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Jean-Frédéric Morin
and Mathilde Gauquelin

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About the Authors

Jean-Frédéric Morin is a senior fellow with CIGI's International Law Research Program (ILRP). He is also associate professor at Laval University, where he holds the Canada Research Chair in International Political Economy.

At CIGI, Jean-Frédéric is contributing to the ILRP's research themes on international intellectual property, and environmental and economic law by building a large database, sponsored by the Canadian Foundation for Innovation, CIGI and Laval University. This database will document institutional interactions among trade, investment and environmental institutions. It will enable Jean-Frédéric and other CIGI researchers to study the emergence, variation, diffusion, implementation and effectiveness of hundreds of different provisions found in thousands of multilateral, regional and bilateral agreements.

Before being invited to hold the Canada Research Chair in International Political Economy, Jean-Frédéric was a professor at Université libre de Bruxelles from 2008 to 2014, and a post-doctoral researcher at McGill University from 2006 to 2008.

Jean-Frédéric has an interdisciplinary training in law and political science, and has taught in law programs as well as in political science programs. He is currently conducting research in the fields of trade policy, investment law, global environmental politics and international intellectual property law, with a particular interest in studying how transnational networks shape the interactions of international institutions.

Mathilde Gauquelin holds a master's degree in international studies from Laval University. Through her studies, she has developed a specialization in international economic law, with a particular interest in the integration of non-trade concerns in trade agreements, as well as dispute settlement within the World Trade Organization system. She has been a graduate research assistant in international economic law at Laval University and a junior political officer at Global Affairs Canada. She currently works at UNESCO's Section for the Diversity of Cultural Expressions in Paris, France.

About the International Law Research Program

The International Law Research Program (ILRP) at CIGI is an integrated multidisciplinary research program that provides leading academics, government and private sector legal experts, as well as students from Canada and abroad, with the opportunity to contribute to advancements in international law.

The ILRP strives to be the world's leading international law research program, with recognized impact on how international law is brought to bear on significant global issues. The program's mission is to connect knowledge, policy and practice to build the international law framework — the globalized rule of law — to support international governance of the future. Its founding belief is that better international governance, including a strengthened international law framework, can improve the lives of people everywhere, increase prosperity, ensure global sustainability, address inequality, safeguard human rights and promote a more secure world.

The ILRP focuses on the areas of international law that are most important to global innovation, prosperity and sustainability: international economic law, international intellectual property law and international environmental law. In its research, the ILRP is attentive to the emerging interactions between international and transnational law, indigenous law and constitutional law.

Executive Summary

A growing number of trade agreements include provisions related to access to genetic resources and the sharing of the benefits that arise out of their utilization. This paper maps the distribution and the diversity of these provisions. It identifies a great variety of provisions regarding sovereignty over genetic resources, the protection of traditional knowledge, prior informed consent, the disclosure of origin in patent applications and conditions for bioprospecting activities. It also finds that some recent trade agreements provide specific measures designed to facilitate the implementation of access and benefit-sharing (ABS) provisions, including measures related to technical assistance, transparency and dispute settlements. Thus, it appears that trade negotiations can become vectors for the implementation of ABS obligations stemming from the Convention on Biological Diversity (CBD) and the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization. The integration of ABS commitments into trade agreements, however, varies greatly, depending on the countries involved. While Latin American countries have played a pioneering role, Canada and the United States still lag behind. The most exemplary ABS standards are not yet widely used, perhaps because they remain little known. These provisions deserve greater attention and should be integrated more widely into international trade agreements.

Introduction

A growing number of trade deals provide for environmental protection measures. Only 20 years ago, when the protection of natural resources was mentioned in trade agreements, it was merely as an exception to trade commitments. While the preambles to these agreements sometimes referred to sustainable development, the legal obligations they created were primarily aimed at trade liberalization. Yet today, some trade agreements set surprisingly ambitious goals in the field of environmental protection.[1] A number of recent agreements even contain specific provisions governing access to genetic resources and the sharing of benefits derived from their use.[2] This development is rather counterintuitive as the market-based logic at the heart of trade agreements is often contrasted with the community-based logic of benefit sharing.

