

A dialogue on trade and development in South Asia

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● TRADE ●

# insight



and

Development Concerns in

# South Asia

IPRS AND GENDER | PROTECTING FARMERS' RIGHTS | TRIPS AND ACCESS TO MEDICINE

## Intellectual Property Rights and Development

**INTELLECTUAL** property (IP) refers to creations of the mind: inventions; literary and artistic works; symbols, names and images; and designs used in commerce. Intellectual property rights (IPRs), exclusive rights or monopolies to the creators (inventors) of IP in the forms of patents, copyrights, trademarks etc., have now become an integral part of the market economy. Most economies today, including those in South Asia, have laws that provide protection to IP. However, with the rapid growth in international trade, policies related to IPRs are no more confined to the national sphere but have also become an important element of international economic governance.

The inclusion of the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) in the World Trade Organization (WTO), despite vehement opposition by developing Members, means that all WTO Members are obliged to provide a minimum protection to IP. Though stronger IPR regimes are said to encourage innovation and benefit the economies as a whole through enhanced investment and technology transfer, they do not merely create restrictions on the use of new products and processes but also pose various challenges to the developing countries, including those in South Asia.

Most developing countries lack the institutional, financial and human capacity to implement such regimes. Stronger protection and longer periods of monopolies to right holders, especially those on medicines, are likely to make healthcare expensive, and in most cases, out of the reach of the poor in these countries. Similarly, the need to provide protection to new plant varieties may affect the biodiversity and agricultural systems in developing countries. Stronger IPR regimes espoused by TRIPS pose a threat of misappropriation of biological and genetic resources and traditional knowledge, jeopardising the rights of their local, indigenous and farming communities. Furthermore, if proper safety nets are not introduced, these impacts are likely to aggravate gender disparities as women are more vulnerable to negative consequences in the health and agricultural sectors.

Given that many developing countries are already Members of the WTO and need to provide a minimum IP protection, it is important that they utilise the flexibilities in the WTO system to use IPRs as a tool to achieve their development objectives. The recent examples of some developing countries indicate that this is possible. Thailand and Rwanda have used the flexibilities in TRIPS to provide cheaper HIV/AIDS drugs to their citizens. Similarly, India has enacted the Plant Variety Protection and Farmers' Rights Act, which ensures that those who commercialise the knowledge or plant varieties that have been preserved and developed by farmers or local communities share the benefits with the latter. The developing countries can also use "geographical indications", a form of IPR recognised by TRIPS, to promote their "indigenous products" in the international market.

While utilising the flexibilities in the WTO system, developing countries need to be cautious that they do not bind themselves to implementing stricter IPR regimes than those required by the TRIPS Agreement. Some developed countries have been eager to ratchet up IPR standards through bilateral and regional trade agreements, which have "TRIPS plus" clauses.

It is important to ensure that developed countries do not restrict the "policy space" of developing countries but assist them in realising their development goals. In this process, developed countries need to show flexibilities and provide assistance to developing countries for enabling them to address the challenges of and benefit from IPRs. ■

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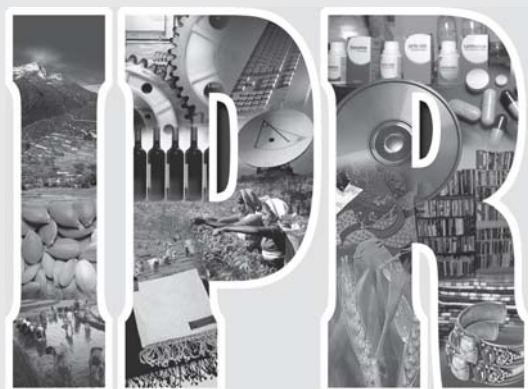
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### SRI LANKA

1. Law & Society Trust (LST), Colombo



## Member States adopt Development Agenda for WIPO

**MEMBER** States of the World Intellectual Property Organisation (WIPO) made a decision on 28 September 2007 to adopt a Development Agenda consisting of a series of recommendations to enhance the "development dimension" of the organisation's activities. The recommendations include a set of 45 agreed proposals covering six clusters of activities, including:

- Technical assistance and capacity building;
- Norm-setting, flexibilities, public policy and public knowledge;
- Technology transfer, information and communication technology and access to knowledge;
- Assessments, evaluation and impact studies; and
- Institutional matters including mandate and governance.



Member States agreed to establish a Committee on Development and Intellectual Property to develop a work programme for the implementation of the adopted recommendations. This Committee will monitor, assess, discuss and report on the implementation of all recommendations adopted by coordinating with relevant WIPO bodies

and will discuss intellectual property (IP) and development-related issues as agreed by the Committee and decided by the General Assembly.

The Committee will be open to all accredited inter-governmental and non-governmental organisations and is expected to hold its first meeting in the first half of 2008. The Committee will report and may make recommendations annually to the General Assembly.

Following a process of informal consultations prior to the General Assembly, in the context of the Provisional Committee on a WIPO Development Agenda, Member States had identified 19 proposals for immediate implementation. With the approval of the General Assembly, these proposals will now be implemented immediately by WIPO ([www.wipo.int](http://www.wipo.int), accessed 03.10.07) **n**

## Work on TK, GR and Folklore

**MEMBER** States of the World Intellectual Property Organisation (WIPO) have agreed to continue accelerated work on intellectual property (IP) and traditional knowledge (TK), genetic resources (GR) and folklore/traditional cultural expressions (TCEs), with a focus on the international dimension. The WIPO General Assembly has extended the mandate of the Inter-governmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) for two years.

This decision renews the Gen-



eral Assembly's 2005 directions to the IGC to accelerate its work, and to focus, in particular, on the international dimension of IP, and TK, GR and TCEs. The mandate excludes no outcome, including the possible de-

velopment of an international instrument or instruments in this field without prejudice to the work pursued in other fora.

In the General Assembly, delegates urged the Committee to work towards a substantive conclusion in the coming two years. Many delegates also called for a binding international legal instrument as the only fully effective response to the global phenomenon of misappropriation and misuse of TK and TCEs for industrial and commercial use ([www.wipo.int](http://www.wipo.int), accessed 03.10.07). **n**

## G12: A new parallel negotiating configuration

A major development that marked trade negotiations in September, and in which the United States (US) played a leading role, was the emergence of a new parallel negotiating configuration, originally known as the "group of eight" (G8).

The group, which includes the US, the European Union (EU), Brazil, India, Australia, Japan, Argentina and Canada, started meeting on 6 September, at the invitation of the US delegation. At the insistence of India, other four countries - China, South Africa, Jamaica and Indonesia - were also invited to join the G8 on 18 September and became new members of what is now called "the group of twelve" (G12).

Since then, the group has held intensive negotiating sessions, occasionally inviting other countries to join the discussions on specific issues. From 14 September onwards, genuine negotiations among group Members were expected to trigger

progress in the Doha Round. While some stakeholders hope that the G12 process will produce a breakthrough towards an agreement on the Doha Development Agenda, a number of Members are frustrated that the multilateral process is again being sidelined.

Given the expiry of the Trade Promotion Authority, few had expected US trade officials to demonstrate the level of engagement they showed by convening the first meeting of the G8 and taking a bold step on proposed agriculture subsidies cuts. Although the US offer (See the news on US domestic support) is important, many World Trade Organization (WTO) Members are questioning the ability of the current US Administration to carry out trade deals that lack Congressional support.



### The US agrees to cap domestic support

THE US on 19 September agreed to cap trade-distorting domestic support to agriculture in the range of US\$ 13-16.4 billion as proposed by the Chair of multilateral agricultural negotiations under the WTO, which resumed on 3 September 2007 after the summer break. The range is below the previous official US offer of US\$ 22 billion. The US move, however, did come with strings attached. In exchange, other Members are expected to accept the rest of the parameters set out in the texts on agriculture and non-agricultural market access (NAMA). The latter appears particularly unlikely, given the stiff resistance the NAMA draft faced from a section of developing Members when it was released in July. (Trade-Watch, 04.10.07). n

## IPRs and Access to Medicines

### Case of Rwanda

Canadian patent authorities recently issued a compulsory licence, authorising the generic production of a patented HIV/AIDS drug for export to Rwanda. The Canadian Intellectual Property Office cleared pharmaceutical company, Apotex to manufacture and deliver 260,000 packs of Apo-Triavir to Rwandan health authorities. This will be sufficient to treat 21,000 AIDS patients for a year. The authorisation follows Rwanda's July notification to the World Trade Organization (WTO) that it wanted to import that quantity of medicine from Canada. Nearly four years after the 30 August Decision waiver, Rwanda became the first country to try to use the mechanism when it notified the "Council for TRIPS" of its intention to do so in July. Similarly, Canada has also become the first country to respond to the 30 August Decision, clearing the way for the export of generic versions of essential medicines through initial legislation in 2004, and then through the Canadian Access to Medicine Regime in May 2005 (Bridges Weekly Trade News Digest, 26.09.07). n

### Case of Thailand

Thailand is considering issuing compulsory licences on three cancer medicines, while another key cancer drug will not be targeted after the patent holder agreed to give free access to patients under Thailand's medical healthcare scheme. The drugs that could be affected include Imatinib and Letrozole from Novartis; Docetaxel from Sanofi-Aventis; and Erlotinib from Genentech. The medicines are used to treat various kinds of cancer, ranging from tumours to breast and lung cancer. Thailand's Minister for Public Health, Dr. Mongkol Na Songkhla affirmed that the government will carefully and thoroughly consider its move to effectively "break the patents" of the cancer medications, and he stressed that the move was necessary for the government to ensure broader access to necessary medicines. Thailand stands firm that it will use compulsory licencing only as a last resort and will do so in strict compliance with the provisions of the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) (www.bangkokpost.net, accessed 25.08.07). n

## SAARC Development Fund Charter finalised

**THE** financial experts of eight Member States of the South Asian Association for Regional Cooperation (SAARC) have finalised the charter and other issues in relation to the SAARC Development Fund (SDF).

The fund was created as per the decision of the SAARC Summit held in 2005 as an umbrella organisation for all SAARC development funding. It comprises three windows:

- Social Window, with an initial amount of US\$ 300 million to fund, among others, poverty alleviation programmes and



- Infrastructure Window, through which funds will be mobilised from within and beyond the region to finance infrastructure development projects; and
- Economic Window, which will fund

other non-infrastructure commercial projects.

The meeting also discussed the issue of capital structure, operations, organisation and management, decisionmaking, critical by-laws and charter, and regulations of the SDF. The experts came to an agreement on the modalities of the SDF operations through two tiers, which would include a governing body and an executive body headed by a chief executive officer entrusted with looking after the day-to-day activities with a permanent secretariat (The Himalayan Times, 02.10.07). **n**

## Pakistan-EFTA meet concludes

**THE** European Free Trade Association (EFTA) - which comprises Switzerland, Norway, Iceland and Liechtenstein - and Pakistani trade officials met in Geneva on 3 October 2007 to investigate how trade and investment relations can be expanded.

During this meeting, the delegates discussed issues concerning current trade regimes of EFTA Members and Pakistan; trade and investment flows; existing trade agreements; and ongoing negotiations. It concluded with an agreement to continue deliberations on ways and means of expanding trade and investment relations in early 2008. These deliberations will address all available trade policy instruments with a view to improving framework conditions and market access for goods, services and investment.

In 2006, Pakistan-EFTA trade stood at approximately US\$ 500 million. Pakistan's main exports to EFTA include clothing, textiles, rice, leather products, sports goods and surgical instruments. Main imports are machinery, chemicals, precious stones, electronic equipments, pharmaceutical products, iron and steel, and plastics. ([www.wto-pakistan.org](http://www.wto-pakistan.org), accessed 16.10.07). **n**

## BIMSTEC meeting reaches consensus on downsizing negative list

**The** 15<sup>th</sup> meeting of the Trade Negotiating Committee (TNC) for the Bay of Bengal Initiative for Multi-Sectoral Technical and Economic Cooperation (BIMSTEC) Free Trade Agreement was held during 24-26 September 2007 in Dhaka, Bangladesh.

At the meeting, trade negotiators from Member countries - Bangladesh, Bhutan, India, Myanmar, Nepal, Sri Lanka and Thailand

- reached a consensus on downsizing the negative list of products from 25 percent of the total 5,226 tariff lines to 15 percent. They also agreed on 35 percent value addition requirement of products for the developing country Members and 30 percent for the least developed country (LDC) Members.

Members also agreed on the modalities for tariff cuts, namely Linear Equal Tariff Cut, by which the LDC Members

will reduce their tariffs in a span of 10 years while the developing Members will do the same within five years.

Around 40 delegates from Member countries participated in the meeting. The next TNC meeting is scheduled to be held in New Delhi, India during 12-15 November 2007, which is expected to finalise the issues agreed upon at the Dhaka meeting ([www.allheadlinenews.com](http://www.allheadlinenews.com), accessed 05.10.07). **n**

## Tonga becomes the 151<sup>st</sup> Member of the WTO

**THE** Kingdom of Tonga became the 151<sup>st</sup> Member of the World Trade Organization (WTO) after its accession package was



ratified on 27 July 2007. Besides being the latest Member, Tonga is also the fourth Pacific Island State to join the WTO after Fiji, Papua New Guinea and the Solomon Islands.

Tonga is one of the world's smallest economies with a population of approximately 116,000 and an area of 748 sq. km. Trade

accounts for 54 percent of its gross domestic product (GDP) and its major industries include agriculture (41 percent of GDP) and fisheries (20 percent of exports). Its main trading partners are Japan, the United States (US), New

Zealand and Australia.

Tonga applied for accession to the WTO in June 1995 but negotiations effectively started only in April 2001. The

terms of Membership, which include the Report of the Working Party for the Accession of Tonga, the Protocol of Accession, and the Schedules of Tonga's commitments on market access for goods and services, were adopted by the Working Party on 1 December 2005 ([www.wto.org](http://www.wto.org), accessed 03.10.07). **n**

## 'Aid for Trade' Regional Review

**THE** World Trade Organization's (WTO) "aid for trade" initiative held its final "regional review" in Tanzania



during 1-2

October 2007, in an attempt to mobilise support for giving African countries the financial and technical assistance they require to boost their capacity to use international trade as a tool for economic development, job creation and poverty reduction.

The conference covered issues ranging from rich country farm subsidies to agricultural safety norms, investment, competitiveness and the relatively high cost of doing business in Africa.

Other discussions aimed to garner aid and technical support to assist developing country exporters comply with food safety standards, which would help them increase exports while minimising the risk to consumers. The WTO has asked rich countries for US\$ 25 million over the next five years in order to fund the WTO's Standards and

Trade Development Facility, which since 2002 has helped developing nations adjust to food safety standards.

Further, as an illustration of how "aid for trade" investments can yield major rewards, WTO Director General, Pascal Lamy referred to Kenya's flower export sector. While pesticide residues had once kept Kenyan flowers out of the markets of the United States (US) and the European Union (EU), a 5 million Euro grant from the EU helped the Kenyan flower industry phase out the pesticides and emerge as one of the world's leading exporters. The sector earned over US\$ 700 million last year and employs two million workers, four-fifths of them on small-scale farms (*Bridges Weekly Trade News Digest*, 05.10.07). **n**

## CONCERNS over EU's free trade agreements

**CONCERN** is growing in both the European Union (EU) and developing countries about whether a series of free trade agreements slated for signature later this year will contain overly stringent rules on intellectual property (IP).

The European Commission has proposed that the Economic Partnership Agreements (EPAs) it wishes to conclude with 76 African, Caribbean and Pacific (ACP) countries by 31 December should commit all parties to a robust enforcement of IP. The Commission's thinking behind its efforts to have IP provisions in trade deals that are concluded with countries outside the EU was outlined in a "market access strategy" published in April. It identified "poor protection" of IP rights as one of the principal barriers to trade encountered by European firms trying to do business abroad.

Anti-poverty activists and ACP diplomats have expressed misgivings about the Commission's approach, arguing that it could be used to open poor countries to Western firms to the detriment of local industries. EU negotiators have recommended that ACP countries should be required to comply with the terms of the Copyright Treaty and the Performers and Phonograms Treaty of the World Intellectual Property Organisation (WIPO).

Similarly, the EU has recommended that far-reaching IP rules should apply to databases. This could mean that data generated by governments such as geographical information of potential use in industrial development would no longer be freely available in libraries and educational facilities (*Intellectual Property Watch*, 20.08.07). **n**



# Patent Pathology

## and Protection of Traditional Knowledge

Codifying and registering TK and GR nationally offer only the slightest protection against the expropriation of TK and GR wealth; the incorporation of disclosure requirement in TRIPS is a first step towards "robust and self-interested" protection.

n Steve Suppan

At the June meeting of the World Trade Organization's (WTO) "Council for TRIPS", the United States (US), Japan, the European Union (EU) and Switzerland, holders of the great majority<sup>1</sup> of the world's patents, copyrights and trademarks, once again sought to make intellectual property right (IPR) enforcement a standing agenda item. And once again, they were rebuffed by a group of developing countries, including Brazil, China, India and Thailand, which argued that the Council's decisions about how IPRs are enforced would undermine WTO Member's discretion in enforcement. Lost in the heated debate about enforcement sovereignty was the question about the validity of the IPRs to be enforced.

