THE PROTECTION OF INTELLECTUAL PROPERTY FOR LOCAL AND INDIGENOUS COMMUNITIES

1) Introduction

Traditionally speaking, intellectual property rights (IPRs) may be defined in two ways: (a) in a colloquial sense, IPRs include everything which emerges from the exercise of the human brain and, (b) in a legal sense, IPRs are understood as "...the legal rights which may be asserted in respect of the product of the human intellect".[1] At the international level, several efforts have been taken to harmonise standards and procedural rules for intellectual property protection. For example, the Paris Convention for the Protection of Industrial Property, of 20 March 1883,[2] and the Berne Convention for the Protection of Literary and Artistic Works, of 9 September 1886,[3] are the basis for most of the international conventions regarding intellectual property protection.[4]

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[1]PHILLIPS and FIRTH, Introduction to Intellectual Property Law (1990), p. 3.

[2]As revised at Brussels on 14 December 1900, at Washington on 2 June 1911, at the Hague, on 6 November 1925, at London on 2 June 1934, at Lisbon on 31 October 1958, and at Stockholm on 14 July 1967.

[3]Completed at Paris on 4 May 1896, and as revised at Berlin on 13 November 1908, completed at Berne on 20 March 1914, at Rome on 2 June 1928, at Brussels on 26 June 1948, and at Stockholm on 14 July 1967.

[4]Most of the international agreements relating to intellectual property protection are administered by an organisation which was created with the signing of the Convention Establishing the World Intellectual Property Organization (WIPO), signed at Stockholm, on 14 July 1967. This Convention is published in 6 I.L.M. 782 (1967).The WIPO has its headquarters in Geneva and has been recognised as the most important forum for discussions on intellectual property issues. Under the WIPO, the Paris and Berne

Originally, the concept of intellectual property included copyrights, authors' rights, trademarks and inventors' rights. The development of new technologies, together with the needs of modern society substantially broadened the concept of intellectual property which now includes the legal protection of broadcasting, computer programmes, biotechnological processes, etc.. Moreover, after the commitments established by the United Nations Conference on Environment and Development (UNCED)[5], *i.e.*, Agenda 21, the Rio Declaration and the Convention on Biological Diversity (CBD), *inter alia,* another aspect of intellectual property protection was raised. The CBD, for instance, recognises in Article 8 (j) that the respect, maintenance and preservation of the "...knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles [is] relevant for the conservation and sustainable use of biological diversity..." and that national legislation shall promote the application of the general principle established by Article 8 (j) "...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 utilisation of such knowledge, innovations and practices".

In light of the wording of the CBD, one must understand that the Convention clearly accepts that the knowledge, innovations and practices of these communities are relevant to the sustainable use of biodiversity. Further the Convention recognises that the traditional knowledge and practices of local and indigenous communities have commercial value. Finally the CBD links sustainable development and commercial value with the traditional concept of IPRs. The latter two points are important for the purposes of this paper. Firstly, it is important to remark that the CBD identifies economic value, once benefits arise from the utilisation of such traditions, and these benefits are to be shared. Secondly, when the Convention discusses knowledge, innovations and practices and entitles local and indigenous communities to be their holders, it links these concepts with the vocabulary typically used for the definition of the proprietor of an intellectual property right.

Conventions are administered by a Union. The Chief Executive of the Union is the Director General of the WIPO.

[5]Popularly known as the "Rio Earth Summit" and held in Rio de Janeiro, Brazil, in June 1992.

In this context, it is possible to interpret the wording of the CBD as including the traditions of local and indigenous communities within the current system of national and/or international laws. What follows is an analysis at the multilateral, regional and national level.

2) A multilateral perspective: the GATT

On 15 April 1994, 124 States signed, in Marrakech, the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations (hereinafter "the Final Act")[6], under the GATT auspices. The Final Act incorporates, *inter alia*, an Agreement establishing the World Trade Organization (WTO)[7] and an Agreement on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods (hereinafter "the TRIPS Agreement")[8] .