This paper on ABS provisions in trade agreements relies on the Trade and Environment Database (TREND),[3] a novel database that has a remarkable breadth and depth. It covers no less than 684 trade agreements signed between 1947 and 2015[4] and stands out for its fine-grained coding of 310 different environmental norms, including eight that are directly related to genetic resources.[5] To ensure the reliability of the coding, each trade agreement was independently analyzed by two encoders, and discrepancies were arbitrated by a third person.

Unsurprisingly, TREND confirmed that the vast majority of trade agreements do not contain any provisions concerning genetic resources. However, 50 agreements do include at least one provision on the matter (see Figure 1). Parties to these agreements attempt to use trade negotiations as levers with respect to obligations contained in the CBD and the Nagoya Protocol, such as the protection of traditional knowledge, the implementation of prior informed consent and the transfer of monetary and technological benefits to genetic resources providers.[6] Often little known,

1 Sikina Jinnah & Elisa Morgera, "Environmental Provisions in American and EU Free Trade Agreements: A Preliminary Comparison and Research Agenda" (2013) 22 RECIEL 324.

2 See Elisa Morgera, Elsa Tsioumani & Matthias Buck, *Unravelling the Nagoya Protocol: A Commentary on the Protocol on Access and Benefit-sharing to the Convention on Biological Diversity* (Leiden: Martinus Nijhoff, 2014).

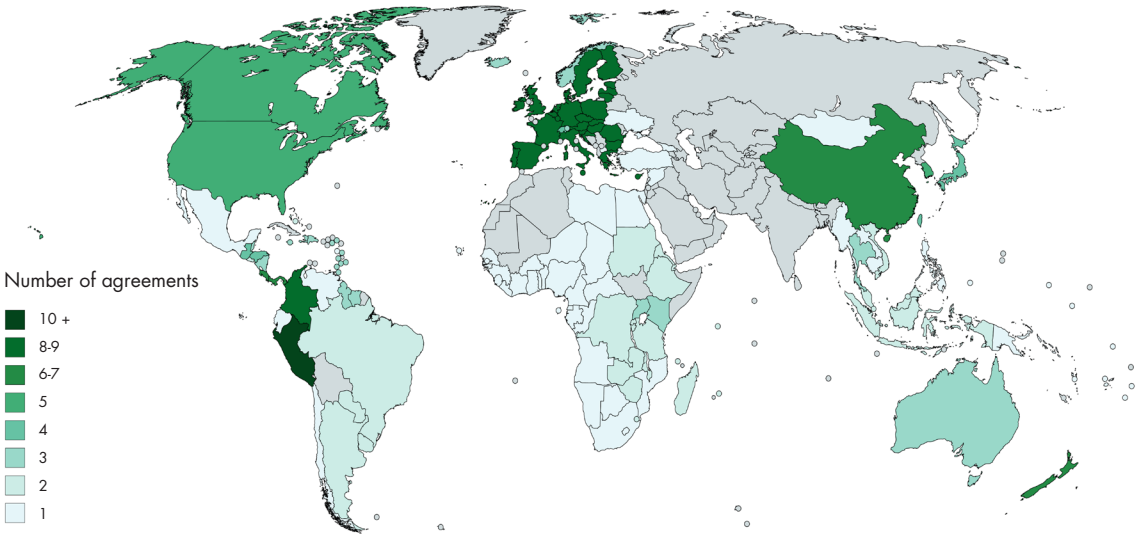
3 This dataset was built thanks to the support of CIGI, the Social Sciences and Humanities Research Council, Laval University's Centre for Interdisciplinary Studies in International Trade and Investment and the Canadian Foundation for Innovation.

4 The authors borrowed this collection of trade agreements from the Design of Trade Agreements database and analyzed them based on their own grid that is specifically focused on environmental provisions. Andreas Dür, Leonardo Baccini & Manfred Elsig, "The Design of International Trade Agreements: Introducing a New Dataset" (2014) 9:3 Rev Intl Org 353.

