GATT and Us

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1 Background

The General Agreement on Trade and Tariffs (GATT), an international forum, was established in 1948 with the aim to reduce trade barriers like quotas and custom duties, and to promote international trade.

Of the various rounds of trade negotiations, the Uruguay Round (8th round) was the most controversial in which the key areas of debate was Trade Related Intellectual Property Rights (TRIPS). The developed countries wanted GATT to monitor the protection of intellectual property rights (IPRs) but developing countries opposed it on the ground that excessive protection could itself become a barrier to trade.

2 Patents & Rights

Philosophical attitudes towards IPRs have historically ranged between two extremes on the one hand is the natural rights view of the IPRs, best encapsulated in the Hegelian dictum an idea belongs to its creator because the idea is a manifestation of the creator self or Personalty; and on the other hand is the utilitarian view stressing the role of innovations in promoting development by local diffusion of knowledge.

While strong IPR regimes emphasise on the natural rights view, weak regimes opt for the utilitarian view. The Uruguay round witnessed a marked polarisation of views, with the industrialised west insisting on the global strengthening of the IPRs, and developing nation resisting the move.

The Uruguay round agreement proposes extending the field to cover select life forms which were hitherto not considered patentable by most countries. Article 27.3 of the TRIPS agreement stipulates patenting microorganisms the first step towards patenting life. In an attempt to extend the Union of Protection of New Plant Varieties (UPOV) to all countries, TRIPS also stresses on plant patents, which is not given by many developing countries.

Developing countries like India, recognise only process patents for chemical industries, including drugs and pharmaceutical which have enabled them to develop indigenous pharmaceutical industries. The Dunkel Draft has introduced provisions whereby these countries will have to change to a product patent system.

To ensure the changes, the Dunkel Draft has Carrots and Sticks terms the carrot is the 10 year transition period available to the country which would change to product patents (but it is 5 years if it retains process patents). The stick is the reversal of the Burden of Proof. i.e. earlier the onus for providing patent infringement was on the complainant. However, now the person charged with the offence, that is the defendant, has to prove his innocence. So far there has been no consensus on the duration of patent grant and Dunkel draft seeks to alter this.

Article 37 of the TRIPS agreement stipulates that patent protection should be for 20 years from the date of filing, with the patent holder ensuring the functioning of the patent in the country of the grant (otherwise the system only confers rights on the patentee). To ensure that the patent is functioning and not abused, there is a provision of compulsory licensing.

3 Plant Genetic Resources

Due to pressure from developed countries, especially the US, and the requirement of the TRIPS agreement in the World Trade Organisation (WTO), a new IPR legislation is being introduced in the area of Plant Genetic Resources (PGRs) WTO allows a five year transition period to introduce PGR legislations, while the US wants it to be imposed immediately.

The US is also demanding monopoly protecting for trans-national corporations (TNCs) which control the seed industry, while peoples organisations are fighting to protect farmers rights to bio-diversity and survival, as well as freedom of scientist to work for the removal of hunger rather than protect corporate profit. The PGR legislation conflict is a conflict between farmers and seed industry, between public domain and private profits, between agriculture that produces and reproduces diversity, and one that consumes diversity and produces uniformity.

The developed worlds IPR orthodoxy is based on the fallacious idea that there can be no innovations unless it is profitable. So far, innovations in seeds and PGRs have been guided by the larger human goods.

Genetic resources are natural resources on which agriculture, pharmaceutical and other industries are based. The international convention governing the ownership of natural resources acknowledge that resources are the property of those countries in whose territories the resources are found. But in the case of genetic resources, this convention is discarded. Most genetic resources are found in tropical and sub-tropical regions (developing countries). Genetic resources, unlike other resources, are treated as the common heritage of the humankind and so are never paid for.

