Monsanto's Legal Strategy in Argentina from a Human Rights Perspective

Mirka FRIES*, Andrés LÓPEZ CABELLO** and Santiago SÁNCHEZ**

Keywords: genetically modified seed, human rights, intellectual property rights, Monsanto

I. Background

On 16 April 2019, the Supreme Court of Argentina rejected a claim filed by Monsanto,[1] seeking patent protection for genetically modified (GM) seeds in Argentina. The decision is based on article 35 of the Argentine Patents and Utility Model Law No. 24.481 (Patent Law), which stipulates that any patent granted under this law shall have a non-renewable term of 20 years, starting from the filing date of the application. Monsanto had filed its claim in February 1996, i.e., more than 22 years ago. Without getting into the substantive issues of the legal action, the Supreme Court decided to dismiss Monsanto's claim on the basis of the expiration of the maximum possible period of validity of a patent.

Eight months before the Supreme Court decision, in August 2018, the Buenos Aires-based *Centro de Estudios Legales y Sociales* (Center for Legal and Social Studies, CELS) and the *Movimiento Nacional Campesino Indígena* (National Indigenous Peasant Movement, MNCI) had filed a petition to be considered as *amicus curiae* to the Supreme Court. The petition alerted the Court to the negative impacts that a decision in favour of Monsanto was likely to have on the rights of peasants, local communities, indigenous peoples and the native biodiversity in Argentina.[2]

The current piece, which follows the line of argument taken in the *amicus* petition, was finalized shortly before the Supreme Court's decision. Nevertheless, as the judges in their finding refrained from ruling on the substantive matter of Monsanto's request – the patentability of GM seeds under Argentine law – and in light of current political debates and developments,[3] the critical reflections in this piece seem to be more relevant than ever before.

* European Center for Constitutional and Human Rights

** Centro de Estudios Legales y Sociales

[1] In 2018, Monsanto was successfully acquired by the German company Bayer AG. The merger was met with strong opposition from civil society actors, who expect that the already strong companies will be able to increase their control over farmers and further cut out competitors.

[2] In Argentina, if the Supreme Court has not invited the submission of *amicus curiae*, any interested party may ask the Court to be granted an opportunity to make such a submission and to hold a public hearing on the subject. The Court, however, is not obliged to rule on the merits of this petition. CELS and MNCI's petition is available at: https://www.cels.org.ar/web/wp-content/uploads/2018/07/Solicitud-Amicus-Semillas.pdf (accessed 11 March 2019).

[3] See part VII of this piece.

Business and Human Rights Journal, 4 (2019), pp. 357–363
doi:10.1017/bhj.2019.11

II. Introduction

Fourteen per cent of the world's total biotech crops are produced in Argentina, making the country one of the leading manufacturers of GM seeds. Around 95 per cent of the country's agricultural area is cultivated with soybeans.[4] Especially since the 1970s, when global trade in soy products significantly expanded, the crop began to have increasing commercial importance for Argentina's local farmers and large-scale producers. Just two decades later, Argentina was one of the largest producers of soybeans worldwide. A significant turning point occurred in the country's agro-industrial development in 1996 when, through the approval of Monsanto's Roundup Ready (RR) soybean, transgenic soybeans were introduced to the Argentine market. At the time of the approval, the area cultivated with soy reached six million hectares, with harvests yielding 12.5 million tons of soy products. By 2015, 20.5 million hectares were cultivated with soybeans in Argentina, which produced a record high of 54.9 million tons of soy products.[5]

After the introduction of its GM crop to Argentina, Monsanto did not submit a request for patent protection in due time, but deliberately left the RR gene in the public domain. The free availability of the gene facilitated its diffusion throughout the country and among its neighbours Brazil, Uruguay, Paraguay and Bolivia. Within a short period of time, the RR gene technology could be found in virtually all soy products produced in Argentina.[6] However, despite the fact that Argentina is one of the largest soybean producers in the world today, Monsanto has not been able to extract as much profit from its business there as the company would like. This is due to the country's intellectual property regulations, which have, to date, focused on granting wide protections to the rights of local communities, peasants, indigenous peoples and the native biodiversity.

