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Summary information of the process by which this report has been prepared

This report is the harmony of the report prepared by an expert group of the Ministry of Agriculture and Rural Affairs (MARA) and the discussions made under the collective study of representatives of Ministry of Justice, Ministry of Foreign Affairs, Ministry of Agriculture and Rural Affairs, Ministry of Environment and The Turkish Institute of Patenting mandated by Ministry of Industry and Trade.

The expert group of the Ministry of Agriculture and Rural Affairs, which is constituted from researchers on plant genetic resources, has examined the relative legislation of the Ministry regarding the genetic resources and benefit sharing namely "Pasture Law", "Regulation on Collection, Utilization and Preservation of Plant Genetic Resources", "Regulation on Collecting Tuberosus Plants" and intended "Breeders Rights Regulation" as well as the survey results of several previously conducted rural development projects. The group has also considered the institutional implementation of the international conventions such as "CCD", "CBD", "Ramsar Convention", "CITES" and "Biosafety Protocol". The expert group of MARA submitted their approaches and the results of analysis of the information gathered as a preliminary report to the Ministry of Environment.

In due course with the preparatory work for the meeting of TRIPs Council, the working group including representatives from Ministry of Justice, Ministry of Foreign Affairs, Ministry of Agriculture and Rural Affairs, Ministry of Environment and The Turkish Institute of Patenting, had decides to convene small working group constituted from the representatives of MARA, Ministry of Environment and The Turkish Institute of Patenting, for the purpose of preparation of non-paper about review of Article 27.3 (b) of TRIPs in relation with the provisions of the CBD. The non-paper that was submitted to the TRIPs Council is attached to this report. The discussions made in the working group had been harmonised with the report of the expert group of MARA on benefit sharing.

The report submitted here is only preliminary one, since the subject is still under discussion and the working group will be convened by Ministry of Environment to clarify national implementation in relation with the CBD and WTO provisions from the wiew point of filling gaps in legislation and administration on benefit sharing arrangemnets.

Intellectual property and traditional knowledge related to genetic resources

(a) How to define relevant terms including subject matter of traditional knowledge and scope of existing rights;

Traditional knowledge is any kind of useful information resulted in the development of new products or different forms of ordinary products, added value and generating benefits of any manner. Scope of traditional knowledge is rather broad but there is no legislative arrangement in Turkey, which is directly related with traditional knowledge and related rights.

In the limited extend of implementation, any legal person has the right to register a new variety of crop developed by him, however the registration of landraces as a new variety not contains any right of the person over the any kind of use of the crop. Registration system is rather aims to control introduction of new varieties into the agri-environment. The draft law on the protection of breeder's rights is intended to establish patent-like protection system in favor of the breeders of new varieties.

Furthermore the traditional knowledge that not directly ended with the new product but indirectly involved in the development of a new processes or products as a key knowledge is not subject to any kind of protection in favor of the owner of the traditional knowledge.

(b) Whether existing intellectual property rights regimes can be used to protect traditional knowledge;

Existing intellectual property rights and related intended arrangements do only cover the newly developed products or inventions. Therefore they are far behind protecting traditional knowledge.

Turkish decree-law 551 on patenting sets the requirements for patenting in line with the European Patent Convention and WTO agreements as "to be new", "convenient for industrial applications" and "to be a invention" therefore traditional knowledge can not be patented in this context. The geographical indications, designs or copyrights under TRIPs may partially cover traditional knowledge, however far from the protection in favor of the owner of the knowledge.

(c) Options for the development of sui generis protection of traditional knowledge rights;

Sui generis systems may be suitable for the countries where there are indigenous communities. Since there are no indigenous people in Turkey, a broad based legislation comprising all the stake-holders is believed to be more convenient.

The development of *sui generis* protection of traditional knowledge rights at the international level requires well defining of traditional knowledge, categorizing and identification of the areas of usage and clarification of indirect steps ended with customary use of such knowledge.

