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# Re-thinking the trips agreement: History and analysis

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## ABSTRACT

**Since when the TRIPs agreement came into operation in 1995, it has become an item in most international fora because the agreement itself did dominate the administration of intellectual property law in both domestic and international levels, while the developed countries are so very much comfortable with the TRIPs agreement, it seems most developing countries are not. As beautiful as the TRIPs agreement is and indeed a much better avenue for the betterment and development of the application of intellectual property the world over, it is of great importance to appreciate the fact that many scholars and practitioners did make interesting commentaries on the TRIPs agreement. However, most disturbing is the conclusion by these commentators that the TRIPs agreement will not as they observed assist the developing countries in their quest for faster development. They view certain areas of its provisions as anti-development in competitive terms. This work intends to look at the TRIPs agreement in its broad form, its history and general analysis of same. However, the most fascinating aspect of the work is to analyse why a rethink of the TRIPs agreement is desirable.**

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**Key Words :** Re-thinking, TRIPS, History, Analysis

## INTRODUCTION

The TRIPS Agreement, which is one of the major international intellectual property agreements, came into force in 1995. The Agreement can be said to be the most controversial component of the World Trade Organization's "package deal" struck in 1994[1].

The few years since it entered into force have seen nothing less than an explosion of interest in intellectual property issues in international fora not previously concerned with the products of human creativity or innovation. Intellectual property is now at or near the top of the agenda in intergovernmental organizations such as the World Health Organization (WHO) and the Food and Agriculture Organization (FAO), in international negotiating fora such as the Convention on Biological Diversity's Conference of the Parties and the Commission on Genetic Resources for Food and Agriculture, and in expert and political bodies such as the United Nations Commission on Human Rights and its Sub-Commission on the Protection and Promotion of Human Rights[2].

We can therefore say that the Agreement had a lot of impact, both positive and negative, and has received many different commentaries. It has however received more negative commentary than positive, as several inherent problems have been noticed, such as there is already "a clamouring" by some parties for the agreement to be reviewed[3].

Some of the issues that have been raised[4] related to the patentability of biological inventions[5], transfer of technology to developing countries, access of developing countries to certain drugs or pharmaceutical products and many more. Will the problem(s) noticed be solved by a mere review of the TRIPs agreement? Or do the problems with the agreement go deeper than the provisions, and relate more to the history of the agreement? Do we not

1. Reichman J. H., Taking the Medicine, with Angst: An Economist's View of the TRIPS Agreement, Journal of International Economic Law, (2001), Vol. 4, p. 795.
2. Helfer R. L., "Regime Shifting: The TRIPs Agreement and New Dynamics of International Intellectual Property Lawmaking". (2004) Yale Journal of International Law, Vol. 29, p. 1. Available at http://www.ssrn.com (visited 6 April 2011)
3. For instance, there is already a Protocol adopted on 6th December 2005, as an amendment of the TRIPS Agreement. Available at http://www.wto.org/tratop_e/trips_e (visited 4 April 2011)
4. See generally, Correa C.M., Reviewing the TRIPS Agreement: Fostering the Transfer of Technology to Developing Countries. (2001). A Third World Network Publication. Available at http://www.twnside.org.sg/index.TRIPS.htm (visited 4 April 2011)
5. A problem with Article 27.3.b of the Agreement. Full text of the TRIPS Agreement. Available at http://www.wto.int/english/docs_e/legal_e/27-trips.pdf (visited 6 May 2011)

indeed have to re-think the entire Agreement especially considering its history and based on an analysis of some of its provisions?

**What is trips? The trips agreement in perspective:**

The agreement on Trade-Related Aspects of Intellectual Property Rights, (TRIPs Agreement)[6] is one of the many agreements concluded in the Uruguay Round of Multilateral Trade Negotiations (1986-1994) which also created the World Trade Organisation (WTO). The Agreement entered into force on 1 January 1995[7].

The Agreement was seen as one of the greatest achievements in the field of intellectual property[8] rights (IPR's) during the last century, and was based on certain international conventions in the field of intellectual property (IP), like the Paris Convention, the Berne Convention, and the Rome Convention, as well as the Treaty on Intellectual Property in Respect of Integrated Circuits[9].

It however provides other obligations additional to those stated in the above-mentioned conventions and the minimum standards of protection included in the agreement are concerned with the availability of almost all categories of intellectual property rights and their enforcement.[10] Also, the Agreement furthermore regulates certain anti-competitive practices in contractual licences.[11]

The TRIPS Agreement applies to all the members of the WTO, which has about 149 members. Its 149 current members account for over 97 per cent of world trade and other countries are still negotiating membership and we can say that in summary, it establishes minimum levels of protection that each government has to provide to the IP of fellow WTO members.[12] It is, therefore, a very important document, where international protection of intellectual property is concerned.

**History of the trips agreement:**

The history of the TRIPS Agreement can be better understood from an analysis of three stages that it can be said, ultimately led to the conclusion of the agreement. The three stages as presented in this paper are a summary of the factors that led to the introduction of the subject of intellectual property rights at the Uruguay Round, the mandate given to the Uruguay round and the actual discussion of the issues and negotiating system that led to the TRIPS Agreement.[13]

**The introduction of intellectual property rights issues at the launching of the Uruguay Round:**

The foundations for the Uruguay Round were laid by a ministerial meeting in Geneva in November 1982, where contracting parties agreed to a new negotiation round to begin in September 1986 in Punta del Este, Uruguay.[14] This Uruguay Round of multilateral trade negotiations was, therefore, launched at Punta del Este, Uruguay in 1986.

The need to consider intellectual property rights during the Round became important, as a result of the claim by American industries, that, they were suffering from heavy losses from the absence of adequate protection of their intellectual property rights abroad. The industries in such sectors as computer software and microelectronics, entertainment, chemicals, pharmaceuticals and biotechnology, had become concerned about the loss of commercial opportunities in other countries.[15]

6. Reichman, J. H. (n 1 above)

7. Mohammed F. B. and Mohammed H. L., "The TRIPs Agreement and Developing Countries: A Legal Analysis of the Impact of the New Intellectual Property Rights Law on the Pharmaceutical Industry in Egypt". (2004), *Web Journal of Current Legal Issues (JCLI). Vol. 2, P. 3*. Available at http://www.webjcli.ncl.ac.uk (visited 4 April 2011)

8. The term 'Intellectual property' refers broadly to the creations of the human mind.

9. Mohamed F. B. and Mohamed H. L., ( n 7 above) p.3

10. Correa C. M., *Intellectual Property Rights, the WTO and Developing Countries: The TRIPs Agreement and Policy Option*. (London: Zed Books Ltd. 2000) P. 2

11. Mohamed F. B. and Mohamed H. L., ( n 7 above) P.3

12. Watal J and Kampf. R. "The TRIPS Agreement and Intellectual Property in Health and Agriculture" In *Intellectual Property Management in Health and Agricultural Innovation: A Handbook of Best Practices* (eds. Krattiger A., Mahoney R. T., Nelsen L., et al.) ( MIHR: Oxford, U.K., and PIPRA: Davis, U.S.A. 2007). Available at http:// www.ipHandbook.org (visited 6 May 2011)

13. *See* generally, Adede A.O., "The political economy of the TRIPS Agreement: Origins and history of negotiations". (2002), P. 4-17. Available at http://www.ppl.nl (visited 4 May 2011); Gervais D., *The TRIPS Agreement: Drafting History and Analysis*. (London, Sweet & Maxwell 1998).