Claims for patent protection for GM seeds by corporations like Monsanto constitute a major threat to the fundamental rights of the Argentine people. With the Supreme Court not deciding on the substantive matter of Monsanto's request, it is not unlikely that similar claims will be brought in Argentina in the near future. The *Monsanto* case can serve as an example for any of such cases. To contextualize the legal action, this piece first provides insight into the international intellectual property system. Second, it elaborates on how the current law applying to seeds in Argentina limits the profits of companies like Monsanto. Finally, it briefly discusses Monsanto's case before the Supreme Court of Argentina, followed by an analysis of the impact that cases like that are likely to have on human rights in the country.

[4] 'Preliminary Observations Special Rapporteur on the Right to Food, Hilal Ever, on her Mission to the [Republic of] Argentina 12–21 September 2018', https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23590&LangID=E (accessed 11 March 2019).

[5] Data available via the National Bureau of Estimates, Delegations and Economic Studies, Office of the Undersecretary of Agriculture at the Ministry of Agribusiness, Presidency of the Nation, http://datosestimaciones.magyp.gob.ar/ (accessed 11 March 2019).

[6] Carlos Correa, 'La disputa Monsanto vs Argentina sobre la soja transgénica' (2007) VIII:3 *Revista Puentes* 12.

https://doi.org/10.1017/bhj.2019.11 Published online by Cambridge University Press

III. Legal Context: The International Intellectual Property Regime

Until the 1960s, plant materials used for genetic improvement were freely available around the globe. With the increasing commercialization of the agricultural sector, however, a global trend emerged promoting intellectual property protection of plant varieties and food crop seeds. The driving force mainly came from the commercial sector and other actors from the Global North, which have predominantly shaped today's international intellectual property regime. Intellectual property protections regulate an inventor's rights *vis-à-vis* the users of their invention. Regarding seeds and plants, this concerns the rights that the creator of a new plant variety, created through breeding or genetic modification, can enforce against anyone who uses their creation.

In 1961, international protections for breeders' rights were institutionalized for the first time with the adoption of the International Convention for the Protection of New Varieties of Plants (UPOV Convention). Since then, the UPOV Convention has been revised several times – in 1972, 1978 and 1991 – to reflect technological developments in the breeding of plants and the experience gained through the convention's application. Each UPOV revision strengthened plant breeder's protections, with the 1991 version intended to place the UPOV system on equal footing with the international patent system.[7]

The most comprehensive international intellectual property regime is contained in the World Trade Organization (WTO) Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). The agreement was the result of the so-called Uruguay Round, which took place from 1986 to 1994. As happened during the discussions on UPOV, actors from the Global North, such as Monsanto and other US-based companies, played a dominant role in the proceedings leading up to the text's formulation.[8] The TRIPS agreement defines minimum standards for different kinds of intellectual property regulations. Regarding the development of intellectual property regimes applicable to plant varieties, states are left with great flexibility. Article 27(3)(b) of TRIPS requires member states of the WTO to enable the protection of plant varieties 'either by patents or by an effective *sui generis* system or by any combination thereof'. Therefore, states have the option to balance the protection of plant varieties against other societal goals and commitments, and to adopt a system corresponding to the circumstances within the country and the needs of the local population. The implementation of the UPOV system, in any of the Convention's versions, constitutes only one type of the *sui generis* protection schemes envisioned under TRIPS. In part due to the broad concessions made to the commercial seed sector under UPOV, especially in the 1991 version of the Convention, US plant breeders have for long been promoting for the UPOV system to be the *sui generis* model worldwide.[9]

---

[7] GAIA/GRAIN, 'Ten Reasons Not to Join UPOV', 2 *Global Trade and Biodiversity in Conflict* (May 1998), https://www.grain.org/article/entries/1-ten-reasons-not-to-join-upov (accessed 11 March 2019).

[8] Susan Sell, 'Multinational Corporations as Agents of Change: The Globalization of Intellectual Property Rights' in Claire Cutler, Virginia Haufler and Tony Porter (eds), *Private Authority and International Affairs* (New York: State University of New York, 1999), 169.

