

Research
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The
TRIPs
Amendments

《TRIPs 协议修正案》研究

熊建军◎著



2003年8月30日，在经过了两年多的协商之后，WTO成员方最终通过了《8月30日决定》，同意免除TRIPs协议第31条第1款和第31条第4款所规定的WTO成员方义务，准许具有药品生产能力的WTO成员方通过专利强制许可措施，向那些没有或者缺乏药品生产能力的国家出口药品，以解决这些正在遭受艾滋病、肺结核、疟疾和其他传染病侵袭国家的廉价药品获取性问题。2005年12月6日，WTO成员方通过修改TRIPs协议有关条款，并且同意将《8月30日决定》的实质内容作为TRIPs协议修正案的内容纳入到TRIPs协议中，使《8月30日决定》所规定的免除WTO成员方TRIPs协议第31条第1款和第31条第4款义务的内容成为永久生效。



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前言

常在广大发展中国家和最不发达国家发生的一些疾病多是一些在发达国家闻所未闻的疾病。一些贫穷国家缺乏药品或者没有药品应对这些疾病的治疗。西方药品产业界常将这些贫穷国家缺药现象的形成原因归结为这些国家的贫穷，否认 WTO 所确立的对所有 WTO 成员方都具有约束力的知识产权保护制度所导致的专利药品高价现象对贫穷国家的药品获取性问题有重大影响。并且他们声称，这些贫穷国家还有一些诸如强制许可的手段，在不经专利权人许可的情况下，只要支付一定的专利使用费就可以使用药品专利，生产和销售专利药品，以解决药品短缺问题。可是，实际情形与上述观点相反。广大发展中国家的药品获取性问题愈来愈严重，导致公共健康危机日益加深。全世界对此也高度关注。

TRIPs 协议第 31 条虽然规定了 WTO 成员方在满足一定条件的前提下，可以不经药品专利权人的许可，以强制许可为由生产或者使用该药品专利。但是，该协议同时又规定该强制许可下的产品应该主要用于供应国内市场。该规定使得那些有药品生产能力的国家的强制许可下的药品不能出口到那些没有或者缺乏药品生产能力同时其国内又正在遭受公共健康危机侵袭的国家。该规定导致很多没有或者缺乏药品生产能力的发展中国家在即使依法签署了强制许可的情况下也不能解决其国内的药品获取性问题。

2001 年《TRIPs 协议和公共健康多哈宣言》（即《多哈宣言》）承认存在这个法律问题，WTO 总理事会要求 TRIPs 理事会应该在 2002 年底之前尽快找到一个解决该法律问题的有效方法。

2003 年 8 月 30 日，在经过了两年的协商之后，WTO 成员方最后通过了一项决定（即《8 月 30 日决定》），同意免除 TRIPs 协议第 31 条第 f 款和第 31 条第 h 款所规定的 WTO 成员方义务，准许具有药品生产能力的 WTO 成员方通过签署强制许可措施，向那些没有或者缺乏药品生产能力的国家出口药品，以解决这些正在遭受艾滋病、肺结核、疟疾和其他传染病侵袭国家的廉价药品获取性问题。2005 年 12 月 6 日，WTO 成员方同意修改 TRIPs 协议有关条款，并且同意将《8 月 30 日决定》的实质内容作为 TRIPs 协议修正案（即《TRIPs 协议修正案》，以下简称《修正案》）的内容纳入 TRIPs 协议中，使《8 月 30 日决定》所规定的免除 WTO 成员方 TRIPs 协议第 31 条第 f 款和第 31 条第 h 款义务的条款效力永久化。按规定，该《修正案》在 2/3 以上的 WTO 成员方认可之后对所有认可它的 WTO 成员方生效。WTO 成员方在 2009 年 12 月 31 日之前都可以认可它。

