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**Cuban Experiences in the Development of a *Sui Generis* System
for the Protection of Plant Varieties**

Draft Discussion Paper

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1. Introduction

The creation of a *sui generis* system for the protection of plant varieties is closely linked to the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs) and the Convention on Biological Diversity (CBD). For such a reason, it is impossible to discuss the topic of the protection of plant varieties without making a brief reference to these multilateral agreements and the conflicts¹ that exist among them.

The present work will be introduced with some reflections on the implications of the TRIPs agreement for developing countries and its conflicts with the Convention on Biological Diversity. It continues with the relationship between the legislation for the protection of biodiversity resources and the relative one to the access.

Finally, we discuss the ideas used in the preparation of a national *sui generis* system for protecting the plant varieties. In such a manner that allows us to fulfil the TRIPs agreement, without putting in danger the national sovereignty and the integrity of our biological resources, as well as, guaranteeing high levels of protection of this varieties according to the necessities of the current technical scientific development of the country.

2. IMPLICATIONS OF THE AGREEMENT ON TRADE-RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS FOR DEVELOPING COUNTRIES, AND ITS RELATIONSHIP WITH THE CONVENTION OF BIOLOGICAL DIVERSITY.

Several advantages are assigned to the TRIPs agreement, especially by the developed countries. It is said that this agreement constitutes an important tool on the stimulation and acceleration of the scientific research and their application to the economic practice, as well as a stimulus to the transfer of technologies.²

However, there is no doubt about the differences among the generation of technologies and inventions that can be really stimulated by this agreement and the difficulties and scarce possibilities of achieving the generation and the reception of technologies on the developing countries, specially the environmental sound technologies. In particular, on the Committee of Trade and Environment at the World Trade Organisation(WTO), it has been discussed that TRIPs agreement constitutes a restriction to the transfer of technologies clean from north to south. They are not few those that claim the necessity to modify this agreement in order to really stimulate the technology transfer.³

¹ WTO- WT/CTE/W/8; W/64;W/50;W/65;W/66;W/82 and others.

² Article 7 TRIPs Agreement.

³ Jha. V, and Vossenaar R. Breaking Deadlock: A positive Agenda on trade, environment and development, pg.15 .

We should also remember that this Agreement approved by the consensus of the countries members in Marrakech/1994, was practically imposed by the developed countries. For that reason it totally responds to the interests of those that generates the new scientific advances in the world and that forget the true interests and peculiarities of the developing countries.

Three important for the developing countries implications of the TRIPs agreement can be enumerated:

- First, the tight character of the innovation concept considered by the agreement, doesn't leave space for other forms that are not the existent ones in the developed countries practice. An authorised statement that ratifies this said: "*The intellectual property right globalisation* (in the way that it is considered by the developed countries) *denies the knowledge of the third world*".⁴... and it legalises the monopoly rights in this sphere with the corresponding negative effect in the developing countries.
- Second, this Agreement motivates the dependence from a single incentive type to the innovation, forgetting that in our countries there could be many kind of innovation depending on the local and community traditions. This Agreement constitutes a tool of control of the competition and forces the developing countries to consume an imported technology without keeping in mind the real interests of the South, its development possibilities and it facilitates the robbery of the resources of our biodiversity.
- Thirdly, due to the high cost in human and financial resources that demands the establishment of an intellectual property protection system, the TRIPs agreement presupposes a cost-benefit model that it is not applicable to the conditions of our countries. For them, it would not make sense the establishment of a such system that absorbs the scarce human and financial resources if their economy doesn't benefit significantly of the existence of those mentioned rights.⁵ Given the current correlation of forces, is incorrect to presuppose that our countries could win more than to lose in a strong system of intellectual property.

As it is known, the 27.3 (b) article of this agreement is directly related to the topic of this work. It is the article that gives the possibility that the members protect all the plant varieties by means of patents, by an effective *sui generis* system or by means of the combination of both.

However, there are a lot of pressures from developed countries, leading by United States, in order to eliminate this, 27.3.b),concession and to reinforce the system of

⁴ Vandana Shiva:US patent Law and TRIPs promote biopiracy

⁵ Mugabe J, and -col. Access to Genetic Resources- Strategies for sharing benefits WRI/UICN- Pg.245 1997

patents in all the spheres of the protection, this according with the interests of the pharmaceutical and pharmacological monopolies.