If the global IPR enforcement regime that patent-rich countries are seeking through bilateral investment treaties (BITs) and negotiations at the World Intellectual Property Organisation (WIPO) is to have any legitimacy, IPRs must be valid. The validity of patents on genetic resources (GR) and, more generally, the validity of privatising the public domain from which patented innovations are derived, are under tough examination by legal scholars. Adam Jaffe and Josh Lerner have characterised the rise of a legal culture granting or extending patents on dubious or even fraudulent grounds as producing a "patent pathology" that is threatening the general capacity for innovation that IPRs are supposed



to promote.<sup>2</sup> In a WIPO open forum in March 2006 on the proposed Substantive Patent Law Treaty for enforcement of a globally harmonised patent system, the prevalence of patent pathology was invoked as one reason not to go forward with the negotiations.

In this article, some legal and regulatory proposals for mitigating the patent pathology affecting the sustainable use of GR, particularly seeds, are surveyed. An analysis of inter-governmental negotiations to protect and sustainably use traditional knowledge (TK) and GR, particularly those used in agriculture, to suggest how TK and GR use rules might aid development, while preventing or at least reducing the incidence of patent pathology, has also been presented.

### Fighting patent pathology: Some legal cases

During the past few months, there have been indications that the ideo-

logical assumption of greater privatisation of knowledge resulting in greater innovation is starting to ebb in patent and trademark offices and in legal tribunals. In separate rulings from March to July, the US Patent and Trademark Office (PTO) rejected four Monsanto patent claims on the grounds that Monsanto had misrepresented the degree of innovation in its RoundUp Ready herbicide-resistant seeds to the point where the patent claims were no longer valid.<sup>3</sup> On 30 June, a US Supreme Court ruling, i.e., *KRS International Inc. v. Teleflex Inc. et al.*, declared that patent applicants would have to better document that their products met the standard of "non-obviousness" by which a patent examiner or similarly skilled person could determine whether a product was truly innovative and hence, meriting a public grant of legal privilege. In May, the EU Patent Office revoked a broad Monsanto patent claim covering all soy seeds and plants.<sup>4</sup>



Monsanto dismissed the importance of the PTO rulings as regulatory misunderstandings and announced that it would appeal the rulings. Monsanto noted that patent rejections are not patent revocations and that it had so many patents on a product, not even a revocation would adversely affect its sales. But for US farmers convicted of violating Monsanto's patents on seeds, the PTO rulings and Supreme Court decision comprise a first step towards possible legal vindication and financial compensation for legal expenses and lost business.

An attorney defending the farmers said of the PTO ruling, "Logically, I would think the judgement [against his clients] is void if the patent is void." However, because many patents often apply to a product, unless a farmer had been convicted of violating the patent that has been declared invalid, it may still be difficult to get an IPR violation conviction annulled.

According to "Monsanto vs. U.S. Farmers<sup>5</sup>," in 2004, Monsanto had a staff of 75 lawyers with a budget of US\$ 10 million dedicated solely to prosecuting alleged IPR violations. Based on Monsanto's claim of undertaking 500 US violation investigations a year, probably thousands of US farmers have settled charges of IPR violation out of court by paying millions of dollars and agreeing to keep both the accusations and settlement terms out of the public record. Better to settle, farmers calculate, than trying to defend themselves in the courts of Monsanto's headquarters in St. Louis, Missouri. But for the dozens of farmers who decided to fight Monsanto in court, such as the renowned case of Monsanto Canada Inc. v. Schmeiser, the PTO rulings and US Supreme Court decision are harbingers of long sought relief.<sup>6</sup>

In the ruling against Schmeiser, the Supreme Court of Canada arrogated to itself the powers of a WIO dispute settlement panel, ruling that the scope of Monsanto's patent claims was consistent with the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS).<sup>7</sup>

These legal battles over the rights

of farmers to save, exchange, cross-breed, and replant their seeds, even if contaminated by patented varieties, take place in the context of inter-governmental negotiations over how intellectual property (IP), TK and GR should be protected and enforced. Decisions over patent validity and infringement are primarily the matters of national law. However, inter-governmental discussions and negotiations not only provide a legitimising framework for national IPR and TK policy but also provide a forum for exchange of ideas on how to make

The US has argued that "access and benefit sharing" is best served by bilateral bio-prospecting contracts, such as one between Merck, Inc. and Costa Rica, in which the company may seek to patent products and earn royalties developed from any and all of 10,000 GR samples

the patent system serve more interests than those of the patent holders.

#### Fighting patent pathology: Multilateral negotiations on TK and GR

On 5 June, the African Group of 41 WTO Members announced its support for a developing country initiative to amend Article 29 of the TRIPS Agreement. The announcement was particularly significant because it now appears that the African Group regards the proposed amendment as at least complementary to its long-standing "No Patents on Life" position.

The proposed amendment requires that WTO Members annually report disclosures of TK and GR used in products in order to support the

TRIPS objectives of improving patent quality by providing a more complete record of the process of claimed innovation (TRIPS Article 27.1). Amendment proponents also want TRIPS to support the access and benefit sharing (ABS) provisions of the Convention on Biological Diversity (CBD) as well as to implement TRIPS Article 8 on preventing abuse of patent system such as biopiracy, and promoting the public interest.

Developed countries, save Norway, have opposed the proposed amendment. The US has argued that ABS is best served by bilateral bio-prospecting contracts such as the one between Merck, Inc. and Costa Rica, in which the company may seek to patent products and earn royalties developed from any and all of 10,000 GR samples. In exchange, Costa Rica received US\$ 1 million and bio-prospection equipment. Norway's proposed amendment to apply the disclosure requirement to future patent applications but not to revoke patents already granted for disclosure failures has been "welcomed" by most developing countries. Future patents would not be granted without TK and GR documentation, according to Norway, but existing patents erroneously granted would be disciplined outside the patent system. TRIPS negotiations remain stymied, along with the rest of the Doha Round.<sup>8</sup>

In WIPO, discussions on whether to negotiate binding norms on protection of TK and GR have been opposed by some developed countries as a threat to TRIPS. Nevertheless, discussions have not halted and several developing countries have undertaken to document and codify their TK and related GR, both for licensing the use of TK and GR in patented products in ABS contracts and for assisting in implementing a disclosure amendment to TRIPS, if it is one day agreed. There are several difficult issues that require practical solutions before effective TK and GR norms can be negotiated. Some of these issues have been outlined in a WIPO Secretariat Paper prepared for the 3-12 July meeting of the Inter-governmental Committee on IP, GR and

TK and folklore.<sup>9</sup>

Two other vital issues (there are still more) that have not been discussed in the Secretariat Paper are: developing an enforcement mechanism for TK and GR violations; and developing a methodology for estimating the economic value of TK and GR in commercial products, particularly patented ones.

There is no agreed methodology for estimating the economic value of genetic resources and traditional knowledge used in patent/commercialised products

Norms to protect TK and GR from misappropriation in the patent system and to foster its sustainable use are only as good as the norms' enforcement mechanism. Professor Peter Drahos has strongly advised against negotiating binding norms in advance of constructing an "enforcement pyramid" whose foundational layer would be the indigenous and local groups, the custodians of the in situ conservation of biodiversity. To build an effective enforcement mechanism, it would be necessary to establish a good working relation between indigenous governance groups and national governments, particularly where the custodians of TK and GR extended across national bodies. At the global level of the enforcement pyramid, Drahos proposes a Global Bio-Collecting Society under the aegis of WIPO, CBD and the United Nations Food and Agriculture Organisation (FAO). These levels of the enforcement pyramid would work together both to protect TK and GR from misappropriation and to ensure that the custodians of TK and GR would be compensated sufficiently to ensure the sustainable use of biodiversity and individual resources. One matter to be enforced will concern the estimated economic value of TK and GR incorporated into patented products and processes.<sup>10</sup>

There is no agreed methodology for estimating the economic value of TK and GR used in patented/commercialised products. Without such

annually for GR providing countries. The annual royalty yield for GR-derived pharmaceuticals and industrial products would be considerably greater in aggregate. But such aggregate estimates would be of little help in negotiating a product specific contract.

### Fighting patent pathology: Building political will to change

What might motivate patent-rich countries to require their companies to pay royalties, when they can expropriate TK and GR from developing countries at little, if any, cost? Why not, instead, continue to intensify efforts to privatise the public domain, including TK and GR, whenever and wherever possible? Why not deny the prevalence of patent pathology and continue business as usual?

The innovation argument against patent pathology may seem self-evident: the TK/GR disclosure argument is perhaps less so. Patenting raw data, e.g., genetic sequences, and then withholding it or only making it available through complex licensing and confidentiality contracts not only inhibits individual product innovation but can also confine research agenda to that which patent lawyers allow. Allowing biodiversity, TK and GR to erode by denying the need to conserve it and pay the custodians of that conservation prevents innovation for an array of future products, the varieties and number of which only the

a methodology, negotiating an ABS licence to pay for TK and GR in a patented product will have little economic basis and it is likely to result in arbitrary and unfair agreements. In 1998, FAO estimated that a one percent royalty on TK and GR used in patented agricultural products would yield about US\$ 150 million

history of science and TK can suggest. Codifying and registering TK/GR nationally offer only the slightest protection against the expropriation of TK/GR wealth. Adopting the disclosure amendment in TRIPS is a first step towards "robust and self-interested" protection.

According to IP scholar James Boyle, the huge expansion in the breadth and duration of IP claims during the past three decades has undermined the balance between the public domain foundation of knowledge and the privately held innovations derived from that foundation.<sup>11</sup> Protecting TK and GR will be part of the reassertion of the primacy of the public domain foundation of innovation. More broadly, as Peter Barnes has written in *Capitalism 2.0*, protecting global public goods will require new legal structures and political constituencies to recuperate the public domain of the natural resources and knowledge we have in common. n

The author is associated with Institute for Agriculture and Trade Policy (IATP), USA.

### Notes

- <sup>1</sup> As of 2005, about 5.6 million patents are in force worldwide, with the US patent office alone having 900,000 patents pending. [www.wipo.int](http://www.wipo.int)
- <sup>2</sup> Adam B. Jaffe and Josh Lerner, *Innovation and Its Discontents* (Princeton: Princeton University Press, 2004).
- <sup>3</sup> [www.pubpat.org](http://www.pubpat.org)
- <sup>4</sup> [www.etogroup.org/en/issues/intellectual\\_property\\_patents.html](http://www.etogroup.org/en/issues/intellectual_property_patents.html)
- <sup>5</sup> [www.centerforfoodsafety.org](http://www.centerforfoodsafety.org)
- <sup>6</sup> In May, Canadian courts finally set a trial date to determine Monsanto's liability for contaminating Percy Schmeiser's canola crops, the result of 40 years of plant breeding. [www.percyschmeiser.com](http://www.percyschmeiser.com)
- <sup>7</sup> [www.lexum.umontreal.ca](http://www.lexum.umontreal.ca)
- <sup>8</sup> [www.tradeobservatory.org/library.cfm?PrefID=88376](http://www.tradeobservatory.org/library.cfm?PrefID=88376)
- <sup>9</sup> WIPO/GRTKF/IC/11/5(a) Add. 2
- <sup>10</sup> [www.cgkd.anu.edu.au/menus/PDFs/Drahos\\_tkframework.pdf](http://www.cgkd.anu.edu.au/menus/PDFs/Drahos_tkframework.pdf)
- <sup>11</sup> [www.law.duke.edu/boylesite](http://www.law.duke.edu/boylesite)

# Promoting Trade and Pro-Poor Growth through Geographical Indications

A GI-based industrial strategy provides a platform for South Asian producers to compete with multinationals in world markets but achieving success entails expenditure on international marketing and legal protection.

**n** Amrit Rajapakse

**F**or much of the coverage of the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) of the World Trade Organization (WTO), developing countries are saddled with onerous obligations, the main beneficiaries of which are entities located in the developed world. The reason is that the vast majority of copyright materials, computer programmes, patents and trademarks that Members undertake to protect are owned by enterprises in developed countries. Most developing country enterprises lack the financial, technological and skilled human resources to trade in these subjects of intellectual property rights (IPRs).

One category of intellectual property protected in TRIPS – geographical indications (GIs) – has significant trade potential for developing countries, and in particular, for South Asia. GIs are defined as “indications which identify a good as originating in the territory of a Member, or a region or a locality in that territory, where a given quality, reputation or

other characteristic of the good is essentially attributable to its geographical origin” (TRIPS Article 22.1). TRIPS has, however, set out which GIs are eligible for protection, and the scope of protection that Members must accord to eligible GIs.

This article discusses some of the main issues surrounding protection of GIs and their potential to contribute to increased trade and economic development in South Asia.

## What are GIs?

Although GIs appeared for the first time as a subject of protection of IPRs in the TRIPS Agreement, its use dates back to the very earliest times of trade among societies and nations. Since antiquity, certain geographical areas have been famous for producing certain products, which were much valued in trade, e.g., Arabian horses, Persian carpets and Chinese silk. The reputation enjoyed by these products has been either due to natural factors such as soil and climate, or human factors such as particular manufacturing techniques and tradition-

al knowledge (TK), or often a combination of both.

Such reputation has enabled these products to command higher prices over comparable products from outside the geographical area. However, this depended on whether or not they are different from other goods. This led to the introduction into trade of various designations to identify the geographical origin of goods. Examples are guild marks, heraldic symbols and the direct use of the geographical names of countries, regions and localities, as in the case of Champagne, Scotch whisky, Cheddar cheese, etc.

The present concept of GIs in the TRIPS Agreement shares all these essential features of their historical antecedents. As TRIPS makes it clear, a GI can be a geographical name, a fanciful name or a symbol, so long as it can identify the goods in question with their geographical origin. Secondly, the goods in question must possess some unique quality, reputation or other characteristic that is essentially attributable to its geographical





origin. Therefore, an actual quality difference is not necessary, if a special reputation can be built around a geographical area. This can be achieved through effective marketing.

### Benefits of GIs

The main benefit associated with GIs is the prospect of higher profits for producers of the GI good, through selling prices over and above the prices of the same type of product produced outside the geographical area in question. For example, Italian Toscano olive oil (i.e., from the Tuscany area) receives a 20 percent price premium over the price of standard Italian olive oil; Bresse poultry in France sells for four times the price of regular poultry meat; and Italian Parma ham sells at a premium of up to 50 percent over other cured hams.

There are two further benefits of GIs that are of particular value to developing countries and their producers. First, by their very nature GIs tend to be associated with agricultural products and products that utilise TK. These products tend to be mainly concentrated in rural areas, the size of production units is small and generally labour-intensive practices are utilised in their production. Therefore, by enabling higher prices and profits for the producers of GI products, GIs help to improve rural incomes and sustain rural employment, stemming rural-urban migration. This is particularly relevant to the countries of South Asia.

The other benefit is that GIs can reduce the advertising cost for producers from the GI area. This is because the GI conveys essential information about the product to consumers, where normally this would have to be undertaken by individual producers, for their individual products. For example, most consumers will spend more for a French perfume or a Swiss watch even if they do not know about the enterprise that actually produced it because of the reputation of the respective country for that particular product. Therefore, this feature of GIs is very beneficial to producers in developing countries when competing with large multinationals in world markets.

### GIs in South Asia

The South Asian region is home to several world-renowned GIs, two of which being Basmati rice and Darjeeling tea. The leading Sri Lankan GIs are Ceylon tea and Ceylon cinnamon, both of which receive higher prices, on an average, in world markets than other origins of tea and cinnamon. Furthermore, there could be many less known products that have GI potential and the process of industrialisation could also create new GIs, e.g., computer motherboards as in the case of Taiwan.

Realising the potential benefits of GIs for producers in South Asia, however, depends on three critical factors – marketing, legal protection, and the distribution of bargaining power and domestic value addition in the industry value chain.

The role of marketing is to make consumers aware of the geographical origin-based qualities, characteristics or reputation of the products, and to associate the particular GI with, and attach a value to, those qualities or characteristics or that reputation. The other two requirements are discussed in the following sections.

### Need for legal protection

The need for legal protection for GIs is tied to their economic value. As goods designated by GIs become successful and attract price premiums,

rival producers often resort to dishonest or "sharp" practices in an attempt to appropriate some part of those profits for themselves. Three such typical responses are false use of GIs, deceptive use of GIs and free-riding on the reputation of GIs.

