

WTO's contribution to sustainable development governance: balancing opportunities and threats

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Environment and Intellectual Property Rights: Conflict or Cooperation Between North and South

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Value, Ownership and Sovereignty in Environmental Protection: Questions of value and ownership underscore environmental protection. More often an owner of an object or resource is allowed to use it to the full, subject only to minimal constraints when the exercise of such rights infringes the right of another, or is against the public good. When we favor conservation, we limit or reallocate the previous rights of ownership so that conservation is a duty that trumps the rights of use and exhaustion. The owner loses the economic value that would otherwise be gained by using and exhausting the object that is now conserved. Opportunity costs result. To add to this, the cost of conservation, of holding and preserving the object, usually falls upon the owner. Such an allocation of costs and loss of opportunity on the owner can seem unjust, even if we favor conservation. This is especially where the owners of the object are less well off than those who favor conservation. This is clearly the case in the conservation of biodiversity, where the richest or mega-diversity areas are predominately in the South, and not in the developed countries of the North. A similar geographical imbalance characterizes the distribution of endangered species. In such cases, the object of intended for conservation belongs to states of the South, and not the North. Even if the idea has gained ground that biodiversity should be considered a common heritage, a forest or indeed many species are particular to a sovereign state, to be considered part of its resources, subject to what has been called, "permanent sovereignty".

Incentives and Compensation in Environmental Agreements: Many developing countries of the South can scarcely afford both the lost opportunities and increased costs of conservation. They assert the right to development, which has been recognized in UN resolutions and also in the Rio Declaration. For this reason, a major trend in international environmental agreements has been to increasingly provide for incentives and compensation to owners. The incentives in modern international environmental agreements commonly include differentiated responsibilities and time-lines that favor the less developed countries. They also promise them access to technology and/ or multilateral funds to assist their transition to meet their obligations. These incentives are granted not as charity, but are conceptualized as "common and differentiated responsibilities" of states that, while having different capacities and responsibilities, wish to pursue shared goals in environmental protection. Compensation is the principle, if not the explicit term, that underlines many of the newer agreements on conservation. This can be seen in the Convention on Biological Diversity.

Convention on Biological Diversity (CBD): Efforts to conserve specific species and nature areas have been early markers in the rise of environmental consciousness. The concept of biodiversity (or biological diversity), as embodied in the 1992 Convention on

Biological Diversity (CBD), is however wider and more recent. The idea serves to provide a broad framework that can hold together the piecemeal approach of area or species specific protection. This is especially important as many preceding conservation efforts, like the Convention on the International Trade in Endangered Species (CITES), focus on international trade and did not directly affect the national, domestic laws. The concept of biodiversity also pushes conservation concerns beyond state sovereignty to one that also recognizes the importance of “common heritage” and global stewardship. To many in the South, one of the most important aspects of the CBD is not the recognition of the need for conservation per se. Rather, it is that the CBD begins to accept that the cost of conservation cannot be placed on the owners, and that there is need for an equitable allocation of costs and benefits between states and among communities. Thus mechanisms have been proposed to create and share value with the states and communities that consent to conserve biodiversity. These mechanisms aim to allow use and create value from the biodiversity, without exhausting or endangering it, and then to equitably share the benefits and profits that arise. These mechanisms include (1) economic analyses and pricing of environmental services derived; (2) debt for nature swaps, or other “purchases” of nature areas without financial leveraging; and (3) bio-prospecting agreements, whereby the state (or community) holding the biodiversity asset can enjoy a share of the value and profit when this asset is used to create value in pharmaceutical or other products.

Promise and Reality: The CBD tries to recognize traditional knowledge, and bridge the conflict between developed and developing countries by providing opportunities for developing countries to have “the fair and equitable sharing of the benefits arising out of the utilization of genetic resources, including by appropriate access to genetic resources and by appropriate transfer of relevant technologies, taking into account all rights over those resources and to technologies, and by appropriate funding”. Yet while this principle and these mechanisms have been much talked about in the last decades, there are few working and successful examples of their application. In bio-prospecting, the prevalence of what some have termed, “bio-piracy” has instead been more observed. There is, at the heart of this, a collision between ideas about intellectual property rights. Does biodiversity as a property (and its value) belong first to the state and community that owns it? Or is the property (and value) more properly identified in the specific products that are derived from such biodiversity, and therefore belong to the persons that so derive it?

TRIPS and Biodiversity: The Trade-related Intellectual Property Rights (TRIPS) Agreement includes provisions under the Article 27.3(b), which deals with patentability or non-patentability of plant and animal inventions, and the protection of plant varieties. The article also guarantees “the protection of plant varieties either by patents or by an effective sui generis system or by any combination thereof”. The rationale behind the provision is the rapid development of biotechnology. Yet these plants and animals are the stuff of biodiversity. Some countries, represented by Africa Group are opposed to the inclusion any life forms, including natural microorganism as well as genes and genetically modified organisms as subject to patent. Existing bilateral and regional free trade agreements follow exactly the same provisions of the TRIPS Agreement. Some examples include the US-Singapore, North American Free Trade Agreement (NAFTA), EU-China and EU-India free trade agreements that guarantee patents on animals and plants, with exclusion of plants and animals other than micro-organisms, and essentially biological processes for the production of plants or animals other than non-biological and microbiological processes.

