

**COMMUNICATION FROM NORWAY**

By means of a communication, dated 18 June 2001, the following text has been received from the Permanent Mission of Norway with the request that it be circulated as a Council document.

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**REVIEW OF ARTICLE 27.3(b) OF THE TRIPS AGREEMENT:  
THE RELATIONSHIP BETWEEN THE TRIPS AGREEMENT AND  
THE CONVENTION ON BIOLOGICAL DIVERSITY**

**1. Introduction**

The General Council has mandated the TRIPS Council to continue its ongoing efforts to clarify the relationship between the TRIPS Agreement and the Convention on Biological Diversity (CBD).

Several WTO Members have expressed concern as to whether there is a legal conflict between the objectives of the two agreements. Norway is a party to both agreements, and therefore has an interest in the outcome of this analysis. Norway holds the opinion that there is no legal conflict between the two agreements. In this communication, Norway will give its views on the relationship between the two agreements.

The CBD – main objectives

The main objectives of the CBD are set out in Article 1. They are as follows:

- (a) "...the conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources, including by appropriate access to genetic resources and by appropriate transfer of relevant technologies."

In order to attain all these objectives, the contracting parties are required to adopt measures that can act as incentives to protect their resources. The Convention also seeks to strike a balance between the interests of the providers and the users of genetic resources.

### The TRIPS Agreement – main objectives

The objectives of the TRIPS Agreement are set out in Article 7, which states:

- (b) "The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations."

In addition, Article 27 of the TRIPS Agreement defines what is considered to be patentable subject-matter. This provision seeks to provide adequate and effective minimum standards for the international protection of intellectual property rights, while balancing the interests of various broad groups.

## **2. The relationship between the TRIPS Agreement and the CBD**

Article 16.5 of the CBD reads as follows:

"The Contracting Parties, recognizing that patents and other intellectual property rights may have an influence on the implementation of this Convention, shall cooperate in this regard subject to national legislation and international law in order to ensure that such rights are supportive of and do not run counter to its objectives."

Article 27.1 of the TRIPS Agreement reads as follows:

- (a) "...patents shall be available for any inventions, whether products or processes, in all fields of technology."

The CBD recognizes the fact that patents may be granted on genetic resources that the Convention is intended to protect. The wording of Article 16.5 is a clear recognition of the fact that intellectual property rights, including patents, may have an influence on efforts to achieve the objectives of the CBD. Article 16.5 of the CBD therefore includes an obligation for the contracting parties to cooperate in order to ensure that intellectual property rights are supportive of the objectives of the CBD.

Before examining how this can be achieved, it would be useful to look at the areas of application of the two agreements. The TRIPS Agreement and the CBD have different objectives and different areas of application. The TRIPS Agreement sets minimum standards for the legal protection of patentable material, including genetic resources, while the CBD creates a legal framework for access to such genetic resources and for benefit sharing.

Nevertheless, there are several areas where the TRIPS Agreement and the CBD do interact. The strongest linkage occurs in the area of patent protection, particularly with reference to genetic resources.

Since patents give the owner the exclusive right to exploit the patent commercially for a limited time-period, it has been claimed that this may in certain cases reduce access to genetic resources, for example agricultural plant genetic resources. It has also been claimed that patents may undermine attempts to ensure effective conservation and sustainable use of biological diversity, which are two of the main objectives of the CBD. Specifically, it has been argued that developing countries may attach less importance to conservation of their genetic resources, if IPR regimes allow for the patenting of genetic resources and knowledge derived from them. This may particularly be the case if

mechanisms are not in place to ensure the fair and equitable sharing of benefits arising from the use of these resources.

Although it may be difficult to substantiate such allegations, Norway does not reject them outright. However, these issues and the fact that the two agreements deal with genetic resources in different ways, do not in themselves indicate that there is a legal conflict between the two agreements.

Nevertheless, there is a potential for conflict between the two agreements, and the question of safeguarding biodiversity, including the issues of access, transfers and benefit sharing, versus the question of intellectual property rights is a complex one.

There seems to be nothing in the two agreements that would prevent each from being implemented in a way that is compatible with the other. Although the TRIPS Agreement sets minimum standards, the relevant provisions of both agreements are worded in a way that makes it possible to ensure consistency through flexible interpretation. However, the parties should be aware of the principles underlying the two agreements in order to ensure mutually supportive implementation in national law.

The main objective of the CBD is the conservation and sustainable use of biological diversity. We note that the Preamble of the WTO Agreement recognizes the principle of sustainable development, thus making it an essential element in the interpretation of the TRIPS Agreement.

Although it contains various provisions that provide for the transfer and dissemination of technology, the TRIPS Agreement does not have any provisions to ensure benefit sharing.

Nevertheless, patents may in certain ways enhance transparency and thereby contribute to benefit sharing. When a patent is applied for, the information will eventually be made available to the public. This enables others to benefit from the invention, for example through further research. In its paper of 2 April 2001, the EU pointed out several useful aspects of patent protection of genetic resources, such as facilitating technology transfer, making it possible to create benefits that can be shared in an equitable manner. The alternative to patents would be to keep inventions secret, which would hamper research, development and the transfer of new technologies.

In Norway's opinion, the key element in ensuring consistency between the two agreements will be mutually supportive implementation of the CBD and the TRIPS Agreement.

To this effect, compliance with the relevant CBD provisions should be ensured through effective implementation in the national legislation of the parties.

It should be noted that work is currently under way both within the CBD and within WIPO to clarify how the CBD can best be implemented to achieve effective benefit sharing.