5 The full codebook is available online: <www.trend.ulaval.ca>.

6 This search for policy coherence on genetic resources is a growing trend. See Jean-Frédéric Morin and Amandine Orsini, "Policy Coherence and Regime Complexes: The Case of Genetic Resources" (2014) 40:2 Rev Intl Stud 303.

Figure 1: Number of Agreements with ABS-related Provisions per Country



Source: Authors.

these trade agreements and their provisions relating to genetic resources deserve greater attention.

The Regulation of Genetic Resources and Traditional Knowledge

Over 28 trade agreements call upon their parties to implement the 1992 CBD, either in its entirety or relative to specific articles. Most of them incorporate certain parts of articles 3 and 15(1) of the convention by reaffirming the sovereign rights of states over their genetic resources, including the authority to determine conditions for their access. Several trade agreements also include an explicit reference to the convention's provisions regarding genetic resources and the sharing of benefits derived from their use (for example, the Canada-Colombia Free Trade Agreement,[7] 2008). Six agreements even go as far as to affirm the primacy of the convention in case of inconsistency with the trade agreement's provisions. The 2011 free trade agreement between Panama and Peru,[8] for example, in article 9.2(2), provides that the obligations of its intellectual property chapter are without prejudice to the provisions of the CBD.

Although references to the CBD are frequent, only two agreements refer to the Nagoya Protocol. In their 2013 trade agreement, Colombia and South Korea "acknowledge the adoption of the Nagoya Protocol...and agree to further discuss relevant issues on genetic resources subject to future developments of multilateral agreements or their respective legislations."[9] South Korea and China went further in their 2014 trade agreement by affirming their commitment to respect the requirements of the Nagoya Protocol and "especially those on prior informed consent and fair and equitable sharing of benefits."[10]

However, one should not hastily conclude from the fact that trade agreements rarely refer to

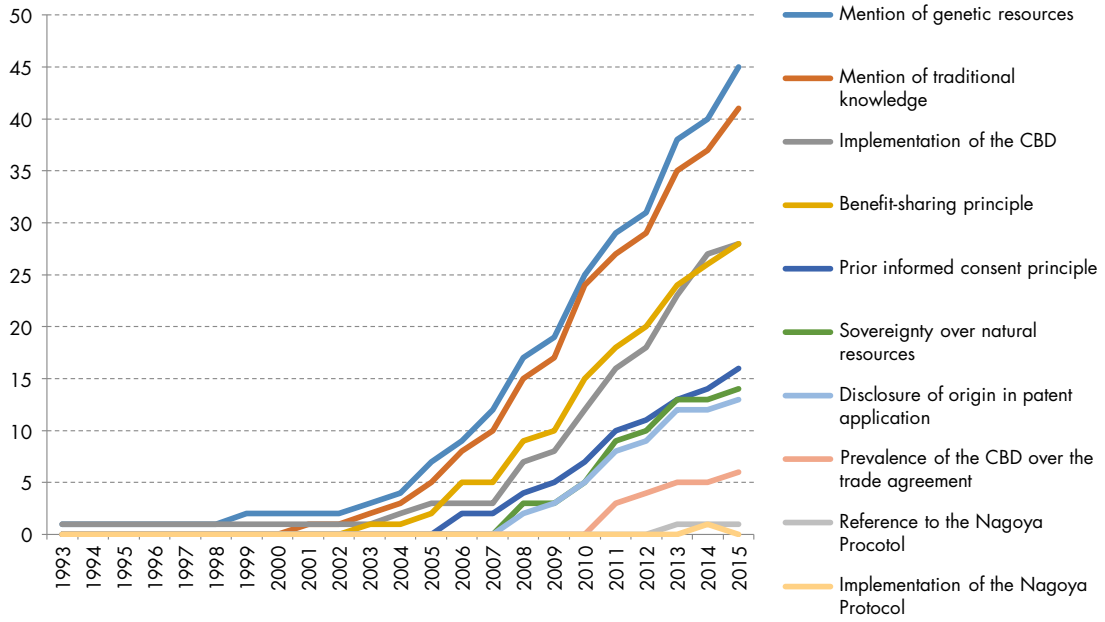
7 *Canada-Colombia Free Trade Agreement*, 21 November 2008 (entered into force 15 August 2011), online: Global Affairs Canada <www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/colombia-colombie/can-colombia-toc-tdm-can-colombie.aspx?lang=eng>.

