

TRIPS REVIEW MUST RESTORE BASIC RIGHTS

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The agreement on Trade Related Intellectual Property Rights (TRIPS) which contains the harmonised regime for intellectual property protection that has to be accepted by all WTO members is currently undergoing a review.

At the conclusion of the Uruguay Round in 1994, it was decided that five years after, TRIPS would have to be reviewed. The protests at Seattle and the derailment of the business -as- usual tenor of the WTO negotiations put paid to that plan in 1999. The review was shelved and has been resumed only now. Meetings of the TRIPS Council have started. It is crucial for developing countries to be aggressive and proactive. At stake is something as fundamental as the human rights of ordinary people, to food, nutrition and health security.

The TRIPS agreement, the focus of simmering discontent in large sections of society across both the developed and developing world, has emerged as the flashpoint of the World Trade Organisation (WTO). There is much that is wrong with the WTO but nothing highlights the inequity and injustice of the global trade regime quite as much as the demand to patent life forms. IPR restrictions on seeds and medicines dictated by the large corporations with interests in biotechnology and pharmaceuticals have come to symbolise all that is rotten with the international trading regime which has moved far away from any concept of free and fair trade. For the poor of the developing world the WTO is increasingly becoming an instrument of repression, pushing the poor into ever deeper poverty. As if the Uruguay GATT Round was not bad enough, the WTO came riding on its back, exacerbating the inequities of the earlier system and jettisoning even the few concessions that had been extracted by developing countries in the earlier negotiation.

Now even those sections that were not openly, or at least aggressively, critical of the anti- poor conditionalities of the GATT/ WTO, are beginning to murmur that things are going too far. There is talk that the TRIPS in fact violate the human rights of people. The United Nations has taken a strong position. The August 2000, Resolution of the UN Sub-Commission for Protecting Human Rights states that *"actual or potential conflicts exist between the implementation of the TRIPS Agreement and the realisation of economic, social and cultural rights in relation to, inter alia, impediments to the transfer of technology to developing countries, the consequences for the enjoyment of the right to food of plant variety rights and the patenting of genetically modified organisms, 'bio-piracy' and the reduction of communities' (especially indigenous communities') control over their own genetic and natural resources and cultural values, and restrictions on access to patented pharmaceuticals and the implications for the enjoyment of the right to health..."* With that it's official!

There is broad consensus that TRIPS in its present form is unacceptable because it violates the fundamental rights of people. There is much that is wrong with TRIPS. It goes against all the rights and opportunities that have been granted to local communities in the Convention on Biological Diversity (CBD) and it strikes at their ability to engage in sustainable development in a self reliant way. In short,

- The TRIPS Agreement hinders the preservation of and respect for the knowledge, innovations and practices of indigenous and local communities.
- . The TRIPS Agreement hinders access to and the fair and equitable sharing of benefits arising from the utilisation of genetic resources. It enables biopiracy since it does not require disclosure of the source of biological materials which are sought to be patented.
- .The TRIPS Agreement creates conditions that will hinder the transfer of technology to developing countries.
- . The TRIPS Agreement is likely to be detrimental to the conservation and sustainable use of biological diversity

The distortion of the original (at least professed) agenda of the General Agreement on Trade and Tariffs (GATT) and then the WTO, has been breathtaking in its impunity. Public interest goals have been subverted, the interests of the poor fully disregarded and structures placed atop the original, to make the trading regime the preserve of big money. The mandate of the GATT was that trade should serve as an instrument for "raising standards of living, ensuring full employment and a large and steadily growing volume of real income" for its member states. To achieve these desirable goals, Members had to lower their trade barriers and open their economies.

WTO took on a still more noble face. Not only did it take on the laudable goals of the GATT, it extended them with express commitments to poverty and environmental safety. According to the WTO, trade should be expanded "in accordance with the objective of sustainable development" and further "ensuring that" developing countries and especially the least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development." Trade was supposed to protect and support the basic human rights of people and become an instrument of their development.

What we have as against these objectives is the following. Developing countries have either willingly, or under pressure lowered their trade barriers, sometimes even removing them, reduced their tariffs and have been forced to open their economies. On the other hand, WTO, specially TRIPS supports agricultural growth that is far from sustainable. Patents on biological materials strike at the root of self reliance in agriculture, denying rural and tribal communities the ability to even earn their livelihoods. The food sources of the poor are threatened, their access to bioresources, the mainstay of their subsistence economy is being cut off as corporations corner these resources to fuel their biotechnology industry. The share of trade, far from increasing and becoming a vehicle of development, has decreased. For the least developed countries, representing 20 % of the global population, their share of international trade has decreased from the pitiful 0.6 % to half that, a miserable 0.3 %. All special safeguard mechanisms that were incorporated for the protection of the poor, like the clauses on Special and Differential Treatment are under severe pressure and are being phased out. So much for the WTO's commitment to protecting the rights of the poor.

