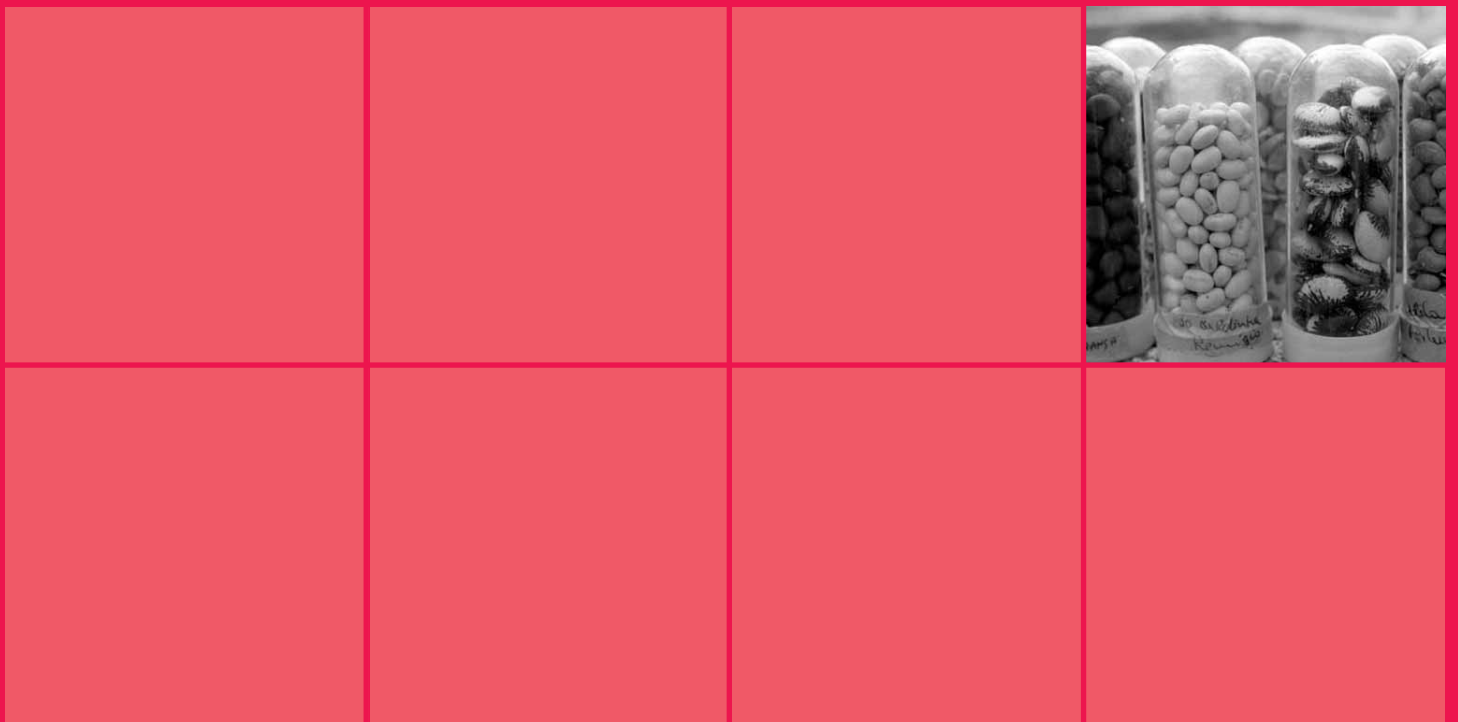


Trade Related Intellectual Property Rights



Trade Related Intellectual Property Rights

Summary

Farming is the main source of livelihood for three quarters of the world's population living in rural areas. In developing countries, small farmers dominate food production and using traditional agricultural practices, meet the food requirements of around 66% of the world's population. The introduction of intellectual property rules on plants and seeds under WTO's Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) could damage the livelihoods of these 1.4 billion farmers worldwide and undermine food sovereignty and food security.

Much attention has been given to the issue of TRIPS and pharmaceutical drugs but, through our experience of working with small farmers in developing countries, ActionAid believes that the impact of TRIPS on farming and food sovereignty poses threats of equal significance.

Before the WTO's Uruguay Round, intellectual property laws were a matter for domestic policy. But the introduction of the TRIPS Agreement made it mandatory for all WTO members to provide for internationally acceptable and enforceable patent protection for new inventions in all areas of technology. For the first time, TRIPS is forcing developing countries to extend intellectual property rights to plant varieties and seeds with consequential impacts on agriculture.

