



# Free Trade Agreements and Access to Genetic Resources and Benefit Sharing: Exploring the Linkages<sup>1</sup>

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**Abstract:** This article highlights the potential relationship between Trade in general, and FTAs in particular, and the negotiations on an international regime for access and benefit-sharing within the context of the CBD, and identifies some questions requiring further scrutiny. In particular this article addresses the linkages between Trade (in particular) FTA and ABS in the context of the disclosure of origin of genetic resources in IPR applications and the restrictions on intellectual property rights (IPR) applications for inventions derived from genetic resources for which an access permit was granted and the relationship between ABS and investment and services rules in FTA.

**Keywords:** Access and benefit sharing; Convention on Biological Diversity; Intellectual Property Rights; Free Trade Agreements; World Trade Organization.

## Introduction

A growing number of bilateral and regional free trade agreements (FTAs) incorporate provisions relevant to biodiversity. Meanwhile, there are ongoing negotiations on an international regime governing access to and the equitable sharing of benefits from genetic resources derived from biodiversity under the Convention on Biological Diversity (CBD). While there are clear linkages between the two sets of regimes, scant research has been conducted on the implications – both positive and negative – of the trade and intellectual property provisions included in FTAs on the international regime for access and benefit-sharing (ABS). This article highlights the potential relationship between Trade in general, and Free Trade Agreements (FTAs) in particular, and the negotiations on an international regime for access and benefit-sharing

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within the context of the CBD, and identifies some questions requiring further scrutiny. Despite the theoretical speculations, it is still uncertain if and how FTAs might have an impact on the negotiating dynamics and country positions with regard to the international regime. More time and analysis will thus be needed in order to identify the potential impact of Trade and FTAs on the negotiations and final outcome of an international regime for ABS.

A growing number of bilateral and regional FTAs incorporate provisions relevant to biodiversity as it is explained below. Meanwhile, there are ongoing negotiations on an international regime governing access to and the equitable sharing of benefits from genetic resources derived from biodiversity under the Convention on Biological Diversity (CBD). While there are clear linkages between the two sets of regimes, scant research has been conducted on the implications – both positive and negative – of the trade and intellectual property provisions included in FTAs on the international regime for access and benefit-sharing (ABS) related to biodiversity. Most of the analysis undertaken so far has focused on the issue of disclosure requirements.

### **Disclosure of Origin and International Trade: Are FTAs Restrictive or Supportive?**

Rules governing access and benefit-sharing are linked to intellectual property rules (and trade rules) in several ways, some of these include:

- ABS rules may pose restrictions on intellectual property rights (IPR) applications for inventions derived from genetic resources for which an access permit was granted. For example, the Biodiversity Law of Bhutan requires prior notification, and India's Biodiversity Law requires prior written authorisation.
- ABS-related rules may require the disclosure of the origin of the materials in an IPR application that concerns or makes use of accessed materials in an invention (incorporated in ABS or Biodiversity Laws, for instance in the Andean Pact Decisions 391 and 486; the Costa Rica Biodiversity Law; the Provisional Measure of Brazil).

One of the measures suggested in order to achieve a synergistic relationship between the CBD and intellectual property systems (in particular, the WTO TRIPs) was the disclosure of the origin of genetic resources or associated traditional knowledge in intellectual property right applications, particularly in patents. For several years the CBD,

the World Trade Organization (WTO), the World Intellectual Property Organization (WIPO), and other agencies through their reports have insisted on the need to promote disclosure of origin in IPR applications.<sup>2</sup>

