

The Arguments For and Against the TRIPS Agreement

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Following the culmination of the Uruguay Round of trade talks, the World Trade Organisation entered into existence on 1 January 1995. Alongside agreements on goods (GATT) and services (GATS), the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) forms one of the three pillars of the new multilateral trading system (WTO, 2008: 24). While it represents the first comprehensive and enforceable global agreement on Intellectual Property Rights (IPRs), it has since its inception been the subject of much criticism (Sell & Prakash, 2004). This paper outlines the main arguments both for and against TRIPS, and in so doing provides a sceptical assessment of its legitimacy and effectiveness. It begins, firstly, with the principal arguments in favour of TRIPS, before critically examining the recent history of the agreement and IPRs more generally. The paper then moves on to discuss the impact of TRIPS on economic development, and concludes that criticism of the agreement is broadly persuasive.

The WTO position

The standard line in support of TRIPS stems from recognition of the contemporary significance of the knowledge economy, and private intellectual property (IP) as a major component of international trade (WTO, 2008: 39). Disagreements over, and absence of, IPR protection constitute significant non-tariff barriers to trade, and TRIPS is the result of the need for a robust multilateral framework to replace what was an ineffective patchwork of pre-existing IPR agreements[i] (Matthews, 2002: 10-12). For the first time, therefore, TRIPS has put in place a global minimum standard of IP protection that all WTO members must adhere to. This covers copyrights, trademarks, industrial designs, geographical indications, patents, integrated circuit designs, trade secrets, and anti-competitive contract restrictions. Like other WTO agreements, it applies the fundamental principles of non-discrimination – most-favoured-nation treatment (no discrimination between trading partners) and national treatment (giving foreigners the same treatment domestically as one's own nationals).

Various wider benefits to society are said to accrue from the imposition of temporary monopolies and other limitations that result from private IPRs (WTO, 2008: 39; CIPR, 2002: 14-18). By instituting legal protection – tackling piracy and counterfeiting – the disclosure of new knowledge and creativity is encouraged, and the significant costs associated with the creative process (such as with research and development) can therefore be recouped and remuneration earned. Innovation is thus both rewarded and further promoted. The scope and reliability offered by a global IPR regime should not only stimulate domestic innovation, but the security offered to developed world patent holders and others can also encourage foreign direct investment, technology transfer and licensing, and the diffusion of knowledge to the developing world (Matthews, 2002: 108-111). TRIPS is therefore able to play a significant role in the overall promotion of trade and economic development.

The agreement also takes care to recognise the differing position of member states vis-à-vis their relative economic status, administrative capabilities, and technological base. As per other WTO agreements, developing countries were afforded special and differential treatment as detailed in Part VI of the agreement under 'transitional arrangements'. While developed countries had to ensure compliance by 1 January 1996, developing and post-communist countries were instead allocated a further four years to achieve this (with another five years granted for new patents products). Under Article 66.1, least-developed countries (LDCs) were given until 2006 to enact TRIPS, with the possibility of further extensions; the 2001 Doha Declaration on TRIPS and Public Health has also subsequently allowed a further ten years for pharmaceutical products for LDCs (WTO, 2001). Article 66.2 meanwhile

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explicitly encourages technology transfer from developed states to the LDCs so as to assist in the establishment of a viable technological base, and Article 67 obliges developed countries to provide technical and financial assistance to facilitate implementation of the agreement.

A further advantage inherent within TRIPS is the 'flexibility' offered to all members in interpreting various articles of the agreement (Vandoren, 2001). Article 27.3, for example, allows members to exclude certain inventions and subject matter from patentability, and permits the protection of others – such as plant varieties – through compatible *sui generis* systems. The Doha Declaration reiterated that developing countries have the right to grant compulsory licences or allow parallel importing for pharmaceutical products under Article 31 to tackle 'national emergencies or other circumstances of extreme urgency' – and that public health crises such as HIV/AIDS, malaria, and other epidemics can be declared as such (WTO, 2001).

