Convention on Biological Diversity, Intellectual Property Rights and Voluntary Codes of Conduct: Facilitating Access and Benefit Sharing

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Tribal and rural men and women conserve and improve our natural resources for public and commercial good at personal cost. But unfortunately they live in poverty, while those who utilise their knowledge and resources prosper. There are several proponents to the theory that value addition can only make a resource useful and marketable. Be it traditional a crop or a medicinal plant unless researchers put in resources of time, money and intellect into developing new varieties or drugs, the value of raw materials are low. But this should not undermine the fact that benefits arising out of value addition are based on the resources that belong to communities and knowledge on their uses that come from such communities. Thus natural resources and traditional knowledge are both important in turning them into marketable products.

It is now widely accepted that the contributions of tribal and rural women and men to genetic resources conservation and enhancement ought to be recognised and rewarded. This concept of equity in benefit sharing was christened "Farmers' Rights" in the forum of the Food and Agriculture Organisation of the United Nations (FAO) over 12 years ago. With the coming into force of the Convention on Biological Diversity in 1993, the principles of equity and ethics in benefit sharing have acquired an international legal status.

The objectives of the Convention on Biological Diversity include three major goals: conservation of biodiversity; sustainable use of biodiversity; and equitable sharing of benefits arising out of such use. While progress is being made with reference to the first two of the above three goals, initiatives relating to equitable sharing of benefits have been inadequate.

Subsequent to the coming into force of the CBD, the World Trade Agreement and its provisions for Trade Related Intellectual Property Rights (TRIPS) have also come into force. Under the World Trade Agreement, "Members shall provide for the protection of plant varieties either by patents or by an effective *sui generis* system or by any combination thereof". With the strengthening and widening of the Intellectual Property Rights (IPR) regime, instances of attempts in industrialised countries to patent material based on traditional knowledge and genetic strains are growing.

Genetic material grown in countries for centuries and whose medicinal and other useful properties have been known for ages, such as neem and turmeric, have been subjected in recent years to IPR claims in the industrialised countries. Even plant material of well established geographical identity such as basmati rice grown in Pakistan and India, have been subjected to IPR claims. This has led to several calls for a moratorium on IPR claims on genetic resources held in public and on those belonging to other countries. An example of such a moratorium is that imposed on the seeds held in trust in the gene banks at the CGIAR's (Consultative Group on International Agricultural Research) International Agricultural Research Centres such as the International Crop Research Institute for the Semi-arid Tropics (ICRISAT) located at Hyderabad in India and the International Rice Research Institute (IRRI) located at Los Banos in the Philippines.

Intellectual property laws, viewed only as engines of industrial and cultural progress, have recently received attention as tools for achieving the broader goals of conserving biodiversity while promoting sustainable development and the equitable sharing of the resulting benefits. It is therefore necessary to outline how intellectual property rights can be applied to the new technologies, commercial practices, and ethical standards of biodiversity prospecting, and to examine the merits of creating new biodiversity prospecting rights.

The Convention on Biological Diversity calls upon countries to establish such a framework. The specific mix of laws and institutions will vary from country to country, depending on local concerns and legal traditions.

The basic argument in favour of applying property rights to biodiversity conservation goes as follows: if those who control a habitat hold proprietary rights to develop its biological resources, then they have a means for obtaining economic benefits from those resources, and, consequently, an incentive to conserve rather than destroy them.

Intellectual property rights are generally justified on grounds that they can (1) provide incentives to innovators, (2) establish a system that promotes public disclosure of new information, (3) reward people who create commercial or cultural value, (4) satisfy principles of moral rights by allowing creators to control the fate of their creations, and (5) facilitate technology transfer.

A rigorous analysis of intellectual property in a particular habitat, for instance a rain-forest or reef, would require research and analysis of applicable local legislation, executive regulations, and judicial decisions. The cultural context of the law would have to be assessed as well since the rule of law counts much more in some countries than others. Here the more modest goal is to explore, in general

terms, those intellectual property doctrines and strategies appropriate to and consistent with conserving the components of biodiversity in wild habitats.

The Convention provides countries with the opportunity to assert sovereignty over their genetic resources, and ensure that the benefits arising from their utilisation are shared fairly and equitably. Countries must move fast, however, to take advantage of this opportunity by establishing national legislation on access and benefit sharing in relation to biodiversity and, just as importantly, by developing procedures and institutional capacities to implement that legislation.