Intellectual property protection as construed under TRIPS could be applied very broadly to allow monopoly rights over individual plant genes and their characteristics. This would imply the removal of farmers' rights over seeds and propagating materials having such genes and characteristics, thus threatening the centuries old practice of saving, using, exchanging and selling farm-saved seed.

Patents effectively block competition for 20 years and enable the patent holder to set the market price for the product. Six multinationals control around 70% of the patents held on staple food crops. The use of patented seeds, plants and genetically modified animals would make small farmers dependent on the corporations that own the patents. In turn, this could lead to fundamental changes in the way agriculture is practiced in developing countries by facilitating the growth of agri-business and the decline of small farms and biodiversity. In addition, if the use of patented seeds became the norm, private corporations would dominate the world's food supply.

ActionAid is calling on the WTO and its members:

- to support the African Group's proposal to 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"¹
- to confirm that the rights of small farmers to save, use, exchange and sell farm saved seed for both protected and patented varieties will be recognised

¹ Joint Communication from the African Group to the Council for Trade-Related Aspects of Intellectual Property Rights (2003) Taking Forward The Review Of Article 27.3(b) of the TRIPS Agreement, IP/C/W/404, WTO, Geneva, 26 June

and respected, consistent with Article 27.3(b) and with Article 30² of the TRIPS Agreement

- to ensure that WTO TRIPS Agreement is consistent with provisions of the Convention on Biological Diversity as well as the International Treaty on Plant Genetic Resources for Food and Agriculture relating to the conservation and sustainable use of genetic resources and ensure prior informed consent and benefit sharing.

Food security under threat

Increased costs for small farmers: royalties, input costs and indebtedness

The royalty payments, restrictive contracts and increased commercialisation associated with seeds protected by intellectual property mean they cost significantly more than traditional or hybrid seeds. Farmers in India have witnessed the impact of increased costs in relation to Monsanto's Bt cotton seeds. Farmers in Nalgonda district of Andhra Pradesh in India paid up to 1600 rupees for a 450-gram packet of Bt cotton seeds, (of which the royalty component was 1200 rupees³), as against 450-500 rupees for normal varieties. Despite the costs, Bt cotton yields have sometimes been lower than those of local varieties.⁴

New patented seeds, especially genetically modified seeds, are often designed for use with specific pesticides, herbicides or other agro-chemicals produced by the same company. The high costs of these inputs places additional burdens on small farmers and can lead to increased levels of indebtedness.

A study of Bt cotton in Andhra Pradesh demonstrated that farmers who cultivated Bt cotton

spent 15% of the total cost of cultivation on the seed, as against 5% in case of non Bt farmers. However, hopes of reduced pesticide requirements and higher yields were not realised. In the year the research was carried out, those farmers using Bt Cotton seeds experienced an average net loss of 1295 rupees per acre while those using more traditional varieties earned an average profit of 5368 rupees per acre.⁵

The high costs and dubious benefits of implementing TRIPS

World Bank economists have pointed out that the costs to developing countries of implementing the TRIPS Agreement are unreasonably high. Mexico spent over US\$30 million upgrading intellectual property laws and enforcement despite starting from a higher level of implementation than is in place in most least developed countries.⁶ The World Bank estimates that the total losses arising from implementing TRIPS would be as high as 10.1% of South Korea's GDP, 1.4% of China's GDP and 0.6% of India's GDP.⁷ The huge direct costs of implementing the TRIPS Agreement, the benefits from which initially will accrue only to foreign businesses, divert limited resources away from development priorities like agriculture, health and education. According to Professor Keith Maskus⁸, the domestic benefits of implementing TRIPS are unlikely to be realised before a country achieves a level of development represented by an average per capita income of around US\$7,750 (in 1985 prices).

² Article 30 states that "Members may provide limited exceptions to the exclusive rights conferred by a patent, provided that such exceptions do not unreasonably conflict with a normal exploitation of the patent and so not unreasonably prejudice the legitimate interests of the patent owner, taking account of the legitimate interests of third parties."

³ <http://members.tripod.com/~ngin/191202b.htm>

⁴ <http://www.hinduonnet.com/thehindu/2003/01/26/stories/2003012601690500.htm> <http://www.hinduonnet.com/thehindu/2003/01/26/stories/2003012601690500.htm>

⁵ Qayum, M. & Kiran, S. (2003) Did Bt Cotton Save Farmers in Warangal, Andhra Pradesh Coalition in Defence of Diversity, India

⁶ Finger, J.M. (World Bank) and Schuler, P. (University Of Maryland), (1999), Implementation of Uruguay Road Commitments: The Development Challenge, paper for WTO/World Bank Conference on 'Developing Countries In A Millennium Round', Geneva, September

⁷ World Bank (2002), Global Economic Prospects and Developing Countries, quoted in http://www.cepr.net/relative_impact_of_trade_liberal.htm

⁸ Maskus, K. (2000a) "Intellectual Property Rights in the Global Economy", Institute for International Economics, Washington DC, pp.73-79.

