New Peruvian Law Protects Indigenous Peoples' Collective Knowledge

By Manuel Ruiz and Isabel Lapeña

Peru – a megadiverse country with a high degree of cultural diversity (peasant and native communities) – has become the first country to establish a comprehensive legal system for the protection of indigenous communities' traditional knowledge associated with biodiversity.

In force since 10 August 2002, Law No. 27811 provides a regulatory framework through which indigenous peoples can assert their rights over collectively-held knowledge related to biological diversity, including the right to prevent unauthorised use of such knowledge. Some of the elements of this new legal instrument could serve to assist in the development of other international, regional or national system on this issue.2

The UN Food and Agriculture Organisation, the Convention on Biological Diversity (CBD), the World Intellectual Property Organisation, the Andean Community, the Organisation of African Unity and many other institutions and forums have been discussing how to protect indigenous peoples traditional knowledge for some time. Recently, the Doha Ministerial Declaration addressed this particular issue in light of the relationship between the TRIPs Agreement and the CBD.3 Clearly, traditional indigenous' peoples knowledge and the need to find legal means to adequately protect it, are firmly established on the international, regional and national policy agendas.

The law requires the written consent of indigenous people for use of their knowledge.

Scope: Collective Knowledge over Biological Resources

The new Peruvian legislation seeks to implement article 8(j) of the CBD and article 63 of the national Industrial Property Law of 1996. However, it only refers to the knowledge of indigenous communities (related to uses and properties of biodiversity) and not to their practices and innovations. Moreover, the protection provided by the law does not extend to all knowledge that could be developed inside a community. It is limited to knowledge held collectively, i.e. knowledge that belongs to the community as a whole rather than the individuals who are part of it (article 10).

The law also provides that knowledge is to be freely exchanged among communities. The system will not only benefit the communities that undertake negotiations for the use of their knowledge, but also those who share that knowledge without taking part in the negotiations. Prior informed consent and thus the authorisation for the use of traditional knowledge will be provided by representative community organisations (article 6).

Objective and Main Principles

The law's general objective (article 5) is the protection of collective knowledge for the benefit of its holders (communities). It recognises that collective traditional knowledge is part of the cultural patrimony of indigenous communities, and that it results from a social learning process transferred by past generations to the present ones, who are its custodians (article 12).

Several instruments – such as contracts, trade secrets, registers and measures to prevent unfair competition – can be used to achieve the overall objective. Inter alia, the law

- obliges interested parties to obtain the prior informed consent of communities providing the biodiversity-related knowledge;
- promotes mutually agreed terms by recognising the need to sign licenses (contracts) for the use of the knowledge when a commercial or industrial application is intended (whether or not in the public domain);
- includes unfair competition procedures to defend the rights recognised in the regime (in the case of misappropriation or unauthorised use);
- calls for the establishment of different types of registers to document collective knowledge and make it more or less (depending on the type of register) available to third parties;
- creates a Fund for the Development of Indigenous Peoples (article 37); and
- associates the protection of traditional knowledge with intellectual property regimes by imposing the obligation of presenting a license when applying for a patent. This requirement is also an obligation under Decision 486 of the Andean Community on a Common Regime on Industrial Property (see Bridges Year 4 No.9, page 9).

Prior Informed Consent

Article 1 of the law recognises the right of indigenous and local communities to decide whether or not to authorise the use of their knowledge for commercial, industrial or scientific aims by third parties. Any person/institution interested in such use must enter into a negotiation with an organisation representing the communities that hold the relevant knowledge, and the representative organisation must inform the widest possible number of communities that might share this knowledge about the negotiation process so that their interests and concerns can be taken into account (article 6).

The utilisation of the collective knowledge for industrial or commercial purposes will require a license, which must be signed by both the communities' representative organisation and the interested party. Article 27 spells out the minimum content of these licenses. These include, inter alia, a minimum compensation in favour of indigenous communities (5 percent of gross sales of commercial products derived from collective knowledge), as well as providing information on research results and assisting in the strengthening of indigenous communities' organisations. Monetary benefits will go to the National Fund for the Development of Indigenous Peoples (article 37). All indigenous communities will have the right to access the Fund's financial resources.

The law also establishes that the license should
- adopt a written format;
- be in Spanish and the appropriate native language;
- be in force for a maximum period of three years; and
- be registered with the competent national authority (in this case INDECOPI, the national patent and unfair competition authority).

The confidentiality of the license is guaranteed. This will not impede other non-exclusive licenses being granted over the same knowledge by different communities, nor will it affect the right of present or future generations to use and develop it further.

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Registers

The law establishes three types of registers (article 15) with the specific purpose of preserving and safeguarding traditional knowledge and of providing the competent national authority with the necessary information to defend indigenous communities' interests associated with their collective knowledge. These are: the National Public Register, the National Confidential Register and Local Registers. Their specific features will depend on the level of confidentiality of each one. The public register will certainly assist in defending knowledge which is clearly in the public domain against patents.

