

Bilateral Free Trade Agreements and Farmers' Livelihood

ISSUES FOR SOUTH ASIAN COUNTRIES

INTRODUCTION

Free trade agreements (FTAs) are becoming synonymous with trade liberalisation in the context of the failure of the World Trade Organization (WTO) to vigorously pursue its *raison d'être*. Bilateral trade agreements (BTAs), one of the variants of FTAs, signed between a developed and a developing country – so called “North-South” FTAs – tend to create highly imbalanced outcomes because of the asymmetric negotiating power and resources. This has created a right opportunity for the multinational “life science” corporations to ratchet the intellectual property right (IPR) standards by negotiating exceptions on “life form” patenting contained in the WTO's Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS). If this trend continues unabated, developing countries will not only find it difficult to comply with their obligations under the Convention on Biodiversity (CBD), but it will also create problems in their efforts to prevent bio-piracy and theft of traditional knowledge (TK) and receive benefits from the commercial use of the rich pool of genetic resources and associated TK they possess. However, examples from a few developing countries show that such an eminent disaster can be prevented with adequate homework and appropriate strategic negotiating tactics. Taking a cue from such developing countries, South Asian countries, which are in the process of signing BTAs with other countries, need to trade with caution.

POLITICAL ECONOMY

Developing countries are among the mega-diverse regions and considered the repositories of a vast amount of TK. It is, therefore, in their interest to ensure the full implementation of CBD, not least to protect the rights of farmers and indigenous communities.

CBD covers a much broader aspect of rights regime, including those of any community, which has made contributions to the conservation of genetic resources. Farmers' rights can be considered a subset of the same because farmers in developing countries are not only the custodians of plant and animal genetic resources



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but also the breeders of new plant varieties. However, their contributions have largely remained unrecognised in practice.

The recent trend towards creating the supremacy of IPRs over the rights of the local and indigenous communities and farmers is detrimental to the developing world. During the Uruguay Round of multilateral trade negotiations, at the behest of powerful multinational corporations (MNCs), engaged mainly in pharmaceutical, seed and agro-chemical businesses, developed countries succeeded in incorporating a controversial agreement within the WTO system. Developing countries were cajoled into agreeing to the TRIPS Agreement, a minimum standard agreement, which aims at harmonising IPR standards globally without paying any attention to the level of economic development of the WTO Member countries. This “one-size-fits-all” approach has been largely criticised on grounds of being anti-development, even by several Northern agencies.¹

Developing countries have been finding it somewhat difficult to fulfill their obligations under CBD, mainly because of the provisions of TRIPS Article 27.3 (b). However, owing to the efforts of the well-meaning negotiators of some developing countries, some exceptions have been included in the Article, which provide certain flexibilities to developing countries. While

the Article makes it mandatory for WTO Members to provide protection to life forms, it does not mandate protection of plants and animals produced through essentially biological processes. It is understandable that the main intention of this provision is to allow for the protection of biotechnology invention but the wordings of this provision, seen in conjunction with other provisions of the Agreement, also offer considerable leeway to the developing countries, not only to protect their biodiversity, but also to regulate access of commercial actors to their genetic resources and associated TK.

Using the window of opportunity created by Paragraph 19 of the Doha Development Agenda (DDA) – the agenda of the ongoing Doha Round of multilateral trade negotiations – developing countries are demanding that an explicit provision be incorporated within TRIPS for disclosure of the source of origin of genetic materials used in the products for which patent is sought. This could, indeed, be an entry point for implementing their commitments under CBD. The Convention requires Contracting Parties (CPs) to ensure, through the implementation of national regime, that the real custodians or donors of genetic resources and associated TK are not only informed in advance of the costs and benefits of sharing their resources and knowledge, but their consent also be obtained. It is also incumbent upon the CPs to ensure that actual donors are made one of the recipients of benefits arising from the commercial utilisation of genetic resources and associated TK. If these changes are incorporated in TRIPS, it would be possible for the developing countries to protect their genetic resources and associated TK from the piracy and theft that are taking place at present. This would be made possible by putting in place as well as implementing the Access and Benefit Sharing (ABS) and Prior Informed Consent (PIC) regimes along with the conservation and sustainable use of genetic resources and associated TK.

