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TRIPS Agreement: From Minimum Standards to Double Standards of Intellectual Property Rights Protection in North-South Relations

Walid Abdelgawad¹

ABSTRACT

The WTO Trips agreement's basic objective of establishing minimum international standards for IP rights protection is based on a restrictive "one-fits-all" approach that denies the right to enact or not to enact intellectual property rights provisions to developing countries and least developed countries and restrict their ability to effectively adapt national laws to their own socio-economic environment and development level. Developed countries had widely benefited from this privilege when no minimum binding standards of intellectual property existed in multilateral relations. The Trips agreement stabilizes the strong inequalities in terms of bargaining power between rich and poor countries ; it also reinforces the pressure exerted by US big business firms during the negotiation process to universalize the western system of IP rights to the detriment of indigenous communities' intellectual property rights. In practice, the Trips agreement illustrates how an international agreement is to facilitate biopiracy by protecting rich countries' inventions and ignoring those from the poor ones.

KEYWORDS

WTO, Trips agreement, Developing countries, double standards, Biopiracy

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I. INTRODUCTION

From a global perspective the WTO Trips agreement has been analysed within the framework of the political economic development of a capitalist system and the quest of the United States (US), followed by the other developed countries, to preserve the monopoly of their multinational corporations on the world economic scene and to harmonize intellectual property (IP) rights starting from their own legal standards (Oddi, 1996; Aoki, 1998; Sell, 2003, McKinley, 2007).

International flows of benefits coming from the protection of the intellectual property were mainly directed to the advantage of the economies, the cultures and the wellbeing of rich countries, especially when the trips agreement was signed in 1995. There clearly exist huge inequalities between various areas of the world as for the patents' holders and the distribution of royalties' income of patents. The OECD countries (amounting to 14per cent of the world population) concentrated 86per cent of the patent applications filed in 1998; it is also worth noticing that respectively 54per cent and twelve per cent of the worldwide royalty and license fees in 1999 originated from the US and from Japan (United Nation development Program (UNDP), 2001). Actually, in 1995, the developed countries' citizens and corporations held 95per cent of the patents in Africa, almost 85per cent of those in Latin America and 70per cent in Asia (Agrawal, 2002; Deere-Birkbeck, 2010).

This situation has not substantially changed in recent years. In 2005, despite the growth of their R&D capacity, developing countries paid net US\$ 17 billion in royalties and licensing fees, mostly to IP right holders located in developed countries and ten of these latter still controlled over 90per cent of the technological output (Deere, 2009).

The WTO's Trips agreement establishes minimum standards of IP rights protection in the area of patents, copyrights, trademarks, geographic indications, industrial designs and integrated circuits layout design. The aim of this article is to analyse the double standards approach between WTO Members regarding IP rights protection and to demonstrate the misuse of the Trips agreement as a tool of discrimination against developed countries and Least Developed Countries (LDCs) by forcing them to accept IP rights standards which are irrelevant with their development needs.

2. ASYMMETRY OF BARGAINING POWER BETWEEN DEVELOPPED AND DEVELOPING COUNTRIES

2.1 THE TOO “VISIBLE HAND” OF U.S. BIG BUSINESS LOBBIES

Since the Eighties a sharp increase in the capitalist merger movement among US multinational corporations in biotechnology sector, in particular in the field of food processing and pharmaceutical industries, has been clearly displayed. The noticeable impact was the control of the global market by a small number of corporations, mainly American, and the reinforcement of their economic private power (Sell, 2003).

This statement of fact explains the reason why at the same time, in particular since 1985, the IP rights legal standards have undergone a spectacular transformation in the US following American big business's initiative which succeeded to make a common cause with the American administration. As a consequence IP was incorporated in the Uruguay multilateral negotiation Round whose final act announced the birth of the WTO in Marrakech in April 1994. Right before the Uruguay's Round, this new commercial approach to the IP integrated in the GATT-WTO system was strongly supported in the US. The Trips agreement's first draft was written by a coalition of thirteen American multinational corporations coming from several sectors (in particular biotechnology, pharmaceutical, seed, chemistry, data processing) gathered in an ad hoc committee called the 'Intellectual Property Committee (IPC)' which, among others, coordinated the position of its US members with that of the US government during the negotiations. The major US players were the following: Pfizer, Merk, Monsanto, Dupont, Bristol-Mayer, FMC Corporation, General Electric, General Motors, IBM, Hewlett-Packard, Johnson & Johnson, International Rockwell and Warner Communications.

