July 1, 2013

To:

- Mr **Javad Mozafari**, Chairperson of the Fifth Session of the Governing Body of the International Treaty on Plant Genetic Resources for Food and Agriculture
- The **Members of the Ad Hoc Advisory Committee on the Funding Strategy**
- Mr. **Shakeel Bhatti,** Secretary of the International Treaty on Plant Genetic Resources for Food and Agriculture

Ladies and Gentlemen

We are writing to share with you our concerns about the proposal to bring the vegetable seed trait licensing platform under the governance of the Treaty [1]. We urge the Advisory Committee on the Funding Strategy and the Bureau of the Governing Body not to forward this proposal to the next session of the Governing Body for the following reasons:

1. Patents on native traits are at the core of the Proposal[1]. Surprisingly one main issue regarding patents on native traits is not mentioned in the documents of the Committee at all: The ongoing political discussion and the legal uncertainties regarding these patents in Europe. Without knowing this background it's not possible to take an informed decision regarding this Proposal.

Patents on native traits are among the most controversial and contested in intellectual property regimes related to plant breeding industry. Patents subsumed by the proposed platform do not include GMOs or non-biological processes but plants bred with conventional, essentially biological breeding processes (incl. marker assisted breeding). many governments, parliaments, associations and experts explicitly reject such patents.

The **European Parliament** in its Resolution[2] of 10 May 2012 on the patenting of essential biological processes (2012/2623(RSP)) "*Calls on the EPO also to exclude from patenting products derived from conventional breeding and all conventional breeding methods, including SMART breeding (precision breeding) and breeding material used for conventional breeding;"*

The **German Bundestag**[3] in its Resolution "No patenting of conventionally bred livestock and plants" adopted 9. February2012 states, that *"[…] there must be a guarantee that conventional breeding methods and products derived through such methods remain excluded from patentability in the future."* [unofficial translation]

[1] This letter is a critical examination of the Proposal as it is described in Appendix 3 of the Report of the RESUMED SEVENTH MEETING OF THE AD HOC ADVISORY COMMITTEE ON THE FUNDING STRATEGY http://www.planttreaty.org/sites/default/files/ACFS-7b_Report%20FINAL.pdf

[2] See http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P7-TA-2012-202

[3] http://www.no-patents-on-seeds.org/sites/default/files/news/bundestag_de.pdf, inofficial English translation at: http://www.no-patents-on-seeds.org/sites/default/files/news/bundestag_en.pdf

The French Economic, Ethical and Social Council of the Biotech Council (**Conseil Économique, Éthique et Social (CEES) du Haut Conseil des Biotechnologies (HCB)),** 12. June 2013 published their recommendations regarding Biotech Patents[4]: "*they think it is necessary to exclude from patentability genes (alleles) and native traits as well as plants derived from essentially biological processes, […] All members of CEES support this minimal solution*." (unofficial translation).

The **European Seed Association (ESA)** in its position paper "Intellectual Property Protection for plant-related inventions in Europe"[5] (February 2012) states: "*Breeding processes based on crossing and selection (i.e. essentially biological processes) are excluded from patentability. This principle must also be applied to biological material resulting from the application of such "essentially biological processes*". With this resolution ESA is echoing the position of several of its member organisations.

In the **Netherlands** the Government, as well as the breeders organisation Plantum, has indicated the negative impacts of patents on plants and are working on solutions to resolve the problem[6].

Last but not least a major consortium of **NGOs and farmers organisations**, (No-patents-on-seeds) [7] have rejected the kinds of patents included in the new platform for many years.

In the spring of this year more than **2 million citizens** signed a petition[8] by Avaaz stating that: "*As concerned citizens, we urge you to take the lead to fix European patent law by calling on the Administrative Council of the European Patent Organisation to close the loopholes that allow corporations to patent plant varieties and conventional breeding methods. Clear and effective safeguards and prohibitions are needed to protect consumers, farmers and breeders from the corporate takeover of our food chain*".

In addition to the heated discussions in Europe, according to our information, all **developing countries** deny patents on plants with native traits.

