

Committee on Trade and Environment

ITEM 8: THE RELATIONSHIP BETWEEN THE TRIPS AGREEMENT
AND THE CONVENTION ON BIODIVERSITY

Communication from India

I. BACKGROUND

1. In 1995, the Committee on Trade and Environment (CTE) had outlined the issues to be discussed under agenda Item 8, as stated in the work programme of the CTE as follows:

- the relationship of the TRIPS Agreement to access and transfer of technology and the development of environmentally-sound technology;
- the relationship between the TRIPS Agreement and MEAs which contain IPR-related obligations. (WT/CTE/W/17, page 7)

2. This paper seeks to address the second issue, with particular reference to the Convention on Biological Diversity (CBD) which contains several IPR-related obligations. The paper keeps in view the conclusions and recommendations of the Committee in its 1996 Report (WT/CTE/1) to the first Ministerial Conference, particularly those contained in paragraph 208, *viz.*

"Further work is required to help develop a common appreciation of the relationship of the relevant provisions of the TRIPS Agreement to the protection of the environment and the promotion of sustainable development, and whether and how, in comparison to other factors, these provisions relate, in particular, to the following issues ... (d) the creation of incentives for the conservation of biological diversity, the sustainable use of its components, and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources, including the protection of knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant to the

conservation and sustainable use of biodiversity".

II. INTRODUCTION

3. The preamble of the TRIPS Agreement recognizes intellectual property rights (IPRs) to be private rights. Article 27.3 incorporates specific obligations on the issue of patenting life forms to the extent that it obliges Members to provide product patents for micro-organisms and for non-biological and microbiological processes. In addition, Article 27.3(b) stipulates that all Members shall provide for the protection of plant varieties, either by patents or by an effective *sui generis* system or by any combination thereof.

4. CBD on the other hand, in its Preamble categorically reaffirms that nation-states have sovereign rights over their own biological resources, recognizes the desirability of sharing equitably the benefits arising from the use of these resources as well as traditional knowledge, innovations and practices relevant to the conservation of biological diversity and its sustainable use, and acknowledges that special provisions are required to meet the needs of developing countries.

5. These two international agreements are, in our view, intrinsically linked with one another. India would propose therefore that the CTE, under its terms of reference, should discuss:

- (a) the relationship between the provisions of the CBD and those of the TRIPS Agreement;
- (b) suggestions on reconciliation of any contradictions therein, in line with the CBD provisions or within the same overall objective of conservation of biological resources with sustainable development.

III. PROVISIONS OF THE CBD AND THEIR RELATIONSHIP TO THOSE IN TRIPS

6. Till the CBD came into force, genetic resources were considered a common heritage of mankind that should be available freely for anyone who wants to access them. Through the CBD, for the first time an international agreement confirmed the sovereign rights of nation states over these resources, and called for the equitable sharing of benefits with prior informed consent and on mutually agreed terms. It further provided for special treatment for countries of origin and for developing countries. Most importantly, the CBD upheld the role of indigenous communities in conservation and protection of genetic resources and stated that there should be a fair and equitable sharing of benefits arising out of the utilization of knowledge system of such communities.

7. More specifically, the objectives of the CBD as stated in Article I are the conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources. Genetic resources are defined in the CBD as any material of plant, microbial or other origin containing functional units of heredity, which has actual or potential value. In addition, Article 15 specifically obliges Parties to take necessary measures to share in a fair and equitable way the results of research and development and the benefits arising from the commercial and other utilization of genetic resources with the Party providing such resources, on mutually agreed terms. However, the fair and equitable sharing of benefits arising out of the patenting and commercial exploitation of genetic resources is not dealt with at all in the TRIPS Agreement.

8. Article 3 of the CBD lays down the principle of the sovereign right to exploit such resources. Further, in Article 15 it is unambiguously stated that the authority to determine access to genetic resources rests with national governments and is subject to national legislation and that access, where granted, shall be on mutually agreed terms and shall be subject to the prior informed consent of the Contracting Party providing such resources.

9. Again Article 18 that refers to "Technical and Scientific co-operation" provides that "the Conference of the Parties, at their first meeting shall determine how to establish a clearing-house mechanism to promote and facilitate" such cooperation. The provisions of Article 19 state "each Contracting Party shall take legislative, administrative or policy measures as appropriate, to provide for the effective participation in biotechnological research activities by those Contracting Parties, especially developing countries, which provide the genetic resources".

10. Article 8(j) of the CBD enjoins Contracting Parties to respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities and encourages the equitable sharing of benefits arising from their utilization.

