

**GENEVA RHETORIC, NATIONAL REALITY:
IMPLEMENTING TRIPS OBLIGATIONS IN
KENYA**

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ABSTRACT

The article is about implementing obligations to article 27.3(b) of the Agreement on Trade Related Aspects of Intellectual Property. Using Kenya as a case study, the article seeks to explore how the latitude and space available in article 27.3(b) has been translated into the domestic architecture of law. At the TRIPS Council, Kenya locates article 27.3(b) in a wider frame of distribute justice using norms and principles in other multilateral agreements. However, its domestic law fails to reflect this rhetoric. As such, the latitude and space in article 27.3(b) was diminished by Kenya's accession to UPOV.

KEYWORDS

TRIPS Agreement, plant variety protection, Kenya

INTRODUCTION*

At a *prima facie* level, this article is about translating obligations to the Agreement on Trade Related Aspects of Intellectual Property¹ into the architecture of domestic law. On the other hand, the paper seeks to re-direct attention away from Geneva and towards national capitals. What might in Geneva be widely considered to be a valid interpretation of the obligation may not necessarily be either politically feasible or economically attractive in national capitals. More significantly, some interpretations may not even get a mention in domestic debates. This disjuncture between Geneva and national capitals is explored through a focus on article 27.3(b) of the TRIPS Agreement. In many senses, the signing of the Marrakesh Agreement establishing the World Trade Organisation (WTO) in 1994 heralds a specific phase of transglobal governance. To reiterate well rehearsed statements, the TRIPS Agreement not only consolidates pre-existing intellectual property Conventions in a single agreement but goes well beyond them by establishing (high) universal minimum standards with time-tabled implementation, backed by regular surveillance for compliance, and sanctions for non-compliance. All this is deeply enhanced by the TRIPS Agreement being part of the Single Undertaking that established the WTO.

Commentators recognise how these transformations have reconfigured the institutional encasement of national territory² and generate multi-layered forms of transglobal governance.³ The latter is poignantly captured by the TRIPS Agreement's surveillance provisions which include the WTO's Dispute Settlement process.⁴ Yet, the WTO, a membership-based organisation, is a rule-structured and consensus driven. This irony has been explained as organised hypocrisy of sovereign equality in decision-making.⁵ To explain, organised hypocrisy is located in patterns of behaviour that are decoupled from rituals and norms that are maintained for external display. The latter is necessary to garner external legitimacy and internal participation for the institution.

Within these movements, article 27.3(b) stands out as an anomaly reflecting a rare instance of intra-Quad differences in negotiating TRIPS⁶. Thus, article 27.3(b) allows an optional exclusion from patents. Specifically, Member countries are obliged to "provide for the protection of plant varieties either by patents or by an

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¹ Marrakesh Agreement Establishing the World Trade Organisation, Annex 1C, Agreement on Trade-Related Aspects of Intellectual Property Rights, 15 April 1994, 33 I.L.M. (1994) 81; henceforth, TRIPS Agreement.

² Saskia Sassen "Territory and territoriality in the global economy" (2000) 15/2 *International Sociology*, 372.

³ Jan Aart Scholte *Globalization: A Critical Introduction* (2nd ed, 2005, Palgrave Macmillan).

⁴ Peter Drahos "Bits and bips: Bilateralism in intellectual property" (2001) 4/6 *Journal of World Intellectual Property*, 791.

⁵ R. H. Steinberg "In the shadow of law or power? Consensus-based bargaining and outcomes in the GATT/WTO" (2002) 56/2 *International Organization*, 339.

⁶ The other notable area of disagreement is geographical indications where a new world – old world divide is apparent.

effective *sui generis* system or by any combination thereof". Beyond allowing an option apart from patents, it is striking that the contours of a *sui generis* system remain undefined in TRIPS. Moreover, there is no textual reference to the existing multilateral treaty concerning plant varieties, namely the International Union for the Protection of New Varieties of Plants (UPOV). Apparently, member countries have considerable latitude and space to be legally imaginative.

A wide and growing body of literature exists on article 27.3(b), specifically, and plant breeders' rights (PBRs), in general⁷. Economists have built theoretical models to assess the impacts of the introduction of IPRs in plant breeding; but agree that their theoretical sophistication is limited.⁸ Some recent contributions have made improvements.⁹ Others have tended to adopt an empirical methodology; thus conducting surveys. Such surveys exist for the US¹⁰ and several Latin American countries.¹¹ The UPOV itself has conducted an empirical study that includes a small selection of its members¹² and some of these countries have also studied by others who arrive at different conclusions.¹³ The law literature is equally broad and vast. Contributions have focused on interpreting article 27.3(b)¹⁴ while also exploring various meanings to the term 'effective' in article 27.3(b)¹⁵ and proposing different *sui generis* systems.¹⁶ The International Plant Genetic Resources Institute prepared a comprehensive template to assist law-making and exploration of residual TRIPS-flexibility and options.¹⁷ The UK government's Commission on Intellectual Property Rights recommended that developing

⁷ In no way should this paragraph be considered either comprehensive or authoritative in its discussion of these literatures.

⁸ See David Godden Plant variety rights - framework for evaluating recent research and continuing issues (1987) 3/3 *Journal of Rural Studies*, 255 and John Kennedy and David Godden Plant variety rights and the incentive to innovate (1993) 21/2 *Oxford Agrarian Studies*, 105.

⁹ CS Srinivasan Plant variety protection, innovation, and transferability: some empirical evidence (2004) 24/4 *Review of Agricultural Economics*, 445.

¹⁰ See for example, Lees J. Butler and Bruce W. Marion *The Impacts of Patent Protection on the US Seed Industry and Public Plant Breeding* Monograph No. 16 (1985, University of Wisconsin-Madison).

¹¹ See for example, Jeroen van Wijk and Walter Jaffe *Intellectual Property Rights and Agriculture in Developing Countries: Impact of Plant Breeders' Rights in Developing Countries* (1996, University of Amsterdam).

¹² International Union for the Protection of New Varieties of Plants *UPOV Report on the Impact of Plant Variety Protection* (2005, International Union for the Protection of New Varieties of Plants).

¹³ One such study was sponsored by the World Bank, see NP Louwaars, R Tripp, D Eaton, V Henson-Apollonio, R Hu, M Mendoza, F Muhhuku, S Pal, and J Wekundah *Impacts of Strengthened Intellectual Property Rights Regimes on the Plant Breeding Industry in Developing Countries: A Synthesis of Five Case Studies* (2005, Centre for Genetic Resources). Another study was conducted under the framework of a broader project on intellectual property and sustainable development, see Dwijen Rangnekar *Report for Work Package 6—Assessing the economic implications of protecting plant varieties*, Prepared under the EC Sixth Framework Programme for Research funded project, Impacts of the IPR Rules on Sustainable Development (2006, European Commission).

¹⁴ Dan Leskien and Michel Flitner *Intellectual Property Rights and Plant Genetic Resources – Options for a Sui Generis System* (1997, Issues in Genetic Resources no 6, International Plant Genetic Resources Institute).

¹⁵ See Francis Mangeni *Technical Issues on Protecting Plant Varieties by Effective Sui Generis Systems* (2000, South Centre and Centre for International Environmental Law) and Dwijen Rangnekar *Access to genetic resources, gene-based inventions and agriculture – issues concerning the TRIPs Agreement*, Prepared for the UK government's Commission on Intellectual Property Rights (2002, Commission on Intellectual Property Rights) at 45-50.

