



## CONVENTION ON BIOLOGICAL DIVERSITY

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THE RELATIONSHIP BETWEEN INTELLECTUAL PROPERTY RIGHTS AND THE RELEVANT  
PROVISIONS OF THE AGREEMENT ON TRADE-RELATED ASPECTS OF INTELLECTUAL  
PROPERTY RIGHTS (TRIPS AGREEMENT) AND THE CONVENTION ON BIOLOGICAL DIVERSITY

### Note by the Executive Secretary

#### I. INTRODUCTION

1. Decision IV/8 requests this meeting to start work on paragraph 10 of decision IV/15 and to make recommendations for future work. In paragraph 10 of decision IV/15, the Conference of the Parties;

"Emphasizes that further work is required to help develop a common appreciation of the relationship between intellectual property rights and the relevant provisions of the Agreement on Trade-Related Aspects of Intellectual Property Rights and the Convention on Biological Diversity, in particular on issues relating to technology transfer and the fair and equitable sharing of benefits arising out of the use of genetic resources, including the protection of knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity."

2. The Executive Secretary has prepared this document to provide a brief overview of activities under the auspices of the Convention and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement). The former is contained in section II and the latter in section III. Developments in other relevant fora are briefly described in section IV. The document then concludes by considering

which this meeting may wish to recommend to the fifth meeting of the Conference of the Parties. In particular, the document considers modalities for undertaking further work on a common appreciation of the relationship between the Convention and relevant provisions of TRIPs Agreement and the importance of reaffirming the need for sui generis systems of intellectual property rights in implementing the provisions of the Convention regarding equitable sharing of the benefits arising from the use of genetic resources.

II. CONSIDERATION BY THE CONFERENCE OF THE PARTIES TO THE CONVENTION  
BIOLOGICAL DIVERSITY

3. Under the Convention process, preliminary discussions took place at the second and third meetings of the Conference of the Parties with respect to the relationship between intellectual property rights and the relevant provisions of the TRIPs Agreement and the Convention. Some progress has been made in the information gathering exercises initiated by decisions of the third meeting of the Conference of the Parties. Some case studies on access and benefit-sharing arrangements and on the implementation of Article 8(j) provide particularly relevant information on alternative forms of protection of knowledge which are not covered by the conventional intellectual property rights systems.

A. Consideration of intellectual property rights under access to genetic resources and sharing of benefits arising from their use

4. Article 15 sets out the basic framework for access to genetic resource and provides a basis upon which the negotiation of the terms of benefit-sharing can take place. There are many mechanisms which can be used to control access to genetic resources. An important one is intellectual property rights. Characteristics such as the extent that they utilize the fact that they are capable of conferring rights to private entities make that they are an important mechanism in any Party's implementation of Article 15. Moreover, intellectual property rights provide a more comprehensive degree of control than many other mechanisms. For example, contractual arrangements are limited by the legal concept of privity (which refers to the notion that contracts are binding only on the parties to the contract and generally do not effect the rights of third parties). Within the context of the Convention an important advantage is that they provide a mechanism to devolve control to private or non-governmental interests. In this regard an important point is that it is only through the use of some form of intellectual property rights that local and indigenous communities will be able to exercise the necessary degree of control in order to allow for proper internalization of the value of their knowledge, innovation and practices.

5. The importance of legal measures such as intellectual property rights in implementing access and benefit-sharing arrangements envisaged by the Convention is recognized in Article 15, paragraph 7, which calls upon each Contracting Party to take legislative, administrative or policy measures aiming to ensure benefits arising from the results of research and development and from the commercial and other use of genetic resources are shared in a fair and equitable way with the Contracting Party providing the genetic resources.

