RIGHT TO FOOD AND TRIPS: FINDING THE BALANCE

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Abstract

Trade Related Intellectual Property Rights (TRIPS) Agreement prescribes a strong intellectual property regime and obligates parties to have intellectual property protection for plant varieties, fertilisers and pesticides. This would lead to adverse consequences on the access to food irrespective of the mode of protection. A stringent intellectual property regime would reduce the economic access to food. Therefore the implementation of the TRIPS Agreement in its current form will lead to severe consequences on peoples' right to food, health and self determination The obligation under International Convenant on Economic, Social and Cultural Rights (ICESCR) on right to food includes physical and economic access to food. It is also very clear that obligation on right to food has primacy over the intellectual property rights. Therefore the implementing legislation of TRIPS Agreement should not only avoid the interference on the right to food but also explicitly safe guard the right. This issue should be addressed by placing different safe guards in the TRIPS implementing legislation. Right to food as a ground for granting of compulsory license is one way of doing it. In other words, a linkage of TRIPS Agreement with ICESCR is required to balance the private and public interests. This can be done by each state at its domestic level. This is mandated by Article 8 of the TRIPS Agreement, which reads "Members may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development...". The article further suggests a number of suggestions to ensure the enjoyment of right to food.

Introduction

The recently concluded annual session of the United Nation Human Rights Commission (UNHRC) had expressed its concern over the impact of TRIPS Agreement on the social security system. Earlier in August 2000 the UN Sub-Commission on Promotion and Protection of Human Rights adopted a resolution expressing similar concerns on the issue of right to food. The Sub-Commission asks "inter-governmental organisations to integrate into their policies, practices and operations, provisions, in accordance with international human rights

obligations and principles, that protects the social function of intellectual property"[1]. These show the actual conflict that exits between the intellectual property regime and the enjoyment of human rights especially economic, social and cultural rights. This paper analyses the impact of TRIPS agreement on the enjoyment of right to food and the possible legislative strategy for the developing countries to safeguard the obligation of right to food.

For the purpose of analysis this paper is divided into three parts. The first part deals with concept of the right to food. The second part discusses international intellectual property regime pertinent to patent and plant variety protection, and the last part outlines the policy options for the developing countries.

A. The Right to Food

According to Article 25 of the Universal declaration of Human Rights 1948 "(everyone) has the right to a standard of living adequate for the health and well-being of himself and of his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions"[2]. This provision achieved normative status under the International Covenant on Economic, Social and Cultural Rights (ICESCR) in 1966.[3] Article 11 of the covenant guarantees the right to adequate food for everyone. The UN Committee on Economic, Social and Cultural Rights elaborated the nature of obligation under Article 11 in its general comment No. 12. According to the committee "the right to food is indivisibly linked to the inherent dignity of the human person and is indispensable for the fulfilment of other human rights"[4]. The committee identifies the root of the problem of hunger lies not in the lack of food but in the access to food[5]. Therefore the committee suggests "the adoption of appropriate economic, environmental and social policies, at both national and international levels"[6]. A state has three levels of obligation with regard to right to food viz. to respect, to protect and to fulfil. At the first level, the state has an obligation to respect the freedom of people to find their own ways to solve their problems and hinder the existing access to food. On the second level, state has the obligation to protect individuals against enterprises and individuals who block others from enjoyment of right to food. At the third level the state has the obligation to fulfil the right to food in case of the other two obligations, i.e., respect and protection of right to food are not enough. This third level obligation can be fulfilled either through facilitating or through providing food.

The right for everyone to adequate food encompasses the physical and economic access at all times to adequate food or means for its procurement[7]. Economic accessibility means, one must ensure that people have the necessary resources in order to satisfy a balanced composition of clothing, food and housing. The price level of food must be such that it does not threaten or compromise the attainment or satisfaction of other basic needs. Physical accessibility means that food shall be available where people can get a hold of it.[8] Therefore, the right to food is a fundamental right, which confers on a state an immediate obligation to eliminate hunger, even in a state of emergency. Even though it is a primary obligation of the state, the International Community has an obligation to help the states to fulfil its duty. The obligation of the international community increases in a globalised milieu where the economic autonomy of states especially of the small states, has been curtailed drastically.

