

Post Doha Scenario relating to Review of TRIPS Agreement

Regional Seminar on Policies for the Protection of Farmers' Rights in Mountain Regions Titled "Evolving *Sui Generis* Options for the Hindu Kush Himalayas" 24-26th March 2003

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Current State of Play

The TRIPS Agreement is currently under review at the World Trade Organisation. The review of Article 27.3 (b) dealing with patenting of life was mandated to begin 4 years after the agreement came into force i.e. in 1999. The whole of the TRIPS Agreement is also currently under review as per the provisions of Article 71.1.

Many developing country governments have been vocal and have expressed their concerns regarding the implications of the TRIPS Agreement on their national development, for their farmers' livelihood and food security as well as for the moral and social cohesion of their societies. The African government in particular have put forth a proposal, to clarify 'that plants and animals as well as micro-organisms 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'. Farmers groups and civil society organisations around the world have joined in this call under the loose banner of the 'no patents on life' coalition.

There have been attempts to harmonise the TRIPS Agreement with the Convention on Biological Diversity's provisions of prior informed consent and equitable benefit sharing led by Brazil and India. Moreover, international and national legislations must take account of the International Treaty on Plant Genetic Resources of the FAO concluded in November 2001 that recognised the significance and special nature of agricultural biodiversity and reaffirmed 'Farmers' Rights to save, use, exchange and sell farm saved seed and other propagating material to support food security.

More recently some of the developed country governments including the European Union have started showing a more flexible stance towards the concerns of developing countries with regards to patents on life as well as the protection of Farmers' Rights.¹ The UK Government set up an independent Commission on Intellectual Property Rights to examine how IPR regimes could be designed and improved to benefit developing countries. The Commission with eminent lawyers, academics, government as well as industry representatives reported in September 2002 with the message that 'ONE SIZE FITS ALL' approach does not work in the area of intellectual property, and that countries with varying levels of development need flexibility in their policy making arena. Additionally, on the specific issue of patenting of staple foods, the report recommends that:

¹ Communication by the European Communities and their member states to the TRIPS Council on the review of article 27.3(b) of the trips agreement, and the relationship between the TRIPS Agreement and the Convention on Biological Diversity (CBD) and the protection of traditional knowledge and folklore "a concept paper" 12th September 2002.

- Patents should not restrict farmers' rights to save, grow, exchange and sell seeds
- Developing countries should have the right not to grant patents on plants and animals, including genes and genetically modified plants and animals
- Governments should put in place measures to promote farmers' rights at a national level
- The current system that has allowed patents on traditional knowledge should be revised to protect poor communities from biopiracy
- Developing countries should introduce rules that restrict the application of patents to agricultural biotechnology.

A looming threat to the current flexibilities in the TRIPS Agreement that are being fought for could be undermined by World Intellectual Property Organisation's (WIPO) patent agenda with its three pillars that (patent law treaty, patent cooperation treaty and substantive patent law treaty) could make it simpler to file worldwide patents, harmonise the domestic laws further as well as possibly remove the exemptions currently allowed under the TRIPS Agreement – in other words a one stop shop for a single global patent. Civil society groups as well as developing countries need to be vigilant and effectively counter the WIPO patent agenda. Any intellectual property system developed nationally or internationally must at the minimum acknowledge and respect the following three positions:

- No patents on life
- Protection of Farmers' Rights to save, use, exchange and sell farm saved seed
- Ensure that the provisions of TRIPS are consistent with the CBD provisions on prior informed consent and equitable benefit sharing.

Finally, investing in farmer-controlled seed development, production and preservation systems that take into account local climatic, social and economic situations can effectively reduce the threat posed by TRIPS.