(d) The relationship between customary laws governing custodianship, use and transmission of traditional knowledge, on the one hand, and the formal intellectual property system, on the other;

It is absolutely necessary for the success of the formal systems to be in harmony with the customary laws. In Turkey there is no legislative arrangement directly aiming to protect intellectual property rights of owners of traditional knowledge. Legislative arrangements such as the newly passed Pasture Law, provide positive aspects to the holders of genetic resources indirectly, therefore can be regarded as basis for the new benefit sharing arrangements to be in harmony with traditional systems.

The customary laws governing custodianship, on the other hand, favor the protection of IPRs of developers of the “new” products or processes which are categorized as “the invention” and convenient to industrial applications, therefore it excludes the protection of traditional knowledge as well as rights of the States over their genetic resources in relation with the application of 27.3(b).

(e) Means by which holders of traditional knowledge, including indigenous peoples, may test means of protection of traditional knowledge based on existing intellectual property rights, sui generis possibilities, and customary laws;

Licensing or patenting the knowledge is absolutely necessary and requires legislative arrangements. Patenting or licensing is rather a critical issue. There might be some cases which same or several communities might have generated similar knowledge spontaneously. Therefore licensing the knowledge may be a better way than patenting. Still problems may arise at this point, who or which community was the first to generate the knowledge or there may be cases where boundaries of the communities are not formally designated. The joint registration and accreditation system may be required in such cases. Public awareness activities to encourage the communities to form judicial associations to enable them to make use of their knowledge could contribute development of means of protection of traditional knowledge.

The current IPR regimes also required to be reviewed from the point of view that related laws should ensure referencing the origin of biological resources and traditional knowledge that have been used in the process of development of the process or the product subject to patenting and IPR protection. Furthermore, the criteria to define biological entities as a “new”, “invention” and “applicable to industry” should be developed.

(f) How to ensure that granting intellectual property rights does not preclude continued customary use of genetic resources and related knowledge;

It is quite possible that granting the intellectual property rights may result in commercialization of the products consequently over utilization of genetic resources through mass production. Sustainable use of the natural resources is the key factor to assure the continued use of traditional knowledge. Intended regulations should take into account that the resources are limited and should be used in a sustainable manner. Therefore resource management should be an essential part of such regulations. This must be realized via periodically prepared instructions given by assigned special expert groups.

The main contradiction arises from the lack of benefit sharing arrangements in favor to countries of origin of biological diversity and traditional knowledge and the weak capacities of developing countries at system, institution and human resources levels to follow up means of commercial use of their own resources and knowledge. Furthermore, patenting systems should not discriminate between traditional methodologies and modern techniques with regard to biological entities and processes.

Intellectual property rights and access and benefit- sharing arrangements

(g) *Ways to regulate the use of resources in order to take into account the ethical concerns;*

(h) *Ways to ensure the continued customary use of genetic resources and related knowledge;*

Ways to regulate the use of resources taking into account the ethical concerns; and ways to ensure the continued customary use of genetic resources and related knowledge are closely related matters therefore they can be examined together. Both of the above mentioned matters only arise with existence of the genetic resources. Therefore any legislative regulations should consider the sustainability issue. This concept is also related with several other factors such as education level of the people, supply and demand balance as well as the commercial value of the resources, demographic and socio-economic concerns etc. Generally the resources are prone to several pressures where there are not enough ethical or legislative regulations controlling the use of them.

Legislative arrangements in harmony with the customary use will be a useful approach to sustainable use of genetic resources and related knowledge. As mentioned at the previous section, public awareness studies would be useful for the success in the implementing the regulations. Another factor affecting the sustainable use of resources is the land ownership issue. Common utilization of the resources and uncertainty at land ownership regime cause negative impact on the resources.

