The TRIPS review at a turning point?

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Will there finally be some adjustments to the TRIPS life patenting regime as a result of the Cancun trade summit? After more than four years of stalemate between developed and developing countries, there are signs of movement. One comes from discussions at the World Trade Organisation about whether patent applicants have to disclose – make public – where they got genetic materials or leads on inventions involving traditional knowledge. The other comes from a parallel debate about whether and how the patent system recognises traditional knowledge in its own right. The Africa Group at WTO has added a new dimension to the debate by tabling a proposal to put traditional knowledge formally under TRIPS rules.

Under intense pressure from the US and Europe, developing countries very reluctantly accepted to include a section on intellectual property rights – TRIPS (Trade-Related Aspects of Intellectual Property Rights) – as part of the WTO agreement in Marrakech in 1994. Especially controversial were the provisions about patents on life forms in Article 27.3(b), which were only agreed on condition that they would be reviewed before they came into force in developing countries in 2000.

This review was slow in starting and has been languishing for years – with a clear North-South divide producing interesting discussions but no progress. One bold move came at the beginning of the review from the Africa Group, which said that all patenting of living matter should be banned worldwide under TRIPS, and that any regime for plant varieties should protect the rights of farmers and local communities. Another bold move came from the United States, which proposed that no kind of inventions at all should be excluded from patenting, not even plants and animals. Along these lines a stalemate soon resulted.

In the past months however, with the Cancun trade summit on the horizon, it seems as if some last ditch efforts are being made to try to get something achieved. From the side of the industrialised countries, the European Union and Switzerland have both indicated willingness to negotiate some kind of mechanism for disclosure of the origin of genetic materials or traditional knowledge used in patented inventions. But neither are willing to make it a mandatory requirement, nor to link it to benefit sharing. Even their notion of origin is limited to a general indication of “geographical area”, in the case of the EU, or simply “source”, in the case of Switzerland.

A number of developing countries, on the other hand, are reaffirming and strengthening their demand for a strong disclosure of origin mechanism which would require not only detailed information about who provided the materials or the knowledge used, but also positive proof of benefit sharing and of prior informed consent.

At the same time, the Least Developed Countries (LDCs) and the Africa Group are reiterating their call for a complete reversal of the TRIPS language on life patenting, so that patents on life forms would be banned instead of required.

But Africa has also tabled a completely new proposal which aims to bring traditional knowledge (TK) formally into the ambit of TRIPS. The Africans want to add to the TRIPS Agreement a whole section on TK. It would mainly specify under what conditions TK can and cannot be the subject of IPRs, but it would also address how TK should be respected and protected in a more general sense.

In this paper, GRAIN will comment mainly on the proposals about disclosure of origin and on the African proposal about TK. In both cases, developing countries are on politically dangerous ground. There is broad consensus about the need to limit the incidence of biopiracy by introducing more checks and balances in IPR systems. But there is also a very real risk that even limited reforms in this direction will serve to legitimise, expand and strengthen intellectual property rights on life. That would leave local communities who depend on biodiversity and traditional knowledge for their livelihood in a worse position than they are at present.

Disclosure of origin

When companies or research institutes apply for patents related to biological materials or traditional knowledge, should they be required to disclose where they got the materials or the knowledge?

The answer would seem to be self-evident. Unless an applicant provides this information, how can a patent office even decide whether an invention has occurred, and not merely an appropriation of already existing knowledge, i.e. biopiracy? Yet there is absolutely no agreement among governments on this simple principle, let alone on how such a requirement should operate.

Developing countries started pushing for a rule on disclosure of origin in TRIPS because of the increasing incidence of patents granted in foreign countries on biopirated materials or knowledge. At present, the only possible remedy is to challenge the patent in the courts or before the patent office of the country where it was granted. This is difficult and expensive, and although large countries like India have sometimes succeeded in having such patents invalidated, the legal avenue is not in most cases a practical option. If TRIPS forced patent applicants to say where they got genetic resources or leads on inventions, it is assumed that fewer biopiracy patents will be granted. This is because disclosure of origin will help to demonstrate whether the patent applicant has actually invented what is claimed, or whether the invention lacks novelty or inventiveness. Proposals to this extent have come from a very large number of developing countries in Africa, Asia and Latin America.

Developing country governments have a strong case also because the Convention on Biological Diversity (CBD) clearly recognises the right of parties, i.e. states, to control access to genetic resources and to receive a share in any benefits from their commercial use or development.