It is often said that IPRs will not prevent farmers from using native seeds. But IPRs are an essential part of a package of agribusiness controlled agriculture in which farmers use seeds supplied by seed multinational com-

panies (MNCs). IPRs wipe out farmers rights to save and exchange seeds and this results in the MNCs controlling agriculture. Thus the MNCs will decide on what to grow, for whom and the prices. While IPRs are an important instrument for establishing MNC totalitarianism, community rights are an important concept to protect public interest. Without community rights, agricultural communities cannot protect agricultural biodiversity, necessary not only for ecological insurance of agriculture but it is also and economic imperative without which farmers will loose their freedom for survival

4 Farmer's Rights

Over the years, farmers in developing countries have created important crops, yet their achievements have never been acknowledged, while their fruits are appropriated by the West without paying any compensation. It is obvious that the common heritage cannot be sustained specially with the growing trends of patent privatisation and stricter PBRs. IF genetic resources are common heritage they cannot be privatised, and if they are privatised, they belong to developing countries and paid for like any other privately owned resources. Corporate interest defending patents insist on protection as it secures returns on large investments undertaken to develop new products. This point is valid, but MNCs should not use raw material without paying for it.

Article 27.5.3(b) of the TRIPs directly affects agricultural biodiversity and farmers rights. It states:

> parties may exclude from patentability plants and animals other than micro-organisms and essentially biological processes for the production of plants and animals other than non biological and micro biological processes. However parties shall provide for the protection of plant varieties either by patents or an effective sui generis[1] system or any combination thereof.

The grant covering all genetically engineered varieties of a species, irrespective of the genes concerned or how they are transferred, enables a single inventor to control what is grown. Patent protection implies exclusion of farmers rights over resources having these genes and characteristics, which will undermine the very foundation of agriculture. In 1985 a patent was granted to scientist Kenneth Hibberd and his co-inventors on tissue culture, seed and whole plant of a corn line selected for tissue culture. Hibberds application had over 260 separate claims. The impact of such patenting will be felt most in the competition between farmers and seed industry. The Hibberd framework will enable the seed industry to force farmers into buying

[1]Sui Generis means generated from within according to a countrys specific needs

seeds every year. If such patents are introduced in India, then farmers who save and replants the seeds of a patented plant violates the law.

In developing countries, agriculture is both a way of life and principal source of sustenance to the economy. Protecting farmers rights to use their own seeds and propagating High Yielding Varieties (HYV) to other farmers is the key to increasing agricultural production and achieving food self sufficiency in these countries. Since farmers from time immemorial have been discovering genes and developing them, they have the legitimate right to claim their share. TRIPS, by way of protection of plant varieties, unfairly encourages a breeder, who affects some mutation in the plant variety, to acquire exclusive rights over it.

According to TRIPS, countries may provide a sui generis for IPRs in PGRs, commonly referred to as Plant Breeders Rights (PBRs) and operating mainly in developed countries. This protection confers on the PBRs holders the right to produce seeds of the protected variety. PBRs offer monopoly on the sale of seeds but not on the variety or its genes. They grant exemption to both breeder as well as farmers. With the UPOV amendment in 1991, breeders exemptions have been done away with, while farmers exemption has been made optional and can be granted only if the interests of PBR holders are not jeopardised. Farmers whose traditional rights include rights to save, modify and sell seeds will be severely handicapped by the conditions of the draft. Even if they can save the seed, they still loose the right to modify to suit local needs.

The provision on protection of plant varieties will inflict incalculable harm on agriculture in developing countries. Exchange of seeds among farmers will stop and farmers will not be allowed to grow or produce seeds if they opt for protected varieties. The view that farmers rights will not be affected as exchange of seeds, according to prevailing custom, can be retained under the sui generis regime, is misleading in Indias case since only 38% of the 600,000 tonnes of seed required is met by government agencies and the rest by inter farmer sales. Acceptance of Dunkel draft will abolish this facility.

Patenting of plant varieties, genetic material, genes etc. will accelerate processes which will erode plant and agricultural diversity, causing a serious threat to environment and development. Thus the TRIPS agreement contradicts the objectives of the biodiversity convention. The Dunkel draft highly favours developed countries and is anti-developing countries, especially their farmers. Accepting the IPR proposals in toto would be detrimental for India and other developing countries.