6. The Conference of the Parties considered Article 15 at each of its last three meetings. At its second meeting, it considered the compilation of "existing legislation, administrative and policy information on access to genetic resources and the equitable sharing of benefits derived from their

use" which were described in document UNEP/CBD/COP/2/13. Within this rubric the meeting also considered policy, legislative, or administrative measure related to intellectual property rights as provided in Article 16 of the Convention (see section II.(b) below). As a result, it adopted decision II/1 on access to genetic resources and II/12 on intellectual property rights

7. At its third meeting, the Conference of the Parties considered a compilation of "views of the Parties on possible options for developing national legislative, administrative or policy measures, as appropriate, to implement Article 15", which were contained in document UNEP/CBD/COP/3/20. The Conference of the Parties also addressed the relationship between intellectual property rights and the relevant provisions of TRIPs Agreement and the Convention on Biological Diversity. To assist the Conference of the Parties in its consideration of these issues the Executive Secretary prepared documents: UNEP/CBD/COP/3/22, "the impact of intellectual property rights systems on the conservation and sustainable use of biological diversity and on the equitable sharing of benefits from its use"; and UNEP/CBD/COP/3/23, "the Convention on Biological Diversity and the Agreement on Trade-Related Intellectual Property Rights (TRIPs): Relationships and Synergies". These documents were prepared with the assistance of the Secretariat of the World Trade Organization (WTO).

8. The Conference of the Parties adopted several decisions addressing the relationship between the Convention and the TRIPs Agreement at its third meeting. In decision III/15 on access to genetic resources, the Conference of the Parties requested the Executive Secretary "to cooperate closely with the World Trade Organization (WTO) through the Committee on Trade and Environment to explore the extent to which there may be linkages between Article 15 and relevant articles of TRIPs Agreement". By its decision III/17 the Conference of the Parties requested the Executive Secretary to transmit the relevant decisions of the third meeting of the Conference of the Parties as well as the documents placed before it to WTO. Consequently, documents mentioned in the previous paragraph were transmitted to the Secretariat of WTO for the use by WTO. In paragraph 8 of this decision, the Conference of the Parties further stated that it:

"[r]ecognizes that further work is required to help develop a common appreciation of the relationship between intellectual property rights and the relevant provisions of the Agreement on Trade-Related Aspects of Intellectual Property Rights and the convention on Biological Diversity, in particular on issues relating to technology transfer and conservation and sustainable use of biological diversity and the fair and equitable sharing of benefits arising out of the use of genetic resources, including the protection of knowledge innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity".

9. Subsequently, the secretariat called for submissions from the Parties and governments of information regarding the impacts of intellectual property rights on the attainment of the objectives of the Convention, including relationships between intellectual property rights and the knowledge, practices and innovations of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity. This paragraph (decision III/17 paragraph 8) was restated in paragraph 10 of decision IV/15.

10. Pursuant to other decisions adopted at the third meeting of the Conference of the Parties, the secretariat also called for submissions on case studies on benefit-sharing arrangements from interested governments organizations and individuals. In particular, case studies were requested on benefit-sharing arrangements with indigenous and local communities involving intellectual property rights and/or traditional resource rights.

11. To date, the secretariat has received several submissions regarding access and benefit-sharing arrangements, which are relevant to the scope of this document. These studies are considered below.

12. At its fourth meeting the Conference of the Parties considered the relationship with the WTO, in particular, the TRIPs Council. As a result in paragraph 9 of decision IV/15, the Conference of the Parties:

"[s]tresses the need to ensure consistency in implementing the Convention on Biological Diversity and the World Trade Organization agreements, including the Agreement on Trade-Related Aspects of Intellectual Property Rights, with a view to promoting increased mutual supportiveness and integration of biological diversity concerns and the protection of intellectual property rights".

13. By the same decision, the Conference of the Parties further "invites the World Trade Organization to consider how to achieve these objectives in the light of Article 16, paragraph 5 of the Convention, taking into account the planned review of Article 27, paragraph 3(b), of the Agreement on Trade-Related Aspects of Intellectual Property Rights in 1999".