The submissions from developing countries have typically argued for a strong and effective disclosure of origin mechanism which must be:

- mandatory: all countries must implement it as a requirement for patent grant;
- linked to patentability itself: no relevant patent should be granted without disclosure, and any patent should be cancelled if it is shown that the disclosed information was false;

- linked to prior informed consent (PIC): it must be shown that the materials and knowledge that fed into the development of the invention were acquired with the consent of at the least the government agency in charge of granting access to these things; and
- linked to benefit sharing: it must be shown that whoever accessed the materials or the knowledge complied with the provider country's benefit sharing regulations.

There is little doubt that this kind of rule would make a real difference in reducing biopiracy. This is indirectly confirmed by the counterproposals put forward by European countries, which lack all four key characteristics. The perpetrators of biopiracy rightly fear multilateral regulation.

However, even if the proposals from developing countries were accepted in full, they would not solve the problem of biopiracy.

One major flaw in the current proposals is that nothing would guarantee a fair deal for the local communities who are the real providers of resources and knowledge. No proof of their consent or of benefit sharing with them would be required, only that of government agencies. (This is of course a flaw shared with the CBD, which also leaves this to national governments.)

Worse, an agreement on disclosure of origin will probably be viewed as a capitulation on the life patenting issue – the very crux of the controversy. Civil society organisations from many parts of the world have been quick to point out that making disclosure of origin a condition for patenting plants or animals contradicts the fundamental principle of "no patents on life".[1]

Traditional knowledge into TRIPS?

Over the last couple of years, a number of developing countries, in particular Africans and Latin Americans, have argued for the creation of a specific legal instrument for the protection of traditional knowledge. This discussion has taken place both at WIPO (the World Intellectual Property Organisation, a UN body) and at WTO. At the WTO's Doha Ministerial in 2001, traditional knowledge was formally added to the agenda of the TRIPS review going on in the TRIPS Council.

The Africa Group has now issued a concrete proposal on TK to the TRIPS Council.[2] It tries to do several different and partly contradictory things at once (see box). On one hand, it tries to set limits on the IPR system as it affects traditional knowledge. It does this by proposing amendments to TRIPS which would:

- make the mere existence of TK grounds for defeating IPRs, since novelty, inventiveness and originality will be compromised; and
- prevent IPRs on inventions derived from TK unless PIC, benefit-sharing and several other access requirements have been met.

[1] See for example the declaration from the civil society conference on "TRIPS, Biodiversity and Traditional Knowledge" organised by EED in Hyderabad, India, on 18-21 June 2003 (available soon at http://www.grain.org/publications/trips-july-2003-en.cfm).

[2] "Taking forward the review of Article 27.3(b) the TRIPS Agreement", Communication from the Africa Group, WTO, IP/C/W/404, 26 June 2003. Available at http://docsonline.wto.org.

However, at the same time the proposal defines TK as being itself a form of intellectual property. This is in sharp contrast to the prevalent understanding among TK holders themselves, who usually regard TK as an integral part of a cultural and spiritual context, not simply as property to be bought and sold. No doubt elements of TK are sometimes commercialised, but when this happens many would say that it also loses its character as TK. At any rate, defining TK as intellectual property undermines and denies its inherent value, its complexity and its central function in many societies.

Perhaps as a consequence of the redefinition of TK as intellectual property, the Africa Group also proposes to give WTO responsibility for a number of measures to develop the protection of TK and the respect for TK rights. Most of the measures listed are not related to intellectual property protection, but to safeguarding reasonable conditions for TK holders to continue using and developing their cultural heritage and traditional economic activities without unwanted commercial interference.

Framing people's rights to traditional knowledge as intellectual property rights is simply wrong, and entrusting their development to a body with a narrow focus on trade and intellectual property rights would be a very dangerous step to take. The privatisation and commercial appropriation of TK through intellectual property rights is one of the major *threats* to TK systems, not a route to safeguarding them.

Part of the confusion is inherent in the word 'protection', which means very different things in intellectual property law and in ordinary usage. 'Protection' of intellectual property means enforcing private, exclusive economic rights to a specific creation in order to prevent others from using or reproducing it. 'Protection' of traditional knowledge, on the other hand, necessarily implies protecting the whole social, economic, cultural and spiritual context of that knowledge so that it continues to be produced and reproduced. The African proposal unfortunately uses the word interchangeably in both senses.

There is no doubt a need to introduce limits and conditions on the use of IPRs on inventions derived from TK. This is something which belongs in WTO, because TRIPS is a major cause of the problems that patenting creates for TK holders. And it can be done by amending TRIPS.

