



International Chamber of Commerce

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Policy statement

TRIPS and the Biodiversity Convention: what conflict?

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A. Introduction

It is often said that there is a direct conflict between the WTO Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) and the Convention on Biodiversity (CBD) which should be resolved. As many feel that the protection of the environment is more important than trade, it is argued that the CBD should have precedence and that accordingly, TRIPS should be amended.

The object of this paper is to consider this position, and to show it is wrong.

It is ICC's position that both the CBD and TRIPS are important international conventions, equally binding on their numerous signatories. They deal with different topics. They are fully consistent with each other and must both be fully implemented by their signatories.

The CBD and the WTO TRIPS Agreement were both concluded quite recently. They have both been ratified by an overwhelming numerical majority of United Nations members (though with the significant exception, in the case of the CBD, of the USA). On the face of it, therefore, it seems unlikely that there should be significant conflicts between them.

B. What are the objectives of the two conventions?

1. The Convention on Biological Diversity (CBD)

The objectives of the CBD are:

- to protect biodiversity
- to promote its sustainable use
- and to share the benefits of such use equitably between providers and users.

The CBD recognizes that some genetic resources have commercial potential. The Convention's measures go further than encouraging benefit-sharing. They are designed to vigorously promote activities (including co-operation in research and development, and private investment to develop genetic resources) needed to create the products or technologies that will give rise to benefits to be shared. Thus, the Convention includes provisions which are based on voluntary co-operation and voluntary licensing of rights, and which require respect for intellectual property rights (i.e., Article 16).⁽¹⁾

The Convention also explicitly recognizes and supports "adequate and effective protection" for intellectual property rights (Article 16.2). This reflects the understanding reached during the CBD negotiations that, in technology transfers under the CBD, intellectual property must be respected. The CBD was explicitly tailored to avoid a conflict with the other major instrument dealing with intellectual property protection, namely, the then-nascent TRIPS agreement.

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2. The WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)

The main objectives of the TRIPS Agreement are:

- to establish adequate and effective levels of protection for intellectual property rights, and
- to reduce distortions and impediments to international trade from differing standards of protection.

TRIPS lays down minimum standards for intellectual property protection in a number of areas. As to inventions, Article 27.1 requires member countries to grant patents in all areas of technology, without discrimination. Article 27.2 provides a general exception to this. A WTO Member need not grant patents for inventions objected to as being contrary to ordre public or morality (this includes inventions which would damage the environment). Nevertheless, such objections must be serious enough to make it necessary to ban the exploitation of the inventions in the Member's territory. Article 27.3 further allows exceptions for plants, animals and essentially biological processes. However, TRIPS requires some effective protection for plant varieties, whether by patents or otherwise ('sui generis' protection, such as plant breeders' rights under UPOV).

C. Why is TRIPS seen as being in conflict with the CBD?

On the face of it, the two conventions address different topics. TRIPS sets norms for intellectual property rights. The CBD addresses, among other things, genetic resource ownership and access issues. Given that so many countries have signed both, major incompatibilities are implausible. If there are areas of doubt, is it not possible to interpret the agreements (if necessary) so that they are both effective? This would accord with the principles *pacta sunt servanda* and *ut magis valeat quam pereat*. At the least, there is a presumption that both conventions are enforceable without contradiction, and the burden is on those who deny this to demonstrate it.

D. What are the areas of conflict alleged?

There is one main charge, and two subsidiary ones:

- The main charge is that while the CBD assigns sovereignty in biological resources to the countries that possess them, TRIPS allows these resources to be patented. It is therefore argued that TRIPS takes away rights that are given by the CBD.

The subsidiary charges are that:

- Patenting of genetic resources encourages unsustainable use; and
- Patenting of genetic resources promotes 'biopiracy'.

1. Detraction from sovereignty

The main charge is based on two separate misunderstandings.

Firstly, this objection is based on the assumption that intellectual property rights allow *existing materials* to be taken out of public use. This is wrong. Intellectual property rights like patents and plant variety rights are granted only for inventions which are *new*. A valid patent cannot be granted for anything whatsoever (process, machine or organism) unless it is new, useful and unobvious. To justify a product patent, existing material must be modified in an inventive way, and only the modified material can be protected. *All existing materials in the public domain* remain in the public domain (and access to them can be controlled by governments whether they are in the public domain or not).

Secondly, the national sovereignty recognised by the CBD is not a new principle. It is a re-affirmation of a recognized principle: that a sovereign nation has control over whatever goes on within its borders. It can control exports and imports, and set conditions for them, and it is by virtue of this power of control that it is enabled to set conditions for access to biological resources within its borders. By joining the CBD, nations undertake to adhere to the principles the CBD embodies in controlling such access.

