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Contents

1. **The Constitutional Perspective of Administrative Law in Pakistan** 1
Dr. Dil Muhmamad Malik
2. **Law of Intellectual Property: Patentability of Life and TRIPs Agreement** 13
Ashfaq Ahmed Khan
3. **Methods of Proof in Criminal Justice** 29
Malik Amanullah
4. **Contract: Formation, Performance & Breach** 39
Muneeb Zia
5. **Four Pillars of International Trade Law** 47
Farooq Umair Niazi
6. **Protection of Biodiversity viz-a-viz Patentability of Biotechnology: Cross Road for Intellectual Property and Environmental Laws** 63
Ashfaq Ahmed Khan
7. **National sovereignty and the International Implementation of Human Rights** 79
Ms. Shazia Qureshi

The Constitutional Perspective of Administrative Law in Pakistan

Prof. Dr. Dil Muhammad*

Constitutional History of Pakistan

Pakistan emerged on the world map, as an independent state, on 14th August, 1947. Prior to 1947, it formed part of British India which was a colony under the East India Company and later under the British Crown. The East India Company which was established in 1600 started its business in India in 1613 by establishing a factory at Surat. By 1643 they were established on the east coast at Masulipatam and Madras, with a factory up the Hoogli river for the Bengal traffic.⁽¹⁾ The profits were enormous and so was the company's influence in the area. From the purchase of Zamindari rights, in three villages of Bengal in 1698, to the annexation of Punjab and Sindh during the middle of 19th century, it was a long and unscrupulous march which brought the whole of India under the political control of the East India Company.

After the unsuccessful War of Independence (1857) which the Englishmen preferred to term as the 'Mutiny' or the Soldiers' Revolt, the British Government assumed the direct control of the Subcontinent in 1858 and thereafter ruled it for about a century. Starting with the Government of India Act, 1858, various constitutional instruments were enacted by the British Parliament.⁽²⁾ The last such enactment was the Government of India Act, 1935. The Indian Independence Act, 1947, the legal instrument which brought an end to the colonial rule, continued the existing constitutional set up with necessary modifications.

The first constitution was enacted in 1956 but it was a short lived Constitution.⁽³⁾ President Iskander Mirza abrogated the Constitution in 1958 and, imposed martial law throughout the country and, a few weeks later, the Supreme Court of Pakistan declared this change valid in the historic but controversial case of *State v. Dosso*.⁽⁴⁾ The President appointed the

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Commander-in-Chief, General Muhammad Ayub Khan, as the Chief Martial Law Administrator, who a few days later, deposed the President and himself assumed that high office.⁽⁵⁾ Thereafter, he ruled the country through martial law for about three and half years and promulgated a new constitution in March 1962. Ayub Khan continued as President under the new constitution which established a presidential system of government in the country. Towards the end of 1968 disturbances started in the country and in March 1969 President Ayub Khan resigned his office. The Commander-in-Chief, General Yahya Khan, did not allow the constitution to run its course and stepped in to assume the office of the President. He abrogated the Constitution and imposed martial law in the country. Under his martial law regime the elections were held in 1970, but the transfer of power to the elected representatives brought about a serious conflict, and after a bloody civil war and foreign intervention the province of East Pakistan became independent as Bangladesh.

The civil government was established over the West Pakistan in 1971 and Mr. Z.A. Bhutto, as leader of the majority party in West Pakistan, took over the control of the government as President and Martial Law Administrator. An Interim Constitution, which was promulgated in April, 1972, brought an end to the martial law.⁽⁶⁾ The permanent Constitution was enacted in 1973 and worked well for a few years.

The first general elections under this Constitution were held in March, 1977. The ruling party won a landslide victory but the opposition parties refused to accept the results and alleged that the same were obtained through massive rigging. A country wide agitation was started by the opposition which caused enormous loss to the lives and properties of the citizens. The government took all possible measures and even proclaimed martial law in the few major cities but all went in vain. The end result was the overthrow of the civilian government by the Army Chief, General Ziaul Haq, who also proclaimed martial law. The constitution was not abrogated this time, it was only suspended. This action of the Army Chief was declared valid by the Supreme Court in *Begum Nusrat Bhutto v. Chief of Army Staff*,⁽⁷⁾ and he ruled the country through martial law for eight years.

The next general elections were held in 1985, the Constitution was revived after substantial amendments, a civilian government was established and the martial law was lifted towards the end of 1985. The

amendments were ratified by the new Parliament by the Constitution (Eighth) Amendment Act, 1985. Some of the important features of the present constitution which are relevant in the context of administrative law are briefly discussed here.

Rule of Law

Pakistan appears to be the only Commonwealth country which provides a constitutional guarantee of rule of law. Introduced in Article 2 of the 1962 Constitution, this guarantee is now available under Article 4 of the present Constitution, which is enforceable through the constitutional jurisdiction of the High Courts under Article 199. Article 4 provides:

- 1) to enjoy the protection of law and to be treated in accordance with law is the inalienable right of every citizen, wherever he may be, and of every other person for the time being within Pakistan.
- 2) in particular.
 - a) no action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law.
 - b) no person shall be prevented from or be hindered in doing that which is not prohibited by law; and
 - c) no person shall be compelled to do that which the law does not required him to do.

Moreover, Article 5 makes obedience to law and the Constitution “an inviolable obligation of every citizen wherever he may be and every other person for the time being within Pakistan”.

Fundamental Rights

All the Constitutions of Pakistan have provided some basic rights to the people. The present Constitution contains a list of Fundamental Rights which includes freedoms of speech,⁽⁸⁾ religion,⁽⁹⁾ movement,⁽¹⁰⁾ assembly⁽¹¹⁾ and association.⁽¹²⁾ There are also provisions for the protection against

arbitrary arrest and detention,⁽¹¹⁾ retrospective punishment,⁽¹⁴⁾ self-incrimination and double punishment.⁽¹⁵⁾ The right to equality before law or the equal protection of law is also protected by the Constitution.⁽¹⁶⁾ The freedom of trade, business and profession⁽¹⁷⁾ and the freedom to acquire, hold and dispose of property⁽¹⁸⁾ are given a limited protection. Any law which is in conflict with the Fundamental Rights is void to the extent of its repugnancy.⁽¹⁹⁾ Some of these rights can be suspended by the declaration of emergency while the remedies for the enforcement of other rights can be suspended during the emergency by a Presidential order to that effect.⁽²⁰⁾

The Supreme Court⁽²¹⁾ and the High Courts⁽²²⁾ are vested with the power to issue necessary orders for the enforcement of these Fundamental Rights.

Principles of Policy

The Constitution has outlined a few principles of policy, and makes it the responsibility of every organ and authority of state to act according to these principles in so far as they relate to the functions of an organ or authority. Although, these principles are not enforceable through the Courts, yet the government cannot altogether ignore them. Article 29(3) makes it incumbent on the President and every provincial Governor to lay before the National Assembly and the Provincial Assembly, respectively, a report on the observance or implementation of these principles. This clause also ensures the making of provisions in rules of procedure of the Assemblies for the discussion on such reports. These principles are enumerated in chapter 2 of Part-II covering Articles 38-40. Some of these principles, enumerated below, have significant relevance in the present context.

Article 37 provides for the promotion of social justice and eradication of social evils. Under this Article the state is required to:

- a) promote, with special care, the educational and economic interests of backward classes or areas;
- b) remove illiteracy and provide free and compulsory secondary education within minimum possible period;
- c) make technical and professional education generally available

- and higher education equally accessible to all on the basis of merit;
- d) ensure inexpensive and expeditious justice;
 - e) make provision for securing just and humane conditions of work ensuring that children and women are not employed in vocations unsuited to their age or sex, and for maternity benefits for women in employment;
 - f) enable the people of different areas, through education, training, agricultural and industrial development and other methods, to participate fully in all forms of national activities including employment in the service of Pakistan;
 - g) prevent prostitution, gambling and taking of injurious drugs, printing, publications, circulation and display of obscene literature and advertisements; and
 - h) decentralize the Government administration so as to facilitate expeditious disposal of its business to meet the convenience and requirements of the public.

Similarly, Article 38 provides for promotion of social and economic well-being of the people, and enjoins the state to: (1) "Secure the well-being of the people, irrespective of sex, caste, creed or race, by raising their standard of living, by preventing the concentration of wealth and means of production and distribution in the hands of a few to the detriment of general interest and by ensuring equitable adjustment of rights between employers and employees, and landlords and tenants; (2) provide for all citizens, within the available resources of the country, facilities for work and adequate livelihood with reasonable rest and leisure; (3) provide for all persons employed in the service of Pakistan or otherwise, social security by compulsory social insurance or other means; (4) provide basic necessities of life, such as food, clothing, housing, education and medical relief, for all such citizens, irrespective of sex, caste, creed or race, as are permanently or temporarily unable to earn their livelihood on account of infirmity, sickness or unemployment and (5) reduce disparity in the income and earnings of individuals, including persons in the various classes of the Service of Pakistan".

Some of these directive principles are being implemented and others will have to be implemented as soon as the resources allow it. This process, inevitably, leads to great expansion in the administrative process which, in turn, directly or indirectly, affects the valuable rights of the people. The resulting situation, thus, poses the question: how to protect the rights and interests of the people from the encroachments of the expanding bureaucracy? These objectives explained above have to be achieved within the constitutional and the legal boundaries. The courts and other controlling institutions are playing the protecting role, and in this perspective the principles of administrative law have great significance.

Economic Regulation

The freedom of trade business and profession is not sufficiently guaranteed though it is included in the list of fundamental rights. Article 18 allows the state intervention in:

- 1) the regulation of any trade or profession by a licensing system; or
- 2) the regulation of trade, commerce or industry in the interest of free competition therein; or
- 3) the carrying on by the Federal Government or a Provincial Government, or by a corporation controlled by any such government, of any trade, business, industry or service, to the exclusion, complete or partial, of other persons.

Again, the property rights are guaranteed to a limited extent. Although Article 24 enjoins that no property shall be compulsorily acquired or taken possession of, save for a public purpose, and save by the authority of law which provides for compensation thereof and either fixes the amount of compensation or specifies the principles on and the manner in which compensation is to be determined and given, yet the adequacy or otherwise of any compensation provided for by any law, or determined in pursuance thereof, cannot be called in question in any court.

Similarly, under Article 24(3) the property rights are subject to any law relating to:

- a) compulsory acquisition or taking possession of any property for preventing danger to life, property or public health; or
- b) taking over of any property which has been acquired by, or come into the possession of, any person by any unfair means, or in any manner, contrary to law; or
- c) taking over of the management of any property by the State for a limited period, either in the public interest or in order to secure the proper management of the property, or for the benefit of its owner; or
- d) acquisition of any class of property for the purpose of providing education and medical aid to all or any specified class of citizens; or providing housing and public facilities and services such as roads, water supply, sewerage, gas and electric power to all or any specified class of citizens; or providing maintenance to those who, on account of unemployment, sickness, infirmity or old age, are unable to maintain themselves.

Article 253 allows the Parliament to make law for: (a) prescribing the maximum limits as to property or any class thereof which may be owned, held, possessed or controlled by any person; and (b) declaring that any trade, business, industry or service specified in such law shall be carried on or owned, to the exclusion, complete or partial, of other persons, by the Federal Government or a Provincial Government, or by a corporation controlled by any such governments.

System of the Government

The present constitution, like all its predecessor constitution, provides for a quasi-federal system of government. Separate executives and legislatures are provided at the federal and the provincial levels, but there is no bifurcation in the judiciary. The powers are distributed between the Federal and the Provincial Governments.⁽²³⁾ A large Federal List enumerates important powers of defense, external affairs, foreign trade, currency, income tax, weights and measures, communications, post offices, nuclear energy, shipping and aircrafts, etc. The federal legislature (Parliament) has the exclusive power to make laws on the subjects contained in this list and

the executive authority of the federal executive extends to all such matters. A concurrent list is also provided and both the Parliament as well as the provincial legislatures can make laws on the subject in this list, with the proviso that in case of conflict between the federal and the provincial law, the federal law shall prevail.⁽²⁴⁾ The remaining subjects are exclusively placed under the control of the provinces. However, the federal principle is severely disturbed during the periods of emergency declared under Article 232 and 234.

The Constitution envisages a parliamentary system of government based on the Westminster model. The President is the head of the state, who is required generally to act on the advice of the Prime Minister and the Cabinet.⁽²⁵⁾ He is elected by the members of Parliament and Provincial Assemblies. The Prime Minister is the leader of majority party or parties, in the National Assembly which is a directly elected house of the Parliament. The cabinet is responsible to the National Assembly⁽²⁶⁾ and the Assembly can replace the executive by passing a vote of no-confidence against the Prime Minister.⁽²⁷⁾ The Senate, which is the upper house of the Parliament and has an equal share in the legislative powers except the money bills, does not have any direct control over the Federal Government. A similar system is provided at the provincial level, as well. The Governor, who is the head of the province, is appointed by the President and acts on the advice of the Chief Minister,⁽²⁸⁾ a nominee of the Provincial Assembly.

Judicial Review

The Constitution does not expressly provide for judicial review of the legislation. But it is clearly implied in some provisions of the constitution.⁽²⁹⁾

The High Courts are, however, expressly invested with the power to review the administrative actions and make necessary orders to correct the illegalities.⁽³⁰⁾ They have the powers to issue various orders similar to the English prerogative writs of prohibition, *mandamus*, *certiorari*, *habeas corpus* and *quo warranto*. This jurisdiction can be exercised by the High Court, on the application of an aggrieved person, when no other adequate remedy is provided by law. The significance of incorporating the writ jurisdiction in the Constitution need not be over-emphasized; obviously, it cannot be restricted, abridged or abolished by any law subordinate to the Constitution. However, the writ jurisdiction of the High Court is subject to other

provisions of the Constitution which exclude the judicial intervention in some matters, such as, election of the President or members of Parliament and Provincial Assemblies, service matters, tribal areas, declaration of emergency, Prime Minister's advice to the President and proceedings of the Parliament or the Provincial Assemblies.

Independent and Effective Judiciary

The Constitution has made provisions for an independent and effective judiciary. The Superior Courts are established under the Constitution and enjoy great amount of independence. The judges are given security of tenure and can only be removed by the President on the recommendation of Supreme Judicial Council,⁽³¹⁾ a body which is staffed by senior judges of the Supreme Court and the High Courts.

At the apex is the Supreme Court which has original jurisdiction in disputes between the Federal Government and the Provincial Governments.⁽³²⁾ The Supreme Court is also empowered to issue necessary orders for the enforcement of Fundamental Rights if a question of public importance is involved. The Supreme Court also has the advisory jurisdiction.⁽³³⁾ The Constitution has invested the Supreme Court with appellate jurisdiction over the decisions of the High Courts,⁽³⁴⁾ Service Tribunal,⁽³⁵⁾ and Federal Shariat Court.⁽³⁶⁾

Below the Supreme Court there is a High Court, for each province. Apart from the power of the High Courts under Article 199, to issue appropriate orders for the enforcement of Constitutional and legal rights, the High Courts are also invested by law with enormous appellate and revisional jurisdiction both in civil and criminal cases.⁽³⁷⁾ Moreover, the subordinate judiciary works under the supervision of the High Courts.⁽³⁸⁾ Under the High Court there is, in each district, a District and Session Court with civil and criminal jurisdiction respectively. At the bottom, there are independent civil courts which are presided over by legally qualified judges. The administration of criminal justice is carried on by judicial and executive magistrates.

Apart from these courts of general jurisdiction, there is a Federal Shariat Court at the national level.⁽³⁹⁾ This court which is creature of the Constitution has special power of judicial review of legislation. The court, on the application of any person, or on its own motion, can review any law

to determine whether it is repugnant to the injunctions of Islam, which is the state religion under the Constitution. If the court finds the law, or any part thereof, repugnant to the Islamic injunctions, it can declare it void. An appeal lies against the decision of this court to an Appellate Bench of the Supreme Court.

Article 212 of the present Constitution also provides for the establishment of administrative courts and tribunals to deal with the service disputes, tortious liability of the public functionaries and the enemy property. The Constitution provides that, if such a court or tribunal is established, no other court can interfere in any matter falling within the jurisdiction of the administrative court or tribunal. An appeal to the Supreme Court lies against the decisions of these courts and tribunals if a question of law of public importance is involved and the Supreme Court grants leave to appeal. So far, only one type of administrative tribunals, the service tribunals, have been established at the federal and the provincial levels.

Ombudsman

A presidential Order,⁽⁴⁰⁾ established the office of Ombudsman at the federal level in 1983. The order enjoys constitutional protection and cannot be amended, altered or repealed by the Parliament except by following the procedure of constitutional amendment. The Ombudsman is appointed by the President and enjoys substantial independence. He has the jurisdiction to investigate into allegations of mal-administration against the federal agencies. Such institutions have also been established at the provincial level. These institutions are working very successfully and are going to make great contribution in the establishment of administrative accountability.

References:

- (1) Lyall, *British Dominion in India*, 24.
- (2) For historical details See authorities cited in note 95 surpa.
- (3) Another historic event took place in 1954 when the Governor-General dismissed the Constituent Assembly which was successfully challenged in the High Court: (See *Maulvi Tameezuddin v. Federation of Pakistan*, PLD 1955 Sindh 96), but lost in the Federal Court; (see *Federation of Pakistan v. Maulvi Tameezuddin*, PLD 1955 F.C. 240).
- (4) PLD 1958 SC (PAK) 533.