But there is an even more urgent need to strengthen the protection of TK in the broader, non-IPR sense. Without better safeguards, many TK systems are threatened by extinction. But this is not a matter for a trade body like WTO, nor for an intellectual property body like WIPO. Both are very much part of the problem, not of the solution. This is instead a matter for intergovernmental bodies with other mandates and competence, such as the UN Human Rights Commission, UNDP (UN Development Programme), CBD or UNESCO (UN Educational, Scientific and Cultural Organisation). All of these have already done valuable work in the field and at least in principle are in a better position to approach the matter in a more holistic manner.

More power to TRIPS? Or less?

Developing country governments are right to demand adjustments of TRIPS to reduce the negative impact on genetic resources management and traditional knowledge systems. But they are wrong if they believe that the WTO is the place to look for 'protection' of genetic resources or traditional knowledge in anything other than a private intellectual property

sense. The WTO mandate is very narrowly concerned with promoting increased international trade. If protecting TK means 'modernising' traditional systems by tearing them apart and transforming their elements into tradable intellectual property, then the WTO is the right place to do it. If not, then TK should be kept out of WTO.

Developing countries resisted TRIPS from the very outset because they saw it as a threat to sustainable development on their own terms. They were correct, and are now increasingly supported by critical assessments from UN bodies and other independent analyses, as well as by growing public opinion both North and South. In the past couple of months alone, several major studies and analyses have been produced by agencies such the UK IPR Commission[3], the UK Royal Society[4], UNDP[5] and the Human Genome Organisation[6] which call for changes in intellectual property law or limitations on its use to stop its ill effects on research, innovation and development. It would be a supreme irony if at this very moment developing countries would turn around and yield more power to TRIPS.

The solution remains to be found in the opposite direction. TRIPS should be amended to reduce obligations on developing countries to adopt full fledged IPR regimes in all fields of technology and to allow broader exceptions. At a minimum, biodiversity and traditional knowledge should be excluded from TRIPS. Nothing new has happened to change the conclusion that life patents will bring no benefits to developing countries, if indeed to anyone. The Africa Group and LDCs are correct in reiterating their principled resistance to life patenting.

The positive agenda – developing better safeguards for traditional knowledge systems and tools through which communities can control the development and use of genetic resources – must be pursued elsewhere. Less power to TRIPS and more to other actors for whom sustainable development, community rights and cultural diversity are truly on the agenda – that is the recipe, not the other way around.

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[3] Commission on Intellectual Property Rights, *Integrating intellectual property rights and development policy*, London, September 2002. Available at http://www.iprcommission.org.

[4] Royal Society, *Keeping science open: the effects of intellectual property policy on the conduct of science*, London, April 2003. Available at http://www.royalsoc.ac.uk/templates/statements/StatementDetails.cfm?statementid=221

[5] United Nations Development Programme, *Making global trade work for people*, Earthscan, London 2003. Available at http://www.undp.org/dpa/publications/globaltrade.pdf.

[6] Helen Pearson, "Human Genome Organisation calls for open-access sequence repositories", *Nature*, 30 April 2003. Available at http://www.nature.com/nsu/030428/030428-10.html.

Key features of the Africa Group proposal on traditional knowledge for TRIPS (June 2003)

The Africa Group has made a special proposal to open the TRIPS Agreement to traditional knowledge (TK) in the form of a Decision for WTO members to adopt. The decision says that:

- TK is a category of intellectual property rights to be recognised and protected under a special regime within TRIPS; members may adopt *sui generis* systems for more extensive protection of TK.
- Rights relating to TK under TRIPS shall include the rights of communities or traditional practitioners to: decide whether or not to commercialise their knowledge; honour any sanctity they attach to their knowledge; give prior informed consent for any access or intended use of their knowledge; receive full remuneration for their knowledge; and prevent third parties from using, offering for sale, selling, exporting or importing their knowledge and any article or product in which their knowledge is input unless all requirements of this Decision are met.
- Local communities and national authorities shall have exclusive rights in perpetuity to any information documented or entered into public registers, as well as the exclusive rights to prevent any access or use they have not authorised or any application that is inconsistent with the rights of local communities under this Decision.
- The existence of TK in any form or in any stage defeats novelty, inventiveness and originality for the purpose of patent or copyright protection.
- No intellectual property rights shall be granted on anything derived from or based on TK or *in situ* genetic resources without compliance with the CBD, and any breach of this principle will result in nullification of the IPRs.
- A Committee on TK and Genetic Resources shall be established within WTO to oversee the implementation and development of this Decision and any related instruments.