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From Rio to Cancun: The rights of the peoples are nonnegotiable

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Introduction

Many people in the international community felt their expectations rise when the Convention on Biological Diversity (CBD) was signed in Rio de Janeiro in 1992, one of the culminating events of the Earth Summit Meeting. It seemed that finally the world had recognized the importance of addressing biological resources and their associated knowledge based on a three-pronged objective: the protection of biodiversity, the sustainable use of its resources for the welfare of present and future generations and the need for fair and equitable sharing of benefits arising out of their use.

However, even then these expectations were overshadowed by certain fears. At the meetings prior to the Summit, a tense relationship was apparent between the protection of collective rights and nature on the one hand and, on the other, the trend towards privatization of biotic resources, defended by transnational companies and the governments of some industrialized countries. During the CBD negotiations, the companies interested in these resources and the governments supporting them, were able to introduce articles that opened up the opportunity for intellectual property rights (IPR) over the coveted raw material of incipient modern biotechnology and its associated knowledge. Likewise, the non-governmental organizations (NGO) and other civil society stakeholders in Latin America foresaw the problem that the majority of the governments of the time would not incorporate their positions on the agendas for discussion at the various CBD implementation fora.

Passing from concern to real facts, the first concrete event in this respect took place in 1995, with the conclusion of the Uruguay Round, the adoption of the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) and the establishment of the World Trade Organization (WTO). This agreement demanded for the first time, in its Article 27.3 b) that all the member countries of this organization should adopt patents on microorganisms and microbiological processes for the production of plants or animals. Likewise, this article demanded that if plant varieties (seeds and vegetative reproduction material) were not protected by patents, the countries would have to adopt a special or *sui generis* system of intellectual property for their “protection” which would have to be subject to certain minimum prerequisites established by TRIPS. The inclusion of this article under these terms had a direct impact on areas that had so far been considered as untouchable in intellectual property matters.

Furthermore, with the extension of intellectual property to “all spheres of technology,” TRIPS not only had a negative impact on the small “potential safeguards” that the CBD seemed to have achieved, but also affected society in general in the so-called countries “of the South” due to the barriers that had started to be created in access to medicines and their effect on public health. The claims by some countries with a high percentage of seropositive population and by many NGOs were notorious at the Ministerial meeting in Doha, where they demanded that the few exceptions that already existed be respected and that changes be made in the interpretation of the IPRs used by the major trans-national pharmaceutical companies. It is a paradox that these companies are the same ones that are doing everything possible to influence CBD imple-

mentation meetings to make sure that nobody, and especially the peoples of biodiversity-rich countries, places obstacles but rather grants facilities to bio-prospectors seeking resources for new medicines.

The latest events that have caused the expectations arising from some of the CBD articles to fall are, in the first place, the adoption of decision VI-24 at the latest Conference of the Parties (COP), held in 2001. In this decision, the member countries adopted the “Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits arising out of their Utilization.” Among other things, these guidelines are a true “capitulation” as they accept intellectual property as a mechanism to share benefits from access to these resources and their associated knowledge. Secondly, in 2002, the Group of Similar Mega-diverse Countries formed by fifteen of the wealthiest countries in terms of biodiversity (Bolivia, Brazil, China, Colombia, Costa Rica, Ecuador, India, Indonesia, Kenya, Mexico, Peru, Philippines, South Africa and Venezuela) was established. Although the Group talks of setting itself up as a mechanism for the preservation and sustainable use of biodiversity, it does not hesitate to endorse the concession of intellectual property rights only in exchange for the conditions established by the Bonn Guidelines to grant access to genetic resources. Furthermore, its claims are located mainly within the field of trade and its demagogic discourse is aimed rather at legitimating the sale of biodiversity, only perhaps at a slightly higher price.

Based on the results of the WTO ministerial meetings – especially the Doha meeting – and the CBD Conferences of the Parties, to which are now added the ambiguous and meagre results of the Food and Agricultural Organization (FAO), together with the meetings of lower ranking committees with specific objectives, it may be assumed that if we continue along the path of narrow guidelines conditioned by world trade, under which intellectual property is set out as the sole instrument to recover company investment and to share benefits, the peoples of Latin America will achieve very little by free determination in the field of socio-economic and environmental development, and above all in respect for the integral rights of indigenous peoples, peasants and local communities..

Within this maze of proposals, meetings and agreements, we cannot overlook, but on the contrary, must emphasize, the pre-eminent and critical analysis of the major paradigms that are valid in contemporary civilization, together with their premises and justifications expressed by an incommensurable dimension of power. At the same time, it is essential to consider the perspective of change at the ethical-political level as proposed by numerous civil society organizations, where discordant voices are heard, seeking to establish a forum for the rejection of single thinking, of monopolizing truth, of the unilateral paths of political decisions, and demanding, in exchange, the establishment of an alternative vision of life, of nature and of human relations, highlighting among them those of gender and the respect for cultural diversity, above all that of the indigenous peoples, for whom the sale of biodiversity is not only an ethical problem but also one that threatens the survival of their own cultures.

This document is divided into four sections. In the first, we consider the anti-values and justifications serving as a backdrop to the hegemonic proposals concerning intellectual property. The new forms of biological colonization are revised together with the myths of intellectual property for the countries of the South. We cannot neglect mentioning our concern over the impositions of the FTAA and other free trade agreements regarding these same issues. In the second section, we discuss the impact of pharmaceutical product patents on health. The third section makes a brief consideration of the results of the Council for TRIPS discussions in complying with the Doha Declaration. In the fourth section, we establish a series of “Notes for a Working Agenda” on all the issues addressed here.

1. The imposition of intellectual property as an instrument for the privatization of biodiversity resources and related knowledge

1.1 The patenting of biological resources and knowledge: an unprecedented process in the history of humanity

IPRs were originally aimed at recognizing the interests of inventors, artists and other creators of *socially useful* products. These were substantially different from the issue concerning us at present, they were machinery, artefacts, books, tools, mechanical, electrical and chemical processes and procedures facilitating the relationship of humankind with nature, IPRs that finally limit the very meaning of inventions, which are always based on collective knowledge.

With the passing of time, and due to the development of chemistry, molecular biology and genetic engineering, together with the hegemony of the reductionism paradigm, we are now talking of agreements and trade standards to privatize and monopolize substances and components of biodiversity and natural functions of human and other living beings. The exclusiveness and monopoly of the so-called creation or invention of new beings is sought, patents are requested for human genes for elements of the human body, for DNA sequences, for microorganisms, for cells, for microbiological processes, even for atoms and elements of nature, transforming the human being and nature as a whole into an object of technology and trade. Now we are speaking not of creative individuals but of large multi-national corporations encompassing various productive and market activities referring to drugs, substances, reproductive technologies, products, genetic and predictive medicine processes, research instruments, chips, pharmaco-genomics, food, seeds, embryo genetic diagnostics, nanotechnology, bio-computer science, biological weapons, among others. We are not here at the inventive level of human artefacts but at the stage of making life itself into an object and manipulating it, its elements and functions, finally, at the very heart of nature, an asset in itself and an asset belonging to the human race. The expression *socially useful* acquires a new profile, it may not be socially useful but only useful from the standpoint of trade with a view to created needs and the moral nature of what is considered as *socially useful* may be in question and may be ethically unacceptable.

The patenting of biochemical/genetic resources and knowledge adds an unprecedented stage to the history of humankind. Not only has life itself, the “organic matter” of genetic material stopped having specificity and singularity, becoming the raw material for biotechnology and genetic engineering (just as iron or wood is the raw material for civil engineering), but also knowledge, which is essentially a constitutive collective part of the human being, is now being claimed as private property and the object of trade monopoly. This is a framework of economic and political power of unspeakable dimensions that insists, premeditatedly – by means of values or anti-values created for its sustainability and their non-critical social absorption – in confusing discovery with modifications and inventions, beings with things, animals with humans, life with machines, diverse and legitimate knowledge with the private property of the knowledge of a few. The paradigm of post-modern and post-industrial society is sustained by constructing symbolic mechanisms that are aimed at diluting perception of the place human beings occupy in nature, ignoring the Asset that is incorporated in their aims.

Thus, a model of single thought is constructed, on disregard for the legitimate existence of other conceptions of life.

BOX 1
TRIPS ARTICLE 27.3 b)

Members may also exclude from patentability: plants and animals other than microorganisms, and essentially biological processes for the production of plants or animals other than non-biological and microbiological processes. However, Members shall provide for the protection of plant varieties either by patents or by an effective *sui generis* system or by any combination thereof. The provisions of this subparagraph shall be reviewed four years after the date of entry into force of the WTO Agreement.

