IPR AGENTS TRY TO DERAIL OAU PROCESS

UPOV and WIPO attack Africa's Model Law on community rights to biodiversity

Genetic Resources Action International (GRAIN)
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Early last month, a meeting was held in Addis Ababa between the Organisation for African Unity (OAU), the Union for the Protection of New Plant Varieties (UPOV) and the World Intellectual Property Organisation (WIPO). Purpose of the meeting? To seek comments on the OAU Model Law that aims to balance the rights to biodiversity of local communities, farmers and breeders in Africa. What could have been a benign exchange of views yielded instead an undisguised attempt from the side of industrial interests to subvert the whole OAU process.

The OAU initiative to develop a *"Model Legislation on the Protection of the Rights of Local Communities, Farmers and Breeders and for the Regulation of Access to Biological Resources"* started back in 1997, when the Organisation embarked on a process to assist African countries in fulfilling their obligations to the Convention on Biological Diversity and the TRIPS Agreement of the World Trade Organisation. The Biodiversity Convention mandates countries to regulate access to biodiversity and respect the rights of local communities. TRIPS requires all members to protect intellectual property rights (IPR) on plant varieties, be it through patents or a *sui generis* system.

The Model Law aims to balance the rights of farmers, plant breeders and local communities based on the explicit recognition that in Africa all parties have an important role to play in the conservation, improvement and sustainable use of biodiversity. The process of drafting the Model Law itself generated a lot of enthusiasm and participation from all walks in Africa – lawyers, NGOs, ministries, farmers' organisations – since the

The OAU Model Law 101

The Model Law has four components:

Access to Biological Resources
Requires: a permit and the prior informed consent of communities; payment of collecting fee; sharing of benefits from commercial products; etc.

Community Rights
Inalienable and collective rights to: control access to resources and knowledge; partake of 50% of any benefits handed to the government under the access regime; properly exercise their own intellectual rights; etc.

Farmers' Rights
Protection for farmers' breeds and seeds according to criteria based on customary practices; the right to save, use, multiply and sell seeds, with the limitation that sale of material owned by a breeder should not be on a commercial scale; etc.

Plant Breeders' Rights
Intellectual property over new varieties that are distinct, stable and sufficiently homogenous or a multiline; the exclusive right to sell and produce such varieties; etc.

Some of the crucial features of the Model Law are:

- Breeders' rights are subordinate to farmers' rights
- The law prohibits patent protection of any life form
- Strong support to the role of women

beginning. And it was consistently blessed with support from the governments themselves. In July 1998, the OAU Heads of State endorsed the Model Law and recommended that it become the basis of all national laws on the matter across Africa. Since then, discussions have taken off in several countries on how to adapt the Model Law to national realities and a number of governments have begun drafting national legislation in line with it.

In September 2000, African Ministers of Trade, meeting in Cairo, passed a resolution stressing the need to further raise awareness about the Model Law and invited UPOV and WIPO, among others, to collaborate *"in the furtherance of this initiative"*. This was the mandate behind last month's meeting in Addis. But instead of offering supportive suggestions and expertise on how to *"further"* the fundamental principles and unique ambitions of this Africa-wide endeavour, the two agencies want to totally change them. They basically insist that it be rewritten to conform with their own intellectual property regimes.

WIPO wants more patenting in Africa

WIPO, in a four-page submission to the OAU, used a professorial and technical approach to clamp down on some of the core political issues that the Model Law addresses:

- As a central principle, the OAU Model Law holds that patents on life are immoral and go against the basic values of African citizens and should therefore be outlawed. WIPO was quick to point out that the prohibition of patents on life forms goes against TRIPS Art. 27.3(b) which requires patents on at least micro-organisms. This ignores the fact that the Africa Group at WTO has taken the position – which was formally endorsed by OAU – that TRIPS should instead ban the patenting of micro-organisms, as well as other life forms. The Africa position is still under discussion in the TRIPS Council, which is reviewing Art. 27.3(b). In the Model Law, the OAU is coherently implementing the principles that Africa defends in international and other fora.

- The OAU wants those who collect biological resources in Africa to affirm that they will not apply for patents over these materials or their derivatives. WIPO is afraid that this means that bioprospectors cannot secure exclusive monopolies on products made or extracted from the goods. They've read it right. How else can Africans prevent biopiracy of their resources and knowledge? (Has WIPO done anything about *that* lately?)

- WIPO rejects the principle of "inalienability" of community rights embedded in the Model Law. This principle is one of the cornerstones of the entire system and is intended to ensure that no one – including members of a local community – can make exclusive claims over collective community knowledge or resources.

- WIPO also advocates that communities take out patents themselves – or let others do it for them – and should obtain *"no less than one hundred percent"* of the commercial benefits generated

Who are WIPO and UPOV?

