CHAPTER VIII
CHAPTER-VIII
WTO AND TRIPS IN INDIA

8.1 MEANING OF TRIPS (TRADE RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS)

The Trips Agreement, which came into effect on 1st January 1995, is to date the most comprehensive multilateral agreement on intellectual property.

The areas of intellectual property that it covers are :-

- Copyrights and related rights (i.e. the rights of performers, producers of sound recording and broadcasting organizations).
- Trademarks including service marks.
- Geographical indications including appellations of origin,
- Industrial design, patents including the protection of new varieties of plants.
- The layout designs of integrated circuits.
- Undisclosed information including trade secrets and test data.

The three main features of the Agreement are :-

- Standards

In respect of each of the main areas of intellectual property covered by the TRIPS Agreement, the Agreement sets out the
minimum standards of protection to be provided by each member. Each of the main elements of protection is defined, namely the subject matter to be protected, the oughts to be conferred and permissible exceptions to those rights and the minimum duration of protection. The Agreement sets these standards by requiring, first that the substantive obligations of the main conventions of the WIPO, the Paris conventions for the protection of Industrial Property (Paris Convention) and the Berne convention of the protection of literary and Artistic Works (Berne Convention) in their most recent versions, must be complied with the exception of the provisions of the Berne Convention on moral rights all the main substantive provisions of these conventions are incorporated by reference and thus become obligations under the TRIPS Agreement between TRIPS member countries. The relevant provisions are to be found in Article 2.1 and 4.1 of the TRIPS Agreement, which relate respectively to the Paris Convention and to the Berne Convention. Secondly the TRIPS Agreement adds a substantial number of additional obligations on matters where the pre-existing conventions are silent or were seen as being inadequate. The TRIPS Agreement is thus sometimes referred to as a Berne and Paris plus Agreement.

• **Enforcement**

The second main set of provisions deals with domestic procedures and remedies for the enforcement of intellectual property rights. The Agreement lays down certain general principles
applicable to all IPR enforcement procedures. In addition it contains provisions on Civil and administrative procedures and remedies, provisional measures, special requirements related to border measures and criminal procedures, which specify in a certain amount of detail, the procedures and remedies that must be available so that right holders can effectively enforce their rights.

- **Dispute Settlement**

  The Agreement makes disputes between WTO members about the respect of the TRIPS obligations subject to the WTO's dispute settlement procedures.

  In addition the Agreement provides for certain basic principles such as national and most-favoured nation treatment and some general rules to ensure that procedural difficulties in acquiring or maintaining IPRs do not nullify the substantive benefits that should flow from the Agreement. The obligations under the Agreement will apply equally to all member countries but developing countries will have a longer period to phase them in special transaction arrangements operate in the situation where a developing country does not presently provide product patent protection in the area of pharmaceuticals.

  The TRIPS Agreement is a minimum standards agreement, which allows members to provide more extensive protection of intellectual property if they so wish. Members are left free to determine the appropriate method of implementing the provisions of the Agreement within their own legal system and practice.
SUBSTANTIVE STANDARDS OF PROTECTION

i) Copyright

During the Uruguay Round negotiation it was recognized that the Berne Convention already for the most part provided adequate basic standards of copyright protection. Thus it was agreed that the point of departure should be the existing level of protection under the latest Act, the Paris Act of 1971, of that Convention. The point of departure is expressed in Article 9.1 under which members are obliged to comply with the substantive provisions of the Paris Act of 1971 of the Berne Convention. However members do not have rights conferred under Article of that convention i.e. the moral rights (the right to claim authorship and to object to any derogatory action in relation to a work, which would be prejudicial to the author's honour or reputation or of the rights derived there from.

ii) Related Rights

The provisions on protection of performers, producers of phonograms and broadcasting organizations are included in Article 14. According to Article 14.1 performers shall have the possibility of preventing the unauthorized fixation of their performance on a phonogram (e.g. the recording of a live musical performance). The fixation right covers only several not audiovisual fixations. Performers must also be in position to prevent the reproduction of such fixation. They shall also have the possibility of preventing the unauthorized broadcasting by wireless means and the communication to the public of their live performance.
Broadcasting Organizations shall have in accordance with Article 14.3, the right to prohibit the unauthorized fixation the reproduction of fixations and the rebroadcasting by wireless means of broadcasts as well as the communication to the public of their television broadcasts. However it is not necessary to grant such rights to broadcasting organizations, if owners of copyright in the subject matter of broadcasts are produced with the possibility of preventing these acts subject to the provisions of the Berne Convention.