False use of GIs refers to using a GI for a product that does not originate in the indicated origin, e.g., labelling Kenyan tea as "Ceylon" or "Darjeeling." On the other hand, deceptive use of a GI refers to use of a GI that is literally true but misleading. This is the case where there are two places that have the same geographical name but only one is famous for producing a particular product. The use of that name for a product of that kind made in the other place would be literally true but mislead consumers.

Free-riding refers to a case where there is no consumer deception, e.g., labels such as "American Basmati" and "Champagne-style wine." Here consumers know that the goods are not the "real thing." Nonetheless, such use is detrimental to genuine producers because it takes away business from them and dilutes the reputation of the GI. In the latter case, the GI may become a "generic" term – the common term for goods of that kind wherever produced, as happened with Cheddar cheese and Dijon mustard. They are then no longer GIs and cannot be protected.

### GI protection under TRIPS and national law

TRIPS sets out the basic protection that Members must provide for GIs. To be eligible for protection, the indication has to firstly satisfy the definition of a GI. Secondly, Article 24 of the Agreement provides that protection may be denied to a GI that has become a generic term in the Member where protection is sought, or where the GI is not protected, or has fallen into disuse, in its country of origin.

The characteristic of TRIPS is that it then prescribes two levels of protection that Members must provide for eligible GIs – one level for all GIs and a higher level of protection for GIs for wines and spirits.

Realising the potential benefits of GIs for producers in South Asia depends on three critical factors – marketing, legal protection and the distribution of bargaining power and domestic value addition in the industry value chain

The basic protection is contained in Article 22 of the Agreement and requires Members to protect all GIs against false and deceptive use and against acts of unfair competition as defined in the 1967 Paris Convention for the Protection of Industrial Property. All GIs are also to be protected against being registered in trademarks for goods not originating in the territory indicated by the GI, if it would mislead the public as to the origin of the goods. However, this right does not apply where the trademark was applied for or registered in good faith prior to TRIPS coming into force in that Member, or prior to the GI being protected in its home country.

GIs for wines and spirits benefit in addition from protection against free-riding (Article 23). GIs for wines are also entitled to protection for homonymous indications (e.g., the "Rioja" indication, which is a GI for wine from Spain and from Argentina), and to have negotiations in the Council for TRIPS for the establishment of a multilateral system of GI notification and registration.

Although TRIPS lays down the basic standards of GI protection to be guaranteed by all WTO Members, it leaves Members free to adopt any national means to implement the requisite protection within their territories. As a result, there is a substantial diversity in national systems of GI protection. A WTO survey<sup>1</sup> identified three broad types of national approach to protect GIs - under laws focusing on business practices and consumer protection; under trademark law; and under special systems of protection.

In practice, many countries, including Sri Lanka, follow a combination of all three types of approach to protect GIs. While each approach differs from the other in terms of the eligibility criteria for protection and scope of protection, there are also substantial differences in the application of the same approach between different countries. In addition, national systems also differ in important respects from the protection mandated by TRIPS, with many national GI systems granting more ex-

The TRIPS Agreement lays down the basic standards of GI protection to be guaranteed by all WTO Members but it leaves Members free to adopt any national means to implement the requisite protection within their territories

tensive protection than TRIPS. For example, GIs may be protected under certain national systems irrespective of protection in their country of origin, while some systems provide the higher level of protection TRIPS accords to GIs for wines and spirits to GIs for all goods.

The implication of the foregoing is that obtaining legal protection for South Asian GIs in their key overseas markets is an exercise requiring substantial legal expertise, which could entail significant expense. For example, in the case of the Ceylon tea, GI registration in some key markets had to be abandoned because of the high cost of foreign law firms.

#### Equitable distribution of gains

The third requirement in realising the potential benefits of GIs for producers in South Asia relates to the distribution of bargaining power and domestic value addition in the industry value chain. Many GI products are exported with minimal value addition for further processing and sale abroad. Therefore, the bulk of the consumer price premiums associated with the GI are captured by foreigners. This is the case with Darjeeling tea, where India exports most of the tea in bulk form for value addition (e.g., manufacture of tea bags and tea packets) abroad. Similarly, most Ceylon sapphires are exported after

cutting and polishing in Sri Lanka for the manufacturing of jewellery abroad.

The distribution of bargaining power in the industry value chain is also a key determinant of whether the benefit of higher prices remains with the exporters or is passed down the value chain in the form of higher wages for workers and higher prices for intermediate inputs. For example, despite the high prices earned by Ceylon tea, cinnamon and sapphires, tea pluckers, cinnamon peelers and gem miners continue to be in the highest poverty brackets in Sri Lanka. In such cases, there may be a market failure necessitating corrective regulatory intervention.

#### Conclusion

A GI-based industrial strategy has a great potential to sustain rural employment and improve rural livelihood, and provides a platform for South Asian producers to enhance their competitiveness in the international market. However, success entails expenditure on international marketing and legal protection, so the decision to go for a GI approach should be based on a careful cost-benefit analysis. Governments and industry regulators will need to work closely with the local industry, and also need to institute appropriate policies to promote greater domestic value addition and to ensure an equitable distribution of benefits to workers and intermediate producers in the industry value chain. n

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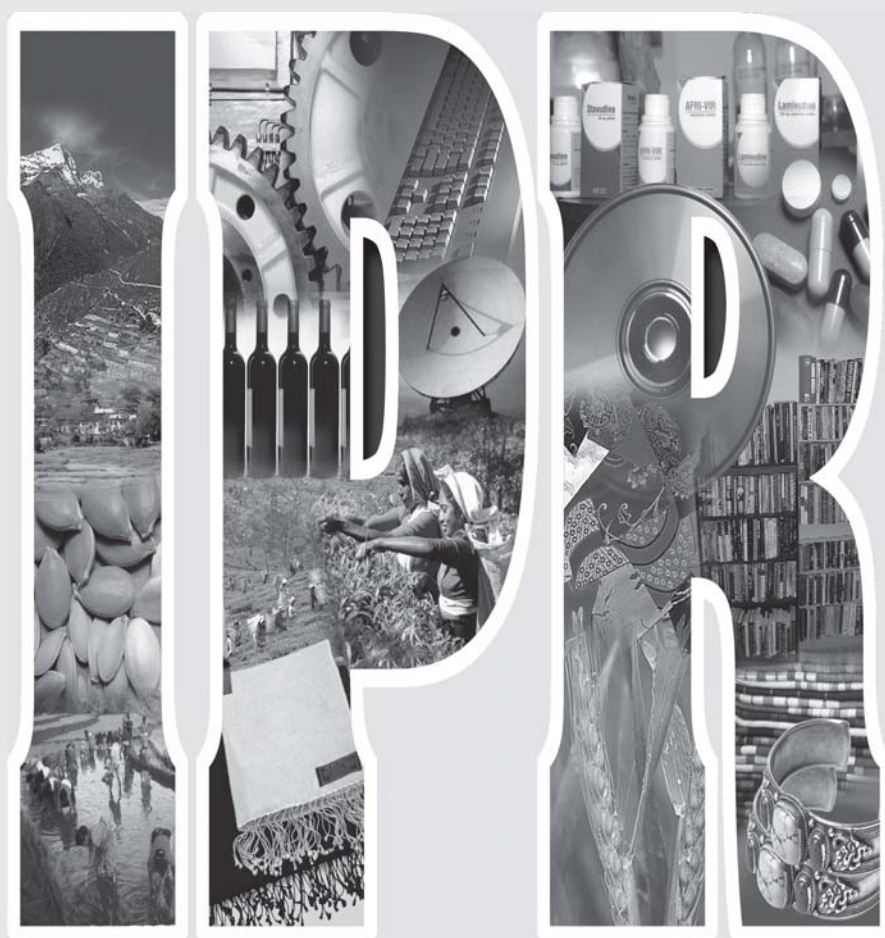
#### Note

<sup>1</sup> WTO. 2003. Review under Article 24.2 of the Application of the Provisions of the Section of the TRIPS Agreement on Geographical Indications: Summary of the Responses to the Checklist of Questions. (IP/C/13 AND ADD.1). Note by the Secretariat. IP/C/W/253/Rev.1. Council for TRIPS.

# Intellectual Property Rights and Development Concerns in South Asia

South Asian countries should utilise TRIPS flexibilities as well as the window provided by the review of TRIPS Article 27.3 (b) to ensure a more balanced approach to intellectual property protection.

n Ratnakar Adhikari



Intellectual property refers to the creation of the mind in the form of ideas. Intellectual property rights (IPRs) bestow the creator of such ideas ownership rights and legal protection over the use of the creation for a limited period. The central premise of this system is that the creator of intellectual property needs to earn credit and thereby economic rents for his/her efforts in the development and marketing of the idea. Essentially, the system is supposed to encourage innovation by restricting the imitation of ideas by others for a limited period in the fields of art, science, technology and industry. IPRs have, to some extent, contributed to the achievement of these objectives.

One might wonder then why the majority of developing countries are opposing the IPR regime under the sanction-based mechanism of the multilateral trade body - the World Trade Organization (WTO).

The way the global IPR regime has been designed and is being implemented, it appears that IPRs have only served the corporate agenda



pushed by knowledge-intensive sectors such as pharmaceutical, agro-chemical, biotechnology and information technology of the developed countries. At the behest of these interests, their governments have brought the issue of IPRs into the international forum with a view to setting a uniform global standard.

Although the World Intellectual Property Organisation (WIPO) was entrusted with the responsibility of promoting the protection of intellectual property throughout the world through cooperation among Member States as well as in collaboration with other international organisations, developed countries were apparently not happy with its functioning, primarily due to the absence of a binding and effective dispute settlement mechanism in case of infringement of IPRs (Katti and Mukhopadhyay 2000). Hence, despite stiff resistance, developing countries were cajoled into signing the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS), which became part and parcel of the WTO when it came into being on 1 January 1995.

TRIPS, in its present form, has implications for several areas, which are important from the development perspective of South Asian countries. In the process of serving private commercial interests, the Agreement tends to negate public interests, including the rights of farmers, students, small researchers, sick and elderly people and indigenous communities of the developing countries. Moreover, the attempts made by developed countries to ratchet up IPR standards have created daunting challenges. Developing countries thus need to devise proactive strategies to address the challenges associated with the negotiation and implementation aspects of IPR rules. This article attempts to identify such challenges and proposes some policy options for the South Asian countries.

### Access to medicine

The South Asian region comprises eight countries, among which three are developing and five are least de-

veloped.<sup>1</sup> This is a region where one-fifth of humanity and a majority of the world's poor live. Many people in the region are food insecure and lack access to education, safe drinking water, sanitation, and other methods and mechanisms to prevent diseases. These have made a majority of South Asians vulnerable to pandemic such as diarrhoea, cholera, viral hepatitis, tuberculosis, malaria and HIV/AIDS. The pharmaceutical industry in the region is still nascent and only India possesses the capacity to manufacture and export medicines and vaccines to other countries in the region.

TRIPS, in its present form, has implications for several areas, which are important from the development perspective of South Asian countries

Since South Asia is a major market for the pharmaceutical giants of the developed countries, they can exercise monopoly control over the South Asian market by refusing to license their patented technology and preventing parallel import (i.e., import of the products manufactured by own company abroad). Although some remedies exist against such practices in the TRIPS Agreement, all the countries in South Asia may not be able to take recourse to such measures, mainly due to lack of capacity to use them and "political reasons". However, two such measures taken in the past by the governments of South Africa and Brazil to provide anti-retroviral (ARV) therapy to their HIV/AIDS patients are still in force, despite the challenges to these measures by the pharmaceutical companies and their governments (Adhikari 2004). The stand taken by these governments was further strengthened by the support they received from several civil society or-

ganisations (CSOs).

CSOs such as Medicines Sans Frontier (MSF) and Oxfam International, along with several developing country governments, were also instrumental in lobbying for the adoption of TRIPS and Public Health Declaration during the fourth Ministerial Conference of the WTO held in Doha in November 2001. One of the major achievements of the Declaration was to clarify the provision of Article 31 (f) of TRIPS, which allows WTO Members to issue compulsory licensing in the event of a public health crisis or in public interest. However, the issue of how countries without domestic manufacturing capacity should make use of this system (often referred to as paragraph 6 system) remained unclear until this matter was resolved on 30 August 2003. Critics argue that the formalities to be fulfilled are extremely onerous, making it almost impossible to utilise this provision when it is needed the most. The fact that only one country has utilised this provision, that too with great difficulty,<sup>2</sup> lends credence to this argument.

While the Declaration has provided a sense of respite for the least developed countries (LDCs) in the region because they are not required to provide patent protection on pharmaceutical products until 2016, other countries were required to provide this protection with effect from 1 January 2005. After India amended its Patent Law in 2004 to fulfil this obligation, it was feared that the prices of medicines would increase astronomically as India's ability to manufacture generic versions of products still under patent would be severely restricted. However, the Patent Office of India is still sensitive to these concerns and has not granted indiscriminate patents on medicines so far. The Indian judiciary is found to be equally responsive (See Box 1).

The TRIPS and Public Health Declaration also led to increased attention towards making an explicit provision in national legislation for compulsory licensing, authorising governments to use patent - referred to as "government use authorisation". A few Asian developing coun-

**Box 1: Novartis Loses Patent Law Challenge**

In 2006, the Indian Patent Office rejected a patent application for Glivec, a cancer drug manufactured by Swiss-based pharmaceutical giant Novartis, on the grounds that its subject matter was anticipated and obvious in the light of prior art and the drug did not show sufficient enhancement of efficacy over the molecule imatinib, on which Glivec is based.

Section 3(d) of the Indian Patent Act, under which the patent was denied, prohibits the granting of patents to inventions involving "a new form of a known substance which does not result in the enhancement of the known efficacy of that substance." The provision was adopted in order to curb frivolous patent applications and to avoid unnecessary delays in introducing generic versions of brandname medicines to the market through the "evergreening" of existing patents based on minor changes in a drug's composition or use.

Consequent to the Glivec patent rejection, Novartis filed a case with the Madras High Court in Chennai alleging that Section 3(d) was unconstitutional and incompatible with the TRIPS Agreement. The High Court ruled on 6 August that Section 3(d) was not unconstitutional, vague or arbitrary as alleged by the complainant. Citing "no jurisdiction to decide on the validity of the TRIPS Agreement", it declined to rule on whether the national law was compatible with the WTO treaty.

While health activists have welcomed the decision, Novartis deplored the verdict but said it would not appeal the decision to the Indian Supreme Court. A WTO dispute brought by Switzerland – the only way to clarify the TRIPS compatibility issue – is also unlikely. As a result, the company plans to shelve its investment plan in India.

Source: ICISD (2007)

tries have amended their IPR legislation to take advantage of this flexibility. Examples include Malaysia, Indonesia and Thailand (See related article on page 27). South Asian countries should also make use of this flexibility while amending or enacting their IPR legislation.

### Protection of biodiversity and farmers' rights

Article 27.3 (b) of TRIPS, which is considered the most contentious provision in the entire Agreement, allows for the patenting of life forms and calls for mandatory protection of plant varieties either through patents, or an effective *sui generis* system, or any combination thereof. While the first part of this Article seems to have been primarily designed by the biotechnology and pharmaceutical lobby in the developed countries to legitimise "biopiracy" (See Box 2) and negate the rights of local and indigenous communities, the second part strengthens the hands of commercial plant

breeders of developed countries, jeopardising, in particular, the rights of developing country farmers.

Local, indigenous and farming communities of mega-diverse regions, which have conserved and nurtured resources for several generations but are either ignorant or lack negotiation skills, can lose incentives to conserve these resources, should the trend of biopiracy continue. Moreover, the lack of necessary legal expertise in the countries of the region (except India) means that initiating legal challenges for getting spurious patents revoked is not an easy task.

The Convention on Biological Diversity (CBD) 1992, which has been signed and ratified by all South Asian countries, mandates the implementation of national regimes on access and benefit sharing (ABS), obliging parties obtaining genetic resources to share benefits with the original donor(s) of the resources. However, except for India, none of the countries in the region have im-

plemented such a regime.

One of the proposals currently submitted by a group of developing countries led by India and Brazil for the review of Article 27.3 (b) of TRIPS demands that TRIPS incorporate a provision on "disclosure" of source of origin as a positive obligation for patent applicants. This proposal, which is being opposed by a select group of countries led by the United States (US) and Japan, is aimed at providing a basis for tracking down spurious patents, ensuring that corporate interests respect the ABS regime of the country of origin of genetic resources.