本书旨在探讨《修正案》及其所涉强制许可制度如何发挥其旨在解决那些正在遭

受艾滋病、肺结核、疟疾和其他传染病侵袭的国家廉价药品获取性危机的功能和作用问题。

迄今为止,我国还没有学者系统地研究《修正案》问题。而《修正案》是当今解决一些发展中国家公共健康危机的最有利、最权威的国际法文件。系统研究《修正案》,能够帮助我们清楚认识和熟悉《修正案》,明白《修正案》存在的一些问题,启发我们找到解决这些问题的有效途径和方法,推动《修正案》的认可和实施,从而更好地实现《修正案》所确定的宗旨和目标。因而,本书的研究具有一定的研究价值。

本书采用章节结构,除了引言和结论部分之外,全文共分七章。

1. 引言

该部分主要叙述了问题的提出、研究动态和现状、选题的背景及意义、素材选取与研究方法等问题。

2. 第一章 《修正案》的产生及其产生原因

本章包括修正案的产生及其产生原因等内容。关于后者,本书分别从法律意识、法律原因和政治原因等几个方面进行了阐述和分析。

3. 第二章 《修正案》的主要内容、意义与缺陷

本章对《修正案》的全部内容进行了全面介绍,并且进行了相关评价。

本书认为,《修正案》的出台标志着 WTO 所确立的知识产权保护制度发展到了一个新的历史阶段,具有重大的历史意义。它是 WTO 成员方首次对 TRIPs 协议重要条款作出的修正。它在对知识产权标准进行保护的同时开始注重保障人权,标志着 WTO 发展过程中成员方的一次重大胜利。它预示着未来对更多的 TRIPs 协议重要条款进行修正成为可能,这是 TRIPs 协议本身发展的必然需要。它对我国制定和实施与公共健康有关药品专利强制许可制度具有重要的指导意义。同时,本章在最后指出,《修正案》自身仍然存在一些缺陷。

4. 第三章 《修正案》的认可问题及相关评论

《关于修改 TRIPs 协议的决定》第 3 段规定:《修正案》应该根据《建立世界贸易组织协定》第 10 条第 3 款的规定生效。根据《建立世界贸易组织协定》第 10 条第 3 款,对 TRIPs 协议的修正,如其具有改变各 WTO 成员方权利和义务的性质,则经 WTO 成员方的 2/3 多数认可后,应对认可该修正的 WTO 成员方生效,并在此后对认可该修正的每一其他 WTO 成员方自其认可该修正时起生效。可见,2/3 以上的 WTO 成员方认可,是该《修正案》对所有 WTO 成员方生效的条件。如果达不到 2/3 以上 WTO 成员方的正式认可,《修正案》不能对所有 WTO 成员方生效。

迄今为止,只有挪威、印度和欧盟等少数 WTO 成员方认可了《8 月 30 日决定》和《修正案》。本章分析了这一现象的形成原因。本书认为,经济、政治和法律是影响 WTO 成员方认可《修正案》的主要因素。本章最后还对《修正案》的未来认可状况进行了预测。

5. 第四章 《修正案》及其所涉强制许可制度对差别定价制、TRIPs 附加协议及其他方面的影响

差别定价制是指制药公司和专利权人在发达国家以高价销售专利药品,在中低收入

国家以相对低价销售专利药品,以及在最不发达国家则以免收专利使用费的价格销售专利药品所形成的一种专利药品销售策略和制度。《修正案》及其所涉强制许可制度对该制度的进一步发展有一定的影响。

自《修正案》被通过以来,美国的一些制药公司极力游说美国贸易代表和美国其他相关部门(包括国会),寻求通过双边和区域自由贸易协定形式加大专利药品的保护力度和水平,抵制诸如《修正案》强制许可制度的通过与实施,或者加大《修正案》的实施难度。欧盟的一些制药公司也同样游说欧盟议会和欧盟其他机构(包括欧盟成员方政府),呼吁通过自由贸易协定形式加强药品专利保护。《修正案》对自由贸易协定有一定的影响。