¹⁶ Interesting examples of this genre of the literature are Neils Louwaars "Sui generis rights: From opposing to complementary approaches" (1998) 36 *Biotechnology and Development Monitor*, 13 and H. Ghijsen "Plant variety protection in a developing and demanding world" (1998) 36 *Biotechnology and Development Monitor*, 2.

¹⁷ International Plant Genetic Resources Institute *The Agreement on Trade-Related Aspects of Intellectual Property Rights – A Decision Check List* (1999, International Plant Genetic Resources Institute).

countries should exercise the optional exclusion in article 27.3(b).¹⁸ Civil Society Organisations have also been very active in this area, with some undertaking a global campaign on food rights and farmers' rights¹⁹.

Recommendations on how to implement article 27.3(b) are also available following a broad-based international conference organised in Thailand by the Thai Network on Community Rights & Biodiversity (Biothai) and Genetic Resources Action International (GRAIN) in 1997²⁰. Some civil society organisations have even sought to single out UPOV and advise WTO Member Countries not to join the Convention²¹. In India, for instance, there has been direct engagement in the law-making process by civil society actors like the Gene Campaign, *Karnataka Rajya Ryota Sangh* [Karnataka State Farmers' Association] and the Research Foundation for Science, Technology and Ecology among others. This engagement also saw the launch of Gene Campaign's *Convention on Farmers and Breeders* as an alternative framework and international convention that has at its foundation farmers' rights.²² All this would suggest that the well-acknowledged asymmetries confronted by Southern Member Countries in negotiating TRIPS might be significantly ameliorated with respect to implementation.

In seeking to flesh out these multiple factors the article analyses Kenya's implementation of article 27.3(b). Kenya presents a useful site for this analysis. To begin, amongst countries in the Global South, it has a 'relatively' long legislative history in this area. While the primary legislation was passed in 1972, the intellectual property provisions were made operational in the late 1990s at which time it also became a member of UPOV. At the TRIPS Council, Kenya has strongly advocated against the strengthening of obligations with respect to plant varieties.²³ For example, not only has it opposed the granting of life-patents it has argued for the integration into TRIPS of norms and principles existing in other multilateral agreements, such as the Food and Agriculture Organisation's International Treaty on Plant Genetic Resources for Food and Agriculture²⁴ and the Convention of Biological Diversity²⁵. This bold rhetoric at Geneva has led some to conclude –

¹⁸ Commission on Intellectual Property Rights *Integrating Intellectual Property Rights and Development Policy* (2002, Department for International Development, UK Government), available at <<http://www.iprcommission.org>> (last accessed 24 April 2002) at 66.

¹⁹ Pertinent examples include Actionaid, a British charity with autonomous and semi-autonomous offices in over 30 countries, which launched an international food rights campaign in the 1990s. The campaign was led by the India office and wove around a series of publications that include 'Crops and Robbers: biopiracy and the patenting of staple food crops' (in 1999) and 'Trade Related Intellectual Property Rights and Farmers Rights: A recipe for change' (in 1999). Mention must be made of *Via Campesina*, an international peasant movement that has led and championed farmers' rights and campaigned on 'WTO out of Agriculture' among other issues. Of significance is its October 2000 conference on concretising the notion of farmers' rights (see http://www.viacampesina.org/main_en/index.php?option=com_content&task=view&id=424&Itemid=40; last accessed 6 October 2007).

²⁰ This was later published as Biothai & GRAIN *Signposts to Sui Generis Rights: Resource Materials from the International Seminar on Sui Generis Rights* (1998, Biothai & GRAIN), available at <<http://www.grain.org/briefings/?id=2>> (last accessed 6 October 2007).

²¹ GRAIN & GAIA "Ten Reasons Not to Join UPOV" (1998) 2 *Global Trade and Biodiversity in Conflict*, available at <<http://www.grain.org/briefings/?id=1>> (last accessed 6 October 2007).

²² A discussion of the proposed Convention is available in an article authored by Gene Campaign's convenor, see Suman Sahai "Protection of new plant varieties: a developing country alternative" (1999) 34/10&11 *Economic and Political Weekly*, 12-17.

²³ World Trade Organisation, Communication from Kenya on behalf of the African Group, Review of provisions of Art. 27.3(b), WTO Doc. No. IP/C/W/163, 8 November 1999.

²⁴ International Treaty on Plant Genetic Resources for Food and Agriculture, 3 November 2001, http://www.planttreaty.org/texts_en.htm (henceforth, ITPGR).

²⁵ Convention on Biological Diversity, 5 June 5 1992, U.N. Doc. UNEP/Bio.Div./N7-INC5/4, 31 I.L.M. 818 (1992) (henceforth, CBD).

mistakenly as this paper discovers – that Kenya is designing a distinctly different *sui generis* law.²⁶ Kenya is also substantially integrated into global supply chains in horticulture and floriculture. These sectors, in general, and agriculture, specifically, are of significance for Kenya in terms of sheer livelihood and export revenues. These factors place varying pressures on the government as it implements its obligation to a multilateral treaty. There is no *a priori* reason to assume that these pressures are either consistent or overlapping. Consequently, studying the way in which this TRIPS-obligation is implemented can be a prism into how different domestic and international constituencies are handled. More specifically, given the legal choice and undefined contours in article 27.3(b), the analysis becomes a litmus test for Kenya’s rhetoric at Geneva and, by extension, an exploration of the expansiveness of what Steinberg²⁷ has characterised as WTO’s organised hypocrisy.

The article is outlined as follows. It begins with a brief overview of the global legal architecture with respect to plant varieties. The next section focuses on Kenya’s Geneva rhetoric. Using submissions to and minutes of the TRIPS Council, the section explicates key elements to Kenya’s position on article 27.3(b). The main substance of the paper comes in the subsequent section which concentrates on the domestic architecture of Kenya’s intellectual property law with respect to plant varieties. Critically analysing the laws concerning patents and PBRs, it is here that the paper assesses whether Kenya has delivered on its rhetoric in Geneva. This is followed by a conclusion where an explanation is provided for our observation of a significant decoupling between Geneva-rhetoric and domestic law-making; thus, suggesting a more expansive dimension to WTO’s organised hypocrisy.

Global IP Architecture

Humankind’s intervention and manipulation of plant genetic resources has a particularly long history. Evidence and use of wheat, one of the oldest crops known to humankind, has been dated at 28,000BC.²⁸ While the use of intellectual property rights is very recent, some locate antecedents in the proliferation of botanical gardens during the colonial period during which a veritable “botanical chess game” ensued with the movement of key plantation and medicinal plants across continents.²⁹ Only in late 19th century did efforts at securing control in plants adopt a decidedly legal approach with a US Commissioner of Patents’ decision in 1889 discouraging plant patents.³⁰ It is in 1930 with the passage of the *Plant Patent Act* in the US that intellectual property rights in plant varieties is secured, though only applicable in select asexually-propagated species. Later, in 1961, the International Union for the Protection of New Varieties of Plants (UPOV) is established as the first multilateral

²⁶ See Susan Sell *Private Power, Public Law: The Globalization of Intellectual Property Rights* (2003, Cambridge University Press) at 140-45 discussing Kenya’s implementation of TRIPS Agreement art. 27.3(b) with the observation that it has pioneered a different legislative architecture.

²⁷ Steinberg *In the Shadow*, above at note 5.

²⁸ Moshe Feldman, F.G.H. Lupton, T.E Miller “Wheat” in J. Smart and N.W. Simmonds (eds) *Evolution of Crop Plants* (1995 Longman Scientific and Technical) 184.

²⁹ Pat Roy Mooney “The law of the seed: Another development and plant genetic resources” (1983) 1&2 *Development Dialogue* 3 at 84-88.