The Conferences of the Parties to the Convention have also addressed the relationship between IPR and biodiversity. For example, at the III Conference of the Parties, Decision III/15 (access to genetic resources) requested the Executive Secretary to cooperate with the WTO through its Committee on Trade and Environment in order to explore the extent to which there may be links between Article 15 of the Convention and the TRIPs. Decision III/17 also recognized, among other things, that further research is required in order to understand the relationship between the provisions of the TRIPs and the CBD, particularly those points relating to technology transfer and the conservation and sustainable use of biodiversity, fair and equitable benefit-sharing, protection of traditional knowledge, etc. The IV Conference of the Parties (1999 Bratislava), in addition to reiterating a number of previous calls from past COPs, emphasized the need to ensure consistency in the implementation of the Convention and the TRIPs, in order to increase mutual supportiveness between both regimes and ensure that biodiversity-related concerns receive IPR protection (IV/15). The V Conference of Parties (2000, Kenya), in Decision V/26, requested the WIPO and UPOV to properly take into account the relevant provisions of the Convention in their work, including the impact IPR might have on the conservation and sustainable use of biological diversity and particularly on the value of traditional knowledge. Subsequently, it invited the WTO to bear in mind that the TRIPs and the CBD are mutually related and called for a more in-depth exploration of that mutually supportive relationship. COP Resolution VI/24/C 1, *"The Role of IPR in the Implementation of Benefit-Sharing Agreements"*, invited the governments and Parties to promote disclosure of the origin of genetic resources in intellectual property right applications when the protected material consists of or makes use of genetic resources in its development. The aim of this disclosure is to help track compliance with prior informed consent and the mutually agreed conditions on which access to those resources was granted. Numeral 2 contains the same invitation regarding associated traditional knowledge. At the VII Conference of the Parties, Decision VII/ 19 requested the Working Group on Access and Benefit Sharing (WGABS) to identify aspects related to disclosure of the origin of genetic resources and associated traditional

knowledge in IPR applications, including aspects related to the certificate of origin/source/legal provenance. It also asked the WIPO and UNCTAD to prepare studies on disclosure of origin in IPR applications, based on a list of topics that need addressing.

The Bonn Guidelines also refer to this topic when they indicate that user country measures should take into account measures to promote disclosure of the origin of genetic resources and the origin of knowledge, innovations, and practices in intellectual property right applications (16.d.ii).

### **Main Elements of the Disclosure Proposal**

It is not surprising that the requirement for disclosure of origin / proof of legality of access in intellectual property applications should be the object of intense political and legal debate. Although different legislations contain references to this requirement, they differ in terms of their consequences.<sup>3</sup> Some of the biodiversity or intellectual property laws contain the obligation to disclose the origin of genetic material utilised in inventions or plant varieties, or even to present proof of the existence of prior informed consent or a certificate of origin that establishes the legality of access to the genetic material or associated traditional knowledge. This stipulation would help to support compliance with the CBD provisions on access to genetic resources and benefit-sharing.

In most cases, the European laws that have introduced this requirement refer only to the obligation to disclose the origin or, in the case of Norway, to prove the existence of PIC (only for genetic materials, not for traditional knowledge). However, these laws do not affect the existence of intellectual property rights as such, but rather fall within the penal or civil domains. Likewise, few laws on plant breeder rights, especially in India, consider this situation.

As Correa (2005) states, "Although the purpose of this obligation and its rationale seem clear enough, and there is substantial – though not unanimous - support for it to be established, the conditions and circumstances of this obligation and how it will be applied need to be more precisely defined..." The scope and conditions of application of the obligation should be consistent with its purpose, and care should be taken not to impose a disproportionate burden on the applicants and the institutions in charge of their applications".<sup>4</sup>

However, other aspects should be taken into account when

considering the inclusion of disclosure of origin in the International Regime negotiations:

