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DEBATES ON THE INCLUSION OF IPRS IN WTO FRAMEWORK

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INTRODUCTION

The issues of protecting Intellectual Property Rights become contentious and led to fierce debates and conflicts between developed countries and developing countries. These conflicts were due to divergent interests with regard to International Trade and Development. While the developed Countries felt that their Commercial and Industrial interests could be at loss without proper protection for IPR issues, the developing countries perceived that their development would be hampered once the TRIPs framework was agreed upon and operationalised.

The intense debates on Intellectual Property Rights issues held on procedural and substantive matters between the developed countries (North) and Developing countries (South) a continued for a long time. Though the General Agreement on Trade and Tariffs (GATT) came into force in 1947, TRIPs agreement was concluded only in 1994 in Uruguay Round of Multilateral Trade Negotiations (MTNs). Prior to the TRIPs agreement, there were only limited and marginal references to IPRs in international trade law. Hence the matters relating to the standards and protection of IPRs were largely governed by World Intellectual Property Organization (WIPO) under the Paris Convention and Berne Convention frameworks.

With the increase in the production and quantitative expansion of goods, the developed countries (representing the interests of famous brands, copy rights, trademarks and patents) had faced the problem of counterfeit goods. Hence the developed countries had demanded the introduction of anti-counterfeiting code into GATT rules during the latter part of Tokyo Round (between 1973 and 1979). These demands on IRPs against counterfeit goods were intended to intercept and destruct such goods outside the channels of commerce.

However, no agreement could be reached during Tokyo Round since only the US and EC had supported the inclusion of IPRs. Meanwhile, certain pressure groups in USA such as International Anti-counterfeiting coalition (a group formed by USA based multinational companies), International Intellectual Property Committee (IPC) (a group formed by the US research based industry) etc., have lobbied for IPR protection at Global level during negotiations in GATT. Some of the multinationals like IBM, Pfizer, General Electricals (GE), Johnson & Johnson, Monsanto, Rockwell International etc worked closely with the negotiating process at GATT and expressed their views on contentious issues of IPRS.[1]

Based on the suggestions of 1982 ministerial meeting of the GATT, the then Director General Prepared certain outlines in 1985 on IPRs. Likewise, the USA and Japan had also tabled their

proposals as early as in 1986 to include IPRs such as patents, trademarks, copy rights and trade secrets. These proposals were vehemently opposed by the developing countries.

At the GATT meeting of the Trade ministers at Punta Del Este in Uruguay in September 1986, a declaration to launch the Uruguay round was adopted and in which a decision to launch negotiations on TRIPs was also included[2].

During the course of negotiations, a number of issues came up for discussion. These debates related to both in favor of and opposition to the inclusion of Intellectual property Rights within the GATT framework. Besides the formal discussions among the countries, intense lobbying and diplomatic methods were also followed to bring a consensus on the inclusion of IPRs. Member states of the GATT, Multinational companies, Research organizations and Non-Governmental organization (NGOs) had participated in the process of negotiations and lobbying.

A major landmark in the history of Intellectual property Rights was the successful inclusion of Trade Related IPRs in Uruguay round multilateral negotiations, in 1994. Later, these TRIPs have formed part of the World Trade Organization (WTO) framework. This framework on TRIPs brings uniformity in the standards of protection both in developing countries and developed countries. Accordingly all the countries are instructed to undertake modifications in their respective laws with regard to IPRs in conformity with WTO frame work of TRIPs. The WTO framework of TRIPs has recognized 7 types of IPRs namely Patents, Copy rights and related rights, Trademarks, Geographical Indications, Industrial Designs, Layout Designs of Integrated Circuits and undisclosed information for as many as 138 countries.

All the WTO members were given one year time, up to January 1996 to phase out the changes in the respective domestic IPR matters duly in conformity with TRIPs provisions f WTO. However, the developing countries and other countries such as Eastern and central European states were given and additional four years i.e. up to January 2000 for undertaking modifications in their domestic Laws pertaining to IPRs. The Less Developed countries (LDCs) were given ten years' time up to 2006.