³⁰ Glen E. Bugos and Daniel J. Kevles “Plants as intellectual property: American practice, law and policy in world context” (1992) 7/2 *Osiris* 75 at 79-80.

treaty for the *sui generis* protection dedicated to plant varieties.³¹ It is with the conclusion of the Uruguay Round and the TRIPS Agreement that an obligation to protect plant varieties becomes a global reality. This section maps out the main global treaties that concern intellectual property protection of plant varieties.

It is useful to keep in mind that the treaties discussed here differ in many respects. For instance, the CBD is concerned with all biological resources whilst the ITPGR focuses on plant genetic resources for food and agriculture and the TRIPS Agreement and UPOV attend only to plant varieties. For that matter, the treaties also differ in how they frame and approach their respective subject matter. No doubt, there are also differences in which actors – state as well as non-state – play more or less prominent roles in these forums.³²

The FAO's International Treaty on Plant Genetic Resources for Food and Agriculture

The FAO's International Undertaking, a predecessor to the ITPGR that is discussed shortly, was adopted as a non-binding instrument in 1983 with a guiding principle that all plant genetic resources, including material cultivated by farmers and those produced by breeders, were part of the "common heritage of mankind and consequently should be available without restriction" (article 1) and that "samples will be made available free of charge, on the basis of mutual exchange or on mutually agreed terms" (article 5).³³

To persuade the participation of Northern governments, members adopted an interpretation in 1989 which clarified PBRs were not incompatible with it.³⁴ Simultaneously, a second annex was appended to the Undertaking that defined Farmers' Rights as "rights arising from the past, present and future contributions of farmers in conserving, improving, and making available plant genetic resources".³⁵ A third annex introduced in 1991 affirmed that 'common heritage' is subject to national sovereignty.³⁶

In the aftermath of the CBD and the continuing focus on *ex situ* collections, Resolution 7/93 opened the process for renegotiating the Undertaking to bring it into harmony with the CBD. After seven years of negotiations, on 3rd November 2001 the FAO Conference adopted the ITPGR as a legally binding international agreement on plant genetic resources. The ITPGR entered into force on 29th June 2004 with the ratification by its 40th member. As of 24 October 2007, it has received 116 ratifications and accessions. Of particular importance is the Multilateral System to Facilitate Access and Benefit Sharing, which includes 64 crops and forage species and seeks to keep them "under the management and control of the contracting parties and in

³¹ While UPOV is recognised as the first *multilateral* treaty on plant varieties, it is better characterised as a (West) European regulatory scheme that later globalised itself. It begins, as this article indicates elsewhere, as part of the process of harmonising (West) European regulations with negotiations between Belgium, France, (West) Germany, Italy, the Netherlands, and UK.

³² For a fascinating and broad narrative of strategies of forum-shifting in the global IPR negotiations see Laurence R. Helfer "Regime shifting: The TRIPS Agreement and new dynamics of international intellectual property lawmaking" (2004) 29/1 *The Yale Journal of International Law* 1 and with respect to patents and medicines see Susan K. Sell and Asim Prakash "Using ideas strategically: The contest between business and NGO networks in intellectual property rights" (2004)48/1 *International Studies Quarterly* 143.

³³ International Undertaking for Plant Genetic Resource, Res. 8/83, Report of the Conference of FAO, 22nd Sess., Rome 5–23 November, 1983, FAO Doc. No. C83/REP.

³⁴ Agreed Interpretation of the International Undertaking, Res. 4/89, Report of the Conference of FAO Conference, 25th Sess., Rome 11–29 November, 1989, FAO Doc. No. C89/REP.

³⁵ Farmers' Rights, Res. 5/89, Report of the Conference of FAO Conference, 25th Sess., Rome 11–29 November, 1989, FAO Doc. No. C89/REP.

³⁶ Res. 3/91, Report of the FAO Conference, 26th Sess., Rome, 9–27 November 1991, FAO Doc. No. C91/REP.

the public domain" (ITPGR, article 11). Those accessing material from the multilateral system are expected to pay a percentage of their profits from products commercialised with this material into a fund that will be administered by the treaty's Governing Body. Another condition for access to material in the Multilateral System requires that "[R]ecipients shall not claim any intellectual property or other rights that limit the facilitated access to plant genetic resources for food and agriculture, or their genetic parts or components, in the form received from the multilateral system" (ITPGR, article 12.3(d)). This clause has been contentiously negotiated and its effective contours remain open to varied interpretations; however, neither textual interpretation nor national jurisprudence are the appropriate sites for resolving meaning which is appropriately the task for the Governing Body.³⁷ The United States, the EU, Canada, and Australia entered statements in the official record that nothing in the treaty conflicts with IPRs recognized under national laws and international intellectual property agreements, such as the TRIPS Agreement.³⁸

The International Union for the Protection of New Varieties of Plants

The UPOV has a number of different antecedents; however, it is the project of harmonising (West) European regulatory architecture that occupies particular significance. While efforts to secure intellectual property rights in plant varieties preceded the harmonisation process, the peculiar construct of UPOV is essentially a consequence of the harmonisation process. Through the 1930s and right up to the late 1950s, the demand for IPRs by plant breeders was rejected by the lobby group of patent lawyers and attorneys, the International Association for the Protection of Industrial Property.³⁹ Eventually, breeders organised through the International Association of Plant Breeders for the Protection of Plant Varieties, decided to develop a *sui generis* system dedicated to protecting plant varieties. In 1961, an agreement was reached between Belgium, France, Germany, Italy, the Netherlands and UK that led to the establishment of UPOV. It has since been revised thrice in 1972, 1978 and 1991. With the entry into force of the 1991 Act in April 1998, the earlier 'Acts' are closed for accession. This was relaxed for those countries who had sought advice on conformity prior to the entry into force of the 1991 Act until 24th April 1999. For some, such as India, the UPOV seems to have further relaxed this deadline⁴⁰. As on 18 October 2007, it had 65 members. Through these three revisions, UPOV has widened its scope of application to include a greater expanse of species and this has been accompanied by a strengthening of the breeders' right. Equally, the geographical scope of application has incrementally grown with new members from the Global South.

³⁷ Laurence R. Helfer "Intellectual Property Rights in Plant Varieties: International Legal Regimes and Policy Options for National Governments" (2004, Food and Agriculture Organisation) at 57.

³⁸ Laurence R. Helfer "Comment II: Using intellectual property rights to preserve the global genetic commons: The International Treaty on Plant Genetic Resources for Food and Agriculture" in Keith E. Maskus and Jerome H. Reichman (eds) *International Public Goods and Transfer of Technology Under a Globalized Intellectual Property Regime* (2005, Cambridge University Press) 217 at 225.

³⁹ Francis. K. Beier, R. Stephen Crespi and Joseph Straus *Biotechnology and Patent Protection: An International Review* (1985, OECD); Andre Heitz *The History of Plant Variety Protection. The First Twenty-Five Years of the International Convention for the Protection of New Varieties of Plants* (1987, UPOV).

⁴⁰ At its 33rd Ordinary Session in October 1999, it decided to make further special provisions for allowing accession to the 1978 Act for India, Nicaragua and Zimbabwe.

