

Building Bridges between Intellectual Property and Biodiversity: The EC's Point of View

By Jean Charles Van Eeckhaute

All too often the current discussion on the interplay between the Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPs) and biodiversity-related issues has been depicted as pitting the North and the South against each other. This presentation of facts however deserves some fine-tuning. While it is true that certain industrialised countries have systematically downplayed this issue, the European Community (EC) takes the view that it must be thoroughly discussed and that adequate solutions must be found.

A global intellectual property (IP) system must reflect the specific needs of all its participants, including the developing countries. What we need are core rules, such as those provided by TRIPs, while leaving countries the flexibility to tailor the systems to their specific needs. Just as the EC believes that trade liberalisation can bolster development, provided it is complemented by effective rules and appropriate domestic policies, we believe that IP can be a tool for development, provided it is properly calibrated to the needs of the implementing countries. The EC's Communication to the WTO of 17 October 2002 (IP/C/W/383) explores this approach with regard to Article 27.3(b) TRIPs and related issues.

This approach can be summarised under three headings:

- **Make full use of the flexibility available under the TRIPs Agreement**

As has been shown in the access to medicines issue, many of the perceived problems with the TRIPs Agreement do not reside in the Agreement itself, but rather in the restrictive interpretations advocated in certain circles. The EC Communication shows that, as regards the patentability of biotechnological inventions, the degree of flexibility offered by the TRIPs Agreement is in fact considerable. This flexibility resides not only in Article 27.3(b). For instance, the interpretation of the patentability criteria under Article 27.1 may differ from Member to Member, which may lead to certain nuances in approach, for instance when distinguishing between an invention and a discovery. Each Member is free to use these flexibilities, while taking into account its needs in terms of biotech research.

Other issues where TRIPs offers a significant degree of flexibility are plant variety rights and farmers' exemptions. The absence of a definition of the term "effective *sui generis* protection" means that Members have considerable room of manoeuvre to design a protection regime for plant varieties that is appropriate to their specific national situation. The UPOV Convention offers a useful standard, but other systems can be envisaged.

Also, specific exemptions allowing subsistence farmers and small farmers in developing countries to save, use, exchange or sell seeds of protected varieties can be perfectly justified under Articles 27.3(b) and 30 of the TRIPs Agreement. This is a clear illustration that, when properly interpreted, TRIPs can offer effective solutions.

- **Use all available means to ensure a mutually supportive implementation of the TRIPs Agreement and the Convention on Biological Diversity (CBD)**

The Communication acknowledges that, even in the absence of legal incompatibility between TRIPs and CBD, there is a considerable *interaction* between both agreements. Specific measures need to be made to ensure that they are implemented in a mutually supportive way. Therefore, the TRIPs Council should focus on ways and means of doing this.

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This means that the CBD (and related instruments, e.g. the Bonn Guidelines) must be fully implemented at national level. Sound regulation of access to genetic resources and benefit-sharing is paramount to creating legal security and to protecting the rights of providers of genetic resources. Contractual approaches alone are not sufficient. At the same time, the TRIPs Agreement must be enforced in a way that supports the objectives of the CBD. The point is that intellectual property systems can and must be used to prevent misappropriation of genetic resources and traditional

knowledge and to ensure appropriate benefit-sharing, as patent protection can serve as an effective trigger for benefit-sharing.

- **Examine new concepts and approaches**

Ensuring an optimal degree of mutual supportiveness between the TRIPs Agreement and the CBD may also require the examination of new mechanisms.

A number of WTO Members have proposed to create a direct interface between the TRIPs Agreement and the CBD by incorporating a requirement into the TRIPs Agreement that patent applicants should disclose the geographical source and origin of the genetic material and the related traditional knowledge (TK) used, and produce an official certificate or evidence that domestic laws on access and benefit-sharing of the source country have been respected (evidence of prior informed consent and of fair and equitable benefit-sharing).

Certain Members have dismissed such proposals, but the EC is prepared to enter into a serious discussion on this issue. As it is related to the list of "outstanding implementation issues", it may even be subject to negotiations in the framework of the Doha Development Agenda in view of inserting a disclosure requirement into the TRIPs Agreement.

As regards the substance of the matter, the Communication takes the view 1) that the information to be provided by patent applicants should be limited to information on the geographic origin of genetic resources or TK used in the invention; and 2) that such a disclosure requirement should not act, *de facto* or *de jure*, as an additional formal or substantial patentability criterion.

There should be no misunderstanding: the disclosure mechanism the EU has in mind is a compulsory one, not a voluntary one.

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Failure to disclose, or the submission of false information should have legal consequences with a deterrent effect. However, these legal consequences should lie outside the ambit of patent law, such as for example in civil law (claim for compensation) or in administrative law (fee for refusal to submit information to the authorities or for submitting wrong information). In our view, disclosure of origin should serve to make sure that benefit-sharing takes place, not to prevent the grant of patents. This would be counterproductive, as the grant of patents can be a useful and effective trigger for benefit-sharing (e.g. the sharing of royalties or transfer of technology).

