et des cadres internationaux relatifs aux droits de l'homme, notamment le droit à l'alimentation.

Au final, l'UE et les États membres sont en position pour aider l'Afrique à trouver un équilibre entre les droits des agriculteurs et les droits des détenteurs de POV. Cet équilibre contribuera grandement à développer une 'approche agroécologique de la production alimentaire en Afrique, dans l'UE et dans le monde. Les pays africains qui sont membres du traité TIRPAA et qui adhèrent de plus en plus à l'UPOV 1991 (les deux cadres juridiques de base sur les questions relatives aux droits des agriculteurs), pourraient s'associer avec l'UE pour trouver cet équilibre. Le soutien de la participation des organisations d'agriculteurs aux processus d'élaboration des politiques semencières est un élément essentiel pour atteindre cet équilibre et pour concrétiser les droits des agriculteurs. C'est un axe d'intervention que la DG INTPA pourrait reprendre et soutenir dans le cadre de ses programmes de partenariat international et de politique de développement .


Enfin, la ZLECAf, les blocs économiques africains régionaux et les institutions de propriété intellectuelle ont besoin de soutien pour harmoniser les différentes lois et politiques existantes en matière de semences. Toutes ces lois et politiques doivent être destinées à favoriser, et non à entraver, la production alimentaire en Afrique. Les institutions européennes peuvent avoir un rôle influent à cet égard en proposant aux pays africains qu'ils adhèrent à une nouvelle réglementation sur les semences alignée sur celles développées en Europe avec ces mécanismes de protection des droits des agriculteurs et préservation des variétés locales. Cela ne signifie pas nécessairement que la mise en œuvre de l'UPOV 1991 devrait priver les agriculteurs de leurs droits à conserver, utiliser, vendre et échanger les semences protégées. Dans tous les cas, il devrait être clair, dans tous les instruments relatifs aux lois sur les semences en cours de mise en place, que les droits accordés aux variétés locales sont différents et distincts de ceux accordés aux variétés protégées.

Des sacs sont remplis de semences lors d'une distribution de semences en Éthiopie effectuée par la FAO.

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1 Introduction



Activities that seed laws regulate include seed certification, variety release, testing and registration, phytosanitary measures, and plant breeders' rights.

Africa's food production systems are unique. They are characterised by an agricultural system that makes significant contributions to national GDP; is a main source of income and livelihoods to many populations; is mainly small-scale and farmer-led; and, food crops farming is for home consumption as well as for the market, whether local or export. Access to seed in the African agricultural environment is a challenge despite numerous efforts to address the problem. As a result, seed systems in Africa are viewed as being constituted by two parts: a formal system, and an informal system.³ The informal seed system in Africa serves many small-scale farmers in Africa, particularly in instances where food production is for home consumption. One of the key characteristics of the informal seed system is seed saving, use and exchange. It is a strategy for accessing seed that is employed from time to time. However, this strategy may run afoul with many seed laws.

Activities that seed laws regulate include seed certification, variety release, testing and registration, phytosanitary measures, and plant breeders' rights also known as plant varieties protection (PVP). All these activities are considered necessary to enable a farmer access to seed of the right quality, in the right quantities and at the right time. The extent to which each of these activities matter varies from crop to crop and farmer to farmer, and different countries may set different standards for each of these activities depending on national circumstances. Some of the circumstances that may determine the extent to which each of these activities may be regulated include the nature of the farmers and seed systems in place, specific crop value chains, and seed sources for particular crops.

In recent years, Africa has witnessed a remarkable change in the landscape of seed laws and policies. One of the drivers towards this change either at the national, regional or continental level is trade, whether regional, within the continent or internationally with other partners such as the European Union. Trade dynamics bring about the need to harmonise laws, including concerning seeds. However, as indicated earlier in this section, seed systems in Africa are unique. This calls for a careful balance of needs and interests in the seed laws, between the various farmers in the continent.


This report reviews the current status of seed laws internationally, in the US, EU and, at the continental level in Africa and the debates informing the status of these laws. The EU is a key trading partner with Africa's national economies and economic blocs. Any policy developments in the EU arising from adoption of the European Green Deal (EGD) may have implications to seed laws in Africa in future. This has necessitated the need to also review the current status of the seed laws in the EU. The report also examines the extent to which African farmers participate in the processes for formulation of seed policies, noting that participation is necessary if seed laws, policies and programmes are to be relevant, effective and sustainable.

Promotion of agroecological, health and affordable food systems is a matter that is gaining prominence in Africa, in the EU and beyond. This cannot be achieved without farmers having the right to save, use and exchange farm-saved seeds and harvests of protected as well as indigenous varieties. Ensuring this right requires farmers participate in seed policy making processes and accountability of governing structures. This is necessary noting that conservation of ecological diversity is part and parcel of the EGD, Sustainable Development Goals (SDGs) and the Comprehensive Africa Agriculture Development Programme (CAADP) which is discussed in detail in this report.

In Africa, continental and regional instruments are all at variance as to how the balance between farmers' rights and the rights of Plant Variety Protection holders is to be found.

3. Louwaars, N. P., de Boef, W. S., and Edeme, J. (2013). Integrated seed sector development in Africa: a basis for seed policy and law. *J. Crop Improvement* 27, 186–214. doi: 10.1080/15427528.2012.751472

2 Current state of international seed laws



While an international seed law does not exist as such, there are international treaties that have been ratified by many countries that influence the form, structure, and content of some aspects of seed laws at the national and regional levels.

While an international seed law does not exist as such, there are four international treaties that have been ratified by many countries that influence the form, structure, and content of some aspects of seeds laws at national and regional levels. The scope of influence by these international treaties has largely been on matters concerning plant breeders' rights.

It is worth to note that plant breeders' rights once conferred apply to protected varieties which may be available in both the formal and informal sectors depending on the crop in question and the nature of the farmer. The international treaties of relevance are: **(1)** the WTO Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS Agreement) **(2)** the International Treaty on Plant Genetic Resources for Food and Agriculture (Plant Treaty), **(3)** the 1978 Act of International Convention for the Protection of New varieties of Plants (UPOV 1978), and **(4)** the 1991 Act of International Convention for the Protection of New varieties of Plants (UPOV 1991). As international treaties, all of them are equal, and none can be said to take precedence over the other given that the objectives of each is different and countries that may be parties to each of them may be different.

Being part of the package of WTO Agreements, the TRIPS Agreement mainly focusses on trade, by providing a harmonization framework for intellectual property rights, some, particularly plant variety protection (PVP) affect seed and planting material. The main provision of the TRIPS Agreement relevant to seed laws, is article 27.3(b). This article provides that whereas WTO Members may exclude plants and essentially biological processes for the production of plants (among others) from patentability, they must provide for the protection of plant varieties⁴ either by patents or by an effective sui generis system or by any combination thereof. Pursuant to this requirement, WTO members have therefore provided for a form of protection of plant varieties at the national level, or through regional instruments. The European Union and its Member States are members of the WTO. Except for two countries, all other African countries

are either members or have observer status at the WTO.⁵ This in part explains why many countries have put in place laws on PVP, and also the proliferation of regional treaties and protocol on PVP particularly in Africa, where three such instruments are in place. The discussion about these instruments in Africa and the extent to which farmers' rights are considered in each is contained in [Section 5](#).

The objectives of the Plant Treaty on the other hand is the conservation and sustainable use of all plant genetic resources for food and agriculture (PGRFA) such as seed and other planting material, and the fair and equitable sharing of the benefits arising out of their use, in harmony with the Convention on Biological Diversity (CBD), for sustainable agriculture and food security.⁶ Farmers' rights which include affirming the past, present and future contributions of farmers in all regions of the world in conserving, improving and making available PGRFA, and the right to save, use, exchange and sell farm-saved seed/ propagating material are important in realization of the objectives of this Treaty.⁷ Admittedly, intellectual property rights do constitute some of the elements through which fair and equitable sharing of benefits arising from the use of PGRFA is attained. One of the innovative instruments of the Plant Treaty, the Standard Material Transfer Agreement (SMTA), which provides a uniform system of transfer and exchange of some PGRFA between countries, contains intellectual property stipulations which are triggered once the recipient of the PGRFA commercializes the material.⁸ In the African region, only seven countries are not parties to this treaty (two have signed but not ratified) while the European Union and its member states are contracting parties.⁹ The Plant Treaty is an influential instrument in Africa in enabling seed and planting material to be available to farmers at the lowest costs possible. As most countries in Africa are parties to this treaty, they are therefore duty-bound to implement its provisions at the national level, much the same as they are required of other instruments that they are a party to. The challenge remains however, that each country is left on its own to implement the Plant Treaty.

⁴ The WTO TRIPS Agreement does not define a plant variety per se. However, other international treaties such as UPOV 1978 and UPOV 1991 have defined a plant variety to mean a plant grouping within a single botanical taxon of the lowest known rank. This definition has become generally acceptable. UPOV 1978 and UPOV 1991 have also gone a step further and defined what breeding a plant variety means, and in this regard, it is not necessarily a formal scientific process and as such farmers in their fields are also capable to breeding new varieties.

⁵ See [Annex 1](#) to this report. ⁶ Article 1 of the Plant Treaty.

⁷ Article 9 of the Plant Treaty. ⁸ Article 6 of the Standard Material Transfer Agreement. ⁹ See [Annex 1](#) to this report.