自《多哈宣言》、《8月30日决定》和《修正案》得到通过以来,国际社会掀起了新一轮的国际造法活动。世界知识产权组织高度重视公共健康和广大发展中国家以及最不发达国家基本药品获取性问题的解决。另外,在一些发展中国家和非政府间组织的压力下,自《多哈宣言》、《8月30日决定》和《修正案》被通过以来,世界卫生组织更加注重全球公共健康和知识产权关系问题,并且根据一些研究成果提出相关行动计划建议。知识产权问题日益成为世界卫生组织的一个重要的讨论话题,这是一个非常有意义的发展动向。

6. 第五章 《修正案》及其所涉强制许可制度对WTO成员方法制的影响

自《修正案》及其所涉强制许可制度被通过以来,世界上有几个国家通过立法,出台了实施《修正案》及其所涉强制许可制度的措施与制度。本章对这些国家实施《修正案》及其所涉强制许可制度的相关法律制度内容进行了比较和评价。

7. 第六章 WTO成员方依据《修正案》及其所涉强制许可制度出台相关实施措施的实施问题

本章共分两节。第一节为概述。本节分为两部分。第一部分叙述了WTO成员方依据《修正案》及其所涉强制许可制度出台相关实施措施的状况。第二部分介绍了WTO成员方所出台实施措施的实施情况。在几个已经出台了实施《修正案》及其所涉强制许可制度相关措施的WTO成员方中,只有加拿大的《加拿大药品获取法(Bill C-9)》被无国界医生组织等尝试适用过。所以本章第二节介绍了《加拿大药品获取法(Bill C-9)》的一些实施情况,并在最后做出了总结与评价。

8. 第七章 应对《修正案》的法律策略与措施

针对WTO所确立的知识产权保护制度和《修正案》所存在的一些缺陷,本书提出了再修改《修正案》的建议。对《修正案》作出再修改,使其更完善、更具有可操作性确有必要。本书建议,在TRIPs协议末尾增加第74条至第84条,以作为TRIPs协议的第八部分。

尽管《修正案》存在一些问题,需要再修改,但是,《修正案》本身还有许多内容可以为我国利用,特别是对那些正在遭受公共健康危机困扰的广大发展中国家。因此,我们应该采取灵活的法律策略,一方面争取再修改《修正案》,另一方面,我们要尽快认可《修正案》,使《修正案》的一些内容和条款尽量能够为广大发展中国家所用。因为《修正案》有一定的实施可能性和一定的利用价值。

本书在最后对中国如何应对《修正案》问题进行了分析,并做出了相关评论。这一部分首先对中国的公共健康状况、中国的药品获取性状况、中国公共健康危机下药品专利强制许可制度的发展和中国根据《多哈宣言》、《8月30日决定》和《修正案》所进行的立法等问题进行了阐述与分析。最后针对中国实施《修正案》的可行性问题进行了分析,并且提出了相关的法律建议和策略。

通过系统阐述和分析,本书在最后得出了研究结论。药品获取性问题是一个非常复杂的问题。WTO 所确立的对所有 WTO 成员方都具有约束力的知识产权保护制度只是影响它的一个因素。《修正案》迄今没有得到充分实施,《修正案》帮助发展中国家进口药品和获取药品的作用有限。这些国家市场太小。除此之外,法律、政治等因素也影响到《修正案》作用的充分发挥。《修正案》在 WTO 总理事会上的通过会对差别定价和一些自由贸易协定产生一定的影响。地区合作和联合获取药品等策略的运用有助于《修正案》的实施。鉴于《修正案》本身有很多的缺陷,所以对《修正案》作出再修改,使其更完善、更具可操作性确有必要。而且本书还指出,随着具有药品专利保护义务的国家越来越多,《修正案》在将来具有很大的实施可能性。WTO 成员方应该尽快认可《修正案》,并且应该充分利用《修正案》,根据国情,制定或者修改其国内相关法律制度,以使《修正案》能够发挥最大作用。

