



CENTER FOR INTERNATIONAL ENVIRONMENTAL LAW

**TREATMENT OF BIODIVERSITY RELATED ISSUES
IN THE WTO**

**PRELIMINARY COMMENTS ON THE
REVISED DOCUMENTS FOR THE DOHA
MINISTERIAL CONFERENCE**

by

BY DAVID VIVAS AND ELISABETH TUERK ¹

November, 2001

¹ The views expressed are those of the authors and do not necessary reflect those of CIEL, South Centre or The Rockefeller Foundation.

Acknowledgements

Paper prepared under the CIEL/South Centre joint project, funded by the Rockefeller Foundation, to assist developing countries on TRIPs-related issues.

The authors would like to thank the comments of Matthew Stilwell and Magali Stitelmann.

David Vivas Eugui
Senior Attorney
CIEL, Europe
BP 21, 160a Route de Florissant
1231 Conches, Geneva, Switzerland
Phone: 41 22 - 789 07 38
Fax: 41 22 - 789 05 00
Email: dvivas@ciel.org

Elisabeth Tuerk
Project Attorney
CIEL, Europe
BP 21, 160a Route de Florissant
1231 Conches, Geneva, Switzerland
Phone: 41 22 - 789 07 38
Fax: 41 22 - 789 05 00
Email: etuerk@ciel.org

TABLE OF CONTENTS

I - GENERAL COMMENTS	1
1. There still is a need to harmonize WTO agreements, in particular the TRIPS Agreement with the CBD. The Doha draft Declaration misses an opportunity to move towards this direction.....	1
II - SPECIFIC COMMENTS	3
1. The preamble of the new draft Declaration fails to identify sustainable development as the main objective of any / the new negotiations.....	3
2. The TRIPS Agreement language in the new drafts mixes up the existing mandated reviews. It may distract focus from the review of Article 27.3b and thus weaken developing countries' opportunities to achieve their objectives.	4
3. The TRIPS Agreement language in the new drafts only identifies issues related to CBD as part of the existing reviews, but fails to call for new negotiations to more broadly incorporated principles and objectives of the CBD.....	5
4. The current text strengthens the advisory role of the Committee on Trade and Environment (CTE) but fails to provide sufficient authority to permit true reform of rules. In relation to MEAs and more specifically to CBD, a long road is created for including new mandates for negotiations.....	6
5. The Implementation text on TRIPS Agreement fails to include biodiversity issues in those ready for immediate action.....	7
6. The Implementation text on the TRIPS Agreement fails to establish new mandates to negotiate the necessary changes of WTO Agreements to accommodate CBD and the International Undertaking (FAO).	7

This note provides preliminary observations on how the second drafts of the Ministerial Declaration² and of the Implementation Decision³ address issues related to biodiversity. It examines developing countries' concerns and concludes that both drafts fail to adequately address developmental considerations, and even raise new concerns. In summary, the new drafts fail to include many of the developing countries' contributions and proposals, which have aimed at achieving recognition of the objectives and principles of the Convention on Biological Diversity (CBD) in the WTO. The drafts thus fail to increase potential for synergies among trade and biodiversity objectives.

The CBD is an international agreement for the conservation of biological diversity. The Convention's objectives 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 use of genetic resources, including through appropriate access to genetic resources and through appropriate transfer of relevant technologies⁴. These objectives are of crucial importance in particular for developing countries. Sustainable use of the biodiversity is warranted through the establishment of a system of access that permits control and preservation of the genetic resources, measurement of the environmental impact, existence of prior and informed consent by the host government and traditional communities, and the fair and equitable sharing of benefits deriving from genetic resources.

This note will first present some general comments on the treatment of biodiversity related issues in the WTO context. It will then provide more specific comments on how the new drafts of the Doha Ministerial Declaration address biodiversity issues, specially in the preamble, in the Agreement on Trade related Aspects of Intellectual Property Rights (TRIPS Agreement) section, and in the new mandate of the Committee on Trade and Environment (CTE). Also, some comments will be provided on the implementation text.

