تعليق على قرار
عدم الإنجاز الكامل لمراجعة المادة ٢٧,٣ (ب) من اتفاقية الجوانب المتصلة بالتجارة من حقوق الملكية الفكرية (TRIPS)ضمن إطار مفاوضات جولة الدوحة

The Unfulfilled Review of Article 27.3(b) and the Doha Round (2001-2025)

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Despite not having officially ended, the Doha Round- launched under the Doha Development Agenda in 2001- is widely considered as reaching a stalemate. The round's main goal is to make international trade rules more equitable for developing nations in the areas of services, agriculture, and intellectual property. Article 27.3(b) of the TRIPS Agreement is one of the most contentious provisions of the TRIPs Agreement considering its effects on plant patenting, food security, and agricultural development in developing nations. Article 27.3(b) creates uncertainty with regard to its legal implications in respect of the patenting of a cell or gene of a plant, and plant varieties, and this could have serious consequences on the flow of plant genetic resources and thereby on food security

المستخلص

على الرغم من أن جولة الدوحة ،والتي أُطلقت في إطار أجندة الدوحة للتنمية عام ٢٠٠١، لم تُختتم رسميًا إلا أنها تُعتبر في حالة جمود تام. الهدف الرئيسي لمنظمة التجارة العالمية من هذه الجولة هوجعل قواعد التجارة الدولية أكثرعدالة للدول النامية خصوصًا في مجالات الخدمات والزراعة وقواعد الملكية الفكرية، اذ تُعد المادة ٢٧,٣(ب) من اتفاقية التربس إحدى أكثر المواد إثارة للجدل نظرًا لتأثير براءات الاختراع النباتية على الزراعة والأمن الغذائي والتنوع الحيوي في الدول النامية. يتسال المقال عن مصير مفاوضات منظمة التجارة العالمية بعد مروروربع قرن على انطلاقها. لذا، يسلط هذا المقال الضوء على مفاوضات التجارة المتعلقة بالمادة ٢٧,٣(ب) من اتفاقية التربس مع التركيز على آثارها التنموية والبيئية. ان عدم التوصل إلى اتفاق بشأن منح هذا النوع من براءات الاختراع قد ساهم في الجمود الأوسع الذي يعيق تحقيق إصلاح حقيقي داخل النظام التجاري المتعدد الأطراف. لان فشل مجلس اتفاقية التربس في تفعيل المادة (٧١.١) يُقوّض من شرعية عمل المجلس حيث يعكس اختلال موازين القوى السائد في القانون التجاري الدولي.

1. Introduction

Despite not having officially ended, the Doha Round- launched under the Doha Development Agenda in 2001- is widely considered as reaching a stalemate. The round's main goal is to make international trade rules more equitable for developing nations in the areas of services, agriculture, and intellectual property. Article 27.3(b) of the TRIPS Agreement is one of the most contentious provisions of the TRIPs Agreement considering its effects on plant patenting, food security, and agricultural development in developing nations. Article 27.3(b) creates uncertainty with regard to its legal implications in respect of the patenting of a cell or gene of a plant, and plant varieties, and this could have serious consequences on the flow of plant genetic resources and thereby on food security.

However, the developments in plant patents and patenting of plant native traits are taking place at the time that Article 27.3(b is under consideration as part of the latest round of trade negotiations of the WTO. In addition, new dynamics have emerged with the adoption of the WIPO treaty, regarding disclosure requirements pertaining to traditional knowledge and genetic resources. This adoption puts pressure on the WTO, particularly the TRIPS Council, to move on with long-stalled negotiations Under Articles 27.3(b) and 71.1. Thus, this essay examines the outcomes of the trade negotiations surrounding Article 27.3(b) of the TRIPS Agreement, with a focus on its developmental implications on agriculture, food sovereignty and biodiversity. It highlights how not reaching an agreement on the patentability of plants and animals has contributed to the broader stagnation in reaching real reform within the multilateral trade system.