In addition to the IPC other coalitions such as the 'Advisory for Trade Negotiations (ACTN)' and 'Business Software Alliance (BSA)', have had a considerable impact on US policy advocating the incorporation of IP rights into the WTO framework (Drahos and Braithwaite, 2000; Sell 2003; Matthews, 2002; Drahos and Braithwaite, 2004, Drahos, 2002a). Thereafter this American coalition has been supported by European and Japanese companies through methodical national networks and transborder trade associations, in particular the Chambers of commerce supported by some economists and legal scholars advocating the advantages of stronger IP protection even for developing countries. Within the framework of the negotiations, the representatives of these

industrial lobbies exerted pressures on their respective government towards the integration of IP in the multilateral trade negotiation (Drahos, 2002b; Deer-Birkbeck, 2010).

During the negotiations, the US, supported by the European Union (EU) and Japan, campaigned strongly to force all WTO members to align their national legislations on minimal protection of IP rights' standards closely modeled on their own legal concept and in favor of their corporations' interests. After long and complex discussions, the current provisions of the Trips agreement related to patent were the result of a compromise between the US and European countries. (Watal, 2001). The main objective was to set up an intellectual property rights order, which would effectively maintain and consolidate the existing monopolistic privileges of the US big business (McKinley; 2007; Sell 2003).

Because of the inequality of bargaining power and disparity in economic resources, income and influence between States, the WTO has forced the developing countries to comply with the IP rights standards enacted by the US and the EU. Several reasons underlie the weakness of some States in terms of bargaining despite their numerical superiority: the state's market power, the capacity of a state to enroll other actors in a coalition, the commercial intelligence networks, including state's trade bureaucracy and business organization (Drahos, 2003).

The Option of World Intellectual Property Organization (WIPO) as an organization naturally dealing with IP was forsaken as a result of the dominating number of developing countries' position. Actually the process of negotiation in WIPO has always been based on the principle 'one State, One vote'. For this reason, the framework of the WTO multilateral trade negotiations made it possible to call IP issues 'trade related' and facilitated the signature by developing countries of the proposals and drafts submitted by the US, the EU, Japan and Canada thanks to the common decision-making process by consensus, and in particular the so called 'green rooms' negotiating system (Adede, 2001; Drahos, 2002a, Drahos, 2002b). According to this system, a 'five plus five' group submitted a draft to a larger group ('ten plus ten') as an agreed package reflecting a consensus. The latter group put forward the agreed proposal as a consensus to a largest one and thereafter the proposal was transferred to the Ministerial Committee for formal endorsement. This system has been criticized by developing countries which could not actually take part in the negotiation (Adede, 2001; Drahos, 2002a, Drahos, 2002b, Matthews 2002). Another reason for bringing IP issues into WTO originated from the strong WTO's dispute settlement and the trade sanctions mechanism.

The outcome of these negotiations has tremendously undermined the hope that the international trade mechanism established by WTO would ascertain the

criteria of good governance. As Drahos pointed out, ‘The TRIPS process became one of the hierarchical rather democratic management. (...) The claim that the TRIPS negotiations were a model of transparency is difficult to defend. In truth, it was the transparency of a one-way mirror’ (Drahos, 2002a, 772).

2.2 UNILATERAL SANCTIONS SUCCESSFULLY BROKE DOWN DEVELOPING COUNTRIES’ RESISTANCE

At the beginning of the eighties a vast majority of developing countries were opposed to the US attempts to introduce IP rights into the Uruguay multilateral negotiations Round and shared the view that WIPO was a more appropriate forum to deal with this topic. They feared a restricted access to technology, a rise of products and drugs prices on their markets, and the loss of control of their genetic resources and traditional knowledge which are not recognised nor fully protected by western IP rights legal standards. They viewed the GATT-WTO IP negotiations as an attempt by developed countries to maintain a protectionist policy in order to strengthen their dominant position on the world market. Considering that patents are in a large amount owned worldwide by major corporations originating from developed countries, developing countries argued that offering the monopoly of IP rights in their markets necessarily favored economic interests of these foreign corporations over national interests (Watal, 2001; Drahos, 2002; Deer-Birkbeck, 2010).

Nevertheless, this resistance was broken down following the threat put forward by the US of unilateral commercial sanctions towards countries which would not follow the US trade policy. Indeed the US threatened to refer to the famous Section 301 of the 1979 US Trade Agreement Act which limits or prohibits access to the US market of products from developing countries, in particular those having what US considered to offer an ‘insufficient protection’ of IP rights. Developing countries were thus forced to submit to the Trips provisions in order to facilitate the access to American market for their textiles and agricultural products (Braithwaite and Drahos, 2000; Adede, 2001; Matthews, 2002).