- (5) See generally Munir, *Constitution of Pakistan*, Introduction and *Begum Nusrat Bhutto v. Chief of Army Staff*, PLD 1977 SC 657 per. Dr. Nasim Hassan Shah, J.
- (6) This martial law was declared illegal by the Supreme Court in *Asma Jilani v. Government of Punjab*, PLD 1972 SC 139.
- (7) PLD 1977 SC 657.
- (8) Article 19.
- (9) Article 20.
- (10) Article 15.
- (11) Article 16.
- (12) Article 17.
- (13) Article 10.
- (14) Article 12.
- (15) Article 13.
- (16) Article 25, 26, and 27, See also Articles 21 and 22.
- (17) Article 18.
- (18) Article 23 and 24.
- (19) Article 8.
- (20) Article 233.
- (21) Article 184 (3).
- (22) Article 199 (1) (C).
- (23) See Articles 142, 143 and the Fourth Schedule.
- (24) Article 143.
- (25) Article 48.
- (26) Article 91.
- (27) Article 95.
- (28) Article 105.
- (29) See Articles 8, 143 and 199 (1) (C).
- (30) Article 199.
- (31) See Articles 209-211.
- (32) Article 184 (1) and (2).
- (33) Article 186.
- (34) Article 185.

- (35) Article 212 (3).
- (36) Article 203 F.
- (37) See generally Cr. P.C. 1896 and C.P.C. 1908.
- (38) Article 203.
- (39) See e.g. Chapter 3A Part-VII of the Constitution containing Articles 203A to 203J.
- (40) Establishment of the Office of Wafaqi Mohtasib (Ombudsman) Order 1983 (P.O. I of 1983).

Law of Intellectual Property: Patentability of Life and TRIPs Agreement

Ashfaq Ahmed Khan*

The first international treaty which makes it legal – and compulsory – to patent life is the World Trade Organization's Trade Related Intellectual Property Rights (TRIPS) Article 27.3(b) during its 1999 Review.⁽¹⁾ It requires member states to provide patent protection for all fields of technology. Articles 27.2 and 27.3 outline which inventions member states may exclude from patent protection and under which conditions. The exceptions to the rules are in these two articles.

Article 27 and its Object

Article 27 of TRIPs states:

Patentable Subject Matter

1. *Subject to the provisions of paragraphs 2 and 3, 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. 5 Subject to paragraph 4 of Article 65, paragraph 8 of Article 70 and paragraph 3 of this Article patents shall be available and patent rights enjoyable without discrimination as to the place of invention, the field of technology and whether products are imported or locally produced.*
2. *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.*

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3. 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 subparagraph shall be reviewed four years after the date of entry into force of the WTO Agreement.

The contribution of the European Patent Convention has strongly influenced that phrasing because it prohibits patents on plant and animal varieties.⁽²⁾ Article 27.3(b) currently requires all member States to provide intellectual property protection either patents or an effective *sui generis* system or both for plant varieties. *Sui generis* identifies a law that is specially created for its purpose.⁽³⁾ For example, the Europeans set up a system of plant breeders' rights (PBR) in the 1960s. Breeders had been asking for some kind of ownership over their varieties since decades. Europeans found that the patent system was not appropriate for plants since plants reproduce themselves. Therefore they created the UPOV system – a *sui generis* system for plant varieties. UPOV stands for Union for the Protection of New Varieties of Plants and it has 42 members today, mostly industrialized countries.⁽⁴⁾

However, in Article 27, no definition of “effective *sui generis* system” is given; yet developing countries had to put such system in place by the end of 1999 if they choose this as an alternative to patenting and if they wish to avoid punitive trade sanctions.

The European States insisted on the introduction on the protection of “*ordre public* or morality”. However, in the absence of an international jurisprudence, the interpretation of this provision will be left to domestic patent law and interpretation of pertinent judicial bodies.⁽⁵⁾

Finally, we find four possible options to implement this provision. The first would be that member countries can allow patents on any invention in biotechnology by not excluding plants, animals and biological processes;

the second would consist in the option to exclude plants, animals and biological processes, but not exclude plant varieties, from patentability. The third, they have an option not to patent plant varieties, i.e. to exclude plant varieties from patentability and introduce a *sui generis* system, an IPR protection of its own kind for the protection of plant varieties. They also can choose not to exclude plant varieties from patentability and to provide in addition, *sui generis* rights, which is the double protection system. Therefore, it seems to us that TRIPs obliges member States to provide some kind of IPR protection on almost all life forms.

General Critique

Article 27 is one of the most contentious principles underpinning the new multilateral trade system. Although 27.3(b) allows countries to exclude plants and animals from patentability, TRIPs requires that all countries provide patent protection on micro-organisms⁽⁶⁾ which are life forms. And depending on how it is defined, a plant cell can be considered a micro-organism yet it can grow into an entire tree. A patent on such a cell⁽⁷⁾ could extend to trees even if you can't patent a plant variety. Most of Constitutions affirm (like the one of Philippine art. XII sec. 2) that the State is the owner of all "flora and fauna" and "with the exception of agricultural lands, all other natural resources shall not be alienated". In this case allowing intellectual property rights over fauna or flora can be seen to be a form of alienation since IPRs are exclusive monopoly rights that prevent other people from using or producing something.

The language of this article is open to wide interpretation. For most developing countries, it is not clear how TRIPs distinguishes plants and animals discretion patented and micro-organisms which must be patented; nor it is clear why essentially biological processes⁽⁸⁾ do not have to be patented, but microbiological⁽⁹⁾ and non biological processes do. After all, a microbiological process is an essentially biological process. In case where the microbiological process whereby a engineered gene⁽¹⁰⁾ is used to modify a product is new, involves an inventive step and is capable of industrial application, apparently can be an patentable invention under TRIPs. The sole fact that it relates to a life form is not a ground for denial of IP protection since it excludes only "plants and animals to other than micro-organisms" and genes are not whole organisms (but micro-organisms).⁽¹¹⁾ Still States may argue that genes are not micro-organisms, since they are unicellular

organisms capable of propagation or can invoke *ordre public* or morality in order to deny such an IP right. Is this denial to be justified under the TRIPs Agreement with respect to a gene used to create a vitamin-enriched food product, where there is no scientific basis for regarding the gene or the rice as harmful to human health or the environment? It is evident that TRIPs, resulting from a painstaking negotiation on a wide number of issues of IP cannot provide a precise guidance but can only have the power to influence the attitude of certain States toward transnational biotechnology companies.

Moot Questioning on Patentability of Biotechnology vs. Protection of Biodiversity?

One of the most critical areas of concerns arises from developing country interests regarding the access to genetic sources material from which genetically engineered products are developed. It also implies the distribution of benefits, say financial or technology transfers, to those appropriated with the genetic source material. This conflict materializes in implementation of States' obligations under TRIPs and under the relevant provisions of the CBD.

The CBD⁽¹²⁾ is a result of prolonged international pressure to respond to the destruction of, and unequal profits from, the biodiversity of the Southern hemisphere. After years of debate, the Convention was agreed upon in 1992 and came into force in 1993. By October 2000, 178 States have ratified or acceded to the convention. The CBD represents an important watershed in international efforts to promote biodiversity conservation. In the first place, the Convention binds signatories to a number of basic principles regarding how, by whom and for whose benefit biodiversity should be conserved.

The relationship of CBD to TRIPs at a non-legal level of abstraction is best characterized in terms of an opposition of principles, an opposition between the principle of sustainable development served by CBD and the principle of economic growth purported by TRIPs. The justification for globalizing and harmonizing intellectual property rights is that such rights will strengthen the supply of innovation to the market. Economic growth, it is said, will be the result of improving dynamic efficiency through stronger intellectual property rights. Pushing markets in the direction of more technological innovation, the high technology fix stands in stark contrast

to the kind of economy that committed environmentalists want. For them, development is subject to environmental costs and implications.

The CBD is intended to strengthen developing countries' capacities to conserve and use biological diversity on a long-term basis, taking into account all rights over those resources, and including the right to enjoy the benefits of this resource base. Southern hemisphere countries feel consistently exploited because of the structural imbalances between countries rich in biological diversity and those strong in technological and legal instruments. On the opposite side, TRIPs is intended to provide private property rights over products and processes, be they biodiversity-based or not. The pressure of certain non-state actors, namely corporate private interests, has been overwhelming in achieving these results.

Coming on a legal ground, we find that Contracting Parties to CBD, recognizing that *"patents and other intellectual property rights may have an influence on the implementation"* of the provisions of that convention, are under the obligation of cooperation to ensure that IPRs are *"supportive of and do not run counter to its (the CBD's) objectives"*. However, this is mainly *"subject to national legislation and international law"*. Article 22 states that the CBD's provisions will not affect rights and obligations of countries to other *"existing international agreements, except where the exercise of those rights and obligations would cause a serious damage or threat to biological diversity"*. Read together and in the spirit of the CBD, many authors have said there is a basis for countering the runaway march of the IPR regimes described above.

The Preamble to the TRIPs Agreement defines intellectual property rights as being private rights. Because these rights are subject to the general WTO principle of national treatment, the implementation of TRIPs Article 27.3(b) on biodiversity will give global jurisdiction to private individual property rights. Therefore, it is argued, that the global scope of these rights will destabilise the regime of national sovereignty espoused by CBD, which itself aims to recognise the inherent rights of indigenous and local communities.

Points of Conflict between TRIPs and CBD

The inconsistencies between IPRs applied to life forms under TRIPs, and the obligations of CBD can be identified as follows:⁽¹⁴⁾

Firstly, the impact of a regime granting IPRs over plants, animals and related biological resources (according to TRIPs) on the environment. This regime, on the one hand may create extraordinary incentive for innovation and on the other hand constitutes a fundamental step for the **development of environmentally harmful technologies**,⁽¹⁵⁾ utterly challenging the rigorous implementation of the Convention on biodiversity.⁽¹⁶⁾ These preoccupations are mainly addressed to the modern genetic technologies which are essentially based on the modification of plant animal and micro-organisms genome with the aim to embody a special characteristic for instance the resistance of herbicide or the predisposition to avoid certain diseases - in order to attain a commercial advantage. With regard to the transgenic plants and animals, specified environmental risks have been identified as particularly harmful for the human health which can concretize in irreversible harms for the global ecosystem and for human welfare (after their entrance into the environment and market).

Secondly, conservation of biological diversity as called for by the CBD is jeopardized under a global regime of private monopoly rights. Conservation of biological resources implies enormous responsibilities that TRIPs does not allocate to those who will benefit from ownership rights to these resources. The private property regime established by TRIPs can undermine the implementation of the access and benefit sharing provisions of CBD. The private monopoly of IPRs holders can only begin where national or community sovereignty over genetic resources has been effectively suspended. In this situation, governments and communities will have little means of regulating access or demanding a share of benefits because they will be subject to private ownership.

Thirdly, an IPR regime without derogations, namely inflexible, can seriously hinder the environmentally-sound technology transfer among States, and particularly from industrialized countries to developing ones. Indeed technology transfer is a key tool to achieve the goals fixed in the CBD.⁽¹⁷⁾

Fourthly, the categories of IPRs traditionally recognized in TRIPs agreement are not completely adequate to guarantee the protection of practices and the knowledge of indigenous communities which have crystallized along the centuries and which play an outstanding role in the conservation of biological diversity. In this connection, the well-known

phenomenon of “bioimperialism” or “biopiracy” has been invoked in order to define the way that industrialized countries can illegitimately “conquer” the biological resources. This “conquest” is undertaken through the obligation on the part of the Southern Countries to grant patents, trademarks and trade secrets without no compensation to the local communities who have preserved and bred these resources. What is more, since some 90% of genetic information and traditional knowledge is found in developing countries,⁽¹⁸⁾ IPRs can prevent the CBD from realising the full and practical meaning of Article 3 on national sovereignty over their natural resources and Article 8(j) on the rights of local and indigenous communities – with the ultimate goal of the fair distribution of the benefits of the use of genetic resources situated in the territories of the Contracting parties.⁽¹⁹⁾

For all these reasons the new commercial opportunities opened up through developments in biotechnology have resulted in engaging in a massive campaign organized by NGOs and developing countries to wrest market control over biodiversity through the patent system, as well as change the rules of that system in the process.⁽²⁰⁾ These controversies are aggravated by the fact that many genetic ‘inventions’ claimed in the North derive from biological products and knowledge from the South. The developed countries companies have sophisticated technologies – such as genetic engineering – to extract value from biodiversity. Through patent protection on life forms, major transnational corporations like Monsanto/Car can take genes from, for instance a butterfly in the fields, forests and coastal waters of developing countries manipulate them in their labs and obtain patent protection thereon. Public outcry rages against the fact that people in developing countries would have to pay royalties on their own resources and knowledge!

A patent under TRIPs is recognised on the basis of novelty. Community rights under CBD are founded on the basis of pre-existing rights to biodiversity and associated knowledge. IPR on biodiversity-related ‘inventions’ is therefore dependent upon the prior rights of communities. These latter rights are undermined by the very existence of the rights detailed in the TRIPs novelty to myopic, culturally reduced industrial interests. It is finally argued that the implementation of TRIPs will systematically negate the wider historical contribution made by communities in developing countries to the planet’s biodiversity.

Biotechnology and Indigenous Knowledge

Indigenous knowledge has been at the centre of a wide range of international fora and treaties including WTO, WIPO, the CBD, and the Food and Agriculture Organization (FAO) and the International Labour Organization (ILO).⁽²¹⁾

Developing countries assert that the traditional knowledge held by local and indigenous communities now forms part of the product development process of the industrialized countries.⁽²²⁾ The aim of TRIPs to attempt to homogenize IPR regimes may jeopardise a country's or community's freedom to choose the way in which it wants to deal with the use and protection of knowledge. This issue blatantly arises when the genes are not appropriated from the State that patents but from another State that manipulates and sells the genetically modified product. Developing countries rise against this kind of "piracy" of indigenous and local community knowledge following the imposition of IPRs on life forms and related knowledge.⁽²³⁾ As indigenous peoples everywhere acquire a deeper understanding of IPR regimes, and ways of challenging them when they impinge on their human or resource rights, they start to invoke the implementation of the relevant provisions of the CBD, especially those dealing with traditional knowledge and overall access to genetic resources.⁽²⁴⁾

Although TRIPs does not contain any provision for the protection of indigenous and local community knowledge, developing countries are seeking intellectual property registration systems that would identify and document the sources of genetic material and indigenous knowledge used in product development.⁽²⁵⁾ Such a system would counter these threats and allow the equitable benefit-sharing arising from the use of such genetic material and knowledge in accordance with the CBD.⁽²⁶⁾ But in cases where domestic law prohibits certain categories of patents on living organisms, the system could also be used to invalidate patents. The TRIPS agreement allows this, provided these organisms are also prohibited from commercial exploitation. It is in this respect that ways need to be found to reduce possibilities for tension between the two regulatory regimes.

The CBD requires that genetic resources and traditional knowledge be used following the granting of Prior Informed Consent (PIC) by the holders of such material and knowledge.⁽²⁷⁾ The TRIPS Agreement, however,

does not require PIC and it is therefore deemed to contradict the CBD. It is generally understood that the PIC requirement would be embodied in some form of agreement for the transfer of biological material or traditional knowledge.⁽²⁸⁾ Such agreements would be made between foreign firms and the governments of the developing countries. But this point tends to conceal the fact that there are areas of conflict between indigenous communities and national governments in regard to inventions but these rights are still nascent.⁽²⁹⁾

When it comes to the claims of indigenous communities over genetic resources, this is particularly sensitive issue since IPRs do not protect the underlying in many genetically modified products but only the actual genetic modification. Therefore, various indigenous groups around the world are making efforts to seek greater autonomy, as it is widely accepted that rights to land (and the related resources such as genetic material) are part of the national discourse.⁽³⁰⁾ In the field of farmers rights on plant variety, a proposition has been advanced by Ricolfi according to which a "displacement offsetting" mechanism should be envisaged. The genetic modification of material "entails a yield" larger than the living matter it derives from or enhanced characteristics representing some sort or other of improvement over the same living matter. As a consequence, farmers growing the original material should tend to be displaced in no time, unless they were entitled to a statutory license to use the genetically improved living material. Indeed, statutory licensees should be provided, so the international exhaustion doctrine would apply and the material could be freely sold anywhere in the world. The question to which a specific group of people or particular entity this right should be ascribed is to be solved, according to us, within State's legislation in the exercise of its exclusive sovereignty. If these conditions are not fully rewarding to indigenous communities, Ricolfi has also proposed a fair use from infringement claims, borrowing this notion from copyright law doctrine. "If I may be visionary for a moment",⁽³¹⁾ in the case a western company patented the method to modify the gene of a specie of butterfly - preserved for millennia by a certain indigenous community - to create a pharmaceutical product, this system would immunize the community in case it repeats that invention within the boundaries of the members of that group of people, i.e., not entailing manufacture or sale of propagating material so entering in competition to the right holder. On the contrary, it may be observed that this idea hardly fits a traditional patent system since fair use, linked to copyright exercise of

rights, is not considered an infringement whereas the repetition of an invention without the proper permission already constitutes an infringement. According to us this far reaching proposition can only be valid in a *sui generis* system of protection, i.e., suitable to the nature of the subject matter in question.

Apparently such sophisticated compromises would not satisfy a large number of NGOs and some countries who claim that indigenous knowledge and the associated genetic material should be considered to be in the public domain and be excluded from patentability. This approach is particularly true for herbal remedies, cuisines and many other traditional applications. Although this approach would reduce some of the international conflicts arising from recent acts of patenting, it would not solve the larger issue of how to stimulate further innovation among local and indigenous communities.

