Paradigm Clash on Ownership

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Convention on Biological Diversity (CBD): “Ownership” of Biodiversity

- Shift from “Common Heritage” over biological and genetic resources to the NATIONAL SOVEREIGNTY/PATRIMONY principle
  - Biodiversity found in one country is part of its national patrimony
  - State acts as the “custodian” of the national patrimony
- Does <u>not</u> cover pre-CBD collections already in the hands of national and multilateral institutions and private companies/individuals prior to 1993
  - Including those obtained without the consent of the country/community of origin

CBD, Article 15 (Access to Genetic Resources)

- Recognizes the sovereign rights of States over their natural resources
- Authority to determine access to genetic resources rests with the national governments and is subject to national legislation
- States shall create conditions to facilitate access to genetic resources for environmentally sound utilization by other Contracting Parties and not to impose restrictions that run counter to the Objectives of the Convention

CBD, Article 15 (Access to Genetic Resources)

- Access to genetic resources shall be subject to prior informed consent of the Contracting party providing such resources
- Collaborative development and undertaking of scientific research based on genetic resources among Contracting Parties
- Share in fair and equitable manner benefits arising from the commercial and other utilization of genetic resources, as mutually agreed by Contracting Parties

“Ownership” in CBD: Biodiversity and Traditional Knowledge

- Biodiversity and traditional knowledge as part of national patrimony
  - Generally regarded as part of “Public domain”: those which are not claimed as private property or which is commonly known or disclosed
  - Prior informed consent (PIC) on access to these biodiversity and traditional knowledge regarded as sole prerogative of the State
  - <u>Assumes</u> that the State acts to serve the interest of the majority or the public good, not just the interest of a few or for commercial interests

"Ownership" in CBD: Traditional Knowledge and Biodiversity

- Biodiversity and Traditional Knowledge as part of national patrimony
  - First-line custodian: indigenous and local communities that developed, conserved and nurtured these resources and knowledge through millennia, including many of the "wild biodiversity"
  - Often does not take into account the inherent rights of indigenous and local communities over traditional knowledge and biodiversity, and disregard the traditional mechanisms on access to these resources
  - Does not take into account the traditional systems of reciprocal rights to and holistic nature of resources and knowledge
  - Linked to the recognition and respect of the rights of indigenous peoples to their ancestral domain

“Ownership” in CBD: Traditional Knowledge and Biodiversity

- “Access and benefit-sharing” in the CBD
  - based on the States’ prerogative to allow access to biodiversity and determine terms in benefit sharing
  - Biodiversity treated as an economic good that States can use to bargain benefits for
- Without clear policies on ancestral domain or community rights over biodiversity and traditional knowledge, “benefit-sharing” is only limited between the State as the resource provider and the parties that access the resource/s
  - Communities’ share in the benefits depend on the prerogative of the State

CBD, Article 8 (In-Situ Conservation)

Each Contracting Party shall, as far as possible and as appropriate:

Para (j) -- "Subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices…"

“Ownership” in CBD: Traditional Knowledge and Biodiversity

- Prior informed consent (PIC) of communities: recognized in Art. 8(j), but <u>subject to national legislation</u>
- Few countries recognize and respect ancestral domain of indigenous peoples
  - Some do not even recognize the existence of indigenous peoples
- Even in countries where the right of indigenous peoples on ancestral domain is recognized, processes in prior informed consent by communities are determined by the national government
- Philippine case: Indigenous People’s Rights Act (IPRA)
  - Social acceptability and PIC: divided communities
  - Final decision on access rests on national government

IPR in the CBD

- CBD also recognizes and respects intellectual property rights (IPR)
  - Implies that IPRs can have a negative effect on implementing the CBD, thus parties need to cooperate to ensure that IPRs are supportive and do not run counter to the CBD objectives (Art. 16.5)
- Tries to strike a delicate balance, reflective of compromises in the negotiation process
  - Free sharing and exchange as the approach that nurtured biodiversity for millennia vs. private rights over innovations involving biodiversity/traditional knowledge
  - Inherent tensions over paradigms on “ownership” even within the CBD

CBD, Article 16 (Access to and Transfer of Technology)

- States shall provide and/or facilitate access for and transfer to other Contracting Parties of technologies that are relevant to the conservation and sustainable use of biodiversity, or make use of genetic resources and do not cause significant damage to the environment
- Access to and transfer of technology shall be under fair and most favourable terms, “including on concessional and preferential terms where mutually agreed” (Art. 16.2)
- In case of technology subject to patents and other intellectual property rights, such access and transfer shall be provided on terms which recognize and are consistent with the adequate and effective protection of intellectual property rights (Art. 16.2)

CBD, Article 16.5

"Contracting parties, recognizing that patents and other intellectual property rights may have an influence on the implementation of this Convention, shall cooperate in this regard <u>subject to national legislation and international law in order to ensure that such rights are supportive of and do not run counter to its objectives</u>."