I - GENERAL COMMENTS

1. There still is a need to harmonize WTO agreements, in particular the TRIPS Agreement with the CBD. The Doha draft Declaration misses an opportunity to move towards this direction.

Biodiversity issues have not been treated horizontally in any of the discussions surrounding different WTO Agreements. So far, the relationship between biodiversity and WTO Agreements has mainly been analyzed in two WTO bodies: the Committee on Trade and Environment (CTE) and the TRIPS Council. Since the inception of WTO, developing countries have presented proposals to both bodies, which aimed to create synergies between the WTO agreements and the CBD. In particular, these proposals aimed to achieve that the TRIPS Agreement explicitly recognizes the objectives and principles of the CBD.

Before the Seattle Ministerial, biodiversity issues were maybe the most important items of developing countries' ministerial agenda on the TRIPS Agreement. In particular,

² See Job (01)/140/Rev.1, October 2001.

³ See Job (01)/139/Rev.1 and Job (01)/152/Rev.1, October 2001.

⁴ See art. 1 of the CBD, 1992.

developing countries' agenda focused on the principles of sovereign rights over genetic resources, prior and informed consent, benefit sharing and availability of mechanisms of enforcement. Currently, and due to various health crisis, the issue of public health and access to medicines has taken a great deal of attention from developing country negotiators. Nevertheless, the importance and urgency of health issues should not overshadow the need for reviewing and renegotiating the TRIPS Agreement so as to adequately address biodiversity concerns.

The second drafts for the Doha Ministerial include language on the relationship between TRIPS Agreement and CBD, and on the protection of traditional knowledge, in several parts of the texts. Overall, these texts present a neutral language with the intention to reduce developing countries pressure on biodiversity related issues and to avoid new negotiations in these fields.

In the following, this note will highlight the main common features and concerns with the different references to biodiversity related issues in the second set of draft Ministerial documents. In summary, the current texts:

- *fail to clearly recognize the principle of sustainable development* as the overarching goal of the future negotiations (see sub-issue 1);
- *mix up the different reviews*, weaken the focused discussion under Article 27.3 b and thus diminish developing countries' opportunities to achieve their objectives (see sub-issue 2);
- *fail to clearly specify what kind of work Members will undertake* on issues related to CBD in the future, and simply point out some CBD related issues as part of “*continuing reviews*”, without a clear call for re-*negotiating* the TRIPS Agreement (see sub-issues 3);
- *fail to provide ways and mechanisms* within the new round of future negotiations to introduce the necessary changes and reform the TRIPS Agreement in accordance to the CBD:
 - *by simply calling for an examination* of CBD linkages within the *existing reviews* (see sub-issue 3),
 - *by failing to provide sufficient authority for the CTE to permit true reform of rules* in relation to MEAs (sub-issue 4); and
- *fail to include biodiversity issues under the list of immediate actions* of the Implementation Decision.

The overall result in the ministerial text relating to the TRIPS Agreement is disappointing. It does not pave the way for a more focused and thus more successful and satisfactory discussion of the main issues; it fails to clearly identify issues within the Article 27.3b review, and finally, it mixes up different existing reviews thus opening the door for discussing new issues through the use of Article 71.1.

II - SPECIFIC COMMENTS

1. The preamble of the new draft Declaration fails to identify sustainable development as the main objective of any / the new negotiations.

The preamble of the second draft for the Ministerial Declaration:

reaffirms the objective of sustainable development as stated in the preamble of the Marrakech Agreement⁵.

In principle, reaffirming the objective of sustainable development does not add anything new to already existing WTO objectives and obligations. Nevertheless, sustainable development is an important objective, and thus it is crucial to recall it in the context of new negotiations – the most likely scenario deriving from the Doha Conference. An explicit recall of sustainable development in the preamble is crucial, even if the preamble by its very nature is not legally binding, but because preambles are a firsthand source for any future interpretation of specific obligations, either under a particular agreement or under a specific negotiating mandate.