Under the 1978 Act, Member countries are obliged to make PBRs available in five species or genus upon entry into force of the treaty and then incrementally expand this to twenty-four within eight year (article 4). Under the 1991 Act, this phased expansion has been deepened with a requirement for making PBRs available in fifteen species or genus at the start and extending it to all species or genus within ten years (article 3(2)). PBRs are granted to plant varieties that demonstrate distinctness, uniformity and stability and commercial novelty.⁴¹ There are two exemptions or limitations to the exclusive rights granted to breeders. Under the 1978 Act, the breeders' (or research) exemption allows other breeders to use the protected variety, without requiring prior authorisation, as parental material in developing a new variety (article 5(3)). In the 1991 Act, this exemption has been narrowed by excluding this provision for those varieties that are deemed to be 'essentially derived' from the (original) protected variety (article 14(5)). The second limitation to exercising PBRs concerns the use of seeds by farmers. Under the 1978 Act, the scope of PBRs has been widely interpreted to *defacto* allow a farmer, without requiring prior authorisation from the breeder, to use seeds and propagating material of a protected variety in a non-commercial manner. Subsequently, in the 1991 Act, this *defacto* provision has been clarified as a 'limited exemption': member countries may optionally allow farmers to use on their own holdings seeds or propagating material saved from their harvest, as long as this is exercised "within reasonable limits and subject to the safeguarding of the legitimate interests of the breeder" (1991 Act of UPOV, article 15(2)).

The Convention on Biological Diversity

The CBD strikes out a much broader frame of reference that also reflects its larger concerns with sustainable development and biological diversity. In particular, it is grounded by three objectives: the conservation and sustainable use of biological diversity; the fair and equitable sharing of benefits arising out of the use of these resources and the preservation of indigenous knowledge (article 1). Like in the Undertaking, the CBD affirms the sovereign rights of states to exploit their own resources, though limited by the recognition that these resources are a common concern of humankind (article 3). The CBD does not specifically refer to plant varieties; however, it has framed the global community's concerns surrounding plant varieties through the different norms and principles it has pioneered. Equally, it takes cognition of IPRs and requires member countries to ensure that IPRs are "supportive of and do not run counter to" its objectives.

Negotiated under the auspices of UN's Environmental Programme, the CBD was opened for signature in 1992 and entered into force in 1993. As of 25 December 2007, there are 190 parties to the CBD. It is the Conference of the Parties (COP), the convocation of CBD members, that shapes the norms and principles of the CBD. Notions of equity and recognition/reward are deeply embedded in the norms and principles that the CBD seeks to promote. Thus, with respect to traditional knowledge and associated resources, it emphasises the need for prior informed consent and equitable sharing of the benefits arising from their use.⁴² This is corroborated by the CBD's focus on *in situ* conservation of biological diversity.

⁴¹ These are discussed in some detail below; see section 'The Sui Generis Protection of Plant Varieties'.

⁴² See the Preamble §12 and art. 8(j) of the CBD, above at note 25.

A number of provisions in the CBD's have implications for multilateral IP agreements and these are mainly in article 16 and have been significantly elaborated through the Decisions of the COP. On the one hand, the CBD recognises that the functioning of the IP system may influence implementation; thus, it obliges member states to cooperate in order to ensure that IPRs are "supportive of and do not run counter to" the treaty's objectives (article 16(5)). However, on the other hand, article 16(2) states that the transfer of technologies must be consistent with "the adequate and effective protection of intellectual property rights". Along with other provisions in article 16, this suggests that IP entitlements are *preserved* by the CBD. The interface between the CBD and other multilateral IP agreements is more complex than this. In fact, COP decisions have sought to develop a mutually supportive framework. By way of example, in April 2002, the COP adopted the Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising Out of their Utilization.⁴³ These Guidelines encourage applicants for IPRs to disclose the country of origin of the genetic resources or the traditional knowledge upon which those IPRs are based. Thus, countries like Kenya, as demonstrated below, have raised the issue of disclosure of origin of genetic material in patent applications at the TRIPS Council.

The Agreement on Trade-Related Aspects of Intellectual Property

As noted earlier, the TRIPS Agreement heralds a new phase of globalised agreements. Among the various features noted here and elsewhere, the TRIPS Agreement is not a free-standing IP agreement but integrated into the World Trade Organisation with the completion of the Uruguay Round of trade negotiations in April 1994. As of 27 July 2007, there are 151 members to the TRIPS Agreement.

Article 27 establishes the broad contours of patentability by identifying three conditions for patentability in terms of "new", "involve an inventive step" and "capable of industrial applicability". More significantly, it establishes an obligation for patents to be available and enjoyable without discrimination as to the field of technology, the place of invention and whether the products are imported or locally produced. There are no comparable non-discrimination clauses elsewhere in TRIPS.⁴⁴ This substantially forecloses the possibility that existed under previous multilateral IP treaties of leaving certain subject matter outside the scope of patentability, such as living organisms and pharmaceutical products. However, the expansiveness and limits of the 'non-discrimination' clause in article 27(1) remain ambiguous not only in terms of other societal objectives noted in TRIPS (e.g. articles 7, 8.1 and 30). For that matter, a WTO Panel concluded that "[A]rticle 27 does not prohibit bona fide exceptions to deal with problems that may exist only in certain product areas".⁴⁵ Prescient,

⁴³ Access and Benefit Sharing as Related to Genetic Resources, Decision VI/24, in Report of the Sixth Meeting of the Conference of the Parties to the Convention on Biological Diversity, UN Doc. No. UNEP/CBD/COP/6/20, The Hague, 7-19 April 2002, available at <http://www.cbd.int/convention/cop-6-dec.shtml?m=COP-06&id=7198&lg=0>, last accessed 25 December 2007.

⁴⁴ United Nations Conference on Trade and Development and the International Centre for Trade and Sustainable Development *Resource Book on TRIPS and Development* (2005, Cambridge University Press) at 368-69.

⁴⁵ World Trade Organisation, Dispute Settlement Body, Report of the Panel, Canada: Patent Protection of Pharmaceutical Products (2000), WTO Doc. No. WT/DS114/R at para 7.92.

as it predates the Doha Declarations which is testimony to the differential treatment of a particular sub-technological group, pharmaceutical products.⁴⁶

The issue of plant varieties emerges in article 27.3(b) which constitutes part of the non-mandatory exception to the wide scope of patentable subject matter. As noted earlier, article 27.3(b) leaves it open for member countries to either protect plant varieties through patents, an effective *sui generis* system or some combination thereof. A formal review of this provision was scheduled for 1999, four years after the entry into force of the TRIPS Agreement. Unlike other areas of IP, here the TRIPS Agreement does not make any textual reference to pre-existing multilateral treaty, notably UPOV. One possible reason was that UPOV's 1991 Act had not yet entered into force and so a reference to it would be premature, whereas a reference to the 1978 Act was considered inadequate by some members.⁴⁷ Another striking feature of this provision is its remarkable brevity: while negotiators have elaborate provisions concerning patents, those on *sui generis* systems are totally absent. One keen observer of the negotiating process notes that this reflects the lack of agreement within the Quad on the contours of an effective *sui generis* system.⁴⁸ For that matter, drafting texts do not shed any insights.⁴⁹ Thus, an early perception that there might be a disharmonising effect in the area of plant variety protection as Member countries proceed to fulfil this obligation.⁵⁰

There is a vast literature on the requirements of an effective *sui generis* system. It is generally accepted as an obligation for an IPR within a system that provides for national treatment and MFN. While some commentators⁵¹ suggest that there is a requirement for the system to encompass all species and genus others⁵² explain that there is adequate ambiguity in this matter. As the requirement is for an IPR, it could be assumed that the right would be comprehensive in terms of controlling particular acts with respect to particular component(s) of the plant variety. Consequently, the system would also possess mechanisms for the right-holder to enforce their rights. Yet, there is no automatic presumption that the rights granted in different species and genera must necessarily be identical nor is there any guidance on what constitutes the right.⁵³ For that matter, the pre-existing template of UPOV itself pioneers a *sui generis* system with differential rights. Finally, confusion persists on the meaning of the adjective 'effective'. Guidance may be taken from the TRIPS Agreement's Preamble which uses the term: "the provision of effective and appropriate means for the enforcement of trade-related intellectual property rights, taking into account differences in national legal systems". Elsewhere in the TRIPS Agreement the term 'effective' is used in reference to procedures for the

⁴⁶ For a discussion of the continuing ambiguity following the Panel's reticence in interpreting the principle of non-discrimination, see Dwijen Rangnekar "Context and ambiguity in the making of law: A comment on amending India's patent act" (2007) 10/5 *Journal of World Intellectual Property*, 365 -387.

