

WTO & Protection of Bio-Assets of Third World

Manoj Kumar & Pancha Bhoi*

The World Trade Organization (WTO) is now promoting the evolution of a new world order equitable to all member countries, as agreed by them under the General Agreement on Tariff and Trade (GATT). Although certain amendments to national laws of many countries have yet to be adopted, the WTO has been busy with appropriate counseling negotiations and dispute settlements between its members. The legal battle in the WTO dispute settlement body with the western countries on Neem, Turmeric, Basmati has brought to theperceived fear of most of the developing countries and the SAARC countries in particular that by using the instruments of the present global regime of Intellectual Property (IPR), much of their natural wealth in the form of bio-diversity aspects are being exploited by Trans-national Corporations (TNCs). The WTO under the agreement on trade-related aspects of Intellectual Property Rights (TRIPS Agreement) imposes on all member states the need for introduction of plant variety protection either through patents or an alternative system. Both patents and plant breeders' rights are monopoly rights, which seek to give the private sector incentives to enter the seed business. The main difference between the two is that the latter provides rights, which are less extensive than the former. Although, TRIPS does not imply in any way that member states have to adopt plant breeder's rights if they do not wish to introduce patents on plant varieties. However, there has been pressure on developing countries to choose plant breeder's rights as an alternative to patents. The situation is of a grave concern for the Third World Countries and it requires a careful study of the existing international protection regime on bio-resources.

The prime tenets of biodiversity and its relationship with the underlying environment factors represent the very basis of human existence. And the conservation of biodiversity can only be achieved through protection of biological habitats that requires a detailed analysis of the existing bio-resources. The conservation strategies are now moving from static or habitat oriented policy to a more dynamic and realistic approach. The aim of this approach is to protect the total diversity at the landscape levels of ecological organization.

The concept of biodiversity goes beyond this definition and is directly linked to the sustainability of livelihood. Thus it is a means of production as well as an object of consumption especially in the Third World society. In such a society bio-diversity means not only the diversity of species but also the diversity of livelihood. Therefore, any loss in biodiversity affects the human life and culture. Apart from those sociological justification there are certain other justifications which emanate from economics ethnics, practical and scientific values. However, now we are witnessing the depletion of biodiversity. Prima-facie, responsibility can be attached to the modern paradigm of economic and social development that encourages excessive human intervention in nature.

Methods and techniques of biodiversity conservation are based on two approaches viz. protecting the habitat (*in-situ*) and protecting the individual species outside the habitat (*ex-situ*). Protected areas cover only limited territory and the latter especially gene banks prevent further evolution. Both techniques also lack peoples' participation, the important flow of both strategy is many time conservation of domesticated plants is out of its scope. New strategies were introduced in late 1970's by UNESCO and in late 80's by the International Union for Conservation of Nature and Natural Resources (IUCN). The IUCN plan known as conservation strategy-II, covers a three-tier action plan (global, natural and local) to conserve the biological diversity. The Convention on Bio Diversity (CBD) provides the legal basis for this action plan. The other elements of the theme elucidate the history of negotiations of the CBD, important provisions of the Convention, issue of Intellectual Property Rights, Community Intellectual Right and position of SAARC countries on this issue.

Convention on Bio Diversity : History and Structure

The idea of an umbrella convention addressing the whole gamut of biodiversity first emerged in the Third World Congress on "National Park" held in Oct. 1982. But the turning point was in 1987 when United Nations Environmental Programme (UNEP) governing council established an ad-hoc working group to consider and report on the necessity of such a convention. After the affirmative decision of

an ad-hoc working group, formal negotiations started in Feb. 1991 on a draft prepared by the IUCN secretariat based on the IUCN and Food and Agriculture Organization (FAO) drafts on the subject. The Intra-governmental Negotiating Committee for CBD, namely, ad-hoc working groups, undertook the negotiation. The Committee was divided into two groups. The first group negotiated on fundamental principles, general obligation measures of conservation, relations with other instruments etc. The second group negotiated on issues like access to genetic resources and relevant technologies, technology transfer, technical assistance financial mechanism and international co-operation.