2. Background: The Doha Round and the Review of the TRIPs Agreement

The Doha Declaration provided the mandate for trade negotiations, including IPR issues of the TRPs Agreement. The TRIPs Council was instructed to review relevant TRIPs provisions, which began earlier

in 1999. In doing so, the guiding principles of the TRIPs council are those of Articles 7 and 8 of the TRIPs Agreement, and in addition they were to fully take into account the development dimension.[1] Article 7 entails that the protection and enforcement of IPRs should contribute to the promotion of technological innovations, and to technology dissemination in ways that ensure social and economic welfare. Article 8 allows parties to take measures that are necessary 'to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development…' After thirteen years of negotiations, the implications for the planet far exceed those that the Doha Round attempted to address. The question is what will be the outcome of the Round that declared: 'we do it for development'? [2]

While developed counties sought to limit the review to the implementation measures of the TRIPs Agreement, developing nations were more concerned with obtaining a review of its text.[3] The debate is wide ranging and covers the patentability of biological material and life forms, the absence of parameters for what constitutes an effective *sui generis* system for the protection of plant variety, the impact of patent and plant variety protection on food security, the protection of traditional knowledge, the relationship between the TRIPs Agreement and CBD and its effect in order to promote biodiversity conservation, and the issue of biopiracy.[4] The review started, but so far have not ended. A number of developing countries proposed a disclosure of the origin of genetic resources and associated traditional knowledge mechanism. Alternative approaches discussed included databases of genetic resources and associated traditional knowledge, and 'national-based approaches to enforce prior informed consent and fair and equitable benefit sharing'.

A proposal submitted by six developing countries, including Brazil, India and Peru suggested an amendment to the TRIPs Agreement so as to ensure support for the disclosure mechanism. The proposal endeavors to incorporate a new Article 29 *bis* into the Agreement.[5] It requires a patent application to include provisions relating to the disclosure of the origin of genetic resources and associated traditional knowledge, along with evidence of prior informed consent and fair and

[1] Article 19 of the Doha Ministerial Declaration.

[2] It seems important to mention that even the name or the title chosen to designate the nature of the round was criticised on the ground that there are many tools to influencing development, and trade is only constitutes one of these tools, and therefore, negotiation of development within the WTO has no mandate. On account of that liberalisation of trade would be then WTO contribution to development, while the question of whether such a liberalisation model is appropriate for developing countries was originally not considered by the WTO. Petros C. Mavroidis, Doha, 'Dohalf or Dohaha? The WTO Licks its Wounds' (2011) 3(2) Trade, Law and Development, 367,370.

[3] Laurence R. Helfer, *Intellectual Property Rights in Plant Varieties: International Legal Regimes and Policy Otions for National Governments* (FAO Legislative Study 85, 2004) 85.

[4] Grain, 'For Full Review of TRIPs 27.3(B): An Update on Where Developing Countries Stand with the Push to Patent Life at WTO' (Grain, March 2000) < http://www.grain.org/article/entries/39-for-a-full-review-of-trips-27-3-b> accessed 10 May 2012.

[5] See document WT/GC/W/564/Rev.2/Add.2, TN/C/W/41/Rev.2/Add.
IP/C/W/474/ Add. 2. Is it the right way?

equitable benefit-sharing.[1] Developed countries have questioned the need to amend the TRIPs to include the disclosure mechanism. The EU supports the establishment of disclosure requirements but not necessarily within the WTO.[2] It considers the WIPO to be the appropriate forum for this purpose, especially its Intergovernmental Committee on Intellectual Property, Genetic Resources, Traditional Knowledge and Folklore established in 2001. The US strongly opposed the idea of mandatory disclosure of origin. The USA, which is not a party to the CBD, and also Japan deny the existence of any conflict between the two agreements as each addresses a separate issue.[3]

