CHAPTER 6

Convention on Biodiversity and Trade Related Intellectual Property Rights

Introduction

In this chapter the interface between CBD and TRIPS is discussed. The divergent views are examined and the differences in the perspectives between developing nations and the developed ones, particularly USA are highlighted. But the important question is whether both CBD and TRIPS are compatible and if not so whether any reconciliation is possible. This chapter seeks to provide an analysis of the various issues and the state of the debate on CBD and TRIPS.

CBD& TRIPS: Harmony or Tension?

The relationship between the objectives of the CBD and the TRIPS Agreement has been a controversial issue and the debate continues in various fora.[1] Both CBD and TRIPS could be examined from a regime perspective and their formations and the institutional structures and functioning could be analyzed on that basis. However as this dissertation focuses on CBD and TRIPS in the context of IPRs and plant genetic resources such an analysis is beyond the scope of this chapter.[2]

Review of Article 27.3(b) of TRIPS has been used by developing nations to highlight their concerns, and, views and the discussions in the CTE also reflect this. On the other hand the contentions of developing nations have been challenged by U.S.A which views that TRIPS contains enough safeguards and the accusations like biopiracy are unwarranted.[3] So whether is there any conflict between CBD & TRIPS itself is subject to debate. As discussed earlier CBD is a framework convention with a very weak enforcement mechanism. Even if a nation destroys biodiversity or abuses its sovereign rights over genetic resources, as long as,

it does not result in trans boundary environmental damage or affects the rights of any other nation or nations, there is no recourse for action either under CBD or under any other convention. There is no timeframe to implement the provisions of CBD by nations and a nation although signatory to the Convention may even choose to do nothing about it. But TRIPS has a fixed time frame for implementation. States, parties to TRIPS are obligated to bring in IPR regimes with in a fixed period and have to at least initiate changes in their laws. More importantly they could be evaluated by WTO's Dispute Settlement Mechanism in their commitments under TRIPS and retaliatory action is a possibility. As it has been discussed elsewhere the combination of dispute settlement with TRIPS is an important aspect of WTO Agreement.[4] A major purpose of TRIPS is to ensure that governments adopt methods to protect intellectual property rights[5]. The relationship between provisions of WTO and various MEAs is again a matter of dispute and there is an ever growing literature on the relationship between MEAs and provisions of WTO.[6] It has been argued that there is no conflict between provisions of TRIPS and CBD.[7]

However both the view of Carvalho and the views of the US government have not been acceptable to many to suggest that there is a tension between CBD and TRIPS and resolution of this tension is essential. The developing nations succeeded in ensuring that Doha Declaration reflects their concern about the relationship between TRIPS and CBD.

According to Paragraph 19 of the Ministerial Declaration:

"We instruct the TRIPS Council, in pursuing its work program included under the review of Article 27.3(b), the review of the implementation of the TRIPS Agreement under Article 71.1 and the work foreseen pursuant to paragraph 12 of this Declaration, to examine, inter alia, the relationship between the TRIPS Agreement and the Convention on Biological Diversity, the protection of traditional knowledge and folklore, and other relevant new developments raised by Members pursuant to Article 71.1. In undertaking this work, the

TRIPS Council shall be guided by the objectives set out in Articles 7 and 8 of the TRIPS Agreement and shall take fully into account the development dimension."

From the paragraph it is evident the mandate is to review in TRIPS Council Article 27.3(b) and Article 71.1 individually. It also specifies that protection of traditional knowledge and other relevant new developments in the context of Article 71.1 and this implies that protection of Traditional Knowledge can be an item for negotiation in the future.

Views on Interface between CBD & TRIPS

For the sake of clarity the various perspectives can be classified as below:

1) There is no relationship between CBD and TRIPS: According to this perspective both agreements cover different subject matters with very different mandates. Further their domains vary and there is no conflict between both. The objectives of the CBD could be fulfilled without amending TRIPS and hence there is no need to change TRIPS. It is argued that protection of indigenous knowledge or respecting the rights of the States and Communities could be ensured through contracts and other similar mechanisms and hence there is no need to clarify provisions of TRIPS. The viewpoints expressed by the U.S government and Carvalho reflect this position to a great extent. They argue that there are no conflicts between both.
2) Reviewing TRIPS in the context of CBD: According to this view the tension occurs when one agreement (TRIPS) is implemented without considering the provisions and objectives of the other agreement (CBD). According to this view it is an issue, reconciling one with another in implementation. Since both agreements are about rights and obligations in different contexts the possibility of reconciliation should be explored. If necessary, TRIPS may be amended to reduce or eliminate the problems or conflicts in implementation.

