

# Beyond Article 27[3b]: Can the TRIPs Agreement Protect Biological and Cultural Diversity?

By Graham Dutfield

Frequently, discussions on the TRIPs Agreement as it relates to biological diversity and the interests of indigenous peoples and local communities focus on patents, in particular the highly emotive issue of patenting life and the availability of the so-called '*sui generis*' option for plant varieties (Article 27[3b]). Without denying the importance of patents, one must bear in mind that the Agreement's 73 articles provide a variety of intellectual property rights. Graham Dutfield examines the relevance of each of these to the conservation biodiversity and traditional knowledge in his study *Can the TRIPs Agreement Protect Biological and Cultural Diversity?* to be published in the Biopolicy Series of the African Centre of Technology Studies later this year. ICTSD has adapted the following excerpt focusing on three issues whose relationship with biological and cultural diversity needs further research: trademarks, geographical indications, and protection of undisclosed information.

## Trademarks

A trademark is a marketing tool that is often used to support a company's claim that its products or services are authentic or distinctive compared with similar products or services from another trading entity. It usually consists of a distinctive design, word, or series of words, usually placed on the product label. Registered trademarks must be renewable indefinitely (Article 18). The trademark owner has the exclusive right to prevent third parties from using identical or similar marks in the sale of identical or similar goods or services where doing so would result in a likelihood of confusion (Article 16[1]).

In many countries, such as the United States, Canada, Australia, Peru and South Africa, traditional handicrafts and artworks are highly marketable products that can be a lucrative source of income for indigenous peoples and traditional communities. Some customers are attracted by the ethnic origins of such products and may be willing to pay extra when they are convinced of their authenticity. Therefore, trademarks could have a useful role to play, especially for groups and communities that are concerned about reproductions falsely attributed to them.

A kind of trademark that exists in the laws of some countries, and which TRIPs does not disallow, is the certification trademark. Certification marks can be used by small-scale producers to guarantee to customers that goods are genuine in some way or another, and perhaps to support production that is conducted in an environmentally-sustainable manner. Certification marks indicate that the claims made by the traders have been authenticated by an organisation independent of the individual or company making or selling the product. This is likely to be a regional trade association that has registered its own collective mark. Thus, in response to the claim that labels such as 'handmade', 'hand-crafted', and 'authentic' that are not authenticated by an independent body confuse buyers and compete with products made and sold by indigenous peoples, Canada has introduced official certification marks to authenticate indigenous peoples' work.<sup>2</sup> For example, Inuit soapstone carvings are labeled with a mark certified by the Department of Indian and Northern Affairs. A certification scheme is also being developed in Alaska to identify Native handicrafts using a symbol bearing the words 'Authentic Native Handicraft from Alaska'.

However, labeling has been unsuccessful in some US states in terms of promoting trade in indigenous peoples' products. This may be because customers are not aware of the marks or do not care whether the articles they purchase are genuine. They may also be confused by the labels. These problems illustrate the difficulties likely to arise from the use of certification and geographical indications for manufactured goods and artwork. Nevertheless, they can be successful marketing strategies, especially if traders have a clear understanding of why people wish to buy their articles.

## Geographical indications

Geographical indications are similar in function to trademarks, except that they identify a product with a particular territory, whereas trademarks identify a product with a company or brand.<sup>3</sup>

Members are required to permit legal action enabling traders to prevent (a) the designation or presentation of a good (such as a trademark) that suggests, in a manner that misleads the public, that the good in question originates in a geographical area other than the true place of origin; and (b) any use which constitutes unfair competition (Article 22[2], [3]). Article 23 deals solely with wines and spirits, which is indicative of the influence of the major wine and spirit-exporting countries in negotiating TRIPs. The geographic indications provisions are to be reviewed periodically by the Council for TRIPs (Article 24).

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## Could Basmati Rice be Protected by Geographical Indication?

Basmati rice is a long-grained aromatic variety of rice cultivated in Northern India and Pakistan. A company called Rice Tech in the United States has for several years been selling basmati rice in the US and the Middle East under the name 'TexBasmati', thus provoking anger among people in India although the germplasm apparently was freely and legally acquired by Rice Tech from the International Rice Research Institute in the Philippines. Until the Parties to the Convention on Biological Diversity resolve the issue of genetic resources in *ex situ* collections, no recourse is available under the Convention. Plant variety protection in countries where it is available is not possible because basmati is not a new variety. So, could India and Pakistan use the geographic indications section of TRIPs to force the United States to stop Rice Tech using the name TexBasmati?

For these countries to be successful, the WTO dispute settlement panel would have to accept the argument that basmati is a variety of rice made distinctive not only by its inherent qualities, but also by its geographical origin. The fact that basmati is not a geographical expression makes the association with a place less strong than, say, Darjeeling tea, whose producers are able to secure very good prices due to its high reputation. Nevertheless, India and Pakistan appear to have a strong case since basmati is not yet a generic term, i.e. it has not come to mean any long-grained fragrant rice. India could do much to enhance the reputation of basmati rice and facilitate international protection from competitors that would unfairly exploit this reputation by making available a system of either appellations of origin or certification trademarks. It should be noted that TRIPs does *not* require protection of geographical indications that are not protected in their country of origin (Article 24 [9]).

