The African Proposal to the WTO: We Have The Right Not to Patent Life and to Recognize Community Knowledge.

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Introduction

The African Group at the WTO presented its proposal for the revision of TRIPs to the TRIPs Council that met on 4-5 June 2003. In its proposal, it restated its known opposition to the patenting of life and proposed that community Rights be protected under TRIPs as an intellectual property rights regime.

Patents and the South

Most patents are held by Northern corporations and used primarily to control the market as a monopoly rather than to get wealth through charging royalties.[1,2]

The World Bank has published a table showing a breakdown of the number of patents per country, categorized into those belonging to applicants resident in that country, and those belonging to non-resident applicants[3]. Data are given for 91 of the 132 countries. Out of the total number of 3,125,603 patents recorded, 301,177 (or 9.6%) are registered in developing countries, the rest (2,824,426) being in industrialized countries. Of these, only 6956 (0.2% of the total and 2.3% of those registered in developing countries) belong to residents. The non-residents, who apply only to control export markets in developing countries are 294,221 or 97.7% of the total in those countries.

The picture for Africa viewed separately is worse. Out of its total of 138,284 registered patents, only 759 (0.5%) are by residents and 137,523 (99.5%) are by non-residents, aimed at keeping the African market captive. It should also be realized that even when an applicant is indicated as resident, it does not mean that that applicant has a substantive production operation in Africa; the country of residence often merely hosts import operations.

The failure of developing countries to look after their own interests is even more glaring in area of community inventions and other innovations. On the whole, innovation in these countries is by indigenous and local communities, but their own national laws recognize only the private IPRs. This is the reason why they allow IPRs of non-resident entities from industrialized countries to control their internal markets. Worse still, these very entities from industrialized countries simply take the technologies developed by communities of the developing countries and IPR protect them privately as their own.[4,5]

Many countries and regions have been making moves to fill in this legal void and protect Community Rights. In its 1998 Summit in Ouagadougou, Burkina Faso, the Organization of African Unity endorsed a model law to this end and recommended that its Members pass national laws based on it.

Patenting Life and Life Processes: the Heart of the Problem

Article 27.1 of TRIPs stipulates that an invention, whether a process or a product, in any field of technology, can be patented provided that it is new, involves an inventive step and is capable of industrial application. A new process made, for example, to produce aspirin would be accepted by everybody as an invention. The term "product", when qualified by "new" would also sound easy to identify. For example, a synthetic pain killer that does not at all occur in nature is a new product, an invention and thus patentable. But aspirin is not new, and thus the aspirin made by the new process should not be patentable. How about the chemical in a medicinal plant that has just been purified and characterized? Is it new? It is certainly new to science but is it new to nature? When we say that "invention" is patentable but "discovery" is not, do we not exclude from patentability such "newness" as is characteristic of the chemical just extracted from a plant? Therefore, many of the drugs pharmaceutical corporations produce would not have been patented since they occur in nature, and most of them have previously been in use, albeit not chemically characterized, by local and indigenous communities as the active principles in traditional medicine. Even the genes that are introduced into other species through modern biotechnology are not invented, but merely discovered in other species and only after that have they been introduced. For this reason, only if a novel gene that does not occur in any organism were constructed *de novo* from synthesized molecules would there be a biotechnological invention. Therefore, the "field of

technology" referred to in TRIPs should not include modern biotechnology. These arguments have been given in greater detail elsewhere[6].

When a question as to whether a product has been made by a patented process or not arises, Article 34 of TRIPs makes it possible to put the onus of proving that the process used was not the same one as that patented, upon the person who is in possession of the product. This may not sound unreasonable when we think of the process as a machine or a chemical reaction. Problem arises with patented living things which, through the natural process of reproduction, can transfer their genes into non-patented individuals, thereby not only contaminating the non-patented individuals, but also criminalizing their owners. There has been such a case in Canada with genetically modified rapeseed contaminating non-modified rapeseed and criminalizing a farmer.[7]

The Aim of the African Group

The African Group's proposal to prohibit the patenting of "plants, animals, microorganisms, essentially biological processes for the production of plants or animals, and non-biological and microbiological process for the production of plants or animals", if adopted, would remove the need for the legal protection of Community Rights in so far as genetic resources, biological knowledge and technologies are concerned since one universal trait of community life has been that genetic resources, knowledge and technologies are given free to any one who wishes to use them. Their emphasis that Article 27.3 (b), which makes the immoral patenting of life compulsory, is a contravention of Article 27.2, which allows countries not to patent if found "necessary to protect *order public* or morality..." would indicate that they are not expecting to achieve the prohibition of the patenting of life globally, but in the South, and indeed in any country that so wishes. It is in this context that their proposal to add a third paragraph to Article 29 of TRIPs, which requires that a patent applicant discloses "the country and area of origin of any biological resources and traditional knowledge used or involved in the invention, and to provide confirmation of compliance with all access regulations in the country of origin", can became consistent with the prohibition of patenting life. They are thus taking a credible position in asking that each country be allowed to decide for itself as to whether it wants to patent life or not and, at same time, to protect the interests of indigenous

and local communities globally from being robbed by those who choose to patent life and will thus not reciprocate in giving access.

The attempt at the protection of the interest of indigenous and local communities is presented as a draft "Decision on Traditional Knowledge", which includes the rights to genetic resources, knowledge and technologies embodied in the Convention on Biological Diversity, the International Treaty on Plant Genetic Resources for Food and Agriculture and the African Model Law for the Protection of the Rights of Local Communities, Farmers, Breeders and for the Regulation of Access to Biological Resources.

The African position is, therefore, consistent and necessary if TRIPs is to serve not only the industrialized countries, but the whole world. Otherwise, it would remain an instrument that breeds disaffection in the poor South which keeps getting further impoverished through established international law. It is such disaffection that is responsible for the current global problems.

Footnotes

1. Carlos M. Correa, 2000. Intellectual *Property Rights, the WTO and Developing Countries*. Third World Network: Penang, Malaysia.
2. Lesser, W., 1997. *The role of intellectual property rights in biotechnology transfer under the Convention on Biological Diversity*. Web: http://www.isaaa.cornell.edu.
3. Gaia Foundation, 1998. "Community Rights, Patents on Life and Benefit-Sharing Schemes – Fair and Equitable?". Gaia Foundation: London.
4. World Bank, 2000. *Entering the 21st Century, World Development Report 1999/2000*. World Bank: Washington, pp. 266-267.
5. Rural Advancement Foundation International, 1997. "Biopiracy Update: The Inequitable Sharing of Benefits", *RAFI Communique*.
6. Shiva, V., 1997. *The Plunder of Nature and Knowledge*. Research Foundation for Science, Technology and Ecology: New Delhi.
7. Gerster, R, 1998. “Patents and development”. *The Journal of World Intellectual Property*, Vol. 1, No. 4.