14. Repetto R. S. and Cavalcanti M., "Introduction to the TRIPS Agreement: Content". Available at http://www.fao.org (visited 6 May 2011)

15. Adede A.O., (n 13 above) P. 4-17.

The conclusion was that something had to be done, and the idea of taking up the issue of protection of intellectual property rights (IPRs), within the General Agreement on Tariffs and Trade (GATT) framework, began to receive support from the United States.[16]

There was, however, a general feeling, among the developing countries, that the concern with the protection of IPRs was being expressed by the American government on behalf of the industries. Therefore, all such efforts towards the establishment of an effective regime for the protection of IPRs were aimed at furthering the interest of the western industries and not those of the developing countries. This feeling was not without foundation.[17] For as, will be observed, the major beneficiaries of the protection of IPRs developed from the TRIPs Agreement, has been the very industries, in developed countries, like the USA.

Accordingly, the developing countries resisted the idea of making the question of intellectual property rights protection a subject for discussion under the multilateral trade negotiations with such strong industry influence and specific agenda. They considered intellectual property an issue that belonged exclusively within the competence of the World Intellectual Property Organization (WIPO) and pointed out their own initiatives in the 1970s to revise the Paris Convention on the Protection of Industrial Property.[18] The developing countries were thus worried about the link that may be established between the TRIPs Agreement under the GATT Forum and the existing intellectual property rights conventions such as the Berne Convention for the Protection of Literary and Artistic works,[19] the Rome Convention for the Protection of Performers, Producers and Broadcasting Organizations,[20] and the Treaty on Intellectual Property in Respect of Integrated Circuits.[21] Linking intellectual property to the negotiation under the GATT Framework was equally not enthusiastically endorsed by the European Community at the beginning, at least not until 1990.

The USA, was on the other hand, not happy with the progress made towards intellectual property rights protection within WIPO. It pointed out the failure of Conferences in 1980 – 1984 to revise the Paris Convention on the Protection of Industrial Property, and, therefore, preferred the GATT Forum for negotiating effective regime for the protection of IPRs. They pointed out that the GATT Forum provided for effective enforcement of agreements and for dispute settlement mechanisms which were practically lacking in the WIPO-administered Conventions. Thus, the USA continued with their efforts to introduce, in the GATT Forum, an item dealing with IPRs to address the problem of counterfeit products and later of copyrights piracy which had been increasing in the developing countries in the 1980s.[22]

When the GATT's Ministerial Conference convened in Punta del Este (Uruguay) 15th – 20th September 1986, to discuss the mandate of the next round of negotiations, the United States mounted the campaign to include IPRs, beyond the question of counterfeiting and piracy, among the issues for discussion under the Uruguay Round of Multilateral Trade Negotiations. The result was that the Trade Ministers at Punta del Este, coined the expression "Trade-related Aspects of Intellectual Property Rights (TRIPs)" and included it on the agenda of the Uruguay Round.[23]

The inclusion of TRIPs issues on the agenda of the Uruguay Round did not, however, mean that the developing countries had abandoned altogether, their reluctance to have intellectual property rights issues discussed under the GATT Forum.[24] We will later discover that for almost 3 years, from 1986 until May 1989, developing countries refused to negotiate an agreement on intellectual property. But finally it was not possible, politically, to avoid the discussion and the drafting of the Agreement started. For developing countries, there

16. *Ibid*.

17. *Ibid*.

18. Also referred to as the Paris Convention; Adopted on 20 March 1883 and revised at Stockholm on 14 July 1967. *See* UNITED NATIONS TREATY SERIES (UNTS), Vol. 828, P. 305

19. Also referred to as the Berne Convention; Adopted on 9 September 1886 and revised at Paris on 24 July 1971. See UNTS, Vol. 1161, P. 31

20. Also referred to as the Rome Convention; Adopted on 26 October 1961. See UNTS, Vol. 496, P. 43

21. Also referred to as The Washington Treaty, Adopted on 26 May 1989. INTERNATIONAL LEGAL MATERIALS, (ILM) Vol. 28, No.1477, 1989

22. Adede A.O., (n 13 above)

23. *Ibid*.

24. *Ibid*.

were two potential benefits in negotiating the TRIPs. First, the trade-offs; the possibility that in other areas of the Uruguay Round negotiations, developing countries could obtain benefits, for instance access to markets for textiles and agricultural products. Second, under the agreement there is a multilateral system for dispute settlement; the expectation was that, by having such a system, unilateral action by the US based on their Trade act, would be curbed.[25]

Unfortunately, for most developing countries it seems there have been less benefits than expected.[26]

**The mandate given to the uruguay round to negotiate an agreement on TRIPs:**

According to the Ministerial Declaration of 20 September 1986, the mandate of the Uruguay Round of trade negotiations included the following issues for discussion: tariffs, non-tariffs measures, tropical products, natural resource-based products, textile and clothing, agriculture, subsidies and countervailing measures, safeguards, GATT articles, multilateral trade negotiations (MTN) agreements and arrangements, dispute settlement, trade related investment measures, and trade related aspects of intellectual property rights including trade in counterfeit goods.[27]

The negotiating objectives were as follows:

- To reduce the distortions and impediments to international trade, taking into account the need to promote effective and adequate protection of intellectual property rights, and to ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade;
- To clarify GATT provisions and elaborate as appropriate on new rules and disciplines; and
- To develop a multilateral framework of principles, rules and disciplines dealing with international trade in counterfeit goods, taking into account work already undertaken in the GATT;

These objectives were to be achieved, without prejudice to other complementary initiatives that could be taken in the World Intellectual Property Organization and elsewhere to deal with the matters included in the agenda.[28]

