



Conflicts and Divergent Perspectives to Protect Traditional Knowledge and Indigenous People

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Abstract

The importance of biodiversity and traditional knowledge protection has increased immensely in the recent past, due to the technological leap in the area of Biotechnology. The pace of competition induced the Western scientists and Multi National Corporations infiltrate local community's traditional knowledge and genetic resources. This in turn resulted in major conflicts among local communities, national governments and MNCs. International agreements dealing with Intellectual Property Rights and Bio Diversity, like Convention on Biological Diversity (CBD) and the Trade-Related Intellectual Property Rights (TRIPs) Agreement has contradictory objectives. This article explores the fundamental tenants, divergence, controversies between CBD and TRIPs; also specifically looks at the major controversies within the Agreements

Keywords: Benefit sharing, biodiversity, bio piracy, CBD, intellectual property, traditional knowledge, TRIPS.

Introduction

The increasing importance of biodiversity and traditional knowledge lead the world in to competition and apprehension over genetic resources. The pace of competition induced the western scientists and multinational corporations infiltrate local community's traditional knowledge and genetic resources. This intrusion resulted major conflicts among local communities, national governments and MNCs. There are conflicts reflected in international agreements like convention on biological diversity (CBD) and the Trade-Related intellectual property rights (TRIPs) Agreement.

TRIPS aiming at harmonizing the intellectual property related laws and regulations worldwide, and was the first of its kind an international agreement governing the protection of intellectual property. The Agreement accomplishes this motive by setting minimum standards for protection of various forms of intellectual property.

The convention on biological diversity aiming to secure the conservation and sustainable use of biological diversity, and it created a set of international legal guidelines governing biological resources worldwide. It attempts to reconcile Northern control of biotechnology with Southern control over biodiversity, by creating a framework under which each could benefit from the other's endowment. CBD recognizes, the sovereign rights of States over their natural resources, while simultaneously mandating efforts towards sharing of genetic resources, technologies and innovations resulting from their use¹. The CBD instructs that states may share its genetic resources under their national sovereignty according to a

general framework established by the agreement, subject to specific national legislation.

Major Conflicts

After the CBD and TRIPs were adopted, several issues emerged regarding the incompatibility of these agreements. The CBD considers intellectual property protection as a means of achieving conservation and sustainable use of biodiversity and equitable benefit sharing while TRIPs appears to consider the strengthening of intellectual property rights itself². However, it would appear that both agreements seek to operate in light of social welfare. Countries like US, Japan etc. claim that there is no such conflict between TRIPs and CBD, Scholars like Bowman identify conflicts between the two but are of the view that the goals of the CBD can be met broadly, interpreting Art 7 and 8 of TRIPs, which deals with consideration of welfare enhancement.

Art 27 of TRIPs, is the most disputed and controversial article in the TRIPs -CBD conflict. This article allows broad scope for protection of products or process, patenting of any inventions in all field of technology, provided they are new, involve an inventive step and are capable of industrial application. This article conflicts with the objectives of CBD. Art 15.1 of the CBD recognises the sovereignty of source nations and allows nations to determine access to their genetic resources. Art 15.6, 15.7, 19.1 and 19.2 provide for fair and equitable benefit sharing between the providers of resources and relevant users. Major difference from TRIPs is that the CBD takes genetic resources out of the public domain by recognising a parent country's right to benefit and technologies coming from them.

Table-1
CBD and TRIPS: Comparison

No	Issue	TRIPS Agreement	CBD
1	Date of Entry into force	1994	1992
2	Governing Body	WTO	UNEP
3	Main Mandate	Trade and IPRs	Environment Conservation
4	Emphasis on Product Ownership	Protection of IP a Private Property	Protection of Genetic Resources (GR) and Traditional Knowledge as Public Goods
5	Access and Benefit Sharing of GR and TK	Not addressed	Addressed

Table-2
CBD and TRIPS: Covering Areas

Convention on Biological Diversity	TRIPS
Recognition of local communities for their contribution to the conservation and sustainable development	Possible assignment of IPRs to corporations or individuals
Required prior informed consent of the nation states or the local communities who are identifies as custodians of the biodiversity for any use of genetic materials.	Patent holder not required to disclosure the source of genetic material on which a patent may have been granted
Developing Countries supplying genetic material must be involved in bio-technological research.	No direct reference to the involvement of developing countries in bio-technological research activities.

Conflict in Rationale and Origin

There are differences in rationale, origins and overall framework of the CBD and TRIPs agreement. TRIPs is a commercial treaty with commercial objectives that largely benefit private firms and multinational corporations. On the other hand, the establishment of the CBD was prompted mainly by the growing concern over the rapid worldwide loss of biodiversity. And also recognise the important role of traditional knowledge and the rights of local communities that develop and hold the knowledge, and the need to regulate access to and the sharing of benefits deriving from the conservation and sustainable use of biodiversity⁴.

National Sovereignty vs. Rights of IPR Holders

Based on the principle of national sovereignty enshrined in the CBD, countries have the right to regulate access of foreigners to biological resources and knowledge, and to determine benefit sharing arrangements. TRIPs enable persons or institutions to patent a country's biological resources in countries outside the country of origin of the resources or knowledge. In this manner, TRIPs facilitates the conditions for misappropriation of ownership or rights over living organisms, knowledge and processes on the use of biodiversity takes place. The sovereignty of developing countries over their resources, and over their right

to exploit or use their resources, as well as to determine access and benefit sharing arrangements, is compromised⁴.