3) It is argued that there are many actual and potential conflicts between both. This is because of the fact that TRIPS does not recognize the principles and objectives of CBD, or for that matter, of any MEA[8]. In other words the tension between various agreements of WTO and MEAs spills over in practice and in policy formulation, and, the conflict between TRIPS and CBD is just one example of this. The TRIPS is biased in favor of private property rights and the expansion of the IP rights under TRIPS is in conflict with public rights and the rights of the States over natural resources, particularly genetic resources. The patent regime as envisaged under allows IP rights over seeds, biological processes, and the exceptions under TRIPS are still debated. Nevertheless by stipulating minimum standards for IP, TRIPS universalizes the extension of private rights and mandates that states adhere to that. TRIPS, specifies that all technologies are covered by IP. Thus by ensuring that all countries adhere to patents, copyrights, trademarks etc TRIPS ensures that all countries irrespective of their level of economic development institute administrative and legal regimes for this. Thus TRIPS is a triumph for private rights over public rights, and, private interests, which are in most cases corporate interests are protected in the name of IPRs under WTO.[9] But biodiversity is not just a resource to be appropriated or exploited recklessly. Interestingly a group of experts have argued that there is no direct legal collision between IP rights and right to genetic resources.[10]

There are tensions between TRIPS and CBD in relation to traditional knowledge, Prior Informed Consent, Disclosure of Origin and patenting 'products of nature' or cultural and scared objects and misappropriation of traditional knowledge /traditional practices. Further by mandating that a sui generis system is a minimum requirement TRIPS also affects the rights of farming communities and hence has an impact on food security and access to food.[11]

CBD & TRIPS: A Comparison

One way to examine the potential issues of conflict between TRIPS and CBD is to find out which provisions of both are relevant for each other and whether is there any conflict, potential or actual in the interpretations and implementation. Prima facie it appears that there are at least in five contexts the conflict is evident.

1. Sovereign Rights, Private Rights and Powers of the State

   Both the preamble of CBD and Article 15.1 recognize that Nation States (Contracting Parties) have sovereign rights over genetic resources within their territory. But under Article 27 of TRIPS biological resources could be protected under IPRS and states have to grant them, subject to provisions of TRIPS. Further TRIPS places many restrictions on the rights of the states on matters protected by IP. For instance state cannot invoke compulsory licensing except under provisions of TRIPS, nor, the state can usurp the rights of the IPR holders except in some circumstances. Moreover the state can be forced to defend its case before dispute settlement and face retaliatory action if necessary. The conflict occurs when a state decides to exclude some categories from patented. But under TRIPS states have to provide patents and / or sui generic protection for plant varieties. IP protection should be available on micro-organisms, non biological processes and what can be excluded is controversial. Thus the grounds on which IP protection can be denied have been narrowed by TRIPS.

2. CBD provides for equitable sharing of benefits arising out of exploitation of biological resources, although what is an equitable sharing is not defined by the CBD. The relevant provisions are Articles 15.7, 19.2. Bonn Guidelines are also relevant to this. Similarly CBD provides for equitable sharing of benefits in the context of using traditional knowledge, innovations and practices. (Articles 18.4, 8(j)).

TRIPS mandates that patents must be provided for all fields of technology and this covers usage of biological resources and the extension of patent rights is problematic for it amounts patenting life. TRIPS has no explicit provision for benefit sharing and the patent holder or applicant is under no obligation to share the benefits with the provider of the genetic resources. Although, naturally occurring substances and products of nature per se cannot be patented, process and product patents relating to isolation and purification and extraction have been granted.