Developing countries claim for more time to evaluate in a comprehensive way all the implications of the 27.3 (b) article, as well as to have possibilities to analyze different options for a *sui generis* system. It is due to the difficulties for implementing the TRIPs agreement in developing countries, as well as the difficulties to apply any of the two versions of the International Agreement for the Protection of Plant varieties (UPOV), aspect that will be analyzed later on.

Another important issue in this analysis is the Convention on Biological Diversity and its relationship with the TRIPs agreement.

The biological diversity is one of the most important natural resource that should be protected. Specially, the developing countries should put special emphasis on it for two reasons:

- It is in our countries where are located the biggest reserves of biodiversity, contrary to the countries of the industrialized north that already almost drained it.
- The biological diversity constitutes the basic natural resource that can be used to try to save the distance that separates our countries from the developed north and to obtain the real sustainable development.

The Decision III/7 adopted in the Third Conference of the Parts in 1996 recognizes the necessity to arrive to a common focus between the TRIPs agreement and the Convention on the Biological Diversity.

Nevertheless, there are different points of tension between these two multilateral agreements. It is due to the fact that the TRIPs agreement imposes a rigorous intellectual property rights system on the biodiversity resources from the SOUTH, while the CDB recognizes the collective rights of the local communities for this protection. In particular, the article 15.1 of this Convention, recognized the sovereign right of the States on its genetic resources and the ability of regulating the access to them. Governments, scientific and multiple social sectors accept that our survival depends on the conservation and the free availability of the biodiversity and not on its privatization.

3. THE RELATIONSHIPS BETWEEN LEGISLATION FOR THE PROTECTION OF THE PLANT VARIETIES AND THE REGULATION OF THE ACCESS TO BIOLOGICAL DIVERSITY.

The preparation of a *sui generis* system for the protection of plant varieties requires to take into consideration the relationship that exists among the regulations for

protecting the new varieties and the access to the biodiversity resources.⁶ Dealing for separate these aspects can lead to the adoption of measures that are not supplemented and don't guarantee the execution of the Convention on Biological Diversity postulates, affecting the interests of the sustainable development in developing countries.

For such a reason, it is very important that developing countries closely co-ordinate the scientific, environmental and commercial policies to achieve a balanced protection of their biological resources. Balance that should be obtained among the rights of intellectual property that are conceded and the guarantee of fair and equal sharing the benefits of their sustainable use. Also, it becomes indispensable to know and to protect those strategic varieties for the country, because of their economic and scientific relevance in research institutions dedicated to the development of new varieties.

Since, the access to biodiversity resources regulations are established by the National Legislation for the protection of Biological Diversity, it is necessary to briefly broach the text of this legislation.

◆ **The National Legislation to Protect the Biological Diversity.**

The existence of a Cuban Law on the Biological Diversity responds to the commitments acquired by Cuba when signing the Convention on Biological Diversity (CBD) in 1992. Actually, this Law is being elaborating and reviewing. Nevertheless, we will refer to the normative that intends in the current draft of the Law.

For the elaboration of the draft they were very useful the results of the National Study of Biodiversity and the National Strategy of Biological Diversity. These were carried out in collaboration with the United Nations Environment Program(UNEP) and the Secretary of the CBD that allowed to have a deep knowledge on our national situation. This draft, is based on the principles of Rio' 92 and the traditional defense posture to the national independence of our country.

In the draft are settled down the regulations for the conservation and sustainable use of the biodiversity resources, the principles that regulate the access to these resources, the rights of intellectual property recognized from their access, the equal distribution of the economic benefits obtained through the commercialization of the resources or the derived products of these.

◆ **The regulation on the access to the resources of the biodiversity.**

The principles that regulate the access to the resources of the biodiversity, are in correspondence with the National Environmental Policy, and all the international

⁶ Mugabe J. and col. Access to genetic Resources..... pg.16

commitments assumed by the country in environmental matter. In the same way, it keeps in mind the derived obligations from our membership to the World Trade Organisation(WTO).

However, all of these commitments and international obligations are fulfilled in appropriate balance to the observance of our sovereignty and the national responsibility of protecting the national resources.

