

# WORLD TR 37nN.9(Ewr27nN. -117.ia2T0.003 Tc(OR)847nN.9(Ewr TRIPS in regard to the protection of traditional knowledge and response to the request made during the TRIPS Council me

<sup>1</sup> that the Secretariat prepare short papers *inter alia*, the agenda items related to review of the provisions of Article 27.3(b), the relationship between the TRIPS Agreement and the Convention on Biological Diversity (CBD) and the protection of traditional knowledge and folklore, summarizing the relevant material presented to the TRIPS Council, whether in written or oral form, and listing all the relevant documentation.

2. Up until this year the discussion in the TRIPS Council on these three matters has taken place in the context of the review of the provisions of Article 27.3(b), and to a much lesser extent in the context of the review of Article 71.1. This note seeks to summarize those parts of this work which relate more specifically to traditional knowledge and folklore. To avoid undue duplication, cross-references to the two other notes have been made in certain places. In accordance with the mandate given to the Secretariat, the note only contains issues raised and points made by delegations in the Council for TRIPS and does not cover the documentation of the Committee on Trade and Environment and of the General Council, unless the relevant paper has also been circulated as a Council for TRIPS document.

3. It is emphasized that this note is an attempt to summarize the work done so far. By its very nature, it cannot include a full reflection of all the interventions made and documents submitted. It is

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traditional and indigenous communities to provide intellectual property protection for a broad range of subject matters including new ones such as plant varieties, biological materials, lay-out designs and computer software, it is only equitable that traditional knowledge should be given legal recognition.<sup>9</sup>

Moreover, the legal protection of traditional knowledge would improve confidence in the international intellectual property system.<sup>20</sup>

9. On the question of the **appropriate international forum/forums** for further development of the protection of traditional knowledge and folklore, two main views seem to exist:

- priority should be given to the ongoing work in WIPO and other relevant international forums, and the WTO should come back to this matter when this work has sufficiently clarified conceptual issues and possible options;
- all relevant forums, including the TRIPS Council, should pursue work on this matter in parallel and in a mutually supportive way.

10. The followi6i30s1o6i30s1o6i30.002;

- reference has been also been made to the work of the Working Group on Article 8(j) of the CBD and the International Treaty on Plant Genetic Resources for Food and Agriculture of the FAO.<sup>28</sup>

11. The reasons that have been advanced for the view that work should proceed in parallel in all relevant forums are as follows:

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13. The view has been expressed that the granting of patents on traditional knowledge already in the public domain amounts to unauthorized appropriation of the knowledge.<sup>39</sup> It has been said that this occurs particularly in the case where Members do not follow appropriate definitions of the criteria for patentability or appropriate procedures.<sup>40</sup> In response, it has been said that, if patents are improperly granted, the patent system provides remedies, as demonstrated by the revocation of the neem and turmeric patents.<sup>41</sup> Were parties other than traditional knowledge holders to obtain patent protection, the patent should be cancelled.<sup>42</sup>

14. Two areas where it has been said that the patent system is not working well enough in connection with the granting of patents covering traditional knowledge have been referred to:

- one is in connection with the **definition of prior art** used to determine whether a claimed invention meets the novelty standard for patentability. In this connection, it has been said that some Members define novelty in a manner that does not recognize information available to the public through use or oral traditions outside their domestic jurisdictions.<sup>43</sup> In response, it has been said that under the patent laws of many Members

as help potential licensees.<sup>53</sup> Moreover, to the extent that traditional knowledge is already recorded in databases and print media, it is important to ensure that patent examiners are made familiar with these resources.<sup>54</sup> It has been said that care should be taken that the databases do not themselves facilitate piracy.<sup>55</sup> Thus, such data bases should only disclose traditional knowledge already in the public domain or traditional knowledge for which prior informed consent has been obtained. It has also been





continuation of traditional farming practices.<sup>71</sup> The view has also been expressed that the TRIPS Agreement does not exclude the possibility of protecting farmers' varieties under a system separate from that providing effective protection for commercially bred plant varieties<sup>72</sup> and that farmers' rights and breeders' rights would have to be balanced;<sup>73</sup>

- unfair competition and trade secrets. Some examples have been given in the discussion involving the use of unfair competition laws or remedies against passing off, in conjunction with, for example, copyright and related rights to deal with the protection of traditional knowledge.<sup>74</sup> It has been said that trade secret law is particularly appropriate in helping indigenous and local communities maintain limitations on the circulation of their knowledge, innovations and practices;<sup>75</sup>
- industrial designs. It has been said that the extent to which indigenous groups have used design law to protect their indigenous cultural expression, through registration and enforcement of indigenous designs and symbols, is the subject of a study in one Member country. An example has been given of the unauthorized reproduction of an indigenous artist's work embodying clan designs, on imported fabric. It has been said that this case involves examining the ability of indigenous groups to protect their designs through the law of unfair competition.<sup>76</sup>