UPOV 1978 and UPOV 1991 provide for a system of grant of plant breeders' rights, to which countries, by becoming a member to these Conventions are bound to conform their national laws. Although the two UPOV Conventions are different, UPOV 1978 is no longer open for signature. In Africa, only South Africa has remained a party to UPOV 1978. Six other countries are parties to UPOV 1991.¹⁰ The African Intellectual Property Organisation (OAPI), by being a party to UPOV 1991 binds seventeen other countries (mainly French-speaking) who are its members. Annex X of the revised Bangui Agreement, which is the main legislation on PVP for OAPI, applies directly to the seventeen OAPI member states.¹¹ The European Union and its member states are all parties to UPOV 1991, except for Italy and Portugal who are parties to UPOV 1978. Even though UPOV 1978 and UPOV 1991 share a common objective, their approaches are slightly different. The distinctions to their approaches lie in several areas: the subject matter for protection; scope of protection of plant varieties; breeder's exemption; and in farmers' privilege. Farmers' privilege refers to whether a farmer may be allowed to save and re-use seed of protected material on own holdings, and the conditions for doing so. Under UPOV 1978 saving and re-using seed of protected material is implicitly allowed¹² while under UPOV 1991, this is only allowed within reasonable limits and subject to the safeguarding of the legitimate interests of the right holder.¹³ How this may occur is left in principle, to individual countries to decide. However, one finds that in Africa, some of its regional PVP instruments, and national PVP laws of many countries have literally lifted the UPOV 1991 provision on farmers' privilege and inserted it in their national laws, without implementation. Annex X of the OAPI Agreement, and Kenya and Tanzanian PVP laws are examples.

The International Seed Testing Association (ISTA), though being a voluntary, non-governmental association of members, is also worth to mention due to its role in influencing seed certification, variety release and testing standards globally, including in Africa. As an association of seed testing laboratories- either public or private, ISTA's vision is to have a uniform system of seed quality evaluation worldwide.¹⁴ Its objectives include to develop, adopt and publish internationally agreed standard procedures for sampling and testing seeds; promote uniform application of standard procedures for evaluation of seeds involved in international trade; and to encourage variety (cultivar) certification among others.¹⁵ Attracting membership from government and private laboratories across the world including from Africa¹⁶ and countries in the EU¹⁷, ISTA's seed certification standards are influential as by their adoption at the national level, countries are saved from developing their own. This may be efficient, but it largely disenfranchises countries from taking into account local circumstances and conditions in the development of their own standards. ISTA has not developed a standard for Quality Declared Seeds (QDS) schemes which make less demand for governments in seed quality processes, particularly for crops that are of low commercial value and landraces.¹⁸

A QDS system was conceived under the aegis of the FAO in 1980s with a view to make the best possible use of resources available for seed quality control and limited-resources conditions, for example in seed relief interventions following calamities and natural disasters.¹⁹ The purpose of a QDS system is to offer an alternative which can be used for those crops, areas and farming systems in which highly developed seed quality control activities are difficult to implement or make relatively little impact.²⁰ The QDS system is based on four principal points: **(a)** the establishment of a list for varieties that are to be produced as QDS; **(b)** registration with the national authority of seed producers for the varieties listed **(c)** inspection of at least 10% of the seed crops by the national authority (not every seed crops) and **(d)** inspection of at least 10% of the seed offered for sale (not all seed).²¹ The QDS system of certification of seeds augurs well with farmers' rights as it provides for a system of provision of clean seed, in markets from local sources, such as farm-saved seeds or seeds of indigenous varieties that may be of little interest to seed companies.

10. See Annex 1 to this report. 11. See Annex 1 to this report. 12. Article xxx of UPOV 1978. 13. Article xx UPOV 1991. 14. <https://www.seedtest.org/en/informations-footer/about-us.html> 15. Ibid. 16. Annex 1 to this report.

17. Belgium, Bulgaria, Croatia, Czech Republic, Denmark, Portugal and Spain are some of ISTA's members from the EU. 18. FAO (2006), "Quality declared seed system." FAO Plant Production and Protection paper 185. 19. Food and Agriculture Organisation of the United Nations (FAO), 2006. Quality declared seed system. FAO Plant Production and Protection Paper 185. FAO, Rome. 20. Ibid. 21. Ibid.

It is not without doubt that full realisation of farmers' rights is at the core of the objectives of the Plant Treaty.²² It is broadly accepted that realisation of farmers' rights is of paramount importance for sustainable agriculture and resilient food and seed systems worldwide and a host of measures, whether technical, legal, administrative exist which could be applied to realise farmers' rights.²³ Since the second meeting of the Governing Body of the Plant Treaty in 2007, farmers' rights is a standing agenda item in the meetings of the Governing Body to the Treaty which meets once every two years. Current discussions at the Plant Treaty concerning realisation of farmers' rights are being steered through the work of an Ad Hoc Technical Expert Group on farmers' rights which was established by the Governing Body in 2017. This Expert Group was mandated to produce an inventory of national measures that may be adopted, best practices and lessons learned from the realisation of farmers' rights and based on this inventory, develop options for encouraging, guiding and promoting the realisation of farmers' rights.²⁴ The report of this Expert Group is due for discussion at the next meeting of the Governing Body in September 2022.²⁵ The relationship between PVP on one hand and farmers' rights on the other remains contentious especially in discerning the extent to which one may influence the application of the other.

In UPOV, contentions and debates relevant to enabling small-scale farmers access seed of protected varieties have been revolving around the exception to the rights conferred. One such exception which is compulsory, is acts done privately and for non-commercial purposes within article 15(1) (i) of UPOV 1991. UPOV's interpretation of this exception²⁶ is seen as restrictive and narrow as it does not allow any material to be shared, even for production of a food crop for home consumption.²⁷ Others have also expressed a similar view: that the UPOV interpretation does not take into account the reality of peasants and small-scale farmers, who make up more than 90% of the world's farmers.²⁸ Calls

have therefore been made to either amend the Explanatory Notes and Frequently Asked Questions which provide UPOV's interpretation, or amendment of UPOV 1991 in totality.²⁹ The second issue in contention at UPOV concerns farmers' privilege. Farmers' privilege in UPOV 1991 is an optional exception and is contained in article 15(2). The contention under this issue is that farmers' privilege does not allow farmers to freely exchange seeds and propagating material of protected varieties, but only for a farmer to re-use seed in their own holdings and this is also with conditions.³⁰ On the other hand, others such as the European Seed Association, hold that farmers' privilege are not a bar to, and do not conflict with, farmers' rights.³¹ Furthermore, inasmuch as it is an optional exception, there is no country that is a party to UPOV that have chosen not to have a provision in this regard in their national laws, and as such the exception does not appear as optional as it is provided.

Separating good quality seed from bad at the IIAM National Laboratory for Seed Quality Control in Maputo, Mozambique.

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22. Document Resolution 2/2007. 23. Document IT/GB-9/22/13/2.

24. Resolution 07/2017. 25. IT/GB-9/22/13.2. 26. UPOV/EXN/EXC.


27. Reply to APBEBES to the UPOV Circular E-20/246.

28. See Contribution of the European Contribution Via Campesina (ECVC) on the implementation of the exception of acts done privately and for non-commercial purposes in relation to small-scale farmers. Available at www.apbrees.org.

29. See South Centre Contribution in response to UPOV Circular E-20/246.

30. Sangeeta Shashikant, "International Contradictions on Farmers' Rights: The interrelations between the International Treaty, its Article 9 on Farmers' Rights and UPOV", November 01, 2016, Third World Network. 31. Szonja Csorgo, "Farmers' Rights & breeders' Rights: a false conflict". Symposium on possible interrelations between the IT PGRFA and the UPOV Convention, October 26, 2016., European Seed Association.

3 Current state of US seed laws and programs



While the Free Trade Agreement programmes may not be very influential so far, the programmes of the USAID on seed policies harmonisation within Africa's regional economic blocs have more direct, immediate and impactful results in shaping the seed policy landscapes in Africa.

US seed law regulation takes place both at the state and federal levels. One primary statute regulates seed activities, and this is the Federal Seed Act. However, programs conceived or supported through USAID seem to have more impact in Africa than the Federal Seed Act. This is more so because the Federal Seed Act seeks to regulate inter-state commerce and insofar as foreign commerce is concerned, its main concern is seed imports.

Federal Seed Act

At the federal level, the primary statute regulating seed activities is the Federal Seed Act and the regulations made thereunder. This statute regulates inter-state as well as foreign commerce in seeds and imposes certain standards with respect to certain imported seeds. With regard to inter-state commerce, the Federal Seed Act requires that all seed being transported across states to be labelled. The nature of the information that is required to appear on the label, such as the percentage of germination, and the month and year when the test to determine such percentages was done invariably requires that the seed must be tested before labelling. Seed testing rules are required to be laid out by the Secretary of Agriculture. With respect to foreign commerce, it is worth noting that the primary function of the Federal Seed Act in regard is prohibition of seed imports that do not meet specific criteria set, rather than seed exports. The function of regulating the quality of seed exports is therefore left to the importing countries.