One of the arguments for conducting the discussions on the question of effective protection of intellectual property rights within the GATT Forum (The Uruguay Round), and not in WIPO, as further explained in the next section, was advanced as follows: Under the GATT Forum, the developing countries may have opportunity to use a bargaining power and secure trade-offs in negotiating favourable terms on issues such as textiles and clothing, agriculture, tropical products and safeguards, as part of the package that included IPRs. The consideration of such trade issues clearly went beyond the limited discussion on whether or not to establish high standards for the protection of IPRs, as would be in the case of negotiations within the framework of the WIPO.[29]

By expanding the scope of issues for discussion, ranging from the TRIPs Agreement to those aimed at producing a series of agreements on the other specific areas mentioned above, the Uruguay Round was billed as presenting a unique opportunity for developing countries for achieving tangible gains at the negotiations. This argument on possible useful trade-offs in the results of the negotiations, encouraged the developing countries to assess more closely the positive and negative elements associated with their continued rejection of the inclusion of IPRs issues in the Uruguay Round. The pressure was mounting on them. With the support of the other industrialised States, the United States kept on pushing for the discussion of IPRs on the agenda of the Uruguay Round along with the new subjects such as trade in services, and related investment measures. In fact, the United Stated had already began to use is domestic law unilaterally to undertake trade retaliation against States whose practices with respect to IPRs it considered to be unfair, and made the enactment of effective legislations by developing countries for the protection of IPRs a mark of good conduct to be rewarded.[30]

Further consideration of the possible package-deal helped some developing countries to warm up to the idea of inclusion of TRIPs on the Uruguay Round agenda. But they still largely gave a rather restrictive interpretation

25. *See* "The TRIPs Agreement and Pharmaceuticals". A World Health Organization publication. Available at http://www.apps.who.int (visited b1 April 2011)

26. *Ibid*.

27. Adede A.O., (n 13 above)

28. *Ibid*.

29. Adede A.O., (n 13above)

30. *Ibid*.

of the Punta del Este mandate by: (a) finding it hard to depart from their original view that WIPO should remain the organization with competence over substantive standard setting for IPRs; (b) continuing to limit the negotiations under the mandate to counterfeit and strictly trade related issues; and (c) stressing the importance they attached to transfer of technology and developmental policies as a *quid pro quo* for intellectual property protection.[31]

Intensive lobbying and discussions on the actual commencement of negotiations on TRIPs continued between 1986 until 1989. During the Ministerial Meeting held in Montreal in December 1988 to carry out the mid-term review of the Uruguay Round the Ministers reached an agreement on eleven of the fifteen subjects under negotiation according to the mandate. However, the Ministers failed to agree on the commencement of negotiations on four areas: agriculture, textile and clothing, safeguards, and the trade related aspects of intellectual property rights, including, trade related aspects in counterfeit goods. They then decided that the Trade Negotiations Committee (TNC) should meet in Geneva during the first week of April 1989 to continue discussions and agree upon the remaining areas and review the entire package.[32]

On reaching agreement on the remaining other issues at the April 1989 meeting, the following further clarifications were made concerning TRIPs. The ministers agreed that negotiations on this subject would continue in the Uruguay Round and shall encompass the following issues:

– The applicability of the basic principles of the GATT and of relevant international intellectual property agreements or conventions;

– The provision of adequate standards and principles concerning the availability, scope and use of trade-related intellectual property rights;

– The provision of effective and appropriate means for the enforcement of trade-related intellectual property rights, taking into account differences in national legal systems;

– The provision of effective and expeditious procedures for the multilateral prevention and settlement of disputes between governments, including the applicability of GATT procedures; and

– Transitional arrangements aiming at the fullest participation in the results of the negotiations.

Ministers also agreed that in the negotiations consideration will be given to concerns raised by participants related to the underlying public policy objectives of their national systems for the protection of intellectual property, including development and technological objectives.

In respect of (d) above, the Ministers emphasised the importance of reducing tensions in this area by reaching strengthened commitments to resolve disputes on trade related intellectual property issues through multilateral procedures.

The negotiations also comprised of the development of a multilateral framework of principles, rules and disciplines dealing with international trade in counterfeit goods. It was to be conducive to a mutually supportive relationship between GATT and WIPO as well as other relevant international organizations.[33]

There was, therefore, a delay of three years between the decision to include TRIPs in the Uruguay Round in 1986 and the actual agreement to take it up for discussion in 1989, by the Negotiation Group 11 of the Trade Negotiating Committee (TNC) of the Multilateral Trade Negotiation (MTN).[34]

**The discussions on the TRIPs Agreement and the negotiating system adopted:**

The discussion on the TRIPs Agreement began with a number of legal texts prepared, first in March 1990 by the members of the European Economic Communities. The submission of a complete text of a TRIPs Agreement by the European Community, which thereby abandoned its earlier doubt about bringing the negotiation on TRIPs under the GATT framework, triggered an important phase of the negotiations. This was followed by a series of similar drafts of complete texts of TRIPs Agreement, submitted in May 1990 by the United States, Switzerland, and Japan, all of which "borrowed substantially from the Community's text." These proposals represented one approach to the negotiation on TRIPs, envisaging a single TRIPs Agreement encompassing all the areas of negotiations and dealing with all categories of intellectual property on which proposals were made. Under this approach, the TRIPs Agreement would be implemented

31. *Ibid*.

32. *Ibid*.

33. *Ibid*.

34. *Ibid*.

as an integral part of the General Agreement that was intended to produce the World Trade Organization.[35]

It was also not until May 1990 that a group of twelve developing countries (Argentina, Brazil, Chile, China, Colombia, Cuba, Egypt, India, Nigeria, Peru, Tanzania, and Uruguay), later joined by Pakistan and Zimbabwe, agreed to participate in the actual negotiations on the TRIPs Agreement by producing their own detailed proposal. The proposals of the group were divided into two parts:

Part I entitled "Intellectual Property and International Trade", dealt mainly with the norms and principles to be applied to trade in counterfeit and pirated goods. It provided for the establishment of certain procedures and remedies to discourage such trade, while trying to ensure an unimpeded flow of trade in legitimate goods. Part II, entitled "Standards and Principles Concerning the Availability, Scope and Use of Intellectual Property Rights", set out the objectives and principles underlying an agreement on such standards and specified the basic standards relating to different categories of IPRs – i.e. patents, marks, industrial designs, geographical indications, copyrights and neighbouring rights and integrated circuit layout designs.[36]

As a basis for negotiations towards a TRIPs Agreement, the Chairman of the negotiating Group 11, using the proposals mentioned above, produced a composite text in which he grouped related points and arranged alternative proposals on the same issues and conveniently identifying them, emphasising that the composite text itself did not seek to prejudice the question as to how the instrument would be implemented and thus left that question wide open. Successive revisions of the composite text occurred as a result of further negotiations leading to the revision of the text which was placed before the Ministerial meeting in Brussels, 3 – 7 December 1990. The Brussels meeting produced tangible results, and intensive negotiations resumed during the last quarter of 1991, leading to the tabling of the Draft Final Act in December 1991. In fact, this Final Act contained close to the complete Agreement on TRIPs. Thus, the subsequent discussions did not yield many substantive provisions different from it, apart from the addition of provision on semi-conductor technology in Art 31(c) and the introduction of para 2 and 3 of Art 64 on the settlement of disputes, which were added to the final version of the Agreement.