Farmers criminalised

Hundreds of farmers are being sued in the US and Canada for the infringement of intellectual property rights. Independent family farms are under threat and their owners are being turned into criminals by the application of intellectual property rights (IPRs) in agriculture.

Percy Schmeiser, a family farmer in Canada is currently being sued by Monsanto for patent infringement after Monsanto's GM canola was found amongst his own canola crop having blown in from a neighbouring farm. Schmeiser is taking his fight to the Supreme Court. He wants the Court to review the right of a company enforcing a patent to interfere with a farmer saving and reusing seed.⁹ Meanwhile, Tennessee farmer Kem Ralph, has been sentenced to eight months in prison for patent infringement

Monsanto to charge exporters in an attempt to recoup royalty payments on soybean in Brazil

Frustrated by its inability to collect royalty payments on patented soybean in Brazil, Monsanto is planning to enforce its intellectual property rights by requiring Brazilian exporters to sign license agreements to ship cargoes containing genetically modified RoundUp Ready soy from July 2003. The company has informed more than 500 exporters and importers of Brazilian soy that it will start monitoring shipments of soy from July onward. Exporters caught sending unlicensed RoundUp Ready will become subject to legal action, said Felipe Osorio, Monsanto's Marketing Director. "We have a patent for our product here... We will start defending our intellectual property rights."¹¹ The likely impact of this move will not fall only on the traders; they will pass on to higher costs to the producers.

because he violated Monsanto's agreement by hiding a truckload of cotton seeds for a friend.¹⁰

As the TRIPS Agreement universalises intellectual property laws it will be increasingly easy for the big seed corporations to enforce their intellectual property rights in developing countries. Where it is not practical or cost effective to sue individual small farmers, they could employ controls on exporters, as they are in Brazil, or prevail upon their governments to pursue non-violation complaints against entire countries (*see below left*).

Corporate control of the seed sector

Patents on the genetic resources for food and agriculture accelerate corporate control of the seed sector. Patents promote the consolidation of global seed and agro-chemical businesses, concentrating power over seeds and seed choices in a very few hands.

Six multinational corporations – Aventis, Dow, Du Pont, Mitsui, Monsanto and Syngenta - are buying up the local seed markets in the developing world. They now control:

- 98% of the global market for patented genetically modified (GM) crops
- 70% of the global pesticide market
- 30% of the global seed market

Multinational corporations are acquiring local seed companies in developing countries in anticipation of monopoly rents once TRIPS is fully enforced. Seed is the first link in the food chain. Whoever controls seed controls the food supply. The top 10 seed companies control approximately 33% of the US\$23 billion seed trade worldwide. DuPont and Monsanto

⁹ Parker, J. The StarPhoenix, <http://www.canada.com/saskatoon/starphoenix/info/business/story.html?id=96546490-0E9E-4E8F-BA0C-8872AC98F1AB>

¹⁰ http://www.knoxnews.com/kns/state/article/0,1406,KNS_348_1951203,00.html

¹¹ Dow Jones Business News, Thursday 12 June; http://biz.yahoo.com/djus/030612/1018000754_1.html

together control 73% of the U.S. seed corn market.¹² An ActionAid's study in Brazil shows that Monsanto controls 60% of the corn seed market (post IPR). 40% of U.S. vegetable seeds come from a single source. The top five vegetable seed companies control 75% of the global vegetable seed market.

Corporate domination of 'life' patents and agricultural research

Agricultural biotechnology multinationals have filed thousands of patents on plant varieties¹³. By manipulating just one gene of a living organism, a company can be declared the sole owner of an entire plant variety, and sometimes an entire species. For small farmers patenting their seeds and plant varieties is not a possibility since the cost of patenting an invention ranges from around US\$5000 - US\$23,000.

Multinational companies claim that IPRs stimulate investment, research and innovation in agricultural and food products. By requiring IPR protection and mandatory breeders' rights for new plant varieties, TRIPS provides incentives to 'innovate' amongst those who have the considerable financial resources necessary to pursue these rights. There are no similar incentives for plant conservation or breeding amongst indigenous farming communities. Furthermore, while patent protection has stimulated research amongst the largest corporations it has had the opposite effect on public research bodies and small companies.

