

BIODIVERSITY ISSUES

C) Review of Article 27.3 (b) of the TRIPS Agreement

Costa Rican Experience

**Paper prepared for the Second Regional Seminar of
UNCTAD**

**“Project on Strengthening Research and Policy Making
Capacity on Trade and Environment in the Developing
Countries”**

**May 31st to June 3, 2000
La Habana, Cuba**

Government of Costa Rica

Introduction

Article 27 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), Annex 1C of the World Trade Organization Agreement (WTO), establish the norms regarding the patentable matters for the inventions of products or processes, in all fields of technology, provided that they are new, involve an inventive step and are capable of an industrial application.

Paragraphs 2 and 3 of article 27 grant WTO members the possibility to exclude certain inventions from patentability. Specifically, point b) of paragraph 3 of article 27, establishes the possibility for Members to exclude from patentability:

- a) Plants and animals, other than microorganisms;
- b) The essential biological processes for the production of plants and animals, other than non- biological or microbiological procedures.

Article 27.3 establishes the exclusion from patentability as optional to the Members; however, it is clear in establishing an obligation for the Members to protect plant varieties through the system that each WTO Member chooses within a patents system, a sui generis system or a combination of both.

The agreement stipulates the examination of the provisions on letter b) of article 27.3 as a pending issue for last year, 1999. This examination was not fulfilled last year at the TRIPS' Council at the WTO.

In regard with the revision of article 27.3.b), Costa Rica considers it would be convenient to establish a mutually supportive between the TRIPS Agreement and the Convention on Biological Diversity. Costa Rica considers both agreements offer each other mutual support given that the effective protection of the intellectual property promotes the creation of technology for the preservation and sustainable use of biological diversity.

National Experience

- Extension of time period

The Costa Rican Government is concerned about the obligation to protect new plant varieties assumed in the context of the TRIPS Agreement, not with standing it is important to point out what paragraph 4 of article 65 (Transitional Arrangements) establishes:

“To the extent that a developing country Member is compelled by this Agreement to extend the protection of product patents to technology areas which are not so likely to be protected in its territory on the general date of application of this Agreement for that Member, as defined in paragraph 2, that member may delay the application of the provisions on product patents of Section 5 of Part II to such areas of technology for an additional period of five years”.

In 1995, Costa Rica's patent law didn't grant protection to plant varieties (general date of the application of the Agreement) and by that time it was not a Member of a protection system such as UPOV.

In regards to such concern and considering the above mentioned disposition, Costa Rica has the right to postpone the application of norms regarding the protection of the new plant varieties up to the year 2005.

Notwithstanding the transitional period that was granted to Costa Rica to delay the application of said protection, it is important to mention that there already is a Law Project on Plant Varieties at the Congress. This project will be submitted for discussion among the different involved sectors, with the purpose to achieve its ratification as soon as possible. The Costa Rican Government expects that such ratification will be achieved during this year.

- Exclusion from patentability of microorganisms and microbiological process.

Costa Rica, according to the standards established on the TRIPS Agreement, decided to make use of the permission granted by article 27, related to the exclusions of patentability for certain inventions.

In this sense, among the reforms made to the Invention Patent Law (Law No, 7979 from December 22, 1999), letter a) of article 2 establishes a reform to article 1 of the law, which stipulates:

"It is excluded from patentability:

- a. The inventions in which the commercial exploitation should be restraint in an objective and necessary way to protect public order, morality, health or the life of people and animals or to preserve the plants or to avoid serious damage to the environment.
- b. The diagnosis, therapeutic and surgical methods, for the treatment of people and animals.
- c. Plants and animals.
- d. The essentially biological procedures for the protection of plants and animals."

Reforms to article 1 of the Invention Patent Law should be analyzed together with the dispositions established on the Biodiversity Law in relation to exceptions to patentability. Article 78 of the Biodiversity Law establishes among other exceptions:

- 1.- The sequences of deoxyribonucleic acid (DNA) per se.
- 2.- Plants and animals
- 3.- not genetically modified microorganism.
- 4.- The essentially biological procedures for the production of plants and animals.
- 5.- The processes or natural cycles by themselves.
- 6.- Inventions which are essentially derived from the knowledge associated to traditional biological or cultural practices on public domain."

Concerning the above mentioned dispositions, specially the ones related to the microorganisms and biological procedures, it is clear that in Costa Rica it is not possible to patent not genetically modified microorganisms and biological procedures for the production of plants and animals.

- Protection of plant varieties by patents or sui generis systems

Article 27.3. b) clearly establishes the obligation for Members to protect plant varieties; however, each Member can establish on its own national legislation the way to grant such protection, in accordance with the possibilities established on the Agreement (protection for patents, an efficient sui generis system or a combinations of that and this).

Consequently from the preliminary conversations the Costa Rican Government has held with the national sectors, agreement has been reached in considering the UPOV system as one form of efficient sui generis protection. It is also considered that being a member or not of the UPOV system.

As it was mentioned above, in Costa Rica the national dialogue about the convenience of being member of the UPOV system, as well as how to explore forms of innovation of an efficient protection of all the plant varieties considering the international obligations assumed in other agreements (for example, the dispositions of the Convention on Biological Diversity) is just beginning. This process is just starting; however the Government of Costa Rica has a positive and open attitude to carry on a dialogue among investigators, right holders, farmers, consumers and other sectors involved with the protection of new plant varieties, ... Costa Rica will have a legislation that endeavors the intellectual protection of the titles of new plant varieties, the agriculture production and the maintenance of the nutritional security and the biological diversity.