Pitfalls in the Emerging Model of Commercialization of Plant Breeders' Rights in Africa

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March 8, 2019

The adoption of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) under the auspices of the World Trade Organisation exemplifies the significance of intellectual property rights (IPRs) protection in global investment and trade. In particular, the importance of transnational investment in plant breeding is demonstrated by article 27.3(b) of TRIPS. The article obligates states to protect plant breeders' rights (PBRs) either by patents or an effective *sui generis*(special in characteristics) system. It is noteworthy that the TRIPS provision is highly flexible on the legal regime to be adopted by states. This is probably due to the realisation that IPRs in plant varieties portend a serious conflict of rights and interests, an issue that this commentary discusses in the African context.

Traditionally, plant varieties were deemed to be part of the common heritage of mankind, to be exchanged, sold and propagated freely for food, survival and

livelihood. The failure to strictly subject PBRs to patenting under TRIPS may be due to the necessity of preventing their over monopolisation, as they concern the most elementary human necessities. The International Union for the Protection of New Varieties of Plants Convention of 1961(UPOV 1961) introduced the concept of granting PBRs for new plant varieties. Despite the grant of PBRs, the classical farmers' right to save, exchange and sell harvested seeds of a protected variety was still permitted, provided it was not undertaken in a large commercial scale.

However, through the initiatives of the developed states that are characterised by large scale commercial farming, and that are also the home countries of large transnational corporations (TNCs) that dominate the breeding and sale of seeds, the International Union for the Protection of New Varieties of Plants Convention of 1991(UPOV 1991) was adopted. After a liberal expansion of the scope of PBRs, article 15(2) of UPOV 1991 fundamentally and unreasonably restricts the rights and privileges of small-scale farmers. In that context, PBRs have become almost like patents under UPOV 1991, which permits monopolisation of vital necessities of survival and livelihood, particularly in Africa.

Based on the notion that the grant of PBRs encourages foreign investment, African states have generally been issuing such IPRs to breeders, but presumably on the assumption that that there is a reasonable preservation of the rights of their own farmers. They have also acceded to international treaties that are flexible on PBRS, such as the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA). However, for African states to accede to UPOV 1991, which is robustly promoted by the Global North and TNCs, they are required to first amend their domestic legislation to strictly conform to the Convention.

Contrary to the case in the Global North, UPOV 1991 like PBRs are fundamentally inappropriate in Africa, where agricultural activities are carried out through subsistence farming. It is approximated that in Sub-Saharan Africa, small scale cultivation constitutes about 80% of all farms and contributes up to 90% of food crops. Second, small scale holdings in Sub-Saharan Africa obtain seeds from both the informal (local exchange and sale of farm saved seeds)

and formal (purchase of protected varieties) systems, with choices determined by the type of crops and associated benefits. The United Nations Special Rapporteur on the Right to Food and the World Bank acknowledge that small scale farmers occasionally obtain protected seed varieties, which they subsequently exchange or sell after their harvests.

The UPOV 1991 like regime for PBRs creates civil and criminal liability for small scale African farmers for exchange of protected varieties in the neighbourhood, and for their modest sale in the local markets for economic subsistence. In addition, it permits TNCs to utilise terminator technology so that any seeds saved from previous harvests by the farmers cannot germinate or propagate. Probably due to increased advocacy against UPOV 1991 by civil society organisations in the context of food security and livelihood of farming populations, Sub-Saharan African states have declined to accede to the Convention, with the exception of Kenya and Tanzania.

To circumvent the refusal by individual African states to accede to UPOV 1991, it seems that the Global North and TNCs are ingeniously influencing sub-regional intergovernmental organisations to develop UPOV 1991-like legal instruments that states in the region are then expected to ratify. For instance, article 22(2) of the Arusha Protocol for the Protection of New Varieties of Plants of 2015, adopted under the auspices of the African Regional Intellectual Property Organisation (ARIPO), is a direct replication of article 15(2) of UPOV 1991 in its unreasonable restriction of the farmers' right. The UN Special Rapporteur expressed her reservations with the non-inclusion of core interest groups in the drafting of the Protocol, and the obscurity of the process. Fortunately, ARIPO member states are yet to ratify the Arusha Protocol, and as cautioned by the Special Rapporteur, they should avoid its operation in their jurisdictions. It seems that the Southern African Development Community (SADC) states are also being hoodwinked into adopting the Draft Protocol for Protection of New Varieties of Plants, which, like Arusha Protocol, is also a direct replication of the UPOV 1991 in its unreasonable limitation of the farmers' right.

Since TRIPS is extremely flexible on the PBRs regime to be adopted, they should obtain guidance from other balanced international instruments such as ITPGRFA. Further, they can obtain vital lessons from states such as India.

Section 39(1)(iv) of the Protection of Plant Varieties and Farmers' Rights Act (PPVFRA) of India explicitly safeguards the farmers' right. Section 18(1)(c) of the PPVFRA further requires that each application for PBRs include a statement that the variety does not utilise terminator technology, which would prevent its further propagation by Indian farmers.

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