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THE RELATIONSHIP BETWEEN THE ACCESS AND BENEFIT SHARING INTERNATIONAL REGIMEN AND OTHER INTERNATIONAL INSTRUMENTS: THE WORLD TRADE ORGANIZATION AND THE INTERNATIONAL UNION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS

by Jorge Cabrera Medaglia*

INTRODUCTION

This article examines the relationship between the International Regimen (“IR”) and the World Trade Organization (“WTO”) and International Convention for the Protection of New Varieties of Plants (“UPOV”). The article highlights the potential relationship between the intellectual property rights system and the negotiations on an international regime for access and benefit-sharing within the context of the Convention on Biological Diversity (“CBD”), and identifies some questions requiring further scrutiny. The WTO, World Intellectual Property Organization (“WIPO”), and UPOV each have provisions related to Access to Genetic Resources and Benefit Sharing (“ABS”) and Intellectual Property Rights (“IPR”). 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 CBD.

The first section provides a general introduction, while the second gives an overview and a factual description of the other instruments, as well as their provisions related to ABS and the relationships between the IR and the ABS provisions or developments identified. The third section seeks to address the different scenarios and options to achieve mutual supportiveness between the IR and the instruments. Finally, some general conclusions are presented.

THE CONVENTION ON BIOLOGICAL DIVERSITY AND ITS RELEVANT ABS PROVISIONS

The Convention on Biological Diversity recognizes the sovereign rights of States over their natural resources in areas under their jurisdiction.¹ The Objectives of the Convention on Biological Diversity are:

1. The conservation of biological diversity;
2. The sustainable use of the components of biological diversity; and
3. The fair and equitable sharing of the benefits arising out of the utilization of genetic resources²

According to the Convention, States have the authority to determine access to genetic resources in areas within their jurisdiction. Parties also have the obligation to take appropriate measures with the aim of sharing in a fair and equitable way the benefits arising from the utilization of genetic resources.³ Two

further principles established under article 15 of the CBD are that “access [to genetic resources], where granted, shall be on mutually agreed terms” and “shall be subject to prior informed consent of the Contracting Party providing such resources, unless otherwise determined by that Party.”⁴ This provides the basic legal framework under the Convention for access and benefit sharing arising from the utilization of genetic resources.

Furthermore, the protection of traditional knowledge, innovations, and practices of indigenous and local communities plays an important role. Traditional knowledge often provides a lead to genetic resources with beneficial properties and can thus form the basis for ABS mechanisms or entitlements. To this effect, Article 8(j) states that:

each contracting Party shall, as far as possible and as appropriate, subject to national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge innovations and practices.⁵

ABS activities should be based on the Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising out of their Utilization.⁶

CURRENT STATUS AND PERSPECTIVES OF THE IR NEGOTIATIONS⁷

The World Summit on Sustainable Development in Johannesburg in 2002 agreed to the establishment of an international regime to effectively promote and safeguard fair and equitable

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benefit-sharing. On December 20, 2002, Resolution 57-260 of the United Nations General Assembly invited the Conference of the Parties to take the necessary measures regarding the commitment established at the Summit to negotiate this regime.⁸ Taken together with the Convention's decision this represents a commitment to create an international regime.

Paragraph 42(n) of the same Johannesburg Plan of Action provided a related commitment to

Promote the wide implementation of and continued work on the Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of Benefits arising out of their Utilization of the Convention, as an input to assist Parties to the Convention when developing and drafting legislative, administrative or policy measures on access and benefit-sharing, and contracts and other arrangements under mutually agreed terms for access and benefit-sharing.⁹

Decision VII/19 of the Conference of the Parties of the CBD is potentially one of the most comprehensive and detailed of all of the decisions having to do with the issue of access to genetic resources. This decision calls for the Working Group on ABS to meet again

... with the collaboration of the Ad Hoc Open-ended Inter-Sessional Working Group on Article 8 (j) and Related Provisions, ensuring the participation of indigenous and local communities, non-governmental organisations, industry and scientific and academic institutions, as well as intergovernmental organisations, to elaborate and negotiate an International Regime on access to genetic resources and benefit-sharing with the aim of adopting an instrument/instruments to effectively implement the provisions in Article 15 and Article 8 (J) of the Convention and the three objectives of the Convention.¹⁰

The group has operated in accordance with the terms of reference contained in the Annex to Decision VII/19. The Conference of the Parties also decided on the terms of reference for such a negotiation, including the process, nature, scope, and elements for consideration in the elaboration of the regime. The terms of reference are contained in the annex to Decision VII/19 D.¹¹ As set out in the Terms of reference of the Working Group on ABS, the IR could be composed of one or more instruments within a set of principles, norms, rules, and decision-making procedures, legally-binding and/or non-binding.

According to these same Terms of reference, the scope of the IR is to include:

- Access to genetic resources and promotion and safeguarding of fair and equitable sharing of the benefits arising out of the utilization of genetic resources in accordance with relevant provisions of the Convention on Biological Diversity;
- Traditional knowledge, innovations and practices in accordance with Article 8(j).¹²

At the eighth meeting of the Conference of the Parties ("COP") in Curitiba, Brazil, the Working Group was requested to complete its work as soon as possible and no later than 2010.¹³

In addition to COP 8, two meetings of the Working Group on ABS, as the negotiating body of the international regime, were held prior to the ninth meeting of the Conference of the Parties. The Working Group held its fifth meeting in Montreal, Canada, from October 8-12, 2007,¹⁴ and its sixth meeting in Geneva, Switzerland, from January 21-25, 2008.¹⁵ At its ninth meeting in Bonn, in May 2008, the COP extended the mandate of the Working Group on Access and Benefit-sharing, and instructed it to finalize the negotiation of the international regime before its tenth meeting, in 2010.¹⁶ The COP adopted a detailed calendar of meetings to achieve this objective and decided that the Ad Hoc Open-ended Working Group on Access and Benefit-sharing should meet three times prior to the tenth meeting of the Conference of the Parties. In addition, the COP decided to establish three distinct groups of technical and legal experts to address key substantive issues at the core of the negotiation process.

The seventh meeting of the Working Group, held in Paris, France, in April 2009, focused on the objective and scope of the International Regime, as well as the components of the International Regime related to compliance, benefit-sharing, and access.

At its eighth meeting (November 9-15, 2009, in Montreal, Canada), the Working Group addressed operative text on all components of the regime, and discussed its legal nature. The meeting adopted the Montreal Annex,¹⁷ consisting of a single, consolidated draft of the international regime, and a second annex on proposals for operational texts left in abeyance for consideration at its ninth meeting, referred to as ABS 9. The Working Group also established an intersessional process leading up to ABS 9, including: a Friends of the Co-Chairs group; a Co-Chairs' Inter-regional Informal Consultation; and a series of regional consultations. Given the fundamental disagreements, only a heavily bracketed structure exists as a basis for the negotiations on the regime.¹⁸ The document has four sections, covering the objective, scope, main components, and nature of the regimen. The content of each section, however, identifies various options or is heavily bracketed. The text regarding the main components includes: benefit sharing, access, compliance, capacity building, and traditional knowledge and also reflects the wide divergence of positions among countries.

The inter-regional consultation (March 16-18, 2010, in Cali, Colombia) was held in order to identify concrete solutions to facilitate and accelerate ABS 9 negotiations. As a result, the Co-Chairs prepared a draft protocol and a draft COP decision was circulated prior to ABS 9. At the ninth meeting of the Working Group in Cali, Colombia, from March 22-28, 2010, a draft protocol was tabled by the Co-Chairs and accepted by Parties as a basis for further negotiations. However, since it was not possible to finalize the text at this session, the Working Group decided to suspend the meeting at the end of the seven days and to resume the ninth meeting of the Working Group in order for it to complete its mandate.¹⁹ The text of the Protocol (still subject to negotiation) became Annex I of the Report.²⁰ Subsequently the CBD Secretary notified²¹ formally to the Parties and other stakeholders the text of the Protocol pursuant to article 28 of the CBD.²² A roadmap to Nagoya was also agreed upon, including

the reassumed session of the ABS/WG to be held in Montreal in July 10-16, 2010. Out of the Cali meeting came a draft protocol text upon which negotiations can move forward towards creating the international regime. But the text is still open for modification and additions.

As a result of the ninth meeting, the Draft Protocol on ABS²³ addresses the following issues of interest for this article: disclosure requirements in IPR applications; the certificate of compliance and technology transfer.²⁴

OVERVIEW AND FACTUAL DESCRIPTION OF THE RELEVANT ABS PROVISIONS AND DEVELOPMENTS AT THE WTO AND UPOV²⁵

FACTUAL OVERVIEW OF RELEVANT PROVISIONS/ DEVELOPMENTS/PROCESSES AT THE WTO AGREEMENT ON TRADE-RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS

Since the entry into force of the TRIPS Agreement, there have been calls, mainly by developing countries, to explore the relationship between the CBD and intellectual property rights (“IPRs”). In parallel, CBD COP decisions²⁶ have stressed the need to gather information on the impact of IPRs on achieving the objectives of the CBD, and to explore the relationship between the Convention and the TRIPS Agreement.²⁷

As early as COP 3,²⁸ the CBD Secretariat was requested to cooperate with the WTO through the Committee on Trade and Environment (“CTE”) to explore the extent to which there may be linkages between CBD Article 15 on ABS and relevant provisions of the TRIPS Agreement. In the WTO context, the TRIPS Council has included the relationship between TRIPS and the CBD on numerous occasions in its discussions.²⁹ Some of the debates about the links between the CBD and WTO took place in the context of the TRIPS review of Article 27.3(b), which was started by the TRIPS Council during 1999, four years after the entry into force of the Agreement.

