

ACKNOWLEDGMENTS

Trade liberalization, regionalization and integration of markets are major trends in the international economy. The last decade has witnessed a noteworthy upsurge in the number of regional trade agreements and mega-integration initiatives. This process coincides with the increasing scope and strengthening of the regulated international trade regime by the incorporation of new issues and the adoption of progressively more stringent standards. Intellectual property rights and environmental issues are among the new themes that concentrate attention and controversy. In the interface of both lie the topics of access to genetic resources and the protection of traditional knowledge.

Both genetic resources and traditional knowledge were, until recently, scarcely mentioned in international treaties and agreements and have been remarkably absent in the negotiations and agreements concerning regional integration.

The scopes of multilateral obligations coupled with processes of regional integration involve a sheer volume of issues extremely diverse and of great technical complexity. These difficulties are exacerbated by the inclusion of the new topics on access to genetic resources and protection of traditional knowledge, putting developing countries in a very awkward situation. Their participation in the international and regional systems together with the need to fulfil the obligations inherent to this participation and the need to cover new, complex issues is almost beyond their human and economic means.

This report, prepared at the request of the Caribbean Regional Negotiating Machinery –CRNM– in the context Regional Technical Cooperation Project of the CRNM–Inter American Development Bank attempts to provide some elements to be considered in the negotiation processes. I wish to thank all those who have contributed to it with their information, comments, suggestions, or logistic support. Particularly I wish to thank Malcolm Spence and Beverley Pereira for their comments on a preliminary version as well as all the participants at the Consultation on Technical Studies commissioned by the Caribbean Regional Negotiating Machinery/IDB project. I wish also to thank Martha Parra Friedli of the WIPO. I am grateful for the administrative and logistic assistance provided by Michelle Roberts and Ronda Smith.

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Obviously the views expressed in this report are those of the author.

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CARICOM Interests in Relation to Biodiversity and Intellectual Property Rights in the Context of Multilateral Negotiations with Special Emphasis on the FTAA

Executive Summary

This report concerns the issues of access to genetic resources, protection of traditional knowledge and intellectual property rights in relation to CARICOM countries negotiations in the FTAA process and in the multilateral trade negotiations under the aegis of the WTO, particularly the negotiations of the Trade Related Aspects of Intellectual Property Rights (TRIPS) Agreement. The report involves issues that until now have been scarcely addressed by CARICOM countries.

The high economic stakes of genetic resources made the access to them and their appropriation one of the most controversial and thorny issues in international relations. Yet genetic resources and traditional knowledge were, until recently, scarcely mentioned in international treaties and agreements and have been remarkably absent in the negotiations and agreements concerning regional integration. Traditional knowledge and genetic material were seen as free or public goods. There were no international laws and in most countries, no national laws regulating access to genetic resources.

Biotechnology and the growing capacity to identify and incorporate exotic genetic material into commercial products have forced the pace of change in bio-prospecting, agriculture, industry and IP regimes. Environmentalists, and indirectly the Convention on Biological Diversity (CBD), introduced the notion of intellectual property rights (IPRs) as a strategic element for the conservation and sustainable use of biodiversity and acknowledged countries' sovereign rights over their genetic resources.

The CBD negotiations took place simultaneously with the negotiations for new international disciplines governing IPRs that materialized in the TRIPS' Agreement adopted by the Uruguay Round of Trade Negotiations. An objective of the agreement is to create international standards for minimum IPR protection. The TRIPS Agreement is today at the core of the international regime on IPRs. Its ratification implies dramatic changes for the national laws of most developing countries. Of particular relevance for this report is that the TRIPS Agreement requires signatory states to adopt an IP system for plant varieties and micro-organisms. It imposes a form of legal protection on plant varieties either by the adoption of a patent system or some sui-generis form of IP. In its turn the CBD provides a framework for the access to genetic resources and for fair and equitable benefit sharing of the benefits that derive from their use.