[9] Susan Sell, 'What Role for Humanitarian Intellectual Property? The Globalization of Intellectual Property Rights' (2004) 6 *Minnesota Journal of Law Science & Technology 191*, 203.

https://doi.org/10.1017/bhj.2019.11 Published online by Cambridge University Press

IV. Argentina's *Sui Generis* Model on Seeds and How it Limits Monsanto's Profits

Argentina passed Law No. 20.247 on Seeds and Phytogenetic Creations (Seed Law) in 1973, as the first law to domestically regulate intellectual property on plant varieties in Latin America. In accordance with agricultural traditions, the Seed Law enshrined the right of farmers to save seeds without having to pay royalties in exchange and allowed them to develop new plant varieties from existing protected varieties without any prior consent from the original owner of the cultivar. The 1973 law still forms the basis of Argentina's regulation of intellectual property in the agricultural sector today.

In 1994, Argentina signed the UPOV Convention in its 1978 version and, one year later, implemented the TRIPS Agreement through the passing of the Patent Law. This law expressly excludes the patentability of all plants, animals and the totality of the biological and genetic material existing in nature or its replication.[10] Thus, in accordance with the country's obligations under TRIPS and the 1978 UPOV Convention, Argentina has put in place a *sui generis* system to protect intellectual property on plant varieties, securing both the breeder's rights and those of the farmers to their own use.

V. Monsanto's Case Before the Supreme Court of Argentina: A Decisive Instance

In February 1996, Monsanto filed a patent application before Argentina's National Institute of Industrial Property (INPI) regarding the gene of sucrose phosphorylase in vegetables, claiming that the Patent Law should protect the company's developments. In September 2005, INPI rejected the request, confirming the applicability of the Seed Law and the 1978 UPOV Convention to Monsanto's creation. According to INPI, the genetic material had the aptitude to generate a full plant and was thus not patentable under Argentina's Patent Law.

Monsanto challenged this decision in court, where it argued that, prior to their creation by Monsanto, neither the DNA molecule in question nor the plant into which the DNA sequence was inserted existed in nature, and that the plant cell could only be regenerated into a plant through the intervention of human. Thus, the company argued that because pre-existing living matter in nature is not patentable under Argentine law, but GM plants are, then Argentine Patent Law should apply to the company's creations. The first instance judge granted the claim, declared the INPI resolution null and void, and ordered the administrative process to continue.

Upon appeal in November 2015, the Federal Civil and Commercial Chamber revoked the prior judgment, concurring with INPI's decision and rejecting Monsanto's claim. The appeal decision was again based on the lack of an authentic inventive activity and the inapplicability of the Patent Law as Monsanto's products were protected by the *sui generis* system provided for in the Seeds Law. Monsanto appealed the latter decision and filed the case before the Supreme Court.

[10] Law No. 24.481 (Argentina), arts 6 and 7.

https://doi.org/10.1017/bhj.2019.11 Published online by Cambridge University Press

For the reasons outlined at the beginning of this piece, the Supreme Court dismissed the company's claim in April 2019. By not deciding upon the substantive issues of the case, the decision makes the 2015 findings by the Federal Civil and Commercial Chamber final. Although this can be registered as a positive development, the issue is yet to be finally decided upon by the Supreme Court in a potential case in future. It is, therefore, necessary that the arguments made in *amicus curiae* do not disappear from the current debate.

VI. Monsanto's Claim and its Human Rights Implications

In its case, Monsanto had asked the Supreme Court of Argentina to decide whether to uphold the current intellectual property regime on plants as regulated by the Seed Law, with its comparatively wide human rights protections, or to declare the Patent Law applicable to seeding material, which would extend the property rights of multinational companies such as Monsanto and significantly curtail the rights of the local population.