14. Decision IV/8, paragraph 3 also provides for the establishment of a regionally balanced panel of experts to explore options on access to genetic resources. This panel is due to meet for the first time in October 1999. As appropriate the panel will draw upon, inter alia, the results of this meeting. The mandate of the panel is to develop "a common understanding of basic concepts and to explore all options for access and benefit-sharing on mutually agreed terms including guiding principles, guidelines and codes of best practice for access and benefit-sharing arrangements". The elements of the options which the Conference of the Parties requested the panel to consider are described in the annex to decision IV/8 and include matters such as; prior informed consent in provider countries for access to genetic resources and research and development; clear, established mechanisms to provide such consent, including, inter alia, legislative, administrative and policy measures, as appropriate; reference to the country of origin, where available, in relevant publications and patent applications; mutually agreed terms including on benefit-sharing and intellectual property rights and technology transfer when appropriate; and efficient permitting and regulatory procedures that avoid burdensome procedures involving high transaction costs. Proposed modalities and agenda for the first meeting of the panel are described in document UNEP/CBD/ISOC/3.

15. One of the proposed elements is legislation related to intellectual property rights, including sui generis systems. The consideration of sui generis systems is relevant with respect to the protection of traditional knowledge (see sub-section C. below) and to the protection of plant varieties, in particular, with respect to article 27.3 (b) of the TRIPs Agreement (see section III below).

B. Consideration of intellectual property rights and the relationship with access to and transfer of technology

16. The Convention contains a number of provisions intended to promote the transfer of relevant technologies. Article 16 contains the central elements of these provisions. The provisions of the Convention dealing with the transfer of technologies applies to those technologies which are relevant to the conservation and sustainable use of biological diversity or make use of genetic resources and do not cause significant damage to the environment. This includes technologies protected by patents and other intellectual property rights. Transfers shall be provided on terms that recognize the protection of intellectual property rights. In order to reconcile divergent interests that might be involved in the transfer of protected technology, Parties shall take measures with the aim of allowing or providing appropriate access to private sector activities.

17. Article 16, paragraph 5 contains the only direct reference to intellectual property rights in the text of the Convention and provides that:

"[t]he Contracting Parties, recognizing that patents and other intellectual property rights may have an influence on the implementation of this Convention, shall cooperate in this regard subject to national legislation and international law in order to ensure that such rights are supportive of and do not run counter to its objectives."

18. At its second meeting, the Conference of the Parties addressed policy, legislative, or administrative measures related to intellectual property rights as provided in Article 16 of the Convention and adopted decision II/12. The decision requested the Executive Secretary to,

"[l]iaise with the Secretariat of the World Trade Organization to inform it of the goals and the ongoing work of the Convention on Biological Diversity and to invite the Secretariat of the World Trade Organization to assist in the preparation of a paper for the Conference of the Parties that identifies the synergies and relationship between the objectives of the Convention on Biological Diversity and TRIPS Agreement".

19. The same decision also requested the Executive Secretary to undertake a preliminary study to analyze the impacts of intellectual property rights systems on the achievements of the objectives of the Convention in order to gain a better understanding of the implication of Article 16, paragraph 5

20. As noted earlier, this resulted in the Executive Secretary preparing documents UNEP/CBD/COP/3/22 and UNEP/CBD/COP/3/23, which, inter-alia, considered the relationship between intellectual property rights and transfer of, and access to technology and TRIPS Agreement and the Convention

21. Decision III/17 invited the Parties and Governments to conduct and communicate to the Executive Secretary case studies on the impacts of intellectual property rights on the achievement of the objectives of the Convention. One of the suggested aspects of such studies was to consider the role of existing intellectual property rights in achieving the objective of the Convention, inter alia, in facilitating technology transfer. This issue was not addressed at the fourth meeting of the Conference of the Parties.