The conflict arises because CBD provides for a legal basis to developing nations and indigenous communities to demand a share in benefits. TRIPS is more oriented towards protecting private rights than towards sharing the benefits that arise out of the private rights. Thus TRIPS does not create an obligation for the IP holder to share benefits with any one, and the IP holder may even chose not to use that right to produce something. The relevant article is 27.1

3. CBD provides for Prior Informed Consent (PIC) of the nation state and / or that of the communities. It also speaks of participation and approval of local communities (Article 15.5).

TRIPS has no such provision regarding PIC or seeking approval of any community. The TRIPS provides for IP protection but does not put any precondition except like those relating to criteria to be fulfilled under the laws on IP. States have authority under, CBD to mandate PIC and participation or approval of communities. But whether a State can mandate this, prerequisite for granting IP protection is a question. The views on this vary and, whether, a requirement (e.g. disclosure of origin or certificate on PIC) violates TRIPS is yet to be sorted out. Technically, States can craft legal regimes on IP within the parameters laid down by TRIPS with some flexibility. But the issue is will such a reading and interpretation of TRIPS is acceptable to all countries when the move is towards harmonization and stronger protection

for IP. As pointed elsewhere the norms relating to prior art, novelty, geographic limitation of prior art vary among countries and hence it can be argued that such requirements can be incorporated in national laws even if there is no consensus on that. But the key question is whether the TRIPS Council or appellate body of WTO will agree with such a move as in conformity with TRIPS.

Interpreting Article 27.3(b) and IP Protection : Views and Perspectives

Article 27.3(b) of TRIPS is a contested article and the positions taken by various countries on this reveal the differences in perspectives. At the core of this is the question of what to include and what to exclude from IP protection. In both WIPO and WTO the nations have submitted various proposals which for the sake of clarity and understanding can be grouped as three major options as envisaged by the countries.

The first option envisages revision of this article so that life forms are excluded from the domain of TRIPS. The option which is a variation of the above is to leave that to the discretion of individual countries without insisting that all countries should give IP protection on biological processes, life forms, micro organisms. The third option is to implement the provision with an understanding that patenting of plants, microorganisms and biological processes is permitted. It also supports the view that UPOV 1991 is the effective sui generis system under TRIPS and double protection for plants and plant varieties is permitted. This stand reflects the views of USA and to a great extent the views of EU. But in practice as there has been no consensus the status quo continues. Countries modify IP rules as needed under the time schedule for implementing TRIPS and to give effect to the rulings of DSB of WTO. Further many countries have entered into regional (e.g. NAFTA) and bilateral trade agreements with provisions on IPRs. It has been observed that often countries agree to a TRIPS Plus regime which includes longer term for patents, restrictions on compulsory licensing, and, strong protection for, copyrights etc. A discussion on this is beyond the scope

of the chapter[12]. Thus even as countries debate these issues they are also taking steps and these have to be understood in a broader context of international economic relations.

The stand that there should be 'No Patents on Life' reflects the view of many NGOs, developing nations, and particularly that of the African Group of countries. According to this perspective the Article 27.3(b) should be amended and, clarified such that patenting of plants, and animals, or their parts thereof. Micro-organisms, biological processes relating to plants, animals, their parts is prohibited. It argued that this should include, inter alia, genes, gene sequences, cells, seeds etc. Elsewhere in this dissertation a related move by the Andean Pact countries to arrive at a common norm for patentability is discussed and their stand comes very closer to this view.

This position can be found in the communication by Kenya to WTO (Draft Communication on Review of the Provisions of Article 27.3(b) of TRIPS Agreement WT/GC/W/302 dated 6th August 2003.

The proposals by India in this context are interesting. It should be read in the context of India's submission regarding other provisions of TRIPS. The position taken by India (vide WT/L/326 dated 22nd Oct 1999) can be summarized as below :

1) Patents on all life forms should be excluded.
2) In the event of this not being acceptable patents based on traditional knowledge/indigenous knowledge, and, products and processes essentially derived from such knowledge should be excluded.
3) Disclosure of Origin, Proof of Prior Informed Consent should be made mandatory. India has amended Patents Act to give effect to such a requirement on disclosure of origin.
4) Regarding, patenting micro-organisms individual nations should have the right to decide what are patentable micro organisms, in light of Article 27.2. [13]

