"TRIPs-Plus": Enhancing Right Holders' Protection, Eroding TRIPs' Flexibilities

The issue of Trade-Related Aspects of Intellectual Property Rights (TRIPs) has been at the centre of controversy ever since its inclusion in the built-in agenda of the Uruguay Round (UR) of trade negotiations. In fact, it was the most controversial component of the World Trade Organisation's (WTO's) "package deal" struck in 1994.[1] Opinions are still sharply divided as to whether the WTO is the right place to have such an agreement although it has already been a part of the WTO since 1995. Many experts, among them trade economist Jagdish Bhagwati, are of the view that the TRIPs Agreement legitimises rent-seeking behaviour and perpetuates monopoly, and these aspects are incompatible with the principle of free trade.

Nevertheless, developing countries have been trying their best to take suitable measures at the national level to become TRIPs compliant. At the same time, they are also trying to strengthen their position and influence at the international level. The first significant breakthrough was achieved at Doha when a deal on TRIPs and Public Health was struck. The deal on public health relaxes the grounds on which WTO Members can issue compulsory licenses. It recognises each Member's "right to grant compulsory licenses and the freedom to determine the grounds upon which such licenses are granted."[2] Access to medicine, however, is only one aspect of the TRIPs Agreement. Farmers' rights over seeds, protection of traditional knowledge, transfer of technology etc. are other pressing issues, which are a cause of concern for developing countries.

Since the TRIPs Agreement makes provision for only minimum intellectual property standards, any intellectual property agreement negotiated subsequent to TRIPs among and/or involving WTO Members can only create higher standards, which is commonly known as "TRIPs-Plus". The developed countries are implementing these TRIPs-Plus provisions by enforcing strict patent rules through bilateral and regional trading arrangements.

The "TRIPs-Plus" concept covers activities, aimed at increasing the level of protection for right holders beyond that what is given in the WTO TRIPs Agreement and measures aimed at reducing the scope of effectiveness of limitations on rights and exceptions. Such intellectual property rules and practices have the effect of reducing the ability of developing countries to protect the public interest and may be adopted at the multilateral, plurilateral, regional and/or national level.[3]

The focus of this paper is limited to those TRIPs plus issues that are related to patents. The developed countries are implementing these TRIPs plus provisions by enforcing stricter patent rules through bilateral and regional trading arrangements. We need to understand how these agreements are threatening to limit the ability of weaker bilateral/regional partners to promote technological innovation, facilitate the transfer and dissemination of technology, take necessary measures to protect public health and take appropriate measures to prevent the abuse of intellectual property rights by patent holders.

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"TRIPs-Plus" in Bilateral and Regional Trade Agreements

Ever since its inception in the WTO in 1995, the Agreement on TRIPs has been under attack from several quarters. It requires WTO Members to grant and enforce intellectual property rights through enacting/amending necessary legislation at the national level. Although the TRIPs Agreement is only about minimum standards (as far as implementation of intellectual property rights at the multilateral level is concerned), its provisions relating to pharmaceuticals and seeds are highly contentious. Many poor countries have expressed their serious concern that unqualified patent protection will result in substantially higher prices for products, with adverse consequences for the health and livelihood of their citizens.

On the contrary, major developed countries and their Transnational Corporations (TNCs) who own more than 90 percent of patents, are of the view that minimum standards prescribed under TRIPs are clearly not strong enough to prevent patent infringement by Third World firms. Unable to further expand the scope of the TRIPs Agreement, developed countries, especially USA and EU are now increasingly using bilateral and regional trade and investment treaties to build more extensive protection for intellectual property than set out in TRIPs Agreement.

What constitutes a "TRIPs-plus" treaty? GRAIN, a EU-based NGO has done an exercise on criteria for "TRIPs-plus" with respect to biodiversity, which is laid out in Table 1 below.[4]

US Leads the Bandwagon

Among the principal players – US, EU and Japan – it is the US, which has been at the forefront of "TRIPs-Plus" bandwagon. The US, in response to pressure from domestic industry lobbies, is seeking to extend the intellectual property rights offered under TRIPs Agreement. The US has pressurised trading partners to agree to provisions in regional and bilateral trade agreements that mandate often higher levels of intellectual property protection than those they agreed to under TRIPs. Developing countries are thus required under these trade agreements to include very high levels of protection in their national laws, with grave consequences for public and national policy objectives.