- (a) The instrument has a limited impact on the prevention of misappropriation or biopiracy, and should, therefore, be accompanied by other complementary mechanisms. For example, in a number of documented cases of misappropriation through patents, the geographical origin of the resource was mentioned. In order to improve the quality of the granting of patents and other intellectual property rights, search systems in order to determine if the inventions are novel are needed. These complementary mechanisms have been explored by the WIPO Intergovernmental Committee on Genetic Resources and Intellectual Property, Traditional Knowledge and Folklore.
- (b) Consideration should also be given to whether countries have the ability to effectively monitor patent applications and patents granted in order to determine if there has been misappropriation of materials. Even if misappropriation is detected, it is doubtful that the countries have the economic and financial capacity to invalidate patents in foreign jurisdictions, considering the long and costly process involved. This situation points once again to the need to study other user country measures, for example, those that facilitate access to justice, as required to achieve the objectives of the CBD.
- (c) One way to prevent misappropriation is to improve access to information existing in the public domain, and make it available to the technical staff in charge of reviewing patents to aid them in determining if they are novel and if prior art exists. This is one of the aspects the WIPO has been working on through the Intergovernmental Committee.
- (d) Finally, although these provisions have been included in some countries' patent laws or in their biodiversity or related laws, it is also advisable, strictly at a national level, for the countries to begin introducing a new statutory obligation into their access or related laws: namely, the requirement for an access applicant to disclose the origin or source of the resource at the time access is granted if the access applicant presents a patent application. Although it is not possible to categorically state whether or how the patent offices will take these legal or contractual provisions into account, or whether they will take action against an applicant

that does not comply with them, this measure merits consideration. Incorporating this provision will require that actions be taken at a national level, which should not wait for the conclusion of international negotiations on the Regime or the WTO discussions.

### **Disclosure and FTA**

With regard to free trade agreements, concerns have been raised that in some cases their IP provisions may limit or preclude the opportunities to introduce disclosure of origin requirements. For example, the language used in the US-Central American Free Trade Agreement (CAFTA), states that “Each party shall provide that a disclosure of a claimed invention shall be considered to be sufficiently clear and complete if it provides information that allows the invention to be made and used by a person skilled in the art, without undue experimentation, as of the filing” (article 15.9.9). Doubts have been raised as to whether this text implies a restriction on additional information being requested when the patent is disclosed. For legal and technical reasons the author does not agree with this interpretation. However, it deserves to be mentioned as a suggested potential implication of the FTA on the disclosure requirements.

FTAs have generally not incorporated a mandatory requirement for the disclosure of origin in the substantive IPR Chapter of the Agreement. However, the issue has sometimes been addressed elsewhere. For instance, in the case of the US-Peru FTA, the following elements have been agreed in a side letter:

- a) Recognition of the importance of traditional knowledge (TK) and biodiversity, as well as their contribution to development.
- b) Recognition of the importance of a) prior informed consent from the appropriate authority; b) equitable sharing of benefits from the use of TK and genetic resources; c) promoting quality patent examination to ensure the conditions of patentability are satisfied.
- c) Recognition of the fact that access and benefit sharing can be adequately addressed by contracts.

Despite the recognition of the issues in the side letter, the text agreed is essentially on uncontroversial matters (e.g the importance of TK). In other words, the side letter does not address or respond to the more controversial aspects of disclosure of origin. Therefore, these provisions may not have an impact on critical issues discussed in the negotiations on an international regime.

## **ABS and Investment/Services Disciplines**

The relationship between ABS and investment and services rules in FTAs is also of interest. For example, research services – including biodiversity-related research – is mentioned in the services chapter of CAFTA.

There may be legal implications of considering bioprospecting as a service and investment disciplines in FTAs may also be applicable. A common discipline in investment provisions is the prohibition (or restriction) of “performance” and other requirements placed on the investor and the investment. Arguably, such restrictions could limit the rights of countries to require, as part of ABS rules or procedures, technology transfer from the potential user of the genetic resources. Such technology transfer has been noted as an important benefit in the biodiversity context. Whether in fact this mandatory requirement for a foreign company imposed in the context of an ABS permit would constitute a violation of the investment disciplines remains unclear.

Nevertheless, a common feature of FTAs is a provision providing that, in case of contradiction between the investment chapter and other chapters, the latter prevail. Thus, the environmental chapter, which requires compliance with environmental laws in the country – including any access law or biodiversity law – would prevail over conflicting investment disciplines. A potential solution would be to require the investor/access applicant to comply with any technology transfer or other benefit sharing provisions in the context of the ABS permit. Any condition imposed on the applicant/investor would thus have its legal basis in the CBD and domestic environmental law.