It is obvious that the multinational “life science” corporations, which were involved in crafting the TRIPS Agreement, are not happy with these developments. They have been making every possible attempt to ratchet the IPR standards so that they are able to obtain immunity to perpetuate bio-piracy as well as to consolidate and strengthen their monopoly/oligopoly position in the markets (Box 1).

FTAs: MOTIVES AND CONTOURS

Since the trade liberalisation agenda is not moving ahead in the WTO to the satisfaction of key players on the international trade front, they are following

BOX 1: EFFORTS TO RATCHET IPR STANDARDS

At the international level, efforts are underway to ratchet the IPR standards and impose “TRIPS-plus” conditions on developing countries through what is known as “forum shifting” tactic by using three major platforms.

The first platform is the forum of World Intellectual Property Organization (WIPO), which is in the process of negotiating Substantive Patent Law Treaty (SPLT). Developed countries are making maximum use of WIPO to create a multilaterally binding agreement aimed at getting rid of the flexibilities contained in TRIPS.

The second platform is the WTO. Here the developed countries are pressurising the countries acceding to the WTO to accept several “TRIPS-plus” conditions during bilateral negotiations for WTO accession. Examples include the explicit requirement to accept the membership of the International Union for the Protection of New Varieties of Plants (UPOV), 1991 in lieu of the TRIPS-sanctioned model of *sui generis* legislation for the protection of plant varieties forced up on countries like Cambodia, China, and Kyrgyzstan.²

The third platform is BTAs, through which, developed countries pressurise developing countries to agree to such IPR standards that fulfill their scientific, technological and commercial interests.

FTAs as a possible route to tear down trade barriers. FTAs can be pursued at two levels – plurilateral and bilateral. Regional trade agreements (RTAs), where a number of trading partners participate, for example, the European Union (EU), North American Free Trade Agreement (NAFTA), South Asian Free Trade Area (SAFTA), Association of Southeast Asian Nations (ASEAN) Free Trade Area (AFTA) etc., are essentially plurilateral agreements. BTAs, as the name suggests, are signed either between two sovereign countries [e.g., the United States (US) and Jordan] or between an existing FTA and another sovereign country [e.g., European Free Trade Area (EFTA) and Mexico]. RTAs tend to be welfare enhancing on the whole because they act as building blocs rather than stumbling blocs to the multilateral trading system; and the balance of negotiation is not disproportionately tilted in favour of one major partner due to its plurilateral character. However, BTAs tend to be welfare reducing for one – relatively weaker partner – mainly because of the weak bargaining position.³

It is striking to note that the conditions imposed by developed countries on most of their developing country partners are similar. Generally, developed countries follow a particular template while negotiating such agreements. For example, in the case of Asia, the US is using the US-Singapore FTA as the template for signing a BTA. While one of the most liberalised countries in the world like Singapore could afford to accept many “TRIPS-plus” conditions, other Asian countries cannot.

Because the BTAs are guided by commercial interests of the most vocal private sector of each of the countries, it is natural for each country to try to protect such interests. The most vocal interest groups in the developing countries are the textiles and clothing lobby, who want to gain preferential access to the developed partners’ market. Similarly, the most vocal lobbies in the developed countries are the MNCs with investment interests in developing countries; the life science industry; and exporters of hi-tech products.

ABS AND PIC: A MAJOR CASUALTY

One of the objectives of the negotiators of the developed countries has been to secure an increasingly higher standard of IPR protection. In some countries, this directive is clearly inscribed in the legislation itself. For example, in the US, trade negotiators are bound by the Bipartisan Trade Promotion Authority (TPA) Act of 2002, which on trade-related intellectual property dictates that one negotiating objective is to “reflect a standard of protection similar to that found in the US law”.⁴

In line with these mandates, the intention of developed countries is to get rid of any exception contained in Article 27.3 (b) of TRIPS, let alone agreeing to any other

conditions on patentability. One of the major means used to achieve this objective is BTAs. As shown in Box 2, the US’ BTAs with Jordan, Morocco, Singapore, Oman and Bahrain have deployed various languages, but all of them come around to promote the interests of the US biotechnology, seed and agro-chemical lobbies.

The obligations assumed by the developing countries, which are, more often than not, at the receiving end of the BTAs, as highlighted in Box 2, can be divided into two categories.

