

## Biodiversity in the Amazon: The “Cupuaçu is ours” campaign in Brazil

### The Issue

The Brazilian Amazon contains some of most diverse life forms and ecosystems within the largest unspoiled tropical rainforest in the world. Hence, the conservation of its ecological and biological diversity is a key concern of the Brazilian government and the indigenous and other local communities that inhabit it.<sup>1</sup> The policy approach adopted by the Brazilian government to conserve this biodiversity has been to promote the sustainable development of the region through the production and commercialization of goods derived from the Amazon. It is held that this activity may lead to substantial economic benefits for Brazil and its indigenous communities, provided that the benefits are adequately shared. Furthermore, the sustainable production of derived goods may act as an incentive for improving the management and conservation of biodiversity and help combat deforestation and unsustainable farming practices that have put the Amazon at risk.

One of the difficulties the country has been facing is the lack of a legal framework to protect and domestic capacity to make effective use of its biodiversity, including the range of genetic resources and associated traditional knowledge that, given the development of modern technology, increasingly become sources of potential economic and cultural value.<sup>2</sup> The Convention on Biological Diversity (CBD)<sup>3</sup> recognised the sovereign rights of nations over their genetic resources,<sup>4</sup> and established the principle of access to genetic resources, subject to prior informed consent of the providing country and the sharing in a fair and equitable sharing of the results of research and development and the benefits arising from the commercial and other utilization of genetic resources upon mutually agreed terms. However, the CBD and the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) also recognise that the intellectual property rights of the researchers or other stakeholders covering the use of genetic resources in processes should be protected.<sup>5</sup>

***The NGO-led campaign against biopiracy and the legal challenges brought about by NGOs in the case of Cupuaçu are examples of how NGOs have pushed for change in national policy-making and achieved concrete, practical results through their campaigning.***

Given the potential number of stakeholders involved, it is important to have clear rules on access and ensure that there are appropriate arrangements in place for fair and equitable sharing of benefits to protect each of the stakeholders, and to ensure that intellectual property

rights are supportive of and do not run counter to the objectives of the CBD. However, this issue remains unresolved, and is currently under discussion in multiple international fora, including the CBD Conference of the Parties, the Food and Agriculture Organisation (FAO), the World Trade Organisation (WTO) TRIPS Council and the World Intellectual Property Organisation (WIPO). Moreover, few countries have implemented national biodiversity – related legislation implementing the CBD principles, in particular those related to access to genetic resources and traditional knowledge. The legal uncertainty regarding the access and use of genetic resources and traditional knowledge and debate on the implications of intellectual property rights on biodiversity has contributed to allegations of the misappropriation or “bio-piracy” of such resources for commercial use and/or patented by corporations claiming inventions based on such resources or knowledge, without the prior consent of the country of origin or adequate compensation being given to the parties involved, including indigenous and local communities.

The mounting concern about biopiracy<sup>6</sup> as well as the ethical aspects of allowing intellectual property rights on life forms has increased the concern of developing country governments and indigenous and local communities on the need to take action to tackle biopiracy and develop regimes that allow for the adequate protection and exploitation of their biodiversity.

Environmental and sustainable development NGOs and indigenous and local communities have been at the forefront of the efforts address issues related to the application of the intellectual property framework under the TRIPS Agreement related to biodiversity and to create public awareness and challenge cases of biopiracy in the Amazon. The NGO-led campaign against biopiracy and the legal challenges brought about by NGOs in the case of Cupuaçu are examples of how NGOs have pushed for change in national policy-making and achieved concrete, practical results through their campaigning.

### The campaign against biopiracy and to reclaim “Cupuaçu”

The national NGO-led movement against biopiracy in Brazil has grown enormously since 2002, with the objective of seeking the protection of national biodiversity and recognition of traditional knowledge held by Brazilian indigenous and local communities, so that their role in conserving the Amazon biodiversity and their right to benefit from the commercial use of the

goods derived from the such biodiversity is recognised. Nonetheless, NGOs have been actively participating in the formulation and implementation of the national laws related to genetic resources and traditional knowledge since the early 1990s.<sup>7</sup>

An important driver in the campaign was a workshop on the local control of agricultural biodiversity that took place in Rio Branco, Brazil, May 2002.<sup>8</sup> The workshop was organised by the international NGO GRAIN, and the Brazilian Amazonian Working Group (GTA).<sup>9</sup> The workshop brought together several NGOs and farmers, indigenous peoples and other local communities from multiple developing countries,<sup>10</sup> raising strong awareness and concern among the different groups and peoples about biopiracy and setting the stage for the development of the biopiracy campaign.