A draft modality text on IP, including a disclosure clause, was submitted at the mini-Mistrial Conference in 2008. The draft was supported by the majority of developing countries and a number of developed countries. However, some member states refused the proposal, claiming that IP issues should not be negotiated along with the liberalisation of trade, agriculture and industrial goods in the Doha Round.[4] Discussions in the following years were built on the common ground reported in 2008, broad support of WTO members for the CBD's principles on prior informed consent and fair and equitable benefit sharing, and agreement on the importance of avoiding erroneous patents.[5] Even though, they differ on whether the formulation and application of a specific disclosure mechanism would be the most effective way of supporting compliance with the CBD objectives, especially its ABS regime, or other mechanism such as database system, should be preferred. [6]

In 19 April 2011, a draft decision to enhance supportive relationship between the TRIPs Agreement and the CBD was circulated at the request of India, Brazil, Peru, China and the African Group.[7] Article 28 *bis* (2) of the draft postulates that if a patent application involves the use of genetic resources and/or traditional knowledge, it must disclose: '(i) the country providing such resources... (ii) The source in the country providing the genetic resources and/or traditional knowledge'.[8] Article 28.1(i) uses language corresponding to the CBD and NP in defining a provider country. It divides countries providing such resources into two categories 'country of origin' and 'country that acquired these resources in accordance with the CBD'. It also obliges a patent applicant to provide a copy of an Internationally Recognized Certificate of Compliance, or if it is not applicable in the providing country, all other relevant information.

[1] Ibid.

[2] Ibid.

[3] Jonathan Carr, 'Agreements that Divide: TRIPs VS. CBD and Proposals for mandatory Disclosures of Sources and Origin of Genetic Resources in Patent Applications' (2008) 18 (1) Journal of Transnational Law and Policy,131, 144.

[4] Jorge C. Medaglia(nError! Bookmark not defined.)27.

[5] See document WT/GC/W/633 — TN/C/W/61(21 April 2011).

[6] Ibid.

[7] Communication from Brazil, China, Colombia, Ecuador, India, Indonesia, Peru, Thailand, the ACP Group and the African Group, TN/C/W/59(19 April 2011).

[8] Ibid.

The disclosure of origin is intended to be a pre-condition for the grant of patent. Article 28 bis (3) recognises that the completion of the disclosure requirement is a pre-condition to the processing of a patent application. Paragraph 28.5 calls upon members to put in place appropriate and effective measures that permit effective action against non-compliance with the disclosure requirement. It states that administrative and criminal sanctions could be imposed by member states in cases of failure to meet the disclosure requirements or provision of fraudulent information. Violation of the disclosure obligation could lead to revocation of a patent.

The underlying reason for the draft decision, as stated in Article 28.1, is to ensure a supportive relationship between the TRIPs Agreement and CBD. This is confirmed in Article 29 bis(1) of the draft which calls upon members of the WTO to have regard to the principles, definitions and objectives of the TRIPs Agreement, CBD and the NP, and particularly the provisions for fair and equitable benefit-sharing. The draft decision uses language that mirrors the CBD. The concept 'supportive relationship' seems to be derived from the principle 'mutually supportive manner' which has been adopted in recent multilateral environmental agreements, and which takes on a specific meaning in the context of environment and trade.[1] In this context, it functions as an interpretive principle that governs the interface between multilateral environmental agreements and other relevant agreements requiring conciliatory reading of potentially conflicting rules in these agreements.[2]

3. Paving the way for new trade negotiations

The 12th Ministerial Conference (MC12) -help in June 2022, is widely regarded as establishing a new global trade agenda.[3] Hence it shifted from the Doha Round's wide-ranging, development-oriented discussions, giving way to more focused, plurilateral, issue-specific agreements. However, it is argued that the new agenda mainly reflects the interests of advanced economies, the issue that could have major impacts on the legacy of the Doha round.[4] The absence of Art.27.3(b) indicates that the 13th Ministerial Conference of the World Trade Organization is not currently focused on advancements in this field.[5] Instead, developments were achieved in areas like fisheries subsidies, dispute settlement and e-commerce.[6] This omission of the developmental implications related to the patenting of plant genetic resources suggests that on the global trade agenda have been deprioritize.