Some developing countries supported the Trips agreement in the hope that the US would be satisfied with the levels of protection they provide and would put an end to their unilateral pressure to establish higher levels of IP rights protection. Nevertheless, this hope has clearly proved ill-founded (Correa, 2000; Watal, 2001), what the ‘Trips-Plus’ bilateral agreements involving the US and the EU with developing countries, obviously illustrates, as these provisions dramatically increase the minimum standards far beyond the Trips agreement’s.

At the final step of the Uruguay Round negotiations, the developing countries eventually approved the Trips agreement under the condition of its review in 1999 in order to better take into account their expectations. Except some relative progress made by the Declaration on Trips agreement and Public Health coming out of the Doha Ministerial declaration in 2001, this process of reexamination is not achieved yet, because of the lack of consensus, in particular as regard the revision of provision 27 and biodiversity protection.

2.3 WEAKNESS COMPETITION RULES AND EXPANDED IP RIGHTS PROTECTION

From the perspective of the WTO free trade model, an international agreement on IP rights without effective competition rules seems in itself a paradoxical and really problematic issue. There lies an obvious unbalance between the too weak antitrust rules and the hard IP rights protection. It is fundamental to be aware that Trips provisions related to competition rules such as articles 8.2, 40 and 31 are truly ineffective *in international relations* and unable to fight anticompetitive practices and abuse of power market committed in developing countries by multinational corporations' holders of IP rights (Abdelgawad, 2008).

Furthermore, since the Havana charter of 1948 until nowadays, because of the reluctance of US big business, the US administration has on the one hand always opposed the establishment within the WTO legal system of any binding multilateral agreement aimed at regulating competition in global markets and at prohibiting anti-competitive practices of multinational corporations. On the other hand, it has actively supported the development of soft competitive rules in other international arena, in particular at the International Competition Network (ICN). Consequently, Trips did not really pursue the goal of free market but, quite the opposite, meant to protect and consolidate exclusive rights of IP rights-holders, mainly those from developed countries, and at the same time to transfer rents from poor countries (users) to the rich ones (producers) (World Bank, 2002; Srinivasan, 2002).

3. LESSONS FROM THE HISTORY: DO AS I TELL BUT NOT AS I DO

The history of IP rights protection highlights the fact that developed countries have exploited the free access to information and the lack of compulsory international IP standards to realize technology transfer which enable them to achieve economic development. During the early time of their industrial

development, many of them had no or weak patent protection and tolerated many infringements on IP rights of others countries by nationals. They simultaneously achieved their economic supremacy through protectionist policies of high tariff, extensive subsidies and preaching free trade towards poor countries in order to capture large shares of the former's markets and to avoid the emergence of possible competitors (Chang, 2008). It is only after reaching a sufficient economic and technologic level in some vital sectors that they foresaw the opportunity of strengthening their patent laws and of opening their market to foreign products.

Economic scholars have observed that for many developed countries and for LDCs, global welfare would be lower if these countries were forced to adopt developed countries' standards than if they were allowed to have their own standards or even if no protection of IP rights was guaranteed at all (Lai and Qiu, 2003). Thus Trips agreement does actually not preserve the best social welfare interest to poor countries (Richards, 2004).

Until the end of the nineteenth century, IP protection was strictly relevant to the national area of each industrial country (Sell, 2003). Nowadays most developed countries enacted their patent laws between 1790 and 1850, followed by copyright and trade mark laws.

During the eighteenth and nineteenth centuries, each western country established and advocated IP laws of their own design and introduced the protection of the inventor only when thinking it was appropriate to do so. For example, fearing the might of the German chemical industry, the UK reformed its patent law in 1919 to prevent the patentability of chemical compounds (Drahos, 2002a).

The adoption of an IP international regime through the Paris Convention for the Protection of Industrial Property in 1883 and the Bern Convention in 1886 on copyrights did not reverse this situation. Contrary to the Trips agreement, these two conventions have not established uniform or new substantive rules nor provided high standards of IP rights protection; but they have offered to the parties a large margin of appreciation at the national level on the extent and the duration of the protection. 'The old system recognised inherent variations in the development levels of different countries' (Sell, 2003, p.12).