Two main arguments used by the above-mentioned stakeholders against such patents are:

- *There is a negative impact on innovation as breeders are not allowed to use the patented plants, animals or genetic material freely for further breeding. This also includes farmer-breeders, who for 10,000 years, ensured the availability of plant genetic resources for all peoples and supported innovation in this way.*
- *Patents have been the engine behind tremendous market concentration in the seed sector, destroying competition and forcing small and medium enterprises out of the market.*

[4] http://www.hautconseildesbiotechnologies.fr/IMG/pdf/130612_Propriete_industrielle_Recommandation_CEES_HCB-2.pdf
[5] http://www.euroseeds.org/publications/position-papers/intellectual-property/esa_12.0100
[6] One basis for this position has been the report "The future of plant breeding in the light of developments in patent rights and plant breeder's rights" by the Centre for Genetic Resources http://documents.plant.wur.nl/cgn/literature/reports/BreedingBusiness.pdf
[7] www.no-patents-on-seeds.org
[8] http://www.avaaz.org/en/monsanto_vs_mother_earth_loc/

Beyond the political discussion in Europe, there is a legal process underway within the enlarged board of appeal of the European Patent Office. In the near future the enlarged board of appeal will decide, if products derived from essentially biological processes are patentable[9]. Most of the amicus curia briefs[10] sent to the European Patent Office (e.g. The German, the Dutch and the French breeders association, the European Seed Association and the German farmers organisation) regarding this case, argue against these patents.

Independent of the legal proceedings in Europe the decision in the Myriad case (patents on human genes) shows a new development in jurisprudence in the USA. ITPGRFA must carefully monitor how this new development impacts future decisions regarding native traits in plants.

A "positive" outcome of this legal case and/or of the political discussion and process mentioned above, denying patents on plants derived from conventional breeding and native traits, could plausibly reduce the benefits to be shared and the contribution to the Benefit-Sharing fund of the Treaty to nothing.

- ➔ Any Discussion in the Governing Body to support, or even include the patent licensing platform under the governance of the Treaty, should therefore be avoided until the political discussion and process about these patents are finalized and the upcoming legal decisions have been taken. Otherwise, time and scarce resources could be wasted.
- ➔ A discussion of such a licensing platform on native traits would interfere with the political discussion in other fora. Support for such a patent licensing platform by the Ad Hoc Advisory Committee on the Funding Strategy or by the Governing Body would be interpreted as support of the highly disputed patentability of native traits. It is not possible to support or manage a licensing platform and simultaneously claim neutrality regarding such patents, this would be a schizophrenic position.

2. The whole concept of patents on native traits is not in the spirit of the Treaty. The promoters of the patent licensing platform are saying that "*The platform provides and/or facilitates access to patented innovations for the use of vegetable plant genetic resources, and, in that respect, is aligned with Art. 13(b)i. of the Treaty, according to which the Contracting Parties are to "[P]rovide and/or facilitate access to technologies for the conservation, characterization, evaluation and use of plant genetic resources for food and agriculture which are under the Multilateral System"".* We firmly oppose this alignment. Art. 13(b)i. clearly states, *"Recognizing that some technologies can only be transferred through genetic material, the Contracting Parties shall provide and/or facilitate access to such technologies and genetic material which is under the Multilateral System and to improved varieties and genetic material developed through the use of plant genetic resources for food and agriculture under the Multilateral System, in conformity with the provisions of Article 12*". To fulfill their duties under this article most parties[11] of the Treaty

[9] https://register.epo.org/espacenet/application?documentId=ETX5APIN1636833&number=EP00940724&lng=en&npl=false

[10] http://www.epo.org/law-practice/case-law-appeals/eba/pending/g2-12.html

[11] Besides developing countries also the Netherlands. A similar amendment is voted in the German parliament soon.