The introduction of life into the patent system to be adhered to by the world in TRIPS Article 27.3 b) (Box 1), is a revolution, an unprecedented rupture from the moral, ethical and juridical standpoint and is based on the principle of considering as “objects” of inventive activity, of market use and subject to exclusiveness and monopoly, modifications on a structure or substance given by nature or the reprogramming of natural structures of different species.¹

1.2. The patenting of living beings: an ontological rupture

Present regulations in the context of the WTO and TRIPS article 27.3 b) do not correspond, by anachronism, to the unprecedented changes and ruptures produced by the development of bio-techno-science. The exclusions foreseen hide, by means of subtle, perverse and confusing mechanisms of conceptual manipulation, that life – in any of its manifestations: microorganisms, plants, animals or human beings – is the object of private property and trade in its ultimate or first material reality and in the knowledge related to it. That is to say, the would-be safeguard of entire living beings and the exclusion of human beings contained in that TRIPS article does not then include the safeguard of the modification, patentability and marketing of its molecular reality, an essential part of the singularity and wholeness of all living beings and of the human being.

In fact, TRIPS article 27.3 b) maintains the view of the continuation of a classical system of monopolizing patents referring to human inventions of “objects” (e.g. records, books, paintings, wine and other beverages) of intellectual exclusiveness that indicate, in themselves, a rupture with what is conventional, with the philosophical reference of the tradition of thought. It is in fact, an ontological rupture, which is not recognized in the epistemology of modern science, a *sine qua non* condition for its existence and operation. Biotechnology applied to the various species, including the human species, and its effects on the health of men and women, rights, food and envi-

¹ Santos, L. G. dos. (2000) Invenção, Descoberta e Dignidade Humana, in: Carneiro, F. e Emerick, M.C. (orgs) **Limite. A Ética e o Debate Jurídico sobre o Acesso e Uso do Genoma Humano**, Rio de Janeiro: December 2000

ronmental sovereignty, the right to self-determination of groups and peoples, cannot be issues to be addressed in the framework of the WTO but must be dealt with at other fora. This problem is an effective sample of an unprecedented crisis in the private organization of techniques and human inventions, in addition to being a strong indicator of the non-acceptance of the cultural and moral diversity of human creativity. .

This crisis, altering the complete existing cultural yardstick concerning human rights, takes place when life itself becomes an “object” of human invention and when the very knowledge of this fact is claimed as being exclusive and private. Not only is an attempt being made to repudiate the impediments limiting access to information and to affirm that knowledge and the benefits derived from research belong to the whole of humanity, as is set out in most of the documents of international organizations regarding biology, genetics and medicine, but also, although this is more difficult to accept, to question us about the moral and epistemological nature of techno-science and its relationship with development from an ethical and political standpoint.

Therefore, a consideration of bio-ethical dimensions should be made. If humanity effectively accepts as a natural fact of human evolution this paradigm that the material support of a gene – understood as a “biological resource” – is *nothing*, or pure chemical matter, or that it does not have any kind of vital specificity, at all events it is relevant to remember that a gene contains the singularity, integrity and future of all living beings. This information is therefore an asset that belongs to the heritage of the species and it will be up to human beings to decide on the ethical acceptability or unacceptability of its use.

This information – generally obtained by means of an expropriation of biological resources and knowledge – cannot remain restricted to the private context of multinational corporations or of governments and to merely commercial objectives.

According to Cruz,² we need to face the deep institutional and conceptual crisis, one of the most significant ones, in the mechanisms and rules for the protection of inventive ideas and intellectual works of timeless significance. The civilization crisis, expressed in discussions on the international patent system, is based on what for many is considered to be irremediable: the equalling of what is inert with what is alive, the absence of a definition of life other than that which allows it to be the object of industrialization, trade and monopoly, and the unilateral truth of the neutral value of knowledge, held as universal and unquestionable. Biological resources and information are undeniable pillars of the contemporary hegemonic economic and political system in the recreated historical expressions of capitalism.

According to Santos³, TRIPS by “protecting” contemporary innovation (in biotechnology, at molecular level, in the reconfiguration of the world, of life and of work, in the reconfiguration of digital and genetic components) protects the value of the information on products and processes manipulated by biotechnology and information

² Cruz F. (1996). M. A norma do Novo. **Fundamentos do Sistema de Patentes na Modernidade**. Murillo Cruz, Rio de Janeiro.

³ Op. cit, Page. 56

technologies, but will never be able to protect other values, such as the values of modern and traditional use and ontological values because they do not fit into the system.

1.3. Biological re-colonization, a process with new forms of dispossession

Although many branches of industry and particularly the agricultural and pharmaceutical industries have for many decades based their production on natural resources and on the knowledge that local populations, peasants and indigenous peoples had of them, during the eighties technological developments, and above all, biotechnology, enormously increased the potential for new forms of exploiting these resources. At the same time, chemical, seed and pharmaceutical companies merged or established closer collaboration agreements, among other reasons, because they were interested in the same “raw material” – the genetic resources of the South. Thus, they were able to share many aspects of research on these resources and control sales in key aspects of consumption, food and health. This encouraged what has been called “bio-prospecting” – or more correctly bio-piracy, that is to say the search for new genetic resources that could be used for commercial purposes, later to be controlled and monopolized by means of intellectual property. The pharmaceutical companies were those most interested in these resources, followed by seed companies.

Between 1986 and 1994, the multi-national pharmaceutical companies in a historic undertaking to globalize their monopoly rights prepared the first draft on patents for the Uruguay Round of GATT (General Agreement on Tariffs and Trade), later to become the World Trade Organization (WTO). Together with other industries from the United States, Europe and Japan, they lobbied the delegates of those countries until they managed to introduce the subject of intellectual property, including that of living beings, into WTO. According to Edmund Pratt, from the largest pharmaceutical company in the world, Pfizer, “Our combined forces enabled us to establish a network of governments and the private sector which set out the foundations for what was later to become TRIPS.”⁴

Although since its beginnings GATT had been a privileged instrument to legalize the North robbing the South of its resources, the inclusion of intellectual property was a historic landmark because it included aspects that so far had not been considered as “typical” trade aspects or goods. In terms of their impact, probably the most significant features of TRIPS were, on the one hand, the globalization of the legal – but illegitimate – privileges of multinational companies monopolizing products, technologies and processes and, on the other, that of obliging all its members to accept patents on living beings, a type of legislation that so far had only existed in the United States.

This was set out in TRIPS article 27.3 b), which was drafted in confusing terms (Box 1). Although its obligations are expressed in negative terms, they are equally forceful: all members of WTO were to establish patents on micro-organisms and microbiological processes for plant and animal production and, furthermore, establish systems of intellectual property for the protection of plant varieties – a sort of patent on plants –

⁴ Pratt Jr., Edmund (1995) .Pfizer Forum: Intellectual Property Rights and International Trade. **The Economist**, 27/05/1995, Page. 26

that would enable, although with limitations, the non-commercial use of varieties registered for research or for the use of farmers on the farm itself.

The use of the term “*sui generis* systems” led various NGOs and some countries of the South to consider that with this concept, they could protect their resources and indigenous and peasant innovation systems, avoiding bio-piracy on their territories. This was a much debated issue among civil society organizations and indigenous and peasant peoples in many parts of the world, due to the fact that while some considered that on the basis of these systems they would be able to comply with TRIPS without having to grant patents on plant varieties, others argued that any obligation to the intellectual property of living beings should be totally eliminated and that indigenous and peasant rights and biodiversity resources should be prevented from in any way being regulated on the basis of commercial purposes and much less in such a deeply anti-democratic forum as WTO.

Meanwhile, it very shortly became clear that the United States and European governments and companies would only accept as an “effective” *sui generis* system that of legislations containing the regulations of the 1991 Act of the International Union for the Protection of New Varieties of Plants (UPOV), which is a framework law for the intellectual property of plant varieties, very similar to patents. This led various countries of the South, as from 1994, to feel obliged to join a convention in which, since its establishment in 1961 and with few exceptions, only countries from the political North had participated, as it was legislation to the disadvantage of the former. Bilateral and regional free trade treaties have also been a tool for exerting pressure on the countries of the South to sign the UPOV Convention. Presently, eleven Latin American countries are members: Argentina, Bolivia, Brazil, Chile, Colombia, Ecuador, Mexico, Nicaragua, Panama, Paraguay and Uruguay.