There have also been similar discussions regarding the TRIPS Agreement under the CTE, including protection of Traditional Knowledge; the transfer of environmentally sound technology; ethical concerns associated with the patenting of living organisms; and compatibility between TRIPS and the CBD.³⁰

The TRIPS Council has also discussed what the implications of IPRs are for access to and transfer of technology. One view has been that IPRs in respect of genetic resources could impede access to and raise the cost of technology in this area, by virtue of the exclusive rights given to rights-holders to prevent others from using the protected technology. In response, it has been argued that full implementation of the TRIPS Agreement in developing countries would stimulate investment in those countries and that, therefore, facilitated technology transfer forms part or the basis of benefit sharing as envisaged under the CBD.³¹ Technology transfer is also a relevant issue addressed by the CBD. Article 16 of the CBD on access to and transfer of technology contains numerous references to IPRs. CBD COP 7 adopted a program of work on technology transfer and technological and scientific cooperation, which required the CBD

Secretariat to prepare, in collaboration with UNCTAD, WIPO, and other relevant international organizations, technical studies³² to explore and analyze the role of IPRs in technology transfer, in the context of the CBD, and identify potential options to increase synergy and overcome barriers to technology transfer and cooperation.³³

Later, in 2001, the Doha Declaration, which launched the current round of trade negotiations, specifically instructed the TRIPS Council to examine the relationship between the TRIPS Agreement and the Convention on Biological Diversity, the protection of traditional knowledge and folklore, and other new and relevant developments pointed out by the Members.³⁴ In particular, the TRIPS Council shall take this into account in conducting the examination provided for in paragraph 3(b) of article 27; the examination of the application of the TRIPS Agreement provided for in paragraph 1 of article 71; and in its work in compliance with paragraph 12 of the Declaration. In carrying out this work, the TRIPS Council shall be governed by the objectives and principles stated in articles 7 and 8 of the TRIPS Agreement and shall fully consider the dimension of development.

Though this debate was originally wide-ranging,³⁵ it now focuses on how the TRIPS agreement relates to the CBD and particularly whether the agreement should be amended to require disclosure in IPR applications, which has been discussed in the WTO based on the mandate established in Doha, or whether alternative approaches, including contractual based systems or databases of genetic resources and traditional knowledge, could be more effective in ensuring mutual supportiveness between the TRIPS and the CBD.

One of the first measures suggested in order to achieve mutual supportiveness 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 rights applications, particularly in patents. It has been suggested by developing countries mostly that the TRIPS Agreement should be amended so as to require that patent applicants disclose, as a condition to patentability one or more of the following: the source and origin of any genetic material used in a claimed invention; and/or any related traditional knowledge used in the invention; evidence of prior informed consent from the competent authority in the country of origin of the genetic material; and evidence of fair and equitable benefit sharing. Proponents of disclosure requirements argue that this stipulation would help to support compliance with the CBD provisions on access to genetic resources and benefit-sharing.³⁶ In response, it has been expressed that such a modification is not necessary to implement the CBD requirements as they should be implemented through corresponding contracts at the national level, and that the TRIPS Agreement is not the appropriate instrument to regulate ABS.

The Declaration adopted at the Ministerial Summit in 2005 in Hong Kong provides (in paragraph 44) that note be taken of the work carried out by the TRIPS Council, in accordance with paragraph 19 of the Doha Declaration, and agrees that work will continue based on this paragraph and on the progress made to

date.³⁷ In addition, in accordance with paragraph 39 concerning implementation, it was decided to address the relationship between the TRIPS Agreement and the CBD through a consultation process on different aspects of implementation.³⁸ This consultation is being carried out with the intervention of the Deputy Director General of the WTO.

In May 2006, six countries, including India, Brazil, and Peru, submitted a proposal to the TRIPS Council suggesting concrete changes to the TRIPS Agreement in order to support disclosure of origin. The Communication³⁹ aims to incorporate a new article 29 bis into the TRIPS Agreement. It proposes an amendment to the TRIPS Agreement to incorporate requirements for disclosure of the origin of genetic resources⁴⁰ and associated traditional knowledge in patent applications along with evidence of prior informed consent and benefit-sharing.⁴¹

At the Mini-Ministerial Conference held in July 2008,⁴² not much changed. A determination regarding the proposed amendment to the TRIPS Agreement to incorporate the disclosure of origin remains to be made at the WTO. A Draft Modality text on IP was presented including negotiations on disclosure.⁴³ The Draft called⁴⁴ for text based negotiations on the IP issues, including disclosure. This Draft Modalities proposal for negotiating the IP issues at the Ministerial level has gathered the support of the majority of developing country Members and some developed countries as well. A large coalition of more than a hundred developing and developed countries led by Brazil, the EU, India, and Switzerland, were pushing for the three TRIPS issues to be moved forward as a single undertaking in the Round, but the proposal was strongly rebuffed by some country Members who contended that the intellectual property issues should not be discussed in tandem with the Doha negotiations on liberalizing trade in agricultural and industrial goods.

The issue of disclosure was also raised at the several TRIPS Council Meetings after the July Mini-Ministerial⁴⁵ in 2009 and 2010, with similar results. In essence, countries largely reiterated known positions on the relationship between the TRIPS Agreement and the Convention on Biological Diversity. Meanwhile, informal consultations on how to move the issue forward are ongoing. However, like all issues discussed at the July Mini-Ministerial Conference, the future of the TRIPS issues depend upon the future of the negotiations.

Relationship between the IR and WTO

As presented in the previous section, discussions on the relationship between the CBD and the WTO provisions have addressed a range of issues and several proposals have been presented. However, the current debate has focused on the disclosure of origin in patent applications or whether alternative approaches including contractual based systems or databases of genetic resources and traditional knowledge could be more effective in ensuring mutual supportiveness between TRIPS and the CBD. In addition, technology transfer (“TT”) is a relevant issue connecting the IR and the WTO.

There are other issues connecting the WTO and the potential IR, but they can be briefly mentioned here, including: the applicability of the WTO investment

provisions to the ABS activities; and the relationships between the Principle of Non Discrimination (the Most Favored Nation and National Treatment Principles); and ABS legislation and practices, among others.⁴⁶

- Disclosure of origin

The Annex of Decision IX/12 has identified five components for the IR. These include: access; fair and equitable benefit sharing; compliance measures; traditional knowledge; and capacity building. Under the Compliance component one of the measures for “further consideration”⁴⁷ is the disclosure requirements. Decision VIII/4/D is more clear about disclosure in the context of the CBD IR negotiations.⁴⁸ The Draft Protocol⁴⁹ provides

In implementing Article 12,

paragraph 1, Parties shall take measures, as appropriate, to monitor the utilization of genetic resources, including from derivatives produced through expression, replication and characterization, having regard to the list of typical uses of genetic resources provided in Annex II of the present Protocol. Such measures include: (a) The identification and establishment of check points and disclosure requirements including at

- (iv) Intellectual property examination offices⁵⁰

- Certificate of Origin/Source/Legal Provenance/Compliance.⁵¹

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 the development of some form of certificate of origin/source/legal provenance—more recently called a “certificate of compliance.” The idea of the certificate is to prevent

Due to the nature of a legally binding instrument of the [Access and Benefits Sharing] Protocol, the countries should develop—in their national legislation—disclosure of origin requirements to comply with the international obligations.

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 supposedly⁵² would favor the creation of simpler access systems in provider countries, because 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:

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.⁵³

Other aspects of interest could include:

1. What the certificate corresponds to: species, genes, specific biological samples, 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,⁵⁴ etc.

Depending on the certificate's final design, some rules of the trade system 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 producing a certificate 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.

With regard to the compliance component of the IR, the Annex of Decision IX/12 identified as an area for “further elaboration” the “Development of tools to monitor compliance: . . . b) (an) internationally recognized certificate issued by a domestic competent authority.”⁵⁵ The Draft Protocol provides that the:

disclosure requirement shall be met by providing *bona fide* evidence that a permit or certificate was granted at the time of access in accordance with Article 5, paragraph 1 (d);

The permit or certificate issued at the time of access in accordance with Article 5, paragraph 1 (d) and registered with the ABS Clearing House Mechanism, in accordance with Article 5 paragraph 2 shall constitute an internationally recognised certificate of compliance. The internationally recognised certificate of compliance shall serve as evidence that the genetic resource in question has been obtained, accessed and used in accordance with prior informed consent and that mutually agreed terms have been entered into, in accordance to national legislation on access and benefit-sharing of the country providing the genetic resource. Disclosure requirements shall be met by providing an internationally recognised certificate or permit. The internationally recognised certificate of compliance shall contain the following minimum information:

- a) Issuing national authority;
- b) Details of the provider;
- c) A codified unique alpha numeric identifier where feasible;
- d) Details of the rights holders of associated traditional knowledge, as appropriate;
- e) Details of the user;
- f) Subject-matter covered by the certificate;
- g) Geographic location of the access activity;
- h) Link to mutually agreed terms;
- i) Uses permitted and restrictions of use;
- j) Conditions of transfer to third parties if any;
- k) Date of issuance.

The Conference of the Parties serving as the meeting of the Parties to this Protocol shall consider additional

modalities of the internationally recognized certificate of compliance system, taking into account the need to minimize transaction costs and to ensure feasibility, practicality and flexibility.⁵⁶

The certificate can contribute to the monitoring and traceability of genetic resources. It appears to have some degree of support, at least regarding an analysis of this proposal to determine whether it should be included in the Regime and, if so, how this should be accomplished. The certificate could be required in patent applications to provide evidence of compliance with national legislation on ABS, including prior informed consent and benefit sharing, thus fulfilling a role in supporting the disclosure of origin requirement.