22. A topic of relevance, which has recently emerged within the Convention process, is the consideration within the programme of work on agricultural biological diversity of new technologies for the control of plant gene expression and their consequences for conservation and sustainable use of biological diversity. The fourth meeting of the Subsidiary Body on Scientific, Technical and Technological Advice (SBSTTA) will consider a preliminary assessment, which is contained in document UNEP/CBD/SBSTTA/4/9. This document also considers the effect of intellectual property rights in development of such technology.

23. Due to the rapid development of technologies, particularly biotechnology, further consideration of the impacts of intellectual property rights on the achievement of the objectives of the Convention, including in facilitating access to and transfer of technology is urgently needed.

C. Consideration of intellectual property rights under the implementation of Article 8(j) and related provisions

24. The Convention contains extensive provisions addressing the role of indigenous and local communities in the aims of the Convention. For example, Article 8(j) provides that:

"[e]ach Contracting Party shall, as far as possible and as appropriate respect, preserve and maintain knowledge, innovation 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".

24bis. As noted previously, intellectual property rights are, and will be, an important mechanism for implementing these provisions.

25. The Conference of the Parties considered this aspect of the Convention for the first time at its third meeting. Decision III/14 established an intersessional process, including a workshop, to advance further work on the implementation of Article 8(j) and related provisions. In the preparation for the workshop, the Conference of the Parties requested the Executive Secretary to prepare a background document addressing a number of specific topics, including linkages between Article 8(j) and intellectual property rights. The Conference of the Parties also invited governments, international agencies, research institutions, representatives of indigenous and local communities and non-governmental organizations to submit case studies to the Executive Secretary, which highlight the key area of consideration on the implementation of Article 8(j).

26. The workshop was held in November 1997 and the report of the workshop was submitted to the fourth meeting of the Conference of the Parties as document UNEP/CBD/COP/4/10/Add.1. In the recommendation for elements for the formulation of a work programme as contained in Annex I of the document, the workshop included such items as:

(a) To develop standards and guidelines for the protection, maintenance and development of indigenous knowledge in consultation and participation with indigenous peoples; and

(b) To develop standards and guidelines for the prevention of biopiracy, the monitoring of bioprospecting and access to genetic resources.

27. The workshop identified a number of options relevant to current topics under equitable benefit-sharing as well as under legal elements. These options are found in Annex II of the above mentioned document.

28. The fourth meeting of the Conference of the Parties considered the report of the workshop as well as a synthesis of case studies submitted to the Executive Secretary. One submission examined the use of existing mainstream intellectual property rights laws by indigenous communities. This report noted that while indigenous peoples in that country are increasingly using existing systems, these tended to be the less technical forms (copyright and trademark). The more complex regimes (patents) appear not to be resorted to for products of indigenous knowledge. Submissions were received on activities of non-governmental organizations in reviewing intellectual property protection regimes and informing indigenous and local community groups on strategies to secure some protection for their traditional knowledge.

29. The Conference of the Parties adopted decision IV/9, which establishes an ad hoc open-ended intersessional working group on Article 8(j). The mandate of this working group includes, inter alia,

"[t]o provide advice as a priority on the application and development of legal and other appropriate forms of protection for the knowledge innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity".

30. This working group is scheduled to meet from 24 to 28 January 2000.

31. Decision IV/8 further invites submissions from governments, international agencies, research institutions, representatives of indigenous and local communities and non-governmental organizations of case studies and relevant information on specified topics, including, inter alia,

"[t]he influence of international instruments, intellectual property rights, current laws and policies on knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity".

32. Based on information submitted, the Executive Secretary will prepare a document on the application and development of legal and other appropriate forms of protection for the knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity for the first meeting of the working group on Article 8(j). A further compilation and synthesis of case studies will also be prepared for this meeting.

D. Relevant case studies so far submitted

33. While the secretariat has not received any case studies specifically focusing on the impacts of intellectual property rights on biological diversity, several submissions have provided information of direct relevance

to this issue. Several case studies, especially those considering the protection of knowledge, innovation and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity, describe legislative, administrative or policy measures being developed in order to implement control over genetic resources in line with the provisions of the Convention which, in effect provide examples of innovative intellectual property rights and, as such can be considered as sui generis systems.