Insofar as influencing seed policy processes in Africa, the US framework for doing so, falls not under the Federal Seed Act, but through international aid programmes of the USAID and also through bilateral and free trade arrangements. USAID programmes

One of the outcomes of the Feed the Future Enabling Environment for Food Security programme of the USAID was a finding that small national variations among regulations related to variety release, seed certification, quality control, and quarantine and phytosanitary regulations led to increased transaction costs and duplicative procedures.³² A consequence of this finding was the conception of The Seed Trade Project (2015 to 2022) which sought to improve

availability of and access to high-quality seed in SADC countries, by supporting the SADC Secretariat to harmonize policies and regulations governing seed trade in the SADC Member States.³³ Some of the sample activities relevant to seed harmonization supported include domestication and harmonisation of seed policies with the SADC region; engaging with seed companies to apply for and register seed varieties on the SADC Seed Variety catalogue; pressure testing the SADC Harmonised Seed Regulatory System; and, operationalising the SADC Seed Centre.³⁴

Another segment of the Feed the Future programme of the USAID supported the West Africa Seed Program (WASP), between 2012 and 2017 through West and Central Africa Council for Agricultural Research and Development (CORAF/WE CARD).³⁵ The WASP programme assists farmers to access higher quality seeds, and also encourages intra-regional seed trade by harmonising regional seed standards and policies. The program component for WASP include creation of a regional-level alliance of seed sector actors to interact with and exchange best approaches to strengthen the seed sector; effective implementation of a regional seed policy to create a harmonised environment to facilitate seed trade among ECOWAS Member States; production of sufficient quantities of quality-improved seeds to meet breeders' demand to expand certified seed production; and, development of a strong West-African private sector to ensure the supply of certified seeds of standard quality.³⁶

32. www.agrilinks.org 33. www.dai.com 34. *Ibid.*

35. <https://2012-2017.usaid.gov> 36. *Ibid.*

US Free Trade Agreements

While the US Free Trade Agreements (FTA) are bilateral and, on a country-by-country basis, the US is currently negotiating an FTA with Kenya. A US-Kenya FTA would be the first with a country in sub-Saharan Africa. It is notable that while Kenya is not a major US trade partner in global terms, the United States view Kenya as a strategic partner and the FTA has potential trade and foreign policy implications for the US Congress.³⁷ Specific to seeds, there are a number of issues of relevance that are lined up for negotiations: intellectual property rights, and prohibition of genetically modified organisms (GMOs) into Kenya.³⁶ It is reported that since 2012, Kenya has been reluctant to approve the importation and planting of GMO food crops, which has restricted the sales of new products from US companies.³⁹ It is observed that a US-Kenya agreement could affect regional trade patterns, for example, through rules of origin requirements, and set precedents for regional trade and investment rules.⁴⁰ Related is the stalled US-Southern Africa Customs Union (SACU) FTA negotiations. SACU is a five member countries union - Botswana, Lesotho, Namibia, South Africa and Eswatini - and since 2002, SACU has been in negotiations towards an FTA with the US. While agricultural products - seeds being one of them - are the subject of the negotiations, the negotiations towards the FTA were suspended in 2006, in part due to divergent views over scope.⁴¹

However, it is clear that while the FTA programmes may not be very influential so far, and the Federal Seed Act, being of least impact, the programmes of the USAID on seed policies harmonisation within Africa's regional economic blocs have more direct, immediate and impactful results in shaping the seed policy landscapes in Africa.

Packets of seed donated by the Food and Agriculture Organisation (FAO) in Borama, Somalia.

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³⁷. <https://crsreport.congress.gov/product/pdf/IF/IF11526>

³⁸. <https://agoa.info> ³⁹. *Ibid.* ⁴⁰. *Ibid.*

⁴¹. <https://crsreport.congress.gov/product/pdf/IF/IF11526>

4 Current state of EU seed laws



The EU seed law framework is quite complex; it is designed to take into account farmers across the formal and informal spectrum.

Although the seed sector in the European Union is governed by a set of complex laws, Directives and Regulations, the central issue that governs this arrangement is food safety with a view to protect the consumers.

EU Directives

As agricultural production in the EU is largely industrialized, the laws in place are primed to support this system of production. Variety testing, registration, release, labelling and packaging is regulated through Directives which have direct application in EU Member States while the Regulations which have an indirect effect focus on matters concerning seed and plant health, and organic production. Further the Directives are not general in nature; each is enacted with the objective of regulating marketing seed for a specific set of crops: fodder plants; cereals; potatoes; beet; oil and fibre plants; vegetables; ornamental plants; and, fruit plants.⁴² Thus Seed Marketing Directives define the quality standards that must be met in the field for seed production of agricultural plant species and seed lots if the seeds are to be marketed in the EU.⁴³

A common catalogue of varieties of agricultural plant species exists in the EU. This common catalogue is compiled on the basis of national catalogues, which are required to be drawn up in accordance with uniform rules.⁴⁴ Distinctness, Uniformity and Stability (DUS) and Value for Cultivation and Use (VCU) tests are essential in order for a variety to be recorded in the catalogue. These tests are conducted using internationally accepted standards (ISTA, OECD Seed Schemes and other internationally accepted standards). It is notable that seed destined for export does not have to meet these standards. While this could be a loophole that could be exploited enabling export of poor quality seeds from the EU to third countries, the overall quality of the seed for export is left to the regulations of the importing country. The above notwithstanding, there are measures that have been put in place in the EU Directives to protect the continued existence of conservation varieties. Conservation varieties are agricultural

landraces and varieties of specific crops that have been traditionally grown and have adapted to local and regional conditions and are either threatened by genetic erosion, are with no intrinsic value for commercial crop production or are intended for use in the preservation of the natural environment.⁴⁵ Each of the Directives on conservation varieties contains specific rules on packaging, labelling, testing, marketing conditions, and regulation of areas of seed production. Further, quantitative restrictions for seed marketed for conservation varieties are imposed, either as a percentage of seed of the same species used in one growing season or based on quantities necessary to sow a unit of land.

EC Regulation on PVP

Matters concerning intellectual property over seed are also provided for under EU seed laws. Here, there are three strands of laws: laws on PVP; laws on geographical indications, and patent laws. On matters PVP, the main legislation is the Regulation EC 2100/94 on EU plant variety rights and the implementing rules made thereunder. The EU PVP legislation follows the UPOV 1991 model for which the EU and most Member States are members. This includes the breadth of rights granted to a breeder, and the exceptions. However, with respect to the exceptions to the rights conferred, there are specific elaborations. First, it is provided that the rights conferred may not violate public morality, public policy or public security, the protection of health and life of humans, animals or plants, the protection of the environment, the protection of industrial or commercial property, or the safeguarding of competition, of trade or of agricultural production.⁴⁶ This limitation is broad and can be exercised in a manner that fits the objectives of the European Green Deal since wider policy objectives may be entertained.

Secondly, for the purposes of safeguarding agricultural production of specific fodder crops, cereal crops, potatoes and oil and fibre plants the Regulations expressly authorise farmers to use seeds for propagation purposes in their own fields, the product of the harvest which they have obtained by planting propagating material of a variety other than a hybrid or synthetic variety.⁴⁷ Small-scale farmers are given specific protection under this rule, exempting them from having to pay any remuneration to the right holder, with other farmers when they save and replant seed from their own harvests being required to pay.

Finally, the plant variety rights do not extend to acts done privately and for non-commercial purposes, which are not elaborated.

⁴². Council Directives 66/401/EEC of 14 June 1966; 66/4012/EEC of 14 June 1966; 2002/56/EC of 13 June 2002; 2002/54/EC of 13 June 2002; 2002/57/EC of 13 June 2002; 2002/55/EC of 13 June 2002; 2008/72/EC of 15 July 2008; 98/56/EC of 20 July 1998; and, 2008/90/EC of 29 September 2008. ⁴³. www.semoe.fr ⁴⁴. Council Directive 2002/53/EC of 13 June 2002. ⁴⁵. Commission Directives 2008/62/EC of 20 June 2008, 2009/145/EC of 26 November 2009 and 2010/60/EU of 30 August 2010. ⁴⁶. Article 13.8 of Council regulation (EC) No. 2100/94. ⁴⁷. *Ibid*, article 14.1.

Geographical Indications

Geographical Indications (GIs) which are mainly a form of a food product quality scheme, also establish Intellectual Property Rights for specific products, whose qualities are specifically linked to the area of production. GIs extend to a wide variety of agricultural products. Besides providing consumers with information and a guarantee of product authenticity, geographical indications also have other functions: preserving the diversity of agricultural products and practices; and, retaining rural populations in the area of origin of the product. While GIs do not protect seeds per se, this Directive correlates with one of the elements of farmers' rights within the Plant Treaty- recognition of the roles farmers have played and continue to play in conservation and sustainable use of genetic resources, as it follows that for a product of a GI to remain certified as such, production methods, including of the seeds that lead to the product must be maintained.

Patent laws

With respect to patent laws, under the European Patent Convention, plants and seeds obtained from conventional breeding and essentially biological processes are generally not patentable. With biotechnology and genetic engineering playing an increasingly important role in many industries including crop improvement in the agricultural sector, the Biotech Directive⁴⁸ was adopted with a view to give clarity to questions around patentability of biotechnological inventions. In recent years, the convergence of biotechnological processes and genetic engineering⁴⁹ has led to calls for legal clarity to be restored on the matter, given the convergence between convention breeding and advance biotechnological methods.⁵⁰

Organic production

On organic production, the relevant EU Regulation⁵¹ recognises that organic production among others, contributes to the integration of environmental protection requirements and promotes sustainable agricultural production. Explicitly, the Regulations provide that organic production is not compatible with GMOs. The scope of the Regulations extends to seeds involved in organic production, including their labelling, placing in the market, including export from the EU to third countries. Broad principles relating to organic agriculture are laid out including, the use of seeds with a high degree of genetic diversity, disease resistance and longevity. Under article 13 of the Regulations, the European Commission is empowered to adopt rules that govern the production and marketing of plant reproductive material of organic heterogenous material for particular genera or species, as regards among others, the minimum quality requirements for seeds lots, including identity, specific purity, germination rates and sanitary quality.

As indicated, the EU seed law framework is quite complex. The EU seed law framework is designed to take into account farmers across the formal and informal spectrum. This framework also exists within the Common Agricultural Policy (CAP) which gives it a dynamic of support none of kind which exists with the seed systems in Africa. Thus while the rights of small-scale farmers in the EU are discernible whether through the lens of organic food production, conservation varieties, GIs or the EU Directives themselves, the extent to which these rights are translocatable in the absence of the support farmers receive through the CAP is difficult to measure.

⁴⁸. Directive 98/44/EC of 6 July 1998 on the legal protection of biotechnological inventions. ⁴⁹. Enlarged Board of Appeal opinion G 3/19 (Pepper) dated 14 May 2020. ⁵⁰. <https://www.europarl.europa.eu/news/en/press-room/20190912IPR60934/no-patents-on-naturally-obtained-plants-and-seeds>

⁵¹. Regulation (EU) 2018/848 of the European Parliament and of the Council of 30 May 2018 on organic production and labelling of organic products and repealing Council Regulation (EC) No 834/2007.