The Doha Development Mandate²

The Doha Ministerial text deals with the issue of biodiversity, food security and Farmers' Rights as stated in the three documents – The Doha Ministerial Declaration; Implementation-Related Issues and Concerns; the Compilation of Outstanding Implementation Issues Raised by Members. Both the Implementation and Outstanding Issues form part of the negotiations based on para 12 of the Ministerial Declaration.³ Most of the issues that civil society groups and developing countries

² Annexe 1

³ The Doha Ministerial text, paragraph 12 states:

*“...we further adopt the Decision on Implementation-Related Issues and Concerns in document WT/MIN(01)/W/10 to address a number of implementation problems faced by Members. **We agree that negotiations on outstanding implementation issues shall be an integral part of the Work Programme we are establishing, and that agreements reached at an early stage in these negotiations shall be treated in accordance with the provisions of paragraph 47 below. In this regard, we shall proceed as follows: (a) where we provide a specific negotiating mandate in this Declaration, the relevant implementation issues shall be addressed under that mandate; (b) the other outstanding implementation issues shall be addressed as a matter of priority by the relevant WTO bodies, which shall report to the Trade Negotiations Committee, established under paragraph 46 below, by the end of 2002 for appropriate action.**”* (boldface added).

have raised form part of the list of Outstanding Implementation concerns which form part of the negotiations.

Other issues such as review of Article 27.3 (b) and 71.1 are also under the Doha Agenda as reviews but not as negotiations. The list of Outstanding Implementation issues is being dealt with by the Trade Negotiating Committee (TNC) of the WTO, who will direct the TRIPS Council on which issues to negotiate on. The TRIPS Council was supposed to have reported back to the TNC by December 2002 on progress made on the issues. However, with discussions in the TRIPS Council deadlocked on the TRIPS and access to medicines issue there wasn't much to report back on. It is best to pursue the route of outstanding implementation issues to achieve our goal. We could follow several policy options⁴ at international negotiations level at the WTO:

- **Amend TRIPS** – this could entail getting changes to the text to clarify:
 - ‘that no patents should be granted on life’ as well as for
 - ‘amendment of article 27.3b in the light of the principles of the CBD and the international undertaking, as well as several issues linked to farmers rights, food security, patentability of life, and protection of indigenous innovations.’⁵

We would need to pursue these through the WTO delegates both in the Capitals and in Geneva. We could work with selected government delegations to influence the TRIPS Council on patents on crops with the aim of them tabling papers at the TRIPS Council.

Suggestions: Africa Group on implications of patents on life

Brazil on disclosure, prior informed consent and benefit sharing, non-violation complaint

LDCs on transfer of technology, operationalisation of the objectives of the TRIPS Agreement, longer transition period,

India on farmers’ rights and indigenous knowledge

- **Clarify the Flexibilities at the international level** - Another route that could be pursued is to get an authoritative interpretation of the given flexibility in the TRIPS Agreement.

There are several key areas that need to be clarified within the TRIPS Agreement. A list of these is found in Annexe 3.

Two key outstanding issues that need clarification are:

Though TRIPS exempts plant varieties from patentability, it requires countries to grant patents on non-biological and microbiological processes as well as micro-organisms. One of the concerns is that when a plant variety is created using a micro-biological process does the end product – the resultant plant also have to be patented. Developing countries must ensure that they exclude patents on plant varieties that have been created by a patented process as the TRIPS Agreement Article 27.3 (b)

⁴ For further details on some of the policy options refer to Annexe 2

⁵ These are taken from the list of Outstanding Implementation issues

does exempt plant varieties from patentability. Infact this is law in Europe. Plant Varieties are (under the EPC) prohibited from being patentable as direct results of a patentable process in Europe (Implementing guidelines 23c)⁶.

The other area of ambiguity is what happens when a patented micro-organism is inserted into a plant – does the plant also have to be patented. Again, developing countries should use the broader interpretation to ensure that they exempt the plant from patentability.

- **Use the Flexibilities at the national level until challenged** - Another key strategy is influencing implementation of the TRIPS Agreement at the national level by working with national governments that are in the process of drafting their national *sui generis* laws to ensure that they retain the maximum flexibility allowed by the WTO and protects Farmers' Rights. In this regard it would be useful to share elements of various national *sui generis* laws that protect Farmers' and Communities Rights (eg. Indian Plant Variety Protection and Farmers' Rights Act, OAU model law). This element is the more critical one in the influencing strategy, given that not much progress has been made at the international negotiations and given that there has been some change in the analysis and perception of experts and governments on the blanket application of IP laws across the world, it is crucial that the national governments are putting in place the laws that suit their need and are appropriate with the level of their development.

Other options

There are several options for influencing the debate and practice available to civil society groups, in addition to engaging with the policy level discussions and negotiations.