From a legal perspective, some authors have pointed out the implications of considering “bioprospecting” as a service and the applicability of the investment disciplines contained in the FTA; in this regard, the prohibition (or restriction) of “performance” and other requirements to the investor and his investment can be mentioned; e.g. limiting the rights of the Country, as part of the access procedure, to require technology transfer from the potential user of the genetic resources (a benefit sharing condition before access is granted). This mandatory requirement imposed on a foreign company in the context of an ABS permit, could constitute a violation of the investments disciplines.

Finally, it is important to point out another implication of FTA’s investment provisions. The investment Chapter usually requires Parties to provide National Treatment to a foreign investment (under certain

circumstances and exceptions carefully negotiated and listed). A concern has been raised because some ABS laws discriminate between nationals and foreigners, creating a more favourable procedure for foreigners (e.g. India, Brazil, Sarawak). At this stage in the IR negotiations it is unclear to what extent, if any, the “access component” of ABS will be included. However, at least some proposals (e.g. those of the EU) have been put forward making a clear reference that ABS should not discriminate between nationals and foreigners.

### **Certificate of Origin/Compliance and Trade Disciplines<sup>5</sup>**

One element ABS negotiations have focused on in order to respond to the call for user country measures, and to contribute to solving problems related to the monitoring and traceability of genetic resources, is by developing some form of certificate of origin/source/legal provenance – more recently named ‘certificate of compliance’.

The idea of the certificate is to prevent or minimize problems generated by the existence of two different jurisdictions for ABS arrangements – that of the place where the material is collected and that of the place where research and development activities are carried out. The existence of an internationally recognized document would make it possible to check the legality of access at the place where the activity (patent, product approval, etc.) generates value, and to discover the subsequent use of the resources and the origin of the corresponding benefit-sharing. At the same time, this supposedly<sup>6</sup> would favour the creation of simpler access systems in provider countries, in that existing control mechanisms would be applied, via the certificate, in the later stages of research and development, thus helping to make the regulations on access to genetic resources more flexible. In this way, monitoring and regulation would be less strict during the access phase and stricter during the research and development phase, where control or check points would be established. This implies that the documentation would need to pass through the various buyers, but the monitoring points would be reserved only for certain milestones in the research and development process, such as those related to product approval, IPR applications, publications, the presentation of funding proposals, etc.

Many aspects still need to be clarified before this system can become operational, including (Fernández, 2004):

1. The designation of national authorities to issue certificates that are mutually recognized

2. The identification of conditions for verification of and compliance with the certificates, that is, the determination of which materials they would apply to, for what purposes, and at what moment or stage they would be verified
3. Exemptions
4. Provisions for cases in which it is not possible to identify the origin of the genetic resources, including benefit-sharing
5. Differential treatment of different sectors
6. Dispute settlement mechanisms
7. The creation of an international certificate register
8. How countries that are not parties to the IR will be handled
9. Provisions related to the resources contained in *ex-situ* collections prior to the Convention

Other aspects of interest could include:

1. Focus on what the certificate corresponds to: species, genes, specific biological samples, derivatives, etc.
2. Transaction costs of the certificate.
3. Different types of certificates: origin, legal provenance, source.
4. Characteristics of the system: simplicity, flexibility, avoidance of complex procedures.
5. Considerations regarding the product supply chain, etc.
6. Ability to comply with the objectives of the CBD, especially conservation.
7. Economic impacts and implications of the certificate for different actors (botanical gardens, etc.)
8. Content of the certificate.
9. Sanctions for non-compliance.
10. Lack of legislation on access.
11. Procedures for control and use of the Clearing House.
12. How to ensure that additional barriers are not created for the non-commercial exchange of resources.
13. Compatibility with international trade regimes,<sup>7</sup> etc.

Depending on the certificate's final design, some rules of the trade system (WTO or FTA) might apply to it, especially those related to technical barriers to trade. For instance, if the certificate is going to be checked at customs and if the legal consequences of not showing the same are the prohibition of the entry of the genetic resources- for which the certificate should have been issued - into a country. However, the

potential implications of such rules on the certificate need to be better understood.