The multilateral trade negotiations, therefore, took very long and it was only on 15 December 1993 that all aspects of the negotiations were finally resolved. The *"Final Act Embodying the Results of the Uruguay Round on Multilateral Trade Negotiations"* was signed at Marrakesh, Morocco, on 15 April 1994. By signing this Final Act, countries agreed to submit the *"Marrakesh Agreement establishing the World Trade Organization"* (called also *"World Trade Organization Agreement"* or *"WTO Agreement"*) for the consideration of their competent national authorities with a view to seeking their approval. As one of the Agreements for which the WTO Agreement is an umbrella, the TRIPS Agreement entered into force on 1 January 1995.[37]

**Overview of the trips agreement:**

As discussed above, the lack of protection of IP at the international level, at a time, became a source of rising tensions in economic relations and hindered technological transfer and innovation. It was argued that existing agreements in the area did not have enforcement mechanisms or sanctions if the obligations were not met. Equally, there was concern that measures and procedures to enforce IPR do not themselves become barriers to legitimate trade. It was to deal with these issues that the international community[39] engaged in the development of a multilateral agreement on trade-related aspects of intellectual property rights.

The TRIPS Agreement encompasses, in principle, all forms of intellectual property and aims at harmonizing and strengthening standards of protection and providing for effective enforcement at both national and international levels.

The agreement covers five broad issues:

– How basic principles of the trading system and other international intellectual property agreements should be applied;

35. *Ibid*.

36. *Ibid*.

37. Repetto R. S. & Cavalcanti M., (n 14 above)

38. See generally: Repetto R. S. & Cavalcanti M., (n 14 above). "Impact of TRIPS on Pharmaceutical Prices, with specific focus on generics in India". *A final report, presented to the Indian National Institute of Pharmaceutical Education & Research*, Mohali, (2006). P.4-5. Available at http://www.scholar.google.com (visited 4 April 2011), "Overview: The TRIPS Agreement". A World Trade Organization Publication. Available at http://www.wto.org (visited 4 April 2011). Full text of the TRIPS Agreement ( n 5 above)

39. Actually at this time, as seen from our discussion on history, it was more an effort of the developed nations.

- How to give adequate protection to intellectual property rights;
- How countries should enforce those rights adequately in their own territories;
- How to settle disputes on intellectual property between members of the WTO; and
- Special transitional arrangements during the period when the new system is being introduced.[40]

More specifically, it addresses applicability of general GATT principles as well as the provisions in International Agreements on IP (Part I). It establishes standards for availability, scope, use (Part II), enforcement (Part III), acquisition and maintenance (Part IV) of Intellectual Property Rights. Furthermore, it addresses related dispute prevention and settlement mechanisms (Part V). Formal provisions are addressed in Part VI and VII of the Agreement, which cover transitional and institutional arrangements, respectively.[41]

**Part I[42] :**

Part I of the Agreement contains general provisions and basic principles. In Article 1 the implementation framework is set out for Members. Governments commit themselves to minimum standards, for which compliance is mandatory. Governments are free to increase additional intellectual property rights (IPR) protection or to decide how such protection should be adopted in their own legal system and practice, provided such protection does not contravene the provisions of the Agreement.

Earlier treaties on IPR were not meant to be abrogated by TRIPS. Negotiating parties, therefore, included substantive provisions to this effect in Article 2. As a result, the Paris Convention for the Protection of Industrial Property, the Berne Convention for the Protection of Literary and Artistic Works and the Rome Convention (International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations), as well as the Treaty on Intellectual Property in Respect of Integrated Circuits became part of the aspects to be considered in the implementation process.

The general principles of the GATT Agreement, employed as a framework for the Uruguay Round negotiations, are reflected in the TRIPS general provisions found in Articles 3 and 4. Members are compelled to respect the principle of "national treatment"[43], under which nationals of other countries are to be granted treatment no less favourable than that accorded to the member's own nationals with regard to the protection of IP. Likewise, the "most-favoured-nation" (MFN) commitment of Article 4 must be considered. According to this, an advantage conferred on any country must be extended to all members.

Article 7 states that the protection of intellectual property rights should aim at promoting technological innovation and the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge, in a manner conducive to social and economic welfare; it should also aim at a balance of rights and obligations.

With respect to the enactment or amendment of their national laws, members may adopt measures necessary to protect public health and nutrition and to promote public interest in sectors of vital importance for their socio-economic and technological development, provided that such measures conform to the TRIPS Agreement. Moreover, governments are entitled to provide for measures to prevent the abuse of IPR by right holders or to contest practices which unreasonably restrain trade or adversely affect the international transfer of technology, again consistent with the provisions of the Agreement.

**Part II[44] :**

Part II of the Agreement addresses, in its various sections, the different kinds of IPR and establishes standards for each category.

*Section 1: Copyright and related rights:*

According to the Agreement, copyright protection shall extend to expressions and not to ideas, procedures, and methods of operation or mathematical concepts as such. Copyright is granted to literary work, musical work, dramatic work, pictorial work, sculptural work, architectural work, choreographic work, graphic work, motion picture, sound recording, audiovisual work, computer programmes, etc. The owner of a copyright has the right to exclude others from reproducing, distributing, preparing derivative works, performing,

40. "Intellectual Property: Protection and Enforcement". Available at http://www.copynot.com/Pages/Trips.html ( visited 11 April 2011)

41. Repetto R. S. & Cavalcanti M., (n 14 above)

42. Art 1-8 of the TRIPS Agreement (n 5 above)

43. *Ibid*. Art 3.

44. *Ibid*. Art 9-40

displaying, or using the work covered by copyright for a specific period of time. The essence of copyright is originality, which implies that the copyright owner or claimant originated the work. However, a work of originality need not be novel. Originality does not imply novelty in copyright law; it only implies that the copyright claimant did not copy from someone else.