UPOV and WIPO are two Geneva-based agencies that promote hard-line intellectual property schemes worldwide. WIPO is part of the United Nations, but UPOV is not, even though it is administered through WIPO and has its office in the same building. WIPO's mandate is to promote IPR in general, while UPOV's is to promote plant variety protection or plant breeders' rights specifically. In that sense, they share plenty in common, except that UPOV works for the benefit of the seed industry in particular. And since 70% of UPOV's members are rich countries in the North, we know which seed industry.

OAU, for its part, is actually not the OAU anymore. From a political association of all African states – the exception being Morocco – it is now trying to become something like the European Union. And has officially changed its name, as of this month, to the African Union.

through trade in African biodiversity. This is a “no go” at the local level, since patents are too expensive and complex to handle and such an approach would end up benefiting urban lawyers more than the rural communities that manage biodiversity.

For the rest, WIPO’s submission pinpoints numerous deficiencies in terms of how the Model Law scopes out the definition and operationality of Community Rights. Most everyone involved in the OAU process – especially national governments currently trying to draft national legislation based on it – has been wrestling with this too. But rather than helping to make these rights really work in the context of rural Africa, WIPO’s solution is to make them fit into global IPR conventions. This is not very useful for African policy makers who are now struggling to develop legislation that serves biodiversity management in Africa. One could have expected more from an organisation that employs hundreds of lawyers and wants to play a role in laws related to traditional knowledge and genetic resources in Africa.

While UPOV wants... Africa!

If WIPO's contribution to the *“furtherance”* of the OAU process was misdirected and counterproductive, UPOV's input consisted of an iron-fisted bash on the whole initiative. UPOV officials even reworked more than 30 articles of the Model Law to suit the standards of their own Convention!

The first question is: who is UPOV to come in and challenge a Model Law that has been carefully developed to serve Africa by balancing the rights of all the different actors working with biodiversity across the continent and turn it into a law to serve the interests of foreign biotech and plant breeding corporations? UPOV has only two members in Africa – Kenya and South Africa – whose plant breeders’ rights systems mainly protect industrial crops and export industries. The whole problem with UPOV’s approach to the Model Law is that it clearly considers its own Convention to provide the one and only “model” for implementation of TRIPS. But TRIPS does not oblige countries to adopt legislation that conforms with UPOV. The reality is that Africa has a choice – and UPOV’s ten-page attack on the OAU Model Law boils down to destroying that choice.

While we could write another ten pages of comment on UPOV’s comments, there are probably four important issues to highlight.

1. The “food security” and “development” crusade

The UPOV Convention, and national laws based on it, provides for the granting of IPRs over plant varieties that are new, distinct, uniform and stable. They don’t have be food crops. They don’t have to be high-yielding. They don’t even have to be improved in any sense of the word. Yet UPOV officials tells Africans a different story. All of a sudden, they claim that UPOV stands for food security and development. The Union’s submission to the OAU is full of vain rhetoric about how its monopoly rights system will actually help feed people.

UPOV’s reasoning is that by giving strong commercial control to plant breeders, they will deliver seeds that produce higher yields, which farmers will buy, which means that food security is assured. The reality, however, is that these plant breeders’ rights are mostly granted to huge breeding and biotech corporations based in the industrialised countries, which undermines the development of any independent national seed sector. The other reality is that most of these monopoly privileges are on crops that aren’t grown for food.

Earlier this year, GRAIN surveyed the data from ten developing countries that implement plant breeders’ rights along UPOV’s lines to see how much food security this has brought them. All told, only 36% of the varieties currently protected by plant variety certificates in those countries could be considered food crops. And many of those get transported to

consumers in industrialised countries. In the case of Kenya, only one title out of the 136 applied for under the UPOV system there was for a food crop – a green bean grown for the European market. The rest were flowers and industrial crops. So much for food security.

2. All for the industry

UPOV's critique of the OAU Model Law makes numerous recommendations designed to bring the scheme closer to the needs of transnational corporations. For example, UPOV wants OAU to de-link breeders' rights from both quality control (criteria regarding the agronomic value of new varieties) and the public interest. These things are *"too vague"*, says UPOV. On the contrary, they are important principles with which countries can orient national research and breeding efforts – but that is not what UPOV is concerned with. UPOV's concern is to strengthen market control for corporate breeders.

In fact, several measures which were developed through the OAU process to protect the interests of small farmers in Africa apparently sent the Geneva officials aghast. In the Model Law, the breeders' rights component is one part of an integral approach to protect a wide set of interests – not the industry's alone. For UPOV, that is simply wrong. A breeders' rights law, in their view, has to provide strong rights exclusively for breeders, full stop. If there are other interests involved that need protection, they should go elsewhere.

This mentality – that the only thing that counts is the interest of the industry – is typical in UPOV circles. But it goes totally against what the OAU Model Law tries to do: strengthen the contribution of *all* stakeholders in the creation of food security.