Similarly, in relation to the protection of plant varieties, South Asian countries feel that a *sui generis* legislation, that protects the rights of breeders without affecting, among others, the rights of farmers to save, use, exchange and sell seeds, would best serve their interest. However, due to pressures from breeders' lobby and their governments, which want them to adopt the model prescribed by the International Union for the Protection of New Varieties of Plants (UPOV)<sup>3</sup>, most countries in the region are facing problems to implement a *sui generis* plant variety protection regime.

While India, after implementing a path-breaking farmer-friendly legislation, has decided to join UPOV<sup>4</sup>, Bangladesh was asked to join the Union as part of a trade and aid deal it signed with the European Union (EU) and Nepal was pressurised to join the same at the time of its accession to the WTO (Adhikari and Adhikari 2003). Fortunately, none of these countries have, so far, joined UPOV. Similarly, Pakistan and Sri Lanka are under pressure to follow the model prescribed by UPOV while designing their plant variety protection legislation, if not join the Union.

### Technology transfer

Technology transfer and diffusion can contribute to economic development via the productivity growth they generate. However, South Asian countries lag behind on the technological front and face a huge technology gap. They not only have lim-

ited capacity to generate technology but also lack requisite infrastructure and legal mechanisms to make best use of the acquired technology.

Since technology transfer takes place at the micro level, it is difficult to design a macro-level policy to facilitate technology transfer, primarily from developed countries to developing ones. TRIPS, at the insistence of developing countries, has incorporated a few provisions to facilitate the process of creating a multilateral regime on technology transfer. Article 7 of TRIPS, which lays down the very objective of the Agreement, notes that IPRs should contribute to the promotion of technological innovation and the transfer and dissemination of technology. Similarly, Article 8.2 recognises that countries may wish to adopt policies to prevent the abuse of IPRs by rights holders or the use of practices that "adversely affect the international transfer of technology." Both these provisions provide, in theory, a much-needed leeway for the developing countries to acquire foreign technology. However, since these provisions are "best endeavour" in nature, the potential for their legal enforceability is, at best, uncertain.

It is also necessary to see as to what is the fate of a seemingly binding provision of TRIPS. Article 66.2 of the Agreement requires developed Members to provide incentives to enterprises and institutions in their territories for the purpose of promoting technology transfer to the LDCs in order to enable them to create a sound and viable technological base. Despite the use of the word "shall" in the text of the Article, which is considered more binding in legal parlance, developed countries have not done enough to operationalise it. One reason is the lack of monitoring mechanism, another being the conspicuous absence of any milestone and deadline to realise the "intended" objectives.

This calls for not only a binding regulation on technology transfer but also exploring the possibilities of South-South cooperation on this issue and providing fiscal incentives, if necessary, to facilitate the process

of technological advancement in developing countries themselves.

### Efforts to ratchet up IPR standards

Despite the absence of a focus on development, TRIPS does contain some flexibilities, which, if used constructively, can help developing countries protect their national interest. After failing to further enhance the level of IPR protection or to protect the interest of their corporate sector (as is evident from the case of pharmaceutical patents in Brazil, South Africa and India, or their inability to make all developing countries agree to follow the UPOV model while designating their plant variety legislation), developed countries are making every possible effort to ratchet up IPR standards and impose "TRIPS plus" conditions on the developing countries. They are making use of what is known as "forum shifting" tactic by using three major platforms to realise their objectives.

First, the WIPO forum, which is in the process of negotiating Substantive Patent Law Treaty (SPLT), is being utilised by the developed countries to create a multilaterally binding agreement aimed at diluting the flexibilities contained in TRIPS. Critics argue that even the so-called WIPO Development Agenda does not contain much in substance to help developing countries address their development concerns (Finger 2007).

Second, countries acceding to the WTO are being pressurised, during bilateral negotiations, to accept several TRIPS plus conditions. Examples include an explicit requirement to accept the UPOV membership in lieu of the TRIPS-sanctioned model of sui generis legislation for the protection of plant varieties, which countries like Cambodia, China and Kyrgyzstan were forced to accept (Adhikari and Adhikari 2003).

Third, bilateral free trade agreements (FTAs), between the developed and developing countries, in-

### Box 2: Biopiracy – A Major Concern for South Asia

Biopiracy is a process whereby "corporate interests" and researchers take away genetic resources and associated traditional knowledge from the local, indigenous and farming communities and patent them (as if they have invented the products) after minor modifications. Biopiracy does not merely mean unauthorised extraction and use of biological and genetic resources but also denotes authorised extraction and use of such resources on the basis of an exploitative transaction. Such exploitative transaction occurs, when, among others, donors of the resources (who are the most ill-informed) are not adequately compensated.

Patents have been granted on several properties of plants, which are endemic to Asia in general and South Asia in particular. Examples include the patenting of Basmati rice as well as select properties of bitter melon, neem and turmeric by corporate interests and research institutions in the US and Japan. While some of these patents have been revoked after legal challenges, others are still in force. n

Source: Dutfield (2004); Adhikari and Adhikari (2007)





clude provisions that go far beyond the requirements of TRIPS. For example, the provisions on compulsory licensing and parallel import were excluded from the text of the US-Singapore and US-Morocco FTAs (Gibbs and Wagle 2006). Similarly, an explicit requirement to allow the patenting of plants (without any exception whatsoever) is included in the US FTAs with Singapore, Morocco, Bahrain and Oman (Adhikari 2006). Finally, most FTAs signed by the US and under the European Free Trade Area (EFTA) contain a provision requiring developing countries to become a member of UPOV (Adhikari 2005).

Countries characterised by the existence of a vibrant civil society, free flow of information and culture of informed discussion and debate have not, however, agreed to one-sided conditions imposed by the developed countries. For example, two Asian countries, namely Malaysia and Thailand, which are at various stages of FTA negotiations with the US, have demonstrated their will power to resist such pressures (Adhikari 2006).

## Conclusion

The debate on the development dimension of IPRs caught the attention of various stakeholders in South Asia, particularly in the aftermath of the inclusion of TRIPS in the sanction-based mechanism of the WTO. Several developing countries that have utilised the flexibilities contained in the Agreement have been able to protect their national interest to a significant extent. Therefore, South Asian countries should also utilise TRIPS flexibilities and the window provided by the review of Article 27.3 (b) to ensure a more balanced approach to intellectual property protection.

With regard to technology transfer, South Asian countries should try to rely more on home-grown solutions. However, at the same time, they should also negotiate for making the provisions on technology transfer within the multilateral regime more explicit and binding.

The debate on the development

The debate on the development dimension of IPRs has further intensified in the wake of various tactics followed by developed countries to ratchet up IPR standards

dimension of IPRs has further intensified in the wake of various tactics followed by developed countries to ratchet up IPR standards. In this regard, South Asian countries should emulate the models of other Asian countries to safeguard their interests. A well-coordinated national strategy, developed in consultation with all the relevant stakeholders, can help solidify their negotiating position, thereby thwarting any attempt to undermine development concerns. n

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## Notes

- <sup>1</sup> While India, Pakistan and Sri Lanka are developing countries, Afghanistan, Bangladesh, Bhutan, the Maldives and Nepal are LDCs.
- <sup>2</sup> Rwanda was the first country to notify the WTO (on 19 June 2007) that it would be making use of this provision. See WTO 2007. Recently, Apotex - a generic drug manufacturing company in Canada - obtained compulsory licence to manufacture and export anti-retroviral medicine under the name Apo-Triair to Rwanda (See related news on page 5).
- <sup>3</sup> The UPOV Convention was created in 1961 at the behest of the European breeders. It has undergone three revisions since it was signed in 1961. The 1972, 1978 and 1991 amendments to UPOV progressively strengthened the protection accorded to plant breeders. UPOV 1991 provides the highest possible level of protection to the breeders, severely restricting farmers' rights to save, reuse, exchange and sell seeds (See Adhikari and Adhikari 2003).
- <sup>4</sup> The decision is, however, pending due to a public interest litigation filed by a leading India-based NGO - Gene Campaign.

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# Making Use of IPR Decisions of the Doha Work Programme

## THE CASE OF INDIA

Almost all the TRIPS-related issues of the Doha Work Programme are in limbo and the blame lies with the developing countries as they are not being proactive in global negotiations on IPRs.

n B. K. Keayla

The fourth Ministerial Conference of the World Trade Organization (WTO) held in November 2001 in Doha is important in many respects. The conference adopted a Ministerial Declaration, which, *inter alia*, dealt with a broad and balanced Work Programme – known as the Doha Work Programme.

A number of issues such as agriculture, services and non-agricultural market access (NAMA) were included in the Work Programme. The Doha Work Programme also deals with issues relating to implementation of intellectual property rights (IPRs) covered by the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS). A separate declaration – Declaration on the TRIPS Agreement and Public Health – was also adopted in a manner supportive of public health by promoting both access to existing medicines and research and development (R&D) for new medicines.

The various TRIPS issues incorporated in the Doha Work Programme are as follows.

- Implementation of TRIPS Article 23.4: The Ministerial Declaration agreed to negotiate the establishment of a multilateral system of notification and registration of geographical indications (GIs) for wines and spirits. The Declaration also noted the issues relating

to the extension of protection of GIs provided for in Article 23 to products other than wines and spirits to be addressed in the Council for TRIPS as an outstanding implementation issue.

- Patentability: Review of TRIPS Article 27.3 (b) relating to patentability of micro-organisms and non-biological and micro-biological processes.
- Review of Article 71.1: Review of the implementation of Article 71.1 of the TRIPS Agreement and other relevant new developments foreseen by Members.
- Relationship between TRIPS and the Convention on Biological Diversity (CBD): Examine, *inter alia*, the relationship between TRIPS and CBD, the protection of traditional knowledge and folklore.
- Trade and technology: Examination in a Working Group under the auspices of the General Council of the relationship between trade and transfer of technology and increased flows of technology to developing countries.

The Ministerial Declaration in Paragraph 19 thereof also stipulates that in undertaking the Work Programme mentioned above, the Council for TRIPS shall be guided by the objectives set out in Articles 7 and 8 of TRIPS and shall take fully into account the development dimension.



## DOHA DEVELOPMENT AGENDA

Paragraph 12 (b) of the Ministerial Declaration also provides that the outstanding implementation issues shall be addressed as a matter of priority by the relevant WTO bodies.

A number of countries, including India, submitted their views on the above issues to the concerned negotiating groups. It is observed from the deliberations in the General Council during its meetings held during 27-29 July 2005 that progress in negotiations on TRIPS-related issues have been rather slow or incomplete. Some of the relevant aspects of these issues are discussed in this article.

### Protection of GIs

During the Uruguay Round of trade negotiations, only wines and spirits were identified for GI protection. These products are relevant for few Members only. The other countries failed to identify their products for a similar protection. Article 23 (4) of TRIPS stipulates that "in order to facilitate the protection of geographical

indications for wines, negotiations will be undertaken in the Council for TRIPS concerning the establishment of a multilateral system of notification and registration of geographical indications for wines eligible for protection in those Members (meaning all WTO Members) participating in the system". This indicates that the Council for TRIPS would be addressing issues relating to the establishment of a multilateral system of notification and registration of GIs only for wines and spirits.

Regarding the issue of extending the system to other countries, India has enacted the Geographical Indications of Goods (Registration and Protection) Act, 1999. Under this Act, protection is extended to agricultural goods, natural goods or manufactured goods or any goods of handicraft or goods of industry, including food stuff. This would prevent unauthorised persons from misusing GIs, protect consumers, add to the economic prosperity of the producers of such goods and also promote goods bearing Indian GIs in the export market. India has many products requiring international protection under this system.

At present, a GI is protected in the country of its origin and there is no obligation under TRIPS for other countries to extend reciprocal protection. However, under the Indian Act, the country would, on the other hand, be required to extend protection to goods imported from other countries, which provide for such

of plants or animals other than non-biological and micro-biological processes" are excluded from patentability. This sub-article also provides that this provision shall be reviewed four years after the date of entry into force of the WTO Agreement. The mandated review process started in 1999 but until now there has not been any final decision on this issue.

Micro-organisms as such occur in nature and whenever any new micro-organism is discovered, the same has to be considered as a discovery and not an invention. In view of this, since micro-organisms are not inventions, they should not be patented. The Oxford Dictionary defines micro-organism as "an organism not visible to the naked eye, e.g. bacterium or virus". Based on this definition, it can be argued that since micro-organisms are not visible to the naked eye, they should not be classified as products and product patent should not be applicable to them.

Interestingly, the Budapest Treaty on the International Recognition of the Deposit of Micro-organism for the purpose of patent procedure does not include any definition of micro-organism, although it defines other seemingly unambiguous terms such as "patent procedure", "intergovernmental industrial property organization" and "industrial property office". The Treaty's Regulations also do not define micro-organism. The World Intellectual Property Organisation (WIPO) Committee of Experts on Biotechnological Inventions and

Microbiological Inventions" prepared jointly by the European Patent Office, the Japanese Patent Office and the United States (US) Patent and Trademark Office in 1988 also did not mention the definition of micro-organism as such. In the absence of a clear-cut definition of micro-organism, it is rather problematic to decide the scope of patentability on such organism.

The naturally occurring micro-organisms when genetically modified do involve human input and as such it could be considered to have incorporated an inventive step. However, such micro-organisms are useful only for performing certain activities. Thus, the best course would be to provide for process patent for genetically modified micro-organisms.

It is unfortunate that the Government of India has made a provision in the Amended Patents Act, 1970 for the protection of micro-organisms. Having done this damage, the only course left to resolve the issue could be that the application of provision relating to protection of micro-organisms should be notified only after the review has been concluded by the WTO. India could then abide by the decision that may be taken by the WTO for multilateral application. It will not be out of place to mention here that renowned scientists are also against the patenting of micro-organisms and of any other life forms as such. A Technical Expert Group established by the Government is examining this issue and its report is still awaited. There has not been any progress at the WTO forum, though a number of countries have submitted their views on whether or not patents should be extended to micro-organisms.

#### Review of TRIPS Article 71

Article 71 of TRIPS stipulates that "the Council for TRIPS shall review the implementation of this Agreement after the expiration of the transitional period referred to in paragraph 2 of Article 65 (of TRIPS)". According to Article 65, the transitional period for the developing countries ended on 31 December 1999. Further, according to Article 71, "the

Since micro-organisms are not visible to the naked eye, developing countries can argue at the Council for TRIPS that they should not be classified as products and product patent should not be applicable to them

protection. In view of this, it is important to have similar protection as is available to wines and spirits.

#### Patentability of micro-organisms

TRIPS, in Article 27.3 (b), provides that "plants and animals other than micro-organisms and essentially biological processes for the production

Industrial Property, which met between 1984 and 1988, also did not define micro-organism. It, however, used the term micro-organism frequently in the discussions, as is reflected in the reports of the meetings of the Committee. The comparative study of "Patent Practices in the Field of Biotechnology Related Mainly to



Council shall, having regard to the experience gained in implementation, review it in two years after that date, and at identical intervals thereafter". Accordingly, the Council for TRIPS is also required to undertake reviews in light of any relevant new developments that might warrant modification or amendment of TRIPS.

The above-stated mandated reviews have not even been initiated as there are several issues, which require consideration by the Council.

(i) Article 27 paragraph (1) provides that the patent holder will enjoy patent rights without discrimination as to the place of invention, the field of technology and whether products are imported or locally produced. This means that the imported patented product by the patent holder has been absolved of the obligation to produce the product in the country, which grants the patent. This provision may only be relevant for small countries, not for big countries like India. It is always possible to produce any new product in India with economic viability as assured demand can be generated within a short period. This issue needs to be reviewed by the Council.

In this regard, Section 83 of the Amended Patents Act, 1970 provides "that patents are granted to encourage inventions and to secure that the inventions are worked in India on a commercial scale to the fullest extent that is reasonably practicable without undue delay". This Section also provides "that (patents) are not granted merely to enable patentees to enjoy a monopoly for the importation of the patented article". The implication of this provision is that patent holders, when they are granted patents under the Patents Act, 1970, have the obligation to produce the patented product in India and not resort to the import of patented products to exploit the domestic market at monopoly prices.

(ii) Article 31 (f) of TRIPS provides that "any such use (compulsory licence) shall be authorized predominantly for the supply of the domestic mar-

ket of the Member authorizing such use". The use of the word "predominantly" has become a matter of discussion. When such a word is used for granting compulsory licence, it means that there is a scope for meeting the demands other than that arising in the domestic market, i.e., it should be possible to export the pat-

"the term of protection available shall not end before the expiration of a period of 20 years counted from the filing date". This term appears to be on the high side. The argument given for an enhanced term of 20 years was that it used to take 7-8 years to grant patents. The reality, however, is different now. The patent is grant-

Article 31 (f) of TRIPS provides that any use of compulsory licensing shall be authorized predominantly for the supply of the domestic market of the Member authorising such use but the use of the word "predominantly" has become a matter of discussion

ented product by the compulsory licence holder. This aspect needs to be debated and clarified so that compulsory licence holders can play an effective role in outside markets.