Even after the enactment of such a flexible international regime of IP, many industrial countries went on infringing the IP rights of foreign holders, and on opposing these international rules.

The US, the strongest advocate of the Trips agreement, waited until 1891 to acknowledge copyrights to foreigners and refused in 1886 to sign the Bern Convention sharing the opinion, as a developing country at this time, that it had the right to access to the heritage of mankind and that it benefited from the

freedom to copy in order to educate the new nation and to satisfy their citizens' socio-economic needs (Chang 2001; Chang 2008).

In the field of patents, the US had the reputation during this period of time to be the European patents piracy land. The US Office of Technology Assessment had pointed out that : '[w]hen the United States was still a relatively young and developing country, for example, it refused to respect international intellectual property rights on the grounds that it was freely entitled to foreign works to further its social and economic development', (U.S.Congress, Office of Technology Assessment, 1986, p. 228).

At the beginning of the nineteenth century, British authors and publishers complained against widespread counterfeit of British books in others countries, among which were the US where the reprinting of works of famous English writers like Charles Dickens had become a common practice (Sell, 2003).

Having the same strategy, many European countries (Germany, France, Switzerland and Russia) deepened their industrial sector by counterfeiting the inventions of other Europeans countries, in particular the UK which was pioneering the industrial revolution.

Switzerland did not provide any protection against IP until 1888, and the Swiss patent law remained weak until Germany threatened it with commercial sanctions in 1907 in retaliation to the Swiss use of its pharmaceutical inventions. This law did not cover Chemical substances until 1978 (United Nation Development Program (UNDP), 2001; Chang, 2001; Baudenbacher, 2012). German industrial representatives 'had called Switzerland a 'pirate state', the lack of patent protection a 'parasitic system' and accused the Swiss chemical industry of behaving like 'robber barons'' (Baudenbacher, 2012, p.476).

Despite the Paris and Bern Conventions, at the end of 19th century, German manufacturers discovered several ways of infringing on British trade law in 1887, sticking the stamp of the country of origin on the packaging instead of individual articles so that the final consumer purchasing of an individual product ignored the country of origin (in particular for watches), or sending some products dismounted into pieces and assembled thereafter in England (Chang, 2001).

In the field of pharmaceutical products, many European countries enacted patent laws after they had reached a certain level of technical skill in order to preserve public health requirements and protect the emerging national pharmaceutical sector. France, Germany and Switzerland respectively enacted pharmaceutical patent legislation in 1960, 1968 and 1977. (Pugatch, 2004; Juma 1999). At the end of the 19th century many European firms established themselves in Basel in order to be allowed to imitate German products and this flourishing industry was

the basis of the current famous Swiss pharmaceutical industry (Baudenbacher, 2012).

After their independence, many developing countries tried to change their IP laws inherited from colonization in order to suit their national interest, as developed countries did in the past (Drahos, 2002a; Deere-Birkbeck, 2010), but this willingness was hindered by the Trips agreement. By establishing the strictest IP minimum standards in the multilateral arena, the Trips agreement has deprived many developing countries from enjoying the same flexibility and benefits in modern times. Those standards have limited the option of developing countries who attempted to fulfill them while at the same time striving for economic development (Karayanidi, 2011).

Before the Trips agreement entered into force, most advanced developing countries, such as South Korea, Taiwan, China, Brazil and India had achieved a prompt economic growth and development with weak IP policies. For these countries, as it was the case for developed countries in the past, ‘the strengthening of IP rights occurred after the initial stages of increased growth and development’ (Bryan Mercurio, 2011, p.49). The attitude of the U.S. and of many European countries in the 19th century in IP protection area was very similar to policies currently promoted by countries like China, India, Taiwan, and South Korea.

In this connection, the UK Commission on Intellectual Property Rights observed that:

‘In fact we consider that developed countries should pay more attention to reconciling their own perceived commercial self-interest, with their own interest in the reduction of poverty in developing countries. To achieve that end, so far as possible developing countries should not be deprived of the flexibility to design their IP systems that developed countries enjoyed in earlier stages of their own development, and higher IP standards should not be pressed on them without a serious and objective assessment of their development impact’ (UK Commission on Intellectual Property Rights, 2002, p.10).

