Intellectual Property Rights Series 1

Rethinking IPRs and the TRIPS Agreement

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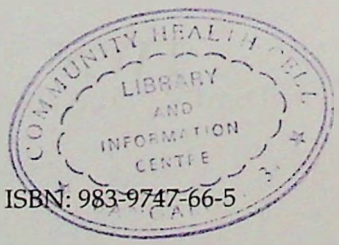
Rethinking IPRs and the TRIPS Agreement
is published by
Third World Network
121-S, Jalan Utama,
10450 Penang, Malaysia.

Printed by Jutaprint
2 Solok Sungei Pinang 3, Sg. Pinang
11600 Penang, Malaysia.

1st Printing 2001
2nd Printing 2003



ISBN: 983-9747-66-5

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1 INTRODUCTION

THE Trade-Related Aspects of Intellectual Property Rights Agreement (TRIPS) was established as part of the World Trade Organisation (WTO) in 1995. It established minimum standards for a set of Intellectual Property Rights (IPRs) that WTO Members have to institute through national legislation. Many developing countries had tried to resist the entrance of IPRs as a subject in the Uruguay Round, and had then tried to limit what they saw as the more damaging aspects of the proposals coming from developed countries. But at the end of the Round, the developed countries (and the companies and industries of the North that were the driving forces and lobbies behind the proposals and negotiations) succeeded in getting most of what they had hoped for in the TRIPS Agreement. TRIPS has been considered by some economic experts of developing countries as the WTO agreement that has the potential of causing the most damage to the prospects for development.

In the six years since TRIPS was established, there has been increasing evidence of many social and economic problems (some of them quite dramatic and very serious), caused by the introduction of stricter IPRs laws as a result of implementation of TRIPS. This is leading to increased public awareness around the world that the present IPRs system is heavily tilted in favour of IPRs holders and against the public interest. This awareness is giving rise to disenchantment with the IPRs regime and with TRIPS. In an increasing number of cases, this dissatisfaction has given rise to public outrage and street demonstrations.

Among the problems are:

- The jacking up of prices of consumer products (including some essential items such as medicines) by companies owning IPRs, reducing consumers' access and affecting their welfare, health and lives;

- The high cost to firms in developing countries which have to pay high royalties for use of technology, or are unable to get permission from IPRs holders to use modern technologies, thus affecting a country's ability to modernise; and

- The phenomenon of "biopiracy" in which corporations (mainly of the North) have been able to patent biological resources and the knowledge of their use (most of which originate in the South).

In the first case, consumers in developed and developing countries lose out. In the second case, producers in developing countries are severely constrained from upgrading their technology. In the third case, farmers and indigenous people (especially in the South) have their knowledge appropriated, and on top of that, their ability to continue to use their resources and knowledge may be adversely affected, and consumers everywhere also lose out. In all cases, the IPRs holders, which are mainly large corporations of the North, are given the special privilege of monopoly rights which prevent competition from other or potential producers, and are enabled to obtain super and monopoly profits. This rentier income is at the expense of consumers and the fulfilment of human needs; other producers; researchers and scientists, who in many cases are prevented or constrained from making use of patented materials; economic development, as well as the environment.

As the imbalances and problems generated by TRIPS become more obvious, there is mounting public demand for change. The range of demands include: more time, flexibility and freedom to choose options

for developing countries in the implementation of the agreement; restraint by developed countries and their corporations from taking action against developing countries; a review and revision of TRIPS to remove the problematic aspects and to enable better operationalising of positive aspects (such as provisions on technology transfer); as well as the removal of TRIPS altogether from the WTO.

2 Some Serious Problems Caused by IPRs and TRIPS

IPRs are not "natural rights" but rather privileges granted to inventors to reward them for inventions. This conferment of the privilege of monopoly is supposed to be an incentive for innovation, and to enable recovery of cost. Any IPRs system has to balance the privilege given to inventors and corporations owning the IPRs with the public interest. The public interest includes consumer welfare, the right of other producers to use technology, the right to development, and environmental protection.