8 *Free Trade Agreement Between Panama and Peru*, 25 May 2011 (entered into force 1 May 2012).

9 *Free Trade Agreement between the Republic of Colombia and the Republic of Korea*, 12 February 2013 (entered into force 14 July 2016), art 16.5(6), online: Foreign Trade Information System <www.sice.oas.org/Trade/COL_KOR_FTA_e/Text19.11.2013_e.asp#a166>.

10 *Free Trade Agreement between the Government of the People's Republic of China and the Government of the Republic of Korea*, 2 June 2015 (entered into force 11 December 2015), art 15.17(2), online: <fta.mofcom.gov.cn/korea/annex/xdzw_en.pdf>.

Figure 2 : Cumulative Number of Agreements per Type of ABS-related Provisions



Source: Authors.

the Nagoya Protocol that trade negotiators are not interested in the governance of genetic resources. The scarce number of references to the Nagoya Protocol in the TREND database is likely a result of the fact that the protocol only entered into force in October 2014. It is likely that a growing number of agreements to be concluded in the future will commit their parties to the implementation of the Nagoya Protocol, just as several trade agreements already provide for the implementation of other multilateral environmental agreements, including the CBD.

Without explicitly referring to the Nagoya Protocol, several trade agreements already incorporate some of its obligations (see Figure 2). Three US agreements, for example, emphasize the importance of prior informed consent and benefit sharing (for example, the United States-Colombia Trade Promotion Agreement,[11] 2006). In its trade agreement with the United States, Costa Rica has also managed to include a reservation to its Schedule of Specific Commitments, specifying that foreign companies supplying bioprospecting services with regard to biodiversity on Costa Rican territory must designate a legal representative that resides in Costa Rica. The fact that such provisions have been included in a US agreement is particularly significant, considering that the United States has yet to ratify the CBD.

Several trade agreements also incorporate provisions relating to traditional knowledge that are analogous to those created by the CBD and the Nagoya Protocol. As such, a total of 41 agreements mention traditional knowledge, most often enjoining states to put into place domestic measures to ensure its protection. For instance, the agreement between Nicaragua and Taiwan calls for a protection of "the collective intellectual property rights and the traditional knowledge of indigenous peoples and local and ethnic communities in which any of their creations...are used commercially."[12] In addition, 17 agreements ensure that access to this knowledge is subject to the prior informed consent of indigenous communities (for example, Colombia-Costa Rica, 2013), and 29 agreements encourage the sharing of benefits derived from

11 *United States-Colombia Trade Promotion Agreement*, 22 November 2006 (entered into force 15 May 2012), online: United States Trade Representative <https://ustr.gov/trade-agreements/free-trade-agreements/colombia-fta/final-text>.

12 *Free Trade Agreement Between the Republic of China (Taiwan) and Nicaragua*, 16 June 2006 (entered into force 1 January 2008) art 17.17(1), online: Foreign Trade Information System <www.sice.oas.org/Trade/nic_twn/nic_twn_e/TWN_NIC_full_text_06_16_09.pdf>.

the use of this knowledge (for example, Caribbean Community-European Community, 2008).

Certain agreements even tackle the tricky interplay between intellectual property protection and benefit sharing. By insisting on the importance of promoting quality patent examination with regard to genetic resources in order to ensure the conditions of patentability are satisfied, as well as providing for information-sharing mechanisms on that matter, these agreements implicitly recognize the risks of misappropriation (for example, United States-Peru, 2006). Thirteen trade deals go even further than the Nagoya Protocol by explicitly authorizing the parties to require disclosure of origin as a condition to genetic resources' patentability, so as to evaluate whether the resources were legally obtained (for example, Colombia-European Free Trade Association (EFTA), 2008). Similarly, certain agreements call on their parties to put into place a specific intellectual property system to protect traditional knowledge emanating from indigenous communities (for example, Nicaragua-Taiwan, 2006). Others anticipated the repercussions of the Nagoya Protocol by requesting parties to conduct negotiations toward the creation of an international system for the legal protection of traditional knowledge (for example, Caribbean Community-European Community, 2008).