Local level action

The biggest threat to Farmers' Rights to seed is their disappearance, due a number of reasons (one of them being propagation of intellectual property rights and commercial agriculture); an effective way to combat this is to make sure that there are local seed varieties in the hands of the farmers. Local level actions could go a long way, for example, encouraging farmers to save, use, exchange and sell seeds freely; organise local seed fairs celebrating the agro-biodiversity and the traditional knowledge; investing in local level information sharing on intellectual property rights and vigilance on the activities of seed companies; promoting farmer- scientist partnership on the farmers fields etc.

⁶ Rule 23c - Biotechnological inventions shall also be patentable if they concern: (a) biological material which is isolated from its natural environment or produced by means of a technical process even if it previously occurred in nature; (b) plants or animals if the technical feasibility of the invention is not confined to a particular plant or animal variety; (c) a microbiological or other technical process, or a product obtained by means of such a process other than a plant or animal variety.

<http://www.european-patent-office.org/legal/epc/e/r23c.htm#R23c>

National level action

Similarly, at the national level, it is critical that we share information and strategise on the implications of intellectual property rights for national level development and food security. Another important policy initiative could be to support public sector research in agricultural R&D that is done in conjunction with and benefits small farmers.

The ActionAid Chip Campaign

ActionAid applied for a patent on potato chips to raise awareness and understanding of the food patenting issue and how patenting rules affects the rights of poor farmers in the developing world. ActionAid launched the campaign on February 11, 2002 at the beginning of National Chip Week. In producing the ActionAid Ready-Salted chip, it worked with a food bio-scientist from Reading University. It also got chip shop/restaurant owners, a lawyer and patent experts involved to ensure that the campaign was credible, emotive, legal and effective. The filing of the application at the patent office was accompanied by street activity – road signs, distribution of chips and campaign leaflets from an ActionAid chip van.

A free spoof tabloid newspaper – Menu - was distributed at six underground stations and seven main line stations across the country by ActionAid staff and volunteers. Menu conveyed the key messages of the campaign and explained the food patent issue in an accessible and topical format. The Menu also formed part of the ActionAid lobbying package at the conference of the Commission on Intellectual Property Rights that took place at the Royal Society in London on February 21-22, 2002. Press advertising was also developed reflecting the chip theme. The campaign generated a lot of media coverage not only in the UK but other countries including India, Pakistan and Japan. The campaign was also extended to the ActionAid main website – www.actionaid.org - and our new Schools and Youth site - www.actionzone.cc - which launched with the ActionAid Chip campaign. Over 5000 supporters wrote to the Prime Minister urging him to support a ban on food patenting. The campaign helped raise the profile of the issue amongst the general public and the policy makers as well as that of ActionAid. It was one of the most successful campaigns of ActionAid in recent past in the UK.

International action

The momentum to push for ‘no patents on life’ seems to have died down at the international level and there is a need to revive the issue through public actions around the world. Global days of action are a good idea - with several groups around the world taking action on the same day nationally to highlight the injustice of the patent system. Mass postcard/email/fax campaigns targeting key negotiators have worked in the past.

ActionAid launched a seed rights campaign in 2002 targeting the US, Canadian, Japanese and European TRIPS negotiators urging them to ensure that Farmers’ Rights to save, use, exchange and sell seed is not threatened by the TRIPS Agreement. Hundreds of groups around the world wrote letters to the negotiators with their own organisation logo under the banner of the seed rights campaign serving dual purpose

of helping groups to get better informed, help them network, influence the negotiations leading to getting a response from the Canadian and EC negotiators.

Research Strategy

In order to support public campaigning and lobbying, it is necessary that our arguments be well supported. There is a need to collate information and do some further research on the implications of intellectual property rights on food security, to further understand some of the legal implications and options available and so on.