5 Current state of continental seed laws in Africa



Regional trade has been the main objective of efforts towards harmonisation of seed laws in continental Africa.

Regional trade has been the main objective of efforts towards harmonisation of seed laws in continental Africa, with efforts made on two levels: at the African Union and within various regional trading blocs and regional intellectual property organisations.

At the African Union, harmonisation of seed laws has been rationalised through **(1)** the Comprehensive Africa Agriculture Development Programme (CAADP) adopted in 2003 **(2)** the African Seed and Biotechnology Programme (ASBP) endorsed by the AU in 2007 **(3)** the Malabo Declaration of 2014⁵² and **(4)** the aegis of the African Continental Free Trade Agreement (AfCFTA), which was adopted in 2018 and came into force in 2019. The coming into force of the AfCFTA has accelerated the endeavour harmonize seed laws in Africa, as seed is not only a tradable commodity and thus covered by the AfCFTA Protocol on Goods, but also in the context of the second phase of the AfCFTA negotiations which focus on among others intellectual property rights, for which PVP are part of.

The ASBP was in particular designed to contribute to the goals of CAADP and also to the attainment of SDG 1, SDG 2, SDG 12 and SDG 13 and has become the official AU policy and program platform for seed sector development.⁵³ Consequently, several projects and initiatives conceptualised by different

organisations and institutions have emerged in an effort to support the implementation of the ASBP. These include ISSD Africa programme⁵⁴, the ASB Platform by Africa Agricultural Technology Foundation⁵⁵, the designation of the Forum for Agricultural Research in Africa (FARA) as the host of the Secretariat of the African Seed and Biotechnology Partnership Platform⁵⁶, the African Seed Access Index (TASAI)⁵⁷, and the Ecological Organic Agriculture Initiative⁵⁸ among others. With the specific objectives within ASBP of these different projects and initiatives varying, the success or otherwise in implementation of the ASBP is hard to measure. However, these projects and initiatives have made efforts to influence policies at national level including on matters such as seed availability and trade, taking into account the wide range of farming systems in Africa.

Continental guidelines for harmonisation of seed regulatory frameworks in Africa

A related activity of the African Union Commission (AUC) within the framework of ASBP is the development of two continental guidelines: **(a)** for the harmonisation of seed regulatory frameworks in Africa⁵⁹ and **(b)** for use of biotechnology to enhance agricultural productivity for food security and nutrition in Africa.⁶⁰ The process of developing these guidelines commenced in 2020. This report focuses only on the guidelines for the harmonisation of seed regulatory frameworks. It is stated that the objective of the guidelines is to support the AU, its Member States and the Regional Economic Communities in Africa to develop or review their seed policies and legal frameworks with a view to enhance their seed sector operation and facilitate cross-border trade.⁶¹ From a trade perspective, the aim of these guidelines is to create an enabling environment for seed trade to occur between countries within the framework of the AfCFTA, with seed being a tradable goods and therefore subject to the Protocol on Trade in Goods of the AfCFTA.

The development of these guidelines has not been without criticism from some civil society organisations on their procedure for development and the substance thereof. Some of these criticisms include that the inception report to the guidelines lacks articulation on farmers' rights and agricultural diversity.⁶² This is against a global call towards reorientation of the food systems and agrobiodiversity embedded in local seed and food systems.⁶³ An examination of the guidelines reveals the following: first, it is acknowledged that two seed systems exist in Africa, that is, formal and informal. The guideline's objectives insofar as the informal seed system is concerned (referred to as Farmer-

52. The Malabo Declaration on Accelerated Agricultural Growth and Transformation for Shared Prosperity and Improved Livelihoods.

53. <https://www.nepad.org/overview/comprehensive-africa-agriculture-development-programme-caadp> 54. Established in 2014, the Comprehensive Programme on Integrated Seed Sector Development in Africa (ISSD Africa) was established with the aim of supporting the development of a vibrant, market-oriented and pluralistic seed sector in Africa. Initially funded by the Government of the Netherlands, ISSD Africa is a programme implemented through a number of partners including Mercy Corps, Bioversity-CIAT Alliance, International Food Policy Research Institute (IFPRI), some CGIAR research programmes, KIT, and, Wageningen Centre for Development Innovation. See <https://issdafrica.org/> 55. Established in 2020, the ASB Platform is a strategic tool to coordinate the African Seed and Biotechnology Programme geared towards establishment of effective and efficient seed systems and enhanced application of biotechnologies and methodologies within the seed sector 56. <https://faraafrica.org/2021/06/04/fara-proposed-to-host-the-african-seed-and-biotechnology-partnership-platform-asb-pp-of-the-african-union-commission-auc/> 57. The work of TASAI is coordinated by TASAI Inc, a not for profit organisation incorporated in the USA. Past and present partners of TASAI have included Alliance for Green revolution in Africa (AGRA), United States Agency for International Development (USAID), Agri-Experience among others. See www.tasai.org 58. AU Executive Council Decision on Organic Farming Doc. EX.CL/Dec.631(XVIII). 59. AUC/DREA/C/036. 60. AUC/DREA/C/037.

61. AUC/DREA/C/036. 62. Africa centre for Biodiversity (2021), Harmonisation of seed laws in Africa: regional and continental integration under the auspices of the African Continental Seed Harmonisation (ACSH) initiative and the African Continental Free Trade Area (AfCFTA). 63. Ibid. Also see the Report of the UN Rapporteur on the right to food. Document A/HRC/49/43.

Managed Seed System-FMSS), is to mainstream this system towards the formal seed trade industry.⁶⁴ The guidelines acknowledge that a Quality Declared Seed (QDS) system may confer practical safeguards in enabling quality seeds and proposes development of appropriate protocols for farmer-managed seeds, which protocols should then be inserted into national seed regulations. Secondly, the guideline's view on the Plant Treaty is that this instrument "does not directly lie in the elements to be harmonised but by the multiplicity of Member States acceding to the treaty, some degree of harmonisation has taken place."⁶⁵ This view is erroneous as seeds are PGRFA and therefore the Plant Treaty falls squarely on the guidelines. The degree of harmonisation that is alluded to as between the Plant Treaty and other instruments in the African regions is also not detailed.

The guidelines also propose that the African Union should become a party to the Plant Treaty much the same as the EU is, claiming that the interests of the African countries will be most secured with the AU itself as a member. This is not a good idea. The suggestion to have the African Union become a party to the Plant Treaty fails to appreciate that the political and sovereign character of the AU is very different and distinct from that of the EU and therefore the success that the EU has had with securing the interests of its Member States at the Plant Treaty are not easily replicable by the AU. As far as farmers' rights are concerned, the guidelines again provide the view that African countries are only able to secure farmers' rights through the AU becoming a party to the Plant Treaty so that these rights can be "negotiated". The guidelines also suggest that the AU should adopt an "abridged version of the Treaty, particularly on aspects that relate to the proper understanding and conduct of the ITPGRFA". However, no specific detail is provided about what this negotiated outcome could look like. Finally, throughout the guidelines, discussions concerning where this document will sit in implementation vis-a-vis the regional instruments in place is lacking. Thus the guidelines could be seen as an additional layer of bureaucracy that is being added to the already incoherent scheme of harmonisation of seed laws in Africa and in order to safeguard interests of the informal seed system and future innovation in the spheres of agroecology should not be pursued at this time.

62. AUC/DREAVC/036. 65. *Ibid.* 66. Article 7 of the Agreement Establishing the African Continental Free Trade Area. 67. Article 7 of the Agreement Establishing the African Continental Free Trade Area. 68. Annex VII to COMESA Gazette Volume 19 No 1. 69. www.comesa.int 70. Section 3 of the COMESA Seed Trade Harmonisation Regulations, 2014

AfCFTA

Another related aspect of the AfCFTA that is expected to have a bearing on the seed law harmonisation process, is the phase II negotiations. Phase II negotiations of the AfCFTA cover Protocols on several areas including Intellectual Property Rights.⁶⁶ The scope of the draft negotiations text to the Protocol on Intellectual Property Rights includes PVP. As the negotiations are evolving, the text is due to change. However, the text on PVP is framed against the background of UPOV 1991. This notwithstanding, the Protocol negotiations must observe several principles including regional economic communities such as COMESA and SADC being the building blocks of the AfCFTA, preservation of the *acquis* and best practices in the Regional Economic Communities.⁶⁷ In the context of PVP and farmers' rights, this means that negotiations cannot ignore the existing frameworks and best practices of balancing between breeders' rights and farmers' rights as espoused in some of the regional instruments. This is discussed further below. At the regional level, trading blocs (COMESA, SADC and ECOWAS) have been more explicit and active in legislating and implementing seed laws. The scope of seed laws that regional trading blocs have legislated is seed certification, variety release, testing and registration, and phytosanitary measures. There are some countries that are members of both COMESA and SADC (see [Annex 1](#) to this report). Regional intellectual property organisations (ARIPO and OAPI) have also legislated on seed laws with their scope being PVP. SADC has also adopted a regional instrument on PVP which adds another level of complexity to those countries that are parties to ARIPO and SADC (see [Annex 1](#) to this report).

COMESA Seed Trade Harmonisation Regulations, 2014

The Common Market for Eastern and Southern Africa (COMESA), a regional trading bloc of 21 countries, enacted the Seed Trade Harmonisation Regulations in 2014.⁶⁸ The regulations were developed to enhance seed production, seed trade, reliability, and increasing competitiveness of the seed industry in the COMESA region.⁶⁹ Through these regulations, a COMESA seed certification, variety release and phytosanitary system is created.