The disagreement between the Developed countries and Developing countries on matters of Intellectual Property Rights was based on different perceptions. These perceptions are relating to the procedural matters and substantive matters on IPRs.

Among the procedural differences, the perception of developing countries that GATT was not the right forum for the discussion of the patents issues, gained prominence for a larger debate. India along with other countries like Argentina, Brazil, Chile, China, Egypt, Nigeria, Pakistan etc have argued that the World Intellectual Property Organization (WIPO) and the United Nations Conference on Trade and Development (UNCTAD) are the appropriate bodies for that purpose. But the developed countries have maintained that protection for IPRs is a prerequisite for any progress in international trade. However, the developing countries have reverted back from their original position and changed their perception and attitudes on IPRs in the four years of complex negotiations. The seven years of negotiations from September 1986 to December 1993, resulted

in the inclusion of IPRs in WTO. Thus the TRIPs agreement is concluded and the role of WTO as implementing and dispute settlement agency is accepted. The developed countries have convinced the developing countries that TRIPs agreement under WTO fame work is necessary because WIPO treatises have no provisions mandating effective domestic enforcement of IPRs and WIPO also has no dispute settlement mechanism to ensure compliance with international obligations.

On the substantial maters, differences existed between the developed countries and developing countries on many issues of IPRs. Among these issues, six prominent issues are worth mentioning. These include, a) patentability and non-patentability b)process patent and product patent c)Exclusive marketing rights and compulsory licensing d)patent laws and competition laws e)Patent protection and Technology transfer and f)Traditional knowledge sources and manipulated patenting. While the developed countries proposed way outs for every objection, the developing countries have insisted upon written guarantees and concessions for accepting the text on Intellectual property Rights. There were also efforts to break the unity among the developing countries on these matters. The objections of the developing countries mainly stemming from their socio economic under development and had vehemently sought guarantees for their development in the event of conceding the IPR text. At home, the Governments had sought the opinions of intellectuals while discussing the issues of IPRs. A compromise is evolved after fierce debate on different issues on IPRs.

Some of the scholars have explained the intricacies of interpreting the provisions of TRIPs and have suggested ways of implementing IPRs in developing countries. The views of these experts ranged from effective support for IPRs to suggestions for escape ways for developing countries to protect their national interests. The reasons for the divergent views during TRIPs negotiations between Developed (North) countries and Developing (South) countries are due to differences in the nature of interests. Ultimately, this conflict of interests is resolved on TRIPs draft of WTO.

Prior to the Uruguay Round, International trade rules incorporated in GATT 1947 were governed only matters related to Trade in goods. The main objective of GATT was to set rules for freer, non-discriminating trade among its members. Before the TRIs agreement, there were only marginal references to IPRs in International Trade Law. The developing countries had to consent the TRIPs agreement in WTO due to the veiled threats from the US on pressing super 301 and special 301 in trade balance[3].

The differing perceptions on the issues of Trade related Intellectual Property Rights are broadly related to the identification and implementation of IPRs. These differences can be discussed as follows.

PATENTABILITY AND NON-PATENTABILITY:

The developing countries led by group of Teen countries l(in which India, Brazil, Argentina and Mexico were more vocal) expressed the view that items like pharmaceuticals, chemicals and food products should be excluded from the scope of TRIPs. These are considered to be vital for the socioeconomic development of developing nations. Once these products are included in the

patents regime, the costs of these products become exorbitantly high and could not be within the reach of the common people. On the other hand, the developed countries insisted that better trade practices could be evolved with patent protection and it would be conducive for foreign direct investment in developing countries. The developed countries assured others that a reasonable and rational negotiating mechanism and dispute settlement mechanism be created to allay the fears on high costs of the products[4].

