ASSESSMENTS ON THE TRIPS AGREEMENT AND THE CONVENTION ON BIOLOGICAL DIVERSITY[*]

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ABSTRACT

Doha Ministerial Declaration paragraph 19 instructs "the Council of WTO for Trade - Related Aspects of Intellectual Property Rights, 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 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". With this instruction the works in WTO regarding the review of "the provisions of Article 27.3(b)", "the relationship between the TRIPS Agreement and CBD", and "the protection of traditional knowledge and folklore" started. It is clear that paragraph 19 has three mandates. This work will examine and describe the work in the TRIPS Council on the relationship between TRIPS and CBD. While examining the relationship, this work will be focused on the main arguments and proposals regarding the issue which are made and presented by the several WTO Members. In the first part of the work, TRIPS agreement and CBD with related articles regarding the issue will be examined. In the second part, general discussions on the issue will be examined. In the third part, more particular disscussions on the issue, especially on the point of prior informed consent, will be focused and different approachs between members will be seen. Lastly this work will seek an answer regarding whether there is any conflict between TRIPS and CBD or possibility of compromise.

Keywords: World Trade Organization (WTO), Trade - Related Aspects of Intellectual Property Rights (TRIPS) Agreement, Convention on Biological Diversity (CBD), The relationship between TRIPS and CBD, Genetic Resources, Traditional Knowledge, Biological Diversity, Prior Inform Consent, Intellectual Property Rights.

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TRIPS ANLAŞMASI İLE BİYOLOJİK ÇEŞİTLİLİK SÖZLEŞMESİ ÜZERİNE DEĞERLENDİRMELER

ÖZET

Doha Bakanlar Deklarasyonu 19. paragrafında, "DTÖ Ticaretle Bağlantılı Fikri Mülkiyet Hakları Anlaşması Konseyi'ne, çalışma programını takip ederken, TRIPS md. 27.3 (b) hükmünün gözden geçirilmesi de dahil, TRIPS Sözleşmesinin 71.1 maddesi uyarınca uygulanmasının gözden geçirilmesi ve işbu deklarasyonun 12. paragrafına göre öngörülen çalışmaları da inceleyerek, TRIPS anlaşması ile Biyolojik Çeşitlilik Sözleşmesi aralarındaki ilişkiyi, geleneksel bilgi ve folklörün korunmasını, ve madde 71.1 uyarınca üyeler tarafından ortaya konan yeni gelişmeleri inceleme talimatı" vermiştir. Bu talimatla birlikte, "TRIPS md. 27.3 (b) hükmünün", "TRIPS anlaşması ile BÇS aralarındaki ilişkinin" ve "geleneksel bilgi ve folklörün korunması" başlıklarının gözden geçirilmesi süreci başlamıştır. Paragraf 19 ile üç ana görev verilmiş olduğu açıktır. İş bu çalışma TRIPS Konseyi içinde yer bulan TRIPS ile BÇS arasındaki ilişkiye dair çalışmaları inceleyip, tanımlayacaktır. Bu ilişkiyi incelerken, konu hakkında çok sayıda DTÖ üyesi tarafından yapılan ve sunulan, önemli tartışma ve önerilere odaklanılacaktır. İlk bölümde TRIPS ve BÇS, konu ile ilgili maddeleri ile birlikte incelenecektir. İkinci bölümde konu hakkında genel tartışmalar incelenecektir. Üçüncü bölümde özellikle önceden izin alınma konusu dahil, daha belirgin tartışmalara odaklanılacak ve üyeler arasındaki farklı yaklaşımlar görülebilecektir. İş bu çalışmada son olarak, TRIPS ile BÇS arasında bir çatışma veya uzlaşma ihtimali olup olmadığı sorusuna cevap aranılacaktır.

Anahtar Kelimeler: Dünya Ticaret Örgütü (DTÖ), Ticaretle Bağlantılı Fikri Mülkiyet Hakları Anlaşması (TRIPS) Anlaşması, Biyolojik Çeşitlilik Sözleşmesi (BÇS), TRIPS ile BÇS arasındaki ilişki, Genetik Kaynaklar, Geleneksel Bilgi, Biyolojik Çeşitlilik, Önceden İzin Alma, Fikri Mülkiyet Hakları

INTRODUCTION

Doha Ministerial Declaration[1] paragraph (para.) 19 instructs "the Council of World Trade Organization (WTO) for Trade - Related Aspects of Intellectual Property Rights (TRIPS), in pursuing its work programme including under the review of Article (Art.) 27.3(b), the review of the implementation of the TRIPS Agreement under Art. 71.1 and the work foreseen pursuant to para. 12 of this Declaration, to examine, *inter alia,* the relationship between TRIPS Agreement and the Convention on Biological Diversity (CBD), the protection of traditional knowledge (TK) and folklore, and other relevant new developments raised by Members pursuant to Art. 71.1". With this instruction the works in WTO regarding "the review of the provisions of Art. 27.3(b)", "the relationship between the TRIPS Agreement and CBD", and "the protection of TK and folklore" started.

It is clear that para. 19 has three mandates. This work will deal with one which is about the relationship between TRIPS Agreement[2] and CBD. The instruction to review of the relation between the CBD and the TRIPS Agreement opened a door for deeper discussions regarding the issue[3]. Since this work was given to the WTO Council for TRIPS (Council), there had numerous discussion on this issue. Several proposals which were given by some developed and developing – lesser developed countries were discussed within the Council.

Although it is going to be seen in this work that there are several different points discussed in the Council, the examination of TRIPS Agreement (TRIPS) - CBD relationship seems to focus on one important question in two aspect: "Whether and how patent aplicants should be obliged to disclose the origin or source of genetic resources and TK used in inventions and provide evidence of prior informed consent and benefit sharing?"[4]

This work will examine and describe the work in the Council on the relationship between TRIPS and CBD. While examining the relationship, this work will be focused on the main arguments and proposals regarding the issue which are made and presented by the several WTO Members. Also in this work

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1 **WTO** (2001), The Doha Ministerial Declaration, Ministerial Conference Fourth Session, Doha 9 - 14 November,WT/MIN(01)/DEC/1.<https://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm> l.a.d.15.03.2019.

2 In this work, instead of the term "TRIPS Agreement" only "TRIPS" may be used.

3 **Eugui, David Vivas** (2002), Issues Linked To The Convention On Biological Diversity In The WTO Negotiations: Implementing Doha Mandates, July, Geneva, Centre For International Environmental Law (CIEL), p. 6, < http://www.ciel.org/Publications/Doha_CBD-10oct02.pdf > l.a.d. 18.03.2019.

4 **Chouchena – Rojas, Martha/Muller, Manuel Ruiz/Vivas, David/Winkler, Sebastian** (Editors) (2005), Disclosure Requirements: Ensuring Mutual Supportiveness Between The WTO TRIPS Agreement and the CBD, IUCN, Gland, Switzerland and Cambridge, UK and ICTSD, Geneva, Switzerland, p. 9, <http://www.ciel.org/Publications/DisclosureRequirements_Nov2005.pdf > l.a.d. 15.03.2019.

TRIPS agreement and CBD with related articles will be examined in general.

In the first part of the work TRIPS agreement and CBD with related articles with the issue will be examined. In the second part general discussions on the issue will be examined. In the third part, more particular discussions on the issue, especially on the point of prior informed consent, will be focused and and different approachs between members will be seen. Lastly this work will seek an answer regarding whether there is any conflict between TRIPS and CBD or possibility of compromise.

I. AGREEMENTS

A. TRIPS AGREEMENT

The TRIPS Agreement is now the most important international agreement providing the standardization of national intellectual property rights (IPRs) regimes[5]. TRIPS is the first comprehensive, multilateral, trade related intellectual property (IP) agreement[6]. TRIPS is the result of the Uruguay Round of trade negotiations of the General Agreement on Tariffs and Trade (GATT), which established a new intergovernmental organization known as the WTO[7].

TRIPS Agreement provides specific standards for the availability, scope and use of IPRs, sets forth the minimum level of IPRs and adequate patent and trade secret protection[8]. In briefly, it specifies standards for the IP laws of the WTO members.[9] TRIPS agreement is binding on all members of the WTO[10]. It should be mentioned that while the standards in TRIPS provide the high standards of IP

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5 **Dutfield, Graham** (2004), Intellectual Property Biogenetic Resources and Traditional Knowledge, London, Earthscan, p. 25.