In the context of this debate, in turn, WIPO is also examining intellectual property issues related to traditional knowledge and biotechnology in light of the CBD provisions.⁽³²⁾

In the meantime, industrialized countries have favoured a system that involves voluntary agreements rather than strict national laws.⁽³³⁾ Indeed, many countries are pursuing this approach. However, nearly 40 countries have either adopted or are actively pursuing the adoption of laws that would regulate access to genetic resources and the associated knowledge. The emergence of these laws and the growing interest in facilitating the implementation of the TRIPS provisions will increase tension between countries on this subject.⁽³⁴⁾

Resolving these issues may require an exploration of the extent to which existing intellectual regimes can protect certain aspects of indigenous knowledge.⁽³⁵⁾ When such possibilities are exhausted, a case should be made for considering this issue in the context of the *sui generis* systems derived from a flexible interpretation of Article 27.3(b) of TRIPS as well as the extension of higher levels of protection for geographical indications to products other than wine and spirits.

References

- (1) In the last round of GATT negotiations, which gave rise to the establishment of WTO, the absence of strong intellectual property rights had emerged as a third generation of trade barriers, after the generations of tariff and non-tariff measures. TRIPs was thus directed to bring developing countries' to the level of IPR laws, particularly under the pressure of transnational trading groups in developing countries who suffered a considerable loss in royalties by the absence of this protection. deem necessary. The TRIPs Agreement came into force on January 1, 1995 and must be implemented by all WTO member states. It entails obligations for seven areas of intellectual property rights available for all fields of technology. It must be implemented in developing countries by the year 2000 and in the least-developed countries by the year 2005. Is subject to the same dispute settlement procedures as other WTO agreements: failure to implement the terms of the agreement will result in trade retaliation against the offending country. A Procedure of revision of Art. 27 as commenced in 1999 and 2000, see GRAIN, *For a Full Review of TRIPS 27.3(b)*, March 2000, <http://www.grain.org/publications/tripsfeb00-en.cfin>.
- (2) Provisions similar to those of the TRIPs Agreement appear in the Convention on the Grant of European Patents, Oct. 5 1973 1065 UNTS, 199. Interpretation of provisions relating to patent genetically engineered plants and animals have been complex with the European Patent Office. See MURPHY S., "Biotechnology and International Law", in *Harvard International Law Journal*, 42, 2001.
- (3) Another example of *sui generis* protection can be found in databases. The European Union has recently created a *sui generis* system of protection of intellectual property over electronic databases, since copyright in the area presented some weakness in the age of the Internet. See also NIJAR G.S., 'Sui generis options: the way forward' in BIOTHA/GRAIN (eds, 1998), *Signposts to Sui generis Rights*, p. 79. Available at <http://www.iatp.org/TRIPs99>.
- (4) UPOV as a legal system designed to reward breeders which service industrial agriculture. It was revised in 1992 to give breeders exclusive commercial rights that extend to the products of the harvest of any farmer using their varieties. That means not only can they claim ownership of a harvest - of flowers for the perfume industry such a *ilang-ilang* but also the product: the product itself. Also, while the earlier version of the UPOV Convention 1978 contained a provision that allows farmers to save their harvest for seed, this is deleted from the 1991 text. It is up to each member government to determine whether their farmers will have a privilege to save seed for the next growing season. Developing country farmers frighten to be policed by transnational seed companies if UPOV were used as a *sui generis* model. The fact is TRIPS makes not mention of UPOV, so it argued that there is no reason, other than political pressure from countries like the US to use it as a model. AS the word effective is difficult to understand what it means. GRAIN, *PVP in the South: The Flow Towards UPOV*, March 2001, <http://www.grain.org/docs/towardsupov.pdf>.
- (5) As earlier discussed, Europe Patent Office (EPO) is for instance developing its position on the subject of morality for biotechnology inventions through a small number of disputed patent applications and patents. Formal opposition proceedings on specific

patents have provided and continue to provide occasions for the EPO Opposition Division and Appeals Boards to interpret Article 53(a) of the European Patent Convention with reference to biotechnological inventions. The moral dimension on patent law would probably let fall the genetic sequence into the clause excluding inventions "contrary to public order and decency", which is part of most European patent legislation. But now we have brought cancerous mice and human genetic material in the potential frame of intellectual property, ethics has moved to a much more central position, where it sits uncomfortably with the patenting profession. From the case law of the European Patent Office we can understand that this institution has been is not comfortable with the role of ethical adjudicator to be thrust upon them by society. Patenting is probably the wrong place for society to be deciding once and for all the morality of, say, the *onco mouse*, see KERNALEGUEN F., "les principes fondamentaux des lois "bioetique" p. 35ss in FEUILLET-LE MINTIER B., dir., *Les Lois "bioetique" a l'epreuve des faits*, PUF, 1998.

- (6) A micro-organism is an organism that can be seen only under a microscope, usually, an ordinary light microscope. They are usually of the order of microns (millionths of a metre) or tens of microns in linear dimensions, and include bacteria, mycoplasm, yeasts, single-celled algae and protozoa. Multicellular organisms are normally not included, nor fungi apart from yeasts. Viruses are also not automatically included; many scientists do not classify them as organisms as they depend on cells to multiply
- (7) A cell line is a supposedly genetically uniform population of cells derived from one individual, or it could be a clone (theoretically genetically identical descendants) of one original cell. The genetic identity of all the cells is a fiction, as the genetic material is subject to many 'fluid genome' processes which constantly make cells genetically different from one another. A genome is the totality of all the genetic material (deoxyribonucleic acid or DNA) in an organism, which is organised in a precise, though by no means fixed or constant way. In the case of viruses, most of them will have ribonucleic acid or RNA as the genetic material.
- (8) An "essentially biological process" is scientifically suspect. Does it mean a process that occurs naturally or which is carried out by organisms? Similarly, a "non-biological process" is difficult to define, as all processes in biotechnology, by definition, are biological. A weak case may be made on the ground that it is one that does not occur naturally, or which is not normally carried out by organisms.
- (9) A "micro-biological process" is presumably one that is carried out by micro-organisms.
- (10) A gene is a stretch of genetic material (DNA or RNA) with a defined function in the organism or cell. It usually codes for a protein. There are many genes within a genome. For example, the human genome is estimated to contain 100,000 genes. A DNA sequence refers to the sequence of bases in a stretch of DNA. DNA is a linear molecule consisting of units strung together. There are 4 different units, each identified by the specific base contained. There are 4 different bases, which are simply represented by the alphabets, A, T, C and G. An example of a DNA sequence is as follows: ATTTCCGCTACGCGTTA... A RNA sequence is similar, except that the alphabet T is replaced by U.
- (11) LESKIEN D. and FLITNER M. "Intellectual Property Rights and Plant Genetic Resources: Options for a Sui Generis System." *Issues in Plant Genetic Resources*,

- No. 6. International Plant Genetic Resources Institute, Rome, June 1997, pp. 18-22.
- (12) *Convention on Biological Diversity*, Done at Rio de Janeiro, 5 June 1992, LTNEP/Bio.Div/N7-INCS/4; 31 *International Legal Material* 818. Its overall objectives are: the 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, including by appropriate access to genetic resources and by appropriate transfer of relevant technologies. Its main obligations of the Convention are: Recognition of the sovereign rights of states over their biological resources (Art. 3 and 15). Access to biological resources can only occur with the 'prior and informed consent' of states (Art 15.5). Protection and promotion by the signatories the rights of communities, farmers and indigenous peoples vis-a-vis their biological resources and knowledge systems (Art. 8j and 10). Establishes access to the biological resources of developing countries on a quid pro quo basis with technology transfer from the industrialised countries (Art. 16). Requires the equitable sharing of benefits arising from the commercial use of communities' biological resources and local knowledge (Art 15.7). Asserts that intellectual property rights must not conflict with the conservation and sustainable use of biodiversity (Art 16.5).
- (13) For in depth study of the preparatory works of the CBD see McCONNEL, *The Biodiversity Convention. A Negotiating History*, Kluwer Law International, The Hague, 1996.
- (14) In the case a conflict arises between two conventions having the same subject-matter, the well known rule *lex posterior derogat lex anterior* (enshrined in Article 30 of Vienna Convention Law on Law of Treaties) will be applied. If we accept that this is the case, TRIPs will control the issue having come into force after CBD. Although we believe that the subject matter of TRIPs and CBD is not exactly the same, certain provisions contained in the two treaties TRIPs and CBD need to be harmonised for the sake of full application of both instruments universally ratified.
- (15) ALEXANDER, "Some Themes in Intellectual Property and the Environment", in *Review of European Community and Int. Environmental Law*, 1993, p. 113. See also PAVONI R., "Brevettabilita genetica e protezione della biodiversita: la giurisprudenza dell' Ufficio Europeo dei Brevetti", in *Rivista di Diritto Internazionale*, 2000, p 430-433.
- (16) Art. 7 c imposes on the States to identify "processes and categories of activities which have or are likely to have significant adverse impacts on the conservation and sustainable use of biological diversity". Such activities have to be coherently managed (art. 8 lit. 1). see TARASOFSKI, "The Relationship between TRIPs Agreement and the Convention on Biological Diversity: Towards a Pragmatic Approach", in *Review of European Community and International Environmental Law*, 1993, p. 148 ss. According to this author the two regimes of protection can be reconciled although the chapeau of Art. 8 says as far as possible and as appropriate can be an element of uncertainty.
- (17) On the question of transfer of technology it is to notice the compatibility between Art. 16 of CBD and the fundamental principle of WTO agreements on the Most Favourite Nation in Art. 3 and 4 of TRIPs, see TARASOFSKI, *op. cit.*, p. 150.
- (18) COTTIER, *op. cit.*, p. 1827.
- (19) The relevant provisions on the benefits sharing are art. 1, 15.7 and 19.2 for those

- relating to the conservation of traditional knowledge and the conservation of biodiversity art 8(j) and 10(c). For some socio-economic consideration see GOLDMAN, "Compensation for Use of Biological Resources under the Convention on Biological Diversity: Compatibility of Conservation Measures and Competitiveness of the Biotechnology Industry", in *Law and Policy International Business*, 1994, p. 695 and PRAKASH, "Towards a Synergy between Biodiversity and Intellectual Property Rights", in *Journal of World Intellectual Property*, 1999, p. 821.
- (20) According to the World Intellectual Property Organisation (WIPO), citizens and corporations of industrialised countries hold 95% of the patents in Africa, almost 85% of those in Latin America and 70% of those in Asia. WIPO, data set IP/STAT/1994/B, released November 1996.
- (21) POSEY D., *Beyond Intellectual Property Rights: Towards Traditional Resource Rights for Indigenous Peoples and Local Communities*, International Development Research Centre, Ottawa 1996. Various conventions and "soft-law" instruments acknowledge and promote these rights: *U.N. Conference on Environment and Development*, June 3-14, 1992, Agenda 21, U.N. Doc A/CONF.151/5/Rev.1 (1992) (hereafter Agenda 21); *Conference on Environment and Development, Rio Declaration on Environment and Development*, UN Doc A/CONF.151/5/Rev.1, 1992 (hereafter Rio Declaration); *International Labour Organization Convention Concerning Indigenous and Tribal Peoples in Independent Countries*, No. 169, June 27, 1989, 28 International Legal Materials 1382, 1989, *International Labour Organization Convention Concerning the Protection and Integration of Indigenous and Other Tribal and Semi Tribal Populations in Independent Countries*, No. 107, 328 UNTS 247. In addition, various instruments affirm the right to development and the entitlement of peoples to full sovereignty over all their natural health and resources, *U.N. General Assembly Declaration on the Right to Development*, G.A. Res.41/128, annex, IJN GAOR, 41th Sess., Supp. No. 53, p. 186, UN DOC A/31/128 (1986).
- (22) See COTTIER, *op. cit.*, p. 1826-1827 for the various trends of action in favour of protection of traditional knowledge in the field of biological resources. The evolution of traditional knowledge in developing industrial society in the 19th century shows that with the shift of scientific research to private institutions, the granting of IPRs accelerated the loss of traditional knowledge and the current mass extinction of genetic resources.
- (23) For example, the patenting of traditional Indian herbal remedies derived from the use of turmeric or a patent related to the *ayahuasca* plant used for centuries by the indigenous people of the Amazon has been the object of legal challenges taken to the U.S. and European patent offices. Both patents have subsequently been revoked by the US Patent and Trademarks Office. The patenting of *basmati* rice, long used in Pakistan and India, has added to the controversy. The situation is compounded by the use of broad patents to protect plant varieties, some of which form the staple diets in these countries. India and many other developing countries argue that the absence of requirements in patent documents (in Article 29 of the TRIPS agreement) to name the countries or origin of genetic material and traditional knowledge creates a conflict between WTO and CBD. The inclusion of such information would make it possible for the developing countries to meet their obligations under the CBD. After the endorsement by the European Parliament, a proposal to give this effect in Europe

was rejected in 1998 by the European Commission. For a thorough study on this issue see NIJAR, G.S., *Towards a Legal Framework for Protecting Biological Diversity and Community Intellectual Rights: A Third World Perspective*, ICCBD 2nd Sess., Nairobi, 20 June - 1 July 1994.

- (24) Article 8(j) the CBD calls for national legislation that would "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 practices."
- (25) Such knowledge, because of its nature, may not be amenable to protection under current IPR regimes. Finally, it has no recognition of the need to equitably share in the benefits of knowledge related to biodiversity. Indeed, it legitimizes the conventional inequities that have characterised the interactions between the industrial-commercial use of biodiversity-related knowledge, and the community/citizen use of such knowledge. See JACOBY A. and WEISS Ch, "Recognizing Property Rights in Traditional Biocultural Contribution", in *Stanford Environmental Law Journal*, 16, 1997, p. 74.
- (26) On this issue see GLOWKA L., *A Guide to Designing Legal Frameworks to Determine Access to Genetic Resources*, World Conservation Union, Gland, Switzerland 1998. Similar debates have been going under the auspices of the FAO Commission on Plant Genetic Resources for Food and Agriculture. The work of the commission focuses on revising the International Undertaking on Plant Genetic Resources to bring it in line with the Convention on Biological Diversity.
- (27) Ricolfi has proposed that this should be a requirement under which if a Western firm genetically engineers a given living matter, the same, before obtaining a patent protection, "has a duty to negotiate with the local entities who have contributed to the preservation the of originating material", RICOLFI M., Presentation of the Geneva Papers on the occasion of the National Meeting on *Farmers' Rights Intellectual Property Rights and Biodiversity Conservation: the Duty to Cooperate*, www.ulpiano.com/IP/J_Pat_la.htm.
- (28) Article 15(5) of the Convention on Biological Diversity provides that: "Access to genetic resources shall be subject to prior informed consent of the Contracting Party providing such resources, unless otherwise determined by that Party".
- (29) The domestic Case law contributes to the evolution of this new field. In an analogous way the Supreme Court of California in a landmark case *Moore v. Regents of the University of California*, held that exploitation based upon, tissue and, therefore, genetic resources, extracted from an individual does not create property rights. The personality is protected by individual's right to prior consent. In the Australian case law, *Mason v. Tritton*, the fishing rights of indigenous populations have been acknowledged for the aim of protection of the habitat of indigenous peoples. See the Australian legislation whereby the Australian government controls the biological resources and reserves the right to set fees and royalties for the access to them for research "relating to the commercial potential of those resources", See Cottier, *op. cit.*, p. 1838. Such a concept of historic rights are recognized by international law when they represent a constant

pattern of "usage" and "acquiescence" by neighbouring states. The International Court of Justice has widely accepted this principle of international law under the name of "historic title" particularly on the occasion of the *Fisheries, United Kingdom v. Norway*, Merits Judgement 18, December 1951. In this case Norway was recognized to have been a persistent objector to the process of creation of the customary rule of the principle of equidistance on the continental shelf delimitation because of the acquiescence of the community of States to the very special method of delimitation of the Norwegian Fishery Zone in the Continental Shelf.

- (30) For a detailed review of this subject, see TEN K. and LAIRD S., *The Commercial Use of Biodiversity: Access to Genetic Resources and Benefit-Sharing*, Earthscan Publishers, London I, 999.
- (31) RICOLFI, *op. cit.*
- (32) See *Reunion sur la propriete intellectuelle et les ressources genetiques*, Geneve 17 et 18 avril 2000, OMPI/PI/RG/00/2. For a summary of the main progresses in the revision process since 1999 see <http://europa.eu.int/comm/trade/csc/dsc:trips.htm>. In legal doctrine, a solution for the illegitimate exploitation of traditional knowledge is a system of Traditions Resource Rights (TRRs) which may encompass existing intellectual property rights adapting to such needs in particular by way of introducing new forms of ownership and licensing arrangements. Although this knowledge is pre-existing, therefore neither novel nor new, it seems suitable to refer to intellectual property since the knowledge and information concerned, while in the public domain, has been part of the traditional heritage of the communities and individuals concerned. Cottier proposes the adoption by way of treaty-making and legislation of a new concept of TIP-Rights which would not rely upon novelty. These are rights *mutatis mutandis* present in the CBD at Art. 15 and 16 establishing the basis for contractual relation between donors and prospecting firms, and for transfer of technology and compensation for the use of existing resources and knowledge.
- (33) See JUMA C. and OJWANG, J., eds., *In Land We Trust: Environment, Private Property and Constitutional Change*, Initiatives Publishers, Nairobi and Zed Books, London, 1996; LADIDOTH R., *Autonomy: Flexible Solutions to Ethnic Conflicts*. United States Institute of Peace Press, Washington, DC 1997.
- (34) According to Cottier, legislation and treaties would be a natural continuum of such rights. This is elaborated on the strong ground both natural resources and genetic information are subject to permanent sovereignty (according to CBD); yet the second is open to appropriation by private law. Cottier proposes that the untouched and potential resources should be under the sovereignty rights appertaining to the state following the example of Australian legislation, COTTIER, *op. cit.*, pp. 1848-1849 see *supra* note 36. See also BLAKENEY M., *Protecting the Cultural Expressions of Indigenous Peoples under Intellectual Property Law – the Australian Experience*, CIER Conference on the Protection of Cultural Identity and Indigenous Knowledge, Utrecht 16 November 2001.
- (35) The World Intellectual Property Organization (WIPO) is examining these options but supporters of *sui generis* systems as well as some indigenous groups are opposed to this process and argue that it is will undermine their efforts to secure unique rights at the national.