Like many other international negotiations this also became a North-South debate, between technology-rich North and resource-rich south. However, the technology of the North depends on the South's resources. The North needs a conducive international legal regime to ensure raw material supply for their biotechnology-oriented agro-fertilizer and pharmaceutical industries. It also requires the new legal regime to be in harmony with the evolving international trade regime under WTO. Moreover the developed countries are not ready to change their development paradigm for biodiversity conservation. The South, on the other hand, wants to exchange its resources with technology. To achieve these goals both groups had contentious debates on access to genetic resources, transfer of technology, bio-safety, and financial mechanism for conservation. The North's attitude has been to help the biotechnology based TNCs to capture world agriculture and pharmaceutical market But it is commonly believed that the North could not achieve its goal. US reluctance to sign the agreement is acted to illustrate this point. Finally, on 22nd May 1992, in Nairobi, the international community adopted the Convention on Biological Diversity (CBD) and on 5th June 1992 at the Rio Conference 150 states become signatories of the convention. After 18 months, on 29 Dec. 1993 the convention came into force.

The CBD is a framework agreement because its provisions are expressed in broad terms and not in hard and precise terms. It also leaves the responsibility of its implementation to the parties; Moreover, CBD permits the Conference of Parties to negotiate further and attach the outcome

* Doctoral Fellow, International Legal Studies, Jawaharlal Nehru University, New Delhi (India), ICHR Fellow, School of Social Sciences, Jawaharlal Nehru University, New Delhi (India).

** Both the authors are practicing lawyers at Delhi High Court, INDIA

either as Annex or as protocols to the convention. But the uniqueness of the CBD lies in its approach. For the first time the conservation sentiments were linked with the concept of sustainable development. Thus, it addresses the issue of conservation in a more realistic manner. The sustainable development concept, while accepting the need of conservation recognizes the need to emphasis on meeting the human needs. Unlike concept of conservation the concept of sustainable development recognized both inter and intra generation equities.

The CBD contains a preamble, 42 articles and two annexes. The long preamble repeats the general principles of international environmental law laid down in the Trio Declaration and certain goals of Agenda 21. But the preamble while explaining the reason for the destruction of bio diversity refers to the by stating biological diversity is being significantly reduced by certain activities. This obscure statement is an attempt to condone the North's role in the biodiversity destruction. Article 1 deals with general principles. Art. 6-12 laid down the specific commitments to achieve the objective so the convention. Art. 23-25 deal with institutional mechanism established by the convention viz. conference of parties, secretariat subsidiary body on scientific technical and technological advice. Art. 27 contains the dispute settlement provision and Art. 28-42 spells out the technical details of the convention.

Commitments under the Convention

The broad objectives of the convention are the conservation of the biodiversity, the sustainable use of the components and the fair and equitable sharing of the benefits arising out of the utilization of generic resources. Therefore, all the commitments are focused on the above mentioned objective and also inter-related to each other. At the same time as stated earlier, commitments are drafted in broad terms with qualification in every step to create checks and balances of rights and duties. Due to its broad nature the parties cannot implement any of the specific commitments. They are left to the contracting parties to draft and implement it in the hard and precise form in the municipal law sphere. The commitments include general measures for conservation and sustainable use, in-situ and ex-situ conservation and sustainable use of components of biological diversity, access to genetic resources, access and transfer of technology, handling of biotechnology and distribution of benefits and financial mechanism.

Art. 6 Obligates contracting parties to develop and adopt national strategy for the conservation and distribution of benefits, sustainable use of biological diversity and also to integrate the conservation and sustainable use of biological diversity and also to integrate the conservation and sustainable use of biological diversity into relevant sectorial or cross-sectorial plans, programmes and policies. This should be done

in accordance with each party's peculiar conditions and capabilities. Thus this article provide the basis for Article 10 which contains more concrete provisions related to national strategy and commitments to avoid or minimise the adverse impact on biological diversity, protect and encourages customary and traditional culture, use and practices, support local people and encourages customary and traditional culture, use and practices, support local people and encourages co-operation between government agencies and private sector. Thus both Art. 6 and 10 encourage an interdisciplinary approach to biodiversity conservation. Both the lost provision in the Art. 10 reflects the hidden agenda of the North, the term private sector is not defended in the convention. Therefore, it includes huge TNCs of North and legitimises its operation in the developing countries.

