

TRIPs and the CBD: What Language for the Ministerial Declaration?

By Franciso Cannabrava

Compatibility between the Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPs) and the Convention on Biological Diversity (CBD) landed on the agenda of the WTO already in 1996, when the Committee on Trade and Environment discussed the relationship between the two Agreements, based on a proposal by India. The debate found a second wind in 1999 when the Council for TRIPs initiated the review of Article 27.3(b), which is the main TRIPs provision dealing with exceptions to patent rights over biological resources. Since then, WTO Members, and in particular developing countries, have submitted numerous proposals on how to address the issue. Reaching a consensus at the Doha Ministerial Conference on this issue appears feasible but will largely depend on the flexibility shown by developed countries.

Key Points in the TRIPs/CBD Debate

Based on the debate at the CTE and the TRIPs Council, three approaches can be identified regarding the relation between the TRIPs Agreement and the CBD.

- The first, which was defended by some developing countries during the initial WTO discussions, is to argue that the CBD and TRIPs are essentially incompatible, given that the former recognises the sovereign rights of its Contracting Parties over their own genetic resources, while the latter provides for the possibility of private rights (patents) over the same resources.
- The second, which reflects the views of some developed countries, including the US, is that there is no conflict between TRIPs and the CBD and therefore no need for harmonisation.
- Finally, a third approach considers that while TRIPs and the CBD are not inherently incompatible, they are likely to conflict in the way they are implemented, which demands some modifications within Article 27.3(b) of TRIPs to incorporate some of the elements of the CBD.

In the context of multilateral negotiations and the search for systemic solutions, the first two approaches do not seem to offer viable solutions to ensure an optimal relation between the two Agreements. In support of the third approach – which seems to be shared by an increasing number of developing and developed countries at the TRIPs Council today – it is important to note that the objectives of both the TRIPs Agreement and the CBD (expressed, respectively, in their Articles 7 and 10) contain a number of common elements: the ‘*fair and equitable sharing of the benefits arising out of the utilisation of genetic resources*’ of the CBD, for instance, is compatible with the TRIPs objectives of ‘*balance of rights and obligations*’ and ‘*mutual advantage of producers and users of technological knowledge*’. The CBD also mentions the objective of ‘*transfer of technology*’, which is certainly consistent with TRIPs objective of ‘*transfer and dissemination of technology*’. In this context, WTO Members should therefore opt for the third approach and proactively aim at mutually supportive relations between TRIPs and CBD.

As most negotiated texts, TRIPs is ambiguous in many respects. This ambiguity allows for flexibility in the way WTO Members interpret the Agreement and implement it in their domestic

legislation. While incompatibilities with the CBD depend, to a great extent, on how one reads the Agreement and which provision one emphasises, this absence of a common interpretation increases the risk of WTO disputes.

The disclosure requirements provided under some national intellectual property laws, such as those of Brazil and the Andean Community of Nations (CAN Decision 486 requires the inventor to disclose the source of the biological material used in the ~~invention~~ *as a sine qua non* condition for the granting of a patent), are classic examples. While such measures might be taken to implement the CBD obligation to regulate access to biological resources and ensure fair and equitable benefit-sharing, some might see them as additional requirements for patentability and challenge them at the WTO as being incompatible with Article 27.1. While the TRIPs Agreement offers some basic requirements for patentability (novelty, inventive step and industrial application, for example) it clearly does not exclude the possibility of Members’ including other requirements in their own national legislation.

Beyond the deterrent effect that this lack of common understanding might have on developing countries seeking to take full advantage of the flexibility

provided under the Agreement when drafting national legislation, such a dispute would create a serious systemic problem. First, if the case were brought to the Dispute Settlement Body, the panel would have to address the WTO’s competence to rule on domestic legislation arguably passed to implement another international instrument, namely the CBD. Second, a panel ruling against such a measure would raise the question of the WTO’s mandate and legitimacy to determine how Member states must implement the Convention on Biological Diversity.

What Could Doha Contribute?

In order to anticipate these systemic problems and move the discussion forward, the forthcoming WTO Ministerial Conference should incorporate in Article 27.3(b) some of the basic elements of the CBD. In this context, Brazil considers that Article 27.3(b) should be amended to include the possibility of Members requiring, whenever appropriate, as a condition to patentability:

- the identification of the source of the genetic material;
- the related traditional knowledge used to obtain that material;
- evidence of fair and equitable benefit-sharing; and
- evidence of prior informed consent from the Government or the traditional community for the exploitation of the subject matter of the patent.