In case the current regime is declared unconstitutional, global players like Monsanto will have the right to patent every type of GM plant in Argentina, granting them a legal monopoly on those plant varieties. This would allow them to increase their profits and their already overwhelming market power. Such a consolidation of the business model in Argentina would come at the expense of the Argentine people and the country's biodiversity and environment. It would particularly curtail the fundamental rights of peasants, local communities and indigenous people, including their rights to health, food and adequate nutrition; the enjoyment of the benefits of scientific progress and its applications; and the protection of cultural practices and traditional knowledge, to name a few. Because of this, CELS and MNCI had filed a petition to be considered as *amicus curiae* to the Supreme Court in the Monsanto case, supporting the current intellectual property regime on plants as regulated by the Seed Law.

The *amicus* brief submitted by the organizations was based on several arguments. First, it argued that unrestricted access to seeds forms the basis of most rural producers' livelihoods and concomitantly ensures the availability of their food supplies, thereby ensuring the human right to food. In a 2001 report, the UN High Commissioner for Human Rights stressed that intellectual property law may negatively affect the effective exercise of the rights to health, food, development and the rights of indigenous people, and emphasized that states must find a balance between protecting public and private interests.[11] Similarly, the UN Committee on Economic, Social and Cultural Rights has noted that states should ensure that intellectual property rights do not lead to a denial or restriction of everyone's access to productive resources like seeds, as such access is crucial for the right to food and farmers' rights.[12] This is especially important as most seed systems operate informally between farmers at the local or community level, which requires the availability of alternatives to buying seeds from the commercial market.

[11] UN Economic and Social Council, 'The Impact of the Agreement on Trade-Related Aspects of Intellectual Property Rights on Human Rights', Report of the High Commissioner, E/CN.4/Sub.2/2001/13 (27 June 2001), paras 2, 10.

[12] UN Economic and Social Council, General Comment No. 24 on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities, E/C.12/GC/24 (10 August 2017), para 24.

https://doi.org/10.1017/bhj.2019.11 Published online by Cambridge University Press

Second, as big companies like Monsanto typically focus on developing only a few seed varieties, the expansion of Monsanto's business model threatens the genetic diversity of crops and risks limiting the right of the local population to enjoy the benefits of scientific progress and its applications. In this vein, the former Special Rapporteur on the Right to Food, Olivier De Schutter, has noted that '[t]he end result [of intellectual property rights] is a progressive marginalization or disappearance of local varieties'.[13] In turn, unbalanced intellectual property laws may not only affect the rights of peasants and indigenous peoples, but they also represent a hazard to the adoption of policies that encourage the preservation of biodiversity,[14] ignoring Argentina's obligations under the 1992 UN Convention on Biological Diversity and the commitments it adopted upon signing the Sustainable Development Goals.

Third, a decision in favour of corporations would potentially implicate an infringement of the local population's fundamental rights to health, life and a healthy environment. Just ten corporations already control 75 per cent of the worldwide seed sector.[15] Those same corporations simultaneously dominate the production of herbicides and frequently sell their seed material in conjunction with agrochemicals. During her mission to Argentina in September 2018, the current Special Rapporteur on the Right to Food, Hilal Ever, noted that the use of pesticides in the country has increased almost tenfold in the past 25 years, with glyphosate being used indiscriminately, 'without the due consideration to the existence of schools and villages'.[16] This development is intrinsically linked to the marketing of GM crops that are resistant to glyphosate and, due to more and more weeds developing resistance to glyphosate, also to other herbicides such as 2,4-D and glufosinate-ammonium.[17] An extension of the property rights on seeds in Argentina would consolidate a model of agribusiness that would be likely to lead to an increasing use of pesticides in Argentine agriculture. This, in turn, would have significant consequences on the health of the local population and infringe upon their rights to health, life and a healthy environment.[18]

Thus, seeds are not only at the core of the cultural identities of many local populations, but they also ensure some of their basic human rights and facilitate their enjoyment of the benefits of scientific progress and its applications. Instead of introducing measures that further restrict access to seeds, measures that increase options for individuals to participate in seed markets and access new plant varieties

---

13 UN General Assembly, 'Seed Policies and the Right to Food: Enhancing Agrobiodiversity and Encouraging Innovation', Report of the Special Rapporteur on the right to food, A/64/170 (23 July 2009) para 36.