*Beyond Article 27[3b], continued from page 5*

Perhaps the best known type of geographical indication is the appellation of origin. The 'appellation d'origine' was originally a French geographical indication applying to products considered to be distinctive due to a combination traditional know-how and highly localised natural conditions.<sup>3</sup> For example, wines from the Champagne region of France are protected this way; local producers acting collectively have prevented the use of the word 'champagne' on bottles of perfume, English wine and German shampoo. This type of intellectual property right might also provide protection for basmati rice grown in Northern India and Pakistan (see box on previous page).

Although so far the use of this method has been confined mainly to certain beverages and foodstuffs, the principles of geographical indications could guide laws to protect intangible expressions of folklore. Indeed, in 1985 the UN Educational, Scientific and Cultural Organization and the World Intellectual Property Organization developed a model law called the 'Model Provisions for National Laws on Protection of Expressions of Folklore against Illicit Exploitation and Other Prejudicial Actions'. In Section 6, prejudicial actions include failure to indicate the ethnic and geographic source of an expression of folklore in printed publications and other communications to the public, and deliberately deceiving the public about the ethnic source of a production. Although not explicitly stated in the document, a law to implement the model provisions *could* include traditional cultivars as 'expressions of folklore' to be protected if national law-making bodies felt it desirable to protect such resources.<sup>4</sup>

### Protection of Undisclosed Information

The inclusion of this section in TRIPs was strongly opposed by developing countries who did not consider undisclosed information to be a form of IPR. However, Switzerland and the United States, who were concerned to safeguard trade secrets internationally, successfully persuaded other governments to accept their proposal for such protection.<sup>5</sup> Because no previous convention provides for protection of undisclosed information, the strategy adopted by the two countries was to argue that such protection is a necessary measure for countries to fulfil their obligations to suppress unfair competition as required by Article 2 of TRIPs.<sup>6</sup>

Members must enable natural and legal persons to prevent 'information lawfully within their control from being disclosed to, acquired by, or used by others without their consent in a manner contrary to honest commercial practices'.

The knowledge or know-how of an individual or a whole community might be protected as a trade secret as long as the information has commercial value and provides a competitive advantage, whether or not the community itself wishes to profit from it. If a company obtains such information by illicit means, legal action may be used to force the company share its profits.<sup>7</sup> Conceivably, a considerable amount of indigenous peoples' knowledge could be protected as trade secrets. Restricting access to their territories and exchanging information with outsiders through agreements that secure confidentiality or economic benefits would be appropriate means to this end. It is very likely that knowledge shared by all members of a community may not qualify as a trade secret. However, 'if a shaman or other individual has exclusive

access to information because of his status in the group, that individual or the indigenous group together probably has a trade secret'.<sup>8</sup>

The InterAmerican Development Bank supports a project in Ecuador to enable indigenous peoples to benefit from bio-prospecting by transforming traditional knowledge into trade secrets.<sup>9</sup> Knowledge from communities wishing to participate in the project will be catalogued and deposited in a restricted-access database in which each community will have its own file. Checks will be made to see whether the entries made are not already in the public domain and whether other communities share the knowledge. If communities with the same knowledge were to compete rather than collaborate, there would be a price war that would benefit only the corporate end-users. To overcome this

danger, the project envisages the creation of a cartel comprising the communities that bear the same trade secret. The trade secret can then be negotiated in a Material Transfer Agreement with the benefits shared between the government and the cartel members.

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### NOTES

<sup>1</sup> Blundell, V. 1993. Aboriginal empowerment and souvenir trade in Canada. *Annals of Tourism Research* 20, 64-87, at 69.

<sup>2</sup> Moran, W. 1993. Rural space as intellectual property. *Political Geography*, 12, 263-277, at 266.

<sup>3</sup> Ibid.

<sup>4</sup> For a commentary on the UNESCO/WIPO Model Provisions, see Posey, D.A. and Dutfield, G. 1996. *Beyond Intellectual Property: Towards Traditional Resource Rights for Indigenous Peoples and Local Communities*. Ottawa: International Development Research Centre.

<sup>5</sup> Blakeney, M. 1996. *Trade Related Aspects of Intellectual Property Rights: A Concise Guide to the TRIPs Agreement*. London: Sweet and Maxwell, at 102.

<sup>6</sup> Article 2 of TRIPs requires Members to comply, inter alia, with Article 10 (bis) of the Paris Convention for the Protection of Industrial Property, which does not limit legal action on the basis of unfair competition to goods already protected by trademark or other forms of legal protection.

<sup>7</sup> Gollin, M. 1993. An intellectual property rights framework for biodiversity prospecting. In Reid, W. V., Laird, S. A., Gamez, R., Sittenfeld, A., Janzen, D. H., Gollin, M. A. and Juma, C. *Biodiversity Prospecting: Using Genetic Resources for Sustainable Development*. Washington DC: WRI, INBio, Rainforest Alliance, ACTS, 159-197.

<sup>8</sup> Axt, J. R., Corn, M. L., Lee, M. and Ackerman, D.M. 1993. *Biotechnology, Indigenous Peoples and Intellectual Property Rights*. Congressional Research Service. The Library of Congress, Washington DC; Shiva, V. and Holla-Bhar. 1993. Intellectual piracy and the neem tree. *The Ecologist*, 23, 223-27.

<sup>9</sup> Vogel, J.H. 1996. The successful use of economic instruments to foster sustainable use of biodiversity: six case studies from Latin America and the Caribbean. Draft report for the *Summit on Sustainable Development*, Bolivia, December 1996; Vogel, J.H. 1997. Know-how licenses: recognising indigenous rights over collective knowledge. *Bulletin of the Working Group on Traditional Resource Rights*, 4, 17-18.