[1] Thomas Greiber et al. An Explanatory Guide to the Nagoya Protocol on Access and Benefit-Sharing (IUCN, Gland, Switzerland 2012) 79.

[2] Ibid.

[3] World Trade Organization, Twelfth WTO Ministerial Conference – Geneva, Switzerland (17 June 2022) https://www.wto.org/english/thewto_e/minist_e/mc12_e/mc12_e.htm accessed 23 April 2025.

[4] M. Bickenbach and A. Berger, 'The World Trade Organization before the 13th Ministerial Conference', German Institute of Development and Sustainability (IDOS), 12 February 2024, available at: https://www.idos-research.de/en/the-current-column/article/the-world-trade-organization-before-the-13th-ministerial-conference/ (last accessed 20 April 2025).

[5] Ibid.

[6] Ibid.

Although the review is still ongoing, limited progress has been made. As of 2024, the TRIPs Council continued the discussion of Art. 27.3(b), yet no agreement has been reached on major reviewed issues related to the patenting of plants and plant varieties. At the general meeting of the WTO in March 2024, Colombia in cooperation with India, Egypt and Bangladesh presented their proposal on TRIPs and development.[1] The proposal submitted by these countries focused on the real-world implications of a strong and expansive intellectual property system, especially in relation to food, health and climate change.[2] The intervention echoed calls for reform describing TRIPs as a source and a symptom of current inequalities between developed an developing countries.

It becomes clear that developed countries delayed and continue to delay any meaningful reform of Art. 27.3(b). It can be said that these countries treat IPRs as nonnegotiable rights using their international position and influence as Sharma describes “"For almost 30 years, the industrialized countries, particularly those countries that regard intellectual property rights on 'theological' grounds, have scuttled the TRIPS-review discussions."[3]

3. Conclusion

The need to create a new real trade agenda is obvious after the continuous failure of the WTO to fulfil its obligations under the Doha Development Agenda, specifically the mandatory review of Article 27.3(b) of the TRIPS Agreement. Art. 71.1 mandates the Council to review the implementation of Art.27.3(b) following the expiration of the transitional period for developing countries as sated in Art.65.2.[4] Until now, the Council for TRIPs has failed to operationalise Art. 71.1.[5] This failure undermines the legitimacy of the TRtheir and its broader framework of the WTO reflecting the power asymmetries present in the international trade law.

Extending the period stipulated in Article 71 may be justifiable if it does not lead to missing the objectives of reviewing Article 27.3.(b) which are mainly developmental related to food and agriculture. Of course, a quarter of a century is a long and unacceptable period, and it has harmed the interests of member states, especially developing and least developed countries, considering the crises the world has faced since COVID-19 and the current political and economic challenges. The failure of the Doha Round to achieve its objectives has far-reaching implications including a loss of trust in the Doha Round itself and in any future similar negotiations.

[1] Sharma, D. (2024). WTO: General Council discussions muddle on following MC13 failure. Third World Network. Retrieved from https://www.twn.my/title2/wto.info/2024/ti240316.htm

[2] Ibid.

[3] Ibid.

[4] Ibid.

[5] Ibid.

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(2601) 2022

JOURNAL OF NINEVEH FOR LEGAL STUDIES

A REFEREED QUARTERLY JOURNAL
ISSUED BY THE COLLEGE OF LAW
UNIVERSITY OF NINEVEH

VOL. (2) NO. (2) March. 2025

ISSN 2957-7721 (PRINT)
ISSN 3078-6274 (ELECTRONIC)
THE ID IN IRAQ NATIONAL LIBRARY
AND ARCHIVE BAGHDAD (2601) 2022