

Violation of Right to Food in Developing Countries: Crosscutting issue of Patenting Gene Modified Crops

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On 1st January, 1995, the WTO brought an agreement which has the force of law across the nations, which is the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) for protection of Intellectual Property Rights. The world was not at the same level when such agreements were brought to force. There were differences on the social, economic and cultural front. There were therefore conflicts in implementing such laws.¹

United States has been very active in obtaining intellectual property protection for its agricultural biotechnology during TRIPS negotiations. This strong protection for gene seeds has increased concerns for other countries' farmers and non-governmental organizations.

The only argument these countries have is the concept of 'food sovereignty'. This implies that "the right of each nation to maintain and develop its own capacity to produce its basic foods respecting cultural and productive diversity."² The content of this rights is controversial and unclear as to the basic concept of human rights. The present paper is inclined towards applying human right approach to this protection of Genetically Modified Crops.

The obligation which is there is CESCR says that every member state has to work towards progressive realization of socio-economic rights, which incidentally also includes right to

¹ One example of such a conflict was the dispute between South Africa and American- and European-backed pharmaceutical industries over South Africa's right to allow cheap parallel imports of patented AIDS medicine. Another example was the U.S.-Brazil dispute over compulsory licensing of AIDS medicine in Brazil. The attention of legal scholars consequently focused on the incompatibility of TRIPS provisions with the right to the highest attainable standard of health care pursuant to Articles 12(1) and (2)(c) of the CESCR.

² Stefan Flothmann & Juergen Knirsch, People over Profit: WTO and GMOs in the Context of Food Security, Food Safety and Sovereignty, in WORLD TRADE, FOOD AND AGRICULTURE - A LOOK AT THE WORLD TRADE ORGANIZATION, GENETICALLY MODIFIED ORGANISMS AND THE ISSUE OF FOOD SECURITY 68 (The Heinrich B611 Foundation ed., 2001), available at <www.boell.org/docs/WTO-Food-GMO.pdf>. (Visited on 12/07/23)

food.³ The present regime is drawing more focus towards protection of intellectual property rights but the one basic aspect of human rights which is right to food, cannot be ignored. The states while framing legislations for IP legislation and agricultural policies will have to keep in mind that they have to promote right to food as well.

1. Rights of Farmers *vis a vis* Multinational Seed

Developing countries perspective has to be understood while dealing with such kinds of policies. In these countries small hold farmers play a significant role in domestic food production.⁴ It is a well settled scenario where major agricultural biotechnology companies are now aiming towards seed market of these countries. The contention of these companies is that GE crops will combat hunger and malnutrition by increasing the productivity but the reality is that cause of hunger and malnutrition is not the production but sometimes it's the accessibility.⁵ Considering India who has 320 million hungry people despite the fact that over 60 million tons of food grains were available in silos in 2001.⁶ Therefore it is to be suggested that 80 percent of people suffering hunger are actually residing in food exporting countries.⁷ This low productivity is also associated with the macro-economic situation of the countries, so it can not be suggested that only GE seed will actually lead to 'miracle crop'.⁸

Macro-economic situation of any country decides that what kinds of seeds the farmers going to use. Farmers in developing countries generally buy seeds but instead they rely on cultivation of wide varieties and the saving and swapping seeds.⁹ Now if these farmers will start cultivating these GE crops, they will have to sign under new IP regimes and thereby they will be under

³ International Covenant on Economic, Social and Cultural Rights (CESCR) art. 2(1), Dec. 16, 1966, 6 I.L.M. 360, 361, available at <www.unhcr.ch/html/menu3/b/a_ceschr.htm>.

⁴ Peter Rossett, Genetically Engineered Crops - will they feed the hungry and reduce poverty? LEISA MAGAZINE, Dec. 2001, at 6. Timothy Byakola, The Fallacy of Genetic Engineering and the Small Farmers in Africa, in VOICES FROM THE SOUTH - THE THIRD WORLD DEBUNKS MYTHS ON GENETICALLY ENGINEERED CROPS 7-12 (Ellen Hickey & Anuradha Mittal eds., 2003), available at www.foodfirst.org/pubs/other/voices/tocandintro.pdf (Visited on 12/07/23)

⁵ Devinder Sharma, Biotechnology Will Bypass the Hungry, in VOICES FROM THE SOUTH - THE THIRD WORLD DEBUNKS MYTHS ON GENETICALLY ENGINEERED CROPS 21-23 (Ellen Hickey & Anuradha Mittal eds., 2003), available at <www.foodfirst.org/pubs/other/voices/tocandintro.pdf>. (Visited on 20.07.23)

