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**The Peruvian Proposal on the Protection
of Traditional Knowledge**

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The Peruvian Proposal on the Protection of Traditional Knowledge

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I. Characteristics of Traditional Knowledge (TK)

The knowledge of indigenous communities must be considered as a legacy from the past generations to present and future generations. Thus, the present generations are but custodians or administrators of said knowledge to their own benefit and that of future generations.

This is collective knowledge that pertains to one or more indigenous communities. The individuals that form part of said communities are but titleholders of the knowledge.

This knowledge is usually shared by different communities. It is possible that communities with similar ecosystems have the same or similar knowledge, whether due to them having developed it in parallel or due to there having been an exchange of knowledge between the different indigenous communities. It is extremely difficult to precisely determine which communities are the rightful owners of a certain knowledge.

Moreover, it is not the case of a static "stock" that is transferred as an inheritance from generation to generation, but of a body of organized knowledge that may be made richer with each generation, when there are the

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adequate incentives or made poorer to the time of disappearance when competing with western medicine.

In various laws they are recognized as part of the cultural heritage of indigenous communities¹. Therefore the communities not only have the right to a fair and equitable distribution of the benefits deriving from the use of their knowledge, but also the right to decide and dispose of it. Thus, they must be able to reserve the right to deny access to their knowledge.

II. What are the Characteristics of the Market of Knowledge?

A basic hypothesis of the perfect competition model is the complete information of the agents that participate in the market. Supposedly those who buy know what they are buying perfectly well and the resulting benefit. In the market of knowledge, who buys does not know what he is buying. Consequently, the potential buyers are not willing to pay for goods if they do not know their value. On the other hand, the sellers, are not willing to disclose their knowledge, because it is the same as giving it away without having the possibility of recovering it.

This characteristic has led to legally protect all the forms of knowledge, except for scientific knowledge, because in the absence of protection at least the incentive of transferring and developing new knowledge is lost, and what interests society is that knowledge be diffused and developed.

The knowledge of the communities does not adapt to the forms of usual protection, whether due to its nature as collective property or due to it not having a direct specific industrial use. The previous mentioned obliges the

creation of a new protection system of intellectual property of the communities' knowledge.

Due to there not being a protection regime there is an almost natural lack of trust from the communities that has been detected by all those who have wanted to discuss their knowledge with them. The communities are afraid of sharing and diffusing their knowledge, because once knowledge is shared or diffused, they lose control over it and receive no benefit in exchange. Due to the lack of incentives, the knowledge is not being developed and preserved, with the consequences that it is disappearing. The danger is that when this knowledge is lost it may be lost for ever.

Although up to now it has been the industry and not the governments that have taken the most important steps towards ensuring the participation of indigenous communities in research and in their benefits. The nonexistence of a legal framework creates an uncertainty for many companies interested in this knowledge. A result of this is that the knowledge of communities is not being taken advantage of by the society and the experience shows that the knowledge of the indigenous communities in some cases show results, where western medicine has not been able to find a solution (the case of acupuncture). The knowledge of the communities should try to complement western medicine.

III. Need to Implement a Sui Generis Protection System

Although the Biodiversity Agreement (CBD) acknowledges the rights of the knowledge possessed in favor of indigenous communities, there are no regulations with regard to the issue.

¹ Costa Rica: Law of Biodiversity, Law N°7788 of May 1998, article 66; Peru: Law on Preservation and Sustainable Use of Biological Diversity, Law N°26839, article 24; also see the

It is then necessary to analyze whether the current modalities of intellectual property offer an adequate protection for the knowledge related to the biodiversity of indigenous communities.

The modalities that may be considered are basically: the right of patents, and trade secrets.

a) Patents

The requirement of a novelty demanded by the patent laws would frustrate the intention of protecting the knowledge of the communities through this means. What is more, the fact that this knowledge is shared by the members of one or more indigenous communities and that it has been developed throughout generations and commercialized through common law, results in the knowledge not complying with this requirement.

Moreover, in these cases it is difficult to unequivocally identify the "inventor". Although in many cases the witch doctor is the one who has all the traditional knowledge, in other cases the knowledge is spread throughout the community(ies). In any case, it is thanks to a social group that the knowledge is created and maintained, so that the seller must not be an individual, but, at the least, a community.