Such a system would be effective, because it would help to prevent misappropriation of genetic resources and related traditional knowledge, *i.e.* by allowing patent offices to establish novelty more accurately by making more focused searches. Moreover it would enable providers of genetic resources to monitor and keep track of compliance with access and benefit-sharing rules as well as with the contractual arrangements between providers and users of genetic resources.

Another missing piece of the jigsaw is effective protection for traditional knowledge. The Communication confirms the EC's support for the development of an international model for the protection of TK. This issue is currently being considered by the WIPO Intergovernmental Committee, and it is important for this Committee to deliver on this issue. On the basis of the outcome of the WIPO process, the TRIPS Council will have to determine whether this warrants further work in the TRIPS-context.

Conclusion

The Doha Development Agenda provides an opportunity to give new momentum to the review of Article 27.3(b) of the TRIPS Agreement and related issues. True, these issues have been overshadowed by the intensive work on TRIPS and public health in the last few years. Also, due to the wide divergences of view among key players, the process has not yet evolved into a constructive dialogue. In this respect, the EC hopes that its approach will contribute to the search for pragmatic and effective solutions. Such an approach is in the interest of all. It is in the interest of the biotech industry, because it will benefit from an IP system that is considered legitimate by all its participants. It is also in the interest of the providers of genetic resources and TK holders, as, if there is a proper interplay with the CBD, they can use the IP system to trigger benefit-sharing and to protect their traditional knowledge.

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The relationship between TRIPs Article 27.3(b) and the Convention on Biological Diversity have been discussed for a number years in the WTO Committee on Trade and Environment (CTE), as well as the TRIPs Council. The agenda of the Council's next regular meeting – scheduled for 3-5 June 2003 – is not yet available, but biodiversity-related issues are expected to feature less prominently than protection for geographical indications and access to medicines (see page 2).

The CTE's meetings in late April/early May will be covered in the next issue of Bridges.

End of the Road for Shrimp-Turtle Litigation

After 11 years of more or less constant litigation between the US government and conservation groups, the domestic-level battle over import requirements for marine shrimp has come to an end. On 7 April 2003, the Supreme Court refused to consider the Sea Turtle Restoration Project's challenge of the revised implementation guidelines for US sea turtle protection legislation.

The law itself – officially known as Section 609 of Public Law 101-162 – requires all marine wild shrimp from regions where sea turtles occur to be caught with vessels using turtle excluder devices (TEDs), which allow the turtles to escape instead of drowning during shrimping operations. This requirement applies to both domestic and imported shrimp.

The first implementing guidelines for Section 609 allowed shrimp imports only from countries that were certified by the US State Department to have (and enforce) national legislation requiring TEDs. That requirement was ruled discriminatory in a landmark WTO case on two main counts. First, it essentially required foreign governments to have the same (instead of comparable) legislation as the US and, second, it discriminated against shrimp caught with TED-equipped vessels in countries that were not certified (Bridges Year 2 No.7, page 9).

To deal with these shortcomings, the US revised the implementing guidelines (but not the law itself) so that fisheries, as well as countries, could be certified. Together with other changes – in particular, a commitment to negotiate an international agreement on sea turtle conservation and to assist other countries in TED-building and use – this 'shipment-by-shipment' exception was an essential element of the US 'compliance package', which was confirmed WTO-compatible in the fourth and final WTO ruling on the case in October 2001 (Bridges Year 5 No.8, page 6). While that ruling ended the multilateral trade dispute, domestic litigation to annul the guidelines revision continued unabated.

New Legislation, Consumer Boycott Considered

In particular, conservation organisations focused their energies on overturning the 'shipment-by-shipment' exception, which they consider an impossible-to-monitor loophole that betrays Congressional intent in passing Section 609. According to Peter Fugazzotto of the Sea Turtle Restoration Project (STRP) "the US shrimp industry may be on its last legs" due to the "flood" of aquaculture shrimp in US markets, as well as "preferential treatment" of foreign shrimp fleets. "It's not fair," he said, "that American shrimpers get punished for doing their share in protecting global resources." STRP's Todd Steiner acknowledged that legal avenues to fight the exception were now exhausted, but added that environmentalists were "currently developing a legislative fix to this loophole in the Shrimp-Turtle Law that will both protect endangered sea turtles and US shrimpers, and not allow the State Department any latitude in misinterpreting the law. Environmentalists are also considering a consumer boycott of all foreign shrimp – both wild-caught and aquaculture."

The shrimp-turtle court battles resemble those still being fought with regard to labelling 'dolphin-friendly' tuna. Conservation groups have twice stopped the US Commerce Department from introducing new labelling criteria developed to comply with multilateral commitments under the International Dolphin Conservation Programme. That case is still under litigation (Bridges Year 7 No.1, page 11).