6 **Keating, Dominic** (2005), "Access to Genetic Resources and Equitable Benefit Sharing through a New Disclosure Requirement in the Patent System: An Issue in Search of a Forum", Journal of Patent & Trademark Office Society, July, V: 87, p. 532; **Jeffery, Michael I.** (2002), "Bioprospecting: Access to Genetic Resources and Benefit-Sharing under the Convention on Biodiversity and the Bonn Guidelines", Singapore Journal of International & Comparative Law, V: 2002, I: 6, p. 770.

7 **Dutfield,** p. 25; **Carr, Jonathan** (2008), "Agreements that Divide: Trips vs. CBD and Proposals for Mandatory Disclosure of Source and Origin of Genetic Resources in Patent Applications", Journal of Transnational Law & Policy, V: 18, I: 1, Fall, p. 135; **McManis, Charles R.** (2003)**,** "Intellectual Property, Genetic Resources and Traditional Knowledge Protection: Thinking Globally, Acting Locally", Cardozo Journal of International & Comparative Law, V: 11, p. 547.

8 **McManis**, **Charles R.** (1998), "The Interface between International Intellectual Property and Environmental Protection: Biodiversity and Biotechnology", Washington University Law Quarterly, V: 76, I: 1, p. 266, (1998); **Ewens, Lara E.** (2000), "Seed Wars: Biotechnology, Intellectual Property, and the Quest for High Yield Seeds", Boston College International & Comparative Law Review, V: 23, I: 2, p. 301; **Jeffery**, p. 771; **Carr**, p. 135.

9 **Linarelli, John** (2002), "Trade-Related Aspects of Intellectual Property Rights and Biotechnology: European Aspects", Singapore Journal of International &Comparative Law, V: 2002, I: 6, p. 407.

10 **Carr**, p. 135.

protection of developed countries, although under the transition provisions of the Agreement, developing countries must meet the same standards as developed countries[11].

TRIPS Agreement has the objective of the protection and enforcement of IPRs. According to TRIPS Art. 7, this objective should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.

Art. 27 is under the title of 'patentable subject matter'. This article constitutes by 3 paragraphs and formulates the how and whether the subject matter is patentable. According to the first para. of Art. 27, which deals with patentable subject matter, "patents shall be available for any inventions, whether products or processes, in all fields of technology, provided that they are new, involve an inventive step and are capable of industrial application".

Art. 27 also permits certain exclusions. Para. 2 states as follows: "Members may *exclude* from patentability inventions, the prevention within their territory of the commercial exploitation of *which is necessary to protect ordre public or morality*, including to protect human, animal or plant life or health or to avoid serious prejudice to the environment, provided that such exclusion is not made merely because the exploitation is prohibited by their law". The terms '*ordre public*' and 'morality' are not defined in TRIPS. If the term '*ordre public*' is interpreted in wide sense, it is said that the term may encompass the matters such, good government, the administration of justice, public services, national economic policy and the proper conduct of affairs in the general interest of the state and society[12]. However, it has been maintained that to prevent some patents such as 'life forms' become outlawed by TRIPS, therefore applying the terms '*ordre public* and morality' shall be narrowly and on a case-by-case[13].

It is stated that Art. 27.1 and 27.2 provide the area of biotechnology and plant varieties IP protection, and the term "all fields of technology" is interpreted to include biotechnology[14]. Linarelli[15] correctly pointed out that 'TRIPS includes provisions on the patentability of rights in biotechnology, and on establishing *sui generis* rights in biotechnology and the key TRIPS provision relevant to IPRs in

11 **Linarelli**, p. 411.
12 **Dutfield,** p. 28.
13 **Dutfield,** p. 28.
14 **Ewens**, p. 301.
15 **Linarelli**, p. 411.

biotechnology is Art. 27'. Rosendal[16] also stated that the TRIPS Agreement standardizes the way IPRs are protected around the world and to strengthen this harmonization process in all technological fields including biotechnology. In conclusion, TRIPS provides ownership – patenting rights in biotechnology[17] and permits genetic resources to be patentable[18].

Art. 27, para. 3 states that "members may also exclude from patentability: (a) diagnostic, therapeutic and surgical methods for the treatment of humans or animals; (b) plants and animals *other than micro-organisms*, and essentially biological processes for the production of plants or animals other than non-biological and microbiological processes. However, Members shall provide for the protection of plant varieties either by patents or by an effective *sui generis* system or by any combination thereof. The provisions of this para. *shall be reviewed four years after* the entry into force of the WTO Agreement". Para. 3 is a kind of facultative paragraph. According to this para., diagnostic, therapeutic and surgical methods for the treatment of humans or animals, the products, plants and animals and essentially biological processes for the production of plants or animals may be excluded from patentability. But micro - organisms and non - biological and microbiological processes are available for patents[19]. Microorganism's definition is the one of the most controversial point. It is said that while few biologists would dispute the definition of micro - organism as 'any of various microscopic organisms, including algae, bacteria, fungi, protozoa, and viruses; European, US and Japanese patent offices have interpreted 'micro-organism' in such a way as to include plant and animal cells[20].

It is indicated that regarding the IPRs, most probably to affect the objectives of the CBD is the area of patents[21]. There are some controversial points in Art. 27, para. 3. In general, there are some concerns that TRIPS rules regarding patented material may conflict with rights that are provided to states in the form of national sovereignty over the genetic resources under CBD[22]. It is properly stated that

[16] **Rosendal, G. Kristin** (2006), "The Convention on Biological Diversity: Tensions with the WTO TRIPS Agreement over Access to Genetic Resources and the Sharing of Benefits", Oberthür, Sebastian, Gehring, Thomas (Editors), Institutional Interaction in Global Environmental Governance, Synergy and Conflict among International and EU Policies, Cambridge, The MIT Press, p. 87.

[17] **Linarelli**, p. 407 and 411.

[18] **Dutfield, Graham** (2002), "Sharing The Benefits Of Biodiversity Is There A Role For Patent System?", The Journal of World Intellectual Property, V: 5, I: 6, November, p. 903, (2002).

[19] **Jeffery**, p. 772.

[20] **Dutfield,** p. 29.

[21] **Jeffery**, p. 772.

[22] **Laxman, Lekha/Ansari, Abdul Haseeb** (2012), "The Interface Between TRIPS and CBD: Efforts Towards Harmonization", Journal of International Trade Law and Policy, V: 11, I: 2, p. 110.

especially 'article 27.3 (b) is open to different interpretations and controversial'[23]. It may be correctly asserted that the centre of debate between developed and developing – lesser developed world root in the Art. 27[24]. There are some legitimate concerns especially the effects of IP protection on biological diversity[25]. It has been considered by some that IP protection has negative impact on biological diversity[26]. It is argued by one commentator[27] that developing world considers that on the one hand developed countries engages freely in gene piracy on the other hand simultaneously demands from developing countries to cease pirating the industrialized world's IP. In our view, Art. 27.3 is still open to discussion and has not reviewed properly as the last sentence of paragraph orders.

B. CONVENTION ON BIOLOGICAL DIVERSITY

CBD is an international agreement for the conservation of biological diversity[28]. CBD recognises TK, innovations and practices relevant to the conservation of biological diversity and the sustainable use of its components. CBD came into force in 1993 and now has 196 parties[29]. It is considered that, while conservation of biodiversity is the most leading element of the CBD, sustainable use is the second and lastly access to genetic resources and equitable benefit sharing which is named as access and benefit sharing (ABS) is the third[30]. The last element is considered to be the most related element with the IPRs[31]. Article 15.7 of CBD mandates that use of biological resources be fair and equitable[32]. On the one hand CBD affirms that the conservation of biological diversity is a common concern of humankind, on the other hand CBD declared that States have sovereign rights over their own biological resources[33].

CBD has three objectives[34]. These are listed in the first article. According to CBD Art. 1 these are, conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources. The objectives include by appropriate access to genetic resources and by appropriate transfer of relevant technologies, taking into

[23] **Dutfield,** p. 29; **Linarelli**, p. 413.
[24] **Carr**, p. 137.
[25] **McManis** (1998), p. 275.
[26] **McManis** (1998), p. 275.
[27] See **McManis** (1998), p. 268.
[28] **Eugui**, p. 1.
[29] <https://www.cbd.int/information/parties.shtml> l.a.d. 18.03.2019.
[30] **Keating**, p. 529
[31] **Dutfield** (2002), p. 899.
[32] **Carr**, p. 133.
[33] See Preamble of CBD.
[34] **Dutfield** (2002), p. 899, **Eugui**, at. 1; **Rosendal**, p. 80.

account all rights over those resources and to technologies, and by appropriate funding. These objectives are very important for the developing countries[35]. CBD aims to regulate biodiversity and the use of biological resources[36].