The primary objectives of the COMESA Regulations is to harmonize phytosanitary measures for seed in the region, ensure the varieties listed in the Variety Catalogue and traded are of high quality, and, encourage investment in seed business among others.⁷⁰ Four classes of seed are established: pre-basic seed; basic seed; first generation certified seed;

and second generation certified seed. Section 20 of the Regulations provide that a variety shall only be released upon satisfying the DUS test carried out in accordance with the UPOV guidelines, and the VCU or National Performance Trials (NPTs). The regulations also provide that seed testing methodologies must be based on the ISTA Rules. Equally, existing varieties cannot be entered into the COMESA Catalogue without providing for DUS and VCU data. While the Regulations provide for a procedure for registration and release of Genetically Modified Varieties, there is no reference to indigenous varieties.

The COMESA regulations are framed in a manner that does not enable trading of varieties not tested, released or registered in the COMESA Catalogue. Indigenous varieties of many crops in the COMESA countries are not registered. It is also worthy to note that 19 of the 21 COMESA countries have adopted the Regulations. While it is possible for a COMESA country to sustain two separate and parallel systems for testing, registration and release of seed so as to also ensure availability of clean seed of indigenous varieties (through 'quality declared seed' system) such a system is likely to add more costs to accessing seed which is likely to have income and livelihood implications.

SADC Harmonised Seed Regulatory System, 2013

The Southern Africa Development Community (SADC), a regional trading bloc of sixteen countries, established a Harmonised Seed Regulatory System (SADC HSRS) in 2013. Although the system is not legally binding, twelve out of sixteen SADC countries have made efforts to align their domestic legislation with the SADC HSRS.⁷¹ Similar to the COMESA Regulations, the SADC HSRS establishes a variety release, seed certification and quality assurance, and a phytosanitary measures system. Five classes of seed are established: pre-basic seed; basic seed; first generation certified seed; second generation certified seed; and Quality Declared Seed (QDS). DUS and VCU tests are mandatory for the first four classes of seed.

The SADC HSRS provides for a framework for registration of landraces. However, detailed rules for registration of these varieties is yet to be developed. When developed, it is expected that landraces and other local varieties will be exempted from field tests, and the QDS standard will be applied for their registration.

⁷¹ *Feed the Future (2020). Manual on Regional Seed Regulations in the Southern Africa Development Community.* ⁷² *FAO (2008). West African Catalogue of Plant Species and Varieties.* ⁷³ *Ibid.* ⁷⁴ *Ibid.* ⁷⁵ www.au.int/en/recs/censad

ECOWAS-UEMOA-CILSS seed regulatory framework

In West Africa, the Economic Community of West African States (ECOWAS), the West African Economic and Monetary Union (UEMOA) and the Permanent Interstate Committee for Drought Control in the Sahel (CILSS) adopted a harmonized seed regulatory framework. Similar to the COMESA and SADC systems, the ECOWAS-UEMOA-CILSS seed regulatory framework provides that DUS and VCU testing is a condition for release of varieties.

National catalogues for member countries are required to maintain two distinct lists: list A which should comprise released varieties whose seed can be multiplied and commercialised within a country, and list B being of those varieties whose seed may be multiplied and exported outside the country.⁷² List A crops invariably include landraces. A perusal of the West African Catalogue of Plant Species and Varieties, reveals that several countries in the region maintain landraces and local varieties in their national catalogues. For example, landraces of pearl millet have been recorded in the national catalogues of Benin, Burkina Faso and Niger.⁷³ Similarly, sorghum landraces are recorded in the national catalogues of Mali.⁷⁴ The ECOWAS-UEMOA-CILSS harmonisation framework contains provisions that enable landraces and local varieties to be made available, though to a limited extent, although export to countries within the territories is not enabled.

Seed-related programmes at the Community of Sahel-Saharan States (CEN SAD)

As a region, North Africa is comprised of several countries that are identified through a number of geographic and economic blocs, some which extend beyond Africa. These include the Arab League and the Union for Mediterranean (UfM). One Afrocentric regional economic bloc in this region is the Community of Sahel-Saharan States (CEN SAD). Initially founded by six countries in northern Africa and the Sahel region, its membership comprises 29 African States.⁷⁵ As a regional economic bloc, its objectives include free trade and movement of goods, commodities, and services between Member States (see [Annex 1](#) to this report). Specific to seeds, a high authority for water, agriculture and seeds was created by the CEN SAD Heads of States in 2005. This high authority was established for the purpose of allowing member countries to develop their agriculture through better control of water resources and seed selection. However, since its creation no seed-related programmes appear to have been implemented by CEN SAD. This notwithstanding, it is worth to note that CEN SAD Member States are also parties to other

regional economic blocs, not to mention the AfCFTA, which do engage in various seed-related policy activities. The COMESA and ECOWAS-UEMOA-CILSS seed policies are further discussed below.

Continental instruments for PVP component of seed laws

With regard the PVP component of seed laws, three regional instruments exist at the continental level: the Arusha Protocol for the Protection of New varieties of Plants adopted under the African Regional Intellectual Property Organisation (Arusha Protocol); Annex X of the revised Bangui Agreement under the African Intellectual Property Organisation (OAPI) (Annex X); and, the SADC Protocol for the Protection of New Varieties of Plants (SADC Protocol). These three instruments service different economic blocs and countries, although there is some overlap between countries that will be subject to the Arusha and SADC Protocols, once these Protocols come into force (and all the countries that are members of ARIPO and SADC ratify them).

Arusha Protocol

The Arusha Protocol was adopted in 2015 by ARIPO Member States. Although the protocol is yet to come into force (it is open for signature to any country that is a member of the African Union), its implementing regulations were adopted in 2017. The Arusha Protocol follows the UPOV 1991 model and UPOV has confirmed that indeed this instrument is aligned to UPOV 1991. Registration of PVP is through a designation system, whereby an applicant makes a choice of ARIPO countries that have ratified the Protocol, the PVP should apply. The breadth of rights of the breeder generally follows those provided for in UPOV 1991. However, with regard to exceptions to the rights of a breeder, Article 22 of the Protocol together with Rule 15 of the Regulations, empower the ARIPO Administrative Council from time to time, to specify a list of agricultural crops and vegetables with historical practice of saving, using, sowing, re-sowing or exchanging seed and acreage/tonnage that defines a small-scale farmer in each Member State based on the criteria established at the national level. Countries therefore seem to have authority to determine the crops whose protected varieties may be saved, sold and exchanged by small-scale farmers. The Regulations go further to clarify what 'own holding' means, to include any parcel of land that may be under the responsibility of a farmer, including leased land. In the case of commercial farming, the Arusha Protocol and the Regulations stipulate that remuneration of the breeder is necessary, where the harvested material is saved and re-used by a farmer

on their own holdings. However, only those farmers (whether small scale or large scale) who exceed the prescribed acreage or tonnage that defined a small-scale farmer will be eligible to remunerate the breeder. The Administrative Council is yet to publish any list of agricultural crops and vegetables that fall under this exception and it is not known yet whether any country that has ratified the Arusha Protocol has established any criteria for determining who a small-scale farmer is. This provision seems to give space to farmers' rights, with the extent to which this occurs being left to countries, in line with article 9 of the Plant Treaty.

Acts done privately and for non-commercial purposes are also excluded from the scope of rights of a breeder under the Arusha Protocol. The Regulations do not give any clarity on what may constitute such acts, and this may give room for further saving, using and exchanging seed of protected varieties between farmers, including large-scale farmers, provided that the purpose remains private and non-commercial.

The Arusha Protocol also addresses concerns of disclosure of origin of the material used in variety development. Rule 7 of the Regulations require an application for PVP to provide the source of the genetic material used. This rule is intended to stem misappropriation and irregular access to genetic resources, and encourage conservation and sustainable use of genetic resources.

SADC Protocol

The SADC Protocol which was adopted in 2017, is yet to come into force. This instrument is also aligned with UPOV 1991, and follows a designation system of grant of PVP within SADC countries that will ratify the Protocol. The scope of rights of a breeder also follow UPOV 1991, including the exceptions. Article 28 of the Protocol provides that where a farmer saves, uses, sows, re-sows or exchanges for non-commercial purposes of his or her farm produce within reasonable limits, the legitimate interests of the breeder must be safeguarded in this regard. No distinction is drawn between small-scale and large-scale farmers as it is the case with the Arusha Protocol and the Regulations. Furthermore, the SADC Protocol only extends this exception to 'non-commercial purposes'. This implies that in the case for commercial purposes, seed saving and re-using is not allowed. The regulations implementing the SADC Protocol may provide an opportunity to give clarity to the question whether small-scale farmers will be exempt as it is the case under the Arusha Protocol, noting that there are overlaps in membership between these two instruments.

Disclosure of origin of parental material used in the breeding process is also addressed in the SADC Protocol. Article 13(5)(e) requires a PVP applicant to declare whether the genetic material or parental material used for breeding the variety has been acquired lawfully. The source of the material also has to be named. This feature is necessary to safeguard against irregular use and misappropriation of genetic material.

Annex X of the revised Bangui Agreement

Annex X of the revised Bangui Agreement provides for a system of registration of PVP among OAPI states. OAPI is a member of UPOV and as such, Annex X is compliant with UPOV 1991 provisions. The scope of the rights conferred to a breeder largely follow UPOV 1991 provisions.⁷⁶ However, the rights conferred vary somewhat to those in UPOV 1991. These rights do not extend to “use by a farmer on his own holding, for the purpose of propagation, of harvested material that he has obtained by cultivating, on his own holding, a protected variety.”⁷⁷ This provision does not apply to fruit, forestry and ornamental plants.

Acts performed privately for non-commercial purposes are also excluded from the scope of rights granted to a breeder. Although “privately for non-commercial purposes” is not defined, it is possible for acts such as saving, using, re-sowing and exchanging of seed and planting material of protected varieties to fit within such acts given that these are not commercial activities. It is also notable that Annex X does not differentiate between small-scale and large-scale farmers and it may therefore extend to a much wider set of farmers than it is the case under the Arusha Protocol.