1.4. The myths for the South of intellectual property

The governments of the countries of the South tend to believe that if they enter intellectual property systems, as demanded by WTO and the corporations, their countries will receive more foreign investment, technology transfer will be increased, innovation will be favoured and in this way, national research too.

In fact, none of these expectations have materialized, rather, according to recent studies, the application of intellectual property systems have promoted the contrary.⁵ The globalization and harmonization of these systems have benefited corporations that can extend their market monopolies to more countries and more effectively exclude eventual local competitors. Foreign investment may even drop, as the corporations are authorized to protect their own technologies and products on new markets, without necessarily making any technology transfer to the country or generating new jobs. In some cases, for example Argentina and Brazil, during the nineties national research

⁵ Kumar, Nagesh (1996). Foreign Direct Investment and Technology Transfer in Development: a perspective on recent literature. United Nations University, quoted by Oh, Cecilia. (2000). **IPRs and biological Resources, Implications for developing countries**. Third World Network, Penang, Malaysia. <http://www.twinside.org>

and development projects were discontinued, as were efforts to adapt imported processes to local conditions, as the acquisition of national companies by multinational corporations (obviously accounted for as foreign investment) has implied the transfer of more sophisticated research to their headquarters, leaving minor, less specialized functions in the countries and negatively affecting national research and technology transfer.⁶

The case of agro-biotechnological research is particularly illustrative because, in an overwhelmingly large percentage, it is carried out by subsidiaries of the trans-national companies themselves, with transfer to the countries of the South of only the minimum necessary technology to enable them, for instance, to carry out field experiments adapting transgenic constructions to agricultural varieties already acclimatized to those countries. That is to say, the corporations benefit from local knowledge and training of technicians in public institutions in the South. Alternatively, in the event that research is carried out by public institutions in our continent, it is generally funded by one of the giant corporations, which then benefits from the results.

The intellectual property of varieties of plants acts by closing the circle as it is the multi-national companies themselves that mainly request and obtain rights for plant improvement in the countries of the South. In the case of Latin American countries, where these rights are granted, a high percentage of the requests are foreign – for example, 84% in the case of Colombia and 97% in that of Ecuador - ⁷, and even negotiate records of plant material of the countries themselves.

Although intellectual property systems have progressed forcefully, due to their imposition by TRIPS and the free trade treaties, they are also accompanied by controversy: in an ample majority of countries of the South, they were accepted as part of a negotiation package. These countries believed that they were giving in to this in exchange for other aspects that would benefit them, such as access to markets in the North – of which as usual and at all events – little has been gained. Likewise, the opposition and complaints by many civil society organizations against TRIPS were and continue to be, very wide, a reason for their lack of legitimacy at many levels. However, they are maintained as the most powerful “legal” international instruments for the imposition of intellectual property.

⁶ Nadal, Alejandro (1999) World Investment Report Flawed on many fronts. In: **South-North Development Monitor**. (SUNS), Number 45 17. Geneva, Switzerland.

⁷ Rodríguez, Silvia (2000). Hacia una propuesta alternativa de ley de Protección de variedades de plantas. **Seminario Nacional: Biodiversidad y Obtenciones Vegetales**. Ministerio de Comercio Exterior, UPOV, OMPI. San José, Costa Rica. 13 March, 2000.

1.5. The Convention on Biological Diversity (CBD), sovereignty and the discourse on benefit-sharing

This is another international agreement which was negotiated shortly before TRIPS, initially seen as positive by the governments of the South and many civil society organizations, is taking on a fundamental role in legalizing and above all, in legitimizing, bio-piracy. In this way of legalizing and masquerading the true situation, CBD has an outstanding role, in spite of the fact that the United States considers it so “dangerous” that it has never ratified it.

The CBD, in force since 1994, presently ratified by over 180 countries, has as its official objectives the conservation of biological diversity, the sustainable use of its components and the fair and equitable benefit sharing arising from their utilization, including as part of this, the transfer of relevant technologies without forgetting to “take into account all the rights over these resources and technologies.”

This has been so right from the start. We see that the CBD accepts and several times repeats that it will “respect” IPRs. This was perceived in 1992, by John Deusing, a Ciba Geigy (now Novartis) official, who, on learning of the final version of the Convention, declared that it could be interpreted in such a way as to achieve better protection of intellectual property than with GATT. Furthermore, in spite of it being a multilateral agreement, it promotes bilateral agreements between countries, or between countries and companies, or companies and indigenous groups, which is a contradiction in itself, as then CBD becomes a mere “framework” of which the powerful can take the parts that suit them and state that they are fulfilling international regulations. Something that they have done repeatedly.

Among the most significant clauses of CBD of relevance to the issue being addressed, is article 3, which, while recognizing the existence of prior international agreements on the sovereignty of the States over their natural resources, converts this principle into a binding one.⁸ In Article 15.1, and with greater specificity, it grants each country the authority to determine access to genetic resources. However, in the next line it limits this sovereign right on also giving the countries the mandate to “create conditions to facilitate access by other Contracting Parties” to such resources (Art .15.2). Recognition of sovereignty and the authority to determine access to genetic resources are presented as achievements by the countries of the Third World, as if it were a just claim. Paradoxically, it may not operate as such, for two basic reasons.

The first one is that, during the travels of the conquistadores first, and later the explorations and collaboration among scientists, most of the genetic resources “*ex situ*” that is to say in collections outside their place of origin, are to be found in institutions in the countries of the North, both in germ plasma banks of varieties for agricultural use and in botanical gardens, aquaria, zoos, and microbial collections. By declaring that

⁸ Leskian, Dan (2002). **Intellectual Property Rights and the Convention on Biological Diversity**. GTZ.

the countries have sovereignty over the genetic resources of their territories, the CBD automatically implies that the resources collected prior to the entry into force of CBD, originating in the South, come under the control – with the possibility of being sold and patented – by the countries of the North which have these resources within their frontiers. This data is significant because although 83% of the whole of biodiversity and associated *in situ* knowledge are to be found in Africa, Asia and Latin America, 75% of the *ex situ* resources and technologies are to be found in the countries of the North. This is not the result of the countries of the North having catalogued and collected their own resources, but because the enormous majority of these resources come from the South and were collected before the CBD.⁹

The second reason is that, so far, sovereignty has only been a myth. Let us remember that a national law is always subordinated to international treaties or conventions. As it involves laws of access, the exercise of each country's sovereignty over its genetic and biochemical resources is conditioned by what the CBD itself notes on the matter and, in particular, by what TRIPS and free trade agreements indicate on intellectual property. In the case of CBD, in addition to imposing on the countries that they must facilitate access, it demands that it shall be on mutually agreed terms (Art. 15.4) – for example, between a sovereign State and a company, a relationship which in principal cannot be among equals, as in theory, States have a higher rank and should unilaterally establish conditions. Finally, as the CBD is very ambiguous on IPRs over genetic and biochemical resources, and tolerates that TRIPS impose themselves on the issue, consequently allowing these rights to operate as an instrument whereby the countries and the peoples lose final control over their resources, however much it is said that they are sovereign or that a so-called equitable benefit-sharing is contemplated.

Additionally, most of the States, if not all, have not respected cultural diversity within their own frontiers nor the indigenous peoples' rights to resources, territory and culture, now converting them simply into objects that can give "consent" to the access required by multi-national companies. In this context, laws of access, that for many, both governments and NGOs seem to be the panacea to avoid the "robbery" of bio-piracy, only add to the concert of regulations that the companies need to continue exercising, but "legally," their task of ransacking and privatising collective and public resources.

The "Bonn Guidelines to Access to Genetic Resources and fair and equitable sharing of the benefits arising out of their utilization," adopted in 2001 by the CBD Sixth Conference of the Parties lay down, on an international level, all these regulations to legalize bio-piracy and "mutual support" between CBD and intellectual property systems, and even state that it is a "right" of the indigenous peoples to receive training in order to sign bilateral contracts, that for many constitute legalized bio-piracy.

⁹ See: RAFI Communiqué . (1996). **The geopolitics of Biodiversity: a biodiversity balance sheet.** Jan/Feb 1996. <http://www.etcgroup.org>

1.6 The manipulation of the so-called “protection” of traditional knowledge

The expectations that may have been arisen by CBD Article 8 (j) (Box 2) because of its contents apparently protecting the rights of indigenous peoples and local communities over biological and cultural biodiversity, were also frustrated with the endorsement given to bio-piracy in 1995 with the adoption of Article 27. 3 b). In this case, because not only does it obliges all the signatories to establish patents on forms of life, but also because, as a contrast, it does not recognize any of the demands of Article 8 (j), does not grant specific value to traditional knowledge or even recognize the requisites for access set out in CBD Article 15.