Methods of Proof in Criminal Justice

(A comparative study of Islamic Law & Pakistani Law)

Malik Amanullah*

In fiqh, evidence, is called Bayyanah. The people do not perceive its right meaning who say that it means four or one witness. It has never been used in this sense anywhere in the Holy Quran. It has been used in the meanings of clear proof or obvious arguments both in singular and plural form. Testimony of witness is only one form of Bayyanah. In Mustshell, it means every thing, which exposes or discloses the real facts. So it includes witnesses, oath and circumstantial evidence.⁽¹⁾

In Islamic jurisprudence there are four methods of proof of crime which are:⁽²⁾

- i) Confession
- ii) Testimony of witnesses.
- iii) Circumstantial evidence.
- iv) Oath

As we have discussed earlier that haddud offences are punishable only at that time when they are proved by way of confession or testimony of required and qualified witnesses. If these modes or proof are not available then haddud punishment is not forcible. The most important distinction between hadd and Ta'zir is that the circumstantial evidence is not entertained to impose the hadd punishment but it is reliable proof to inflict the Ta'zir punishments in cases of haddud. The fourth mode of proof which is oath is disputed among the jurists. Some jurists have accepted as a source of proof and some have refused to accept it. Both have their own arguments in their favour which shall be discussed at the later stage.

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Confession

Confession is called Al Iqrar in Islamic Jurisprudence and lingually it means to accept the commission of a prohibited act. Legally, it gives information about any fact or to accept any liability. The roots of its proof are found in the Holy Quran and Holy Sunnah and in the consensus of ummah. Allah said; Do you admit the heavy responsibility imposed by Me they replied yes we admit it. The Hadith of Ma'az and Ghamdiah show that they Holy Prophet (PBUH) depending on their repeating confession, ordered their stoning death. There is consensus of all the Muslim jurists on the validity of confession. The logic behind it is that the disclosure of fact by the confessor against himself is such an information which is doubtless, it is impossible that a sane person would tell a lie against himself which would incriminate him. Therefore, it is given more evaluation than the testimony of the witnesses. Whenever the offence is confessed it is taken as a proof which is beyond the doubt and it becomes obligatory to impose hadd, qisas or Ta'zir as the case may be.⁽³⁾

When a person confesses the offence against himself then no other proof is required. It has been given priority in the Holy Quran and Holy Hadith.⁽⁴⁾

Mostly the jurists have saved a separate chapter in their juristic *treaties*.⁽⁵⁾ The majority of the Muslim jurists have agreed that confession is a good proof against the offender himself and not against the co-accused or accomplice. It may have an effect of circumstantial evidence against the co-accused.

It is a fundamental condition that confession must be clear, explanatory and absolute and it must have the nexus between actus reus and the offender. No crime would be proved if the statement of confession is ambiguous and can be interpreted differently. It is obligatory for the court to ask the details and the explanation relating to sanity, compulsion and the stage of crime whether it was an attempt or commission as it is evident from the Holy Hadith relating to the confession of Ma'az.⁽⁶⁾ Confession is not admissible if made by a person of unsound mind or suffering insanity.

According to Imam Abu Hanifa if the offender becomes unsound mind due to the prohibited intoxicant, his confession in that situation would not

be accepted in haddud offences but would be accepted in the cases of qisas and Ta'zir.⁽⁷⁾

If the intoxication is caused due to non-prohibited intoxicant then there would be no criminal liability in any case. Imam Sha'afi differed and opined if intoxicant or medicine was administered without necessity and with the knowledge of its nature was known to the confessor then there would be criminal liability in all the cases.⁽⁸⁾

Confession under duress or compulsion is also not admissible in criminal liability. In Islamic Jurisprudence it is of two kinds. One is called Ikrah-e-Ta'am which means absolute compulsion and other is called Ikrah-e-Naqis or partial compulsion. In absolute compulsion the compelled has neither consent nor capacity to do according to his own will but to do what is dictated by intimidation of death or zina. On the other hand there is capacity but not the consent in the partial or defective compulsion, e.g., injury to property or honour. Confession in both cases of compulsion is inadmissible but confession must fulfil the following conditions.

- 1) The threat of injury or damage must be addressed to the confessor himself. If it is addressed to some one else other than the compelled person, then there is difference of opinion among the jurists. Some jurists accept it as absolute compulsion and the other reject it as compulsion. The Hunbli School of Law extended the threat of injury to son and father of the compelled person.
- 2) The threat of use of force must be instant. If it relates to future then such compulsion is no defence.
- 3) The third condition is that the person who is compelling he must have the capacity to inflict the injury or cause damage.
- 4) There must be reasonable apprehension of use of force. The reasonable apprehension must be objective based on solid grounds. If there is way to avoid the threat then compulsion is no defence.

Judicial view in Pakistan is more or less same as in Islamic jurisprudence. Confession must be recorded according to the formalities as required by law. If it is not recorded under the relevant provisions of

Criminal Procedure Code, 1898 it would not be admissible in evidence at all. The provisions of Criminal Procedure Code, 1898 fulfill almost all the conditions required by Islamic Jurisprudence.⁽⁹⁾

The Retraction from Confession

The retraction from confession would be accepted and the punishment of hadd would be enforced if it is voluntarily and without any compulsion. The rationale behind it is that the rights of Almighty cease where doubt arises. The rights of the public are those rights of Almighty Allah which do not cease due to doubt, the retraction from confession is useless. There is consensus of all the Muslim jurists if the offender retracts from his confession in the offences of haddud, hadd is not enforced.⁽¹⁰⁾

There is also consensus that the confession is a good proof, except in haddud offences, in all the cases of qisas and Ta'zir even confession is retracted. If confession is otherwise proved to be false then punishment is not awarded. On the other hand if the offence is proved with additional evidences then retraction from confession is immaterial.⁽¹¹⁾

In Pakistan,⁽¹²⁾ if confession is retracted then hadd is not enforced but the punishment of Ta'zir may be awarded.

Testimony of Witnesses

The second mode of proof in case of hadd and ta'azir is the testimony of witnesses which is indiscriminately accepted by all the Muslim jurists. However, the validity and admissibility of this mode of proof depends on the fulfilment of the following conditions:

1. **Number of witnesses:** The required number of witnesses in all cases of haddud is two except zina where four witnesses are required. These number of witnesses are proved by Quran and Sunnah.⁽¹³⁾

The stand of proof in corporeal punishment of Ta'zir is same one as that of qisas. The proof of qisas requires two male witnesses of good character and standard of proof is necessary to punish in Ta'zir according to Imam Sha'afi and Imam Ahmad.⁽¹⁴⁾ According to Imam Abu Hanifa the testimony of two male persons or one male or two female are sufficient in

cases of Ta'zir.⁽¹⁵⁾

If Ta'zir is in form of corporeal punishment then the standard of proof is different when it is awarded in form of financial or monetary punishment. According to Imam Sha'afi and Imam Ahmad, the standard of proof is like of Qisas which means testimony of two witnesses. On the other hand, if there is an offence, in which financial punishment is awarded then the testimony of one male and two female or the testimony of one male with the oath of victim is required as quantum of proof.⁽¹⁶⁾

Imam Malik⁽¹⁷⁾ proposed the testimony of two witnesses or one male with the oath of victim in some offences as a proof of Ta'zir offence. According to Imam Abu Hanifa the testimony of one male witness with oath of victim or one male witness and two females are sufficient in cases of Ta'zir. The two disciples of Imam Abu Hanifa differed with him and opined that the testimony of one witness of good character is enough proof. They went to the extent that even personal knowledge of the judge is sufficient to punish in the cases of Ta'zir,

According to Imam Abu Hanifa⁽¹⁸⁾ where there is financial penalty and Ta'zir then the proof must not be less than the testimony of two male witnesses or one male and two female witnesses as it is proved in the Holy Quran. Hanafi School of Law is very lenient and flexible while fixing the standard of proof in Ta'zir due to their repeated happenings which damage the public interest and to keep the order of the society.

2. **Puberty:** Every witness should be an adult person because the evidence of minor is not acceptable in Islam. This concept is based on the verse of Holy Quran where the word "Rajul" signifies only the adult person. "They should bring the witnesses of two men from you".⁽¹⁹⁾ Adult means that he is rational in his observation and has experience, even one or two years are remaining in his puberty. His testimony is acceptable.

3) **Insanity:** There is consensus of the jurists that testimony of a sane person is acceptable. An insane person is not permitted to give evidence under any law.⁽²⁰⁾

4) **Probity and Purgation:** The witness must be of good character and must have integrity in his personality, it is called the purgation of the witness

which means that he must not have committed the major sins. Every Muslim is presumed to be of good character until rebutted by the other party, it differs from the right of opponent party which is cross examination. It is a secret enquiry by the court.⁽²¹⁾

5) **Islamic Faith:** A witness should be a Muslim. Whether his evidence is in favour of or against a Muslim or a non-Muslim is immaterial as far as the legal aspect is concerned. The evidence of an infidel is not admitted concerning a Muslim. But the evidence of infidel against or in favour of another infidel is acceptable according to Hanafi School of Law and it is inadmissible in the opinion of Imam Malik and Imam Sha'afi.⁽²²⁾

6) **Observation:** A witness should give evidence on the basis of his personal observation and not on hearsay or second hand information. It means that evidence must be heard or seen directly by the witness himself.⁽²³⁾

7) **Linguistic Clarity:** The evidence should be couched in plain and straight forward phraseology and non figurative language. It should eschew from metaphorical and figurative expression to absolutely minimise or eliminate the possibility of any ambiguity. It should reply on the denotative aspect of words and not on their connotative implications.⁽²⁴⁾

8) **Unity of Time and place:** It is generally observed that the whole testimony should be completed in one and the same meeting. However, Sha'afi, Zahiri and Zaidi scholars do not recognize the unit of time and place as an indispensable element of evidence.⁽²⁵⁾

9) **Masculinity and Sexual Discrimination:** in cases of Hudood, the testimony of male members alone is permissible. However, Ibn Hazm has accepted the permissibility of female witnesses in cases of adultery on the principle of double members of the female witnesses. No where in the Holy Quran and Sunnah the evidence of a female has been rejected. So it would be unfair to say that the Holy Quran or Sunnah has declared it invalid. The writer of Hedaya has recognized the evidence of female witness as an alternative of male member.⁽²⁶⁾

Since the evidence of female witness is valid in the cases of hadud and Qisas. so it would be more reliable in the cases of Ta'zir. The great jurist Ibn Qayyam said that the purpose of the evidence was fulfilled with the testimony of one woman if she was equipped with the capacity of

observation and good memory e.g. in the religious matters.⁽²⁷⁾ There are some cases where only the witness of female is exclusively admissible and the evidence of male member is not admissible e.g. birth of child and fosterage.

In Pakistan the conditions and limitation of proof provided under the Article 3 and 17 of the Qanoon-e-Shahadat Ordinance, 1984 are sufficient for the punishment of Ta'zir. In these provisions no number of witnesses are fixed, majority is not condition and there is no difference of male and female witnesses. Similarly, there is no distinction between a Muslim and non-Muslim witness to prove the offence of Ta'zir.⁽²⁸⁾

Circumstantial Evidence

The third mode of proof is very important which is called material or circumstantial evidence. It does not have the decisive role in proof of crime but it is very vital and significant. It plays a great role to put in order the missing links of the facts. So the Holy Quran stresses on its importance in the story of Yousaf (PBUH), the messenger of Allah where it assisted to explore the factual situation. A wise man in the palace of Egyptian king said, after listening the whole event, if the shirt of Yousaf was torn out from front, then Yousaf had committed the wrong and if it was torn out from back then the queen was responsible for the imputation. Therefore, Yousaf was declared to be innocent.⁽²⁹⁾

Similarly, the Holy Prophet (PBUH) said that the child was the son of his father. The presumption is based on the circumstantial evidence.⁽³⁰⁾

The majority of Shafi's administrators and the judges have been accepting the circumstantial evidence as a solid ground of proof in criminal and civil cases.⁽³¹⁾ The famous jurist Ibn Qayyam has declared the circumstantial evidence as equal to the ocular evidence. Even it has been accepted as a proof to award the alternative punishment in the cases of Hudood, e.g., pregnancy in fornication and possession of stolen property in theft. Its significance as proof increased gradually with the evolution of science and civilization. Now, it is reliable in a number of matters even more than the witnesses. Finger prints, thumb impression and the reports prepared with the medical skills or profession are used to prove crimes and rights. The circumstantial evidence is used with great care and attention.⁽³²⁾

In Pakistan, the circumstantial evidence is admissible and it may be reasonable and solid ground to give the punishment of Ta'zir.⁽³³⁾

Oath

Oath is the fourth mode of proof in Ta'zir. It is only acceptable in the cases of murder and in some cases of Hudood but oath in cases of Ta'zir is not accepted, when there is no other proof. There is consensus of all the Muslim jurists that oath is a way of proof only in murder but not in any crime which results in injury, imputation of organ of body, disability of organ or any kind of hurt or persecution.⁽³⁴⁾

There has been a difference of opinion among the Muslim jurists about oath as a mode of proof in crimes of Ta'zir. According to Imam Malik it is not possible to decide on the basis of refusal of accused from taking the oath in all the crimes of Hudood or Qisas or Ta'zir. It means that the shifting of burden of oath on the accused is useless. Imam Sha'fi's view is that Ta'zir can be inflicted on the ground of refusal from oath only in the cases of Hudood.

In the cases of Ta'zir where there is financial punishment, the refusal of accused from taking oath is a good ground to award punishment but not in the case where there is corporeal punishment according to Imam Abu Hanifa. The disciples of Abu Hanifa differed and opined that it was a valid ground of punishment in both cases of corporeal and financial punishments of Ta'zir, Imam Ahmad agreed with Imam Abu Hanifa and upheld the differentiation between corporeal and financial punishment of Ta'zir.⁽³⁵⁾

In Pakistan, the law of evidence has been Islamized in 1984. The parliament and the judiciary of Pakistan, exercising the right of ijtihad, have deviated from the traditional principles of interpretation of evidence. In all the four Hudood Ordinances, it has been embodied that if the required proof is not available to give hadd punishment then the court is authorised to give Ta'zir punishment.⁽³⁶⁾

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- (26) Ibid. p. 342
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- (33) Articles 3 and 17, Qanoon-e-Shahadat Order, 1984.
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Contract: Formation, Performance and Breach

Muneeb Zia*

Outline

This article is a conceptual reading of the rules that are relevant to the formation, performance and breach of contracts and the consequences thereof, including a critical introduction of the policy considerations governing the aforesaid areas and the need and significance thereof.

Formation

Contracts may well be treated by many of us as ordinary promises yet legal rules draw clear distinction between promises and contracts⁽¹⁾. These rules require a higher threshold of certainty and sanctity to the contracts by specifying absolute conditions within which contracts are created, modified, performed and avoided or cancelled. Promises, as such, are nothing more than assurances of one person to another to do or not to do an act. Such assurances or promises do not, per se, constitute a legal act unless they are meant to produce the desired result and intended to be seriously respected and relied upon by the concerned parties. As such, most promises largely remain a social act or representation and do not get recognition by law unless they are capable of producing some economic incentive (or detriment) for the concerned parties and are relied upon. The economic incentive (or detriment) comes in the form of valuable consideration against which the promises are made. If there were no monetary or economic value involved in making the promise, the law would generally refrain from respecting the promise. Given the said consideration, there is an "agreement", which is, thus, a promise made by one party to do or not to do an act to another party for a valuable consideration. The agreement becomes reflective of meeting of minds of the parties over the same subject and their serious intention to achieve the objectives sought through the promises made. Given an economic incentive, human mind is capable to promise anything,

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including something immoral, improper or socially harmful, or even illegal. Should that be justified only because the essential conditions of an agreement have been fulfilled? The answer will, unarguably, be in the negative. It is, therefore, imperative for the legal recognition and enforceability of agreements to include only such promises that are not immoral, or against public policy, or illegal or impossible to be performed but instead are made by free consent of the competent parties for lawful objects and consideration. This is the principal reason why only such agreements that are legally binding are considered as "contracts", despite the fact that the elementary constitution of both "contracts" and "agreements" is the same.