From this historical overview, five lessons which contrast with the Trips fundamental objective of harmonisation in minima can be highlighted: **i)** each industrialized country adapted its own legal system of protection of IP according to its national interests and to its development level **ii)** the technology transfer between industrialized countries did not always rest on a legislation devoting a rigorous protection of IP rights (United Nation Development Program, 2001) **iii)** The advocacy of the US and of many developed countries for the Trips agreement lies in contradiction with their own historical practice when

demanding developing countries to abide by legal standards they themselves had refused in the past at a time when they had a similar level of development or were even more developed iv) The promotion for one universal set of minimum uniform standards for all countries has revealed inappropriate and prejudicial, what an increasing number of scholars have observed through an economic approach (Lai and Qiu, 2003; Chang, 2001, Chang, 2008, Richards, 2004) and an historical perspective (AOKI, 1998; Oddi, 1996; Braithwaite and Drahos, 2000; Drahos, 2002a; Watal 2001; Sell, 2003; Lieshout, Went and Kremer, 2010; Karayanidi, 2011). v) The Trips agreement, contrary to many WTO agreements, did not acknowledge the principle of a special and differential treatment in favor of the developing countries following the hostility of developed countries. It did not graduate the obligations of WTO members according to their development level and to their socio-economic environment. Nevertheless it has established a mere transitional period respectively offering developing countries and LDCs, the opportunity to delay its implementation for five years from 1995 (i.e. until 2000) and ten years (extended until 2013 by Trips Council decision). It has also recognised duties to developed countries to create incentives for technology transfer to LDCs (article 66.2) and to provide technical and financial assistance in favor of developing countries and LDCs (article 67) (WTO, 2013).

Many of developing countries ‘viewed the extended deadlines as arbitrary and insufficient concessions in the face of the Agreement’s deeply unbalanced rules’ (Deere, 2009, p.13). Unlike developed countries, for most developing countries, implementing the Trips agreement forced them to raise their IP standards and to assume a high economic cost in connection with the legal, judicial and administrative reforms required to set up a system of intellectual property in accordance with these new standards. (Deere, 2009; Lieshout, Went and Kremer, 2010). The World Bank estimates at 45 billion a year the increase in technology license payments for these countries as a result of the Trips agreement (cited by Lieshout, Went and Kremer, 2010, p. 84). Consequently the Trips requirements have considerably increased the cost of access to technology and to new inventions for developing countries for the benefit of foreign corporation holders of IP rights.

As AOKI mentioned : ‘In agreement such as the Trade-Related Aspects of Intellectual Property Rights (...) there are serious questions as to what nations, regions, and classes of persons benefit from “free trade” whether it be scientific textbooks, bestsellers, bytes, germ plasm, or CDs’ (AOKI, 1998, p.15)

4. ARTICLE 27 of TRIPS AGREEMENT AND BIOPIRACY: Protecting inventions from rich countries rather than those from poor ones

Biopiracy may be defined as the misappropriation of developing countries' biological diversity and traditional knowledge (TK) by corporations and research institutions from developed countries. The misappropriation by bioprospectors of indigenous communities' TK enables them to locate and understand the medical and agricultural use of indigenous plants and varieties seeds. As a consequence they plunder and transfer these resources and knowledge in order to obtain, in many northern countries, after some minor genetic alteration, a protection by patents (or rights of vegetable obtaining) of their alleged "invention" (or of plant varieties). Proceeding this way, seeds and pharmaceutical companies tremendously reduce their investment cost by rubbing traditional inventions, which were already discovered, developed and tested by indigenous communities but not protected by the western and international IP rights system like the Trips agreement.

Biopiracy has largely expanded in the international arena and harmed millions of indigenous people; it has brought about for these people and their developing countries a loss of earning calculated in billions of dollars. According to studies carried out by the UNDP in 1999, even if only two per cent of royalty were charged on genetic resources and TK that had been developed by local communities in poor countries, it is estimated that the developed countries and their corporations would owe nearly 5.3 billion US dollars per annum in unpaid royalties for medical plants and farmers crop seeds (The United Nations Development Programme, 1999). Throughout the last decades, famous biopiracy cases concerned developed country's disputed patents granted for plants and TK from developing countries: *Curcuma*, *Neem*, *Ayahuasca*, *Hoodia*; *Mexican Yellow Enola Beans*, (Shiva, 1997; Mgbeoji, 2006, Robinson, 2010; Abdelgawad, 2007). More recently, *Bt Brinjal* case highlights the unauthorized access and uses of Indian biological material and TK by the US multinational seed corporation Monsanto and its Indian collaborators in violation of Indian Biodiversity Act (Abdelgawad, 2012). In practice, biopiracy acts were committed in most cases by US business actors and sometimes by European or Japanese ones.