⁴⁷ Jayashree Watal *Intellectual Property Rights in the WTO and Developing Countries* (2000, Kluwer Law International) at 140.

⁴⁸ *Ibid.*

⁴⁹ Daniel Gervais *The TRIPS Agreement: Drafting History And Analysis* (1998, Sweet & Maxwell) at 147-51.

⁵⁰ Carlos M. Correa "The GATT Agreement on Trade-Related Aspects of Intellectual Property Rights: New standards for patent protection" (1994) 16/8 *European Intellectual Property Review* 327.

⁵¹ Leskien and Flitner *Intellectual Property*, above at note 14.

⁵² Rangnekar *Access to genetic*, above at note 15.

⁵³ *Ibid.*

domestic enforcement of IPRs where measures to “permit effective action against any act of infringement of intellectual property rights covered by this agreement” should exist (article 41.1). Some commentators have sought to challenge this reading by interpreting “effective” in terms of other articles in TRIPs (e.g. articles 7 and 8) and the CBD.⁵⁴ Clearly, these are all speculative as the Agreement itself remains nobly silent on the contours of an effective *sui generis* system.

THE GENEVA RHETORIC

At Geneva, on article 27.3(b) Kenya is a leading interlocutor for the Africa Group of countries. This position corresponds with similar leadership on the issue of access to medicine where Kenya has been active in the process culminating with the Doha Declarations⁵⁵ and the WTO debates leading to the August 2003 decision to implement paragraph 6 of the Declaration⁵⁶. Testimony of this leadership and participation are the papers that it has submitted⁵⁷ which include some on behalf of the Africa Group⁵⁸. Equally, Kenya participated in key meetings, which also includes the breakthrough meetings in mid-August 2003 convened by Chair of the TRIPs Council, Vanu Gopala Menon of Singapore, which included delegates from Brazil, India, South Africa and US. At the June 2003 TRIPs Council meeting, Kenya, applied moral pressure by expressing its commitment to “finding a permanent, binding and economically viable solution to the issue posed in paragraph 6 of the Declaration”.⁵⁹ Similarly, Kenya has been active on the issue of article 27.3(b), particularly during the mandated 1999 review of the article. At the TRIPs Council meeting in July 1999, Kenya called for a full review and recommended that the Council examine the link between IPRs and biodiversity, farmers’ rights, and community rights.⁶⁰ Subsequently, Norway acknowledges Kenya’s views as “fundamental concerns” and submits that these concerns should be “integral” to the review.⁶¹ India’s call to grant the CBD observer status at the TRIPs Council⁶², even while opposed by the US⁶³ receives support from Kenya⁶⁴, who reiterate this support at subsequent meetings.⁶⁵

⁵⁴ Mangeni *Technical Issues*, above note 15.

⁵⁵ WTO, Declaration on the TRIPs Agreement and Public Health, Ministerial Conference, Doha: 9-14 November 2001, WTO Doc. No. WT/Min(01)/Dec/W/2.

⁵⁶ WTO, *Decision of the General Council on Implementing Paragraph 6 of the Doha Declaration*, WT/L/540, adopted 30 August 2003.

⁵⁷ WTO, Communication from Kenya, Council for Trade-Related Aspects of Intellectual Property Rights - Elements of a Paragraph 6 Solution, WTO Doc. No. IP/C/W389, 14 November 2002.

⁵⁸ See for example, WTO, Communication from Kenya on behalf of the African Group, Council for Trade-Related Aspects of Intellectual Property Rights - Proposal on Paragraph 6 of the Doha Declaration on the TRIPs Agreement and Public Health, WTO Doc. No. IP/C/W/351, 24 June 2002.

⁵⁹ WTO, Council for Trade-Related Aspects of Intellectual Property Rights – Minutes of Meeting held in the Centre William Rappard on 4-5 June 2003, WTO Doc. No. IP/C/M/40, 22 August 2003 at para 36. The quote here and those in the remainder of this section are taken from the minutes of TRIPs Council meetings, unless indicated otherwise. While not verbatim quotes, they can be taken as closely reflective of the statement made by the Member country as the minutes are verified by Member countries.

⁶⁰ WTO, Council for Trade-Related Aspects of Intellectual Property Rights – Minutes of Meeting held in the Centre William Rappard on 7-8 July 1999, WTO Doc. No. IP/C/M/24, 17 August 1999.

⁶¹ WTO, Council for Trade-Related Aspects of Intellectual Property Rights – Minutes of Meeting held in the Centre William Rappard on 20-21 October 1999, WTO Doc. No. IP/C/M/25, 22 December 1999 at para 76.

⁶² WTO, Council for Trade-Related Aspects of Intellectual Property Rights – Minutes of Meeting held in the Centre William Rappard on 26-29 June 2000, WTO Doc. No. IP/C/M/27, 14 August 2000 at para 8.

⁶³ *Id* at para 9.

The high point on article 27.3(b) is Kenya's November 1999 communication on behalf of the Africa Group⁶⁶ followed by TRIPS Council meetings in June and September 2000. Three broad points are made in the communication. First, it asks for the deadline for implementing article 27.3(b) be revised so as to begin with the completion of the ongoing mandated review. Second, it notes the artificial distinction between biological and microbiological organisms and processes, and proposes a clarification stating that plants and animals as well as microorganisms and all other living organisms and their parts cannot be patented, and that natural processes that produce plants, animals and other living organisms should also not be patentable. Thus, expressing a very expansive 'no patents on life' position. Finally, it advocates integrating into TRIPS principles and norms that exist in other multilateral treaties, notably the ITPGR and the CBD. In this respect, the submission recommends two 'amendments' to article 27.3(b) to clarify the contours of a *sui generis* system: (a) include provisions for the protection of indigenous innovations and traditional knowledge and (b) include traditional farming practices including the right to save and exchange seeds. For that matter, Kenya also aligned itself with India, a leading interlocutor from the global South, by extending "their full support" to India's position.⁶⁷

Underlying these interventions is Kenya's effort to situate the obligation in article 27.3(b) in a wider frame of reference that seeks to restore balance and distributive justice between different groups of peoples using plant genetic resources.⁶⁸ It sees the granting of IPRs in plant varieties as impacting conservation and use of biological diversity, food security and equity with farming communities, among others. Hence, its constant calls for integrating into TRIPS norms and principles from other multilateral treaties, namely CBD and ITPGR. In particular, it sees the conditions for and exceptions from patentability as the avenue for integrating these other norms and principles.⁶⁹ Countries can define the notion of novelty in a manner that could limit the grant of patents on living organisms or at least raise the bar by excluding from patentability mere discovery or isolation of naturally occurring organisms. It also sees the term 'effective' appended to *sui generis* system as allowing the introduction of a broader set of policy considerations to bear on law-making.⁷⁰ In contrast to other templates for article 27.3(b), such as UPOV, Kenya sees in the CBD particular norms and principles for promoting conservation and sustainable use of genetic resources as well as acknowledging and rewarding a wider set of actors like indigenous and farming communities. Many of these norms and principles are incorporated in the OAU Model Law. Thus, it concludes that "[I]f a model was needed for purposes of *sui generis* systems under article 27.3(b) of the TRIPS Agreement, members of the African Group would have this

⁶⁴ Id at para 8.