The TRIPS Agreement has resulted in a very significant shift in the balance in the IPRs regime away from the public interest towards the monopolistic privileges of IPRs holders. Since TRIPS is a legally-binding international framework enforceable in the WTO through the threat of trade sanctions, it has been able to effectively disseminate a model of IPRs regime throughout the world to its over 130 Member states. TRIPS has therefore instituted a basically "one-size-fits-all" system of IPRs, where similar standards are set for countries of differing levels of development. It is in the developing countries where the unsuitability and effects of many of the inappropriate provisions are most adversely and acutely felt. And even in the developed countries, consumers, the public and the scientific community in general also suffer adverse effects.

The following are some of the problems caused by TRIPS and its model of IPRs regime:

(a) Effects on consumer access to essential and other products

Consumers are becoming aware that prices of many IPRs-protected products are jacked up, in some cases many times above the cost of production, because the corporations owning a patent or copyright are enabled to prevent competition from other or potential producers. The IPRs owners enjoy super and monopoly profits, whilst consumers have reduced access.

In the pre-TRIPS period, countries were able to set their own IPRs policies and legislation. Most developing countries exempted essential consumer items, especially pharmaceutical drugs, food products and biological materials (including seeds and plant varieties) from patentability. Under TRIPS, exclusions can be made only for products where the option for exclusion is explicitly stated. Drugs and food products are not explicitly mentioned as products that can be excluded; some biological materials and processes appear to be included as items that must be allowed for patenting; and plant varieties must also be allowed to be protected.

Prices of some consumer products are fixed by companies owning IPRs far above the levels that would prevail had there been free competition. The most obvious and outrageous example is pharmaceutical drugs, as shown dramatically in the recently highlighted case of AIDS medicines.

A year's supply of a combination of AIDS medicines costs USD10,000 to 15,000 in the USA. The price for a similar combination offered by an Indian generic drug producer is around USD300. The margin of profit for the branded product covered by patent is thus astronomical. TRIPS requires that if a patent for a medicine has been registered in a developing country, other producers are not permitted to produce, import or sell the

medicine (without the permission of the patent holder). Patients in developing countries will thus be even more unable to afford medicines that are patented, as the AIDS drugs example shows.

TRIPS does allow that in the case of "national emergency" a government is allowed to make use of "compulsory licensing" provision to suspend the patent right, and thus allow production or import of the product. However, when South Africa introduced such legislation in respect of AIDS drugs, it was put under pressure by some developed countries, and then sued in court by over 30 transnational drug firms. Developing countries are thus coming under pressure not to exercise their right, under TRIPS, to relax IPRs in certain circumstances. This kind of bullying has given TRIPS, which already has a bad name, an even worse image as it has become obvious that the TNCs that own patents, and governments of some rich countries, are so adamant in putting the right to make monopoly and super profits above the right of patients to health and life.

When public outrage over this was expressed in South Africa and other developing countries, and echoed in developed countries through reports and actions by groups such as Medicine Sans Frontier, Oxfam, RAFI and GRAIN, and through the media, one of the drug firms announced it would supply a combination of two AIDS drugs at USD600 to developing countries, a price level at which, it said, it would not make a profit. There was thus an implicit admission that the profit margin for selling the drug at USD10,000 and above (in the US) is astronomical. The reduction in the price for developing countries is read by some as an attempt by the company to limit the public outrage, save the patent system from a possible basic challenge, and offset the need of developing countries to exercise their option of compulsory license.

In the case of another product, computer software, the prices are also usually far above the cost of production. If they have to purchase software products at the high market prices, most consumers in developing countries would be unable to afford them, and this would shut them

out of an important part of the "knowledge society" and be a major contribution to the global "digital divide." In many countries, consumers have obtained copies of software freely or cheaply. However there is increasingly strict enforcement of copyright laws, made mandatory by TRIPS, in many countries, with raids by government enforcement agencies together with representatives of multinational software companies. As enforcement becomes more effective, the would-be users of software (individual consumers as well as companies and educational institutions, etc.) will find their access shut off or significantly reduced.