By 2002 the Brazilian NGO Amazon Link, created in September 2001 to supply information on the Amazon, became an important player in developing the campaign, coined the phrase “ethical limits to trademarks and patenting of the biological resources and traditional knowledge of the Amazon”.<sup>11</sup> At the time Amazon Link was supporting local rural producers of goods derived from the Amazon biodiversity by helping to find potential buyers for their products abroad, when they encountered difficulties related to intellectual property rights in order to market and export the products. During the process, Amazon Link discovered that the name “Cupuaçu”, a native tree of the Amazon rainforest belonging to the Cocoa family, had been registered as a trademark for various products by a Japanese company, Asahi Foods, in Japan since May 20, 1998, and later in Europe and the United States. While trademarks do not create individual exclusive rights in the product itself, they give the exclusive right to the owner to use a certain term, in this case “Cupuaçu”, as a trademark. Thus, the Japanese company was able to prohibit any other producer from using the term in the labelling of their products derived from “Cupuaçu”. This was claimed to have caused harm to the rural producers who felt inhibited from using the word “Cupuaçu” in their exports of jams and sweets and other Cupuaçu products. The producers were forced to sell the products under a different name. Amazon Link also found that the Japanese company had also taken out several patents on claimed inventions derived from Cupuaçu.<sup>12</sup>

Amazon Link together with the Amazonian Working Group (GTA) then on started a campaign targeting the trademarks and patents related to Cupuaçu, in an attempt to cancel such intellectual property rights, but also to create public awareness of this and other cases of alleged misappropriation and their impact on the commercial, ethical and cultural activities of the indigenous and local communities of the Amazon. The Cupuaçu case has become emblematic in the broader campaign against biopiracy in Brazil and helped to

mobilize the public and media both at the national and international level and to increase the awareness and involvement of the indigenous and local communities in the debate on how to deal with biopiracy in Brazil. The debate revolved not only on determining whether the trademarks or patents should have been granted or not in the cases related to Cupuaçu, but also on the type of arrangements and ethical standards that should be established under Brazilian national law to stop biopiracy and ensure that indigenous and local communities receive a fair share of the benefits of the economic exploitation of goods derived from biodiversity, often undertaken by foreign companies. It also sought to assert the international position of Brazil in the fight against biopiracy, in line with the positions the country has adopted in the CBD COP, WTO and other international for a where the relationship between intellectual property and the CBD principles are being discussed.

The campaign “Cupuaçu is ours”, (Cupuaçu e nosso!) gathered support from local and indigenous communities and national and international NGOs, and put strong pressure on the Brazilian government in order take a leadership role in the campaign and to actively get involved in the process of challenging the intellectual property rights related to Cupuaçu. Amazon Link and GTA, in partnership with other organisations worked with the Amazon indigenous and local communities that produce Cupuaçu products to bring forth a legal challenge against the “Cupuaçu” trademark in Japan with the aim of getting the registration of the trademark annulled, under the international principle that a proper name of a natural species cannot be trademarked. Amazon Link was supported by the NGO Brazilian Institute of International Trade Law and Development (IDCID)<sup>13</sup> and academics and experts associated to the University of São Paulo Law School (USP) who instructed legal counsel from the international law firm Baker Mackenzie to represent the Amazon peoples in legal proceedings in Japan. The Brazilian National Institute of Intellectual Property (INPI) and the foreign ministry likewise participated in the petition to cancel the Japanese trademark, officially filed in April 2003.

On March 1, 2004, the Japanese Patent Office (JPO) annulled the trademark Cupuaçu. Furthermore, the JPO denied Asahi Foods the patent for processing Cupuaçu seeds into a chocolate-like product, faced with the threat of international legal action on behalf of the government of Brazil. The refusal to grant the product was based on the fact that the Brazilian governmental agricultural research agency, EMBRAPA, had previously sought an international patent for the process. The final product has been called “cupulate”, given its resemblance to chocolate.

The awareness-building and advocacy activities of the Cupuaçu campaign also included workshops with the

indigenous and local communities and public campaigns and demonstrations against the trademarks and patents on Cupuaçu.

### Successes and Lessons Learned

The Brazilian “Cupuaçu is ours” campaign was born out of the effort of local NGOs to pro-actively attempt to openly challenge the existence of patents and trademarks on Cupuaçu and products derived from it. However, the campaign also served as an example to highlight concerns associated with biopiracy and to mobilize public opinion in Brazil and the government to take action.

The collaboration between NGOs, indigenous and local groups and governments was a significant factor in the outcome, in terms of the annulment of the trademark of Cupuaçu in Japan, which in itself was not a case of biopiracy, but served the broader purpose of mobilizing support for and awareness of the broader biopiracy campaign. The national coordination of the campaign was essential in bringing together different networks and organisations together and to coordinate action. The case constituted a symbolic triumph in a national battle to reclaim national sovereignty over what is considered part of the biological and cultural patrimony of Brazil.

