



IMPLEMENTING OBLIGATIONS UNDER ARTICLE 27.3(B) OF TRIPS IN THE GLOBAL SOUTH

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Introduction

- Article 27.3(b) of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) obliges member countries of the WTO to provide a form of intellectual property system for plant varieties
- The intellectual property system could be: patents, a *sui generis* (unique) system or any combination of systems
- Many WTO member countries from the Global South opt for the *sui generis* option
- TRIPS does not define *sui generis*; therefore, countries have the latitude to develop systems that best suit their needs
- 'Plant Breeders' Rights' as set out in the UPOV is a *sui generis* system promoted by actors from the Global North
- 'Farmers' Rights', 'Prior Informed Consent' and 'Food Sovereignty Principles' in the ITPGRFA, the CBD, and Social Movements respectively are examples of counter-hegemonic *sui generis* norms and principles recommended by actors from the Global South
- These varied systems, norms and principles create spaces for creative forum-shopping



Research Question

- Considering the range of counter-hegemonic norms and principles that have proliferated in various international forums, and the apparent latitude in Article 27.3(b) of TRIPS, why have WTO member countries from the Global South been circumspect in their explorations of the spaces opened up by the possibilities of *sui generis* intellectual property systems for plant varieties?

Theoretical Framework

- This research is grounded in the Third World Approaches to International Law (TWAIL)
- TWAIL is both a political and intellectual movement that is oppositional to unjust international norms, and seeks a reformation (or transformation) of international systems that are unfair to the Global South
- This research also critically incorporates concepts from 'post-colonial' contestations, the 'struggles' of making and framing international law, and international law from below

Methodology

- Library-based Study
- Critical analysis of primary literature: multilateral treaties, national plant varieties legislations and case laws
- In-depth exploration of secondary literature: policy reports, textbooks, journal articles and civil society interventions

Research Findings



Article 27.3(b) of TRIPS offers choice, yet many WTO members from the Global South tend to mimic 'Plant Breeders Rights', a *sui generis* system set out in UPOV.

A variety of actors argue that the 'Plant Breeders' Rights' system in the 1991 UPOV Convention may not be best suited to the socio-economic realities of countries in the Global South because:

- It provides stringent requirements of Distinctness, Uniformity and Stability (DUS) which marginalises small-scale farmers in the Global South, as they tend to grow heterogeneous crop varieties (these requirements are suitable for countries that have highly industrialised agricultural sectors); and
- It threatens the livelihoods of small-scale farmers by limiting their traditional approach to saving seeds.

Consequently, NGOs such as GRAIN advocate that countries from the Global South ignore the UPOV *sui generis* system, and instead construct *sui generis* systems that incorporate counter-hegemonic norms and principles from other multilateral treaties and social movements.

In this regard, the African Model Law, 2000 provides exemplary guidelines for countries seeking to construct *sui generis* systems.

Marking major watersheds in translating Article 27.3(b) of TRIPS into domestic legal architecture are India and Thailand's imaginative *sui generis* systems.

Significantly, India's Protection of Plant Varieties and Farmers Rights Act, 2001 is the first national legislation in the world to provide for the protection of farmers' varieties and farmers' rights to save, use, sow, re-sow, exchange, share or sell farm produce.

Similarly, Thailand's Plant Varieties Protection Act, 1999 provides for the protection of local domestic varieties (these are varieties that exist only in a particular locality).

Although the Indian and the Thai *sui generis* systems provide for the protection of farmers' varieties and local domestic varieties, the practicability of these provisions are uncertain, as farmers and farming communities are yet to register their varieties.



This picture depicts the traditional farming practices prevalent in many countries in the Global South, where small-scale farmers use simple farming tools, and harvest heterogeneous varieties which do not meet the DUS requirements of UPOV

This picture depicts the industrialised farming practices prevalent in many countries in the Global North, where large-scale farmers and agribusinesses use sophisticated farm machinery, and harvest Distinct, Uniform and Stable varieties, which meet the UPOV requirements

Conclusion

- Article 27.3(b) of TRIPS opens up spaces for WTO member countries from the Global South to forum-shop when constructing intellectual property systems for plant varieties
- India and Thailand have model *sui generis* systems, while the African Model Law sets out exemplary guidelines for countries seeking to construct *sui generis* systems
- Employing the smorgasbord of *sui generis* alternatives, WTO members from the Global South can ignore the UPOV system, and creatively construct TRIPS-Compliant *sui generis* intellectual property systems for plant varieties suited to their socio-economic realities

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