

## IMPACT TO TRIPS AGREEMENT ON INDIAN AGRICULTURE

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### Abstract

The TRIPs agreement would require substantial changes in the patents regime of our country. The TRIPs agreement aims at a certain minimum standard of IPR protection. Successful implementation of the TRIPs agreement has a number of pre-requisites. The important ones being legal, administrative and institutional reforms, appropriate research investments, and first rate science and technology capability. Provided the IPR protection is adequate and effective (worldwide), the TRIPs accord can promote innovations, transfer of technology, foreign direct investment, use of genetic resources and environmental protection.

Intellectual property is becoming increasingly important to agricultural trade. The success of Indian agriculture may be determined more in the future by our ability to engage in effective marketing and product innovation, than our ability to continue to improve yields. If this is the case, the international rules governing the trade aspects of intellectual property are important in defining the path of India's continued development in the agricultural sector.

The Agreement on Trade Related Aspects of Intellectual Property (TRIPs) sets minimum standards for Intellectual Property (IP) rights around the world. TRIPs are due to be reviewed at the end of 1999. In this context, it is timely to consider what opportunities the international IP framework gives India and to begin to form an opinion about what outcomes are desirable for agriculture in the coming TRIPs review. This paper will cover how changes in the TRIPs agreement might impact on Indian agriculture. It identifies some areas where Indian agriculture stands to gain, and some areas where it stands to lose. Following that, it suggests what might be a good outcome from the coming review of TRIPs and which industries are likely to be most affected.

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This paper covers Problems facing by Indian famers due to TRIPS, Seed Industry after TRIPS.

## Evolution

Intellectual Property Rights are the rights arising out because of the creations of human mind. Its role is sine qua non in the economic and technological development of a country. These at the face of it appear to be private rights but they require a multilateral framework of rules and regulations dealing with these. On the same line, the World Intellectual Property Organization (WIPO) and Paris Convention make effective laws for patents. However, they lack the authority to enforce law.<sup>1</sup> Trade-Related Aspects of Intellectual Property Rights<sup>2</sup>(TRIPs) is an effort made to bring intellectual property rights<sup>3</sup> under the ambit of WTO Agreements besides its function of dispute settlement.

TRIPs encourage the member countries<sup>4</sup> of WTO to provide minimum standards for high level protection for intellectual property. The Agreement also lays down the procedures and remedies for each member country. TRIPs includes seven intellectual property rights, namely copyrights, trademarks, geographical indications, industrial designs, patents, integrated circuits and undisclosed information.

## Need for TRIPs

- 1) To reward creativity and inventiveness by protecting intellectual property adequately and efficiently.
- 2) There was a pressing need to regulate and discipline the intellectual property right.
- 3) There was a need to provide standards and principles of trade related intellectual property rights.
- 4) To facilitate settlement of disputes between governments regarding trade-related aspects of intellectual property rights.
- 5) The least developed countries needs flexibility regarding domestic implementation of such laws.
- 6) There has always been a persistent need to smoothen the relationship between various international organizations, including the WTO and WIPO.

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<sup>1</sup> S.R MYNENI, LAW OF INTELLECTUAL PROPERTY 11 (Asia Law House).

<sup>2</sup> Annexure IC of Agreement Establishing World Trade Organization.

<sup>3</sup> TRIPs is a multilateral Trade Agreement.

<sup>4</sup> Article II(2) of the WTO Agreements.

## The Pre-requisites of TRIPs

Part III of the Agreement sets out the obligation of member countries to provide for a procedure and remedy under their domestic law for protecting the intellectual property rights enforced by foreign right holders as well as their own nationals. This essentially requires, procedures, fair and equitable, which permit effective action against infringement of IPR, not necessarily complicated or costly, and should not entail unreasonable time limits or unwarranted delays.

The Agreement establishes a Council for Trade-Related Aspects of Intellectual Property Rights to monitor the operation of the Agreement and governments' compliance with it. Dispute settlement would take place under the integrated GATT dispute-settlement procedures as revised in the Uruguay Round.

Part I of the Agreement contains a 'most-favoured nation' clause. It is a novelty in an international intellectual property right agreement, under which any advantage a party gives to the nationals of another country must be extended immediately and unconditionally to the nationals of all other parties.