Performance

The strict discipline in which contracts may be formed is just a fundamental step aimed at providing certainty and sanctity to contracts. However, the same object would be defeated if contracts were not required to be performed as agreed upon by the concerned parties. The basic rule, therefore, that the parties to a contract must perform as specified in the contract⁽²⁾. To avoid impracticability, inconvenience and unproductiveness that may be caused by the inflexible adherence of this rule, certain exceptions to the rule have been permitted to exist, which are as follows:

1. the parties may agree to change the terms of the contract or substitute a new contract⁽³⁾;
2. dispensation or remission may be made of the whole or part of performance of the contract⁽⁴⁾;
3. one or both parties may cancel or rescind the contract⁽⁴⁾; or
4. the performance may be avoided⁽⁶⁾

The first exception caters for the need of the parties (i) to change any existing terms of the contract between them ("alteration"), or (ii) to substitute the existing contract with altogether a new one ("novation"), by their mutual consent. For a whole variety of reasons, the parties to a contract may wish to simply change, alter or modify some of the existing terms of the contract and retain the rest. The intention of the parties may be that the original contract continues to bind them in so much as it is not changed. The process

may be called "alteration", the effect of which is that the modifications are read into and become part and parcel of the original contract. The old terms also continue to operate between the parties but only to the extent that they are not inconsistent with the modifications.⁽⁷⁾ Quite contrarily, if the parties want to give a new shape to their existing contractual relationship in as much as not to continue with the old terms and conditions, they are allowed to do so by their mutual consent. In doing that, the intention of the parties is that the rights and liabilities under the existing contract be, presently and immediately, extinguished and substituted with new rights and liabilities. The process is called "novation" and it comes into operation when the old contract is substituted with a new contract in such a way that the former is rescinded.⁽⁸⁾ The essence of novation thus lies not in the dissimilarity of the terms between the two contracts but in the intention of the parties to supersede the old contract by the new contract.⁽⁹⁾ There will not be a true novation, if there is a reversion to the old contract.⁽¹⁰⁾

The second exception covers the cases where the party to whom the promise is made (the promisee) does not require performance of the said promise either in whole or in part. The promisee may show his said intention by remitting or dispensing with performance of the promise. The said act of the promisee is, generally, unilateral and requires no valuable consideration for its legally binding effect since it is a voluntary act of the promisee. Nevertheless, the effect of remission or dispensation is that the promisor is excused from performance of the promise to the extent of remission or dispensation of the promise and no legal remedy thereafter is available to the promisee on the basis of the remitted or dispensed part of the promise.⁽¹¹⁾ A legally binding remission or dispensation needs to be absolute and not conditional;⁽¹²⁾ and, in case it is made in the future, it must be made through a separate agreement supported by valuable consideration for its validity.⁽¹³⁾

The third exception deals with the case where either one or both the parties want to bring an end to the contract. The law does not stand against the mutual choice of the parties in extinguishing their private relationship created through contract. All that the parties to a contract need to do is to get their mutual consent to give an end to their contractual relationship. With the contract coming to an end, the rights and responsibilities therein extinguish and no further performance is required to be made. However,

to allow an absolute free hand to one party to cancel or rescind the contract and get away with it at its own free will is likely to cause injustice and prejudice to the other party to the contract. In such a case, the other party needs to be protected from any adverse effects of the said unilateral act of one party. For instance, the promisor may refuse to perform the promise contained in the contract, which would amount to breach of the contract by the promisor. In such a case, to avoid any damaging outcome, the promisee is given the choice to treat the contract alive⁽¹⁴⁾ and give further opportunity to the promisor to perform the contract. The promisee also has the alternative to take retributive measures by cancelling or rescinding the contract, which, although a unilateral act, is justified and recognized by law,⁽¹⁵⁾ since it is largely considered as a remedial measure available to the promisee against breach of the promisor.

The fourth exception deals with the contracts which are impossible to be performed mostly due to extraneous factors beyond the control of the parties. For instance, a fire may destroy the goods which are the subject of a contract of sale; a war between two countries may defeat the performance of a contract of trade between the citizens of the two countries; or death of one party may void the marriage contract with the other. In any such case, the contracts are essentially frustrated and the parties are left under no further rights and obligations in relation to such contracts.

Breach & Consequences

Where a contract is not performed according to its terms and conditions, the party not so performing the contract is said to be in violation or breach of the contract. The breach may thus occur in case a party:

- (a) fails to perform the contract,
- (b) disables itself to perform the contract, or
- (c) refuses to perform the contract.

Whether the breach exists in condition (a), (b) or (c) above, it destroys the contractual expectations of the other party either in whole or in part. Thus a relationship created with a view to cause benefit, in case of breach, results in loss and which ought to be compensated by the party causing it.

The breaching party is, therefore, exposed to a claim for compensation or damages by the other party on account of the breach and loss suffered by the latter party. The non-breaching party, on the other hand, is relieved of its obligations under the contract. However, the non-breaching party is not relieved of its duty to have done all the things required of it under the contract until the time of breach, and to have done nothing that would have made it impossible or unreasonably difficult for the breaching party to perform its part. This is essential to justify the non-breaching party's innocence and the resultant claim for damages.

The need for damages by the aggrieved party in case of a broken contract is quite legitimate. However, any over-zealous pursuit for damages may not be allowed to erode the due distinction between cases of "non-performance" and "substantial performance". The cases of non-performance of contract are generally reflective of an overall uncooperative and offensive attitude of the non-performing party to the contract and thus the claim for damages is not generally limited. On the other hand are the cases of substantial performance of contract by the promisor that has largely fulfilled its obligations under the contract. In such cases, the claim for damages by the promisee against an unintentional shortage by the promisor in meeting some particular detail of the promise, which does not affect the essence of the contract, is generally restricted to the extent of such detail only.

The ordinary remedy for breach of contract is money damages.⁽¹⁶⁾ Some contracts go so far as to include an agreement on a set amount of "liquidated damages" which are to be paid in case something goes wrong. These are acceptable to the Courts as long as the amount of liquidated damages is a reasonable estimation of the harm that would be done by the breach. If the amount is so excessive as to amount to a penalty or fine rather than compensation for harm, the courts will ignore the liquidated damages clause and assess damages by actually measuring at trial the financial harm done by the breach.⁽¹⁷⁾

The purpose of damages in suits on contracts is at best to place the injured party in as nearly as possible the same position he would have been in, had the contract been properly performed, and at least to restore him as nearly as possible to the position he would have been in, had he made no contract at all. In other words, no one should suffer loss because another has not performed a contract properly.

There may arise situations where money damages may not adequately compensate the injured party, for example, a party contracts to purchase a unique painting or a particular house. In such cases, quite possibly, the promisee-purchaser may not have even paid for the object of the contract (that is, the painting or house). However, on breach of his promise by the seller, and frustration of the specific expectations of the purchaser, a valuable right accrues to the injured purchaser to seek from the Court specific performance of the contract. In such situations, depending upon the uniqueness of the object of contract and inadequacy of money damages, the Courts may revive the broken contract and strictly enforce the promises contained therein. But it is often more practical to make the person who breaks the promise simply pay money damages to the injured party.

Conclusion

If a society had no way of knowing what promises were serious enough to be fulfilled, and in case of non-fulfillment, whether the recourse would be to try to find the culprit and treat him with violence, the society would be left with uncertainty and disorder. To avoid such uncertainty and disorder, societies have developed the concept of legally binding agreements. The essence of which, exists in providing reasonably certain and clear rules of making, performing and breaking enforceable promises, and having the power of government to enforce such promises, or, at least, to see that the one who breaks the promise pays adequate compensation to the other. Any such rules and laws thus, in their own manner, contribute to bringing certainty, predictability and order to societies and allow them to function in a civilized, just and productive manner.

References

- (1) See Sections 2 and 10 of the Contract Act, 1872.
- (2) See Section 37 of the Contract Act, 1872.
- (3) See Section 62 of the Contract Act, 1872.
- (4) See Section 63 of the Contract Act, 1872.
- (5) See Sections 39, 62 and 64 of the Contract Act, 1872.
- (6) See Sections 56 and 65 of the Contract Act, 1872.

- (7) See AIR 1955 Calcutta 65.
- (8) See AIR 1957 Patna 408 and AIR 1961 Punjab 202.
- (9) See AIR 1924 Oudh 169 (DB) and AIR 1957 Andhra Pradesh 784.
- (10) See AIR 1956 Madh B 25 and AIR 1954 Nagpur 142.
- (11) See 9 Indian Cases 763 (Madras).
- (12) See AIR 1915 Madras 1144 (DB).
- (13) See AIR 1965 Andhra Pradesh 171 (DB).
- (14) See AIR 1926 Madras 778.
- (15) See Section 39 of the Contract Act, 1872.
- (16) See Section 73 of the Contract Act, 1872.
- (17) See Section 74 of the Contract Act, 1872.

Four Pillars of International Trade Law

Farooq Umair Niazi*

Main Principles of GATT 1994

In 1857 Richard Cobden wrote "Free trade is God's diplomacy, and there is no other certain way of uniting people in the bonds of peace".⁽¹⁾ The basic document that strives to ensure and guarantee free international trade is GATT. General Agreement on Tariffs and Trade was first concluded in 1947. Now after the successful culmination of Uruguay Round and establishment of World Trade Organization, GATT is called GATT 1994. General Agreement on Tariffs and Trade is based on four main principles.⁽²⁾ They are:

1. Elimination of quantitative restrictions.
2. Reduction and elimination of tariffs and other barriers of trade.
3. Most favoured Nation Principles.
4. National Treatment rule.

These principles are not quite simple. Entire structure of GATT is built on these four principles. Nearly all the provisions of GATT are related to these principles. The authors of General Agreement have tried to make it a just, fair and impartial agreement. Before proceeding further first the objectives of this document be analyzed. GATT provides that in the field of trade and economic endeavor should be conducted to achieve the following purposes.⁽³⁾

- a) Raising standard of living.
- b) Ensuring full employment and a large and steadily growing volume of real income and effective demand developing the full use of the resources of the world.

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- c) Developing the full use of the resources of the world,
- d) And expanding the production and exchange of goods.⁽⁴⁾

Now the question arises how these objectives mentioned above would be achieved. GATT also answers the question. It further provides that these objectives would be achieved by entering into reciprocal and mutually advantageous arrangements directed to:

- a) The substantial reduction of tariffs and other barriers of trade.
- b) And the elimination of discriminatory treatment in international commerce.⁽⁵⁾

The objectives of GATT are of global nature. They are meant for the welfare of the peoples of the world. Therefore GATT foresees that the fair, free and non-discriminatory trade could only be possible when tariffs and other barriers of trade are cut down considerably and discriminatory attitude of importing countries against the exporting countries be brought to an end. History has shown us that majority of international trade disputes that arose in the past were due to these two practices by some countries. Elimination of these two practices is among the four principles of GATT. Countries with strong economies are always in a position to discriminate and exploit countries with weak economies in the international trade. A country may impose restrictions on the free import or export of certain goods. These restrictions may be the fixation of quotas, import or export licenses or other measures. These restrictions and prohibitions are termed as quantitative restrictions. Now we shall discuss these principles in detail.

First Principal of GATT 1994

(RULE AGAINST DISCRIMINATION)

General Elimination of Quantitative Restrictions.⁽⁶⁾

General Elimination of Quantitative restrictions is the first main principle of GATT. It is also termed as rule against discrimination. Countries with strong economies are always in a position to discriminate and exploit countries with weak economies in international trade. A country may

impose restriction on the free import or export of goods. These restrictions can be in the form of fixed quotas, import or export licenses or other such measure. These restrictions or prohibition are termed as quantitative-restriction.

The use of quantitative restrictions had been a great hurdle in the past for free international trade. General Agreement strictly prohibits the use of such restrictions. "The first rule, while recognizing that it is important for member countries to follow open and liberal trade policies, permits them to protect domestic production from foreign competition, provided that such protection is extended only through tariffs and is kept at low levels. To this end it prohibits countries from using quantitative restrictions, except in specified cases. The rule against quantitative restrictions has been strengthened in the Uruguay Round".⁽⁷⁾ The principle against quantitative restrictions is that the contracting parties shall not impose restrictions and prohibitions like quotas, import or export licences or other measures. They could only impose restrictions and prohibitions like taxes, duties and other charges. This provision is not only applicable to imports from contracting parties but also exports to other contracting parties of any product.⁽⁸⁾ The principle provided is quite just and equitable. In past the countries who for their own benefits restricted the imports in the name of quotas, import and export licenses and other such measures have been stopped from doing so. In fact rich and industrialized countries used quantitative restrictions against developing or poor countries. Quantitative restrictions have been a tool of exploitation. A situation may arise when a country's economy gets into a critical phase. If such a situation is not controlled, the chances are that the entire economy of the country may collapse. In such cases GATT provides exceptions to the general principle against quantitative restrictions.

Exceptions

In order to protect the legitimate interests of the contracting parties, GATT authorizes the use of quantitative restrictions in certain situations. They are:

- a) Export prohibitions or restrictions temporarily applied to prevent or relieve critical shortages of foodstuff or other products essential for the exporting contracting party.

- b) Importing and export prohibitions or restrictions necessary to the application of standards or regulations for the classification grading or marketing of commodities in international trade.
- c) Import restrictions on any agricultural or fisheries product imported in any form necessary to the enforcement of governmental measures which operate:
 - i) to restrict the quantities of the like product permitted to be marketed or produced, or if there is no substantial domestic production of the like product of a domestic product for which the imported product can be directly substituted.
 - ii) To remove a temporary surplus of the like domestic product, or, if there is no substantial domestic production of the like product, of a domestic product for which the imported product can be directly substituted by making the surplus available to certain groups of domestic consumers free of charge or at price below the current market level, or
 - iii) To restrict the quantities permitted to be produced of any animal product the production of which is directly dependent wholly or mainly on the imported commodity, if the domestic production of that commodity is relatively negligible.⁽⁹⁾

Similarly a country is also authorised to use quantitative restrictions when it is facing the problem of the balance of payments. Different countries of the world have to discharge their international financial liabilities. These financial liabilities can be discharged effectively when a country has enough foreign exchange reserves. Therefore, a country may find itself facing the problem of the balance of payments, when its foreign exchange earnings from international trade, foreign investment etc. are not enough to meet the international liabilities and also the foreign exchange reserves are failing short. In the situation mentioned above GATT has permitted its members to use quantitative restriction in order to increase their foreign exchange reserves for meeting their international financial obligations effectively.⁽¹⁰⁾ The rationale for such permission is that the "price based measures" should be used to overcome the problem of the balance of payments. When the price based measures cannot arrest a sharp deterioration in

the external payments position, then quantitative measures be used as a last resort.⁽¹¹⁾

Another important exception against the use of quantitative restrictions is for the developing countries. Developing countries are permitted to use quantitative restrictions on imports in only one case. This is the situation when the monetary reserves of a developing country are declining. In order to check such decline of monetary reserves, developing countries can use quantitative restrictions.⁽¹²⁾

Quantitative restrictions were used by different countries in the trade in textiles and clothing. This was permitted under MFA.⁽¹³⁾ MFA permitted countries to impose restrictions on imports of textiles and textile products under certain specified conditions. Now the Agreement on Textile and clothing (ATC),⁽¹⁴⁾ requires member countries using quantitative restrictions to remove them in four stages, and to abolish them completely by January 1, 2005.

Similarly agriculture sector was also an exception where many developed countries used quantitative restrictions. These restrictions were applied by developed countries on agricultural imports, beyond limits authorized by GATT. These restrictions were in the form of variable levies. The purpose of such restrictions was to protect domestic agricultural production from the foreign competition. Now the Agreement on Agriculture requires the member countries to abolish quantitative restrictions and system of variable levies and by replacing these with tariffs⁽¹⁵⁾

Non-Discriminator Applications of Quantitative Restrictions

The aim of General Agreement on Tariffs and Trade is the elimination of quantitative restrictions. It permits the use of quantitative restrictions in very exceptional and rare circumstances which are fully justified. It further provides that whenever quantitative restrictions are applied, they must be applied in a non-discriminatory way. GATT provides that no prohibition or restriction shall be applied by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation of any product destined for the territory of any other contracting party, unless the importation of the like product of all third countries or the

exportation of the like product to all third countries is similarly prohibited or restricted.⁽¹⁶⁾

A careful analysis of the rule against quantitative restrictions reveals that many protections are provided for developing countries. This principle has far reaching effects on international trade.

“The new frame work of rules covering agricultural products and textile which the Uruguay Round has developed will ensure that GATT’s basic rule against the use of quantitative restrictions and requiring that protection to domestic production is given only through tariffs are followed in practice by all countries. Exporting enterprises prefer tariffs to quantitative restrictions for many reasons. Tariffs are transparent and their incidence on price is predictable. The use of quantitative restriction imposes an uncertainty on the trade, as administering authorities have the power to adjust the sizes of quotas from time to time. Finally, as the operation of quota restrictions requires licensing enterprises can export only if their foreign buyers are able to obtain licence”.⁽¹⁷⁾ This principle and its exception tries to achieve a balance. Now the countries are not in position to use quantitative restrictions in a discriminatory way. If the use of quantitative restrictions is necessary under the principles prescribed by GATT, then it should be applied equitably and in a just manner.

Second Principle

Reduction of Tariffs

The second important principle for the promotion of free and liberal international trade is the reduction of tariffs.⁽¹⁸⁾ The guideline for this purpose is that the countries using tariffs and other measures to protect their domestic production from international competition, should reduce such tariffs through negotiations among contracting parties. This reduction of tariffs should be bound against further increase.⁽¹⁹⁾ A detailed procedure for reducing tariffs is also laid down for contracting parties.⁽²⁰⁾ Schedule of Concessions provides the rates of tariffs.

Each member of WTO has a separate schedule with different rate of tariffs for different products. It is also provided that members should not impose tariffs or other duties which are in excess to those set forth⁽²¹⁾ in the

schedule. The rates of tariffs listed in the schedule are known as bound rates of tariffs. During trade negotiations a country could bind its existing positive rate or to reduce the rate of tariffs. GATT 1994 also lays down the principle for trade negotiations and exchange of concessions among member countries. This principle is called principle of reciprocity and mutual advantage.⁽²²⁾ According to this principle if a country desires to access the market of an other country, through the removal or reduction of tariffs, etc., then it must make concession is tariffs, etc., to other country on the basis of reciprocity and mutual advantage.

