

Relevance of Intellectual Property Rights for Less Developed Countries

By Shristi Khadka

Trade, particularly international trade, has been recognized as the key vehicle for economic growth. Experience shows that freer trade and economic growth are directly proportional. Free trade however does not mean complete absence of trading barriers, but a rules-based trading system. Thus, the World Trade Organization (WTO) as the legal and institutional foundation of the multilateral trading system sets the rules for the game of free trade. Intellectual Property Rights (IPRs), as one of the rules for trade, were introduced by the WTO's Agreement on Trade Related Aspects of Intellectual Property Rules (TRIPs). Hence, understanding and aligning with the rules and regulations of the WTO (IPR being one of them) is imperative as all member countries of the WTO are obliged to perform their trading activities within the framework set by it. IPRs-- patents, copyrights, trademarks, industrial designs, integrated circuits and geographical indications-- have become economically and politically important today in this era of globalization where the world economy is becoming more knowledge based. Factors like knowledge, information and idea are most probably the most important ingredients in making any product or service. Hence, like any other factor payment, IPRs are the payments made to the generator of the idea—product of the mind.

The positive role of IPRs in economic growth can be broadly classified into two headings—stimulation of innovation and dissemination of the new knowledge for productive use. IPR as an incentive induces the generation of innovation and the commercial use of which ultimately facilitates the betterment of society. There is no

doubt in stating that innovation is not only the primary factor for economic growth but for the prosperity of humankind also. A huge amount of investment goes into the creation of new and productive knowledge. Hence, IPRs have been designed so as to rightfully compensate the generators of such knowledge which is the foundation of economic growth and progress of human civilization. The objective of IPR is to maintain a balance between the long term benefits of innovation to society and the short term cost that has to be incurred by the society. However, the application of IPRs in multilateral trade regime has been alleged to create winners and losers in international trading relations. The apparent reason being the fact that almost all of innovations take place in developed countries and thus they enjoy overwhelming quantity of IPRs. Since developed countries can afford to invest in Research and Development (R&D) it is not surprising to know that they have huge share of IPRs. According to the US Patents and Trademarks Office, 2001, the top ten countries, viz. USA, Japan, Germany, France, UK, Italy, Canada, Netherlands, Sweden and Switzerland account for 84% of global resources spent on R&D activity annually and they control 94% of the technological output in terms of patents taken.

The developing countries lag far behind in protection and enforcement of IPRs as their level of economic and social development is low. First of all they do not possess much of innovations for patent protection. Secondly, even in cases where they could benefit from patent protection they lack the competence to attain patent protection at an international level. In this scenario, it is more likely that the developing and especially the least developed countries pace of development might be stranded by strong implementation of IPRs due to high prices of patent protected products and closure of local industries

engaged in imitation¹ of foreign innovation. Due to lack of proper domestic preparation and negotiating skills on the part of the less developed countries they have not been able to benefit from favorable provisions inside the IP system. The provisions inside the IP system like the *sui generis* system has been designed so as to safeguard cheating of genetic and traditional knowledge owned by less developed countries. Nepal is one of the richest countries in the world in terms of biodiversity; it has been ranked 25th from the top in the global biodiversity context (NBAP¹, 1998). At the same time the economy has predominantly been based on agriculture. However, so far, it has not been capable to utilize this provision so as to make use of its ecological diversity.

The experiences of some Asian countries depict thriving examples of how countries can climb up the ladder of economic growth with the help of weak IPRs. It is widely agreed that the success of countries like Japan, Thailand, South Korea, Singapore and Taiwan in East Asia (EA) owes a lot to duplicative imitation and reverse engineering. In Japan, chemical and pharmaceutical products were excluded from patent protection until 1975. Similarly, Japanese IPR system provided utility models to encourage minor adaptations or improvements over the imported machinery by domestic inventors and protection of industrial designs that needed to demonstrate novelty and not inventiveness. It is only in the year 1994 that Taiwan allowed patents on food, beverages, micro-organisms and new uses for products. In case of India, the 1970 Act which reduced the scope of patentability in food, chemicals and pharmaceuticals to only processes and not products has led to the development of local technological capability, especially in pharmaceutical industry. As a

