TRIPs and Biodiversity: Towards the 1999 Review

By Richard Tarasofsky

On 19 March, about forty people from around the world attended a
roundtable dialogue on the upcoming review of the Agreement on
Trade-Related Aspects of Intellectual Property Rights (TRIPs). The
event was convened in Geneva by the International Centre for Trade
and Sustainable Development, IUCN-The World Conservation Union,
the Sociedad Peruana de Derecho Ambiental and the Institute for
Agriculture and Trade Policy.

The purpose of the roundtable on ‘TRIPs and Biodiversity: Towards
the 1999 Review’ was to provide a non-partisan forum for examining
the issues at stake in the review of Article 27.3(b) of the TRIPs
Agreement. This Article deals with patenting obligations and
exemptions concerning life forms and plant varieties and must be
reviewed by the WTO in 1999 (i.e. four years after the Uruguay Round
agreements entered into force).

Panelists addressing the meeting included
Kristin Dawkins of IATP, Graham Dutfield
of the University of Oxford, Michael Flitner
of the University of Freiburg, David
Hathaway of AS-PTA, André Heitz of the
International Union for the Protection of New
Varieties of Plants, V.R. Krishna Iyer of the
People’s Commission on Biodiversity, Dieter
Laudien of Boeringer-Ingelheim, Nuno Pires
de Carvalho of the WTO, Richard Owens of the
World Intellectual Property Organisation,
Manuel Ruiz Muller of the Sociedad Peruana
de Derecho Ambiental, Richard Tarasofsky
of the IUCN Environmental Law Centre,
Godber Tumushabe of the African Centre for
Technology Studies and Joseph Vogel,
independent consultant. The roundtable was
facilitated by Ricardo Meléndez-Ortiz of ICTSD. All panelist and
other participants from intergovernmental and non-governmental
organisations attended in their personal capacities.

Patenting life forms

The first area of discussion concerned the desirability of patenting
life forms, an area the TRIPs Agreement might in the future possibly
allow. Among the principal points made by participants were:

• Patents are needed to stimulate research and invention.
• The requirements of the Agreement are not clear in this respect,
except that patents are mandatory for micro-organisms.
• It should not be assumed that the Agreement, which is an
international instrument, should be interpreted in the same way as
national legislation containing similar provisions.
• TRIPs allows exclusion from patenting for ethical or moral rea-
sons, so long as commercial exploitation is also disallowed.
• Patenting life forms is unethical. Few countries permit such
patenting, and the result of the TRIPs review of Article 27.3(b)
should be a ban on all patenting of life forms since it is difficult to
contain its possible harmful consequences.

Treatment of plant varieties in the TRIPs Agreement

The obligation to protect plant varieties was discussed particularly
in relation to the UPOV regime, based on the International Convention
for the Protection of New Varieties of Plants. A key element of that
convention is the requirement to grant and protect breeder’s rights
for plant varieties which are new, distinct, uniform and stable.

The main thrusts of this discussion included:

• Conceptually, it is important to distinguish between plant genetic
resources for food and agriculture and those for medicinal or bio-
technological purposes.
• The UPOV Convention provides a negative right, rather than a mo-

nopoly, since many countries allow for a ‘farmer’s privilege’.
• Plant variety protection assists in:
  - ensuring that varieties are exploited optimally;
  - promoting investment in plant breeding;
  - optimising trade; and
  - developing sustainable agriculture.
• Environmental impacts of this system are mixed: if new varieties
provide a better yield there is a temptation to replace traditional
varieties while, at the same time, some new varieties require less
exploitation of land.

TRIPs Article 27.3 (b):
Members may exclude from patentability plants and animals
other than micro-organisms, and
especially biological processes
for the production of plants and animals
other than non-biological and
microbiological processes.
However, Members shall
provide for the protection
of plant varieties either by
patents of by an effective sui
genesis system or by any
combination thereof.

Protection of indigenous knowledge

The protection of indigenous knowledge is a
key concept of the Convention on Biological
Diversity (CBD). Its Article 8(j) requires Parties
to ‘encourage the equitable sharing of the
benefits arising from the utilisation of such
treasures, innovation and practices’.