BOX 2
RIGHTS OF COMMUNITIES AND INDIGENOUS PEOPLES
(ARTICLE 8 J) OF CBD

Subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices;

At various meetings on the subject, the obvious agreement was reached that the IPRs are not appropriate to protect traditional knowledge . As a result, two years ago a discussion started among international organizations to see which of them, in accordance with their jurisdictions, was the most suitable one to ensure the “protection” of traditional knowledge. Various candidates arose: UNESCO, UPOV, UNCTAD, but the election was centred on CBD and the World Intellectual Property Organization (WIPO). Those who proposed CBD felt that the issue would be given a broader treatment there, considering that WIPO would place emphasis on the economic use of knowledge, however the balance was tipped in favour of the latter, which established an Intergovernmental Committee on Genetic Resources, Traditional knowledge and Folklore which has held four specific sessions and convened a fifth one to be held next June to address the issue.

Contrasting with the opinions of the interested parties themselves(Box 3), as part of the discussions within the Council on TRIPS to comply with the mandate of the Doha Agreement (Box 4), various governmental delegates declared themselves in favour of WIPO taking over this issue. What is more, the European Union has advanced the proposal of developing an international model for the legal protection of this knowledge, because “it would be highly beneficial to strengthen the IPR system under the WTO” . That is to say, always seeing what favours their interests and not what really helps those whom they say they want to benefit and “protect.”

BOX 3
CONSIDERATIONS BY A REPRESENTATIVE OF INDIGENOUS PEOPLES ON
THE INTERGOVERNMENTAL COMMITTEE OF WIPO

It has no legitimacy, as it has not included among its member the interested parties themselves, that is to say, those who possess indigenous knowledge.

Without their presence, the Committee has been unable to grasp the concept that they have of their knowledge and innovations. They possess a different epistemological base, they are collective, trans-generational, and unalienable, of open access and therefore, their administration (managed by consuetudinary laws) has nothing whatsoever to do with the intellectual property promoted by WIPO, whose mission and objectives are to promote current property rights and not to protect other systems of knowledge like the indigenous peoples do. (Alejandro Argumedo, personal communication)

What all these discussions have left is very much confusion among the local communities and indigenous peoples, as they are not clear about taking decisions on matters such as, for example, what concessions they can make in the field of trade or not to sell anything, under which organization to protect their rights, whether to support the creation of a positive law on the subject of their knowledge or to maintain it under the wing of consuetudinary law, whether “protection” should be granted through bilateral or multilateral agreements and, above all, how to defend the unyielding principles that they cannot and must not negotiate in any contract under the risk of losing much more than what is being offered to them as part of “equitable” benefit-sharing. .

1.7. Beyond harmonization between TRIPS and the CBD: the TRIPS-plus

One of the ministerial mandates given at the Council for TRIPS meeting held in 2001 in Doha was to examine the relationship between TRIPS Article 27.3 b) and CBD, (Box 4). The subject was not new, as it arose as a concern from the very time CBD was concluded in 1992, due to its imprecise articles. In a more organic way, at the Third Conference of the Parties of CBD held in 1996, when the TRIPS had already been signed, the Secretariat prepared a document¹⁰ requesting an in-depth examination of the existence of discrepancies or support between CBD and TRIPS, which have the same legal rank as international conventions.

¹⁰ UNEP/CBD/COP/3/23 (1996) **CBD and TRIPS: relations and synergies**

BOX 4
MINISTERIAL DECLARATION: THE DOHA DEVELOPMENT AGENDA:
ON TRIPS ARTICLE 27.3(b) AND THE CONVENTION ON BIOLOGICAL
DIVERSITY. PARAGRAPH 19

We instruct the Council for TRIPS, in pursuing its work programme including under the review of Article 27.3(b), the review of the implementation of the TRIPS Agreement under Article 71.1 and the work foreseen pursuant to paragraph 12 of this Declaration, to examine, *inter alia*, the relationship between the TRIPS Agreement and the Convention on Biological Diversity, the protection of traditional knowledge and folklore, and other relevant new developments raised by Members pursuant to Article 71.1. In undertaking this work, the TRIPS Council shall be guided by the objectives and principles set out in Articles 7 and 8 of the TRIPS Agreement and shall take fully into account the development dimension.

At the WTO Ministerial meeting held in Seattle in 1999, this issue was on the agenda¹¹ and again addressed at the Doha meeting in 2001, where the item on protection of traditional knowledge and folklore (Box 4) was added, which in itself is a defeat, because it accepts that these issues are also included in the commercial and elitist context of WTO. It is important to note, that beyond this ministerial mandate, Article 27.3 b) itself includes an order review the provisions of this subparagraph four years after the date of entry into force of the WTO Agreement, as it had been the subject of much controversy.

While the meetings convened by the Council for TRIPS throughout 2002 and the beginning of 2003 to comply with these mandates revealed almost insurmountable obstacles in the work of the participants, during which they were unable to reach an agreement on definitions as important as “micro-organisms” or “non-essentially biological processes,” our concerns go beyond these WTO agreements, and are centred on current conversations - lacking transparency and any real participation of civil society- on the signature of free trade agreements between the United States and Central America and, above all, on the signature of the Free Trade Agreement of the Americas (FTAA) in which the United States is imposing, and our countries are meekly accepting, more drastic measures than those already signed in the TRIPS and CBD regarding intellectual property over forms of life.

¹¹ WT/CTE/W/125 (1999). **La relación entre el CDB y los ADPIC, Art. 27.3 b).** Pregunta especial sobre cómo se está implementando el “sui generis” de variedades de plantas. 5 October 1999.

2. The need to develop further the struggle for universal access to medicines

2.1. The voracity of transnational companies and the Doha Declaration on TRIPS and Public Health

One of the scenarios where the profiting vocation of transnational companies is most evident, even at the cost of peoples' lives and health, is the medicine business monopoly, protected by the TRIPS Agreement standards. In Doha, the major pharmaceutical companies did not have their best moment, the Fourth Ministerial WTO Summit Meeting was held in the midst of increasing world repulsion over the exaggerated prices of patented medicines, particularly those used to treat HIV-AIDS. Contradictions among the rich countries that are establishing the orientation of free world trade had become more acute and the delegates of many countries of the South were encouraged by the progress made by South Africa and Brazil vis-à-vis the powerful transnational companies in their struggle for access to cheap retroviral medicines and the right to produce generic medicines.

In spite of the inflamed rejection by powerful governments such as that of the United States, and the intense lobbying carried out by the large pharmaceutical companies of the North, the representatives of various underdeveloped countries went ahead with their initiative and achieved the adoption of the Declaration on the TRIPS Agreement and Public Health. This may become an accomplishment in the struggle of all the peoples for full access to essential medicines, if the traps it contains can be overcome, if the spirit giving primacy to the quality of peoples' lives over IPRs prevails and if "(...) the gravity of the public health problems afflicting many developing and least-developed countries, especially those resulting from HIV/AIDS, tuberculosis, malaria and other epidemics" is taken seriously. Given these difficult conditions to achieve a significant victory in the field of health, civil society organized groups, both at national and international level continue their struggle to maintain, as a minimum, the exceptions existing within the TRIPS.

2.2. The trap of TRIPS regarding Public Health

The first trap, sweetened by some concessions, is found in Article 4 of the Declaration on the TRIPS Agreement and Public Health (Box 5), as in the first place it very clearly reiterates its commitment to this Agreement and only later requests that it should be re-interpreted. That is to say that the root of the problem remains. As pointed out by the International Gender and Trade Network, "(...) TRIPS protect the pharmaceutical industry's patents of very few developed countries, while they prevent a majority of countries, lacking a pharmaceutical industry, to develop their capacity for research, innovation and production of essential medicines to protect life."¹²

¹² Red Internacional de Género y Comercio (2003). Declaración dirigida a las Redes de Mujeres en América Latina, **Seminario "Estrategias de las Mujeres para la OMC"**. Rio de Janeiro - 21 June 2003.

BOX 5
DECLARATION ON THE TRIPS AGREEMENT AND
PUBLIC HEALTH - PARAGRAPH 4

We agree that the TRIPS Agreement does not and should not prevent members from taking measures to protect public health. Accordingly, while reiterating our commitment to the TRIPS Agreement, we affirm that the Agreement can and should be interpreted and implemented in a manner supportive of WTO members' right to protect public health and, in particular, to promote access to medicines for all. (Emphasis added).