Community Rights vs. Private, Individual Rights

In the preamble of TRIPs, it is recognised that "intellectual property rights are private rights". Patents confer exclusive rights on its owner to prevent third parties from making, using, offering for sale, selling or importing the patented product, and to prevent third parties from using the patented process. In TRIPs, the award of IPRs over products or processes confers private ownership over the rights to make, sell or use the product or to use the process. This makes it an offence for others to do so, except with the owner's permission, which is usually given only on license or payment of royalty⁴.

IPRs, therefore, have the effect of preventing the free exchange of knowledge, of products of the knowledge, and their use or production. This system of exclusive and private rights is at odds with the traditional social and economic system in which local communities make use of, and develop and nurture, biodiversity. For example, seeds and knowledge on crop varieties and medicinal plants are usually freely exchanged within the community. Knowledge is not confined or exclusive to individuals but shared and held collectively, and passed on and added to from generation to generation, and also from locality to locality.

The CBD has several provisions that acknowledge this and also that aim at protecting community rights, the key provision being Article 8(j). However, the contribution and nature of community knowledge and community rights are not recognised in the TRIPS agreement. Instead, the patent system endorsed by TRIPS favours private individuals and institutions, enabling them to acquire rights, including rights over the products or knowledge, whose development was mainly carried out by the local communities. TRIPS and the enactment of patent laws relating to biological materials in some countries have facilitated the misappropriation of the knowledge and resources of indigenous and local communities, and the number of bio-piracy cases has been increasing at a rapid rate. This misappropriation is counter to the principles and provisions of the CBD that oblige countries to recognize local community rights and fair benefit sharing. Indeed, one of the main objectives of establishing the CBD was to counter the possibility of misappropriation or bio-piracy, whilst one of the effects of TRIPS has been to enable the practice of such misappropriation.

Traditional Knowledge Vs Modern Technology

Under TRIPS, patent protection can be granted only to those inventions which have identifiable inventor. As traditional Knowledge is a product of collective contribution of many individuals/communities, the possibility of recognising the contribution of traditional knowledge is highly diminished. Moreover TRIPS, require that the invention must have a prospect of industrial application to be considered for patent protection whereas the innovations through TK are more implicit in nature and rarely have direct industrial application. While the CBD adequately recognize TK and practices the TRIPS rewards addition to knowledge made through modern technology.

Prior Informed Consent of States and Communities vs. Unilateral Patents

According to CBD (art. 15.4) the access to genetic resources shall be subject to prior informed consent of the Contracting Party providing such resources unless otherwise determined by that Party. Thus, intending collectors of biological resources of knowledge relating to these have to provide sufficient information of their work and how it is intended to be used, and obtain consent, before starting the work. In the draft laws of many countries, the prior informed consent of the state as well as the relevant local communities has to be obtained. This implies that consent can also be denied, and that consent is conditional on mutually-agreed terms for benefit sharing between the collector, the state and the local communities. The PIC requirement is thus a measure to prevent misappropriation of resources and knowledge, and to facilitate fair benefit sharing⁴.

In TRIPS, there is no provision that applicants for patents or other IPRs over biological resources have to obtain prior informed consent. There is thus no recognition in TRIPS of the rights of the country in which the biological resource or knowledge of its use is located. Thus, patent applicants can submit claims on biological resources or knowledge to patent offices in any country and the patent office's can approve the claims without going through a process even of checking with the authorities of the country or countries of origin. Thus, whilst the CBD has set up a PIC system as a check against misappropriation or bio-piracy, TRIPS on the other hand facilitates the possibility of such misappropriation by not recognising the need for and thus omitting a mechanism of PIC.

Benefit Sharing Arrangements

The main characteristic of the CBD, recognize the sovereign rights of states over their biodiversity and genetic resources and gives the state right to regulate access, enables the state to enforce its rights on arrangements for sharing benefits. Access, where granted, shall be on mutually agreed terms (Article 15.4), shall be subject to prior informed consent (Article 15.5), countries providing the resources should fully participate in the scientific research (Article 15.6). Most importantly, each country shall take legislative, administrative or policy measures with the aim of sharing in a fair and equitable way the results of research and development, and the benefits arising from the commercial and other utilization of genetic resources with the contracting party providing such resources. Such sharing shall be upon mutually agreed terms.

In TRIPS, there is no provision for the patent holder on claims involving biological resources or related knowledge to share benefits with the state or communities in countries of origin. In fact, there is little that a country of origin can do to enforce its benefit-sharing rights, if a person or corporation were to obtain a patent in another country based on the biological resource or related knowledge of the country of origin. While a legal challenge can be launched, such legal cases are prohibitively expensive. Even if a state has the resources to legally challenge a patent in another country, it may not have the resources to track down and challenge every patent that it believes to be a case of bio-piracy against it, nor is there a guarantee of success. Thus, if the patent laws, the administration of approvals, or the courts of a particular country operate in a context that is favourable to granting such patents, there is little that can be done by a country of origin to ensure that bio-piracy does not take place, or that if it takes place that it can get a remedy⁵.

Conclusion

In recent years, there has been worldwide concern for the protection of biological resources, traditional knowledge and rights to such resources. This apparently leads to a global debate over the intellectual property rights and protection of these resources. There are genuine concerns in granting intellectual

property rights under the TRIPs satisfying the objectives of CBD, since there are difference in rationale origin and framework. TRIPs has commercial objective while CBD stands for the protection of the biodiversity, traditional knowledge and the rights of the local communities. The TRIPs and CBD both attempt to legislate some form of intellectual property and technology transfer. The agreements appear to provide contradictory statements for the protection of genetic resources and biodiversity. The core issues between the CBD and TRIPs are in the areas of patentable subject matter, benefit sharing, protection of local knowledge, requirements of prior informed consent.

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