### **Capacity Building**

Studies on the implementation of national ABS laws confirm the difficulties provider countries face in adequately complying with their current legislation. In the opinion of the author, in order to achieve CBD objectives, the importance of national frameworks and their application should not be neglected. This topic is closely related to capacity building. From this perspective, the international regime should contribute decisively to ensure the best possible application of existing legal frameworks on ABS, the strengthening of legal certainty and the creation of national capacities for that purpose.

FTAs often contain provisions on environmental cooperation (including capacity building activities) either in an Environment Chapter and/or in an Environmental Cooperation Agreement to be ratified separately. In each case, preliminary priorities have been set out for cooperation and capacity development in different areas or fields. ABS could be considered one of these areas and receive financial and other support from trade partners. These programmes could support capacity building activities under the international regime.

### **Discrimination against Countries without user measures in Place:<sup>8</sup> Flexibility through Governmental Reciprocity and Trade Implications**

One step that source countries can consider, as a means of finding an appropriate standard of flexibility in addressing post-access monitoring and oversight, is the concept of reciprocity.

A source country might consider adopting legislation under which special ABS special procedures are only available for users operating under the jurisdiction of a country that has adopted certain measures. This approach might eliminate a common problem where applications that had been refused, because the authorities felt that did not have adequate guarantees or were uncertain of how exported material might really be used.

This solution should address the legal possibility for a country providing genetic resources to condition the granting of access to the existence of appropriate measures in the user country (User Measures). To condition the granting of access or to establish more favorable

procedures, in the cases in which measures of this nature exist in the User Country, also has implications from international trade.

Often it is argued that the purpose of user measures is to provide an incentive for countries of origin to develop more flexible ABS rules and procedures and thus facilitate access in line with the CBD objectives. This was a 'key conclusion' of the first panel of experts in ABS: "Flexibility in providing countries is related to the extent that user countries and organizations implement measures that provide incentives or establish control mechanisms in order to secure the interest of providers over their resources."<sup>9</sup>

### **Description of the Measure**

The proposed measure consists in introducing a mechanism that would provide for the existence of an additional, reciprocal and expedited access procedure (AREP) that would only be available for those countries who have effectively adopted user measures (including but not limited to the certificate of legal provenance and disclosure requirement).<sup>10</sup>

The issue of what exactly could be simplified (e.g. procedural or substantial issues) in the expedited procedure and how this would be determined has to be further explored. However, the mere existence of such mechanism would itself greatly assist those countries interested in developing effective access regimes. Additionally, this should be coordinated with the ongoing capacity-building efforts.

The measure is 'additional' in that it should not overrule the authority to determine access. Thus, the proposed alternative procedure would coexist with the general or standard procedure for ABS, which could then have more protective conditions.

However, the main advantage of the measure is that it could facilitate benefit sharing, so sending a much needed signal. First, as flexibility would increase so would the access activity and consequently the chances to generate benefits to share. Second, for any given country, it is more likely that benefit sharing will become significant in an aggregate manner rather than in an isolated way. Thus, as flexibility would take less time to be part of the system this would shorten the time for significant transactions to occur. As a result, significant benefit sharing would be facilitated.

In being available only to Parties to a binding instrument, for example, the measure would contribute in attracting signatories. If the international regime is to realize its potential in becoming the main

legal structure regulating ABS and is to bring some degree of order and predictability to germplasm flows, it must attract wide adherence. The use of this kind of incentive has been successfully tested in relation to other Multilateral Environmental Agreements (MEAs).

The mechanism would require substantial information from National Focal Points (NFPs), which could be incorporated into databases of countries and user measures held in the CBD Clearing-House-Mechanism (CHM). The information would then be available for National Competent Authorities (NCAs) who would verify upon the eligibility of applicants and decide upon granting AREP.

