

THE RELATIONSHIP BETWEEN TRIPS AND CBD

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CBD

The Convention on Biological Diversity (CBD) and the WTO/ TRIPs are essentially two treaties in conflict with one another. The CBD supports above all, the protection of biodiversity and the rights of those local communities that have nurtured that biodiversity over generations. It also supports the viewpoint and interests of developing countries. The WTO/ TRIPs on the other hand represent the interest of the corporate sector, the most visible face of which is the "Life Sciences" industry. Rather than the conservation of biodiversity, TRIPs seeks to facilitate corporate control over biodiversity which in the era of biotechnology is one of the most sought after raw materials in the world today.

In the Convention on Biological Diversity two provisions are notable from the TRIPs point of view, namely;

- (i) Acknowledgement that biodiversity resources are the sovereign property of the country of origin, and
- (ii) Acknowledgement of the need to equitably share benefits with indigenous communities for their contribution to conservation and their knowledge of sustainable uses of biodiversity. These provisions run completely contrary to TRIPs and point towards the most significant defect in the prevailing regime of Intellectual Property Rights (IPR).

In the use and transfer of biological material, the CBD makes it mandatory to disclose the source and method of obtaining the foundation material. All biodiversity resources are to be obtained only on the basis of prior informed consent (PIC) of the country of origin and after executing a Material Transfer Agreement (MTA). All this would involve confrontation with the procedures mentioned under the GATT / WTO regime. Also, the CBD's advocacy for preferential location of research and development activities and the transfer of technology on concessional terms to the countries of origin will come into conflict with the implementation of TRIPs.

TRIPS

TRIPS Article 27: Patentable Subject Matter

3. Members may also exclude from patentability:

(b) Plants and animals other than microorganisms, and essentially biological processes for the production of plants or animals other than non-biological and microbiological processes. However members shall provide for the protection of plant varieties either by patents or by an effective *sui generis* system or by any combination thereof. The provisions of this subparagraph shall be reviewed four years after the date of entry into force of the WTO agreement.

TRIPS Article 27.3(b), which requires all WTO countries to provide some kind of intellectual property rights (IPR) on plant varieties, is up for review in 1999. In 2000, the entire TRIPS Agreement will be reviewed. In the meantime, a whole new round of trade negotiations - which could result in further changes to TRIPS - could commence before 2000.

There is a fundamental conflict between TRIPS and the Convention on Biological Diversity.

TRIPS does not allow for the full exercise of national sovereignty over biodiversity (because it obliges countries to enact intellectual property rights on plant varieties). TRIPS does not allow countries to seek a share of benefits obtained from patented biodiversity (there is no provision requiring patentees to disclose the country of origin of any biological materials, therefore no claims can effectively be made from the countries of origin). TRIPS do not require patentees to fulfil access obligations towards genetic resources (it therefore condones and facilitates biopiracy).

TRIPS overrules (and legally compromises the development of) CBD Art 8(j) because patent claims can be worded to embrace and expand on indigenous knowledge without recognition of or compensation for it. Turmeric, Neem, and Basmati as also Phyllanthus amara and the diabetes formula based on Karela, Jamun & Gurmar, are well known cases of this but there are many others. Also, UPOV type of plant variety protection (PVP) certificates are being granted on traditional plant varieties from developing countries. Australia granted a patent on a chickpea variety which comes from India.

These are conflicts at the level of substantive provisions, not mere operating principles. And it is clearly TRIPS which undermines the implementation of CBD. It is important to remember that TRIPS was negotiated as a discrete treaty. It was drawn up by a small group of GATT negotiators and became part of a take-it-or leave-it package toward the end of the Uruguay Round. Therefore, governments were not able to say yes or no to TRIPS specifically in consideration of their obligations to CBD.

The whole argument in favour of IPRs is bogus. The life sciences industry argues that intellectual property protection is necessary for investment and innovation. Any review of the literature will indicate that this is not so. There is no cause-effect link between strong intellectual property right (IPR) regimes and increased investment. If one looks at foreign direct investment (FDI) flows as mapped by UNCTAD, for example, there is no correlation between FDI inflows and the availability of strong IPR protection. FDI flows are highly concentrated in a few countries and 60% of them amount to capital flows within the same corporation via mergers and acquisitions. China attracts a full third of all FDI going to the developing world, despite her record for violating US and European intellectual property rights! Germany has a negative FDI balance sheet (more investment leaves the country than arrives) these years, certainly not because Germany offers a bad climate for IPR enforcement! Actually, economists have not managed to understand the role of IPRs. Therefore, it is widely accepted among economists that arguments about strong IPR laws stimulating investment are simply not well founded. Even the World Bank has recently reported that the relationship between IPR and trade flows is ambiguous in general and insignificant in high technology sectors specifically. As for innovation, much of it goes on in the absence of IPR - as illustrated by the whole history of plant breeding, health care and even recent decades of biotechnological R&D. Most importantly, there are many tools to stimulate innovation, which are more in the public interest and which do not foster dangerous monopolies, but governments are being pressured to accept the TRIPs / IPR route.