The section also makes reference to the Berne Convention for the Protection of Literary and Artistic Works of 1971 and establishes that members should comply with Articles 1 through 21 and with the Appendix thereto. Members are compelled to provide enforcement procedures to protect these rights. For the first time at the international level, rental rights for phonograms, films and data compilations and minimum standards of protection for works not belonging to natural persons are being granted. Section 1 is also dedicated to the protection of software, in particular computer programmes which, whether in source or object code, should be protected as literary works under the Berne Convention.

*Section 2: Trademarks:*

According to this section of Part II of the Agreement, any sign, or any combination of signs, capable of distinguishing the goods or services of one undertaking from those of other undertakings, is capable of constituting a trademark and, therefore, eligible for registration as a trademark. The holder of a trademark has the right to exclude others from using that trademark. Based on the provisions laid down in the Paris Convention for the Protection of Industrial Property, the TRIPS Agreement defines the signs' criteria necessary for eligibility for trademark or service mark protection, laying down prerequisites for assignment, terms of protection and exploitation of the entitled rights.

*Section 3: Geographical indications:*

Geographical indications identify a good as originating in the territory of a Member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin. Several commercial products are traditionally produced in a specific geographically definable region. Where these products are accredited specific criteria essentially attributable to their geographical provenance, the geographical indication becomes, in trade relations, the reliable "carrier" of qualifying product characteristics. Geographical indications are then ascribed the function and importance of trademarks and are entitled to legal protection.

Section 3 incorporates the principles of the Lisbon Agreement for the Protection of Appellations of Origin and their International Registration signed in 1958 and revised in 1967, although without explicit reference in the text. Under the Agreement Members are committed to adopt legislation which prevents the use of indications likely to mislead the public as to the geographical origin of the goods or to constitute an act of unfair competition. Members should also refuse or invalidate the registration of a trademark which contains or consists of a geographical indication with respect to goods not originating in the territory indicated, if use of the indication in the trademark is of such a nature as to mislead the public as to the true place of origin.

More restrictive provisions have been developed for wines and spirits. Here, Members shall provide the legal means for preventing the use of a geographical indication identifying wines or spirits as not originating in the place indicated by the geographical indication in question, even where the true origin of the goods is indicated or where the geographical indication is accompanied by corrective supplements such as "kind", "style", "imitation" or similar. The holder of the right does not have to show that there is a likelihood of confusion or that there is unfair competition; the use of an identical or similar indication of origin is itself an infringement. Section 3 also comprises exceptions to given provisions. Previously existing protection of rights may not be diminished because of the Agreement. Members may refuse protection of geographical indications, which have become generic terms of product description in that Member.

The implementation process must avoid distortion of prior trademark rights. Where a trademark right has been applied for or registered in good faith, or where rights to a trademark have been acquired through use in good faith either before the date of application of the Agreement in that Member or before the geographical indication is protected in its country of origin, implementing measures should not prejudice eligibility for or the validity of the registration of a trademark, or the right to use a trademark, which is identical with, or similar to, a geographical indication. Members are not obliged to protect geographical indications which are not or cease to be protected in their country of origin, or which have fallen into disuse in that country.

*Section 4: Industrial designs:*

According to Section 4 of Part II of the Agreement, Members shall provide for the protection of independently created industrial designs that are new or original. Also based on the Paris Convention, yet going far beyond that, the Agreement undertakes to protect industrial designs

for a minimum period of ten years. This enables the right holder to prevent third parties not having the holder's consent from manufacturing, importing or selling products embodying the protected design, when such acts are undertaken for commercial purposes.

*Section 5: Patents:*

A patent is an IPR granted to inventors. The inventor, as owner of the patent, has the right to exclude any other person from making, using, selling or importing the invention protected by the patent, for a certain period of time in a given territory. Partly based on the Paris Convention in its latest version, Section 5 lays down minimum standards for patent law at the international level. According to the provisions of the Agreement, Members are committed to make patents available for any invention, whether products or processes, in all fields of technology without discrimination as to the place of invention and whether products are imported or locally produced, provided the requirements of novelty, inventiveness and industrial applicability are fulfilled. Mandatory terms of application comprise complete and sufficiently clear disclosure of the invention as to the method of use and production.

Exceptions from the rule of patentability are admissible where inventions are contrary to public order or morality, or where inventions are dangerous to human, animal or plant life or health or to the integrity of the environment. It is no longer possible to exclude patentability on the grounds that it would harm economic development. Members may also exclude from patentability diagnostic, therapeutic and surgical methods for the treatment of humans or animals.

Members can also exclude from patentability plants and animals other than micro-organisms, as well as naturally occurring breeding methods. However, Members are required to allow the patentability of non-biological and microbiological processes such as biotechnological gene manipulation, gene transfer and so on. Members must also provide for the protection of plant varieties either by patents or by an effective *sui generis* system or by any combination thereof[45] . The complexity of this subject matter prevented a clear definition of the implementation terms and left unresolved differences among the contracting Parties. Hence, Article 27.3(b), although not a minor commitment, is viewed as a transitional solution which, according to the Agreement, was to be reviewed four years after the date of the entry into force of the Agreement.

Patent protection within TRIPS standards must confer on the right holder exclusive rights to the making, using, offering for sale, selling and importing. Process patents must additionally extend these rights over products obtained directly by the process in question. Patent owners shall also have the right to assign, or transfer by succession, the patent and to conclude licensing contracts. Members are committed to provide this protection for a minimum period of 20 years commencing on the filing date. However, Members are entitled to provide for exceptions to the exclusive rights conferred by a patent, where such exceptions do not unreasonably conflict with the normal exploitation of such rights.

Section 5 contains a "reversal of burden of proof". Provided the patent's subject matter is a process for obtaining a product, judicial authorities have the right to call the defendant to prove, that the process by which an identical product is produced, substantially differs from that which benefits protection.

Where patentee and license applicant have failed to agree on commercial terms and within a reasonable period of time, provisions are included to allow for the issuance of compulsory licences under defined conditions, and which require the payment of adequate remuneration to the patentee in each case. Governments are equally subject to the terms of licensing. For any decision based on such provisions Members are compelled to provide for the opportunity for judicial review from a higher authority.

*Section 6: Layout-designs (Topographies) of integrated circuits:*

In Section 6 of Part II of the Agreement, Members agree to provide protection to the layout-designs (topographies) of integrated circuits. Authorization of the right holder is necessary for importing, selling, or otherwise distributing for commercial purposes a protected layout-design, an integrated circuit in which a protected layout-design is incorporated, or an article incorporating such an integrated circuit only in so far as it continues to contain an unlawfully reproduced layout-design. As regards the Treaty on Intellectual Property in Respect of Integrated Circuits, the TRIPS Agreement gives additional terms of protection for this subject matter, i.e. minimum protection for ten years, and provides for minimum penalties for infringements.

