



Quaker United
Nations Office



Intellectual Property and Biodiversity: Friend or Foe?

Report of a Panel Discussion
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Panellists

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The Geneva Environment Network and the Quaker UN Office held a roundtable discussion on intellectual property (IP) and biodiversity. Panellists considered in what ways IP rights can help preserve biological diversity, and in what ways IP protection might undermine such diversity. They discussed some of the fora in which IP and biodiversity issues are being discussed and some likely future directions of policy and thinking in this area. QUNO has prepared this report of the discussion.

Introduction - Setting the context

The panel started with a brief outline of why biodiversity is important and what IP entails. Biodiversity was emphasised as the diversity of life at all levels, from genetic to ecosystem level diversity, alongside its centrality to all dimensions of economic and social wellbeing.

Carlos Correa outlined the policy context within which IP has expanded into the realm of genetic resources (GR). He noted that the first IP on living resources were in the seed sector, on plant varieties, and that more recently, starting with the US Chakrabarty case in the early 1980s, patents have been allowed on genes in certain legal systems.

The present system has created several areas of contention. There is an argument that IP decreases access to biological resources as GR become more expensive or out of reach for industrial breeders, national academic institutions and farmers. IP therefore leads to a decrease in agricultural biodiversity as breeders and researchers will not be able to access as many GRs as they would without IP rights. In contrast, many argue that IP protection is essential to stimulate and reward innovation, which increases human and economic welfare. It was pointed out that, generally speaking, IP rights are available for innovations based on biodiversity but not on biodiversity itself.

Evidence of IP impact on biodiversity

Isabel López Noriega referred to a preliminary literature study carried out in her institution, on the basis of which it seems that there is no conclusive empirical evidence on how IP affects or does not affect biological diversity. There was general consensus among the panellists that evidence drawing conclusions about the links between biological diversity and IP rights is still limited. Wend Wendland recalled that biodiversity preservation is not the explicit rationale of the IP system. IP can, however, be used to protect technologies based on biodiversity or technologies that can assist in the conservation of biodiversity. IP can also be used to protect traditional knowledge (TK) associated with biodiversity. The use of geographical indications as a form of IP protection and their link with biodiversity conservation were also recalled by a participant.

IP and innovation

Panellists also explored the link between IP and innovation. For the situation of innovation in agriculture, studies carried out by the Secretariat of the Convention on the Protection of New Varieties of Plants (UPOV) based on UPOV 1978 concluded a positive correlation between IP and innovation, while other studies find a very weak link between PVP and innovation. Overall, the evidence

remains controversial and more studies are needed. Carlos Correa raised the point that now, discovering or isolating a gene can be considered “innovation” under US patent law, reflecting that there are concerns as to how the act of isolating a single gene of a living organism consists of a patentable innovation. He also reflected upon the view that the isolated nature of a gene does not affect the fact the gene is part of nature. He recalled that in the WTO, the Bolivian Delegation has expressed the view that no patent should be applied to living organisms.

Panellists and participants discussed the examples of the Enola Yellow Bean, the Ayahuasca and the Turmeric cases. All of these consisted of plants well-known and used in Amazonia or other regions of Latin America being patented by private entities in the US.

Wend Wendland cautioned against drawing sweeping conclusions from a relatively limited number of these cases. More technical, empirical analysis would be useful. Panellists considered whether the IP system is self-correcting: the fact that the Enola case patent was invalidated within the patent system itself versus the nine years the process took. A participant pointed out that even if there were only be a few cases of biopiracy, the occurrence of *any* such cases should alert us to the fact that there are problems with the system. The same participant also raised the issue that it is often developing country genetic resources that are patented in industrialised countries. Panellists picked up on this to discuss the North-South inequities in distribution of genetic resources (mostly in the global South) and the technology and know-how (mostly in the global North) to exploit these GRs for financial gain, including through IP.

Ivonne Higuero brought in a new framing of the issues by asserting that we must consider *who* is being granted the benefit when IP rights are given. Indigenous communities with TK often disagree with the concept of private ownership, which is problematic for the IP system as a whole. She emphasised the importance of understanding IP as a neutral tool: it can have positive or negative impacts depending on how it is used. It *can*, for example, be applied as a tool to improve the protection of TK in developing countries. Although it wasn't designed to protect biodiversity, it could also be possible to apply in a way that contributes to biodiversity objectives.

IP and the CBD

This steered the discussion towards the links between the Convention on Biological Diversity and IP. The CBD's 2010 Nagoya Protocol on Access and Benefit Sharing has been seen as a way of achieving the third objective of the CBD (equitable sharing of benefits arising from the use of genetic resources). It upholds the principles of Prior Informed Consent (PIC) and mutually agreed terms, which is hoped will help developing countries enjoy positive benefits from their own genetic resources. Ivonne Higuero described the Nagoya Protocol as a step in the

right direction, and expressed curiosity to see future synergies and collaboration between Nagoya and the World Intellectual Property Organization (WIPO). Such progress could bring clarity to ‘how the rules work’ regarding IP and genetic resources.

Wend Wendland noted that TK is also “intellectual property” and can be protected through the application of IP principles. He described the state of negotiations in the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC), which has made great progress in the last 18 months. Negotiating texts on TK, genetic resources and traditional cultural expressions are now before the IGC. The text on TK would establish a *sui generis* form of protection for TK and address what TK consists of, who the beneficiaries are, the scope of rights and exceptions to the rights. On Genetic Resources (GR), many countries were calling for text-based negotiations on a proposed mandatory disclosure requirement, and, in addition, a text on ‘objectives and principles’ on IP and GRs was also being negotiated. A provisional text on GR addresses prevention of erroneous cases (such as the Enola case), links between IP and wider international law, and the role of the IP system in GR. Some of this work will bring clarification, as well as add to principles found in Nagoya. Wend Wendland recalled that the work of the WIPO IGC is explicitly complementary to the CBD and the Nagoya Protocol.

Carlos Correa mentioned the discussions on these topics within the World Trade Organization (WTO) and Isabel López Noriega presented the work in this area within the International Treaty for Plant Genetic Resources for Food and Agriculture.

Comments from participants included questions about the business lobby interaction, seed banks and the importance of putting biodiversity needs over IP objectives. Higuero said CBD COP-10 had the biggest business presence so far. This reflected the realisation that it no longer makes sense to address the three-fold objectives of the CBD by staying within the environmental arena; the economic sector is a crucial actor which needs to be engaged.

Overall, it was noted that perhaps one of the keystones in the debate on IP and biological diversity stems from fundamental differences in people's values of what biodiversity is for and what we should be doing with it. For instance, those who believe biological resources should be conserved may be critical of an IP-based approach, while those who wish to give biological resources a monetary value, because they think the market can play a role in ensuring that these resources are not overused, may be more prone to support IP rights.

Comments from participants reflected the view that the lack of evidence, alongside these diverging views on how to value biological resources, make it unclear at present whether IP is indeed a friend or foe of biodiversity •