### 1. Access legislation

34. Document UNEP/CBD/COP/4/23, "Review of National, regional and sectoral measures and guidelines for the implementation of Article 15", observes that the scope of the law often includes "traditional", "intangible", "indigenous" and "local" knowledge associated with genetic resources or its derived products, citing the Andean Pact Regime as an example. Consequently, the rights that are established by these laws can be considered as a type, albeit innovative, of intellectual property right. As such they provide examples of sui generis systems of intellectual property rights. Other examples can be found in draft Fijian Sustainable Development Bill and the Philippines Executive Order and Implementing Regulations, as well as Indigenous Peoples' Rights Act and Traditional and Alternative Medicines Act.

### 2. Community registers

35. Community registers seek to document the knowledge of occurrence, practices of propagation, sustainable harvests and conservation, as well as economic uses of biological resources that are found within communities. A well known example of such a register is being developed in India, where as of early 1998, approximately sixty peoples' biodiversity registers have been completed or are nearing completion in nine Indian states. All information accumulated in the register can be used or distributed only with the knowledge and consent of the local community. These registers therefore represent a mechanism for a decentralized regime on access to biological resources and associated knowledge. As such, they can be considered a sui generis system of intellectual property rights.<sup>2</sup> The submission from Koisaan Kubasanan Kadazandusun, Sabah, with respect to the implementation of Article 8(j) also reported that they had undertaken a project to list indigenous multipurpose plants that are still alive within the living memories of the current elder generation of their people.

### 3. Know-how licenses

36. A know-how license is a contractual legal instrument applied to the intellectual property embodied in, for example, biotechnology or computer software. Know-how licenses allow knowledge to be used without actually passing title to it.<sup>3</sup> The case study on the International Cooperative Biodiversity Groups (ICBG) Program, submitted by J. P. Rosenthal of National Institutes of Health, describes the case of Peru ICBG program, which is collaborating with the Aguaruna People of lowland Andean rainforest of northern Peru. In this programme, the Aguaruna Peoples and Searle Pharmaceutical Co. are reported to be negotiating a knowhow license that outlines Searle's use of the traditional knowledge and specific benefits associated with that use. The study found that while the application of a know-how license to indigenous knowledge was not without legal complications, it offered a potentially powerful tool to provide indigenous



and other local peoples recognition and protection in a type of contract that was familiar to the commercial sector. As such, they represent another example of a potential useful sui generi system of intellectual property rights.

### III. TRIPS AGREEMENT AND WTO

37. TRIPS Agreement requires countries to provide minimum standards of protection for intellectual or intangible property in their legal regimes. These standards are based upon providing the kind of protection that already exists in developed countries. Once countries ratify the TRIPS Agreement they will be obliged to establish comprehensive intellectual property rights systems covering patents, copyrights, trademark, industrial designs, trade secrets and know-how. In addition, the TRIPS Agreement contains detailed provisions on judicial and administrative procedures relating to dispute settlement, monitoring and review of Parties' implementation of the minimum TRIPS standards. Developing countries and least developed countries are allowed a grace period of four and ten years respectively, in which to implement these provisions.

38. The TRIPS Agreement does, however, contain a number of exceptions that allow for some flexibility in the nature and scope of intellectual property rights regime required by the Agreement. For example, Article 1 allows countries to determine the appropriate method of implementing its provisions. As far as Article 15 of the Convention is concerned, the most important exceptions are outlined in Article 27 of TRIPS Agreement. Article 27 (2) of TRIPS Agreement allows Members to exclude from patentability inventions, "the prevention within national territory of the commercial exploitation of which is necessary to protect ordre public or morality, including to protect human animal or plant life or health or to avoid serious prejudice to the environment." Under Article 27 (3), Members may also exclude from protection "plants and animals other than micro-organisms, and essentially biological processes for the production of plants or animals other than non-biological and micro-biological processes". These exceptions allow Members to exclude from patents and other conventional type intellectual property rights a range of products. For example, it allows countries to exclude natural genes from patents or plant breeders' right type of protection. Plant varieties must however, be protected by patents or by "effective" sui generis system or any combination of them.