EXCLUSIVE MARKETING RIGHTS VS COMPULSORY LICENSING:

The WTO agreement insists upon granting Exclusive Marketing Rights (EMRs) for the patent holders for a fixed term. These EMRs come in vogue from the date of application for patent (whether approved or not). It provides the patentee the right against the 'unfair commercial use of the inventions. In fact some countries have granted only EMRs, instead of patents for a shorter period. Developing countries have vehemently appealed for the non inclusion EMRs as these rights entrust the patentee the sole producer of the product and which may result in monopoly. However the developed countries insisted that exclusive marketing rights for field tenure would facilitate voluntary transfer of Technology. To cope up with the inadequacy of production patented items, nations can permit compulsory licensing with other investors. In fact in the Berne convention Article 13(1) allows Compulsory Licenses on certain copy rights with the authors consent. Such provisions have been allowed to developing countries on compulsory licensing to ensure to low costs on text books, teaching materials, sound recordings, cable broad costs etc. The system of compulsory licensing is provided only after the nations strictly comply the provisions of TRIPs agreement. The initiatives taken by Brazil, India and South Africa led to the adoption of a declaration on TRIPs and Public Health by WTO ministerial conference in 2001. This declaration acknowledges the primacy of the countries right to grant compulsory licenses and the freedom to determine the grounds on which such licenses are granted. This concession can be availed under situations of national emergency. The countries have the right to determine the previous that constitute national emergency or other circumstances of extreme urgency for the purpose of implementing the compulsory licensing system under TRIPs agreement[5]. Para-V of the TRIPs agreement determines the ground for compulsory licenses such as national emergencies and exhaustion rights.

PUBLIC INTEREST (SOCIAL COSTS) AND BUSINESS INTERESTS:

The agreement on Trade Related Intellectual property Rights (TRIPs) grants the innovator exclusive rights to stimulate creativity and investment in the production of newly innovated goods and services. It is believed that the gains to society from innovation will outweigh the effects that higher prices have on consumers. Hence there should be a judicious balance between Intellectual property right of the innovator and public Interest.

However, the agreement on TRIPs creates a paradoxical situation where the business interests enter the IPR domain particularly in pharmaceuticals, agriculture and digital technology sectors and provide benefit in the form of royalties for generations together. The business interests may

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also indulge in IPR based blackmail as these rights are more technical in nature. As Andrew Gower's (who headed the commission for an Independent Review into the UK IPR frame work) observes, IPRs "in an obscure and distant domain, its laws shrouded in jargon and technical mystery, its applications relevant only to a specialist audience. Yet IPR is everywhere. Even a coffee jar relies on a range of IP Rights, from patents to copy rights, patents to trademarks"[6]. Patent rights have become the instruments for commercial intimidation and monopolistic exploitation. The developing countries led by India and Brazil have expressed fears that the costs of pharmaceuticals, health goods and agricultural inputs will sky rocket with the implementation of this TRIPs agenda.[7]

However, these fears of developing countries were rejected by the developed nations. Among certain assurances given for developing world were, lowering the average tariff rates removing the quantitative restrictions (QRS), creating opportunities in Non conventional technology based services such as super specialty hospital services, satellite mapping services, standardization and quality assurance services, maintenance service and so on.[8] As a compromise between developed countries and developing countries Article 30 of TRIPs agreement is provided which deals with the practices that are not regarded as infringements. India Pakistan and other developing countries strive hard for this[9]. Further, the essential drugs for human survival are listed by World Health Organization (WHO) and are kept beyond the purview of the patent system.

TRADITIONAL KNOWLEDGE SOURCES AND MANIPULATED PATENTING:

Indigenous knowledge is local knowledge that is unique to a given culture, society or a geographical region. Indigenous knowledge is the systematic body of knowledge acquired by local people through the experiences, informal experiments and initiatives of understanding the environment in a given culture. It reflects the experiences based on traditions. Hence it is known as Traditional knowledge. Local people, including farmers, landless labourers, women rural artisans, cattle rears etc are the custodians of this traditional knowledge. Traditional knowledge can make a significant contribution to sustainable development. People have utilized and created Traditional knowledge in a sustainable way for thousands of years. Traditional knowledge provides useful leads for scientific research. For example the herbal medicine is a traditional knowledge, which is motivating so much of pharmaceutical research.