The developments in the biotechnology open new vistas for higher yielding plants, better quality crops and lower production costs. However, the private participation in Research and Development (R&D) resulted in the expansion of proprietary rights to plants as well as animals. As a result today 13 trans-national corporations own 80% of the patents on genetically modified foods and five agrochemical companies control almost the global seed market.[9] This increases the monopoly in agriculture especially in the food sector. This would increase the price and affect the accessibility of food. Therefore, every state, which is a party to the

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Covenant, has an obligation to protect and facilitate the access to food by regulating the intellectual property rights in the area of food and agriculture. Since majority members of the World Trade Organisation (WTO) are parties to the ICESCR it has an indirect obligation to protect as well as facilitate the enjoyment of right to food.

B. Intellectual Property Regime

The TRIPS Agreement adopted by the World Trade Organisation (WTO) in the Uruguay Round in 1994 extends protection to all sorts of intellectual properties including patents and plant varieties. It is an attempt to make the patent laws of different states more similar to each other and in that way to facilitate international trade. The TRIPS Agreement gets its teeth from the WTO's dispute settlement system which enables the cross retaliation in case of violations of the Agreement.[10] The TRIPS Agreement prescribes universal minimum standards for all aspects of patent protection as well as other intellectual properties. This changed the international patent regime. It now talks about the compulsory patent protection for all inventions irrespective of the field of technology.[11] It also mandates compulsory product patent for the pharmaceutical and agro-chemical inventions.[12] Further it makes compulsory to provide protection for microorganisms and non-biological and micro-biological methods of production of plants and animals[13]. Lastly, the plant varieties are also put under its purview by making it compulsory to extend protection either by patent or a sui generis or a combination of both.[14] Thus the hitherto freedom available to member countries under the Paris convention has been eliminated by the TRIPS agreement by prescribing a compulsory minimum level of protection to the inventions. This took away the freedom of states to provide a patent regime conducive to the socio-economic conditions suitable to them. Then the agreement further enhanced the rights of the patentee by giving an exclusive right to import the patented product[15]. The patentee can import the product instead of working at the granting state. The granting of compulsory licensing is made stringent by putting several conditions for the granting of the license[16]. In the case of granting of license for commercial purposes stringent conditions are imposed. A prior request with the patentee is required before applying for the compulsory license.[17] This new licensing system if implemented verbatim without exploring the rooms for protecting the public interest will hamper the chances of the developing countries to achieve their developmental objective. The agreement further made it compulsory to reverse the burden of proof in case of process patent infringement. The patent holder can threaten his competitors to keep away from the alleged infringement. Further the term of the protection has been increased universally for a minimum period of 20 years[18]. This took away the freedom available to the developing countries to regulate the monopoly right according to the circumstances. For instance many countries including the developed countries gave a short period of protection to the inventions in the field of pharmaceutical and agro-chemicals. This space has been taken away by the new provision. The long duration of protection irrespective of the nature of technology will retard the progress of technology in many fields. For instance, the market cycle of software is maximum for three years. A protection for 20 years unnecessarily gives the producer an additional 17 years of protection, which does not have any economic value other than preventing others from developing new technology using the protected one. The TRIPS agreement gives a transitional period of ten years for countries to transform their patent system inline with the TRIPS agreement. However, this transitional period was neutralised by the provisions of the exclusive marketing rights which demands the countries to give a maximum period of five years exclusive marketing rights to products of pharmaceutical and agro chemicals sought for the product patent in the concerned country upon the approval of marketing from the concerned authority.[19]

The TRIPS Agreement will have serious

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implications for developing countries, which includes the adverse effect on the economical and social life of the people especially on the peoples' enjoyment of rights to health and food. The hard patent regime under the TRIPS Agreement will affect the availability as well as accessibility of food and medicines.[20] The African AIDS drug crisis clearly corroborates the fears of accessibility of drugs. As far as food is concerned the options available for plant variety protection has little effect due to the patent protection on pesticides and fertilisers. The adverse effect of TRIPS is on the knowledge-based industries of the developing countries, which are at infant stage.[21] It causes the marginalisation of the developing countries in this sector. In the pharmaceutical industry it will result the confinement of pharmacy industry only in the production of generic drugs. This will affect the growth of domestic pharmaceutical industry in the developing countries and the market will be controlled by the Multinational Corporations (MNCs).[22] Further, the expansion of patent in life forms affects the biotech industries of the developing countries by denying them the access to the new technologies as well as a chance to catch up with many of the existing technologies. This would result in a peculiar case that, bio resources are situated in developing countries and technology is with the developed countries. Thus the Agreement legitimises a new kind of dependency. This also will have impact on the agriculture sector of the developing countries and as a result the food security of the developing countries will be in danger. Information technology is one of the fast growing sectors in the field of knowledge-based industries. Since it is a labour intensive industry, developing countries have great potential to use this industry to its economic advantage. The dissemination of information technology is very fast compared to other sectors like pharmacy or biotechnology. However the granting of the patent protection to software or e-commerce business models will obstruct the percolation of technology as well as the potential chances of the developing countries in this sector.