By taking into account the fact that the maintenance of customary use of genetic resources highly depends on the capacities of countries of genetic diversity to regulate access and benefit sharing as well as the willingness of the developed countries to ensure transparency, equitability and fairness in the scientific and technological studies to help with obligations under the CBD. The enforcement of international obligatory systems against unauthorized customary use of genetic resources has particular importance in terms of IPRs protection, conservation of biological diversity and meeting ethical concerns.

(i) *How to make provisions for the exploitation and use of intellectual property rights to include joint research, obligation to work any right on inventions obtained or provide licenses;*

Making provisions for the exploitation and use of IPR to include joint research is possible provided that the knowledge is commercialized. In this case certain percentage of the added value may be transferred to the related research studies and licensing organizations. Without patenting or licensing the knowledge, it does not seem to be possible to exploit the material value deriving from IPR in the other areas.

Technical requirement is the capacity building of countries of origin of genetic diversity to undertake systematic study for molecular characterization and fingerprinting of genetic resources subject to commercial use.

(j) *How to take into account the possibility of joint ownership of intellectual property rights;*

The current international agreements and regulatory mechanisms required to be discussed in harmony with the principles and provisions of the CBD. IPRs regimes should ensure referencing the origin of biological resources and traditional knowledge that have been used in the process of development of the process or the product subject to patenting and IPRs protection. The private ownership of biological entities and processes through IPRs protection systems should also be further examined for the purpose of developing criteria to define biological entities and processes as a “new”, “invention” and “applicable to industry”.

DRAFT STATEMENT BY TURKISH DELEGATION REGARDING THE REVIEW OF THE 27.3.b

COMMUNICATION FROM TURKEY

1-This communication concerns about Turkey's appreciation for the review and the implementation process of the Article 27.3.b which has a vital importance from our point of view in terms of eliminating the existing and potential conflicts between the Article with other international conventions and agreements, and our approach in terms of identifying the regarded issues at the conjunction of the trade related intellectual property rights and the biological diversity.

2-Being a country of origin for genetic resources and a party to the Convention on Biological Diversity, Turkey is fully aware of the importance of the spirit of both the Convention and its Protocol on Biosafety, and values the genetic and biological diversity as a common asset for mankind. In addition to this, the Convention considers the rights of the country of the origin to be the unique authority complementing the above mentioned objective to conserve the natural genetic resources and biodiversity (CBD, Article 3). In this regard, during the review process of Article 27.3.b TRIPS Council should take into account the natural rights of the country of the origin on the genetic resources through the conservation and sustainable use of biological diversity for the benefit of mankind. As a result, the context of the Article 27.3.b should be harmonized through and should be mutually supportive with the related articles of the Convention namely 8(j), 15, 16 and 19, and also particularly with the outcomes of the 5th Conference of the Parties to the Convention on Biological Diversity.

3-This review process of Article 27.3.b should consider the clarification and the standardization of terminology regarding the biotechnological inventions, namely plant and animal patents, plant and animal variety, microbiological processes, essentially biological processes and effective sui-generis systems considering the other related international conventions and agreements.

4-Regarding the complexity of the process, this review process of Article 27.3.b should be expanded in order to be able to clear out the implications of TRIPS on farmers privilege, biodiversity conservation objectives and protection systems, and the interlinkages and conflicts between 27.3.b and (i) the rights of the countries of origin of genetic resources and traditional knowledge, within the framework of trade and competitiveness concerns on food and agriculture, (ii) the Convention on Biodiversity and other articles of TRIPS, especially Articles 22, 23 and 24 concerning geographical indications.

5-As a result, TRIPS Council Meetings concerning the review of this Article would be an important cornerstone to improve the process aiming reaching a consensus to harmonize the context of the Article through the frameworks of the other related international processes. Therefore, as the process which is being continued under the CBD is a dynamic one, the Council should involve the Secretariat of the Convention of Biological Diversity as an observer in its own process and meetings to build the links timely. Additionally, check list method to discuss the top priority issues of the Article substantially should be preferred to evaluate the present situation of the contracting states and to achieve action oriented objectives.