The TRIPS Agreement will be administered by the Council for Trade Related Aspects of Intellectual Property Rights (hereinafter "the Council for TRIPS"), established under the institutional framework of the WTO[9]. The Council for TRIPS will have the assignment of monitoring "... the operation of this [TRIPS] Agreement and, in particular, Member's compliance with their obligations hereunder,..." and the duty of providing assistance requested by the Members relating to trade-related aspects of intellectual property rights and dispute settlement procedures.

Furthermore, a Decision on Trade and Environment[10], taken at the Ministerial Meeting of the GATT in Marrakech on 14 April 1994, calls for the establishment of a Committee on Trade and Environment open to all Members of the WTO. This Committee shall initially address "...the relationship between the provisions of the

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[6]The origin of the General Agreement on Tariffs and Trade (GATT) dates to 1948. At that time, the "Havana Conference", set up to draft a "International Trade Organization (ITO)", failed. Ironically enough, the initiative to establish such an organisation was taken by the United States and the most important reason for the ITO's failure was that the US Congress did not approve the so-called "ITO Charter". The GATT is itself an international agreement that, because of the historical events which occurred during the attempt at establishing the ITO, has the status of an international binding agreement and the functions of a multilateral trade organisation. See, for a more detailed analysis of GATT's history, JACKSON, The World Trading System: Law and Policy of International Economic Relations (1989), Chapter 2.

[7]The Final Act, pp. 9-19. Hereinafter referred to as "the WTO Agreement".

[8]The Final Act, Annex 1C, at pp. 319-351.

[9]The WTO Agreement, Art. IV (5).

[10]GATT Doc. MTN.TNC/MIN(94)/1/Rev.1, 11 April 1994, at pp. 4-6.

multilateral trading system and trade measures for environmental purposes, including those pursuant to multilateral environmental agreements"[11], *inter alia*, and "... will consider ... the relevant provisions of the Agreement on Trade-Related Aspects of Intellectual Property Rights as an integral part of its work, ..."[12].[13] As a consequence, the analysis of the relevant provisions of the TRIPS Agreement, together with the analysis of the relationship between the WTO and multilateral environmental agreements, will lead the Committee to discuss the provisions of the CBD which recognise the rights of local and indigenous communities.

Probably the most important provision of the TRIPS Agreement is the one related to biotechnology. Article 27 (3) (b) of the TRIPS Agreement states that "plants and animals other than microorganisms, and essentially biological processes for the protection of plants and animals other than non-biological and microbiological processes" shall be excluded from patentability. Moreover, in accordance with the 1991 revision of the International Convention for the Protection of New Varieties of Plants (hereinafter "the 1991 UPOV Convention")[14], Article 27 (3) (b) of the TRIPS Agreement establishes that "..., Members shall provide for the protection of plant varieties either by patents or by a *sui generis* system or by any combination thereof"

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[11] *Ibid.*, p. 5.

[12] *Ibid.*, p. 6. Emphasis added.

[13] From the announcement of the first drafts of the Final Act up to 1994 Decision on Trade and Environment, note 10, *supra*, discussions of environmental issues were generally unsatisfactory. See, *e.g.*, ARDEN-CLARKE, The GATT Report on Trade and Environment - A Critique by the World Wide Fund for Nature (1992), ARDEN-CLARKE, International Trade, GATT, and the Environment (1992), and FOUNDATION FOR ENVIRONMENTAL LAW AND DEVELOPMENT - FIELD, The Multilateral Trade Organization: a Legal and Environmental Assessment (1992). However, at the end of the Uruguay Round of negotiations there was an agreement on the terms of reference for the development of a work programme on the links among trade, environment and sustainable development (GATT Doc. MTN.TNC/W/141, 15 December 1993).