Multilateral Environmental Agreements (MEA) including the CBD and other agreements dealing with genetic resources such as the FAO-International Undertaking on Plant Genetic Resources, are not generally designed with GATT/WTO or regional economic integration obligations in mind, nor were the latter designed bearing in mind environmental and genetic resources concern.

A similar situation exists for traditional knowledge. International legal instruments related to traditional knowledge have evolved following a complete separate path from those that guided international agreements on biodiversity and IPRs, so that they do not address issues related to trade liberalization and regional integration. In their turn regional integration schemes and multilateral trade negotiations and agreement rarely mention traditional knowledge issues.

Any concern and policy for the access to genetic material, and the protection of traditional knowledge and their relation with IPRs, must be determined within the context of national needs. However they must also survive within a regional and global political and economic framework defined by the international trade system and different multilateral agreements, treaties and codes of conduct.

Most of the integration processes are pursued as an economically enhanced free trade concept, focusing mainly on the liberalization of: trade in goods and services, movements of capital and labour; as well as the harmonization of regulatory regimes. The core of the diplomatic agenda of regional agreements is the creation of a wide, liberal trade and investment regime. Free trade diplomacy has taken little notice of other dimensions such as biodiversity or genetic material.

Given the simultaneous trends towards increasing trade liberalization and regionalization, growing concern and pressure over the access to genetic resources and the prominent role of IPRs both in the context of trade regimes and for the access to genetic materials, CARICOM countries will face heavy demands on their trade and IPRs systems. In order to face these demands it is necessary to strength the negotiating capacity in the various forums.

The institutional framework under which these interactions occur, in terms of formal organizations, laws and policies, and informal norms and practices is the crucial factor in the outcome. In this perspective it seems that CARICOM should aim to develop broad common policy framework, for the management of genetic resources and traditional knowledge, through processes of regional discussions and consensus building. The key issue will be whether biodiversity issues, particularly the access to genetic material, and traditional knowledge should be incorporated into the process of regionalization and trade liberalization or continue to be treated as a separate issue to the FTAA's negotiations track. If the first option is choose then the question of how should be considered.

The CBD recognize sovereign rights of States over genetic resources. Under this principle genetic resources automatically fall under the jurisdiction and control of States subject to their international obligations. Although sovereignty gives control and jurisdiction to the state it does not define the property of the resources. It concerns the States to define what type of property - public, private, public goods- in relation to genetic resources or to keep them outside the scope of property rights.

Throughout CARICOM there are no mature examples of rational and systematic organization of the rules embodying distinct principles of application to environmental, natural resources, including genetic resources, and traditional knowledge matters. Most CARICOM legislation deals with individual resources in isolation being the most frequent: forest, water, soil, beaches and coastal areas. Legislation concerning genetic resources and traditional technology is almost non-existent or it has not yet found its proper place amidst the established areas of the laws with principles of their own. No country as yet established a comprehensive legislation to govern the access to genetic resources.

The mere ratification of international treaties, such as the CBD and TRIPs, is insufficient to implement their various provisions: national laws, regulations and administrative procedures are required for their practical execution. To exert sovereign rights over genetic resources requires the definition of a system of property rights. Similarly, to put into practice the access and benefit sharing provisions of the CBD also need to define and enact a legal and institutional framework.

To design and to adopt a comprehensive legislation is a lengthy and costly process that can easily take many years. Few countries decided to move fast by adopting a rather sketchy and relatively flexible legislation, while others have adapted some existing law, mainly related to natural resources, to include in them provisions concerning the access to genetic material such as: prior informed consent (PIC), benefit sharing, protection of traditional knowledge and material transfer agreements. This approach, allows the use of already in place administrative and institutional infrastructure, is likely to be less costly than the elaboration of a comprehensive legislation and could be relatively efficient in the short term. Yet the most simple and most frequent solution has been the acceptance of individual contracts for bio-prospecting and access to genetic resources between a notional institution, or the government and an external firm, research institution, university, or a bio-prospecting company. CARICOM countries may wish to analyse some of these alternatives.