CBD COP Decision VIII/4C established an Expert Group (“EG”) on an internationally recognized certificate of origin/source/legal provenance.⁵⁷ The Group agreed that the basic role of any certificate system would be to provide evidence of compliance with national ABS legislation. This could be achieved by a system of national certificates with standard features to allow for their international recognition.

The Group⁵⁸ identified a number of points common for all proposals of a certificate, including that it could be required for presentation at specific checkpoints in the user countries, *inter alia* patent and in general IP applications.⁵⁹ Indeed, the certificate of origin could perhaps be integrated into the existing system of requirements for disclosure of information in the patent system. A majority of certificate proposals envisage a system of checkpoints at which disclosure of the certificate of origin would be required for the purposes of processing IP applications, among other things. Compliance with disclosure requirements would be facilitated where an internationally recognized certificate could act as evidence of conformance with national and international law.⁶⁰

However, the certificate, depending on its design, may raise other international trade issues. Some rules of the trade system might apply to it, especially those related to technical barriers to trade. In this regard, considering that the certificate could be a document attached to the transfers/export (international trade) of genetic resources it also should be analyzed in the context of the relevant rules of the WTO regarding non discrimination (the Most Favored Nation Principle and the National Treatment Principle) as well as the appropriate measures contained in the Agreement on Technical Barriers to Trade (“TBT”), which governs the elaboration and use of technical regulations, standards, and conformity assessment procedures in a way that do not create unnecessary obstacles to international trade. The certificate could be considered a technical regulation and it must take into account the relevant provisions of the TBT Agreement, especially article 2.2: technical regulations shall be no more restrictive than necessary to fulfill a legitimate objective and the requirement that technical measures shall be the less trade restrictive in light of applicable risks.⁶¹

- Technology transfer as an element of the benefit-sharing component of the IR.

Annex I to Decision IX/12, under section III. B. on “Fair and equitable benefit-sharing” also includes as a component to be further elaborated, the access and transfer of technology. A technology transfer measure could be developed in the context of the benefit sharing component of the IR.⁶² The Draft Protocol provides (article 18 bis) that:

In accordance with Articles 15, 16 and 19, Parties shall collaborate, cooperate and contribute in scientific research and development programmes, particularly biotechnological research activities, as a means to generate and share benefits in accordance with Article 4 of this Protocol. This shall include measures by developed country Parties that provide incentives, to companies and institutions within their jurisdiction, to promote and encourage access to technology by, and transfer of technology to, developing countries, including the least developed among them, in order to enable them to create a sound and viable technological base. Where possible, such collaborative activities shall take place in the country providing genetic resources.⁶³

It is outside the scope of this article to analyze the relationship between IPRs in general, and TRIPS in particular, and technology transfer in the context of the CBD. However, it is clear that technology transfer is a key element of the ABS CBD provisions⁶⁴ and of the IR. As one study has pointed out “The provisions of the Convention on technology transfer reflect the consensus of the international community laid down in key international policy documents, that the development, transfer, adaptation and diffusion of technology and the building of capacity is crucial for achieving sustainable development.”⁶⁵ For instance, technology transfer could be one element of structuring mutually agreed terms and benefit sharing arrangements.

At the same time, transfer of technology (e.g. protected by IPRs) may create some links between the IR and TRIPS provisions on this matter.⁶⁶

FACTUAL OVERVIEW OF RELEVANT PROVISIONS/DEVELOPMENTS/PROCESSES AT UPOV⁶⁷

The International Convention for the Protection of New Varieties of Plants was signed in Paris in 1961 and entered into force in 1968. It was revised in 1972, 1978, and 1991. The 1991 Act of the UPOV Convention entered into force in 1998. The purpose of the UPOV Convention is “to ensure that the members of the Union acknowledge the achievement of breeders of new varieties of plants, by granting to them an intellectual property right, on the basis of a set of clearly defined principles.”⁶⁸ Thus, the Convention provides a *sui generis* form of intellectual protection specifically adapted to the process of plant breeding and developed with the aim of encouraging breeders to develop new varieties of plants. To be eligible for protection, varieties have to be: (i) distinct from existing, commonly known varieties; (ii) sufficiently uniform; (iii) stable; and, (iv) new in the sense that they must not have been commercialized prior to certain dates established by reference to the date of the application for protection.⁶⁹ The Convention offers protection to the breeder,

in the form of a “breeder’s right,” if his plant variety satisfies the above conditions. The scope of the breeder’s right is, however, limited by two important exceptions in Article 15. The first exception, known as the “breeder’s exemption” allows the use of the propagating material of the protected variety, without prior authorization, for the purpose of breeding other varieties. The breeder’s exemption optimizes variety improvement by ensuring that germplasm sources remain accessible to all breeders. The second exception concerns the right of farmers to use farm-saved seed for replanting. This is known as the “farmers’ privilege” and seeks to safeguard the common practice of farmers saving their own seed for the purpose of re-sowing.⁷⁰ However, the Convention requires that the farmers’ privilege be regulated “within reasonable limits and subject to safeguarding of the legitimate interests of the breeder.” As of August 1, 2004, 55 States were a Party to the UPOV Convention. The mission of UPOV is “to provide and promote an effective system of plant variety protection, with the aim of encouraging the development of new varieties of plants, for the benefit of society.”⁷¹

- Relationship to access and benefit-sharing

In response to notifications by the Executive Secretary inviting relevant international organizations to contribute to the work on access and benefit-sharing, the Vice Secretary-General of UPOV provided detailed replies highlighting the access and benefit-sharing aspects of the UPOV Convention. The UPOV submission is included in the compilation of submissions by Parties, international organizations, and other relevant stakeholders.⁷²

In these communications, UPOV highlighted the importance of access to genetic resources to ensure progress in plant breeding. It also pointed to the concept of the breeder’s exemption in the UPOV Convention which reflects the view of UPOV that the worldwide community of breeders needs access to all forms of breeding material to sustain progress in plant breeding and hence maximize the use of genetic resources for the benefit of society. The communications also include reference to the inherent benefit-sharing principles of the UPOV Convention, in the form of breeder’s exemption and other exceptions to the breeder’s right. Concern is expressed with respect to any other measures for benefit-sharing that could introduce unnecessary barriers to progress in breeding and the utilization of genetic resources. Finally, UPOV urges the Working Group on Access and Benefit-Sharing to recognize these principles in its work and to ensure that any measures it develops are supportive of these principles and of the UPOV Convention.

UPOV is of the opinion that the Convention on Biological Diversity and the UPOV Convention should be mutually supportive and the international regime on access to genetic resources and benefit-sharing should be designed so that the mutual supportiveness of the UPOV Convention and the CBD will not be affected. The views of UPOV with respect to the work of the Working Group on Access and Benefit-Sharing, adopted by the Council of UPOV at its thirty-seventh ordinary session on October 23, 2003, were provided to the Secretariat prior to the second meeting of the Working Group. These views

provide a useful overview of issues related to the international regime from the perspective of UPOV.⁷³

A further contribution was provided by UPOV in preparation for the fourth meeting of the Working Group on Access and Benefit-Sharing and was made available in a document that highlights that the UPOV Convention is not an instrument relating to access and benefit-sharing.⁷⁴ As further detailed in the UPOV contribution, it was requested that “consideration is made that any measures pursued in the international regime do not undermine plant variety protection according to the UPOV Convention. For its part UPOV supports the view that the Convention on Biological Diversity and relevant international instruments dealing with intellectual property rights, including the UPOV Convention, should be mutually supportive.”⁷⁵

UPOV has also prepared a study⁷⁶ on the impact of plant variety protection and its report is now available on UPOV’s website. The study indicates that “the UPOV system of plant variety protection provides an effective incentive for plant breeding in many different situations and in various sectors, and results in the development of new, improved varieties of benefit for farmers, growers and consumers” and that “farmers, growers and breeders have access to best varieties produced by the breeders throughout UPOV member territories.”⁷⁷

The position of the UPOV Council on access to genetic resources and benefit-sharing related to plant breeders’ rights (“PBR”) (adopted by the UPOV Council in its thirty-seventh session, on October 23, 2003), mentioned above, needs to be briefly presented here to fully understand the options and scenarios.

Access to genetic resources: “UPOV considers that plant breeding is a fundamental aspect of sustainable use and development of genetic resources. It is of the opinion that access to genetic resources is a key requirement for sustainable and substantial progress in plant breeding. The concept of the “breeders’ exemption” in the UPOV Convention, whereby acts done for the purpose of breeding other varieties are not subject to any restriction, reflects the view of UPOV that the worldwide community of breeders needs access to all forms of breeding material to sustain greatest progress in plant breeding, and thereby, to maximize the use of genetic resources for the benefit of society.”⁷⁸

Disclosure of origin: “. . . UPOV encourages information on the origin of the plant material, used in breeding of the variety, to be provided where this facilitates the examination [for compliance with the conditions of protection], but could not accept this as an additional condition of protection since the UPOV Convention provides that protection should be granted to plant varieties fulfilling the conditions of novelty, distinctness, uniformity, stability and a suitable denomination and does not allow any further or different conditions for protection Thus, if a Country decides, in the frame of its overall policy, to introduce a mechanism for the disclosure of countries of origin or geographical origin of genetic resources, such a mechanism should not be introduced in a narrow sense, as a condition for plant variety protection. A separate mechanism from the plant variety legislation, such as that used for phytosanitary requirements, could be applied uniformly to all activities concerning

the commercialization of varieties, including, for example, seed quality or other marketing related regulations”⁷⁹

