

## Developing Countries and TRIPs: A Case for a Full-fledged Review of Article 27.3(b)

By Genetic Resources Action International

When developing countries reluctantly signed on to the Agreement of Trade-related Aspects of Intellectual Property Rights (TRIPs) as part of the overall package of the Uruguay Round Agreements, they expected to revisit the TRIPs provision on ‘patentable subject matter’ during a substantial review scheduled for 1999. TRIPs Article 27.3(b) states that WTO Member must provide patent protection over micro-organisms and microbiological processes, such as those used in biotechnology today, but countries are free to exclude plants and animals from their patent laws. However, all nations must provide intellectual property titles over plant varieties, either through patents or through an ‘effective *sui generis* system’.

The review of Article 27.3(b) got underway one year before developing countries were obliged to implement the provision. This was important because the provision itself was a source of tremendous uncertainty in the South. Many people hoped that TRIPs could be clarified through the review and, if possible, amended to better suit the development interests of the South.

Up to now, the review has been a disappointment. It was only in July 1999 that discussions started on the substance of Article 27.3(b) rather than its implementation by WTO Members. India highlighted the need to focus on two complementary dimensions: The fundamentally political question of whether patenting life is acceptable in terms of ethics, and the need to recognise not only formal systems of innovation but informal systems as well, especially with regard to biodiversity.

In particular, India insisted on the need to reconcile TRIPs with the Convention on Biological Diversity (CBD). Malaysia took the discussion a step further by asking the WTO Secretariat to prepare a list of other *sui generis* options than that offered by the Union for the Protection of New Varieties of Plants (UPOV).

It is important to note that around this time, the preparations for the Seattle Ministerial Conference entered a critical phase. Between the July and October sessions of the TRIPs Council, almost 100 developing countries signed onto nearly a dozen proposals to reform TRIPs as far as biodiversity and indigenous knowledge were concerned. These proposals were tabled in the WTO’s General Council for negotiation at the Ministerial. The Africa Group’s position was the first and the most comprehensive from the South.<sup>2</sup> It proposed an extension of the deadline to implement TRIPs 27.3(b) for developing countries so that the review may proceed and conclude properly. It also spelled out that the Africa Group would like the review to clarify that patents on life should be prohibited, including those on microbiological processes. In the eyes of many, these two suggestions amounted to a proposal for a moratorium on implementation of the current text.

In subsequent TRIPs Council meetings, the South continued to proactively shape the frame for a review of the provisions of Art. 27.3(b), and the North also finally addressed issues of substance. The United States, for instance, argued that patenting of life forms had tremendous advantages; that UPOV 91 was what Washington would consider an effective *sui generis* system; and that there was no conflict between TRIPs and the CBD.<sup>3</sup>

Europe supported the US perspective, although it indicated that it was prepared to take into account the need to deal with ethics

and, by way of example, provide protection for traditional knowledge systems. However, the January 2000 deadline for implementation of Article 27.3(b) in developing countries arrived before any conclusions could be drawn from the mandated re-examination of the text.

Then came Seattle. Beyond the tear gas, a negotiating text reflecting proposals on TRIPs from the Africa Group and the Like-Minded Group of developing countries was on the table. One ‘Green Room’ session, involving a limited number of participants, looked at the TRIPs chapter but did not conclude anything. As the Conference was ‘suspended’ without any agreement on where negotiations stood or how they would proceed, the status of these demands is unclear, and confusion reigns at present about the obligations and opportunities generated by the review. (See page 6 for a report on the TRIPs Council’s discussion on Article 27.3(b) at its March 2000 session, *ed* ).

### Problems embedded in TRIPs Article 27.3(b)

- No parameters for what a ‘*sui generis*’ system can amount to.
- No parameters for what is ‘effective’.
- Many WTO members have expressed their view that genes and microbiological processes are not inventions and therefore are not patentable subject matter.
- with its lack of any benefit-sharing mechanism, TRIPs offers no remedy for the ongoing wave of biopiracy and is perceived as exacerbating the problem.
- There is a bias ingrained in TRIPs to protect breeders and biotechnologists at the expense of farmers and local communities.
- Many countries perceive a conflict between TRIPs and the rights and obligations countries previously acquired under the Convention on Biological Diversity (CBD).

In addition, there is evidence that plant variety laws inspired by the Union for the Protection of New Varieties of Plants (UPOV) have no positive impact on food security<sup>1</sup>, a matter that the TRIPs Council has not looked into.

### Implementation of Article 27.3(b) in the South: State of Play

The vast majority of developing country WTO Members have approached their obligation to grant intellectual property rights over plant varieties through ‘an effective *sui generis* system’ – whatever that means – rather than patenting.<sup>4</sup> The deadline to have such legislation in place<sup>5</sup> was 1 January 2000.

Despite the threat of possible trade sanctions, only a few developing countries managed to adopt such legislation in the final hour. To our knowledge, only 21 of them currently have plant variety protection (PVP) legislation in place (see chart on next page). Leaving out the 29 ‘least-developed’ WTO Members, whose transition period ends 1 January 2006, we now face a situation where 47 Third World countries which are party to TRIPs have not enacted IPR protection for plant varieties. This means that 70 percent of the (non-LDC) developing countries that participate in the WTO system are presently in arrears of their obligations regarding TRIPs Article 27.3(b), and could be considered targets for dispute settlement proceedings on grounds of non-compliance with their WTO obligations.