## The TRIPs Agreement and the Plant Breeders and Farmers

### TRIPs Provision

Article 27.3(b) under Section 5 (Patents) in Part II of TRIPs states,

"3. Members may also exclude from patentability:

- a) .....
- b) Plants and animals other than micro-organism and essentially biological process for the protection of plant or animals other than non-biological and microbiological processes. However, Members shall provide for the protection of plant varieties either by patents or by an effective sui generis system or by any combination thereof. The provisions of this paragraph shall be reviewed four years after the date of entry into force of WTO Agreement."

This article makes it the duty of every state to undertake measures for protection of the right of plant breeders and farmers so as to ensure the development of new varieties of plants. India

having ratified the Final Act<sup>5</sup>, is bound to make provisions giving effect to the said article.

The objectives of this Article are enlisted below:

- 1) For developing an effective support system in order to encourage the plant breeders and farmers, and protect new plant varieties.
- 2) To protect the right of the farmers for their contribution in conserving, improving and making available plant genetic resources for the development of a plant variety.
- 3) To stimulate investment for research and development by plant breeders, both in public and private sector, for the accelerated development of agriculture in the country.
- 4) To catalyze the seed industry growth in a country for obtaining high quality seeds and planting material for the farmers.

### **The Indian Law**

It is the obligation of all the member nations of WTO to protect plant varieties either by patents or by an effective sui generis system or by any combination thereof. To give effect to the same, India decided to protect plant varieties by a sui generis law<sup>6</sup> and enacted the Protection of Plant Varieties and Farmers' Rights Act, 2001. The objectives of this act were in line with the objectives of the article 27.3, and can be summed up into three points. Firstly, in private and public sectors stimulation of investment for better research and to yield good returns for the said investment. Secondly, to give recognition to farmers and tribal communities as cultivators and conservators, and rewarding them by way of benefit sharing. Thirdly, to facilitate the growth of seed industry.

### **The Rights of the Farmers**

Under the Act, there are various rights ensured to be given to the farmers. They are:

- i) A farmer who has bred or developed any variety shall be given a right of registration and all the more same recognition as a breeder of a variety.
- ii) A farmer who is engaged in the conservation of genetic resources of land resources and wild relatives of economic

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<sup>5</sup> The Final Act embodies the results of the Uruguay Round of Multilateral Trade Negotiations, which gives rise to establishment of the World Trade Organization, in 1994.

<sup>6</sup> Or alternatively should have been protectable by patents.

plants and their improvement through selection and preservation shall be entitled in the prescribed manner for recognition and reward from the Gene Fund.<sup>7</sup>

- iii) Farmers shall be deemed to be entitled to save, sow, exchange, share or sell his farm produce including seed of a variety protected under the Act in the same manner as was able to before coming into force of this Act. However, the farmer shall not be entitled to sell branded seeds<sup>8</sup> protected under the Act.
- iv) Section 39 of the Act protects the interest of the innocent farmers. It provides that in case a breeder provides or sells a variety of seed to any farmer(s), he is bound to disclose the expected performance of the seed in the given condition. Failing this, the farmer(s) is entitled to compensation.
- v) Section 42 provides for protection against innocent infringement of the Act by a farmer, who at the time of infringement was unaware of the existence of such right.
- vi) Section 43 provides that where an essentially derived variety is derived from a farmers' variety, the authorization by the breeder of such farmers' variety shall not be given except with the consent of the farmer(s) who have made contribution in the preservation and development of such variety.
- vii) Farmer(s) or village community shall not be made liable to pay any fee during the proceedings before any Authority, Registrar, Tribunal or High Court (Section 44).

### Advantages of the Plant Varieties Protection Scheme

The advantages of the said Act are enormous; the most important being in the field of research. A shield is provided to the public research system by protecting the variety developed by the Indian breeders. This in turn encourages agricultural research in India. In India, given its agro-climatic regions, these protections encourage better and mission-oriented<sup>9</sup> research for development of new plant varieties.

The Act provides for constitution of National Gene Fund in which inter alia, the benefit sharing received from the breeder of a variety, by way of royalty, will be credited. This in turn would

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<sup>7</sup> *Supra* note 1, at 569.

<sup>8</sup> "Branded seeds" mean any seed labelled or packed in a manner indicating that such seed is protected one.

<sup>9</sup> V.K AHUJA, LAW RELATING TO INTELLECTUAL PROPERTY RIGHTS 516 (Nagpur: Lexis Nexis Butterworths Wadhwa).

facilitate for meeting any amount to be paid by way of benefit sharing<sup>10</sup> and other expenses.