Bearing in mind, CBD recognises the TK of indigenous and local communities. TK plays an important role in many industries such as pharmaceuticals, botanical medicines, cosmetics and toiletries, agriculture, and biological pesticides[37]. It is correctly pointed out by Dutfield[38] that "while TK is used as an input into modern industries, traditional peoples and communities are responsible for the discovery, development, and preservation of a tremendous range of medicinal plants, health - giving herbal formulations, and agricultural and forest products that are traded internationally and generate considerable economic value".

There are some terms as 'biological diversity', 'genetic resources', 'biorespecting' 'genetic material', need to be explained, for better understanding of CBD. Biological diversity is defining in CBD Art. 2 as "the variability among living organisms from all sources including, *inter alia*, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part; this includes diversity within species, between species and of ecosystems". Biological diversity embodies the variability among all living organisms, including diversity within species (genetic diversity), among species, and among ecosystems[39]. It is not a secret that while rich biodiversity is located in developing countries of the South, biotechnology to exploit the genetic resources is located in the North[40].

Genetic resources are defining in CBD Art. 2, as 'genetic material of actual or potential value'. It is stated that genetic resource is understood to mean the genetic material of the wide variety of life on the earth[41]. Genetic resources have long been important raw materials in agriculture and medicine[42]. The growing biotechnology industry currently utilises genetic resources to develop new and improved drugs, crop varieties, etc.[43]. Among USA sectors, it is said that the "biotechnology" is the sixth profitable sector in 2016 with a 24.6% net profit margin[44].

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35 **Eugui**, p. 1.
36 **Carr**, p. 133.
37 **Dutfield, Graham** (2001), "TRIPS - Related Aspects of Traditional Knowledge, Case Western Reserve Journal of International Law", V: 33, I: 2, p. 243, (2001).
38 **Dutfield** (2001), p. 243.
39 **Rosendal**, p. 79.
40 **Jeffery**, p. 758 -759.
41 **Keating**, p. 526
42 **Jeffery**, p. 758.
43 **Jeffery**, p. 747 – 748.
44 **Chen, Lyan**, Forbes, "The Most Profitable Industries in 2016", <https://www.forbes.com/sites/liyanche

The term "bioprospecting" is defining as 'the exploration of biodiversity for potentially valuable genetic and biochemical resource"[45]. How to effectively regulate bioprospecting seems a real problem, as because given the nature of the activity, the subject is essentially related with the regulation of access to genetic resources[46]. Bioprospecting may yield benefits for diseases, but also it may yield detriments such as biopiracy[47].

According to CBD Art. 2, genetic material means any material of plant, animal, microbial or other origin containing functional units of heredity.

Article 3 establishes a general principle[48] that States have the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction. Art. 8.j stated that each Contracting Party shall, as far as possible and as appropriate; subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practice. Article 8.j provides for conservation on both biological resources and indigenous knowledge and practices[49].

In the preamble of CBD, members state that they recognise the close and traditional dependence of many indigenous and local communities embodying traditional lifestyles on biological resources, and the desirability of sharing equitably benefits arising from the use of TK, innovations and practices relevant to the conservation of biological diversity and the sustainable use of its components. TK is defined briefly as "the knowledge held by traditional peoples and communities"[50]. It is stated that TK also usually defines as "an intellectual value added over the genetic and biological resources existing in nature"[51].

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n/2015/12/21/the-most-profitable-industries-in-2016/#51e4d3b75716 > l.a.d. 19/02/2019.

45 **Jeffery**, p. 748.

46 **Jeffery**, p. 748 – 749.

47 **Tejera, Valentina (**1999), "Tripping over Property Rights: Is It Possible to Reconcile the Convention on Biological Diversity with Article 27 of the TRIPs Agreement", New England Law Review, V: 33, I: 4, Summer, p. 971.

48 **McManis** (1998), p. 260.

49 **Tejera**, p. 973.

50 **Dutfield** (2001), p. 240.

51 **Eugui**, p. 7.

CBD Articles 15 and 16 are the provisions most relevant to IPRs[52]. Art. 15 legitimises the sovereign rights of the States over their natural resources and their authority to determine access to genetic resources[53]. According to CBD article 15.2, while each Contracting Party shall endeavour to create conditions to facilitate access to genetic resources for environmentally sound uses by other Contracting Parties and not to impose restrictions that run counter to the objectives of this Convention, access may only be on mutually agreed terms and subject to prior informed consent of the Contracting Party providing such resources, unless otherwise determined by that Party. This article deals with access of genetic resources and provides national governments to have an authority and national control to determine and regulate the access to its genetic resources[54]. It should be underscored that Article 15 permits the access only be on mutually agreed terms and subject to prior informed consent of the Contracting Party. But parties may agree on the contrary. Under the CBD, members may condition access to their genetic resources on informed consent and other terms, thus, it is maintained that this provides the potential for capturing most aspects of bioprospecting within enforceable and bilateral agreements[55]. It is also presumed that this authority gives countries to gain more of the benefits from industrial use of their biogenetic resources, at the same time they may achieve to conserve and sustain their biodiversity[56]. On the one hand Art.15 provides the national control over its genetic resources, on the other hand this national control is limited by the obligation to facilitate access by the other Contracting parties and not to impose restrictions that run counter to the CBD objectives[57].

Eugui[58] correctly argued that CBD Art.15 is designed to establish an interim "consistency examination" in the patent procedure and this "consistency examination" becomes in practice, a new requirement to patentability. This "consistency examination" includes recognition of sovereign rights over genetic resources; access based on prior informed consent; access and benefit sharing based on mutually agreed terms; joint research activities over genetic resources[59].

Art. 16 details the appropriate access to, and transfer of, technology and requires contracting parties to establish a framework within which to provide and/or facilitate access to and transfer of technology under fair and most favourable

52 **Linarelli**, p. 423.
53 **Dutfield** (2002), p. 902.
54 **Dutfield,** p. 38; **Jeffery**, p. 761 – 762; **Linarelli**, p. 423.
55 **Jeffery**, p. 761.
56 **Dutfield,** p. 38.
57 **Jeffery**, p. 762.
58 **Eugui**, p. 3.
59 **Eugui**, p. 3.

terms[60]. This article regulates the transfer of technological innovation to the countries from which the genetic resources are obtained[61]. Access to and transfer of technology include biotechnology among contracting parties are essential elements for the attainment of the objectives of the CBD (Art. 16.1). Each According to Art. 16.1, each contracting party shall recognize that technology includes biotechnology. Therefore it should be emphasized that the term 'technology' used in CBD includes the term 'biotechnology'. Rather, biotechnology is the only directly referred technology in the article[62]. That is to say, by wording of this subarticle CBD includes patentable biotechnology[63]. Article 16 is evaluated as the most related article with the interface between IP and environmental protection[64]. Parties undertake to provide and/or facilitate access for and transfer to other Contracting Parties of technologies that are relevant to the conservation and sustainable use of biological diversity or make use of genetic resources (Article 16.1). Access to and transfer of technology to developing countries must be provided and/or facilitated under fair and most favourable terms (Article 16.2). In the case of technology subject to patents and other IPRs, such access and transfer shall be provided on terms which recognise and are consistent with the adequate and effective protection of intellectual property rights (Article 16.2). This wording seems consistent with the wording of TRIPS Agreement and establish a link with it[65].

Art. 16.3 states that each Contracting Party shall take legislative, administrative or policy measures, as appropriate, with the aim that contracting parties, in particular those that are developing countries, which provide genetic resources are provided access to and transfer of technology which makes use of those resources, on mutually agreed terms, including technology protected by patents and other intellectual property rights. It may be asserted that while CBD's aim is to promote the sustainable use of natural resources, at the same time CBD regulates the application of IPRs on the biotechnological industry[66].

According to Article 16.5 the contracting parties, recognizing that patents and other intellectual property rights may have an influence on the implementation of this convention, shall cooperate in this regard subject to national legislation and international law in order to ensure that such rights are supportive of and do not run counter to its objectives. This subparagraph requires

60 **McManis** (1998), p. 260; **Jeffery**, p. 765; **Dutfield** (2002), p. 902.
61 **Linarelli**, p. 423.
62 **Dutfield** (2002), p. 902.
63 **Carr**, p. 134.
64 **McManis** (1998), p. 260.
65 **Dutfield,** p. 38; **Dutfield** (2002), p. 903.
66 **Carr**, p. 134.

from the parties to cooperate to ensure that patents and other IPRs 'are supportive of and do not run counter to' the CBD's objectives[67]. Subparagraph 5 is understood that IPRs should be revised if they run counter to the aims of the treaty[68].