Prior Informed Consent: “. . . UPOV encourages the principles of transparency and ethical behaviour in the course of conducting breeding activities and, in this regard, the access to the genetic material used for the development of a new variety should be done respecting the legal framework of the country of origin of the genetic material. However, the UPOV Convention requires that the breeder rights should not be subject to any further or different conditions than those required to obtain protection. UPOV notes that this is consistent with article 15 of the CBD, which provides that the determination of access to genetic resources rests with the national governments and is subject to national legislation. . . .”⁸⁰

Benefit-sharing: “UPOV would be concerned if any mechanisms to claim the sharing of revenues were to impose an additional administrative burden on the authority entrusted with the grant of breeder’s rights and an additional financial obligation on the breeder when varieties are used for further breeding. Indeed, such an obligation for benefit sharing would be incompatible with the principle of the breeder’s exemption established in the UPOV Convention whereby acts done for the purpose of breeding other varieties are not, under the UPOV Convention, subject to any restriction and the breeders of protected varieties (initial varieties) are not entitled to financial benefit sharing of varieties developed from the initial varieties, except in the case of essentially derived varieties. . . .”⁸¹

Access and PBR: The legislation on access to genetic material and the legislation dealing with the grant of breeders’ rights pursue different objectives, have different scopes of application, and require a different administrative structure to monitor their implementation. Therefore, it is considered appropriate to include them in different legislation, although such legislation should be compatible and mutually supportive.⁸²

Later, the UPOV Council, at its twenty-fifth extraordinary session held in Geneva on April 11, 2008, decided to request the COP IX to include in the IR decisions the following paragraphs: “Recognizing that UPOV supports the view that the Convention on Biological Resources and the UPOV Convention should be mutually supportive” and “Further Instructs the Ad-hoc Open Ended Working Group on Access and Benefit Sharing that any provisions which it develops for an international regime on access and benefit sharing should ensure mutual supportiveness with the UPOV Convention.”⁸³

THE RELATIONSHIPS BETWEEN UPOV AND THE IR

UPOV has a direct relevance for the sustainable use of plant genetic resources and for the CBD objectives. However, in the light of the current IR negotiations, the most relevant issues connecting the IR and UPOV are the disclosure of origin/certificate and its relationship with UPOV provisions, and the technology transfer measures related to Plant Breeders Rights. A potential disclosure requirement/check point for the certificate would be the plant breeders’ right applications,⁸⁴ but UPOV is of the opinion that this could not be an additional condition of protection.

Also TT provisions to be included in the IR could be related to Plant Breeders’ Rights.

It does not seem that the current IR components as set forth in Annex to Decision IX/12 or in the Draft Protocol could negatively impact the basic principles of UPOV, including the freedom to use developed varieties that are protected solely by PVP for further breeding without the consent of the breeder (the breeder exemption),⁸⁵ except for the issue of disclosure of origin drafted as a condition for protection. However, depending on the form of any future amendments or recommendations and resulting obligations, there may still be the potential to impact UPOV principles.

OPTIONS AND SCENARIOS

THE IR AND THE WTO

There are three relevant aspects of the IR which may have an impact on the WTO rules: the disclosure of origin; the certificate of compliance; and technology transfer. The following paragraphs explore the different scenarios and options.⁸⁶ It should be pointed out again that the current text of the Draft Protocol is entirely open to further negotiations and nothing of its content can be considered agreed.

- Disclosure requirements/certificate of compliance developed in the CBD IR negotiations and its relationship to the WTO provisions.

The inclusion and discussion of disclosure requirements and the use of the certificate in patent applications have both been contentious issues during the IR negotiations.⁸⁷ However, one potential scenario would be the inclusion of some form of disclosure requirement in the IR negotiations. In this regard, it has been suggested that the inclusion of mechanisms such as the disclosure of origin of genetic resources and traditional knowledge, or the certificate in patent or other IPR filing procedures as proposed, would strengthen mutual supportiveness between the WTO’s IPR system and the CBD ABS IR. Due to the nature of a legally binding instrument of the ABS Protocol, the countries should develop—in their national legislation—disclosure of origin requirements to comply with the international obligations. While there may be some variances with regard to the scope, consequences, and practical operations of these requirements, some experts agree that⁸⁸ in general the requirements of disclosure do not run counter to the international IP agreements (with regard to the UPOV Convention, see paragraph 78) and the TRIPS agreement in particular.⁸⁹ In addition, there are ongoing negotiations regarding disclosure at the WTO and no final decision has been made yet whether or not to accept the disclosure requirements in the TRIPS Agreement.

Alternatively, a “soft version” of the disclosure could also be developed at the CBD to encourage the adherence of some countries that are already opposed to disclosure requirement (both in the WTO and the CBD).⁹⁰ However, some delegations and stakeholders do not support any disclosure requirements in IP applications, and support alternative mechanisms to address concerns regarding misappropriation. In their view, new patent disclosure requirements will be ineffective in promoting the objectives sought and will introduce uncertainties into the patent system.

Under this scenario (the development of disclosure requirements in the IR), the IR negotiations could promote more clarity on relevant issues, such as the meaning and implications of prior informed consent (“PIC”) and benefit-sharing requirements. Some of the objections to the disclosure provisions are related to the lack of clarity about the exact scope and the legal implications of the terms used. A number of terms and concepts that are central to the ABS regime, such as “fair and equitable benefit sharing,” “traditional knowledge,” and “access to genetic resources” are not defined in the CBD. The definition of terms is an ongoing process in the CBD and was included in the mandate of prior ABS Working Group meetings.⁹¹ The IR could clarify issues of PIC, benefit-sharing, certificate of origin, etc. It also could offer guidance on key topics, such as the scope of the terms “genetic resource” and “biological resource.”

This scenario would present two main disadvantages: the condition of non-CBD Party United States, a relevant IP country, and difficulties for the integration of the disclosure requirements into the IP system if the provisions would be integrated in the CBD.⁹²

In relation to the certificate, the IR could provide the necessary practical and operational details for its use in IPR applications. The certificate as such has not been discussed at the WTO, but the development of appropriate provisions on the certificate under the IR could facilitate the use of the certificate for disclosure of origin purposes. It is clear that the certificate has a broader scope and objectives than merely serving as an instrument to promote disclosure.⁹³ However, a certificate system that serves merely to demonstrate compliance with the requirements of the laws of the providing country, and a legal title to use of the resources and identify the rights and limitations attached to the access and use, would not appear to run counter the WTO rules. It would depend on how the certificate, if agreed, is finally designed. The certificate, if it is designed in a non discriminatory fashion, could be in harmony with the trade system and both instruments could be developed in a mutually supportive manner.

- Disclosure of origin/source at the WTO.

A different scenario is the incorporation of disclosure provisions at the WTO (in this case through a legally binding amendment to the TRIPS Agreement). The exact scope and precise content of a potential amendment of the WTO is still uncertain (whether or not sanctions for non-compliance will be outside the patent law or not; the necessity of proving compliance with PIC

and benefit-sharing; etc) as well as the amendment *per se*. This scenario would also create mutual supportiveness between the IPR system of the WTO and the CBD ABS IR.

In addition, under this scenario the disclosure could contribute to the “defensive protection”⁹⁴ of traditional knowledge (“TK”), therefore supporting the TK component as well as the compliance component under the IR. Requirements for disclosure of the origin of traditional knowledge associated with genetic resources may assist in ensuring prior informed consent and equitable benefit-sharing with regard to both traditional knowledge and the associated genetic resources.

Considering the large membership of the WTO and its economic relevance for the Contracting Parties, this amendment would promote a better and wider integration of the disclosure of origin in the IP system (and in the national laws) and would promote broad implementation of the instrument. In this case, the CBD may provide assistance and coordination in developing and implementing disclosure requirements by clarifying terms and instruments, including the certificate role in the disclosure. A reference and description of the disclosure mechanism in the context Protocol could also be established, but the substantive provisions would be integrated into the TRIPS agreement.

- No disclosure requirements in either instrument.

Another scenario would be the absence of disclosure requirement provisions in both the CBD IR and in the WTO. In this case there will be no conflict between the IR and WTO, but, in the view of some countries and experts, an opportunity to promote mutual supportiveness between the WTO IPR system and the CBD ABS IR could be lost. However, some countries and stakeholders support this approach because it would avoid the alleged negative consequences of new patent disclosure requirements mentioned before. These delegations and stakeholders support other mechanisms to address concerns regarding misappropriation.

- Technology transfer provisions developed in the IR

Technology transfer provisions could be specifically developed in the context of the IR benefit sharing component in line with the current provisions and language of the CBD itself. This actually has been included in the current Draft Protocol (article 18 bis).⁹⁵

However, considering that the current text is open for negotiations, TT provisions could end up in different forms in the final version of the Protocol. The IR could set minimum requirements for benefit-sharing to be included in the mutually agreed

The effective implementation of the international regime will demand input and collaboration from a range of organizations and fora to ensure that all cross-sectoral issues are given due consideration and effect.

terms, including TT. Technology transfer measures could also be developed as a direct obligation for CBD Members. These provisions could be similar to the ones already included in the CBD (articles 15, 16, and 19).⁹⁶

Both types of provisions could be drafted to be in harmony and provide mutual supportiveness between the IR and the WTO/TRIPS IPR provisions.⁹⁷ These measures would be compatible and mutually supportive of the WTO efforts and text regarding technology transfer, including the Doha Mandate (par. 19).⁹⁸

THE IR AND UPOV

Despite the UPOV Council position on the IR and the UPOV Convention, some authors are of the opinion that a disclosure of origin requirement does not necessarily conflict with UPOV basic rules.⁹⁹ At the same time, there are no known initiatives within UPOV to modify the UPOV Convention for the inclusion of disclosure requirements. With regard to the WTO discussions on disclosure, these take place in the context of the patent system and would not affect PBR protection.¹⁰⁰

- Disclosure/certificate requirements established for PBR in the IR¹⁰¹

For these reasons, a potential option to include the disclosure of origin in PBR as a result of the CBD IR negotiations could conflict with the UPOV interpretation of the compatibility between the disclosure requirements and UPOV conditions for protection,¹⁰² if the disclosure requirements were drafted as an additional condition for protection.

