USER MEASURES AS A MEANS OF RESOLVING POTENTIAL CONFLICTS BETWEEN WTO AND CBD

The development and implementation of regulations to govern access to genetic resources and benefit sharing (ABS) in various countries has been well documented. Much less attention has been given to the possibility of using a wider range of policy instruments which aim to ensure that commercial and scientific users carry out their activities in a manner which supports the realization of the objectives of the Convention on Biological Diversity (CBD), assist in the compliance ABS agreements and facilitate access to technologies developed through the use genetic resources. If compared with exiting legislative solutions, 'user measures' better match the diversity of actors, values, and interests involved in the field of genetic resources. Legal development and incorporation of user measures would promote the emergence of a more cooperative vision of the interface between biotechnology and biodiversity, thus recasting the relationship between TRIPS and the CBD as one of interdependence rather than fundamental conflict. The brief will give some insights on innovative policy and institutional tools that could promote cooperation between CBD and TRIPs.

CBD and benefit sharing – 10 years on

Ten years after the signing of the CBD, the objective of fair and equitable sharing of the benefits arising from the utilization of genetic resources —one of the three objectives of this convention— is far from being achieved and continues to stir up heated discussions. The current international system is based on a system of bilateral transactions with the CBD providing that benefit sharing shall be upon "mutually agreed terms" between the provider and the user of genetic resources (CBD, Article 15.7). Therefore, private contracts set the specific conditions of access to genetic resources and the advantages granted the provider. To date about 50 countries have adopted legislative, administrative and/or policy measures to help establish the parameters under which such private transactions may take place. These measures are based on the CBD and in some cases have been inspired by the Bonn Guidelines on ABS adopted in 2002. However, only about 25 countries have established specific ABS regulations to govern negotiation of contracts and establish conditions for access and benefit sharing.

This lack of legislative control reflects a number of differing challenges faced in the development of ABS law and policy. Developing countries have complained of the burdensome costs of developing and implementing regulations while the spin-offs are still at a low level, whether in financial or technology-transfer terms. Agreement on where responsibility lies for securing effective governance of ABS is hard to obtain due to the varying perspectives of stakeholders, including provider and user countries, local and indigenous communities, commercial and scientific users, and civil society organizations. The uncertainty regarding the value of genetic resources is a further factor leading to reluctance to take on the costs of developing national or international measures.

Failure of the status quo

It is now clear that the status quo is no longer tenable. Both in terms of economic efficiency (investment in genetic resources) and social legitimacy (legal certainty of genetic resources transactions) current mechanisms regulating bioprospection activities have proven to be insufficient. Although provider countries, local and indigenous communities and the large corporations who would like to make use of their genetic resources and associated traditional knowledge are theoretically natural allies, the current ABS mechanism has failed to bring them together in an effective form.

Many scholars have analyzed the reasons for this "market" failure: evolutionary nature of genetic resources, collective character of the innovation process, high degree of uncertainty of the value of genetic resources, high transactions costs, lack of trust, a divergence of cultural values, etc. These

issues make clear that in addressing the difficulties posed by intellectual property rights to the issue of ABS simple legal solutions can cannot be made. When consideration is given to the need to promote other social values (self-determination, distribution of wealth, equity or cultural identity) in the development of ABS law and policy, the existing legal resources for the protection of property rights and promotion of innovation (essentially intellectual property rights or even human rights) are clearly insufficient.

User measures

However, it is possible to envisage a more cooperative vision of the interface between biotechnology and biodiversity, one that recasts the relationship between TRIPS and the CBD as one of interdependence rather than fundamental conflict. This can be achieved through the use of a broad set of mechanisms aimed at the users of genetic resources. Such user measures may include: self-regulation by users, involving development and enforcement of codes of conduct; the development of monitoring mechanisms such as certificates of origin and controls such as disclosure requirements for patent and product approval processes; the development of institutional capacity to monitor resource transfers and enforce compliance with ABS agreements; and improved access to dispute resolution mechanisms. Putting in place effective user measures will require more than mere legislative changes.

The development and implementation of efficient system of ABS governance requires one to look beyond the law, in the direction of the network of actors and institutions on which its implementation will depend. The different expectations of the plethora of actors concerned by the use of genetic resources (companies, local communities, botanical gardens, researchers, and private brokers) have major implications for the design of any regulatory framework. From this perspective user measures represent an innovation insofar as the emphasis is placed at the level of all users who intervene in the exchange of genetic resources. The diversity of different actors and interests is matched by the variety and flexibility of different user measures, which can help to fill the legislative gap between the stage of acquisition of a right (access contract) and the exercise of a right (i.e. development, marketing, and/or patenting of a product), This provides incentives for value creation throughout the whole production process and not only at the final stage of innovation process as is currently the case with intellectual property rights (IPR) regimes. User measures can also help to reduce the legislative, economic and administrative burden of developing and maintaining ABS regulations and monitoring and enforcement systems from developing countries, in particular less developed countries (LDC's) and small island developing states (SIDS).

Certificates of origin

This can be illustrated through the example of certificates of origin. The rationale for a certificate of origin is to build bridges between national and international jurisdictions as well as between providers and users of resources. As an instrument of a traceability system, certificates of origin can help monitor trade and movement of resources and discourage their unapproved and illegal use. Certificates could provide evidence of rights to transfer resources, thereby helping to reduce the complexities involved with cumbersome systems involving the multiple permits and licenses associated with access, collection and export and import of resources.

By increasing legal certainty regarding the rights to use resources and thereby their value, a certificate scheme would create incentives for the provision and protection of genetic resources, create a known link to benefit-sharing provisions, and support conservation. It has also been suggested that a certificate of origin can convert simple commodities into differentiated products through the provision of information to users. A certificate system could also help to simplify the processing of IPR applications in regimes with disclosure of origin requirements.

Knowing that a majority of genetic and biological resource use is not for commercial industrial purposes, it has been proposed that a certificate could accompany genetic resources like a passport through their entire history from collection to use, but that the obligation to produce a certificate would arise only at specific trigger points such as for transboundary movements, patent and product approval authorities as well as the international depository system within WIPO's Budapest Treaty.

Certificates of origin present the advantage of reflecting the diversity of use and the changing nature of genetic resources along the processing chain (change of purpose, from research to commercial, over a period of time; mutant nature of genetic resources from biological material to information contained in gene). In order to determine the viability of any system it will be important to consider, where possible, the use of existing infrastructure, human resources and existing checkpoints. Indeed, certificates of origin might perhaps be integrated into the existing system of requirements for disclosure of information in the patent system.

Conclusion

In the context of the dramatic evolution in the biological sciences characterized by changing institutional relationships (particularly involving the public sector), new corporate structures, and evolving laws and policies, political tensions have intensified in recent years over the ownership and exchange of genetic resources. User measures might help to overcome those tensions by proposing a new way of governing genetic resources exchange and use, facilitating convergence between CBD objectives and innovation strategy. A certificate of origin system is just one of a number of potential measures which may be considered, but it is one which cannot be easily overlooked.