

IP-RELATED TECHNICAL CO-OPERATION, ASSISTANCE AND CAPACITY BUILDING: THE PERUVIAN EXPERIENCE

(Draft)

To date, there has been no qualitative or quantitative assessment of Peru's experience with IP-related technical co-operation, assistance and capacity building in Peru (in the area of patents, trademark and copyright). As such, there is little existing analysis to draw on in terms of the relevance and/or impact of this technical cooperation or on how it emerges and is implemented.

Most of the IP-related technical assistance and co-operation that has taken place in Peru has been a response to the need to adapt national IP policies and legislation to international standards established in international IP agreements and, in particular, the WTO's Agreement on Trade Related Aspects of Intellectual Property Agreement (TRIPS).

In the medium term, it is likely that the international commitments of Andean countries—such as Peru—will further evolve as countries negotiate and elaborate Free Trade Agreements scenario with the United States (e.g., Colombia, Ecuador and Peru) which may increase existing levels of IP protection. According to some experts interviewed for this study, the implementation of such agreements is leading to an increasing disconnection between the development needs of the country and how IP tools and instruments (and the existing institutional framework) may appropriately respond. This is particularly (but not exclusively) the case in the area of patents.

Even though the Medium Term Plan for WIPO Program Activities – Vision and Strategic Direction of WIPO (2003) reflects what conceptually most experts would agree to (this is, IP *responding* to specific national needs), reality seems to show a growing gap between the strengthening of IP tools and standards and the possibilities of these of actually enhancing technological and intellectual development in general.

The reaction by developed countries (especially the United States) to the Development Agenda for WIPO proposal (WO/GA/31/11) (September/October, 2004) provides a clear illustration of the divergence between the perceptions and views of industrialised countries with respect to IP, on the one hand, and how developing countries perceive IP and its role in promoting development (including technical cooperation) on the other.

This background note provides a very general overview of some IP technical co-operation issues relevant to Peru, and also to the broader international (and regional) context in which IP policymaking takes place.

I. Methodology

This background note is based on information compiled as part of a survey sent to and interviews held with a series of private sector experts and public officials from relevant institutions. These experts include: Prof. Carmen Arana, Prof. Baldo Kresalja, Mr. Nestor

Escobedo (head of the Office of Patents and New Technologies of INDECOPI), Ms. Teresa Mera (Head of the Office of Marks of INDECOPI), Ms. Silvia Bazan (responsible for Patent and Plant Breeders registration in INDECOPI), Ms. Luisa Elena Guinand (Andean Community official), and Ms. Odette Silva (responsible for Technical Co-operation in INDECOPI).

It is also based on information extracted from two key documents: INDECOPI (2005) *National Interests in IP and Free Trade Agreements: A Referential Framework, Institutional Documents*, Lima,; and INDECOPI (2005) *Balance of Knowledge and IP in Trade, Series of Research Papers*. Lima. To access these documents see: <http://www.comunidadandina.org>.

This brief does not reflect an official national position nor the official position of the institutions mentioned but rather the personal views and opinions of the author.¹

II. How has Peru determined its needs in regards to IP technical co-operation ?

Over the last decade, Peru's needs and priorities in respect of IP technical co-operation have been determined mostly according to specific needs identified by the National Institute for the Defence of Competition and Intellectual Property (INDECOPI) and, in particular by its Office of Marks, Office of Copyright and its Office of Inventions and New Technologies.

The identification of these needs has not emerged from any formal strategic planning or priority-setting process. Rather, technical cooperation activities have been primarily determined by circumstances, timing, existence of resources (human and financial), and individual requests by stakeholders.

In discussion with relevant officials, three broad areas were identified as especially sensitive and as priorities for technical co-operation:

Technological needs per se

- Full automatization of all three IP offices—Copyright, Inventions and New Technologies, and Marks (the Office of Marks of INDECOPI is, according to some experts interviewed, one of the most efficient and well trained in the Latin American region)
- IP infrastructure
- Strengthening capacities of IP examiners (particularly patent examiners)

Awareness raising in IP and its tools, options and advantages

¹ Limits in time for the preparation of this study have prevented the author from accessing and reviewing quantitative data and information on how much has been invested (in terms of financial resources – donor funding, national budget, etc..) in IP co-operation and capacity building in particular.

