

## TRIPs-related Issues

#4/2017

*The architecture of the WTO Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPs) accords the WTO members the sovereignty to promulgate rules of a sui generis (unique to their socio-economic circumstances) nature, for purposes of maximising intellectual property rights (IPR) protection. Despite the foregoing, the developing country members are still faced with pulls and pressures not only with regard to compliance and enforceability of their TRIPs obligations, but most importantly ensuring that TRIPs provisions reflect and deliver their socio-economic needs. Part of the reason is that the TRIPs Agreement is silent on obligations of the developed country members with respect to issues of development assistance and sharing of royalties. This silence is reflected in the 'best endeavour' language, which does not compel the developed country members to aid the developing country members. There are four core issues linked to TRIPs and development: Article 27.3(b) of the TRIPs Agreement, Geographical Indications (GI), Traditional Knowledge (TK), and Non-Violation Complaints (NVC).*

### Background

The long-standing debate on the TRIPs Agreement has been how to make it beneficial for the developing country members of the WTO with special attention to least developed countries (LDCs) and Small and Vulnerable Economies (SVEs). Unlike other Agreements in the WTO whose focus is on market access through tariff and subsidy reduction, the TRIPs Agreement is focussed on protection and enforceability of IPRs.

Therefore, not to lose sight of its development dimensions, the debate must arrive at practical conclusions in favour of developing countries, LDCs and SVEs. The *status quo* is that developed countries have taken full advantage of TRIPs to

foster their industrialisation, most importantly, through its patenting provisions.

The TRIPs debate at the multilateral level is based on proposals by the developed country members for stronger, if not additional, protection of IPRs on the other hand, the developing country members' focus has been on increased flexibilities to ensure that TRIPs captures its development dimensions.

Another debate has been on the loose framework of the TRIPs Agreement that has caused the WTO members to seek additional protection from other IPR related treaties, such as the Patent Cooperation Treaty, Berne Convention,

Lisbon Agreement, Hague Agreement, Madrid Protocol, amongst others.

The result has been lack of harmonisation of commitments and obligations. Members are also yet to arrive at a consensus on key issues such as the definition of compensation and access benefit sharing of rights.

Therefore, the selected four issues are deemed important for the on-going debate on development dimensions of trade as they directly touch on socio-economic needs of development and have been subjected to additional proposals by the developed countries for stronger protection. While the WTO TRIPs Agreement is the ultimate custodian in so far as IPR protection is concerned, the key question should be how a strengthened IPR regime can foster equitable development of all WTO members.

### **Article 27.3(b) of the TRIPs Agreement**

The outstanding issues are minimal or lack of harmonisation thereof between the TRIPs Agreement and the Convention on Biological Diversity (CBD) on curbing bio-piracy, the legal exclusivity of patents, and the linkages between patent protection and facilitation of transfer of technology (ToT).

Although the CBD has exclusive provisions on [bio-piracy and bio-trade](#), TRIPs has no enforceability framework and development guidelines through a clear access and benefit sharing of rights scheme. Additionally, while all WTO members are by default signatories to TRIPs, but not all are signatories to the

CBD. Hence, there is no legal reprieve for the TRIPs signatories who are not part of the CBD in the event of bio-piracy.

Secondly, the exclusivity of patents indirectly facilitates bio-piracy because TRIPs focuses more on the need for an 'innovative step', but does not have additional provisions on whether or not the community from which the naturally occurring biochemical or genetic material has been derived from was sufficiently compensated.

Due to this, developing countries have in the past incurred revenue losses. For example, the case of microbes derived from Lake Bogoria in Kenya, in which a company in the US developed a genre of soap (tide wash) used to manufacture stonewash jeans garments and the communities in that region have not been benefited from the royalties.

On facilitation of ToT, the long-standing debate has been how to ensure patenting provisions that are not stumbling blocks and, by the same token, ensuring ToT does not erode countries' policy space to innovate and enjoy a substantial degree of exclusivity.

### **Geographical Indications**

The general focus should be on amending the TRIPs Agreement so that the scope of GI coverage is widened as long as the developing country members can prove that the same is of economic importance to them.

Based on the foregoing, the following key issues must be borne in mind:

- whether the TRIPs framework provides a mandate to negotiate GI extension
- the need for and the extent to which Article 24 of the TRIPs Agreement can be amended
- exceptions to be created in the event there is an extension of GI protection
- the transitional phase-out period of GI

Furthermore, extension may be considered for the following reasons:

- development of traditional rural products through GI protection would provide efficient means to prevent relocation of production and would help retain and sustain workers in the rural areas, thus reducing rural-urban migration
- an extension would assist producers to unlock the value of their products by promoting them as origins
- given the importance of agriculture to developing countries, GI extension will further transform farmers from raw material producers to exporters of differentiated products, which can be easily identifiable in the global market
- GI contributes to biodiversity by encouraging localised production of distinct products with diverse qualities, thus protecting traditional cultures and enhancing national identity

## Traditional Knowledge

There is the need to develop an exclusive legal provision in TRIPs, clearly defining the parameters of what constitutes TK. So far the World Intellectual Property Organisation has been on course in developing an agreement that seeks to resolve the pending issues.

Secondly, the TRIPs Agreement should include a *proviso* in Article 27.3(b) on the setting up of a TK repository notification process to curb erroneous patenting. India is one of the few developing countries that have a Traditional Knowledge Digital Library and a Traditional Knowledge Resource Classification System, which have averted erroneous patent applications globally to its benefit.

## Non-Violation Complaints

Proposals have been submitted by the US and Switzerland at MC10 (Nairobi 2015) to lift the current [moratorium in TRIPs](#) on NVCs. This move was opposed by developing members on grounds that TRIPs does not directly address issues of market access and tariffs.

Therefore, an attempt to introduce NVCs goes against the overall objective and reflects mischief on part of some developed country members in respect to their commitment of ensuring equitable benefits across the board.

The current *sui generis* system allows the WTO members to enact IPR protection regimes without being adversely exposed to disputes. For example, Article 3(d) of India's (amended) Patent Act grants

exclusive rights to curb ever-greening of patents. Therefore, lifting this moratorium would open a floodgate of disputes, which developing country policymakers may not have the technical capacity and resources to resolve.

## Way Forward

The paramount focus for developing countries should be on how to ensure the realisation of development dimensions of the WTO TRIPs Agreement. It must be emphasised that a robust IPR regime can be a conduit for accelerating development.

On that note, the following key issues should be put into consideration for amending the TRIPs Agreement to add value to the needs of developing countries:

- boost IPR regimes through regional integration so that developing country members can have convergence of interests on particular IPR issues that needs to be amended and/or reviewed (for instance, the Africa Intellectual Property Organisation is a platform for African countries to cultivate development-friendly IPRs and further assist each other through cooperation and coordination)
- introduce a simplified and well-articulated access and benefit sharing of rights scheme in the TRIPs Agreement to ensure that non-signatories to the CBD are also equally covered

© CUTS International, 2017

This Viewpoint Paper has been written by Jill Atieno Juma, Policy Analyst, CUTS International. D-217, Bhaskar Marg, Bani Park, Jaipur 302 016, India. Ph: 91.141.228 2821, Fax: 91.141.228 2485, Email: [cuts@cuts.org](mailto:cuts@cuts.org), Web Site: [www.cuts-international.org](http://www.cuts-international.org).

Also at Delhi, Calcutta and Chittorgarh (India); Lusaka (Zambia); Nairobi (Kenya); Accra (Ghana); Hanoi (Vietnam); and Geneva (Switzerland).

November 2017