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OPEN LETTER

To: Pascal Lamy
Commissioner
Directorate-General for Trade
European Commission

From: Genetic Resources Action International (GRAIN)

Date: 26 February 2003

Subject: EU concept paper to the World Trade Organisation TRIPS Council regarding patents on seeds and traditional knowledge

Dear Mr Lamy,

We are writing this letter to set the record straight, from our own perspective, on the latest EU submission to the review of TRIPS Article 27.3(b).[1]

Recent media coverage is erroneously projecting a message that the EU is now coming to the rescue of developing country governments in seeking far-reaching changes to the TRIPS Agreement. Suddenly, we are being told that the European Union has proposals on the table that will arrest the problem of bio-piracy, curb the power of the biotechnology industry, and safeguard the right of poor farmers to freely use patented seeds.[2]

One source of this disinformation appears to be your own article in the January 2003 edition of *Our Planet*, a journal produced by the United Nations Environment Programme.[3] You therefore have your own responsibility to rectify the factual misrepresentations of the initiative coming from the EU.

The disclosure issue

A number of developing countries have tabled proposals to amend TRIPS so that patent applicants are required to "disclose" where genetic materials or traditional knowledge involved in a claimed invention came from. This disclosure requirement is supposed to make clear not only the country where the bioresources and local knowledge originated, but also provide proof of prior informed consent of the people from whom they were taken. Several developing countries have already enacted such a requirement in their national patent or plant variety rights legislation. Developed countries continue to resist the idea.

You claim that the EU now supports creating such an obligation under the TRIPS Agreement. This is not correct. What the EU actually proposes in its concept paper of September 2002 is to create a separate and essentially voluntary mechanism for disclosure of origin. A "self-standing" measure is how the EU describes it. This falls far short of what developing countries have been requesting in at least two respects.

(1) The EU wants to strictly limit the content of what is disclosed in patent applications to the country of origin only. You dismiss the need for patent seekers to indicate who were the original holders of the biological material or the knowledge. You also dismiss the need for patentees to provide documentary proof of prior informed consent from the people affected.

(2) The EU insists that even this very limited form of disclosure must never serve as a condition for patentability nor to judge what constitutes a legitimate patent. As the concept paper says, *"Failure to disclose, or the submission of false information should not stand in the way of the grant of the patent and should have no effect on the validity of the patent, once it is granted."*[4] In other words, the EU can only accept the principle of disclosure provided it is ineffective. Worse, the EU paper is explicitly saying that providing false information in patent applications about the origin of the genetic material is perfectly acceptable. This logic is extended later on in the EU's paper to traditional knowledge as well.[5]

This shows that the EU does not want to do anything to stop biopiracy. The "disclosure" mechanism you offer would allow patents to be granted on any genetic material or knowledge misappropriated from indigenous or farming communities. And it would do so even when the patent applicant intentionally withholds or falsifies information about the original source.

Creating a need for farmers' exemptions

The other part of the EU paper which has been misconstrued for the public is the question of whether or not farmers should be allowed to save, reuse and sell seeds if they are patented or subject to *sui generis* plant variety protection (PVP) schemes. The message getting across is that the EU wants poor farmers spared of any restrictions on seed saving that come with the implementation of TRIPS.

The EU paper, in fact, does no more than suggest that the impact of seed patents on certain farmers in developing countries could be minimised through limited "exemptions". These exemptions could be permitted, it is said, in national plant variety protection or patent laws by virtue of TRIPS Article 27.3(b) and 30 respectively.

It is true that such an approach is possible under TRIPS. After all, the EU has such exemptions in its own legislation. However, you fail to mention that nothing in the TRIPS Agreement requires developing countries to introduce either patents on seeds or restrictive PVP laws[6] in the first place. In other words, you are telling developing countries that if they do allow patents on plants and if they do adopt UPOV-type PVP laws, *then* they can have exemptions for small farmers. What you fail to say is that if they prohibit seed patenting and avoid restrictive UPOV-type plant variety laws, as is their right under TRIPS, there would be no need for the exemptions.