Who Benefits?: Many developing countries view TRIPS and other similar provisions as a two-edged sword. On one hand it may threaten community rights because it could create legal monopolies on common resources. On the other hand, it could provide opportunities. TRIPS Agreement seems to be focused on granting patents to the inventors of products or processes, which benefit patentees. In very many cases, these are transnational companies from developed countries. TRIPS fails to protect the interests of indigenous peoples and holders of traditional knowledge, and the developing states. This is notwithstanding that many and perhaps most inventions in the area of biological resources are mainly derived from traditional knowledge practised by indigenous or local communities in developing countries.

Conflict or Coherence?: In 2001, the Doha Ministerial Conference issued the Doha Declaration, where its Paragraph 19 suggests that TRIPS Council should look at the relationship between the TRIPS Agreement and United Nations Convention on Biological

Diversity (CBD) and the protection of traditional knowledge and folklore. Whether intellectual property rights (IPRs) especially patents are actually against the conservation and sustainable use of biodiversity, is still debatable. Those who are pro-patent argue that patents support the CBD since they stimulate industrial interest in natural products, offer benefit sharing with local communities and stimulate technology transfer. Those who oppose patents think the opposite: patents will harm the biodiversity and support biopiracy. This view is supported by a case where patent for plant varieties is one of the main factors that lead to monocultural agriculture. This practice has decreased crop diversity and at the same time put pressure to land condition by absorbing certain nutrients and introduce more use of pesticides and fertilizers.

Towards Common Ground: The more pragmatic perspective prefers to work to improve the existing IPR systems and make them compatible with CBD. Even the most moderate view has still many challenges to overcome. How do we prevent patents being wrongly granted? Stricter requirements should be applied for patent registration. Those may include the novelty principle – whereby a patent is granted on a “first-to invent” basis, and not “first-to-file” basis. Another step would be to have disclosure requirements, whereby patent applicants must reveal the information on the origin of the biological resources and traditional knowledge used, evidence of prior informed consent and fair and equitable benefit sharing. The proposal of “disclosure requirements” comes from a group of developing countries, including Brazil and India. This is still being discussed in the current TRIPS negotiations. Peru has submitted communication on its strategy to prevent biopiracy by establishing a working group and national anti-biopiracy commission whose first task is to search and identify possible biopiracy cases from US, European and Japan patents databases. Also, in order to ensure the patent systems do not contradict the CBD’s objectives, each country may apply additional policy measures such as conducting a rigorous environmental and social impact assessment that include public consultation for each patent application. Another challenge with such suggestions is the question of institutional arrangements for each country: what body should be responsible, and should it be under patent institution’s authority?

Developing Country Options: Those who see the TRIPS Agreement as opportunities for developing countries will consider applying IPRs to protect their plant varieties. Still within the framework of protecting the rights of traditional knowledge holders, the use of other non-patent IPRs should be taken into account. For local communities, patents may not be the appropriate way to address their interest to benefit from their “invention” since patent application procedure is too expensive and complicated. Moreover, patent is economic-oriented, while local communities’ concerns include not only economic interest but also self-determination. Another option is to have a principle for transparency in the geographical origins of a product, whereby the IP applicant would have to state a particular place or country based on a given quality or characteristic attributable to its geographical origin. The current negotiation in TRIPS Council is facing deadlock over the issue. However, geographical indications may prevent a recurrence of cases such as basmati rice case; where French and US companies have been granted trademarks under the name “basmati”, whereas in fact basmati is originally from India. A possible option that developing countries have to protect plant varieties is by an effective sui generis system. This term needs to be clearly explained to prevent different interpretations. The system has to be confined in a way that will not further exploit and monopolize biodiversity and will not create loopholes where corporate bioprospectors may take advantage, and not the local communities. TRIPS however places a pressure on the creation of sui generic systems and many have taken the TRIPS obligations to mean they are to put in place a US-based system.

IP in Developing Countries: In the vast majority of trade reports on developing countries, the developed states of the North complain about the usurpation of intellectual property rights through piracy of various products. One common example of this that very many travelers and tourists will encounter relate to the pirated DVDs and CDs and knock off “designer” clothes. This is often derided as piracy and theft. Outside pressure can elicit state promises and improve performance in some cases. Many analysts however believe that actual and habitual compliance in this area only improves when a society begins to see how it benefits more from respecting intellectual property rights, than from circumventing them. This may be observed as some countries of the South move up the economic value chain, and shift from being consumers of intellectual property to being inventors and

prospective owners of intellectual property. Yet many in the South have not begun on this path and intellectual property rights across a wide spectrum are not respected. If the value in the property of biodiversity can be better recognized and shared among developed and developing states, this could well improve the observance of these states and societies in intellectual property.

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He has spoken to a number of business meetings, including the APEC, PBEC and ASEAN Business Leaders Summits and the World Economic. His comments have featured in various international and regional media, including the BBC World Service, CNN and Newsweek.

Simon previously practised law at large commercial practice, before coordinating the Singapore Volunteers Overseas, sending teachers, doctors, and others to Asia and Africa. As an undergraduate at the National University of Singapore, he was president of the Students' Union for three terms, and led a petition against government policy. He is also a writer of stories and poems, with five published works. In 1995, he was named Singapore Young Artist of the Year.