

*It appears that intellectual property rights (IPRs) applied on biodiversity, which are protected by the WTO TRIPs agreement (Trade-Related Aspects of Intellectual Property Rights), and biodiversity objectives that are covered by the Convention on Biological Diversity, contradict each other on most accounts. Issues such as private rights vs. public rights, indigenous communities vs. trans-national corporations, rights of commercial breeders vs. rights of farmers are contentious. The Doha declaration demanded an examination of the relationship between the TRIPs agreement and the CBD, taking into account the development dimension.*

At the outset TRIPs maintains that patents can be granted for all innovations and processes in all fields of technology (provided that they are new, involve an inventive step and have industrial production capability), which in a sense supports private IPRs. In the context of biodiversity, the TRIPs agreement under Article 27.3(b) provides that members may exclude animals and plants from patentability, though micro-organisms for products, and microbiological and non-biological processes for plant and animal production, must be subject to patenting.

On the other hand, a country's sovereign rights over its biodiversity are acknowledged by the CBD. Such interpretation permits countries to establish protection measures over their biodiversity regarding applications of patents, such as evidence of 'prior informed consent' (PIC) through disclosure requirements such as 'country of origin'. The TRIPs agreement lacks cognisance of such sovereign rights and hence, at present disclosure of PIC and country of origin for patent applications are disregarded. The trouble of this approach is that it amplifies the opportunity for bio-piracy, whereby a person or a corporation can transfer and own bio-resources of a country and associated traditional knowledge. Bio-piracy has already taken effect as bio-resources from developing countries, such as Indian Basmati rice, Bolivian and Peruvian Quinoa (drought resistant food crop) and Amazonian Ayahuasca (healing plant) have all been patented in the US on some pretext or other.

### Protection of Plant Varieties

Article 27.3(b) of the TRIPs agreement grants members flexibility in the way they provide protection of plant varieties, by means of offering options of either patents, an effective *sui generis* system or a combination of both. Often developing countries choose their own *sui generis* system in protecting plant varieties.

However, developed countries find the *sui generis* model under the International Convention for the Protection of New Varieties of Plants (UPOV) as effective for such protection, and many northern governments have promoted the UPOV to developing countries not only in these negotiations, but also in bilateral trade agreements. It must be recognised that it

is mostly developed countries who are signatory to the UPOV. This is explicable considering that the principles set out in the convention compliments developed countries' farming practices.

In this context, it can be said that subsistence farming, which is the primary source of livelihood in many developing countries, could be ruined under the UPOV *sui generis* approach as farmers would not afford excessively priced seeds from trans-national corporations (TNCs) or even the costly UPOV authorised breeder's rights certificate.

The major flaw in the UPOV is that there are no provisions for benefit sharing and limited reference to farmers' rights, which are the main reason for opposition by developing countries.

### Equitable Sharing of Biodiversity Benefits

The TRIPs agreement has no regard for the need to equitably share benefits of knowledge related to biodiversity, while this is promoted by the CBD under Article 15(7). This augments the concern for traditional knowledge, as it is not protected by any of the TRIPs provisions.

Conversely, traditional knowledge is recognised by the CBD and given due notice under Article 8(j), which states: parties should protect knowledge and practices of indigenous and local communities relevant for sustainable use of bio-diversity, and promote the same for wider application with the approval of the TK holders while encouraging equitable sharing of benefits arising from such knowledge and practices.

Hence, without TK protection provisions under the TRIPs, inventions may be derived from holders of TK, but entitlement of these holders is ambiguous. Disputes have arisen as a consequence of the lack of such protection of TK. For instance, the US awarded a patent on 'the use of turmeric in wound healing', which was opposed by India, as turmeric was already known and used by Indians for centuries. Although the patent was revoked, the reason for this was only because India proved an absence of novelty via scientific literature through a costly and time-consuming legal process. If India were unable to prove this absence of novelty, then the Indian TK holders would have lost all economic entitlement for the TK of the use of turmeric.