No exception whatsoever: This is the most dangerous of all. This may still be fine with Singapore, an ardent supporter of free trade, which does not have any agricultural production, biological resources and TK worth protecting. However, this is probably not a good idea for Jordan and Morocco, which are not only rich in biodiversity, but also have populations dependant on farming for their livelihoods.

Exception on patenting of animal only: BTAs with the USA signed by Bahrain and Oman, however, contain limited exceptions. While animal has been excluded from the scope of patentability, protection to plants, whether or not they are produced through essentially biological process, has been made mandatory.

The US is not the only culprit in making use of BTA as an instrument for exploiting the genetic resources and associated TK of the global South. Besides the US, the EFTA member states, which claim that TRIPS provides many flexibilities to developing countries with respect to the protection of IPR on life forms¹⁰, have

BOX 2: US FTA CLAUSES ON LIFE FORM PATENTING

US-Jordan FTA (signed on 24 October 2000): No exception to essentially biological process for production of plants and animals (Article 14.8).⁵

US-Singapore FTA (signed on 6 May 2003.): Exceptions provided under Article 27.3 (b) of TRIPS Agreement are not valid. The only exceptions provided for in Article 27.2 and 27.3 (a) are valid. “Each Party may exclude inventions from patentability only as defined in Articles 27.2 and 27.3(a) of the TRIPS Agreement” (Article 16.7.1).⁶

US-Morocco FTA (signed on 15 June 2004): Explicit mention is made on the need to unconditional protection to plants and animals. “Each Party shall make patents available for the following inventions:

(a) plants, and (b) animals” (Article 15.9.2 2).⁷

US-Bahrain FTA (signed on 14 September 2004): Exceptions do not include “plant” but only “animal”. “Each Party may also exclude from patentability animals and diagnostic, therapeutic, and surgical procedures for the treatment of humans or animals” (Article 14:8.1).⁸

US-Oman FTA (signed on 19 January 2006, but yet to come into effect): Plants are excluded from exception. “Each Party may exclude from patentability... (b) animals other than micro-organisms, and essentially biological processes for the production of animals other than non-biological and microbial processes” (Article 15.8.2).⁹

also been using BTA as a back door to impose “TRIPS-plus” standards.¹¹

NOT EVERY COUNTRY CAVES IN

The examples of the countries mentioned in Box 2 are fortunately not a true representative sample. While some might have knowingly agreed to such provisions in their desire to further their free trade agenda, others might have agreed to unreasonable “TRIPS-plus” conditions due to their absolute need to obtain market access to developed countries’ markets. Yet some others might have just agreed to these conditions without knowing their implications!

It is this category of countries which need to do extensive homework and learn from experiences of other countries to safeguard their national interests. For example, Thailand and Malaysia both are separately negotiating BTAs with the USA. While the negotiation for the former BTA is at an advanced stage, the negotiation for the latter has recently begun. The example of Thailand has shown that countries characterised by the existence of a vibrant civil society, free flows of information, culture of discussion and debate, and a functional democratic order are unlikely to easily bow down to the pressure from the US. Thailand has given a tough time to the US negotiators by submitting intellectual property proposals, including the one calling for enacting measures for benefit sharing related to the research and commercialisation of products that utilise genetic resources and/or TK.

The sixth round of the US-Thai BTA negotiations held in Chang Mai in January 2006 was marred by demonstration of civil society organisations (CSOs), farmers and health activists. Talks have been suspended since. The US target of concluding the talks by early 2007 and get the proposed BTA ratified by the US Senate before the term of the TPA provided to the President Bush, which expires in June 2007, is likely to be missed now, not least because of the recent political developments in Thailand.¹²

Similarly, the US-Malaysian FTA can provide some important lessons for developing countries to follow. The recent remarks of the Malaysian Trade Minister that the US approached Malaysia for the FTA and not the other way around and that Malaysia is not under any obligation to conclude the FTA in time before the TPA expires¹³, are the manifestations of Malaysia’s negotiating tactics and ability to withstand pressures to accept “TRIPS-plus” conditions. At the same time, a popular movement, led by the CSOs, opposing the government’s plans to negotiate the FTA with the US is gaining momentum in Malaysia. Apparently, some poli-

ticians including former Prime Minister Mahathir Mohamad have expressed reservations on the proposed FTA.¹⁴ If these indications are any guide, it would be extremely difficult, if not impossible for the US to impose its will on Malaysia, let alone use the US-Singapore BTA as a template for negotiations.