⁶ *Ibid.*

⁷ Food First, GMOs: The Wrong Answer to the Wrong Problem - Interview with Rafael Mariano, Head of the Peasant Movement in the Philippines, in VOICES FROM THE SOUTH - THE THIRD WORLD DEBUNKS MYTHS ON GENETICALLY ENGINEERED CROPS 6-7 (Ellen Hickey & Anuradha Mittal eds., 2003), available at <www.foodfust.org/pubs/other/voices/tocandintro.pdf>. (Visited on 20/07/23)

⁸ It is presumed by companies that raising the productivity of small farmers and developing crops which addresses the special needs of malnourished people, such as vitamin-rich grains, known as "golden rice".

⁹ *Supra* Note 6.

obligation to buy new seeds every season. The pressure¹⁰ exerted by developed countries on developing countries to incorporate more and more protection towards intellectual property rights will eventually cause these problems for the farmers of developing countries.

2. The Right to Food

When talking about the necessities of life, three things come to mind, i.e food, clothing and shelter. Right to food is basic right which should be made available to every human being. There are many national and international Conventions which provide for this. Right to food was first recognised as a human right in Article 26(1) of Universal Declaration of Human Rights, 1948¹¹ and is also dealt with in Article 11 of International Covenant of Economic, Social and Cultural Rights, 1966.¹² Right to adequate food does not only mean to satisfy the hunger but also include food which is culturally appropriate, appropriate to the physiological needs of the person and free from adverse substances.¹³

The availability and accessibility of food is implicit in right to food. To make food available it must be locally produced and transported to the place of demand.¹⁴ Along with availability of food, it must be economically and physically accessible to the people. Economical accessibility requires the food to be reasonably priced and an adequate minimum wage and food subsidies. Physical accessibility requires it to be accessible to every age group, disabled person and remote areas.¹⁵

Sustainability of access to food is also an important component of right to food. It requires that access is available not only during peace times but also during crisis situations. The supply and access to food must be maintained during the crisis situations like recession and pandemic for

¹⁰ to join international (TRIPS) and bilateral (TRIPS plus) agreements on the protection of intellectual property. These agreements would obligate them to modify their domestic IP laws and to protect foreign intellectual property according to Western standards.

¹¹ Universal Declaration of Human Rights, G.A. Res. 217 (III), U.N. Doc. A/217 (Dec. 10, 1948).

¹² The International Covenant on Economic, Social and Cultural Rights (hereinafter "ICESCR"), G.A. Res 2200 A (XXI) of 16 December 1966

¹³ Asbjom Eide, *The Right to an Adequate Standard of Living Including the Right to Food*, in *ECONOMIC, SOCIAL AND CULTURAL RIGHTS - A TEXTBOOK 90* (Asbjom Eide, Catarina Krause & Allan Rosas eds., 1995).

¹⁴ UN Committee on Economic, Social and Cultural Rights, General Comments 12 - The Right to Adequate Food, U.N. Doc. E/C. 12/1999/5 (1999) at p.12.

¹⁵ *Ibid* at p.13.

the present and the future generations.¹⁶ This can be achieved by self-reliance than by depending on outside aid.

Opponents of GM crops advocates that dependence of GM seeds destroys right to food. If the agriculturist become overly dependant on GM seeds it affects the physical and economic accessibility of food. And continuous use of GM seeds also affects food security.¹⁷

3. Right to Food and Patenting of Gene-modified crops

Seeds are by their nature, self-replicating. Essentially, a farmer only needs to buy the seeds once. As is the practice among many farmers, they save some seeds from their first harvest. But the MNCs from whom the farmers buy the GM seeds make the farmers sign agreements which prevent them from saving seeds from their harvest and also prevent them from swap them with other farmers.¹⁸ As these patented GM seeds tends to spread out to that plant varieties, additional legal measures are taken by these MNCs to prevent their invention from falling into public domain.

Small and peasant farmers prevalent in developing countries are not ideal customers for these MNCs. These farmers mostly operate with little or no resources and cannot buy new seeds. They rely on seeds saved from harvests and on seed swapping with other farmers. Which is prevented buy these GM seed producing corporations.