The term protection is at least 50 years for performers and producers of phonograms and 20 years for broadcasting organizations (Article 14.5).

**iii) Trademarks**

The basic rule contained in Article 15 is that any sign, or any combination of signs, capable of distinguishing the goods and services of one undertaking from those of other undertakings must be eligible for registration as a trademark, provided that it is visually perceptible. Such signs in particular words including personal names, letters, numerals, figurative elements and combinations of colour as well as any combination of such signs must be eligible for registration as trademarks.

Where signs are not inherently capable of dusting wishing the relevant goods or services. Member countries are allowed to require, as an additional condition for eligibility for registration as a trademark, that distinctiveness has been acquired through use.
Members are face to determine whether to allow the registration of signs that are not visually perceptible (e.g. sound or small marks)

The owner of a registered trademark must be granted the exclusive right to prevent all third parties not having the owner's consent from using in the course of trade identical or similar signs for goods or services which are identical or similar to those in respect of which the trademark is registered where such use would result in a likelihood of confusion. In case of the use of an identical sign for identical goods or services a likelihood of confusion must be presumed.

iv) Patents

The TRIPS Agreement requires member countries to make patents available for any inventions, whether products or processes in all fields of technology without discrimination subject to the normal tests of novelty, inventiveness and industrial applicability. It is also required that patents be available and patent rights enjoyable without discrimination as to the place of invention and whether products are imported or locally produced.

There are three permissible exceptions to the basic rule on patentability. One is for inventions contrary to ordre public or morality, this explicitly includes inventions dangerous to human, animal or plant life or health or seriously prejudicial to the environment. The use of this exception is subject to the condition that the commercial exploitation of the invention must also be
prevented and this prevention must be necessary for the protection of the Ordre public on morality.

The second exception is that members may exclude from patentability diagnostic, therapeutic and surgical methods for the treatment of humans or animals.

The third is that members may exclude plants and animals other than micro-organisms and essentially biological processes for the production of plants or animals other than non-biological and microbiological processes. However any country excluding plant varieties from patent protection must provide an effective sui generis system of protection. Moreover, the whole provision is subject to review four years after entry into force of the Agreement.

To exclusive rights that must be conferred by a product patent are the ones of making, using, offering for sale, selling and importing for these purposes, process patent protection must give rights only over use of the process but also over products obtained directly by the process. Patent owners shall also have the right to assign, or transfer by succession the patent and to conclude licensing contracts.

Members may provide limited exceptions to the exclusive rights conferred by a patent, provided that such exception do not unreasonably conflict with a normal exploitation of the patent and do not unreasonably prejudice the legitimate interests of the patent owner, taking account of the legitimate interests of third parties.
The term of protection available shall not end before the expiration of a period of 20 years counted from the filing date.

v) **Layout-Designs of integrated circuits**

Article 35 of the TRIPS Agreement requires member countries to protect the layout designs of integrated circuits in accordance with the provisions of the IPIC Treaty (the Treaty on Intellectual Property in Respect of Integrated Circuits) negotiated under the auspices of WIPO in 1989. These provisions deal with inter alia, the definitions of "integrated circuits" and "layout-design", requirements for protection exclusive rights and regulations as well as exploitation, registration and disclosure. An "Integrated Circuits" means a product in its final form or an intermediate form in which the elements at least one of which is an active element and some or all of the interconnections are integrally formed in and/or on a piece of material and which is intended to perform an electronic function. A "layout-design is defined as the three dimensional disposition, however expressed of the elements at least one of which is an active element and of some or all of the interconnections of an integrated circuit or such a three dimensional disposition prepared for an integrated circuit intended for manufacture. The obligation to protect layout designs applies to such layout designs that are original in the sense that they are the result of their creator's own intellectual effort and are not commonplace among creators of layout designs and manufacturers of integrated circuits at the time of their creation. The exclusive
rights include the right of reproduction and the right of importation, sale and other distribution for commercial purposes. Certain limitations to these rights are provided for.