The successes of these countries, at least, in terms of holding on to their positions are in part due to strong condemnation by several CSOs such as Bern Declaration, Genetic Resources Action International Network (GRAIN), Institute of Agriculture and Trade Policy (IATP) and Third World Network. These organisations have been



creating pressures on the Northern constituency to refrain from taking advantage of the vulnerable positions of developing countries and putting unreasonable demands on them during bilateral negotiations.

WHY SHOULD SOUTH ASIA BE CONCERNED?

Trade and Investment Framework Agreement (TIFA), considered a prelude to FTA negotiations, is like a letter of intent to sign an FTA. So far, three South Asian countries have signed such an agreement with the US and one is in the process of doing so.

Sri Lanka is the first country to have signed TIFA with the US. While Sri Lanka signed the FTA on 25 July 2002, Pakistan signed on 25 June 2003. Similarly, Afghanistan signed a TIFA with the US on 21 September 2004. Bangladesh has also agreed on 15 February 2005 to sign such an agreement with the US. Even in Nepal, exporters of readymade garment producers, who have seen their exports shrink in the aftermath of phasing out of textiles and clothing (T&C) quotas, are raising their voices in favour of a BTA with the US.¹⁵ As most of these countries have substantial interests in enhancing market access for their T&C products as well as to attract and sustain US investment, they are likely to be soft on the US demands.

While the contours of other agreements are not yet known, the draft agreement with Sri Lanka shows that

there was a demand on the Island to increasingly harmonise its IPR standards with those of the US. In order to create extra pressure on Sri Lanka to implement these measures, IPR is linked to investment as well as technical assistance to be provided by the United States Agency for International Development.¹⁶

Unlike in Thailand and Malaysia, most South Asian countries lack a culture of consultation with the stakeholders and are not considered great believers in transparency. They are equally prone to pressure from vested interests. In one extreme example, it was found in one of the South Asian countries that those officials engaged in FTA negotiations did not even consult their own colleagues, who negotiate at the WTO, at the time of signing the agreement. Moreover, the limited capacity of trade negotiators means that they could compromise national interests even when they negotiate on good faith. Finally, there is a danger of application of classic principles of political economy, i.e., concentrated benefits to the well organised groups and dispersed costs to be borne by the unorganised and marginalised groups. For example, in such a case, there will be a greater degree of pressure on farmers and indigenous communities to shoulder disproportionate burden of adjustment.

CONCLUSION AND RECOMMENDATIONS

Slow progress in multilateral trade negotiations has resulted in a spate of North-South BTAs containing stringent IPR conditions, going beyond the requirements of the WTO/TRIPS Agreement. This is because those groups in the developed countries, which consider the TRIPS Agreement “insufficient” to protect their interests, are lobbying for imposing “TRIPS-plus” conditions through a multiplicity of fora, BTAs being one of them. Restrictions on the rights of sovereign nations to regulate access to their genetic resources and associated TK and put in place a mechanism to ensure benefit sharing, is the major fallout of the such conditions. While those countries that do not need to care much about the livelihoods of their farmers can afford to sign on to such a deal, for South Asian countries, where a substantial number of population is dependant on agriculture, this is clearly a recipe for disaster.

However, there seems to be some light at the end of the tunnel, as the fates of the ongoing US BTA negotiations with Thailand and Malaysia have vividly demonstrated. While it is doubtful that they will succeed in completely turning the tide in their favour, it is certain that they are not likely to fall into the trap most other countries have fallen into. Taking a cue from these countries as well as the negotiations taking place at the mul-

tilateral fora, South Asian governments and other stakeholders should consider the following:

Support Multilateralism

South Asian governments and other stakeholders should support multilateralism as the major route for trade reform as well as to resist any attempt to ratchet international IPR standards. At the same time, they should also try to ensure that disclosure of source of origin as well as ABS and PIC mechanisms are incorporated into TRIPS during the ongoing negotiations for the review of Article 27.3(b). It is also possible to promote plurilateral RTAs as the second best option.