The Implementation of Legal Obligations Relating to Genetic Resources

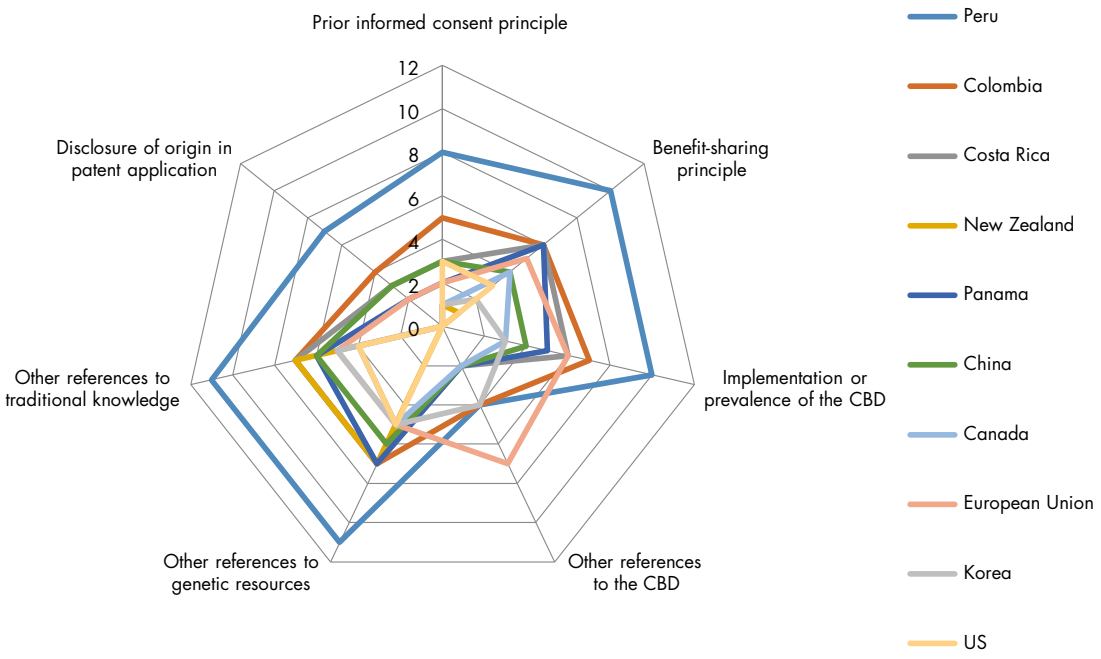
Some trade agreements not only include obligations relating to genetic resources, but also provide for specific measures designed to facilitate their implementation. Seven agreements require their signatories to take legal and administrative action so that the conditions of access to genetic resources are correctly observed (for example, Colombia-Costa Rica, 2013). They also ask that parties cooperate and exchange information to identify and trace the sources of illegal access to genetic resources and traditional knowledge (for example, Costa Rica-Peru, 2011). This cooperation can even go as far as the exchange of staff between the national offices responsible for access to genetic resources (for example, Colombia-Panama, 2013). Some agreements also include provisions regarding capacity building, in order to work toward the establishment of surveillance programs and genetic resource monitoring in developing countries (for example, Canada-Honduras, 2013).