39. A number of concerns raised by Parties to the Convention regarding the implementation of the TRIPS Agreement have been addressed both in meetings of the Convention and relevant meetings of WTO. A central concern in the context of this item of the agenda is the relationship between TRIPS Agreement, the meaning of "effectiveness" and sui generis systems developed under the Convention.

40. "Effectiveness" is not, however, defined either in TRIPS Agreement or the Convention. Establishing an effective sui generis system takes time and resources. The timetable required by TRIPS Agreement, in the view of several Members does not allow them enough time to develop an "effective" alternative. As a result they fear that the plant breeders' right system established under the International Convention for the Protection of New Varieties of Plants (the UPOV Convention), which represents the main internationally recognized system of plant breeders' rights, will be used as the standard for effectiveness, regardless of its appropriateness with respect to national needs and goals and the provisions of the Convention. Indeed, the Director

General of GATT in 1994 stated that whilst countries "have been left greater flexibility in meeting their obligations in this area than would have been entailed had there been a specific reference to UPOV... In practice, many countries will, nonetheless, wish to profit from the experience that has been gained under UPOV and tailor their systems to it" <sup>4</sup> A number of developing countries have already started developing plant breeders' right legislation with a view to joining the International Union for the Protection of New Varieties of Plants (UPOV) as a direct result of their obligations under the TRIPS Agreement.

41. The secretariat has made submissions and participated in meetings of the WTO's Committee on Trade and Environment (CTE) on matters relating to the subject of this paper. The secretariat, in accordance with the decisions of the Conference of the Parties has requested observer status in the TRIPS Council. At the request of the TRIPS Council the Executive Secretary also made a factual submission to the Council on activities of the Convention pertaining to the TRIPS Council review of Article 27.3(b) of the TRIPS Agreement in 1999.

42. While the TRIPS Council is mandated to review the implementation of the TRIPS Agreement, the WTO's Committee on Trade and Environment (CTE) offers a forum for the member States to discuss the relationship with the provisions of multilateral environmental agreements (MEAs) and the provisions of WTO. CTE recognizes that a further work is required to examine the role of the TRIPS Agreement in facilitating access to and transfer of environmentally-sound technology and products. It also recognizes that further work is required to clarify the relationship between the TRIPS Agreement and the Convention. CTE has organized an annual information session with the secretariats of the relevant MEAs, which the secretariat has attended twice. These sessions have facilitated the exchange of information between the two processes and helped to raise awareness among delegates at CTE on the developments in MEAs. CTE will organize another information session in conjunction with its next session, scheduled on 2 - 30 June 1999.

43. From last year's report of CTE, it can be seen that the issues raised as needing further examination with respect to the relevant provisions of the TRIPS Agreement include: the origins of genetic samples; reference whether living organisms had been extracted in accordance with the norms of the country of origin; examination of the definition of terms, such as plants, animals, microorganisms and biological processes, plant varieties and effective sui generis systems. Not all of them, however, were agreed to be taken up at CTE. In order to address the synergies between the TRIPS Agreement and the Convention, it was agreed that the Secretariat of WTO would prepare a paper on Convention-related notifications to the TRIPS Agreement.

#### IV. DEVELOPMENTS IN OTHER FORA

44. The UPOV Convention and the International Undertaking on Plant Genetic Resources (the Undertaking) of the FAO are two other fora that are important in considering the relationship between intellectual property rights, TRIPS Agreement and the Convention on Biological Diversity.