[14] The UPOV Convention was signed on 2 December 1961, and revised on 10 November 1972, 23 October 1978, and 19 March 1991. One may argue that the 1991 revision of the UPOV Convention follows, in some sense, the recommendations of the Committee of Experts on Biotechnological Inventions and Industrial Property, under the auspices of the Paris Union, note 4, *supra*, designed to discuss the interface between patent protection and biotechnology . For the reports of the discussions of the Committee of Experts, see WIPO Docs. BioT/CE/I/3, 9 November 1984; BioT/CE/II/3, 7 February 1986; BioT/CE/III/3, 3 July 1987, and; BioT/CE/IV/4, 28 October 1988. During the discussions of the Committee of Experts, it was concluded that it is not clear if plant variety rights should be protected by patent or by a *sui generis* system. The 1991 revision of the UPOV Convention, therefore, does not impose any specific system of protection for plant varieties; it simply states that "[e]ach Contracting Party shall grant and protect breeders' rights" (1991 UPOV Convention, Art. 2).

and that the provisions of this sub-paragraph will be reviewed four years after the entry into force of the WTO Agreement.

Two significant points must be made. Firstly, the provision of the TRIPS Agreement, although not expressly mentioned, is to a large degree based on the wording of the 1991 UPOV Convention. The latter does not establish a different treatment for new plant varieties created by traditional methods and for those created by methods of genetic engineering. Therefore, no precise distinction between the two methods exists. Consequently, plant varieties created using traditional methods of local and indigenous communities are not excluded from legal protection. Secondly, the negotiators of the TRIPS Agreement decided that Article 27 (3) (b) should be reviewed in four years after the entry into force of the WTO Agreement. In the future, it is possible that issues concerning the rights of local and indigenous communities will become more important within the context of the TRIPS Agreement and, perhaps, it will be the task of the Committee on Trade and Environment to enhance this importance.

Finally, it is noteworthy that the TRIPS Agreement proposes the establishment of minimum standards which shall be adopted by national law. However, there is no restriction on adopting higher standards of IPRs than those proposed by the TRIPS Agreement. Furthermore, the TRIPS Agreement will have binding force once ratified by Members, but will be enforced under the new international trade system only after an additional period of time granted solely to less developed countries[15]. The establishment of the WTO links together issues of trade, IPRs, the environment and sustainable development. Within this context new strength will almost certainly be given to the legal protection of the traditional knowledge and practices of local and indigenous communities.

3) A regional perspective: the Andean Pact

[15] TRIPS Agreement, Art. 65. Generally, Members of the TRIPS Agreement will be obliged to apply the provisions of the Agreement within one year of the date of the entry into force of the WTO Agreement (Art. 65 (1)). However, developing countries and "transforming economies" have been granted an extra period of 4 years (Art. 65 (2) and (3), respectively). In addition, the extra period for "Least-Developed" countries is 10 years (Art. 66).

In 1969, as a result of the inevitable failure of the LAFTA[16], the Andean Pact was established with the signing of the Cartagena Agreement. Its original Members were Bolivia, Chile, Colombia, Ecuador, Peru and Venezuela. Chile withdrew in 1976. Peru withdrew in 1992, planning to return at the end of 1994[17]. The legislative functions of this integrated system are carried out by the Commission. Its decisions are applicable in the Member States without the need of further implementation by national law[18].

Most, if not all, of the Member States of the Andean Pact have indigenous communities in their territories. The Andean Pact's current legal framework, however, and in particular the Decisions regarding the protection of intellectual property, do not refer directly to IPRs for local or indigenous communities. However, two recent decisions appear to be relevant for the purposes of the present analysis.

Decision 344, Common Provisions on Industrial Property, of 21 October 1993[19], has provisions which may be used to protect traditional practices and knowledge. For instance, an application for the protection of industrial secrets, as established, may be effective if some requirements are met: (a) the existence of an information which is secret; (b) that this information has actual or potential value because it is secret and; (c) that the person who legally has the information under his control has taken reasonable steps to keep this information secret.[20] Moreover, and probably more important, is the duration of the protection of industrial secrets. Decision 344 rules that "[t]he protection afforded under Article 72 shall last for as long as the circumstances provided for therein continue to obtain."[21] Therefore, if all the