Preface

Many of the diseases and health conditions that account for a large part of the disease burden in low and middle – income countries are far less common in high – income countries. The pharmaceutical industry certainly prefers to blame poverty and poor governance, and rejects arguments that patent rights allow them to set high prices that keep life saving drugs out of the reach of the poor. Compulsory licensing and government use measures, which allow third parties or the government to use a patented invention for a royalty or fee, are provided in some countries' laws, though not necessarily in their patent laws. But the realistic conditions are not in line with the above opinions. Some developing countries' access to medicines questions are more and more dangerous and often follow the public health crisis, which lead to the worldwide views.

In international law, The WTO Agreement on Trade – Related Aspects of Intellectual Property Rights (TRIPs) sets out the minimal norms and standards WTO Members must adhere to in protecting intellectual property rights. As regards patents, these include the requirement that 20 – year patent protection be available for all inventions, whether products or processes, in almost all fields of technology. Article 31 of TRIPs allows for the compulsory licensing or governmental use of patents, without the authorization of the patent owner, under certain conditions. One such condition, Article 31 (f), is that the compulsory License or government use of the patented invention be predominantly for the supply of the domestic market. This article lead to access to medicines question in some developing countries, even if these countries which often have insufficient or no manufacturing capacity in the pharmaceutical sector issue according to law compulsory license.

The 2001 Doha Declaration on the TRIPs Agreement and Public Health recognized that WTO Members with insufficient or no manufacturing capacity in the pharmaceutical sector face difficulties making effective use of compulsory licensing under the TRIPs Agreement. This is because Article 31 (f) prevents WTO Members with manufacturing capacity in the pharmaceutical sector from issuing compulsory Licenses authorizing the manufacture of lower – cost, generic versions of patented medicines for export to countries with little or no such capacity.

Council for TRIPs was thus instructed to find an expeditious solution to this problem and to report to the General Council before the end of 2002.

After two years of negotiations, on August 30, 2003, WTO Members agreed to waive Article 31 (f) and (h), subject to certain terms and conditions, so as to give Members with pharmaceutical manufacturing capacity the right to issue compulsory Licenses authorizing the manufacture and export of pharmaceutical products to countries with insufficient or no pharmaceutical manufacturing capacity. The stated purpose of this waiver is to facilitate developing and least-developed countries' access to less expensive medicines needed to treat HIV/AIDS, tuberculosis, malaria and other epidemics. It is important to note that the remaining obligations under Article 31 were not waived.

On December 6, 2005, WTO Members approved changes to the TRIPs Agreement to transform the August 2003 agreement into a permanent amendment. The amendment will formally become part of the TRIPs Agreement once two-thirds of WTO Members ratify the change. Members have until December 31, 2009 to do so.

As a first step in the review of WTO Compulsory License Decision (Decision), the purpose of this paper is to solicit comments as to how the WTO intellectual property regime can better deliver on medicine-export country's commitment to improve access to less expensive medicines that are urgently needed to treat HIV/AIDS, malaria, tuberculosis, and other epidemics in developing and least-developed countries, while remaining compliant with World Trade Organization (WTO) rules.

After sophisticated analyses and fit comments, this article gives in the conclusion part some conclusions.

The Decision introduces intricate, time-consuming and burdensome procedures for the exportation of medicines, when what is needed is a simple, fast, and automatic mechanism. The August 30th mechanism is based on a drug-by-drug, country-by-country and case-by-case decision-making process. From a manufacturer's perspective, it means the whole process must be undertaken each time it fills an order for a drug destined for export. The WTO Decision flies in the face of the practical reality of managing a health programme, where flexibility and rapidity of response to ever-changing circumstances are vital. A compulsory license for export can only be granted once the heavy procedural steps have been completed successfully. It did not have to be this way; in fact the WTO chose to stay away from designing an automatic procedure which would have been possible under WTO law.

It also ignores the fact that economies of scale are needed to attract interest

from producers: without the pull of a viable market for drugs, generic manufacturers will not seek to produce for export.

