TRIPs and Public Health, Opportunities for Doha

By Evelyne Herfkens

What should we do about the immense tragedy of the AIDS epidemic, which continues to rage mercilessly around the world, particularly in Southern Africa?

You cannot defeat AIDS with a single drug. The best treatment is a cocktail of several drugs. If one is missing, the whole cocktail loses much of its effect. I see this as a parallel to the fight against AIDS. We must attack it on all fronts at once. Openness and prevention, yes, but also more information, research, improved healthcare and access to affordable medicines. All of these are vital for our cocktail.

This comment focuses on one ingredient in the cocktail: the cost of medicines and, connected with that, of developing new drugs. In short, patents and trade-related intellectual property rights. These rights go beyond AIDS; the same facts apply to malaria, tuberculosis and many other diseases. In every case, the international community's challenge is to stem the tide of these diseases, which ruin any prospect of development for the poor.

A balanced interpretation of TRIPs has everything to do with universal human rights.

World Trade Talks

The Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPs) is on the agenda of the fourth WTO Ministerial Conference in Doha, Qatar. Before looking at TRIPs in detail I want to touch briefly on the vital framework that it is part of.

We still do not know whether Doha can go ahead. The terror attacks on Washington and New York have already forced us to cancel the Children's Summit and the annual World Bank/IMF meeting. It will be a crying shame if Doha also falls through.

The new WTO round is immensely important. A new round is the best way of opening up international trade to benefit the poor. The incipient recession makes it harder to throw the markets open, and the recent attacks will make it even more so. The IMF forecasts a decline in world trade growth from 12.4 percent last year to 4 percent in 2001. The World Bank expects economic growth in developing countries to fall from 4.3 percent to 3.5 percent. The poorest will be hit hard if this carries on. We can then abandon our hope of meeting our target to halve world poverty by 2015.

Earlier this month Professor Jeffrey Sachs wrote that a proactive trade policy was more important now than ever before to give developing countries confidence in the world trade system. Market access is part of that. But also fair and balanced TRIPs rules are really key for restoring confidence in the WTO and thereby creating the conditions for a global round of trade negotiations that really deserves the name 'development round'.

TRIPS and Health

Fair and balanced TRIPs rules mean striking a balance in intellectual property law. On the one hand, we want to provide incentives for innovation and research, and on the other hand we want to make products widely accessible. This balance is in the public interest. Fair patent rules mean more than industry's self-interest.

Where we strike the balance differs from country to country and from situation to situation. It is essential to understand that. Patents must reward real innovation and top research. The poorest countries stand to gain little from that at first; they have scant knowledge of their own to protect by patents, and when patent law comes into force they suddenly have to pay more to import knowledge in knowledge-intensive products. TRIPs shifted the global rules in favour of the industrialised countries, although the more advanced developing countries may eventually also gain from patent protection.

Many of the latter have their own drug companies, producing generic medicines. The Western pharmaceuticals industry often dismisses them as "copycat companies", but I am less negative. You could see the production of generics as an important step towards developing their own products, as well as reaching the social objective of making medicines affordable. The economist Jayashree Watal has found that patent protection would almost certainly lead to patented medicines doubling or tripling in price. This includes treatment for major diseases like AIDS in countries where patents apply.

Developing countries went along with including TRIPs in the Uruguay Round in the hope of making compensatory gains on other fronts, such as access to rich countries' markets for agricultural products and textiles. While their hopes have not yet come true, the TRIPs Agreement itself is less rigid than is sometimes suggested. Broadly speaking, it leaves countries free to protect their national health interests. Rather than the Agreement itself, the problem is how to interpret its rules. Consensus in the WTO by means of a separate declaration by the ministers, should really put an end to that problem.

Compulsory Licences and Parallel Imports

The provisions on compulsory licences and parallel imports are the key here, and the Agreement gives Members some freedom in these areas. Developing countries must be allowed to make use of it without rich countries' holding a knife to their throat. It is totally unacceptable for rich countries to apply bilateral pressure on them to be stricter than TRIPs allows, or to be stricter than the rich countries themselves. Surely the whole point of multilateral agreements is to protect countries from the bilateral jungle where the strongest always win?

I also want to stress the need to re-examine the provision that governments can issue a compulsory licence only to national companies producing predominantly for their domestic market. That shuts the poorest countries out: they have no industry of their own to give licences to. I am pleased to see the EU is trying to get the WTO members to agree to a solution and has already drawn up a legal framework to tackle this problem.

A balanced interpretation of the TRIPs Agreement has everything to do with universal human rights. The UN High Commissioner for Human Rights recently released a report, which maintained that most WTO Members are bound to implement the Agreement in the light of their human rights obligations as 111 out of the WTO's 141 Members have also ratified the International Convention on Economic, Social and Cultural Rights.