It is stated that the wording of the subparagraph 5 results in considerable disagreement.[69] It is quated[70] that USA concerned because of the language of Article 16[71]. According to USA, CBD focuses on IPRs "as a constraint to the transfer of technology rather than as a prerequisite"[72]. USA President George Bush considered that the CBD is not the best interests of USA, also would impair American IPRs and refuse to sign the CBD[73]. It is stated that the reason to refuse to sign the treaty is the unbalancing provisions regarding IP and technology transfer[74]. Although USA later in the Clinton administration signed the CBD (in 04/06/1993), but has not ratified it yet[75]. Other than Holy See, USA only state which does not ratified the CBD in the world[76].

II. GENERAL VIEWS IN THE WORK OF COUNCIL BY MEMBERS

While examining the general views on the issue of relationship between TRIPS and CBD in the Council, it will be noticed that as mentioned in one work "while developed countries have found no inconcistencies between two treaties several developing countries have indicated the need to reconcile them, possible by means of revision of TRIPS"[77]. There has not always certain differences between developed and developing countries views on the issue. For example it is going to be seen that European and Switzerland proposals are very much in same line with those several developing countries proposals.

Regarding relationship between two treaties, as it has been said in one WTO document[78] that there are two general issues discussing in the Council;

67 **Dutfield,** p. 38.
68 **Ewens**, p. 300.
69 **Dutfield,** p. 38; **Dutfield** (2002), p. 903.
70 See **McManis** (1998), p. 256 and 262.
71 See also **Ewens**, p. 299.
72 See **McManis** (1998), p. 256 and 262.
73 **Dutfield,** at. 38, **McManis** (1998), p. 256; **Dutfield** (2002), p. 903. See also <https://defenders.org/sites/default/files/publications/the_u.s._and_the_convention_on_biological_diversity.pdf> l.a.d. 18.03.2019.
74 **Carr**, p. 134.
75 See the details in <https://defenders.org/sites/default/files/publications/the_u.s._and_the_convention_on_biological_diversity.pdf> l.a.d. 18.03.2019. See also **McManis** (1998), p. 256 – 257 and **Carr**, p. 135.
76 See <https://www.cbd.int/information/parties.shtml > l.a.d. 18.03.2019.
77 **Roffe, Pedro / Melendez-Ortiz, Ricardo / Bellmann, Christophe / Chamay, Marie and others** (2005), Resource Book On TRIPS and Development: An Authoritative And Practical Guide To The TRIPS Agreement (UNCTAD - ICTSD capacity building Project on IPR's), 1st Edt., USA, Cambridge University Press, p. 397, <http://www.iprsonline.org/unctadictsd/ResourceBookIndex.htm> l.a.d. 18.03.2019.
78 **TRIPS Council Secretariat**, "The relationship between the TRIPS Agreement and the Convention on

firstly whether or not there is a conflict between two treaties, secondly whether there is anything to be done to keep mutual supportiveness the two treaty. On these two issues there are two certain different ideas and between them some other ideas in the Council[79]. First group of countries which generally USA leading this group believe that "the TRIPS Agreement and CBD have different, non - conflicting objectives and purposes and deal with different subject - matter and should be implemented in a mutually supportive manner"[80]. This group sees no conflict between two agreement. Therefore, this group of members considers no change is required in TRIPS nor in CBD[81].

Opposing to that group, in one view it is belived that there is a conflict between two treaties. According to their view[82], TRIPS provides certain genetic material to be patentable and do not prevent the patenting of others. So this provides for the appropration of such genetic resources by private parties which is inconsistent with CBD and also this group claims that TRIPS does not provide prior informed consent and benefit sharing as providing in CBD. This group propose an amendment[83] in Article 27.3(b) of the TRIPS to oblige all Members to make life forms and parts thereof non-patentable.

In conclusion, it can be said as pointed out in one work that "on the one hand, the strong interests of some developed countries in ensuring protection of biotechnological innovations and on the other, the important differences existing among such countries with regard to the scope of protection, as well as the concerns of many developing countries about the patentability of life forms"[84]. As it is clear that regarding the issue, it is the interests that the make members apart.

As it has been mentioned above between this two opposing view, there is also another view[85] which asserts that while there is no inherent conflict between two agreements, there is a need for enhancing the international action for mutual supportiveness between two agreement. Especially they have proposals to ensure the disclosing the source and country of origin or TK used in the inventions.

Biological Diversity –Summary of Issues raised and points made", (TRIPS Council Secretariat) (IP/C/W/368/Rev.1, February 2006)p.3,<http://www.wto.org/english/tratop_e/trips_e/ipcw368_e.pdf> l.a.d. 18.03.2019.

79 See also **Carr**, p. 138 – 139.

80 **TRIPS Council Secretariat**, p. 4, Australia, IP/C/M/47, para. 55, Canada, IP/C/M/47, para. 66, Japan, IP/C/M/47, para. 69, United States, IP/C/W/434, IP/C/W/257, IP/C/W/209, IP/C/W/162, IP/C/M/43, para. 55, IP/C/M/42, para. 109. All the documents related with WTO members can be found at (Log in Documents online search facility <https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S001.aspx,> l.a.d. 18.03.2019.

81 United States IP/C/M/46 para. 23,

82 **TRIPS Council Secretariat**, p. 7- 8; African Group, IP/C/W/404, IP/C/W/206; Brazil, IP/C/W/228; India, IP/C/W/198.

83 **TRIPS Council Secretariat**, p. 8.

84 **Roffe/Melendez-Ortiz/Bellmann and others**, p. 388.

85 **TRIPS Council Secretariat**, p. 4 and 6.

Another important argument in the Council' work is on the issue of which forum is the appropriate forum. One view considers that "World Intellectual Property Organization (WIPO) provides the more appropriate forum since it has more technical expertise on these issues"[86]. On the other hand, another view is that "solutions to the concerns raised about the TRIPS Agreement should be found in the WTO, and "Forum Shopping" should be avoided"[87]. As it has been correctly stated that "it is the only WTO, which combines global trade rules with worldwide IP protection, that can ensure better market access and conditions for commercially valuable assets resulting from a TK – related production process"[88]. In our view that the most appropriate forum can be WTO because of it's global function.

III. DIFFERENT APPROACHS ON THE ISSUE IN THE COUNCIL BY MEMBERS

As it has been mentioned that there are serious concerns on TRIPS to not provide sufficient provisions as CBD provides such as obligation of prior informed consent which is the one of the core element of CBD. On the issue of the prior informed consent and benefit sharing, there are two main approaches which are called[89] "National-Based Approach" and "Disclosure Approach".

A. NATIONAL - BASED APPROACH

This approach[90] is mostly developed countries' approach which can be named also "contract - based approach". This approach also, because of their given importance to patent system, is called "patent - based approach"[91]. According to this view best solution is national solutions which are outside the IP system. Being compatible with CBD, members should pass national legislation requirements for the conclusion of contracts betweeen authorities competent to grant access to genetic resources. They believe that prior informed consent can only be achieved with contractual arrangements and in this view members can impose civil or criminal law penalties to prevent reaching the sources without permit. Points of contact can be selected inside the government or indigenous community and

86 Canada, Australia, IP/C/M/46, paras. 54 and 64.
87 Brazil, IP/C/M/47 paras. 32 and 86.
88 **Cottier, Thomas/Panizzon, Marion (**2008), "Legal Perspective On Traditional Knowledge: The Case For Intellectual Property Protection", Journal of Intenational Economic Law, V: 7, I: 2, February, p. 399 and p. 376, see footnote 21.
89 **TRIPS Council Secretariat**, p. 13.
90 See United States, IP/C/W/434 and 257; see for all approach **TRIPS Council Secretariat**, p. 14 – 27.
91 **Roffe/Melendez-Ortiz/Bellmann and others**, p. 411

within the contract a party could require the researcher or other party accessing the genetic resources and traditional knowledge to report regularly to the point of contact.

According to this view, this approach has many advantages such as; firstly "contractual system could ensure the sharing of benefits arising from the commercialization of the results of research and development based on materials to which access had been provided, whether or not these results were the subject of a patent and contracts could specify how disputes that might arise under any contract would be handled and in what jurisdiction"[92]. Secondly "the contract-based system was easily adaptable to a country's particular legal system and provided the flexibility to protect TK and genetic resources without undermining the economic development incentives of strong IP protection"[93]. and lastly "it is based on existing contract law, there is no need to wait so much"[94].