Unfair Competition Rules

On a procedural note, the law foresees legal mechanisms for the defence of rights recognised in the new regime (article 67). It creates a special recourse called acción por infracción de derechos de los pueblos indígenas, which can be presented before the national authority against anyone who could have revealed, acquired or used the collective knowledge in bad faith or without the prior consent of the indigenous community or its representative organisation. It also applies where the user might have made collective knowledge public without authorisation or while under obligation to maintain the information secret or confidential. In addition, this action is useful in cases where no formal infringement of the regime has (yet) taken place but where an imminent risk of rights being violated exists. The competent authority itself which can also initiate action, as well as take precautionary measures. In all cases, the burden of the proof belongs to the defendant.

Institutional Structure

INDECOPI is the competent national authority to register licences, manage the national public and confidential registers and oversee administrative procedures (article 64). The law establishes a Consejo especializado en la protección de los conocimientos indígenas (article 63), a council formed by national experts and representatives of indigenous and local communities tasked with monitoring the operations of the system; providing legal and technical assistance to indigenous peoples' representatives and supervising the committee responsible for the national fund, etc.

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ENDNOTES

[1] For background and a more detailed review of the Peruvian regulation, see Ruiz, Manuel: *Protecting Indigenous Peoples' Knowledge: A Policy and Legislative Perspective from Peru*. Policy and Environmental Law Series. SPDA. No. 3, May 1999. Lima.

[2] Paragraph 19 of the Doha Declaration: 'The Council for TRIPs, in pursuing its work programme including under the review of Article 27.3(b), the review of the implementation of the TRIPs Agreement under Article 71.1 and the work foreseen pursuant to paragraph 12 of this Declaration, to examine, *inter alia*, the relationship between the TRIPs Agreement and the Convention on Biological Diversity, the protection of traditional knowledge and folklore, and other relevant new developments raised by Members pursuant to Article 71.1. In undertaking this work, the TRIPS Council shall be guided by the objectives and principles set out in Articles 7 and 8 of the TRIPs Agreement and shall take fully into account the development dimension.'

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Regulations designed to achieve universal access, such as cross subsidisation between different end-users, are not achievable using the kind of market-based mechanisms that the GATS supports. For as the World Bank study points out, 'eliminating restrictions on market entry imply an end to cross subsidisation, because it is no longer possible for firms to make extra-normal profits in certain market segments'. In fact, the very nature of liberalisation threatens arrangements with the potential to ensure universal supply. Not until EU trade policy makers acknowledge this and adjust their GATS negotiating position accordingly, can they claim to be supporting 'sustainable development'.

Conclusion

Following WDM's critique of the current GATS negotiations, a key industry figure, during a meeting with UK Government officials asked why certain sectors were being singled out by civil society organisations. The UK government's response was that it was because they 'were seen as basic services which people had the right to receive from their Governments'.[8] At the heart of much objection to the current GATS negotiations is the agreement's enormous scope and the subsequent impact that commitments will have on a range of domestic regulations integral to government decision-making.

With a significant number of request proposals on the table, this is an opportune moment to step back and review negotiating intentions, particularly those of the EU. The World Development Movement, along with civil society groups around the world, has been calling for an independent and thorough assessment of service liberalisation based on potential social, economic, environmental and cultural impacts, before further negotiations continue. Key to this is the publishing of current negotiating documents.

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ENDNOTES

[1] 'EU tables market access requests to inject momentum into WTO services negotiations', EU press release, Brussels 4/7/02.
[2] General Agreement on Trade in Services (GATS): Article XIX.
[3] 'EU tables market access requests to inject momentum into WTO services negotiations', EU press release, Brussels 4/7/02.
[4] WTO, Council for Trade in Services, 'Communication from Thailand, Assessment of Trade in Services', TN/S/W/4, 19/7/02.
[5] Indonesia's GATS restrictions state that foreign companies can only control 49 percent of a joint venture and must work through a local representative when setting up branches inside Indonesia.
[6] Mattoo, A, quoted in, World Trade Organisation, Council for Trade in Services Special Session, 'Communication from Cuba, Senegal, Tanzania, Uganda, Zimbabwe and Zambia – Assessment of Trade in Services', S/CSS/W/132, 6/12/01
[7] World Trade Organisation, 'GATS Fact and Fiction'. Quoted in a version issued on the 16/3/01. The emphasised section was removed from later versions.
[8] World Development Movement, 'UK Government colludes with business to defeat campaign on the General Agreement on Trade in Services', November 2001.
[9] Howse, R and Tuerk, E: *The WTO negotiations on services (GATS): The regulatory state up for grabs*, paper presented at the conference, 'From Doha to Kananaskis: The Future of the World Trading System and the Crisis of Governance', York University and University of Toronto, Ontario, Canada, 1-3/3/02.