*Section 7: Protection of undisclosed information:*

Recognizing the commercial value of trade secrets

45. *See* Art 27.3(b)

and non patentable "know-how", TRIPS requires Members to develop national legislation to protect such information from being disclosed to, acquired by, or used by persons without the consent of the person who is lawfully in control of it, in a manner contrary to honest commercial practices. To be awarded protection, such information must be secret, have commercial value because it is secret, and have been subject to reasonable steps to keep it secret. Likewise, these provisions are valid, under defined circumstances, for information submitted to governments (i.e. undisclosed tests or other data submitted as a condition of approving the marketing of pharmaceutical or agricultural chemical products), giving protection against unfair commercial use.

*Section 8: Control of anti-competitive practices:*

In the last section of Part II of the Agreement, Members agree that some licensing practices or conditions pertaining to IPR which restrain competition may have adverse effects on trade and may impede the transfer and dissemination of technology. The section provides for consultations between governments where there is an abuse of IPR resulting in an adverse effect on competition.

**Part III**[46]

Sufficient protection for IPR would be worthless unless the right holders have the opportunity to claim their rights and infringers can be prosecuted. These issues are dealt with in Part III of the Agreement, which commits Members to the development of remedies and procedures under domestic law to ensure that IPR are effectively enforced for both national and foreign right-holders. The implementation should comprise procedures for effective action against infringement of IPR, ensuring that they are fair and equitable, not unnecessarily complicated or costly, and do not entail unreasonable time limits or unwarranted delays.

Without being obliged to put in place a judicial system distinct from that for the enforcement of domestic law in general, Members have to allow judicial review of final administrative decisions and initial judicial decisions.

Further provisions in Part III include civil and administrative procedures and remedies on evidence of proof, injunctions, damages and other remedies including the right of judicial authorities to order the disposal or destruction of infringing goods. Where a delay is likely to cause irreparable harm to right-holders or where evidence is likely to be destroyed, the same authorities should be conferred the right to order effective provisional measures. Finally, Members must provide for criminal procedures and penalties at least in cases of wilful counterfeiting or piracy on commercial scale. Remedies should include imprisonment and fines.

**Part IV**[47]

Part IV of the Agreement deals with procedural questions concerning acquisition and maintenance of IPR, yet avoiding detailed definition of the subject. Hence, Part IV contains general rules concerning procedures and formalities for obtaining IPR, requiring that they are fair, reasonably expeditious, not unnecessarily complicated or costly, and generally sufficient to avoid impairment of the value of other commitments.

**Part V**[48]

Part V of the Agreement includes dispute prevention and settlement procedures. For this purpose the integrated dispute settlement mechanism as laid down in the WTO Agreement shall apply to TRIPS issues.

**Part VI**[49]

Part VI of the Agreement lays down transitional arrangements, in particular as regards the obligation to apply the provisions of the Agreement. The deadlines for implementation are to be counted from the date of entry into force of the Agreement. The length of the period granted to ensure compliance depends on the level of development of Members as recognized by the United Nations. Developed countries must comply with all the Agreement provisions within one year, *i.e.* by 1 January 1996. All Members, including those availing themselves of longer transitional periods, must comply with the provisions concerning "national treatment" and the "MFN" commitment.

Developing countries are required to bring legislation and practices into conformity within a transitional period of five years, *i.e.* by 1 January 2000; and in some cases of product patents, they are given a further period of five years. Countries in the process of transition from a centrally-planned to a market economy are given the same privileges as to terms of implementation as developing countries, provided they are planning a

46. *Ibid*. Art 41-61

47. *Ibid*. Art 62.

48. *Ibid*. Art 63-64.

49. Article 65-67, Ibid.

structural reform of their IP system and encounter special problems in the preparation and implementation of the latter within domestic law.

In view of their special needs and requirements and the various obstacles that might deter rapid implementation, least developed country Members are given a transitional period of eleven years, *i.e.* by 1 January 2006. This transition period is subject to a possibility of extension upon duly motivated request. Countries availing themselves of a transition period are compelled, since entry into force of the Agreement, to comply with the so-called "non-backsliding" clause and the "mail-box" provision. As to the former, during the period of transition, Members are not allowed to reduce the level of protection of IP to a level below that which is provided by the Agreement. As to the latter principle, developing country Members which do not provide for patent protection for pharmaceutical and agricultural chemical products at the date of entry into force of the WTO Agreement are compelled to accept the filing of patent applications for such products as from that date.

**Part VII[50]**

Finally, provisions in Part VII establish the Council for TRIPS as the compliance monitoring institution of the Agreement. The Council for TRIPS shall, moreover, review the implementation of the Agreement after five years from coming into force and every two years thereafter at identical intervals.

**Re-thinking the trips agreement:**

It is clear from the discussion above, that at first glance the TRIPS Agreement appears to be 'the saviour'[51], 'the protector'[52] and 'the provider'.[53] However, upon a calm and dispassionate view, it becomes obvious that the Agreement has had more of a negative, rather than positive effect on the WTO member states, especially the developing nations.

Complaints about and criticisms of the Agreement began a little while after it came into force and has continued till date. Criticisms have arisen on a number of levels. There are those who criticize the implementation of its provisions in sovereign countries, there are others that criticize the provisions of the TRIPS agreement and there are still others who criticize its very existence.[54]

Perhaps better insight will be gotten from a glance at some of the problems[55] discovered with the Agreement, or some of the comments or criticisms by various writers.

Says Noam Chomsky, a renowned academic:

*"There is nothing liberal about [the TRIPS agreement]. It is a highly protected system, designed to ensure that private tyrannies, which is what corporations are, monopolize the technology and the knowledge of the future."*[56]

Dr. Zafar Mirza, Executive Coordinator of the Network, a Pakistani health advocacy group, asks:

*"They are talking about harmonizing trade policies, but nobody is saying a word about harmonizing the socioeconomic conditions of the world. All countries are at different stages of development, how could they be governed by the same law?"*[57]

According to Jeffrey Sachs, an Economist:

*"The global regime of intellectual property rights requires a new look. The United States prevailed upon the world to toughen patent codes and cut down on intellectual piracy. But now transnational corporations and rich-country institutions are patenting everything from the human genome to rainforest biodiversity. The poor will be ripped off unless some sense and equity are introduced into this*

50. *Ibid.* Art 68-73.

51. In that it saved the developed countries

52. In that it protected the rights of IP holders generally

53. In that it provides better investment opportunities for the developing countries

54. Subhan J. "Scrutinized: The TRIPS Agreement and Public Health". (2006) *Mcgill Journal of Medicine*. Vol. 9. No. 2, P. 152–159.