45. The UPOV Convention provides a specially designed protection for new varieties of plants, reflecting plant breeders' right. The UPOV Convention was signed on 2 December 1961 and went into force on 10 August 1968. It has been revised three times since then: on 10 November 1972 (with respect to

some administrative provisions); on 23 October 1978 (with respect to all provisions (UPOV 78)); and (substantially, for example, by expanding the scope of the breeder's right on 19 March 1991 (UPOV 91)). As of 23 March 1999, UPOV had 39 member States. 16 other countries and one regional economic integration organization have initiated with the Council of UPOV the procedure for becoming members of the Union. The UPOV Convention provides an example of sui generis systems, considered under Article 27.3 (b) of TRIP Agreement. To be eligible for protection, the plant variety must be distinct, stable, novel and uniform.

46. The Global System for the Conservation and Sustainable Use of Plant Genetic Resources for Food and Sustainable Agriculture was created by FAO in 1983 in order to coordinate the conservation and use of plant genetic resources for food and agriculture production. One of its two institutional components is the Undertaking, another being Commission on Genetic Resources for Food and Agriculture (CGRFA). Resolution 3 of the Nairobi Final Act recognized "the need to seek solutions to outstanding matters concerning plant genetic resources within the Global System for the Conservation and Sustainable Use of Plant Genetic Resources for Food and Sustainable Agriculture." Negotiations to revise the Undertaking in harmony with the Convention started in 1994, in CGRFA. 160 governments and the European Community are members of the Commission. The negotiations concern the scope of the Undertaking, the rules governing access to genetic resources for food and agriculture, benefit-sharing and the realization of Farmers' Rights. By the end of 1998 it had been agreed that the scope of the Undertaking would be all plant genetic resources for food and agriculture (PGRFA), managed under a system of facilitated access to PGRFA. It is aimed to conclude negotiations by the end of 1999.

47. In conclusion, the UPOV Convention provides an example of an effective sui generis system for plant varieties which are accepted under Article 27.3(b) of TRIPs Agreement. The impacts of such breeder's right on conservation and sustainable use of biological diversity is, however, not clearly understood. Moreover, pursuant to the aims of the Convention, non-UPOV systems for plant varieties are also considered important in order to address the concerns of many countries regarding food security. With regard to the Undertaking, in paragraph 18 of decision III/11, the Conference of the Parties "affirms its willingness to consider a decision by the Conference of FAO that the International Undertaking should take the form of a protocol to this Convention once revised in harmony with this Convention". It should also be noted that in its decision II/15, the Conference of the Parties recognized "the special nature of agricultural biodiversity, its distinctive features and problems needing distinctive solutions". Furthermore, in its decision IV/6, the Conference of the Parties urged the momentum in the intergovernmental negotiations of the revision of the International Undertaking on Plant Genetic Resources in harmony with the Convention should be maintained with a view to its timely conclusion before the end of 1999. In UPOV 78, a "farmer's privilege" is implicitly recognized. UPOV 91, on the other hand, extends the plant breeders' rights to all production. However, member States are allowed in their national legislation to except farm-saved seed from the breeder's right, thus preserving the possibility for the "farmer's privilege".

48. The close relationship between the provisions of the Convention and the TRIPs Agreement has been noted by several other bodies. At its fifty-third session, for example, the United Nations General Assembly welcomed decision IV/15 of the Conference of the Parties regarding the

relationship between the Convention and the TRIPs Agreement mentioned above and reaffirmed the importance of developing both instruments in a harmonious manner (A/RES/53/190).

## V. CONCLUSIONS AND RECOMMENDATIONS

49. Under the Convention process, preliminary discussions took place at the second and third meetings of the Conference of the Parties with respect to the relationship between intellectual property rights and the relevant provisions of the TRIPs Agreement and the Convention. Some progress has been made in information gathering exercises, initiated by decisions of the Conference of the Parties. Some case studies on access and benefit-sharing arrangements and on the implementation of Article 8(j) provide relevant information, in particular, alternative forms of protection of knowledge which are not covered by the conventional intellectual property rights systems.