The preambular language of the current draft also states that:

upholding and safeguarding an open and non-discriminatory multilateral trading system, and acting for the protection of the environment and the promotion of sustainable development can and must be mutually supportive⁶.

This type of statement has been one of the main concerns raised by some developed countries on the issue of environmental protection and by some developing countries on the issue of sustainable development. This text also responds to some concerns of the NGO community when recalling the need to create synergies between Multilateral Environment Agreements (MEA) and the WTO agreements. Even if this language has not been designed to specifically include biodiversity related concerns, it could be a good tool when seeking recognition of the principles and objectives of the CBD within the WTO.

Finally, the preambular language recognizes:

the right of Members under WTO rules to take measures to uphold and enforce the levels of health, safety and environmental protection they deem appropriate. We agree to ensure that measures taken to address such concerns shall not be used for protectionist purposes⁷.

This sentence permits WTO members to take measures for promoting health, safety and environmental protection if those measures are consistent with WTO standards. This sentence contrasts with the previous draft text (first draft)⁸ where there was a mention to *multilateral rules* in general and not *WTO rules*. The idea under the previous text was to give

⁵ Idem note 1, paragraph 6.

⁶ Idem.

⁷ Idem.

⁸ See WTO Job 140, paragraph 5, September 2001.

space for supportive interpretations of WTO with other multilateral agreements, especially MEAs. This situation gives less space for supportive interpretations of the CBD and WTO Agreements.

2. The TRIPS Agreement language in the new drafts mixes up the existing mandated reviews. It may distract focus from the review of Article 27.3b and thus weaken developing countries' opportunities to achieve their objectives.

Paragraph 19 of the Ministerial Declaration deals with existing reviews under Article 27.3b and Article 71.1 of the TRIPS Agreement. According to the current text, Ministers instruct:

the TRIPS Agreement 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 71.1⁹.

This mandate raises serious concerns. In particular, the above language would imply a fusion of the existing reviews, which Members are already carrying out under the TRIPS Agreement. Such a fusion will *de facto* merge all reviews within a single discussion and Members will thus lose the useful focus on the Article 27.3b review.

So far, the review of Article 27.3b has been oriented towards an analysis of exceptions to patentability and of other issues of interest to developing countries and civil society in general. This review has been the *main* entrance for expanding exceptions to patentability and for including principles of the CBD and the International Undertaking into the WTO. Confusing and combining different reviews will place the incorporation of new developments, such as those pursuant to Article 71.1 onto the same legal level as discussions under Article 27.3b.

Article 71.1 contains a full review of the TRIPS Agreement as a whole. An unfocused review of the TRIPS Agreement can bring new issues and new intellectual property standards into the negotiations, for which most of developing countries are not ready, including, patents on business procedures, patents on life, extended plant variety protection, *sui generis* protection of databases, renewed standards on enforcement, etc. This may considerably weaken developing countries' opportunities in rebalancing the TRIPS Agreement, specially in areas of interest for developing countries like the non patentability of life, flexible *sui generis* systems for protecting plant varieties, recognition of farmers rights, inclusion of the requirement for identification of the genetic resources' origin, and the protection of traditional knowledge.

⁹ Idem note 1, paragraph 19.

3. The TRIPS Agreement language in the new drafts only identifies issues related to CBD as part of the existing reviews, but fails to call for new negotiations to more broadly incorporated principles and objectives of the CBD

Paragraph 19 of the Ministerial Declaration calls for an *examination* of issues, not for *negotiations*. Examination of issues does not imply any change in the current status of the work already undertaken by WTO Members on the existing reviews. Articles 27.3b and 71.1 reviews are being discussed as an ordinary item in the agenda of the TRIPS Council since several years. The term examination simply means detailed inspection or investigation¹⁰. Thus, by simply calling for “*continuing reviews*”, the current text fails to specify what kind of *new* work Members will undertake in the future. There is not a need for further study or investigation, but for negotiations on practical means to include biodiversity, environmental and ethical concerns.