Crucially, TRIPS also represents a significant improvement on previous IPR agreements in having considerable monitoring, enforcement, and dispute settlement capabilities (Matthews, 2002: 79-95). A TRIPS Council – comprising all WTO members – reviews national legislation and implementation of the agreement. Should serious disputes occur, any member may ultimately bring a case to the WTO's Dispute Settlement Body, which has the power to issue punitive trade sanctions to ensure compliance. Successful cases launched by Ecuador and Brazil show that the dispute resolution mechanism works for both developed and developing countries alike (MIP, 2010). TRIPS is therefore seen by its supporters as representing an enforceable global system of IPR protection that plays an essential role in the modern global information society. By rewarding and encouraging innovation, it facilitates international trade, spurs economic growth, and enables technological progress and the dissemination of knowledge, ultimately benefiting both producers and users throughout the developed and developing world.

A critical perspective

Carla Hesse (2002: 26) usefully reminds us, however, that "the concept of intellectual property – the idea that an idea can be owned – is a child of the European Enlightenment". Unlike physical property, knowledge is generally not rivalrous and can be shared without loss of utility: one person's contemporaneous use of it does not detract from another's ability to do so. The institution of intellectual property therefore involves the 'construction of scarcity' where none necessarily exists (May & Sell, 2006: 17-20). As noted above, granting of private IP rights is intended to protect and encourage innovation; a balance is consequently to be struck between the private rights of ownership and the public good of shared knowledge, for the broader welfare of society.

The TRIPS agreement is however predicated on a particular conception of intellectual property as an idea, and internationalising this can be problematic. This may be in the narrow sense that different societies afford greater priority to the public good on a variety of issues, and in the broader sense that some forms of 'traditional knowledge' (TK) as shared amongst indigenous communities do not conform to the codified Western model of individual and exclusive ownership (Michalopoulos, 2003: 17-18). The recent progress made in biotechnology-based products has notably highlighted this contrast: for Western advocates, modern genetic research aimed at increasing human welfare is entirely respectable 'bioprospecting', a form of IP that fits within the TRIPS framework. For indigenous peoples, by way of contrast, the patenting of TK resources such as neem extract^[ii] can be seen as a form of 'biopiracy', and represents the "disingenuous repackaging of traditional knowledge in order to secure monopoly rents for the biopirate while excluding the original innovator from a claim of these rents" (Isaac & Kerr, 2004). TRIPS, crucially, does not currently provide an agreed interpretation of either what constitutes traditional knowledge, or how it should be protected (CIPR, 2002b: 73-87).

It is also vital to note that the concept of intellectual property as contained within the TRIPS agreement stems from a particular interpretation of IPRs that has developed within the Western tradition over the last few decades alone. Intellectual property was initially highlighted an international issue in the 1960s and 1970s by the G77 group of developing countries, when as part of the push for a New International Economic Order they unsuccessfully sought the dilution of existing IPR protection in order to narrow the technology gap with the developed world (May & Sell, 2006: 155-156). This debate, however, also galvanised various corporate actors in the USA – and to a lesser extent in Europe and Japan – who were becoming increasingly concerned about losses stemming from trade in counterfeit

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goods.

While pressure from the likes of the chemical, pharmaceutical, and entertainment industries led to a 'silent revolution' in stricter IPR protection within the USA from the 1970s onward, corporate lobbyists also sought to move the issue to the global level (Archibugi & Filippetti, 2010). American government policy-makers, concerned about the country's trade deficit and loss of competitiveness, became increasingly receptive to their lines of argument. International IPRs as based on protection and exclusion, rather than competition and diffusion, were thus promoted as a means of maintaining a comparative advantage in emerging knowledge-based, high-technology sectors of the global economy. Business groups succeeded in placing IP protection on the Uruguay Round agenda, and – through claiming unrivalled expertise in arcane 'technical' matters of IP legislation – they managed to play a key role in shaping the terms of the agreement (Matthews, 2002: 7-28).