On the other hand, patents confer a temporary protection. Once the protection term expires, inventions are of public domain and freely available. Given these characteristics of knowledge - transgenerational knowledge - not only the present generations should be benefitted with this type of protection. Moreover, communal and intercommunal tensions would be created since the competition

Brazilian Draft Law N°4579 of 1998, article 46.

for the commercialization of the collective property would increase. Due to the above, it is sought that these rights be imprescriptible.

Finally, the community knowledge is probably not industrially applicable, which is another requirement provided for in the patent laws.

b) Trade secrets

Under this modality all information is protected against its disloyal acquisition or use by third parties.

To that end it is necessary, among others, for the information to be confidential.

Inasmuch as the knowledge of the communities has been diffused among the communities, it seems difficult to access protection through this channel.

IV. The Peruvian Consultancy Procedure

In 1996 on the initiative of the Peruvian Government five groups were formed to explore the possibilities of protection and regulation of TK and the access to genetic resources, namely, 1. to make a diagnosis of the forms of organization of the indigenous communities in Peru and the mechanism of the benefit sharing distribution; 2. inventory of the genetic resources in Peru; 3. regulation of access to genetic resources; 4. protection of TK; 5. development of didactic material and strategy of the training of indigenous communities.

The participants were comprised of the different entities: governmental (Instituto Nacional de Defensa de la Competencia y de la Protección de la Propiedad Intelectual - INDECOPI, Ministerio de Industria, Turismo, Integración y Negociaciones Comerciales Internacionales - MITINCI, Ministerio de Promoción de la Mujer y del Desarrollo Humano - PROMUDEH, Instituto Nacional de Recursos Naturales - INRENA), NGOs (Sociedad Peruana de Derecho Ambiental - SPDA, Centro de Estudio y Promoción del Desarrollo - DESCO), academic sectors, and representatives of the indigenous communities (CONAP, Asociación Interétnica de la Selva Peruana - AIDSESEP).

Following various studies and discussions about the TK on the kind of protection most feasible, it was concluded that a sui generis type of protection was indicated.

Drafts were drawn up and the points discussed with the indigenous communities beginning last year. This took the form of workshops. The first of these was held in Lima (April 26-27, 1999) with the directors of the indigenous communities, the second in Cuzco (Mai 10-12, 1999) with the directors and representatives of the bases of the indigenous communities. In these workshops the concepts and basic definitions of the TK protection project, the intellectual property principles and how it can be used as an instrument for the protection of their knowledge were explained and the protection regime was presented. Finally, work-groups were formed among the participants. Each work-group was assigned a protection regime project subject, which according to government authorities were the most conflictive and where an opinion on the part of the indigenous communities was needed. At the end of the discussion there was a full meeting where each group presented its subject, the conclusions reached and comments regarding this subject in the Protection Regime Project. Then a discussion was begun with all the members of the other work-groups. The final conclusions reached were transcribed and were divided among those attending.

Finally an international seminar (Mai 19-21, 1999) was organized by INDECOPI and World Intellectual Property Organization - WIPO with the participation of government, private sectors, NGOs, academics and of course representatives of the indigenous communities as well as many participants from abroad, in particular from Brazil and the Andean countries.

Comments were welcomed, accepted, then discussed.

Following these, INDECOPÍ published the proposal in *El Peruano*, the national official newspaper of Peru, in October 1999² in to order diffuse and spread this proposal thereby facilitating the obtaining of useful comments and suggestions. The initial time limit for receiving comments (December 20, 1999) was extended on repeated occasions at the request of the indigenous communities (December 21, 2000 & Mai 22, 2000).

By means of both national³ and international⁴ workshops and seminars it has been possible to diffuse this proposal.

More recently in August of 2000 a second proposal containing the comments obtained previously was published in *El Peruano*⁵. You can find it in the web site from INDECOPÍ⁶.

We continue to work closely with the indigenous communities and the objective is to submit the completed proposal to Congress in the near future. At present there are primers made out by a consultant which contains the principal points

² *El Peruano* of October 21, 1999, 179492 et seq., <http://www.indecopi.gob.pe>.