Paragraph 19 also avoids any reference to the TRIPS Council Chairman’s list of issues on 27.3b, which was oriented towards a more focused agenda on all concerns presented by Members. The list¹¹ presented by the Chairman included the following issues:

- the implications of intellectual property right protection under 27.3b for the developmental and economic interests of developing countries;
- the exclusions to patentability in Article 27.3b, and the definition of terms;
- the provisions on *sui generis* systems in Article 27.3b, and their relationship with UPOV;
- ethical questions about the patenting of life-forms;
- prior informed consent and benefit sharing;
- traditional knowledge and farmers’ rights.

The use of this list and its content was opposed by one country in the TRIPS Council discussions and never formally approved. Nevertheless several developed and developing countries have been using the list’ content in order to focus their proposals and presentations.

The text of paragraph 19, makes a direct reference to the relationship between the TRIPS Agreement and the CBD. An *examination* of this relationship has already begun in the context of the Article 27.3b *review*. The current Ministerial draft fails to specifically mention the need to *comprehensively* review the TRIPS Agreement in the light of the CBD or in the light of current recently approved text of the International Undertaking¹² under the Food and Agricultural Organization (FAO). Such comprehensive review might require changes in the Agreement’s text, which can only be introduced through “negotiations”. However, the current text fails to call for new *negotiations* to more broadly incorporated principles and objectives of the CBD.

In paragraph 19, there is also an express mention for examining the protection of traditional knowledge (TK) and folklore. TK usually means an intellectual added-value over

¹⁰ See Oxford Concise Dictionary. 1999.

¹¹ This list was presented in an informal document without number of the 21st of March 2000.

¹² International Treaty on Plant Genetic Resources for Food and Agriculture, FAO, November 2001.

the genetic resources. The use of the term “protection” helps to qualify TK and folklore as “TRIPS Agreement plus” issues. This is positive, as it might facilitate future inclusion of TK as a possible negotiating item. It is unfortunate that the same does not apply to the objectives of the CBD.

4. The current text strengthens the advisory role of the Committee on Trade and Environment (CTE) but fails to provide sufficient authority to permit true reform of rules. In relation to MEAs and more specifically to CBD, a long road is created for including new mandates for negotiations.

First, the current text on organization and management of the work program, instructs the CTE:

*to pursue its work on all items of its agenda and give special attention to, among others, the relation between the multilateral trade system and the MEAs, and the relevant provisions of the TRIPS Agreement*¹³

In the CTE, several developed country members have promoted the need to transfer the objectives and principles of the CBD into the relevant WTO Agreements. Amongst these are the principles of prior and informed consent and the need for benefit sharing of the use of genetic resources and TK. In this context, Members have presented their national experiences on the implementation of the CBD but have failed to reach any agreement on recommendations for future action. The current Ministerial draft aims to give special attention to the relationship between MEAs and the WTO. However, there is no guarantee that this “special attention” will finally result in any real recommendations for re-negotiation, and even less, that such recommendations would be taken into account.

Second, the new Ministerial draft gives the CTE a new “advisory” role:

*within its mandate by identifying any need for clarification in any WTO rules*¹⁴. The Committee would have the capacity to issue *recommendations with respect to future actions including the desirability of negotiations*; at the same time the CTE could *within its respective mandate, act as a forum to identify and debate environmental aspects of the negotiations, in order to help to achieve the objective of sustainable development*¹⁵.

This advisory role of the CTE has a limited effect. The CTE could only impulse legal changes if there is internal consensus inside the CTE for recommending negotiations to the General Council or to the Ministerial Conference. Once the recommendations are received by the General Council, this body would have to analyze the desirability of new negotiations and only after that, a new mandate for negotiations could be established. This procedure would introduce an extremely long road for proposals in favour of transferring the principles of the CBD into the WTO system.