A worker showing a handful of maize seeds stored at the Sotouboua Seed Farm (Ferme semencière), Togo.

© FAO/Giulio Napolitano



⁷⁶. Articles 32 of Annex X. ⁷⁷. Article 30 (d) of Annex X

6 Participation of African farmers in seed policies formulation processes



Participation in seed policy making by farmers, or farmer representatives, is necessary. It is not only democratic but it is also part of the realization of farmers' rights under the Plant Treaty.

Claims are abound that African farmers are not informed of, and do not participate in, seed policy formulation processes. That even when they become aware of these processes, farmers' requests to participate are not honoured by the regional and continental-wide bodies setting these seed policies.

This section examines the manner and extent to which African farmers participate in seed policies formulation processes at the continental and regional levels in Africa, and when they do, their objectives and arguments. Participation in seed policy making by farmers, or farmer-representatives, is necessary. It is not only democratic but is also part of realization of farmers' rights under the Plant Treaty. According to the UN Rapporteur on the right to food, farmers' right to participate should include laws, policies and practices that address matters such as seed release, seed registration, seed commercialization laws, access and benefit sharing laws, plant variety protection laws and trade laws at the national level.⁷⁸ This section does not examine farmers' participation across all areas outlined by the UN Rapporteur on the right to food but rather only to the extent that they are involved in the general seed policies formulation processes at the continental and regional levels.

African Union

At the continental level, the objective of the AU, which succeeded the Organisation of Africa Unity, is to promote the unity and solidarity of the African States including by enactment of treaties, conventions, policies and programmes that are indicative of areas in which the African States consider necessary to cooperate. As identified in the Constitutive Act of the AU, the agricultural sector is one of the areas that African States have a desire to cooperate.⁷⁹ Indeed, towards this end a department focusing on agriculture among other areas, exists within the AU Commission.⁸⁰

Being an intergovernmental organisation, participation and contribution of non-state actors in the affairs of the AU is discretionary. This notwithstanding, the preambular text of the Constitutive Act of the AU observes that building partnerships between governments and all segments of civil society is necessary in strengthening solidarity and cohesion in Africa. Within the AU Commission, a

Civil Society Division was established within the Citizens and Diaspora Directorate. This division is responsible for mainstreaming civil society engagement in AU's processes, departments and organs.⁷⁹ What constitutes civil society has been defined by the Executive Council of the AU to include social groups, professional groups and associations, non-governmental organisations, civil society organisations and cultural organisations.

The AU thus appears to have a structured mechanism for engagement with civil society organisations in all matters within its remit for cooperation within states, including the agricultural and seed sector. Notwithstanding this structured mechanism for engagement, it is difficult to discern the level and extent to which civil society organisations engage with the AU on these matters, and the uptake by the AU of civil society's contributions is unknown. Specific to the seed sector, the level of engagement that is visible for the AU is with other African-based or African-founded public entities and charities, such as FARA and AATF. However, these organisations are not representative of farmers or farmer organisations, and it cannot therefore be concluded that farmers are participating in the decision making processes of the AU within the requirements of the Plant Treaty.

COMESA

With respect to the regional blocs, COMESA has a mandate to work with civil society and private sector organisations and has established a civil society platform.⁸² Criteria and rules of procedure for accrediting civil society organisations are in place and several have been accredited over time. However, the structured engagement with civil society organisations appears limited to the COMESA Programme on Peace and Security, and not to the others, agriculture being one. Thus the extent to which civil society organisations could have contributed to the COMESA Seed Harmonisation Regulation in 2014 is not discernible. Further, stewardship of implementation of the Harmonisation regulations is being undertaken by the Alliance for Commodity Trade in Eastern and Southern Africa (ACTESA) and not by COMESA itself. ACTESA is a specialized agency of COMESA whose primary role is to promote trade in agricultural commodities.⁸³ ACTESA was initially founded by the COMESA ministers of agriculture in 2008 and only signed an agreement as an implementing agency of COMESA's agricultural programmes in 2010.⁸⁴ The board of ACTESA is comprised of two umbrella bodies for farmer organisations, the East African Farmers' Federation (EAFF) and Southern Africa Confederation of Agricultural Unions (SACAU), among others.⁸⁵ A

⁷⁸. Document A/HRC/49/43. ⁷⁹. Articles 13 and 14 of the Constitutive Act of the African Union. ⁸⁰. Department of Agriculture, Rural Development, Blue Economy and Sustainable Environment. ⁸¹. www.au.int ⁸². <https://gps.comesa.int> ⁸³. www.comesa.int/new-actesa-board-unveiled/ ⁸⁴. <https://actesacomesa.org> ⁸⁵. www.comesa.int/new-actesa-board-unveiled/

further examination of the countries from which EAFF and SACAU draw membership reveals the following: first, not all countries from which EAFF draws membership are members of COMESA. Tanzania is an example. Secondly and similarly, not all countries from which SACAU draws membership are members of COMESA. Botswana, Lesotho, Mozambique, Namibia and South Africa fall in this category. Finally, there are countries that are members of COMESA from which neither EAFF and SACAU draw membership: Comoros, Egypt, Libya, Somalia, Sudan, Tunisia and Zambia. Although it can be argued that farmers are represented in ACTESA's governance, decision making and plans, it is evident that not all farmer organisations from COMESA are so represented. Furthermore, given that there is a mismatch between COMESA member countries and the countries from which EAFF and SACAU draw membership, it is likely that their programmes and plans may not be necessarily aligned to COMESA's as far as seed policies and programmes are concerned. Nonetheless, it is worthy to note that engagement and supporting small-scale farmers is a core pillar to the realisation of the 2020-2030 ACTESA Strategic Plan and perhaps; this may include considerations for how to engage the small-scale farmers not represented through the EAFF and SACAU framework in ACTESA's organisational framework.⁸⁶

ARIPO

As an intergovernmental organisation, ARIPO has been criticised for the manner it has related with civil society organisations particularly in the process leading to the adoption of the Arusha Protocol.⁸⁷ Although these criticisms cannot be verified, it is notable that some civil society organisations have claimed having successfully lobbied and influenced ARIPO to take on board their views on the Arusha Protocol.⁸⁸ While the accreditation procedures for non-state actors into ARIPO meetings are not well documented, a perusal of ARIPO's annual reports reveals that non-state actors (referred to as Cooperating Partners) regularly attend the

Administrative Council meetings. For example, African Seed Trade Association (AFSTA) was represented at the 43rd and 44th Sessions of the Administrative Council of ARIPO in 2019 and 2020.⁸⁹ However, a perusal of the list of the organisations that are either in relationship with ARIPO⁹⁰ or regularly attend the Administrative Council meetings, at least since the adoption of the Arusha Protocol does not reveal any that is affiliated to farmers organisations in Africa.⁹¹ Further, civil society organisation similar to those complaining of the relationship with ARIPO are not listed. As a key strategic goal in the 2022-2026 ARIPO Strategic Plan is to establish and strengthen stakeholder engagement, membership drive, partnerships, regional and international cooperation, ARIPO should consider establishing formal relations with African farmer organisations, as the Arusha Protocol directly affects farmers' activities.⁹²

SADC

For SADC, information about how observer status may be acquired or how non-state actors such as farmer organisations may contribute to the policy making processes is not available. SACAU, in the 2020 annual report indicate that SADC recognize the organisation as the farmer's voice on matters relating to agricultural development in southern Africa. In this regard SACAU contributed to the SADC Climate Change strategy and action plan (2020-2030) with key proposals being the need to strengthen participation of famers and civil society organisations in climate policy planning, agenda setting, implementation and monitoring among others.⁹³ Some of SADC's seed programmes invariably involve farmers and farmer organisations too. For example, community gene banks which are recognized as invaluable in conservation of PGRFA have been promoted through partnerships between national gene banks and non-governmental organisations. To this extent SADC Plant Genetic Resources Centre (SPGRC) has published guidelines on the establishment and management of community gene banks.⁹⁴ Evidence of farmers and farmer groups being consulted in some of the SADC member countries during the process of establishing community gene banks is recorded in the SPGRC 2019/2020 Report.⁹⁵ The above notwithstanding, SADC has received criticisms of not engaging with civil society organisations enough.⁹⁶ This may be because the structures for engagement between SADC and civil society organisations are not clear.

^{86.} 2020-2030 ACTESA Strategic Plan ^{87.} <https://afsafrika.org/wp-content/uploads/2019/05/final-letter-to-aripo-april-2017.pdf> ^{88.} Ibid. ^{89.} ARIPO 2020 Annual Report. ^{90.} 2022-2026 ARIPO Strategic Plan. ^{91.} These include AFSTA, Community Plant Variety Office (CVPO); and the French National Seeds and Seedlings Association (SEMAE). ^{92.} 2022-2026 ARIPO Strategic Plan. ^{93.} www.sacau.org ^{94.} Southern Africa Development Community (2020) Guidelines on the Establishment and Management of Community Genebanks. ^{95.} SADC Plant Genetic Resources Centre, Twenty-Ninth Annual report (2019/2020). ^{96.} Chenai Mukumba, and Muntanga Musiwa, "Civil Society Role in SADC integration: a missed opportunity" Great Insights, Vol 5-Issue 4, July/August 2016.

OAPI and ECOWAS

While it has not been possible to find documented information on farmer groups or civil society organisations' engagement with OAPI, a more positive picture of engagement between ECOWAS and civil society organisations is painted generally. However, the scope of this interaction appears to be more on matters concerning peace and security than on agriculture and seed sector in particular.⁹⁷ Evidence is also available of ECOWAS seeking partnerships with civil society organisations on agricultural matters.⁹⁸ Specific to the seed sector, ECOWAS appears to be seeking views and input of farmer organisations and civil society organisations in its activities.⁹⁹ However, notwithstanding these engagements between ECOWAS and farmer organisations and civil society organisations, there are concerns and views that more can be done. For example, the West African Peasants Seed Committee has called for the AU, ECOWAS, UEMOA and CILSS to implement a regulatory framework that promotes farmers' seed systems and involve farmers' organisations in agricultural policy making bodies as representative stakeholders.¹⁰⁰

A farmer collecting seeds from FAO in Somalia.