Due to the fact that the IR negotiations outcome on disclosure is to be contained in a legally binding instrument, a potential inconsistency between the two agreements would exist. Such an approach could be a disincentive for the UPOV members to become Parties to the legally binding IR.

Another option is to amend the UPOV Convention to include a disclosure of origin condition for the protection of Plant Breeders' Rights. However, there is no information that such a process has been suggested by UPOV members.

- Exclusion of PBR from the disclosure/certificate or an alternative drafting

One option is to exclude PBR applications from the disclosure provisions or to create a different and special system, taking into account both the legal and technical implications of such system for the case of plant varieties. A special disclosure

requirement could be designed taking into account the legal requirements and conditions established in the UPOV Convention and the process of the access and use of plant genetic material for the breeding of new varieties.

- Technology transfer provisions and UPOV

There are not specific technology transfer provisions as such in the UPOV Convention. However, similar arguments and conclusions to the ones presented in the WTO section could be made with regard to TT provisions developed in the IR and UPOV.¹⁰³ The IR could establish TT provisions related to plant variety protection, which could co-exist in harmony and be mutually supportive of the UPOV Convention.


- IR statement on mutual supportiveness with the UPOV Convention

UPOV Council statements have called repeatedly for mutual supportiveness between both instruments. In addition, references to UPOV in the current IR negotiating text are found under some of the options for the IR Scope. One possible option is to expressly include a reference to the mutual supportiveness between the UPOV Convention and the IR. However, it could be objected to on the grounds that similar statements could also be made for many other international instruments and processes.

CONCLUSION

There is a lot of space to strengthen mutual supportiveness between the IR outcome and the WTO, WIPO, and UPOV processes and instruments. In principle, the IR Protocol, could co-exist in harmony with the other treaties or processes, taking into account the arguments and options presented in this article.

The calls for mutual supportiveness between the CBD, WTO, WIPO, and UPOV regimes can be read as implying the need to make compatible multiple regimes with very different objectives, approaches, and values demanding and claiming legal protection.¹⁰⁴

The effective implementation of the international regime will demand input and collaboration from a range of organizations and fora to ensure that all cross-sectoral issues are given due consideration and effect.¹⁰⁵ Therefore, it is important to foster closer co-operation and co-ordination between the processes of the WTO and UPOV and the Convention IR negotiations in order to better capitalize on potential synergies between the prospective international regime on ABS and the IP system. 

Endnotes: The Relationship Between the Access and Benefit Sharing International Regimen and Other International Instruments the World Trade Organization and the International Union for the Protection of New Varieties of Plants

¹ U.N. Convention on Biological Diversity art. 15(1), June 5, 1992, 1760 U.N.T.S. 79, available at <http://www.cbd.int/convention/convention.shtml>.

² *Id.* art. 1.

³ *Id.* art. 15(7).

⁴ *Id.* art. 15(4), (5).

⁵ *Id.* art. 8(j).

⁶ Sixth Ordinary Meeting of the Conference of the Parties to the Convention on Biological Diversity, the Hague, Neth., Apr. 7-19, 2002, *Access and benefit-sharing as related to genetic resources*, U.N. Doc. UNEP/CBD/COP/DEC/

ENDNOTES: THE RELATIONSHIP BETWEEN THE ACCESS AND BENEFIT SHARING INTERNATIONAL REGIMEN AND OTHER INTERNATIONAL INSTRUMENTS THE WORLD TRADE ORGANIZATION AND THE INTERNATIONAL UNION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS *continued from page 33*

VI/24, available at <http://www.cbd.int/decision/cop/?id=7198>. See also Bonn Guidelines, <http://www.cbd.int/abs/bonn.shtml> (last visited May 4, 2010).

⁷ A significant amount of literature is now being written about the IR. I particularly recommend Kathryn Garforth & Jorge Cabrera Medaglia, *Sustainable Biodiversity Law: Global Access, Local Benefits*, ICFAI J. INT'L L., Oct. 2005, Vol. IV, No. 4; MIRIAM DROSS & FRANZISKA WOLFF, BFN-SKRIPTE, NEW ELEMENTS OF THE INTERNATIONAL REGIME ON ACCESS TO GENETIC RESOURCES AND BENEFIT SHARING—THE ROLE OF CERTIFICATES OF ORIGIN (2005); Miriam Dross & Franziska Wolff, *Do we need a new access and benefit-sharing instrument?*, Y.B. OF INT'L ENV'T L., 2004, Vol. 15; Jorge Cabrera Medaglia, *Las negociaciones sobre el Régimen Internacional de acceso a recursos genéticos y distribución de beneficios: opciones para un país en desarrollo*, PUENTES, May-June 2004, Vol V, No. 3; Tim Hodges & Anne Daniel, *Promises and Pitfalls: a First Step on the Road to the ABS International Regime*, RECIEL, 2005, Vol. 14, No. 2; Tomme Young, *Opciones y Procesos de desarrollo de un Régimen Internacional sobre Acceso y Distribución de Beneficios: Manual de Resumen para las delegaciones de la CBD* (on file with author); BILL BOWEN, THE ABS PROJECT, IUCN, DEVELOPING AN EFFECTIVE INTERNATIONAL REGIME FOR ACCESS AND BENEFIT SHARING FOR GENETIC RESOURCES: USING MARKET-BASED INSTRUMENTS (2004).

⁸ G.A. Res. 57/260, U.N. Doc. A/RES/57/260 (Dec. 20, 2002). Although the language of the Summit refers only to benefit-sharing, the meeting on the Convention's Program of Work (Montreal, Mar. 2003) recommended that the Working Group on ABS consider, at its second meeting, the process, nature, scope, elements, and modalities for an international regime on access to genetic resources and benefit-sharing.

⁹ World Summit on Sustainable Development, Johannesburg, S. Afr., Aug. 26-Sep. 4, *Plan of Implementation of the World Summit on Sustainable Development*, ¶ 42, U.N. Doc. A/CONF.199/20.

¹⁰ Seventh Ordinary Meeting of the Conference of the Parties to the Convention on Biological Diversity, Kuala Lumpur, Malay., Feb. 9-20, 2004, *Access and benefit-sharing as related to genetic resources*, ¶ D, U.N. Doc. UNEP/CBD/COP/DEC/VII/19 (Feb. 20, 2004).

¹¹ *Id.*

¹² *Id.*

¹³ Eighth Ordinary Meeting of the Conference of the Parties to the Convention on Biological Diversity, Curitiba, Braz., Mar. 20-31, 2006, *Access and benefit-sharing*, U.N. Doc. UNEP/CBD/COP/DEC/VIII/4 (Jun. 15, 2006). See www.cbd.int for information about the IR negotiating process.

¹⁴ See Fifth Meeting of the Ad Hoc Open-ended Working Group on Access and Benefit-sharing, <http://www.cbd.int/wgabs5/> (last visited May 4, 2010).

¹⁵ See Sixth Meeting of the Ad Hoc Open-ended Working Group on Access and Benefit-sharing, <http://www.cbd.int/wgabs6/> (last visited May 4, 2010).

¹⁶ Ninth Meeting of the Conference of the Parties to the Convention on Biological Diversity, Bonn, Ger., May 19-30, 2008, *Access and benefit-sharing*, U.N. Doc. UNEP/CDB/COP/DEC/IX/12 (Oct. 9, 2008).

¹⁷ Eighth Meeting of The Ad Hoc Open-Ended Working Group on Access and Benefit-Sharing, Montreal, Canada, Nov. 9-15, 2009, Annex 1, U.N. Doc. UNEP/CBD/WG-ABS/8/8 (Nov. 20, 2009).

¹⁸ The so-called "Montreal text" was considered unusable due to both its length and the number of bracketed areas of texts, 3400 pairs of them.

¹⁹ See Earth Negotiations Bulletin, Ninth Meeting of the Ad-Hoc Open-ended Working Group on Access to Genetic Resources and Benefit Sharing of the Convention on Biological Diversity, <http://www.iisd.ca/biodiv/abs9/> (last visited May 4, 2010).

²⁰ See Ad Hoc Open-Ended Working Group On Access And Benefit-Sharing, *Report of the Ninth Meeting of the ABS/WG*, Annex I, UN Doc. UNEP/CBD/WG-ABS/9/3 (Apr. 26, 2010), available at <http://www.cbd.int/doc/meetings/abs/abswg-09/official/abswg-09-03-en.pdf> [hereinafter *Report of the Ninth Meeting of the ABS/WG*].

²¹ See Secretariat of the Convention on Biological Diversity, *Access and Benefit-Sharing: Communication of a Proposed Protocol Pursuant to Article 28, Paragraph 3 of the Convention on Biological Diversity*, SCBD/SEL/LG/71198 (Apr. 15, 2010), available at <http://www.cbd.int/doc/notifications/2010/ntf-2010-071-abs-en.pdf>.

²² Article 28 (Adoption of Protocols) provides that any if this instruments shall be adopted at a meeting of the Conference of the Parties and that "The text of any proposed Protocol shall be communicated to the Contracting Parties by the Secretariat at least six months before such meeting." See Convention on Biological Diversity art. 28, June 5, 1992, 1760 U.N.T.S. 79.