The NGOs involved also played an important role in helping indigenous populations strengthen the knowledge and improve the governance skills to govern their land, resources and assert and defend their rights. It also helped indigenous groups to reassert and preserve the traditional management systems for the cultivation of Cupuaçu, highlighting the importance of the traditional knowledge held by the indigenous and local communities. The Cupuaçu case is one in which the traditional local communities were directly involved as key stakeholders, and were supported by NGOs and the government in their struggle.

The campaign also played a key role in helping different stakeholders to provide inputs into Brazilian foreign policy related to intellectual property and the conservation and sustainable use of biodiversity, in particular with regards to the on-going discussions at the CBD, WTO and WIPO.

Viviana Munoz Tellez

<sup>1</sup> See, for example, IP-Watch, “Brazil Fights to Make Case for International Biodiversity Protection”, 31 May 2006.

<sup>2</sup> In Brazil there is currently a provisional law on genetic resources and traditional knowledge, “Medida Provisoria No. 216-16”, partially regulated by the Decree No. 3.945, 28 September 2001.

<sup>3</sup> The CBD was concluded at the 1992 Earth Summit in Rio de Janeiro, Brazil, and signed by 188 countries. The CBD establishes three main goals: the conservation of biological diversity, the sustainable use of its components, and the fair

and equitable sharing of the benefits from the use of genetic resources.

<sup>4</sup> The CBD under Article 15 recognises “the sovereign rights of States over their natural resources, the authority to determine access to genetic resources rests with the national governments and is subject to national legislation.”

<sup>5</sup> Under TRIPS Article 27.3 (b), Patenting of micro-organisms and “microbiological processes” and some effective form of intellectual property rights on plant varieties, either patents or a *sui generis* form of protection. Articles 16.5 and Article 22 of the CBD dealt with intellectual property rights. Article 16.5 states that member countries shall cooperate to ensure that intellectual property rights are supportive of and do not run counter to the objectives of the Convention. Article 22 states that the CBD's provisions will not affect rights and obligations of countries to other “existing international agreements, except where the exercise of those rights and obligations would cause a serious damage or threat to biological diversity.

<sup>6</sup> See for example, the recent report revealing multiple cases of “bio-piracy” in Africa, Jay McGown, “Out of Africa: Mysteries of Access and Benefit-Sharing”, Edmunds Institute, African Centre for Biodiversity, 2006, <http://www.edmunds-institute.org/outofafrica.pdf>.

<sup>7</sup> For example, NGOs and indigenous and local communities actively participated in the discussions concerning the Project Law presented to the Senate in 1995 and approved in 1998 by the then Senator Marina Silva, current Minister of the Environment, to implement the CBD principles. The project law was not made permanent and the process of establishing legislation concerning genetic resources and traditional knowledge continues to be debated in an intra-Ministry working group (Cgen) in which NGOs are not allowed to participate.

<sup>8</sup> The “Growing Diversity” workshop in Brazil was part of the “Growing Diversity Project” launched in January 2000 by four NGOs: GRAIN, Crocevia, Bread for the World and SSCN. The main objective of the project was to help empower and strengthen the groups involved in the local management of biodiversity in Africa, Asia and Latin America. See <http://www.grain.org/seedling/?id=198>. The final report is available at <http://www.grain.org/gd/en/gd-final-en.pdf>.

<sup>9</sup> The Amazonian Working Group (GTA) is a network of over 600 NGOs and other grassroots organisations working in the Brazilian Amazon Region. See <http://www.gta.org.br/gta.php>.

<sup>10</sup> For more information about the workshop, see <http://www.grain.org/gd/en/case-studies/latin-america.cfm>.

The workshop resulted in the joint statement “The Rio Branco Commitment”, that asserted the rights and responsibilities of indigenous and local communities over biodiversity. See <http://www.amazonlink.org/gd/diversity/riobranco.html>.

<sup>11</sup> Amazonlink was founded September 2001 in Rio Branco, capital of the Brazilian state of Acre, and is headed by Michel F. Schmidlehner. See [www.amazonlink.org](http://www.amazonlink.org).

<sup>12</sup> See Michael Schmidlehner “Copuacu: A Case of Amazonian self-assertion”, Seedling, April 2003, GRAIN, at [www.grain.org/seedling-03-04-5-en.cfm](http://www.grain.org/seedling-03-04-5-en.cfm)

<sup>13</sup> See <http://www.idcid.org.br/>.