© FAO/Arete/Ismael Taxta




⁹⁷ Olonisakin. F., 2009, 'ECOWAS and Civil Society Movements in West Africa', *IDS Bulletin*, Vol.40, No.2, pp.105-112.

⁹⁸ <https://parl.ecowas.int/agra-seeks-partnership-with-ecowas-to-strengthen-agric-policies-ensure-food-security/>

⁹⁹ https://www.aatf-africa.org/wp-content/uploads/2021/02/HArmonization-in-ECOWAS-Workshop_Success-Story.pdf

¹⁰⁰ <https://afsafrika.org/west-african-peasant-seed-fair-declaration/>

7 Conclusion



The approaches towards implementation of farmers' rights at the continental level and at the regional level in Africa is varying. At the continental level, the need to implement farmers' rights is acknowledged but no direction is given as to implementation.

It is evident that at the global level, questions and debates about how to balance between implementation of PVP and farmers' rights remain. Countries that are members of the WTO have no choice but to comply with the provisions of article 27.3(b) of the TRIPS Agreement. The WTO then has become a silent forum in the discussions about PVP, but this debate has shifted to UPOV and at the Plant Treaty. In recent years, UPOV on account of trade impetus has gained indirect influence in Africa with regional PVP instruments being aligned to UPOV 1991 such that even without countries being members to UPOV, through regional economic blocs and intellectual property organisations, they are either complying or will comply with UPOV 1991 once the regional trade instruments enter into force and countries ratify them.

The approaches towards implementation of farmers' rights at the continental level and at the regional level in Africa is varying. At the continental level, the need to implement farmers' rights is acknowledged but no direction is given as to implementation, except to state that AU's joining the Plant Treaty will aid in this cause. This is in part due to the fact that farmers' rights are considered to be peripheral and not central to the trade discussions taking place. Yet, the AU joining the Plant Treaty might risk diluting national obligations towards farmers' rights under the Plant Treaty. The current negotiations under AfCFTA for the Protocol on Intellectual Property Rights seems to be starting from the premises that UPOV 1991 is the default PVP model that should be adopted. Regionally, ARIPO seems to be following the EU model, through its Arusha Protocol providing for an opportunity to distinguish between categories of farmers who may save, re-use and exchange seed and planting material without compensating the right holder. On the other hand, OAPI does not provide for such a scheme while SADC potentially could.

In the realm of seed certification, variety testing, registration and release, variance can be observed as between the COMESA, SADC and the ECOWAS-UEMOA-CILSS instruments. SADC and ECOWAS provide for opportunities for registration of landraces and indigenous varieties just like the EU does with conservation varieties. SADC in particular has been able to achieve this objective by incorporating a quality declared seed scheme into its overall scheme. COMESA on the other hand is very strict in this regard, following ISTA standards. Neither the African Union nor the regional economic blocs Africa provide for regulation of farming of organic plants something that the EU has provided for.

As regards participation of farmer organisations in seed policy setting processes at the continental level, the picture that emerges is the following: that the AU has put in place elaborate institutional programmes and procedures to incorporate civil society's views in execution of its mandate. However, with respect to regional economic organisations and intellectual property organisations, this is different. Whereas COMESA has an institutional framework for engagement with civil society, the framework is restricted to matters concerning peace and security. Specific to the seed sector, COMESA's framework is made more complicated on account of the fact that a specialised agency of COMESA-ACTESA is leading in the process of implementing the Seed Harmonisation Regulations. ACTESA's Board comprises civil society and farmer organisation's representatives. This does not in strict sense qualify for farmer organisation participation in seed policy making processes, as Board representation is a governance issue. In ARIPO, the space for farmer organisations participating in the PVP law development processes seems narrow and restricted. No farmer organisation in Africa has been granted observer status or admitted as a Cooperating Partner. However, several associations of seed producers, public and private universities, African and foreign intellectual property organisations are Cooperating Partners. In ECOWAS region, evidence is present of the institution cooperating with civil society organisations and views of farmer organisations being sought in the process of implementing seed policies. The same case applied to SADC where inasmuch as formal policy in cooperating with civil society organisation is not discernible, evidence on the ground has demonstrated otherwise particularly in in situ conservation efforts through community gene banks.

Finally, it also emerges that African regional organisations are receptive to external support in implementing seed policies and programmes. The USAID is active in designing, implementing and supporting projects that at the very least aligned to some of the African regional seed programmes as evidenced by the work in West African and Southern Africa. This is despite some of the US trade policy efforts such as FTA negotiations in Africa either stalling or being underway.

Further recommendations to improve the coherence of seed policies and guarantee farmers' rights to access, save, reuse and sell seeds are provided in [Annex 2](#).

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Annex 1. Overview of signatories to international treaties and instruments

	COUNTRY	AU	WTO	ITP/REFA	UPOV	COMESA	CEN-SAD	SADC	ECOWAS	ARIPO	ARUSHA PROTOCOL	OAPI	ISTA	CISS	EUMOA
1	Burundi	✓	✓	✓	✗	✓	✗	✗	✗	✗	✗	✗	✗	✗	✗
2	Cameroon	✓	✓	✓	✓	✗	✗	✗	✗	✗	✗	✓	✗	✗	✗
3	C.A. Republic	✓	✓	✓	✓	✗	✓	✗	✗	✗	✗	✓	✗	✗	✗
4	Chad	✓	✓	✓	✓	✗	✓	✗	✗	✗	✗	✓	✗	✓	✗
5	Congo	✓	✓	✓	✓	✗	✗	✗	✗	✗	✗	✓	✗	✗	✗
6	DR Congo	✓	✓	✓	✗	✓	✓	✓	✗	✗	✗	✗	✗	✗	✗
7	Equatorial Guinea	✓	ObSt	✗	✓	✗	✗	✗	✗	✗	✗	✓	✗	✗	✗
8	Gabon	✓	✓	✓	✓	✗	✗	✗	✗	✗	✗	✓	✗	✗	✗
9	Sao Tome & Principe	✓	ObSt	✓	✗	✗	✓	✗	✗	✓	✓	✗	✗	✗	✗
10	Comoros	✓	ObSt	✗	✓	✓	✓	✓	✗	✗	✗	✓	✗	✗	✗
11	Djibouti	✓	✓	✓	✗	✓	✓	✗	✗	✗	✗	✗	✗	✗	✗
12	Eritrea	✓	✗	✓	✗	✓	✓	✗	✗	✗	✗	✗	✗	✗	✗
13	Ethiopia	✓	ObSt	✓	✗	✓	✗	✗	✗	✗	✗	✗	✓	✗	✗
14	Kenya	✓	✓	✓	✓	✓	✓	✗	✗	✓	✗	✗	✓	✗	✗
15	Madagascar	✓	✓	✓	✗	✓	✗	✓	✗	✗	✗	✗	✗	✗	✗
16	Mauritius	✓	✓	✓	✗	✓	✗	✓	✗	✗	✗	✗	✗	✗	✗
17	Rwanda	✓	✓	✓	✗	✓	✗	✗	✗	✗	✗	✗	✓	✗	✗
18	Seychelles	✓	✓	✓	✗	✓	✗	✗	✗	✓	✗	✗	✗	✗	✗
19	Somalia	✓	ObSt	✗	✗	✗	✓	✗	✗	✓	✗	✗	✗	✗	✗
20	South Sudan	✓	ObSt	✓	✗	✗	✗	✗	✗	✗	✗	✗	✗	✗	✗
21	Sudan	✓	ObSt	✓	✗	✓	✓	✗	✗	✓	✗	✗	✗	✗	✗
22	Tanzania	✓	✓	✓	✗	✗	✗	✓	✗	✓	✓	✗	✓	✗	✗
23	Uganda	✓	✓	✓	✗	✓	✗	✗	✗	✓	✗	✗	✓	✗	✗
24	Algeria	✓	ObSt	✓	✗	✗	✗	✗	✗	✗	✗	✗	✗	✗	✗
25	Egypt	✓	✓	✓	✓	✓	✓	✗	✗	✗	✗	✗	✓	✗	✗
26	Libya	✓	ObSt	✓	✗	✓	✓	✗	✗	✗	✗	✗	✗	✗	✗
27	Mauritania	✓	✓	✓	✓	✗	✓	✗	✗	✗	✗	✓	✗	✓	✗
28	Morocco	✓	✓	✓	✓	✗	✓	✗	✗	✗	✗	✗	✗	✗	✗
29	Sahrawi Republic	✓	✗	✗	✗	✗	✗	✗	✗	✗	✗	✗	✗	✗	✗
30	Tunisia	✓	✓	✓	✓	✗	✓	✗	✗	✗	✗	✗	✓	✗	✗

ObSt = Observer Status

The **UPOV** column does show countries whose laws are compliant with UPOV 1991. This includes countries that are OAPI members

