

Protection for sustainable production; not patent: Path to food security in Africa

1. Introduction

The Trade Related Intellectual Property Rights (TRIPs) Agreement is a treaty of the World Trade Organisation (WTO). As a result of this agreement, the protection of intellectual property has become a responsibility of the WTO. The Agreement covers each of the main areas of intellectual property. One of these areas is "patent" including availability of patents for plant variety protection.

TRIPs details a comprehensive set of new rules and standards of intellectual property which Member States must adhere to. One of these new rules is embodied in Article 27.3(b) which confers rights to biological resources, including patent rights for biotechnology products and processes, animals, micro-organisms as well as plant varieties. Those who advocate the patenting of plant varieties and by extension life forms have little proof (real life experience) to substantiate the benefit to Africa at current level of development. The countervailing argument suggests that the patenting of plant varieties may have grave consequences for Africa. It has been argued that granting patents on plant varieties will place undue restriction on farmers practices, lead to genetic erosion and negatively impact on research and development.

There are also the related issues of the fundamental conflict between TRIPs and the Convention on Biological Diversity (CBD), consumer safety, biosafety, biosafety etc. in addition, patenting of plant varieties in the classical sense is a new trade concept and in the context of biological resources and living organisms, a relatively new phenomenon in Africa. It is partly for these reasons that most African member States of the WTO have difficulty enacting appropriate legislation and mechanism for the implementation of the TRIPs Agreement in general and its Article 27.3(b) in particular.

In this discussion paper, an effort will be made to present an African reaction to the TRIPs Agreement and why it rejects the requirement of the WTO for patent on life.

2. The OAU Initiative and Patent on Life

The Organisation of African Unity has been an active participant in the Uruguay Round as well as the Earth Summit in Rio (1992) which enunciated the Convention on Biological Diversity (CBD). Several Member of the OAU are also Members of the World Trade Organisation (WTO). Consequently, issues on the implementation of the Convention and its ensuring protocols, decisions and resolutions, the World Trade Organisation (WTO) and it related on the yearly agenda of the Council of Ministers and summit of Head of State and Government of the OAU.

In more recent times, the Organisation of African Unity, through its Scientific, Technical and Research Commission targeted the problem of TRIPs Article 27.3(b) and patenting of life forms. This activity was occasioned by the decision of the Council of Ministers of the OAU in Ouagadougou, Burkina Faso (June 1998) that "Member States give due attention as a matter of priority to the need for regulating access to biological resources, community knowledge and technologies and their implications for intellectual property rights as entrenched in the international trade regime of the TRIPs Agreement." The OAU initiative represents an effort to implement the decision of the Council of Ministers. Its principal purpose is to formulate a legal framework which would assist Member States to develop national legislation to secure the rights of local communities and peoples, especially farmers and traditional medicine practitioners rights over their germplasm. This will secure for them ownership of the physical resource as well as the traditional knowledge associated with the resource.

The initiative has been implemented through a series of workshops, participation in related seminars, information sharing and concept enrichment with likeminded individuals and organisations. In this information exchange process, the emphasis has been on coordinated interaction with government institutions and functionaries, the civil society and other stakeholders. The process has yielded two major outcomes:

- -the OAU Model Legislation on the protection of the rights of local communities, farmers and breeders and the regulation of access to biological resources.
- -Contribution to the formulation of an African Common Position on TRIPs and Article 27.3(b).

The concluding part of this discussion will now focus on the African common position.

3. TRIPs: Contradiction in Terms and Criteria for Patenting

Even though Article 27.3(b) of the TRIPs Agreement contains some vague exclusion clauses, its substantive interpretation ends up in a "patent" mode irrespective of the sui generis option. TRIPs provides absolutely no explanation as to why useful human interventions in mechanical and living things, which common knowledge understands as different should be protected under the same system. The problem may not be with the Word "Patent" but with the criteria for granting patent which was developed as appropriate for tools and machines, but

now being extended unconditionally to living things. In addition, most of the key words used in TRIPs are not defined and remain vague. The difference between machines and living organisms remain unresolved as a result of lack of precision in some provisions of the TRIPs Agreement.

Article 27.1 of the Agreement specifies that it is inventions that are patentable. By implication, discoveries are not. Discoveries may thus be excluded even if what is discovered is a technology e.g. a piece of pottery or farm implement buried with an African King in the Songhai empire several centuries ago. Yet in some countries, finding a hitherto "unknown" trait or traits may be patentable. In these states "discovery" is acceptable as "invention". Living things are made of only some of the elements (substances) that constitute the non-living world. No living thing has been created solely out of the non-living world. Anyone who claims to have done so, may well be playing "God".