Some suggested topics are presented below:

- I. Some basic research on what patents/plant breeders rights have been granted in the country in the area of food and agriculture and if there haven't been any patents granted why not
- II. Studies on the consolidation of the seed sector in developing countries and their impact
- III. Implications of multiple IPRs protection (legal opinion on the hierarchy of different forms of IP protection – i.e. PBRs, Patents)
- IV. Research looking at the levels of investment in agriculture – both public and private funding and the trends towards it to help strengthen the argument that public funding in agriculture could be an alternative to protecting agricultural research through patenting and the preferred option for poor farmers.
- V. A short research to define 'life' – what does 'no patents on life' mean?
- VI. What is the implication of the mandatory legal protection for patenting microorganisms and microbiological processes on farmers and breeders in developing countries
- VII. What would the implications of patents on food items, especially processed foods and methods be for developing countries and food security
- VIII. A question frequently asked is that farmers can choose not to buy these patented or protected seeds. Moreover, it is also claimed that small and marginal farmers often don't buy seeds from the market and hence TRIPS and patenting will not affect them

The Doha Mandate and TRIPS

1. The Doha Ministerial mandates negotiations in the following areas:
 - The examination of the scope and modalities for the application of non-violation complaints. (Article 64.2 of the TRIPS Agreement).
 - Implementation of mechanisms for enforcement and monitoring developed countries obligations to provide incentives to their enterprises in order to generate technology transfer (Article 66.2).
 - Negotiations to extend protection of geographical indications to other products other than wines and spirits. (According to articles 23 & 24 of the TRIPS Agreement).
 - Interim suspension of granting patents that do not fulfill article 15 of the Convention on biological diversity (CBD).
 - Extension of the implementation period of the TRIPS Agreement for least developed countries.
 - Operationalization of articles 7 and 8 of the TRIPS Agreement.
 - Clarification that no patents should be granted on life.
 - Amendment of article 27.3b in the light of the principles of the CBD and the international undertaking, as well as several issues linked to farmers rights, food security, patentability of life, and protection of indigenous innovations.

2. The Declaration further mandates review in the following⁷:
 - Review of Article 27.3(b) (farmers' rights, patentability of lifeforms)
 - Review of 71.1 (Examining new developments)
 - Relationship between TRIPS and the CBD
 - Disclosure
 - Prior informed consent
 - Equitable benefit sharing
 - Protection of traditional knowledge
 - Sui generis protection, IPRs or no IPRs
 - All the above to be done taking account of the development dimension

⁷ According to the Ministerial text, paragraph.19, the TRIPS council is instructed to pursue its work programme under article 27.3b, article 71.1, and paragraph 12 of the Ministerial Declaration *“to examine, inter alia, the relationship with the Convention of Biological Diversity and the protection of traditional knowledge...”*.

We welcome the direction the Ministerial Declaration provides to the TRIPS Council in undertaking its work by focusing on *“the objectives and principles set out in articles 7 and 8 of the TRIPS agreement”* as well as *“the development dimension”*.

Annexe - 2

Policy options – Protecting Farmers’ Rights

In the context of the Doha Development Agenda, the review of Article 27.3(b) and the TRIPS review, the WTO member states could consider the following options to address some of the concerns regarding patenting of food and crops:

- Farmers’ Rights to save, use, exchange and sell farm saved seed might not be protected in the case of patented varieties. TRIPs Council should confirm that this right is not affected by the TRIPs Agreement. It is our belief that this provision is compatible with Article 30⁸ of the TRIPs Agreement.

This could be further achieved through the following means⁹:

- Substantive review of the TRIPS Agreement should clarify that nothing in the TRIPS Agreement undermines Farmers’ Rights to save, use, exchange, and sell farm-saved seed and other propagating material.
- Expand the exemptions under Article 27.2 to clearly state that Farmers’ Rights to save, use, exchange and sell farm-saved seed is excluded from the exclusive rights of the patent holder.
- Substantive review of Article 27.3b should clarify that plants and animals as well as microorganisms; non-biological and microbiological processes should be exempt from patentability. If this is not possible, then:
 - ensure that there is no requirement to patent micro-organisms, non biological and microbiological processes
 - exclude key food security/staple crops from patenting
- Substantive review of Article 27.3b should clarify that the *sui generis* system protects Farmers’ Rights to save, use, exchange and sell farm-saved seed.
- The provision for an effective "*sui generis*" legislation should be interpreted within the framework of the CBD under which the State is obliged to protect biodiversity and indigenous knowledge. This would facilitate the development of *sui generis* legislation on the protection of community rights, Farmers’ Rights and the conservation of agricultural biodiversity.

The above clarification to protect public interests and in particular Farmers’ Rights will ensure the primacy of food security and nutritional concerns vis-à-vis security of private intellectual property rights.