The fact is that, despite TRIPS, an increasing number of developing countries are being coerced to accept the patenting of plants and the rigours of UPOV in their own countries

through bilateral deals. Through so-called free trade agreements, partnership agreements, bilateral investment treaties and other means, the United States and Europe are putting direct pressure on developing countries to adopt and enforce higher standards of intellectual property protection than the WTO prescribes. A preliminary survey that GRAIN conducted with colleagues in 2001 identified more than 20 such "TRIPS-plus" agreements affecting or potentially affecting biological diversity.[7] Almost half of them were initiated by the EU. To name one example, under the EU-South Africa bilateral trade agreement of 1999, South Africa is required to recognise patents on biotechnological inventions.[8] To name another example, under the EU-Tunisia partnership agreement of 1998, Tunisia is required to join UPOV.[9] By pushing developing countries to adopt such TRIPS-plus intellectual property regimes, the EU in fact creates the need for the exemptions then offered to soften the blow.

Avoiding the fundamental issue

The EU paper fails to address the most important problem on the table. Since the review began, developing countries have not only proposed technical adjustments to TRIPS 27.3(b). They have also raised the fundamental issue: whether life forms should be patentable at all. The African Group in particular has tabled a proposal to amend TRIPS so that it prohibits patents on all living organisms in all the WTO member states. This is the most logical solution to bio-piracy: addressing the problem at the source.

The EU paper, on the contrary, says that TRIPS presently reflects a carefully negotiated balance and that a reopening of the discussion may give rise to counterclaims from those who would like to see patents on life made mandatory with no exclusions possible.[10] The EU's message seems to be that TRIPS is cut in stone and can never be changed except in the direction of even stronger patent rules.

This standpoint has no basis in the built-in mandate for the review of Article 27.3(b), which simply says that the provisions shall be reviewed, without any qualifier or limitation. Nor can it find support in the expanded mandate from Doha, which specifically emphasises the development dimension and the balance of interests between technology producers and users.[11]

The EU is ignoring the very issue which should be at the centre of the review: whether or not the patenting of life forms, as required by TRIPS, stands the test of social legitimacy and whether or not it will further sustainable development. It is our conviction, and that of many other NGOs and civil society groups, that it most emphatically does not.

However much you try to avoid it, this issue will not go away

Thank you for your attention.

Sincerely

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[1] European Commission, "Communication by the European Communities and their Member States to the TRIPs Council on the review of Article 27.3(b) of the TRIPs Agreement, and the relationship between the TRIPs Agreement and the Convention on Biological Diversity (CBD) and the protection of traditional knowledge and folklore - A Concept Paper", Directorate-General for Trade, Brussels, 12 September 2002, http://trade-info.cec.eu.int/europa/2001newround/comnr_trips.pdf.

[2] See, for example, Alex Kirby, "EU backs poor farmers' seed use", *BBC News Online*, Nairobi/London, 3 February 2003, http://news.bbc.co.uk/1/hi/sci/tech/2719129.stm. Or "New EU rules protect farmers from bio-pirates", Deutsche Welle, 4 February 2003, www.dw-world.de/english/0,3367,1446_A_771177_1_A,00.html

[3] Pascal Lamy, "As precious as gold", *Our Planet*, UNEP, Nairobi, January 2003, www.ourplanet.com/imgversn/134/lamy.html.

[4] European Commission, *op. cit.*, para 55.

[5] *Ibid.*, para 66.

[6] We refer to those laws modelled on the UPOV Convention. The principles that the EU paper describes as an "effective *sui generis* system" come from UPOV.

[7] *TRIPS-plus through the back door: How bilateral treaties impose much stronger rules for IPRs on life than WTO*, GRAIN in cooperation with SANFEC, July 2001, www.grain.org/publications/trips-plus-en.cfm

[8] Council of the European Union, "Agreement on Trade, Development and Cooperation between the European Community and its Member States, of the one part, and the Republic of South Africa, of the other part", 8731/99, 9 July 1999, Article 46. http://europa.eu.int/comm/development/south_africa/agreement.pdf

[9] "Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Tunisia, of the other part", Official Journal L 097, 30/03/1998, Annex7, paragraph 1, http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=21998A0330(01)&model=guichett

[10] European Commission, *op. cit.*, para 28.

[11] "We instruct the Council for TRIPS, in pursuing its work programme including under the review of Article 27.3(b), the review of the implementation of the TRIPS Agreement under Article 71.1 and the work foreseen pursuant to paragraph 12 of this declaration, to examine, inter alia, the relationship between the TRIPS Agreement and the Convention on Biological Diversity, the protection of traditional knowledge and folklore, and other relevant new developments raised by members pursuant to Article 71.1. In undertaking this work, the TRIPS Council shall be guided by the objectives and principles set out in Articles 7 and 8 of the TRIPS Agreement and shall take fully into account the development dimension." Paragraph 19, *WTO Ministerial Declaration*, adopted in Doha, Qatar, on 14 November 2001, www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm