

Official country positions and proposals on TRIPS Article 27.3(b)

GRAIN | updated October 2004

WTO member(s)	Proposals regarding the life patenting provisions of 27.3(b)	Proposals regarding the <i>sui generis</i> (plant varieties) provision of 27.3(b)
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Africa

African Group ¹	<ul style="list-style-type: none"> ▪ Review should be extended and there should be an additional five year transition period afterwards ▪ Review should clarify that plants, animals, microorganisms, their parts and natural processes cannot be patented; patents on life forms are unethical and TRIPS should prohibit them ▪ TRIPS should contain provisions to promote, not undermine, the conservation and sustainable use of genetic material ▪ TRIPS should contain provisions to prevent biopiracy ▪ Art. 29 should be modified to require (a) disclosure of country and area of origin of any biological resource and traditional knowledge used or involved in an invention and (b) proof of compliance with all access regulations of the country of origin 	<ul style="list-style-type: none"> ▪ Review should be extended and there should be an additional five year transition period afterwards ▪ <i>Sui generis</i> laws should allow for protection of community rights, the continuation of farmers' practices (e.g. seed saving) and the prevention of anti-competitive practices which threaten food sovereignty ▪ The flexibility to protect farmers' rights and traditional knowledge in the context of <i>sui generis</i> systems for plant varieties must be retained and construed in consistency with the CBD, the FAO International Undertaking (IU) on Plant Genetic Resources and the OAU Model Law on Farmers', Breeders' and Community Rights.
<p>The Africa Group suggests that the Council for TRIPS adopt a <i>Decision on Protecting Traditional Knowledge (TK)</i> which affirms that:</p> <ul style="list-style-type: none"> ▪ TK and inventions of local communities should be protected under a special regime ▪ TK is a category of intellectual property rights to be recognised and be protected under TRIPS; members may adopt <i>sui generis</i> systems for more extensive protection of TK ▪ The rights relating to TK under TRIPS shall include the rights of communities or traditional practitioners to: decide whether or not to commercialise their knowledge; honour any sanctity they attach to their knowledge; give prior informed consent for any access or intended use of their knowledge; receive full remuneration for their knowledge; and prevent third parties from using, offering for sale, selling, exporting or importing their knowledge and any article or product in which their knowledge is input unless all requirements under this Declaration have been met ▪ Local communities and national authorities shall have exclusive rights in perpetuity to any information documented or entered into public registers, to prevent any access or use they have not expressly authorised or any application that is inconsistent with the rights of local communities under this Decision ▪ The existence of TK in any form or in any stage defeats novelty, inventiveness and originality for the purpose of patent or copyright protection ▪ No intellectual property rights shall be granted on anything derived from or based on TK or <i>in situ</i> genetic resources without compliance with the Convention on Biological Diversity; any breach of this principle shall result in nullification of any such IPRs ▪ A Committee on TK and Genetic Resources shall be established to oversee the implementation and development of this decision and any other instruments 		

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Kenya ²	<ul style="list-style-type: none"> ▪ Need five-year extension of transition period ▪ Harmonise TRIPS with CBD 	<ul style="list-style-type: none"> ▪ Need five-year extension of transition period ▪ Increase scope of 27.3(b) to include protection of indigenous knowledge and farmers' rights ▪ Harmonise TRIPS with CBD
Southern Africa Development Cooperation (SADC) ³	<ul style="list-style-type: none"> ▪ The transition period for implementation of 27.3(b) should be extended and the 2000 review should be postponed. ▪ Harmonise TRIPS with CBD. ▪ The exclusion for essentially biological processes should extend to microbiological processes. 	<ul style="list-style-type: none"> ▪ The transition period for implementation of 27.3(b) should be extended and the 2000 review should be postponed. ▪ Retain the <i>sui generis</i> option.