(b) Adverse effects of TRIPS on development and industries in developing countries

Historically, technology transfer has played a key role in industrialisation, and a large part of this transfer took place by firms imitating or copying the technologies used by others. Producers in developing countries will find it difficult or impossible to copy technology which is IPRs protected when TRIPS and associated national legislation takes effect. Domestic firms that wish to make use of the technology would have to obtain permission from the patent holder (which may or may not grant the permission, even if the applicant intends to pay the commercial rate), and pay expensive royalties. Many firms may not be able to afford the fees; and those that can would find that the high cost reduces their ability to be competitive. The TRIPS IPRs regime thus places high obstacles to developing countries' efforts to upgrade technology levels, to modernise, and to industrialise.

The one-size-fits-all or rather one-standard-fits-all approach of TRIPS is a great disservice to developing countries. Many of the present-day developed countries did not adopt IPRs legislation, or strict IPRs standards, when they were going through the stages of development that the developing countries of today are attempting to go through. In Switzerland a hundred years ago, as a rule, Swiss industrial inventions could be patented abroad where patent legislation was in effect, but as Switzer-

land had no patent laws, Swiss industries were free to copy foreign inventions without restrictions (Gerster 1999). When most of the now-developed countries established their patent and other IPRs laws in the 19th century, all of these IPRs regimes were highly "deficient" by the standards of today (Chang 2000). Few of them allowed patents on chemical and pharmaceutical substances until the last decades of the 20th century. Pharmaceutical products were patented only in 1967 in West Germany and France, 1979 in Italy and 1992 in Spain. Chemical substances were patented only in 1967 in West Germany, 1968 in Nordic countries, 1976 in Japan, 1978 in Switzerland and 1992 in Spain (Chang 2000).

If at their stage of development the developed countries had had to adhere to the minimum standards set by TRIPS, it is most doubtful many of them would have attained the levels of technology and industrialisation that they achieved. Yet the developing countries of today are asked to adhere to IPRs standards that would effectively prevent them from taking the same technology path as the developed countries. It is hard to avoid the conclusion that TRIPS is a protectionist device designed not only to advance the monopoly privileges of the large corporations but also to prevent developing countries from being successful competitors to the developed countries.

As Correa (2000: p18-19) concluded: "The strengthening and expansion of IPRs are likely to adversely affect the conditions for access to and use of technology, and thereby the prospects for industrial and technological development in developing countries...Under the TRIPS agreement, reverse engineering and other methods of imitative innovation – that industrialised countries extensively used during their own processes of industrialisation – shall be increasingly restricted, thereby making technological catching-up more difficult than before."

An example of difficulties facing local firms in developing countries is that of Indian industry attempting to adjust to India's implementation of its obligations under the Montreal Protocol, in which Parties have agreed to phase out their use of CFCs and other ozone-damaging substances by target dates. Indian-owned firms have been producing CFCs that are used in the manufacture of refrigerators and air-conditioners in India. The Indian CFC producers wanted to shift from making CFCs to an environmentally-sound substitute, HFC 134a. A few companies in developed countries control the patents to HFC 134a. An Indian company seeking access to the technology of producing HFC 134a was quoted a very high price (USD25 million) by a transnational company holding the patent. The supplier proposed to the Indian firm two alternatives to the sale: that it be allowed a majority share in a joint venture with the Indian firm; or that the Indian firm agree to restrict its exports of HFC 134a produced in India. Both options were unacceptable to the Indian firm, and the quoted price was also far too high as it was estimated that the fee should at most have been USD2 to 8 million (Watal 1998).

This case shows not only the difficulty for a developing country firm and industry to modernise its technology, but also for a developing country to meet its commitments under a multilateral environment agreement (MEA). Even if a local firm is willing to pay the market rate to obtain permission to use patented technology, the patent holder can quote an unreasonably high price, or impose unacceptable conditions, or even refuse permission outright. Moreover, although some MEAs may have financial-assistance, technology-transfer and technology-assisting clauses supposedly to benefit developing countries, in practice developing countries are finding that the developed countries may not fulfil their obligations on assistance, and developing countries find difficulties and disadvantages in fulfilling their environmental obligations.