11. Article 16.5 of the CBD calls upon Parties to cooperate in order to ensure that intellectual property rights are supportive of and do not run counter to its objectives. This provision has been addressed in the WTO Secretariat Paper WT/CTE/W/8 and discussed in a preliminary manner in the Committee in 1996. It is our view that the Committee needs to devote more time to examine this issue, especially since it appears to be a CBD provision that Parties shall take measures aiming at the private sector to facilitate access to joint development and transfer of technology.

12. Therefore, TRIPS and CBD represent two significantly separate multilateral approaches to the utilization of living resources. While TRIPS seeks to promote and foster technological innovation by ensuring the certainty of intellectual property protection and of world markets for at least some biotechnological inventions, its provisions are silent on how this protection can achieve the objective of sustainable development, especially in developing countries. The CBD seeks to facilitate access to living resources, while focusing on conservation and sustainable use, as well as the equitable sharing of the benefits of such use. In its effort to create a stake for developing countries in conservation and sustainable use, as well as the equitable sharing of benefits of such use the CBD emphasizes the need to share with them benefits which include the need to share in the development and transfer of technology.

IV. SUGGESTIONS FOR RECONCILIATION OF THE PROVISIONS OF THE TRIPS AGREEMENT WITH THE CBD

13. The first important contradiction between the TRIPS Agreement and the CBD is the lack of any conditions on patent application (in Article 29 of the TRIPS Agreement) to mention the origin of biological/genetic resources and indigenous/traditional knowledge used in the biotechnological invention. The present mandatory conditions are confined to disclosure of the invention in a manner sufficiently clear and complete for inventions to be carried out by a person skilled in the art. In addition Members may require the applicant to indicate the best mode of carrying out the inventions known to the inventor at the filing date. These conditions were developed in the patent laws of different countries basically with respect to mechanical and chemical inventions. Biotechnological inventions need to be governed by a set of additional specification requirements. It could be considered whether the objectives of the CBD could be incorporated through inclusion in Article 29 of provisions requiring a clear mention of the biological source material by indigenous communities in the country of origin. This part of the patent application should be open to full public scrutiny immediately after filing of the application. Such a reconciliation would permit countries with possible opposition claims to examine the application and stake their claims well in time.

14. The next contradiction is the lack of provisions in the TRIPS Agreement on prior informed consent of the country of origin and the knowledge-holder of the biological raw material meant for usage in a patentable invention. This needs to be reconciled with Article 15.5 of the CBD. Thus, if any inventor wants to develop such biological materials for commercial purpose, he or she would have to get the prior informed consent of the country as well as of the owner and, if required by such owner, enter

into agreements with the country of origin.

15. A Material Transfer Agreement (MTA) would be necessary where the inventor wishes to use biological material and an Transfer of Information Agreement (TIA), where the inventor is basing himself or herself on indigenous or traditional knowledge. India feels that an obligation in the TRIPS Agreement to share benefits in this manner and through MTA/TIA should be considered as an effective tool to ensure that the benefits reach the claimant. Since individual beneficiaries cannot be expected to negotiate with large multinational companies, it would be the government of the country of origin which would be negotiating on behalf of the actual claimants.

16. India feels that the TRIPS Agreement could incorporate an obligation on patent owners to execute TIAs for any traditional or indigenous knowledge, which is already in the public domain or is a part of the recorded or otherwise publicly accessible knowledge, to be incorporated as a specific form of intellectual property in the Agreement. This will give a concrete shape to the laudable objective of such benefit sharing incorporated in the CBD. The CTE can also examine the pros and cons of evolving a system for patenting of indigenous knowledge and local, contemporary innovations of traditional folk.

17. Three documents presented to the CTE, viz. WT/CTE/W/8, WT/CTE/W/44 and WT/CTE/W/50 give an overview of similar concerns expressed in the drafting of provisions of the CBD as well as its later Conferences of the Parties. As mentioned in document WT/CTE/W/50 in paragraph 4, the CBD Conference of the Parties recognizes the need for further work, *inter alia*, on the sustainable use of biological diversity and the fair and equitable sharing of benefits arising out of the use of genetic resources, including the protection of knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity. CBD document UNEP/CBD/COP/3/22, *inter alia*, states that options for accommodating traditional knowledge within existing IPR regimes may be explored. The CTE, on its part, may discuss the need for exploring such options within the TRIPS Agreement. This paper, in paragraphs 12-14, proposes to assist such discussions.

18. The CBD document UNEP/CBD/COP/3/23 titled "The Convention on Biological Diversity and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS): relationships and synergies" may also be considered by the CTE. The CTE may ensure the continuing process of consultations and cooperation with the Secretariat of the CBD, aimed at promoting the harmonious implementation of the TRIPS Agreement and the CBD. Also, the CTE may like to consider the proposition that environmentally-sound technologies and processes (EST&Ps) should not be made obligatory until they are freely available.