result of the act, the share of pharmaceuticals in national exports increased from 0.55 per cent in 1970-71 to over 4 per cent by the 1999/00. This made India the second largest exporter of pharmaceuticals after China among the developing countries. The soft IPR policies adopted by these countries have helped them to absorb, transfer and diffuse foreign technologies. However, these countries are gradually strengthening IPR protection due to international pressure from the developed countries and also to provide protection to their technological capabilities which have been developed by now. In a report prepared by the US Patents and Trademarks Office in 2001, the collective share of US patent granted to the countries like Taiwan, South Korea, Israel, Hong Kong, South Africa, Mexico, Brazil, China, Argentina, Singapore, Venezuela and India has increased from 1.4 per cent during the 1977-87 to 5.7 per cent during 1996-2000 (Nagesh, 2003). These countries have reached the stage where FDI can leverage the on going rate of economic development. Thus, strengthening the IPRs is certain to catch the attention of viable foreign investments in case of these prospering Asian countries. All the above case studies reveal how lack of strong IPRs do not harm the citizens of developing countries but rather reiterates that IPR regime should depend upon the level of development achieved by a country. (Nageshⁱⁱ, 2003)

In case of developing countries technology transfer is one of the ways for dissemination of new productive knowledge. Although some studies have shown a positive correlation between strength of IPRs and inward Foreign Direct Investment (FDI), the direct relationship between IPRs and FDI is subject to question. The role played by other unobserved variables like higher levels of income, stronger technological capabilities and

favorable business environment might be higher (Maskusⁱⁱⁱ, 2000). Since foreign investors assess a country's complete profile before making investment decision, it would be unfair to draw a direct relationship between IPRs and FDI only. Therefore, strengthening of IPRs might boost inward FDI in a country provided the political, economic, social and technological environment of the country favors business activities.

Therefore, it can be concluded that the relevance and impact of IPRs depends upon the state of the country and it can be benefited by wisely tuning the strength of IPRs with the country's state. The intensity of IPRs first falls, as a country benefits by weak IPRs to boost the local capabilities by imitating foreign knowledge, then rises as they engage in generation of new productive knowledge (World Bank^{iv}, 2001). Thus, for prospering Asian countries like Singapore, India, China, Malaysia, Hong Kong and so on the strengthening of IPRs might play a positive role for development. The less prosperous countries lack the institutional, financial and human capacity to negotiate for flexibilities in the IP regime. The provisions like parallel imports and compulsory licensing in medicine and *sui generis* in agriculture have been designed in order to safeguard the interests of the developing and least developed countries. Besides, negotiating for flexibilities they should also work toward strengthening the capability of domestic industries so as to compete in the world market. The effect of strict IPRs on public health and agriculture will be the most drastic if developing countries fail to secure their interest. For instance, the implementation period for Least Developed Countries (LDCs) in case of pharmaceutical patents has been extended until 2016. After 2016, the LDCs will have to make use of the two flexibilities inside the TRIPS—compulsory licensing

and parallel import. Compulsory licensing is a process whereby countries are permitted to give licenses to companies or individuals to manufacture the patented products without the patent owner's consent. Thus, unless the LDCs develop their domestic pharmaceutical industries by 2016 there is no way they can benefit by this process. Besides, parallel import allows a country to import copied versions of drugs manufactured under compulsory licensing. Again, there is no guarantee that the LDCs can afford to import medicines from countries making use of compulsory licensing (Adhikari^v, 2005).

As stated earlier, IPRs have already been set as the rules so each country should develop their own strategy to secure their interest in the world market. If developing and least developed countries do not realize the urgency of designing IP policy that suits their country's interest they will have to face bitter consequences.

ⁱ NBAP (1998) 'Nepal Biodiversity Action Plan', Ministry of Forest and Soil Conservation/UNDP, Kathmandu, Nepal.

ⁱⁱ Nagesk, K (2003), 'Intellectual Property Rights, Technology and Economic Development: Experiences of Asian Countries', Research and Information System for Developing Countries, New Delhi

ⁱⁱⁱ Maskus, K. (2000) 'Intellectual Property Protection, Foreign Direct Investment and Technology Transfer', a discussion paper #19, international Finance Corporation.

^{iv} World Bank (2001), 'Intellectual property: balancing incentives with competitive access', in Global Economic Prospects, 129-150, Washington, DC.

^v Adhikari, K (2005), 'Intellectual Property Right: Public Health Concerns for Nepal', Kantipur Publication, Kathmandu, Nepal.