The access to the resources of the biological diversity will be conditioned to the principle of public utility and social interest. For such a reason, it is the State who keeps the ownership of their resources, including the genetic ones. The access to these, as well *ex situ* as *in situ*, will only be carried out through permits and access contracts that are applied to all the biodiversity resources, to their derived products, to their intangible components and the genetic resources of the migratory species that are in the territory for natural reasons. They are only excluded of this application:

- The human genetic resources and their derived products.
- The exchange of genetic resources, their derived products, the biological resources that contain them, or of the intangible components associated to these that are carried out among the communities for their own consumption, based in practice commons.

The access contracts will regulate the terms where it is guaranteed the fair and equal sharing of the benefits obtained from the conservation and the sustainable use, and commercial exploitation of the biodiversity resources. The Parts in the access contracts will be the State and the applicant for the access. These contracts are based on the principle of the consent by the supplying part of the resource.

The contracts of accesses are granted, as much for the prospecting as for research, and they constitute the test of genuineness of the product or resulting procedure, be protected or not by the intellectual property rights. This process begins with an access application.

The ownership of an access permission to a biological resource doesn't presuppose the transmission of rights on the genetic resources contented in that biological reserve.

These general principles allow to summarize the forms in that the access will be limited to our biological diversity. The **access to the resources will be limited** in the following cases:

- In case of endemic, rarities or species, subspecieses, varieties or races in extinction danger.
- When the vulnerability conditions or fragility in the structure or function of the ecosystem could be increased by access activities.
- In case of adverse effects on the human health or on essential elements of the cultural identity of the population.

- In case of genetic erosion danger caused by the access activities.
- By biosecurity regulations.

It won't be recognized the intellectual property rights over any biodiversity resource if they are accessed in an illegal way.

The contracts should also guarantee the fair and equal distribution of the benefits derived from the use of the biodiversity resources. They should specify: how those benefits will be distributed, those that will be directed to the development of the technological and scientific infrastructure that originated them, the right of the nationals to participate of the benefits in order to achieve the sustainable development of the activity that generated them. Finally, it is given special importance to the transfer of technologies and know-how in the activity that makes use of the requested resources.

4. CONSIDERATIONS ON THE *SUI GENERIS* SYSTEM FOR THE NATIONAL PROTECTION OF THE PLANT VARIETIES.

The plant varieties constitute an autonomous modality of the Intellectual property whose protection has been the focus attention of many international fora and countries, specially the developed one.

The instrumentation in Cuba of a system of protection of the plant varieties obeys the execution of the chronogram for the legal work as part of the compromise that emanate from the incorporation of our country to the WTO, **but guaranteeing the defense of the national interests**. Without ignoring the current debates and proposals of modifications to the TRIPs agreement that are necessary for the developing countries.

At the present time, we have a draft of the Cuban sui generis system that is being analyzed and it will be approved at the end of this year, to go into effect starting from January of the 2000.

The application of the International Agreement for the Protection of Plant Varieties (UPOV) has a remarkable incidence on the selected sui generis system. For that reason, it is convenient to exchange our ideas on the implications of this Agreement, specially for the developing countries, and exchange other ideas during the discussion in this workshop.

- **UPOV and its implications.**

As it is known, the International Agreement for the Protection of Plant Varieties (UPOV) went into effect in 1961, which establishes a protection system that based on the grant of exclusive rights to the plant breeder regarding certain acts of exploitation.

UPOV establishes a breeder's right that confers to its owner the ability to prevent at any third person the use of the reproduction material or vegetative multiplication without its previous authorization. For such a reason, this right could interfere the productive expansion of an important and crucial variety for a country.

The opposition of most of the developing countries to follow UPOV like a *sui generis* system is due to that it doesn't keep in mind the peculiarities of the agricultural production in these countries neither the farmer's rights, the right that grants on the use of the seed is narrow, it doesn't recognize neither supports the inherent rights of the communities on the biodiversity and its possibility to innovate.

The application of the UPOV statements implies only to recognize the breeder's rights system over the rights of the farmers and the communities. Such breeder right has become stronger in each UPOV revision, while the other ones haven't increase their validity.

Another UPOV limitation, similar to the patent system, is the not recognition of the communities indigenous property rights, whose have accumulated all of the traditional knowledges that are important target of research and exploitation by the main pharmacological companies.