From the CBD to TRIPS

- IPR not just relevant in technology transfer and cooperation, as provided in Art. 16 of the CBD
  - Cooperation among parties to ensure that IPRs are supportive of the CBD are subject to national legislation (e.g., IPR laws) and international laws (e.g., TRIPS)
- TRIPS applies to <u>all fields of technology</u>, including those that involve biodiversity and traditional knowledge
  - facilitates biopiracy and misappropriation of indigenous/traditional knowledge and resources

TRIPS: Basic Principles

- Preamble: "…intellectual property rights are PRIVATE RIGHTS"
- National Treatment: Equal application of provisions and terms among nationals/citizens of a Member and nationals of other Members
- Most-Favored-Nation Treatment
  - Any advantage, favor, privilege or immunity granted to nationals of a Member shall be accorded *immediately* and *unconditionally* to the nationals of other Members
  - Unless, such advantage is derived from international agreements on IPR which entered into force prior to the WTO

National Sovereignty vs. Private Rights

- IPR as private rights are granted by the State
  - IPR applies in specific national boundaries, but are awarded equally to foreigners under the national treatment principle in the TRIPS
- Same State entrusted to work towards the attainment of CBD objectives
  - Challenge for States to balance these interests and ensure that IPR do not run counter to CBD objectives
- Controversial questions:
  - Should IPR be applied on biodiversity and traditional knowledge?
  - Is IPR the appropriate system to community rights over biodiversity and traditional knowledge?

TRIPS: Patents

- Art. 27.1
  - Members may not exclude any field of technology from patentability
  - Non-discrimination: Members may not discriminate as to the fields of technology, place of invention, and whether products are imported or locally produced
  - Members may exclude from patentatibility:
    - Inventions contrary to *public ordre* or morality
    - Diagnostic, therapeutic and surgical methods for human or animal treatment
    - Plants and animals, with some qualifications

TRIPS, Article 27.3(b)

Members may exclude from patentability plants and animals other than micro-organisms, and essentially biological processes for the production of plants or animals other than non-biological and microbiological processes. <u>However, Members shall provide for the protection of plant varieties either by patents or by an effective sui generis system or by any combination thereof</u>. The provisions of this subparagraph shall be reviewed four years after the date of entry into force of the WTO Agreement.

TRIPS and Community Rights

- TRIPS ties up countries and communities to the IPR system
  - Patents: for all forms of inventions (including those involving life forms, biodiversity and traditional knowledge)
  - Copyright: for literary work (including those involving traditional art work, songs, design and folklore)
  - Plant Breeders' Rights: for new plant varieties (including those based on traditional varieties)

IPRs vs. Community Rights Over Biodiversity&Traditional Knowledge

- IPRs directly clash with the worldview of indigenous and local communities vis-à-vis biodiversity and knowledge
  - Products of generations of innovations across communities
  - Cannot be attributed to single individual or even community, and cannot be owned privately
  - Dynamic nature of innovations
  - Reciprocal relations involved
  - Holistic nature of resources and knowledge

Options and Attempts to Redress the "Paradigm Clash" in CBD and TRIPS

- Within TRIPS
  - Restricting plant breeders' rights through *sui generis* systems of plant variety protection
  - "Appropriate" interpretation of TRIPS and *sui generis* systems
  - Prior informed consent from countries or communities of origin
  - Certificate of origin
  - Digital database on traditional knowledge
  - Patenting of traditional knowledge by local innovators
  - Incorporating traditional knowledge into TRIPS

Options and Attempts to Redress the "Paradigm Clash" in CBD and TRIPS

- "Outside" TRIPS
  - Banning the patenting of living organisms
  - Community intellectual rights act/policy
  - Model laws and national policies on community rights, access to biological resources and benefit-sharing
  - Non-IPR systems of reward, incentives and benefit-sharing
  - National policies promoting traditional knowledge

Addressing the Paradigm Clash on Ownership in CBD & TRIPS

- Recognition and respect of the collective rights of indigenous and local communities over biodiversity and traditional/indigenous knowledge
- Development of appropriate mechanisms to protect community rights over biodiversity and traditional/indigenous knowledge <u>outside</u> of the IPR system
- IPRs must not be applied on life forms and traditional/indigenous knowledge
- Strengthening community control over biodiversity and traditional/indigenous knowledge

Thank you!