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Draft Implementation Decision Drops Action in Key Areas

Textual changes in the second draft of the Ministerial Declaration and in the revised Decision on Implementation indicate that many areas of importance to developing countries have been watered down from the previous releases on 26 September. This could threaten the possibility of any agreement at Doha, particularly given that developing countries were not fully satisfied with the initial implementation language in the previous draft to begin with (Bridges Year 5 No.7, page 7).

A 3 October General Council session on implementation geared to reach agreement on a range of 'early harvest' areas fell apart due to developing countries' numerous concerns with the text, primarily over perceived inconsistencies between the structure, language and professed aims of the draft implementation document, and the lack of specifics on certain key issues. India, for one, expressed 'profound disappointment' in the original implementation text.

The September proposal divided implementation deliverables into three Annexes: those for agreement before Doha (Annex I), those for agreement at the Ministerial (Annex II), and those to be addressed within the context of a new round (Annex III). Because no agreement was reached on 3 October, in the latest text the original 'early harvest', or Annex I, items have now been folded into Annex II.

The new draft implementation Decision has backtracked on some major developing country concerns. It has dropped 17 demands from the original text in areas such as safeguards, textiles and clothing, technical barriers to trade, and trade-related investment measures, and sent them to relevant WTO bodies for further study and analysis.

Key stipulations that made industrialised countries most uncomfortable have been deleted or weakened, including special and differential treatment in the Agreement on Subsidies and Countervailing Measures, and rules of origin in textiles. Pointing to a reason behind these changes, the United States said on 23 October that not all implementation demands were appropriate for future negotiation, particularly those on textiles and clothing and on anti-dumping. The only anti-dumping provision that does not require at least a year's further work to develop recommendations for action would oblige Members to conduct a 'pre-initiation examination' on whether circumstances have changed prior to a initiating a new anti-dumping investigation if a previous one on the same product from the same country resulted in a negative finding within 365 days.

The draft Implementation Decision would have Members agree to a work programme that could make some S&D provisions mandatory and/or more operational. Under paragraph 12 of the Decision, the WTO Committee on Trade and Development would be tasked to:

> 'identify those special and differential treatment provisions that are already mandatory in nature and those that are non-binding in character, to consider the legal and practical implications...of converting special and differential treatment measures into mandatory provisions...and to report to the General Council with clear recommendations for a decision by July 2002.'

If the Committee cannot reach consensus on whether a certain provision can be made mandatory, the work programme would authorise the CTD to make the provision more operational. Developing countries had originally requested that all S&D provisions be made mandatory.

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This, she says, means that countries must be encouraged to prevent the abuse of intellectual property rights through an effective competition policy. And that they must be encouraged (yes, encouraged) to incorporate TRIPs provisions on compulsory licences and parallel imports into their national legislation "as safeguards to protect the right to health and to access to essential drugs". Not, I would point out, to give them up, as Jordan was forced to do in order to conclude a bilateral trade agreement with the US.

This is a vital issue. The TRIPs Agreement allows plenty of leeway, but it is crucial that national legislation is in place.

These are the ingredients I think we must deal with in the separate ministerial declaration on TRIPs which is currently in the pipeline. The declaration must give developing countries the security that they can make full use of the freedom TRIPs allows in the interests of their nations' health. A failure to agree on such a declaration would be sending them quite the wrong signal.

Conclusion

The flexible interpretation of TRIPs that I call for does not amount to an attack on the pharmaceuticals industry. We are talking about perfectly legal instruments under a global, rules-based system. Industry sometimes gives the impression of seeing it as an attack, and it has a powerful lobby for a narrower interpretation.

But its arguments do not convince me. The main one is that any relaxation of patent rules will slow down research into new medicines. I have my doubts about the gloomy announcement that AIDS research has already been scaled down because of compulsory licences. Income from patent protection in poor countries is of very little importance when decisions on research investment are made. People in those countries will not be able to afford patented AIDS antiretrovirals anyway. The deciding factor is the home market in rich countries.

Industry also claims that pressure groups exaggerate the importance of patents. It says that surveys suggest that only 16 percent of AIDS drugs are patented in Africa, leaving plenty of scope for cheaper drugs. Since even these cheaper drugs are too expensive for the poor, patents have no relevance whatsoever; money is the bottleneck. Here industry is contradicting itself: one moment it says that patents do not matter, another moment it says they are vital to stimulate research.

I will be happy to continue discussing sensible differential pricing proposals with industry. It is a question of solidarity for patients in rich countries to pay what they can afford while the poor pay much less. That allows industry to get a return on its investment from the rich. But we have to make absolutely sure that cheap medicines do not trickle back into our own markets.

Another idea is for new medicines, particularly vaccines, to be developed with some public money from rich countries; a lot of health research is already publicly funded. That is another way of making sure that expensive research is not paid for out of the empty pockets of patients in developing countries. While patent protection might indeed give future generations of AIDS patients more hope, as Nefarma director Cees Visser says, that should not be a reason to give AIDS patients in poor countries less hope now. We cannot allow patents to make their lives even more difficult.

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