¹³ Idem note 1, paragraph 28.

¹⁴ Idem note 1, paragraph 28.

¹⁵ Idem note 1, paragraph 44.

5. The Implementation text on TRIPS Agreement fails to include biodiversity issues in those ready for immediate action.

Implementation concerns consist of those issues presented by developing countries to rebalance existing WTO Agreements and to resolve problems of putting existing agreements into practice. The structure of the current implementation text is divided between immediate actions and future actions (compilation of outstanding implementation issues raised by Members). The text on immediate actions¹⁶ contains decisions that can be implemented immediately and do not need any changes in existing WTO Agreements. However, this part of the implementation text does not contain any reference to biodiversity issues.

The implementation text that refers to future actions¹⁷ contains issues that could be addressed only through new negotiations. According to paragraph 12 of the Second Ministerial draft not all implementations concerns are subject to negotiations. Only those issues listed in the text for future work that were provided with a specific mandate for negotiations can be part of the round of negotiations. If an item in the future work list is not subject to negotiations, this particular item will be addressed as a matter of priority under the relevant WTO bodies, which generally means as part of the existing reviews.

The text on future actions contains several references to biodiversity issues. One of the most important references to the CBD is contained in tiret 15. This language refers to the need for *a clear understanding that in the interim, patents inconsistent with Article. 15 of the CBD shall not be granted*. However, this text is a provisional one and consequently, this text should be part of the immediate actions' list.

6. The Implementation text on the TRIPS Agreement fails to establish new mandates to negotiate the necessary changes of WTO Agreements to accommodate CBD and the International Undertaking (FAO).

In tiret 95 of the future action list, there are currently two texts related to Article 27.3b under brackets. The texts are the following:

- Tiret 95 first version.

[Article 27.3(b) to be amended in light of the provisions of the Convention on Biological Diversity and the International Undertaking. Also, clarify artificial distinctions between biological and microbiological organisms and processes; ensure the continuation of the traditional farming practices including the right to save, exchange and save seeds, and sell their harvest; and prevent anti-competitive practices which will threaten food sovereignty of people in developing countries, as permitted by Article 31 of the TRIPS Agreement.]

¹⁶ See Job (01)/139/Rev.1, October 2001.

¹⁷ Job (01)/152/Rev.1, October 2001.

- Tired 95, second version.

*[Article 27.3(b) **should be amended** to take into account the Convention on Biological Diversity and the International Undertaking on Plant Genetic Resources. The amendments should clarify and satisfactorily resolve the analytical distinctions between biological and microbiological organisms and processes; that all living organisms and their parts cannot be patented; and those natural processes that produce living organisms should not be patentable. The amendments should ensure the protection of innovations, of indigenous and local farming communities; the continuation of traditional farming processes including the right to use, exchange and save seeds, and promote food security.]*

Both texts call for the amendment of Article 27.3b in the light of the provisions of the CBD and the International Undertaking. The inclusion of the CBD and the International Undertaking of the FAO will help create a system for the protection of biodiversity, and not only a set of international rules under various international organizations.

The first draft establishes a clear obligation for amending Article 27.3b, while the second is just a statement that Article 27.3b *should* be amended. The first draft puts more emphasis on the clarification of the exceptions to patentability and limitations to the plant variety protection and the second focuses more on some of the issues related to protection of traditional knowledge. An express enumeration of biodiversity issues will be a good tool for specifying the changes needed in Article 27.3b.

Independently of which draft text prevails, it is of crucial importance that brackets are left out and that the word *amendment* is preserved as a mandatory obligation. If there is not an express *reference to negotiations* or *to amendments* of Article 27.3b of the TRIPS Agreement, nothing will be obtained in the implementation text in practical terms.