So a first task is to decide how national and regional objectives concerning genetic resources would be best achieved in CARICOM: through a global common regime for the overall endowment and all types of genetic resources, or whether differentiated regimes would be more appropriate depending on the type of genetic resource affected and the economic, social and political environment in which access and use should be determined. A regional common regime could provide the general framework, principles and rules for the access to genetic resources leaving particular implementation to each country. This approach has the advantage to apply general consistent principles and standards to all biodiversity. Yet this advantage is confronted with the inconvenience of the unavoidable generality of provisions. The broader and more general the provisions are the less adequate they would be for adequate guidance to States and private parties dealing with genetic resources.

CARICOM countries should identify their interests in relation to access to genetic resources and traditional knowledge; to include them into their broader negotiation agenda and to pursue the objectives by formulating concrete, technically sound proposals.

Considerations about access to genetic resources have been normally absent from the negotiations of regional agreements. The negotiation process of the FTAA is not an exception: it does not have any structure or particular mechanism to discuss this matter. Access to genetic resources and traditional knowledge are not explicit subjects of the negotiation processes of the WTO neither of the FTAA. Therefore to introduce them into the negotiations require either to create an opening in both negotiation processes or to introduce the topic through some of those subject matters explicitly recognized for negotiations or for which specific forums, working groups and procedures have been established. Obviously a strategy can be adopted combining both approaches.

Some aspects can be dealt with in the Working Group on Intellectual Property Rights, yet as noted by this study, IPRs deals only with a particular dimension of the problem. Many crucial aspects concerning the access to genetic resources and the protection of traditional knowledge are likely to be ignored by working group.

There is no specific group in relation to environmental issue in the current negotiations of the FTAA though there is a group on Agriculture, where some dimensions of genetic resources can be examined and negotiated. However, any negotiations in agriculture are likely to refer to genetic material only in relation to domesticated plants and animals. A possible approach can be the introduction of the environment as a cross cutting issue throughout the negotiations and using the environment to bring in the issue of access to genetic resources. Associated with this it can be

considered the creation of an ad-hoc or special committee to deal with environmental related issues in relation to each of the existing negotiations group. It could be a sort of “mainstreaming” process of environmental considerations, including access to genetic resources in different FTAA working and negotiating Groups.

CARICOM countries may consider including in the negotiation process the broader subject of sustainable development and trade-environmental related matters so to give an appropriate framework to the negotiations concerning access to genetic resources and traditional knowledge. From this perspective CARICOM countries may wish to consider pushing for an agreement along the lines of the NAFTA’s Environmental Side Agreement and the creation of a Commission on Environmental Issues or Development Related Environmental Matters. This approach would provide an institutional and legal framework for the negotiation on access to genetic resources.

CARICOM can draw the elements for the negotiations in the FTAA process from the existing international and regional agreements such as the FAO International Undertaking and Code of Conduct, the TRIPS agreement, the CBD as well as from existing regional agreements and national experiences that have dealt with the subject In relation to traditional knowledge in addition to the ILO Convention, the UNESCO-WIPO model provisions and the UNESCO Recommendations on the Safeguarding of Traditional Culture and Folklore could be examined among others. FTAA negotiations should be WTO consistent. Therefore the elements of the negotiations in both spheres should be mutually reinforcing. Since the issue of access to genetic resources moves around CBD and TRIPS it has been considered useful to revise the current situation of the TRIPS negotiations process and to assess the relevance of the issues been discussed from the perspective of the FTAA process. Is true that on the FTAA process exists a negotiation group on IPRs yet, until now, the issues examined by this study have not been dealt with.

In the negotiation process it must be remember that the broad objectives of the TRIPS Agreement are “... *the promotion of technological innovation, transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in manner conducive to social and economic welfare, and to a balance of rights and obligations*”. Yet these objectives have not been incorporated into specific provisions of the Agreement. It should be also remembered that, the question of access to genetic resources is linked, by the CBD, to the issue of access and transfer of technology: “... *both access to and transfer of technology among Contracting Parties are essential elements for the attainment of the objectives of the Convention...*”

Behind the negotiations on CBD and TRIPS there is the strategic role of technology, particularly new high technology, for its wide applicability in different sectors and activities, its relevance for competitiveness and international trade, its critical significance for the overcoming of poverty and achieving sustainable development. The debate and controversy surrounding IPRs are but the reflection of the broad and extremely complex issue of the conflict of interests between technological leaders and technological followers, between technological innovators and technological users, between well-established IPRs holders and new potential innovators.

