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Sanou, Tonssira

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PLANT VARIETIES PROTECTION:

THE ALTERNATIVE SUI GENERIS REGIME AS DEFENDED BY THE AFRICAN GROUP

Myriam Sanou[1]

Summary

This writing aims at giving a progress report on the proposals made by African States at the time of the re-examination by the World Trade Organization in 1999 of the implementation of the article 27.3.b of TRIPS. This article which imposes on the Member States, the implementation at the national level of a protective system of the plant varieties caused debates within sight of its effects on the needs of developing countries and more precisely on the reach of food self-sufficiency.

The Agreement on trade-related aspects of intellectual property rights (TRIPS) is the result of trade negotiations which led to the creation of the World Trade Organization (WTO) in 1994. It radically modifies the international framework in which intellectual property fits. Indeed, the TRIPS constitutes the first multilateral treaty imposing the harmonization of the procedures and sanctions and, as regards settlement of the disputes, it conforms to the constraining mechanism instituted by WTO. TRIPS impose on the Member States the obligation to protect plant varieties.

In substance, article 27. 3. b stipulates that: “Members shall provide for the protection of plant varieties either by patents or by an effective *sui generis* system or by any combination thereof.” So, some flexibility is granted to the Member States for the protection of plant varieties through three alternatives: patent, sui generis system, combination of both. However, the agreement does not specify the meaning of the various concepts. Indeed, it is nowhere specified what is:

- a plant variety?

- a sui generis system?

[1]Ph D. Student and Researcher at the CRID (Research Center for Computer Law),University of Namur, Belgium

- the “effectiveness” of the system sui generis?

Therefore, it seemed inappropriate for African countries to apply such an ambiguous text that would have unquestionable effects on their future. Their intention was consequently to take advantage of the re-examination of the provisions in 1999 by imposing their opinion on what an effective system for plant variety protection should be. On that occasion African States transmitted communications to the WTO, specifying the stakes of the implementation of a protective system in their countries (I) and the key principles of its content (II).

I. The stakes of the implementation of the protective system of plant varieties in African States.

It arises from the communications addressed to WTO[2] that the African States have their own vision of what an “effective” system would be. It would be based more on the reach of the social and economic objectives rather than focusing itself on the guarantee of minimum rights and protection mechanisms for privative rights. Thus, the stakes that the protective system must take into account are:

The incidence of the protective system of plant varieties on development

In their views, article 27.3.b of the TRIPS should not impede development. The solving of this question which is likely to lead to the creation of an exclusiveness on the resource will affect food safety, social and economic wellbeing, and the public health of the populations of African countries composed mostly of the least developed countries. For them, this stake is not in opposition with the Agreement on TRIPS which envisages in its articles 7 and 8, flexibilities addressing this specific situation of food safety.

Indeed, Article 7 which deals with the objectives of Agreement on TRIPS stresses the need for instituting a balance between the rights of the holders of intellectual property and the prerogatives of the users. It specifies that “the protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the

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[2] WTO, General Council, PREPARATIONS FOR THE 1999 MINISTERIAL CONFERENCE, Communication from Kenya on behalf of the African Group, WT/GC/W/302, 6 August 1999
WTO, Council for Trade-Related Aspects of Intellectual Property Rights, REVIEW OF THE PROVISIONS OF ARTICLE 27.3(b), Communication from Mauritius on behalf of the African Group, IP/C/W/206,20 September 2000

transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations."

Article 8 which relates to the principles of Agreement on TRIPS proposes the need for taking into account the public interest during the adoption by the States of the mode of intellectual property. It envisages thus that "Members may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Agreement."

The incidence of the protective system on the protection of the life of people, animals, and the safeguarding of plants and of the environment

African States have expressed their concern of seeing the protective system respecting the safeguarding of the living matter. For that, it would be necessary in their opinion to reject one of the alternatives of protection envisaged by article 27.3.b, i.e. the patent. This exclusion would find its basis in article 27.2 of the TRIPS Agreement which specifies that "Members may exclude from patentability inventions whose commercial exploitation must be prevented on their territory in order to protect public order or morality, including to protect human, animal or plant life or health or to avoid serious prejudice to the environment, provided that such exclusion is not made merely because the exploitation is prohibited by their law."

The incidence of the protection of plant varieties on other international engagements

The risk is great that it results from the protection of plant varieties a divergence between the agreement on TRIPS that prescribes the protection of the plant varieties and other international conventions which have a vocation to govern the access and the use of genetic resources. One of these conventions dealing with access to biological resources is Convention on the biological diversity (CBD) of 1992[3]. It aims at protecting biological diversity as well as protecting the rights of indigenous people and local agricultural communities. Another

[3]The main controversy concerns the contradiction between the CBD, which recognized the sovereign right of State (local communities) over their biological diversity, and TRIPS, which confers monopoly rights through Intellectual property rights.

convention is the Food and Agriculture Organization of the United Nations (FAO) International Treaty on Phytogenetic Resources for Food and Agriculture of 2001 which aims at preserving genetic resources and protecting and promoting farmers' rights.

African States wish that the implementation of the article 27.3.b enable them to respect the international obligations which they contracted.