(c) IPRs, biological materials and biopiracy

Another major controversy is the way TRIPS has facilitated the patenting of life-forms as well as "biopiracy", or the exploitative appropriation by transnational companies of the biological resources and traditional knowledge of local communities based mainly in developing countries.

Before TRIPS, most countries had excluded patenting of life-forms, biological resources and knowledge on their use. This changed with TRIPS. Article 27.3b of TRIPS allows patent exclusion only for plants and animals (but not microorganisms) and exclusion for essentially biological processes for production of plants and animals (but not for non-biological and microbiological processes). Thus it appears that WTO Members have to allow patents for certain types of life-forms and living processes; and it is being debated whether this also applies to naturally occurring life forms and processes. If it applies, then the basic foundation on which the patent system rests is undermined, for patents must be given for what are at best discoveries and not inventions. In any case, there is no scientific basis for allowing exclusions for certain organisms and not for others, and for certain living processes and not for others. This contradiction sticks out like a sore thumb.

Several scientists also argue that there is no scientific basis for the patenting of life forms even if they are genetically modified. The patent system is an inappropriate method for rewarding innovations in the field of biological sciences or in relation to biological materials and processes (Shiva 1995, Tewolde 1999, Ho and Traavik 1999). A fundamental critique of life patenting has been made by B. G. E. Tewolde, the African scientist, who is also general manager of the Ethiopia Environment Authority, and chairperson of the Africa Group in the Convention on Biological Diversity (CBD). According to Tewolde (1999), the patent system was drawn up to reward innovation in relation to mechanical processes, and this system is inappropriate when applied to biological processes as living things are not invented, and they also reproduce

themselves, unlike mechanical things and processes. This is also true of genetically modified organisms. He further argues that discoveries relating to life forms and living processes should also be rewarded, but not through the patent system. "Distorting the meaning of patenting in order to make it applicable to life only serves to attract the rejection of the whole system. Who ever worried about the legitimacy of patenting before the 1990s, before it became known that the USA was allowing the patenting of living things? But now, opposition is growing all the time, opposition not only to the legitimacy, but also to the legality of patenting."

Article 27.3b also requires Members to grant IPRs for plant varieties, either through patents or a *sui generis* system. Previously, few developing countries granted IPRs protection for plant breeding and plant varieties. TRIPS opens the road for either patenting or a system of plant breeders' rights that may restrict the right of farmers to save, exchange and use seeds.

Many developing countries in the WTO have argued that Article 27.3b should be amended. The Africa group has proposed that the TRIPS review process "should clarify that plants and animals as well as micro-organisms and all other living organisms and their parts cannot be patented, and that natural processes that produce plants, animals and other living organisms should also not be patentable." It also proposed that the review clarify that in implementing their option on plant varieties protection, developing countries should be allowed to institute a *sui generis* law that protects the knowledge and innovations of indigenous and local farming communities, and provides for continuation of traditional farming practices including the right to save, exchange and use seeds and sell their harvest.

Meanwhile TRIPS has opened the floodgate to the corporate patenting of life, and to biopiracy. The London-based Guardian's special report on The Ethics of Genetics (15 November 2000) found that as of November 2000, patents are pending or have been granted by 40 patent authorities

worldwide on over 500,000 genes and partial gene sequences in living organisms. Of these there are over 9,000 patents pending or granted involving 161,195 whole or partial human genes.

Patents have been given on genes or natural compounds from plants that are traditionally grown in developing countries (including rice, cocoa, cassava) and on genes in staple food crops originating in developing countries (including maize, potato, soybean, wheat). Patents have also been granted on plants used for medicinal and other purposes (e.g. as an insecticide) by people in developing countries. Examples include a US patent for the use of tumeric for healing wounds (this was successfully challenged by the India government on the ground that it has been traditionally used by Indian people for healing wounds), and the patenting by American scientists of a protein from Thai bitter gourd after Thai scientists found its compounds could be used against the AIDS virus.

The thousands of cases of life patents and the increasing evidence of biopiracy has aroused indignation among a wide range of people and institutions, including governments of the South and their delegations at the CBD and the WTO; organisations of farmers and indigenous people worldwide, particularly in the South; development NGOs in the South and North; the environment community; and also the human rights community. As Tewolde noted, the controversy has threatened the legitimacy and questioned the legality of the IPRs system and TRIPS.