It may be pointed out that Section 84 (7) (a) (iii) of India's Patents Act, 1970 provides that "the reasonable requirement of the public shall be deemed not to have been satisfied - if, by reason of the refusal of patentee to grant a licence or licences on reasonable terms for a market for export of the patented article manufactured in India is not being supplied or developed". This stipulation in the Indian law needs to be strengthened further using Article 31 (f) of TRIPS. No dispute should be raised on this count in the country or at the WTO forum.

(iii) Article 31 (h) of TRIPS provides that "the right holder shall be paid adequate remuneration in the circumstances of each case, taking into account the economic value of the authorization". This provision is not explicit in the sense that there is neither a fixed royalty nor a ceiling on royalty. Absence of this aspect would raise disputes between the patent holders and the licencees. It would be appropriate if a specific provision is made on royalty payment. It is also important to incorporate guidelines for arriving at a reasonable royalty.

(iv) Article 33 of TRIPS provides that

ed in many cases within 1-2 years. Further new generation of products are being introduced at a much faster pace affecting the utility of earlier products. In view of these, there is a strong justification for reducing the long period of protection of 20 years. However, the best possible solution could be to revise Article 33 as follows: the term of protection available shall not end before the expiration of a period of 20 years counted from the filing date or 12 years from the date of grant of the patent, whichever is earlier. This will clearly provide for an effective use of patents for 12 years.

(v) Article 27 of TRIPS stipulates that patent shall be available for any invention, whether products or processes, in all fields of technology, provided they are "new, involve an inventive step and are capable of industrial application". The terminologies mentioned above need to be defined explicitly so that frivolous claims are not filed. Regarding the definition of invention, it would be appropriate to define the same as "patentable basic invention". The idea is that the research aspect is applicable only to basic research and not for subsequent incremental modifications or additions to such basic inventions. Similarly, for the pharma and chemical sectors, only basic molecules should be patentable.

Patent rights provide exclusivity whereby others are legally prohibited from exploiting the patent. Such an exclusive right ought to be extremely selective and provided to products of real basic research. Similarly, the other patent terminologies should also be defined appropriately. This will facilitate the filing of patent claims and their examination by the concerned patent control authority.

### TRIPS and CBD

CBD was negotiated at Rio De Janeiro in 1992. The Convention reaffirms that States have sovereign rights over their biological resources. Article 15 of CBD provides that "access to such resources, where granted shall be on mutually agreed terms and prior informed consent of the Contracting Party providing

ensure that the terms and conditions to which approval is granted secures equitable sharing of benefits arising out of the use of accessed biological resources, their by-products, innovations and practices associated with their use and applications and knowledge relating thereto in accordance with mutually agreed terms and conditions".

In order to legalise benefit sharing, suggestions have been made by several countries that, as a means of benefit sharing, patent applicants be required to identify or indicate in their applications the source of any genetic material or traditional knowledge used in developing their claimed inventions. There is, however, hardly any progress in the relevant Working Group to resolve this issue. In addition, the US and some other major

In order to legalise benefit sharing, suggestions have been made by several countries that, as a means of benefit sharing, patent applicants be required to identify or indicate in their applications the source of any genetic material or traditional knowledge used in developing their claimed inventions

such resources". It is also provided in this Article that "each Contracting Party shall take legislative, administrative or policy measures, as appropriate, with the aim of sharing in a fair and equitable way the results of research and development and the benefits arising from the commercial and other utilization of genetic resources with the Contracting Party providing such resources and thus sharing shall be upon mutually agreed terms".

The Indian Parliament in order to legalise the application of the provisions of CBD enacted the Biological Diversity Act, 2002. One of the major challenges for India is to adopt an instrument, which could help in realising the objectives of equitable sharing of benefits. Consequently, Section 21 of the Biological Diversity Act stipulates that "the National Biodiversity Authority shall while granting approvals under the Act

developed countries are against benefit sharing. They disagree with the suggestion to share commercial benefits accruing from patented products. Instead, they are suggesting that the issue of benefit sharing should be settled at the time of approving the access to biodiversity material.

### Trade and technology transfer

Paragraph 37 of the Doha Ministerial Declaration deals with trade and transfer of technology. The Declaration stipulates that the Working Group under the auspices of the General Council will examine the issues relating to relationship between trade and transfer of technology and the steps that might be taken within the framework of the WTO to increase the flow of technology to developing countries. The General Council was supposed to submit its report to the fifth WTO Ministerial Conference on the progress in the negotiation.

On trade and transfer of technology, Article 7 of TRIPS (on objectives) provides that "the protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations".

The spirit of Article 7 is quite clear. What is needed is to provide for a specific provision for transfer and dissemination of technology as and when compulsory licences are granted on patented product or patented process as the case may be. India's Amended Patents Act, 1970 does not include provisions for this. Due to the stipulation in Article 7, there was no question of any negotiation in the Working Group. It is pertinent to point out that such issues are within the domain of the national governments to implement rather than to be raised at the WTO forum. At the WTO forum, there is no easy finality on such issues. Again, this is an issue of serious concern for the developing countries and not for the developed countries. Developed countries are indifferent to these issues as the issue of transfer of technology goes against their interest.

### Conclusion

Almost all the TRIPS-related issues of the Doha Work Programme are in limbo and the blame lies with the developing countries. Despite the realisation that the TRIPS Agreement is likely to impact in several areas of development, developing countries are not showing full interest in protecting their concerns in the Council for TRIPS. If they want to protect their national interest, they must adopt pro-active approaches to settle these issues. Otherwise, with the passage of time, no decision would mean ~~fit~~ accomplishment on these issues. n

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# Intellectual Property Rights and Gender

The IP system must take into account the gender inequalities in the production and marketing of innovations, the other factors that affect the ways in which women adopt technologies and access markets as well as the gender-differentiated impacts of strict IP rules.

n Bryn Gay and Yumiko Yamamoto

Various forms of property are needed for effective participation in trade, and women usually begin from a disadvantaged position in this aspect, which frequently results in unequal outcomes between the genders. The gendered impacts of intellectual property rights (IPRs) and women's potential to benefit from them are emerging issues in the area of trade and gender, especially in the context of the World Trade Organization's (WTO) Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS). IPRs are a socially constructed system of regulations that protects new ideas and technologies, and provides monetary incentives for inventors but it may have particular gendered effects. Indeed, IPRs are relevant to women and men from three perspectives.

First, women are the prominent purveyors of plant genetic resources, traditional knowledge and cultural folklore. Traditional knowledge has often been passed down to women through generations of matrilineal relations. Notions of communally shared knowledge such as traditional medicinal plants and cultural goods contrast with current intellectual property (IP) provisions under TRIPS, which mostly value the commodification of ideas (Shiva 1997; Verzola 1999). Over the years, however, traditional medicines have gained economic value; handicrafts made by indigenous women have become commercially viable and popular in developed country mar-



kets. Commodifying this knowledge transforms their cultural meanings with implications for groups' cultural survival (Appadurai 1986). At the same time, women are unlikely to obtain economic gains, if strict IPR regimes reduce women's ability to control the propagation of seeds in crop production and of herbs in the production of traditional medicines.

Second, the negative effects from strict IPR regimes are likely to be greater on women than men. In the case of medicines, strict IP rules may pose additional challenges for accessing affordable, life-saving medicines, particularly for people living in poverty – more so for women. The impoverishment of women's health and economic status also has negative effects on children's well-being; it brings about a vicious, generational cycle of poverty. Even if women are not patients, lack of access to af-

fordable drugs and health services will increase women's burden to take care of sick people at home.

Third, when women's ideas are patented, they are more likely to be undervalued and pirated; benefits from IPRs are consequently unequally shared. Historically, women's inventions were seen to be associated with their private, domestic sphere roles, not as viable in larger markets. When women's inventions are only seen as "domestic innovations", "commonplace", "nurturing" and "non-scientific", devaluing women's potential to create further puts down other women's productive and reproductive work (Barwa and Rai 2002: 44, 54). The following sections look at the linkages between IPRs and gender in four areas: biodiversity, seeds and agricultural inputs; traditional medicinal knowledge; public health; and cultural materials.



### Biodiversity, seeds and agricultural inputs

Many women and men in less developed countries earn their income in agriculture and medicinal plant cultivation. In these countries, women have been central to resource cultivation and allocation, while they actively engage in food production. They rely on freely sharing seeds, agricultural technologies and fertilisers to improve production. In addition to difficulties in accessing land and credit, stringent IPRs could pose challenges for women farmers. Many women farmers opt to diversify plants and livestock because they see that diversity improves the quality and sustainability of their subsistence systems (Quiroz 1994; Menchú 1984). Women mostly avoid patented seed varieties that male counterparts advocate when producing cash crops (Quiroz 1994). Moreover, any benefits derived from patented plant varieties are less likely to be distributed equitably (Commission on Intellectual Property Rights 2002; Wynberg 2004).

Patents on plant varieties could increase the cost of essential seeds and impair seed sharing practices among farming communities. Patents on seeds could further hinder the distribution of food, with additional implications for people's, particularly women's, nutrition, health and overall well-being. Technological advances in the past century yielded new research on ways to improve plant quality and production. Yet patents on these advances, including genetically modified plants, create financial obstacles for farmers and raise concerns about the patenting of life forms.

Patents increase the cost of farming expenses, which may cut into women farmers' household expenditures. The inability to purchase time-saving technologies such as herbicides increases the amount of time women spend in controlling weeds and pests, and diminishes the time spent in the private sphere (Tran-Nguyen and Beviglia Zampetti (eds.) 2004). By enhancing women's involvement in agricultural research and in decisions on IP protection,

By enhancing women's involvement in agricultural research and in decisions on IP protection, women will have greater control over technological changes with greater opportunities to improve agricultural productivity

women will have greater control over technological changes with greater opportunities to improve agricultural productivity.

Farmers' rights movements, reliant on women's social networks, try to amend TRIPS provisions that mandate patents and plant variety protection (PVP)<sup>1</sup> so that they recognise farmers' rights to save, reuse, exchange and sell seeds (Doan 2002; Borowiak 2004: 514-522). Sufficient consultation with women, indigenous communities and civil society must be facilitated while drafting IP provisions. In particular, it must be ensured that IP rules do not neglect the principles of access and benefit sharing and prior informed consent (PIC). Similarly, there should also be a requirement for IPR applicants to disclose the source of origin of biological/genetic resources and associated traditional knowledge. These provisions are critical to reward women for their contributions in agriculture and biodiversity conservation.

### Traditional medicinal knowledge

Production of traditional medicinal and aromatic herbs as well as organic food and drinks is becoming a niche for non-traditional agricultural exports. Throughout Asia and the Pacific, such herbs are widely available – and women are very much involved as producers. Traditional medicines are used commonly at

home and in local hospitals but recently, multinational corporations have targeted exports to Europe, Japan and North America.

Linkages between international treaties such as TRIPS and micro-based poverty reduction programmes through small and medium enterprise development have not been largely examined. Furthermore, many countries' legislation encourage access to plant resources for local producers but the effective implementation of such laws has been difficult.

Notably, WTO Agreements such as TRIPS lack coherence with biodiversity conventions. Particular measures to safeguard traditional medicinal knowledge of local producers, especially indigenous communities, from biopiracy<sup>2</sup> are necessary. Numerous policy linkages require focused attention and a gender perspective, which could consider: geographical indications (GIs),<sup>3</sup> special tariff structures for organic foods and herbs, the scope for regional collaboration to reduce costs of exporting, sanitary and phytosanitary standards, and/or national regulations for health products. The case of the Canadian government, which has taken steps to protect traditional knowledge in other areas and to regulate health products, could be examined as an example for discussing the pros and cons of such a policy.

### TRIPS and gendered access to anti-retroviral drugs

IP has drastic repercussions on people's access to inexpensive medicines, healthcare and technologies, with notable disparities between women's and men's access. Strict IPR regimes have the potential to make pharmaceutical drugs – necessary for sexual and reproductive health and for widespread diseases such as HIV/AIDS – expensive and inaccessible. The estimated number of women (aged 15 to 49) living with HIV/AIDS is less than that of men in Asia-Pacific. However, the estimated number of women, who are infected with HIV, has been increasing at a faster rate than that of men. Thus, the gender gap of the HIV in-

fection rates is narrowing.

Apart from biological reasons, women's low socio-economic status in society, limited knowledge about their sexuality and obstructed access to information increase their vulnerabilities to the epidemic compared to men (UNDP/APMRN 2004: 14-15). Some figures (World Bank 1997; Tran-Nguyen and Beviglia Zampetti 2004: 264) estimate that 70 percent of infected women are 15-25 years old. Within this age set, increasing numbers of women are pregnant or raising children.

Of the total number of people infected with HIV in 2005, only about 20 percent received anti-retroviral (ARV) therapy. Only 9 percent of pregnant women have access to mother-to-child prevention services, indicating a grim future for stopping the spread of the disease (UNAIDS 2006: 62). A number of social and economic factors explain the existing gender-related deprivation of treatment for HIV/AIDS.

First, given lower (or no) income status than men and lack of access to property and land, women do not have much bargaining power within the household to demand treatment or borrow money from husbands or relatives to seek it. Even when treatment is provided free of charge, women's opportunity costs and other costs, e.g., transportation costs to the nearest clinic, prevent them from seeking treatment (UNAIDS/UNFPA/UNIFEM 2004: 25). A survey in India found that as many as one-fourth of women have not sought treatment due to financial constraints, while this percentage is only 11 percent in men's case (Pradhan and Sundar 2006: 46).

Second, the priority of medical care tends to go to men, who are seen as bread-winners, if treatment is not affordable for everyone in the household.

Third, social stigma, discrimination and the risk of violence associated with being HIV-positive impede women from seeking treatment. Both in the community and household,



women are frequently blamed for infections and risk domestic violence and abandonment if they are found to be HIV-positive (Pradhan and Sundar 2006: 27). Moreover, abused women are reluctant to take HIV medicines on a consistent basis if they are afraid of their partners, if they are depressed, or if they are ashamed of being abused (Lichtenstein 2006).<sup>4</sup> Finally, women's responsibilities in household chores and care work and lack of support from families<sup>5</sup> generate added difficulties in seeking healthcare.

Strict IP rules may pose additional challenges for accessing afford-

While many women's and indigenous peoples' methods for keeping cultural resources within their communities may be seen as obstacles to commercial development, these communities are best suited for preserving cultural heritages and the intellectual commons

able, life-saving medicines, particularly for women in poverty. Several studies (Oxaal 1998; Masud Ahmed et al. 2005) show that a slight increase in medical costs will prevent people, especially women, from seeing doctors and/or taking drugs. Less developed countries' public health expenditures become more strained when faced with higher prices for life-saving medicines (UNAIDS 2006: 13). Irregular health consultations in such countries also increase women's risk to becoming sick, and in the worst case, women's mortality rates.

The increased domestic responsibilities to take care of the sick reduce women's opportunities to participate in income-generating activities. Such responsibilities also cut their participation in leisure activities, or they simply have to work harder in both productive and reproductive spheres.

### IPR on cultural materials

As the qualifications to meet TRIPS standards of originality and utility are constructed according to what will generate commercial profits, they are seen as contrary to how indigenous peoples and other communities might view their knowledge. This process transforms cultural materials into cultural commodities, with exchange values that are dependent on how often outside parties use them. Value is seen not as something with inherent worth but based on utility and functionality (Rowlands 2004: 212). Implications for transforming sacred and historically significant cultural materials into goods for consumption and export must be further investigated because this has dramatic consequences for the cultural survival of indigenous communities. While many women's and indigenous peoples' methods for keeping cultural resources within their communities may be seen as obstacles to commercial development, these communities are best

suites for preserving cultural heritages and the intellectual commons.

Trends to digitise cultural materials such as songs, folk legends, dances or designs have introduced different opportunities to indigenous peoples and communities in the global South. On the one hand, IPRs on clothing, jewellery, pottery or basketry may generate more income for groups wishing to market their cultural creativity. On the other, without ethical consultation, PIC, participation in marketing of cultural materials, and sustainable benefits from royalties, women purveyors of this cultural knowledge lose out significantly on IPR-related economic opportunities.

Efforts to include and train women, particularly in indigenous communities, on IPR and non-IPR protection of cultural materials are essential to securing control over their cultural and economic rights. It is also important to recognise a group's rights over cultural materials and the decision not to use the IPR regime to protect them. Along these lines, entrepreneurs seeking to use women's or indigenous communities' patterns and designs must abstain from appropriating their cultural knowledge. To avoid theft, it is possible to store information about various designs and cultural outputs in public databases or archives, as long as the people within a culture group are trained to monitor this process. The Mataatua Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples, ratified by more than 150 indigenous groups, elaborates on this method of cultural protection.