Table 1: TRIPs-Plus provisions (in Biodiversity)

Subject Matter	TRIPs-plus Provision	Why this is TRIPs-plus
Plants	Extension of standards of protection, such as: reference to UPOV[5], no possibility of making exclusion from patentability of life forms, reference to "highest international standards"[6].	No reference to UPOV in TRIPs agreement; TRIPs allows countries to exclude plant and animals from patent protection; "highest international standards" is vague and there is no indication that it refers to TRIPs.
Animals	Same as plant.	Same as plant.
Micro-organisms	Requirement to accede to the Budapest Treaty[7].	No reference to Budapest in TRIPs.
Biotech	Requirement to protect "biotechnological inventions".	No reference to "biotechnology" to TRIPs.

Before examining some of the US' bilateral/regional Free Trade Agreements (FTAs), it would be worthwhile to look into the genesis of US' bilateralism and its link to intellectual property. In the early 1980s and after the Tokyo Round of trade negotiations in 1979 when Members were discussing the possible agenda for the Uruguay Round, USA reformed its Trade Act of 1974 to make provisions for linkage with intellectual property. The principal enforcement tool of US trade policy, Section 301 was amended to make it clear that it could be used to obtain protection for US intellectual property. A mechanism known as 'Special 301' was created requiring the United States Trade Representative (USTR) to identify countries denying adequate and effective protection for intellectual property rights and the administration of the Generalised System of Preferences (GSP) programme[8] was linked to the adequate protection of US intellectual property rights.[9]

Some of the US' bilateral trade treaties, which have strong TRIPs-Plus provisions are US-Jordan and US-Chile FTAs. In fact the US-Jordan FTA has served as a model for other FTAs being negotiated by US. It is a wide-ranging agreement containing provisions on trade in goods, trade in services, intellectual property rights, labour and environment, electronic commerce and government procurement. In contrast to the somewhat soft provisions on labour and environment (eg. each party "shall strive to ensure" that its labour standards are consistent with international norms) the provisions on intellectual property are long and detailed.[10] A comparison of some of the intellectual property rights provisions in US-Jordan FTA with WTO TRIPs Agreement is provided in Table 2.

The platform for more extensive protection of intellectual property was created by the North American Free Trade Agreement (NAFTA) in 1994, much before the signing of US-Jordan trade agreement. Within NAFTA, Mexico being a developing country, has been at the receiving end from its two big brothers – US and Canada. In fact NAFTA preceded TRIPs agreement and to a large extent served as a model for the US in the TRIPs negotiations. NAFTA, however, when compared to TRIPs sets stronger standards for intellectual property rights protection.

NAFTA, *inter alia*, requires the parties to give effect to UPOV, and it does not contain the kind of objectives clause and principles statement found in Articles 7 & 8 of TRIPs and the transition periods as provided in TRIPs agreement. As regards compulsory licensing, the provision in NAFTA is more restrictive when it comes to issuing licenses for patents that require authorisation to use a prior patent.

The US-Chile is another bilateral trade treaty in which the US has tried to replicate the Jordan model. The provisions on intellectual property protection may not be as stringent as they are in the US-Jordan treaty but it imposes commitments, which go well beyond WTO and NAFTA provisions. The agreement on intellectual property in the US-Chile FTA severely limits the grounds for allowing use of compulsory licensing of medicines (undermining the agreements and commitments made in "Doha Declaration on TRIPs and Public Health"), and effectively extends the 20-year term of drug company patent monopolies by an additional five years, threatening access to affordable medicines. The FTA also sets a precedent by applying the principle of "first-in-time", "first-in-right" to

trademarks and geographical indications applied to products. In addition, Chile has to ratify UPOV before January 1, 2009.

EU: A Step Behind

In globalising intellectual property protection through bilateral and regional trade agreements, the US is closely followed by the EU. A recent survey conducted by a EU based non-governmental organisation GRAIN reveals that the EU is making extensive use of bilateral and regional trade and investment treaties to enforce "TRIPs-Plus" provisions on developing countries. According to GRAIN, EU has forced "TRIPs-Plus" commitments regarding intellectual property on life forms in almost 90 developing countries that include ACP countries.[11]

Unlike the US, the EU does not have any set template for bilateral trade agreements. Therefore, the language of the individual agreements differs from each other. While, some countries must join UPOV and/or accede to the Budapest Treaty, in other cases the UPOV clamp is not so neat (see Table 3). Further, under some of the agreements, the parties recognise the need to provide adequate and effective protection of intellectual property rights, sometimes to the level of the "highest international standards", which is not clear. These standards could refer to European standards, World Intellectual Property Organisation (WIPO) standards or new *de facto* standards emerging from the increasing number of bilateral treaties on trade and investment.