Most of the debates on the traditional knowledge at the international level is now taking place in the context of intellectual Property Rights. It is through IPRs, particularly with patents, attempts are made to control and own to the traditional knowledge by commercial interests. Many MNCs have been granted patents on products which are otherwise considered as traditional knowledge by local communities. This is termed as Bio piracy[10] or knowledge piracy or manipulated patents. Large numbers of patents were granted over genetic resources without the consent of Indigenous people who possess this traditional knowledge from time immemorial. Some of the examples of these manipulated patents include.

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Patent over India's turmeric has been granted to researchers of university of Mississippi medical centre in 1995 for its wounds therapeutic properties. However, the patent granted was revoked on determined challenge put forth by Centre for Scientific and Industrial Research (CSIR).

The use of Neem, lndia traditional tree, having medicinal and pesticidal properties has been claimed as a patent by the W.R Grace and Co, UK (for using Neem oil as anti fungal agent).

The Basmati Rice – superior quality rice originally invented and produced only by India and Pakistan for ages, has been patented to Rice Tech - taxes USA in 1999). However, it is revoked on challenges from India. Rice tech has named this rice as Texmati rice.

Aswagandha - a traditional Ayurvedic System of medicine of India has been patented to Reliv International Inc. for using it as dietary supplement for nutritionally promoting healthy joint function. This has been in use in India for time immemorial.

Bitter gourds (Karela), Brinjal, Jamun and Gumar which are widely used in India for medicinal properties are patented by Cromark Research Inc., USA for herbal diabetic properties to reduce sugar.

India's herbal products like Amla, Vasab, saptrangi and baebel have been granted patent by the US patent and Trademarks office for their various derivatives.

Pepper, ginger, mustard, bitter gourds, soap nut, gooseberry, black berry, Cumin – all India's traditional herbs, plants and fruits have all been patented, in spite of many objections from Indians[11].

Some of the concerned citizens and Indian Research Institutes have challenged these manipulated patents. For example, Vandana Shiva, Director, Research Foundation for Science, Technology and Ecology has challenged many such manipulated patents. Vandana Shiva has successfully contested a Neem patent assigned to a foreign company at European patent office in Munich and this has resulted in the revocation of the patent. Dr. Shiva said, "it was pure and simple piracy. The oil from Neem has been used traditionally by farmers to prevent fungus. It was neither a novel idea nor was it invented. It is a major victory that this appeal has been finally dismissed. The Neem patent was granted by the European patent office to the US department of Agriculture and the famous multinational, W.R Grace in 1995. Since then Dr Shiva along with the International Federation of Organic Agriculture Movement and the Green party in the European Parliament had been challenging on manipulated patents it. Dr. Shiva has termed the revocation of Neem patent as a historic movement and "patenting is one of the ways through which traditional users can be threatened. But now such patents will no longer be a threat for traditional users[12].

NATIONAL SOVEREIGNTY - TECHNOLOGY TRANSFER:

The developing countries argue that under a strong Intellectual property Regime, their power of national sovereignty is challenged. Some of these countries also perceived this as a revisit of colonialism with WTO system in general and IPR Regime in particular.[13] The disagreements over

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the applicability of IPR rules emanate from the fears of historical dependence for centuries on European powers in all matter of economic importance and thus perceive the new IPR regime as one more issue that contribute for excessive dependence on developed countries. Thus, by allowing goods and services already patented by other nations, their power of economic sovereignty is curtailed. Further, the developing countries feel that by consenting the IPR regime the national interest are affected in their respective counties as these countries cannot exercise any control on matters of production and pricing of patented goods.

The fears of developing countries are dispelled by the advocates of free trade regime. In the context of the world trading system moving towards an interdependent pattern of economic relationship, the exclusiveness in the name of sovereignty does not appear to be holding even for big and powerful nations. Liberal like Han Ulrich makes a cautions note by stating that "it is up to the sovereign judgment of each and every country to strike the necessary balance just as it is upto its judgment to shape the conditions of the market which, in turn, will determine the reward accruing to the inventor by virtue of his exclusive rights.[14] Some of protagonists of IPR regime have also emphasized on the benefits of Technology Transfer. As the former director of UNCTAD writes "hey affect the access of these countries to the treasure house of rapidly expanding world stock of technologies".[15] The best possible option that the developing nations could utilize is to attract foreign investment and encourage the setting up of branches with Research & development (R & D) facilities for evolving appropriate technologies. This also arrests the trends of brain drain that most of the developing nations are experiencing.