### **National Experience in Discussing the Measure**

The idea of introducing, in addition to the standard access procedure, certain expedited/simplified access procedures for nationals of jurisdiction where user measures have been adopted, was discussed within the environmental public sector in Mexico, during the deliberation of the Draft National ABS Law. In the end the Ministry of Environment was not persuaded due to misunderstandings over the exact limitations posed by international trade obligations and an over-dimensioning of the issue of discrimination. The general trade concern was over the discrimination that the measure entailed, without any further elaboration.

The Seychelles constitutes a good example of a country for which oversight and control of users will be nearly impossible. The Seychelles is not primarily a "user" of GR, and will probably not be able to build the level of infrastructure to monitor, test, or take other actions that impose restrictions on users. Its draft law, however, attempts to remedy these deficiencies, through the use of two kinds of provisions, legal mandates (basic user measures) and reciprocity. These provisions were included to give users and user countries an idea of the minimum that is expected from other countries in return for access and the right to use genetic resources.

These user provisions are very basic statements, however. In general, they simply require Seychellois who are utilising the genetic resources of other countries to

- Comply with the laws of the source country (Article 32);
- Comply with the terms and conditions of any relevant permit or contract (Article 33); and

- Notify the source country when the resources have been accessed (Article 34.)

For purposes of access legislation, however, a much more important provision is that which addresses questions of legal reciprocity and unconscionable terms and conditions. In this connection, Article 36 of the draft law states that

The provisions of this Part shall only apply in respect of the laws or other terms and conditions of access or utilisation of foreign jurisdictions providing equivalent or reciprocal protections to those contained in this Part, and shall not be enforceable where any relevant terms and conditions are declared unconscionable.

Both clauses of this provision are of interest legally. First, the reciprocity clause appears designed to create an incentive for user countries to adopt “user measures.” In essence, it says that “if you don’t protect our genetic resources from unauthorised exploitation, we won’t do the same for you.” Presuming that other source countries (with larger genetic-resource industry and research bases) follow this example, such an incentive might indeed develop. At the same time, that clause suggests that all that user countries must do is provide three of four unenforceable single sentence mandates, in order to meet their responsibility under Article 15.7.

In addition, the second clause might be interpreted to be an authority to declare foreign law invalid – another provision that might have negative reciprocal impacts, if a user country were to adopt and enforce it.

### **Trade Concerns: The Limitations**

A wide variety of trade measures (TREM’s) have been used in MEAs, either amongst parties or against non-parties. This includes reporting requirements on trade flows, labelling or other identification requirements, requirements for movement documents (such as permits or licenses, or systems of prior notification and consent), and export and/or import bans.

Particularly those TREMs aiming to provide means of enforcing a MEA (i.e. measures amongst parties and against parties) can give rise to considerable trade concerns. This is because they entail a discriminatory practice that might be incompatible with a basic tenet of the world trade system: *non-discrimination*. Non-discrimination is promoted mainly by operation of two principles: most-favoured-nation (MFN) and

national-treatment (NT). The former requires Member Countries to extend the best treatment granted to like products from any other Member (Article I of GATT). The latter requires Members to extend the same treatment to domestic and imported like products (Article III of GATT).

However, GATT also contains general exemptions by virtue of which a Party can deviate from its basic obligations under certain circumstances, including the obligations not to discriminate. Pursuant to Article XX, measures aimed to protect the environment can be validly pursued under paragraph (b) on protection of human, plant and animal life and health; and paragraph (g) on protection of exhaustible natural resources. There are some conditions that have to be met in order to be able to benefit from these environmental exemptions. The measure must be the less restrictive to trade, must be related to the environment, and must not be, according to the “*chapeau*”, a disguised restriction on international trade, or applied in a manner which would constitute a means of arbitrary<sup>11</sup> or unjustifiable discrimination between countries where the same conditions prevail. Thus, in addition to the MFN and NT principles, discrimination is addressed in the T&E scenario through the *chapeau* of article XX.

In the same vein, in the environment field the international community has committed to avoid measures that constitute a means of arbitrary or unjustifiable discrimination.<sup>12</sup> Note however, that the consensus in both fields is limited to the excesses since clearly not all form of discrimination is *arbitrary or unjustifiable*.