Increasingly, access to new agricultural technologies is legally restricted by a complex pedigree of patented gene traits. For example, one of Pioneer Hi-Bred's genetically engineered insect-resistant corn hybrids requires access to 38 different patents controlled by 16 separate patent holders.¹⁴ The control of patented genes and traits has not only created legal barriers that make it difficult or

impossible for small companies or public sector researchers to gain access to new agricultural technologies, it has also made such research extremely expensive, since if patented processes or traits are employed, royalties must be paid.

Clearly private research is driven by the demand for profits. As such it is unlikely to focus on the needs of poor farmers in developing countries. 80% of public research is oriented to farmer's needs compared with only 12% of corporate research.¹⁵ In a recent study, the authoritative Washington based research group IFPRI notes that public sector investment into agricultural research and development was one of the top three factors lifting millions out of poverty in India and China.¹⁶

Reducing BioDiversity

Traditionally, poor farmers reduced the risk of total crop failure by planting a wide range of crop varieties. Their use of seeds with differing traits allows future generations to select and breed plants that are best adapted to changing environmental, economic and social pressures.

In contrast, intellectual property laws, by encouraging the development of seeds with a large commercial potential have led to an increase in monoculture and the reduction of environmental heterogeneity. This poses a danger to farmers and food security because of the increased risk of wholesale crop failure inherent in agriculture using such a narrow genetic base. For most developing countries, widespread crop failure spells nothing less than disaster.

A recent UNDP report on trade¹⁷ also highlights the gender dimension of the impact of IPRs on biodiversity. Women are the primary users and protectors of biodiversity. They produce 50% of all food in the world and are also responsible for collecting food, fodder, fuel and water. Privatisation

¹² Hope Shand. Intellectual Property Enhances Corporate Monopoly and Biosefdom, July 2002. <http://www.mindfully.org/GE/GE4/Intellectual-Property-MonopolyJul02.htm>

¹³ TRIPS states that plant varieties must be protected either through patents or sui generis systems

¹⁴ Shand, H.J. (2002), Fatal Harvest: The Tragedy of Industrial Agriculture, Environmental News Network, Berkeley, California

¹⁵ RAFI, In search of Higher Ground. The Intellectual Property Challenge to Public Agricultural Research and Human Rights and 28 Alternative Initiatives. The Occasional Paper Series - Vol. 6. No. 1 September 2000.

¹⁶ IFPRI, http://poverty.worldbank.org/files/1150_PresentationSFan.pdf

¹⁷ UNDP (2003), Making Trade Work for People

of biological resources directly affects women, who lack resources to purchase them and are left relying on shrinking and increasingly degraded common property resources.¹⁸

Pirating indigenous knowledge and resources

TRIPS has made it possible for companies to patent and exploit the traditional knowledge and local genetic resources (plants, medicines, etc) of poor communities worldwide. Instead of harnessing this knowledge for the benefit of all, companies are using it for their own profit.

Claiming private property rights on plants, processes and knowledge developed over centuries by generations of farmers or traditional healers, raises serious questions about the application of the concept of 'prior art' in international patent regimes. Indeed, such behaviour can be viewed as a form of intellectual property theft.

Key issues in current negotiations at the WTO

At a time when the TRIPS Agreement is under review at the World Trade Organisation,¹⁹ the specific review of Article 27.3(b) that deals with patents on food and agriculture, which began back in 1999, is still underway due to a lack of consensus amongst WTO members.²⁰

TRIPS Article 27.3(b) requires countries to grant patent protection to micro-organisms, non biological and microbiological processes. WTO members must also protect plant varieties either through patents or through an effective *sui generis*²¹ system or a combination of both. Most developing countries have opted for the *sui generis* protection of plant varieties taking into account their agricultural development and farming practices.

The Doha Declaration stated that work in the TRIPS Council on the reviews of Article 27.3(b) and Article 71.1, as well as on any other implementation issues,

For thousands of years, the San people of the Kalahari desert in South Africa, Botswana, Namibia and Angola have chewed the hoodia, or 'xhoba' plant, on hunting TRIPS because they had learned that it had appetite suppressing qualities. However, CSIR, a public research institute in South Africa, together with Phytopharm, a UK-based company successfully patented the plant's key constituents. These companies then sold the rights to develop and market the resulting drug to Pfizer, a huge pharmaceutical multinational, for US\$21 million. The San bushmen were not consulted and received no benefit: their traditional knowledge was effectively stolen.

Working with BioWatch in South Africa, ActionAid brought global attention to the San's case. Helped by this campaign, the San's rights to benefit sharing from the use of their traditional knowledge have been recognised. While this agreement represents a breakthrough, concerns remain. Firstly, although the sums involved could be substantial, the percentage the San will receive is less than 0.003 % of net sales. Secondly, the San's rights were only recognised once an international campaign was underway.