8.2 FAVOURABLE EFFECTS OF TRIPS

The TRIPS Agreement requires undisclosed information trade secrets or know-how to benefit from protection. According to Article 39.2, the protection must apply to information that is secret that has commercial value because it is secret and that has been subject to reasonable steps to keep it secret. The Agreement does not require undisclosed information to be treated as a form of property but it does require that a person lawfully in control of such information must have the possibility of preventing it from being disclosed to acquired by or used by others without his or her consent in a manner contrary to honest commercial practices. "Member contrary to honest commercial practices" includes breach of contract, breach of confidence and inducement to breach as well as the acquisition of undisclosed information by third parties who knew or were grossly negligent in failing to know, that such practices were involved in the acquisition.

Article 40 of the TRIPS Agreement recognizes that some licensing practices or conditions pertaining to intellectual property rights, which restrain competition, may have adverse effects on trade and may impede the transfer and dissemination of technology. Member countries may adapt consistently with the other provisions of the Agreement, appropriate measures to prevent
or control practices in the licensing of intellectual property rights which are abusive and anti-competitive. The Agreement provides for a mechanism whereby a country seeking to take action against such practices involving the companies of another member country can enter into consultations with that other member and exchange publically available non-confidential information of relevance to the matter in question and to the conclusion of mutually satisfactory agreements concerning the safeguarding of its confidentially by the requesting member. Similarly a country whose companies are subject to such action in another member can enter into consultations with that member.

One of the claims made in favour of the TRIPS is its likely impetus or stimulation to agricultural research. India is nowhere inferior to that of the developed countries in research and competence.

8.3 UNFAVOURABLE EFFECTS OF TRIPS

Trade is technical in its substance but highly political in its consequences. Reciprocity as a structural alternative to the multilateral system equals bilateralism; equals discrimination; and trade relations based on power rather than rules are the result. This would be a very dangerous departure from the success story of the multilateral system.

The growth of regionalism is a more complex issue. There is no natural contradiction between regionalism and the multilateral system. This has been the shared assessment of the great majority
of the international trade community. The real contradiction is between open trade and protectionism. Regional trade initiatives can certainly help to lower trade barriers and thus promote economic growth. But the relationship between regionalism and a multilateral system based on the MFN principle is nonetheless a complex one. The provisions of the WTO have sought to ensure compatibility by requiring regional agreements to cover substantially all trade among the partners and to promote trade policies, which do not lead to higher protection or extra restrictions on the trade of non-members.

It is apprehended that India may be a loser on account of intellectual property rights since none of the arguments related to developing countries, counted for much at the GATT talks; whether it was the argument for the anti-cancer drugs derived from the Rosy perwinke found in Madagascar, which saves 30,000 lives in the US every year. Or some payment or credit then should be made to countries which gave the genetic resources that yielded these life-saving drugs. But so far, the developed world has dominated and has held its upper hand in this regard ignoring all facts.

The development of substitutes of chemical fertilizers as bio-fertilisers and chemical pesticides as bio-pesticides has revolutionised agricultural technology. India has not developed fully in this direction. The entry of multinationals into agricultural sector armed with IPR would mean a substantial control over entire range of seed, fertilizers, pesticides and research. They will not only
control important inputs and research but also have a command on investment production, distribution and marketing. The worst sufferers will be small and the marginal farmers. They would have practically no relevance in the high-tech agricultural production era.

The conclusion that can be drawn on the basis of questionnaire is that IPR is an open invitation to multinationals to enter into our agricultural sector with enormous investment potentials, high-technological level, market experience and command over research, production, distribution and marketing. And by this command, they will also command, control and regulate the agro-based industrial sector, agro-trade and agro-services. In other words, in the name of trade liberalisation and globalisation we are moving towards monopolisation. We, in the name of globalisation, have reduced our "commanding heights," but have accepted the commanding heights of multinationals. In the drawn the protectionist policies. But the fact is that we have accepted the protection of multinationals and of other international agencies. Is it not the beginning of an area of "humble slavery"?