What the CBD does not do is create a new right of property in genetic materials, let alone one that nullifies other possible rights. The right of property in genetic materials - cattle or seed or timber, for example - remains with whoever owned it before, be they farmers, or private companies or the State. The CBD is not a charter for confiscating property. No-one has suggested that a country's sovereign powers are inconsistent with rights to private property, though they may well limit the way in which such rights are exercised. So, just as property rights are allowed by the CBD, so are other possible rights that may affect the use of genetic materials - such as patent rights. There is no inconsistency.

There is no conflict between the concepts of sovereignty over genetic resources and private property rights, whether those rights are in personal or intellectual property.

2. Unsustainable use⁽²⁾

TRIPS encourages (though it does not in every case mandate) patent protection for organisms. A view sometimes heard is that patenting of any living organisms (or similar protection for plant varieties) is harmful. Intellectual property rights are accused of encouraging activities that will damage the environment⁽³⁾ and result in loss of biodiversity. For example, it is argued that a patent on a genetically modified organism can promote its commercial exploitation, which may have unforeseen damaging environmental effects. Or that protection for a new plant variety, however benign that variety's properties, can promote over-wide commercial use, with loss of biodiversity in the form of less productive but more diverse traditional varieties.

This view appears to hold that biological innovation is (on balance) bad, and that risks from genetic modification are likely to outweigh gains. In this view, new varieties may have useful properties, but these will not compensate for loss in biological diversity caused by their widespread adoption. Indeed, it is argued that the more useful they are, the more dangerous they could be, because they are more likely to spread widely and displace diversity. Intellectual property rights over biological innovations are therefore considered to be bad, because they encourage such innovation. Without patent protection in a particular country, for example, genetically modified varieties are unlikely to be developed for that country, and varieties that are not developed run no risk of causing damage.

While we would agree that intellectual property protection promotes innovation and development, the pessimistic view described above must be rejected for several reasons. Firstly, this view assumes that genetically modified organisms (GMOs) are likely to be dangerous to the environment, with few or no compensating advantages. This is profoundly believed by many concerned for the environment, but less on evidence of danger, than on the basis that safety has not been proved to their satisfaction.⁽⁴⁾

Secondly, this view ignores the fact that absence of patents in one country will not prevent the import of GMOs developed elsewhere. Such GMOs, not being under any control by a patentee, are more likely to be misused (if misuse is possible) because no-one has a stake in developing them properly. Whether it grants patents or not, a country will need sound safety regulations to prevent misuse.

It is also said that the existence of intellectual property laws tends to promote uniformity at the expense of biodiversity: for example, a few new commercial plant varieties of broadly similar genetic

background displace many diverse 'farmers' varieties'. This argument makes several unjustified assumptions.

First, it assumes that the 'farmers' varieties' are all different. This is quite often not the case - many are very similar, and some differ mainly in the names given to them. Secondly, it assumes that commercial varieties lack diversity. In fact, though individual seeds in a single commercial variety closely resemble one another, genetic differences between such varieties are typically much greater than those between locally available farmer varieties. Thirdly, it assumes no substitution of farmers' varieties will take place without commercial breeders making use of intellectual property rights. In fact, there is urgent demand for more productive varieties, and if this is not met by commercial breeders, it will be met by national or international agricultural research centres. Such centres may be more concerned about biodiversity than commercial breeders, but will not have capacity to produce several diverse varieties for each outlet, and may not even have access to as wide a range of germplasm as commercial breeders (taken as a group).

Finally, in the absence of intellectual property rights, not only will fewer new varieties be produced, but the best available variety in each situation will be widely multiplied, and other varieties little used, resulting in possibly dangerous uniformity. Intellectual property protection (by limiting copying) helps to prevent this.

3. 'Biopiracy'

A final charge is that TRIPs, by permitting patenting of organisms, encourages 'biopiracy', which it is the object of the CBD to avoid.

We must first define 'biopiracy', an essential step which is not often taken (it is too often used simply as a generalised term of abuse for the behaviour of multinational companies dealing with genetic resources). In our view, a rational definition of 'biopiracy' would focus on activities relating to access or use of genetic resources in contravention to national regimes based on the CBD.⁽⁴⁾ Accordingly, a legitimate claim of 'biopiracy' will involve unauthorized access to a controlled genetic resource and using that resource in a manner that contravenes the national regime. In practical terms, this means that (a) the activity in question occurred after the CBD came into force (December of 1993), and (b) the acts consist of a party gaining access without the consent of the source country, or in contravention to laws or regulations governing access to or use of genetic resources that the country has established.

This concept of biopiracy stands in stark contrast to the claims of biopiracy that are made with ever-increasing frequency by certain groups. For these groups, biopiracy consists of an innovator gaining access (legitimate or otherwise) to some genetic resource, making an invention, and filing a patent application. Indeed, some groups make lists of 'examples' of biopiracy that consist merely of patent applications.