In relation to potential trade implications of the measure, considering some of the understandings produced over the debate of MEA-WTO relationship, as well as the terms of the environmental exemptions embedded in the GATT and the inclusion of the notion sustainable development in the international trade system, it can be concluded that the proposed measure should be considered WTO compatible.

In sum, it can be safely argued that the measure proposed in this paper poses no major problems of WTO compatibility, considering:

- The precedents found in other MEAs and in the International Treaty for Plant Genetic Resources for Food and Agriculture.
- The terms of the exceptions of the Article XX of the GATT and its interpretation; and

### Box I: Links between the International Regime on ABS and FTAs

IR component	FTA Implications
<ul style="list-style-type: none"> <li>● Benefit-sharing/ Traditional knowledge</li> </ul>	<ul style="list-style-type: none"> <li>● Promotion of mechanisms to support/ recognise the importance of benefit-sharing (Side Letters addressing the issue).</li> <li>● Side Letters and other relevant provisions reaffirming the importance of TK and biodiversity for development.</li> <li>● In some commentators opinion potential restrictions on disclosure included in IPR Chapters.</li> <li>● Restrictions on the type and modalities of benefit-sharing requirements imposed on bioprospecting (investment disciplines and their applicability with regard to ABS activities). However, primacy of Environmental Chapter of FTA could solve this restriction, allowing the investor's requirements (e.g. tech transfer) in the light of the obligation to enforce environmental laws (biodiversity related laws).</li> </ul>
<ul style="list-style-type: none"> <li>● Access</li> </ul>	<ul style="list-style-type: none"> <li>● Promotion of mechanisms to support/ recognise the importance of PIC from the competent authority (Side Letters addressing the issue).</li> <li>● Prohibition of discrimination between foreigners and nationals (ABS activities considered as services or investments<sup>13</sup>). However, primacy of the Environmental Chapter of FTA and recourse of other Treaty's provisions and exceptions could solve this restriction.</li> </ul>
<ul style="list-style-type: none"> <li>● Support compliance with Prior Informed Consent (PIC) and Mutually Agreed Terms (MAT) of provider countries.</li> </ul>	<ul style="list-style-type: none"> <li>● Technical Barriers to Trade rules (or the reaffirmation of the WTO disciplines found in FTA) and their impact on a potential certificate of origin/compliance (depending on its final structure; design; check points; legal consequences of non presentation of the certificate; etc). In accordance to some commentators disclosure of origin restrictions.</li> </ul>
<ul style="list-style-type: none"> <li>● Capacity Building</li> </ul>	<ul style="list-style-type: none"> <li>● Environmental Cooperation Agreements and capacity building in priority areas, including potential activities in ABS-related areas.</li> </ul>

- The understandings that have emerged during the long debate of the relationship between MEAs and the WTO rules.

## Concluding Remarks

This article has highlighted a number of links between Trade (focusing on FTAs) and the international regime for ABS that is currently being negotiated under the CBD (see Box I). Despite the theoretical speculations, it is still uncertain if and how FTAs might have an impact on the negotiating dynamics and country positions with regard to the international regime. So far, this has not seemed to be the case. With regard to the substantive content of the proposals submitted by the different countries or by regional groups in the negotiations, it is difficult to link the modifications of recent country proposals to the content of their FTAs (especially because the proposals do not include specific negotiating language).

More time and analysis will thus be needed in order to identify the potential impact of Trade and FTAs on the negotiations and final outcome of an international regime for ABS.

