In Conversation with Dr Susan Isiko Štrba

By:

Dr Susan Isiko Strba

April 15, 2019

Dr. Susan Isiko Štrba combines teaching and research with providing policy and legislative advice and technical training to governments, intergovernmental organisations and NGOs. She focuses mainly on intellectual property, trade and development.

Q: At the WTO Council for TRIPS, the African Group pushes for *sui generis* plant variety protection systems that include farmers' rights and access and benefit sharing as drawn from the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA) as well as the Convention on Biological Diversity (CBD) and its Nagoya Protocol. Can you share your thoughts on the African Position?

Dr Susan Isiko Štrba (SIS): There have been so many attempts by the African Group to push for *sui generis* plant variety protection systems and traditional knowledge.One of the most recent documents through which the African Group promoted these issues at the WTO Council for Trade-Related Aspects of

Intellectual Property Rights (TRIPS) is 'Taking Forward the Review of Article 27.3(b) of the TRIPS Agreement' (IP/C/W/404, 26 June 2003). Article 27.3(b) of TRIPS requires countries to protect plant varieties using patents, an effective *sui generis* system or a combination of systems. The Articlealso mandates its review within four years of the entry into force of TRIPS. It was basedon this mandated review that the African Group submitted its position. The main issues the African Group raised were (i) the slow pace at revising Article 27.3(b) and (ii) the reasons why specific intellectual property systems for plant varieties were inappropriate for Africa and similar developing/least developed countries. My thoughts on the African Group's document is that so many issues were combined. The CBD, its Nagoya Protocol and the ITPGRFA are all critical for plant variety protection (PVP), traditional knowledge and genetic resources. However, I think it was dangerous for the African Group to presentthem as a complete manifestation of plant variety protection. Employing forum shopping, the discussions around traditional knowledge and genetic resources have now shifted to the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (WIPO – IGC). However, there is not much progress at the WIPO -IGC. On the otherhand, PVP is not being discussedin WIPO as such, but progress on its protection is taking place under the International Union for the Protected of New Varieties of Plants (UPOV). Attempts by some African delegations at WIPO to discuss PVP in the IGC have received stiff resistance. That said, there are on-goingdiscussions at the international level that explore the relationship between the WTO and the CBD.

Q: Can you share your thoughts on the current state of plant variety protection in Africa?

SIS: From my research, I would say that PVP is a continental affair. I have found that at least 48 of the 55 African countries have introduced or are in the process of introducing PVP systems which are based on or are likely to be modelled on UPOV 1991. The African Intellectual Property Organisation (OAPI), introduceda plant variety protection system (Annex X of the Bangui Agreement) designed in line with the UPOV 1991 Convention. Similarly the Southern African Development Community (SADC) has a draft 'Protocol for the Protection of New Varieties of Plants (Plant Breeders' Rights) in the Southern African Development Community Region', while the African Regional Intellectual Property

Organisation (ARIPO) has gone a step ahead by adopting its 'Arusha Protocol for the Protection of New Varieties of Plants' (Arusha Protocol). Both SADC and ARIPO's plant variety protection instruments are designedin line with the UPOV 1991 Convention. ARIPO would be a member of UPOV if there was no last-minute amendment of the draft Arusha Protocol by the ARIPO Administrative Council, to prevent the ARIPO secretariat from granting plant varieties without the consent of ARIPO member states. On a country level, Kenya, Morocco, South Africa, Tunisia and the United Republic of Tanzania are members of UPOV. The majority of the remaining African countries have crafted or are in the process of crafting a PVP instrument. The main criticism of the UPOV 1991 Convention is that it primarily emphasises the protection of plant breeders at the expense of local farmers. Put differently, poweris givento (formal/scientific) plant breeders. Although the UPOV 1978 Convention allowed flexibility for farmers to save, reuse, exchange and sell farm-savedseeds, this was reversedwith the introduction of the UPOV 1991 Convention which prioritises the interests of the plant breeders (see Article 15.2,UPOV 1991 Convention). The policy, politics and message around the UPOV 1991 Convention are that it is an effective *sui generis* system. As such, many African countries have been convinced into adopting it.

I acknowledge that technological development is vital to improving farming in Africa and plant breeding is one solution. Indeed, the Science, Technology and Innovation Strategy for Africa 2024 (STISA-2024), adopted by the African Union in 2014 supports the promotion of science and technology on the continent. It addresses "technology readiness" of the continent. I think that efforts at increasing agricultural productivity on the continent should aim at improving the capacityof small scale farmers to participate in any technologies introduced. However, the trend on the continent is that it is the foreign plant breeders and seed companies that protect and benefit from the protection of new varieties. African countries that have embraced the highest forms of plant variety protection don't have the scientific and technological development capacity to benefit from the systems introduced.

I would like to see the development of both formal and informal technologies on the continent. We have lost track of our traditional practices and knowledge systems. For example, farmers of old could explain the impacts of moving clouds on farming. Withan increase in global warming and climatic changes,

there is a needfor varieties that can grow in diverse conditions and would be resistant to pests and droughts. Accordingly, we need to invest in the development of both formal and informal technologies to improve plant breeding on the continent.

Q: Can you share your thoughts on attempts to harmonise intellectual property (including plant variety protection) in Africa through the Pan-African Intellectual Property Organisation (PAIPO) and the African Continental Free Trade Area (AfCFTA)?

SIS: As mentioned earlier, OAPI is already party to the UPOV 1991 Convention, while SADC and ARIPO have initiated the process of accession. As such, there is already an orientation of embracing UPOV. The PAIPO statute states that it will harmonise intellectual property standards that reflect the needs of the African Union, OAPI and ARIPO and regional economic communities. Since OAPI and ARIPO are already linkedwith UPOV, my thinking is that PAIPO will embrace UPOV. However, PAIPO will focus more on the administration of intellectual property.

For the negotiation of the Intellectual Property Protocol in the AfCFTA, my guess is that OAPI andARIPO alongside international organisations such as WIPO and UPOV would be involved (mainlybecause WIPO and UPOV have been active in the setting up of PAIPO). Consequently, it looks like the plant variety protection system introduced may go the UPOV way. The African Union also appears to endorse UPOV as this formed part of the discussions at The African Ministerial Conference 2015: Intellectual Property for an Emerging Africa, co-hosted by Senegal and the African Union.

Q: Can you share your thoughts on the proliferation of UPOV in Africa and the challenges in constructing plant variety protection systems at the national levels?

SIS: UPOV, like any other organisation, has its agenda. It was set up in Europe to promote Plant Breeders' Rights globally. (Bear in mind that the European and developed countries have established and have thriving seed/ plant breeding industries.) When African countries or developing countries that do not yet have full plant breeding capacity join UPOV, their plant variety protection systems will mainly benefit foreign interests.

The membership of regional organisations also influences the types of plant variety protection systems introduced at the national level. For example, although South Africa is currently a party to the UPOV 1978 Convention, if SADC accedes to the UPOV 1991 Convention, South Africa will also have to upgrade its system to comply with the 1991 Convention. Although there are African countries that are not linkedto UPOV because they are not members of OAPI, ARIPO or SADC, their membership of the WTO gives them an option to introduce a plant variety protection system, as per Article 27.3(b) of TRIPS. In theory, least developed countries (LDCs) do not have an obligation to grant PVP in implementing the TRIPS Agreement before 2021. The following statistics provide some perspective: 33 out of the 47 countries designated as LDCs by the UN are in Africa, 26 of which are Members of the WTO, six observers, meaning they are in the process of acceding to the WTO. Only one African LDC does not (currently) have links to the WTO. By UN standards, least developed countries are low-income countries confronting severe structural impediments to sustainable development. They are highly vulnerable to economic and environmental shocks and have low levels of human assets. Such countries need space to develop. In practice, as indicated above, many African countries are embracing PVP.

Harmonisation of intellectual property through the IP Protocol of the AfCFTA may be an opportunity to rewrite and introduce plant variety protection instruments suited to Africa. As statistics show, most African countries need space for development. Is there enoughcourage and unity among the 55 countriesto promote a uniform plant variety protection agenda suited for Africa?

View online: In Conversation with Dr Susan Isiko Štrba

Provided by Afronomicslaw