The part representing a sort of victory for the countries of the South – that was not even achieved in Doha, but recognizing what had previously been adopted and until today remaining exclusively rhetoric – is to be found in the affirmation of the rights of the governments to use important safeguards in the matter of public health, establishing that they may use patents without the consent of their owners (compulsory licences) and determine autonomously the reasons for granting such licences, arguing reasons of public health. Furthermore, they may determine what constitutes a national emergency and import patented goods from the cheapest legitimate international source (parallel imports).

The Declaration also gives the so-called “less-developed countries” an additional period of 10 years (the year 2016 instead of 2006) by not obliging them to implement, with respect to pharmaceutical products, the sections concerning patents and protection of disseminated information (sections 5 and 7 of Part II of the TRIPS Agreement).

In spite of these concessions, it is well known that most of the poor countries suffer from precarious social, environmental and sanitary conditions, which give rise to high levels of vulnerability in the event of epidemics and pandemics. They cannot pay the high costs of patented medicines and do not have the capacity to produce generic medicines appropriate to their epidemiological profile domestically. Presently, many of them depend on the importation of cheap versions from other countries of the South which do have the capacity to produce them and which have not yet totally applied the TRIPS Agreement.

According to reports by the World Health Organization (WHO), presently some 2000 million people do not have access to essential medicines in poor countries. On a world level, some 11 million people die every year, that is to say, over 30,000 thousand per day, of which almost 50% are children under 5 years of age, mostly from poor countries. Meanwhile, of the 1,393 new medicines introduced on the market over the past 25 years, only 16 were for tropical diseases and tuberculosis. Furthermore, this year the 10 largest pharmaceutical companies monopolized 58.4% of the world market for medicines, valued at 322 thousand million dollars.

This situation will become more complicated after 1 January 2005, when the countries presently producing generic medicines will be obliged to apply the TRIPS Agreement, restricting their exportation and requiring the granting of patents for a minimum of 20 years to pharmaceutical companies. These measures seriously limit access by poor

people to new medicines for the treatment of diseases such as malaria, tuberculosis, other drug-resistant infections, HIV/AIDS and other diseases that can turn into disasters, such as SARS and anthrax.

The impacts will be particularly serious in those poor countries that do not have the capacity to produce the generic version. In spite of invoking some safeguard or issuing an obligatory licence that will allow them to import generic medicines, they will have no other alternative but to import expensive patented medicines, becoming dependent on them, due to the fact that their present suppliers will be prohibited from exporting cheap generic medicines, despite the sanitary needs of the other countries. In Latin America, only Argentina, Brazil, Cuba and Mexico have the capacity to produce new medicines, in the other countries of the subcontinent, capacities are insufficient or non-existent.

For example, in the case of El Salvador, which already suffers from quite precarious sanitary conditions, on submitting to the TRIPS rules, medicines will become more expensive and their accessibility will be more limited, obliging more resources to be allocated from the already rickety State and family incomes. It should be noted that presently 60% of the population lives in a situation of poverty, with recurrent epidemic outbreaks of cholera and dengue (including haemorrhagic dengue). In spite of this, the coverage and quality of public health services are rapidly declining and are presently subject to a privatization process. National expenditure on health represents nearly 8.0% of the GDP, with an annual per capita expenditure of US\$153,00 of which 59.0% correspond to private expenditure and 41.0% to public expenditure and with close on 20.0% of the Ministry of Health funding coming from foreign sources (loans and donations). Only 33.0% is allocated to first level health care.

Contrasting with this, the countries of the industrialized North can ignore a patent and produce their own versions of generic medicines if they can establish that the prices are too high or that supply is insufficient. This problem, arising from the application of TRIPS regarding Public Health, and reflecting a major structural injustice based on patent monopoly, was acutely revealed and produced heated confrontations within the WTO. However, the Ministers of Trade participating in the Doha Summit meeting, instead of lifting restrictions on the export of health products, which they could have done by quoting TRIPS Article 30, blocked by the representatives of trans-national companies and delegates from the rich countries, were unable to give a favourable solution to the enormous majority of the poor countries' populations. Under these circumstances, what was achieved was Paragraph 6 of the Declaration (Box 6).

BOX 6
DECLARATION ON THE TRIPS AGREEMENT AND
PUBLIC HEALTH - PARAGRAPH 6.

We recognize that WTO members with insufficient or no manufacturing capacities in the pharmaceutical sector could face difficulties in making effective use of compulsory licensing under the TRIPS Agreement. We instruct the Council for TRIPS to find an expeditious solution to this problem and to report to the General Council before the end of 2002.

2.3. TRIPS-plus in health

Similarly to the issue of intellectual property over forms of life, our concerns regarding public health go beyond what may be negotiated within the WTO, to consider what is decided in the free trade agreements and FTAA. There are two facts that have recently increased our concern. One was the announcement that for the first time, the United States might use medicines as a political weapon, as it has done for years with food. Last May the Congress of that country adopted legislation whereby assistance to AIDS is tied to the acceptance of genetically modified organisms.¹³ Another matter for concern were the complaints that Washington is attempting to impose stricter regulations in FTAA than those established in the TRIPS regarding the possibility of prohibiting, for over 20 years, the production of generic medicines of the expensive anti-retroviral medicines. This, as in the case of patents on forms of life, is a clear attempt to convert this regional free trade agreement into a TRIPS-plus.¹⁴

¹³ [iiii H.R.1298 US Leadership Against HIV/AIDS, tuberculosis, and Malaria Act of 2003 passed the Senate on May 15th], quoted by: FoE 23/05/03. **Gm Food: U.S. is 'Playing With Hunger'** www.foei.org/publications/gmo

¹⁴ Martínez, Reny (2003) **Denuncian presiones de EEUU sobre patentes de fármacos para sida.** Reuters, La Habana. 11 April 2003. Disseminated by: grain@baylink.mozcom.com.

3. *The state of discussions in the council for TRIPS*

Within the different, very divergent and scantily agreed on opinions expressed within the Council for TRIPS' sessions on addressing these issues, we have decided to present here on the one hand, some opinions of the countries of the North and, on the other, specifically look at those of the Africa Group¹⁵ as this is the official collective body that has expressed itself in the most organic manner on the issues under discussion. On this basis, we will give our opinion, which on some occasions is supported by the contributions of different groups and organizations.

3.1. Intellectual property over forms of life

The countries of the European Union, Japan, the United States and Switzerland unquestioningly support this type of intellectual property and propose that there should be no discrimination in the standards of "protection."¹⁶ Contrasting with this, the Africa Group maintains a firm position regarding a resounding NO to patents on forms of life, in line with what they had submitted in 1999 during the first discussions on Article 27.3 b) and at the preparation of the Seattle Ministerial Meeting (Box 7).

BOX 7
THE AFRICA GROUP'S POSITION AT THE TRIPS COUNCIL REGARDING PATENTS ON FORMS OF LIFE
May 2003

Patents on life forms are unethical and the TRIPS Agreement should prohibit them, as they are contrary to the moral and cultural norms of many societies in Members of the WTO.

The Group proposes that Article 27.3 b) should be revised through modifying the requirement to provide for patents on microorganisms and on non-biological and microbiological processes for the production of plants or animals. (See ref. 19).

The research reports by international organizations^{17 18 19}, religious and development

¹⁵ Communication from the Africa Group. (2003). **Taking forward the Review of Article 27.3 b) of the TRIPs Agreement.**

¹⁶ GRAIN (2003). **Official country positions and proposals on TRIPS Article 27.3 b).** June 2003. www.grain.org

¹⁷ Byström, Marie and Einarsson, Peter. (2001) "**TRIPS: Consequences for Developing Countries, Implications for Swedish Development Cooperation**". Swedish International Development Cooperation Agency. Stockholm, August 2001. Posted on GRAIN's website: <http://www.grain.org/docs/sida-trips-2001-en.PDF>

¹⁸ Commission on Intellectual Property Rights (2002). **Integrating Intellectual Property Rights and Development Policy.** London. <http://www.iprcommission.org>.

¹⁹ UNDP, Heinrich Böll Foundation, Rockefeller Brothers Fund, the Rockefeller Foundation, Wallace Global Fund. (2003). **Making Global Trade Work for People.** Earthscan Publications. London.

foundations^{20 21 22} are kindred to this position, as are documents and recent declarations by different civil society groups of international relevance^{23 24 25 26 27 28 29 30 31 32}.³³ No doubt in the world of the countries of the South and in some spheres of the North, there is a cry going even beyond the Africa Group proposal, demanding the complete revocation of TRIPS Article 27.3 b), and not only its thorough revision.