What is needed are multilateral rules that enforce the rights of communities and countries to prior informed consent before traditional knowledge is appropriated and benefit sharing arrangements when it is used for profit.

¹⁸ UNDP *ibid*

¹⁹ Zambia has raised several important points relating to full review including the need to examine the extent to which the transfer of technology has taken place, the costs of implementing the Agreement and its implications in developing countries and particularly LDCs.

²⁰ The TRIPS Council was due to report to the Trade Negotiations Committee (TNC) by December 2002 but with discussions deadlocked, the Chair of the Council opted instead to deliver a verbal report to WTO Director-General Supachai.

²¹ Literal meaning is 'of its own kind', implying that the law can be tailor made for that particular product

should examine the relationship between the TRIPS Agreement and the UN Convention on Biological Diversity, the protection of traditional knowledge and folklore, and other relevant new developments that member governments raise in the review of the TRIPS Agreement (e.g. food security). It adds that the TRIPS Council's work on these topics is to be guided by the TRIPS Agreement's objectives (*Article 7*) and principles (*Article 8*), and thus must take development fully into account.

Extensive discussions have taken place in the TRIPS Council regarding these issues. Over time, the position of the European Union (EU) has moved, but the US remains opposed to developing country proposals.

No patents on life

Developing country governments have expressed clear concerns regarding the implications of the TRIPS Agreement for farmers' livelihoods and food security, national development and for the moral and social cohesion of their societies.

In June 2003, the African Group at the WTO restated their position 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". Farmers groups and civil society organisations around the world have supported this position under the loose banner of the 'no patents on life' coalition.

The African Group are seeking a revision to Article 27.3(b) to prohibit patents on life forms, but the EU argues that no modification or clarification is required because TRIPS already allows members sufficient flexibility to modulate patent protection as a function of their needs, interests or ethical standards. They claim that Article 27.3(b), in conjunction with Article 27.2 (exclusion from patentability of inventions the commercial exploitation of which is necessary to protect public order or morality) and Article 27.1 (patentability criteria) provide developing countries with considerable leeway.²²

However, given the historical stance taken by the US on TRIPS, it is by no means certain that actions taken within this 'leeway' would not be challenged at the WTO, not least as a result of pressure exerted by multinationals.

Sui generis

TRIPS states that countries are free to protect plant varieties either through patents or through a sui generis option. The International Union for the Protection of New Varieties of Plants (UPOV) was developed as a sui generis system for the protection of new plant varieties in Europe in the 1960s to suit the needs of European agriculture and farming because, at that time, patents were not considered appropriate to protect plant varieties. The flexibility for developing countries in terms of what should constitute an effective sui generis system should be maintained and it should not be equated with UPOV.

The African Group in their June 2003 submission to the TRIPS Council reiterated that "Members have the right and the freedom to determine and adopt appropriate regimes in satisfying the requirement to protect plant varieties by effective sui generis systems...that provide appropriate and effective protection for the rights and knowledge of farmers, as well as indigenous peoples and local communities in a manner that suits the circumstances of Africa and possibly other developing members".

The EU agrees that, "Members have a considerable degree of flexibility in determining how their legislation meets the standard of effectiveness, thus allowing them to design a protection regime that is appropriate to their specific national situation". It has accepted that "although the UPOV Convention meets the standard of effectiveness in Article 27.3(b), other protection models may be equally effective".

²² IP/C/W/383, 17 October 2002

Farmers' Rights threatened

In India, over 85% of seed requirements are met by the farming community themselves, the remainder being supplied by both the public and private sector. This makes the country an attractive untapped market for the international seed industry.

However, the profits of multinational seed producers are dependent on strong protection of their proprietary seeds. The International Seed Federation (ISF) has been vocal in criticising India's Plant Variety Protection and Farmers Rights Act which gives farmers the right to save, use, exchange and sell farm-saved seed. ISF members are strongly opposed to any 'farmer's privilege' going beyond the provisions of the 1991 Act of the UPOV Convention, that is, within reasonable limits in terms of acreage, quantity of seed and species concerned and subject to the safeguarding of the legitimate interests of the breeders in terms of remuneration and information. According to the ISF, any national legislation that goes further in authorising farm saved seed without reasonable limit would not be an effective sui generis system in the meaning of the article 27.3(b) of the TRIPS agreement.²⁵

Farmers' Rights

The TRIPS Agreement requires protection of breeders' rights but is silent on the issue of Farmers' Rights. A number of developing countries have made submissions in this regard to the TRIPS Council reaffirming the contribution made by farmers in developing countries agriculture and the

importance of protecting their rights to save, use, exchange and sell farm-saved seed.