Table 3 below down some of the bilateral trade agreements through which the EU seeks commitments to TRIPs-plus standards for intellectual property on life in developing countries.

Implications for Developing Countries

Many studies have been done to measure the impact of TRIPs agreement on the development prospects of developing countries. But in view of the growing enforcement of TRIPs-plus standards through bilateral and regional agreements, the studies that only evaluate the effects of TRIPs cannot provide us with a true picture. The enforcement of TRIPs-plus standards through bilateral and regional trade agreements is progressively eroding, not just developing countries' ability to set domestic standards, but also their ability to interpret their application through domestic administrative and judicial mechanisms.

Empirical analysis shows that in India prices of patentable medicines could, depending on assumptions, rise by as much as 250 percent. Compulsory licenses could significantly reduce prices, although not to pre-patent levels.[12] An UNCTAD study also finds out that TRIPs could have certain negative impacts on developing countries including higher prices for technologies under IPR protection and restrictions on the diffusion of technologies.[13] Keith Maskus has provided evidence that importers of intellectual property (mostly developing countries) will experience increased costs as a result of TRIPs.[14] The main beneficiary he points out in terms of static rent transfers would be the US with an inflow of some US$5.8bn per year.[15]

The above-mentioned empirical findings have been calculated by taking into account only the TRIPs agreement, which makes provision for only minimum intellectual property protection. One could easily imagine the devastating consequences if the US and the EU are successful in their drive to harmonise intellectual property law worldwide, i.e., beyond the minimum requirements of the WTO.

At Doha, developing countries were successful in slicing a separate deal on TRIPs and Public Health making provisions for members to grant compulsory licenses and the freedom to determine the grounds upon which such licenses are granted. However, a country like Jordan may not be able to reap benefit out of this as US-Jordan FTA provision on compulsory licensing is more restrictive than the equivalent provision in TRIPs.

In the case of Chile, so far no studies have been carried out on the possible impacts of TRIPs-plus commitments on public health. However, it is worth noting that, in cases like Chile, the World Health Organisation (WHO) recommends caution in the approval of legislation that is stricter than the provisions in TRIPs so as to ensure that such measures favour, rather than undermine, public health, which has already deteriorated as a result of the

Table 2: TRIPs-Plus Provisions in US-Jordan FTA

IPR Area	TRIPs Agreement	"TRIPs-Plus" Provisions
Plant varieties protection	No reference of UPOV in TRIPs; only indirectly covered in Article 27.3, which says that 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 requirement that each party give effect to UPOV and that in case of Jordan it ratify UPOV within 12 months.
Patent exclusion	Allows member to exclude plants and animals from their patent laws.	No provision to exclude plants and animals from national patent laws; narrowing the grounds of exclusion from patentability (basically, the grounds of exclusion in Article 27.3 (b) of TRIPs are ommited).
Compulsory licensing	Compulsory licenses could be granted to private parties for commercial non-public use so long as TRIPs procedures and rules, including payment of reasonable compensation to the patent holder, were complied with.	Compulsory licensing would only be permissible if the licenses were granted to government entities or legal entities operating under the authority of a government.
Delays in enforcement	Members shall ensure that procedures for enforcement shall not be unnecessarily complicated or costly, or entail unreasonable time-limits or unwarranted delays.	An obligation to provide for an extension of patent term to compensate patent owners for regulatory delays in being able to exploit the patent.