have decided to enact Intellectual Property Rights which do not allow the patenting of plants derived from essentially biological processes.
We have to be aware that even with a patent licensing platform, other breeders have still to pay license fees based on highly disputed patents, and that this mechanism is not comparable to the "breeders exemption" as it is understood today. Although the promoters of the platform suggest that their initiative is a progressive approach to sharing the benefits of innovation, it's evident that the approach to deny patents on conventional plants is a much better way to secure access to innovation and genetic resources – the basis for further breeding.
The detrimental effect of patents on the free access to genetic resources can be seen in this patent example: The Syngenta Patent EP 2 140 023[12] on Insect Resistant Plants has been granted in May 2013. The patented resistance has been found in a wild Capsicum annuum (Pepper) accession which was identified as a source of resistance to Bemisia tabaci (silverleaf whitefly) and to thrips infestations. The patented plants have been developed by conventional breeding methods (marker assisted breeding). The accession, where the resistance was found originates from Jamaica and was accessed through the seed bank at Wageningen (now Centre for Genetic Resources, NL). In patent claim 3 Syngenta claims: "*A cultivated Capsicum annuum plant according to any of claims 1 to 2 containing a genome comprising at least one quantitative trait locus ("QTL") which contributes to Bemisia resistance, wherein said QTL is obtainable from a donor plant which has the genetic background of line 061M4387, […] or from a progeny or an ancestor thereof comprising said QTL*."
This means all progenies and ancestors (including the plant accessed in Wageningen) could not be freely used anymore to bred plants performing this resistance. Such claims are the opposite of facilitated access as promoted by Art. 13(b)i of the Treaty. And it could even be argued that such patents are in contradiction with Art. 12.3 (d) of the Treaty which says, that: "*Recipients shall not claim any intellectual property or other rights that limit the facilitated access to the plant genetic resources for food and agriculture, or their genetic parts or components, in the form received from the Multilateral System;".* We are not suggesting that there has been a breach of the SMTA, as the wild pepper has been accessed before the Treaty entered into force, but we believe that such patent claims are intended to be prevented by the Treaty.

➔ The patents which are intended to be licensed through the patent license platform and the legal system behind these patents are in contradiction with the spirit of the Treaty which is committed to facilitate access to genetic resources.

3. The promoters speak about benefit-sharing and the amount of money which will flow in the benefit-sharing fund through the patent license platform. But their estimates are based on the assumption that there will be no change of patent law. This is not realistic, as most stakeholders are working towards a change of the patent law in this regard. It has also to be pointed out that donations through the patent license platform are not a benefit-sharing *stricto sensu*, as most vegetables are not part of the multilateral system anyway. Benefit-sharing in the sense of the CBD is negotiated between providers and users. The sovereign right of provider countries to negotiate benefit-sharing has been delegated to the

12 http://worldwide.espacenet.com/publicationDetails/biblio?locale=en_EP&FT=D&CC=EP&DB=EPODOC&NR=2140023B1&date=20130508&ND=4&KC=B1

multilateral system for the crops in annex 1, but not otherwise. A donation by the patent holders of patents included in the patent license platform would therefore fall under Art. 18.4 (f) "*Voluntary contributions may also be provided by Contracting Parties, the private sector, taking into account the provisions of Article 13, non-governmental organisations and other sources*." But these donations could be made, even if the Governing Body does not support this patent licensing platform.

➔ The amount of money which will be collected through the patent licensing platform is extremely uncertain.
If they would like to do so, the promoters of the platform are free to set up the platform and to make donations for the implementation of plans and programmes under the Treaty. There is no need for a structural engagement by the Governing Body or even the necessity that the Treaty governs this platform.

4. It is said in the report of the Co-chairs and the Co-leads that "*a partnership with the ILP that generates revenue for the Benefit-sharing Fund, although voluntary by nature, could follow the spirit of the so-called African proposal (Article 6.11 of the SMTA), as it would materialize a collective form of monetary benefit-sharing in return for facilitated access to biological material*." In our view it is bizarre to pretend that the patent licensing platform follows the spirit of Art. 6.11 – the so called African proposal. The aim of 6.11 (and the big difference to 6.7) is to generate a benefit-sharing from all the sales of the specific genera accessed through the multilateral system, independently if they are patented. The patent license platform does the opposite by linking the benefit-sharing to patents.

➔ We are aware that there is an urgent need to review the benefit-sharing mechanism under the Treaty. A revision of the SMTA to make payments for all users mandatory (according to Art. 13.2 (d) ii) and/or to promote the use of Art. 6.11 are promising scenarios which have to be further discussed at the next Governing Body. If the promoters of the patent licensing platform seriously wish to enhance the benefit-sharing mechanism of the Treaty, they may also support other solutions to the problem. A patent licensing platform governed by the Treaty would be a fake solution for a real problem.

We thank you very much, for taking into account our concerns, when discussing the proposal to bring the vegetable patent licensing platform under the governance of the Treaty. Bringing this proposal to the next Governing Body would take away important time and resources to discuss solutions which are much more promising and which are in line with the spirit of the Treaty.

Sincerely

François Meienberg, Berne Declaration

Pat Mooney, ETC Group

Nori Ignacio, Searice

Teshome Hunduma Mulesa, Development Fund