²³ A note in the Protocol is written with the following statement: "This document, which was not negotiated, reflects the efforts by the Co-Chairs to elaborate the elements of a draft Protocol, and is without prejudice to the rights of the Parties to make further amendments and additions to the text. This document should be read in conjunction with the main body of the report, which reflects the views of the Parties during the ninth meeting of the Working Group on Access and Benefit-sharing, which took place in Cali, Colombia." See *Report of the Ninth Meeting of the ABS/WG*, *supra* note 20, at 44.

²⁴ One of the most contentious issues of the negotiations in Cali, was the relationship between the Protocol and other international instruments. These discussions and disagreements are not reflected in the current text. See *Id.* For many delegations it is important that the ABS Protocol includes a self-standing article on its relationship with other international agreements and processes.

²⁵ Discussions in the World Intellectual Property Organization are also particularly relevant for genetic resources and Traditional Knowledge, but outside the scope of this article. The WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore ("IGC") was established by the WIPO General Assembly in October 2000 as a forum for debate and dialogue on the relationship between intellectual property, traditional knowledge, genetic resources, and traditional cultural expressions. It was considered that these topics did not fall within the scope of other WIPO bodies. The IGC's mandate consists of analyzing aspects of intellectual property related to genetic resources, traditional knowledge, and the protection of expressions of folklore. One of the topics the Committee had considered—and continues to do so under its current mandate—is precisely the relationship between intellectual property and genetic resources (including disclosure of origin in patent applications) and the protection of TK. The Committee has met on several occasions (15). The current mandate of the Committee (2009-2011) includes:

(a) The Committee will, during the next budgetary biennium (2010/2011), and without prejudice to the work pursued in other fora, continue its work and undertake text-based negotiations with the objective of reaching agreement on a text of an international legal instrument (or instruments) which will ensure the effective protection of GRs, TK and TCEs.

(b) The Committee will follow, as set out in the Annex, a clearly defined work program for the 2010/2011 biennium. This work program will make provision for, in addition to the 15th session of the Committee scheduled for December 2009, four sessions of the IGC and three inter-sessional working groups, in the 2010-2011 biennium.

(c) The focus of the Committee's work in the 2010/2011 biennium will build on the existing work carried out by the Committee and use all WIPO working documents, including WIPO/GRTKF/IC/9/4, WIPO/GRTKF/IC/9/5 and WIPO/GRTKF/IC/11/8A (Traditional Cultural Expressions, Traditional Knowledge and Genetic Resources), which are to constitute the basis of the Committee's work on text-based negotiations.

(d) The Committee is requested to submit to the 2011 General Assembly the text (or texts) of an international legal instrument (or instruments) which will ensure the effective protection of GRs, TK and TCEs. The General Assembly in 2011 will decide on convening a Diplomatic Conference. World Intell. Prop. Org. [WIPO], *Matters Concerning the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore*, 1-2, Agenda Item 28, WIPO G.A. 38th Sess. (Sept. 22- Oct. 1, 2009), available at http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_15/wipo_grtkf_ic_15_ref_wipoint_28.pdf.

This was the Committee's strongest mandate yet. The scope of work of the IGC includes the possible development of an international instrument or instruments on IPRs and genetic resources as well as traditional knowledge.

²⁶ See Third Ordinary Meeting of the Conference of the Parties to the Convention on Biological Diversity, Buenos Aires, Argentina, Nov. 4-15, 1996, *Access to Genetic Resources*, ¶ 8, U.N. Doc. UNEP/CBD/COP/DEC/III/15; Fifth Ordinary Meeting of the Conference of the Parties to the Convention on Biological Diversity, Nairobi, Kenya, May 15-26, 2000, *Access to Genetic Resources*, ¶¶ 1-4, U.N. Doc. UNEP/CBD/COP/DEC/V/26 B (May 26, 2000); Sixth Ordinary Meeting of the Conference of the Parties to the Convention on Biological Diversity, the Hague, Neth., Apr. 7-19, 2002, *Access And Benefit-Sharing As Related To Genetic Resources* ¶ 10, U.N. Doc. UNEP/CBD/COP/DEC/VI/24(D); *Id.* UNEP/CBD/COP/DEC/VI/24/24(C)(1); Eighth Ordinary Meeting of the Conference of the Parties to the Convention on Biological

Diversity, Curitiba, Braz., Mar. 20-31, 2006, *Access and Benefit-Sharing*, U.N. Doc. UNEP/CBD/COP/DEC/VIII/4(D).

²⁷ Kent Nnadozie et al., Synergetic Implementation: Coordinated National Implementation Of Access And Benefit Sharing Issues – CBD, Biosafety Protocol, ITPGRA and Relevant IPR Instruments (unpublished manuscript, on the file with the author).

²⁸ See Convention on Biological Diversity Conference of Parties, *Access to Genetic Resources*, ¶ 8, U.N. Doc. UNEP/CBD/COP/DEC/III/15.

²⁹ See e.g., Council for Trade-Related Aspects of Intellectual Property Rights, *Summary Of Issues Raised And Points Made With Regard The Relationship Between The Trips Agreement And The CBD*, IP/C/W/368/rev 1 (Feb. 8, 2006), available at http://www.wto.org/english/tratop_e/TRIPS_e/ipcw368_e.pdf.

³⁰ See World Trade Organization, Ministerial Declaration of 20 November 2001, ¶ 32(i), WT/MIN(01)/DEC/1 [hereinafter Doha Declaration].

³¹ Nnadozie et al., *supra* note 27.

³² Ninth Ordinary Meeting of the Conference of the Parties to the Convention on Biological Diversity, Bonn, Ger., May 19-30, 2008, *The Role of Intellectual Property Rights and Technology Transfer in the Context of the Convention on Biological Diversity*, U.N. Doc. UNEP/CBD/COP/9/INF/7 (May 3, 2008), available at <https://www.cbd.int/doc/meetings/cop/cop-09/information/cop-09-inf-07-en.pdf>.

³³ Seventh Ordinary Meeting of the Conference of the Parties to the Convention on Biological Diversity, Kuala Lumpur, Malay., Feb. 9-20, 2004, *Transfer of Technology and Technology Cooperation Annex*, U.N. Doc. UNEP/CBD/COP/DEC/VII/29 (Apr. 13, 2004).

³⁴ Doha Declaration, *supra* note 30, ¶ 19.

³⁵ There are several issues that were discussed by the delegations at the TRIPS Council, which are relevant to the CBD, such as the “patentability of life,” removal of references to patenting of microorganisms from article 27, inclusion of the Traditional Knowledge protection on the concept of sui generis systems found in article 27.3(b), the scope and extension of the exemptions of article 27.3 (b), among others. See Eighth Ordinary Meeting of the Conference of the Parties to the Convention on Biological Diversity, Curitiba, Braz., Mar. 20-31, 2006, *The Relationship between the TRIPS Agreement and the Convention on Biological Diversity—Summary of Issues Raised and Points Made—Submission by the WTO Secretariat*, U.N. Doc. UNEP/CBD/COP/8/Inf/37.

³⁶ For a detailed analysis of the different legal ways in which some countries have included disclosure of origin in patent applications at the national level, see Thomas Henninger, *Disclosure requirements in patent law and related measures. An overview of existing national and regional legislation on IP and biodiversity*, ICTSD, Mar., 2010.

³⁷ Doha Declaration, *supra* note 30, ¶ 34.

³⁸ *Id.* ¶ 12.

³⁹ Communication from Brazil, China, Colombia, Cuba, India, Pakistan, Peru, Thailand, and Tanzania, *Doha Work Programme – The Outstanding Implementation Issue on the Relationship Between the TRIPS Agreement and the Convention on Biological Diversity*, WT/GC/W/564 (May, 31 2006), available at http://www.wto.org/english/tratop_e/trips_e/art27_3b_e.htm. Norway has also submitted an alternative proposal for disclosure of origin. Communication from Norway, *The Relationship Between the TRIPS Agreement, the Convention on Biological Diversity and the Protection of Traditional Knowledge*, IP/C/W/473 (June 14, 2006).

⁴⁰ The language of the proposal is broader and makes reference to “biological resources.”

⁴¹ For further details see documents WT/GC/W/564/Rev.2, TN/C/W/41/Rev.2, IP/C/W/474 and WT/GC/W/564/Rev.2/Add.2, TN/C/W/41/Rev.2/Add.2, IP/C/W/474/Add.2.

⁴² See WT/GC/W/591TN/C/W/50 (June, 9 2008) (“Issues related to the extension of the protection of geographical indications provided for in article 23 of the TRIPS Agreement to products other than wines and spirits and those related to the relationship between the TRIPS Agreement and the Convention on Biological Diversity,” which summarized the different positions on this issue before the Mini-Ministerial.).

⁴³ The three current intellectual property issues: the relationship between the TRIPS Agreement and the CBD; the extension of the protection of geographical indications provided for under Article 23 to products other than wines and spirits; and the establishment of a multilateral system of notification and registration of geographical indications for wines and spirits.

⁴⁴ Communication from Albania, Brazil, China, Colombia, Ecuador, the European Communities, Iceland, India, Indonesia, the Kyrgyz Republic, Liechtenstein, the Former Yugoslav Republic of Macedonia, Pakistan, Peru, Sri Lanka, Switzerland, Thailand, Turkey, the ACP Group, and the African Group, *Draft Modalities for TRIPS Related Issues*, TN/C/W/52 (July 19, 2008). Draft Modality

text as contained in document TN/C/W/52 have been cosponsored by 110 Members that request the inclusion of the TRIPS related issues as part of the horizontal process for the negotiations. The Draft speaks of country providing/source of genetic resources not of origin. This proposal of Draft Modalities attempts to link the amendments to the TRIPS agreement on three issues, creation of a registry for geographical indications, establishment a disclosure of origin obligation and the extension of the geographical indications protection. The proposal suggests the inclusion of these issues as part of the horizontal process in order to elaborate a final draft legal texts with respect to each of the issues as part of the single undertaking of the Doha Round.