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[16]EL-AGRAA and HOJMAN, The Andean Pact, in *International Economic Integration*, EL-AGRAA (Ed.), (1988), p. 257. The Latin American Free Trade Area (LAFTA) was formed in 1960 by Argentina, Brazil, Chile, Mexico, Paraguay, Peru and Uruguay, and was followed by the accessions of Colombia and Ecuador, in 1961, Venezuela, in 1966, and Bolivia, in 1967. For various economic and political reasons LAFTA failed and was replaced by the Latin American Integration Association (LAIA) in 1980. For a more detailed analysis of the history of the process of Latin American integration, see, *e.g.*, FINCH, The Latin American Free Trade Association, in *International Economic Integration*, EL-AGRAA (Ed.), (1988) , Chapter 10, pp. 237-256; WIONCZEK, The Misfortunes of the Association for Latin American Integration (ALADI), 1980-83, in *International Economic Integration*, EL-AGRAA (Ed.) (1988), Chapter 12, pp. 267-283.

[17]KENDALL, *et. al*, Andean Pact still split on outside tariff, *Financial Times*, 12 May 1994, p. 6.

[18]ZALZUENDO, Patentes en el Grupo Andino: Reforma de 1991, *Revista del Derecho Industrial*, , No. 39, 1991, at p. 459.

[19]*Gaceta Oficial del Acuerdo de Cartage*, X - No. 142, of 20 October 1993.

[20]Decision 344, Art. 72.

[21]*Ibid.*, Art. 75.

requirements listed in Article 72 are met the protection of undisclosed information will have an unlimited duration. This seems to be of great importance within the context of the protection of local and indigenous rights, in so far as the information which has been developed and which has endured throughout the centuries will be legally protected in perpetuity, so long as the requirements of the law are met. If one takes into account other types of IPRs, the term of protection will be extremely limited and, in some cases, the requirement concerning its industrial and/or commercial use will have to be satisfied.

Decision 345, Common Provisions for the Protection of Breeders of Plant Varieties, of 21 October 1993[22], also appears to be relevant for the purposes of this paper. This Decision focuses on the protection of the rights of breeders of plant varieties, and aims to enhance scientific investigation within the territories of the Member States of the Andean Pact and the transfer of technology within or without its territories[23].The basic requirements for the protection of a plant variety are: novelty, distinctness, uniformity and stability[24] and the term of protection varies from 15 to 25 years. It is possible that a local or indigenous community might file a successful application for the protection of a plant variety. However, after taking into account the rights granted to these communities by national constitutional law, a breeders' right may be granted only to natural persons or legal entities[25]. In some cases it is possible that, to file an application for the registration of a new plant variety, an indigenous community will be required to have legal personality.

A commendable goal of Decision 345 is the transitional provision calling for common provisions on access to genetic resources, to be approved before 31 December 1994[26]. A draft Decision was prepared by the World Conservation Union (IUCN)[27] and future negotiations are forthcoming. The future Decision might contain as one of its most important objectives, the recognition of "... the rights and needs of indigenous

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[22] *Gaceta Oficial del Acuerdo de Cartage*, X -No. 142, of 20 October 1993.
[23] Decision 345, Art. 1.
[24] *Ibid.*, Art. 21. These requirements are, to a large degree, based on those proposed by the 1991 UPOV Convention, Arts. 5-9.
[25] *Ibid.*, Art. 14.
[26] *Ibid.*, Transitional Provision, Third.
[27] IUCN, Elements for a Draft Decision on Access to Genetic Resources - Draft Issues To Be Considered, 9 May 1994, SPDA/IUCN ELC.

and local communities in relation to customarily used genetic resources through benefit sharing."[28] In addition, this draft Decision proposes that when the access to genetic resources is related to the knowledge, innovations, and practices of an indigenous or "campesino" community, "...benefit sharing will take into account their knowledge, innovations, and practices which accompany those genetic resources."[29] The approval of a Decision in these terms, as a means of implementing the CBD and as a means of benefit sharing arising from the commercial exploitation of traditional knowledge and practices, seems an appropriate approach to the subject. As a matter of law, the provisions on intellectual property rights of the Andean Pact will, therefore, need to take into account those provisions which regulate access to genetic resources and hence protect traditional knowledge and practices.