	COUNTRY	AU	WTO	ITPGRFA	UPOV	COMESA	CEN-SAD	SADC	ECOWAS	ARIPO	ARUSHA PROTOCOL	OAPI	ISTA	CISS	EUMOA
31	Angola	✓	✓	✓	✗	✗	✗	✓	✗	✗	✗	✗	✗	✗	✗
32	Botswana	✓	✓	✗	✗	✗	✗	✓	✗	✓	✗	✗	✓	✗	✗
33	Eswatini	✓	✓	✓	✗	✓	✗	✓	✗	✓	✗	✗	✗	✗	✗
34	Lesotho	✓	✓	✓	✗	✗	✗	✓	✗	✓	✗	✗	✗	✗	✗
35	Malawi	✓	✓	✓	✗	✓	✗	✓	✗	✓	✗	✗	✓	✗	✗
36	Mozambique	✓	✓	✓	✗	✗	✗	✓	✗	✓	✓	✗	✗	✗	✗
37	Namibia	✓	✓	✓	✗	✗	✗	✓	✗	✓	✗	✗	✗	✗	✗
38	South Africa	✓	✓	✗	✓	✗	✗	✓	✗	✗	✗	✗	✓	✗	✗
39	Zambia	✓	✓	✓	✗	✓	✗	✓	✗	✓	✗	✗	✓	✗	✗
40	Zimbabwe	✓	✓	✓	✗	✓	✗	✓	✗	✓	✗	✗	✓	✗	✗
41	Benin	✓	✓	✓	✓	✗	✓	✗	✓	✗	✗	✓	✗	✓	✓
42	Burkina Faso	✓	✓	✓	✓	✗	✓	✗	✓	✗	✗	✓	✗	✓	✓
43	Cabo Verde	✓	✓	OSig	✗	✗	✓	✗	✓	✗	✗	✗	✗	✓	✗
44	Cote d'Ivoire	✓	✓	✓	✓	✗	✓	✗	✓	✗	✗	✓	✗	✓	✓
45	Gambia	✓	✓	✗	✗	✗	✓	✗	✓	✓	✓	✗	✗	✓	✗
46	Ghana	✓	✓	✓	✓	✗	✓	✗	✓	✓	✓	✗	✓	✗	✗
47	Guinea	✓	✓	✓	✓	✗	✓	✗	✓	✗	✗	✓	✗	✓	✗
48	Guinea-Bissau	✓	✓	✓	✓	✗	✓	✗	✓	✗	✗	✓	✗	✓	✓
49	Liberia	✓	✓	✓	✗	✗	✓	✗	✓	✓	✗	✗	✗	✗	✗
50	Mali	✓	✓	✓	✓	✗	✓	✗	✓	✗	✗	✓	✗	✓	✓
51	Niger	✓	✓	✓	✓	✗	✓	✗	✓	✗	✗	✓	✗	✗	✓
52	Nigeria	✓	✓	OSig	✗	✗	✓	✗	✓	✗	✗	✗	✓	✗	✗
53	Senegal	✓	✓	✓	✓	✗	✓	✗	✓	✗	✗	✓	✓	✓	✓
54	Sierra Leone	✓	✓	✓	✗	✗	✓	✗	✓	✓	✗	✗	✗	✗	✗
55	Togo	✓	✓	✓	✓	✗	✓	✗	✓	✗	✗	✓	✓	✓	✓

OSig = Only Signature means no ratification of the ITPGRFA

The **UPOV** column does show countries whose laws are compliant with UPOV 1991. This includes countries that are OAPI members

Annex 2. Recommendations

This report demonstrates that the existing seed law arrangements in Africa are incoherent, and hard to implement notwithstanding the variability of local conditions that exist in the continent. Protection and promotion of landraces through explicit agenda in the law, is necessary. The quality declared seed scheme as recognised in the SADC region as well as registration of landraces in ECOWAS region (notwithstanding that landraces do not qualify for export), are some elements that are transferable to the COMESA region.

Provisions in Africa's PVP laws at the continental level vary, and it is likely that the AfCFTA Protocol on Intellectual Property Rights may add an additional layer of incoherence. As the negotiations towards the adoption of the AfCFTA Protocol on Intellectual Property Rights progress, it is necessary that farmers' rights are taken into account, and scope for their implementation is provided similar to the approach the Arusha Protocol has taken. The other instruments on PVP, namely the Annex X of the Bangui Agreement and the SADC Protocol, should also borrow a leaf from the Arusha Protocol and create space through their regulations for implementation of farmers' rights.

With regard to variety testing, release and registration, the AU guidelines for the harmonisation of the seed regulatory frameworks in Africa explicitly provide detail on how farmers' rights should be provided for. Some of the regional instruments, such as the ECOWAS-UEMOA-CILSS seeds framework recognises landraces and indigenous varieties and provides for mechanisms for them being available in local markets without making attempts to formalize the seed systems they operate in. The AU guidelines together with the COMESA seed harmonisation regulations should similarly provide for landraces to operate.

Organisations and institutions in Africa involved in seed policies setting should be deliberate, explicit and intentional in providing clarity on farmer organisation participation. Information on accreditation procedures for farmer organisations to these organisations should be open and easy to access. The AU is one example of an organisation which notwithstanding having a formal structure for engagement with civil society organisations, this structure is not open and easily available.

Sustainability of farmer organisations in engaging with institutions such as the AU, ARIPO, OAPI, SADC and COMESA is an issue, based on the fact that the small-scale farmers who they represent do not necessarily engage in commercial activities from which finances to contribute to the life of the farmer organisations is made possible. These organisations rely heavily on external support, yet it is evident that the role they play is crucial in realisation of farmers' rights. Farmer organisations need to be supported by the national governments and external partners. External support that is currently evident is being channelled to seed trade associations mostly comprised of seed companies, not farmer organisations. The European Commission should make deliberate efforts to identify and support Africa farmer organisations and farmer lobby groups such as the Alliance for Food Sovereignty in Africa. Through institutions such as the International Treaty on Plant genetic Resources for Food and Agriculture and the Global Forum on Agricultural Research and Innovation (GFAR), identification of candidate farmer organisations for support should be possible. Besides farmer organisations, other African non-state actors such as Biovision Africa Trust (the executing agency for the Ecological Organic Agriculture Initiative (EOAI), deliberately promoting ecological and organically sound strategies in agriculture) should be supported. Furthermore, support of these organisations will also form part of the process of the EU's contribution to the realisation of farmers' rights under the Plant Treaty.

At UPOV, the discussion that is on-going as to what constitutes acts done privately and for non-commercial purposes is one which can be brought to a conclusion through collaboration between the EU, EU Member States that are parties to UPOV 1991 and the African parties to the UPOV, i.e. OAPI and Ghana, Kenya, Morocco, Tunisia and South Africa. African experiences can aid in informing what private and non-commercial practices entail and these practical experiences will complement the debate on the issue. Many farmers in Africa are small-scale farmers and engage in a broad range of non-commercial farming activities with regard to seed and planting material. As UPOV's reach and influence extends to African countries, not finding a common understanding of what private and non-commercial entails may run counter to the objectives and principles of the Plant Treaty, and some of the regional instruments in place on PVP such as the Arusha Protocol, and for the EU, the European Green Deal.

Seed regulatory environment in the EU is much more advanced than in Africa. The standards, regulation and enforcement mechanisms in place in the EU are not easily replicable in Africa, given the peculiarities of farming communities in Africa, and the role agriculture plays in African economies and livelihoods. However, the European Commission should consider providing more direct and prominent role in supporting the development of formal as well as informal seed systems in Africa. These two systems exist side by side, and each has its own place, and serves a specific function. Replaceability of one seed system for another is very complex and dependent on many social, economic and cultural variables

A number of approaches could be taken by European Commission in this regard as follows:

Firstly, increased support towards the activities of the Plant Treaty in Africa. The Secretariat to the Plant Treaty should receive increased support aimed at its work in African on matters concerning farmers' rights and seed trade. Currently, the Plant Treaty is not visible in seed trade policy formulation processes in Africa, yet the subject matter for trade is PGRFA.

Secondly, the European Commission could support the African Union Commission with the introduction of Regulatory Impact Assessments (RIAs) in the seed sector to assess the likely costs, benefits and effects of new regulations and policies. RIAs form part of the European Commission's better regulation agenda, but are not applied on the African continent.

Thirdly, introducing a human rights approach towards advocating for farmers' rights may aid in fostering these rights in the trade discussions taking place globally or in Africa. The EC could champion this approach through supporting farmer lobby groups and human rights groups in Africa, such as those that comprise the Alliance for Food Sovereignty in Africa.¹⁰¹ As the right to food and farmers' rights are inextricably linked, yet human rights group and farmer lobby groups may not be aware, building capacity of these groups would be a starting point.

Fourthly, more research and studies need to be undertaken specifically focussing on the economic aspects of informal seed systems. The European Commission should consider providing funding to organisations such as Pan-African Network for economic Analysis of Policies (PANAP) and the Africa Economic Research Consortium (AERC)¹⁰² to

undertake research related to economic aspects of informal seed systems, farmers' rights and combined threats of climate change and biodiversity loss in Africa. Fourth, of CADDP Goals and as reiterated in the Malabo Declaration is to end Hunger in Africa by 2025. It is highly unlikely that this goal will be met. The European Commission should support the African Union in reassessing the CAADP framework taking into account organic agriculture, climate change and the global biodiversity framework. It is only through such a holistic approach to agriculture that multiple outcomes, and sustainable development goals will also be met. Fifth, the continental guidelines for harmonisation of seed regulatory frameworks in Africa being developed by the African Union need be reviewed and realigned with the farming practices and realities in many African countries. Farmers' rights need to be considered as central components in the guidelines. The voices of farmers organisations need to be heard and considered in this regard, and the European Commission should support in enabling these voices to be heard.

Finally, as UPOV 1991 continues to gain influence in the African continent, it is essential that consideration is made on the extent to which this convention as presently design takes into account climate change which is an existential threat to many livelihoods in Africa. UPOV 1991 was adopted more than three decades ago when threats posed by climate change were not well known. It is well understood that promotion of indigenous rights, farmers' rights and agroecology may aid in dealing with adverse effects of climate change. However, UPOV 1991 does not take cognizance of these elements. The European Commission should lead in advocating for change and amendment to UPOV 1991, (including the Explanatory Note ad FAQs on private and non-commercial use) so that farmers' rights, and rights of indigenous communities are also preserved within UPOV 1991, as is through such actions that this instrument is likely to make significant contributions towards climate change mitigation and adaptation.

101. <https://afsafrika.org/core-members/> 102. <https://aercafrica.org/>

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