50. Further submissions of case studies and relevant information are expected on these areas since intersessional events are planned for both of these issues. The ad hoc open-ended intersessional working group on the implementation of Article 8(j) and the related provisions of the Convention includes in its mandate the development of advice on the application and development of legal and other appropriate forms of protection for knowledge innovation and practices of indigenous and local communities. The expert panel on access and benefit-sharing will explore options for access and benefit-sharing on mutually agreed terms including on intellectual property rights and technology transfer. Meanwhile, cooperation with the World Intellectual Property Organization (WIPO) is also being developed, whereby collaborative work regarding the relationship between intellectual property rights systems and the Convention is expected to develop. A study on the effectiveness of alternative protection systems to knowledge is an area where collaboration efforts are being made.

51. The secretariat has not received any study or information specifically regarding the impacts of intellectual property rights on the achievements of the objectives of the Convention, including technology transfer. Before deriving any conclusions, further analysis is therefore needed.

52. The intersessional meeting on the operations of the Convention is invited to consider the following recommendations to the Conference of the Parties regarding the relationship between intellectual property rights and the relevant provisions of the TRIPs Agreement and the Convention on Biological Diversity:

### The intersessional meeting on the operations of the Convention

1. Recommends to the Conference of the Parties that further work on a common appreciation of the relationship between the Convention and intellectual property rights and the relevant provisions of the TRIPs Agreement may proceed as follows:

a) The on-going work of the panel of experts on access and benefit-sharing consider, inter alia, how to address mutually agreed terms including on benefit-sharing and intellectual property rights and technology transfer;

b) The fifth meeting of the Conference of the Parties consider in depth the issue of access to genetic resources, taking into account the outcome of the meeting of the panel of experts on access and benefit-sharing, and the negotiations, by Governments within the FAO Commission on Genetic Resources for Food and Agriculture, for the revision of the International Undertaking on Plant Genetic Resources, in harmony with the Convention;

c) At its sixth meeting, SBSTTA may wish to address the impact of intellectual property rights systems in achieving the objectives of the Convention, as one of the issues to be considered under the topic of access and benefit-sharing (see document UNEP/CBD/SBSTTA/4/4 on the programme of work of SBSTTA). This assessment will take into account the relevant work under the Convention and build on the work of the TRIPS Council review as well as the Committee on Trade and Environment of WTO;

d) The sixth meeting of the Conference of the Parties could then consider the findings of SBSTTA in conjunction with its consideration of benefit-sharing;

e) At its eighth meeting, SBSTTA may wish to consider factors affecting transfer of technology and modalities for technology cooperation;

f) The ninth meeting of SBSTTA may wish to consider guidelines for technology transfer and cooperation (see document UNEP/CBD/SBSTTA/4/4); and,

g) The seventh meeting of the Conference of the Parties to consider technology transfer and technology co-operation.

2. Recommends to the Conference of the Parties to reaffirm the importance of sui generis systems of intellectual property rights in implementing the provisions of the Convention regarding equitable sharing of the benefits arising from the use of genetic resources. It further recommends that the Conference of the Parties, therefore, continue gathering the information on the experience of the Parties and the relevant case studies in accordance with decisions IV/8 and IV/9. This reaffirmation and further findings should be transmitted to WTO.

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Notes:

1. Lyle Glowka, A Guide to Designing Legal Frameworks to Determine Access to Genetic Resources, Environmental Policy and Law paper No. 34, IUCN The World Conservation Union, 1998.

2. R. V. Anuradha, "In Search of Knowledge and Resources: Who Sows? Who reaps?", 6 Review of European Community & International Environmental Law 263, 1997.

3. B. Tobin, "Know-how Licenses: Recognising Indigenous Rights Over Collective Knowledge", Bulletin of the Working Group on Traditional Resources Rights, Winter 1997.

4. Sutherland, P "Seeds of Doubt: Assurance on 'Farmers' Privilege" Time of India, 15 March 1994, p4.

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