

TRIPs-plus provisions and its negative consequences on Agriculture in Thailand

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Thailand and EFTA states are currently negotiating a bilateral free trade agreement. If EFTA states succeed in forcing Thailand to extend their IPR law to cover “biotechnological inventions”, Thailand would face serious negative effects on food security and their biodiversity management. This “TRIPs-Plus” push is going beyond the TRIPs Agreement under WTO.

The US have asked for similar TRIPs Plus measures under US-Thailand FTA negotiations. This is one of the most important issues that pushed more than 10,000 concerned Thai farmers and people who living with HIV to protest against the sixth round US-Thailand FTA negotiations in Chiang Mai in January 2006. Moreover, the resistance against the national FTA policy and other privatization policies were behind the nationwide demonstration against Thaksin Shinawatra administration during February and March 2006.

What is “TRIPs-plus”?

Criteria for TRIPs-plus status of bilateral treaties with respect to biodiversity

SUBJECT MATTER	TRIPs-PLUS PROVISIONS ENCOUNTERED	WHY THIS IS TRIPs-PLUS
Plants	Extension of standards of protection, such as: - reference to UPOV - no possibility of making exclusions from patentability for life forms - reference to "highest international standards"	- UPOV is not a reference in the TRIPs agreement. There is no explicit measuring stick for “effective sui generis system” and developing countries believe that they have options aside from UPOV. - TRIPs allows countries to exclude plants and animals from patent protection. - “Highest international standard” is vague and there is no indication that it refers to TRIPs. While not automatically TRIPs-plus, it is highly suspect, particularly in the context of Most Favoured Nation treatment of investments under the bilateral investment treaties.
Animals	same as plants (excl. UPOV)	same as plants (excl. UPOV)
Biotech	Requirement to protect “biotechnological inventions”	There is no reference to “biotechnology” in TRIPs. This introduces a new category of subject matter for intellectual property protection. It also very strongly implies, where it is not stated, the availability of patent protection for plants and animals.

Negative consequences

The aforementioned TRIPs-Plus provisions are designed to allow for the patentability of all categories of life-forms, including plants, animals, biological processes, genes, and gene sequences. Under FTAs, the developing countries are obligated to patent the by-products of genetic engineering and other biotechnological methods without linking the patentability issues to ethical, social, economic and environmental considerations.

The patenting of life when imposed through an FTA could have a considerable socio-economic impact on developing countries. Granting of patents on biological materials such as genes will cause a power shift in agriculture towards large biotechnology companies and will disrupt the access to essential products such as seeds or foodstuffs in the same way that patents are unfairly restricting access to vital medicines for people in poor countries. Stricter protection for IPRs would increase the monopoly powers of the right holders, generally multinational firms, allowing them to gain far greater control over the production chain of crops and food.

In regard to plant variety protection (PVP), Article 27.3 (b) of TRIPs gives signatory countries options to protect plant varieties by patents, an effective *sui generis* system, or both. The International Union for the Protection of New Varieties of Plants (UPOV) system is recognised to be one method, but not the unique method, for establishing a *sui generis* system. The ambiguity of the term “effective *sui generis* system” under TRIPs allows developing countries to avoid developing strong IPR laws covering plant varieties. Some developing countries, such as Thailand and India, have flexibly implemented the TRIPs provision by incorporating Farmers’ Rights and the access and benefit sharing (ABS) system under the Convention on Biological Diversity into national legislation.

Thailand has so far resisted ratifying UPOV or adopting it as the standard for its PVP law. This is because plants are vitally important for agriculture, which is still regarded as the backbone of the Thai economy. Its current law, the Plant Variety Protection Act 1999, is notable for not following the UPOV model. Unlike UPOV, the law aims at promoting not only the creation of new varieties of plants but also the conservation and encouragement of agricultural practices in the country. The law protects breeders’ rights and recognises the rights of farmers and local communities over plant genetic resources. It also adopts legal requirements such as prior informed consent and ABS that allow individuals and communities to claim compensation for their contribution to resources.

Countries can adapt and change the PVP system to their local conditions, agriculture and farming sectors. There is no doubt that FTAs attempt to limit this flexibility by requiring the trade partners to ratify the UPOV 1991 Act. The UPOV 91 system would leave Thailand and other FTA partners with no option regarding the scope of protection, since the 1991 Act provides the least flexibility to the signatory states in choosing how to protect plant varieties.

According to Article 14 of the 1991 Act, protection must be extended to all plant varieties. The exclusive rights must cover vegetative or reproductive propagating material, and extend to essentially derived varieties and harvested material. The rights of farmers to save, use, exchange, or sell farm-saved seeds are constrained. This full-scale monopoly right will adversely affect the food and agricultural sectors, and cause adverse effects to poor farmers, in particular when their right to save seeds is removed. Moreover, accession to UPOV 1991 will prohibit the inclusion of any provision requiring applicants to prove that the plant variety is safe and does not cause any harmful effects to environment, as currently enshrined under the PVP law of Thailand.

As already mentioned, the Thai economy has been dominated by agriculture and will continue to rely on this sector for important export earnings. By ratifying a TRIPs-plus bilateral treaty, Thailand will open the door for the biotechnology industry, not only to dominate its farming sector but also to exploit its abundant

biological resources. Although it is endowed with plentiful biological resources, Thailand will not be able to take advantage of these resources as a source of economic growth and poverty alleviation. The UPOV 91 system would impose mandatory components of PVP and restrain the country's sovereign rights over its biological resources and its ability to regulate access to its biodiversity.

Under the TRIPS-plus and UPOV regimes, Thailand's attempts to balance IPRs protection and maintain an alternative rights system would be reduced.

Note: There are some indices that EFTA, during the ongoing negotiations, has moved away from their requests on Plant Variety Protection and biotech-patents

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