BTAs as the Last Choice

BTAs, in particular of the North-South variety, should be the last choice for trade policymakers as well as negotiators within the region. When it is indispensable to enter into a North-South BTA, four ground rules should be followed:



- A transparent process of benefit and cost analysis of the agreement – not only economic but social and political too.
- A thorough and systematic process of consultation with stakeholders – both within and outside the governments.
- Capacity building of trade negotiators for which a South-South cooperation model may be more appropriate, such as East Asian negotiators building the capacity of their South Asian counterparts.
- Avoiding to set a deadline for concluding negotiations so as not to give the impression to the Northern partner that the country is willing to agree to any conditions in order to meet the “prescribed” deadlines.

Investments for Capacity Building

Investments should be made on building capacity of voiceless and marginalised stakeholders so as to enable them to understand the implications of the BTAs and make informed interventions with a view to creating bottom up pressure to secure a balanced deal.

Advocacy at the Global Level

Advocacy should be intensified at the global level, in collaboration with the development friendly CSOs, to create pressures on the trade negotiators of the developed countries so as to prevent them from imposing unreasonable demands on the developing countries. ■

NOTES

- 1 See, for example, Commission on Intellectual Property Rights. 2002. *Integrating Intellectual Property Rights and Development Policy: Report of the Commission on Intellectual Property Rights*. September. London; and Fink, C. and K. E. Maskus. 2005. *Intellectual Property and Development: Lessons from Recent Economic Research*. Washington D.C.: World Bank.
- 2 Adhikari, R. and K. Adhikari. 2003. *UPOV: Faulty Agreement and Coercive Practices*. Policy Brief. No: 5. Kathmandu: SAWTEE.
- 3 See Adhikari, R. 2005. "Dangerous Liaison" in *The Kathmandu Post*. 16 and 17 October.
- 4 See Gibbs, M. and S. Wagle. 2005. *The Grate Maze: Regional and Bilateral Free Trade Agreements in Asia*. Colombo: UNDP Asia-Pacific Regional Centre.
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- 6 http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Singapore_FTA/Final_Texts/asset_upload_file708_4036.pdf, accessed on 13 May 2006.
- 7 http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Morocco_FTA/Final_Text/asset_upload_file797_3849.pdf, accessed on 13 May 2006.
- 8 <http://www.fta.gov.bh/images/UploadFiles/14-ipr.pdf>, accessed on 13 May 2006.
- 9 http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Oman_FTA/Final_Text/asset_upload_file715_8809.pdf, accessed on 13 May 2006.
- 10 See, for example, the papers presented by Switzerland (IP/C/W/284) and the EU (IP/C/W/383) in the WTO process on the review of Article 27.3(b) of TRIPS. Cf. Bern Declaration. 2003. *TRIPS-plus through EFTA's back door*. Zurich.
- 11 Bern Declaration. 2003. Above note 10.
- 12 Thalang, J. N. 2006. "Is time running out for a Thai-US free trade agreement?" in *The Nation*. 2 May.
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- 14 Heung, C. Y. 2006. "Malaysians question US free-trade deal". *Asia Times Online*. 21 April. Available at: http://www.atimes.com/atimes/Southeast_Asia/HD21Ae03.html, accessed on 8 June.
- 15 In the words of the General Secretary of the Garment Association of Nepal, "Nepal can propose for another option of a BTA with the US, considering the political and economic interest of the US in Nepal with regard to the recent democratic movement in the country." See Pandey, U. R. 2006. "Work on FTA to grant duty free access for Nepali Garments in the US" in *nepalbiznews.com*. 2 May. Available at: <http://www.nepalbiznews.com/detail.php?news=551>, accessed on 12 June.
- 16 Kelegama, S. 2005. "Emerging Scenarios in the North-South BTAs of South Asia" in *Trade Insight*. Vol. 1. No.3. Kathmandu: SAWTEE.

Launched in December 1994 at Nagarkot, Nepal by a consortium of South Asian NGOs, South Asia Watch on Trade, Economics & Environment (SAWTEE) is a regional network that operates through its secretariat in Kathmandu and 11 member institutions from five South Asian countries, namely Bangladesh, India, Nepal, Pakistan and Sri Lanka. Registered in Kathmandu in 1999, 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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