55. For some of the problems, see: Sonderholm J. "Intellectual Property Rights and the TRIPS Agreement: An Overview of Ethical Problems and some Proposed Solutions". Policy Research Working Paper 5228, March 2010. Available at http://www.wds.worldbank.org ( visited 4 May 2011).

56. Chomsky N. Speech delivered at the Asian College of Journalism, Chennai. Available at http://www.greenmac.com/World_Events/aninterac.html ( visited 5 April 2011)

57. Rizvi M. "TRIPS Will Push Health Care Beyond Poor". Editorial, Third World Network publication. Available at http://www.twnside.org.sg/title/beyond-cn.htm (visited 4 April 2011)

*runaway process."*[58]

A similar view has expressed Prof. Barton (Stanford University) who has noted that:

*"The risk that intellectual property rights slow the movement of technological capability to developing nations, suggests that harmonization efforts might most wisely consider one common standard for developed nations and a different one for developing nations"*[59]

The UNDP "Human Development Report 1999" has also stated that

*"The relentless march of intellectual property rights needs to be stopped and questioned. Developments in the new technologies are running far ahead of the ethical, legal, regulatory and policy frameworks needed to govern their use. More understanding is needed –in every country- of the economic and social consequences of the TRIPS agreement. Many people have started to question the relationship between knowledge ownership and innovation. Alternative approaches to innovation, based on sharing, open access and communal innovation, are flourishing, disproving the claim that innovation necessarily requires patents".*[60]

What these commentators are trying to say is simple: we must re-think the TRIPS Agreement.

**Why should we re-think the trips agreement?**

From the history and analysis of the TRIPS Agreement, the need to re-think the Agreement becomes obvious. However, for emphasis, this writer is of the opinion that the TRIPS Agreement needs to be reconsidered for the following reasons:

Firstly, the initial idea was not international. One of the greatest strengths of TRIPS has been the fact that it has a wide coverage, binding all WTO members to protect international IPRs. However, it is clear from the history of TRIPS that the idea of including IPRs on the agenda for negotiations, in the Uruguay Round, was initiated by the developed countries. This has led to constant criticism by the developing countries, which are now bearing a lot of the consequences that resulted from the implementation of TRIPS. It can therefore be said that since the Agreement was based on a faulty premise, to begin with, and a solution to any problems with same, would necessitate a re-think of the Agreement.

Secondly, the Agreement is generally not balanced, in terms of its advantages to members. We will recall that the developed countries proposed the discussion of IPRs at the Uruguay Round, in other to protect IPRs in a more stringent way and a look at the Agreement shows that this aim was achieved to a great extent. These Industrialized countries, in getting the developing nations to agree to negotiations, argued that more stringent protection of IPRs would have positive effects for developing countries, like more foreign direct investment (FDI), stimulation of innovation[61] and promotion of the transfer of technology.[62] The developing-country members of the WTO therefore agreed to respect relatively stringent worldwide norms of IP protections.[63] It is however unfortunate, that rather than lead to advantages, it has led to problems for developing nations. For instance, rather than foster development, the enhanced IP protection has limited access to technology, especially in developing countries.

If therefore, we can accept, that the advantages of the TRIPS Agreement, which are meant to be felt by all members of the WTO, are only one sided then we can understand the need for a re-think of the Agreement.

Thirdly, there is a question about the relatively unfair steps to the implementation of the Agreement, of course for developing nations. It is obvious that the levels of protection embodied in the TRIPs Agreement already mirrored the existing standards in developed countries' laws and regulations[64] . They therefore had no problem implementing the Agreement. The developing countries

58. *See* "The TRIPs Agreement and Pharmaceuticals". A World Health Orgarnization publication. Available at http://www.apps.who.int (visited 1 April 2011).

59. Barton, J., "Intellectual property, biotechnology, and international trade". Two examples, prepared for Berne World Trade Forum, Bern University, 28-29 August 1999, P. 15

60. UNDP, Human Development Report 1999, (New York, Oxford University Press, 1999),P.75

61. Correa C. (n 10 above)

62. *See*(n 58 above)

63. Reichman, J. H., "Comment: Compulsory Licensing of Patented Pharmaceutical Inventions: Evaluating the Options". *The Journal of Law, Medicine & Ethics.* (2009) *Vol.* 37, No.2, P. 247-263.

64. Correa C. M., (n 10 above)

on the other hand, regard the standards as exceptionally high.[65] A lot of developing countries are still far from meeting up with the implementation deadline[66] and yet there are proposals for review already. Rather than review and change further Articles and put extra burdens on these nations, the TRIPS Agreement should be reconsidered.

In relation to the above point is the question of sovereignty. It must be noted that all WTO Members are bound to include these standards in their own national laws and non-compliance with such an Agreement may trigger the initiation of dispute settlement procedures.[67] Does the strict and compelling nature of this Agreement not affect the right to internal sovereignty of states? We must note from the history of TRIPS that the process that was adopted in the negotiations was not such that it involved the input necessary and desired of all the states. Can this not have a negative effect on the full implementation of the Agreement, especially with any subsequent reviews? Considering the general international principle of respect for internal sovereignty, can such a binding agreement be maintained? Or is re-think necessary? The writer answers the latter in the positive.

Fourthly, we must consider the negative effect of the Agreement on the fundamental human rights. Here, we refer mostly to the right to health and access to drugs and medicines. This is one area where there has been constant criticism of the TRIPS Agreement. As seen from our overview, the TRIPS Agreement requires all WTO Members to grant patents for, *inter alia,* pharmaceuticals and protects test data.[68] This, together with the provisions of Article 31(f), has been identified as a major problem for developing countries facing public health problems, such as, for example an epidemic of a serious disease such as AIDS.[69]

We must note the following:

- Access to essential medications is a fundamental human right;[70]
- Intellectual property legislation has been a driving force behind innovation for commercial purposes;[71]
- The world's primary source of novel and generic drugs has been and will continue to be the commercial pharmaceutical industry;[72] and
- The TRIPS agreement is yet to be amended and will continue to shape international intellectual property law,[73] until so amended.

What we are saying in effect, is that the TRIPS Agreement has exerted negative influence on implementing domestic public health policies in many developing country Members by adversely affecting their access to medicines. Conforming to the Agreement by providing or strengthening the protection of pharmaceutical products with intellectual property rights has posed a special challenge for many developing country Members, worsening the opportunities for access to medicines, particularly for the poor.