Opposing to this view, it has been said that "this approach can not be only solution for erroneously granted patents and transboundary use of genetic resources and traditional knowledge"[95],also "unequal bargaining powers is a problem in this system" [96] and "contracts could not substitute such a system because the greater majority of owners of genetic resources were not aware of the benefits of their resources"[97]. And lastly "national - based system is costly and fragmented"[98].

B. DISCLOSURE APPROACH

There are three kind of 'Disclosure Approach' proposal in the Council and named respectively "The TRIPS Disclosure Proposal", "The Patent Cooperation Treaty (PCT) Disclosure Proposal" and " The Mandatory Proposal".

1. The TRIPS Disclosure Proposal

Proponents of the TRIPS disclosure proposal are developing countries, whose biological resources are diverse[99]. According to this approach, TRIPS must be amended[100] to ensure the requirements of following informations as a condition of acquiring patent rights; firstly "evidence of the source and country of

92 IP/C/M/37/Add.1 para 235.
93 IP/C/M/47, para. 44
94 IP/C/M/37/Add.1, para 234
95 African Group IP/C/W/404; Brazil and India, IP/C/W/443.
96 India, IP/C/M/46, para. 38.
97 Kenya, IP/C/M/46, para. 67.
98 Brazil and India, IP/C/W/443.
99 **Carr**, p. 139.
100 See **TRIPS Council Secretariat**, p. 28.

origin of the biological resource and of the TK used in the invention", secondly "evidence of prior informed consent from the authorities under the relevant national regime" and lastly "evidence of fair and equitable benefit sharing under the relevant regime". It is said that "the obligation to provide evidence of prior informed consent would be discharged by a declaration in the patent application accompanied, where relevant, with the evidence of prior informed consent, for example in the form of a certificate issued by a relevant national authority"[101].

As correctly it has been pointed out that "this proposal is seeking to incorporate disclosure requirements in the TRIPS Agreement as a mechanism that allows the verification that any genetic resource or associated TK have been obtained in a legitimate manner and that the legal requirements of the country of origin have been fulfilled as an integral part of the patent filing process"[102]. It has been argued that because of the TRIPS agreement is broadly recognised as the most important IP instrument, it is natural to seek an amendment in it to faciliate coherence with CBD[103].

2. The PCT Disclosure Proposal

This proposal presented to the Council by Switzerland and also to the WIPO[104]. This approach proposes an amenmend in PCT to explicitly enable the national patent legislation of contracting parties to the PCT, to require the declaration of the source of genetic resources and TK in patent applications, if an invention is directly based on such resource or knowledge. This is a permissive requirements, namely it is up to members to admit, but when it is incorporated, it would be obligatory. It is said, before that, this proposal requires a declaration of the source of genetic resources and TK. According to Swiss proposal the source

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101 India, IP/C/M/46, para. 39.

102 **Eugui**, **David Vivas/Ruiz, Manuel**, "Toward An Effective Disclosure Mechanism: Justification, Scope and Legal Effects", Chouchena – Rojas, Martha/Muller, Manuel Ruiz/Vivas, David/Winkler, Sebastian (Editors) (2005), Disclosure Requirements: Ensuring Mutual Supportiveness Between The WTO TRIPS Agreement and the CBD, IUCN, Gland, Switzerland and Cambridge, UK and ICTSD, Geneva, Switzerland, <http://www.ciel.org/Publications/DisclosureRequirements_Nov2005.pdf > l.a.d. 15.03.2019., n. 4, above, p. 24.

103 Ibid., p. 25.

104 See WIPO, PCT/R/WG/4/13, <https://www.wipo.int/edocs/mdocs/pct/en/pct_r_wg_4/pct_r_wg_4_13.pdf > l.a.d. 18.03.2019, WIPO, PCT/R/WG/5/11/Rev., <https://www.wipo.int/edocs/mdocs/pct/en/pct_r_wg_5/pct_r_wg_5_11_rev.pdf> l.a.d. 18.03.2019. See also, **Addor, Felix**, "Switzerland's Proposals For Disclosure Of The Source Of Genetic Resources And Traditional Knowledge In Patent Applications; And Views On Prior Informed Consent And Benefit Sharing In Patent Applications", Chouchena – Rojas, Martha/Muller, Manuel Ruiz/Vivas, David/Winkler, Sebastian (Editors) (2005), Disclosure Requirements: Ensuring Mutual Supportiveness Between The WTO TRIPS Agreement and the CBD, IUCN, Gland, Switzerland and Cambridge, UK and ICTSD, Geneva, Switzerland, <http://www.ciel.org/Publications/DisclosureRequirements_Nov2005.pdf > l.a.d. 15.03.2019, n. 4, above, p. 35 – 40; Switzerland, IP/C/W/433 and 423 and **TRIPS Council Secretariat**, p. 31 – 33.

should be understood in its broadest sense possible. Bearing in mind, the proposal requires that the invention must be directly based on a specific resource to which the inventor has had access. That is to say, if there is a TK, inventor must consciously derive the invention from this TK.

To support this proposal, it is argued that "The PCT proposal has two advantages over any TRIPS based approach, firstly, in contrast to TRIPS, amendment in PCT can be carried out in a very short period, secondly, an amendmend of PCT can be decided by a three - quarters majority of the PCT's Contracting Parties, whereas TRIPS needs consensus to be amended"[105].

3. The Mandatory Disclosure Proposal

This proposal was presented by European Community (EC) (and its Member States) firstly to the WIPO[106], later to the Council[107]. EC, from the very first discussions within the council, emphasized on a requirement that should be applied to all patent applications with regard to genetic resources for which they have granted access[108].

While examining this proposal, it must be borne in mind that EC does not see any conflict between TRIPS and CBD[109], *inter alia,* EC maintains that "they have different objectives and do not deal with the same subject matter and there is nothing in the provisions of either agreement that would prevent a country from fulfilling its obligations under both"[110].

EC proposed that "the information to be provided by patent applicants should be limited to information on the geographic origin of genetic resources or TK used in the invention which they know, or have reason to know and each country would accept as an obligation to require all patent applicants to disclose this information"[111]. Also EC holds the opinion that such a disclosure requirement should not act, *de facto* or *de jure*, as an additional formal or substantial patentability criterion and 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[112].

EC (and its Member States) believes that the disclosure obligation should be

105 **Addor**, n. 4 above, p. 39 – 40.
106 See WIPO/GRTKF/IC/8/11, (17 May 2005), annex p. 1 <https://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_8/wipo_grtkf_ic_8_11.pdf> l.a.d. 18.03.2019.
107 See EC, IP/C/M/47, para. 58, EC, IP/C/M/49, para. 124.
108 See IP/C/W/383, p. 2 and para. 51.
109 EC, IP/C/W/383, p. 2.
110 EC, IP/C/W/383, para. 35.
111 EC, IP/C/W/383, para. 54.
112 EC, IP/C/W/383, para. 55.

mandatory[113]. According to EC, the disclosure requirement should be implemented in a legally binding and universal manner[114]. EC proposed that "the binding disclosure requirement should be introduced to disclose the country of origin or source of genetic resources and this mandatory requirement should be applied to all patent applications, which implied that it should be implemented in a legally binding and universal manner"[115]. EC also holds the opinion that "the disclosure requirement would apply to all international, regional and national patent applications at the earliest possible stage"[116].

Briefly all concept of "EC proposal was as follows: (1) a mandatory requirement should be introduced to disclose the country of origin or source of genetic resources in patent applications; (2) the requirement should apply to all international, regional and national patent applications at the earliest stage possible; (3) the applicant should declare the country of origin or, if unknown, the source of the specific genetic resource to which the inventor had had physical access and which was still known to him; (4) the invention must be directly based on the specific genetic resources; (5) there could also be a requirement on the applicant to declare the specific source of TK associated with genetic resources, if he was aware that the invention was directly based on such TK and, in this context, a further in-depth discussion of the concept of "traditional knowledge" was necessary"[117].

4. Arguments Regarding Advantages and Disadvantages of Disclosure Requirements Proposal

The supporter of TRIPS disclosure proposal maintain that "this system would help the countries providing access to genetic resources to monitor compliance with access and benefit – sharing rules"[118] and also "would enhance transparency in the context of access to genetic resources and associated TK"[119]. Other advantage of this system is said to be that "requirement of disclosure would help in improving what was available and guarantee a better system which would make it more difficult for those involved in acts of misappropriation and benefit the victims of such acts"[120].