The incidence on the protection of the communities' rights

Finally the fourth stake would be that this protective system recognizes the traditional knowledge and the "innovations" of the local communities. Owing to the fact that traditional knowledge is collectively held and often lacks the characteristics of innovation required for protection, it seems difficult to extend to it the existing systems of intellectual property. Such is also the case of the farmers who have similar interests in relation to the protection of their knowledge, innovations and practices in the field of genetic resources. As previously stated, the rights of the farmers and the rights of the local communities cannot be regarded as a category of the existing intellectual property laws since they cannot be asserted by individual farmers.

In view of the preceding concerns, African States made proposals on the contents of the protective system of plant varieties.

2. Proposals of the African countries on the protection of plant varieties

The exclusion of the patentability of plant varieties

African States consider that by prescribing or by allowing the patentability of seeds, plants and genetic and biological material, article 27:3 b. will result in the appropriation of the knowledge and the resources of local communities.

- The respect of the principles of the **Convention on biological diversity (CBD)**, of the **FAO International Treaty on Phytogenetic Resources for Food and Agriculture** and the **model law of the Organization of African Unity (OAU) on the Protection of the Rights of Local Communities, Farmers and Breeders and for the Regulation of the Access to Biological Resources** elaborated in 2000.

Contrarily to the CBD and FAO Treaty, the OAU model law[4] is an initiative of some African countries to manage rights on plant varieties. It is based mainly on the CBD but has incorporated to some extent a few provisions of the UPOV Convention, the 1978 Act and the FAO International Treaty. One of the objectives of the model law is to "ensure that biological resources are utilised in an effective and equitable manner in order to strengthen the food security of the nation." It includes provisions related to access to genetic resources under prior informed consent principle, equitable sharing of benefits arising from the utilization of genetic resources, intellectual property rights related to genetic resources, protection of traditional knowledge, innovations and practices related to genetic resources. It can be qualify as a "hybrid system of protection"[5] that deals with both biodiversity and plant varieties. It also rejects the monopolisation of genetic resources by patent and limits breeder's rights for many objectives, inter alia the protection of food security. In fact the text specifies that "Breeders' Rights on a new variety shall be subject to restriction with the objective of protecting food security, health, biological diversity and any other requirements of the farming community for propagation material of a particular variety"[6] and that "Where the Government considers it necessary, in the public interest, the Plant Breeders' Rights in respect of a new variety shall be subject to conditions restricting the realization of those rights. These restrictions may be imposed, inter alia: …where food security or nutritional or health needs are adversely affected"[7]

It arises from the communications that the provisions of article 27.3.b must be aligned on the principles of the above mentioned texts. Rather than being presented in the form of contradictory texts, the international instruments must be applied in a complementary way in order to achieve the national targets of development as well as the conservation and the sustainable use of genetic resources.

Therefore it is imperative that the protective system of the plant varieties include:

- the conservation and the sustainable use of biological diversity
- the organization of the access to biological resources and the sharing of benefits resulting from the commercial use of plant varieties.

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[4] The text is available at http://www.cbd.int/doc/measures/abs/msr-abs-oau-en.pdf

[5] See T. KONGOLO, New Options for African Countries regarding Protection for New Varieties of Plants, *The Journal of World Intellectual Property*, Vol. 4, No., 3, May 2001, at 349.

[6] Art. 26.3

[7] Art. 33

On this point, Africa wishes that its partners in development defend the principles of the access to genetic resources under the conditions of informed prior and the sharing of the advantages. In order to guarantee the access and the benefit sharing, the proposal is made to institute a mechanism of execution within the WTO for managing contractual arrangements between the governments of the developing countries and the entities which seek to get genetic material.

- the protection of the rights and knowledge of local communities and the promotion of the rights of the farmers

- *The compliance with competition rules*

For the African States the protection of the plant varieties must prevent that the anti-competitive rights or practices do not threaten food sovereignty of their populations. To achieve this goal, it is possible to refer to article 31 of the TRIPS which provide the possibility to make use of the resources protected by patent without obtaining authorization for the right holder in situations of national emergency or other circumstances of extreme urgency.

3. Conclusion

The “sui generis” system provides African countries an opportunity to protect their biological resources and traditional knowledge with flexibilities that meets their goals and objectives. It clearly appears that African States attach a great value to the principles set by the CBD, the FAO international Treaty and the OAU model law. They also want to maintain the secular practice of exchanges of seeds and to limit individual monopolistic rights on plant variety by the recognition and the protection of the rights of the communities and farmers known as informal innovators. Concerning the responses given to these proposals, one notes that they did not have repercussions at WTO.

African states have implemented the article 27.3 b. very differently. In fact, certain countries do not consider the potential flexibilities offered by the implementation of a *sui generis* system. It is in particular the case of the francophone African countries members of the Bangui Agreement of 1977 instituting the African intellectual property organization

(OAPI) which adopted the UPOV system[8]. Some African States such as South Africa, Egypt, Namibia and Zimbabwe worked out a *sui generis* system with several variants based on the principles of CBD, the model law of the OAU and the FAO International Treaty.

[8] Annex X of the Agreement on plant variety protection adopted in 2006. The Francophone members of the OAPI are Benin, Burkina Faso, Cameroon, Central Africa Republic, Chad, Congo, Djibouti, Gabon, Guinea, Cote d'Ivoire, Niger, Mali, Mauritania, Senegal and Togo.
For more information on the UPOV system, see the contribution of C. KER "Analysis of IP rights applicable to agricultural plants and food".