Although we can say that the obligations established by the TRIPS Agreement were likely to have substantial impact on prices of, and access to, medicine, there was very limited participation by public health experts and officials in the negotiating process, although pharmaceutical industry representatives played a major role in pressing for conclusion of the Agreement.[74] Against

65. South Centre, *The TRIPs Agreement. A Guide for the South. The Uruguay Round Agreement on Trade-Related Intellectual Property Rights*. A South Centre publication. (1997). Available at http://www.southcentre.org/publications/trips/toc.htm (visited 4 April 2011)

66. Some countries have till 2013, while least developing countries have till 2016, to implement the Agreement.

67. Gervais D., "*The TRIPS Agreement: Drafting History and Analysis*. (London: Sweet & Maxwell. 1998) P. 249

68. Correa C. M.," Protection of data submitted for the registration of pharmaceuticals: Implementing the standards of the TRIPS Agreement". (2002) Geneva, South Centre. P. 23-24. Available at http://www.who.int (visited 11 April 2011)

69. "Acceptance of the Protocol Amending the TRIPS Agreement to Implement the Doha Declaration on TRIPS and Public Health: A Discussion Document". (2007). Available at http://www.med.govt.nz/intellectualproperty (visited 6 May 2011)

70. "*Striking a Balance: Patents and Access to Drugs and Health Care" Editorial, World Intellectual Property Organization*. Available at http://www.wipo.int (visited 6 April 2011)

71. World Trade Organization Website. <http://www.wto.org/>

72. World Trade Organization. TRIPS Council. Trade-Related Aspects of Intellectual Property Rights (TRIPS) (1994) Available at <http://www.wto.org/english/docs_e/legal_e/27-trips.pdf>.

73. Kohr M. "The WTO, the Post Doha Agenda and the Future of the Trade System". (2002), Third World Network. Available at <http://www.twnside.org.sg/title/mkadb.htm>.

74. Abbott, F. M. "The TRIPS Agreement, Access to Medicines, and the WTO Doha Ministerial Conference". (2002) *Journal of World Intellectual Property*. Vol. 5, No.1, p.15.

this ground, it is not surprising that WTO developing (including least-developed) Members face difficulties in implementing the Agreement.[75]

Consequently, United Nations Commission on Human Rights pointed out in its Report (2000) on "Intellectual Property Rights and Human Rights" that there are apparent conflicts between the intellectual property rights regime embodied in the TRIPS Agreement, on the one hand, and international human rights law, on the other, since the implementation of the TRIPS Agreement does not adequately reflect the fundamental nature and indivisibility of all human rights, including the right of everyone to enjoy the benefits of scientific progress and its applications, the right to health, the right to food and the right to self-determination.[76] Accordingly, appeals for mainstreaming human rights into the TRIPS Agreement are becoming stronger.[77]

Concerning an area such as human rights, this particular criticism has been an ongoing one and attempts to solve it have not yielded much.[78] Perhaps now is the time to re-think the TRIPS Agreement.

Fifthly, we must wonder what role the industry, NGOs and Civil Societies played in the negotiation of the TRIPS agreement.[79] It is obvious from the history of TRIPS that they had little or no role to play in the negotiations that led to TRIPS. Perhaps this is a major reason why there are several problems with the Agreement, because the NGO's, and international organizations are as much members of the international community, as states and are just as affected by international Agreements.

This in turn has led to the need for some of these bodies, which were previously not affected by intellectual property, to consider applying intellectual property to their rules. In some of these venues, intellectual property lawmaking has led to the negotiation of new treaties; in others, challenges to TRIPs are framed through reinterpretation of existing agreements and the creation of nonbinding declarations, recommendations, and other forms of soft law.[80]

Whatever be the result, the ripple effect of the failure of the Uruguay Round to take all parties into consideration in the negotiating of the TRIPS Agreement, must be addressed. But do we address it by making more rules and amending other existing laws? Or do we simply address the root cause?

Finally, the procedure for amendment of TRIPS, especially as necessary, to regularize all the problems with the Agreement, may prove to be an uphill task.

According to Marrakesh Agreement on Establishing the World Trade Organization (WTO Agreement) and the TRIPS Agreement, the ways to amend the TRIPS Agreement, which includes:

- amendments to Article 4 of the Agreement shall take effect only upon acceptance by all Members;
- amendments to provisions of the Agreement, of a nature that would alter the rights and obligations of the Members, shall take effect for the Members that have accepted them upon acceptance by two thirds of the Members and thereafter for each other Member upon acceptance by it; and amendments to provisions of the Agreement, of a nature that would not alter the rights and obligations of the Members, shall take effect for all Members upon acceptance by two thirds of the Members; and
- amendments merely serving the purpose of adjusting to higher levels of protection of intellectual property rights achieved, and in force, in other multilateral agreements and accepted under those agreements by all Members of the WTO may be referred to the Ministerial Conference for action in accordance with paragraph 6 of Article X of the WTO Agreement on the basis of a consensus proposal from the TRIPS Council.

The necessary procedure applicable would be the second procedure, involving a two-third majority of the members and this may prove to be a problem, especially as the Agreement does not have the same effect on all members. While it is advantageous to some, it is disadvantageous to some. Also, due to the gap in technology levels, there is an imbalance of interests between the developed and developing worlds in IPR

75. Sun H., "Reshaping the TRIPS Agreement concerning public health: Two critical issues". Available at http://www.cid.harvard.edu (visited 11 April 2011).

76. *Ibid*.

77. See Ernst-Ulrish P. "The WTO Constitution and Human Rights". *Journal of International Economic Law,* (2000) Vol. 3, P.19-25

78. In stating this, I am not unaware of the steps taken, like the DOHA Declaration and other attempts to amend TRIPS.

79. Adede A.O. (n 13 above) P. 1-2.

80. Helfer R. L., (n 2 above)

protection.[81] Thus the likelihood of reaching a resolution to amend the Agreement may be a time consuming task. It would most likely save more time to re-think the entire Agreement.

**Conclusion:**

It is important in concluding this paper that we reiterate that though the TRIPS agreement is currently the sweet spot on the punching bag that is the World Trade Organization and fairly or not, has been alleged to be a monstrosity of modern capitalism[82], it is not without benefits. However, the benefits have been totally overshadowed by the problems, thus necessitating a re-think of the Agreement.

This paper has been concerned with re-thinking the TRIPS agreement. It has given a summary of the history of the TRIPs Agreement, as well as an overview of the contents of the same agreement. Arguments were then put forth for in support of the re-thinking of the Agreement, and then a major recommendation is made, that the TRIPS Agreement be reconsidered, because as a matter of history, analysis and fact, this might be the best solution to the problem that is the TRIPs Agreement.

**Recommendation:**

This writer makes but one recommendation: that the developing countries and the entire international community, reconsider or re-think the TRIPs Agreement, especially based on the history and analysis of the Agreement as discussed above.

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