Finally, it has been argued that the differentiation of process and product in patentability is spurious and superfluous.

4. Africa's Response to Article 27.3(b) of the TRIPs Agreement and the Patenting of Life Forms

Africa's predominant position and response to Article 27.3(b) of the TRIPs Agreement and the patent on life is predicated on its commitment to the spirit, principles and relevant provisions of the Convention on Biological Diversity. These provisions include the sovereign right of the state to the ownership of biological and natural resources, their authority to regulate access to genetic resources, maintain knowledge, innovations and practices of indigenous peoples as well as equitable sharing of benefits arising from the use of such knowledge, innovations and practices.

Africa is a multi-ethnic continent with a deep sense of moral, religious and cultural values. Its population consists of a large array of indigenous peoples whose environment comprising trees (including sacred forests), crops, animals, birds, fish, soil, organisms etc are an integral component of their total life style in fellowship with others. It's long history and political existence has survived centuries of careful growth and development consistent with available benefits of Western Civilisation. These values and the future of African Society are currently being threatened by privatisation, multi-national corporations drive for profit, unethical Science and technology research outcomes and corporate monopoly through intellectual property rights and patent on life forms. Africa's reaction suggests that these incursions are totally at variance with its' culture and tradition and therefore unacceptable.

Africa recognises its obligation to a World driven by science and technology, international agreements and the concept of free trade based on the free flow of knowledge and information. It, however, has difficulty accepting concepts and principles which are detrimental to it's development and survival as a people and continent. The development of new technologies and the dissemination of innovation is indeed a desirable on-going process that must be supported by Governments and Nations with appropriate accompanying rewards, rights and incentives. But the types of rights of Africa needs are not those monopolised through patent and privatisation, but rewards which support local communities, farmers, indigenous peoples and their efforts over the past millenia to conserve and enhance biodiversity for the benefit of all human kind. It is against this backdrop that Africa has rejected the option for the patent on life. The ownership of knowledge, individual or corporate should be in the interest of the overall public good. This is hardly guaranteed by the patent system.

In reality, however, the reaction of individual African countries on a bilateral level has been determined partially by whether a given country:

- -can comply with Article 27.3(b) on the basis of an existing patent legislation
- -has enabling patent legislation pending in parliament or
- -is without appropriate enabling patent legislation.

Irrespective of which category a country belongs, the issue of patent on life is important and has been a matter of open discussion. The Francophone OAPI countries (Benin, Burkina Faso, Cameroon, Cote d'Ivoire, Gabon, Niger, Mali, Mauritania, Senegal and Togo) after due deliberations agreed to adopt UPOV – 91 (the Bangui Accord) as an acceptable "sui generis" system consistent with Article 27.3(b) of the TRIPs Agreement. By this decision they acceded to the principle of patent on life. The Accord, has however not been ratified and therefore has not come into force. On the other hand, ARIPO members (Anglophone) meeting in Kampala, Uganda (March 4-9, 1999) criticised the TRIPs Agreement, calling attention to fundamental imbalances inimical to the development of Africa. They cited several adverse effects, which include constraint on domestic technology development, barriers to technology transfer and monopolistic high prices (including cost of medical products, seeds and software). As far as Africa is concerned, they concluded that the most serious problem with TRIPs is it's failure to recognise the rights of local communities, their knowledge, innovation and practices. This may lead to unjustified patenting of their knowledge and biological resources by foreign corporations. In this context, they suggested the exclusion of all life

forms from patentability. They recommended that African countries should develop appropriate "sui generis" systems of protection of plant varieties, indigenous knowledge, technologies and community rights consistent with their national priorities and ensure that the TRIPs Agreement conforms with the aims of the Convention on Biological Diversity. Similar discussion at other fora have led to an African common position on the TRIPs Agreement in general, Article 27.3(b) and the patent on life forms in particular.

This position was endorsed by the OAU Council of Ministers Meeting in Algiers (July 1999) and communicated by Kenya on behalf of the African Group to the World Trade Organisation (WTO) in Geneva (July 1999).