## Geographical Indication (GI) in India

### Introduction: The 1999 Review

Article IV of the WTO Agreements require a Ministerial<sup>11</sup> Conference<sup>12</sup>, which shall be held biennially to discuss and decide on any of the trade agreements.

The Third Ministerial Conference of the WTO was held at Seattle from November 30, 1999 to December 3, 1999. The result of the Conference resulted in a deadlock as all member countries stuck to their stands. Work shall be undertaken on geographical conditions, was stated in paragraph 29 of the Declaration. Paragraph 29 of the declaration provided completion on the establishment of a multilateral system regarding notification and registration of Geographical Indication(GI) for wines and spirits as per article 23.4 of the TRIPs Agreement. This is of particular interest to countries where the production cost is high, such as in small countries or in emerging economies of developing countries.<sup>13</sup>

### Geographical Indication

Geographical indication is a way of giving recognition to a particular product which originates from a region and bears some special characteristics or qualities, owing to its place of origin. These special characteristics or qualities may be due to factors such as natural factors (example soil, climate, temperature, moisture) or because of the method of preparation or manufacture (example traditional production methods), or other human factors such as specialization in the product and the maintaining of the

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<sup>10</sup> Section 2(b) of the Plant Varieties and Farmers' Rights Act, 2001 defines 'benefit sharing' in relation to a variety as 'protection of the benefit accruing to a breeder of such variety or such proportion of the benefit accruing to the breeder from an agent or license of such variety, for which a claimant shall be entitled as determined by the authority'.

<sup>11</sup> The TRIPs Agreement does not have any annexes or any Ministerial Decisions unlike most of the other major WTO Agreements. The main aim is pure and effective implementation of TRIPs.

<sup>12</sup> The conference consists of trade and commerce ministers of WTO member-countries.

<sup>13</sup> Felix Addor and Alexandra Grazioli, *Geographical Indications Beyond Wines and Spirits: A Roadmap for better Protection for Geographical Indications in the WTO/TRIPs Agreement*, THE JOURNAL OF WORLD INTELLECTUAL PROPERTY 882 (2002).

quality standards.<sup>14</sup> It is important to note here that the nexus between the product and the region should be so strong that the name of the product reminds us of the region and vice versa. For instance, the wine 'Champagne' gives a reminder of the District of Champagne in France. Some other examples include, 'Darjeeling Tea', 'Assam Tea', 'Benarsi Saree', 'Havana for Tobacco', 'Tuscany' for olive oils, 'Florida Oranges', etc.

### **Need for Geographical Indication**

Geographical Indication corresponds to the needs of indigenous and local communities, and also to the farmers. They are:

- a) based on the entire traditions of the communities and community's decision making process
- b) accelerating the evolution of these communities and also reward the traditional approach
- c) knit a close web of chains is intricately woven between human efforts, culture, land resources and environment
- d) not transferrable from one owner to another<sup>15</sup>.

They therefore are valuable property to the producers, i.e. additional protection increases the value of GI as marketing tool. They identify the identify goods as originating from a particular region. They suggest the consumers that the goods come from an area where a given quality or characteristic of the product is essentially attributable to their geographic origin. They promote the goods of producers of a particular region.

### **The *Basmati Rice Controversy***

Basmati is a special variety of rice that grows in the sub-Himalayan region. It has distinct qualities like a peculiar aroma and different taste due to the different cultivation practises and special soil ingredients found in India and Pakistan.

The dispute regarding this variety of rice arose when U.S Patent and Trademark office granted a patent to Rice Tec Inc. (a U.S based company) for an invention "Basmati Rice Lines and Grains" which was an attempt to grow basmati outside India and Pakistan. They used the label "American Type Basmati rice".

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<sup>14</sup> Surekha Vashishta and Amar Raj Lall, *Geographical Indications of Goods (Registration and Protection Act, 1999*, in A.K KOUL AND V.K AHUJA (eds.), THE LAW OF INTELLECTUAL PROPERTY RIGHTS: IN PROSPECT AND RETROSPECT, 248 (2001).

<sup>15</sup> *Supra* note 13, at 865-97, 866.