(d) Questionable claims and unkept promises

Disenchantment over TRIPS and the IPRs regime has also arisen because some of the claims made on behalf of a strict IPRs regime have not been borne out, whilst some promises of benefits have not been fulfilled.

It was claimed that a strict IPRs regime is needed in order to promote innovation and research by providing incentives. However, there has been criticism from many quarters that in fact IPRs discourage or help to

prevent scientific research. In developing countries most patents are held by foreigners, and local R and D can be stifled since the monopoly rights conferred by patents restrict the research by local researchers (Oh 2000). Dr. Gahuur Alam (1999) of India points out that the changes to the IPRs policies in developing countries raises concerns that a strong IPRs system will be "extremely detrimental to local research" in the area of new plant varieties and genetically engineered plants. Researchers and librarians in the North are also concerned that current IPRs practices and trends in information technology will constrain and stifle the flow and use of information.

TRIPS has many references and provisions that deal with technology transfer. Article 7 on objectives states that IPRs should promote innovation and transfer technology. Article 66.2 on LDCs states that developed countries shall provide incentives to their enterprises and institutions to promote technology transfer to LDCs. However, little or nothing has been done by developed countries to either provide concessions, or provide incentives to their enterprises to transfer technology to developing countries.

There has thus been an erosion of confidence in the sincerity or intentions of developed countries to fulfil their claims and obligations, and correspondingly an erosion of confidence and image of the IPRs system and of TRIPS.

3 Conclusions and Proposals

THE IPRs system under the influence of the TRIPS framework has tilted the balance between owners and users of technology and knowledge much too far in the favour of IPRs holders. Moreover, in the balance of rights and obligations of IPRs holders, their privileges and rights have been overly protected whilst their obligations to social and economic welfare of the public, and to technology transfer, have been underfulfilled or unfulfilled. There are also asymmetries between North and South in the balance of benefits and costs.

Developing countries are overwhelmingly dependent on innovations made in the North; patent applicants from developing countries constituted less than 2 per cent of all applicants in the US between 1977 and 1996; and the developed countries dominate the trade in medium and high tech goods. Thus, the worldwide establishment of strict IPRs standards under TRIPS will result in benefits accruing overwhelmingly to the developed countries, paid for by the increased costs accruing to the developing countries. It is time to redress these imbalances and asymmetries.

The following are some proposals:

1. Many developing countries are facing difficulties in implementing TRIPS at the national level. Taking this into account, the transition period for developing countries should be extended until after a proper review of TRIPS is carried out and appropriate changes are made to the agreement.

2. In implementing TRIPS through national legislation, developing countries must be allowed the flexibility to choose between different options, without undue and inappropriate influence asserted on them. The various options should be explained to developing countries, together with the advantages and disadvantages of each option. Within the scope and space enabled by the flexibility and provisions of TRIPS, developing countries should make strong efforts to choose the options that are least damaging and that best protects national and public interests (TWN 1998; Correa 1998).

3. Pressures should not be put on developing countries either through bilateral means or regional arrangements or the process of accession to WTO, to get them to agree to implement IPRs standards even higher than those in TRIPS. Such pressures have been and are being applied by some developed countries.

4. Similarly, pressures must not be put on developing countries to give up the use of options available to them under TRIPS. For example, pressure had been applied to some countries, including South Africa, not to exercise their right to resort to compulsory licensing in the case of medicines to treat AIDS patients.

5. The mandated review of Article 27.3b of TRIPS should resolve the artificial distinctions made between certain organisms and biological processes (which are allowed exclusion from patentability) and other organisms and processes which are not allowed exclusion. This may be resolved through following the proposal of the Africa Group in WTO: that the review should clarify that all living organisms and their parts, and all living processes, cannot be patentable. This clarification can be done through a suitable amendment to Article 27.3b. Changes in national legislation should be carried out in line with this amendment. The transition period for implementing Article 27.3b should be extended to five years after the review is completed.