UPOV gives the opportunity to the companies from developed countries to appropriate the South's biodiversity, free off the obligation of sharing the benefits. Contrary to the Convention on Biological Diversity, UPOV doesn't have any disposition about the sharing of the benefits.

The establishment of a minimum number of species to be protected is another limitation under UPOV . Each country should protect those varieties that represent an economic interest and for which it has real technical conditions. When species are protected without keeping in mind the existence of the technical requirements ⁷ on the national economic point of view it could be unfavorable.

UPOV system doesn't establish the relationship between the plant varieties protection and the biodiversity access regulations, as result of this some plant varieties, part of the national biological patrimony, could be protected against the national interests.

Ending, any of the UPOV versions recognizes the exception rights that should be conferred to the State for protecting the alimentary interests of the people.

- **The proposed *sui generis* system.**

⁷ As technical requirements should be understood, enough experimental support and de possibility of a validation process. If the country haven't these conditions, will be obligated to look for these services on other country and it imply the spent of hard money not available for the nationals.

The design of a national legislation of a *sui generis* protection system started with a consultation process that implicated all of the actors involved on the new varieties generation, its extension and economic application.

The *sui generis* system protection has been prepared taking in account the scientific, environmental and commercial policies of the country, as well as the interests, priorities and national infrastructure.

In Cuba, the agricultural production and the scientific research related to the plant varieties have a directly social character. Moreover, it prevails the state property on the earth. For those reasons, it is not compatible the excessive monopolization of the plant varieties property.

As result, the *sui generis* system draft, protects the breeders interests that are mainly represented by research institutions of the Ministries of the Agriculture and of the Sugar Industry. It also provides protection to the farmers that predominantly use the seeds supplied by the State.

It is important to consider the scientific strategy in order to understand the characteristics of the scientific centers dedicates to the seeds production and to recognize the paper that the Cuban State has played on the promotion of the science for satisfying the alimentary requirements of all the people. In addition, it is necessary to consider the national policy about the plants reproduction to defines the varieties that should be further developed.

The *sui generis* system draft also considers the external commercial factors, the presence of foreign capital in the agricultural activity, in particular in the seeds production.

For our country, the implementation of the mentioned system will assume the technical structure of the process proposed by UPOV, therefore it takes implicit an important investment, as long as, the varieties test should be made on the base of reference collections of varieties, of each gender or species. While the reference collections are wider, better they guarantee that rights are not granted on varieties that have been previously commercialized. This has a vital importance for the protection of our phytogenetic resources and trade.

It is proposed the gradual application of the protection system for each gender or species until embracing the entirety of the species with commercial relevance in Cuba. This gradual adoption of the system permits to complete a good reference collections of varieties in each case. Our country, in these moments, carries out a serious study of its agricultural research infrastructure and the commercial impact of the species.

The effectiveness of our protection system against illicit activities depends on the coordination between the both legal instruments: the sui generis system of plant varieties protection and the Biodiversity Law establishing the rules of the resources access. For that reason, **we are working in achieving the almost simultaneous promulgation of both groups of regulations.**

5. Conclusions.

- There is no doubt, the adoption of the TRIPs agreement for developing countries is a big challenge determined by the fulfil of the compromises emanated from their incorporation to the WTO, but guaranteeing the defense of the national interests. It also should not be ignored the current debates and proposals of modifications to the TRIPs agreement that are necessary for the developing countries.
- The preparation of a *sui generis* system requires to coordinate the regulations for protecting new varieties and the relative one to the regulation from the access to the biodiversity resources. Dealing for separate these aspects can lead to the adoption of measures that are not supplemented and don't guarantee the execution of the Convention on Biological Diversity postulates, affecting the interests of the sustainable development in developing countries.

Theses are the reason because it is unavoidable the policy coordination on the scientific, environmental and commercial spheres.

- The application or not of the normative proposed by UPOV for the creation of a protection sui generis system in the developing countries, it should be carried out knowing of their real implications, in particular, for the defense of the rights of the farmers and the communities.
- The direct relationship and coordination between the system of breeder's rights and the access to the phylogenetic resources, guarantee the effectiveness of the preventive and precautionary protection of our resources against illicit activities that bear to an application and ulterior concession of a right.