Table 3: TRIPs-plus in EU's Bilateral Treaties		
Agreement with	Year	TRIPs-plus and potential TRIPs-plus provisions
ACP	2000	The parties recognise the need to ensure adequate and effective protection of patents on plant varieties and on biotechnological inventions.
Algeria	2002	Algeria shall accede to and implement UPOV (1991 Act) within five years of entry into force, although accession can be replaced by implementation of an effective *sui generis* system if both parties agree. Must accede to Budapest Treaty.
Bangladesh	2001	Bangladesh shall endeavour to join UPOV and to accede to the Budapest Treaty by 2006.
Lebanon	2002	Lebanon must join UPOV and accede to Budapest Treaty by 2008.
Mexico	2000	Mexico must accede to Budapest Treaty within three years and shall provide "highest international standards" of IPR protection.
Morocco	2000	Morocco must join UPOV and accede to Budapest Treaty by 2004.
Palestinian Authority	1997	"Highest international standards".
South Africa	1999	South Africa shall ensure adequate and effective protection for patents on biotechnology inventions Must provide "highest international standards".
Sri Lanka	1995	"Highest international standards".
Tunisia	1998	Tunisia must join UPOV and accede to Budapest Treaty by 2002. "Highest international standards".
Source: TRIPs-plus must stop: The EU caught in blatant contradictions, GRAIN, March 2003		

continued privatisation and commercialisation of this sector.

The implications of imposing a UPOV kind of model for protection of plant varieties would also have grave implications for developing countries. Protecting plant varieties on the basis of UPOV means compromising the rights of the farmers, which form majority of population in most of the developing countries.

Conclusions

As already mentioned the TRIPs Agreement indirectly recognises monopoly rights and these bilateral treaties would further strengthen these rights of rich countries and their businesses. This backdoor route to enforce more stringent intellectual property standards is making a mockery of multilateral initiatives at WTO and WIPO.

Developed countries can always say that individual countries have the right to agree or disagree with any "TRIPs-plus" proposal in bilateral treaties but the answer is not so simple and straight. They are practising coercion politics through these bilateral deals – no patent, no trade or aid.

Hence, there is an urgent need to put a halt on this unethical practice. Civil society groups have to play a major role not only in exposing such practices but also in stopping them.

Endnotes

1 J. H. Reichman, *Taking the Medicine*, *With Angst: An Economist's View of the TRIPs Agreement,* Journal of International Economic Law, 4, 2001.

2 A. Panagariya, *Developing Countries at Doha: A Political Economy Analysis,* Department of Economics, University of Maryland, USA, 2002.

3 S. Musungu and G. Dutfield, *Multilateral Agreement and a TRIPs-Plus World: The World Intellectual Property Organisation,* TRIPs Issues Paper 3, Quaker United Nations Office, Geneva and Quaker International Affairs Programme, Ottawa, 2003.

4 See GRAIN in cooperation with SANFEC, "TRIPs-plus" through the backdoor: How bilateral treaties impose much stronger rules for IPRs than the WTO, July 2001, available at http://www.grain.org.

5 A treaty governing the Union for the Protection of New Plant Varieties, gives patent-like rights to plant-breeders working in the formal seed industry. It rewards a very narrow type of plant breeding, geared toward genetic uniformity and large-scale monocultures.

6 Numerous EU bilateral treaties bind developing countries to enforce the "highest international standards" of IPR protection. It is unclear which standards these are.

7 A treaty on the deposit of microorganisms for the purpose of patent protection (1977) creates a union of countries operating common rules on filing samples of patented microorganisms. It is administered by the World Intellectual Property Organisation (WIPO).

8 The GSP is a programme under which developed countries can grant reduced or zero tariff to selected imports from developing countries without having to extend the same concessions to other members, and without the beneficiaries having to reciprocate, as WTO rules would otherwise require.

9 P. Drahos, *Bilateralism in Intellectual Property,* Oxfam GB, London, 2001.

10 Ibid.

11 See GRAIN, "TRIPs-Plus" Must Stop, The EU Caught in Blatant Contradictions, March 2003, available at www.grain.org/publications/trips-plus-eu-2003-en.cfm.

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15 Ibid.

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This Briefing Paper is researched and written by Pradeep S. Mehta with Pranav Kumar & Aparna Shivpuri of and for CUTS Centre for International Trade, Economics & Environment, D-217, Bhaskar Marg, Bani Park, Jaipur 302 016, India, Ph: 91.141.228 2821-3, Fx: 91.141.228 2485, E-mail: citee@cuts-international.org, Web Site: www.cuts-international.org, and printed by KBS Printers, Tonk Road, Jaipur 302 015, India. An earlier version of this paper was written for India Development Foundation.