6. Plant varieties are part of living organisms. The exclusion of patentability should also apply to them. Countries can however devise a suitable system of reward or incentive for plant breeders, if they so desire, but this should not be compulsory and should be left to each country to decide on; such a system should however not compromise the rights and practices of local communities. Countries may also wish to institute policies and legislation that protect and promote traditional knowledge and the rights of local communities to their resources and their knowledge.

7. In relation to medicines that are needed for serious and life-threatening ailments, countries should be allowed the flexibility to exclude from patentability. Indeed, countries should be allowed to exempt pharmaceutical drugs in general and the drug industrial sector from being subjected to patent protection. This can be done through an amendment to TRIPS. (A proposal by developing countries, that "the list of exceptions to patentability in Article 27.3b of TRIPS shall include the list of essential drugs of the WHO", is part of para 21 of the Draft Seattle Ministerial Text of 19 Oct 1999 and is under the active discussion on implementation issues currently before the WTO.)

8. Countries should also be allowed to exempt environmentally-sound technology from patentability.

9. The transfer of technology provisions and objectives of TRIPS (including Articles 7 and 8 and 66.2) should be made legally obligatory and operationalised. Developed countries and their enterprises should be obliged to put into effect the transfer and dissemination of technology to developing countries.

10. Developing countries should also be given flexibility to exempt certain products and sectors from IPRs protection (or have a longer

transition period), on grounds of public welfare and the need to meet development objectives.

11. Finally, WTO Members should seriously reconsider whether TRIPS belongs to the WTO. IPRs is not a trade issue. Moreover high IPRs standards constitute a form of protection that prevents or constrains the international transfer of technology; they constitute the institutionalising of monopoly privileges that result in rentier incomes and that restrains competition and promotes anti-competitive behaviour. It is an aberration that TRIPS is located in a trade organisation whose main functions are supposed to be the promotion of trade liberalisation and conditions of market competition, whilst TRIPS is protectionist and curbs competition. The reality is that TRIPS was placed in the WTO because the developed countries wished to make use of its dispute settlement system in order to ensure effective enforcement of disciplines on developing countries.

    Recently, there have been calls made to governments to transfer TRIPS out from the WTO. The joint NGO statement, "WTO: Shrink or Sink", formulated in March 2000 and endorsed by a thousand NGOs worldwide, has called for the removal of TRIPS from the WTO. Recently, in a letter to the Financial Times, the free-trade economist, Jagdish Bhagwati, has argued that intellectual property protection does not belong in the WTO, and declared support for the NGO statement "asking for the IP leg of the WTO to be sawn off". He argues that the WTO must be about mutually gainful trade, whereas intellectual property protection is a tax on poor countries' use of knowledge, constituting an unrequited transfer to the rich producing countries. "We were turning the WTO, thanks to powerful lobbies, into a royalty-collection agency, by pretending, through continuous propaganda that our media bought into, that somehow the question was 'trade related'," Bhagwati remarked. The review of TRIPS should therefore include on the agenda the question of its

removal from the WTO so that that trade organisation can return to its mission of promoting balanced trade relations.

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RETHINKING IPRs AND THE TRIPS AGREEMENT

The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) has been considered by some economic experts of developing countries as the World Trade Organisation agreement that has the potential of causing the most damage to prospects of development. In the six years since TRIPS was established, there has been increasing evidence of many social and economic problems caused by the introduction of stricter intellectual property rights (IPRs) laws as a result of the implementation of TRIPS, as well as rising public disenchantment worldwide.

This paper argues that the current IPRs system is heavily tilted in favour of IPRs holders and against public interest. According to the author, the worldwide establishment of strict IPRs standards under TRIPS will result in benefits accruing overwhelmingly to the developed countries, paid for by the increased costs accruing to the developed countries. Tracing the implications for consumers, local and indigenous communities, and prospects for development and industrialisation in the South, the author asserts that it is time to redress the imbalances and asymmetries of the present IPRs regime and the TRIPS Agreement.

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TWN INTELLECTUAL PROPERTY RIGHTS SERIES

is a series of papers published by **Third World Network** to provide a critical analysis of intellectual property rights protection from a Third World perspective. A particular focus is given to the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and its implications for developing countries.