⁴⁵ The minutes of the meetings of the TRIPS Council can be found on the WTO website.

⁴⁶ See generally Jorge Cabrera Medaglia, *Trade (in particular free trade agreements) and access to genetic resources and benefit sharing: exploring some of the linkages*, ASIAN BIOTECHNOLOGY AND DEV. R., July 2008, Vol. 10, No. 3.

⁴⁷ Ninth Ordinary Meeting of the Conference of the Parties to the Convention on Biological Diversity, Bonn, Ger., May 19-30, 2008, *Access and Benefit Sharing Annex*, U.N. Doc. UNEP/CBD/COP/IX/12.1 (Oct. 9, 2008). The Annex in accordance to Decision IX/12.1 shall be the basis for the negotiations. The Components have been divided in two different categories: “Components to be further elaborated with the aim of incorporating them in the IR” and “Components for Further Consideration.” The distinction was later on abandoned at the Seventh Meeting of the ABS-WG.

⁴⁸ Eighth Ordinary Meeting of the Conference of the Parties to the Convention on Biological Diversity, Curitiba, Braz., Mar. 20-31, 2006, *Access and Benefit-Sharing*, U.N. Doc. UNEP/CBD/COP/DEC/VIII/4(D).

⁴⁹ This issue has not been agreed yet, important disagreements about this language remain. See Ninth meeting of the Conference of the Parties to the Convention on Biological Diversity, Bonn, Ger., May 19-30, 2008, *Access and benefit-sharing*, U.N. Doc. UNEP/CDB/COP/DEC/IX/12 (Oct. 9, 2008).

⁵⁰ *Id.* at 49.

⁵¹ It is not the intention of this article to develop the idea of the certificate in depth. For further detail, see the following documents; Miriam Dross & Franziska Wolff, *New Elements of the International Regime on Access and Benefit Sharing of Genetic Resources: the Role of Certificates of Origin*, BFN, 2005; JOSE CARLOS FERNANDEZ, 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, Mar. 11, 2005; Brendan Tobin, David Cunningham, and Kazuo Watanabe, *The Feasibility, Practicality and Cost of a Certificate of Origin System for Genetic Resources*, United Nations University Institute of Advanced Studies Yokohama, Japan, Dec. 2004, available at http://www.ias.unu.edu/binaries2/abswg-03-inf-05-en_revised%202.pdf.

⁵² An analysis of the causes behind processes to reform the implementation of ABS laws can be found in, KATHRYN GARFORTH AND JORGE CABRERA MEDAGLIA, LEGAL REFORM FOR THE DEVELOPMENT AND IMPLEMENTATION OF MEASURES ON ACCESS TO GENETIC RESOURCES AND BENEFIT-SHARING (T.W. McInerney, ed., International Development Law Organization 2006).

⁵³ JOSE CARLOS FERNANDEZ, 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, Mar. 11, 2005.

⁵⁴ On this last aspect, see Sélim Louafi & Jean-Frédéric Morin, *Certificates of Origin for Genetic Resources and International Trade Law* (IDRR 2004).

⁵⁵ Ninth meeting of the Conference of the Parties to the Convention on Biological Diversity, Bonn, Ger., May 19-30, 2008, *Access and benefit-sharing*, U.N. Doc. UNEP/CDB/COP/DEC/IX/12 (Oct. 9, 2008).

⁵⁶ Ninth Meeting of the Ad Hoc Open Ended Working Group On Access and Benefit-Sharing, *Revised Draft Protocol on access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity* art. 13(1)-(5), U.N. Doc. UNEP/CBD/WG-ABS/9/3 Annex I, available at <https://www.cbd.int/doc/meetings/abs/abswg-09/official/abswg-09-03-en.pdf>.

⁵⁷ Eighth Ordinary Meeting of the Conference of the Parties to the Convention on Biological Diversity, Curitiba, Braz., Mar. 20-31, 2006, *Access and Benefit-Sharing*, U.N. Doc. UNEP/CBD/COP/DEC/VIII/4(C).

⁵⁸ Fifth Meeting of the Ad Hoc Open Ended Working Group On Access and Benefit-Sharing, *Report of the meeting of the Group of Technical Experts on an international recognized certificate of origin/source/legal provenance* U.N.

Doc. UNEP/CBD/WG-ABS/5/7 (Feb. 20, 2007), available at <http://www.cbd.int/doc/meetings/abs/abswg-05/official/abswg-05-07-en.pdf>.

⁵⁹ BRENDAN TOBIN, GEOFF BURTON, & JOSE CARLOS FERNANDEZ-UGALDE, CERTIFICATES OF CLARITY AND CONFUSION: THE SEARCH FOR A PRACTICAL, FEASIBLE AND COST EFFECTIVE SYSTEM FOR CERTIFYING COMPLIANCE WITH PIC AND MAT UNU-IAS (2008) available at http://www.ias.unu.edu/resource_centre/Certificates%20of%20Clarity%20or%20Confusion_The%20search%20for%20a%20practical_%20feasible%20and%20cost%20effective%20system%20for%20certifying%20compliance%20with%20PIC%20and%20MAT.pdf.

⁶⁰ *Id.*
⁶¹ See Sélim Louafi & Jean-Frédéric Morin, *Certificates of Origin for Genetic Resources and International Trade Law* (IDDRI 2004), (suggesting that in order to ensure consistency with WTO rules, any certification system should be designed on a product basis—not on that of a country or an individual company).

⁶² Transfer of Technology has also been identified as a benefit sharing option in the Bonn Guidelines.

⁶³ Ninth Meeting of the Ad Hoc Open Ended Working Group On Access and Benefit-Sharing, *Revised Draft Protocol on access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity* art. 18, U.N. Doc. UNEP/CBD/WG-ABS/9/3 Annex I, available at <https://www.cbd.int/doc/meetings/abs/abswg-09/official/abswg-09-03-en.pdf>.

⁶⁴ In this regard Article 1 of the CBD has been pointed out, “It is noteworthy that this fundamental provision of the Convention already includes an explicit reference to technology transfer as a means to implement its third objective.” See Ninth Ordinary Meeting of the Conference of the Parties to the Convention on Biological Diversity, Bonn, Ger., May 19-30, 2008, *The Role of Intellectual Property Rights and Technology Transfer in the Context of the Convention on Biological Diversity*, U.N. Doc. UNEP/CBD/COP/9/INF/7 (May 3, 2008), available at <https://www.cbd.int/doc/meetings/cop/cop-09/information/cop-09-inf-07-en.pdf>. Decision VII/19 makes an explicit reference to the elaboration and negotiation of the IR to effectively implement the provisions in article 15, 8 (J) and three objectives of the CBD. Seventh Ordinary Meeting of the Conference of the Parties to the Convention on Biological Diversity, Kuala Lumpur, Malay., Feb. 9-20, 2004, *Access and benefit-sharing as related to genetic resources*, ¶ D, U.N. Doc. UNEP/CBD/COP/DEC/VII/19 (Feb. 20, 2004).

⁶⁵ Ninth Ordinary Meeting of the Conference of the Parties to the Convention on Biological Diversity, Bonn, Ger., May 19-30, 2008, *The Role of Intellectual Property Rights and Technology Transfer in the Context of the Convention on Biological Diversity*, U.N. Doc. UNEP/CBD/COP/9/INF/7 (May 3, 2008), available at <https://www.cbd.int/doc/meetings/cop/cop-09/information/cop-09-inf-07-en.pdf>.

⁶⁶ Part 2 of CBD article 16 provides that technology subject to patents or other IPRs access and transfer must be provided “on terms which recognize and are consistent with the adequate and effective protection of IPR.” The inclusion of the phrase “adequate and effective” makes a direct link to the TRIPS. See Susan Bragdon et al., *Safeguarding Biodiversity: The Convention on Biological Diversity (CBD)*, in *The Future Control of Food* (Geoff Tansey & Tasmin Rajotte eds., 2008).

⁶⁷ A general description of the International Union for the Protection of New Varieties of Plants was provided in document UNEP/CBD/WG-ABS/3/2, which highlights its relationship to access and benefit-sharing. Third Meeting of the Ad Hoc Open Ended Working Group On Access and Benefit-Sharing, *Analysis of Existing National, Regional, and International Legal Instruments Relating to Access and Benefit Sharing and Experience Gained in their Implementation, Including Identification of Gaps*, U.N. Doc. UNEP/CBD/WG-ABS/3/2 (Nov. 10, 2004).

⁶⁸ *Id.*
⁶⁹ INTERNATIONAL UNION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS, WHAT IT IS, WHAT IT DOES, UPOV PUBLICATION No. 437 (E)(2003), available at <http://upov.int/export/sites/upov/en/about/pdf/pub437.pdf> [hereinafter UPOV].

⁷⁰ Int’l Convention for the Protection of New Varieties of Plants, art. 15 (Mar. 19, 1991), <http://upov.int/export/sites/upov/en/publications/conventions/1991/pdf/act1991.pdf> (last visited May 5, 2010).

⁷¹ UPOV, *supra* note 69.

⁷² Third Meeting of the Ad Hoc Open Ended Working Group On Access and Benefit-Sharing, *Compilation of submissions provided by parties, governments, indigenous and local communities and relevant stakeholders in preparation for the third meeting of the ad hoc open-ended working group on access and benefit-sharing*, U.N. Doc. UNEP/CBD/WG-ABS/3/INF/1.

