

A Review of the IP Negotiations in the US – Andean FTA

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To no one's surprise, the intellectual property chapter of the free trade agreement under negotiation between the US and three Andean countries – Colombia, Ecuador and Peru – remains probably the most difficult.

After seven rounds of discussions underway since early 2004, at best limited progress has been made on the intellectual property (IP) Chapter. The Cartagena Round, which ended on 11 February 2005, demonstrated that contentious issues remain to be resolved in the areas of:

- protection of undisclosed data related to pharmaceuticals and agro-chemicals – in practice extending the duration of patent rights and seriously affecting access to essential medicines;^{1 & 2}
- adherence to international IP agreements that have higher standards of protection than the WTO's Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS) and to which Andean countries are not members;
- patent protection for plants and animals – contravening express provisions in TRIPS and regional legislation; and
- biodiversity and protection of traditional knowledge (TK).

Since the beginning of the negotiating process, biodiversity and protection of TK have been heralded as critical bargaining tools for the Andean countries. Their inclusion in the IP Chapter at the early stages of the process responds not only to their social, cultural, economic and political importance, but also to a tradition of consistency by these countries in various other fora where IP-related issues have been addressed, including the TRIPS Council, the World Intellectual Property Organisation (WIPO), the Convention on Biological Diversity (CBD) and the FAO.

In contrast to other US-sponsored free trade agreements (FTAs), where 'bio-diversity' has hardly been mentioned, the Andean countries have strongly advocated and publicly voiced their commitment to ensuring that the IP Chapter does not impact on national policies and laws related to biodiversity conservation (specifically in relation to access to genetic resources) and the protection of TK.

The Andean countries have proposed a text that recognises:

- a) the access and benefit-sharing principles of the Convention on Biological Diversity;
- b) the need to subject the granting of IPRs to respect of national legislation regarding access to genetic resources and the protection of traditional knowledge;
- c) the need to include new disclosure requirements in patent applications (indicating origin and legal provenance of genetic resources and TK);
- d) the need to improve patent search practices of IP offices in order to enhance novelty and prior art discovery processes;³ and
- e) the need to develop appropriate databases (which include genetic resources- and TK-related data and information) to support patent searches.

So far, US negotiators' reactions have been surprisingly mild, particularly as the US is not a Party to the CBD. Although they have expressed serious concern and basic opposition to modifying patent rules or adding new patenting requirements (whether formal or substantial), they seem open to accepting at least some of the general principles proposed by the Andean countries, especially with regard to points d) and e). It is of utmost importance to the Andeans that, as a minimum, patent searches are improved in order to prevent the granting of 'bad' patents – often associated with biopiracy – by the US Patent and Trademark Office.

At this stage of the process it is clear the pressure is up to accelerate the pace of the negotiations. Certain sectors seem frustrated at the almost imperceptible progress made with the IP Chapter. Only a few days ago, the Peru's lead IP negotiator (representing INDECOPI, the IP office) resigned unexpectedly. While the reasons are still unclear, the official was pressing to keep these critical issues – i.e. opposition to extending patents to plants and animals, as well as to undisclosed test data for pharmaceuticals – on the negotiating table. There is speculation that pressure by pharmaceutical multinationals (with subsidiaries in Peru) may have played an indirect role in this. Others see a clear fracture within the positions of the principal Peruvian agencies in this negotiation: INDECOPI may be seeking a more conservative approach, while the Ministry of Trade and Tourism is seeking to streamline the process.

Stuck over IP and agricultural issues, the negotiations are not expected to conclude before May 2005 at the earliest. Decisions (almost certainly based on politics rather than on technical grounds) will need to be made – and fast.

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ENDNOTES

¹ During a recent video conference sponsored by the Pan-American Organisation of Health, the Ministers of Health of Colombia, Ecuador and Peru agreed on a common strategy to confront the remaining rounds of the FTA negotiations in order to ensure timely access to medicines by the region's population. This may be affected by the direction IP negotiations are taking, especially with regard to proposals for the protection of undisclosed pharmaceutical data and information.

² It may be simpler for Colombia to accept the US proposal given that the country already has in place national legislation in this regard.

³ Part of the arguments to support this provision relies on a Communication from the United States to the Council for TRIPS (IP/C/W/434 November 2004), where the US recognises the need for organised searchable databases of genetic resources and TK to assist in the examination of patent applications.