In the field of intellectual property on varieties of plants, the United States has stated that Article 27.3 b) should include a reference in the sense that it is through adhesion to UPOV 91 that the countries should comply to protect varieties of plants. Other industrialized countries such as the European Union and Japan indicate that UPOV could be a model to this effect, but not the only one. The Africa Group proposes that the members of WTO should be at liberty to determine and adopt *sui generis* measures to protect varieties of plants. It recommends drawing upon the International Treaty on Plant Genetic Resources for Food and Agriculture (or Seed Treaty), the CBD, the 1978 Act of the Convention of UPOV and the African Model Legislation on the Protection of the Rights of Local Communities, Farmers and Breeders.

²⁰ Mulvaney, Patrick (1998). **TRIPS, Biodiversity and Commonwealth Countries: Capacity-building priorities for the 1999 Review of TRIPS Article 27.3(b): a discussion paper and web resources**. Nov. 1998. London, UK. http://ds.dial.pipex.com/ukfg/UKabc/TRIPs/cs_exsum.html

²¹ Van Dillen, Bob and Leen, Maura (2000) **Biopatenting and the Threat to Food Security: A Christian and Development Perspective**. International Cooperation for Development and Solidarity. (CIDSE, Belgium). <http://www.cidse.be/pubs/tg1ppcon.htm>

²² Edmonton Journal (2002). **Church leaders oppose seed patents: Increase in hunger feared**, Roman Catholic leaders have joined the Council of Canadians in a campaign against patenting genetically modified seeds. October 4, 2002

²³ **Declaration by the International Indigenous Forum on Biodiversity** at the meeting of the Ad-hoc open-ended Working Group on Access and Benefit-Sharing, CBD (2001) 22-26 October. Bonn, Germany

²⁴ Campaña: **Repensando los TRIPs en el marco de la Organización Mundial del Comercio**. (2001). Third World Network. www.biodiversidadla.org

²⁵ Propuestas de la Conferencia Comercio Mundial. **II Foro Social Mundial**, Porto Alegre, 1 de febrero de 2002. Revista del Sur. Marzo-Abril 2002.

²⁶ Compromiso de Río Branco (2002). **Taller Internacional Cultivando Diversidad**. Río Branco, Brasil. GRAIN et al. www.grain.org

²⁷ Soberanía alimentaria: un derecho para todos. (2002) **Declaración política del Foro de las ONG/OSC para la Soberanía Alimentaria**. Rome.

²⁸ **Declaración de Greenpeace, Oxfam y ILEIA al final de la Cumbre Mundial de Alimentación** (2002). Rome.

²⁹ Johannesburg declaration on Bio-piracy, Biodiversity and Community Rights. (2002) **Biopiracy Summit**. Johannesburg, South Africa.

³⁰ Declaration of Hyderabad (2003). The power of people's traditional knowledge: how TRIPS threatens biodiversity and food sovereignty. **Taller Internacional "Un solo Mundo"**. Servicio de las Iglesias Evangélicas en Alemania para el Desarrollo (EED). Hyderabad, India. www.grain.org

³¹ **Declaración para la Salud de los Pueblos** (2000). Iniciativa conjunta de Health Action International, International People's Health Council, Consumer's International (Malasia), et al.. Savar, Bangladesh, December 2000

³² **Posiciones de la IGTN sobre la OMC y patentamiento de la vida**. Boletín Mensual de la Red Internacional de Género y Comercio (IGTN). Vol. 01, No.5, Nov.2001. www.genderandtrade.net

³³ **Declaración Dirigida a las Redes de Mujeres en América Latina** (2003). Seminario "Estrategias de las Mujeres para la OMC". Rio de Janeiro. IGTN. 21 de junio de 2003.

They add in their proposal that, regardless of what *sui generis* system is adopted for protecting plant varieties, non commercial use of plant varieties, and the system of seed saving and exchange as well as selling among farmers, are rights and exceptions that should be ensured as matters of important public policy to, among other things, ensure food security and preserve the integrity of rural or local communities. They affirm that while the legitimate rights of commercial plant breeders should be protected, these should be balanced against the needs of farmers and local communities, particularly in developing countries. Finally, they maintain that any *sui generis* system should enable Members to retain their right to adopt and develop measures that encourage and promote the traditions of their farming communities and indigenous peoples in innovating and developing new plant varieties and enhancing biological diversity.

We do not share this proposal as we definitely reject any type of intellectual property over living beings, either by means of patents or by means of “protection” of varieties of plants. We coincide with the Africa Group in all its considerations on farmers’ rights and the need to ensure plant breeding contributing to biodiversity, but we maintain our distance regarding the proposal that this may be achieved by allowing for appropriation through forms of intellectual property such as the rights of plant breeders, including those set out in the African Model Legislation. This law, however progressive it may seem, grants exclusive rights to both plant breeders and farmers on living beings, rights that are at the base of intellectual property contained in the patents that the Africa Group claims it rejects in the previous item. f

3.2. The TRIPS-CBD relationship and access to genetic resources

The Africa Group points out that both the TRIPS Agreement and the Convention on Biological Diversity as well as the International Treaty on Plant Genetic Resources should be implemented in a mutually supportive and consistent manner. In this regard, Members retain the right to require, within their domestic laws, the disclosure of sources of any biological material that constitutes some input in the inventions claimed, and proof of benefit sharing.

In addition to the protection of genetic resources in national legislation, the Africa Group suggests that Article 29 of the TRIPS (Conditions on Patent Applicants) be modified and clearly state the requirement for an applicant for a patent to disclose the area of origin of the biological resources and traditional knowledge. A similar position to that of the Africa Group was proposed by a group of developing countries (Brazil, Cuba, Ecuador, India, Peru, Thailand and Venezuela).

This perspective is clearly opposed by various developed countries. The European Union and Japan do not find any incompatibility between the two treaties, neither do they favour more requisites being included to grant intellectual property. The United States shares this opinion, adding that benefit-sharing can be made by means of contracts. Switzerland considers that there is no need to modify TRIPS to reveal the origin of resources or to prove that benefit-sharing is taking place. It proposes a mecha-

nism enabling (but not as a requisite), declaration of origin through WIPO, to be regulated in national legislation.³⁴

We observe that what are basically being alleged in the Council on this item are aspects related with access to genetic resources and benefit-sharing which show the true scope of CBD negotiations, that is, the marketing of biodiversity. Little is said about the Convention's other two official objectives: the conservation and the sustainable use of resources and whether the TRIPS are an obstacle to achieving them.

In addition to this initial bias on the scope of the relationship between the two treaties, the next question to be asked is, how can any doubt or resistance exist on the part of the countries of the North on the requirement to reveal the origin of materials or their associated knowledge, as a basis to judge whether the request for intellectual property refers to an invention or to the mere appropriation of what already exists?.³⁵ However, the problem does not remain there, and rather we must be very careful in diverting attention to this suggestion. In fact, the requirements of countries rich in biodiversity – which in principle seems absolutely fair in the sense of demanding a strong and effective mechanism to safeguard their rights over their resources – are leading the discussion towards very dangerous ground, on converting it into a true capitulation: if you to reveal the origin and grant a certain degree of benefit-sharing, I will yield on the issue of intellectual property, which is the quid of the matter regarding control of resources.

3.3. Traditional knowledge and its “protection”

At the meetings of the Council for TRIPS, discussions on traditional knowledge were similar to those on the issue of access to genetic resources, in the sense of demanding certain requisites in order to grant intellectual property. In this case, an attempt is being made to require revision of prior art regarding this type of knowledge, which is generally unwritten. Likewise, discussions were continued on whether its “protection” should be a matter for national legislation or of an international system and, if so, if it should be implemented under the auspices of WIPO or of TRIPS itself.

We have identified a similar problem that is at the base of all discussions within the Council for TRIPS, referring to the lack of clear and universally accepted definitions of all key concepts. In this case, for example, it is not clear even what “protection” means. Only New Zealand indicated the need to come to an agreement on the meaning of this term, but no major follow-up was made of this fundamental concern. As there is no consensus, the accent on “protection” of traditional knowledge is simply placed on strengthening exclusive and private economic rights over a specific creation, with the unique finality of others not using it or reproducing it without due payment, exactly like any other intellectual property right, only that it is collective.