⁶⁵ WTO, Council for Trade-Related Aspects of Intellectual Property Rights – Minutes of Meeting held in the Centre William Rappard on 21-22 September 2000, WTO Doc. No. IP/C/M/28, 23 November 2000, at paras 139-146; WTO, Council for Trade-Related Aspects of Intellectual Property Rights – Minutes of Meeting held in the Centre William Rappard on 5-7 March 2002, WTO Doc. No. IP/C/M/35, 22 March 2002, at para 211.

⁶⁶ WTO Doc. No. IP/C/W/163, above at note 23.

⁶⁷ WTO Doc. No. IP/C/M/25, above at note 61, at para 75.

⁶⁸ WTO Doc. No. IP/C/M/28, above at note 65, at paras 139-146.

⁶⁹ Id at paras 141-145.

⁷⁰ Id at para 142.

model law [the OAU Model Law]. It would be the source for their domestic laws on protecting plant varieties by effective *sui generis* systems”.⁷¹ In a similar vein, Kenya has regularly advocated for the ‘disclosure of origin’ in patent applications. It sees the identification of the source of genetic material in patent applications as an effective way to deliver on farmers’ rights as in the ITPGR and also to promote access and benefit sharing as set out in the CBD⁷². In more recent times, it has proposed amending TRIPS’s patent requirements to require the disclosure of origin of genetic material.⁷³

These are not isolated expressions. Much to the contrary, there is a remarkable consistency. Clearly, this rhetoric at Geneva places a high watermark with which to assess domestic law-making. The rest of this article is devoted to this assessment.

THE DOMESTIC INTELLECTUAL PROPERTY ARCHITECTURE CONCERNING PLANT VARIETIES

To what extent has Kenya delivered on its Geneva rhetoric? Has it, for example, incorporated a ‘no patents on life’ position in its domestic IP laws? Equally, how has it handled the distinction between essentially biological and microbiological, which it otherwise considers artificial? Having constantly expressed the need to integrate into TRIPS norms and principles elaborated at other multilateral agreements, what has Kenya done in this respect? Essentially, to what extent have its domestic laws in this area been inspired by the OAU Model Law?

The Patentability of Plant Matter in Kenya

Like other former colonies, Kenya inherited a portfolio of laws from its coloniser, which in the area of patents was the British Patent Registration Act, Cap 508. In fact, even as late as 1990, only the holder of a British patent could register the same in Kenya.⁷⁴ This changed with the enactment of the Industrial Property Act of 1989⁷⁵. Obligations to the TRIPS Agreement required revisions which led to the enactment of the Industrial Property Act, 2001⁷⁶. It is here that an assessment of delivering on Geneva rhetoric can be made.

Regarding patentability, Section 26 sets out two broad categories of exclusions. Paragraph (a) states that non-patentable inventions include “plant varieties as provided for in the Seeds and Plant Varieties Act, but not parts thereof or products of biotechnological processes”. And, paragraph (b) introduces other grounds for exclusions, namely “inventions contrary to public order, morality, public health and safety, principles of humanity and environmental conservation”. In addition, it is also the case that discoveries or findings that are products or processes of nature where mankind has not participated in their creation will not be considered

⁷¹ *Id* at para 145.

⁷² WTO Doc. No. IP/C/M27, above at note 62, at paras 8-9.

⁷³ WTO, Council for Trade-Related Aspects of Intellectual Property Rights – Minutes of Meeting held in the Centre William Rappard on 18 November 2003, WTO Doc. No. IP/C/M/42, 4 February 2004, at para 114 and WTO, Council for Trade-Related Aspects of Intellectual Property Rights – Minutes of Meeting held in the Centre William Rappard on 1-2 December 2004, WTO Doc. No. IP/C/M/46, 11 January 2005, at para 67.

⁷⁴ WTO, Council for Trade-Related Aspects of Intellectual Property Rights, Review of Legislation: Kenya, WTO Doc. No. IP/Q4/KEN/1, 7 May 2004.

⁷⁵ Industrial Property Act, 1989, Laws of Kenya, Cap. 509.

⁷⁶ Industrial Property Act, Act No. 3 of 2001, Laws of Kenya, Cap. 509, Published in Kenya Gazette Supplement, 03/08/2001, No. 60.

'invention'.⁷⁷ It could be argued that microorganisms *per se* are not patentable under the Kenya's patent laws. However, they are not *per se* excluded from the field of patentable subject matter. Section 2 clearly includes "microorganisms and other self-replicating material" within the purview of a utility model; thus, patentable subject matter. This can also be read from the limits to the exclusion in Section 26(a) noted above. To be clear, the exclusion does not apply to parts of plants, their products and biotechnological processes. Any residual ambiguity is clarified by Section 29 which is headlined, 'Patents Related to Living Matter', and deals with disclosure and depository requirements for microorganisms among others.

Clearly, rather than deliver on Geneva rhetoric, legislators in Kenya have sought to closely adopt the optional exclusion available in TRIPS. Instead of exploring flexibility (and ambiguity) in TRIPS and scripting a 'no patents on life', Kenya has remained conservative. For that matter, it has effectively *mimicked* the architecture of law in Europe that seeks to demarcate juridical space between PBRs and patents so as to closely map onto biological space as 'essentially biological' and 'microbiological' respectively. The Strasbourg Convention⁷⁸ pioneered this effort which was strengthened in the European Patent Convention⁷⁹ where article 53(b) spells out a prohibition of patents in plant varieties. This article lies at the heart of the intra-Quad difference that emerges in the form of TRIPS article 27.3(b) with its optional exclusion of plant varieties from patentability.

A number of comments can be made about this construction of Kenya's patent law. First, there is ground for legal ambiguity in the phrase "plant varieties as provided for ...". It could be argued that plant varieties not— provided for in the Seeds and Plant Varieties Act⁸⁰ constitutes patentable subject matter. This may include those plant varieties that are of species or genera that the Minister has not (yet) specified in a Scheme under the SPVA. To explain, PBRs are only granted in respect of plant varieties of such species or group as have been specified by a Scheme made by the Minister. On the other hand, "provided for" may also be narrowly read as 'protected by'; thus, presenting an interpretation where plant varieties that fail to meet the SPVA's conditions for grant of protection are to be considered patentable subject matter.⁸¹ Independent of these legal ambiguities, demarcating the juridical spheres of patents and PBRs is problematic. When scripting the laws in Europe in the 1960s, the hope was for two fields "without any overlapping and without conflict".⁸² European case law provides ample evidence of how this hope remains unfulfilled. The obvious temporality of these borders is characterised by patent law's incremental, but incomplete, encroachment into the arena of plant varieties.

Moving onto the norms and principles of the CBD and ITPGR, the legislative developments in Kenya are remarkable. Provisions concerning access and benefit sharing are located in the Environmental Management

⁷⁷ WTO Doc. No. IP/Q4/KEN/1, above at note 74, at 32-3.

⁷⁸ The Convention on the Unification of Certain Points of Substantive Law on Patents for Inventions, 1963.

⁷⁹ Convention on the Grant of European Patents, 1973.

⁸⁰ Seeds and Plant Varieties Act 1972, Laws of Kenya, cap 326, henceforth SPVA.