Civil society organisations across the world are mobilising opinion to intervene in the TRIPS review process so that pressure is built up to introduce meaningful changes. Gene Campaign along with the Centre for Environment Concerns had organised a

public workshop in Hyderabad some months ago. The Andhra level workshop brought together several groups and people working on agriculture, environment, human rights and rural development, in the districts. Gene Campaign is planning other state level programs to revive the TRIPS debate and broaden the base for demands for changes.

Basically, members of civil society and concerned citizens from all walks of life are coming together to demand equity and justice from the World Trade Organisation. The specific demand is an overhaul of the chapter on Trade Related Intellectual Property Rights which has provisions that strike at the very heart of the fundamental right of every citizen of the world to have access to food, health and the means to earn a living. TRIPS have been particularly callous to the rural and tribal communities of the world because it threatens their right to food and livelihoods by attacking their resources and taking them away. Civil society is seeking changes that will stop the poor in their lands from being marginalised any further. They want modifications in TRIPS that will allow the rural and tribal communities to uphold and exercise their right to food and livelihood. There is a very simple way of bringing greater justice in to the TRIPS process. That is to make TRIPS compliant with the Convention on Biological Diversity (CBD).

The following have been identified as the changes that must be negotiated during the review of TRIPS. India must play a strong and enabling role in this process and help to coordinate the efforts of developing countries to secure basic rights for their citizens.

1. The review of Article 27.3(b) must be one of a *substantive* nature, not merely of implementation, as is being mooted. We need to revisit the provisions and correct the fundamental inequities contained in them, not just make a char of which country has implemented what.
2. A clause for Disclosure will have to be introduced in TRIPS. Members should revise Article 27.3 (b) and/or Article 29 of the TRIPS Agreement, so that the source of patented material has to be disclosed. This should prevent biopiracy. The requirements for patent applications should be revised to help prevent misappropriation of knowledge regarding genetic resources and to ensure consistency with access and benefit sharing regimes of the CBD. WTO
3. A substantive review of Article 27.3(b), should be completed and the review seek to harmonise the TRIPS Agreement with the CBD and the International Undertaking on Plant Genetic Resources (IUPGR) where rights of farmers and communities are recognised.
- 4.*The period for implementation of Article 27.3(b). Should logically be extended till after a substantive review is completed.
- 5.*The exceptions to patentability under Article 27.3(b) should be expanded.
At a minimum, members must have the discretion not to grant plant and animal patents that the current language of Article 27.3(b) allows. The discretion to refuse patents over life is essential to give Members who are also CBD Parties the flexibility they need to experiment with approaches for implementing CBD.
- 6.* The flexibility that the GATT allowed in defining *sui generis* systems for the protection of new plant varieties should be retained . Members should have the right to determine their own *sui generis* system. UPOV (Union for the Protection of New

Plant Varieties) which is a platform for regulating sui generis systems like Plant Breeders Rights in industrial countries and of which no developing country is a member, is not mentioned in the TRIPS agreement. The current effort to make UPOV the only "effective" sui generis platform acceptable under TRIPS is unjustified and must be abandoned.

India has already drafted a sui generis legislation called the Plant Variety Protection and Farmers Rights Act. This is not in line with UPOV. Gene Campaign has together with CEAD, drafted an alternative treaty to UPOV called the Convention of Farmers and Breeders (CoFaB). The UNDP Human Development Report has termed CoFaB a far superior option for developing countries than the restrictive UPOV. CoFaB or something similar should form the basis for a sui generis platform for developing countries, not UPOV.

7. A "sustainability review" provided under Article 71.1 of the TRIPS Agreement should be undertaken straightaway to assess the impact of TRIPS on the capacity of developing countries to engage in sustainable growth and development.

The TRIPS Review should ensure that implementation of the TRIPS Agreements supports its objectives, as set out in its Preamble and Article 7, as well as the broader objective of the WTO to promote trade "in accordance with the objective of sustainable development". In the event that the TRIPS Agreement fails to meet these objectives, or is found inconsistent with the successful implementation of international agreements, such as the CBD, WTO Members should amend it, as permitted by Article 71.1 and Article X of the WTO Agreement. As required in Article 16(5) of the CBD, Parties must cooperate to ensure that IPRs are supportive of, and "do not run counter" to, the objectives of the CBD.

8.* A moratorium must be put on unilateral pressure and challenges at the WTO dispute settlement system. WTO Members should agree to a moratorium on any challenges against developing countries until the reviews under Articles 27.3(b) and 71.1 are complete, and any extended transitional periods are over. Further, WTO Members should refrain from exercising unilateral pressure that aims to have developing countries implement intellectual property regimes that offer a higher level of intellectual property protection than required by the TRIPS Agreement. The EU has been having bilateral consultations with countries like Jordan and Pakistan and recommending that they accept UPOV 1991. This is unfair and undesirable.

9. CBD objectives must be taken into consideration in the WTO dispute settlement process. In the event of a conflict, the TRIPS Agreement must not interfere with a Party's legitimate implementation of its CBD obligations.

10. And finally, the Human Rights concerns that have been raised with respect to TRIPS, should be taken on board. The TRIPS should be modified so that it does not violate the rights of ordinary citizens.