### **3. National implementation**

As indicated above, Norway is of the opinion that there is no legal conflict between the two agreements. However, the implementation of one agreement may have a bearing on the implementation of the other. It is important that countries are aware of this when implementing the two agreements.

As yet, not many parties have implemented both agreements fully. It is therefore important that sufficient priority is given to implementing both agreements in national legislation.

When countries implement the CBD, they should also put in place appropriate national systems for benefit sharing and prior informed consent, and establish access and transfer regimes. Our impression is that most countries have not reached this stage yet. It will also be important to ensure that local communities and indigenous peoples benefit from the use of genetic resources and knowledge originating in their territories.

Since an estimated 90 per cent of the world's genetic resources are found in developing countries, it is particularly important to ensure that these countries introduce the necessary national legislation to make the CBD effective. However, developed countries should also consider what legislative or other measures they need to take to implement the relevant provisions of the CBD. Implementation measures in developed and developing countries should complement each other in order to facilitate a well-functioning international exchange of genetic resources.

It is especially important to implement effective measures to achieve fair and equitable sharing of the benefits from the accessed and transferred materials. Each contracting party should therefore establish regimes to ensure the effective enforcement of national legislation. In this regard, we would like to mention that Norway is currently framing a plan of action to implement the CBD. In addition, a committee has been appointed to propose legislation on biological diversity.

The developed countries should offer technical assistance to the developing countries on national implementation, if requested.

#### **4. The relationship between PGRFA and the TRIPS Agreement**

It is important to note that different sectors may need different regimes for access and benefit sharing. Although the CBD sets out certain basic conditions for such regimes, there is a high degree of flexibility. "Mutually agreed terms" as stipulated in the CBD does not necessarily have to mean bilateral terms.

In the field of agricultural biodiversity, in particular plant genetic resources for food and agriculture (PGRFA), bilateral agreements for the exchange of genetic resources would be highly impractical. This is because there is a high degree of interdependence between countries with regard to such material. An enormous number of bilateral agreements would be needed to ensure the exchange of PGRFA that is needed for plant breeding worldwide. Moreover, it would be almost impossible to create a tracking system to ensure fair and equitable sharing of benefits between source countries of genetic material, given the fact that some modern plant varieties can have a large number of genetic "parents" (in some cases, more than 50 countries would be involved).

Consequently, a multilateral system is needed for access to and exchange of PGRFA. This is why the ongoing negotiations in the FAO to arrive at a revised version of the International Undertaking on PGRFA, and make it into a legally binding agreement, are so important.

If PGRFA is exchanged within a multilateral system with open and facilitated access, however, it follows logically that mechanisms for benefit sharing must also be multilateral in nature. Furthermore, if access is open, one can easily argue for a higher threshold for IPR protection than when access is subject to prior informed consent and mutually agreed terms. This is why certain specific provisions dealing with IPR protection are being discussed in the negotiations on the International Undertaking. In our view, there is nothing in the TRIPS Agreement that prevents parties to a new agreement from enacting IPR rules in a way appropriate for that agreement. In fact, if the TRIPS Agreement and the CBD are to be implemented in mutually supportive ways, one should take a pragmatic approach and consider whether TRIPS obligations could be implemented somewhat differently according to the needs of different sectors.

## **5. *Sui generis* systems**

The TRIPS Agreement gives WTO Members the option of establishing an effective *sui generis* system for the protection of plant varieties, as an alternative to patents. It is the responsibility of each Member to create a system that gives sufficient protection for the parties involved.

It is important to be aware of the need to secure a sufficiently flexible interpretation of the effective *sui generis* option. This is necessary to ensure that CBD obligations on benefit sharing are fulfilled, in particular with regard to indigenous and local farming communities. An important aim is to maintain the flexibility that allows such farmers to manage farm-saved seed in traditional ways.

## **6. The question of requiring the disclosure of origin of the genetic resources to be included in patent applications**

According to the CBD, all states that provide genetic resources have the right to make access to these resources subject to prior informed consent. However, the TRIPS Agreement has no provisions making prior informed consent a condition for achieving patent protection.

An obligation under the TRIPS Agreement to disclose the origin of genetic resources when applying for patent protection could ensure transparency as regards the origin of biological materials that are to be patented. This could make it easier for parties to enforce their rights to their own genetic resources when they are subject to a patent application. An obligation of this kind could also make the CBD provisions on prior informed consent and benefit sharing more effective. Furthermore, it could be an appropriate step towards giving effect to the provision of Article 16.5 of the CBD. The introduction of such an obligation should therefore be discussed and further analysed.

In our communication to the TRIPS Council, dated 21 October 1999, Norway referred to this question. We note that, according to their communication of 2 April 2001, the European Communities and their member States are willing to discuss this issue.

### Conclusions:

1. There is no legal conflict between the CBD and the TRIPS Agreement.
  2. The CBD and the TRIPS Agreement interact in several areas. The key element in ensuring consistency between the two agreements will be the implementation of the CBD and the TRIPS Agreement in national legislation. Developed countries should provide technical assistance to help developing countries carry out effective and consistent implementation.
  3. A system for benefit sharing should be established in all contracting states and secured through national implementation of the CBD.
  4. There should be sufficient flexibility with regard to the implementation of the *sui generis* option for plant variety protection, to allow for effective benefit sharing with indigenous and local farming communities.
  5. It should be considered whether a provision on the disclosure of the origin of genetic resources should be inserted in the TRIPS Agreement to ensure a more effective implementation of the CBD.
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