Indeed, the possibilities that the Decision can enable import of affordable medicines to small and poor markets are rather limited. The economic prerequisites are probably going to be difficult to achieve. The Decision can probably not enable affordable imports under compulsory Licenses when the recipient markets are not large enough to off-set the substantial costs and risks involved for the licensee. These markets are also probably the ones where governments would have most difficulty in handling the administrative tasks required by the new system. At the same time these countries would be the ones most in need of increased bargaining power. There is no obvious way to combine the Decision with competitive procurement procedures which reduces the possibility for prices to approach marginal cost. The use of donor money could improve purchasing power but donor rules are not always compatible with use of the Decision.

The system can probably be viable for some situations and for some countries. However, the larger or more advanced developing countries can also have other means of accessing affordable medicines and were perhaps not the ones primarily intended to be aided by the Decision. Factors outside the WTO may add complications or make use impossible. Use of the Decision will probably not be legally possible for countries that have obligations, encouraged through RTAs or other measures, on pharmaceutical test data or on linking regulatory approval of medicines to patent status.

My proposed model draws on these solutions and develops them further. In a nutshell, the model aims to preserve the Conventional International Patent Régime (CIPR) framework, while creating viable checks and balances in the form of a flexible model of compulsory licensing. Despite the apparent rift between CIPR and Access to Patented Medicines (APM), it is still possible to join the two systems conceptually. Indeed, the proposed model seeks to refine the 2005 WTO amendment to the TRIPs Agreement. An enhanced APM system would not stand counter to TRIPs but would rather reflect the “sprit” of that Agreement.

Each member shall be entitled to determine whether a case at hand constitutes a National Medical Emergency or other circumstances of such extreme urgency that a National Medical Emergency is deemed imminent HIV/AIDS, tuberculosis, and malaria, among other epidemics, constitute a National Medical Emergency. The declaration of National Medical Emergency can be cancelled or retracted following a determination that said emergency has ceased to exist or did not exist in the first place. Such a determination may be rendered by a WTO dispute resolution panel in consultation with the WHO and/or any national health organiza-

tion and/or authority within the relevant jurisdiction. A WTO member may unilaterally, and at any time, cancel or retract its declaration of National Medical Emergency.

Following a valid determination of National Medical Emergency, a compulsory license may be issued by the affected member state's national government to an entity, located within the jurisdiction of that member state. Such an entity would need to possess the capacity to manufacture the pharmaceutical product under the patent. A compulsory license shall not be contingent on the approval of the patent holder of the relevant patented active ingredient. The patent holder may petition the WTO Dispute Settlement Body or national courts and seek compensation for its substantiated losses. Such compensation shall be contingent on a showing that the compulsory license was utilized without justification (i.e., that a National Medical Emergency had not occurred) or that actual losses have been sustained by the patent owner. Absent repayment by local industry, the state issuing the compulsory license shall be liable for the payment of damages in the amount equal to the actual profits collected from the sale of the pharmaceutical product within its jurisdiction.

In addition to sanctioning the production of a patented medicine by a national industry, and in order to expedite the production of a medication, the compulsory license may also allow national pharmaceutical research and development entities to utilize all research data and results that were compiled or reached by the original patent holder. All member states in which the original patent is registered will divulge such relevant information. All disputes in this regard will be refereed by the WTO Dispute Settlement Body, which would consult with WHO and WIPO.

After obtaining a compulsory license, if a member state does not possess a mechanism capable of producing the needed pharmaceutical product, the state would be entitled to seek assistance of industries operating within another member state (Assisting Member). The government of the Assisting Member must give prior consent to such assistance, which consent would be contingent on the following: (1) License is intended to produce medicines for the consumption of the citizens and residents of the member state with a declared National Medical Emergency only; (2) License will be used by Assisting Member for the sole purpose of exporting the relevant medicine to the member with a declared National Medical Emergency.