CONCLUSION:

After all the debates on proposals submitted by the developing countries led by India, Brazil and others, certain changes are made in the text. The need for transitional periods for developing countries to amend their Intellectual property laws was recognized and granted. The draft text also recognizes the need for technical assistance to the developing countries. In fact, it is generally believed that the developed nations had upper hand during these negotiations as have greater stakes in the intellectual property rights domain. In conclusion, a sound Intellectual property protection regime coupled with emphasis on Research and Development (R&D) is widely accepted as an instrument of growth and progress. As a result of these decades' long deliberations, the agreement on Trade Related Intellectual property Right (TRIPs) is made an integral part of WTO system.

REFERENCES:

1. Jayashree Watal, "Intellectual Property Rights in the WTO and the Developing Countries" Oxford University press, New Delhi (2001) Page 17 and Chakravarthi Raghavan (1990), "Recolonization: GATT, the Uruguay Round & the Third World", Zed Books Ltd., London; Page 37.

2. Ministerial declaration on the Uruguay Round (GATT Doc. No. Min, December 1986) at Punta Del Este, Uruguay. In part-I under title "Negotiations on Trade in goods" mentions of TRIPs.
3. Deepak Nayyar (1992), "Intellectual property Rights and LDCs some strategic Issues" Economic and political weekly (EPW) Bombay, February 8-15. The like United States not only insisted that the developing countries participate fully in the new trading regime negotiations on the basis of reciprocity, but also clamped down a series of unilateral measures against some of the major developing countries like India and Brazil. These measures were related to unfair trade practices and inequal trade quantum from Special 301and Super 301 sections of US Trade Act of 1988. These measures have believed to have scuttled the unity among the developing nations on issues of TRIPs.
4. Bhaumik T.K., (2006) "The WTO - A Discordant Orchestra" (2006) sage publication, New Delhi.
5. Alokesh Barua & Rober M. Stern., (Ed), (2010) "The WTO and India Issues and Negotiating strategies", Orient Black Swan, Hyderabad, Page 36 -51.
6. The Hindu, (December 15, 2006) "Road map to peace in intellectual property war, Hyderabad Edition. Page 13.
7. Devinder Sharma, (1999) "GATT to WTO seeds of despair", Vikas Publishers, Bombay, page 45-51.
8. Vijaya Kathi, (1999) "New Trading Opportunities under the Uruguay Round: Agriculture, Manufacturing and Services"; in Seattle & beyond: The unfinished Agenda by Bhattacharya (Ed.), BR Publishers, New Delhi.
9. Siddhartha Deva, (2002), "Doha Declaration and the TRIPs: importance of Article 30" in The Hindu (Hyderabad Edition) March 14, 2002.
10. Malini Reddy & Shilpa Deekshit, (2007), "Agricultural Bio technology and Traditional knowledge," an unpublished paper submitted in a Seminar on opportunities & Challenges to Indian Agriculture at Osmania University 2007, March.
11. Nanjundaiah & Rajendran (2008), "Intellectual Property Rights and protection of indigenous Environmental knowledge of Indigenous community" in Institutional policy option for sustainable agricultural Development (Ed) by Prof. G. Gopal Reddy, Department of Economics, Osmania University-Hyderabad Page 172 - 173.
12. The Hindu 9th March 2005, "India wins Neem Patent Case".
13. Rajan Dhanjee and Laurence Charzourmes (2990), "Trade related aspects of Intellectual property Right (TRIPS): Objectives, Approaches and Basic Principles of the GATT and Intellectual property conventions" in Journal of World Trade Vol 24, October 1990.
14. Jagadish Kumar Patnaik (1997), "India and the GATT; origin, Growth and development" : APH publishing corporation, New Delhi. Page 131.