Moreover, certain trade agreements determine that the general dispute settlement mechanism of the agreement also applies to provisions on genetic resources (for example, Colombia-EFTA, 2008).[13] This marks a significant expansion of the means available to states to ensure the implementation of international obligations relating to genetic resources. Indeed, where no agreement can be reached through negotiation, good offices or mediation, and where the parties have not accepted either arbitration or the submission of the dispute to the International Court of Justice as a common compulsory means of dispute settlement, the CBD simply provides for a conciliation commission as an agreement-specific dispute settlement mechanism. The Intergovernmental Committee for the Nagoya Protocol has gone a step further, by establishing a compliance committee tasked with receiving submissions relating to issues of compliance and non-compliance with the provisions of the protocol. The inclusion of ABS provisions in trade agreements opens up even more options. An increasing number of countries can now use their trade agreements to unilaterally request the establishment of an arbitration panel to settle a matter relating to genetic resources (for example, Colombia-Peru-European Commission, 2012). In some cases, should a party refuse to implement an obligation from the Nagoya Protocol that happened to be incorporated in a trade agreement, its trade partner could be authorized to suspend some of its trade commitments in response to the violation (for example, EFTA-Peru, 2010). The applicability of this trade dispute settlement mechanism to environmental matters might represent a step forward in the effective implementation of international obligations relating to genetic resources.[14]

13 Sikina Jinnah, "Strategic Linkages: The Evolving Role of Trade Agreements in Global Environmental Governance" (2011) 22:2 J Env & Dev 191.

14 This is not free of problems: see S Jinnah & J Kennedy, "A New Era of Trade-Environment Politics: Learning from US Leadership and its Consequence Abroad" (2011) 12:1 Whitehead J Diplomacy & Intl Rel 95.

Figure 3: Occurrences of ABS-related Provisions per Country



Source: Authors.

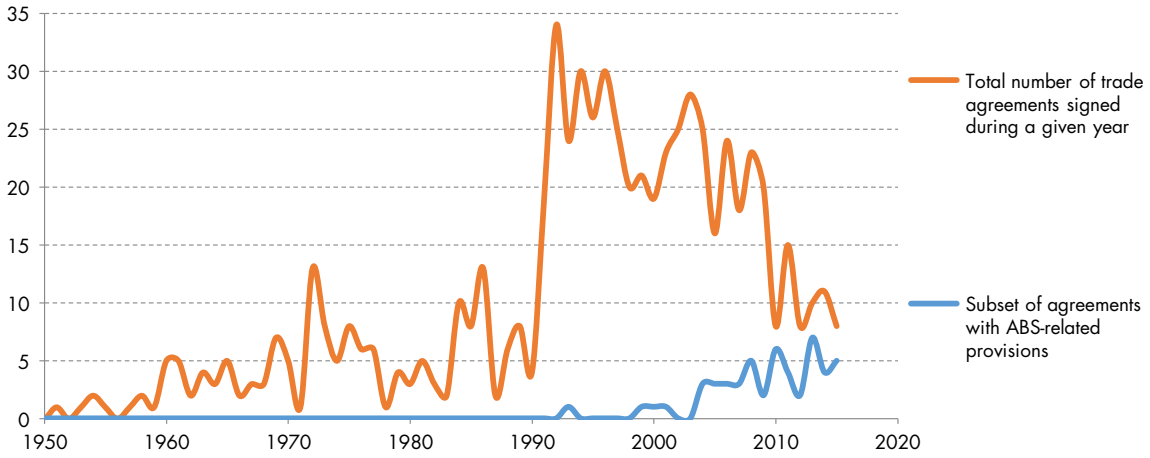
Recent Trends in Trade Negotiations

The distribution of the trade deals incorporating obligations on genetic resources reveals some interesting patterns. Out of a total of 50 agreements, over half were signed by at least one country located in Central or South America. In fact, the very first obligations relating to genetic resources appeared in trade agreements in the early 2000s and systematically involved Latin American states. Thereafter, the introduction of new binding obligations relating to genetic resources, such as prior informed consent or the disclosure of origin in patent applications, mostly took place through trade agreements involving either Colombia or Peru (see Figure 3). This trend is still clear today in terms of the number of such agreements signed by these two states. Of the six states that have signed the highest number of trade agreements mentioning genetic resources, four are located in that same region: Peru (11), Colombia (8), Costa Rica (8) and Panama (7). The other two parties are the European Union (8) and New Zealand (7). These trends echo Latin America's role as a leader during the negotiations of the CBD and the Nagoya Protocol, and more recently at the World Intellectual Property Organization's Intergovernmental Committee on Genetic Resources, Traditional Knowledge and Folklore.