4) A national perspective: Brazil

Regarding intellectual property protection, Brazil is taking a step towards the adaptation of its national legislation to the new international developments concerning minimum standards of intellectual property protection. The P.L. No. 824/91[30] does not mention the protection of plant varieties. It is possible that the national legislator intended to leave the subject to a *sui generis* system of protection. Therefore, although not patentable, a plant variety will be able to be protected under a particular law that shall be negotiated in the future. In general, however, the P.L. No. 824/91, is in accordance with the proposed rules of the TRIPS Agreement[31].

The Brazilian Constitution[32] does provide particular rights to indigenous communities. Article 231, *caput*, rules that "[t]he social organization, customs, languages, creeds and traditions of Indians are recognized, as well as their original rights to the lands they traditionally occupy, ...".[33] Clearly, it is possible to interpret

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[28] *Ibid.*, Possible Objectives for a Decision, No. 7.
[29] *Ibid.*, Conceptual Issues, No. 9.
[30] P.L. is the abbreviation of "Projeto de Lei", or legislative "Bill", in English. The P.L. No. 824/91, which aims to regulate duties and rights related to industrial property, was submitted to the Brazilian National Congress, by President Fernando Collor, on 30 April 1991. It has been already discussed and amended by the Chamber of Deputies (Low Chamber) and is now, under the number P.L.C. No. 115/93, in the Federal Senate (High Chamber).
[31] Note 8, *supra*.
[32] Approved on 5 October 1988.
[33] Emphasis added.

this constitutional provision as protecting the intellectual property rights of indigenous communities. Nevertheless, the details of this interpretation will be constructed by national courts aided by the provisions arising from secondary legislation in this matter. In addition, Article 231 (2) goes further and states that "[t]he lands traditionally occupied by Indians are destined for their permanent possession, and they shall be entitled to the exclusive usufruct of the riches of the soil, rivers and lakes existing thereon". This is a remarkable constitutional right to be granted to indigenous societies. Their land rights over the exploitation of the territories they have traditionally occupied entitle indigenous communities to exploit commercially the lands and the knowledge they posses. Also, acts aiming at the occupation, dominion or possession of these lands, or at the exploitation of the natural wealth of the soil, rivers and lakes are formally considered null and void, producing no legal effects[34]. If there is an infringement of their constitutional rights they may bring a case before a national court, with the Public Ministry[35] intervening in all stages of procedure[36].

Moreover, forthcoming legislation might grant the indigenous communities the right to establish legal entities to represent their interests and, further, to exploit commercially their lands and the knowledge that they have over these lands.[37] With the right to set up "Western-style" businesses the indigenous communities will have the possibility of claiming for their IPRs and of negotiating with other private undertakings the commercial exploitation of these rights.

5) Conclusion

It is, then, possible to argue that intellectual property protection for local and indigenous communities may be granted by the existing system of laws. On the other hand, however, one may argue that because of its specific features, a *sui generis*

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[34]Brazilian Constitution, Art. 231 (6).

[35]Public Ministry is a permanent institution, constitutionally considered essential for the functioning of the judicial system, with the duty of defending the legal order, the democracy and the social and individual rights (Brazilian Constitution, Art. 127).

[36]Brazilian Constitution, Art. 232.

[37]*Folha de São Paulo*, 30 June 1994, p. 8. This information was received by electronic mail and is in the form of a summary of Brazilian newspapers. It says that a Special Committee of the Chamber of Deputies approved a Bill regulating the rights of indigenous societies, withdrawing the tutelage of the State over the Indians and granting them the right to set up undertakings for the purpose of exploiting their lands. This Bill will now be sent to the Federal Senate for further discussion and negotiation.

system should be created in order to protect the intellectual property rights of these communities. Within the present system one might claim that it is not possible to bring indigenous rights under the traditional legal concept of IPRs. However, this matter has not yet been interpreted in any detail by national courts. The latter will one day have to decide upon such disputes and, as a matter of fact, Case law will establish the legal approach to the subject.

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