To summarise, the latest IP system potentially binds common goods as private property and uncovers costly litigation for handling disputes, which could bring severe consequences to women with limited funds and negotiating power within IP discussions. To become more gender-sensitive, the IP system must take into account the gender inequalities in the production and marketing of innovations, the other factors that affect the ways in which women adopt technologies and access markets (Barwa and Rai 2002) as

well as the gender-differentiated impacts of strict IP rules. Much work remains to be done to provide women with equal access to education and opportunities that enable them to accumulate property, including IP, and other assets. **n**

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## Notes

- <sup>1</sup> Article 27.3 (b) of TRIPS requires WTO Members to provide protection to plant varieties either through patents, or an effective sui generis system, or a combination of both. See TRIPS Article 27.3, [http://www.wto.org/english/docs\\_e/legal\\_e/27-trips\\_04c\\_e.htm](http://www.wto.org/english/docs_e/legal_e/27-trips_04c_e.htm)
- <sup>2</sup> Practice of appropriating a plant resource, obtaining a patent and not acknowledging or compensating the original owner.
- <sup>3</sup> See TRIPS Article 22 and 23, [http://www.wto.org/English/docs\\_e/legal\\_e/27-trips\\_04b\\_e.htm](http://www.wto.org/English/docs_e/legal_e/27-trips_04b_e.htm); Waglé (2007).
- <sup>4</sup> The study is based on the interviews with women living with HIV in Alabama, United States of America.
- <sup>5</sup> For example, see Pradhan and Sundar (2006) for the survey results in India.

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# TRIPS flexibilities and access to medicine

The case of some of the countries in Asia-Pacific indicate a positive shift in the willingness of their governments to use TRIPS flexibilities and ensure an appropriate balance between private rights and public interests.

n Cecilia Oh

In 1997, 39 pharmaceutical companies filed a lawsuit against the government of South Africa. The companies' cause of action was that the government's amendment of its medicines law<sup>1</sup> to enable the parallel importation of generic medicines was, among others, in contravention of the World Trade Organization's (WTO) Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) and a deprivation of their constitutional right to intellectual property.

The backlash of public opinion forced the pharmaceutical industry to withdraw its legal action without waiting for a decision on the validity of its cause of action. Since then however, the WTO Ministerial Declaration on the TRIPS Agreement and Public Health in 2001 has confirmed that governments are within their rights to incorporate the so-called TRIPS flexibilities (which include measures such as parallel importation and compulsory licensing) into their national laws and to use them in the public interest of promoting access to affordable medicines for all.

The drug industry has since been unwilling to engage in such high-publicity legal challenges but there remains persistent political and industry pressure on developing countries against their use of TRIPS flexibilities. Despite such pressures, in recent years, some Asia-Pacific countries have taken measures to limit the private exclusive rights under intel-



lectual property protection in the interest of safeguarding public health. These developments appear to signal a greater political willingness to take measures that more appropriately balance the interests, as between protecting intellectual property rights (IPRs) and ensuring adequate access to medicines.

## Compulsory licences and government use

In the context of access to medicines, compulsory licensing permits a third party to "use a patent", by producing or importing generic versions of a patented product. A compulsory licence authorising the government itself to use a patent is referred to as a government use authorisation. Provisions for government use authorisation are a common feature in most patent regimes, and governments typically have a large degree of freedom to act when they use patents in the public interest. For instance, the legislation of the United States (US) and the United Kingdom (UK) allow

the governments to use patents or authorise a third party to use patents for virtually any public purpose, without the need for negotiations or prior consent of the patent holder, unlike in the case of compulsory licences by private entities.<sup>2</sup> TRIPS permits a similar waiver of prior negotiations with the patent holder in the case of a government use of a patent for public, non-commercial purposes (as opposed to private, commercial transactions). This waiver allows for "fast tracking" a government use authorisation as it avoids the delay that often occurs in the negotiations, sometimes used as a delaying strategy against compulsory licensing. Government use authorisations, thus, allow governments to take speedy measures to ensure access to urgently needed medicines.

Malaysia was the first country in Asia to grant a government use authorisation in 2003. The government relied on a provision in the patent law, which permits the relevant Minister to authorise a government agency or a third person to exploit a patented invention in the case of, *inter alia*, a national emergency, or where the public interest so requires.<sup>3</sup> The government use authorisation permitted public hospitals to dispense the cheaper generic HIV/AIDS drugs imported from India. The introduction of generic anti-retroviral (ARV) reduced the monthly cost of treatment – for both generic and orig-

inator products - by about 80 percent of the 2001 prices.<sup>4</sup>

A year later, Indonesia also granted a government use authorisation. The Presidential Decree effecting the authorisation cited "the urgent need of the community in the effort to control HIV/AIDS epidemic" as the reason for the use of the patents related to two HIV/AIDS drugs. The decree authorised the relevant Minister to appoint a "pharmaceutical factory as the patent exploiter for and on behalf of the Government" taking into account the recommendations of the National Drug and Food Control Authority. A local generic producer now manufactures generic versions of the first-line ARV treatment, at a monthly cost of US\$ 38, a significant reduction from the price of US\$ 800-1000 for the similar treatment comprising patented products.<sup>5</sup>

More recently, in November 2006 and January 2007, Thailand issued government use authorisations for the local production and import of two AIDS drugs and a blood-thinning treatment for heart disease. The pharmaceutical industry initially sought to challenge the validity of these authorisations on grounds that there had been no prior consultation or negotiation with the patent holders. A reading of the Thai patent law suggests that prior negotiations are not required in the case of a public use of patent rights, provided the patent holder was informed promptly, as was done in the Thai case.<sup>6</sup> The US government has not alleged a violation of the TRIPS Agreement or the national law. The United States Trade Representative (USITR), Susan C. Schwab, stated that the US Administration "fully respected the Thai Government's ability to issue compulsory licences" and "had not suggested that Thailand has failed to comply with particular national or international rules".<sup>7</sup> The Administration, however, placed Thailand on the Priority Watch List of the USITR's Special 301 Report, citing "a weakening of respect for patents" and a "lack of transparency and due process" in the grant of the compulsory licences.<sup>8</sup>

This is not the first time political pressure has been brought to bear on

Thailand. Under threat from the US to limit textile imports, the Thai government passed a law banning parallel imports in 1992 (although parallel imports were allowed again after amendments to the patent law which came into force in 1999). Again in 1998, after a threat of high tariffs on imports of wood products and jewellery, the Thai government passed ministerial regulations to restrict the use of compulsory licensing, which is permitted under the Thai law.<sup>9</sup> This time, however, the threat of the loss of duty-free access to the US market for a number of its exports from the Priority Watch List has not worked to compel the Thai government to cancel its government use authorisations.

### TRIPS flexibilities - not only for emergencies or HIV/AIDS

Thailand also set a new precedent in the use of TRIPS flexibilities, by granting an authorisation for a heart disease drug. The government use authorisation on the patent on clopidogrel, marketed under the brand name of Plavix (under patent held by Bristol-Myers-Squibb), marks a departure from recent compulsory licences or government use authorisations for AIDS treatments.

It is a common misperception that the use of TRIPS flexibilities is only restricted to address public health emergencies and epidemics, and to drugs to treat the three diseases specifically mentioned in the Doha Declaration - HIV/AIDS, tuberculosis and malaria. The Doha Declaration does not restrict the use of TRIPS flexibilities to specific diseases. In addition, the Declaration explicitly confirms the right of countries to determine the grounds on which such licences are granted. As non-communicable diseases such as cancer, heart disease and diabetes affect increasing numbers of people in the developing world, the high prices of such treatments will raise similar issues of access and equity, as they did for HIV/AIDS drugs.

### Other TRIPS flexibilities

The flexibilities in TRIPS are not restricted to just compulsory licensing

or parallel imports. The Doha Declaration does not provide an exhaustive listing of the flexibilities permitted to governments in formulating their domestic intellectual property laws but Paragraph 4 of the Declaration sets out the fundamental principle in this respect: not only can WTO Members implement TRIPS in a manner supportive of their rights to protect public health, they should do so.<sup>10</sup>

One such flexibility relates to the criteria for patentability. While the TRIPS Agreement stipulates that the criteria for patentability should be defined as meeting the tests of "novelty, inventive step, and industrial application", it does not provide specific directions for how these criteria are to be applied at the national level. In this way, countries retain the ability to interpret and apply the criteria, as best suits the public interest and objectives.

This is the debate now taking place in India. In 2005, India was obliged to bring its patent legislation into conformity with TRIPS and hence, introduced the product patent regime. Developing countries like India, which did not provide patents for pharmaceutical and agro-chemical products at the time the TRIPS Agreement came into force in 1995, were allowed a 10-year transition period until 2005 to introduce such a system of protection. During this period, these countries were required to accept patent applications (for pharmaceutical and agro-chemical products) as of 1995 and to keep the applications pending in a patent "mailbox" until 2005. The Indian mailbox was opened on 1 January 2005, after which Patent offices were required to examine the patent applications, for the eventual granting or rejection of the applications.

The new Indian patent law, in establishing the product patent regime, also incorporated a safeguard provision<sup>11</sup>, which would reject product patents for "mere" discoveries of a new form or a new use of already-known drugs or modifications to them unless the modifications make the drugs significantly more effective. The provision, Section 3(d) of the Patents (Amendment) Act, is

aimed at preventing "ever greening", whereby patent owners seek to patent trivial modifications to already existing products in order to extend their patent terms and block the entry of generics.

The Cancer Patients Aid Association relied on this provision in 2005 to file an opposition to Novartis' patent application for its anti-cancer drug, Gleevec, on the ground that the application related only to a modification that did not improve the efficacy of the drug. In what many consider a landmark decision, the Patent Office rejected the patent application for Gleevec, on a number of grounds, including that claimed by the Cancer Association. Novartis' appeal is being heard in the courts now.<sup>12</sup>

An opposition was also filed against GlaxoSmithKline's (GSK) patent application for Combivir, a fixed-dose combination of two widely-used HIV/AIDS drugs (lamivudine and zidovudine). The patent application appears to claim an invention on the combination drug, on the basis that adding a "glidant" to the two already known drugs constituted an invention. In the pharmaceutical industry, glidants are essentially common ingredients such as silicon dioxide (or in common parlance, sand), corn starch, talc and calcium carbonate (or chalk) that drug manufacturers routinely use when making pills or tablets, to hold together pharmaceutical compositions. As such, neither the glidant nor the method of using the glidant to combine the drugs is new. Hence, both fail to pass the test of patentability as well as the criteria in Section 3(d). Ahead of a decision on the patentability of the Combivir patent, GSK in March 2006 announced the withdrawal of its patent application.

The rejection of Novartis' patent application has sent a signal that Section 3(d) will be used to ensure a clear consideration of public health interests in the implementation of patent law. This has spurred other patent oppositions in India with approximately 180 patent oppositions having been filed against patent applications for pharmaceutical products at present. It also has had the

effect of persuading patent applicants to withdraw applications that will not pass the test of patentability and do not justify patent protection.

### Conclusion

The cases described above indicate a positive shift in the willingness of some governments in Asia-Pacific to use TRIPS flexibilities so as to ensure an appropriate balance between "private rights" and "public interests".

The current appeal by Novartis in India should be regarded as the "test case", as to whether the balancing will eventually be achieved. The appeal by Novartis is not merely against the rejection of its patent application. The challenge against the validity of Section 3(d) on grounds that the provision is not TRIPS-compliant represents a challenge against the Indian government's interpretation of the TRIPS Agreement, which take account of public health interests. The Doha Declaration's exhortation to interpret and implement the TRIPS Agreement in a manner supportive of public health may perhaps have been forgotten. It also might be useful to remind ourselves of the outcome of the case in 1997 in South Africa when 39 companies sued the government for incorporating a TRIPS flexibility into its legislation. <sup>n</sup>

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### Notes

<sup>1</sup> Section 15C of the Medicines and Related Substances Control (Amendment) Act, 1997.

<sup>2</sup> See 28 USC 1498 for US government use provision and the UK Patent Act 1977 on Crown use of a patent.

<sup>3</sup> Section 84 of the Patents Act in Malaysia.

<sup>4</sup> See Musungu and Oh (2006), Khor (2007).

<sup>5</sup> See Khor (2007).

<sup>6</sup> See Section 51 of Thai Patent Act and Ministry of Public Health and National Health Security Office (2007).

<sup>7</sup> Letter to Congressman Sander M. Levin, dated 17 January 2007, in response to a letter from 22 Members of Congress, requesting the Administration to clarify its position on the Thailand case. See Document 11 in the compilation of document by Ministry of Public Health and the National Health Security Office, Thailand (2007)

<sup>8</sup> USTR Special 301 Report 2007, 30 April 2007

<sup>9</sup> Medicins sans Frontieres (1999), in Oh, C. (1999)

<sup>10</sup> Paragraph 4 of the Doha Declaration states: "We agree that the TRIPS Agreement does not and should not prevent Members from taking measures to protect public health. Accordingly, ... we affirm that the Agreement can and should be interpreted and implemented in a manner supportive of WTO Member's right to protect public health and, in particular, to promote access to medicines for all".

<sup>11</sup> Section 3(d) of the Patents (Amendment) Act 2005 provides that the "mere discovery of a new form of a known substance which does not result in the enhancement of the known efficacy or the mere discovery of any new property or new use of a known substance or mere use of a known process...unless such known process results in a new product or employs at least one new reactant" will not be considered to be a patentable invention.

<sup>12</sup> At the time of writing this article, the appeal of Novartis was being heard in the Madras High Court in Chennai, India. See the update about it in Box 1 of the Cover Feature on page 16.

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## Protecting Farmers' Rights in the Global IPR Regime

# Challenges and Options

Farmers' rights are vital to food security and poverty eradication in the South and a key to maintaining global agro-biodiversity for future generations. But how can they be protected?

n Regine Andersen

Genetic diversity of agricultural plants is the very basis of farming. It provides the pool from which plant traits can be found that meet the challenges of crop pests and diseases, marginal soils, and – not least – of changing climate conditions, and it is a vital way of spreading risks for small-scale farmers. Plant genetic diversity is probably more important for farming than any other environmental factor, simply because it is the factor that enables adaptation to changing environmental conditions. Thus, it is crucial to global food security as well as to poverty eradication in the South.

The world's agro-biodiversity is disappearing at an alarming rate. For several major crops, up to 80–90 per cent losses in variety over the past century have been reported.<sup>1</sup> Since the dawn of agriculture, farmers have been the custodians of agro-biodiversity. In developing countries, the vast majority of farmers still act as stewards and innovators of genetic diversity but the enormous transformations of agricultural systems worldwide are increasingly threatening their livelihood options. Farmers' rights are about enabling farmers to continue as stewards and innovators of agro-biodiversity, and about rewarding them for their contribution to the global genetic pool. As such, farmers' rights are vital to fight against poverty. This article outlines central challenges and options for the realisation of farmers' rights.<sup>2</sup>

### Concept of Farmers' Rights

The International Treaty on Plant

Genetic Resources for Food and Agriculture (ITPGRFA) provides for the realisation of farmers' rights. It does not define the concept but leaves it to Member governments to choose the measures they deem appropriate – some measures are suggested in the Treaty – according to their needs and priorities. Arriving at a clear and fruitful understanding of the concept is the first challenge and fundamental to identifying further challenges and options.

The idea of farmers' rights has been intimately linked with the discussion on intellectual property rights (IPRs) ever since the concept was first voiced internationally.<sup>3</sup> Whereas there are many perceptions regarding farmers' rights today, they generally fall within one of two different main approaches, which relate differently to IPRs.<sup>4</sup>

### The ownership approach

This approach refers to the right of farmers to be rewarded for genetic material obtained from their fields and used in commercial varieties and/or protected with IPRs. The idea is that such a reward system is necessary to enable equitable sharing of benefits arising from the use of agro-biodiversity and to establish an incentive structure for continued maintenance of this diversity. Access and benefit sharing (ABS) legislation and farmers' IPRs are suggested as central instruments.

### The stewardship approach<sup>5</sup>

This approach refers to the rights that farmers must be granted in or-

der to enable them to continue as stewards and innovators of agro-biodiversity. The idea is that the legal space required for farmers to continue this role must be upheld and that farmers involved in the maintenance of agro-biodiversity – on behalf of our generation, for the benefit of all humankind – should be rewarded and supported for their contributions.