- Strengthening competitive features of small enterprises (Small and Medium Size Enterprises or PYMES)
- Strengthening capacities of collecting societies

Issue-related capacity building

This includes benefiting IP officials and potential users with direct training / capacity building in the areas of:

- Geographical indications
- Collective marks
- Enforcement and measures at frontiers (including in particular training for judges and prosecutors and custom officials)
- Traditional knowledge and genetic resources

III. Assistance in regards to IP co-operation

To date, there has been no comprehensive, integrated and long term technical cooperation projects to build IP capacity in Peru (based on a strategic assessment of needs). Rather, technical assistance provided to Peru has responded to very concrete needs and circumstances at particular points in time. Specifically, IP assistance has mostly been a response to specific requests in different areas of IP where INDECOPI (and sometimes other actors) determine there is a training or capacity building related need.

Technical assistance to Peru has been provided by a series of organisations and donors, including:

- United States Agency for International Development (USAID)
- World Intellectual Property Organisation (WIPO)
- Union for the Protection of New Plant Varieties (UPOV)
- European Patent Office (EPO)
- Spanish Patent and Trademark Office
- Japanese International Co-operation Agency (JICA)
- Korean Office for International Co-operation and Assistance (KOICA)
- Swiss Agency for International Development
- Asia Pacific Economic Co-operation
- Non traditional donors and providers such as Non Governmental Organisations and universities (e.g. Peruvian Society for Environmental Law and Catholic University). This also includes funding provided by the Andean Finance Corporation (CAF) and the Inter American Development Bank (IDB) in IP related issues such as protection of traditional knowledge and genetic resources.

Technical assistance to Peru has concentrated in the following five areas:

- legal and technical assistance in policy and legislative reform,
- funding for organisation of seminars and workshops,
- funding for participation of IP officials in international and regional training,

- capacity building courses, and
- support for specific activities and process.

WIPO has been especially active in providing with assistance in most of these areas. At the national level, WIPO works directly with INDECOPI and at the regional level, has also provided assistance to the Andean Community. The central focus of WIPO in each instance has been on technical and legal assistance and in training IP administrators and officials in the use and application of existing IP tools and rules. Their focus has not (understandably) been to provide a more critical approach to how these tools may be tailored (if they can be) to satisfy specific and very different development needs between countries.

The Andean Community (comprising Bolivia, Colombia, Ecuador, Peru and Venezuela) is an economic integration bloc established in 1970 which legislates through Decisions which automatically (when published in the Andean Community Gazette) become law in all five countries. Given that most IP legislation in Peru (and the region) is based on IP-related Decisions (which are thereafter regulated at the national level), co-operation between the Andean Community, WIPO and national IP authorities has been constant over the years and has been reflected particularly through awareness raising and capacity building activities.

These activities include:

- Seminar on Border Measures (Bogota, Colombia, July 2002)
- Workshop on Access to Genetic Resources, Traditional Knowledge and Folklore (Lima, Peru, May 2003)
- Andean Patent Manual (Lima, Peru, December 2003)
- Presentation of Second Edition of Andean Patent Manual (Lima, June, 2004)
- First Meeting for the Elaboration of an Andean Trademark Manual (Lima, December, 2004)

Box 1. An example of assistance provided by non traditional donors

In late 2004, the Peruvian Society for Environmental Law (SPDA) launched the Andean Amazon Biopiracy Prevention Initiative (which is supported by the International Development Research Centre (IDRC).

As part of its Peru-related activities, this Initiative has provided INDECOPI with legal assistance and financial resources to:

- Enable the initial operations of the National Commission for the Prevention of Biopiracy (created by Law 28216 (2004)) by financially supporting the work of the Commission co-ordinator, supporting his participation in a training course on genetic resources, IP and traditional knowledge in Sweden (June 2005), supporting research activities of an IP examiner in INDECOPI, and supporting the publication of research reports.

- Initiate the process of implementing Law 27811 for the Protection of Traditional Knowledge (2005), by supporting the creation of an INDECOPI traditional knowledge web site and the creation of the National Public Register for the Protection of Traditional Knowledge

In addition, a Small Grant Project of SPDA (Protecting, Disseminating and Maintaining Traditional Knowledge through the Creation of a National Traditional Knowledge Register) provides INDECOPI with assistance in the creation of this register through a pilot project working with Amazonian Shipibo Conibo indigenous peoples under the institutional framework of the National Confederation of Amazonian Nationalities (CONAP).

Box 2. An example of cooperation and assistance in IP related negotiations

Over the last decade, Andean countries have led and actively participated in international negotiations on the relationship between access to genetic resources, traditional knowledge and intellectual property. Specific legislation has been enacted (Decision 391 on a Common Regime on Access to Genetic Resources (1996) and Decision 486 on a Common Regime on Industrial Property (2002)) include concrete measures regarding the defensive protection of traditional knowledge (through disclosure of origin and legal provenance requirements).