The authorization to extend the license will be granted if the conditions are established by the state issuing the license. WTO member states undertake not to circumvent or forfeit rights in any future trade agreement. Furthermore, each member state undertakes to revise any existing free trade agreement, to which it is a member, and to amend any provision that negates, undermines, or nullifies

this chapter. Member states also undertake to revise duly any existing trade agreement the terms and conditions of which are counter to the provisions of WTO Compulsory License Decisions.

All WTO Members should draw conclusions from this: tinkering in the margins of a basically flawed framework is simply not going to deliver. Canada, which has committed to a public review of the legislation, and the WTO, responsible for the new TRIPs rules, need to act on these conclusions. The World Trade Organization must review the implementation of the TRIPs flexibilities, and in particular assess the efficacy of recent TRIPs amendments based on the August 30th Decision, with a view to proposing alternative mechanisms that meet health needs, are expeditious and take into account the economic reality of global drug procurement. In particular, the WTO should explore automatic solutions that do not necessitate complex time-consuming procedural steps. The Canadian government must assure a rigorous and transparent parliamentary review of the Jean Chretien Pledge to Africa, one that seriously addresses the fundamental flaws in the legislation; and must use its experience trying to implement the Decision as the basis to act at the WTO in order to remedy the constraints of the WTO rules governing the delivery of generic medicines to those in need. All other WTO members should learn from Canada's experiences.

So far there has been a limited need to use the system established by the Decision, but it will become more important in the future. The analysis on compulsory licensing as an instrument for improved access showed that it can be a useful tool in certain cases. It introduces another actor into the market—one that in contrast to patent holders does not have to be concerned with problems of prices in developing countries influencing prices in high income countries. The analysis also showed that so far most countries have been able to import essential medicines using other instruments than compulsory Licenses. However, with the full implementation of the TRIPs in all countries with meaningful manufacturing capacity the need for the new system will increase, especially where there is rapid product development. The main advantage of a compulsory License is to provide a bargaining tool for importers when negotiating with patent holders. The new system may already have had such indirect effects and strengthened developing country negotiators, even though nobody has so far completed an attempt to use the system.

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引言

一、问题的提起

2003 年春天,严重急性呼吸道综合征(也称“非典型性肺炎”, Severe Acute Respiratory Syndrome, 简称 SARS)病毒的爆发证明了致命性传染性疾病从一个国家迅速传播到另一个国家的可能性。正如 Obijiofor Aginam 所指出的:细菌没持“外国护照”,也不“承认”地理、政治边界或国家主权。受到旅游、贸易、观光、全球化现象和一些其他方面的推动,在一个世界边远地区爆发的疾病所引起的公共健康恐吓能轻易地越过国家边界,威胁他国的人群。例如第一次天花流行病于公元前 1350 年在埃及有记载,该流行病于公元 49 年被传到中国,700 年后被传到欧洲;1520 年被传到美国,1789 年被传到澳大利亚。在当代,减少诸如艾滋病^①和肺结核病这些传染性疾病在其他洲的传播势在必行。^②

世界上三个人中就有一人获取不到基本药品。^③ 根据统计,如果发展中国家^④现在能够获得足够的基本药品,那么每年大约有 100 万人的生命可得到挽救。许多人死于艾滋病。目前全球艾滋病感染者大约有 4000 万人。^⑤ 艾滋病危机深刻地说明了药品获取性问题的严重性。对于穷人和穷人占大多数的发展中国家来说,该问题已存续了很长时间。比如,早在 20 世纪 50 年代,广谱抗生素获取性问题就已存在。当时,许多发展中国家的四环素价格十多年保持不变。据说,至少部分是由于一些跨国公司^⑥ Pfizer、Cy-

① 艾滋病,即获得性免疫功能丧失综合征,英文名称 Acquired Immune Deficiency Syndrome,以下简称“HIV/AIDS”。

② F. M. Scherer & Jayashree Watal, Post-TRIPs Options for Access to Patented Medicines in Developing Countries, *Journal of International Economic Law*, Vol. 5, 2002, p. 913, p. 938; Peter K. Yu, SARS and the Patent Race: What Can We Learn from the HIV/AIDS Crisis, *Find Law's Writ*, May 29, 2003, http://writ.news.findlaw.com/commentary/20030529_yu.html.