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This does not mean that developing countries are inactive on the legislative front. Far from it. India, Egypt and the Philippines have final drafts under scrutiny by their national assemblies right now. Costa Rica, Malaysia, Pakistan and Egypt are either discussing drafts or have them awaiting Cabinet approval for submission to Parliament. Many other countries are still drafting. For example, most of the member states of the Organisation of African Unity are deeply engaged in a process to develop national legislation based on a regional Model Law, which was only finalised last November. The OAU Model Law covers not only breeders' rights but also farmers' rights, benefit-sharing and rules on access to genetic resources. The 15 members of the Organisation Africaine de la Propriété Intellectuelle revised the Bangui Agreement in February 1999, incorporating a UPOV-based system of intellectual property rights for plant varieties. But to the best of our knowledge, national PVP laws drawn from the revised Bangui Agreement are not yet in force.

Nevertheless, the message is that despite four-year transition periods, despite best intentions to bear the cost of inclusion in the WTO trade system, as well as the pressure and countless workshops organised by the industrialised world, including UPOV, *developing countries are not ready to implement TRIPs Article 27.3(b)*. They have good reason to be in this state: since the mid-1990s, they have been under intense, often unilateral, pressure from industrialised countries to follow the UPOV model of plant variety protection as a means of implementation – something which many developing countries strongly feel is not in their interest. The WTO itself joined in this campaign by sponsoring a series of workshops for developing countries on UPOV-as-*sui-generis*-solution even while hosting a review, which was supposed to revisit the very provision. Then, proposals from developing countries to clarify what the Article means, not only through the TRIPs Council review but a Ministerial Conference, were not dealt with. Finally, commitments to other treaties that TRIPs overlaps with, *viz.* the CBD and the International Undertaking at FAO, have inclined many developing countries to want to ensure that community rights and farmers' rights are not torpedoed by rash legislation favouring industrial plant breeders.

The developing countries that did adopt UPOV-based PVP laws reacted understandably to all these conflicting pressures. But they did so in most cases – not all – without meaningful consultation or debate with those who will be most affected: the farming and indigenous communities. They certainly did not, in any case, resolve the underlying conflicts.

#### For a Full-fledged Review

It is hard to escape the conclusion that a full and thorough review of Article 27.3(b) is imperative. The current text is the result of a compromise between Europe and the US, with no proper consideration of the interests of developing countries or of the principles embedded in the Convention on Biological Diversity and other international agreements. In addition, the text as it stands

is full of dangerous ambiguities. Rather than bulldoze ahead and force inappropriate legislation upon developing countries and their farmers, it is important to seriously review the Article as originally agreed, and clarify its scope, meaning and objectives taking into account all these interests and concerns.

In that context, the Africa Group has offered the most comprehensive proposal on how to move forward and it merits full support – and active implementation – without further delay. It can be seen as leading to a moratorium since it demands a thorough review procedure, an extension of the transition periods and specific clarifications, which would result in amendment of the treaty. However one designates it, this in no way means that countries should abandon their efforts to develop balanced

national systems of rights in the meantime. On the contrary, putting the African proposal into action should provide the appropriate time and space for developing countries to elaborate, in a more integrated and consultative way, legislation that properly meets their needs. Protecting biodiversity, promoting its sustainable use and giving fair recognition to the rights and interests of local communities and indigenous peoples cannot be sidelined from implementation of TRIPs. These objectives and issues go far beyond the scope of any world trade system, but they

stand directly in the way of the current WTO TRIPs Agreement.

The collapse of the Seattle process could very well mark the start of a new era in which developing countries increasingly and successfully challenge the over-expanding reach and undemocratic functioning of the WTO, and the way it has served the interests of the industrialised world and its corporations. In that context, these are times to review and rebuild – not to rush ahead and adopt inappropriate IPR laws.

*This article is adapted from a longer, fully footnoted, paper entitled 'For a Full Review of TRIPs 27.3(b) – An Update on Where Developing Countries Stand with the Push to Patent Life at the WTO', produced by Genetic Resources Action International (GRAIN), based in Barcelona, Spain. The report is available at: <http://www.grain.org/adhoc.htm>*

#### ENDNOTES

<sup>1</sup> GRAIN (1999). *Plant variety protection to feed Africa? Rhetoric versus reality*, Barcelona, October. <http://www.grain.org/publications/reports/variety.htm>

<sup>2</sup> *Preparations for the 1999 Ministerial Conference: The TRIPs Agreement. Communication from Kenya on behalf of the African Group*. WTO, Geneva, WT/GC/W/302, 6 August 1999.

<sup>3</sup> *Article 27.3(b): Views of the United States of America*, paper presented at the TRIPs Council, WTO, Geneva, 20 October 1999.

<sup>4</sup> At present, only the United States and the Republic of Korea explicitly provide patent protection for plant varieties.

<sup>5</sup> Some interpret this deadline as one requiring that the process to implement was in motion, but not necessarily completed.

<sup>6</sup> Cameroon ratified – without parliamentary discussion – but there is still no national law in force. In the other countries, the ratification process is reportedly stalled.