Developing countries, on the other hand, had little input, although while many were initially sceptical of the proposals, resistance to a deal on TRIPS was gradually overcome (Drahos, 2002). The promise of greater access to agricultural and textile markets, economic coercion via threat of American sanctions, the potential development of restrictive bilateral IPR agreements, and an overall lack of awareness of the content of proposals, all played their part (May & Sell, 2006: 157-158). TRIPS therefore reflected the interests of particular global corporate actors, and it is only through acknowledgement of this that it can be properly understood (Matthews, 2002: 4-5). It is the specific view of intellectual property as promoted by Western transnational corporations, and supported by governments, that became embedded within the agreement. The fine balance between private gain and the public good – the purpose and scope of IPRs – may therefore have been tilted too far toward the former at the expense of the latter, and the consequences of this for how TRIPS functions in spite of its stated objectives are what we now turn to.

TRIPS and development

One of the principal criticisms made of the TRIPS agreement is that it offers an inappropriate uniform standard across a diverse range of states. Developed countries generally already possess suitable levels of IPR protection, and are home to the overwhelming majority of IP rights-holders that stand to benefit from increased protection (Chang, 2001: 23). Most developing countries, on the other hand, may incur significant costs from raising domestic standards to the required level – taking scarce resources away from other crucial sectors – and from the increased payments to be made to developed world rights-holders. A 2001 World Bank report suggested that in the short term TRIPS effectively constitutes an annual \$20 billion transfer of wealth from technology-importing developing countries to technology-exporting developed countries (cited in Dutfield & Suthersanen, 2004). Similarly, Philip McCalman (2005) estimates that the beneficiaries of TRIPS are just a handful of developed countries: primarily the USA and various Western European states. Countries from India to Brazil – and even South Korea – meanwhile suffer through their reliance on technology imports. While most countries could still benefit in the long-term, McCalman argues that the advantages will nonetheless be distributed overwhelmingly amongst the leading developed countries. The Commission on Intellectual Property Rights also arrived at similar conclusions in its 2002 report on IPRs and development – assessing the argument that a stronger IPR regime would offset short-term implementation costs over the long-term, they concluded that:

“...for most developing countries with weak technological capacity, the evidence on trade, foreign investment, and growth suggests IP protection will have little impact. Nor is it likely that the benefits of IP protection will outweigh the costs in the foreseeable future. For more technologically advanced developing countries, the balance is finer. Dynamic gains may be achieved through IP protection, but at cost to other industries and consumers.”

(CIPR, 2002a: 12)

The Commission emphasised that developing countries do require different IP strategies as depending on their level of development. Contrary to the claims of TRIPS advocates, “rapid growth is more often associated with weaker IP protection” and does not start to become important until a country is well into upper-middle income category (CIPR, 2002b:22). So, while the WTO may claim to take developing countries needs into account, its emphasis on the need for a single high standard of IPRs appears to run contrary to the historical evidence. Indeed, Ha-Joon Chang

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observes of Europe and the USA that they themselves were “still routinely violating the IPRs of other countries’ citizens well into the twentieth century” (2001: 10). The flexible use of IP regimes to further economic interests was also successfully adopted by East Asian states such as Korea and Taiwan until very recently, where imitation and reverse-engineering were all considered important methods for developing technological and innovative capacity (CIPR, 2002b: 19-20). Strong IPR protection therefore appears to be a consequence, rather than a cause, of economic development.

The potential social cost of TRIPS for poorer countries has meanwhile been particularly evident over the issue of access to medicines, most notably with regard to antiretroviral drugs (Lanoszka, 2003). Before TRIPS, many countries either did not patent medicines or provided less than the robust 20-year protection subsequently introduced. Contemporary TRIPS rules, however, drive up costs to unaffordable levels by enabling monopoly pricing and excluding cheaper ‘generic’ alternatives. In 2001, by way of example, a group of 39 pharmaceutical companies took the South African government to court to prevent their use of compulsory licensing of generics, although intense public pressure did eventually force them to abandon the case (Sell & Prakash, 2004). However, the incident showed how multinational corporations attempt to use TRIPS to pursue private gain at clear cost to the public good[iii]. While some flexibilities in interpreting the agreement in light of public health concerns have since been established, as mentioned above, they often remain unused owing to cost, complexity, and the threat of trade ‘retaliation’ (O’Farrell, 2008).