③ 药品(或称药物)是指用于预防、治疗、诊断人的疾病,有目的地调节人的生理机能并规定有适应症或者功能主治、用法和用量的物质。参见《中华人民共和国药品管理法》第 102 条。基本药品(Essential Medicines)则是指满足大多数人的健康护理需求,并且必须在所有时间、以充足的数量和合适剂量予以供应的药品。

④ TRIPs 协议区分发展中国家和最不发达国家。本文所指称的发展中国家包括发展中国家和最不发达国家。但谈到 TRIPs 协议时,本文区分发展中国家和最不发达国家的称谓。参见:WTO, Development-Who are the Developing Countries in the WTO?, http://www.wto.org/english/tratop_e/devel_e/d1who_e.htm (last visited Oct. 31, 2007); WTO, Frequently Asked Questions About TRIPs, http://www.wto.org/english/tratop_e/TRIPs_e/tripfaq_e.htm (last visited Oct. 31, 2007); WTO, Understanding the WTO: Least-Developed Countries, http://www.wto.org/english/thewto_e/whatis_e/tif_e/org7_e.htm (last visited Oct. 31, 2007).

⑤ Rosine Jourdain, Intellectual Property Rights and Public Health in the Revised Bangui Agreement, in Christophe Bellmann, Graham Dutfield & Ricardo Melendez-Ortiz (eds.), *Trading in Knowledge: Development Perspectives on TRIPs, Trade and Sustainability*, 2003, p. 143. <http://library.wur.nl/WebQuery/catalog/lang/1893553>.

⑥ 跨国公司(transnational corporation),又称多国公司(multinational corporation)、多国企业(multinational enterprise)、全球公司(global corporation)或国际公司(international corporation),是专指那些投资者是来自不同国家的公司。参见百度百科:《跨国公司》, <http://zhidao.baidu.com/question/17530857.html>.

anamid、Bristol、Squibb 和 Upjohn 相互之间实行价格联盟^①的原因。^② 这个问题也出现在 1979 年, 当时美国参议员肯尼迪发表了一个演讲, 指出在国际儿童年里大约会有 260 万儿童当年会死于可免疫疾病, 因为他们享用不到已开发出来的疫苗。由于无法获取廉价药, 艾滋病夺去了几百万贫穷而无辜的生命。^③ 根据联合国于 2002 年的估计, 在总数为 4000 万的感染人群中, 有 3600 万人居住于发展中国家。他们获取不到能延长他们生命的抗逆转录病毒药品。事实上, 96% 的艾滋病携带者购不到抗逆转录病毒药品, 大约 500 万至 700 万的人急需这些药品。^④

诚然, 药品价格并不是导致公共健康问题的唯一因素。世界卫生组织 (World Health Organization, WHO) 和联合国艾滋病规划署 (Joint United Nations Programme on HIV and AIDS, UNAIDS) 也强调这点。国内卫生福利基础薄弱和财政系统不合理等也是引起公共健康问题的重要因素。如果缺乏诊所、医生、医药信息和安全知识, 那么药品的作用不能发挥最好效应。税收和关税也会影响药价。没有质量和安全保证的伪造药品的大量出现也是很危险的。^⑤