Another perspective is that excluding life forms from the coverage of TRIPS should be an option available to nations. In other words 'may exclude' should be interpreted as that the nations have the discretion to determine whether patenting life forms is permissible. In effect it is left to countries to provide protection on plants and animals, without a corresponding condition that countries should provide patents on plant varieties, microorganisms, non-biological processes. The proposal by the African Group in this regard wants to incorporate the principle that TRIPS should promote sustainable use of genetic resources and their conservation. See WT/GC/W/302 dated 6th August 1999,IP/C/W/206 dated 20th Sep 2000. The proposal from Brazil opined that Article 27.3(b) should be amended for allowing members to stipulate that identification of the source of the genetic material, traditional knowledge used for that, evidence of fair and equitable benefit sharing, and evidence of PIC for exploitation of the patent. Similar views of have been expressed by Zambia, Jamaica, Venezuela, Kenya, Pakistan and Uganda among others. Some other countries have suggested that Patents should not be granted if they are inconsistent with Article 15 of CBD. Some proposals have suggested that products of nature should be excluded from patentability.

The proposals as cited above give more importance to CBD and its benefit sharing provisions and try to strike balance between CBD and TRIPS. By suggesting exclusions and conditions they want to ensure that TRIPS does not totally reverse the existing criteria relating to microorganisms etc. But in both USA and EC these questions relating to exclusions from patentability have long been debated and decided. The challenge to the biotechnology directive of EC was defeated at EC Court of Justice[14]. If at all anything the IP protection has been extended to genome sequences, genetic tests, software etc. Thus the possibility of these proposals being accepted by EC, USA and Japan is very remote. If at all anything they could be used in negotiations as positions to begin with.

In contrast in their proposals both USA (WT/GC/W/115 dated 9th November 1998, IP/C/W/209 dated 20th September 2000), European Countries (WT/GC/W/193 dated 2nd June 1999, IP/C/W/254 dated 13th June 2001) have contended that the two treaties do not deal with the same subject matter. The interface between the provisions of both has been pointed out earlier. But it is argued IP is only one of the many aspects relating to ABS and IPRs do not regulate the access to genetic resources, nor does it regulate bioprospecting. The origins of such positions can be traced to the objections raised by the USA during the negotiations of CBD and its refusal to sign CBD. It has been observed that:

"Thus, it seems that the policy of the United States is willing to respect a country's autonomy regarding its conservation policies as long as it does not interfere with a system of intellectual property rights."[15] Hence it is no wonder that conditions like certificate of origin are resisted and it is insisted that only conditions that are essential to meet the criteria of patentability should be incorporated. It is also argued that the proper forum for issues relating to indigenous/traditional knowledge is WIPO, where discussions on issues relating to benefit sharing can be discussed. In other words TRIPS should be left untouched as much as possible.

But some countries are willing to take a flexible stand in this issue. For example Norway has suggested that whether inserting the provision on the disclosure of origin in TRIPS will result in an effective implementation of CBD's objectives could be considered. Belgium has tried to reconcile provisions of TRIPS with that of CBD by amending IP laws and such efforts although cannot have succeeded fully, it is important that nations are willing to try, than to rule out the possibility or pay lip service to the demands of developing nations.[16] On these issues EU has taken a position that is partially sensitive to the demands of the developing nations.[17]

Disclosure of Origin has emerged as one of the possible ways to reconcile TRIPS and CBD, vide discussion in the chapters on Indigenous Knowledge and Bioprospecting. It is suffice to point out here that this idea needs to be developed and debated further. It can be used to reconcile TRIPS and CBD, provided suitable amendments are made in TRIPS.[18]. But what is most wanting is political consensus at the international level.

Hence in view of the variances in the positions taken by developing nations and developed nations the possibility of a solution being found in the near future is remote. Apart from CBD, now the IUPGR negotiated by FAO is another treaty that is relevant in the context of genetic resources and benefit sharing.