Asia (developing)

India ⁴	<ul style="list-style-type: none"> ▪ Harmonise TRIPS with CBD either by requiring information on providers of genetic resources and countries of origin of biological material under TRIPS Art. 29, or by incorporating a provision that patents inconsistent with CBD Art. 15 must not be granted. ▪ Exclude patents on all life forms. If this is not possible, then at least exclude patents based on traditional/indigenous knowledge and products and processes essentially derived from such knowledge. ▪ There must be disclosure of the country of origin of the biological resource and associated knowledge, and proof of the provider's consent, to ensure equitable sharing of benefits. ▪ It should be left to national policy to decide what are patentable microorganisms, including in light of Art. 27.2 (morality and <i>ordre public</i>). ▪ Developing countries like India cannot accept any further strengthening of the protection presently provided to life forms. 	<ul style="list-style-type: none"> ▪ There are various ways to develop an effective <i>sui generis</i> system and no reason why countries cannot develop their own models. ▪ It would be essential to ensure that the preservation of farmers' rights is not considered a dilution of effectiveness of the system. ▪ What is an effective <i>sui generis</i> system may be best left to each Member to evolve in its legal system and practice.
Singapore ⁵	<ul style="list-style-type: none"> ▪ Should extend to plants and animals (i.e. no exclusions) ▪ TRIPS should not be used to enforce benefit-sharing arrangements or any common approach to benefit-sharing 	<ul style="list-style-type: none"> ▪ UPOV would be a useful reference for the basic level of protection
South Asia Association for Regional Cooperation (SAARC) ⁶	There is a need to prevent piracy of traditional knowledge built around biodiversity and to seek the harmonisation of TRIPS with CBD to ensure appropriate returns to traditional communities.	

Latin America

Bolivia, Colombia, Ecuador, Nicaragua, and Peru ⁷	The Seattle Ministerial Conference should adopt a mandate to: (a) carry out studies in order to make recommendations on the most appropriate means of recognizing and protecting traditional knowledge as the subject matter of IPR; (b) initiate negotiations with a view to establishing a multilateral legal framework that will grant effective protection to the expressions and manifestations of TK; (c) complete the legal framework envisaged in paragraph (b) above in time for it to be included as part of the results of the new round of trade negotiations.
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WTO member(s)	Proposals regarding the life patenting provisions of 27.3(b)	Proposals regarding the <i>sui generis</i> (plant varieties) provision of 27.3(b)
Brazil ⁸	<ul style="list-style-type: none"> ▪ Flexibility for members to exclude plants and animals should be retained. Art. 27.3(b) should neither exclude all life forms, as proposed by India, nor extend patentability to all life forms, as proposed by the US. ▪ Art. 27.3(b) should be amended to allow members to require further conditions for patentability, viz. (1) identification of source of genetic material; (2) traditional knowledge used to obtain that material; (3) evidence of fair and equitable benefit-sharing; and (4) evidence of prior informed consent for the exploitation of the patent. ▪ Art. 27.3(b) should bear an interpretative note clarifying that discoveries or naturally occurring materials are not patentable. ▪ There is a need to incorporate the issue of TK in the review of Art. 27.3(b). 	<ul style="list-style-type: none"> ▪ Flexibility for members to decide on the most effective means of a <i>sui generis</i> system should be retained. UPOV is not the only reference to fulfill the criterion of effectiveness.
Cuba, Honduras, Paraguay and Venezuela ⁹	TRIPS should be amended to provide effective moral and economic intellectual property rights to traditional knowledge, medicinal practices and expressions of folklore of indigenous and local communities, taking into account the social and collective nature of these rights, by 2004.	
Venezuela ¹⁰	Introduce mandatory system of IPR protection for traditional knowledge of indigenous and local communities, based on the need to recognise collective rights	

Mixed developing country groups

Africa-Caribbean-Pacific Group (ACP) ¹¹	<ul style="list-style-type: none"> ▪ Art 27.3(b) must clarify that all living organisms, including plants, animals and parts of plants and animals, gene sequencing and biological and other natural processes for the production of plants, animals and their parts should not be patented. ▪ WTO members should require, as condition for patent grant, applicants to disclose the country or area of origin of any biological resource or TK involved in the invention. Compliance with all regulations in country of origin, including prior informed consent and access and benefit sharing, should be demonstrated under this requirement. ▪ TRIPS must be supportive of and not run counter to the CBD, especially regarding fair and equitable sharing of benefits. 	<ul style="list-style-type: none"> ▪ Supports the position of the LDCs that WTO members shall select their own <i>sui generis</i> system, including recognising traditional knowledge and the rights of farmers to use, save, re-sow, exchange or sell seeds. ▪ Supports the position of the Africa Group that members have the right and freedom to determine and adopt their own <i>sui generis</i> regimes that encourage the traditions of farming communities & indigenous peoples. ▪ TRIPS must be supportive of and not run counter to the CBD, especially regarding fair & equitable sharing of benefits
Bolivia, Brazil, Cuba, Ecuador, India, Peru, Thailand, Venezuela ¹²	<ul style="list-style-type: none"> ▪ TRIPS must contain a provision mandating applicants for a patent relating to biological resources or traditional knowledge to disclose the source of origin of such resources and knowledge, to provide evidence that they have obtained the necessary prior informed consent and to provide evidence that they have complied with national laws on benefit sharing ▪ The challenge is to prevent misappropriation of genetic material and associated knowledge (biopiracy) and support the objectives and implementation of CBD. 	

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Brazil, China, Cuba, Dominican Republic, Ecuador, India, Pakistan, Peru, Thailand, Venezuela, Zambia and Zimbabwe ¹³	<ul style="list-style-type: none"> ▪ TRIPS must be modified so that it will not run counter to the objectives of CBD by requiring patent applicants to: disclose the source and country of origin of the biological resources and traditional knowledge used in an invention; provide evidence of prior informed access to access the material or the knowledge; provide evidence of fair and equitable benefit sharing. ▪ These amendments must be part of a single undertaking as part of the multilateral round of trade negotiations under the Doha Development Agenda. ▪ Members reserve the right to also propose an international framework for the positive protection of traditional knowledge. 	
Brazil, India, Pakistan, Peru, Thailand and Venezuela ¹⁴	<ul style="list-style-type: none"> ▪ An obligation to disclose source and country of origin of biological resource and/or traditional knowledge used in an invention would improve the availability of prior art to examiners, facilitate determination of patentability, reduce costly disputes and play a critical role in ensuring patent quality. ▪ Disclosure would be part of both substantive and formal aspects of patent law, would be triggered by any use of a biological material or knowledge associated with it, would not be burdensome and is already being required by Members at national level. ▪ Insufficient, wrongful or no disclosure of source and country of origin of biological resource and/or traditional knowledge should justify the non-processing of the patent application. When discovered after grant, the patent should be revoked or the claims narrowed or the rights transferred. ▪ The disclosure obligation may be introduced as an amendment or as a new article in the TRIPS Agreement, 	
Cuba, Dominican Republic, Egypt, El Salvador, Honduras, India, Indonesia, Malaysia, Nigeria, Pakistan, Sri Lanka and Uganda ¹⁵	<ul style="list-style-type: none"> ▪ Article 27.3(b) should be amended in light of the provisions of CBD and the IU, in which the conservation and sustainable use of biological diversity, the protection of the rights and knowledge of indigenous and local communities and the promotion of farmers' rights are fully taken into account. ▪ The review should also: clarify the artificial distinction between biological and microbiological organisms and processes; ensure the continuation of traditional farming practices including the right to save and exchange seeds and sell their harvests; and prevent anti-competitive practices that will threaten food sovereignty of people in developing countries. 	
Cuba, Egypt and Honduras ¹⁶	The transition period for developing countries must be extended.	
Group of 77 ¹⁷	Future negotiations must seek mechanisms for a balanced protection of biological resources and disciplines to protect traditional knowledge	

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Least Developed Countries (LDC) Group ¹⁸	<ul style="list-style-type: none"> ▪ There should be a formal clarification that plants, animals and parts of plants and animals, including gene sequences and biological processes for the production of plants, animals and their parts are not patentable. ▪ Incorporate provision that patents must not be granted without prior informed consent of country of origin ▪ Patents inconsistent with CBD Art 15 should not be granted ▪ Need for extended transition period 	<ul style="list-style-type: none"> ▪ Must be flexible enough to suit each country's seed supply system ▪ Members shall select their own systems, including recognising traditional knowledge and the rights of farmers to use, save, re-sow, exchange or sell seeds ▪ Need for extended transition period
The WTO bodies and Fifth Ministerial Conference are called to agree on establishing an international mechanism to protect genetic resources, traditional knowledge and farmers' rights and ensure the non-patentability for all life-forms.		
Zambia, Jamaica, Kenya, Pakistan, Sri Lanka, Tanzania, Uganda and Zimbabwe ¹⁹	<ul style="list-style-type: none"> ▪ It should be clarified that the provisions on patenting of microorganisms only apply to genetically modified microorganisms. ▪ Should provide that where a country grants patent protection to plant-based inventions, applicants are obliged to (a) declare the origin of materials and demonstrate prior consent of the country of origin and where relevant the indigenous or farming communities; and (b) pay compensation to the country or communities that had the material or the traditional knowledge used. 	

Industrialised countries

Australia ²⁰	<ul style="list-style-type: none"> ▪ TRIPS and CBD are not in conflict ▪ Has reservations about amending TRIPS to facilitate implementation of CBD (disclosure of origin, proof of benefit sharing, etc). 	
European Union ²¹	<ul style="list-style-type: none"> ▪ There should be no lowering of standards of protection ▪ There should be no extension of transition periods ▪ TRIPS and CBD do no conflict ▪ The EU does not favour incorporating complex requirements on disclosure of origin or proof of prior informed consent.. The EU is open to other solutions on sharing information about origins of patented biological material. The EU proposes a self-standing disclosure requirement limited to the geographic origin of genetic resources or TK without it being a criterion for patentability and the non-respect of which would like outside the field of patent law. ▪ The EU sees no reason to amend TRIPS Art. 27.3(b) as it currently stands. ▪ The TRIPS Council is not the place to discuss an international instrument to protect TK. ▪ Providing a farmers' exemption under national patent law can be justified under TRIPS Art. 30, depending on the scope. 	<ul style="list-style-type: none"> ▪ UPOV provide a model of effective <i>sui generis</i> system, but other models may be equally effective. ▪ For any regime to be effective it must clearly define: the subject matter, the conditions for grant (novelty being essential), the procedure to obtain the rights, the rights granted, limitations and exceptions to those rights, and the duration of the rights. It must provide for national treatment and MFN treatment. It must provide enforcement procedures and a deterrent to infringement. ▪ Providing a farmers' exemption under national plant variety protection law can be justified under TRIPS Art. 27.3(b), depending on the scope.

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Japan ²²	<ul style="list-style-type: none"> ▪ There should be no lowering of standards of protection ▪ There are no incongruencies between the requirement to patent microorganisms and the option to prohibit patents on plants and animals. ▪ The ethics of patentability of life are dealt with under Art. 27.2. ▪ TRIPS and CBD are mutual non-exclusive and can be implemented in a non-conflicting way. ▪ A requirement to disclose country of origin of genetic resources or traditional knowledge would upset the current balance of TRIPS. ▪ Benefit sharing should be achieved by contracts, not under TRIPS. 	<ul style="list-style-type: none"> ▪ A system under the UPOV Convention is an effective <i>sui generis</i> system ▪ The proper balance between breeders' rights and farmers' rights will be solved by adopting a UPOV system
Norway ²³	<ul style="list-style-type: none"> ▪ The ethics of patenting life should form an integral part of the review. However, the status quo of Art. 27.3(b) is acceptable. ▪ It should be seriously considered whether a provision on the disclosure of the origin of genetic resources could be inserted into the TRIPS Agreement to ensure a more effective implementation of the CBD. 	<ul style="list-style-type: none"> ▪ There should be flexibility with regard to the implementation of the <i>sui generis</i> option to allow for effective benefit sharing with indigenous and local farming communities. ▪ There is no need for a formal or explicit reference to UPOV to clarify what TRIPS means by an effective system.
Switzerland ²⁴	<ul style="list-style-type: none"> ▪ No lowering of standards of protection ▪ The exclusion from patentability for plants and animals is a balanced provision that takes into accounts members' needs and interests ▪ The Patent Cooperation Treaty and by implication the Patent Law Treaty, both administered by the World Intellectual Property Organisation, should be amended to allow parties, if they wish, to require disclosure of specific genetic resources or traditional knowledge, innovations and practices ▪ Providing a farmers' exemption under national patent law can be justified under TRIPS Art. 30. ▪ WIPO is the forum to discuss the IPR-related issues of traditional knowledge ▪ There is no need to modify TRIPS or CBD to ensure their harmonious implementation 	<ul style="list-style-type: none"> ▪ Agrees with Singapore that the UPOV system is a useful reference for the basic level of protection of any <i>sui generis</i> system for the protection of plant varieties. Nonetheless, also agrees that there may be other <i>sui generis</i> systems that meet the requirements of Art. 27.3(b) besides UPOV and considers the elements listed by the US to be helpful in drawing up such systems.
United States ²⁵	<ul style="list-style-type: none"> ▪ There should no subject matter excluded from patentability ▪ The allegation that TRIPS and CBD are inconsistent should be laid to rest. ▪ Requiring patent applicants to disclose the source of genetic resources or traditional knowledge would be extremely ineffective. ▪ Benefit sharing should be achieved through contracts, not under TRIPS 	<ul style="list-style-type: none"> ▪ The US believes that an effective <i>sui generis</i> system would: apply to all varieties in the plant kingdom; apply to varieties that are new, distinct, uniform and stable; grant rights only to breeders; grant rights of at least 20 year duration; prevent others from commercialising protected varieties without authorisation; etc. ▪ A reference to UPOV 91 should be incorporated into TRIPS

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References:

- ¹ WT/GC/W/302 of 6 August 1999, IP/C/W/163 of 8 November 1999, IP/C/W/206 of 20 September 2000 and IP/C/W/404 of 26 June 2003
- ² WT/GC/W/233 of 5 July 1999
- ³ WT/L/317 of 1 October 1999
- ⁴ WT/GC/W/255 of 16 July 1999, WT/GC/W/294 of 5 August 1999, IP/C/W/161 of 3 November 1999, IP/C/W/195 of 12 July 2000 and IP/C/W/196 of 12 July 2000
- ⁵ JOB(00)/7853 of 11 December 2000
- ⁶ WT/L/326 of 22 October 1999
- ⁷ WT/GC/W/362 of 12 October 1999 and IP/C/W/165 of 3 November 1999
- ⁸ IP/C/W/164 of 29 October 1999 and IP/C/W/228 of 24 November 2000
- ⁹ IP/C/W/166 of 5 November 1999
- ¹⁰ WT/GC/W/282 of 6 August 1999
- ¹¹ ACP Declaration on the Fifth Ministerial Conference of the WTO, 1 August 2003
- ¹² IP/C/W/403 of 4 June 2003 and IP/C/W/420 of 2 March 2004
- ¹³ IP/C/W/356 of 24 June 2002
- ¹⁴ IP/C/W/429 of 21 September 2004
- ¹⁵ WT/GC/W/354 and WT/GC/W/355 of 11 October 1999
- ¹⁶ WT/GC/W/209 and Corr. 1 of 17 June 1999
- ¹⁷ WT/MIN(99)/3 of 2 November 1999
- ¹⁸ WT/GC/W/251 of 13 July 1999 and LDC-II/2003/L.1/Rev.1 of 2 June 2003
- ¹⁹ JOB(99)/3169 and Add. 1
- ²⁰ IP/C/W/310 of 2 October 2001
- ²¹ WT/GC/W/193 of 2 June 1999, IP/C/W/254 of 13 June 2001 and IP/C/W/383 of 17 October 2002
- ²² WT/GC/W/242 of 6 July 1999 and IP/C/W/236 of 11 December 2000
- ²³ IP/C/W/167 of 3 November 1999 and IP/C/W/293 of 29 June 2001
- ²⁴ IP/C/W/284 of 15 June 2001, IP/C/W/400 of 28 May 2003, IP/C/W/400/Rev.1 of 18 June 2003 and IP/C/W/423 of 14 June 2004
- ²⁵ WT/GC/W/115 of 19 November 1998, IP/C/W/162 of 29 October 1999, IP/C/W/209 of 20 September 2000 and IP/C/W/257 of 13 June 2001