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CONFRONTING THE GLOBAL FOOD CHALLENGE: INTELLECTUAL PROPERTY AND GENETICALLY MODIFIED ORGANISMS

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This session highlighted some of the ways in which intellectual property rules and genetic modification technologies have been brought into agriculture and what the implications of these developments are, particularly for human rights. The discussion focussed on potential avenues for action, as well as the difficulties for those working in the field.

HOW DID IP AND GMOs COME INTO AGRICULTURE?

The Role of Corporations:
The lobbying power of biotechnology companies and the revolving door between government and industry secured the initial cultivation of genetically modified (GM) crops in the US. The ability of the key players to buy up their competitors and embark on aggressive marketing campaigns has ensured the spread of genetically modified organisms (GMOs) worldwide.

Seed and biotechnology companies, with the support of developed country governments, have also played a crucial role in bringing various intellectual property (IP) agreements (e.g. the TRIPS Agreement[1]) and IP institutions (UPOV,[2] WIPO[3]) into existence.

TRIPS
The TRIPS Agreement revolutionized IP protection – all WTO members must implement minimum standards of IP protection or face the threat of trade sanctions. TRIPS allows countries to exclude plants and animals from being patented but all WTO members must provide some form of plant variety protection, either through patents or an effective *sui generis* system. The TRIPS Agreement also requires that countries patent micro-organisms. There are on-going debates as to whether plants and animals should be eligible for patenting, what 'effective' *sui generis* systems should look like, and how to define micro-organisms.

Bilateral trade agreements
Bilateral trade agreements often include IP clauses that eliminate the flexibilities provided by the TRIPS agreement. One example of these 'TRIPS-plus' standards, often demanded by the US, EU or Japan, include an obligation to accede to UPOV 1991 (see below).

UPOV
UPOV is the International Union for the Protection of New Varieties of Plants, which administrates several versions of an international agreement that provides protection for plant breeders' rights.

[1] The WTO's Agreement on Trade Related Intellectual Property.
[2] The International Union for the Protection of New Varieties of Plants, known by its French acronym.
[3] The World Intellectual Property Organization.

UPOV has historically been a relatively small club, comprised of countries with industrialized agricultural sectors and significant commercial breeding industries. However, in order to comply with their multilateral or bilateral trade obligations, many developing countries have either implemented or are in the process of implementing UPOV 1991, which is the latest version of the agreement and the one all new members must join. UPOV 1991 is also the version that provides the highest levels of protection to plant breeders, at the expense of small farmers and continued agricultural research and development (R&D). The organization is characterized by a lack of transparency and very restricted civil society representation. Joining UPOV 1991 differs from other international agreements, such as the TRIPS Agreement, because countries must *first* change their laws to make them UPOV compatible, before being considered for membership.

WIPO's Technical Assistance
WIPO is much older than TRIPS but the agreements WIPO administers are optional – countries can join one and not the other. WIPO's role in bringing IP into agricultural sectors has been galvanized by the organization's position as the key provider of technical assistance for the implementation of the TRIPS Agreement. Despite the existence of numerous flexibilities in the TRIPS Agreement, WIPO's technical assistance has often been biased in favour of stringent application of WTO rules, and IP standards far higher than what TRIPS requires. For example, many countries have been pushed to join UPOV 1991 instead of creating their own unique, national sui generis laws.

Bilateral Development Assistance
Numerous development partnerships are also accused of providing biased technical assistance. For example, one of the proposed aims of a GTZ[4] project in Egypt was to assist the country with accession to UPOV 1991.

WHAT ARE THE IMPLICATIONS OF IPRS AND GMOs?

GMOs
GM technologies are increasing corporate control of seeds. Three companies (Monsanto, Syngenta, and DuPont) own the vast majority of GM seeds and are able to use their market power to set prices of seeds and pesticides. Monsanto and others buy up local seed companies, thereby eliminating local competition, and also provide licenses to other corporations to sell their GM seeds. Farmers often have little choice but to buy GM crops.

1.4 billion small scale farmers use farm saved seed and stand to become dependent on powerful corporations if the aggressive push towards GM crops, supported by the spread of stringent IP regimes, continues. The threats to farmers' right to food and right to an adequate standard of living will have particularly detrimental affects on women, who make up the majority of the world's small farmers.

Biotechnology companies have long promoted the idea that the use of GM crops is ecologically sustainable because their modified traits mean they require less pesticides. In reality, numerous independent studies have shown that GM farmers have to increase their pesticide use, because of previously unseen diseases that plague these GM monocultures. Many of these pesticides have proven negative effects on human and environmental health.

Despite the risks outlined above, governments are constantly pressurized – by a multitude of different actors – to implement laws that will pave the way for GM cultivation. For example, the Alliance for a Green Revolution in Africa (AGRA) is accused of promoting pro-GM legislation in Kenya and other African countries. AGRA's ability to recruit journalists, influence the local media and even hire speech writers for relevant ministers makes it exceedingly difficult for other groups to get their concerns about GM heard.