If we take the measures suggested under the ITPGRFA for the realisation of farmers' rights as the point of departure, the goals to pursue would be quite different for the two approaches (See the table on the next page).<sup>6</sup>

Proponents of the stewardship approach note that agricultural plant varieties are normally shared among farming communities: ownership of varieties is traditionally an alien idea among farmers and represents a profound break with traditional perceptions. Furthermore, it would be difficult to identify exactly who should be rewarded. In addition, the demand for farmers' varieties among commercial breeders is limited, so relatively few farmers would benefit, whereby most of the contributors to the global pool of genetic resources would remain unrewarded. Also, the ownership approach could lead to disincentives to share seeds and propagating material among farmers because of benefit expectations, and/or because of exclusive IPRs for farmers' varieties. If countries choose to follow the ownership approach, it is thus vital that it does not conflict with the

## Two Approaches for the Realisation of Farmers' Rights

ITPGRFA measures	Protection of farmers' traditional knowledge	Equitable sharing of benefits arising from the use of genetic resources	Participation in relevant decisions at the national level	Farmers' customary use of propagation material (saving, sharing, selling)
Stewardship approach	The goals are to protect this knowledge against extinction and thus to encourage its further use.	Benefits are to be shared between stewards of plant genetic resources and society at large – partly through the Multi-lateral System.	Participation is important to ensure legal space and rewards for farmers' contributions to the genetic pool.	The goal is to uphold the legal space to ensure farmers' continued maintenance of plant genetic resources.
Ownership approach	The goals are to protect the knowledge against misappropriation and to enable its holders to decide over its use.	Benefits are to be shared between purported "owners" and "buyers" of genetic resources upon prior informed consent on mutually agreed terms.	Participation is important to ensure adequate legislation on ABS and IPRs.	The goal is to introduce farmers' IPRs along with breeders' rights – in balance.

overall objective of stewardship, which has been the prevailing principle in the Food and Agriculture Organisation (FAO) ever since the discussion came up.

Based on the many perceptions on the concept, the following working definition may be seen as a lowest common denominator:<sup>7</sup>

Farmers' rights consist of the customary rights that farmers have had as stewards and innovators of agrobiodiversity since the dawn of agriculture to save, grow, share, develop and maintain plant varieties; and of their legitimate rights to be rewarded and supported for their contribution to the global pool of genetic resources as well as to the development of commercial varieties of plants, and to participate in decision-making on issues that may affect these rights.

Such a "minimum definition" does not directly address the latent conflict between farmers' rights and IPRs. Rather, it seeks to establish a common ground from which to address the crucial issue of farmers' rights, which is necessary to develop a fruitful dialogue among stakeholders on necessary measures to be taken – also with regard to IPRs. Based on this definition, we can derive three core challenges:

- upholding and developing a legal space<sup>8</sup> for farmers' customary practices related to agrobiodiversity;
- creating support mechanisms for farmers' contributions to the global pool of genetic resources; and
- enabling farmers' participation in relevant decision-making processes.

We will focus on the first two in this article.

### Upholding legal space

Farmers' practice of saving, using, exchanging and selling seeds and propagating materials from their own harvest is increasingly affected by three forms of legislation: IPRs, particularly plant breeders' rights; seed laws; and ABS laws.<sup>9</sup>

Plant breeders' rights restrict the use of farm-saved seeds and the exchange of seeds and propagating materials from plants protected with such rights. The extent to which they restrict such practices depends on the coverage of the rights and possible exemptions for small-scale farmers. The past 40 years have seen a steady increase in restricting these rights through the International Union for the Protection of New Va-

rieties of Plants (UPOV), the World Trade Organization's (WTO) Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) and the World Intellectual Property Organisation (WIPO). Also, regional and bilateral trade agreements often set the introduction of plant breeders' rights as a condition. IPR regimes are evolving extremely fast in many developing countries, increasingly restricting farmers' legal space. The problem is that the IPR regimes in these countries never had the chance to adapt to a slowly developing seed sector, as in the North. This makes it extremely difficult to establish "prior art" – formal knowledge of already existing plant varieties – which is necessary to establish whether a new variety, subject to plant breeders' right, is really new. Normally the burden of proof lies with the farmers.

Seed laws cover exchange and sales of seeds and propagating materials – regardless of whether they are protected with IPRs – for plant health reasons. Their certification rules are normally based on criteria relevant to genetically homogeneous plant varieties from professional plant breeders, but not farmers' varieties. The result is that farmers' varieties are excluded from the formal

market in many countries – in Europe, it is even prohibited to exchange seeds among farmers or to give them away.

ABS laws, often adopted with reference to the Convention on Biological Diversity (CBD), tend to restrict access to genetic resources for companies and entities other than farmers and indigenous peoples. However, in some cases, the acts also cover gene bank conservation activities, vital for farmers' continued access to agro-biodiversity. In Peru, for example, access-related legislation on the protection of traditional knowledge has proven a barrier to conservation and has discouraged the sharing of seed potatoes among farmers in some areas.

From a farmers' rights perspective, the main goal must be to uphold the legal space for farmers within these emerging legislative frameworks. As a minimum, it must, as a general principle, allow farmers to save, develop, exchange and sell seeds and propagating materials from their varieties<sup>10</sup> with other farmers. Plant health concerns must be addressed in other ways. Furthermore, IPR legislation must be designed so as to enable small-scale farmers to continue their customary practices related to seeds and propagating materials. Finally, ABS legislation must not impose barriers to conservation activities, or serve to discourage seed exchange among farmers.

### Creating support mechanisms

Creating effective support mechanisms is related to the equitable sharing of benefits from the use of genetic resources. We can distinguish between direct and indirect, as well as monetary and non-monetary, benefit sharing. Direct benefit sharing takes place between purported "owners" and "buyers", whereas indirect benefit sharing is between the stewards of agro-biodiversity and society at large, often channelled through development cooperation. Although several countries in the South have enacted legislation on direct benefit sharing, no instances have been reported so far with regard



to agro-biodiversity.<sup>11</sup> By contrast, there are many examples of indirect benefit sharing, normally non-monetary. The most frequent are:

- access to seeds and propagating materials, and related information;
- participation in the definition of breeding goals;
- participatory plant breeding in collaboration between farmers and scientists;
- strengthening farmers' seed systems;
- conservation activities, including local gene banks; and
- enhanced utilisation of farmers' varieties, including market access.

Today, these benefits reach only a limited number of farmers. Options to scale them up include the establishment of funds or facilitating mechanisms at the international and national levels to channel the necessary resources to activities supporting farmers in their maintenance of agro-biodiversity. This would also require up-scaling institutional structures and competence for these purposes – in close collaboration with farmers.

### Conclusion

Raising awareness about the importance of protecting farmers' rights for food security and poverty eradication is the most pressing challenge today. A minimum definition, as proposed in this article, may be instrumental in furthering dialogue between stakeholders on measures to be taken. Core challenges are the increasing legal restrictions on farmers' customary practices related to agro-biodiversity, and the lack of support structures and farmers' participation in rele-

vant decisionmaking processes. Central options pertain to creating a legal space within legislative frameworks for farmers' stewardship and innovations in agriculture, and to establish funding mechanisms at the international and national levels in order to scale up activities supporting them in their vital contribution to the global genetic pool. **n**

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### Notes

<sup>1</sup> FAO, *State of the World's Plant Genetic Resources for Food and Agriculture* (Rome: Food and Agriculture Organisation, 1998).

<sup>2</sup> The article is based on findings from an international research project on Farmers' Rights led by the author. Publications from the project can be downloaded free of charge from [www.fnin.no/farmers/main.html](http://www.fnin.no/farmers/main.html).

<sup>3</sup> Regine Andersen, "The History of Farmers' Rights – A Guide to Central Documents and Literature," FNI Report 8/2005 (Lysaker: The Fridtjof Nansen Institute, 2005a).

<sup>4</sup> This is based on Regine Andersen, "Results from an International Stakeholder Survey on Farmers' Rights," FNI Report 9/2005 (Lysaker: The Fridtjof Nansen Institute, 2005b).

<sup>5</sup> In this context, the term 'stewardship' is used in recognition of farmers' role in maintenance and innovative development of genetic resources.

<sup>6</sup> From Regine Andersen, "Realising Farmers' Rights under the International Treaty on Plant Genetic Resources for Food and Agriculture, Summary of Findings from the Farmers' Rights Project (Phase 1)," FNI Report 11/2006 (Lysaker: The Fridtjof Nansen Institute, 2006).

<sup>7</sup> *Ibid*

<sup>8</sup> This concept was first used in this context in Andersen (2006).

<sup>9</sup> This development can be seen as the result of the interaction between the international regimes presented here, and their driving forces, as analysed in Regine Andersen, *Governing Agrobiodiversity: Plant Genetics and Developing Countries* (Aldershot: Ashgate, forthcoming 2007).

<sup>10</sup> This concept broadly covers traditional varieties and farmers' plant variety innovations.

<sup>11</sup> Andersen (2005b).



# Protection and enforcement of Intellectual Property Rights

Yet another example of do as I say and not as I do?

n Hannah Irfan and Shandana Gulzar Khan

The concerns of the United States (US) over China's poor intellectual property right (IPR) protection and enforcement had been brewing for a while, giving rise to speculations as to whether or when the US would take the matter up before the Dispute Settlement Body (DSB) of the World Trade Organization (WTO). When lobbyists representing three US business giants - Walt Disney, Microsoft and Vivendi - stated that Chinese copying of movies, music and software cost them nearly US\$ 2.2 billion in 2006 sales losses, the US came into action.

In April of this year, the United States Trade Representative (USITR) requested the WTO DSB for consultations under Article 4.4 of the Dispute Settlement Understanding (DSU) with China on two cases, one of which deals with the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS).

Consultations were held in Geneva on 7 and 8 June but the two sides were not able to resolve the matter. As a result, the office of the USITR requested the DSB on 13 August to establish a panel to rule upon the merits of the case. As is the norm, China blocked the establishment of a Panel in a meeting of the DSB but the Panel was automatically established at the next meeting of the DSB on 25 September following a second request by the US.

The dispute is expected to be fol-

lowed closely by the bulk of developing Members of the WTO, and although no Member participated as a third party in the consultative stage of the dispute, the option to join the proceedings at the Panel stage remains available. The matter raised by the US, i.e., the scope of a Member's commitment in effective protection and enforcement of IPRs under TRIPS, is one that remains unresolved and a contentious issue. Two separate fora, the DSB and the Council for TRIPS, have seen the developed and developing world occupied with the spicy issue of TRIPS enforcement since the inception of the WTO.

## TRIPS enforcement provisions

TRIPS (Articles 41-61) imposes minimum standards for the enforcement

of IPRs, enabling both right holders of IPRs and those challenged in such processes, to protect their legitimate interests through civil or administrative proceedings. During the Uruguay Round of trade negotiations, developing countries put up a fierce fight to block provisions in TRIPS that would require either a WTO Member to establish special courts for IPRs or to specially allocate resources for effective IPR enforcement. More specifically, Article 1.1 of TRIPS states that "Members shall be free to determine the appropriate method of implementing the provisions of the TRIPS Agreement within their own legal system and practice".

## The present debate

According to the USITR, the Chinese regime for IPRs fails to implement the TRIPS as per China's commitments at the WTO contained in its protocol of accession. It alleges:

- That the quantitative threshold which must be met by IPR holders in order to initiate criminal prosecutions of IPR infringement is so high that it effectively allows large scale piracy and counterfeiting to pass unchecked.
- That the Chinese regime for disposal of counterfeit goods effectively allows sale of these goods in markets.
- That China denies copyright protection to imported works awaiting censorship review,



thus allowing for piracy to take place during the waiting period.

- That Chinese law, in certain cases, does not prosecute unauthorised reproduction of copyrighted works unless reproduction is accompanied by unauthorised distribution.

According to statements issued by the Chinese government, "Measures challenged by the US are fully consistent with the TRIPS Agreement and should bear no blame." Moreover, "China strongly opposes any attempt by any other WTO Member to impose additional obligations beyond the TRIPS Agreement through inappropriate application of the WTO dispute settlement mechanism, and believes that the impact resulted therefrom would by no means be accepted by other developing Members".

### Negotiations on enforcement and implications for developing world

China's reference to the lack of acceptance of the concept of such additional obligations by other developing Members is a strong hint at the kind of vigour that China intends to display during its defence of its regime of laws on IPR enforcement. Moreover, the said reference to "additional obligations" is the crux of the matter both in this dispute and the Council for TRIPS.

Two years earlier, at the Council for TRIPS meeting held during 14-15 June 2005, a submission from the European Community (EC), which had the support of most of the developed Members, drew fire from the developing world. According to its proposal, the EC suggested that the Council for TRIPS be authorised, pursuant to Article 68 of TRIPS, to monitor Members' compliance with the enforcement provisions of the Agreement. This would include assessing "the implementation of TRIPS' provisions on enforcement in detail, and make recommendations on ways to improve the situation (for instance, by laying down benchmarks to evaluate the progress made by national

administrations towards a higher level of intellectual property enforcement, suggesting best practices, etc.) to ensure a full implementation of TRIPS obligations in this field."

One of the reasons put forward by the developing Members for rejecting this proposal of the EC was the lack of mandate for such monitoring, under Article 68 of TRIPS, by the Council for TRIPS.

Ironically, calls by a large group of developing countries for recognition of biopiracy and other IPR infringement by large western pharmaceutical companies in their national jurisdictions have fallen on deaf ears (this situation persists even today vis-a-vis the "TRIPS-CBD discussion" in the Council for TRIPS and the Doha Round of trade negotiations).

This issue has stayed on the agenda ever since. At the Council for TRIPS meeting during 25-26 October 2006, in a paper submitted jointly with the US, Switzerland and Japan, the EC highlighted "the need for intervention from the TRIPS Council to assist efforts to curb the rapid increase in piracy and coun-

terfeiting worldwide". While the EC recognised that Members are allowed to implement suitable enforcement provisions domestically, it felt that "such measures must ultimately help to achieve the objectives of the TRIPS Agreement".

However, verbal jostling between the developed and developing Members led some developing Members to state that this issue would face blocking from the agenda if those Members that requested it each time were aiming for more than unilateral sharing of best practices. Referring to Article 1.1 of TRIPS, the developing world argued that discussing enforcement in the Council for TRIPS would mean restraining countries' flexibility to draft domestic legislation on this issue. Moreover, the developing Members found it amusing that a number of issues pertaining to IPRs and of concern to them were met with a less than enthusiastic response from most developed Members.

The calls for recognition of community IPRs were brushed aside as "not a part of the Doha mandate" by a majority of the developed Members and the need for effective enforcement of TRIPS provisions that made it obligatory for national governments to question their businesses on how they were transferring technology were not even an issue that concerned the developed Members. Thus, developing Members saw no reason to add to their already burdened resources and share the lopsided view of IPR recognition, protection and enforcement of their counterparts from the developed world.

### Disputes on enforcement

The China-US IPR dispute will be the first one of its kind, as it makes it to the Panel stage, since the inception of the WTO in 1995. Three requests for consultations have been made under the enforcement provisions of TRIPS, all initiated by the US, all against various Member States of the EC, and all disputes resulted in notification of mutually agreed solutions (MAS) before the

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matter went to the Panel stage.

In the disputes "Denmark - measures affecting the enforcement of intellectual property rights" (1997) and "Sweden - measures affecting the enforcement of intellectual property rights" (1997), the issues were nearly identical, i.e., to make available prompt and effective provisional measures for infringement of IPRs in civil proceedings in Danish and Swedish courts respectively. The Swedish MAS was reached in 1998 whereas the Danish one in June 2001.

In order to be fully TRIPS-compliant, the Parliament of Sweden passed legislation on 25 November 1998 amending Sweden's Copyright Act, Trademarks Act, Patents Act, Design Protection Act, Trade Names Act, Act on Protection of Semiconductor Products and Plant Breeders Protection Act. This led to granting judicial bodies in Sweden the authority to order provisional measures in the context of civil proceedings involving IPRs. Specifically, the legislation provided that "if there is reason to believe that a person has taken or is about to take action to infringe intellectual property rights, the court may order a search for infringing materials, documents or other relevant evidence. The search may be ordered *inadita altera parte* if there is a risk that materials or documents could be removed, destroyed or altered". The legislation came into effect on 1 January 1999.

In the Danish case, the Danish Parliament on 20 March 2001 passed amendments to the Administration of Justice Act granting the relevant judicial authorities in Denmark the authority to order provisional measures in the context of civil proceedings involving the enforcement of IPRs. Specifically, the amendments provide that the "judicial authorities may decide that an investigation at the place of the defendant shall be carried out in order to secure evidence of an infringement of intellectual property rights, and that such an investigation may be conducted without prior notification of the defendant if it is assured that the notification would cause a risk of removal, destruction or modifications of

The trend of mutual agreement and immediate rectification in future disputes arising with respect to IPR enforcement in developing or least developed countries seems highly unlikely

objects, documents, information in computer systems or anything else which are comprised by the petition for investigation".