A problem may rise while carrying on trade negotiations on the basis of reciprocity and mutual advantage. Countries with weak economies cannot negotiate with countries having strong economies on the basis of reciprocity and mutual advantage. For this purpose it is provided that the developing countries should not be treated on equal basis and reciprocity with developed countries while carrying on trade negotiations.⁽²³⁾ It is also provided that the developed contracting parties do not expect reciprocity for commitments made by them in trade negotiations to reduce or remove tariffs and other barriers to the trade of less developed contracting parties.⁽²⁴⁾

The phrase "do not expect reciprocity" means that in accordance with the objectives set forth in this Article (XXXVI), the less developed contracting parties should not be expected, in the course of trade negotiations, to make contributions which are inconsistent with their individual development, financial and trade needs, taking into consideration past trade developments.⁽²⁵⁾

A facility is also provided for developing countries with regard to tariff rates. A number of developing countries have been given ceiling bindings in certain instances. Ceiling rate is in fact a permission given to developing countries to vary their tariff rates on some products or sectors, but not more than the agreed rates.⁽²⁶⁾ Understanding on the Interpretation of Article XXVIII of the General Agreement on Tariffs and Trade also lays down a procedure for modifications or withdrawal of a concession.

Uruguay Round Achievements for the Reduction of Tariffs

Uruguay Round has brought a considerable change in the tariffs. These achievements are as follows:

- a) Developed countries have agreed to reduce their tariffs on industrial goods from an average of 6.3% to 3.8%, a 40% reduction.
- b) The proportion of industrial products which enter the developed country markets under Most Favored Nation (MFN) zero duties will more than double, from 20% to 40%.
- c) At the higher end of the tariff structure, the proportion of imports into developed countries from all sources that encounter tariffs above 15% will decline from 7% to 5% and from 9% to 5% for imports from developing economies.
- d) The percentage of bound tariff line industrial products has risen from 78% to 99% for developed countries from 21% to 73% for developing economies and from 73% to 98% for transition economies. As a result there is high degree of market security for traders and investors.
- e) Once the Uruguay Round tariff reductions are fully implemented, the proportion of industrial products which enter the developed country markets under MFN zero duties will more than double, from 20% to 44% (from 22% to 44% for imports from developing economies). At the higher end of the tariff structure, the proportion of imports into developed countries from all sources that encounter tariffs above 15% (so called "peak" tariffs) will decline from 7% to 5% (9% to 5% for imports from developing economies).

The industrial tariff profile of developing countries and areas is "bipolar", with 42% of imports centering duty free and 38% bound at duties above 15%, once the Uruguay Round Tariff reductions are in place.⁽²⁷⁾

After a careful analysis of the provisions for the reduction of tariff one can safely say that developing countries have been given many facilities for the promotion of their trade. "The Uruguay round has also resulted in significant progress in tariff binding by all countries. The assurance that, because of the binding, the lower rates agreed in the negotiations will not be raised by countries to which exports are being made encourages enterprises to invest in manufacturing plants, equipment and distribution networks and to take other measures to develop trade. Furthermore, the bindings give enterprises a guarantee that the tariffs that are payable on

the raw material and inputs which they have to import for use in export production will not be increased by their own governments.”⁽²⁸⁾

Third Principle

Most-Favoured-Nation Principle

Third most important principle of GATT is Most Favoured Nation Treatment Principle (MFN). This principle prohibits the discrimination between contracting parties. The underlying point in the principle of MFN treatment is that if a country grants any privilege or concession regarding tariff etc. for the import of particular product, then such concession or privilege should be granted to all other contracting parties regarding the like product. This MFN principle is not only confined to imports but also to exports. This means that if a country levies duties on the export of a product to one destination, it must apply it at the same rate to exports to all destinations.

According to Principle MFN Treatment is given in following cases:

- a) With respect to customs duties and charges of any kind imposed on in connection with the importation or exportation.⁽²⁹⁾
- b) Customs duties or charges of any kind imposed on the international transfer for payments for imports or export.⁽³⁰⁾
- c) With respect to the method of levying such duties or charges.⁽³¹⁾
- d) With respect to any advantage favour, privilege granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.⁽³²⁾
- e) In case of non-discriminatory administration of quantitative restrictions, it is provided that non-prohibition or restriction shall be applied by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation of any product destined for the territory of any other contracting party,

unless the importation of the like product of all third countries or the exportation of the like product to all third countries is similarly prohibited or restricted.⁽³³⁾

As the GATT provides for free, fair and non-discriminatory international trade, at the same time it also tries to balance the negative aspects of a provision. MFN principle is quite exhaustive. The principle has some exceptions, as GATT recognizes that tariffs and other barriers of trade can be reduced on a preferential basis by countries under regional arrangements. This further provides that lower or duty free rates applicable to trade among members of regional arrangements need not be extended to other countries.⁽³⁴⁾

This is a very important exception to MFN. General Agreement lays down conditions for such arrangements. These conditions are:

- a) The member countries of regional arrangements must remove tariffs and other barriers to trade affecting substantially all trade among themselves.⁽³⁵⁾
- b) The arrangements should not result in the imposition of new barriers of trade with other countries.⁽³⁶⁾

The regional arrangements can be of two types. It can either be a customs union or free-trade area.⁽³⁷⁾ In both cases the trade among member countries takes place on a duty free basis while the trade with other countries is subject to MFN tariff rates.

In case of a customs union, tariffs of member countries are harmonized and applied to imports from outside countries on a uniform basis. In case of free trade area member countries continue to use without harmonization, the tariffs set out in their individual national schedules.⁽³⁸⁾

Among many regional arrangements some are following:

European Union (EU), (EU-East Europe Free Trade Arrangements, Australia, New Zealand Closer Relations Trade Agreement (CER); North American Free Trade Agreement (NAFTA); Mercado Común del Sur (Mercosur) comprising of Brazil, Argentina, Uruguay, Paraguay; Andean

Pact, Peru, Venezuela, Bolivia, Colombia, Ecuador: Common Market for Eastern and Southern Africa (COMESA) consisting of twenty-three African countries.

This regional trade is no doubt good for developing countries. It will create a good trade balance between the members of a free trade area. At the same time it may affect the international trade negatively. "But dedicated followers of fashion are divided. While some claim to see regionalism and globalization as complimentary, other see them as contradictory. These critics say that belying their appealing name; FTAs will make world trade less free".⁽³⁹⁾

In addition to these arrangements developed countries have introduced one way free trade arrangements under which imports from either all or limited number of developing countries enter their markets duty free. These arrangements are non-reciprocal as developing countries benefiting from preferential access do not extend any preferential treatment to imports from developing countries. Examples of such one-way preferential arrangements are:

- a) The Lome Convention under which member states of the European Union allow imports from a number of countries in Africa and the Caribbean and LDCs in Asia and Pacific countries (ACP Countries) to enter on a duty-free basis.
- b) The Generalized System of Preference (GSP) under which developed countries allow imports from all developing countries of industrial products and selected agricultural products on preferential and duty free basis.
- c) The Caribbean Basin Arrangement, under which the United States allow imports from countries belonging to the Caribbean region on a duty free basis.⁽⁴⁰⁾

Fourth Principle

National Treatment Principle

The fourth and most important principle of GATT is "National

Treatment on Internal Taxation and Regulation".⁽⁴¹⁾ The MFN⁽⁴²⁾ principle prevents the member countries from discriminating among the member countries. The principle in Article III provides that when any imported product has crossed the border of any country after paying customs duties and other charges, then such imported product should be treated on the same basis as a locally manufactured product of same kind is treated in the country.

This principle of National Treatment prohibits a discrimination between an imported product and a locally manufactured product of same kind. It is not permitted to any member to impose any other internal tax on any imported product (when such imported product has entered the country after the payment of usual customs and other duties) which increases the price of such imported product as compared to the price of a locally manufactured product of same kind.

This principle⁽⁴³⁾ also provides that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal, offering for sale, purchase, transportation, distribution or use of products, internal quantitative regulations requiring the mixture, processing or use of products in specified amounts or proportions should not be applied to imported or domestic products so as to afford protection to domestic production.

It is further provided⁽⁴⁴⁾ that the products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products. Moreover, no contracting party shall otherwise apply internal taxes or other internal charges to imported or domestic products in a manner contrary to the National Treatment Principle as laid down in GATT.

Similarly⁽⁴⁵⁾ the products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favorable than that accorded to the like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering sale, purchase, transportation, distributions or use. The provisions of this paragraph shall not prevent the application of

differential internal transportation charges which are exclusively on the economic operation of the means of transport and not on the nationality of the product.

On the use of internal quantitative regulations⁽⁴⁶⁾ that no contracting party shall establish or maintain any internal quantitative regulation relating to the mixture, processing or use of products in specified amounts or proportions which requires, directly or indirectly, that any specified amount or proportion of any product which is subject to the regulations must be supplied from domestic sources. Moreover no contracting party shall otherwise apply internal quantitative regulations in a manner contrary to principles.⁽⁴⁷⁾

These provisions are of paramount importance. It is quite clear once the distinction between imported and exported products in finished and domestically manufactured products do not receive any favourable treatment, then it is expected that international trade will boom. The result will be an improved standard of goods for the consumers. Panel of GATT in 1958 issued a report on the discrimination done by Italian law which provided special credit facilities for the purchase of agricultural machinery produced in Italy. The Panel observed that it was not the intention of General Agreement to limit the right of contracting party to adopt measures which appeared to it necessary to foster its economic development or to protect a domestic industry, provided that such measures were permitted by the General Agreement. The GATT offered a number of possibilities to achieve these purposes through tariff measures or otherwise.

The Panel did not appreciate why the extension of credit facilities in question to the purchases of imported tractors as well as domestically produced tractors would detract from the attainment of the objectives of law, which aimed at stimulating the purchase of tractors mainly by small farmers and cooperatives in the interests of economic development. If on the other hand, the objective of the law although not specifically stated in the text thereof to protect the Italian agricultural machinery industry, the Panel considered that such protection should be given in ways permissible under the General Agreement rather than by the extension of credit exclusively for purchases of domestically produced agricultural machinery.⁽⁴⁸⁾

In another report Panel of GATT recalled that the distinction between import duties and internal charges is of fundamental importance because the General Agreement regulates ordinary customs duties, other import charges and internal taxes differently, the imposition of ordinary customs duties for the purpose of protection is allowed unless they exceed tariff bindings, all other duties or charges of any kind imposed on or in connection with importation are in principle prohibited in respect of bound items [Article 11:1(b)]. By contrast internal taxes that discriminate against imported products are prohibited, whether or not the items concerned are bound (Article 111 :2).⁽⁴⁹⁾

The Panel also reported that the intention of the drafters of the Agreement was clearly to treat the imported products in the same way as like domestic products once they had been cleared through customs. Otherwise indirect protection could be given.⁽⁵⁰⁾

The National treatment rule gives assurance to the exporters that their products after crossing the borders of importing countries and by paying customs duties and other charges payable at the border, will not be required to pay other such internal taxes at rates that are higher than those payable on products of domestic origin. The national treatment rule applies not only to internal taxes but also to the rules governing mandatory standards for products and these applicable to the sale and distribution of goods. The governments impose taxes. They also adopt new rules and regulations. This is done for the health and safety of people and protection of environment the principle discussed above would ensure that such taxes and regulation would be applied not only to imported but also to domestic products on a non-discriminatory basis. This is very important for exporters.

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Protection of Biodiversity vis-à-vis Patentability of Biotechnology: Cross Road for Intellectual Property and Environmental Laws

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Bilateral Treaties on IPR Protection on Inventions on Life Forms

Notwithstanding the numerous concerns raised by TRIPS, industrialized countries and the transnational corporations (TNC) consider this Agreement only a minimum standard of protection of IPRs on biological resources. In order to achieve much stronger standards of protection, developed countries are negotiating, one by one, a range of bilateral, regional and sub-regional agreements with governments of the Southern countries under the mantra of "national treatment" and "Most Favoured Nation" (MFN) principles. This practice may soon make TRIPs obsolete⁽¹⁾ achieving what has been called a "TRIPs plus Agreement".

One of the biggest novelties introduced by these bilateral agreements is the requirement to provide patent protection on plants and animals but through bilateral agreements with industrialized countries. This is true for Jordan, Mongolia,⁽²⁾ Nicaragua, Sri Lanka⁽³⁾ and Vietnam.⁽⁴⁾ Under another approach, South Africa and the 78 African Caribbean Pacific (ACP) countries are supposed to grant patents on "biotechnological" inventions.⁽⁵⁾ This presumably means plants and animals, in addition to the microorganisms required by TRIPS.

In the field of micro-organisms, TRIPS does not advocate the Budapest

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system for patent protection of micro-organisms. Indeed this treaty obliges parties to recognise the physical, deposit of samples of micro-organisms, in lieu of full written disclosure of the invention through an international depository authority. Under Budapest, deposit fulfils the requirement for disclosure. This treaty, whose Contracting parties are mostly industrialized ones, relies on a network of recognised international depository authorities which operate special rules on access to the biological samples, especially to avert potential patent infringement. Under bilateral agreements with industrial countries such as Korea,⁽⁶⁾ Mexico,⁽⁷⁾ Morocco and Tunisia⁽⁸⁾ have been required to join the system, while Jordan must implement its substantive provisions.⁽⁹⁾ The presence of the clause that calls for implementation of IPRs in developing countries "in accordance with the highest international standards"⁽¹⁰⁾ is at the centre of concerns of NGOs and peoples. These undefined standards open the door to new standards being generated through the investment treaties. These kind of agreements represents simply a tip of the iceberg of the unrelenting pressure to patent plants and animals of a new idea that, quietly brewing away in a corner, is becoming rampant.

Possible Major Options for Revision of Article 27 of TRIPs

Several options for a review on the scope of Article 27.3(b) are under discussion in WIPO and in WTO. The maximum position would be to revise Article 27.3(b) so as to exclude life forms altogether from the ambit of the TRIPS Agreement. The minimum position should seek to preserve the status quo, that is, the existing text, so that the IPR protection is not strengthened any further, and that the present textual ambiguities may be exploited in the implementation process.⁽¹¹⁾

1. Option I - "No Patents on Life"

Option I reflects the maximum position, one which seeks to exclude life forms from the ambit of the TRIPS Agreement altogether. In particular, we note that the African Group of countries in the WTO has proposed that Article 27.3(b) should be amended to clarify that plants, animals, micro-organisms and all other living organisms and their parts cannot be patented. Thus, Article 27.3(b) should be revised so as to prohibit the patenting of plants and animals, including their parts, and the processes which make

use of, or are related to, plants, animals and their parts. The prohibition against patenting parts of plants and animals must include genes, gene sequence, cells, seeds, etc. which are very much part of the particular plant or animal. A number of other developing countries in the WTO have supported this position.⁽¹²⁾

2. Option II - Full Discretion to exclude Patenting of Life

The second option is short of excluding life forms from the ambit of the TRIPS Agreement. In this instance, the words "may exclude" are used to denote the discretion available to national governments to determine on the issue of patenting of life. The effect of this formulation is that WTO members will retain the right to exclude patentability of plants and animals, without the condition of providing protection for micro-organisms, microbiological processes, non-biological processes and also plant varieties.⁽¹³⁾ Moreover Article 27 should incorporate requirements in the CBD concerning access authorisation from the government of the country providing a genetic resource used in an invention, prior informed consent, benefit sharing, protection of traditional knowledge and technology transfer. Proponents⁽¹⁴⁾ of this measure argued that this would ensure that source countries' laws on access and benefit sharing and on protection of traditional knowledge would be respected by patent applicants and would prevent abusive patenting of existing traditional knowledge by parties other than the holders of the traditional knowledge. This issue was also discussed in the Autumn of 2000 at the WIPO General Assembly,⁽¹⁵⁾ which agreed to establish a special Intergovernmental Committee to consider the relationship between intellectual property and genetic resources, as well as traditional knowledge and folklore. The first meeting of this Intergovernmental Committee has taken place from 30 April to 5 May 2001¹⁶. In this context it is interesting to note that a major advancement was to include in the filing of patent application an indication of origin of the genetic material. The US strongly objected to the inclusion of such a requirement on the excuse that same was substantive law and procedural law. It is hard to see how such a simple filing requirement in the procedure of the patent office would constitute substantive law.

3. Option III - Maintenance of the Status Quo

The main legal ground of European Countries,⁽¹⁷⁾ USA⁽¹⁸⁾ and some

others⁽¹⁹⁾ for the status quo, is that the two treaties do not deal with the same subject-matter. The objectives CBD are: the 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 main objectives of The TRIPs Agreement are to set minimum standards of intellectual property protection within WTO Members and to ensure that States make available to rights holders judicial and/or administrative procedures to enforce their intellectual property rights. It is clear that implementation of patent legislation may impact on the implementation of the CBD. Nevertheless, it is argued that intellectual property is only one of many complicated aspects concerning access to genetic resources and benefit sharing. Intellectual property rights do not aim either to regulate the access and use of genetic resources, or to regulate the terms and conditions for bioprospecting and commercialization of IPR-protected goods and services. Patent authorities should not examine whether an invention meets criteria other than those applying to an invention.⁽²⁰⁾ The arguments of the majority of the Southern hemisphere countries should be developed in appropriate international instruments particularly to achieve the objectives of access to genetic resources, benefit sharing and protection of traditional knowledge. However, WIPO should be the forum of negotiation of measures aiming at facilitating benefit sharing and protecting sovereign access right by for instance inserting a disclosure of origin obligation or to develop protection of traditional knowledge.