IPRs on seeds

[4] The Deutsche Gesellschaft für Technische Zusammenarbeit (GTZ), an international cooperation enterprise for sustainable development.

IPRs have grave impacts on agricultural R&D. The profits awarded to IP-protected seeds promote research into commercially profitable techniques and varieties, particularly biotechnology. This neglects the needs of small farmers and the continued lack of investment and research into farming methods that benefit them will threaten their livelihoods and food security. In addition, IP protection over seeds is increasingly being strengthened, making research, even for commercial breeders, more and more difficult.

IPRs will also accelerate the depletion of agricultural biodiversity. Agricultural biodiversity has been developed and conserved by farmers through their selection, exchange, and re-planting of seeds. IPRs on seeds – both in the form of patents and plant breeders' rights – restrict these practices and will ultimately reduce the number of seed exchanges and on-farm breeding experiments. These constraints pose a serious threat to the right to food of future generations.

In addition, IPRs on seeds incentivize a genetically uniform agriculture. Although genetic diversity has always been a farmer's greatest source of protection against pests, pathogens and climatic variations, IPRs are only granted to genetically uniform seeds. This will intensify current trends towards monoculture-cropping, which depletes local varieties and increases the vulnerability of food crops.

IPRs on Livestock

IPRs in agriculture affect livestock farming as well. Livestock production is dominated by a handful of companies who control the few remaining gene lines for broiler hens, layer hens, etc. Worrying trends include the development of 'terminator technology' in fish and shrimps and advances in genome mapping. Many of the livestock IPRs are protected by trade secrets which are even more monopolistic than patents, in that they prohibit public access to the information.

AVENUES FOR ACTION

Holding Corporations to Account

There is currently a dearth of accountability mechanisms for corporations. Although the OECD Guidelines, the ILO Principles and the Global Compact outline human rights principles to be *respected* by corporations, none of them provide effective tools for accountability or redress. The Special Representative of the UN Secretary General (SRSG) on Business and Human Rights, John Ruggie, is in the process of developing guidelines regarding corporate practice but nothing is established yet.

The most promising path for holding companies legally accountable seems to be at the national level. National criminal law, tort law or law of civil remedies, and contract law could be used against corporations. The difficulty lies in demonstrating that it is a company's negligence that has caused harm. There are many ways in which biotechnology companies are able to absolve themselves of responsibility, for example by claiming that harm caused by pesticides for GM crops is a result of 'improper use' of the product.

Establishing Evidence – the health risks

There is a need to establish more evidence about the negative effects of GMOs although this is difficult because of industry's ability to influence governments to stop research (e.g. the Rowett Institute case). One possibility may be through the WHO unit that is researching GMOs.

Getting into UPOV

This may only be possible through creating a plant breeders' organization, which is being explored. More analysis needs to be devoted to the reports UPOV submits to the TRIPS Council regarding its capacity building activities in developing countries.

Engaging in WIPO

In recent years, WIPO has become the focal point of the tension between efforts to increase IP protection and those to balance it with public policy concerns. One potential forum for civil society engagement is the Inter-Governmental Committee on Intellectual Property and Genetic Resources,

Traditional Knowledge and Folklore (IGC). However, there are concerns that the IGC will remain a talking shop and never yield concrete results.

The WIPO Development Agenda discussions, still in their initial phase, may be a more effective avenue. Issues relating to technical assistance and impact assessments need continued civil society input.

Discussions on Access and Benefit Sharing (ABS)
There are discussions in the TRIPS Council and at the Convention on Biodiversity (CBD), regarding ways of adding certain requirements to patent applications, including the need for prior informed consent, disclosure of origin, and benefit sharing. These solutions are not a panacea but may improve the existing patent system. Some, however, fear that this approach will simply legitimate the patent system.

Human Rights Mechanisms
Human rights issues relating to IPRs on seeds or GMOs can be raised in the various UN treaty bodies or by requesting urgent action by the Special Rapporteur on the Right to Health or Food. Human rights provide both legal and advocacy tools.

Lobbying Governments
Is it politically realistic to lobby governments to take an anti-GM position or to be against IPRs in agriculture? Currently, there is little political momentum, particularly because governments are so beholden to corporate interests. Perhaps the best way forward is to promote alternatives to UPOV 1991, and promote alternatives to the current IP system itself.

Current and Planned Campaigns
www.no-patents-on-seeds.org is a global campaign backed by farmers' organizations and NGOs to oppose the granting of patents on conventional (non-GM) broccoli and tomato seeds, which may soon be awarded by the European Patent Office.

The People's Year of Rice Action will be launched in April 2009. This pan-Asian campaign aims to ensure that GM rice is not commercialized.

Conclusion
There are many difficulties with regards to both advocacy and litigation relating to IP and GMOs. At the same time, there are a multitude of fora in which to engage, and numerous existing campaigns. The battle to encourage more governments to implement IP and GM policies that promote human rights, and not just agribusiness profit margins, continues.