## Endnotes

- <sup>1</sup> Parts of this article are based on a previous article of the author, published in Biodiversity and regional and bilateral trade agreements: Implications for access and benefit-sharing negotiations, Bridges Trade and Environmental Review, Issue No. 3, ICTSD, Geneva, March 2008
- <sup>2</sup> Concerning technical and legal aspects of disclosure of origin, readers are referred to the following studies which, in addition to being comprehensive, present some differing conclusions on various aspects: WIPO, Technical Study on Patent Disclosure Requirements Related to Genetic Resources and Traditional Knowledge, Study No 3, 2005; Sarnoff, Joshua and Correa, Carlos, Analysis of Options for Implementing the Disclosure of Origin Requirements in Intellectual Property Applications; UNCTAD, February 2006; Rojas, Martha et al., Disclosure Requirements, op. cit.; Sarnoff, Joshua, Compatibility with Existing International Property Agreements of Requirements for Patent Applications to Disclose the Origins of Genetic Resources and Traditional Knowledge and Evidence of Legal Access and Benefit Sharing, available at [www.piipa.org](http://www.piipa.org); Ho, Cynthia, Disclosure of Origin and Prior Informed Consent for Applications of Intellectual Property Rights based on Genetic Resources. A Technical Study of Implementation Issues. Final Report, July, 2003; and, Hoare, Alison, Background Paper for the Chatham House Workshop: "Disclosure Requirements in Patent Applications - Options and Perspectives of Users and Providers of Genetic Resources." 9-10th February 2006, Energy, Environment and Development Program, Chatham House.
- <sup>3</sup> For example, Brazil, the Andean Community, Costa Rica, India and Egypt, among others.
- <sup>4</sup> Correa, Carlos, Alcances jurídicos de las exigencias de divulgación del origen en el sistema de patentes y derechos de obtentor, Research Documents, Initiative to Prevent Biopiracy, Year 1, No 2, August 2005.

- <sup>5</sup> It is not my intent to develop the idea of the certificate in depth. For further detail, see the following documents: Dross, Miriam and Wolff, Franziska, *New Elements of the International Regime on Access and Benefit Sharing of Genetic Resources: the Role of Certificates of Origin*, BFN, Bonn, 2005; Fernandez, Jose Carlos, *The Feasibility, Practicality and Cost of a Certificate of Origin System for Genetic Resources: Economic Considerations*; in *Yokohama Round Table: Toward Fair and Equitable Benefit Sharing: Instruments for the Effective Implementation of the Bonn Guidelines under the Convention On Biological Diversity*; Yokohama, Japan, 11 March 2005; Tobin, Brendan, Cunningham, David and Watanabe, Kazuo: *the Feasibility, Practicality and Cost of a Certificate of Origin System for Genetic Resources*, working paper submitted to the Secretariat of the Convention on Biological Diversity, February, 2005.
- <sup>6</sup> An analysis of the causes behind processes to reform the implementation of ABS laws can be found in, Gatforth, Kathryn and Cabrera Medaglia, Jorge, *Factors Contributing to Legal Reform for the Development and Implementation of Measures on Access to Genetic Resources and Benefit-Sharing*, publication pending.
- <sup>7</sup> On this last aspect, cfr. Louafi Salim, Morin, Jean Frederic, *Certificates of Origin for Genetic Resources and International Trade Law*, IDRRI, 2004, first draft.
- <sup>8</sup> This section is based on a previous draft of the book Cabrera Medaglia, Jorge y Christian López Silva (2007). *Addressing the Problems of Access: protecting sources, while giving users certainty*. Gland, Suiza: UICN.
- <sup>9</sup> Report of the Panel of Experts on Access and Benefit-Sharing, UNEP/CBD/COP/5/8, 2 November 1999, Conference of the Parties to the Convention on Biological Diversity, Nairobi, parr 151.
- <sup>10</sup> A somewhat similar measure was suggested at the First Panel of the Experts of the CBD. However, it focused on the conduct of persons, not State. The measure recommended only referred to voluntary instruments and it only suggested simplifying the PIC procedures. See Report of the Panel of Experts, op cit, Annex V.
- <sup>11</sup> WTO panels have accorded special attention to flexibility in the application of the measure concerned. The more rigid and inflexible the application, the higher the likelihood that the measure is regarded as arbitrary and unjustifiable.
- <sup>12</sup> As stated in Principle 12 of 1992 Rio Declaration and confirmed in paragraph 101 of the 2002 Johannesburg Plan of Implementation.
- <sup>13</sup> Few ABS laws provide a more favourable treatment to nationals in the process of granting of the ABS permit.

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