

# THE INCORPORATION OF THE CBD MANDATE ON ACCESS AND BENEFIT-SHARING INTO TRIPS REGIME: AN APPRAISAL OF THE APPEAL OF DEVELOPING COUNTRIES WITH RICH GENETIC RESOURCES

*Kuei-jung Ni\**

## ABSTRACT

*It is clear that most valuable genetic resources are located in developing countries. The value, academically and from a business perspective, has been luring biological researchers and bio-technologically advanced companies to conduct bio-prospecting activities in these areas. The patents resulting from this illegal bio-piracy are then granted in developed nations. The recent national implementation of the CBD by imposing a relatively restrictive policy on access and benefit-sharing of genetic resources may correct this unjust situation. But, the CBD is a conservation treaty, and by its very nature, cannot govern the*

---

\* Associate Professor of Law, Institute of Technology Law, National Chiao Tung University, Taiwan. Visiting Scholar, Boalt Hall School of Law, University of California at Berkeley, 2005-2006. Ph.D in law, University of Edinburgh, 2000; Visiting Scholar, Yale Law School, 1996; LL.M, Boalt Hall School of Law, University of California at Berkeley, 1995; LL.M., National Taiwan Ocean University, 1992; LL.B., National Taiwan University, 1986. An earlier version of this article was presented at the "International Conference on Policy and Law Aspects of Asia and WTO: Challenges and Opportunities" organized by the then WTO Research Center (now Asian Center for WTO and International Health Law and Policy), College of Law, National Taiwan University in Taipei, Taiwan, on July 9, 2005. The author would like to thank participants at the conference and an anonymous reviewer for their comments. He is also grateful to David J. Tien, Hui-chih Chen, Yueh-ping Yang, Anna Chang, Ching-fu Lin and the entire editorial team of the Asian Journal of WTO & International Health Law and Policy (AJWH) for their brilliant editing process and excellent suggestions.

*national IPR system of countries that are not contracting parties to the treaty. Developing countries thus endeavor to play a very aggressive role in pushing for the revision of the WTO/TRIPS with a view to accommodating the CBD requirements. The approach is not welcomed by patent powerful Members, such as the United States. This article will examine whether appeal would be fair and just in the TRIPS context and how the WTO should address the issue. The article proposes that the proposal partially departs from the integrity of the patent system. For the sake of balancing rights and obligations, a new concept for the conditioning of the grant of patents on disclosure of the CBD elements deserves the careful contemplation of the international community. Even if the approach were not entirely adopted and thus not mandatory for all WTO members, this article suggests that it should discretionary for all members. Hence, the policy of linking the CBD to national patent systems should not be challenged at the WTO by countries that disfavor the appeal.*

**KEYWORDS:** *genetic resources; bio-piracy; patent; CBD; ABS; WTO; TRIPS; Doha Declaration*

## I. INTRODUCTION

Following the development of biotechnology, the value and significance of biogenetic resources has appeared increasingly prominent, playing a significant role in the spheres of world agriculture, food security, and the global economy.<sup>1</sup> Nevertheless, there has been a differential approach between technologically advanced (most developed) countries and those (most developing) with rich genetic resources towards the issues of benefit sharing and technology transfer resulting from genetic resources, and who should have the entitlement of the intellectual property based on such resources.

Most valuable genetic resources originated in developing countries, including Central<sup>2</sup> and South America,<sup>3</sup> and many Asian countries.<sup>4</sup>

---

<sup>1</sup> See generally GRAHAM DUTFIELD, *INTELLECTUAL PROPERTY RIGHTS, TRADE AND BIODIVERSITY* 1 (2000).

<sup>2</sup> Costa Rica is renowned for its abundant bio-resources which account for five percent of species in the world. See generally Christopher J. Hunter, *Sustainable Bioprospecting: Using Private Contracts and International Legal Principles and Policies to Conserve Raw Medicinal Materials*,