Art. 8 and 9 provide the central theme of the convention ie. The conservation technique viz. in-situ and ex-situ conservation measures. In-situ conservation measures under Art. 8 include not only the conservation of ecosystem and wild species but also domesticated plants and animals and strike a balance envisaged either within or behind the protected areas. Measures also address the threat of biotechnology and introduction of alien species to the biodiversity. The measures of in-situ conservation go beyond the mere idea of conservation to a positive obligation, to rehabilitate and restore the degrading ecosystem and to promote the recovery of threatened species. As a part of the measures, each state should respect, preserve and maintain knowledge innovation and sustainable uses of biological diversity. Art. 9 requires contracting parties to adopt, establish and maintain measures and facilities has ex-situ conservation preferably in the country of origin of species. Many fear that the provision for ex-situ conservation, that too without a provision for non-commercialisation of such collection would serve as a means of conservation of raw material in the form of germoplasm collection.

Art. 15 is about rights and obligations regarding access to genetic resources and their subsequent uses. It recognizes, for the first time, the sovereign rights over the genetic resources and rejected the Northern notions of 'common heritage'. Thus now access to genetic resources is subject to national legislation and a prior informed consent depending on the discretion of the contracting party providing such resources. At the same time contracting parties are under a general obligation to provide access to genetic resources for environmental friendly uses. This obligation should be reciprocated by showing the benefits derived from the subsequent use of such genetic resources in a fair and equitable manner. But these rights of the providing countries are subject to 'mutually agreed terms'. This qualification gives room for negotiation. In an unequal world negotiation generally would work in favour of the dominant party i.e. the developed country. Moreover these promising of showing of bayonets apply only to those resources, which are provided by the parties in accordance with the convention. Thus the convention does not apply to the past transaction

but only apply to the future transactions. Hence the convention legitimised the bio-exploitation committed by the North in the past and denied the South's legitimate share in the benefits. Apart from this, the convention is salient about the access to genetic resources in the high-tech gene banks of North, which preserve the 90 per cent of known agriculture seeds. Therefore, the access of genetic resources become a one-way traffic transaction.

CBD recognizes the role of technology especially biotechnology for the biodiversity conservation and obligates contracting parties to ensure access and transfer of technology. This general obligation applies only to three types of technology viz.

- i. Technology relevant to the conservation of biological diversity
- ii. Technology relevant to the sustainable use of its components
- iii. The technology made use of scientific resources.

Furthermore, the general obligation is the subject of two more credentials. Firstly there is an option either to provide or facilitate access for a transfer of technology. Secondly, technology must not cause significant damage to the environment.

Para (2) of article 16 sets the terms for access to and transfer of technology to developing countries under fair and most favourable terms including on concessional and preferential terms. But access and transfer should be on mutually agreed terms and subject to patent and other intellectual property rights. Moreover, art. 16 recognizes biotechnology as an essential element for the attainment of the objective of the convention. Thus, CBD accepts biotechnology, as necessary for the conservation and sustainable use biological diversity. But in reality biotechnology consumes diversity as raw materials and substituted natural biodiversity. Hence, biotechnology would operate against the objectives of sustainable uses. Apart from this, the convention also recognizes life patent, at least in an implicit way. But, even after 5 years the CBD has not made much progress in sorting out major issues related to conservation of biodiversity in the developing countries. The issues that need urgent attention are, creation of biodiversity fund, making the private sector and TNCs to share the responsibility of biodiversity conservation, biosafety protocol, intellectual property, access to genetic resources and recognition of the contribution of local communities. The CBD not only recognizes the sovereign rights of state over its natural resources but also the role and participation of indigenous and local communities to achieve the objective of the convention. Further, the CBD obliges the contracting parties to promote and encourage the effective uses of traditional knowledge for the conservation and sustainable use of biological diversity. States are also committed not to commercialise (wider ap-

plication) the traditional knowledge, innovation, practice⁴ without the consent of the holders' community and equitable sharing of the benefits arising from the utilisation of such knowledge. The present practice of TNC is a blatant violation of this provision. Furthermore, the recognition of patent by the CBD is not absolute but with some cautions: According to Para (5) of Art. 16, states that, 'subject to national legislation and international law in order to ensure that such rights are supportive of and do not counter to its objective'. However, according to the general and customary principles of international law, it is not the duty and obligation of the state that legislate law to come out with conclusive scientific proof and clarification about their steps.

Therefore, using the close mandate of CBD, developing countries should develop parallel rights, which protect the rights of the indigenous people, traditional medical practitioners and farmers to continue their traditional practice even in the presence of a patent right. Another option is giving a joint patent of the community and the so-called inventor. Here it must be noted that, joint patent right for the employer and employee is a well-established norm of IPAR jurisprudence.