IPRs systems are generally supposed to balance the interests of innovators with those of society as a whole and with those of the technological consumers in particular. The evolution of the last years has reinforced the proprietary character of technology and weakened the function of diffusion and easing access to the new knowledge. Both the CBD and TRIPS merely provide for the protection of the IPRs holders, without any significant balancing factors to protect the

interests of the users of science-based technology. For developing countries, the rapid diffusion of technology is crucial to their economic performance and growth as well as for sustainable development, thus it is not surprising their concern by the increasing proprietary character of technology and its likely consequences on its diffusion.

The above is the real issue behind the debate on IPRs and as such it should be faced in any negotiation processes being the WTO/TRIPS or any other international negotiations including the negotiation of mega-regional integration processes such as the FTAA. To look at the IPRs only as a system that promotes creativity and innovation is, specially for developing countries, largely an euphemism for the real value of IPR is its use as a market powerful tool in international trade, as a passport to markets, as a means to increase competitiveness, an instrument to block the entry of competitors or new rivals but also as a powerful instrument for the alleviation of poverty, to foster economic growth and to promote sustainable development.

The report examines separately several elements that could be included in the FTAA and the TRIPS negotiations. Some of the elements analysed that could be considered in both negotiations should be elaborated along the following basic principles and issues:

- IPRs should be considered in their dual role: protection of the holders of rights and mechanism for the diffusion and dissemination of knowledge. Any negotiation dealing with IPRs should attempt to maintain an adequate balance between the innovators and the users of technology, between technological leaders and technological followers.
- While negotiating IPRs regime in the FTAA it is important to keep in mind not only TRIPS but also other international agreements that directly and indirectly refers to IPRs among them. It is worth to remember the MEAs such as the Framework Convention on Climatic Change, the Montreal Protocol and, particularly relevant for this study, the CBD, so that principles, provisions, concepts and objectives are harmonized and conflicts minimized.
- The concept of sovereign rights should be embodied since the beginning in the FTAA process
- Recognition and protection of the rights of the holders of traditional knowledge related to genetic resources
- Recognition of the rights of the holders of traditional knowledge to sharing of the benefits arising out of the use of genetic material and traditional knowledge
- Incorporation of the PIC concept in the WTO-TRIPS negotiations as well as in the FTAA process so that domestic laws will include it in their IPR regimes.
- To preserve the right of any Member country to exclude from patenting plants and animals and to develop a sui generis regime accordingly with the characteristics and needs of the country and to ensure that the flexibility to develop it will be maintained.
- Naturally occurring substances, including genes shall be kept outside the scope of IPRs protection.
- When the subject matter of a patent application is derived from a genetic material original from other country the consent of the country of origin must be obtained before granting the patent, and whenever a patent could be granted then the benefits derived from the patent should be shared with the country of origin of genetic material.
- Provisions should be included to impede the use of IPRs for anti-competitive practices. In this context there should be provisions authorising countries to use compulsory licensing.

- To include realistic transitional periods for the implementation of any agreement on IPRs.
- To negotiate the inclusion mechanisms of cooperation to facilitate the implementation and enforcement of the regional agreement without jeopardizing the access of CARICOM countries to technology. Cooperation will be necessary to develop IPRs mechanisms to domestic circumstances and level of development as well as for the strengthening or creation of adequate institutional infrastructure.
- To examine the relevance and eventually to negotiate the application of special and differential treatment in relation to IPRs, access to genetic resources, access to and transfer of technology.

Regional economic integration requires nations to cooperate in creating supranational policy frameworks for the governance of biodiversity and the access to genetic resources, as well as for the access to, and protection of, traditional knowledge. CARICOM and the ongoing negotiations on FTAA offer opportunities for such cooperation.