The Inter American Development Bank (BID) and the Andean Corporation of Finance (CAF) have funded a regional process (through the Andean Community) to support the negotiating skills and capacities of IP (and non IP) negotiators in these particular issues. Two regional workshops (Lima (2002) and Caracas (2003)) and a Guideline for ABS and TK Negotiators are the direct, tangible results of this process.

The BID and CAF have also provided support to the Andean Community to finance a process to implement the mandate in Decision 391 and 486 for the development of a regional legal regime for the protection of traditional knowledge. A recent publication, *The Legal Protection of Traditional Knowledge from an Indigenous Perspective* (June, 2005) is the most recent result in this area.

IV. Evaluation of IP co-operation received and impacts

As mentioned earlier, no qualitative or quantitative assessment exists of the impact of IP related co-operation in Peru. There are, however, some indirect indicators which can provide some insight as to how effective IP cooperation has been.

According to INDECOPI (personal interviews), most IP technical co-operation has taken place “satisfactorily” (achieving proposed objectives) and in accordance to requests made. In parallel, interviewees believed that that donor (or cooperating agencies) have also been satisfied with the overall results of cooperation. One area highlighted as still in need of

support is the automatization of IP offices (in INDECOPI) and the creation of a Centre for Technological Information. This relates to further up scaling and updating IP infrastructure.

Importantly, INDECOPI is still perceived by the Peruvian public (in many public polls) as an institution which maintains its institutional autonomy and is thus not affected by political pressures, typical in a developing country where the market economy is still in the process of consolidating itself. It is also perceived as an institution whose technical capacities are above the average of most other public institutions in Peru.

That said, there is still a need for a continued process of training and capacity building targeted at IP administrators (in INDECOPI in particular) in the areas of enforcement and, most importantly, in applying IP laws and regulations in a pro-competitive manner (preventing excessive concentration of market power in right holders). Understanding the relationship between competition law and rules and IP tools is becoming a key element to ensure the adequate overall functioning of the IP system.

A fourth point to mention in these final comments relates to negotiations for a Free Trade Agreement between the US and Colombia, Ecuador and Peru.

Box 3. Main negotiating issues in the FTA US/Colombia, Ecuador and Peru

- The US is proposing changes in the scope and extension of patents / Andean countries are seeking to maintain – at least – existing Decision 486 standards or at least TRIPS standards
- The US is proposing limitations in the use of exceptions under TRIPS / Andean countries are seeking to maintain options for compulsory licences and parallel imports
- The US is seeking protection of sensitive pharmaceutical and agro-chemical test data / Colombia already protects this data / Ecuador is in position to accept this proposal
- The US is pressing for the adhesion to a series of international IP instruments which would add additional obligations in the area of patents, breeders rights, trademark
- The US is proposing for the protection of technological measures to safeguard copyright in electronic works
- The US is proposing additional obligations and commitments to ensure enforcement of IP rights

Andean countries are maintaining (in the Chapter on IP) a strong, common position regarding protection of traditional knowledge (disclosure of origin and legal provenance, enhancing search procedures for novelty and inventiveness).

According to a recent study by INDECOPI (see INDECOPI (2005) *Balance of Knowledge and IP in Trade, Series of Research Papers, Lima*) signing a FTA with the United States will bring (in the area of knowledge and innovation) a further, widening gap in relation to knowledge vested in trade of goods and services between Peru and the United States and the rest of the world. According to this study, even though the trade balance (with the

United States) in 2004 was positive (US\$ 2,729 million) the balance in terms of knowledge (vested in traded goods and services) was negative in approximately US\$500 million. This reflects according to INDECOPI, a serious problem in the generation of knowledge (and value added goods and services) which will probably become aggravated if the IP chapter of the FTA is signed off with the modifications and proposals mentioned above.

INDECOPI's study (and other experts view) indicate that the only way to overcome this situations is: a) generate a State policy to promote alliances between the private sector and the public sector in R&D; b) undertake a planning process to identify goods and services where R&D resources may be applied; and c) ensure the State invests more than the current 0.1 % of its national gross product in R&D. Once this is one, IP tools could be used much more proactively and effectively by nationals.

Finally, a serious bottle neck exist in regards to costs of obtaining IP rights (and maintaining them) in Peru and abroad. For researchers (and especially national entrepreneurs), cost of filing a patent or any other IP are exceedingly high and act as a disincentive to use these tools and instruments and seek protection of intellectual innovations.