While some Asian countries, such as China and Korea, are parties to a relatively high number of agreements that mention the protection of genetic resources, the incorporation of these legal obligations in trade agreements remains dependent on the participation of Latin American countries. As such, the agreements between Asia and Latin America tend to involve complex, specific and detailed obligations, whereas other Asian agreements often involve a single, more general provision enjoining parties to protect genetic resources.[15] This tendency has nevertheless started to fade in recent years, as some agreements between Asian countries include detailed obligations (for example, China-Korea, 2014). This finding might suggest that some policy diffusion occurred from Latin America to Asia, where

15 Similarly, New Zealand had concluded agreements involving ABS-related provisions as early as 2005 (for example, New Zealand-Thailand, 2005), but these agreements were mostly limited to general provisions regarding the parties' right to protect traditional knowledge and genetic resources, as opposed to more specific norms.

Figure 4: Agreements Including ABS-related Provisions out of Total Agreements Signed



Source: Authors.

the norm of including ABS-related provisions in trade agreements is being internalized.

As for Canada and the United States, both countries have yet to sign an agreement mentioning genetic resources with a state located outside Central or South America. The European Union has only recently started incorporating obligations relating to genetic resources into agreements with countries outside Latin America (for example, European Union-Ukraine, 2014). Looking toward the future, it will be interesting to see whether this European trend can be confirmed and whether it will incentivize other countries in the Organization for Economic Co-operation and Development to include similar obligations in their new trade agreements (see Figure 4).

The Trans-Pacific Partnership (TPP),[16] which was signed on February 4, 2016, should also be an interesting indicator of future tendencies, as it spans multiple regions of the world (North and South America, Asia and Oceania) and includes fairly comprehensive provisions on traditional knowledge and genetic resources. While the TPP contains less restrictive ABS obligations than some previous trade agreements,[17] it does recognize that "some Parties require, through national measures, prior informed consent" and also calls upon the parties to share the benefits arising from the utilization of genetic resources (article 20.13(4)).[18] Several side letters exchanged between signatory states also acknowledge that access to genetic resources and benefit sharing "can be adequately addressed through contracts or other instruments that reflect mutually agreed terms between users and resource providers."[19]

This appears to be a significant development, as out of the 12 TPP signatories, only Peru and, to a lesser extent, New Zealand have been known to conclude agreements with particularly restrictive ABS-related provisions on a consistent basis. As such, for the other states, including the United States and Canada, the TPP represents a step up from their usual commitments. If ratified, the TPP could thus mark the beginning of a new stage of trade negotiations in which more detailed ABS-related provisions are included in trade deals, paralleling the EU tendency mentioned above. The Comprehensive Economic and Trade Agreement[20] between Canada and

16 *Trans-Pacific Partnership Agreement*, 4 February 2016 [*TPP*], online: Global Affairs Canada www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/tpp-ptp/text-texte/toc-tdm.aspx?lang=eng.

17 The TPP does not create any obligation regarding disclosure of origin. Interestingly, it does not explicitly mention the CBD.

18 *TPP*, *supra* note 16, art 20.13(4).

19 For example, see Foreign Trade Information System, online: <www.sice.oas.org/Trade/TPP/Final_Texts/English/MYS_MEX_ENV_Ltr1.pdf>.

20 *Comprehensive Economic and Trade Agreement between Canada, of the one part, and the European Union [and its Member States...]*, 29 February 2016, online: European Commission <trade.ec.europa.eu/doclib/docs/2016/february/tradoc_154329.pdf>.

the European Union, however, mentions neither genetic resources nor traditional knowledge and is a reminder that ABS-related provisions are not yet automatically included in new deals.

Trade negotiations are thus progressively becoming vectors for the implementation of obligations stemming from the CBD and the Nagoya Protocol. It appears, however, that the nature of these provisions varies greatly, depending on the countries involved. The most exemplary standards are not yet widely used, perhaps because they remain little known. These provisions deserve greater attention and should be integrated more widely in international trade agreements.

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