³⁴ Khor, Martin (2003). **TRIPS debate on biological materials: Africa reiterates proposal to ban life patents**. Third World Network Publication: TWN Info Service on WTO Issues (June03/3) Date: 11 June 2003 URL: <http://www.twinside.org>

³⁵ GRAIN (2003). The TRIPS review at a turning Point?. July 2003. www.grain.org

For our part, we consider that the “protection” of a traditional knowledge cannot be achieved outside the safeguard of the entire cultural, economic and social context where the knowledge is produced and reproduced, but must be totally integrated into this context. We affirm that knowledge grows when shared, so to state that it is being “protected” by isolating it, privatizing it and monopolizing it, is going against its very nature.

This is underscored and complemented by the voice of the indigenous peoples themselves³⁶ who state the following:

Our collective knowledge is not merchandise that can be commercialized like any other object on the market. Our knowledge of biodiversity is indivisible from our identities, laws, institutions, systems of values and cosmovisions as Indigenous Peoples. For generations, our peoples have been and continue to be, the guardians of Nature on which we all depend. (...)

Further on, in this same document, they stated that:

(...) we are concerned that, currently, a disproportionate emphasis placed upon the commercial and economic values of biological diversity through intellectual property rights, at the expense of conservation and its cultural and spiritual values, we believe that privatization of the knowledge and natural resources of indigenous people, turning them into a commodity, would undermine their political, social, economic and cultural integrity.

Surprisingly, the Africa Group submitted in June 2003, as part of its proposals, a draft of a “Proposal on Traditional Knowledge” proposing that this would eventually become a part of the TRIPS, that is to say, the WTO would receive it similarly to the one adopted in Doha concerning public health. The Group considers that the protection of traditional knowledge and genetic resources will not be effective unless international mechanisms are established in the framework of the TRIPS. Other means, such as contracts for access and databases for the recognition of patents would only be complementary to international mechanisms.

We are against the Africa Group proposal or any other that is set out in similar terms:

1. Because it is a mistake to inscribe management and the future of resources and knowledge within WTO jurisdiction, whose limited mandate is the promotion of international trade.
2. Because the Indigenous Peoples demand that the design of any instrument for the “protection” of their knowledge must use as a basis ideas, concerns and values from their standpoint, resting on Indigenous law, that is to say, outside international or national western law.
3. Because the proposal admits the fact that only by complying with certain requirements established in the CBD – among them, prior and informed consent and an

³⁶ International Indigenous Forum on Biodiversity at the Ad-hoc open-ended Working Group on Access and Benefit-Sharing. CBD, 22-26 October 2001, Bonn, Germany

agreement on benefit-sharing – can intellectual property rights be granted to knowledge, as in the case of genetic and biochemical resources. This is a moral legitimization of piracy, privatization and monopoly. It is, furthermore, extremely conflictive for most of the Indigenous Peoples, as companies and governments will always find some communities or persons willing to sign contract and obtain something in exchange for access. Among those accepting, there will also be competition to sell cheaper and to sell first. Competition will also take place among generations, among cultures and peoples in different countries with shared ecosystems, plants and knowledge, which will all go to their detriment instead of their so much debated “protection.”

3.4. Intellectual property and health

Similarly to what has happened with the discussion on the relationship between the TRIPS and CBD, conversations to enforce paragraph 6 of the Doha Declaration on the TRIPS and Public Health (Box 6), did not fulfil their commitment. The time ran out without the governmental representatives reaching a “prompt solution” regarding the medicines of the poor countries. In March 2003, some delegates expressed their frustration at not having reached a consensus – due to the lack of support of only two countries, pressed by the pharmaceutical industry³⁷ - the “President’s Text” of 16 December 2002, which proposed a multilateral arrangement of the problem. The issue has taken on dramatic proportions as we are coming close to the date when we will lose the capacity to produce, sell and export generic versions of new medicines, established at January 2005.

Moreover, as if the Doha Declaration on Public Health (Box 6) were non-existent, the United States government and transnational pharmaceutical companies headed by the North American group, PhRMA (Pharmaceutical Research and Manufacturers of America) started a counteroffensive attack, attempting to dismiss the spirit of protecting public health and promoting access to medicines for all. Their position was to hinder the solution to the Gordian knot it was in, which was: Under certain conditions Doha allows the rules for patents for imports to be broken, but in the case of countries that do not have the capacity to produce the necessary generic medicines, it complicates them, as it does not authorize any country to break the rules for exports.

Thus, the United States negotiators have devoted themselves unyieldingly to demolish the Declaration, together with trans-national company officials, insisting on placing temporary delays and limiting the list of “exportable” generic medicines to those used in the treatment of AIDS, malaria, tuberculosis and some epidemic diseases in Africa, arguing that a wider or more flexible list would reduce the pharmaceutical companies incentives to investigate and produce new medicines. They also consider that this measure will not solve the public health problem of the poor countries. Although they are nearly always isolated and without any valid justification other than blackmail to achieve advantages for the trans-national companies, they have made all the negotiation rounds fail.

³⁷ World Trade Organization **IP/C/M/39**. 21 March 2003. Point 71.

Although it is not the only way to solve the problem, the proposals of the poor countries, which include the initiatives of the Africa Group (41 members), Brazil, Ecuador, India, Indonesia, Malaysia and Peru, among others, are based on removing restrictions to exports of generic medicines, interpreting Article 30 of the TRIPS Agreement (Box 8). The countries of the South that have promoted it, see this proposal as a simple, flexible and direct mechanism, authorizing exports of generic medicines to countries that do not have the financial and technological capacity to produce them locally. Furthermore, compensations would be established to the patent holders, according to compensation standards in the countries where the medicines are used.

BOX 8

ARTICLE 30 OF THE TRIPS AGREEMENT

Exceptions to Rights Conferred. Members may provide limited exceptions to the exclusive rights conferred by a patent, provided that such exceptions do not unreasonably conflict with a normal exploitation of the patent and do not unreasonably prejudice the legitimate interests of the patent owner, taking account of the legitimate interests of third parties.

Our position as civil society would go much further than these official proposals, demanding that issues relating with the health of the peoples should not be a matter for discussion nor decision in trade contexts, be these free trade treaties, or the TRIPS of the WTO. In other words, we are in favour of breaking with the patent system in this field.

4. Notes for a peoples' agenda from the civil society standpoint

We consider the following point to be mere notes for an open and necessary debate at various levels, local, national and international, leading to an agenda. In the issues addressed here, we find specific initiatives for each issue, followed by an agenda of common issues.

4.1. Regarding intellectual property over forms of life and traditional knowledge

1. To demand the annulment of the articles in all international, regional or national treaties or conventions (TRIPS, FAO, Free Trade Agreements, legislation), that include patenting and any other type of intellectual property over living beings and their components, modified or not. In this respect the complete annulment of Article 27.3 b) would be included and, as part of this, of intellectual property over new varieties of plants.
2. This would involve simultaneously, the requirement of not applying trade sanctions or any other type of pressure based on lack of compliance with Article 27.3 b) or similar ones, while this type of article is being annulled.
3. Faced with the immediate danger of regional conventions such as FTAA and any other type of free trade treaties attempting to affirm and exacerbate intellectual property standards on living beings, to demand that patents should not be granted either on micro-organisms, modified or not, non-biological or microbiological processes for the production of plants or animals, their parts and components,. This requirement also includes non-concession of intellectual property for new varieties of plants by any legal means.
4. To make known at all levels that any work for plant improvement and development of many medicines is based on thousands of years of collective efforts, with results that have never been privatized or monopolized by millions of indigenous peoples, small-scale farmers and to demand that this process be respected and protected by the comprehensive recognition of the indigenous peoples and peasants right to their culture, resources and forms of life and production. All forms of intellectual property attack these processes and none should be legitimized.
5. To develop a positive action agenda that will truly “protect” traditional systems of knowledge under the auspices of contexts in which the indigenous peoples and local communities themselves will maintain control. None of the issues related with these cultures should be the object of trade negotiations.
6. The above implies the requirement of not allowing issues related with traditional knowledge or indigenous knowledge to be discussed and resolved on within TRIPS, the WIPO and other trade fora. On the contrary, to promote more power and protagonism among the direct stakeholders for whom sustainable development, community rights, indigenous rights and cultural diversity will be basic elements on their agenda.