A large number of countries – including India, the countries of the Andean Community, Norway and several African and Asian countries – have already supported this proposal. Additionally, the Ministerial Conference should also take into account the language in Article 16.5 of the CBD and state, as political guidance for WTO Members, that the provisions of the TRIPs Agreement are supportive of, and do not run counter to, the objectives of the Convention on Biological Diversity. An interpretative note to Article

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27.3(b) should also clarify that discoveries or naturally occurring material, including in isolated form, shall be excluded from patentability. Such an amendment would not only help clarify the relation between the two instruments; it would also represent a necessary step to prevent biopiracy of genetic resources and related traditional knowledge (TK). Developing countries do not have the capacity to follow each and every patent issued outside their territories on the use of their resources and challenge cases of misappropriation of biological material. An internationally agreed solution appears to be an appropriate and cost-effective approach to this complex issue.

As we move towards the next Ministerial Conference after two years of a rich and intensive debate within the TRIPs Council, the momentum should not be lost. WTO Members are in a position to come up with some guiding language in the Ministerial Declaration on these issues.

The TRIPs Agreement is under severe criticism by public opinion today, in light of general concerns with its potential negative impacts over public health and biodiversity, among other overarching public policies. WTO Members should take the opportunity of the Ministerial Conference in Qatar to establish an adequate balance between the interests of developing and developed countries. Developed countries cannot oppose the idea of ensuring a mutually supportive relation between TRIPs and the CBD. They therefore should show sufficient flexibility to allow WTO Members to take action in that direction.

Francisco Cannabrava works at the Permanent Mission of Brazil to the WTO in Geneva. The views expressed by the author do not necessarily reflect the views of the Government of Brazil. This article is a synthesis of a presentation given by the author at an ICTSD informal roundtable on the compatibility of the TRIPs Agreement with the Convention on Biological Diversity held on 18 July 2001.

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when they do undertake such commitments, Members may subject them to 'limitations' and 'conditions'. At the end of the day, it is likely that carefully scheduled commitments, resulting from integrated negotiation positions involving not only trade ministries but also environmental policy-makers, would be the best way to ensure that GATS 2000 has a satisfactory outcome from an environmental perspective. Conversely, lack of information, data, analysis and comprehension of the GATS and of trade in services in general certainly constitutes the major challenge for the environment in the present services negotiations, not only in terms of addressing potential threats, but also for the regulations needed to reap environmental benefits from liberalisation of trade in services. A positive, if modest, step in this direction might have been taken by Switzerland, who recently requested the WTO Secretariat to prepare a study for the assessment of the environmental effects of services liberalisation. The study is expected to be completed by March 2002.

Prepared by Caroline Wiman, ICTSD GATS and Sustainable Development Programme.

ENDNOTES

¹ See, for instance, Scott Sinclair, *GATS: How the World Trade Organization's new "services" negotiations threaten democracy*, Canadian Centre for Policy Alternatives, 2000.

² See OECD, *Environmental services: the 'win-win' role of trade liberalisation in promoting environmental protection and economic development*, COM/TD/ENV(99)93/FINAL, 11 September 2000.

³ See, however, WWF, *Preliminary Assessment of the Environmental & Social Effects of Trade in Tourism*, May 2001; and Dale Andrew, *Services trade liberalization: Assessing the environmental effects*, OECD 2000.

⁴ Scale effect refers to economical growth following trade liberalisation, which can have negative environmental impacts resulting from increased production and consumption, and positive impacts such as increased revenues to address environmental concerns. Technology effects refer to impacts on production processes due to the transfer of technology, environmentally friendly or harmful.

⁵ Elisabeth Tuerk (CIEL)/Peter Fuchs (WEED), *The General Agreement on Trade in Services (GATS) and future GATS-Negotiations – Implications for Environmental Policy Makers*, Draft, September 2001.

⁶ Measures 'relating to qualification requirements and procedures, technical standards and licensing requirements [should] not constitute unnecessary barriers to trade in services' or be 'more burdensome than necessary to ensure the quality of the service' (GATS Article VI:4).

⁷ It should be noted that lacking knowledge of the effects of the GATS is not limited to the environment; the social and economical impacts are also largely unexplored.

⁸ Negotiations on unfinished aspects of GATS' regulatory framework are being conducted in subsidiary bodies to the Council on Trade in Services; they include domestic regulation, government procurement and emergency safeguards.

⁹ Doc. S/L/4, 1 March 1995.

¹⁰ WTO, *GATS – Fact and fiction*, 2001.

¹¹ United States – Import Prohibition of Certain Shrimp and Shrimp Products. Recourse to Article 21.5 by Malaysia. Report of the Appellate Body, 22 October 2001 (WT/DS58/AB/RW).

¹² See, for instance, the Japanese and Canadian negotiating proposals on energy services (S/CSS/W/42/Suppl.3; S/CSS/W/58).