As of now many nations are attempting to formulate laws relating to access and benefit sharing based on CBD. The problem is that these laws are yet to be tested for their efficacy in achieving the objectives. However a maze of laws brings neither, clarity nor facilitates cooperation between countries. Amending the trade laws at the global level is much more desirable. Amending TRIPS to facilitate the objectives of CBD is possible. But this would result in TRIPS accepting the national sovereignty over natural resources and providing flexibility to nations on interpreting Article 27.3(b) and allowing nations to draw their own list of patentable subject matter. Incorporating disclosure of origin and certificate for PIC are ideas that have been resisted by developed nations. But they are willing to concede these as long as they are non-binding or voluntary disclosures. Vide discussion in the chapter on indigenous knowledge. Some of the suggestions for harmonization look fine in paper but they fail to take into account the complexities in reality.[19]

Biological resources are products of nature and hence cannot be patented, except under some circumstances. They are physical entities. But indigenous knowledge is also information. Information is very different from a physical entity. Using information one can

create IP rights that cover a physical entity. But IP rights do not give control over physical entity per se.

So how should the TRIPS Agreement be amended is not clear. Recognizing indigenous knowledge can be done in many ways including monetary compensation, contracts etc and it can be argued that there is no need to amend TRIPS for this. The key question is how to ensure that IP rights regime does not help in misappropriation. (Although indigenous knowledge and genetic resources can be misappropriated in many ways even without IP rights, that is not examined here). Some suggestions may sound relevant prima facie. But they are not well suited to meet the challenges being faced by developing nations.

Prohibition of patenting microorganisms of all sorts looks fine. But this fails to take into account the fact that many developing nations are trying to build up capacity in biotechnology and are planning to use biotechnology as a development strategy. Using IP as a strategy dictates that they start granting IP protection for genetically modified organisms, plants etc. And obviously granting IP rights on genetically modified organisms for citizens of a country, but denying it to citizens or entities from other countries would be contravention of TRIPS. It is true that patenting has been a factor in the growth of biotechnology industry and the number of biotech patents has increased rapidly the relationship between patenting micro organisms or genetically modified organisms and their impact on biodiversity is unclear.[20] As most biotechnology patents have been obtained in Europe and USA the trend indicates that although relatively it is a new field, the growth in the number of patents granted in biotechnology is phenomenal.[21]

Thus developing nations will have to craft a strategy that will enable them to use both CBD and TRIPS without losing sight of their development objectives. To do this they have to use the flexibility available in TRIPS in defining the criteria for patentability and interpret and implement Article 27.3(b) in such a way that patent claims, particularly, broad patent

claims on biological processes, etc are not permitted.[22] But to what extent countries can do this depends on the outcome of the negotiations in WTO and other fora.

It should be noted that TRIPS and CBD need not always be viewed as mutually antagonistic. The synergy between the two can also be considered and used to further the mutually supporting objectives of both.[23]. It has also been suggested that both developing nations and developed nations should adopt specific measures to harmonize CBD and TRIPS in a comprehensive manner covering traditional knowledge, biodiversity and benefit sharing.[24]

But recent developments indicate the North South divide will continue to have its impacts on proposals to harmonize CBD and TRIPS as both USA and Japan do not even agree that there is a need to discuss these issues in TRIPS Council. As of now it seems that EC is willing to consider the demands of developing nations but other countries like USA and Japan are unwilling to acknowledge them as legitimate demands. Similarly the difference of opinion on protection to TK/IK is also sharp and hence consensus will not emerge in the near future. Thus while the developments in different fora (CBD, TRIPS Council, WIPO) are very important it will be naïve to think that solutions will be found just because the discussions are proceeding in different fora and meetings are held at periodical intervals.

Unless there is a change in the positions taken by different countries there is a remote possibility of finding a solution that tries to harmonize TRIPS with CBD. But in the long run some solution may emerge which is likely to be a compromise between the 'extreme' positions taken by different countries. The possibility of EC and European nations playing an important role in this cannot be ruled out.[25]

Conclusions

TRIPS and CBD are based on different objectives. So far there has been no direct conflict or case for dispute settlement has arisen, still, it is clear, that the provisions of both create potential conflict, in implementing both. However, the various proposals (amending TRIPS, creating an obligation – disclosure of origin, Bonn guidelines, providing flexibility in interpreting Article 27.3(b)) are hotly debated in various fora but there is a long way to go in terms of positions acceptable to all countries. To what extend these proposals will be accepted is yet to be seen. However it is possible that a solution may emerge as a part of the wide debate on TRIPS and it is likely that some flexibility may be made available to facilitate reconciliation. It may include a definite but weaker requirement on disclosure of origin, giving more time to implement Article 27.3(b), giving more flexibility in interpreting terms of Article 27.3(b). At this juncture only some conjectures can be made out.