Article 27 of the Trips agreement relating to patent is a prominent illustration of double standards in IP rights protection at the international level, in particular with regard to both aspects ; i) firstly it protects modern inventions from piracy and ignores at the same time the misappropriation of TK, biopiracy, ii) secondly,

it only recognises western IP rights concepts and does not mention customary and collective IP rights developed by indigenous communities since centuries.

According to article 27.1 'patent shall be available for any inventions (...), provided that they are new, involve an inventive step and are capable to industrial application'. This article protects only "modern" technology inherited from the industrial revolution in western countries, as the three criteria of patentability clearly show it. It embraces a Western approach of intellectual property. This provision preserves the interests of innovators in the capitalist system but does not protect the indigenous and local communities which supply the underlying genetic material and traditional knowledge. The protection of IP rights is viewed in this article from a sole mercantile view and from the private and exclusive rights of the patent holder.

This framework is in sharp contrast with the collective and intergenerational nature of TK and with the indigenous spiritual vision of the world: interests of the community, share of biological and immaterial resources, belief in the sacred character of the nature which cannot be appropriated nor exploited. The intellectual property rights are recognised only, according to article 27.1, when knowledge and innovation generate economic profits, and not in the case for TK, when the first priority is aimed at fulfilling social needs such as medical treatment and food security for the poor. Because of this narrow and unilateral definition of knowledge and innovation, the Trips agreement can be criticized for supporting Multinationals Corporation's interests and for excluding TK and biodiversity from protection (Shiva, 1997; Mgbeoji (2006); Abdelgawad 2007). The universality given to western IP rights' approach by the TRIPS agreement set up a selective process which determines what kind of innovation must be protected and who have the right to control biological resources and related TK in global markets.

Moreover, article 27 failed to recognise the customary and collective IP rights system developed by the indigenous communities since centuries to protect and safeguarded their TK.

As G. Dutfield pointed out : 'TK holders and communities are understandably concerned that one type of IPR system is being universalised and prioritised to the exclusion of all others, including their counterpart customary systems. This does not seem fair. After all, if indigenous peoples in WTO member states are required to accept the existence of patents that they are economically prevented from availing themselves of (...), why should their own knowledge-related customary regimes including property rules not be respected by others?' (Dutfield, 2006, p.24).

According to the Trips agreement, the protection of intellectual property rights in the categories recognised in western legal cultures has become a mandatory

requirement for developing countries within the multilateral trading system (Gana, 1995).

Article 27.3(b) most certainly sets up a room of manoeuvre to every WTO Member to legally provide with the protection of its own plants varieties “either by patent or by an effective *suis generis* system or by any combination thereof”; this flexibility must be used by developed countries at the national level. Nevertheless, this article does not offer any binding *multilateral* system for WTO members in order to protect TK. Article 27: 3 b) ignores the fundamental role and contribution of the local populations in the development and safeguarding of the living resources. Due to the transnational character of biopiracy acts, national rules cannot have a sufficient deterrent effect to fight effectively against the plunder of TK by multinational corporations. In addition, this article demands all WTO Members to recognise patent on alive being micro-organisms and on natural microbiological processes. The first priority of this provision is to protect foreign patents’ holders, in particular biotechnology corporations and not indigenous people who, under spiritual and ethical beliefs, oppose patents on life-forms which should be unconditionally prohibited according to their customary IP rules.

Consequently, the Trips agreement creates a favorable legal framework to biopiracy development in the international arena. On the one hand, it strongly fights against piracy of modern inventions by setting up a binding multilateral system that requires from WTO members to implement minimum standards of IP rights, to enforce IP rights under their laws and ascertains at the same time deterrent legal sanctions through the WTO’s dispute settlement system. On the other hand, article 27 obliges developing countries, rich in biodiversity, to recognise the patentability of some categories of biological resources without establishing any multilateral system for their protection against misappropriation. Indeed only inventions from rich countries and not those from poor ones are actually protected.

Contrary to the Trips agreement, article 8 of the Convention of Biological Diversity (CBD) has recognised the fundamental contribution of TK, and innovations by indigenous and local communities for the conservation and the sustainable use of biological diversity. The Trips agreement failed to share the CBD’s goals of informed consent and benefit sharing. The criteria for patentability provided by article 27 made no mention to CBD requirements.

