

Trade related intellectual property rights: Plant varieties and biodiversity, traditional knowledge and benefit-sharing

SUMMARY

- ▶ *Developing countries have complained of undue pressure to comply with the terms of the TRIPS Agreement and say they need more than 5 years to adopt its provisions.*
- ▶ *Some developing countries want the Agreement to allow their farmers to save and exchange seeds and to prevent practices which threaten their “food sovereignty”.*
- ▶ *The TRIPS Council is currently reviewing numerous topics: protection of new plant varieties, ethical issues to do with life forms, traditional knowledge and the right of communities and any potential conflict between the TRIPS Agreement and the UN Convention on biological diversity.*

Legal framework

The relationship of intellectual property rights to genetic resources has been a key issue during WTO trade negotiations, in particular at the Doha Ministerial Meeting.

Article 27 of the Agreement on trade-related aspects of intellectual property rights (TRIPS Agreement) defines the types of inventions that are eligible for patent protection and those that can be exempt. These include products and processes, and cover all fields of technology.

In their submissions to the TRIPS Council, developing countries questioned what they considered unreasonable pressures by developed countries to comply with the Agreement, for example, by introducing legislation and establishing an intellectual property infrastructure. They stressed that the transitional period of five years is insufficient for complex and costly tasks such as modernizing administrative infrastructure (intellectual property offices and institutions, judicial and customs systems), as well as promulgating new intellectual property laws.

Closely related issues are addressed in the International Treaty on Plant Genetic Resources for Food and Agriculture, which the FAO Conference adopted in 2001. The Treaty is a binding international instrument and has provisions relevant to intellectual property rights (IPRs) issues. In particular, it provides for:

- ▶ The establishment of a multilateral system of access and benefit-sharing (MLS) for a list of crops crucial for food security and in which countries are interdependent. Recipients shall not claim any intellectual property or other rights that limit facilitated access to

the plant genetic resources for food and agriculture (PGRFA), or their genetic parts and components, in the form received from the MLS (Article 12.3 (d)); when a product that is a PGRFA and that incorporates material accessed from the MLS is commercialized, a mandatory payment is required whenever the product is not available to others for further research and breeding (Article 13.2 (d) (ii)).

- ▶ The International Agricultural Research Centres of the Consultative Group on International Agricultural Research and other international institutions to bring their *ex situ* collections of PGRFA into the MLS.
- ▶ The recognition by governments of farmers' rights, which may include protection of traditional knowledge relevant to PGRFA.

Biological inventions (Article 27.3(b))

This subject is currently under review in the TRIPS Council. Some countries wish to cover biodiversity and traditional knowledge. They are now seeking a ministerial statement on the subject.

Broadly speaking, Article 27.3(b) allows governments to exclude plants, animals and “essentially” biological processes (but micro-organisms, and non-biological and microbiological processes have to be eligible for patents). However, plant varieties have to be eligible either for patent protection or through a system created specifically for plant variety protection (*sui generis*), or a combination of the two. For example, countries could enact a plant varieties' protection law based on a model of the International Union for the Protection of New Varieties of Plants (UPOV) or adhere to the UPOV Convention.

The review of Article 27.3(b) began in 1999 as required by the TRIPS Agreement. The topics raised in the TRIPS Council's discussions include:

- ▶ the pros and cons of various types of protection for new plant varieties (patents, and UPOV, etc);
- ▶ how to handle moral and ethical issues (e.g. whether invented life forms should be eligible for protection);
- ▶ how to deal with traditional knowledge and the rights of communities where genetic material originates (including benefit-sharing when inventors in one country have rights to creations based on material obtained from another country);
- ▶ whether there is a conflict between the TRIPS Agreement and the UN Convention on Biological Diversity (CBD).

While some countries are seeking clarification on issues such as the meaning of the term "micro-organism" and the difference between "biological" and "microbiological" processes, others hold that life forms and living creatures should not be patented and that ethical questions should be discussed.

Some developing countries want to ensure that the TRIPS Agreement takes account of more specific concerns such as allowing their farmers to continue to save and exchange seeds that they have harvested, and preventing anti-competitive practices which threaten developing countries' "food sovereignty".

Many of these points require discussions on the draft ministerial declaration, although the text will not go into detail - it will establish a means of addressing them.

Proposed action

Countries' negotiation skills should be strengthened on the above issues. In addition, legislators will benefit from independent advice when elaborating the required legislative instruments, both at the national and regional levels.

To that effect, the FAO Legal Office could conduct training on the following items which are of specific relevance:

- Assessing the ethical implications of granting IPRs on genetic resources;
- Reviewing the legislative requirements and their implications when granting such rights;
- Assessing the various ways for protecting biological inputs of indigenous and local farming communities in developing countries when using and developing genetic resources;
- Assessing potential ways for preventing anti-competitive rights or practices which will threaten the food sovereignty of people in developing countries, in particular when developing trade practices based on non-legally appropriated genetic resources.

In order to satisfy the above capacity-building needs, assistance could be deployed by the FAO Legal Office with the aim to increase countries' capacities to devise appropriate legislative instruments to enforce regulations and standards and to formulate or revise national legislation related to IPR over plant varieties, animal breeds, related technologies and germplasm, as well as in quarantine, food control, seed policy, and other related matters.

The target audience should be legislation policy specialists, trade specialists and other technical staff involved in the implementation of SPS/TBT and TRIPS and qualified NGO/CSO representatives.

KEY CHALLENGES

- ▶ *To ensure the relationship between intellectual property rights and genetic resources remains an important topic during the WTO trade negotiations;*
- ▶ *To strengthen the skills of developing country negotiators when negotiating on TRIPS related issues;*
- ▶ *To provide training in such areas as assessing the implications of granting IPRs on genetic resources, legislative requirements and protecting the biological inputs of local farmers when developing genetic resources and resisting anti-competitive practices.*