- communities often hold this knowledge in parallel which makes it difficult to determine title holders;<sup>83</sup>
- communities lack adequate education, awareness and resources to take advantage of IPRs;<sup>84</sup>
- communities do not use scientific methods but trial and error over time.<sup>85</sup>

B. CONTRACTS

23. It has been suggested that bilateral contracts, backed by suitable national or local legislation between those seeking to develop knowledge, innovations and practices into commercial products and those providing such traditional knowledge would be the best way forward. While it is possible that a few individuals could ignore legal requirements laid down in a contractD6 Tc0.eontdeD6 T1.3(a)-0.(em)18.4(s)-0.4

used to justify a refusal to discuss, any more than they had deterred Members from agreeing to the protection of a range of subjects in the TRIPS Agreement that were new to many Members.<sup>96</sup>

26. The point has been made that there is nothing in the TRIPS Agreement that prevents WTO Members from setting up a specific protection regime for traditional knowledge that regulates or enforces access to, prohibition of, and rewards for the use of traditional knowledge.<sup>97</sup> Support has been expressed for drawing up an international model for such legislation.<sup>98</sup>

27. With regard to action at the multilateral level, views have been expressed that national systems will not be sufficient and that there is a need to explore an international system of minimum standards of protection of traditional knowledge, drawing on synergies with the work of CBD, WIPO, FAO and UNCTAD.<sup>99</sup> Another view in this connection is that once WIPO has completed work on model national legislation, attention could be focussed on how and to what extent the protection of traditional knowledge can be included in the TRIPS Agreement.<sup>100</sup>

28. Some more specific suggestions have been made on what such a *sui generis* system should cover:

- a possible definition put forward states that traditional knowledge consists largely of innovations, creations and cultural expressions generated or preserved by its present possessors, who may be defined and identified as holders of rights who are either individuals or whole communities, natural or legal persons;<sup>101</sup>
- the rights provided should follow those provided in Article 28 of the TRIPS Agreement so as to give exclusive rights to prevent third parties not having the owner's consent from the acts of making, using, offering for sale, or importing the covered product or process;<sup>102</sup>
- creating a system for registration of innovations and giving the registered owner the right to challenge any use of the innovations without prior permission. It has been said that for novel and useful innovations, some kind of a petty patent system should be implemented.<sup>103</sup>

#### **IV. INFORMATION ON MEMBERS' NATIONAL LEGISLATION, PRACTICES AND EXPERIENCES**

29. Three Members have made submissions with regard to their legislation, practices and experiences, with respect to the protection of traditional knowledge. These are Australia, India and Peru.<sup>104</sup>

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<sup>96</sup> Brazil, IP/C/M/30, para. 183.  
<sup>97</sup> EC, IP/C/W/254.  
<sup>98</sup> EC, IP/C/W/254.  
<sup>99</sup> Brazil, IP/C/W/228.  
<sup>100</sup> EC, IP/C/W/254.  
<sup>101</sup> Bolivia, Colombia, Ecuador, Nicaragua and Peru, IP/C/W/165.  
<sup>102</sup> Indonesia, IP/C/M/32, para. 134.



<b>LIST A – Records of the work of the TRIPS Council</b>			
	IP/C/M/21-35	Minutes of the TRIPS Council Meetings	22 January 1999 – 22 March 2002

<b>LIST B - Members' submissions relating to the agenda items</b>			
<b>2001</b>			
Australia	IP/C/W/310	Communication from Australia: Review of Article 27.3(b)	2 October 2001
EC	IP/C/W/254	Review of the Provisions of Article 27.3(b) of the TRIPS Agreement: Communication from the European Communities and their Member States	13 June 2001
Norway	IP/C/W/293	Communication from Norway: Review of Article 27.3(b) of the TRIPS Agreement: The Relationship between the TRIPS Agreement and the Convention on Biological Diversity	29 June 2001
Switzerland	IP/C/W/284	Communication from Switzerland: Review of Article 27.3(b): The View of Switzerland	15 June 2001
United States	IP/C/W/257	Communication from the United States - Views of the United States on the Relationship between the Convention on Biological Diversity and the TRIPS Agreement	13 June 2001
<b>2000</b>			
Brazil	IP/C/W/228	Review of Article 27.3(b) – Communication from Brazil	24 November 2000
India	IP/C/W/195	Communication from India	12 July 2000
India	IP/C/W/196	Communication from India	12 July 2000
India	JOB(00)/6091	Non-paper by India	5 October 2000
Japan	IP/C/W/236	Review of the provisions of Article 27.3(b) - Japan's view	11 December 2000
Mauritius	IP/C/W/206	Communication from Mauritius on behalf of the African Group	20 September 2000
Singapore	JOB(00)/7853	Non-paper by Singapore - Article 27.3(b)	11 December 2000
United States	IP/C/W/209	Review of the Provisions of Article 27.3(b) - Further Views of the United States – Communication from the United States	3 October 2000
<b>1999</b>			
Andean Group	IP/C/W/165	Review of the Provisions of Article 27.3(b) - Proposal on the Intellectual Property Rights Relating to the Traditional Knowledge of Local and Indigenous Communities – Communication from Bolivia, Colombia, Ecuador, Nicaragua and Peru	3 November 1999
Canada, EC, Japan and USA	IP/C/W/126	Review of the Provisions of Article 27.3(b) - fromb) -r.9(68r.9(5)12(ef))4(e.1(tell)82.9(e)0.2(9an)TTJ0 -1.1522 TD0.0015 Tc-0.0026	

