Intellectual Property and Genetic Resources: Relationship with Relevant International Instruments

Viviana Munoz Tellez
Coordinator
Development, Innovation and Intellectual Property Programme
South Centre
munoz@southcentre.int

26 May 2016

The views expressed are those of the author and do not necessarily reflect the views of the South Centre or its Member States.
UN 2030 Agenda for Sustainable Development

- UNGA A/RES/70/1 adopted in 2015
- Common international framework with targets to shift the world to more sustainable development
- Recognition of the need to reconcile and harmonize:
  - Economic growth
  - Social inclusion
  - Environmental protection
- WIPO is a specialized agency of the UN system
UN 2030 Agenda for Sustainable Development

• Goal 4: end hunger, achieve food security and improved nutrition and promote sustainable agriculture
  – Target: maintain the genetic diversity of seeds, cultivated plants and farmed and domesticated animals and their related wild species, and promote access to and fair and equitable sharing of benefits arising from the utilization of GRs and associated TK as internationally agreed

• Goal 15: sustainably manage forests, combat desertification, halt and reverse land degradation, halt biodiversity loss
  – Target: promote fair and equitable sharing of the benefits arising from the utilization of GRs and promote appropriate access to such resources, as internationally agreed
## Relevant International Legal Framework: Multiplicity and Dynamism

### Environmental Law
- Biodiversity conservation and sustainable use: regulates access and benefit sharing from GRs and associated TK
  - Convention on Biological Diversity
  - Nagoya Protocol
  - Bonn Guidelines
  - FAO ITPGRFA
  - FAO CPRFA
  - UNCLOS ABNJ
  - UN SDGs

### Intellectual Property Law
- State granted to individual to promote inventiveness and creativity and its dissemination
  - WTO TRIPS Agreement
  - WIPO administered treaties
  - Union for the Protection of Plant Varieties

### Trade and Investment Law
- WTO agreements
  - Regional Trade & Investment Agreements

### Human Rights Law
- Fundamental, inalienable and universal entitlements
  - UNHCHR, ILO, FAO
- Rights of Indigenous peoples
- Right to Food
- Right to the protection of the moral and material interests of the author
- WG on rights of peasants and other rural workers
- WG on transnational corporations

### Customary Law
- Indigenous customary laws may be recognized in national law
  - Voluntary guidelines CBD Article 8(j)

### Contract Law
- Contracts on ABS
  - UNITDROIT Principles of International Commercial Contracts

### Global Health Law
- WHO
  - Pathogens: Pandemic Influenza
  - Virus Sharing
Intellectual property is a tool of public policy

- Evolving nature of intellectual property law

- “Recognizing the underlying public policy objectives of national systems for the protection of intellectual property, including developmental and technological objectives.” TRIPS preamble.

- “The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and objectives”. TRIPS Article 7
Relationship patents and genetic resources

TRIPS Article 27 compromise:

• Patent laws must be technology neutral
• Patents must meet patentability criteria (novelty, inventive step or non-obviousness, industrial applicability, sufficiency of disclosure of the invention)
• Discretion in defining *invention* and application of patentability criteria
• Obligation to protect *micro-organisms*: not defined
• Can exclude:
  – to protect *ordre public* or morality
  – methods of treatment
  – plants and animals and essentially biological processes to obtain them
Relationship patents and genetic resources

TRIPS Article 29: sufficiency of disclosure

1. Members shall require that an applicant for a patent shall disclose the invention in a manner sufficiently clear and complete for the invention to be carried out by a person skilled in the art and may require the applicant to indicate the best mode for carrying out the invention known to the inventor at the filing date or, where priority is claimed, at the priority date of the application.

2. Members may require an applicant for a patent to provide information concerning the applicant’s corresponding foreign applications and grants.
On-going Review of TRIPS Article 27.3 (b)

• Of relevance to WIPO as main technical assistance provider to both WIPO and WTO Member States

• Proposals for:
  – limiting scope of patentable inventions in relation to life forms
  – incorporating protection for traditional knowledge and related innovations of indigenous and local farming communities
  – Introducing requirement on patent applicants to disclose origin/source of GRs and associated TK as amendment to article 29 (TN/C/W/59 – 2011)
Relationship PVP and genetic resources

TRIPS Article 27 compromise:

• Obligation to protect plant varieties by patents or by an effective sui generis system or by a combination
Issues: within the patent system

Patents:
• Expanding scope of subject matter
• Low inventive step
• Broad claim scope
• Insufficient prior art search
• Abusive litigation of weak / questionable patents
• Use of free trade agreements to impose patents on plants

Issues:
• Innovation and its dissemination depends on a number of factors – no direct correlation between patent protection and increased innovation
• Patents can constrain follow-on innovation and limit traditional practices of farmers and indigenous communities
• Greater uncertainty for users regarding validity of patents
• Increased genetic uniformity narrowing genetic diversity
• Increased concentration and control by few players in food system
Issues: within the patent system

Proposed solutions:
• Exclude plants and animals and essentially biological processes from patent protection
• Advise against FTA provisions that oblige patents on plants and animals
• Increase threshold for inventive step
• Introduce exception to allow farmers to save, re-use and exchange seeds they have obtained in their own fields, not subject to remuneration to patent holder
Issues: in relation to other legal frameworks

- Key ABS concepts not recognized in IP framework:
  - Countries can regulate access (e.g., collection) and utilization (R&D, commercialization) of GRs and TK and establish compliance measures
  - Prior Informed Consent
  - Mutually agreed terms - Benefit sharing

- Misappropriation: illegal access and/or utilization of genetic resources or traditional knowledge

- Public domain concept for “traditional knowledge” in contradiction with pre-existing rights recognized in national legislation and/or customary laws

- Lack of recognition of contribution and value of traditional knowledge associated to genetic resources

- Non-parties to other international agreements
Issues: in relation to other legal frameworks

- Proposed solutions:
  - Oblige patent/PBR applicants to provide relevant information pertaining to the origin/sources of GR and/or TK and use for their invention: disclosure requirement
    - Increase transparency in the patent / PVP system
    - Play “check point” function for ABS
    - Mutually supportiveness of CBD/Nagoya Protocol with the TRIPS Agreement and others, i.e. UPOV, Patent Cooperation Treaty
  - Focus of WIPO IGC