The Southern African Development Commission (SADC) had in a separate communication to the World Trade Organization called attention to several unresolved issues including "no patent on life forms". Similar decisions were taken by the meeting of African Ministers of Trade in Algiers (September, 1999) and reaffirmed in their recently concluded meeting in Cairo, Egypt (September, 2000).

I am informed that a recent submission by the African Group in Geneva to the TRIPs Council has raised the same outstanding issues on Article 27. 3(b) over which they had earlier presented a common position. These issues include:

- -technical issues relating to patent protection under Article 27.3(b).
- -technical issues relating to "sui generis" protection of plant varieties.
- -Ethical issues relating to the patentability of life forms
- -The relationship of the conservation and sustainable use of genetic materials (resources) and
- -the relationship between the concept of traditional knowledge and farmers rights.

With respect to technical issue related to patent protection under Article 27. 3(b), "the African Group has highlighted the incongruencies raised by the artificial distinction made between plants and animals (which may be excluded from patentability) and micro-organisms (which may not be excluded), as well as between essentially biological processes for making plants and animals (which may be excluded) and micro-biological processes (which may not be excluded). They contend that these distinction challenge the basic tenets of intellectual property law.

On issue relating to the patentability of life forms, African concern is predicated on ethical, moral, religion and cultural values. "The commodification and market transaction of life structures violate the fundamental moral principles of some cultures of a large number of Member States and societies. It is also presumed that "patent over research materials may restrict further research, that discoveries do not amount to inventions and that they could result in escalating cost of medicines and the targeting of research towards products for the affluent to the detriment of the poor and general public health".

5. FUTURE AGENDA

The African common position is rational, valid and has profound merit. However, it needs widespread common understanding, commitment and support to sustain under pressure from the developed economics. A small group of interested scientists, government functionaries and NGOs within a network of active monitors have good ideas which need political support and concerted action at National Capitals and in the trade Missions in Geneva of Africa has to succeed with future negotiations of the African common position. The following follow-up agenda is proposed.

- -elaboration of a strategy to document and disseminate the potential implications of TRIPs and patent on life forms to stakeholders at national, sub-regional and regional levels. There is a need to undertake a rapid assessment of the work of various ministries and national institutions on TRIPs and related other international agreement with a view to harmonization.
- -There is a need for technical support for the conceptualization and drafting of submission documents, preparation of briefing materials and organizing of national, sub-regional and regional pre-negotiation meetings to discuss and coordinate strategies, presentatis and procedures for on-coming negotiations and review sessions.
- -There is need to undertake empirical studies and generate evidence on the impact of TRIPs and/or intellectual property rights on:
 - --Biodiversity and agro-biodiversity
 - --Farmers access to germplasm and plant varieties as well as technology transfer.
 - --Local biological resource based production systems.
 - --Indigenous (traditional) knowledge, innovation and practices as well as local community rights systems

- --Economic losses due to patenting of life forms (royalty payment, biopiracy and total absence of benefit sharing etc) should be investigated to substantiate the harmful impact of IPRs on the agricultural systems, economies and environment of African countries. Some of these studies already exist and could be synthesized by an expert group of consultants. These studies would add legitimacy to the African position and strengthen the bargaining position of its negotiators.
- -There is need for technical assistance and capacity building at national, sub-regional, and regional levels as well as in the Trade Missions in Geneva on key issues of TRIPs and on-coming negotiations. Implementing strategies to promote and popularize the OAU Model Legislation on the Rights of Local Communities, Farmers and Breeders and the Regulation of Access to Biological Resources will greatly enhance the capacity of African Governments and civil society to better understand and contribute to the debate on TRIPs and patent on life. It will also help African Countries that have not done so, commence action to develop strong national positions, teams of international negotiators and enact appropriate enabling legislation at national level.

Mr. Chairman, Ladies and gentlemen, it is my hope that my presentation to you today and humble suggestions will assist in crafting a strategic plan of action to support the African common position on the TRIPs Agreement and patent on life forms in the years ahead.

6. CONCLUSION

Africa's position on TRIPs and patenting of life forms is unequivocally clear. TRIPs and its accompanying criteria for the granting of patent does not provide an appropriate system for the protection of Africa's biological resources. Africa insists that there should be no patent on plants, animals and other life forms. The envisaged review process of Article 27. 3(b) should be a substantive review with due consideration for broader issues related to biodiversity management and conservation. In essence, African is of the view that Article 27. 3(b) should be amended to read: Countries must exclude plants, animals, micro-organisms and parts thereof and any processes making use thereof or related thereto from patentability".

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