⁸¹ A useful discussion of case law under the European Patent Convention is available in Joshua A. Funder "Rethinking patents for plant innovation" (1999) 21/11 *European Intellectual Property Review* 551.

⁸² Joseph Straus "The relationship between plant variety protection and patent protection for biotechnological inventions from an international viewpoint" (1987) 18/6 *International Review of Industrial Property and Copyright Law* 723 at 724.

and Co-ordination Act, 1999. Section 7 sets up the National Environmental Management Authority (NEMA), which is endowed with the responsibility to formulate guidelines and administer the sustainable management and utilisation of genetic resources. NEMA works closely with institutions such as Kenya Intellectual Property Institute and Kenya Plant Health Inspectorate Service – and they are all members of the National Biodiversity Committee.⁸³ Despite this institutional interfacing, there seems to be no specific regulatory provisions that actually integrate these norms and principles into the administration of IPRs, whether patents or PBRs. My observation is corroborated by Kenya's responses at the TRIPS Council during its May 2004 review of legislation.⁸⁴ Responding to a question raised by the European Communities regarding the existence of additional conditions apart from those in article 29 (of TRIPS) for the grant of a patent, Kenya clarified that there were no additional requirements.⁸⁵ Thus, not only are these different legislations not interfaced but it is also the case that Kenya has not introduced any disclosure of origin requirements in its patent law.

The *Sui Generis* Protection of Plant Varieties

Setting the framework

It could be argued that Kenya has partly delivered on its Geneva-rhetoric by excluding plant varieties from the scope of patents; thus, partly maintaining a 'no patents on life' position in domestic law. Doubts about the limits to that exclusion are clear from my analysis above. However, the question remains as to how PBRs law delivers on other substantive components of its Geneva-rhetoric? Some commentators may argue that this is a facile enquiry as Kenya introduced the SPVA in 1972. True; however, it only legislated the PBR section in 1994 and with a subsequent amendment in 2002 there was ample opportunity to deliver on its Geneva-rhetoric. On the other hand, those suggesting that this is a facile enquiry would need to explain the logic and worth of Kenya's Geneva-rhetoric: what value are the theatrics in Geneva if the opportunity to deliver on them have already eclipsed?

The SPVA was enacted in 1972 and came into force with the passage of the Seeds and Plant Varieties Regulations (Seeds)⁸⁶ in 1975. Alongside South Africa⁸⁷ and Zimbabwe⁸⁸, this is amongst the earliest legislations in the area of seeds and plant varieties in Africa. An initial amendment in 1977 was followed by another amendment to the SPVA and the SPVR in 1991. It is useful to recall that Part V of the SPVA remained dormant without any implementing measures until the enactment of the Seed and Plants Varieties (Plant

⁸³ Patricia Kameri-Mbote *Intellectual Property Protection in Africa: An Assessment of the Status of the Laws, Research and Policy Analysis of the Intellectual Property Rights in Kenya*, IELRC Working Papers on Intellectual Property (2005, International Environment Law Research Centre).

⁸⁴ WTO Doc. No. IP/Q4/KEN/1, above at note 74.

⁸⁵ *Id* at 15.

⁸⁶ Seeds and Plant Varieties Regulations (Seeds) 1975, Laws of Kenya, cap 326, henceforth SPVR.

⁸⁷ The Plant Breeders' Rights Act, No. 15 of 15 March 1976 entered into force on 1st November 1977. It was subsequently revised and amended in 1980 and 1986. South Africa became a member of UPOV in 1977 and is bound by UPOV's 1991 Act.

⁸⁸ The Plant Breeders' Rights Act was enacted in 1973 and entered into force in 1974. It is modelled on UPOV's 1961 Act. In 1998, Zimbabwe initiated procedures for being a member of UPOV.

Breeders' Rights) Regulation (1994).⁸⁹ Operationalisation had to wait for the establishment of a regulatory body, the Kenya Plant Health Inspectorate Service (KEPHIS), in March 1997. KEPHIS was endowed with powers to regulate the seed market and it houses the Plant Breeders' Rights Office to administer the PBR system. In 1996, these regulations and institutional measures were reviewed by UPOV following a formal request from Kenya for accession to the 1978 Act.⁹⁰ UPOV requested specific changes to the regulatory architecture as a prerequisite to accession. Upon making these changes, Kenya acceded to the 1978 Act of the UPOV Convention on 13th April 1999 which was domesticated through the Statute Miscellaneous Amendment Bill, 2000.⁹¹ It is for all these reasons that there is striking similarity between the Kenya's PBRs system and the 1978 Act of UPOV. Finally, in 2002 the SPVA was again amended and my analysis below relates to this version. Rather than analyse the entire PBRs system, I focus on two areas: the conditions for the grant of protection and the scope protection. These are key elements to the architecture of the PBR system and areas where Kenya could deliver on its Geneva-rhetoric.

The conditions for grant of protection

The conditions for grant of protection can promote multiple policy objectives. On the one hand, it constitutes a doctrinal barrier between what remains in the public domain and what can be protected through private rights as only those plant varieties that meet these conditions are eligible for PBRs. On the other hand, as the availability of PBRs are seen as an incentive for private breeders to invest in plant breeding, legislators have an opportunity to influence the size and direction of plant breeding. Finally, this provision could also determine the possibility of inclusion/exclusion of other individuals and groups as 'breeders', viz. farmers, farming and indigenous communities.

The first point of entry is the definition of 'breeders'. In the PBR Regulation, 'breeder' is defined as the 'person who *discovers* or breeds a new plant variety' (emphasis added, PBRs Regulation, section 2). This corresponds with the SPVA where it states that PBRs are awarded to the person who bred or discovered the variety or his successor (the SPVA, section 18(2)). This is a rather loose definition that allows a discoverer to be treated on par with breeders; thus, potentially enabling the misappropriation of traditional, farmer and indigenous varieties by 'formal' breeders. Naturally any such 'discovered' varieties will also have to satisfy the conditions for grant of protection.

The conditions for grant of protection are elaborated in Part II of Schedule Four of the SPVA. Paragraph 1 sets out the triple requirement for distinctness, uniformity, and stability (DUS): the variety must be 'sufficiently distinguishable by one or more important morphological, physiological or other characteristics' from any other varieties whose existence is common knowledge; be sufficiently uniform or homogenous; and be stable in its

⁸⁹ Seeds and Plant Variety (Plant Breeder's Rights) Regulation, 1994, Laws of Kenya, cap 326, published in Official Kenya Gazette (1995) 73, henceforth, the PBRs Regulation.

⁹⁰ UPOV *Examination of the Conformity of the Legislation of Kenya with the UPOV Convention*, UPOV Doc. No. C/30/13, 10 October 1996, Presented at 30th Ordinary Session of the UPOV Council at para 16.

⁹¹ J. Otieno-Odek *Towards TRIPS Compliance: Kenya's Experience and Legislative Reform* (2001, International Centre for Trade and Sustainable Development and African Centre for Technology Studies) at 11.

essential characteristic.⁹² In addition to DUS, a plant variety must also demonstrate novelty. This is a requirement for the materials derived from it, or materials forming parts of it, will only be protected when it has not been offered for sale in Kenya or elsewhere within a given time duration.⁹³ This is merely a requirement for ‘commercial novelty’ rather than an absolute/general test for novelty as in patent law.⁹⁴

The above construction of law is remarkably consistent with the 1978 Act of UPOV (article 6). Not surprising as Kenya acceded to it in April 1999. To be fair, Kenya attempted a different legal architecture. An earlier version of the SPVA had requirements for non-trivial demonstrations with respect to uniformity and stability. For instance, one of the rules required the demonstration of “agroecological value [that] must surpass in one or more characteristics that of existing varieties according to results obtained in official tests”. This, along with a couple of other provisions, was deleted as a precondition for the accession. Commenting on this rule, UPOV observed that it “is a departure from the principles of the UPOV Convention. The Convention does not consider that the value of a variety should be taken into account for the purposes of protection”.⁹⁵

Attempts to script a different law were scotched by UPOV accession. However, nothing substantive in either the earlier law or the subsequent UPOV-compliant version indicates an effort to deliver on Geneva-rhetoric. Particularly absent are efforts to introduce a disclosure of origin provision as part of the conditions for grant to protection.