India and Pakistan claimed Basmati to be a GI. Rice Tec claimed that it a generic name can be used by anyone.<sup>16</sup> According to Article 22.1 of the TRIPs agreement defines 'geographical indication as indications which identify a good as originating in the territory of a member, or a region or locality in that territory, where a given quality, reputation or other characteristics of the good is essentially attributable to its geographical origin. Thus, this definition specifies that the quality, reputation or other characteristics of a good can each be a sufficient basis for eligibility as a geographical indication, where they are essentially attributable to the geographical origin of the good.<sup>17</sup> This, to a greater extent, supports the claim of Rice Tec. However, the intricately woven nexus and the strong reputation "Basmati" holds with the origin, is a matter of fact and cannot be overlooked<sup>18</sup>. These grounds are sufficient to qualify to get the Geographical Indication certificate<sup>19</sup>.

### The Aftereffect of *the Controversy*

By the above argument, it is clear that "Basmati" should be covered under the Geographical Indication; but this was the challenge put forth to India and Pakistan. Secondly, Article 22.3 says, "The registration of a Trademark which uses a geographical indication in a way that misleads the public s to the true place of origin must be refused or invalidated *ex officio* if the legislation so permits or at the request of any interested party." The label used by Rice Tec, "American type Basmati", clearly, did not intend to mislead the consumers over the place of origin.

Thirdly, under article 23 of the Agreement, GIs identify only wines and spirits. It is noteworthy that after the WTO has come into existence, the competition for Basmati has increased substantially as the duty on the Indian Basmati has been cut in Europe, which has the highest demand for premium rice, significantly.

After more than two years of extensive research, India put forth a strong argument and challenged the patents of Rice Tec. The

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<sup>16</sup> Article 24, paragraph 6, of the TRIPs agreement provides that, "Where the term becomes generic for describing the product in question, it shall be covered under the exception to protection under Geographical Indication."

<sup>17</sup> Overview, the TRIPs Agreement, *available at* [https://www.wto.org/english/tratop\\_e/trip\\_e/intel2\\_e.htm](https://www.wto.org/english/tratop_e/trip_e/intel2_e.htm), (visited on October 23, 2015).

<sup>18</sup> Saudi Arabia recognizes, under its labelling of rice, "Basamti" as the rice grown in India and Pakistan only.

<sup>19</sup> As per the Code of Practice for Rice, "Basmati" can be said to be only used by cultivators of rice in the sub-Himalayan region.



USPTO issued patents only to three hybrids of Basmati grain, which were entirely different from the “Basmati” rice.

As far as the use of geographical indication of Basmati is concerned, the Patents office, stated that Rice Tec could use the Basmati Appellation, because it was not a trademarked name or a geographical indicator specific to a region<sup>20</sup>. It was also stated that the Basmati saga had a turbulent history ever since the perceived transgression in the mid-1990s was first reported when Texmati and Jasmati<sup>21</sup> hit the shelves of grocery chain stores.<sup>22</sup>

The Basmati Rice controversy was an eye-opener and India enacted the Geographical Indications of Goods (Registration and Protection) Act, 1999.<sup>23</sup> This is the first specific law which provides for the registration and protection of geographical indication.<sup>24</sup>

### Critical Analysis

It is apparent from an analysis of the provisions of the “Post-TRIPS laws” that in India, allowing patents on life forms has a direct and substantial impact on many other previously unrelated areas and that new legislations have been developed to address these issues.

The success of Indian agriculture may be determined more in the future by our ability to engage in effective marketing and product innovation, than our ability to continue to improve yields. If this is the case, the international rules governing the trade aspects of intellectual property are important in defining the path of India’s continued development in the agricultural sector. The impact of the TRIPS agreement has been huge on agriculture.



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<sup>20</sup> Unlike Champagne which was specific to a region, “Basmati” was grown in Pakistan, India and Thailand.

<sup>21</sup> Texmati, Kasmati and Jasmati were the trademarks under which Rice Tec was selling its version of Basmati Rice for years. *See also* JayshreeWatal, *Intellectual Property Rights in the WTO and the Developing Countries*, THE HAGUE 272-73 (2001).

<sup>22</sup> TIMES OF INDIA, August 22, 2001.

<sup>23</sup> V.K AHUJA, LAW RELATING TO INTELLECTUAL PROPERTY RIGHTS351(Nagpur: Lexis NexisButterworthsWadhwa).

<sup>24</sup> *Id.*