⁸ Article 30 states that ‘Members may provide limited exceptions to the exclusive rights conferred by a patent, provided that such exceptions do not unreasonably conflict with a normal exploitation of the patent and so not unreasonably prejudice the legitimate interests of the patent owner, taking account of the legitimate interests of third parties.

⁹Some of the following proposals have been made by developing countries; Including Brazil - IP/C/W/228 24 November 2000, India - IP/C/W/161 3 November 1999, IP/C/W/195 12 July 2000, Africa Group - WT/GC/W/302, 6 August 1999

If the matter is not ably resolved in the TRIPS Council, we believe the WTO Mexico Ministerial will benefit by clarifying and reaffirming Farmers' Rights to save, use, exchange and sell farm saved seed and other propagating material to support food security as recognised by the International Treaty on Plant Genetic Resources of the FAO.

Annexe - 3

Policy Option: Flexibility in the TRIPS Agreement:¹⁰

Article 27.3(b) of the TRIPS-agreement in its current form accommodates the following flexibilities and interpretations:

a) In applying the customary rules of interpretation of public international law, each provision of the TRIPS Agreement shall be read in the light of the object and purpose of the Agreement as expressed, in particular, in its objectives and principles.

b) Given the existence of a *sui generis* protection system on the national level, countries may decide to exempt plants and plant varieties entirely from patent protection. This includes patent protection for both products and the immediate products of patentable processes. No mention is made in TRIPS of patents for plant parts (cells, proteins, genes, gene fragments, etc.). As parts of exemptible objects they too may be exempted from patent protection.

c) If member states decide not to provide patent protection within their borders for inventions on the economically significant level of plant varieties, they are obliged to set up a *sui generis* protection system for plant varieties. TRIPS contain no specific provisions concerning the nature of such systems other than that they be “effective”. *Sui generis* systems give developing countries considerable latitude in adapting intellectual property rights for plant varieties to their socio-economic needs.

d) If they opt for *sui generis* protection instead of granting patents for plant varieties, countries may also join the UPOV-convention in one of its two valid forms. Even though formal admission on the basis of the older 1978-version is no longer possible, Members are still free to implement a protection system compatible with the 1978 UPOV-version without actually joining the association.

e) Members have the right to develop a uniform and consistent protection policy to make sure that protective instruments developed and provided for plant varieties are not subverted by other rights whose exclusivity clause might jeopardize the status of plants specifically exempted from patent protection. This is particularly important in the case of patents for micro-organisms and their components if the latter were implanted into crops by means of biotechnological procedures.

f) Members may decide to end patent protection for micro-organisms and their components once the protected object is introduced into a crop. Also, they are not obliged to redefine the cells of plants, animals or humans (or components thereof) as micro-organisms. As they implement TRIPS-provisions for their country, they also have the authority to draw their own line of separation between inventions worthy of protection and mere discoveries that deserve no such protection.

g) In their patent laws Members may include all exemptions from special protection/variety protection granted for the benefit of farmers and breeders engaged in traditional activities. They may also adjust the implementation of TRIPS-provisions

¹⁰ Achim Seiler, Science Centre for Social Research Berlin

nationally so as not to jeopardize the obligations of other relevant agreements dealing with living matter.

h) Members may impose safeguards to prevent plant genetic materials provided or extracted under the multilateral system of the FAO Seed Treaty from being subjected to restrictive patent rights. This notably includes parts and components contained therein, even if these are present in an isolated and purified form.

i) The effects of the provisions in the TRIPs Agreement that are relevant to the exhaustion of intellectual property rights is to leave each Member free to establish its own regime for such exhaustion without challenge, subject to the MFN and national treatment provisions of Articles 3 and 4.

j) We reaffirm the commitment of developed-country Members to provide incentives to their enterprises and institutions to promote and encourage technology transfer to least-developed country Members pursuant to Article 66.2. We also agree that the least-developed country Members will not be obliged to implement the provisions contained in Art. 27.3(b) or to enforce rights provided for under this paragraph until 1 January 2016, without prejudice to the right of least-developed country members to seek other extensions of the transition period provided for in Art. 66.1 of the TRIPs Agreement. We instruct the Council for TRIPs to take the necessary action to give effect to this pursuant to Art. 66.1 of the TRIPs Agreement