4. Should TRIPs be Placed Elsewhere?

Many civil society groups prefer to see the obligation to protect plant varieties removed from TRIPs. Indeed, the definition *sui generis* systems uses flexible terms so that they allow for protection of communities' rights and traditional knowledge. Yet other questions need an answer such as do indigenous peoples support the culture of exclusive monopoly rights? Do farmers want IPRs? Should what the religious leaders say about the moral and ethical dimensions of "owning life", be taken into account nationally and internationally? Should the homocentric concepts of law be replaced by granting rights to nature and animals as subjects of law? Is such a radical change in the legal paradigms likely to be accepted? Would communities want to see their rights defined and disputed through WTO? Are their rights "trade related"? Because of these grave uncertainties these far reaching intellectual movements purport the removal of TRIPs from the WTO and

for it to be settled elsewhere... But we can still wonder where is the appropriate forum?

Under the present circumstances, these propositions are rather far from being realistic. The TRIPs review of 1999 in many respects represents unfinished business so far as the US is concerned. Indeed, TRIPs was an initiative of an international business coalition consisting of mainly European, Japanese and US multinationals⁽²¹⁾ who saw the intellectual property issue as exclusively an investment issue. In the context of the Uruguay Round, US corporations wanted to be able to assure intellectual property revenues on a world-wide basis. These interest groups under the leadership of the US pursued three broad objectives. Firstly, the globalization of intellectual property protection by the adoption mainly in developing countries of intellectual property laws. Secondly, the begin of a process of harmonizing intellectual property laws to higher standards, thereby taking advantage of the principle of national treatment that had long been part of international intellectual property. Thirdly, the inclusion of TRIPs in WTO would ensure that States took their international obligations seriously through the advantage of the enforcement mechanism and dispute settlement procedure.

After being outvoted in fora such as WIPO and UNESCO by a coalition of developing countries, the US undertook a strategy of shifting the issue of intellectual property into the GATT, consequently catching the train of the Uruguay Round to fit it into WTO Treaties. It goes without saying that above-mentioned goals on intellectual property are more likely to be achieved in WTO. This operation was largely successful since the US and other supporting countries can use the size of their markets: US can use negotiating capabilities and the multi-bargaining dimensions of the WTO to secure outcomes for intellectual property and finally dominate the agenda setting process, and thus accomplish all results which remained beyond US reach in fora like WIPO or UNESCO.

In spite of these unbalances in the international institutional arena, we do not see any merit in the argument against protection of Intellectual Property for micro-organisms if it is used for certain strategic role in remedying pollution, reversing degradation, decomposing some non-biodegradable waste such as plastics and biotechnological options for eliminating use of chemical pesticides and other toxins. One can still argue that biotechnology could be used for many other purposes as well. But at the end of it all, it

seems to us that the biggest benefactor from the suspension of Article 27.3(b) would be the polluting industries. Indeed, they would feel not under pressure to invest in research on bio-remediation because the investment would not be recovered in the absence of IPRs.

5. Conclusion

It has been argued that the patent regime is a western form of IPRs totally unsuitable to the majority of the societies in the south. The vast majority of farmers who manage biodiversity at the local level are used to collective rights, private rights being completely alien to these communities.⁽²²⁾ The argued conflict between the two international instruments is generated by this very basic assumption. Hence, possible solutions of reconciliation must involve the fact that Article 27.3(b) should be reviewed determining the type of rights that should be given to individuals and to communities, they should retain their sovereign right to determine what incentives they should give to individuals and to communities within their own countries.

It is amazingly striking how events completely unrelated with such a technical topic as biotechnology can influence the evolution of the law. We can empirically observe probably the first of the major international legislative impacts of the infamous catastrophe of September 11th 2001 precisely on the topics of primal importance in this paper: the revision of Article 27.3(b). Despite the reluctance stressed in the western proposals about the revision of this Article mentioned above, during the last Ministerial Conference of WTO in Doha, Qatar, an unexpected language can be found in the declaration of November 14th 2001:

"We instruct the Council for TRIPs, in pursuing its work programme including under the review of Article 27.3(b), the review of the implementation of the TRIPs Agreement under Article 71.1 and the work foreseen pursuant to paragraph 12 of this Declaration, to examine inter alia, the relationship between the TRIPs Agreement and the Convention on Biological Diversity, the protection of traditional knowledge and folklore, and other relevant new developments raised by Members pursuant to Article 71.1. In undertaking this work the TRIPs Council shall be guided by the objectives and principles set out in Articles 7 and 8 of the TRIPs Agreement and shall take fully into account the development dimension".

We do not discuss the reasons of such a change of objectives, since they are mainly to be found in the recent evolution of international relations. But a strong change in the negotiation priority has to be found in the US approach to these issues.⁽²³⁾

Now it is time for making of the review of Article 27.3(b) a real opportunity for both developing and developed countries to include certain ethical and institutional responsibilities to be shared between WIPO and WTO. In the realm of international conferences major weight should be then given to the voice of non-state actors as it is generally done in the UN fora. This opens to wider question of the doctrine of the competence of international organizations.⁽²⁴⁾ Although 27.3(b) has been negotiated in the GATT-WTO Uruguay Round, in order to establish the full competence of this international organisation in reviewing this article, the evolution of the UN System has to be also considered. The past international cooperation in sectorial fields is now seen as a coherent and coordinated system with agencies that function in a cross sectorial way.⁽²⁵⁾ The concept of exclusivity (which accompanies the one of speciality⁽²⁶⁾) is nuanced in the practice of the specialized agencies. However, this modus of negotiation can be handicapped by the barrier that can arise between the WTO and WIPO, the first not being directly connected with the family of the United Nations and the latter being a UN Specialised Agency. For all these reasons, we believe that only a joint work between the two organizations in the revision of this article, can result in an answer to the apparent philosophical or pro-life argument about excluding all living matters from patent protection (including microorganisms). Eventually, a balanced revision of Article 27 can become the key to open to the real flow of biotechnologies among the southern countries as well as from north to south.

Cases

(a) *International Cases*

Fisheries, United Kingdom v. Norway, Merits Judgement 18, December 1951.

Panel Report on *India - Patent Protection for Pharmaceutical and Agricultural Chemical Products* (Complaint by the United States), WT/DS50/R, 5 September 1997.

Appellate Body Report on *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/AB/R, 19 December 1997.

(b) *Domestic Case Law*

Diamond, Commissioner of Patents and Trademarks v. Chakrabarty, Supreme Court of the United States, 447 U.S. 303; 1980 U.S. LEXIS 112 (1980), in *ABBOTT, op. cit.*, p. 29.

Brenner v. Manson 148 U.S.P.Q. 698, 1966.

State Street Bank and Trust Co v. Signature Financial Cup Inc. 47 USPQ.2d.1596, 1000 Fed/Circ. 1998.

Amgen Inc v. Chunghai Pharmaceutical 18 U.S.P.Q. 2d 1016, (Fed. Cir. 1991).

Harvard Onco mouse, 447 US at 307.

Ex parte Hibberd 227 U.S.P.Q. 443, 444 – 448.

Ex parte Allen 2 U.S.P.Q. 2d 1425, 1427.

Moore v. Regents of the University of California 793 P. 2d. 479, 1991.

Riddlesbarger's Application (1936), 53 R.P.C. 57

Merrielle Dow Pharmaceuticals v. Norton and Co, (1995) 33, IPR 1.

(c) *European Patent Office Case Law*

Onco Mouse/Harvard 111, Examining Division, 3rd April 1992, O.J.E.P.O., 1992.

Onco-Mouse/Harvard II, Technical Board of Appeal 3.3.2., 2 October, n. T 19/90, O.J.E.P.O., 1990.

Relaxin EP- BI 112 114 OJ EPO 1995 388.

Decision T356/93. *Plant cells/Plant Genetic Systems* OJ EPO 1995545.

ANNEX-1: Synopsis of the Points of Conflicts between CBD and TRIPs⁽²⁷⁾

CBD Says

1. Nation states have sovereign public rights over their biological resources (*Preamble, art. 15.1*).
2. The use or exploitation of biological resources must give rise to equitably shared benefits (*art. 15.7, art. 19.2*).
3. The use or exploitation of traditional knowledge, innovations and practices relevant to the use of biodiversity must give rise to equitably shared benefits (*Preamble, art. 18.4, art. 8.j*).
4. Access to biological resources requires the prior informed consent of the country of origin. It also requires the 'approval and involvement' of local communities (*art. 15.5*).
5. States should promote the conservation and sustainable use of biodiversity as a common concern of humankind taking into account all rights over biological resources.

TRIPs Says

1. Biological resources should be subject to private intellectual property rights. Compulsory licensing, in the national interest, should be restricted (*art. 27, art. 21*).
2. Patents must be provided for all fields of technology, therefore the use or exploitation of biological resources must be protected by IPR. There is no mechanism for sharing benefits between a patent holder in one country and the donor of material in another country from which the invention is derived (*art.27.1*).
3. Patents must be provided for all fields of technology, therefore the use or exploitation of biological resources must be protected by IPR. There is no mechanism for sharing benefits between a patent holder

in one country and the donor of material in another country from which the invention is derived (*art.27.1*).

4. There is no provision requiring prior informed consent for access to biological resources which may subsequently be protected by IPR.
5. The safeguarding of public health and nutrition, and the public interest in general.

The Conflict

1. National sovereignty implies that countries have the right to prohibit IPRs on life forms (biological resources). TRIPs requires the provision of IPRs on micro-organisms, non-biological and microbiological process, as well as patents and/or *sui generis* protection on plant varieties.
2. CBD gives developing countries a legal basis to demand a share of benefits. TRIPs does not mention that legal authority.
3. CBD gives developing countries a legal basis to demand a share of benefits. TRIPs does not mention that legal authority.
4. CBD now gives states legal authority to diminish the incidence of biopiracy by requiring prior informed consent. TRIPs does not mention this authority with the risk to promote the phenomenon of "biopiracy".
5. CBD places the public interest and common good over private property and vested interests. TRIPs grants private rights on the same subject matter.

Engagement on the phylogenetic resources	Rights plant breeding	Patent
	Criteria: Distinction, homogeneity, stability	Criteria: novelty, inventive step, industrial application
↓	↓	↓
<ul style="list-style-type: none"> * Common Heritage of Humanity * Free access to genetic resources * Farmers Rights * Financial Compensation for their contribution to the conservation and the development of phylogenetic resources * Transfer of Technology 	<ul style="list-style-type: none"> * Characteristics * Protection for 15 years (or 18 years for the trees and vineyards) of the cultivar (but not for the composing genes) * Exemption of the research * Privileges for farmers 	<ul style="list-style-type: none"> * Characteristics * Monopole of exploitation of the 20 years in Europe delivered at the origin for technical processes
↓	↓	↓
Recognition under way	Revision 1991	↓
↓	↓	↓
* Common heritage of humanity replaced by easier access on	* Protection granted to all the superior vegetal species (including)	* Extension of the patents to life forms, extension to entire products & varieties,
↘	↓	↙
	Convention on Biological Diversity	

References

- (1) Using the TRIPs-plus criteria described above, and looking at only a portion of these agreements, GRAIN has identified 23 cases of bilateral or regional treaties between developed and developing countries that should be classed as TRIPs-plus as far as IPR on life forms is concerned. These agreements affect more than 150 developing countries. Which means that something serious is going on: the TRIPs-plus features of these treaties cannot be accidental.

- (2) Agreement on Trade Relations between the Government of the United States of America and the Government of the Mongolian People's Republic. http://199.88.185.106/tcc/data/commerce_html/TCC_2/MongoliaTrade.html [Art. 9(c)].
- (3) *Agreement on the Protection and Enforcement of Intellectual Property Rights between the United States of America and the Democratic Socialist Republic of Sri Lanka.* http://199.88.185.106/tcc/data/commerce_html/TCC_2/Sri_Lanka_Intellectual_Property/Sri_Lanka_IntellectualProperty.html (Sec 2c).
- (4) Agreement between the United States of America and the Socialist Republic of Vietnam on Trade Relations. <http://usembassy.state.gov/vietnam/www/hbta.html> [Chpt II: Art 1.3 and Art 7.2(c)].
- (5) Partnership Agreement between the African, Caribbean and Pacific States and the European Community and its Member States, CE/TFN/GEN/23-OR, ACP/00/0371/00, 8.2.00. <http://europa.eu.int/comm/trade/pdf/acp.pdf> [Art 45]. Agreement on Trade, Development and Cooperation between the European Community and its Member States, of the one part, and the Republic of South Africa, of the other part, Official Journal L 311 of 4 December 1999 p. 0003-0297. http://europa.eu.int/eur-lex/en/lif/dat/1999/en_299A1204_02.htm1 [Art 46].
- (6) *Record of Understanding on Intellectual Property Rights.* http://199.88.185.106/tcc/data/commerce_html/TCC_2/KoreaIntellectual.html [Sec. B.6].
- (7) Economic Partnership, Political Coordination and Cooperation Agreement between the European Community and its Member States, of the one part, and the United Mexican States, of the other part, Official Journal L 276/45 of 28 October 2000. http://europa.eu.int/comm/trade/pdf/text_dec.pdf [Art 12.1]. Decision No 1/— of the Joint Council. http://europa.eu.int/comm/trade/pdf/text_dec.pdf [Title IV, Art 36.2 and 36.4].
- (8) *Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Tunisia, of the other part,* Official Journal L 097 of 30 March 1998 p. 0002-0183. http://europa.eu.int/eur-lex/en/lif/dat/1998/en_298A0330_01.html.
- (9) *Agreement Between the United States of America and the Hashemite Kingdom of Jordan on the Establishment of a Free Trade Area.* <http://192.239.92.165/regions/eu-med/middleeast/textagr.pdf> [Art 4.1(b), Art 4.18, Art 4.21 and Art 4.29(b)].
- (10) Euro-Mediterranean Interim Association Agreement on trade and cooperation between the European Community, of the one part, and the Palestine Liberation Organization (PLO) for the benefit of the Palestinian Authority of the West Bank and the Gaza Strip, of the other part, Official Journal L 187 of 16 July 1997, p. 00030135. http://europa.eu.int/eur-lex/en/lif/dat/1997/en_297A0716_01.html [Title II, Art 33].
- (11) See some of these propositions can be found in "*Relations entre les droits de propriété intellectuelle et les dispositions pertinentes de l'Accord sur les aspects des droits de propriété intellectuelle qui touchent au commerce et la Convention sur la diversité biologique*", Réunion intersessions sur le fonctionnement de la Convention, Montréal, Canada, 28-30 juin 1999, Union Mondiale pour la nature.

- (12) Draft Communication by Kenya Review of the Provisions of article 27.3(b) of the TRIPs Agreement, WT/GC/W/302, 6 August 1999. India proposes to exclude patents on all life forms. If this is not possible, then at least exclude patents based on traditional/ indigenous knowledge and products and processes essentially derived from such knowledge. There must be disclosure of the country of origin of the biological resource and associated knowledge, and proof of the provider's consent, to ensure equitable sharing of benefits. It should be left to national policy to decide what are patentable micro-organisms, including in light of Art. 27.2 (morality and *ordre public*). Developing countries like India cannot accept any further strengthening of the protection presently provided to life forms, WT/L/326 of 22 October 1999.
- (13) Article 27.3(b) of the TRIPS Agreement: Review options for the South on this point, it has been suggested that since Article 27.3(b) refers to "plants and animals" and not to any particular class thereof (such as varieties, "races" or "species"), this reference should be read to include both naturally occurring plants and animals and parts thereof, as well as those which have been genetically modified (i.e., transgenic).
- (14) The African group proposes that the review of 27.3 should clarify that plants, animals, micro-organisms, their parts and natural processes cannot be patented. TRIPS should contain provisions to promote, not undermine, the conservation and sustainable use of genetic material. Finally TRIPS should contain provisions to prevent "biopiracy", WT/GC/W/302 of 6 August 1999 and IP/C/W/206 of 20 September 2000. Southern Africa Development Cooperation (SADC). The exclusion for essentially biological processes should extend to microbiological processes. WT/L/317 of 1 October 1999. Brazil proposes to keep the flexibility for members to exclude plants and animals should be retained. Art. 27.3(b) should be amended to allow members to require further conditions for patentability, viz. (1) identification of source of genetic material; (2) traditional knowledge used to obtain that material; (3) evidence of fair and equitable benefit-sharing; and (4) evidence of prior informed consent for the exploitation of the patent. Art. 27.3(b) should bear an interpretative note clarifying that discoveries or naturally occurring materials are not patentable. IP/C/W/228 of 24 November 2000. This is also the position of Venezuela, WT/GC/W/282 of 6 August 1999 and Zambia, Jamaica, Kenya, Pakistan, Sri Lanka, Tanzania, Uganda and Zimbabwe, JOB(99)/3169 and Add. 1. The Least Developed Countries (LDC) Group affirm that there should be a formal clarification that naturally occurring plants and animals, as well as their parts (gene sequences), plus essentially biological processes, are not patentable. Incorporate provision that patents must not be granted without prior informed consent of country of origin. Patents inconsistent with CBD Art 15 should not be granted, WT/GC/W/251 of 13 July 1999. Cuba, Dominican Republic, Egypt, El Salvador, Honduras, India, Indonesia, Malaysia, Nigeria, Pakistan, Sri Lanka and Uganda add that the review should also: clarify the artificial distinction between biological and microbiological organisms and processes; ensure the continuation of traditional farming practices including the right to save and exchange seeds and sell their harvests; and prevent anti-competitive practices that will threaten food sovereignty of people in developing countries, WT/GC/W/354 and WT/GC/W/355 of 11 October 1999.
- (15) *Matters Concerning Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore*, WIPO Doc. WO/GA/26/9.