14 Ibid, para 38.

15 Charlotte Dreger and Gertrud Falk, 'Zugang zu Saatgut und das Menschenrecht auf Nahrung', *FoodFirst* 4/2016, p 4.

16 Preliminary Observations Special Rapporteur on the right to food, Hilal Ever, on her mission to the Argentina 12–21 September 2018, https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID =23590&LangID=E (accessed 11 March 2019).

17 Agrovoz, 'El Gobierno aprobó la venta de nuevos maices y sojas transgénicos' (6 March 2018), http://agrovoz.lavoz.com.ar/agricultura/el-gobierno-aprobo-la-venta-de-nuevos-maices-y-sojas-transgenicos (accessed 11 March 2019).

18 The massive consequences the use of agrochemicals has on the health of its users was recently determined in a US court, where the plaintiff was awarded US$289 million compensation after the jury agreed with the plaintiff's argument that his cancer had been caused by the glyphosate-based product Roundup. 'Monsanto Ordered to Pay $289m as Jury Rules Weedkiller Caused Man's Cancer', *The Guardian* (11 August 2018), https://www.theguardian.com/business/2018/aug/10/monsanto-trial-cancer-dewayne-johnson-ruling (accessed 21 January 2019).

https://doi.org/10.1017/bhj.2019.11 Published online by Cambridge University Press

should be implemented and protected. The focus of Argentina's regulations on intellectual property and plants must be on those stakeholders whose fundamental rights are most at risk, namely local rural producers.

VII. Final Considerations

So far, Argentina has successfully resisted the global trend to develop and enforce a broad intellectual property scheme for plant varieties. Should a claim like Monsanto's be successful in any future legal action, it will significantly increase corporate influence on the Argentine market, probably to the detriment of rural farmers.

Currently, change is already visible at the national level: in line with the interests of multinational corporations, Argentina's Congress is about to pass a new law on seeds that would adapt the existing Argentine law to the 1991 UPOV Convention by curtailing farmers' rights to re-use seeds.[19] Any decision on the patentability of GM seeds under the country's patent law is also expected to have an impact well beyond Argentina's national borders. With the provisions of both TRIPS and UPOV involved, the issue is an interesting one to follow for many other countries dealing with similar questions. Furthermore, any such decision will have to be rendered against the backdrop of the Free Trade Agreement currently being debated between the European Union and the founding members of Mercosur (Argentina, Brazil, Paraguay and Uruguay), the draft of which includes an obligation for the states to ratify the 1991 UPOV Convention.[20] These developments make civil society intervention more than necessary.

The petition filed before the Supreme Court was only one of many actions advanced by Argentine civil society. For years now, many organizations promoting the rights of local agriculture, indigenous peoples, the environment and human rights have been working to oppose Monsanto's business model. They are now joining forces to organize demonstrations and activities to alert the public to the risks that companies like Monsanto pose to Argentine society and agriculture. It is hoped that their combined efforts will prompt both legislators and judges to maintain an intellectual property system for plants and seeds that corresponds to the circumstances, needs and rights of Argentina's local population.

[19] 'Obtuvo dictamen el proyecto que modifica la Ley de Semillas', *iProfessional* (13 November 2018), https://www.iprofesional.com/negocios/281402-exportaciones-agroquimicos-monsanto-A-pedir-de-Bayer-y-Monsanto-obtuvo-dictamen-y-entro-en-cuenta-regresiva-la-aprobacion-de-una-Ley-de-Semillas-que-privatiza-el-control-del-insumo (accessed 11 March 2019).

[20] Article 9 of the EU proposal for a legal text on Intellectual Property Rights in the Trade Part of the EU-Mercosur Association Agreement, http://trade.ec.europa.eu/doclib/html/155070.htm (accessed 11 March 2019). To import 'TRIPS-plus' obligations into free trade agreements is a common practice for countries from the Global North. Peter Drahos, 'Expanding Intellectual Property's Empire: The Role of FTAs', International Centre for Trade and Sustainable Development (2003), https://www.ictsd.org/sites/default/files/downloads/2008/08/drahos-fta-2003-en.pdf (accessed 11 March 2019).

https://doi.org/10.1017/bhj.2019.11 Published online by Cambridge University Press