The Trips Agreement

The TRIPS agreement under the Article 27.3 (B) imposes on all member states the introduction of plant variety protection either through patents or an alternative system of "seigneurs" system. However, there has been constant pressure on developing countries to choose plant breeders right as an alternative to patents. Both patents and plant breeder's rights are the monopoly rights, which seem to allow the private sector to enter seed business. Though, the scope of Article 27.3 (B) is under review of WTO, the third world is working hard to exclude the naturally occurring materials, and genes from patent ability. The concept of plant variety protection was first time recognised by the European countries in 1961 with the specific aim of enhancing the private sector interest in the seed business. Presently, the right is protected under the "International Convention for the Protection of New Varieties of Plants-1991"⁵ It made compulsory exception to breeders right in favour of farmers. It also strengthened the preview of plant breeder" right by introducing a registration system, and by recognizing complete monopoly right of the breeder on plant variety.

Intellectual Property Rights (IPR) under Trade Related Intellectual Property Rights (TRIPs) is perceived as a private right. Moreover, TRIPs does not recognize the community Intellectual Rights or the collective Intellectual rights. The doctrine of collective and community intellectual right is essentially a southern concept. The northern industrialised societies are in opposite of this concept. Therefore, the TRIPs represent the northern view of IRPs. Moreover, the patent

regime under the TRIPs failed to respond to the shift in the innovative activity, which shifted from tangible things to intangible things like DNA and microorganisms. TRIPs applies the old patent jurisprudence to all type of innovations, which makes it possible to get patent for plants and microorganism without having the real innovative element. And it resulted in taking envoy of genetic materials from south to North without being compensated for either innovation or maintenance of those materials in their native place. This rush for commercialisation of traditional knowledge not only affects the livelihood but also may result in the deprivation of certain rights enjoyed by the indigenous people, practitioners of indigenous medicine and farmers. The major effect of this TRIPs sponsored commercialisation is the depletion of biodiversity. Therefore, the moot question is how could the biodiversity and traditional knowledge be protected under the CBD from the onslaught of bio-piracy.

The Food and Agriculture Organisation Policies

In order to protect the farmers' right on plant variety a revision on the "International Undertaking on plant genetic resource" is being negotiated under the FAC Commission on Genetic Resources. The proposed revision recognises the protection of traditional knowledge, the right to participate in sharing the benefit arises from the use of plant variety and right to participate in decision making about their management. The revision also recognises that, no limit should be put on the farmers' rights to sale, use and exchange of seeds including every right over what they have produced. On the issue of protection of Bio-assets, the FAO undertakes to protect the farmer's right in contrary to Article 15 of CBD, which recognises the sovereign right of the state on biodiversity.

Challenges before the SAARC

The SAARC region is one of the largest gene-rich regions of the world and equally rich in traditional and indigenous knowledge. The rich socio-cultural heritage of the SAARC member countries is evident that the plant variety always remains free accessible to all since time immemorial. The thrust on ensuring food security by the free sharing of traditional knowledge and information on agro-transaction both within the inter and intra farming communities are the reason for which the SAARC community never recognised the intellectual property right on the plant variety. In this backdrop, all the member countries are members of the WTO, FAO and parties to the 1992 Convention on biodiversity. Under the international obligations, countries are in the verge of legislating appropriate law regarding protection of biological diversity and plant variety. In this connection the region is inheriting the compelling challenges from population explosion and food security. Though the commercialisation of agriculture and bio-resources has been initiated since early nineties but pre-condition of food security has been a dominated factor before the policy makers. As the de-

bate and discussion about the implementation of the CBD, TRIPs and FAO agreement is on, as it is a first step towards the law making process on the subject, the policy makers should take due notice of the peculiar and unique socio-cultural traditions and emotions of the local people on the issue. In this connection the paper highlights some of the issues needed to be features in the proposed legislation and legal reforms by each SAARC country.

The forthcoming legislations should take due consideration of the following objectives -

- to regulate access to biological resources of the country with the purpose of securing equitable share in benefits arising out of the use of biological; and associated knowledge relating to biological resources.
- To conserve and sustainable use of biological diversity
- To respect and protect knowledge of local communities related to biodiversity;
- To secure sharing of benefits with local people as conservers of biological resources and holders of traditional knowledge and information
- Conservation and development of areas from stand point of rich bio-resources
- Protection and rehabilitation of endangered fauna and flora
- To ensure active participation of private sector, NGOs and local people in the broad sense of schemes for policy implementation.