THE WAY OUT

The way TRIPS stands at the moment, the only way to fully ensure a fair deal for communities and people in developing countries is to remove biodiversity from TRIPS altogether. Since achieving this ambitious goal may take more time than the 1999 review allows, the most practical option is to secure a five-year suspension of the implementation of Article 27.3(b) so that developing countries, which are facing

enormous difficulties with TRIPS, may sort out the solutions more appropriately. In any case, developing countries must at least ensure that there is no strengthening of the TRIPS Agreement, as some developed countries are pushing for. It is important to stress that these are not mutually exclusive options - and they should be fought for simultaneously.

Most developing countries are contemplating the *sui generis* route to compliance, instead of patenting. A number of influential bodies, including the WTO itself, are pushing for a narrowing of the *sui generis* option to one legislative model provided by the Union for the Protection of Plant Varieties or UPOV. This is unfair and uncalled for. UPOV is not mentioned in the TRIPS Agreement when other relevant IPR treaties are. Independent legal and economic experts have reiterated that UPOV should not be accepted as an effective *sui generis* system for TRIPS and that there is ample scope for manoeuvre, flexibility and national discretion in interpreting the *sui generis* option.

Even in industrial nations there are grave problems associated with intellectual property protection of plant varieties, particularly the UPOV Convention. Three significant influences are listed below.

Impact on producers:

UPOV introduces legal and economic restrictions on farmers' livelihood practices. Farmers' rights are reduced by law to a "privilege", or derogation, which is subject to the vagaries of national law under the 1991 treaty. As a general principle, access to genetic resources declines through their privatisation and becomes subject to restrictive terms, whether for production or breeding purposes. Although farmers are responsible for 80-90% of the seed supply in the South, this will massively shift to private control under plant variety rights regimes. Contrary to what many people assume, corporate breeders do take farmers to court for alleged piracy of proprietary seed and they are actively pursuing more powerful means to prevent the reuse of seed on the farm (such as contract law governing purchase agreements, "terminator" type technologies and hybridisation).

Genetic erosion:

UPOV is biased towards the needs of industrial agriculture, especially through its DUS (Distinction -Uniformity - Stability) criteria; the uniformity criterion alone has been singled out as favouring, for example, pure lines as opposed to varietal mixtures on the market. By allowing companies to collect royalties on seed sales, UPOV stimulates the corporate take-over of plant breeding which means fewer actors supplying the market. Corporations are not in the business of genetic conservation (they rely on genebanks) and tend to work with highly stabilised elite material with wide adaptation. These highly marketed varieties tend to replace more diverse traditional materials, and consequently the diversity being used by farmers declines.

Adverse impacts on R&D:

Impact studies conducted in one UPOV member state, the USA; report a decline in the flow of germplasm among breeders, a decline in the sharing of scientific information and a decline in the rate of progress in plant breeding. It is noteworthy, however, that UPOV was obliged to revise its treaty in 1991 in order to address an important dysfunction in its own system: instead of providing an incentive for innovation (breeding truly novel varieties), UPOV was providing an incentive for plagiarism (making slight changes on existing varieties and calling them "new" and worthy of protection).

Developing countries must provide themselves an alternative to UPOV since UPOV does not serve our interests for the following reasons:

- i. There are no Farmers Rights in the UPOV system, only Breeders Rights.
- ii. UPOV conditions are for industrial, not agricultural economies where only 2 to 5% of the population practices agriculture and there are no small and marginal farmers.
- iii. UPOV laws are for countries where subsidy to agriculture is very high and farmers get paid for leaving their fields fallow.
- iv. In Europe agriculture is a purely commercial activity. For the majority of Indian farmers however, it is a livelihood.
- v. In UPOV countries agricultural research is conducted by seed companies with private capital, so they maximise profits by market monopolies. In India agricultural research is done in public institutions with the taxpayers money and it belongs to the people.
- vi. The UPOV system is very expensive. The cost of a Breeders Right certificate could be a few lakhs. This will exclude small companies, farmers co-operatives and farmer-breeders from participating.
- vii. If we join UPOV we shall be forced to accept the patenting of Plant Varieties which is not in our interest. In UPOV both patents and Breeders Rights are used.

Gene Campaign and CEAD has prepared an alternative to UPOV called the Convention of Farmers and Breeders (CoFaB). This proposed treaty is designed to protect Farmers and Breeders Rights in the germplasm owning countries of the South, to secure their interests in agriculture and to fulfil the food and nutritional security goals of their people.

MOBILISING PUBLIC OPINION

On the broader scale, there is a large body of opinion held by academia, politicians, and civil society groups all over the world, that IPRs should not be regulated under the World Trade Organisation at all. Refining the jurisdiction of TRIPS would be part of a more fundamental reassessment of whether trade policy instruments governing; market access should determine national intellectual property regimes. In recent times, several platforms have demanded granting primacy to CBD over TRIPS. More and more nations should support this move and place this as a demand at the TRIPs review.

Demanding primacy for the CBD is justified and supported by Article 22 of the CBD which says - *The provisions of this Convention shall not affect the rights and obligations of any Contracting Party deriving from any existing international agreement, except where the exercise of those rights and obligations would cause a serious damage or threat to biological diversity.* It is clear that the implementation of TRIPs is detrimental to the health of biological diversity and therefore its implementation must be made subservient to the conditions of the CBD.