

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, Nuño 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 TRIPs 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 reasons, 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 biotechnological purposes.
- The UPOV Convention provides a negative right, rather than a monopoly, 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.
 - Since UPOV effectively restricts farmers' access to seeds to those from commercial firms, the result is no benefit-sharing. Therefore, the special protection for plant varieties provided for under Article 27.3(b) of TRIPs should be deleted.
 - A contradiction exists between the reciprocity provisions of UPOV and the national treatment principle of TRIPs.

**TRIPs Article 27.3 (b):
Members may exclude from
patentability plants and animals
other than micro-organisms, and
essentially 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
generis 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 knowledge, 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 intellectual 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 knowledge 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 perspective. 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' licenses 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 be 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.

*Richard G. Tarasofsky is
Senior Legal Officer at the IUCN Environmental Law Centre in Bonn.*

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environmental policies. In response, IUCN and IISD 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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