The proposed legal reforms on the subject should address the issues concerning access to genetic resources associated knowledge by foreign individuals, institutions and TNCs and equitable sharing of benefits arising out of these resources and knowledge to the host countries and local people. In this connection the following exemptions on the legal control to the accessibility of the bio-resources would no doubt safeguard their interest of the local people.

- Free access to biological resources for intra-country uses by own nationals other than commercial uses.
- Free use of biological resources by Ayurvedic medical practitioners
- Free access to own citizens to use bio-resources within the country for research purpose

To ensure the food security and protection of the farmers' right the following issues should be duly considered.

- The farmers right to save, use, exchange, share or sell the farm produce of a protected variety of crop without any limitations should be ensured.
- Recognition of the contribution of farming community for the development of a new

crop variety under the bio-genetics and reimbursement of financial compensation to the total chain of contributors for the commercial use of the new variety.

Total ban on 'terminator technologies' those are injurious to the life and death of human beings, animals and plants.

In this background it would be worth noting that aforesaid suggestions could be implemented as both the CBD and TRIPs allow developing countries to implement the international obligations in their own way without undermining the basic objectives of the multilateral agreements.

Conclusion

As it is evident by now, there are two schools of thought regarding the protection of biodiversity and traditional knowledge from bio-piracy. According to the first school, which recognizes the TRIP paradigm and does not recognize the informal innovation of the community. According to them communities are entitled only for compensation and no right to share the results. This approach would speed up the depletion of biodiversity from the control of indigenous and local communities and therefore would work against the objectives of the convention. Notably, the existing benefit sharing mechanism shares a problem. Only the present generation receives the benefit in the mode of compensation in exchange of traditional knowledge. Where as the same is an evolutionary product of the past generations and the future generation also have an equitable right over the same. The second school of thought rejects the domains role of IPRs and recognizes the role of community as

an innovator. According to this school Community as a whole plays the role of conservation as well as innovation, therefore the innovation of community should be recognized and placed over the individual oriented IPR paradigm of TRIPs. Community rights have been recognized by the customary international law and it is included in many legal instruments. Most important among them is International Covenant on Economic Social and Cultural Rights (ICESCR), which recognizes the cultural rights. Traditional knowledge is a part of the culture when we perceive culture as a body of knowledge. FAO also recognizes the farmers' rights as well as farmers as a breeder. Apart from the anthropocentric approach of the CBD, its western bias is real than apparent. This western bias of the CBD assures the western countries, the unhindered flow of raw materials from their biotechnology industry. So, the following facts can be drawn from the theme:-

1. The CBD recognizes biotechnology a necessary element for biodiversity conservation while totally ignoring dangers of biotechnology to the biodiversity conservation
2. CBD provisions on access and transfer of technology apply only to the future transactions and it is inadvertently silent on the access of genetic resources in the gene banks of northern countries.
3. The provisions that contain the pro-south approach are subject to wide ranging qualifications including patent and other IPR regimes.
4. CBD by recognizing Patents in fact recognizes TRIPs paradigm of patent rights, which is detrimental to the biodiversity conservation. It also denies the equitable sharing of the benefits.

The developing countries can check effects by using certain provisions like Art. 6, 8 and 10 etc., which gives a mandate to chalk out strategies to protect their biodiversity. The reason is simple because third world interest cannot be protected through the western notion of conservation. Any attempt of conservation and sustainable use of biodiversity would not be succeeded without changing the development model. The existing production pattern encourages monoculture, homogeneity, over production and over exploitation of nature. Therefore, the success of biodiversity conservation with the present development model is bound to be a futile exercise.

According to the bio-rich developing countries, the desirable scenario should be one in which their bio-assets are not exported without re-wards by third parties. To achieve this objectives there are some possible strategies and modalities to be followed by the enactment of an appropriate biodiversity protection legislation including the concept of benefits sharing consistent with Article 15 of CBD. To achieve this end in the developing countries', internal conditions and traditional practices peculiar to each country should be carefully considered before adopting any biological diversity or plant variety protection law under the international obligations. If so, then the economy passages from the North in exchange of bio-resources would be a dominating factor for the economic development and anti-poverty programmes of SAARC member countries.