The Africa Groups states that "seed saving and exchange as well as selling among farmers, are rights and exceptions that should be ensured as matters of important public policy."²³ Furthermore, they recognise that effective protection for plant varieties as proposed by TRIPS should also be appropriate and effective for the farming populations in Africa who are breeders and conservers of plant varieties.

The EU have now accepted that 'farmers' exemptions which allow farmers to save, use, exchange or sell seeds of protected varieties or seeds could be permissible, under certain circumstances, under Article 27.3(b) or Article 30 of TRIPS. They believe that the special situation of developing countries could be addressed by specific exceptions allowing subsistence farmers or small farmers to save, replant, exchange, share and resell seed, provided they do not use the commercial denomination of the variety. Farmers with significant commercial interests should remain subject to more stringent rules.'²⁴

TRIPS and the Convention on Biological Diversity

The 1993 Convention on Biological Diversity (CBD) is a legally binding international treaty which states (inter alia) that nations have sovereign rights over their genetic resources and these can only be removed subject to prior informed consent.²⁶

Furthermore, the CBD states that such access must give rise to benefit-sharing between the community or country of origin and those using the resource. Thus, under the provisions of the CBD, a patent on genetic material would only be allowable if the resources were acquired with national approval.

²³ Africa Group submission to the TRIPS Council, IP/C/W/404, 26 June 2003

²⁴ IP/C/W/383, 17 October 2002

²⁵ <http://www.worldseed.org/FSSe.htm>

²⁶ CBD parties have the liberty to decide whose consent is needed - that of communities where the material is collected, or that of the government.

Although all WTO members participating in discussions at the TRIPS Council acknowledge the rights and obligations conferred by the CBD, there are diverging opinions regarding how these relate to TRIPS provisions and the best mechanisms for their enforcement.

Brazil and India have been leading developing country attempts to harmonise the TRIPS Agreement with the provisions of the CBD. Along with other developing countries²⁷ and supported by the African Group, these countries have made several submissions demanding a mandatory requirement for patent applicants to disclose the origin of biological material or associated traditional knowledge. They point out that preventative measures are crucial in curbing biopiracy because once bad patents are granted it is prohibitively expensive for developing countries to challenge them in the courts. Brazil and India are clear that they want an amendment to TRIPS that would ensure that proof of disclosure, prior informed consent and equitable benefit sharing would be a condition to acquiring patent rights.

Noting that TRIPS should also be harmonised with the International Treaty on Plant Genetic Resources, the African Group is looking at solutions that 'go beyond a purely legal context' to deal substantively with the crux of the issues raised within the framework of the review. This counters the EU's use of legal opinion to validate their claim that there is no legal conflict between CBD and TRIPS.

The EU and Norway are willing to accept a mandatory disclosure requirement to keep track, at global level, the use of genetic materials in all patent applications, as long as the legal consequences to the non-respect of the requirement lie outside the ambit of patent law.²⁸ This contrasts with the Brazil and India paper, which states that "Leaving the consequences of disclosure of source of origin, and evidence of PIC (prior informed consent) and fair and equitable benefit sharing outside the realm of patent law would render these requirements ineffective."

Switzerland has made similar proposals regarding national patenting laws but does not see a need to amend the Agreement.

However, the US opposes such a move. It argues that such an amendment would contradict the criteria of patentability and would create an additional burden for patent applicants. The US argues that TRIPS is the wrong forum to ensure disclosure, prior informed consent and benefit sharing which it believes would be better enforced through contracts between individual nations and bio-prospectors. As China has pointed out, the US takes an optimistic view of the candour of bio-prospectors and the ability of developing country governments to regulate their behaviour.

Traditional and indigenous knowledge

The inclusion of traditional and indigenous knowledge in the TRIPS debate is relatively new and has been prompted by its increased exploitation of traditional knowledge in the search for, and use of, genetic materials whose commercial value now runs into millions of dollars.

The disclosure issues discussed above extend to traditional knowledge in so far as genetic resources incorporate such knowledge and/or such knowledge is collected along with the genetic material and forms part of the background to a patentable invention.

The Africa Group suggested in their June 2003 submission²⁹ that the TRIPS Council adopt a decision on protecting traditional knowledge. The Africa Group proposed modifying TRIPS Article 29 to include the requirement for equity, disclosure of the community of origin, and demonstration of compliance with domestic procedures for all such patent applications.