On the other hand in regard to the PCT it has been maintained[121] that this

113 WIPO/GRTKF/IC/8/11, (17 May 2005), annex p. 1.
114 WIPO/GRTKF/IC/8/11, (17 May 2005), annex p. 1.
115 EC, IP/C/M/49, para. 124.
116 EC, IP/C/M/49, para. 124.
117 EC, IP/C/M/47, para. 58.
118 Brazil, IP/C/M/46, para. 46.
119 IP/C/M/48, para. 38.
120 Peru, IP/C/M/46, para. 51.
121 Switzerland, IP/C/W/423, IP/C/M/42, para. 98.

system explicitly enable the contracting parties of the PCT to introduce a disclosure requirement in their national laws and it leaves Members with adequate flexibility to develop an efficient national legislation according to their needs. And lastly, it has been argued that this system is not burdensome for patent applicants so as to deter them from filing for patents and encourage them to maintain secrecy over their inventions.

Owner of the Mandatory proposal, EC also indicates its proposal's advantages which are those ; "the disclosure requirement should not affect the balance of rights and obligations set out in the TRIPS Agreement, nor the rights of WTO Members to create a favourable environment for research and development activities in the field of biotechnology and should not necessarily be burdensome either to patent offices or to applicants"[122].

But disclosure requirement proposal is criticized by the supporters of the national based approach. One of the national - based supporter maintained[123] regarding disclosure proposal that "for ensuring appropriate access and equitable benefit sharing or to prevent the erroneously granted patents, this system is ineffective to achieve these objectives, furthermore this system add new uncertainties, administrative burdens and it undermines the role of patent sytem and potential benefit sharing."

There has also some arguments on the disclosure of evidence of prior informed consent and benefit sharing. In TRIPS diclosure proposal in addition to the declaration of the source of genetic resources, it is sought an evidence of prior informed consent. This new addition is criticizing even by EC. It has been maintained that "'this situation is not feasible", *inter alia*, it has been said that "it is difficult for patent offices to judge whether foreign country legislation on access and benefit - sharing had been complied with. The main function of patent offices was to ensure that patentability requirements were met, which was a difficult task, especially in the field of biotechnology. Requesting patent offices to verify whether patent applicants had respected all legal rules related to the material used in their inventions would seriously overburden patent offices and create legal interpretation problems"[124]. Also EC believes that "it is premature to consider a requirement to provide evidence of prior informed consent"[125].

United States and some members have some concerns on the consequences for benefit sharing of sanctioning patent revocation for non – compliance with

[122] EC, IP/C/M/49, paras. 122 - 123.
[123] United States, IP/C/W/434 and 449.
[124] EC, IP/C/M/44, para. 34.
[125] EC, IP/C/M/47, para. 62.

disclosure requirements. They criticize[126] that it would be free to public, so it can be commercialized without any obligation to share benefits, if a patent were issued but later invalidated or if an application were published. And on the same subject it has been said that "the disclosure of evidence of prior informed consent or benefit sharing would be a disincentive to patents applicants because such information could be kept secret and not disclosed"[127]. Similary on the same subject USA argues that "the problem with the disclosure requirement was that it could discourage patent applicants from applying for patents on their inventions in the first place and would be a disincentive to innovation"[128].

In response to these claims it has been stated correctly that because in regard of patent law practice, there are a number of other disclosure requirements, including disclosure of best mode, and in other jurisdictions, such as the USA, a requirement to disclose all information material to patentability, therefore the TRIPS disclosure proposal's requirement is no different from these obligations [129]. It is also pointed out as a response that "the disclosure obligation as envisaged, taking into account existing practice, would therefore not impose any burdensome administrative or other costs on applicants"[130]. In other words in terms of implementation for the USA system, the proposed disclosure requirement would not be burdensome at all, as it could be covered under the existing requirement of information material to patentability[131]. Consequently, the role of the patent examiner will be limited to confirming that the patent application contains a declaration in the prescribed form indicating that prior informed consent was obtained[132]. Although, the evidence of prior informed consent and benefit-sharing arrangements should be given to the patent offices, the proposal did not require patent examiners to determine the validity of these arrangements in order to grant a patent[133]. The patent office will need to take decisions based on these documents only when the validity of a patent is challenged in the pre- or post-grant opposition or revocation proceedings[134].

Regarding the relations with TRIPS, the disclosure proposal is criticized that "a disclosure requirement applicable to only some fields of technology might also conflict with Article 27.1 of TRIPS and also it would be contrary to Article

126 **TRIPS Council Secretariat**, p. 49; USA, IP/C/M/40, para. 122 and IP/C/M/39, para. 131.
127 Japan, IP/C/M/48, para. 75.
128 United States, IP/C/M/39, para. 128.
129 Brazil and India, IP/C/W/443, para. 20.
130 Brazil and India, IP/C/W/443, para. 20.
131 India, IP/C/M/47, para. 38.
132 Brazil and India, IP/C/W/443, para. 21.
133 India, IP/C/M/47, para. 38.
134 Brazil and India, IP/C/W/443, para. 22.

62.1"[135] which these two claims are not accepted by supporter of TRIPS disclosure proposal[136]. Also although it has been maintained that "the proposed amendment to TRIPS Agreement with respect to disclosure that allows revocation of a patent would impact on Members' other existing obligations under this agreement is not clear"[137], it has been responsed to that "several countries already established this requirements in their national legislations as means of implementing the CBD and there would be legal certainty if the TRIPS Agreement were amended accordingly"[138].

IV. CONFLICT – COMPROMISE

A. CONFLICT OR NOT?

It has been seen above that there is a continuous discordance among WTO members regarding the issue of the relation between CBD and the TRIPS Agreement[139]. It has been mentioned above several times that when examing the relationship between CBD and TRIPS, two question always comes into mind that whether there is a conflict between two agreement[140] or whether two agreement in mutual supportiveness or not. Actually, it can be said that all volume of work and arguments in the Council are seeking these questions' answer. It has been seen above that mostly developing countries maintain that because of the reason that TRIPS and the CBD are incompatible, TRIPS should be amended, especially Article 27.3(b) to conform to CBD[141]. For example while Doha Declaration instruction on reviewing regarding the relationship between two agreement is interpreted by some developing countries "as opening up the the possibility of amending Article 27.3(b)"[142], it definitely was not interpreted the same by developed countries. Many developing countries consider that, as it can be seen the above, "there is need to reconcile Article 27.3(b) with the relevant provisions of the CBD"[143]. It is most probably true that the issue is mostly relative. That is to say, the answer of the question can be changed for all member of the WTO due to their level of economical situations or level of richness of biodiversity. But to better

135 Japan, IP/C/M/29, para.155
136 India, IP/C/M/37/Add.1, para. 224; **TRIPS Council Secretariat**, p. 54.
137 Canada, IP/C/M/49, para. 108.
138 India, IP/C/W/195 and 198.
139 **Eugui**, p.1.
140 See **Carr**, p. 138.
141 **Linarelli**, p. 423.
142 **Roffe/Melendez-Ortiz/Bellmann and others**, p. 396.
143 Ibid., p. 389.

answer, it needs to be focused on the concept and relevant provisions in the two agreements.

As highlighted in the CBD official website[144] **that** CBD represents a significant progress in the conservation of biological diversity, the sustainable use of its components, and the fair and equitable sharing of benefits arising from the use of genetic resources". Most importantly, it has been mentioned in the preamble para. 12 of CBD text that "parties of the CBD recognise the close and traditional dependence of many indigenous and local communities embodying traditional lifestyles on biological resources, and the desirability of sharing equitably benefits arising from the use of traditional knowledge, innovations and practices relevant to the conservation of biological diversity and the sustainable use of its components". Therefore it is correctly argued by Stoll and Hahn that "the CBD is based on a rather advanced and elaborate concept regarding "indigenous and local communities"[145]. It is clear that CBD itself gives a significant importance to the indigenous and local communities. This given importance can be noticed also from the Art. 8(j) that this article refers to "knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity". As it has maintained correctly by scholars that "CBD clearly goes along with the notion of traditional knowledge"[146]. It is certain that CBD explicitly refers to indigenous people's rights which are derived from their knowledge (which means TK), innovations and practices. But bear in mind that traditional knowledge is not a legally recognised form of IP in its own right yet[147]. It is correctly pointed out that CBD recognises the knowledge which is held by communities instead of just a single owner[148].

In contrast, it should be said that there has not any directly reference to indigenous or local communities, their knowledge, innovations and practices in TRIPS Agreement. As it has been correctly pointed out by the scholars that "TRIPS contains material and procedural standards for the protection of IPRs along the lines of well - established concepts, however, it does not specifically adres protection of TK"[149].

It is true to say, while TRIPS provides stronger patent protection, the CBD

144 <https://www.cbd.int/history/> l.a.d. 22.03.2019.

145 **Stoll, Peter - Tobias / von Hahn, Anja** (2003), "Indigenous Peoples, Indigenous Knowledge and Indigenous Resources in International Law",von Lewinski, Silke (Editor), *Indigenous Heritage and Intellectual Property, Genetic Resources, Traditional Knowledge and Folklore*, 1st. edt., p. 27.

146 Ibid., p. 28.

147 **Linarelli**, p. 425.

148 **Tejera**, p. 984.

149 **Stoll/von Hahn**, p. 31. See also for the same conclusion **Cottier/Panizzon**, p. 378 – 379.

encourges fair and equitable sharing of biological resources[150]. Therefore some developing countries have argued that TRIPS should be included available provisions as; for access to genetic resources within the territory of a WTO member, prior informed consent for use of genetic resources in inventions, sharing of the benefits of inventions associated with genetic resources[151]. On the one hand TRIPS Agreement only recognises and provides individual ownership of property rights, on the other hand the CBD recognises rights of indigenous cultures to preserve their knowledge and resources[152]. The ideas of individual ownership of property rights and rights of indigenous cultures to preserve their knowledge and resources seem incompatible. IPRs recognise one private inventor, whereas indigenous knowledge and biological resources are needed to be used and discovered collectively[153]. There is also a factual concern that researchers and companies in developed world may be tempted to misuse TK, if the patent office staff are known to have insufficient time, knowledge or resources to conduct through prior art searches and examinations where like in developing or lesser developed world[154].

The objectives of the CBD is stated in the Art. 1. as; 1- conservation of biological diversity, 2- the sustainable use of its (biological diversity) components, 3- the fair and equitable sharing of the benefits arising out of the utilization of genetic resources and 4- providing the appropriate access to genetic resources and transfer of relevant technologies. Any of these objective has no priority in the TRIPS Agreement.

Because IPRs in biotechnology is very important for innovations, control over genetic resources which are crucial for biotechnology innovations became the global subject in recent years[155]. It is pointed out that many countries widely perceived that there is a fundamental conflict interface between international IP and environmental protection[156]. Because it is true that while many developing or lesser developed countries are rich in biodiversity, poor in biotechnology, on the other hand many developed countries are rich biotechnology, poor in biodiversity[157]. On the one hand developing countries claim their resources are wrongfully taken under acts of biopiracy, where corporations and industrialized nations allegedly steal and commercialize genetic resources of other biologically

150 **Carr**, p. 132.
151 **Linarelli**, p. 423.
152 **Tejera**, p. 971.
153 Ibid., p. 974.
154 **Dutfield** (2001), p. 248.
155 **Laxman/Ansari**, p. 109.
156 **McManis** (1998), p. 255.
157 **Tejera**, p. 972.

diverse countries, on the other hand it is a fact that developed countries benefit greatly from patenting biotechnology and claim that patent protection is vital to the advancement of science, technology, and global economic development[158]. While some developed countries sees the CBD as harmful to the competitiveness of biotechnology corporations on the other hand many developing countries struggle to strengthen their position for the protection of their right to control access to their own countries biological resources[159]. On the one hand developing countries traditionally have been importers of innovation, on the other, with the growth of biotechnology, developing countries became exporters of biological resources and traditional knowledge, but without adequate recognition in the WTO agreements[160]. CBD provides the principles of equitable sharing and conservation of genetic resources wheras TRIPS presents the time-limited exclusive right to genetic resources[161].

Many officials and scholars draw attention the conflicting areas between the two agreements in recent years. For example, at the opening of the Ad Hoc Open - Ended Working Group on ABS meeting[162], speaking on behalf of the Executive Director of the United Nations Environment Programme (UNEP), Mr. Klaus Töpfer addressed some significant points and said that "there are real contradictions in essential points between TRIPS and the CBD that had to be resolved, IPRs applied to life forms under TRIPS run counter to and did not support the objectives of the Convention and the private property regime established by the TRIPS Agreement would undermine implementation of the access and benefit-sharing provisions of the Convention"[163].

Some conflicting issues are also presented correctly by Eugui[164]: TRIPS allows private rights to be granted over genetic resources that are subject to sovereign rights; TRIPS allows the granting of patents regardless of whether a particular invention uses or incorporates legally or illegally accessed genetic material or associated traditional knowledge (meaning without prior informed consent and benefit sharing). Similarly McManis[165] correctly expressed that on the one hand TRIPS seeks to strengthen IP protection in the developing world in

158 **Carr**, p. 132.
159 **Carr**, p. 132.
160 **Linarelli**, p. 413.
161 **Rosendal**, p. 89.
162 UNEP/CBD/WG-ABS/3/7, 3 March 2005, para. 12 and 13.
163 After Mr. Töpfer speech, UNEP Executive Director refused the speech as their formal position and stated that Mr. Töpfer does not represent or reflect the position of the Executive Director and UNEP and the speech was not the speech of the Executive Director of UNEP. See UNEP/CBD/WG-ABS/3/7, 3 March 2005, p. 3, deepnote.
164 **Eugui**, p. 7.
165 **McManis**, p. 548.

order to promote world trade, on the other hand CBD seeks international support for the conservation sustainable use, and guaranteed access to genetic resources in the developing world in return for a fair and equitable share of the benefits arising out of the utilization resources. Tejera[166] put forth correctly that while TRIPS Agreement aims to reduce distortions and impediments to international trade and provides individual ownership of property rights, whereas, the CBD aims to protect the biodiversity, biological resources, and indigenous knowledge. It may be asserted also that traditional knowledge is collectively held and generated while patent law treats inventiveness as an achievement of individuals[167]. While CBD recognizes TK, whereas TRIPS not.

In this sense, it is correctly stated by authors[168] that two agreement seems to present two conflicting visions of future global trade, in genetic resources. Carr sees that at the center of the biopiracy debate there are two international agreements. According to him, instead of resolving the concerns of both sides, in some ways these agreements have only widened the gap between them[169]. McManis[170] maintained that TRIPS and the CBD seems to expose fault lines and divides the developed world and developing world. Tejera[171] argues that TRIPS must be amended according to the CBD objectives.

It is most probably to maintain that the most important articles in CBD when reviewing the relationship between two agreements is Art. 15 para 4 and 5. It is stated in these two paragraph that "access, where granted, shall be on mutually agreed terms and subject to prior informed consent of the Contracting Party providing such resources, unless otherwise determined by that Party." So according to these provisions access to sources can only be in mutual terms and subject to prior informed consent. The provisions on access to genetic resources and the equitable sharing of the benefits of their utilization, constitute an essential elements of the CBD[172]. Indisputably, in many areas TRIPS Agreement affects the fulfillment of the CBD such as; the placement of private rights over public rights; the recognition of patents and other IPRs using genetic resources and TK without prior informed consent and benefit sharing[173].

It has been mentioned when examining the national – based approach that they are based their view on contractual agreements. Mutual agreements is not

166 **Tejera**, p. 971 – 984.
167 **Dutfield** (2001), p. 254.
168 **McManis** (1998), p. 255; **Ewens**, p. 302 - 303.
169 **Carr**, p. 132.
170 **McManis**, p. 548. Also see **Carr**, p. 132.
171 **Tejera**, p. 984.
172 **Rosendal**, p. 81.
173 **Eugui**, p. 1.

problem for also the supporter of that view and also it is compatible to the TRIPS. But the most problem is derived from the obligation of prior informed consent. According to Oliva and Perrault "prior informed consent is a pre-requisite to ensuring enviromentally sound access to genetic resources, moreover, the lack of prior informed consent actually impedes the fulfiment of the objectives of the CBD[174]". Also it has been maintained by the same authors that "prior informed consent is particulary significant in the context of access to genetic resources because of concerns about companies, research instituations, other entities, and individuals acquiring and using genetic resources and traditional knowledge from biodiversity - rich countries without the knowledge and permission of rightful orders"[175]. It is the same arguments which the TRIPS disclosure requirements supporters were said, to prevent these misappropriation TRIPS is needed to be amended as to be alike to CBD. Bearing in mind, there is no reference to the prior informed consent in TRIPS.

It has indicated in one work that "the relationship between provisions of TRIPS and the CBD has given rise to different opinions, ranging from perfect harmony to collision and this collision has been associated with possible granting of IPRs, based on or consisting of genetic resources, without observing the prior informed consent and benefit sharing obligations established by CBD"[176].