Notes and References

[1] Ruiz, Manuel (2003)

See also Tarasofsky, Richard G (1997), Chaytor Beatice(1999).

[2] Coleman, William D. Gabler, Melissa (2002), Rosendal,Kristin (2003)

[3] "In the view of the United States, which, by the way, is not a Party to the CBD, the TRIPs Agreement and the CBD are mutually supportive, to the degree there is any relationship at all "Fowler, Peter N. Zalik Spring, Alice T. (2003). The observation by the U.S delegation is that

" .. [W]e note that suggestions that amendment is necessary are always made in the context of the TRIPS Agreement and not the alternative "(WTO document IP/C/W/209 at 5 31st October 2000). But the contention of developing nations is other wise.

[4] Hasson, Adam I. (2002)

[5] Charnovitz, Steve (2002)

[6] Shaffer, Gregory C (2001)

For an analysis of WTO and CBD and the implications of trade measures for sustainable agriculture, sustainable use, biosafety etc see Ogolla, Bondi, et al. (2003)

[7] For example, Carvalho writes

"Actually the TRIPS Agreement, if correctly implemented supports the objective of CBD, in the sense that protection of intellectual property contributes to the promotion of technological innovation which is relevant for the conservation and sustainable use of biological diversity". Carvalho (2002)

[8] For e.g. "The IPR regimes established by the WTO and TRIPs, and the CBD, are two international legal regimes with apparently conflicting objectives. The WTO/TRIPs objective is to create and support the expansion of patents and intellectual property rights over life forms. This has serious negative implications for the biodiversity rights of developing countries that are recognized under the CBD. To date, it appears that the WTO/TRIPs agenda or corporatization and privatization of biological resources is winning out" in Bhutani, Shalini and Kothari, Ashish (2002)

[9] Drahos, Peter with Braithwaite (2002)

[10] Anja Von Hahn (2001) It is also noted that

"However, the statement that there is only a very limited potential for possible direct legal clashes does not fully answer the question whether there generally are conflicts. In other constellations and beyond the area of direct legal collisions, one must examine the effectiveness and assertiveness of the rights. In this context, it is of some significance that intellectual property rights can be secured and asserted globally, though in practice this is may entail huge efforts and hold little promise for effective protection. Despite all difficulties in the legal practise, this clearly sets the assertiveness of intellectual property rights apart from the assertiveness of the ownership rights over genetic resources."

[11] Tansey, Geoff (2002)

[12] Musungu,Sisule F. and Dutfield, Graham (2003), Morin (2003)

[13] Kruger, Muria (2001)

[14] This has been discussed these elsewhere in this thesis.

[15] Tejera (1999)

[16] Van Overwalle, Geertrui (2002)

[17] As discussed elsewhere in this chapter, with comments on recent developments.

[18] Susanne (2003)

[19] Tejera (1999) at P.985

"The TRIPs Agreement should be amended to recognize the reality that biological resources and indigenous knowledge are many times part of the same package. By recognizing both, indigenous knowledge would be as protected as the resources it helps bioprospectors to find. Also, such recognition would allow for compensation of the holders of the knowledge"

[20] Cripps, Y. (2001).

[21] From 1990 to 2000, the number of patents granted in biotechnology rose 15% a year at the United States Patent and Trademark Office (USPTO) and 10.5% at the European Patent Office (EPO), against a 5% a year increase in overall patents – OECD (2002)

[22] Correa. C (2000)

[23] Chaytor (1999)

[24] Staffler, Curci (2003)

[25] It is evident from the following that irreconcilable differences persist in the discussions over TRIPS and CBD. There is no agreement even on the issue of the proper forum for this issue. Hence at this stage only protracted negotiations seem to be ahead with no consensus in sight.