³ "Reunión de Trabajo sobre la participación de los pueblos indígenas en el proceso de desarrollo de legislación sobre protección de sus conocimientos colectivos y acceso a los recursos genéticos," organized by the Secretaría Técnica de Asuntos Indígenas of PROMUDEH (October 26, 1999); "Consulta a los Pueblos Aymaras, Quechuas y Amazonicas sobre conocimientos indigenas y recursos genéticos" organized by the Organización de Comunidades Aymara, Amazonenses y Quechuas (OBAAQ), sponsored by the Comisión Jurídica para el Autodesarrollo de los Pueblos Originarios Andinos (CAPAJ) and the Asociación de Defensa y Desarrollo de las Comunidades Andinas del Peru (ADECAP) (January 15, 2000), "Taller Comunal sobre la Propuesta de Régimen de Protección de los Conocimientos Colectivos de los Pueblos Indigenas y Acceso a los Recursos Genéticos" organized by the Organización de Asociación ANDES, held in Cuyo Grande, Cusco (February 19, 2000).

⁴ "Roundtable on Intellectual Property and Tradicional Knowledge" organized by WIPO in Geneva (November 1-2, 1999), Consultation organized by Peoples' Biodiversity Network (IPBN), in the frame of the "Primera Reunion del Grupo de Trabajo especial de composicion abierta del periodo entre sesiones sobre el articulo 8 j) y disposiciones conexas del Convenio sobre la Diversidad Biologica", held in Sevilla (March 28, 2000), Consultation on "Strategies and Instruments for Protecting the Traditional Knowledge of Indigenous and Local Communities, in the frame of the workshop on Instruments for Access and Benefit Sharing from Genetic Resources and Related Traditional Knowledge Issues, co-organized by the Indigenous Peoples' Biodiversity Network (IPBN) and the World Resouces Institutes (WRI), as part of the Global Biodiversity Forum 15, held in Nairobi (Mai 13, 2000); "Reunión de la OMPI para países andinos sobre el uso de los sistemas de propiedad intelectual para la protección de los conocimientos tradicionales y el folclore", held in Bolivia (October 19-20, 2000); 12th Ringberg-Symposium "Indigenous and Traditional Resources", held in Ringberg, Germany (November 22-25, 2000), Max Planck Institut.

⁵ *El Peruano* of October 21, 1999.

⁶ <http://www.indecopi.gob.pe>.

of the Protection Regime Project. The object is to diffuse the proposal more widely and in a didactic manner. In this way two consultancy processes were held: a pilot work-shop with Amazonian students on 10 / 17, 18 / 00, as well as a work- shop with indigenous representatives of all the country on 10 / 25, 26 / 00. The final objective of PROMUDEH is to hold a big consultation at national level.

The previous consultancy process and diffusion reflects the efforts of the governmental authorities of the country because the Protection Regime Project is a true reflection of the needs and preoccupations of the indigenous communities and are widely known. Afterwards, the project should be presented to Congress for its discussion and approval.

V. Main Issues of the Peruvian Proposal

a) Scope of protection

The Peruvian proposal based solely on TK associated with the biodiversity. Other kinds of TK are not regulated here.

b) Objectives of the regime

- to promote respect and protection of TK.
- to preserve TK.
- to promote equitable benefit sharing and
- the use of TK in benefit of humanity.

c) Possession vs. Creator

Protection is giving to the indigenous communities in possession of TK, this being of more importance than knowing who the creators were.

This knowledge exists among various indigenous communities, so it is almost impossible to determine which one was the actual creator.

d) Title holding

The rules and regulations proposal will only apply to collective knowledge.

In the case of more than one community possessing that knowledge, they will become co-holders.

e) PIC

The buyers that wish to access the knowledge of a community must previously request its authorization and give a retribution in exchange. In order to give the authorization indigenous communities must have enough information as to the purposes, risks and implications of the activity that is to be carried out. The idea is that the community should have enough elements of judgement to give its authorization.

A difference exists between authorization for research and authorization for exploitation. For the former, PIC is required, and for the latter in addition to PIC a licensed agreement must be obtained.

f) TK in the public domain

It is considered that TK knowledge is in the public domain when it has been established that anyone not belonging to the indigenous community has acquired this knowledge by means of media communications such as newspaper publications, TV and perhaps personal contacts among the indigenous community.

Once this knowledge has been diffused, though unintentionally, it becomes public domain, thereby not requiring either PIC or a licensed agreement for its exploitation. However a contribution must be made to a Fund. The development options exist whereby the interested party and the community may come to an agreement as regards sharing any profits.

g) Duration of rights

These rights are limitless because they are the property of the National Patrimony. Likewise they are passed on from generation to generation.

h) Register

The objective of the Register is that of preserving the knowledge of the communities. The Register is not public but confidential and only he who has the authorization of the communities has access to it. The Register is not compulsory, and is only declaratory in what regards rights.