⁷³ International Union for the Protection of New Varieties of Plants, *Reply of UPOV to the Notification of June 26, 2003, from the Executive Secretary of the*

Convention on Biological Diversity (CBD), http://www.upov.int/export/sites/upov/en/news/2003/pdf/cbd_response_oct232003.pdf

⁷⁴ Third Meeting of the Ad Hoc Open Ended Working Group On Access and Benefit-Sharing, *Compilation of Submissions Provided by Parties, Governments, International Organizations, Indigenous and Local Communities and Relevant Stakeholders Related to the International Regime on Access and Benefit-Sharing*, U.N. Doc. UNEP/CBD/WG-ABS/4/INF/3 (Dec. 14, 2005), available at <http://www.cbd.int/doc/meetings/abs/abswg-04/information/abswg-04-inf-03-en.pdf>.

⁷⁵ Fifth Meeting of the Ad Hoc Open Ended Working Group On Access and Benefit-Sharing, *Overview of recent developments at the international level relating to access and benefit-sharing, Convention on Biological Diversity*, U.N. Doc. UNEP/CBD/WG-ABS/5/4/Add.1

⁷⁶ UPOV, REPORT ON THE IMPACT OF PLANT VARIETY PROTECTION (2005), available at <http://www.upov.int/en/publications/impact.html>.

⁷⁷ *Id.* at 3, 5.

⁷⁸ Int’l Union for the Protection of New Varieties of Plants, *Access to Genetic Resources and Benefit Sharing*; ¶ 6, available at http://www.upov.int/en/news/2003/pdf/cbd_response_oct232003.pdf.

⁷⁹ *Id.* at ¶¶ 7-9.

⁸⁰ *Id.* at ¶ 10.

⁸¹ *Id.* at ¶ 12.

⁸² *Id.* at ¶ 11.

⁸³ Letter from Kamil Idris, Secretary-General, UPOV, to Ahmed Djoghlaif, Executive Secretary, CBD (Apr. 17, 2008), available at http://www.upov.int/export/sites/upov/en/about/pdf/upov_cbd_17_04_2008.pdf.

⁸⁴ In the case of plant varieties, there may be technical and practical obstacles to this provision unless it is carefully structured. Some difficulties have been pointed out regarding the applicability of a disclosure requirement to plant varieties, such as: problems that occur when plant varieties originate from genetic material which came from different countries and sources and from crosses and back-crosses and obstacles to determining the origin of the germplasm of a variety because of the lack of documentation and the length of time between its acquisition and its use in breeding programmes. See Graham Duffield, *Protecting Traditional Knowledge and Folklore: A review of progress in diplomacy and policy formulation* (2003) (Issue Paper No. 1, ICTSD and UNCTAD) available at http://ictsd.org/downloads/2008/06/cs_duffield.pdf.

⁸⁵ See Int’l Convention for the Protection of New Varieties of Plants, art. 15(1)(iii) (Mar. 19, 1991), <http://upov.int/export/sites/upov/en/publications/conventions/1991/pdf/act1991.pdf>; Int’l Convention for the Protection of New Varieties of Plants, art. 5(3) (Oct. 23, 1978), <http://www.upov.int/en/publications/conventions/1978/act1978>.

⁸⁶ Ninth Meeting of the Conference of the Parties to the Convention on Biological Diversity, Bonn, Ger., May 19-30, 2008, *Access and benefit-sharing Annex I, III*, U.N. Doc. UNEP/CDB/COP/DEC/IX/12 (Oct. 9, 2008).

⁸⁷ COP Decision VII/19 reaffirms the fact that disclosure of origin in IPR applications is part of the terms of reference of the Annex to Decision VII/19 D for the development of the IR. It recognizes that this issue has been discussed in the WIPO and the WTO, and invites the relevant fora to begin (or continue) discussing the topic of disclosure of origin in IPR applications, bearing in mind the need to ensure that their work is supportive of and does run counter to CBD objectives. Seventh Ordinary Meeting of the Conference of the Parties to the Convention on Biological Diversity, Kuala Lumpur, Malay., Feb. 9-20, 2004, *Access and benefit-sharing as related to genetic resources*, U.N. Doc. UNEP/CBD/COP/DEC/VII/19 (Feb. 20, 2004). See also Ninth Meeting of the Ad Hoc Open Ended Working Group On Access and Benefit-Sharing, *Revised Draft Protocol on access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity* art. 18, U.N. Doc. UNEP/CBD/WG-ABS/9/3 Annex I, available at <https://www.cbd.int/doc/meetings/abs/abswg-09/official/abswg-09-03-en.pdf>.

⁸⁸ See Nnadozie et al., *supra* note 27; Joshua Sarnoff & Carlos Correa, *Analysis of Options for Implementing Disclosure of Origin Requirements in Intellectual Property Applications – A contribution to UNCTAD’s response to the invitation of the Seventh Conference of the Parties of the Convention on Biological Diversity*, UN Doc. UNCTAD/DITC/TED/2004/14 (2006); IUCN ET AL., DISCLOSURE REQUIREMENTS: ENSURING MUTUAL SUPPORTIVENESS BETWEEN THE WTO TRIPS AGREEMENT AND THE CBD (2005), available at http://www.iprsonline.org/resources/docs/Disclosure_req_book.pdf; Tobin et al., *supra* note 59; JORGE CABRERA MEDAGLIA, IUCN, THE INTERNATIONAL REGIMEN FOR ACCESS AND BENEFIT SHARING (2006).

⁸⁹ Interpretation of the TRIPS agreement is undertaken under the procedures of the WTO (Article IX.2 of the WTO Agreement). For the intellectual property

point of view existing standard on patentability scope and use of patents, such as those set out in articles 27, 29, 32, and 62 of the TRIPS agreement may afford some guidance to how WIPO and WTO Member States may address this concept. See World Intell. Prop. Org. [WIPO], *Technical Study on Patent Disclosure Requirements Related to Genetic Resources and Traditional Knowledge*, WIPO Publication No.786(E) (2003), available at http://www.wipo.int/ken/publications/technical_study.pdf.

⁹⁰ The current drafting of the disclosure requirements in article 13 of the Draft Protocol, could respond to this approach. The text does not address what could happen in the case of non compliance with the disclosure requirements, e.g. if the patent could be revoked or otherwise limited in its effect if obtained in a breach of a disclosure obligation. The lack of clarity on the legal consequences of the lack of disclosure or insufficient or false disclosure is one of the critics of the current provisions. See Earth Negotiations Bulletin, *op cit.*

⁹¹ Decision IX/12 created an Expert Group on concepts, terms, working definitions and sectoral approaches.

⁹² “Locating such provisions within the CBD regime would not incorporate disclosure requirements directly into the intellectual property law system, and thus would complicate efforts to assure that disclosure obligations are adopted within the intellectual property treaty regimes. Further disclosure requirements mandated within the CBD would not directly apply to the intellectual property systems of countries that are not Parties of the CBD.” See Sarnoff & Correa, *supra* note 88, at 36. This is the case for the United States, which is a signatory but has not yet ratified the CBD.

⁹³ See Report of the Technical Expert Group, *op cit*, par. 4 (regarding the objectives of the certificates).

⁹⁴ World Intell. Prop. Org. [WIPO], *Intellectual Property and Traditional Knowledge*, Booklet No. 2, WIPO Publication No. 920(E), (2009).

⁹⁵ CBD, *supra* note 1, art. 18.

⁹⁶ CBD, *supra* note 1, art. 15, 16, 19.

⁹⁷ See Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Art. 7, 8, 66.2, 1869 U.N.T.S. 299 (1994), available at http://www.wto.org/english/tratop_e/trips_e/t_agm2_e.htm (declaring objectives: “the protection and enforcement of IPR should contribute to the promotion of

technological innovation and to the transfer and dissemination of technology. . . .”); *id.* art. 8 (stating principles: “Members may, in formulating or amending other laws and regulations, adopt measures necessary to . . . promote the public interest in sector of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Agreement”); *id.* art. 66.2 (addressing Least Developed Country Members: “Developed Countries shall provide incentives to enterprises and institutions in their territories for the purpose of promoting and encouraging technology transfer to least developed country Members. . . .”). The TRIPs Council adopted a Decision on February 2003 which lays down an obligation to developed countries to submit reports on actions taken or envisaged to provide such incentives.

⁹⁸ Doha Declaration, *supra* note 30, para. 19.

⁹⁹ Sarnoff & Correa, *supra* note 88, at 23 (“Although UPOV has suggested that disclosure obligations that would deny or invalidate plant rights conflict with the UPOV Convention, UPOV did not directly address the issue of entitlement to apply for such rights, but rather treated such requirements as an additional condition for protection”).

¹⁰⁰ Sarnoff & Correa, *supra* note 88, at 35 (“Applying such disclosure requirements only in the context of patents, however, would not affect other intellectual property applications whose subject matter implicates CBD access and benefit sharing requirements. Of particular relevance such a limitation would not apply mandatory disclosure obligations to the subject matter of plant breeders rights”).

¹⁰¹ The current text of the Protocol (Article 13) refers broadly to disclosure requirements and check points, including IPR Offices. It may also include PBR offices. However, the formulation of the obligation is unclear in terms of legal sanctions, to what extent is a condition for protection or not, etc.

¹⁰² The same argument applies to the certificate as an instrument to facilitate the disclosure requirements.

¹⁰³ See *The Role of Intellectual Property . . . op cit*, paragraph 48, note 14.

¹⁰⁴ See Nnadozie et al., *supra* note 27.

¹⁰⁵ Center for International Sustainable Development Law Biodiversity and Biosafety Law Programme, *The Interface Between Sustainable Forest Management and Access and Benefit Sharing: Outlining Potential Areas of Synergy*, Jorge Cabrera, Oliver Rukundo, & Frederic Perron-Welch, Montreal, Can., 2010.