The scope of protection

It is the scope of protection that substantially shapes many of the policy options that legislators have with respect to PBRs. The scope of protection is a key factor impinging on the rights of other users of plant varieties and seeds, viz. competing breeders, seed merchants and traders and farmers. While a more expansive scope could potentially generate greater incentives for pioneering breeders it also constrains opportunities for follow-on breeders in exploiting and developing the emergent technological pathway. Equally, it will be the scope of protection that impinges on pre-existing traditional and cultural practices associated with seeds and plants. Elements of the latter are expressed in the norms and principles at the CBD and the ITPGR; thus, an opportunity for Kenyan legislators to deliver on their Geneva-rhetoric.

The Act in Section 20(1)(a) sets out the breeders’ rights in terms of the ‘reproductive material’. The rights offered are identified in terms of particular transactions involving the reproductive material, viz., the breeder or their assignee have the rights to the variety for commercial purposes, to commercialise it, offer it for sale, export it, or to stock it for any of these purposes⁹⁶. Additional provisions for cut blooms and flowers exist in

⁹² The SPVA, above at note 80, Part II, Schedule Four, Section 1(1)(a)- (d)). The term ‘essential’ remains undefined in the Act and in the PBRs Regulation. It was difficult to get a clearer understanding of the term and/or its operational value in terms of the DUS testing procedures.

⁹³ *Id* at section 2(1).

⁹⁴ Rangnekar *Access to genetic*, above at note 15, at 45-50.

⁹⁵ UPOV *Examination*, above at note 90, at para 16.

⁹⁶ In comparison to 1978 Act of UPOV (art. 5(1)), this is more expansive as it additionally includes ‘exports’ and ‘stock’.

the Fifth Schedule⁹⁷. For instance, the right-holder may be granted the exclusive rights to authorise others to produce or propagate that variety in order to sell parts or the products of the variety.

Competing breeders are permitted to use the reproductive material of the protected variety for activities “undertaking solely for research purposes or for developing new varieties”. This exemption is popularly termed the breeders’ exemption or research exemption. As there is no prior authorisation required, this is a broad exemption. However, there are some limits to the exemption. The repeated use of the reproductive material of the protected variety for the production of the variety would require prior authorisation of the right-holder. This construction closely follows the 1978 Act of UPOV (article 5(3)) which is well acknowledged to refer to the use of protected varieties as parental material for the breeding of F1-hybrids.

How are farmers and related traditional/cultural practices treated with respect to the scope of protection?

This presents an opportunity to incorporate norms and principles existing in other multilateral treaties which Kenya has adhered to and which it otherwise promotes at the TRIPS Council, namely the CBD and ITPGR.

Revealing a strong epistemic correspondence with the 1978 Act of UPOV, there is no explicit exemption for seed saving/exchanging activities of farmers. As in the case of 1978 Act of UPOV, it can also be argued that Kenya’s law gives farmers’ a de facto exemption to reuse seeds saved from the harvest of a protected variety. The Act in Section 20(5)(a) says that ‘the sale of reproductive material of protected varieties does not imply that the breeder authorises the purchaser to produce the reproductive material that was sold to him’. No doubt, a farmer is prohibited from selling seeds – a point reinforced by seed certification regulations. Ironically, this is a narrower exemption than what formerly existed in the laws of UPOV member countries. Notable here are provisions in member countries like the US where ‘brown bagging’ has been legally formalised in law. To explain, 1978 Act of UPOV is understood as implicitly allowing propagation for non-commercial purposes. The US Supreme Court in *Asgrow Seed Co. v. Winterboer*⁹⁸ held that the farmers’ privilege in PVPA allows a farmer to sell for reproductive purposes only that amount that he or she has saved for replanting on his or her own acreage.

Finally, in terms of duration, PBRs are awarded for a minimum period of 15 years and a maximum period of 25 years.⁹⁹ In the case of fruits, forests and ornaments trees and grapevines a minimum period of 18 years is provided.¹⁰⁰ As in the 1978 Act of UPOV (article 5(4)), which allows Member states to grant more extensive rights in respect of certain botanical genera or species, the SPVA in Section 19(5) makes provisions for extending the duration of the right with a maximum total duration of twenty-five years.

Again one sees a failure to deliver on Geneva-rhetoric. To be fair, there were feeble attempt to introduce different standards for the conditions for grant of protection. However, these attempts to differ were scotched

⁹⁷ This also mimics the 1978 Act of UPOV, where in art. 5(4) similar provisions for expanding the scope of protection for particular species exist.

⁹⁸ 513 U.S. 179, 1995

⁹⁹ The SPVA, above at note 80, at sec. 19(1)-(3).

¹⁰⁰ Id at sec. 19(2).

by Kenya's accession to UPOV. The close cooperation with UPOV diminished any residual epistemic space to think and legislate differently.

CONCLUSION

This narrative of implementing obligations under article 27.3(b) of the TRIPS Agreement in Kenya throws up a number of puzzles. The puzzles inherently arise because article 27.3(b) does (potentially) allow remarkable cognitive space to legislate; space, that goes beyond well-recognised elements of residual flexibility in TRIPS. With respect to article 27.3(b), Kenya has expressed a desire to incorporate norms and principles that exist in other multilateral treaties. For that matter, my analysis shows that Kenya has been undeniably consistent in this rhetoric at Geneva. In contrast, the study of its domestic IP architecture clearly shows that it has failed to deliver on this rhetoric. Beyond this failure, it acceded to UPOV; thus, introducing a *sui generis* system for plant varieties that otherwise does not get a mention in the TRIPS Agreement.

The rhetoric at Geneva demonstrates that Kenya has sought to locate article 27.3(b) in a wider frame of distributive justice between the different groups of peoples using plant genetic resources. The failure to deliver suggests other mechanisms generating epistemic lock-in as Kenya has neither been at the receiving end of threats of trade sanctions or party to bilateral free trade agreements with TRIPS-plus standards. What then are these other mechanisms of IP-harmonisation? An adequate reply to the question is beyond the scope of the article. However, figments of that answer could be located in Kenya's accession to UPOV. The feeble attempts at scripting a different law were scotched by accession to UPOV. Maybe, along with analysing Kenya's law for conformity, UPOV's technical missions and cooperation generating an epistemic lock-in that diminished the space to imagine and implement other norms and principles. No doubt, any space for this was entirely eliminated with accession to the 1978 Act of UPOV. Finally, what does this story tell us about the organised hypocrisy of the WTO?¹⁰¹ Steinberg sees the procedural fictions of consensus and sovereign equality of the WTO as scripts and rituals necessary for external display and legitimacy. Maybe, the theatrics of TRIPS Council meetings are integral elements of this organised hypocrisy. In that, Southern interlocutors are *allowed* their theatrics as a means primarily for internal legitimacy. As the demands for procedural reform of WTO continues, it might also be necessary to revisit the dynamics of TRIPS Council meetings.

¹⁰¹ See Steinberg *In the Shadow*, above at note 5 for an explication of the notion of organised hypocrisy.

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