However it brings about certain advantages: The patenting of this knowledge is only permitted upon applying for and the granting of authority from INDECOPI.

It is also of assistance to potential bioprospectors in order to locate the various sources.

i) License agreement

Due to the fact that the communities are only custodians or administrators of the knowledge, they are inalienable. They only can be subject of a license of use agreement.

The license agreement must stipulate, among others, the establishment of royalties that the communities would receive for the use of their knowledge.

Although the knowledge may belong to more than one community, the celebrating of the license agreement is sufficient with only one of the communities as opposed to with all the communities.

The registration of the license agreement is facultative not obligatory.

j) Justifiable Compensation

There are two payments which may be made to the communities. The first one is when the celebration of the license agreement takes place. This payment is obligatory, and can take the form of money or goods such as building schools, medical posts, communication centres.

The second one is when some benefit has been obtained following the exploitation of the TK. The minimum payment is 0.5% of the gross sales.

k) Development Fund

Inasmuch as a large part of the knowledge is shared by more than one community, it being impossible for all of them to consent to the execution of the license of use agreement, a Development Fund would be created so that all the communities would be benefitted.

A Committee has been formed by the communities and the government sectors in order to take decisions regarding the distribution and destination of the benefits.

VI. Relationship between TK and IP

The recognition and regulation of the rights of the communities over their knowledge does not in any way impede the obtaining of intellectual property rights on the results of the investigations carried out starting from a knowledge. Due to the regulation about protection of the knowledge not having any aid faced with no respect, a binding is necessary between both systems of protection. For this reason, the Proposed Protection Regime foresees that in case an invention has been developed starting from knowledge of an indigenous community, its patenting would not be possible unless the authorization for use of this knowledge is shown⁷. A similar disposition in respect to the access to genetic resources can be found in the norms on access to Andean genetic resources (Decision 391)⁸ and in the regulation project of

⁷ Second Complementary Disposition.

⁸ Second Complementary Disposition.

Peruvian access⁹. At the same time in the new Andean Decision on IP¹⁰ an inclusion of a norm of the same terms has been included¹¹.

VII. Final Remarks

In the absence of a protection regime, the bispropection contracts executed among private companies and indigenous communities and universities or other research centers have been regulating the use and distribution of the benefits resulting from the use of the genetic resources and knowledge of indigenous communities. But purely contractual agreements have their shortcomings:

- Only the parties to the contracts are benefitted
- There is a high transaction cost for the parties
- The communities are unaware of the legal regime in force
- There is little community negotiation capacity.

The system of protection which is now to be implemented should try to establish clear rules to facilitate the conclusion of contracts, prevent abuses in these contracts and reduce the transaction costs, so that both parties (sellers and buyers) can benefit from them. The protection system should not be so complicated and bureaucratic that it discourages potential users.

The particular characteristics of the knowledge and genetic resources make a regulation convenient – not only at a national level. Conscious of this, work and analysis were being carried out at an Andean level and also in Bolivia and Colombia, with the aim of introducing protection systems similar to the Peruvian proposal. At the same time at a regional level in the frame of the FTAA “Free Trade Area of the Americas” the Andean countries and MERCOSUR (Brasil, Argentina, Paraguay, Uruguay) have requested the inclusion of this subject in the negotiations which are taking place in the Negotiating Group on Intellectual Property Rights (NGIP).¹²

⁹ First Complementary Disposition.

¹⁰ Decision 486 of September 14, 2000, Gaceta Oficial del Acuerdo de Cartagena of September 19, 2000, N° 600.

¹¹ Art. 29-i), Art. 75-h).

¹² Doc. FTAA.ngip/w/47 of December 13, 2000.

1999 in the Ministerial meeting held in Seattle and organized by the WTO Peru submitted a Proposal to the TK and IP in the frame of the TRIPs Agreement.¹³ This proposal had two stages. First to make the correspondent studies and second to introduce regulations. As you know the whole meeting was not a success.

Only when knowledge is protected at multilateral level can it be said that true protection has been achieved.

¹³ Doc. WT/GC/W/362 of October 12, 1999.