

**THE RELATIONSHIP BETWEEN THE TRIPS AGREEMENT AND
THE CONVENTION ON BIOLOGICAL DIVERSITY (CBD)**

CHECKLIST OF ISSUES

Submission from Brazil, Cuba, Ecuador, India, Peru, Thailand and Venezuela

The following submission, dated 26 February 2004, is being circulated at the request of the Delegations of Brazil, Cuba, Ecuador, India, Peru, Thailand and Venezuela.

I. INTRODUCTION

Discussions on the relationship between the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and the Convention on Biological Diversity (CBD) and how to ensure their mutual supportiveness have been taking place in the Council for TRIPS since 1999. Specific issues have arisen within the discussion of the relationship between the TRIPS Agreement and the CBD. One of the major concerns expressed is that the TRIPS Agreement allows the granting of patents for inventions that use genetic material and associated knowledge without requiring compliance with the provisions of the CBD. To the extent that bio-piracy is today accepted as a major problem, the challenge is to determine what measures need to be taken within the framework of the TRIPS Agreement to prevent misappropriation and to support the objectives and implementation of the CBD.

More than 25 communications and papers have been submitted by Members on the subject to date. While discussions have continued in the Council for TRIPS following the mandate given to the Council in Doha,¹ significant work remains to be done in order to find a satisfactory solution. This checklist of the issues has been prepared in order to facilitate more focused, structured and result oriented discussions.

The purpose of the checklist is therefore to assist and expedite the process and not to limit the ambit of the discussions. The checklist should be considered open for Members to raise and address any additional elements that are of significant concern to them. The checklist has been drawn up on the basis of the issues raised and points made by various delegations in their communications and statements to the Council for TRIPS since 1999 and, in particular, in the post-Doha period. Account has also been taken of the various notes prepared by the Secretariat, especially documents IP/C/W/368 and IP/C/W/370, both dated 8 August 2002.

¹ See paragraphs 12 and 19 read together with paragraph 47 of the Doha Ministerial Declaration (WT/MIN(01)/DEC/1).

II. CHECKLIST OF ISSUES

1. Disclosure of source and country of origin of the biological resource and of the traditional knowledge used in the invention

- How would an obligation for disclosure of country and source of origin of biological resource and associated traditional knowledge used in an invention help in better examination of patents and in preventing cases of bad patents?
- What is the meaning of disclosure of source and country of origin of biological resource and of the traditional knowledge used in the invention?
- What would be the legal effect of wrongful disclosure or non-disclosure?
- On whom should the burden of proof lie?
- In what manner should the proposed obligation of disclosure of source and country of origin and associated traditional knowledge be introduced in the TRIPS Agreement?

2. Disclosure of evidence of prior informed consent under the relevant national regime

- How would furnishing the above evidence facilitate achieving the objectives of the CBD of ensuring prior informed consent and harmonious relationship between the CBD and the TRIPS Agreement? Could contractual arrangements for ensuring prior informed consent and benefit-sharing suffice to achieve the objectives of the CBD in this regard?
- How should the evidence of prior informed consent through approval of authorities under the relevant national regime be provided for?
- What should be the nature of obligation on the patent applicant that should satisfy the requirement of prior informed consent?
- What should be the obligation if there is no national regime in the country of origin?
- What should be the legal effect of not providing evidence of prior informed consent through approval of authorities under the relevant national regime?

3. Disclosure of evidence of benefit sharing under the relevant national regime

- What should be the meaning of evidence of benefit sharing under the relevant national regime?
 - When is this evidence to be introduced by the patent applicant?
 - What should be the obligation if there is no relevant national regime in the country of origin?
 - What should be the legal effect of not providing evidence of fair and equitable benefit sharing under the relevant national regime?
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