The few allowances that are granted to developing countries in the TRIPS agreement can therefore be seen as insufficient, and the numerous limitations far too restrictive. As Constantine Michalopoulos (2003) notes, TRIPS does not actually offer the same range of ‘special and differential treatment’ (SDT) as other WTO agreements. Once the transition periods have expired, developing countries must implement the same rules on scope and duration of protection – regardless of circumstances – as the most advanced developed countries[iv]. Any form of *permanent* SDT is not an option: LDCs can no longer exempt sectors from protection, or reduce patent duration, as a means of addressing social or economic concerns. The flexibilities within the agreement, as seen above, therefore offer only limited room for manoeuvre.

Robert Wade (2003) suggests that as a result this constitutes a distinct ‘shrinking of the development space’: a reduction in states’ policy-making autonomy that denies them the paths to development that were taken by others before them. Furthermore, the agreement is “vague at points where vagueness benefits the developed countries, and precise at points where precision works against developing countries” (Wade, 2003: 630). The obligations of developing countries and the rights of developed are both enforceable to a far greater extent than the rights of the developing and the obligations of the developed. There is, for example, despite the clearly stated objective of Article 66.2 regarding technology transfer, little evidence of a sustained effort by developed states to honour such commitments (Moon, 2008).

Conclusion

The legitimacy and effectiveness of the TRIPS agreement is clearly vulnerable to numerous criticisms, particularly so with regard to developing countries. It is noteworthy that even prominent free trade advocates such as Martin Wolf (2005: 217) criticise the ‘hypocrisy’ of TRIPS, seeing it as a rent extraction device for many developing countries, with potentially devastating effects on education, public health, and economic development. Even within those countries who appear to gain most from the agreement, the benefits may only accrue to particular sections of society, so that “the real winners from TRIPS are not advanced countries, but rather the large corporations that pressed for its adoption” (Archibugi & Filippetti, 2010: 144). TRIPS has also not provided a solution to policy-makers’ concerns, as trade balances have continued to erode, while the recent emphasis on private rights may even serve to inhibit innovation and the spread of knowledge in developed countries in the long term (Hesse, 2002). While Archibugi & Filippetti (2010) caution against attributing too much importance to TRIPS, it is apparent that the agreement does not function as advertised. From a global perspective, it seems clear that adopting a ‘one-size-fits-all’ approach to IPRs is entirely inappropriate. A tiered system, offering more substantive special and differential treatment according to countries’ developmental needs, would have been more suitable. However, it remains to be seen whether major reform of the agreement is likely, given that TRIPS is now firmly established within the WTO system.

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[i] The main agreements – the Paris and Berne Conventions of 1883 and 1886 respectively – have been subsumed within TRIPS, as have parts of the 1961 Rome Convention and the 1989 Washington Treaty (WTO, 2011).

[ii] Neem is a tree from South Asia whose extract has long been used as a form of natural medicine, pesticide, and fertilizer (CIPR, 2002b: 76)

[iii] As Chang (2001: 15-16) notes, the industry argument that profit through such strict patent protection is critical for innovation remains unconvincing. Scientific curiosity and common humanity are often sufficient motivation, while public funds are often provided to assist private sector research, and profits can also still accrue via 'natural protective mechanisms' (e.g. imitation lag and reputational advantage).

[iv] Botov (2004) describes how developed countries had over a century – from the Paris Convention in 1883 to the WTO agreement in 1995 – to fully develop their IPR regimes, and suggests the same latitude should be extended to today's developing countries.

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