3. Killing farmers' rights

This is the probably the most serious and unacceptable part of UPOV's attack on the Model Law. The Model Law was intended to uphold and advance the rights of farmers and local communities first, foremost and above everything else. The farmers' rights component is central to the whole legislation, as can be seen from how the breeders' rights are time and again made subject to the farmers' rights. This clearly makes sense in Africa, where the role of farmers in developing better crop varieties has traditionally be underestimated and ignored. For UPOV, this is *"ineffective"* and must be turned right side up.

In reality, many African officials who are against patenting life are willing to live with breeders' rights as a softer form of IPR *so long as those rights do not impinge on the rights of the farmers and other local communities*. It may be difficult to achieve, but that is precisely what the OAU is trying to allow for: greater equity of space and a better balance of power, in order for Africa to progress. UPOV is adamant that the opposite is true: farmers' rights – which it wants to narrow down significantly – have to be subordinate to breeders' rights or no one will get anywhere in Africa.

4. Wrong agriculture

Taken together, UPOV's "contribution" to the OAU process advocates an agenda for agricultural and rural development that revolves around dependency, uniformity and external markets. Quite the contrary of what the basic philosophy behind the Model Law is. For UPOV, scientists do *"breeding"* while farmers do *"unconscious selection",* and food production can only increase through expensive technologies and industrial farming systems. This flies in the face of many experiences in strengthening ecological agriculture where high yields are perfectly attainable without UPOV's "distinct, uniform and stable" plant varieties.

The breeding that UPOV wants, and which most farmers don't do, is good if you want local producers to produce for livestock and other industries on the other side of the planet. It fits the export-oriented monoculture pattern like a glove. It does not, however, fit a more self-reliant, farmer- and local consumer-oriented kind of food system. The Green Revolution, which propagated the industrial agriculture pattern throughout the South, has already failed in Africa – meaning it is the wrong agenda. The drafters of the Model Law knew this all along.

Thanks, but no thanks

In his immediate reply to the submissions of WIPO and UPOV, Dr Tewolde Berhan Egziabher, head of Ethiopia's Environmental Protection Authority, reminded everyone that the two agencies were invited by Africa's Trade Ministers to contribute to the furtherance the OAU process. They were not invited, he said, *"to change the essence of the Model Law"*. After all, the central features of the Model Law – those relating to community rights and access to genetic resources – had already been approved at the highest level: by the Heads of African States.

The Model Law's provisions on community and farmers rights, which the IPR gurus from UPOV and WIPO complain so bitterly about, are no more and no less than a regional transcription of global agreements such as the Convention on Biological Diversity and the International Undertaking on Genetic Resources for Food and Agriculture. By drawing up the Model Law, the OAU has shown that Africa takes biodiversity, and international agreements related to it, seriously.

In July, a pan-African experts meeting is planned in Algeria to further discuss the OAU Model Law and its national implementation. Without a doubt, WIPO, UPOV and their partners in Africa will be present to further press their point of view – which could undermine the basic principles on which the African legislation is built. This should not be allowed to happen.

The OAU consulted these two Geneva agencies in good faith. As Dr Tewolde put it, *"While we are grateful to UPOV and WIPO for their friendly gestures, we reaffirm our obligation to the decisions of the OAU (…). We would, therefore, appreciate support within the context of those decisions and recognition of OAU's right to lead Africa, especially on emerging critical issues."*

Those who have been behind the development of the OAU Model Law deserve our support. And those who are now trying to destroy it deserve our rejection.

For further information:

The OAU produced an explanatory booklet about the Model Law which is available from the Scientific, Technical & Research Commission of the OAU, PMB 2359, Lagos, Nigeria. Tel: (234-1) 263-3430, Fax: (234-1) 263-26093, Email: oaustrcl@rcl.nig.com. Apart from a 30-page explanatory text, the booklet contains the English and French versions of the Model Law itself. An electronic version can be downloaded from GRAIN's web site: http://www.grain.org/publications/oau-en.cfm

GRAIN has published a number of briefings and articles about TRIPS, UPOV and WIPO, and the implications of their activities for the management of biodiversity. They are available from our office or can be downloaded from our website. Suggested titles related to this paper are:

"WIPO's Mission Impossible", *Seedling*, September 1998
http://www.grain.org/publications/set981-en.cfm

"UPOV on the War Path", *Seedling*, June 1999
http://www.grain.org/publications/jun991-en.cfm

"Plant Variety Protection to Feed Africa?, *Seedling*, December 1999
http://www.grain.org/publications/dec991-en.cfm

For a Full Review of TRIPS, March 2000
http://www.grain.org/publications/tripsfeb00-en.cfm

GRAIN
Girona 25 pral. • 08010 Barcelona • Spain
Tel: (34-93) 301 13 81 • Fax: (34-93) 301 16 27
Email: grain@grain.org • Web: http://www.grain.org/