It is hard to see how the filing of a patent application can, in itself, amount to 'biopiracy'. The filing of a patent application presumes that something beyond the information relating to the genetic resource has been developed; namely, an invention. By attacking the innovative process itself, including efforts to obtain intellectual property protection for inventions arising out of use of genetic resources, these groups will ultimately prevent or deter parties from even attempting to create benefits that could be shared under the CBD model.

Finally, we do not accept the application of this term to cases where indigenous knowledge is used to make a further invention: for example, by isolating the active principle from a medicinal herb. Of

course, the CBD may require equitable sharing of the benefits from such an invention; if this does not take place, this could then reasonably be termed 'biopiracy'. However, the wrong does not lie in filing the patent application, but in failing to deal fairly with the parties that helped create the opportunity for innovation.

E. TRIPS supports the CBD?

Not only does TRIPS not contradict the CBD, we argue that, by promoting intellectual property protection, it in fact supports the CBD's objectives. Intellectual property protection per se does not contribute to the preservation of biological diversity (except perhaps in a few instances, where the deposit of biological material for patent purposes helps to preserve ex situ what subsequently becomes lost in situ). However, it seems beyond doubt that it can help to encourage uses, including sustainable uses, of biological material, in the same way as intellectual property protection helps to encourage all novel uses. Above all, it can contribute to equitable sharing of the benefits of such use. Economists tell us that most of the benefits of innovation (and in particular of agricultural innovation) go ultimately to consumers. Intellectual property rights provide a method of recovering some of these benefits from consumers, by way of higher prices: these benefits are then available, at least in principle, not only for paying for research and development but also for sharing with the providers of essential biological materials. Without intellectual property protection, such benefits cannot be recovered - and this, surely, is less than equitable?

F. If there were a conflict, would the CBD prevail?

Finally, it should be noted that if any of the provisions of the CBD and the TRIPS agreement were found to conflict, it would be the TRIPS Agreement that controls. Why? Under the Vienna Law on Treaties, the agreement that is either later in time or clearer and more specific on the issue will control. In the case of the TRIPS Agreement and the CBD, both factors would result in the TRIPS agreement controlling.

ICC maintains that the two conventions deal with different areas and are fully compatible with each other, both in spirit and in substance. However, should a conflict ever be found, ICC will argue strongly against weakening the existing provisions of TRIPS.

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FOOTNOTES

(1) This reads:

1. Each Contracting Party, recognizing that technology includes biotechnology, and that both access to and transfer of technology among Contracting Parties are essential elements for the attainment of the objectives of this Convention, undertakes subject to the provisions of this Article to provide and/or facilitate access for and transfer to other Contracting Parties of technologies that are relevant to the conservation and sustainable use of biological diversity or make use of genetic resources and do not cause significant damage to the environment.

2. Access to and transfer of technology referred to in paragraph 1 above to developing countries shall be provided and/or facilitated under fair and most favourable terms, including on concessional and preferential terms where mutually agreed, and, where necessary, in accordance with the financial mechanism established by Articles 20 and 21. In the case of technology subject to patents and other intellectual property rights, such access and transfer shall be provided on terms which recognize and are consistent with the adequate and effective protection of intellectual property rights. The application of this paragraph shall be consistent with paragraphs 3, 4 and 5 below.

3. Each Contracting Party shall take legislative, administrative or policy measures, as appropriate, with the aim that Contracting Parties, in particular those that are developing countries, which provide genetic resources are provided access to and transfer of technology which makes use of those resources, on mutually agreed terms, including technology protected by patents and other intellectual property rights, where necessary, through the provisions of Articles 20 and 21 and in accordance with international law and consistent with paragraphs 4 and 5 below.

4. Each Contracting Party shall take legislative, administrative or policy measures, as appropriate, with the aim that the private sector facilitates access to, joint development and transfer of technology referred to in paragraph 1 above for the benefit of both governmental institutions and the private sector of developing countries and in this regard shall abide by the obligations included in paragraphs 1, 2 and 3 above.

5. 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."

(2) "Sustainable use' means the use of components of biological diversity in a way and at a rate that does not lead to the long-term decline of biological diversity, thereby maintaining its potential to meet the needs and aspirations of present and future generations." (CBD, Article 2). More generally, any use that damages the environment may be considered unsustainable.

(3) For the present, we will assume that we all agree on what constitutes damage to the environment. In fact, it is very difficult to define. In consequence, any change is usually assumed to be damage. This lacks logic, and can impede beneficial changes.

(4) The Convention on Biological Diversity is a "framework agreement" that requires implementation by its parties to give effect to its provisions.