To conclude this part, this paper's author shares Rosendal[177] view that while CBD's core principle is equitable sharing of biotechnological use of genetic resources which an essential element of biodiversity conservation, wheras the TRIPS' aim is to strengthen and harmonize IPRs in all technological fields, including biotechnology, TRIPS seems hardly compatible with the CBD.

In conclusion in our view that two agreements are in clear conflict, and also it can not be said that they are in mutual supportiveness. It is most probably to achive mutual supportiveness between two agreements and end the conflict, TRIPS should be amended as to ensure the protection of traditional knowledge, recognition of sovereign rights over genetic resources by states and obligation of prior informed consent. If TRIPS is amended according to CBD Art.15; then to grant a patent, other than the requirements of novelty, inventive step and

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174 **Oliva, Maria Julia / Perrault, Ann**, "Prior Informed Consent And Access To Genetic Resources", Chouchena – Rojas, Martha/Muller, Manuel Ruiz/Vivas, David/Winkler, Sebastian (Editors) (2005), Disclosure Requirements: Ensuring Mutual Supportiveness Between The WTO TRIPS Agreement and the CBD, IUCN, Gland, Switzerland and Cambridge, UK and ICTSD, Geneva, Switzerland, <http://www.ciel.org/Publications/DisclosureRequirements_Nov2005.pdf > l.a.d. 15.03.2019, n. 4, above, p. 18.

175 Ibid.

176 **Roffe/Melendez-Ortiz/Bellmann and others**, p. 404.

177 **Rosendal**, p. 93.

industrial application, the principles of Article 15 (recognition of sovereign rights over genetic resources; access based on prior informed consent; access and benefit sharing based on mutually agreed terms; joint research activities over genetic resources) of the CBD shall be followed[178].

B. POSSIBILITY OF COMPROMISE

In an attempt to reconcile the two agreements, developing countries have proposed from the beginning an amendment that would require disclosure of genetic source and origin in patent applications[179]. It is said that ABS through a new disclosure requirement in the patent laws is one of the leading subject in many developing countries[180]. The concept of a new disclosure requirement means that patent applicants must disclose in their patent applications the source of any genetic resources for claiming invention, evidence of prior informed consent and evidence that the genetic resources which obtained according to mutually agreed terms[181]. If the patent applicant does not comply with these said within the set time limit, the designated office may refuse the application or consider it withdrawn on the grounds of this non – compliance[182].

It is indicated that industrialized countries currently have disclosure requirements in their patent systems[183]. Many developing countries in Latin America, the Caribbean region, Asia and Africa generally favor the idea of a new disclosure requirement and although USA and Japan oppose such proposal of disclosure requirement, maybe not same as the developing countries, Switzerland and the EU have begun to support new disclosure requirements[184].

Indeed, in 18 July 2008, Brazil, the European Communities, India and Switzerland submitted the text of draft modalities[185] for consideration by Ministers for TRIPS related issues with support of many countries[186] in WTO. According to draft, members agree to amend the TRIPS agreement to include a mandatory requirement for the disclosure of the country providing/source of genetic resources, and/or associated TK for which a definition will be agreed, in patent

178 **Eugui**, p. 3.
179 **Carr**, p. 132 and 140.
180 **Keating**, p. 525.
181 **Keating**, p. 526 and **Carr**, p. 140.
182 IP/C/W/423, 14 June 2004, para. 25.
183 **Keating**, p. 526.
184 **Keating**, p. 541.
185 TN/C/W/52, 19 July 2008 (Draft Modalities For TRIPS Related Issues).
186 Communication from Albania, Brazil, China, Colombia, Ecuador, the European Communities, Iceland, India, Indonesia, the Kyrgyz Republic, Liechtenstein, the Former Yugoslav Republic of Macedonia, Pakistan, Peru, Sri Lanka, Switzerland, Thailand, Turkey, the ACP Group and the African Group. See the text TN/C/W/52.

applications[187]. Therefore without completion of the disclosure requirement patent applications will not be processed[188].

As it is seen that new disclosure requirement proposal is supported by many countries. Other than especially USA and Japan position, there is a possibility to compromise between TRIPS and CBD. In this author view that, Draft Modalities For TRIPS Related Issues can be addressed as a first step for a compromise between TRIPS and CBD. If there is sufficient negotiations take place, there is not going to be any obstacle for genetic resources and TK protected in CBD, to be included in the scope of international IP protection by TRIPS. Lastly, in this author view that this draft is on the one hand an "attempt to ease the developing countries fear of biopiracy by increasing transparency regarding the use of genetic resources and responsibility to share benefits of their use"[189], on the other hand a way out to continue supporting the IP rights and standardization in the area of biotechnology. Because many developing countries in WTO object fundamentally to some TRIPS provisions and assert that the TRIPS obligations are either inappropriate or too protective of categories of IP that favour established interests in developed countries[190], this draft may be seemed as a starting point for revising the TRIPS article 27.

CONCLUSION

It has been clearly seen that there is a comprehensive work and discussion regarding the issue of reviewing the relationship of TRIPS and CBD in the WTO Council. Doha Ministerial Declaration instructed the Council to examine the relationship between two agreement and the examination process has been well done and still continue. The work (examination) is based on the WTO members arguments which they present with documents and orally to the Council. It can be understood from above that arguments regarding the issue mainly divided in two different aspect of views.

First view which mostly supported by developed countries maintains that there is no conflict between two agreements, they are mutually supportive agreements and such issues as obligation of prior informed consent and benefit sharing can be provided best with contractual agreements between provider and user which is named contract - based approach. The second view which mostly developing countries supports (except EC Mandatory Approach and Swiss PCT

187 See TN/C/W/52, para. 4.
188 See TN/C/W/52, para. 5.
189 **Carr**, p. 141.
190 **Linarelli**, p. 435.

approach) admits generally that there is a conflict between two agreements and there is an urgent need for an amendment which will ensure the TRIPS be compatible with some of the CBD's provision such as providing prior informed consent and equal benefit sharing.

This work shows that there is still continuing discussion within TRIPS members and also CBD members. These discussions put forth that some developed countries like USA disregards the objectives of the CBD and there is a clear need to incorporate those objectives into the text of the TRIPS Agreement[191]. While there is comprehensive and clear work regarding the issue, there is not clear conclusion. Why it is not clear is that because neither approach is alone sufficient to solve the problem. As it has been correctly pointed out by one author[192] that "the patent system is not operating appropriately if it only recognises the rights of those who have generated an invention by using inputs and knowledge provided by others and infringing their property rights. In other words, the patent sytem should not validate misappropriation nor should it encourage research and innovation at any price". There should be an approach which ensure incentiveness of innovation and at the same time providing equal benefit sharing and preventing the misappropriation.

It is quite right to state that regarding the area of the IP rights for genetic resources, CBD and TRIPS seems to divide the global community instead of unite[193]. It is true that mainly two agreements are two different agreement, but especially the provisions which are about prior informed consent and benefit sharing (and also provisions about protection of the traditional knowledge) in CBD are not quite in mutually supportiveness with TRIPS. These provisions in CBD certainly related with the IPRs, namely, related with some of the TRIPS provisions (such as Article 27 3(b)).

In this author view that it is difficult to assert that there is not any conflict between TRIPS and CBD, in fact there is a real and clear need to reconcile some of the provisions of the two agreements. In other words, some of the articles regarding the issue of this work of two agreements are in clear conflict, and also it can not be said that they are in mutual supportiveness. It is most probably to achive mutual supportiveness between two agreements and end the conflict,

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191 **Eugui**, p. 1.

192 **Venero, Begoña**, "Addressing The Disclosure Requirement At The International Level: The Role Of The TRIPS Agreement", Chouchena – Rojas, Martha/Muller, Manuel Ruiz/Vivas, David/Winkler, Sebastian (Editors) (2005), Disclosure Requirements: Ensuring Mutual Supportiveness Between The WTO TRIPS Agreement and the CBD, IUCN, Gland, Switzerland and Cambridge, UK and ICTSD, Geneva, Switzerland, <http://www.ciel.org/Publications/DisclosureRequirements_Nov2005.pdf> l.a.d. 15.03.19, n. 4, above, p. 29.

193 **Carr**, p. 152.

TRIPS should be amended as to ensure the protection of traditional knowledge, recognition of sovereign rights over genetic resources by states and obligation of prior informed consent.

Draft Modalities For TRIPS Related Issues can be addressed as a first step for a compromise between TRIPS and CBD. If there is sufficient negotions take place, there is not going to be any obstacle for genetic resources and TK protected as in CBD, to be included in the scope of international IP protection by TRIPS.

Lastly regarding the question of which is the appropriate forum, our answer is WTO because of it's global function.

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