WORLD TRADE ORGANIZATION

RESTRICTED

WT/CTE/W/85
7 July 1998

(98-2663)

Committee on Trade and Environment

Original: English

CLUSTER ON MEAS – ITEM 8

Response of India to Comments by United States on WT/CTE/W/65

I. INTRODUCTION

1. India has made a contribution on the relationship between the TRIPS Agreement and the Convention on Biological Diversity (CBD) in WT/CTE/W/65. This paper seeks to meet the recommendations of the report of this Committee to the Singapore Ministerial Conference (WT/CTE/1). In paragraph 208 of this Report further work was called for to develop a common appreciation of the relationship of the relevant provisions of the TRIPS Agreement to the protection of environment and the promotion of sustainable development and whether and how, amongst other factors, these provisions relate in particular to the issue of the creation of incentives for the conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of benefits arising out of the utilisation of genetic resources, including the protection of knowledge, innovations and practices of indigenous and local communities, embodying traditional life-styles relevant to the conservation and sustainable use of biodiversity. When India's paper was discussed in the Committee on 24-25 November 1997, the United States raised important issues relating to WT/CTE/W/65 in the Committee (WT/CTE/M/16, paragraphs 89-92 and 95). The present contribution by India attempts to clarify some of the points raised by the United States.

II. THAT THE ISSUES RAISED BY INDIA ARE RELEVANT TO NATIONAL LEGISLATION AND NOT TO TRIPS

2. India has specifically identified the intrinsic link between the CBD and the TRIPS Agreement by stating that Articles 8, 15 and 16 of the CBD cannot be implemented without incorporating an obligation under Article 29 of the TRIPS Agreement requiring patent applicants to disclose the country of origin for any biological source materials on traditional knowledge referred to by them. The implementation of these articles of the CBD would also require prior informed consent and the signing of contracts for the sharing of materials or information on mutually agreed terms. It was suggested by India that these could be made obligations on patent applicants under the TRIPS Agreement. Of course, while India (or any other WTO Member) is free to include such conditions in its own national legislation, other WTO Members are not obliged to do so. It is for this reason that the European Parliament suggested a similar amendment while discussing the Biotechnology Directive of the European Commission last year. Unfortunately, the Commission stated that this need not be done as it is not required by international law. The international community must consciously make it a part of international law and this has to be done by reviewing the provisions of Article 29 of the TRIPS Agreement.

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III. THAT THE DISCLOSURE REQUIREMENT OF THE TRIPS AGREEMENT IS SUFFICIENT TO MEET INDIA'S CONCERNS

3. The United States has asserted that if the source of biological genetic resource is unique an applicant would have to identify it in order for a person skilled in the art to be able to carry out the invention. Similarly, indigenous traditional knowledge closely related to an invention would have to be identified as prior art if it was known to the applicant. Requiring any additional disclosure would increase the cost of research and the cost of the resultant product.

4. Developing countries like India face the problem of keeping track of the numerous patents being filed in developed countries based on biological genetic resources found in their country or on traditional knowledge taken from their country. India is therefore proposing that Members agree to provide for more transparency in this process. Also, if the requirement of prior informed consent, already agreed to by all signatories to the CBD including the United States, is built into the TRIPS Agreement, such instances would come more easily to the notice of developing countries.

IV. INTELLECTUAL PROPERTY RIGHTS FOR LOCAL, CONTEMPORARY INNOVATIONS

5. The United States has argued that knowledge that is truly traditional or indigenous is already in the public domain and would not meet the standards of patentability specified under Article 27.1 of the TRIPS Agreement. If such innovations are covered by copyright industrial design law or by trade secrets it should be up to the national governments to obtain such protection at home and abroad. However, India has sought discussion on evolving a separate system of IPRs to cover local, contemporary innovations as these do not fit into the classical criteria prescribed to IPRs covered under the TRIPS Agreement. Such a discussion would be relevant for the CTE as it is well within its mandate to develop a common appreciation for protection of the knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant to the conservation and sustainable use of biodiversity.

V. ON THE TIMING OF THE CONCLUSION OF CBD AND TRIPS

6. The United States has asserted that the CBD was concluded in 1993, and the TRIPS Agreement was concluded later. This is factually incorrect as negotiations in the Uruguay Round were effectively concluded in December 1993. Moreover, negotiations on the TRIPS Agreement really ended in December 1991 as very few changes were allowed to be made to the so called "Dunkel Text" after this date. Therefore, signatories to the CBD should follow Article 16.5 and this Committee needs to devote some time to examine how access to technologies as required under the CBD could be reconciled with adequate and effective protection of intellectual property rights (IPRs) as required under TRIPS.

7. In conclusion, India has raised relevant issues on the relationship between TRIPS and the CBD, which aim at promoting the harmonious implementation of both these international agreements.

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