5. CONCLUSION

This article has shown that the Trips agreement high minimum levels of intellectual property protection as a result of developed countries' negotiation power are based in reality on a double standards approach. Developed countries have imposed on developing ones and LDSc the enforcement of IP rights protection levels that they would have not themselves followed in the earlier stage of their development. Moreover, the Trips agreement supports unfair and selective "IP Rights" and "invention" concepts in favor of western IP rights system to the detriment of TK. This situation contributed to strongly fighting against piracy of modern inventions in global markets and to permitting or not condemning biopiracy. A fundamental revision of the Trips' approach has to be carried out in order to recognise TK and indigenous communities' customary IP rights systems. This would merely be a first step towards repairing the historical injustice committed by developed countries' multinationals corporations on these communities.

6. REFERENCES

Abdelgawad, W (2008), 'Les règles de concurrence dans les accords de l'OMC : le déséquilibre d'un système de libre-échange sans police de marches', in Abdlgawad, W (eds.), *Mondialisation et Droit de la concurrence. Les réactions normatives des Etats face à la mondialisation des pratiques anticoncurrentielles et des opérations de concentration*, (Paris : Litec-LexisNexis)

Abdegawad, W (2007), 'La biopiraterie et le commerce des produits pharmaceutiques face aux droits des populations locales sur leurs savoirs traditionnels', in Moine-Dupuis, I. (eds.), *Le Médicament et la Personne: Aspects de Droit International*, I. (dir.), (Paris : Litec)

Abdelgawad, W (2012), 'The *Bt Brinjal* Case : The first Legal Action Against Monsanto and its Indian Collaborators for Biopiracy', *Biotechnology Law Report* 31 (2), pp136-139

Adede, A.O (2001), *The Political Economy of The TRIPS Agreement : Origins and History of Negotiations*, 24 Biopolicy international Series, African Center of technology Sties, International Center of Trade and Sustainable Development, (Nairobi: Acts Press)

Agrawal K.C (2002), *Global Biodiversity: Conservation, Indigenous Rights and Biopiracy*, (New Delhi: Nidhi Publishers)

Aoki, K (1998), 'Neocolonialism, Anticommons Property, and Biopiracy' in the (Not-So-Brave) New World Order of International Intellectual Property Protection', 6 *Indiana Journal of Global Legal Studies* 6, pp11-58

Baudenbacher, C (2012), 'Swiss Economic Law Facing the Challenge of International and European Law', *Zeitschrift für Schweizerisches Recht* 146, pp419-673.

Chang, H.J (2001), 'Intellectual Property Rights and Economic Development. Historical Lessons and Emerging issues', *Journal of Human Development* 2 (2), pp287-309

Chang, H.J (2008), *Bad Samaritans : the Myth of Free Trade and the Secret History of Capitalism*, (New York: Bloomsbury Press)

Correa, C (2000), *Intellectual Property Rights, the WTO and Developing Countries : The TRIPS Agreement and Policy options*, (London New York: ZedBook-Third World Network)

Deere, C (2009), *The implementation Game. The TRIPS Agreement and the Global Politics of Intellectual Property. Reform in Developing Countries*, (New York : Oxford University Press)

Deere-Birkbeck, C (2010), 'Developing Countries in the Global IP System Before TRIPS: the Political Context for the TRIPS negotiations', in Correa, C. M (eds.) , *Research Handbook on the Protection of Intellectual Property under WTO Rules. Intellectual property in the WTO*, Volum I, Cheltenham-UK, Massachusettes, USA : Edward Elgar Publishing Limited)

Drahos, P (2002a), 'Developing Countries and International Intellectual Property Standards-Setting', *The Journal of World Intellectual Property* 5 (5), pp765-789.

Drahos, P. (2002b), 'Negotiating Intellectual Rights: Between Coercion and Dialogue', in Hansen, H. C (eds.), *International Intellectual Law & Policy*, Vol. 7, Chapter 82, (New York: Juris Publishing)

Drahos, P (2003) 'When the Weak bargain with the Strong : Negotiations in the World Trade Organization', *International Negotiation* 8, pp79-109

Drahos, P. and Braithwaite, J (2000), *Global Business Regulation*, (Cambridge: Cambridge University press)

Drahos, P. and Braithwaite, J (2004), 'Une hégémonie de la connaissance : Les enjeux des débats sur la propriété intellectuelle'. *Actes de la recherche en sciences sociales*, 151-52, pp69-79

Dutfield, G (2006), *Protecting Traditional Knowledge : Pathways to the Future*, (Geneva: International Centre for Trade and Sustainable development-ICTSD)