²⁷ IP/C/W/403, 28 May 2003

²⁸ IP/C/W/383, 17 October 2002

²⁹ IP/C/W/404, 26 June 2003

The US believes that traditional knowledge should be removed from the agenda in the TRIPS Council and believes that the issue should instead be discussed at the World Intellectual Property Organisation (WIPO).

While supporting the development of an international *sui generis* model for legal protection of traditional knowledge in WIPO and arguing that this would be the right forum in which to negotiate a protection regime³⁰, the EU believes that preventive approaches to avoid misappropriation of traditional knowledge and to stimulate the sharing of benefits could be dealt with by the TRIPS Council.

Geographical Indications

According to the WTO, “The use of a place name to describe a product - a ‘geographical location’ - usually identifies both its geographical origin and its characteristics. Therefore, using the place name when the product was made elsewhere or when it does not have the usual characteristics can mislead consumers and it can lead to unfair competition. The TRIPS agreement says countries have to prevent the misuse of place names”.

Extension of geographical indications to products other than wines and spirits has been a controversial issue in the TRIPS Agreement discussions for sometime. The extension of geographical indication to products other than wines and spirits is likely to have losers and winners amongst developing countries as well as local communities.

Non-violation

One of the most important TRIPS issues that will be on the table at the WTO Ministerial in Cancún will be the issue of non-violation. Article 64.2 of the Agreement temporarily banned non-violation disputes for the first 5 years of the Agreement, that is, until 1999. Countries have differing views about whether this ban continues. Many developing countries believe that the non-violation clause

should be removed altogether and others want to see the moratorium on non-violation complaints extended.

In principle, disputes in the WTO involve allegations that a country has violated an agreement or broken a commitment. However, under non-violation clauses, countries can complain to the Dispute Settlement Body if they can show that they have been deprived an expected benefit because of some governmental action, or lack of it, even if there has been no violation of the agreement. The purpose of allowing these ‘non-violation’ cases is to preserve the balance of advantage struck during multilateral negotiations.

For the biotech and agro-chemical multinationals, non-violation provisions provide a method for enforcing patents that avoids the extremely difficult task of doing so at the level of individual small farmers. Should these multinationals conclude that the introduction of patented seeds is not yielding the expected financial benefits in a particular country, they could lobby their home country to institute a challenge at the WTO.

Non-violation could also be problematic in cases where members have different opinions regarding ‘pro-farmer’ legislation allowing farmers the right to save and sell their seed. Other WTO members could challenge such countries laws.

Canada argues that allowing non-violation complaints would increase uncertainty and deter WTO members from introducing new and perhaps vital social, economic development, health, environmental and cultural measures. Their reasoning relates to the “ill-defined benefits” of intellectual property protection under TRIPS. In order to justify a non-violation complaint, the complaining country would have to argue that it is being deprived of some benefits. Canada argues that although countries agree that intellectual property protection is beneficial, they differ considerably in how they define the benefits.

³⁰ IP/C/W/383, 17 October 2002

Developing countries have reiterated their “general support to the position that there should not be non-violation complaints in the TRIPS Agreement” in June 2003.³¹ In their submission on this issue³², developing countries stated that applying non-violation and situation complaints to the TRIPS Agreement is undesirable and threatens to limit use of the flexibilities inherent in the Agreement to secure objectives relating to public health, nutrition, the transfer of technology and other issues of public interest in sectors of vital importance to socio-economic and technological development.

The EU has been willing to discuss a possible extension, but the US is blocking any such moves because it wants the moratorium removed completely from the Agreement.

Restricting flexibility – TRIPS Plus

A looming threat to the current flexibilities in the Agreement that are being fought for could be undermined by the bilateral trade and aid agreements as well as more restrictive multilateral agreements.

WIPO's patent agenda with its three pillars (patent law treaty, patent cooperation treaty and substantive patent law treaty) could make it simpler to file worldwide patents, harmonise the domestic laws further as well as possibly remove the exemptions currently allowed under the TRIPS Agreement – in other words a one stop shop for a single global patent. Civil society groups as well as developing countries need to be vigilant and effectively counter the WIPO patent agenda. Any intellectual property system developed nationally or internationally must at the minimum acknowledge and respect the following three positions:

- No patents on life
- Protection of Farmers' Rights to save, use, exchange and sell farm saved seed
- Ensure that the provisions of TRIPS are consistent with the CBD provisions on prior informed consent and equitable benefit sharing

³¹ Khor, M., SUNS, 10 June 2003

³² Peru, Argentina, Bolivia, Brazil, Colombia, Cuba, Ecuador, Egypt, India, Kenya, Malaysia, Pakistan, Peru, Sri Lanka and Venezuela; IP/C/W/385, 4 October 2002

ActionAid's recommendations

ActionAid calls on WTO members:

- To amend Article 27.3(b)³³ to clarify that:
 - all living organisms, including plants, animals and parts of plants and animals, including gene sequences, and biological and other natural processes for the production of plants, animals and their parts, shall not be granted patents.³⁴
- Until the amendment is taken forward, countries should be free not to grant patents that run counter to their public order and morality as laid out in Article 27.2.
- To confirm that the present requirement to patent micro-organisms, micro biological and non-biological processes does not include patents on the whole plant or plant varieties. National governments are free not to grant patents on plant varieties that have been created by a patented process consistent with Article 27.3 (b) of the TRIPS Agreement, which exempts plant varieties from patentability.³⁵
 - To confirm that farmers' rights to save, use, exchange and sell farm saved seed for both protected and patented varieties will be recognised and respected, consistent with Article 27.3(b) and with Article 30³⁶ of the TRIPS Agreement.
 - To confirm that nothing in the TRIPS Agreement prevents members from taking measures to ensure food security and safeguard farmers' livelihoods in accordance with the principles and objectives of the TRIPS Agreement as laid out in Articles 7 and 8.

- To confirm that countries are free to select their own sui generis system as outlined in Article 27.3b, so that the rights of farmers to save, use, exchange and sell seeds and other propagating material are protected, consistent with the International Treaty on Plant Genetic Resources and common practice in most parts of the world.
- To ensure that the TRIPS Agreement is consistent with the provisions of the Convention on Biological Diversity and the International Treaty on Plant Genetic Resources for Food and Agriculture on prior informed consent and equitable benefit sharing. This should be applicable to all protected varieties and for those products that remain patentable after the amendment proposed by the African Group prohibiting patents on life forms.
- To ensure that traditional knowledge becomes part of the solution to support the development of indigenous and local communities and not merely as a commodity for corporations to profit from. ActionAid believes that discussions on protection of traditional knowledge should take place outside the intellectual property fora such as WIPO and the WTO.
- To conduct further assessment on the likely costs and benefits of the extension of geographical indications to products other than wines and spirits.

³³ The article of the Agreement on Trade Related Aspects of Intellectual Property Rights dealing with patents on life forms

³⁴ As proposed by the Africa Group in their submission to the TRIPS Council, IP/C/W/404, 26 June 2003

³⁵ Plant Varieties are (under the EPC) prohibited from being patentable as direct results of a patentable process in Europe. Rule 23c - Biotechnological inventions shall also be patentable if they concern: (a) biological material which is isolated from its natural environment or produced by means of a technical process even if it previously occurred in nature; (b) plants or animals if the technical feasibility of the invention is not confined to a particular plant or animal variety; (c) a microbiological or other technical process, or a product obtained by means of such a process other than a plant or animal variety. <http://www.european-patent-office.org/legal/epc/e/r23c.htm#R23c>

³⁶ Article 30 states that 'Members may provide limited exceptions to the exclusive rights conferred by a patent, provided that such exceptions do not unreasonably conflict with a normal exploitation of the patent and so not unreasonably prejudice the legitimate interests of the patent owner, taking account of the legitimate interests of third parties

ActionAid calls upon developed country governments:

- To commit to providing developing country governments the space and resources needed to make use of the existing flexibilities in the TRIPS Agreement without fear of trade sanctions or aid cuts. Furthermore, they should commit that developing countries will not be pressurised into adopting TRIPS plus standards either through multilateral fora or through bilateral pressure.
- To ensure a central role for agricultural research by the public sector and small farmer groups in their agricultural support plans to offset the imbalances arising from private research driven by commercial needs and the desire to expand intellectual property portfolios. Investment in public sector research is crucial in developing good quality seeds for small farmers in developing countries and thus ensuring continued food security.

ActionAid and Azione Aiuto are members of the ActionAid Alliance, a network of non-governmental development organisations working together to promote structural changes to eradicate injustice and poverty in the world. ActionAid Alliance members are ActionAid (UK), ActionAid Hellas (Greece), ActionAid Ireland (Ireland), Aide et Action (France), Ayuda en Accion (Spain) and Azione Aiuto (Italy). ActionAid Alliance's members have the regular and active support of more than 600,000 EU citizens, and its programmes reach over 9 million people in more than 40 countries in Africa, Asia, Latin America and the Caribbean.

The Food Rights Campaign is an ActionAid initiative that works with women and men to secure their right to food at local, national, regional and international levels. The campaign works in sixteen countries across Asia, Africa, Latin America and Europe.

ActionAid is a unique partnership of people who are fighting for a better world – a world without poverty.

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