The same small farmers are necessary for the sustainable access to food in these developing countries. It is through these local farmers the right to food can be realised. They contribute to local availability of food and ensure that the prices are not influenced by world markets.¹⁹

The cultivation of GM crops is the antithesis of sustainable and self-reliant food production.²⁰ Farmers who cultivate GM seeds become dependant on them and the requirement to purchase the seeds every single time. And also, this also makes food stability to be highly reliant on

¹⁶ Peter Straub, *Farmers in the IP Wrench - How Patents on Gene-Modified Crops Violate the Right to Food in Developing Countries*, 29 *Hastings INT'L & COMP. L. REV.* 187 (2006) at p. 194

¹⁷ Jayashree Watal, *INTELLECTUAL PROPERTY RIGHTS IN THE WTO AND DEVELOPING COUNTRIES* 162 (2001).

¹⁸ *See supra* note 18 at pg. 196

¹⁹ *See supra* note 6 Rossett, at 6.

²⁰ *See supra* note 18 at pg. 197

natural disasters, price fluctuations, and other outside influences.²¹ If the farmer is subject to a bad harvest or because some other reasons, he loses his income he cannot afford to buy new seeds for the next season.

Patent monopolies in GM seeds will allow the companies to keep the prices high, reduced supply and thus getting more profits. This will in turn affect right to food as the food prices would soar thus affecting the accessibility to food. High food prices and economic unavailability are the major causes of hunger.²² For example, in India and Bangladesh, hundreds of people are going hungry when the grains are rotting away storages, because the poor cannot afford the food.²³

4. Conclusion

The scope of patents and gene modified crops is increasing day by day. Sometimes very aggressive measures are employed for their protection by transnational seed corporations which impacts farming practices. In developing countries, the productivity of small farmers is directly related to food security and if such gene modified seeds will be introduced then it will eventually affect the human right to adequate food for the local population. Thus, as argued in the second part of the article that the governments shall be more concerned for enacting intellectual property legislations which respects and protects human rights. The main consideration is that TRIPS and other international instruments place restrictions on the sovereignty of States in this regard, options still remain as to how States can reconcile their human rights obligations with their international obligations to protect intellectual property rights.

The states are faced with two opposite obligations. These both obligations are deriving their force from moral legitimacy. In such scenario state is more likely to choose the one that is backed by more forceful mechanism. As demands for a high standard of IP protection are in a way supported by threat of trade sanctions under TRIPS Dispute Settlement Understanding and

²¹ *Ibid* at pg.198

²² *See supra* note 18 at pg. 199

²³ Anuradha Mittal, *Technology Won't Feed World's Hungry*, in VOICES FROM THE SOUTH - THE THIRD WORLD DEBUNKS MYTHS ON GENETICALLY ENGINEERED CROPS 24 (Ellen Hickey & Anuradha Mittal eds., 2003), available at <www.foodfirst.org/pubs/other/voices/tocandintro.pdf>. (last visited on 28th July, 2023)

by essentially illegal²⁴ because unilateral trade sanctions through United States, developing countries will succumb to these demands.²⁵

It has been predicted keeping in mind the present scenario that there is a possibility of a revision of Article 27.3 (b) of TRIPS agreement²⁶ in favour of developing countries but this revision will depend on political strength of environmental NGOs in developed countries.²⁷ Therefore for NGOs its very important to strengthen their influence and that can be done by them when they give legal basis to their demands. Ultimately, they will have to establish that they their demands are based on ‘hard’ human rights not on some ‘fuzzy’ values. Until this happens the right of food for people of developing countries will be in abyss and it may even over run by technological gene changes in agriculture as a part of new standards of IP protection.

²⁴ Jayarashree Watal, Perspectives from National Systems and Universities: India, in INTELLECTUAL PROPERTY RIGHTS IN AGRICULTURE: THE WORLD BANK'S ROLE IN ASSISTING BORROWER AND MEMBER COUNTRIES 53 (Uma Lele, William Lesser & Gesa HorstkotteWesseler eds., 2000)

²⁵ The TRIPS Agreement outlaws unilateral trade sanctions against non-compliant countries. Disputes about minimum standards must instead be handled in multilateral procedures under the Dispute Settlement Understanding. This makes the unilateral trade sanctions under Section 301 U.S. Trade Act, which are still applied by the United States, illegal.

²⁶ Broadly speaking, part (b) of paragraph 3 (i.e. Article 27.3 (b)) allows governments to exclude some kinds of inventions from patenting, i.e. plants, animals and “essentially” biological processes (but micro-organisms, and non-biological and microbiological processes have to be eligible for patents).

²⁷ *Supra* Note 26.