Brazil	IP/C/W/164	Review of the Provisions of Article 27.3(b) - Communication from Brazil	29 October 1999
Cuba, Honduras, Paraguay and Venezuela	IP/C/W/166	Review of Implementation of the Agreement under Article 71.1: Proposal on the Intellectual Property Rights of the Traditional Knowledge of Local and Indigenous Communities	5 November 1999
India	IP/C/W/161	Review of the Provisions of Article 27.3(b) - Communication from India	3 November 1999
Kenya	IP/C/W/163	Review of the Provisions of Article 27.3(b) – Communication from Kenya on behalf of the African Group	8 November 1999
Norway	IP/C/W/167	Review of the Provisions of Article 27.3(b) - Communication from Norway	3 November 1999
United States	IP/C/W/162	Review of the Provisions of Article 27.3(b) – Communication from the United States	29 October 1999
<b>1008</b>			
Mexico	Job No. 6957	Non-paper from Mexico: Application of Article 27.3(b)	8 December 1998

**LIST C - Information on national legislation, practices and experiences**

<b>1999</b>			
Australia	IP/C/W/125/Add.13	Review of the Provisions of Article 27.3(b) - Information from Members - Addendum	16 March 1999
Bulgaria - (Republic of)	IP/C/W/125	Review of the Provisions of Article 27.3(b) - Information from Members	3 February 1999
Canada	IP/C/W/125/Add.12	Review of the Provisions of Article 27.3(b) - Information from Members - Addendum	12 March 1999
Czech Republic	IP/C/W/125/Add.8	Review of the Provisions of Article 27.3(b) - Information from Members - Addendum	16 February 1999
European Communities	IP/C/W/125/Add.4	Review of the Provisions of Article 27.3(b) - Information from Members - Addendum	10 February 1999
Hungary	IP/C/W/125/Add.1	Review of the Provisions of Article 27.3(b) - Information from Members - Addendum	16 February 1999
Japan	IP/C/W/125/Add.7	Review of the Provisions of Article 27.3(b) - Information from Members - Addendum	12 March 1999
Korea (Republic of)	IP/C/W/125/Add.9	Review of the Provisions of Article 27.3(b) - Information from Members - Addendum	16 February 1999
Morocco	IP/C/W/125/Add.14	Review of the Provisions of Article 27.3(b) - Information from Members - Addendum	20 April 1999
New Zealand	IP/C/W/125/Add.2	Review of the Provisions of Article 27.3(b) - Information from Members - Addendum	12 February 1999
Norway	IP/C/W/125/Add.17	Review of the Provisions of Article 27.3(b) - Information from Members - Addendum	19 May 1999
Poland	IP/C/W/125/Add.11	Review of the Provisions of Article 27.3(b) - Information from Members - Addendum	12 March 1999
Romania	IP/C/W/125/Add.6	Review of the Provisions of Article 27.3(b) - Information from Members - Addendum	16 February 1999
Slovak Republic	IP/C/W/125/Add.18	Review of the Provisions of Article 27.3(b) - Information from Members - Addendum	27 July 1999
Slovenia	IP/C/W/125/Add.10	Review of the Provisions of Article 27.3(b) - Information from Members - Addendum	16 February 1999
South Africa	IP/C/W/125/Add 16/Corr.1	Review of the Provisions of Article 27.3(b) - Information from Members - Corrigendum	25 May 1999
South Africa	IP/C/W/125/Add.16	Review of the Provisions of Article 27.3(b) - Information from Members - Addendum	21 April 1999
Switzerland	IP/C/W/125/Add.15	Review of the Provisions of Article 27.3(b) - Information from Members - Addendum	13 April 1999
United States	IP/C/W/125/Add.5	Review of the Provisions of Article 27.3(b) - Information from Members - Addendum	20 April 1999
Zambia	IP/C/W/125/Add.3	Review of the Provisions of Article 27.3(b) - Information from Members - Addendum	10 February 1999





<b>LIST E – Notes by the Secretariat</b>		
	<b>2001</b>	
Job No. 2689 IP/C/W/273	Review of the Provisions of Article 27.3(b): Synoptic Tables of Information provided by Members – Informal Note by the Secretariat	5 June 2001
	<b>2000</b>	
JOB(00)/7517	The Relationship between the Convention on Biological Diversity and the TRIPS Agreement: Checklist of Points Made – Note by the Secretariat	23 November 2000
Job no. 2627	UPOV-WIPO-WTO joint symposium on the protection of plant varieties under Article 27.3(b) of the TRIPS Agreement: Texts of pr(e 2)12567.3C/W/273	