- (16) On this topic see BLAKENEY, *op. cit.*
- (17) WT/GC/W/193 of 2 June 1999 and IP/C/W/254 of 13 June 2001.
- (18) WT/GC/W/115 of 19 November 1998 and IP/C/W/209 of 20 September 2000.
- (19) This is the position of Singapore TRIPS should not be used to enforce benefit-sharing arrangements or any common approach to benefit-sharing, JOB(00)/7853. Japan WT/GC/W/242 of 6 July 1999. Norway adds that – It should be considered whether a provision on the disclosure of the origin of genetic resources should be inserted in the TRIPS Agreement to ensure a more effective implementation of the CBDIP/C/W/293 of 29 June 2001. Switzerland fosters no lowering of standards of protection The exclusion for plants and animals is a balanced provision that takes into accounts members' needs and interests. Switzerland also agrees with Singapore that the UPOV system is a useful reference for the basic level of protection of any *sui generis* system for the protection of plant varieties. Nonetheless, also agrees that there may be other *sui generis* systems that meet the requirements of Article 27.3(b) besides UPOV and considers the elements listed by the US to be helpful in drawing up such systems, IP/C/W/284 of 15 June 2001.
- (20) Therefore, the EC does not favour incorporating into the TRIPs Agreement overly complex requirements which would oblige patent applicants to provide, in their patent application, an official certificate of the source and origin of the genetic material and the related traditional knowledge used, evidence of fair and equitable benefit sharing and evidence of prior informed consent from government or local communities for the exploitation of the subject matter of the patent". However, the European Communities "are open to examine possible effects of the patent system and look into different ways of positively support states in achieving the objectives of the CBD, in particular benefit sharing, while maintaining existing standards and level of intellectual property protection and not unduly increasing the burden on patent applicants and taking in to account the outcome of the above - outlined negotiation process which is taking place in the frame work of CBD. As already mentioned above, further discussions on access and benefit-sharing will take place under the CBD.
- (21) For the history see Peter DRAHOS, "Global Property Rights in Information: The Story of TRIPS at the GATT" Prometheus, 13, 1995, pp. 6-19.
- (22) See for instance the African approach on human rights who encompass collective rights enshrined The African Charter on Human and Peoples' Rights adopted 17 June 1981, entered into force 21 October 1986, OAU Doc. CAB/LEG/67/3 Rev. 5, 21, International Legal Materials, p. 59.
- (23) See the letter of the US Chief Senator for International negotiation Tom Daschle of November 1, 2001 where he gives guidelines to the US delegation in FAO negotiation round, illustrating the change of the US position: <<[...] Specifically, I support proposals to exempt farmers from paying royalties on patented farmed animals and technical fees on seeds that have been genetically modified. [...] Additionally, patent holder or owners of genetically modified rogranisms and related technology should be liable for health, safety and environmental impacts...>>
- (24) VIRALLY M., << La notion de fonction dans la theorie de l'organisation internationale

>>, in *Melanges offerts a Charles Rousseau: La Communaute internationale*, Paris, ed. A. Pedone, 1974, p. 281.

- (25) The recent major international conferences are a consequence of this evolution. The Social Summit, the Conferences on the Environment, Conference on Population, on Women, on Water have not been organized by single specialized agencies, but sponsored by a number of them.
- (26) MITRANY, *A Working Peace System*, Quadrangle Books, Chicago, 1966 (1st ed. 1943), pp. 62-63.
- (27) This synopsis has been inspired by the one effectuated by GRAIN, we have modified it in accordance to our convenience to illustrate the relations between the two conventions.

National Sovereignty and the International Implementation of Human Rights

Ms. Shazia Qureshi*

There is a better vantage point to grasp the real issues which a case adjudicates: whether it is a matter of drawing the line between state sovereignty and fundamental rights of the individual; of determining the nature of the obligations incumbent on the States (passive obligation to abstain from intervening or an active obligation to protect fundamental freedoms); of fixing the level of activism of the organs of the Convention in promoting human rights (a subsidiary role in the scrutiny of national legislation and practice or an active role in fixing the objectives to be achieved); in each case the problem can be reduced to a question of interpretation of the terms of the Convention.⁽¹⁾

National Sovereignty vis-à-vis the role of Human Rights Organs

A. *The Issue of the Reserved Domain Before Human Rights Organs.* The *Belgian Linguistics Case* represents the earliest case where the issue of domestic jurisdiction was specifically raised as a preliminary objection by a state party before a judicial organ established under a human rights treaty.⁽²⁾ Professor Bernhardt notes that the issue is not so much one of domestic jurisdiction, but rather how the human rights organs conceive their competence as circumscribed in the treaties establishing them.⁽³⁾

B. *Interpretation of Rights and the Provisions of Human Rights Treaties.* Professor Waldock has remarked in respect of the European Convention: '[t]he question [is] whether we are to regard the Convention primarily as a treaty or as a form of 'constitution' - a question apparently at the root of some recent differences in the interpretation of certain provisions. The true answer, I suspect, is that the nature of the Convention is ambivalent'.⁽⁴⁾ Professor Merrills sees Judge Fitzmaurice's separate opinions at the European Court prefigured upon the question as to the 'specific conception

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of the nature of the ... Convention and as a corollary a distinctive conception of the court's role in relation to it'.⁽⁵⁾ Judge Fitzmaurice urged for a distinction to be drawn between the 'law-giver's law' and the law based on convention.⁽⁶⁾ The disagreements emanating from the conception of the nature and thus of interpretation can be identified as: 'constitutional' instrument v. sovereignty-limiting treaty (*character*); liberal interpretation v. restrictive interpretation (*approach*); objective criteria by reference to object and purpose v. subjective criteria by reference to intentions of parties (*criteria and element*).

Thus, it had been stated, on the one hand:

The Convention is not intended to restrict State sovereignty to a degree beyond what is explicitly stated in its provisions. The Convention is a treaty of international law. The restrictive interpretation of such treaties in favour of State sovereignty corresponds to a general principle of international law.⁽⁷⁾

And on the other hand:

The overriding function of the convention is to protect the rights of the individual and not to lay down as between States mutual obligations which are to be restrictively interpreted having regard to the sovereignty of these States. On the contrary, the role of the convention and the function of its interpretation is to make protection of the individual effective.⁽⁸⁾

The human rights organs have emphasized on *objective* criteria of interpretation that looks at the *object and purpose* of the treaties rather than a *subjective* criteria that seeks to ascertain the intentions of the parties.⁽⁹⁾ An objective criteria would vindicate their object and purpose which lies in the protection of the *basic rights of the individual* rather than to accomplish subjective and *reciprocal rights of the state parties*.

Exhaustion of Local Remedies: A Figment of the Sovereign Domain

Professor Trindade observes that the 'salient feature common to the plea of domestic jurisdiction and non-exhaustion of local remedies is that both constitute devices at the service of the sovereignty of States'.⁽¹⁰⁾

The rule as enunciated in human rights treaties encapsulates the right

of the territorial state to exercise jurisdiction over all persons and things within its boundaries. The European Court has observed that the rule "delimits the area within which the contracting States have agreed to answer for wrongs alleged against them before the organs of the Convention".⁽¹¹⁾ The Human rights Committee and inter-American Court have also emphasized this elemental aspect of sovereign domain as underlying the rule.⁽¹²⁾ The approach of human rights organs to the rule manifests a concurrence in approach in interpreting the rule in favour of substantive rights.

A. *Burden of Proof.* The traditional doctrine stated by Judge Lauterpacht indicates that the burden, *prima facie*, lay upon the defendant state to prove that some remedies existed, while the claimant had to show that the remedies were ineffective.⁽¹³⁾ Significant in the traditional rule is the fact that ineffectiveness which is an exception to the rule was a matter for the claimant to prove. With respect to human rights, the organs have emphasized that the state bore not only the burden of proving the existence but of the effectiveness of remedies in its domestic legal system.⁽¹⁴⁾ Thus an individual-oriented rather than, or at least not, a state-oriented approach is adopted.

B. *An affirmative Duty to Provide Remedies.* Professor Trindade identifies as a corollary to the element of sovereign competence the 'counterpart duty of the state to provide the [remedies]'.⁽¹⁵⁾ The ultimate purpose of the rule lies in the element of *actual redress* rather than the mechanistic *process of exhaustion*. The territorial ingredient of the rule is transformed into an affirmative international obligation upon states to secure the justifiability of human rights within their national legal structures. The inter-American Court has, for instance, noted that indigence of an individual not only infringed the right to a fair trial, but that the plea of non-exhaustion of local remedies could not be raised by a state in this respect.⁽¹⁶⁾ The European Court has treated the non-incorporation of the Convention within a state's national order as likely to render absence of 'effective remedies'.⁽¹⁷⁾

C. *Administrative or General Practices.* There exists a concurrence among human rights organs that the rule is inapplicable.⁽¹⁸⁾ The *raison d'être* for the inapplicability of the rule lies in the fact that the object of the complaint before an international organ is to determine the general compatibility of measures with international undertaking regarding human rights.

National Jurisdiction and Limitations upon Human Rights

Limitations upon human rights are: reservations, derogations and clawback clauses. The attachment of reservations by a state upon accession to treaties is an attribute of this sovereign competence. The utilization of derogation and clawback clauses underscore the State's control over domestic affairs.⁽¹⁹⁾

A. *Reservations.* The validity and permissibility of reservations as limitations to adherence to human rights are determined by reference to the object and exercise of its national sovereignty is to be examined against the overall purpose of treaties in fostering human rights. The inter-American Court has emphasized that: 'the purpose of the convention imposes real limits on the effect that reservations attached to it can have'⁽²⁰⁾ and that interpretation of reservations should be consistent with that object and purpose. The emphasis on the supreme importance of the object and purpose of the treaty engenders a restrictive interpretation of any reservations.

B. *Derogations and Clawback Clauses.* In the European system, the notion of national margin of appreciation underpins the domestic domain of a state. Thus in respect of derogations, '[i]t falls in the first place to each contracting State, with its responsibility for the "life of its nation" to determine whether that life is threatened by "public emergency", and if so, how far is to necessary to go in attempt to overcome the emergency... In this matter, Article 15 leaves to those [national] authorities a wide margin of appreciation.'⁽²¹⁾

Professor Green argues that 'it would seem in the light of the Anglo-Irish decision at least, that the European Convention, despite the presence of the Commission and the Court, does not prevent auto-interpretation by a state party to it of an emergency justifying derogation'.⁽²²⁾ The jurisprudence, however, indicates that a state's particular appreciation of the circumstances is subject to international appraisal: '[t]he States do not enjoy an unlimited power in this respect. The domestic margin of appreciation is thus accompanied by a European supervision'.⁽²³⁾ The Human Rights Committee has not doubted 'the sovereign right of a State party to declare a state of emergency',⁽²⁴⁾ yet it felt that a state could not evade its obligations under the Covenant by merely invoking the existence of exceptional circumstances.

Reliance upon a clawback clause is predicated upon the ultimate preservation of democratic society and a state can take derogatory measures 'not so much to preserve itself, but rather to preserve the democratic system'.⁽²⁵⁾

References

- (1) F Ost "The Original Canons of Interpretation of the European Court of Human Rights" in *The European Convention for the Protection of Human Rights: International Protection versus National Restrictions* (ed. M. Delmas-Marty) (1992) 283-4. (hereinafter cited as Delmas-Marty *European Convention*).
- (2) Belgian Linguistics Case (Preliminary Objections) (1967) 45 ILR 114, pp. 131-2. for arguments by the Commission (at pp. 132-3) and decision of the Court (at pp. 133-5).
- (3) R Bernhardt "Domestic Jurisdiction of States and International Human Rights Organs" (186) 7 HRLJ 205, 212.
- (4) CHM Waldock "The Effectiveness of the System set up by the European Convention on Human Rights" (1980) 1 HRLJ 1, 2.
- (5) JG Merrills "Sir Gerald Fitzmaurice's Contribution to the Jurisprudence of the European Court of Human Rights" (1982) 53 Brit YH Int'l L 115, 116.
- (6) Judge Fitzmaurice disputed the assertion of an overriding constitutional character in the European Convention: see *Golder v United Kingdom* (1975) 57 ILR 200 at p. 246 (hereinafter cited as *Golder Case*); *National Union of Belgian Police v Belgium* (1975) 57 ILR 262 at pp. 293-5. Merrills notes that Judge Fitzmaurice's general approach derived from his conception of the convention as a traditional sovereignty-limiting treaty which was different from the constitutional character visualized by the majority of the Court, *ibid* at 161. Waldock, on the other hand, was of the view that the constitutional, rather than the treaty, character of the Convention as a European Bill of Rights was of supreme importance, *loc cit supra* note 4 at 2.
- (7) *Wemhoff v Federal Republic of Germany*, Appln. No. 2122/64, Report of the Commission (166) (sep. op. commissioner susterhenn) [citation of authorities omitted]; see also: *Golder Case* *ibid*, sep. op. Judge Verdross (at p. 224); sep. op. Judge Fitzmaurice (at p. 251).
- (8) *Golder v United Kingdom*, Appln. No. 4451/70, Report of the Commission (1973). See also: the advisory opinion of the inter-American Court in respect of the Application of the Government of Costa Rica with Regard to Viviana Gallardo (1980) 20 ILM 1424, 1427. Analogy may also be drawn to the approach in interpreting national constitutions: Lord Diplock stated in *Attorney-General of the Gambia v Mamodou Jobe* [1984] 3 WLR 174 at p. 183 that, "[a] Constitution and in particular that part which protects and entrenches human rights and freedoms to which all persons in the State are entitled is to be given a generous and purposive construction".
- (9) European Commission: *Austria v Italy*, Appln. No. 7881/60, (1960); *France et al. v Turkey*, Applns. Nos. 9940-44/82 (1982). European Court: *Ireland v United Kingdom* (178) 58 ILR 188, pp. 291-2; *Belgian Linguistic Case* *supra* note 2 at pp. 161-2. Inter-American Court. *The Effects of Reservations on the Entry into Force of the American*

- Convention (Articles 74 and 75) (1983) 22 ILM 37; Restrictions to the Death Penalty (Articles 4(2) and 4(4) American Convention on Human Rights) (1984) 23 ILM 320 (hereinafter cited as Reservations to Death Penalty Case).
- (10) ACC Trindade "domestic Jurisdiction and the Exhaustion of Local Remedies: A Comparative Analysis" (1976) 16 Ind YB Int'l L 1987. The rule first developed in the field of diplomatic protection underpins the primacy of the sovereign competence of a state: *Losinger & Co. Case (Switzerland v Yugoslavia)* [1959] ICJ Rep at p. 27.
 - (11) *De Wilde, Ooms and Versyp v Belgium (No. 1)* (1970) 56 ILR 336, P. 368.
 - (12) HRC: *TK v France* (187) UN Doc. A/45/40. See generally SD McGoldrick *Human Rights Committee* (1990) 187-90; IACHR: *Velasquez Rodriguez Case* (1989) 28 ILM 291, p. 305.
 - (13) *Case of Certain Norwegian Loans (France v Norway)*, [1957] ICJ Rep at p. 39.
 - (14) For the practice of the HRC: McGoldrick op cit supra note 12 at 187-97; ACC Trindade "Exhaustion of Local Remedies under the UN Covenant on Civil and Political Rights and its Optional Protocol" (1979) 28 ICLQ 734-65; the IACHR: ACC Trindade "Exhaustion of Local Remedies in the inter-American System", (1978) 18 Ind YB Int'l 345-51; the ECHR; ACC Trinidad *The Application of the Rule of Exhaustion of Local Remedies in International Law* (1983) 59-127, 143-71 (hereinafter cited as Application).
 - (15) *Trindade Application* ibid at 57.
 - (16) *Exceptions to the Exhaustion of Local Remedies*, adv. Op. (1991) 12 HRLJ 20, pp.22-3.
 - (17) *Campbell and Fell v United Kingdom* (1884) 78 ILR 292, 343.
 - (18) *Greece v United Kingdom* (1956) 25 ILR 168, p. 170 (legislative measures and administrative practices); *Ireland v United Kingdom* (1978) 58 ILR 188, p. 263 (hereinafter cited as Irish Case) (administrative practices); *Velasquez Rodriguez Case* supra note 12 at pp. 306-9 (governmental policy tolerating disappearances).
 - (19) JF Hartman "Derogations from Human Rights in Public Emergencies" (181) 22 Harv. ILJ 1, 2; M Delmas-Marty and G Soulier "Restraining or Legitimizing the Reason of State" in M Delmas-Marty *European Convention* op cit supra note 1 at 7.
 - (20) *Restrictions to Death Penalty Case*, supra note 9 at p. 324.
 - (21) *Irish Case* supra note 18 at p. 278-9.
 - (22) LC Green "Derogations of Human Rights in Emergency Situations" (178) 16 Can YBIL 92, 101; also at 102-3.
 - (23) *Irish Case* supra note 18 at p. 279. Professor Bernhardt remarks of the close relationship between state sovereignty and competence of international organs in the fact that it is not the state but the Convention organ which finally decides, however, whether a national margin of appreciation exists and where the limits are; loc cit supra note 3 at 213-4.
 - (24) *Jorge Landinelli Silva et al. v Uruguay* (1981) UN Doc A/36/40 136, pp. 132-3.
 - (25) *Delmas-Marty and Soulier* supra note 19 at 10.