Participants put forward the following points:

• Both India and Peru are experimenting with establishing registers
for traditional knowledge.
• Contracts can be useful for benefit-sharing arrangements.
• The issue of indigenous knowledge was never raised during the
negotiation of the TRIPs Agreement, but it has been discussed by
the WTO Committee on Trade and Environment. According to the
speaker, most indigenous knowledge can be protected by intellec-
tual property rights and the TRIPs Agreement does not hamper the
creation of new rights.
• Patents, by definition, could not protect indigenous knowledge, but
trade secrets might.
• Indigenous people face a ‘Catch-22’ situation: if indigenous knowl-
edge is published, it becomes part of the public domain; if it is a
trade secret, competition among suppliers drives the price down.
The creation of ‘oligopolies’ or cartels of suppliers of indigenous
knowledge could be a way forward (see Bridges Vol. 1 No. 6, page
14 for details on biodiversity cartels, ed.).
• It is important to combat biopiracy from a commercial perspec-
tive. Article 8(j) of the CBD could be implemented through patent
protection of indigenous knowledge (including a requirement of
evidence of prior informed consent), contracts creating ‘know-how’
licences and national trust funds to share benefits.
• It is important not to fall into the ‘TRIPs trap’, whereby everything
is seen through the perspective of commercialisation. A litmus test
should be whether a given measure advances the interests of the
weakest members of society.

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Developing effective sui generis systems

Article 27.3(b) of TRIPs requires Members to ‘provide for the protection of plant varieties either by patents or by an effective sui generis system or by any combination thereof’. In certain circumstances, it allows Members not to grant patents for ‘essentially biological processes for the production of plants and animals other than non-biological and microbiological processes’. The following comments were made regarding these provisions:

- The exact meaning of three key concepts remains to be defined by WTO Members, i.e. what is understood by:
  - ‘sui generis’ (literally, from Latin, ‘of its own kind’.)
  - ‘effective’ (in the context of the obligation to provide ‘effective’ sui generis systems for the protection of plant varieties.)
  - ‘essentially’ (referring to the ‘essentially biological processes’ which need not the patented when ethical, health or environmental concerns contradict such patenting.)

- A universal definition of sui generis systems would defeat the purpose. Even a nation-wide standard for sui generis systems may be inappropriate.

- Too much variety in sui generis systems, on the other hand, might ultimately be unsuccessful, and the TRIPs Agreement was intended to produce some amount of harmonisation.

- Sui generis systems should not hinder the implementation of Article 8(j) of the Convention on Biological Diversity or be limited to Western notions of intellectual property rights.

- Sui generis systems must involve prior informed consent of indigenous knowledge, as well as benefit-sharing, and must still allow individuals within the communities to have rights.

- A sui generis system could be based on an integration of rights and responsibilities from a number of international regimes, but this would require increased national co-ordination of various government units.

Future intergovernmental activity on these issues

The final component of the dialogue concerned future work of WIPO and the WTO on the issues raised in the dialogue.

- Pending official approval, the work programme of WIPO will include components on biodiversity, indigenous knowledge and technology transfer.

- Although no suggestions concerning the 1999 Review have yet been made in the TRIPs Council, the subject has come up in the CTE. One participant speculated that while it may be difficult to reach consensus on these matters in the context of the WTO review process, agreement might be more attainable in a new trade negotiations round where various interests and objectives can be traded off against each other.

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environmental policies. In response, ICTSD and IISS put forward a proposal for a Standing Conference on Trade and Environment, a new and independent forum which would meet as need arises in order to permit a broad range of actors from governments and civil society to participate in ‘articulating the issues in such a manner that governments can usefully address them and develop the needed system of international rules’. A key function of such a forum could be to find ‘appropriate homes’ for outstanding issues as a complement to the work of the WTO on trade and the environment.

For copies for the proposal for a Standing Conference on Trade and Environment, please contact ICTSD.

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