For example the Philippines Executive Order 247 on regulating access to biological and genetic resources in the Philippines discusses establishing a framework to regulate biodiversity prospecting by using the following mechanisms:

- A system of mandatory research agreements between collectors and the government containing minimum terms concerning provision of information and samples, technology co-operation and benefit sharing;

- An Inter-Agency Committee (IAC) to consider, grant, monitor and enforce compliance with Research Agreements as well as to co-ordinate further institutional, policy and technology development;

- A requirement and minimum process standards for obtaining prior informed consent from local and indigenous communities where collection of material is carried out; and

- Minimum requirements to conform to environmental protection laws and regulations.

Ways Forward

There is an urgent need to harmonise the provisions of TRIPS with the equitable benefit sharing and prior informed consent (PIC) provisions of the CBD. What is urgently needed is a new global trade and transactions order - a "TRIPS Plus" - where "Plus" refers to equity and ethics in IPR claims. Since the same governments are members of both the World Trade Organisation and the CBD, there is a need for co-ordinated action in matters relating to biodiversity. In this context, the recent move of the World Intellectual Property Rights Organisation (WIPO) to consider questions relating to the recognition of traditional knowledge systems and informal innovations is particularly relevant. Traditional and formal

knowledge systems represent a continuum and it will be unethical to recognise only the "tip of the iceberg" in the innovation chain. Synergy between traditional knowledge and modern science is often essential for imparting the dimensions of ecological and social sustainability in technology development and dissemination.

Pending the enactment of suitable legislation to give effect to the provisions of the CBD, we have to think in terms of introducing immediately steps such as codes of conduct for both academic researchers and commercial entrepreneurs and companies, and information and material transfer agreements for the purpose of implementing the PIC and benefit sharing provisions of the CBD. Know-how licenses of the kind introduced in Peru will also be valuable to regulate the flow of information and resources. Knowledge and the resources to which the knowledge relates often go together.

Several significant voluntary initiatives like the Tropical Botanic Garden Research Institute (TBGRI), India model, the University of California model and others have been developed by research institutions, botanic gardens and commercial companies in the areas of PIC and benefit sharing including the development of institutional policies and codes of conduct on access and benefit sharing. Their experience provides valuable lessons for developing transparent and implementable procedures for ensuring equity and ethics in the use of traditional knowledge and genetic resources. Case studies on the experience of the Philippines and the Andean Pact countries in enforcing legal measures for access and benefit sharing also provide important insights of value to other countries currently developing legislation relating to the CBD.

Before commencing any activity on collection, use and value addition, under the purview of the CBD, there is a need for parties to obtain the prior informed consent (PIC) of the people who own the resources. This must be on mutually agreed terms (MATs). Article 15(5) of the CBD clearly states that access to genetic resources shall be subjected to PIC . The next steps to this is to address issues of benefits and their appropriation.

Voluntary Codes of Conduct are often seen as possible solutions in the short-term.

Key features of the Code must include:

- Commitment to follow international, national, and local research policies and codes of conduct;

- Collaboration with local communities on product development and technology transfer;

- Respect for the rights and right to privacy to information of indigenous peoples;
- Promotion of sustainable development and conservation;
- Description of negotiation for patent rights; and
- Benefit Sharing and fair compensation with short, medium, and long-term reciprocity.

However, such codes must be based on the following undertaking that:

- No standard procedure is adequate for all circumstances!
- Flexibility and diversity are important tools for all parties involved.
- A transparent government administrative authority working solely on these issues can only streamline the process.

If the benefits of genetic resources utilisation are to be shared fairly and equitably, Governments will need to design specific mechanisms to ensure that those benefits actually reach intended beneficiaries, be they local communities, national research institutions, or government agencies and NGOs. The nature of the intended beneficiaries will influence the appropriateness of different kinds of benefits. Training and technological empowerment will enable them to improve their economic condition, while sticking to their conservation ethics. The kinds of policy and institutional instruments being developed in Brazil and India for the purpose of regulating access and promoting benefit sharing are examples of such initiatives.

One simple and quite feasible change that would bring IPRs more in line with the benefit sharing provisions of the Convention would be for governments, primarily in developed countries, to amend their IPR systems to include a requirement that patent applications disclose information relating to the country of origin or sources of the genetic material used in the research leading to the innovation for which they are seeking IPR protection. The confidentiality of such information could be protected and their use restricted solely for dealing with issues related to benefit sharing.

The CBD seeks to initiate a process that will lead to a transition from an exploitative and inequitable relationship between providers of biodiversity and its users, to one of partnership between them based on the principles of equity and

ethics. By recognising the right of sovereign states to regulate access to genetic resources and associated knowledge according to national conservation and developmental priorities, and by espousing the principles that should guide national access and benefit sharing regulations, the CBD sets the stage for states to ensure that genetic resources benefit, rather than work against people and biodiversity in perpetuity.