"At the 8 March meeting of the WTO Council for Trade-related Aspects of Intellectual Property Rights (TRIPs), a group of developing countries renewed their efforts to speed up discussions on resolving potential conflicts between the TRIPs Agreement and the Convention on Biological Diversity (CBD) by putting forward a checklist of issues for further discussion. While the EC, Norway and Switzerland signalled their willingness to proceed with the debate in the TRIPs Council on the basis of their proposal, the US and Japan opposed further discussions on the points raised in the checklist.

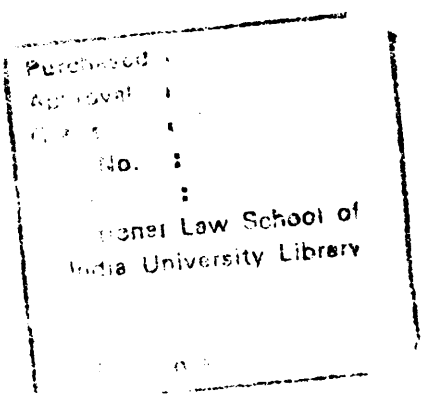
In their submission, the group of countries, including Bolivia, Brazil, Cuba, Ecuador, India, Peru, Thailand, Venezuela and Pakistan, highlight concerns that the TRIPs Agreement allows the granting of patents for inventions that use genetic material and associated knowledge without requiring compliance with the CBD provisions (IP/C/W/420). To address this gap and the resulting problem of bio-piracy, the countries put forward a checklist of three issues and related questions raised in previous proposals, namely disclosure of origin and evidence of prior informed consent and benefit-sharing related to genetic material and traditional knowledge (see BRIDGES Trade BioRes, 28 November 2003).

While the EC did not necessarily agree with all three points, such as evidence of prior informed consent, it was willing to pursue the discussions along those lines. It also stressed that in order to avoid duplication, the TRIPs Council's work on traditional knowledge should await the outcomes of the WIPO Intergovernmental Commission on Intellectual Property Rights and Genetic Resources, Traditional Knowledge and Folklore. Switzerland and Norway also signalled their openness to discussions. In contrast, the US opposed the checklist, arguing that there was no conflict between the TRIPs Agreement and the CBD and that the CBD should not be enforced through patent law. The US, along with Japan, called for the discussions to take place in WIPO. In response, the India-led group,

supported by other developing countries, insisted that discussions should continue in the TRIPs Council pursuant to the mandate set out in para 19 of the Doha Declaration.

Also at the meeting, the EC responded to an earlier submission by the African Group on the review of Article 27.3(b) (patentability of life forms) of the TRIPS Agreement (IP/C/W/404; see BRIDGES Trade BioRes, 13 June 2003). In general, the EC supported the submission's suggested approach to identify and focus on areas where agreement could be reached.

BRIDGES Trade BioRes, 4 March 2004 www.ictsd.org



CHAPTER 7

Seeds, Plant Varieties and Intellectual Property Rights

Introduction

Granting IP rights over seeds has been a controversial issue, as, for many years seeds were considered as products of nature, and hence no IP protection could be granted. However today there are hundreds of patents on plant varieties and patents have been granted on plant parts, genes, traits etc. In this chapter the transformation of this product of nature into a patentable object is examined and the Article 27.3(b) is analyzed in detail in the context of the options available for developing countries in developing a sui generis system.[1]

Seeds were once outside the purview of industrial mode of production. But during the last hundred years or so there has been a sea change in this and today the very right of farmers' to save seeds and reuse them is under dispute. Plants can be considered as products of nature, only, and, if only, the contributions of farmers' are ignored. Farmers have over the ages have introduced thousands of varieties, created new ones and propagated them and plants have been taken across continents and have been integrated in to various cultures and nations. However plants could be multiplied and a handful of seeds are enough to (re)create plantations or fields filled with plants. This reproducibility is a feature that resisted commodification of germplasm/plant genetic resources for long.[2]

As pointed out earlier the colonial expansion and the transfer of exotic germplasm and introduction of new crops and varieties in distant lands went hand in hand. The colonial expansion also resulted in many other developments ranging from establishing botanical gardens in many places and Colombian exchanges which often resulted in genocides, destruction of native nations and cultures. Marx's observation on commodification are very