Gana R, L (1995), “ Has Creativity Died in the Third World? Some Implications of the Internationalization of Intellectual Property”, *Denver Journal of International Law and Policy*24, pp109-137

Juma, C, (1999), ‘Intellectual Property Rights and Globalization: Implications for Developing countries’, Discussion Paper n° 4, Science Technology and innovation. Center for International Development, Harvard University, Cambridge, MA, USA. Available at : <http://www.cid.harvard.edu/archive/biotech/Papers/discuss4.pdf>. (Last accessed 7 February 2013)

Karayanidi, M (2011), ‘Bargaining Power in Multilateral Negotiations on Intellectual Property Rules: Paradox of Weakness’, *The Journal of World Intellectual Property* 14 (3-4), pp265-275

Lai, E.L-C and Qiu, L. D (2003), ‘The North’s Intellectual Property Rights Standard for the South?’, *Journal of International Economic* 59 (1), pp183-209

Lieshout, P. V, Went, R., and Kremer, M (2010), *Less Pretension, More Ambition: Development Policy in Terms of Globalization*, (The Hague/ Amsterdam: Amsterdam University Press).

Matthews, D (2002), *Globalising Intellectual Property Rights : The TRIPs Agreement*, (London : Routledge)

Matthews, D (2011), *Intellectual Property, Human Rights and Development. The Role of NGOs and social Movements*, (Cheltenham-UK, Massachusettes, USA : Edward Elgar Publishing Limited)

McKinley, M (2007), *Economic Globalisation as Religious War : Tragic Convergence*,(New York : Routledge)

Mercurio, B (2011), ‘Intellectual Property Rights, Trade, and Economic Development’, in Yong-Shik Lee, et al. (eds.) *Law and development. Perspective on international Trade Law*, (Cambridge: Cambridge University Press)

Mgbeoji (2006), *Global Biopiracy: Patents, Plants, and Indigenous Knowledge*, (Vancouver-Toronto : University of British Columbia, UBC Press)

ODDI, A.S (1996), ‘TRIPS-Natural Rights and a “Polite form of Economic Imperialism”’, *Vanderbilt Journal of Transnational Law* 29, pp415-470

Pugatch, M. P (2004), *The International Political Economy of Intellectual Property Rights*, (Cheltenham-UK, Massachusettes, USA : Edward Elgar Publishing Limited)

Richards, D.G (2004), *Intellectual Property Rights and Global Capitalism. The Political Economy of the TRIPS Agreement*, (New York: M.E. Sharpe, Inc.,)

Robinson, D. F (2010), *Confronting Biopiracy : challenges, cases and international debates*, (London: Earthscan)

Sell, S . K (2003), *Private Power, Public Law. The Globalization of Intellectual Property Rights*, (Cambridge: Cambridge University Press)

Shiva, V (1997), *Biopiracy, The Plunder of Nature and Knowledge*, (Cambridge: South End Press)

Srinivasan, T.N (2002), ‘Developing Countries and the Multilateral Trading System after Doha’, Economic Groth Center - Center Discussion Paper n° 842, Yale University, pp1-37(available at (<http://papers.ssrn.com/abstract=301394>) (Last accessed 15 February 2003)

UK Commission on Intellectual Property Rights, (2002) ‘Integrating Intellectual Property Rights and Development Policy’. Report of the Commission on Intellectual Property Rights (London: Commission on Intellectual Property Rights); available at (<http://www.iprcommission.org>) (Last accessed 5 February 2013).

United Nations Development Programme-UNDP (1999), ‘ Human development Report 1999 ’, UNDP, (Oxford-New York: Oxford University Press).

United Nations Development Programme-UNDP (2001) ‘Human Development Report 2001. Making New technology Work for Human Development’, (Oxford-New York: Oxford University Press).

U.S. Congress, Office of Technology Assessment, (1986), *Intellectual Property Rights in an Age of electronics Information, OTA-CIT-302* (Washington, DC : U.S. Government Printing Office). Available at : <http://www.fas.org/ota/reports/8610.pdf> (Last accessed 5 February 2013)

Watal, J (2001), *Intellectual Property Rights in the WTO and developing Countries*, (Cambridge-Oxford University Press)

World Bank (2002), *Global Economic Prospects and the Developing Countries. Making Trade Work for the World’s Poor*, (Washington DC- New York: The Office of Publisher, World Bank)

WTO, (2013), Trips : Least Developed Countries' Priority Needs in Intellectual Property, (www.wto.org/english/tratop_e/trips_e/idc_e.htm) (Last accessed 5 February 2013)