7. To demand that all the countries that have been obliged to sign UPOV 91 due to pressure of signing TRIPS and in particular Article 27.3 b), or free trade agreements, may revise their positions and change their membership, based on the temporal logic that nobody can be obliged to comply with something which is being revised or which was signed without the prior informed consent of the peoples.
8. To open up opportunities for discussion and even, for example, competitions, to enable citizens to contribute to thinking of ways of encouraging plant breeders and to contribute to the adaptation of varieties of plants to regional and local ecological niches, collaborating and taking as an example the many small-scale farmers and peasants who have an enormous wealth of knowledge on this issue.
9. To promote strategic planning meetings with the system of women's movements (regional and international) which are acting in health, agriculture, environment and development areas to develop the possible differential effects of intellectual property systems on women's health and food.
10. To promote public research on agriculture, in order to improve production for local supply in the first place, and for the export of sustainable products, under the slogan that the peoples' right to food sovereignty is above the rights of seed and agro-chemical trans-national companies. For this purpose, it is essential for public research to be based on the needs of its populations and to collaborate actively with indigenous and peasant systems of breeding.
11. To call on public universities in the area to remember that the reason for their research is not to serve the initial ladder for the development of products that trans-national companies conclude and control by means of intellectual property, but to return to their origins, at the service of social needs.
12. To demand that international agreements and standards on Human Rights, human health, reproductive technologies and bioethics and the human genome are governed outside fora such as TRIPS and other international trade treaties.
13. To incorporate the ethics dimension in discussions on the meaning of intellectual property on different forms of life and of the human race.
14. To include on the agenda of networks and alliances accompanying trade agreement processes and the regional integration process, aspects regarding TRIPS, and biotechnology and its impacts, if this is not already the case.

4.2. Regarding intellectual property and health

1. In the effort to free medicines from dependency on trans-national companies, we are clear that the goal guiding our Notes for a Working Agenda should be, as with food, biodiversity and traditional knowledge, to remove health from the World Trade Organization.
2. Faced with the threat of loosing the little ground gained, more public force must be given to alternative proposals prepared from the South and at the next Ministerial Meeting, insistence must be placed on making progress in breaking away from patent monopoly. The contents of paragraph 6 of the Doha Declaration on TRIPS and Public Health must be retaken in all their extension, criteria must be approved and mechanisms must be established to ensure that the present orientation of negotiations is changed to enable access by all to essential medicines.
3. As the most immediate task, we propose that all the poor countries resist bilateral pressure put on them, that they revise their national legislation and incorporate, from now on, TRIPS safeguards in favour of public health.
4. We suggest making use of all possible available opportunities, such as the so-called “temporary advantages,” granted when applying WTO agreements on patents.
5. There is an urgent need to accompany these measures by the reversal of the privatization of health and social security services that, under the auspices of the International Monetary Fund and the World Bank, have been promoted in nearly all the countries. Likewise, it is necessary to obtain a significant increase in public funding – from national and international sources, such as WHO – to improve the quality and the coverage of health services, sufficient to subsidize the purchase of the essential medicines required from the cheapest sources. This public subsidy should not be used for business with trans-national pharmaceutical companies.
6. Along these same lines, the behaviour of trans-national pharmaceutical companies should be closely monitored, ensuring that their practices and policies regarding patents respect, at the least, the contents of the Doha Declaration.
7. Similarly, it is necessary to put pressure on the United States government, to make it honour the right of poor countries to use TRIPS safeguards concerning public health.
8. Finally, the industrialized countries must be prevented from continuing in delaying, through TRIPS or through FTAA or other free trade treaties, the possibility of a better quality of life for the entire world population.

4.3. Notes for an Agenda on common issues

The list here below contains a series of non-specific proposals, cutting across all the items analyzed here on intellectual property.

1. To carry out global, regional and national campaigns based on common issues mobilizing civil society in the different countries. The health crisis always seems to mobilize more, in relation to the lack of access by the poor population to basic health services and medicines. Abstract issues such as intellectual property, globalization, biotechnology, transgenic organisms and others may be linked, but this must be done effectively. This task demands prior research within national frameworks.
2. To broaden partnerships among international cooperation agencies for the construction of common and integrated strategies (linking programmes) and with similar analyses of the international situation and policy vision of support to actions by social movements and NGOs.
3. To widen alliances and political linking among the various sectors of civil society operating in the fields of genetic reproductive/health technologies and bioethics, food sovereignty, transgenic organisms, ethnic/racial movements, human rights movements, tertiary sector networks, collective intellectual rights networks, professional and research associations and federations

These proposals are based on three findings:

- a) Alternative and critical political resistance action is fragmented among the various sectors of national, regional and international civil society. For example, the women's movement is not linked to the environmentalist movement, and vice-versa, those lobbying against pharmaceutical industries are not linked with campaigns against production and trade of transgenic organisms.
- b) Thematic fragmentation or absence of a greater analytical theoretical referential to enable the different technological sectors associated with the technical-scientific paradigm to become incorporated. In the case of biotechnology, this is clear: sectors linked to the struggle in the field of health – access to medicines – do not incorporate in the discussion the effects of transgenic medicines on health. This greater analytical theoretical referential would also enable political actions to be qualified from the standpoint of their ethical-political, anthropological and philosophical contents.
- b) The absence of a gender perspective, in general in the proposals for thematic and political linking in the analysis of the impacts of the patent system in the services and social area on women, may cause prejudice to the design of strategies and weaken the force of the actions' possible political scope

BOX 9
SUMMARY OF OUR PRINCIPLES, POSITIONS AND GENERAL PROPOSALS

NO to intellectual property over any form of life and its components, including non-living components, or of its related knowledge, either by means of patents or of any other type of intellectual property.

YES to the repeal of TRIPS and in particular of Article 27.3 (b) in its entirety.

YES to leaving agriculture, biodiversity, health, traditional knowledge and all issues related to indigenous and peasant culture, rights and forms of life, out of WTO, FTAA, and all free trade agreements

In the case of traditional or indigenous knowledge, NO to its discussion within international, regional or national contexts, unless at the initiative of the indigenous peoples and peasant organizations themselves.

NO to the parallel and complementary work of CBD and WTO together with FAO, WIPO and UPOV which, under the aegis of trade, are legalizing and attempting to make acceptable the privatization of life through IPRs. The main instruments for legitimization are: *the declaration of origin of the resources used and similar mechanisms, which in principle we agree with, but not to justify their use to grant patents or any kind of intellectual property rights.*

NO to the moral legitimization of piracy and privatization through "prior informed consent." With this, the comprehensive and ancestral rights of indigenous peoples to their culture, land, territories and resources are not recognized and they are merely taken as fragmentary objects so that they give their "consent" to the sale and use of resources in exchange for some compensation through contracts. The negotiated amount is not of importance, but the fact of accepting a sale in itself, under these conditions.

YES to full recognition of the comprehensive rights of peasants and indigenous peoples to their culture, resources, land, territory and forms of government. They are not interested in monopolizing acquisition of a gene or of molecular information, but in the preservation and utilization of ecosystems and their resources as a whole for their own survival and that of their cultures.

NO to the legalization of bio-piracy through so-called "benefit-sharing," in exchange for intellectual property and under the premise: *If it is paid for, it is no longer "piracy" but sale.* We maintain that bio-piracy will continue because privatization and monopolization of resources and their related knowledge exists, paid for or not.

NO to so-called State "sovereignty" which ignores the real and necessary self-determination of indigenous peoples, but which grants the governments of the moment, the capacity to sell or arbitrate in the sale of resources that never belonged to them. The States assume the capacity to transfer property of genetic resources, something that until a short while ago had never been the object of property. Neither is it the property of indigenous peoples or communities in particular. Genetic resources are public assets that cannot be privatized by anybody.

YES to all research in the public context without the possibility of anybody benefiting from it (as has been the case throughout history, even most recent history).

YES to the proposals for comprehensive health for all, which implies its management outside WTO, FTAA and any other free trade agreement.

YES to the inclusion of the gender perspective in the analysis and proposals on the impacts of intellectual property on health and food.

YES to the inclusion of the bio-ethical approach regarding the monopolization of biodiversity resources and their knowledge and of technologies for their use.

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Acronyms

AIDS	Acquired Immunodeficiency Syndrome
CBD	Convention on Biological Diversity
COP	Conference of the Parties
CSO	Civil Society Organization
DNA	Deoxyribonucleic acid
FAO	Food and Agricultural Organization of the United Nations
GATT	General Agreement on Tariffs and Trade
IGTN	International Gender and Trade Network
IPR	Intellectual Property Rights
NGO	Non-Governmental Organization
PVP	Protection of new varieties of plants
SARS	Severe Acute Respiratory Syndrome
TRIPS	Trade-Related Aspects of Intellectual Property Rights
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
UNESCO	United Nations Educational, Scientific and Cultural Organization
UPOV	International Union for the Protection of New Varieties of Plants
WIPO	World Intellectual Property Organization
WTO	World Trade Organization

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