In the consultations "Greece - enforcement of intellectual property rights for motion pictures and television programs", the US alleged that a "significant number of television stations in Greece regularly broadcast copyrighted motion pictures and television programs without the authorization of copyright owners. Effective remedies against copyright infringement were not provided or enforced in Greece with respect to these unauthorized broadcasts. This situation appears to be inconsistent with the obligations of Members under Articles 41 and 61 of the TRIPS Agreement".

On 20 March 2001, the parties to the consultations notified an MAS concerning the obligations of the EC and Greece under TRIPS to ensure that the enforcement system in Greece permits effective action against copyright infringement by television stations and constitutes a deterrent to further infringements. This MAS also entailed legislation by the Greek authorities, which provided additional enforcement remedies for copyright holders whose works were infringed by television stations operating in Greece, for the immediate closure of television stations that infringe IPR and an undertaking to continue to improve the effective enforcement of IPRs.

The common thread between the three consultations and the resultant MAS was that they were between developed Members (the US and the EC Member States), where the respondent Members had to change the laws and remedies available within a short period of time and the respondents belonged to a customs union, the EC, which helped them in bringing about the required legislative and administrative changes.

This trend of mutual agreement and immediate rectification in future disputes arising with respect to IPR enforcement in developing or least developed countries seems highly unlikely. However, one thing is certain: IPR lobbies in developed countries are picking up and not lessening their drive to protect their IPRs regardless of the capacity of the Member(s), which are allegedly lacking enforcement mechanisms.

### What next?

The China-US IPR dispute is likely to be a turning point on ascertaining the exact scope of the TRIPS Agreement (Article 1.1) and for testing the limits of its implementation and enforcement provisions (Articles 41-61). However, whether the dispute lives up to these expectations will also depend on how the Panel and the AB view their own role under Article 3.2 of the DSU and their use of "judicial economy" in perhaps avoiding a substantive ruling on this sensitive yet important issue. At the very least, what is hoped for is that the dispute throws some light on the issues currently under hot debate at the Council for TRIPS, and provides impetus to the entire Membership for attaining a more just and balanced negotiations agenda that ensures an equitable and full implementation of TRIPS' obligations by all Members. <sup>n</sup>

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# The Nexus Between Indian Laws and International IPR Conventions

Effective protection and management of intellectual property rights such as patents, trademarks, industrial designs and copyright are becoming increasingly essential to the survival and vitality of businesses worldwide.

**n** Hemant Batra and Ambalika Banerjee

**A**n endowment comprises an assortment of attributes such as manners, ingenuity, presentation, or any other potential of valuable human endeavour. Intellectual property (IP) plays a crucial role in every area built and groomed by human beings. Today, owning basic capital or labour does not suffice for the victory or success of a country. Ingenious innovation marks a country's development, be it economic, social, political or legal. How a country is able to tap its intellectual wealth and make use of it is the determining factor for development. The IP structure is a vibrant tool for creating wealth, also inducing enterprises and individuals to innovate. It is also a lush setting for the development of and trade in intellectual assets and it aids in the creation of a stable environment for domestic and foreign investment. Thus, a country's growth depends on industrial, technological and pharmaceutical development and those responsible for this whirlpool are researchers and inventors.

The establishment of the World Intellectual Property Organisation (WIPO) and the World Trade Organization (WTO) has brought about a major transformation in global trade in the 21<sup>st</sup> century. In particular, the WTO is bringing about changes in both the constitution and convulsion of international trade and devel-



opment. There is evident global inter-dependency for establishing trade links and creating a strong web of global integration.

While protecting its IP goodwill, India has, time and again, brought itself in tune with the various international IP conventions, creating an encouraging environment for other countries to trade with and invest in India.

## Copyrights

India's copyright law is held in the Indian Copyright Act, 1957. The copyright law has been amended periodically to keep pace with changing requirements. The amendment

to the copyright law, which came into force in May 1995, has ushered in comprehensive changes and brought the copyright law in line with the developments in satellite broadcasting, computer software and digital technology.

The amended law has made provisions, for the first time, to protect performers' rights as envisaged in the Rome Convention. The Indian Copyright Act today is compliant with most international conventions and treaties in the field of copyrights. India is a Member of WIPO, the Berne Convention of 1886 (as modified at Paris in 1971), the Universal Copyright Convention (UCC)

of 1951 and the WTO. Though India is not a Member of the Rome Convention of 1961, the copyright law is fully compliant with the Rome Convention provisions.

Copyright laws operate territorially. They generally provide protection only for a country's nationals or for works first published in the country. Generally, treaties or bilateral agreements address the availability of protection for foreign authors and grant the same protection to them as they do to nationals under "reciprocity" conditions.

### Universal Copyright Convention

UCC was adopted in 1952 and is administered by the United Nations Educational, Scientific and Cultural Organisation (UNESCO). Altogether, 92 countries, including India, are Members of this convention. Under the convention, each Member State grants the same protection to published and unpublished works by nationals of all Member States and to works first published in any other Member State as granted by Member States to their nationals for works first published in their territories or unpublished works created within their territories. Thus, softwares created by Indian authors or first published in India are protected in all Member States to the same extent that India's current copyright status protects software.

This provision applies only to works that were first published outside the country requiring the observance of the formalities, and were not authored by one of that country's nationals. Also formalities such as registration are required under UCC in order to avoid an infringement suit.

### Berne Convention

The Berne Convention was established in 1886 in Berne, Switzerland, in order to protect international copyright through mutual cooperation. WIPO administers the convention and 105 countries are its Members.

The Berne Convention contains a more far-reaching regulation of copyright than does UCC. Members of the Berne Convention constitute a

Though the Patents Act, 2005 brought about quite an upheaval and was not welcomed at all by a number of stakeholder groups in India, it has worked out for the best as the country's research and development units have been developed for better innovations in the field of medicine

union that is open to all countries of the world, provided that certain minimum protective requirements are met. These requirements include national treatment, granting of certain moral rights to authors with regard to the exploitation of their works and certain economic rights, and adoption of certain minimum terms of protection for various works. The Berne Convention also provides copyright protection without requiring any formalities.

### Patents

Patents benefit none other than the owners of IP and add value to all industrial as well as business concerns and laboratory discoveries and in doing so, provide incentives for private sector investment and development. Anyone in the above business should have an independent research and development (R&D) centre.

India, after much ado over a period of 10 years, was able to scratch out its old Patent law, amending it to cover product patents too. This revolution in 2005, which was a consequence of its WTO membership, helped the country to come on a par with its international competitors. It has also opened gates for higher trade and investment in the country as foreign companies are now will-

ing to invest more than before due to an assurance of IP safety through revised legal regimes.

For instance, though the Patents Act, 2005 brought about quite an upheaval and was not welcomed at all, it has worked out for the best as the country's R&D units have been developed for better innovations in the field of medicine. Initially, the Indian market was able to provide similar but much cheaper generic versions of life-saving drugs. Though the copycat business actually facilitated a few to burgeon into global players and made medications cheaper, pharmaceutical multinational companies (MNCs) were forced to witness a reduction in their market share due to Indian companies.

Now, both the domestic companies and MNCs see the new environment with cautious optimism. This has resulted in the coming of many new firms to India and thus a boom in trade. India has introduced a new product patents regime, covering drugs, foods and chemicals. This is in compliance with the WTO's Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS).

Strong patent law is expected to encourage foreign investment in R&D projects and consequently benefit the Indian economy. Thus, it can be seen that strong IP protection is essential to the success, and in some instances, to the survival of the biotechnology companies in this country. For such companies, the patent system serves to encourage development of new medicines and diagnostics for treatment and monitoring intractable diseases, and agricultural products to meet global needs.

### Trademarks

India's Trademarks Act, 1999 has affiliations with and derivations from TRIPS and meets the requirements of the WTO. Till date, India is not a Member of the International Convention on Trademarks, namely the Madrid Protocol. Hence, if a foreign company is desirous of establishing an office in India or wants to set up business in India, it must undergo the country's trademarks registration

formalities and register in India separately, even if it is registered in its own country.

A good image and goodwill provide a company with a competitive edge. With Indian companies contending for a place in the global markets, their trademarks will require protection at the international level as well and policymakers have responded to the beckoning of the Madrid Protocol. The Madrid Agreement concerning the international registration of trademarks became effective on 13 July 1892 and is a special arrangement within the scope of Article 19 of the Paris Convention and only countries parties to the convention may join the Agreement.

After over 100 years, there are more than 75 countries, which are signatories to the Agreement or the Protocol. However, India is not a signatory to either.

The Madrid system disengages a device whereby a trademark owner may obtain an international registration of trademark from WIPO. This would catapult trade as a company would no longer have to keep getting its trademarks or services marks registered in different countries, which is cumbersome. The barriers to trade with respect to IP would be reduced to a large extent. The primary advantage of the Madrid system is that it allows a trademark owner to obtain a trademark protection in any or all Member States by filing one application in one jurisdiction with one set of fees, and make any changes and renew registration across all applicable jurisdictions through a single administrative process.

Currently, in order to obtain trademark protection in foreign countries, the Indian applicants are required to file a separate trademark application in each individual foreign country of interest for each mark. Since many companies in India are vying to take the global podium and reap the benefits of globalisation, this is a very important feature. Administering such large international portfolios involves considerable administrative effort

Intellectual property management has emerged as one of the major areas of business competence and there is an urgent need for it to be made an integral part of corporate strategy

and expense, produced in part by the necessity of retaining local trademark counsel or agents in each country, legalisation of documents in many countries through a burdensome multi-step process and translation of documents into multiple languages.

The Madrid system provides for lots of advantages with respect to fees. For example, the applicants for international registration of a trademark are required to pay fee only once in local currency. The payment of a single filing fee and preparation of a single application result in savings in legal service fees. This provision is a major attraction of adherence to the Protocol. Moreover, the fees associated with filing through the Madrid system are generally lower than the fees involved in national filings. It is, therefore, expected that India's accession to the Madrid system will open the flood gates to business, commerce and trade.

### Conclusion

IP is an invaluable asset germinating from human ingenuity. In the long run, it is the quality of the IP created, over and above all the tangible investments or assets in a business, that determines the success of the business or trade, in terms of profitability, growth and brand equity.

Globalisation, deregulation and advances in information and communication technologies have radically altered the economic land-

scape. In this vibrant environment, Indian companies have grown rapidly, leveraging the availability of a large pool of highly skilled scientific, technical and managerial human resource to provide high quality products and services worldwide. This has been made possible, inter alia, due to the evolution of laws, which give effective protection to IP.

To sustain growth, profit and market share, and to move up the value chain, companies need to emerge as technology leaders by aggressively deploying resources in R&D and product and process innovation. The innovative ideas and products emerging from the R&D laboratories need to be effectively protected and converted into valuable IP assets, in order that they translate into revenues and profit for the business.

Constantly evolving national, regional and international IP regimes impact businesses and create new opportunities as well as challenges for them. Effective protection and management of IP rights (patents, trademarks, industrial designs and copyrights) are becoming increasingly essential to the survival and vitality of businesses worldwide. IP management has emerged as a major area of business competence, and there is an urgent need for it to be made an integral part of corporate strategy. It has become as important and relevant to the overall management of businesses worldwide as other aspects of management like technology, marketing, finance, corporate governance, and industrial economics and strategy. n

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# Trade Policy and Farmers' Rights



## Future of Trade Policy in South Asia

SAWTEE organised the two-day regional seminar titled Future of Trade Policy in South Asia during 30-31 August 2007 in Nepal. The seminar, attended by about 50 participants from Bangladesh, Pakistan, India, Nepal and Sri Lanka, provided a platform to stakeholders, including civil society representatives, the media, private sector, and government officials and trade negotiators to discuss emerging trade issues and deliberate on the future of trade policy in South Asia. The seminar was divided into six sessions: "Future of Multilateralism - Implications for South Asia", "Economic Cooperation in South Asia in the Changed Context", "Trans-Regional Trade Agreements in South Asia", "Benefiting from Trade Reforms: Behind the Border Issues", "Trade Policymaking in South Asia", and "Future of Trade Policy in South Asia". The seminar was organised as part of "Progressive Regional Action and Cooperation on Trade (PROACT-Phase II)" Project, which SAWTEE has been implementing in South Asia since August 2004. n



## IPRs and Farmers' Rights

SAWTEE, its partners and Local Initiatives for Biodiversity Research and Development (LIBIRD) organised the international seminar titled Farmers' Rights in the Context of Global Regime on Intellectual Property Rights during 28-29 August 2007 in Nepal. The seminar's six sessions were: "Farmers' Rights and IPRs: Conceptual Issues and Present Understanding"; "Farmers' Rights and IPRs: Perspectives of the Breeders and Seed Companies"; "Farmers' Rights and IPRs: Perspectives of Farmers and Farmers' Organisations"; "International Regime on IPRs: Options and Challenges"; "Institutional Mechanisms within National Regimes on IPRs and ABS"; and "National and International Agenda for Developing Countries." More than 50 participants from Bangladesh, Bhutan, France, India, Malaysia, Nepal, Norway, Pakistan and Sri Lanka attended the event. The seminar was part of SAWTEE's "Regional Programme on Securing Farmers' Rights to Livelihood in the Hindu-Kush Himalayan (HKH) Region", which has been under implementation since 2001. n

## Congratulations

Dr Debapriya Bhattacharya has been appointed as the Ambassador and Permanent Representative of Bangladesh to the World Trade Organization (WTO) and United Nations (UN) Offices in Geneva for the next two years. A renowned economist and a civil society leader, Dr Bhattacharya has been leading the Centre for Policy Dialogue (CPD), Bangladesh as its Executive Director since 1999.

Dr Bhattacharya has been involved in policy influencing on various critical issues, particularly macroeconomic and trade issues. He was a member of the official Bangladeshi delegation to the WTO Fourth Ministerial Meeting held in Doha in 2001 and the Second Meeting of the Least Developed Country (LDC) Trade Ministers held in Dhaka in 2003. He provided leadership in conceiving and organising the Pre-Cancun LDC Civil



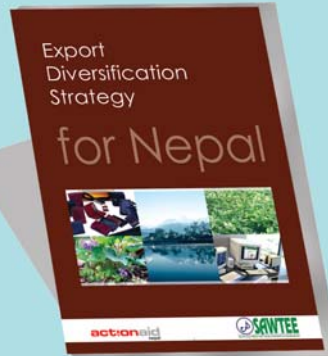
Society Conference held in Dhaka in 2003. He also played a critical role in the national preparatory process for the WTO Ministerials held in Cancun and Hong Kong.

Dr Bhattacharya played a guiding role in organising the International Civil Society Forum 2005: For Advancing LDC Interests in the Sixth WTO Ministerial held in Dhaka in 2005. He has been a member of the Advisory

Committee on WTO Affairs, Ministry of Commerce, Government of Bangladesh. He led CPD's Geneva Tracking Missions to the WTO, United Nations Conference on Trade and Development (UNCTAD), Diplomatic Missions of several countries and other non-governmental organisations in Geneva in 2002 and 2005. Dr Bhattacharya is also a member of the Advisory Board of SAWTEE's Trade Insight Magazine. n



Book: Impact of Textiles and Clothing Quota Phase Out on Nepal – A Study from Human Development Perspective  
Publishers: SAWTEE and ActionAid Nepal  
Year Published: 2007



Book: Export Diversification Strategy for Nepal  
Publishers: SAWTEE and ActionAid Nepal  
Year Published: 2007



Book: Trade and Industrial Policy Environment in Nepal  
Publishers: SAWTEE and ActionAid Nepal  
Year Published: 2007



Book: Trade Negotiation Strategy for Nepal  
Publishers: SAWTEE and ActionAid Nepal  
Year Published: 2007



Discussion Paper: Government Support to Textiles and Clothing Sector – A Study of Select South Asian Countries  
Publisher: SAWTEE  
Year Published: 2007



Issue Paper: The WIPO Development Agenda  
Publisher: SAWTEE  
Year Published: 2007



Policy Brief: Review of Article 27.3 (b) of TRIPS Agreement – Policy Issues for South Asia  
Publisher: SAWTEE  
Year Published: 2007



Briefing Paper: Textiles and Clothing Sector in South Asia – Current Status and Future Potential  
Publisher: SAWTEE  
Year Published: 2007



South Asia Watch on Trade, Economics & Environment (SAWTEE) is a regional network that operates through its secretariat in Kathmandu and member institutions from five South Asian countries, namely Bangladesh, India, Nepal, Pakistan and Sri Lanka. The overall objective of SAWTEE is to build the capacity of concerned stakeholders in South Asia in the context of liberalisation and globalisation.

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