但是, 我们不能否认药品专利会影响到药价, 药价一般也会影响药品获取。^⑥ 正如《TRIPs 协议^⑦和公共健康多哈宣言》(简称《多哈宣言》) 所指出的: 我们承认知识产权保护对新药的研究开发是重要的。我们也承认知识产权保护对药品价格产生影响的忧虑。药价问题确实非常重要, 因为一些发展中国家购买药品费用一般占到了整个医药费用的 80%, 严重地影响到大众的公共健康。^⑧ 许多发展中国家没有建立起一般医疗保险体系。大多数人都是依靠自己的经济收入来解决药品和就医问题。许多发展中国家没有足够的购买力。据世界卫生组织统计, 这些人群自掏腰包购买药品的费用占到整个医疗费用的 50% ~ 90%。药品价格起到了至关重要的作用, 医疗体系的缺失使贫穷人群更加贫穷。^⑨

① 价格联盟实质是变相的垄断, 它违背了市场经济下的公平竞争原则, 违反了国家的相关法律法规。退一步说, 即使价格联盟在短期内取得一定收效, 缓解了同盟企业的燃眉之急, 但其潜在和长期的危害却不可忽视。首先, 它制约了企业竞争, 自由竞争是市场经济的基本属性, 离开了竞争, 市场就成为死水一潭。由于价格联盟下的不同企业经营成本不同, 却执行相同的价格, 形成大家平均瓜分市场份额的局面, 无形中保护了落后, 鼓励不思进取, 严重挫伤了企业发展的积极性; 其次, 它损害了消费者的知情权和选择权, 伤害了消费者的利益, 并且不利于培养消费者成熟的消费理念。俗话说, 没有成熟的消费者就不会有成熟的市场, 因此, 最终结果还是不利于整个行业的长期发展。参见百度百科:《价格联盟》, <http://baike.baidu.com/view/355602.htm>。

② The world medicines situation. WHO/EDM/PAR/2004.5, p.61, available at www.who.int/medicinedocs/collect/medicinedocs/pdf/s6160e/s6160e.pdf.

③ Symposium, The Global AIDS Crisis, Connecticut Journal of International Law, Vol.17, 2002, p.149; Comm'n on Intellectual Prop. Rights, Integrating Intellectual Property Rights and Development Policy: Report of the Commission on Intellectual Property Rights, 2002, p.30, http://www.iprcommission.org/papers/pdfs/final_report/CIPRfull.pdf.

④ Rosine Jourdain, Intellectual Property Rights and Public Health in the Revised Bangui Agreement, in Christophe Bellmann, Graham Dutfield & Ricardo Melendez-Ortiz (eds.), Trading in Knowledge: Development Perspectives on TRIPs, Trade and Sustainability, 2003, p.143, <http://library.wur.nl/WebQuery/catalog/lang/1893553>.

⑤ WHO, The world medicines situation. WHO/EDM/PAR/2004.5, pp.61 ~ 74, available at www.who.int/medicinedocs/collect/medicinedocs/pdf/s6160e/s6160e.pdf.

⑥ Sherer, F.M. & Jayashree Watal, Post-TRIPs Options for Access to Patented Medicines in Developing Countries, Commission on Macroeconomics and Health, Working paper WG4: 1, 2001, pp.5 ~ 8, http://cmhhealth.org/cmh_papers&reports.htm.

⑦ TRIPs 协议是指《与贸易有关知识产权协议》(Agreement on Trade-Related Aspects of Intellectual Property Rights, 简称 TRIPs 协议)。

⑧ The WTO Decision on Compulsory Licensing, Does It Enable Import of Medicines for Developing Countries with Grave Public Health Problems?, 2008 (2), http://www.kommers.se/upload/Analysarkiv/Arbetsomr%C3%A5den/WTO/Handel%20och%20skydd%20f%C3%B6r%20immateriala%20r%C3%A4ttigheter%20-%20TRIPs/Rapport%20The_WTO_decision_on_compulsory_licensing.pdf.

⑨ WHO, More equitable pricing for essential drugs: what do we mean and what are the issues? Background paper for the WHO-WTO secretariat workshop on differential pricing and financing of essential drugs, Høsbjør, Norway, 8-11 April 2001, prepared by the WHO Secretariat, http://www.wto.org/english/tratop_e/trips_e/who_background_e.pdf.