C. The Remedial Measures

As a party to the TRIPS Agreement most of the developing countries have to transform their patent law in accordance with the prescription of the TRIPS Agreement. Therefore the crucial question is how can one safeguard some of its crucial interest while doing so. The answer lies in the interpretation of the TRIPS agreement. Therefore, member countries should implement the TRIPS Agreement with the proper understanding of the implication of the Agreement. According to United Nations Conference on Trade and Development (UNCTAD), "it is also important to underline that strengthening the Intellectual Property Right (IPR) system, while bearing some potential for expanding access to trade, Foreign Direct Investment (FDI) and technology, is liable to be of small value for developing countries unless it is done in a coherent framework of broader policies. IPR thus should be implemented in a way that promotes dynamic competition through, the acquisition and local development of technology in an environment that is conducive to its growth. In such an environment, stronger IPR themselves, should become a spur to additional growth. Otherwise, they might result in higher prices and limited growth". Therefore the implementation of the TRIPS should be done in coherent manners in the specific context of each country. To do this one should have certain objective to be achieved by the implementations of the TRIPS patent regime.

As stated above the policy approach towards the TRIPS agreement should be taking into the realities of the socio-economic conditions of the respective countries and at the same time to fulfil the international obligations under the agreement. Therefore, one has to look into the fact that all changes are required to be inline with the TRIPS Agreement. After identification of these changes, one should employ the interpretative techniques, which should be employed in the implementation of the TRIPS provisions. An analysis of the

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Agreement brings the fact that it provides much manoeuvering space to the member countries during the implementation stage. This manoeuverability emanates mainly from the non-interpretation of the key words or concepts in the Agreement.[23] Secondly, it emanates from either the non-inclusion of the definition or meaning of many concepts or explicit prohibition of certain practices.[24] Hence a state can make use of these opportunities to safeguard its interest by giving legal clarity to these concepts and practices in its new patent and plant variety law. Another possible way of doing this is to interpret the TRIPS provisions in the light of other international agreements pertaining to the issues covered by the TRIPS agreement. In other words, translating the TRIPS provisions in compliance with other international Agreements especially Convention of Biotechnology, which provides sharing of benefits as well as prior informed consent for the access to the biological recourses. By making these conditions as a requirement for granting of patent thus guarantees against bio-piracy. Likewise using of concepts like right to health and right to food in the patent legislation as a ground for granting compulsory license would safe guard the public interest to a certain extent.

The practices in the developed countries show that the basic conceptual element such as novelty, inventive step, and usefulness has been interpreted in such a fashion to extend protection to the new technologies. The original conceptual understanding never accommodates these inventions especially the inventions related to microorganisms and software within the patent protection. The practice of granting patents to pharmaceutical products on the basis of new use and new dosages are also an example of tampering of the basic concepts of patentability. This leads to the fact that it is the commercial and not the legal considerations that played the crucial role in shaping these concepts over the years. Therefore, the developing countries have to stick to the original idea of these concepts in order to limit the scope of patent protection especially in the above-mentioned areas.[25]

The other possible steps to be followed by a country at implementation stage of patent and plant variety protection provisions of TRIPS Agreement are explained below. The Scope of patentability in the new act should be limited as much as possible. To this end, while giving protection according to the TRIPS Agreement, states should rely on the following steps.

