

REVIEW OF THE PROVISIONS OF ARTICLE 27.3(b)

Communication from Mauritius on behalf of the African Group

The following communication has been received from the Permanent Mission of Mauritius on 18 September 2000.

At the meeting of the Council for TRIPS held on 21 March 2000, the Chair set out the issues that had arisen under the review of the provisions of Article 27.3(b) of the TRIPs Agreement, as follows:

- the link between the provisions of Article 27.3(b) and development;
- technical issues relating to patent protection under Article 27.3(b);
- technical issues relating to *sui generis* protection of plant varieties;
- ethical issues relating to the patentability of life forms;
- the relationship to the conservation and sustainable use of genetic material; and
- the relationship with the concepts of traditional knowledge and farmers' rights.

He arrived at this list on the basis of proceedings in the Council for TRIPS and informal consultations. These issues are of fundamental importance to us and should be seen in line with our submission contained in document WT/GC/W/302.

1. Link between Article 27.3(b) and development

1.1 The link between Article 27.3(b) and development is important to the African Group because, apart from being mandated by the General Council decision agreed at the meeting of 7 and 8 February 2000 (WT/GC/M/53), it is fundamental to the review itself.

1.2 The topic is timely because of ever increasing concerns over the expropriation effects of bio-patenting over genetic resources.

1.3 The review should be seen in the context of broad socio-economic development expectations among members of the African Group. The promise of benefits from globalization and joining the

multilateral trading system and from the revolution in biotechnology as well as the mutuality of benefits that the TRIPS Agreement has been based on, are yet to be duly evaluated.

1.4 The review of the link between Article 27.3(b) and development must address specific issues of:

- whether and how intellectual property rights such as patents and plant breeders' rights lead to relocation of investment to natural resource endowed countries, transfer and dissemination of technology, research and development, and innovation in developing countries;
- whether the appropriate balance has been struck between the protection of intellectual property rights and the protection of key socio-economic interests such as food security, health and the conservation and sustainable use of genetic resources; and
- whether protection of intellectual property rights has or is leading to equitable sharing of benefits between producers and consumers of technology and natural resources.

2. Technical issues relating to patent protection under Article 27.3(b)

2.1 Our domestic laws are based on internationally recognized regimes of intellectual property law that distinguish discoveries (which are not patentable) from inventions (which are patentable).

2.2 The African Group has highlighted the incogruencies raised by the artificial distinction made between plants and animals (which may be excluded from patentability) and micro-organisms (which may not be excluded); and also between essentially biological processes for the production of plants and animals (which may be excluded) and non- or micro-biological processes (which may not be excluded).

2.3 These distinctions violate the basic principles of intellectual property law. These questions, raised in our submission for the Seattle Third Ministerial Meeting, are yet to elicit specific responses.

3. Technical issues relating to *sui generis* protection of plant varieties

3.1 The obligation to protect plant varieties, in requiring protection of plant breeders' rights, raises the vital and parallel question of protecting farmers' rights. The latter entail the right to save, share and replant seeds.

3.2 The obligation also raises the question of the exemption for other breeders to innovate around protected varieties, without overly restrictive or prohibitive compensatory conditions in favour of breeders of protected varieties.

3.3 These rights and exemption directly have an impact on the national goals of African countries for food security, health, rural development and equity for local communities whose traditional knowledge systems have produced staple varieties, including varieties that have medicinal and biodiversity value.

3.4 These local communities have not benefited from patents granted in developed countries, either in the form of effective benefit-sharing schemes or transfer of technology.

3.5 It is the objective of the African Group to ensure that the obligation to protect plant varieties by effective *sui generis* systems for purposes of Article 27.3(b), is consistent with the provisions of

the Convention on Biological Diversity (CBD) and the FAO International Undertaking on Plant Genetic Resources.

3.6 It is on this basis that the African Group considers this subject particularly relevant in the review.

4. Ethical issues relating to the patentability of life forms

4.1 The grounds for concerns over the patentability of life forms, obtaining in societies far and wide, are ethical, religious and cultural. The co-modification and marketing of life structures violate the cultural principles of quite a number of societies.

4.2 The concerns also arise from the fact that patents over research material may restrict further research, that discoveries do no amount to inventions, that the cost of medicines keeps escalating due to the required systems of patent protection, and that research increasingly targets products for the affluent rather than for the general public health.

5. Conservation and sustainable use of genetic material

5.1 Africa, like other developing countries, is rich in biological diversity, a resource that holds great potential for its economic development. At the same time African biological diversity greatly benefits the entire world and possesses intrinsic value that merits its conservation and sustainable use.

5.2 On this basis, Africa expects its development partners to support the condition of access to genetic resources on the basis of mutually agreed terms, the requirements for prior informed consent and benefit sharing.

5.3 However, Article 27.3(b) of the TRIPS Agreement, though making provision for the protection of plant varieties through patents and *sui generis* systems, does not provide the condition of access to genetic resources on the basis of mutually agreed terms, as well as the requirements for prior informed consent and benefit sharing. Consequently, compliance with its provisions does not require compliance with these condition and requirements.

5.4 The African Group is of the view that the TRIPS Agreement should contain provisions to promote and not undermine the conservation and sustainable use of genetic material, and to prevent the associated biopiracy.

5.5 To ensure benefit sharing and authorization of access to genetic material, contractual arrangements between developing country governments and entities seeking genetic material, require an enforcement mechanism at the WTO level.

6. The relationship with the concepts of traditional knowledge and farmers' rights

6.1 Local and farming communities have over the years developed knowledge systems for the conservation and sustainable use of biological diversity. This includes the selection and breeding of plant varieties for agricultural and medicinal purposes. The well-established practices of saving, sharing and replanting seeds, fundamentally sustain these communities and ensure their food security.

6.2 *Sui generis* systems for protecting plant varieties have related laws that deal with traditional knowledge and farmers' rights. The knowledge and the rights, in many instances, take the form of selecting, breeding, using and sustaining plant varieties.

6.3 Domestic laws and measures on plant varieties therefore directly affect the traditional knowledge and farmers' rights, and may support or harm these, depending on whether or not the laws and measures strike a balance between the various key interests; and whether or not farmers' rights and traditional knowledge are duly recognized and provided for.

6.4 At the international and regional level, these knowledge systems and traditions have been duly recognized:

- the Convention on Biological Diversity provides (under Articles 8j and 10) for the protection and promotion of rights of communities, farmers and indigenous peoples vis-à-vis their customary use of biological resources and traditional knowledge;
- the FAO International Undertaking on Plant Genetic Resources provides for regulated access to genetic resources to ensure that both providers and users of these resources enjoy mutual benefit, and directly recognises farmers' rights; and
- the OAU model law protects the rights of local communities, farmers and breeders, and regulates access to biological resources.

6.5 It is important, therefore, to recognize that there exists a variety of international instruments which may be used complementarily to pursue national goals for development and the conservation and sustainable use of genetic resources, while ensuring the development of commercial agriculture.

6.6 The last recital of the preamble to the TRIPS Agreement recognizes the desire to establish a mutually supportive relationship between the WTO and the WIPO as well as other relevant international organizations.

6.7 The African Group is of the view that the flexibility allowed by Article 27.3(b) should be retained and construed consistently with the instruments referred to above.