## Doha Negotiations

The US, who are not party to the CBD, find no conflict between TRIPs and CBD. It holds a position that any conflict that does arise can and should be settled by national systems and legislation. As in the previous case of turmeric, the national legislation was accurate in revoking the illegal patent. They propose a contract-based system, which would provide 'flexibility in determining benefit-sharing, both monetary and non-monetary'.

Additionally, the US holds that under such an approach 'a party can require the researcher to report regularly to an authority regarding progress of his research and whether any future commercial application' will come about. Under this system, the contract can also specify the choice of law' when a dispute arises. However, it is suggested that the US contractual based system would only be effective, if contractual arrangements in national laws are 'enforceable across borders'.

Often it is problematic to enforce a foreign obligation for a law that is not prohibited in the country in which it is to be put into effect. Brazil argues that such contractual system between those seeking access to traditional knowledge and the holders of such knowledge are often unequal parties (such as TNCs and indigenous communities) and therefore, it will be difficult to ensure that prior informed consent from local communities is an informed decision.

Developing countries promote 'country of origin' and benefit sharing global disclosure requirements, which would allow for further convergence between TRIPs and CBD. The aim is to prevent bio-piracy, rather than taking action once such piracy has occurred, which is the logic behind the US contract based system.

The proposal accepts that global disclosure requirements shall not be managed as a stand alone system, but shall be used to support current national regimes for prior informed consent.

Researchers/collectors of bio-resources should not be deterred from access, but disclosure requirements are simply to be effected in order to achieve compliance of a national regime's prior informed consent and benefit sharing. Notably, in regard to the latter, the disclosure requirements should both enhance the monitoring of patent owners and whether they are fulfilling the need of benefit sharing arrangements once the patent is commercialised. This will assist in gathering whether benefits are shared equitably amongst parties, potentially fulfilling the requirement of the CBD.

However the US conclude that such patent disclosure requirements would not promote benefit

sharing, because the whole process may stop or hinder the actual benefit being sought.

## Protection of Plant Varieties

There is pressure from US, EC, Switzerland and Japan to WTO members to use the *sui generis* system of the UPOV. While Brazil and India contend that the FAO's International Undertaking on Plant Genetic Resources or the CBD provide a more adequate and effective *sui generis* system for developing countries.

Though African countries (notably Kenya, Mauritius and Zambia) support the current flexibility provided by the TRIPs agreement in allowing them to consider their own PVP (plant varieties protection) system, it is regarded that any PVP system in place should recognise farming and indigenous communities contribution to biodiversity conservation. Such reasoning may enable a *sui generis* system that is in favour of farmers' rights over PVP.

## Conclusions

Considering the wide disagreement between the US and developing countries, it is understandable that the Hong Kong (draft) ministerial text offers little mention on the current stage of negotiations on the issue of convergence between the TRIPs agreement and the CBD.

There must be provision within the TRIPs that correctly identifies and supports traditional knowledge. Both the enhancement of TK database and provisions that incorporate disclosure requirements of PIC and 'country of origin' should promote sharing of benefits to the initial holders.

At the same time, such disclosure requirements must be in place to prevent bio-piracy. It is suggested that TNCs, which harbour interest for particular bio-resources, should not be allowed in applying for such patents by such practices. Appropriate steps should also be taken into account within national legislation, in consideration of patent application's regard to novelty requirements.

The fact that in many developing countries farming is not simply a business but a way of life should be highlighted. For instance it is estimated about 60 percent of the population in India are engaged in agriculture. Hence many livelihoods could be harmed without proper regard to farmer's rights in patenting of plant varieties.

Hence without any doubt developing countries with plenty of biodiversity and bio-resources must refuse the UPOV in any negotiations. A *sui generis* system that promotes both the cause of farmers' rights and plant varieties protection must be asserted.

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