* Define the concept of invention in order to make difference with discovery. The discoveries are not qualified for patent protection. As a result plants and micro organisms found in nature become ineligible for patent protection.[26]

* Define the following terms viz. micro-organism, non-biological and biological process of production, in order to limit the scope of protection. For instance a limited definition of micro-organism can deny protection to DNAs, Cell lines etc.[27]

* Define the basic concept in such a way to include a limited invention within its fold. Explicitly exclude certain inventions using the TRIPS mandate provided in Article 27. The first exception is stated in Article 27.2 and is for inventions that are contrary to *ordre* public or morality. This includes inventions that are dangerous to human beings, animals, plant life or health or which are seriously prejudicial to the environment. The second exception, found in Article 27.3(a) excludes from patentability diagnostic, therapeutic and surgical methods for the treatment of humans or animals. Finally, the third exception, found in Article 27.3(b), which is the most interesting from the perspective of this essay, states that "[members] may also exclude from patentability: [...] plants and animals other than micro-organisms, and essentially biological processes for the production of plants or animals other than non-biological and microbiological processes". New plant varieties *shall* however be protected either by patents or by an effective *sui generis* system or a combination thereof.

* The freedom available under the Article 29 should be used in order to give patents only to those inventions, which are sufficiently disclosed.

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This mandate can be used to implement requirements like disclosure of the geographical origin, prior informed consent, and sharing of benefits mentioned in the Convention of Bio Diversity.[28] This would result in the linkage of TRIPS Agreement with Convention of Bio Diversity and thus avoids the conflicts between the two treaties.

* Any wilful wrong disclosure of origin will make the ground for revocation of the patent.

* Exceptions to the patentee's rights under Article 30 can be used to provide at least the following exceptions. Parallel import would permit the importation of the protected variety from any part of the world where it is marketed legally and available at cheaper price. Bolar exception permits the production of protected items generally medicines for the purpose of regulatory clearance.[29] This should be made available to plant varieties. Exception should be allowed to conduct R&D activities during the protected period.

* Compulsory license should be given on those grounds explicitly mentioned under Article 31. But additional grounds can be added. At least environmental protection, working requirement of patents should be added as a ground for the grant of compulsory license.[30] The term adequate remuneration should be defined in such way to fix a minimum royalty say 8%. Further a minimum time frame should be given for grant of compulsory license. The concept of public interest for granting of compulsory license should be defined to include right to health and food. As mentioned in the first part of this essay, states which are parties have an obligation to respect, protect and fulfil the obligation regarding the enjoyment of right to food. Therefore, it is necessary on the part of the states to interfere against the intellectual property right holder to ensure right to access the food. Granting of compulsory license in order to ensure right to food thus emanates from state's human rights obligation and not from the TRIPS Agreement.

* Duration of patents should be fixed for 20 years and no extension should be permitted.

* As mentioned earlier TRIPS Agreement provides three options regarding plant varieties, which can be protected through either patent or *sui generis* or a combination of both. However the preferred mode of protection for developing countries is the *sui generis* system[31]. Compared to exclusive nature of patent rights *sui generis* system gives room for a flexible system, which is conducive to the socio-economic needs of the respective system. Further, the TRIPS Agreement does not mention the nature of *sui generis* protection. As a result there is no obligation on the part of the member countries to provide UPOV model protection, which restricts farmers' rights to preserve seeds. Hence, the implementing legislation should incorporate provisions for farmers' rights. At the same time it should also incorporate the features of above-mentioned patent law especially the limitation of the rights and compulsory license provision. Further the protection should be given to limited varieties. Plants for the food production should be exempted.

Conclusion

The TRIPS Agreement prescribes a strong intellectual property regime. This would lead to adverse consequence on the access to food irrespective of the mode of protection. The option for plant variety protection will have little effect due to the patent protection on fertilisers and pesticides. The obligation under ICESCR on right to food includes physical and economic access to food. A stringent intellectual property regime would reduce the economic access to food. Therefore, the implementation of the TRIPS Agreement in its current form will lead to severe consequences on peoples' right to food, health and self determination. It is also very clear that obligation on right to food has primacy over the intellectual property rights. Therefore, the implementing legislation of TRIPS Agreement should not only avoid the interference on the right to food but also explicitly safe guard the right. This can be done through by making right to food as a ground for the

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granting of compulsory license. In other words, a linkage of TRIPS Agreement with ICESCR is required to balance the private and public interests. This can be done by each state at its domestic level. This mandated by Article 8 of the TRIPS Agreement, which reads "Members may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development... Apart from this, the other specific suggestions mentioned above would balance the public and private interest in implementing the rights.

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